DAVID FALCIGNO *v.* STEPHEN FALCIGNO
(AC 42047)

Lavine, Bright and Sheldon, Js.*

Syllabus

The plaintiff sought to recover damages for breach of fiduciary duty from the defendant, his brother, in connection with his sale of shares representing a minority interest in a family business, S Co. The parties were often at odds with each other, and the plaintiff approached the defendant about selling his shares of S Co. to him. The parties ultimately agreed

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

on a price of $200,000 for the plaintiff's shares. The defendant stated that he would revisit the compensation he had paid if he later sold S Co. for "millions." More than one year later, the defendant sold S Co. for $8 million. Subsequently, although the plaintiff and the defendant arranged to meet, they were unable to agree on the plaintiff's request for additional compensation. Following a trial to the court, the trial court found in favor of the defendant on all counts of the plaintiff's complaint and in favor of the plaintiff on a counterclaim brought by the defendant, from which the plaintiff appealed and the defendant cross appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the trial court's finding that the defendant proved by clear and convincing evidence that he engaged in fair dealing and full disclosure was clearly erroneous and was inconsistent with its finding that the defendant had made false representations to the plaintiff that S Co. was a "dinosaur" and was falling apart; the court rejected the plaintiff's claims of misrepresentation, which the plaintiff had not claimed as error, and the evidence demonstrated that the plaintiff knew that his shares would be worth more if and when the defendant sold S Co., he knew that his shares were worth more at the time he sold them to the defendant, the plaintiff wanted to sell his shares to remove himself from family disputes, he willingly accepted only $200,000 because he was planning to build a new home and that this was his mistake, not based on misrepresentations made by the defendant, the court clearly found that this "misrepresentation" was not material and that it was not truly a misrepresentation, and that the plaintiff did not rely on the defendant's representation that S Co. was a "dinosaur."

2. The plaintiff could not prevail on his claim that the trial court erred in finding that the defendant proved by clear and convincing evidence that he engaged in fair dealing and full disclosure as to his purchase of the plaintiff's minority shares of S Co. stock when the evidence demonstrated that the defendant failed to disclose all relevant information to the plaintiff, including that he was applying a minority discount to his purchase of the plaintiff's shares, and that he would be seeking to profit from the purchase of those shares upon a future sale of S Co., as the trial court's finding that the defendant had met his burden of proving fair dealing by clear and convincing evidence was not clearly erroneous; the court specifically found that the defendant explained to the plaintiff the significance of the minority discount in practical terms, and the evidence demonstrated that the defendant told the plaintiff that he did not need his shares because he already had control of S Co., and that the defendant disclosed all relevant information and gave the plaintiff access to S Co.'s financial documents and tax returns and advised him to speak to S Co.'s accountant, and was honest and fair in his interaction with the plaintiff.

3. The plaintiff could not prevail on his claim that the evidence demonstrated that the defendant did not prove fair dealing and full disclosure with clear and convincing evidence under each of the four requirements set forth in *Konover Development Corp.* v. *Zeller* (228 Conn. 206) for fiduciaries, as the *Zeller* framework, which permits a more relaxed fiduciary duty in certain situations, was inapplicable: given that the *Zeller* framework is more forgiving to the fiduciary than is the traditional analysis applied by the court, this court failed to see how the plaintiff could have benefitted from its application; moreover, the court fully considered, while applying the correct legal test, all of the facts relied on by the plaintiff in support of his breach of fiduciary claim.

4. The trial court did not improperly render judgment in favor of the plaintiff on the defendant's counterclaim seeking attorney's fees pursuant to a certificate of satisfaction signed by the plaintiff when he transferred his shares to the defendant, as the language of the certificate was clear and unambiguous, and, pursuant to the plain language, it did not apply to the case; read in its entirety, the language of the certificate clearly set forth the plaintiff's obligation to defend his interest and rights in the shares from claims made by third parties to those shares, and to hold the defendant harmless and to protect him from such third-party claims, and the plaintiff properly characterized the certificate as applicable only to a third-party claim challenging the plaintiff's unencumbered interest, title, and right to his shares and his absolute right to sell his shares to the defendant.

Argued March 4—officially released August 25, 2020

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendant filed a counterclaim; thereafter, the court, *Ecker*, *J.*, granted in part the defendant's motion for summary judgment; subsequently, the matter was tried to the court, *Hon. Thomas J. Corradino*, judge trial referee; judgment for the defendant on the complaint and for the plaintiff on the counterclaim, from which the plaintiff appealed and the defendant cross appealed to this court. *Affirmed.*

Chet L. Jackson, for the appellant-cross appellee (plaintiff).

Barbara M. Schellenberg, with whom was *Robert R. Lewis*, for the appellee-cross appellant (defendant).

Opinion

BRIGHT, J. Following a trial to the court, the plaintiff, David Falcigno, appeals from the judgment of the trial court rendered in favor of the defendant, Stephen Falcigno, on his cause of action for breach of fiduciary duty. The defendant cross appeals from the judgment of the court, rendered in favor of the plaintiff, on the defendant's counterclaim for breach of the representations and warranties contained in an agreement signed by the plaintiff. In his appeal, the plaintiff claims that the court erred in finding that the defendant proved, by clear and convincing evidence, fair dealing and full disclosure as to the defendant's purchase of the plaintiff's minority shares of stock. In his cross appeal, the defendant claims that the court improperly failed to award him attorney's fees pursuant to the agreement that the plaintiff signed as part of the stock transaction. We affirm the judgment of the trial court.

The following facts, as found by the court, *Hon. Thomas J. Corradino*, judge trial referee, or as uncontested in the record, and the relevant procedural history assist in our review of the parties' claims. The parties, who are brothers, and another brother, Richard Falcigno, together owned individual shares of stock, which totaled 100 percent of all the stock in a family business, Statewide Meats and Poultry, Inc. (Statewide). The defendant owned 60 percent of the shares, with each of his brothers owning 20 percent of the shares. Over the years, the defendant, who operated Statewide, allowed his brothers to get free gas and meat from the business, and, from approximately 2005 forward, the defendant paid each of his brothers a $14,000 yearly

consulting fee, although there was no evidence that they rendered any services in exchange for those fees.[1]

The plaintiff was aware, since at least 2005, of the defendant's ultimate goal to sell Statewide. The brothers often were at odds with each other, and, in 2009, the plaintiff told the defendant that he wanted to sell his shares of Statewide to the defendant so that he could escape the turmoil and be brothers again with the defendant; he also needed money to build a house.[2] The defendant told the plaintiff to contact Matthew Giglietti, the certified public accountant for Statewide, who also is a cousin of, and the personal accountant for, the parties and their brother, Richard, and to get whatever he needed from Giglietti.[3] He encouraged the plaintiff to exercise due diligence with regard to the proposed stock sale and told the plaintiff that he could have access to anything he wanted for that purpose. The defendant acknowledged at trial that Giglietti had Statewide's balance sheets, ledgers, payroll records, and tax returns.

The plaintiff obtained and reviewed Statewide's tax returns, and he discussed selling his shares with Giglietti, telling him that he just wanted the fighting to end

[1] Matthew Giglietti, the certified public accountant for Statewide, testified that the defendant ran Statewide, which was "an $18 million company, and [that] it [was] not an easy company. Meat companies by their very nature are not easy companies. [The defendant] was a one man show. He . . . was involved with sales. He did most, if not all, of the purchasing. The biggest problem with the business is collecting your money. When you're dealing with restaurants and country clubs, if you're not on top of that . . . you could be in big trouble in a big hurry, so . . . he was relentless in collecting money for the business. So, he had all the headaches [of] operating an $18 million business . . . ."

[2] The plaintiff testified that he previously had thought about selling his shares because of the family turmoil, as well.

[3] Giglietti testified that he had been the accountant for Statewide since approximately 1985, and that, while working in that capacity, he did Statewide's "corporate tax returns, [the] payroll . . . and [provided] tax advice . . . ."

and that he thought selling his shares to the defendant might accomplish that end. Giglietti repeatedly advised the plaintiff not to sell his shares. Giglietti told the plaintiff that he estimated that Statewide was worth $2 million. The plaintiff was aware that Statewide had a certified Angus beef license (CAB license),[4] and that it repeatedly won awards for being part of the "million pound club" for substantial sales of high quality beef. He also was aware of Statewide's customer base. The plaintiff had access to Statewide's balance sheet for 2008, and he had Statewide's tax returns going back several years before 2009, which indicated $17 million to $18 million in gross annual sales, which, the court found, "could only result from a strong customer base."

On September 9, 2009, the plaintiff and the defendant met at Luce Restaurant (Luce), along with the family's personal stock and bond broker, Fred Mueller, to discuss the terms of the sale. The plaintiff initially stated that he wanted $450,000 to $500,000 for his shares, and the defendant initially offered $100,000. The defendant explained to the plaintiff that because he was the majority shareholder and already controlled Statewide, he did not need the plaintiff's shares. After discussions, the parties ultimately agreed on a price of $200,000, and the defendant stated that he would revisit the compensation or cut the plaintiff back in if he later sold Statewide "for millions."[5]

The defendant asked Statewide's attorney, Mark Sklarz, to draft the necessary paperwork for the stock transfer.

[4] Giglietti testified that the defendant was the person responsible for acquiring the CAB license, with the hope that it would enhance Statewide's business. The defendant testified that he acquired the CAB license in 1994, after initially having been rejected in 1993.

[5] The court specifically found that "there was some sort of understanding between the parties that if Statewide were to be sold, the plaintiff might receive extra money, but there was no understanding of how much additional money the defendant would give the plaintiff . . . ."

Sklarz drafted documents, including, a certificate of purchase, a stock power form, a certificate of satisfaction, and an affidavit of lost certificate.[6] Sklarz then provided the plaintiff with the certificate of purchase and the stock power form, so that he could sign the documents and have them notarized, which he did on October 9, 2009. On October 13, 2009, the plaintiff and the defendant met at Sklarz' office to close the sale. In connection with the closing of the sale, the plaintiff executed the certificate of satisfaction. The certificate of purchase signed by the plaintiff indicated that the sale price of the shares was $200,000. After the parties finished their business with Sklarz, the defendant gave the plaintiff a paper bag containing $50,000 in cash.[7] The court found that "there [was] not an iota of evidence [that] the defendant over the years, since he had made it his goal to sell Statewide, ever tried to induce the plaintiff to sell his shares."

Around September, 2010, at a certified Angus beef conference, a representative of Sysco Corporation (Sysco) approached the defendant and asked if he might be interested in selling Statewide. The defendant told the representative to call him if Sysco was interested in buying the company. In January, 2011, a representative of Sysco met with the defendant. A few months later, Sysco sent the defendant a letter of intent, indicating that it was interested in purchasing Statewide. Following subsequent negotiations, Sysco ultimately made a firm offer of $8 million, consisting of $6 million up front and an additional $2 million earn-out if Statewide maintained a certain level of sales.[8] Sklarz testified that he was "substantially surprise[d]" by the offer because it "was substantially in excess . . . of what [the defendant and

[6] Apparently, the plaintiff had lost his stock certificates.

[7] The court specifically stated that it "[could not] conclude [that] the $50,000 given to the plaintiff by the defendant was part and parcel of an understanding between both of them that it would be part of the sale price for the plaintiff's shares."

[8] The defendant explained: "[T]he actual deal was $6 million and there was a $2 million earn-out that I had to earn over the next two years. I had

he] . . . anticipated." He also testified that they had thought that Statewide was worth "somewhere in the neighborhood of two to three million dollars based on the financial statements . . . ." The sale closed on August 12, 2011.[9] Giglietti testified that it appeared that Sysco was not "terribly interested in the [Statewide] operation itself. As a matter of fact, they closed it up soon [after the sale] so they didn't care about [the] equipment or [the] trucks or anything like that. I think the main thing they were looking for was the customers, and, quite frankly, they were looking at the CAB license."

In or around April, 2012, the plaintiff and the defendant arranged to meet at the Quinnipiac Club in New Haven. The plaintiff was surprised because the defendant brought Attorney Jeffrey Hellman to their meeting. Hellman testified that the defendant offered the plaintiff a "gift" of $100,000, but the plaintiff stated that he was entitled to more and requested $250,000. By the end of the meeting, Hellman believed that the plaintiff was going to accept the $100,000, and, within a day or two, he drafted an agreement for the parties to sign.

On June 1, 2012, the plaintiff and the defendant met at Mueller's office, where the defendant was to give the plaintiff the $100,000 "gift." After the parties arrived, the defendant asked the plaintiff to sign the agreement prepared by Hellman, which provided in relevant part: "David Falcigno . . . hereby releases Stephen Falcigno . . . of and from any and all actions . . . claims . . . agreements, promises . . . or demands . . . of

to continue with the level of sales. . . . If I hit the sales, they would give me $1 million, one of the $2 million. I successfully was able to get the $2 million."

[9] The court noted that Sklarz testified that there had been no offers to buy Statewide in 2009 or 2010. The court also found that "[n]o evidence was offered to show the defendant knew that a deal to buy Statewide was imminent" at the time he bought the plaintiff's shares, and that "Giglietti and Sklarz were astounded by the fact that Sysco offered $8 million in 2011 to buy Statewide."

any kind whatsoever including, but not limited to any claims concerning the shares of Statewide . . . from the beginning of the world to the date of this agreement." It does not appear that the plaintiff signed the agreement. Unbeknownst to the defendant and Mueller at the time, the plaintiff made an audio recording of this meeting.

On October 5, 2012, the plaintiff commenced the present action. His June 14, 2013 revised complaint was brought in ten counts: Count one, breach of contract; count two, promissory estoppel; count three, fraudulent concealment; count four, fraudulent misrepresentation; count five, negligent misrepresentation; count six, breach of fiduciary duty; count seven, breach of the implied covenant of good faith; count eight, unjust enrichment; count nine, unlawful conversion; and count ten, statutory theft in violation of General Statutes § 52-564. At the time of trial, five of the plaintiff's counts remained viable, namely, breach of contract, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty. The defendant also had a counterclaim that remained viable, namely, breach of the representations and warranties contained in the certificate of satisfaction signed by the plaintiff when he conveyed his shares to the defendant. In a very thorough memorandum of decision, the court found in favor of the defendant on all counts of the plaintiff's complaint and in favor of the plaintiff on the defendant's counterclaim. This appeal and cross appeal followed. Additional facts will be set forth as necessary.

I

THE PLAINTIFF'S APPEAL

The plaintiff claims that the court erred in rendering judgment in favor of the defendant on the plaintiff's cause of action for breach of fiduciary duty.[10] Specifically, he argues that the court erred in finding that the

[10] In its memorandum of decision, the court noted that, in the plaintiff's posttrial brief, his "breach of fiduciary duty claim overlaps, legally and

defendant proved by clear and convincing evidence that he engaged in fair dealing and full disclosure as to his purchase of the plaintiff's minority shares of Statewide stock. We are not persuaded.

The trial court's determination of whether a party breached his fiduciary duty is a factual finding, and, therefore, we apply the clearly erroneous standard of review when assessing that finding. *Spector* v. *Konover*, 57 Conn. App. 121, 126, 747 A.2d 39, cert. denied, 254 Conn. 913, 759 A.2d 507 (2000). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotations marks omitted.) Id., 126–27.

"In determining whether the court's decision was clearly erroneous, we must examine the court's decision in the context of the heightened standard of proof imposed on a fiduciary." Id., 127. "Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence. . . . Proof of a fiduciary relationship, therefore, generally imposes a twofold burden on the fiduciary. First, the burden of proof shifts to the fiduciary; and second, the standard of proof is clear and convincing evidence." (Internal quotation marks omitted.) *Papallo* v. *Lefebvre*, 172 Conn. App. 746, 754, 161 A.3d 603 (2017). "Although

factually [with his] fraudulent nondisclosure, fraudulent misrepresentation, and negligent misrepresentation claims." The court found in favor of the defendant on each of these causes of action. The plaintiff appeals only from the court's judgment on his cause of action for breach of fiduciary duty.

we have not expressly limited the application of these traditional principles of fiduciary duty to cases involving only fraud, self-dealing or conflict of interest, the cases in which we have invoked them have involved such deviations." (Emphasis omitted.) *Murphy* v. *Wakelee*, 247 Conn. 396, 400, 721 A.2d 1181 (1998).

"Although not always expressly stated, the basis upon which the aforementioned burden-shifting and enhanced burden of proof rests is, essentially, that undue influence will not be presumed . . . and that the presumption of fraud does not arise from the relationship itself. We note, however, that [this] rule is somewhat relaxed in cases where a fiduciary relation exists between the parties to a transaction or contract, *and where one has a dominant and controlling force or influence over the other. In such cases, if the superior party obtains a possible benefit*, equity raises a presumption against the validity of the transaction or contract, and casts upon such party the burden of proving fairness, honesty, and integrity in the transaction or contract. . . . Therefore, it is only when the confidential relationship is shown together with suspicious circumstances, or where there is a transaction, contract, or transfer between persons in a confidential or fiduciary relationship, *and where the dominant party is the beneficiary of the transaction, contract, or transfer*, that the burden shifts to the fiduciary to prove fair dealing." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Heaven* v. *Timber Hill, LLC*, 96 Conn. App. 294, 303–304, 900 A.2d 560 (2006).

In the present case, there is no dispute as to whether the defendant, as the president and majority shareholder of Statewide, had a fiduciary relationship with the plaintiff, a minority shareholder. The court also found, and we agree, that the defendant derived a benefit from obtaining the plaintiff's shares, and, therefore, the burden of proving fair dealing shifted to the defendant. We, therefore, need assess only whether the

court's finding that the defendant had proven, by clear and convincing evidence, that he acted in a fair and honest manner in his transaction with the plaintiff was clearly erroneous. We conclude that the court's finding was not clearly erroneous.

"The intentional withholding of information for the purpose of inducing action has been regarded . . . as equivalent to a fraudulent misrepresentation. . . . An officer and director occupies a fiduciary relationship to the corporation and its stockholders. . . . He occupies a position of the highest trust and therefore he is bound to use the utmost good faith and fair dealing in all his relationships with the corporation. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . It is essential to the validity of a contract between a fiduciary and a beneficiary concerning matters within the scope of that relationship that a full disclosure be made of all *relevant* facts which the fiduciary knows or should know. . . . [T]hese high standards [are what] the law demands of fiduciaries." (Citations omitted; emphasis added; internal quotation marks omitted.) *Pacelli Bros. Transportation, Inc.* v. *Pacelli*, 189 Conn. 401, 407–408, 456 A.2d 325 (1983).

"Majority or controlling stockholders have a duty not to take advantage of the minority in purchasing the latter's shares. Accordingly, majority stockholders, when purchasing the stock of minority stockholders, are under a duty to disclose to them all material facts known to the majority stockholders by virtue of their position. Thus, a majority shareholder making an offer to purchase all remaining outstanding stock owes a fiduciary duty to minority shareholders, which requires complete candor in disclosing fully all of the facts and circumstances surrounding such tender offer; and the correct standard requires disclosure of all germane facts rather than mere disclosure of adequate facts.

"Absent nondisclosure, fraud, or oppression, a majority shareholder has no duty to pay a 'fair' price for shares. A shareholder in a closely held corporation does not breach the shareholder's fiduciary duties to the second shareholder by failing to disclose the true value of the corporation when the second shareholder sold their interest to the first shareholder, where there is no evidence that the first shareholder knew the true value of the corporation, and the second shareholder was advised, but refused, to obtain an appraisal. However, a majority stockholder may be held accountable as a fiduciary, where he or she is in active charge of corporate affairs and induces a minority stockholder to sell his or her holdings, concealing the true condition of corporate finances for the purpose of making a personal profit, or failing to reveal an offer from a prospective purchaser for the purchase of all of the stock of the corporation at a price which is higher than that offered to the minority holder." (Footnotes omitted.) 18A Am. Jur. 2d 529–30, Corporations § 662 (2015).

In the present case, the plaintiff argues that the court erred in finding that the defendant proved by clear and convincing evidence that he engaged in fair dealing and full disclosure as to his purchase of the plaintiff's minority shares of Statewide stock because the defendant (1) made false representations to the plaintiff by telling him that the Statewide facility at Long Wharf was a "dinosaur" and was falling apart, and (2) failed to disclose relevant information to the plaintiff and applied a minority discount when he purchased the plaintiff's shares. He also argues that the court's analysis of his claim was inadequate under the four requirements of *Konover Development Corp.* v. *Zeller*, 228 Conn. 206, 635 A.2d 798 (1994). We will consider each of these arguments in turn.

A

The plaintiff argues that the court's finding that the defendant proved fair dealing and full disclosure was

clearly erroneous and inconsistent with its finding that the defendant had made false representations to the plaintiff that Statewide was a "dinosaur" and was falling apart. He argues that "it must be highlighted that the trial court found 'the defendant represented, falsely by implication, that Statewide was a dinosaur, [and] he would only offer $200,000 for the plaintiff's shares because the place was falling apart.' " (Emphasis omitted.) He contends that "it was misleading for the defendant to tell the plaintiff he would not pay close to the plaintiff's asking price of $450,000 because the Statewide Long Wharf facility was old and falling apart. . . . [The defendant introduced] no evidence . . . that the overall physical condition of the meat businesses had any bearing on Sysco targeting businesses with the CAB license." (Citations omitted.) The defendant argues that the court found that the defendant had established that his representation of Statewide as a "dinosaur" was meaningless in light of the situation, and, therefore, this representation was not relevant to the defendant's fair dealing. We agree with the defendant.

Judge Corradino rejected the plaintiff's misrepresentation claims, and the plaintiff did not appeal from that aspect of the judgment. The court specifically reasoned: "For the court at least the misrepresentation claim is not convincing. At the meeting at Luce Restaurant where the putative sale of the plaintiff's shares was first discussed in some detail, the plaintiff said he wanted $450,000 to $500,000 for his shares. But the defendant represented, falsely by implication, that Statewide was a dinosaur, he would only offer $200,000 for the plaintiff's shares because the place was falling apart. Also the defendant said to the plaintiff that he was only a minority shareholder, the plaintiff's 20 percent ownership interest compared to the defendant's 60 percent ownership interest. The defendant had no need to buy the

plaintiff's shares since he already owned a majority interest in Statewide.

"Leaving aside the possibility of a sale and looking at Statewide as an operating business, *it is difficult to conclude the defendant misrepresented*. The court has examined the tax filings for 2003 through 2007, and the balance sheet for 2008, the year before the sale of Statewide to Sysco. The gross receipts are in the range of $17 million to $18 million but when one takes account of expenses the taxable income is never higher than $131,000. The 2008 balance sheet shows net income before taxes was only $67,275.17. The plaintiff testified one year showed a loss. [Giglietti], who worked as a CPA for Statewide for over twenty years said a meat business like Statewide is not an easy business, you work on a 'small margin' and it is not a business to make a lot of money in, profits fluctuate.

"But more to the point Sysco in fact bought Statewide for $8 million over a year and a half after the plaintiff sold his shares to the defendant. Giglietti testified that the only way to put a value on a business like Statewide is what someone is willing to pay for it. Sysco did not confine itself to profit margins for the existing Statewide business operations. Giglietti, who was involved in the sale of Statewide to Sysco, testified Sysco determined what to offer based on gross sales, Statewide's CAB license (license to sell high quality meat), and mainly Statewide's customer list. There is nothing to indicate the defendant misrepresented any of these matters to the plaintiff.

"Even more importantly the plaintiff always knew the defendant intended to sell Statewide—he knew this since 2005, at least. Giglietti and Attorney Sklarz both testified Statewide was worth in their opinion, between two and four million dollars upon sale. Giglietti was

[the plaintiff's] accountant, [and was] also the accountant for everyone in the family and for Statewide. The plaintiff was asked if Giglietti ever told him what Statewide was worth in 2009. The plaintiff first said he did not remember then said he was told it was worth around $2 million. He said Giglietti may have told him this before 2009—i.e., the sale of his shares.

"In the context of the foregoing *it is not possible to conclude that the plaintiff was misled about the defendant's description of the business from a day to day operational point of view as a dinosaur* and in that context his shares were not even worth $100,000. The point is that there was a prospect of a sale which both parties were well aware of and both parties knew that, that sale might reap much more money for shareholders. Thus, at the Luce meeting the plaintiff asked what would happen if Statewide was sold—he knew exactly that if it did and he retained his shares he could get much more than $200,000. The defendant's response was if Statewide sells for millions I'll cut you back in according to the plaintiff. How on earth can it be said that the defendant misrepresented what the worth of Statewide was in the context of a commodity the defendant, as the plaintiff well knew, intended to sell? It was in this regard [Giglietti] told the plaintiff not to sell his shares. He reasoned that if a buyer came along one could take into account what the buyer offered and could get much more for his shares than could be garnered from just accepting an offer for his shares prior to any sale. Later in his testimony, Giglietti was asked if he specifically told the plaintiff this reasoning. His response was: 'You know, I'm sure I might [have]. I definitely told him not to sell and those would be the reasons I would have told him not to sell.'

"Finally it is interesting to note that the plaintiff did his own due diligence to see what he would ask for his shares at Luce. He said based on the shareholder's equity

in the tax documents and his 20 percent ownership of Statewide shares he arrived at his figure of $450,000 to $500,000. Oddly enough this is roughly about 20 percent of the two or three million Giglietti and Attorney Sklarz, Statewide's attorney, said Statewide was worth at the time of the sale of the plaintiff's shares. That he accepted only $200,000 and relied on a generalized cut you back in or revisit language was his mistake not based on misrepresentations as to Statewide's value or, better put, Statewide's value if it were to be sold by the defendant but on his desire to remove himself from the toxic atmosphere engendered by continuing involvement in Statewide—especially in light of the fact that he would be receiving $200,000 at the same time he was constructing a home which ended up having a value of over $500,000." (Emphasis altered.)

The plaintiff now argues, focusing only on a single statement by the court that the defendant "represented, falsely by implication, that Statewide was a dinosaur," that the court erred in concluding that the defendant proved he engaged in fair dealing because the court found that the defendant made a misrepresentation. We are not persuaded.

First, the court rejected the plaintiff's claims of misrepresentation, which the plaintiff has not claimed as error, specifically holding that "*it is difficult to conclude the defendant misrepresented*" and that "*it is not possible to conclude that the plaintiff was misled about the defendant's description of the business from a day to day operational point of view as a dinosaur . . . .*" (Emphasis added.) Second, the court found that the evidence demonstrated that the plaintiff knew that his shares would be worth more if and when the defendant sold Statewide, and he knew that his shares were worth more at the time he sold them to the defendant, having asked for $450,000 after being told by Giglietti that the company was worth $2 million and that he should

not sell his shares. Third, the court also found that the evidence demonstrated that the plaintiff wanted to sell his shares to remove himself from family disputes,[11] that he willingly accepted only $200,000 at the same time he was looking to build a $500,000 home, and that this was "*his mistake not based on misrepresentations*" made by the defendant. (Emphasis added.) Fourth, the court clearly found that this "misrepresentation" was not material and that it was not truly a misrepresentation. As to the operation of the business, the tax returns showed little income and showed some losses. The record also demonstrates that after Sysco bought Statewide, it closed the old facility and moved to a new, larger facility in Rhode Island. Further, the court concluded that the plaintiff did not rely on the defendant's representation that Statewide was a "dinosaur" because he knew the company had value if it was sold, and Giglietti told him it would be worth more if sold later. Accordingly, the defendant's statement that Statewide was a "dinosaur" has no bearing on whether he proved that he engaged in fair dealing when he purchased the plaintiff's shares.

B

The plaintiff also argues that the defendant failed to meet his burden of proof because the evidence demonstrated that the defendant failed to disclose all relevant information to the plaintiff, including that he was applying a minority discount to his purchase of the plaintiff's

[11] The court explained the family situation as follows: "A tense family situation existed for years, they had not celebrated a holiday together since 1996. A letter was written by the plaintiff . . . to his brothers Richard and Steven in 2000 . . . . The letter tells of bitter family disputes and attitudes that interestingly have nothing to do with the operation of Statewide which is not even mentioned. At one point, after discussing his desire that they all should be acting like brothers and go to a concert together, [the plaintiff] says about all his complaints: 'Stephen, I know this doesn't apply to you as much as it does to Richard considering you've been attempting to make some kind of progress in this whole matter.' "

shares, and that he would be seeking to profit from the purchase of those shares upon a future sale of Statewide.[12] The defendant argues that he provided the plaintiff with all relevant information, including explaining in layman's terms that he was applying a minority discount, giving him access to Statewide's financial documents, and telling him to talk to Giglietti and to do due diligence. The defendant also argues that the evidence clearly demonstrated that the plaintiff knew that his shares would be worth more than the defendant was offering if and when the defendant found a buyer for Statewide. We agree with the defendant.

The court specifically found that the defendant explained to the plaintiff "the significance of the minority discount . . . in practical terms." This finding is supported by clear and convincing evidence, which demonstrates that the defendant told the plaintiff that he did not need his shares because he already had control of Statewide. "The purpose of a minority discount is to adjust for lack of control over the business entity on the theory that [noncontrolling] shares of stock are not worth their proportionate share of the

[12] The plaintiff also argues that the defendant failed to disclose that the plaintiff could sell his shares to someone other than the defendant. The trial court did not address the import, if any, of the defendant *not remembering* whether he told the plaintiff that he might be able to sell his shares to someone else. A review of the plaintiff's posttrial brief reveals that the plaintiff included the following statement in his dissertation of the facts: "Nor does the defendant recall ever informing the plaintiff that since the defendant was not willing to pay four-fifty that he could sell them to Statewide or Richard [Falcigno] and if they did not want to pay four-fifty he could go sell them to anyone else. . . . That said, however, the defendant admitted 'I know he had the opportunity to do that.' " (Citation omitted.) The plaintiff did not raise this again in the entirety of his posttrial brief, nor did he analyze it in any way. Accordingly, the trial court did not mention it in its memorandum of decision. On the basis of the foregoing, we will not consider this argument in our analysis except to say that there is no evidence in the record that anyone other than the defendant was interested in purchasing the plaintiff's minority shares or what someone would have offered had there been an interest.

firm's value because they lack voting power to control corporate actions." (Internal quotation marks omitted.) *Swope* v. *Siegel-Robert, Inc.*, 243 F.3d 486, 495 (8th Cir.), cert. denied, 534 U.S. 887, 122 S. Ct. 198, 151 L. Ed. 2d 139 (2001).

The evidence further demonstrated that the defendant gave the plaintiff access to Statewide's financial documents and told him to talk to Giglietti and to do due diligence. The tax returns that the plaintiff obtained from Giglietti showed "gross profits in the millions which of course depended on a strong customer base." The court also found that, according to the plaintiff's own testimony, he "knew what a CAB license was . . . ."[13] The plaintiff said he examined the tax documents and took 20 percent of the shareholder's equity to formulate his demand of $450,000 to $500,000 which he initially presented to the defendant at Luce when sale of the plaintiff's [shares] was first formally discussed." (Footnote added.) Additionally, although the plaintiff testified at trial that he had no hesitation about talking to Giglietti, the court explained that when the plaintiff picked up the returns, he "did not ask Giglietti about the prospective sale and its desirability. His response as to why this was so seems to be that Giglietti was always busy and if he ever asked Giglietti anything, it would get back to the defendant who would raise a ruckus." The court could not understand the plaintiff's professed reluctance in light of the fact that the defendant specifically had told the plaintiff to talk to Giglietti and to do due diligence. The fact that the plaintiff failed to make full use of Giglietti's knowledge is not the fault of the defendant, who specifically urged him to do due diligence and to talk to Giglietti. See generally *Pacelli Bros. Transportation, Inc.* v. *Pacelli*, supra, 189 Conn.

[13] The plaintiff testified that he was aware that Statewide had a CAB license and that such a license was for "a higher end selected meat. It's just kind of the Mercedes Benz of . . . steaks or meat."

408 ("Where a party realizes he has only limited information upon the subject of a contract, but treats that knowledge as sufficient in making the contract he is deemed to have assumed the risk of a mistake. 1 Restatement (Second), Contracts § 154.").

Further, the court noted that "Giglietti said shareholder's equity is not a good basis for valuation of a company such as Statewide. A company such as Statewide receives an accurate valuation based on what a buyer is willing to pay for it. But both Sklarz and Giglietti estimated [that] the value of Statewide in 2009, before Sysco's offer, was two million dollars or three million. The initial demand the plaintiff came up with [was] close to 20 percent of a two million valuation figure." The court further noted that the plaintiff, in his posttrial brief, "argued that the defendant made no representations during the negotiations about the value of Statewide or the plaintiff's interest. But Giglietti told [the plaintiff that] the company was worth two million. And he certainly knew his 20 percent would be worth more than the $200,000 he was being offered, if Statewide sold, which he knew had been the defendant's goal for years. In fact, he asked the defendant at Luce, what if Statewide sold—the defendant responded, if it sells for millions, I will revisit the matter or cut you back in . . . ." The court also found that Giglietti, the accountant for Statewide and the personal advisor of the plaintiff, specifically and repeatedly told the plaintiff not to sell his shares.

On the basis of the foregoing, the court found that the defendant had explained in layman's terms to the plaintiff that he was applying a minority discount to his potential purchase of the plaintiff's shares and that the plaintiff knew about the possibility of a future sale and that it would be more advantageous to him if he did not sell his shares at that time. The court found that "the plaintiff, having received a $200,000 offer at Luce,

knew by the very asking of the question—what if Statewide sells—that if he kept his shares, they would be worth more, and the defendant's comment of cutting back in or revisiting the matter only confirmed what he already knew." It also found that the defendant disclosed all relevant information because he gave the plaintiff full access to Giglietti and the financial documents and tax returns of Statewide. If the plaintiff had questions or needed more information, he certainly could have and should have inquired.

The court found that the evidence demonstrated that the defendant was honest and fair in his interaction with the plaintiff, that he gave the plaintiff access to whatever he needed, including Giglietti, and that the plaintiff made his own decision. The evidence demonstrates that no one, including Giglietti, Sklarz, or the defendant, had any idea that Sysco or anyone else would offer $8 million for Statewide; Giglietti and Sklarz each had valued Statewide at approximately $2 million, and they genuinely were surprised by the offer in 2011, with Giglietti testifying that he would not have imagined an $8 million offer "in [his] wildest dreams." Here, the court reasoned that "none of the [defendant's] actions . . . [could] be characterized as a plot to force the plaintiff to sell his shares at a reduced price because of [some] imminent sale. There were just ongoing tensions in this family, apparently, for a variety of reasons. There was no evidence . . . that in the fifteen years before the defendant bought the plaintiff's shares [the defendant] even suggested the shares be sold to him although he had a goal of selling Statewide for years. The plaintiff made the first specific mention of wanting to do that in a heated June, 2009 call that had nothing to do with Statewide . . . . Besides, what kind of orchestrated squeeze takes place when one of the parties receives free gas and meat on a weekly basis and $14,000 a year for consultation fees when no consultation has taken

place." All in all, the court ultimately found that the plaintiff wanted to sell his shares to the defendant and that the plaintiff's "real motive was to be bought out from Statewide because of the toxicity of the relations that he felt were engendered by this family business at a time when he could use any monies he received for his shares to help construct his new house." We conclude that the court's finding that the defendant had met his burden of proving fair dealing by clear and convincing evidence was not clearly erroneous.

C

Although conceding that *Zeller* does not apply in this case, and specifically stating that he "is not himself invoking the *Zeller* standard," the plaintiff, nevertheless, also argues that the evidence demonstrates that the defendant did not "prove fair dealing and full disclosure with clear and convincing evidence under each of the four requirements in [*Konover Development Corp.* v. *Zeller*, supra, 228 Conn. 206] for fiduciaries." He also argues that the defendant failed to prove fair dealing because he created an ambiguity regarding the terms of the stock purchase when he told the plaintiff that he would cut him back in or revisit the compensation if he sold Statewide for millions. We agree with the parties that the *Zeller* framework is inapplicable, and we decline to consider the ambiguity argument because it was not raised before the trial court and is inconsistent with the arguments raised by the plaintiff in his posttrial brief to the trial court.[14] See generally *Lopiano*

[14] In regard to the plaintiff's argument on appeal that the defendant failed to prove fair dealing because he created an ambiguity regarding the terms of the stock purchase by telling him that he would "cut [him] back in" if Statewide later sold for millions, the plaintiff did not make such an argument in his posttrial brief to the trial court, nor in the breach of fiduciary duty count of his complaint. As a matter of fact, the plaintiff argued in his posttrial brief that the "cut you back in" or revisit language was part of the parties' contract or that it formed its own "definite and certain . . . binding contract," and that it was clear and unambiguous. The trial court determined that this statement did not form a contract, but the language was not ambigu-

v. *Stamford*, 22 Conn. App. 591, 594, 577 A.2d 1135 (1990) ("[o]ur role on review is to decide whether the trial court's decision is clearly erroneous in view of the evidence and pleadings in the record; Practice Book § 4061 [now § 60-5]; and we must dispose of a case on the theory on which it was tried and decided").

It is noteworthy to mention that, although the plaintiff cited to *Konover Development Corp.* v. *Zeller*, supra, 228 Conn. 219, *once* in his seventy-five page posttrial brief to the trial court, specifically for the purpose of characterizing the degree of trust in a fiduciary relationship, he neither raised nor argued to the trial court that the court should apply the framework adopted by our Supreme Court in *Zeller*; see *Konover Development Corp.* v. *Zeller*, supra, 227–28 (adopting framework that is flexible enough, "in the context of a commercial limited partnership [to balance the need] . . . to ensure that partners with diverse interests will be able to craft and rely on a partnership agreement that reflects their common interests" with "the principle of fiduciary honor"); or used *Zeller* as a guideline for his analysis. Nevertheless, we agree with the parties that the *Zeller* framework, which permits a somewhat more relaxed fiduciary duty in certain situations, does not apply to this case. See id.; *Spector* v. *Konover*, supra, 57 Conn. App. 128; see also Connecticut Civil Jury Instructions 3.8-2 (B) and (C), available at https://www.jud.ct.gov/JI/Civil/Civil.pdf (last visited August 18, 2020) (differentiating traditional framework from *Zeller* framework, which is employed in cases with "sophisticated, commercial parties" wherein "parties may contractually agree that the fiduciary will gain some advantage or benefit at the expense of the principal"). In any event,

ous, i.e., the plaintiff knew that it meant that the defendant would consider giving the plaintiff some additional money if he received millions for Statewide once he found a buyer. Accordingly, we decline to consider this argument on appeal.

given that the *Zeller* framework is more forgiving to the fiduciary than is the traditional analysis applied by the court, we fail to see how the plaintiff could have benefitted from its application in this case.

Furthermore, the trial court fully considered, while applying the correct legal test, all of the facts relied on by the plaintiff in support of his breach of fiduciary duty claim. Before the trial court, regarding his claim of breach of fiduciary duty, the plaintiff argued in his posttrial brief that the defendant had the burden of proving fair dealing, and that the defendant failed to meet that burden because the evidence demonstrated that he had "fail[ed] to disclose relevant information [that he] knew or should have known," "appl[ied] a minority discount on the plaintiff's shares," and "commit[ted] a 'freeze-out' of the plaintiff as a minority shareholder . . . ." See generally *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 272 n.6, 422 A.2d 311 (1979) ("a 'freeze-out,' [is] defined broadly as any action by those in control of the corporation which results in the termination of a stockholder's interest in the enterprise, with the *purpose* of forcing a liquidation or sale of the shareholder's share, not incident to some other wholesome business goal" (emphasis in original)).

Judge Corradino, in turn, painstakingly examined each and every claim and argument raised by the plaintiff in his posttrial brief. He analyzed the reasons set forth by the plaintiff in his burden shifting argument, and he then shifted the burden to the defendant, and thoroughly analyzed each and every argument briefed by the plaintiff. The plaintiff had argued at various points in his posttrial brief, including in claims other than his breach of fiduciary duty claim, that the defendant had (1) referred to Statewide as a "dinosaur," (2) failed to inform the plaintiff that he could sell his shares to someone

other than the defendant, (3) failed to explain the significance of the CAB license, (4) failed to explain Statewide's customer base, (5) failed to inform the plaintiff about the potential sale of Statewide, and (6) failed to tell the plaintiff that he was applying a minority discount to his purchase of the plaintiff's shares and would sell them for more later.

Judge Corradino found that the defendant's use of the word "dinosaur" to describe Statewide was, among other things, not material. See part I A of this opinion. As for the operation of the business, the tax returns showed little income and showed some losses. The record also demonstrates that after Sysco bought Statewide, it closed the old facility and moved to a new, larger facility in Rhode Island. Further, the court concluded that the plaintiff did not rely on that representation because he knew Statewide would have value if sold, and Giglietti had explained to him that Statewide would be worth more if sold later and told him that he should not sell his shares to the defendant.

As for the plaintiff's alleged right to sell to others, we decline to address that argument. See footnote 12 of this opinion.

As for Statewide's CAB license, the court found that the plaintiff was aware of the license and knew it was the "Mercedes Benz" of meat. The evidence also demonstrated that no one knew what the license was worth and that the defendant, Sklarz, and Giglietti all were shocked by the amount Sysco offered to purchase Statewide. In fact, the court stated that "Giglietti and Sklarz were astounded by the fact that Sysco offered $8,000,000 in 2011 to buy Statewide." Additionally, as to the customer list, the plaintiff knew the customers because he had worked at the Statewide facility and was well aware that Statewide had won awards for being part of the "million pound club." The plaintiff

had access to Statewide's balance sheet for 2008, and he had its tax returns going back several years before 2009, which indicated $17 million to $18 million in sales, which, the court specifically found, "could only result from a strong customer base." He also had access to Giglietti, and the defendant had encouraged him to talk to Giglietti and to get whatever he needed to do any necessary due diligence before selling his shares.

As for the defendant's alleged knowledge in 2009 of a potential sale of Statewide, the plaintiff had known since at least 2005 that the defendant wanted to sell the company. This was not a secret. The plaintiff also knew from Giglietti that a sale could generate more value for him than if he sold to the defendant in 2009, and that Giglietti, his accountant and the accountant for Statewide, opined that he should not sell his shares to the defendant. Furthermore, in 2009, when the defendant offered to purchase the plaintiff's shares, there were no pending offers on the table to purchase Statewide. An initial inquiry came a year later and the astonishing offer from Sysco came months after that. There was no evidence that the defendant had any basis to expect such an offer at the time he purchased the plaintiff's shares. On the related issue of purchasing the plaintiff's shares at a minority discount with the intention of selling them for a higher price later, we have addressed this more fully in part I B of this opinion. Overall, the trial court made several subordinate findings of fact to support its ultimate finding that the defendant proved by clear and convincing evidence that he did not act unfairly when he purchased the plaintiff's shares. Importantly, the plaintiff has not challenged any of those subordinate findings, and they are all amply supported by the evidence.

This is a sad and troubling case because it concerns family, including at least two brothers, the plaintiff and the defendant, who apparently once had a close relationship. After hearing the evidence and considering

the claims and arguments of the parties, the court found that the brothers often were at odds with each other, and, in 2009, the plaintiff told the defendant that he wanted to sell his shares of Statewide to the defendant so that he could escape the turmoil and be brothers again with the defendant. The plaintiff also wanted to sell because he was building a new home and needed the money. The defendant agreed to purchase the plaintiff's shares and told him to speak with Giglietti, to obtain whatever he needed, to exercise due diligence, and to come up with a reasonable price. The plaintiff did so, and the parties negotiated a price, with the defendant telling the plaintiff he would revisit the money issue if he sold Statewide for millions. Nearly two years later, the defendant sold Statewide for an astonishing $8 million. When he offered to give the plaintiff another $100,000, the plaintiff felt it was not enough, and he brought this action against the defendant. The trial court determined that the plaintiff's claims failed on their merits. The plaintiff, on appeal, has not established that the court was wrong. On the basis of the foregoing analysis, we conclude that the court's finding that the defendant proved, by clear and convincing evidence, fair dealing and full disclosure in his purchase of the plaintiff's minority shares of stock was not clearly erroneous.

II

THE DEFENDANT'S CROSS APPEAL

The defendant claims in his cross appeal that the court improperly rendered judgment in favor of the plaintiff on the defendant's counterclaim seeking attorney's fees pursuant to the certificate of satisfaction signed by the plaintiff when he transferred his shares to the defendant. He argues that, "[a]t the time the parties executed the contract for [the] defendant's purchase of [the] plaintiff's shares, [the] plaintiff signed a

'certificate of satisfaction, representations and warranties and indemnification regarding shares of stock' (certificate), in which he agreed to 'hold harmless and protect the purchaser from and against any claim of any party with respect to such shares,' " and that the court, therefore, erred in refusing to award attorney's fees. The plaintiff argues in relevant part that the plain language of the certificate applies only to third-party claims and does not include attorney's fees.[15] We conclude that the certificate does not apply in the present case.

We begin with our standard of review. "[W]here there is definitive contract language . . . the determination of what the parties intended by their contractual commitments is a question of law. . . . It is implicit in this rule that the determination as to whether contractual language is plain and unambiguous is itself a question of law subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 101–102, 84 A.3d 828 (2014).

"[I]n reviewing a claim that attorney's fees are authorized by contract, we apply the well established principle that [a] contract must be construed to effectuate the intent of the parties, which is determined from [its] language . . . interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the

[15] We note that the plaintiff, in his posttrial brief to the trial court, did not make the argument that the certificate applied only to third-party claims. Rather, he argued in relevant part that because the certificate did not specify that attorney's fees were included, the American rule would bar such an award. Because the parties have fully discussed this issue in their respective appellate briefs, and because we conclude that the interpretation of the certificate is a matter of law in this case, the argument of the parties in the trial court is not controlling.

subject matter of the [writing]." (Citation omitted; internal quotation marks omitted.) *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, 153 Conn. App. 387, 415, 102 A.3d 87, cert. denied, 315 Conn. 901, 104 A.3d 106 (2014).

In the present case, the certificate provided in relevant part: "[The plaintiff] was the sole and exclusive owner of [his] [s]hares, had the absolute right, power and authority to sell, transfer, assign and convey such [s]hares to the [defendant], that the [s]hares were not subject to any pledge, mortgage, lien, security interest, option, right of first refusal, restriction, contract or encumbrance of any kind or manner with respect to the sale, transfer, assignment and conveyance of [s]hares to the [defendant], and the [plaintiff] will warrant and defend such interest, title and right to such [s]hares and hold harmless and protect the [defendant] from and against any claim of any party with respect to such [s]hares."

We conclude that the language is clear and unambiguous. We further conclude that, pursuant to the plain language of the certificate, it does not apply in the present case. In the certificate, the plaintiff agreed that he was the sole and exclusive owner of his shares, that they were unencumbered, and that he had the absolute right to sell them to the defendant. Additionally, the plaintiff agreed and warranted that he would "*defend such interest, title and right to such shares*"; (emphasis added); and hold the defendant harmless and protected from and against any claim made with respect to such shares. Read in its entirety, this language clearly sets forth the plaintiff's obligation to defend *his* interest and rights in the shares from claims made by third parties to those shares, and to hold the defendant harmless and to protect him from such third-party claims. Consequently, we conclude that the plaintiff properly characterizes the certificate as applicable only to a third-party

claim challenging the plaintiff's unencumbered interest, title, and right to his shares and his absolute right to sell his shares to the defendant. Accordingly, it is inapplicable to the present case.

The judgment is affirmed.

In this opinion the other judges concurred.

ARTHUR M. DEMATTIO *v.* ROBERT PLUNKETT ET AL.
(AC 41283)

Moll, Devlin and Pellegrino, Js.*

Syllabus

The plaintiff, who had been hired by the defendants to perform certain home construction site work, sought to recover damages for, inter alia, breach of contract, after the defendants failed to make an installment payment under the parties' contract. The contract set forth a schedule of six installment payments. Work was scheduled to begin on March 9, 2015, and was to be completed on May 11, 2015. As a result of delays, work did not begin until May, 2015. In October, 2015, the plaintiff ceased working for the defendants; the plaintiff maintained that he was terminated whereas the defendants claimed the plaintiff walked off the job. The plaintiff claimed he was entitled to the fourth installment payment. The defendants then hired V Co. to complete the work. The plaintiff thereafter brought the present action seeking damages for the defendants' failure to remit the fourth installment payment. The defendants filed a counterclaim. Following a trial to the court, the trial court rendered judgment for the defendants on the complaint and on their counterclaim, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly determined that the contract violated the Home Improvement Act (§ 20-418 et seq.) and was unenforceable against the defendants; the plaintiff failed to follow the statutorily (§ 42-135a (1) and (2)) prescribed language and form for the cancellation notice in the contract and failed to furnish the defendants with a detachable notice of cancellation as required by § 42-135a (2) and (3), and these failures amounted to material noncompliance with the act.
2. The trial court's finding that the plaintiff caused the delay in the completion of the work was not clearly erroneous; the court had before it the testimony of the defendants' expert regarding the percentage of work

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

completed by the plaintiff and how much work was left to complete, which the court was free to credit, and the court did not have to credit the plaintiff's testimony regarding his reasons for the project's delay.

3. This court declined to review the plaintiff's inadequately briefed claim that the trial court improperly refused to admit certain evidence proffered by the plaintiff; the plaintiff failed to identify with any specificity the exhibits he claims were improperly excluded and did not provide any legally relevant analysis as to why the court's alleged refusal to admit certain evidence was error.

4. The trial court's finding that the defendants did not receive a copy of the cancellation notice was not clearly erroneous; the court reasonably could have credited the defendant homeowner's testimony and it was within its province as trier of fact to make credibility determinations and to find the homeowner credible and the plaintiff not credible.

5. This court declined to review the plaintiff's unpreserved claim that the trial court should not have permitted the defendants' expert witness to testify because he was not qualified as an expert; the plaintiff did not file a motion in limine to preclude or limit the testimony of that witness nor did he object to the witness' testimony at trial.

6. The plaintiff could not prevail on his claim that the trial court failed to consider the defendants' duty to mitigate their damages; the defendants promptly sought of the services of V Co. to complete the work and the court expressly credited the testimony of the defendants' expert with respect to the amount of work necessary to complete the project and it implicitly found the expert's estimates and V Co.'s pricing reasonable by virtue of its damages calculation; moreover, the burden of proving the defendants' purported failure to mitigate rested with the plaintiff and he failed to present evidence beyond his argument that the pricing of V Co., the company the defendants hired to complete the work, was unreasonable.

7. The plaintiff could not prevail on his claim that the trial court erred with respect to its calculation of damages; the court's damages calculations were supported by the evidence, and the court properly subtracted the unpaid balance due on the plaintiff's contract from the adjusted cost of completion based on V Co.'s estimate, to come to the total actual loss that it awarded in damages to the defendants.

8. There was no merit to the plaintiff's unpreserved claim of judicial bias and, under a comprehensive review of the record, reversal under the plain error doctrine was not appropriate.

Argued October 22, 2019—officially released August 25, 2020

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where

the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Hon. A. William Mottolese*, judge trial referee; judgment for the defendants on the complaint and on the counterclaim, from which the plaintiff appealed to this court. *Affirmed.*

Arthur M. DeMattio, self-represented, the appellant (plaintiff).

Gregory J. Williams, with whom, on the brief, was *Todd H. Lampert*, for the appellees (defendants).

Opinion

MOLL, J. The self-represented plaintiff contractor, Arthur M. DeMattio, appeals from the judgment of the trial court, rendered following a bench trial, in favor of the defendant homeowners, Robert Plunkett and Karen Plunkett, on the plaintiff's complaint and the defendants' counterclaim in the amount of $21,720.34. On appeal, the plaintiff's claims distill to whether the trial court erred by (1) concluding that the home improvement contract entered into among the parties (contract) was invalid and unenforceable against the defendants as a result of the contract's noncompliance with the Home Improvement Act (HIA), General Statutes § 20-418 et seq., (2) making numerous factual findings contrary to the evidence presented at trial, (3) failing to determine that the defendants did not mitigate their damages, (4) improperly calculating its damages award, and (5) acting in a biased manner toward the plaintiff.[1] We affirm the judgment of the trial court.

The trial court found the following facts. On January 12, 2015, the plaintiff and the defendants entered into the contract for the purpose of remodeling, and building an addition to, the defendants' kitchen. The

[1] The plaintiff's arguments are presented in a different order in his principal appellate brief.

contract price totaled $86,300, to be paid in six installments throughout the course of the renovations. Pursuant to the contract, the start date was March 9, 2015, with a completion date of May 11, 2015. The plaintiff did not begin work until May, 2015, and the specified completion date in the contract was not extended as a result of the delay.

On October 21, 2015, the plaintiff ceased work for the defendants. The plaintiff maintained that the defendants terminated him on that date; the defendants claimed that he simply "walked off the job." The plaintiff contended that he had completed the work entitling him to the fourth installment payment of $15,600, while the defendants maintained that they had overpaid the plaintiff based on, in their view, the lack of progress he had made by that point.

On January 19, 2016, the plaintiff commenced this action. The plaintiff's seven count complaint asserted the following claims against the defendants: breach of contract; account stated; quasi-contract; quantum meruit; unjust enrichment; fraud; and civil conspiracy. On March 1, 2016, the defendants filed an answer and special defenses, the first of which alleged that the contract violated the HIA in various ways, including the lack of the statutorily required notice of cancellation. The defendants also filed a two count counterclaim, asserting claims for a breach of contract and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On May 13, 2016, the plaintiff filed a reply to the defendants' special defenses, as well as an answer and special defenses to the defendants' counterclaim, the reply to which was filed on July 12, 2017. On July 13, 2017, the defendants filed a request for leave to amend their counterclaim and appended the proposed amendment, which was deemed to have been filed by consent absent objec-

tion. On July 21, 2017, the plaintiff filed an answer and special defenses to the amended counterclaim.

The matter was tried to the court on August 6 and 30, and October 4, 2017.[2] Following the trial, on October 13, 2017, the plaintiff withdrew all counts of his complaint, with the exception of the breach of contract claim, relating to which the plaintiff sought compensatory damages in the amount of $15,920, comprising the fourth installment of $15,600 and the amount of $320 alleged to be owed for asbestos testing. Also on that date, the defendants withdrew their CUTPA claim against the plaintiff, leaving only the breach of contract claim. The parties submitted posttrial briefs.

On December 19, 2017, the court issued its memorandum of decision. With respect to the plaintiff's breach of contract claim, the court concluded that the contract failed to comply with the HIA, specifically, General Statutes § 42-135a, in six respects, which we discuss in part I of this opinion, rendering the contract unenforceable against the defendants. With respect to the defendants' breach of contract claim, the court found in favor of the defendants and awarded them $21,720.34 in compensatory damages with judgment rendered accordingly. On December 22, 2017, the plaintiff filed a motion for reargument and a motion for articulation. On January 2, 2018, the trial court denied both motions.

This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court erred in concluding that the contract was rendered unenforceable against the defendants as a result of the contract's noncompliance with the HIA.[3] The plaintiff principally

[2] The plaintiff was represented by counsel at trial.

[3] In so doing, the plaintiff essentially challenges the court's finding in favor of the defendants on their first special defense, specifically, that the contract violated the notice of cancellation requirements of the HIA.

argues that (1) the court erred in finding that the contract's use of the term "rescission"—instead of "cancellation," as required by the HIA, with respect to an owner's cancellation rights—was not merely technically noncompliant, and (2) with respect to the court's finding that the contract did not include a notice of cancellation, (a) the trial court erred in finding credible Karen Plunkett's testimony that the defendants did not receive a separate copy of the required notice of cancellation (which the plaintiff did not produce at trial) and (b) he located, posttrial, the original, signed contract with an endorsed, detachable notice of cancellation, which he contends this court should now consider. The defendants respond that the trial court correctly held that the contract was unenforceable against the defendants as a result of its noncompliance with the HIA, and that such noncompliance was substantial and material. We agree with the defendants.[4]

In order to put the plaintiff's claim in its proper context, we begin our analysis by setting forth the standard of review and applicable legal principles. "The determination of the requirements of the HIA is a matter of statutory construction and, therefore, a matter of law over which this court's review is plenary." *Wright Bros. Builders, Inc.* v. *Dowling*, 247 Conn. 218, 226, 720 A.2d 235 (1998). "When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [the court seeks] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question

[4] We note that "[a] contract is subject to the requirements of the HIA if it constitutes an agreement between a contractor and an owner for the performance of a home improvement." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, 232 Conn. 666, 676, 657 A.2d 1087 (1995). There is no dispute as to whether the HIA applies to the contract in this case; rather, the dispute focuses on whether the contract's noncompliance with HIA was merely technical.

of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs [the court] first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 712–13, 159 A.3d 1149 (2017), cert. denied, U.S. , 138 S. Ct. 1181, 200 L. Ed. 2d 314 (2018).

The starting point of our statutory analysis under the HIA is General Statutes § 20-429,[5] which provides in relevant part: "(a) (1) (A) No home improvement contract shall be valid or enforceable against an owner unless it: (i) Is in writing, (ii) is signed by the owner and the contractor, (iii) contains the entire agreement between the owner and the contractor, (iv) contains the date of the transaction, (v) contains the name and address of the contractor and the contractor's registration number, (vi) *contains a notice of the owner's cancellation rights in accordance with the provisions of chapter 740*, (vii) contains a starting date and completion date, [and] (viii) is entered into by a registered salesman or registered contractor . . . .

"(c) The contractor shall provide and deliver to the owner, without charge, a completed copy of the home

[5] Although § 20-429 has been the subject of two amendments since 2015, the year in which the contract between the plaintiff and the defendants was signed; see Public Acts 2016, No. 16-35, § 3, and Public Acts 2017, No. 17-48, § 18; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 20-429.

improvement contract at the time such contract is executed. . . .

"(e) *Each home improvement contract entered into shall be considered a home solicitation sale pursuant to chapter 740 and shall be subject to the requirements of said chapter* regardless of the location of the transaction or of the signing of the contract. . . .

"(f) Nothing in this section shall preclude a contractor who has complied with subparagraphs (A) (i), (ii), (vi), (vii) and (viii) of subdivision (1) of subsection (a) of this section from the recovery of payment for work performed based on the reasonable value of services which were requested by the owner, provided the court determines that it would be inequitable to deny such recovery." (Emphasis added.) General Statutes § 20-429 (a) (1) (A), (c), (e), and (f).

Section 20-429 (a) (1) (A) (vi) and (e) incorporates by reference the provisions of chapter 740, the Home Solicitation Sales Act (HSSA), which is codified at General Statutes § 42-134 et seq. The relevant portion of the HSSA, set forth in General Statutes § 42-135a, provides in relevant part: "No agreement in a home solicitation sale shall be effective against the buyer if it is not signed and dated by the buyer or if the seller shall . . . (1) Fail to furnish the buyer with a fully completed receipt or copy of all contracts and documents pertaining to such sale at the time of its execution, which contract shall be in the same language as that principally used in the oral sales presentation and which shall show the date of the transaction and shall contain the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer, or on the front page of the receipt if a contract is not used, and in boldface type of a minimum size of ten points, a statement in substantially the following form:

"YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

"(2) Fail to furnish each buyer, at the time such buyer signs the home solicitation sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned 'NOTICE OF CANCELLATION,' which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point boldface type the following information and statements in the same language as that used in the contract:

"NOTICE OF CANCELLATION

". . . (Date of Transaction)

"YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

* * *

"I HEREBY CANCEL THIS TRANSACTION.

". . . . (Date)

". . . . (Buyer's Signature)

"(3) Fail, before furnishing copies of the 'Notice of Cancellation' to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation. . . ." General Statutes § 42-135a (1) through (3).

"The HIA is a remedial statute that was enacted for the purpose of providing the public with a form of consumer

protection against unscrupulous home improvement contractors. . . . The aim of the statute is to promote understanding on the part of consumers with respect to the terms of home improvement contracts and their right to cancel such contracts so as to allow them to make informed decisions when purchasing home improvement services." (Citation omitted.) *Wright Bros. Builders, Inc.* v. *Dowling*, supra, 247 Conn. 231. "While the purposes of the [HIA] are advanced by an interpretation that makes compliance with the requirements of § 20-429 (a) mandatory, it does not necessarily follow that advancement of the purposes also requires that the mandatory compliance with each subsection be technically perfect." Id.

Against this backdrop, we set forth the following additional factual findings and legal conclusions drawn by the trial court. The defendants signed and dated the contract, agreeing to its terms, on January 12, 2015, and the plaintiff signed and dated the contract on January 17, 2015. The contract contained the following provision relating to the notice of cancellation requirement, in this form:

"**Right of Rescission—**

"Under the law you have three business days to rescind this contract and receive a full refund of any money you have on deposit with the contractor.

"If you elect to refuse this right, and effectively speed up your job start by three business days, then please sign below, attesting to the fact that you wish to forego your three day right of rescission.

"Homeowner Date"

(Emphasis in original.) The spaces for the homeowner's signature and date were left blank. Although the plaintiff testified at trial that he provided the defendants with a separate, detachable copy of the notice of cancellation, he did not produce a copy at trial, and the court

expressly credited the defendants' denial of having received a copy of such notice.

The court ultimately concluded that the contract failed to comply with the HIA, specifically, § 42-135a, in six respects. *First*, the notice used the term "rescission," rather than "cancellation," as prescribed by § 42-135a (1) and (2), and, as a result of the legal distinctions between those terms (i.e., rescission being an equitable remedy), "[t]he substitution of one word for the other [was] therefore a material departure from the statutory requirement and [was] not merely a technical noncompliance." *Second*, the text of the notice does not substantially follow the language prescribed by subsection (1) or (2) of § 42-135a and is not written in boldface type of a minimum font size of ten points, as required. *Third*, the notice is neither signed nor dated, the latter omission of which is significant because the signature page bears two different dates, namely, January 12, 2015, for the defendants and January 17, 2015, for the plaintiff, leaving the defendants to determine which of the dates triggered the cancellation period. *Fourth*, the notice does not refer to an "attached notice of cancellation form for an explanation" of the right of cancellation. *Fifth*, because no separate notice was attached to the contract, as required by § 42-135a (2), there was no "easily detachable" copy that the defendants could mail or deliver to the plaintiff. *Finally*, a completed copy of all documents was not provided to the defendants, as required by § 42-135a (1), because the defendants were never given a separate, detachable copy of the notice. On the basis of the foregoing, the court concluded that such omissions and defects (1) were collectively more egregious than those in *Kronberg Bros., Inc.* v. *Steele*, 72 Conn. App. 53, 804 A.2d 239, cert. denied, 262 Conn. 912, 810 A.2d 277 (2002), in which this court concluded that a home improvement contract violated the HIA, and (2) could not be considered minor or merely technically noncompliant.

The plaintiff primarily relies on *Wright Bros. Builders, Inc.* v. *Dowling*, supra, 247 Conn. 231, for the proposition that compliance with the HIA does not need to be "technically perfect." According to the plaintiff, the distinction between the terms "rescission" and "cancellation" was of no significance. Additionally, although the notice was not signed and dated, he maintains that the date by which the transaction could be canceled could have been easily deduced from reading the contract. The plaintiff further avers that the missing detachable notice of cancellation was located after the trial.[6] In contrast, the defendants largely rely on *Kronberg Bros., Inc.* v. *Steele*, supra, 72 Conn. App. 53, for the proposition that the contract's noncompliance with the HIA was material. We examine these precedents in turn.

In *Wright Bros. Builders, Inc.* v. *Dowling*, supra, 247 Conn. 226, the defendant homeowners argued that the home improvement contract they entered into with the plaintiff did not comply with the HIA because "the plaintiff did not attach *two* copies of the notice of cancellation to the copy of the contract that it provided to [the homeowner], as required by § 42-135a (2), and did not enter the date of the transaction or the date by which the transaction could be canceled on the notice of cancellation, as required by § 42-135a (3)." (Emphasis added.) However, "the alleged deviations from the precise specifications of § 42-135a (2) and (3) were of a minor and highly technical nature, and did not result in a lack of notice to the defendants that they had a

[6] The plaintiff contends that he did not produce the detachable notice of cancellation page at trial because he believed it had been destroyed in a storage facility flooding. After filing this appeal, the plaintiff filed two motions with this court to supplement his appendix whereby he sought to add, inter alia, a copy of the contract with an accompanying detachable notice. Both motions were denied by this court. "As an appellate court, we are limited to the record before us in deciding the merits of an appeal." *In re Amanda A.*, 58 Conn. App. 451, 461, 755 A.2d 243 (2000). Thus, the record before us does not include any detachable notice of cancellation.

right to cancel the contract within three days of the contract's signing." Id., 232. Specifically, the contractor complied with the HIA by furnishing one copy of the contract with an attached notice of cancellation to the homeowner, and one copy of the same to the homeowner's husband, who constituted an "owner" under the HIA. Id.; see also General Statutes § 20-419 (6). With respect to the contractor's failure to provide the required dates on the notice of cancellation, that information "easily could have been gleaned from even the most cursory review of the contract." Id., 233. Thus, our Supreme Court concluded that the contract satisfied the requirements of § 20-429 (a) and that the HIA did not preclude the plaintiff from enforcing the contract against the defendants. Id., 232–34.

In *Kronberg Bros., Inc.* v. *Steele*, supra, 72 Conn. App. 60, this court distinguished *Wright Bros. Builders, Inc.*, and concluded that the defects with the contract at issue amounted to "material noncompliance" with the HIA's requirements. More precisely, "not only did the cancellation notice fail to contain the date of the transaction and the date by which the defendants could cancel the contract, the contract itself lacked a transaction date. Furthermore, the contract did not contain the required cancellation notice in immediate proximity to the space reserved in the contract for the signature of the buyer. Near the top of the second page of the contract, there was language that notified the defendants of their right to cancel the contract, but the language failed to comply with § 42-135a in both verbiage and location. The contract indicated a start date of October 6, 1997, but the contract was not signed by [the homeowner] until October 7, 1997." Id., 59. Such noncompliance "amounted to more than a mere technicality; it constitute[d] material noncompliance" with the HIA's requirements. Id., 59–60. Thus, this court concluded that the trial court properly determined that the contract violated the HIA. Id., 60.

Applying the foregoing principles to the present case, we conclude that the plaintiff's failures (1) to follow in any meaningful way the prescribed language and form of the cancellation notice and (2) to provide the defendants with a detachable notice of cancellation, as required by § 42-135a, amount to material noncompliance with the HIA.

First, with regard to the "right of rescission" contained in the contract, it is clear that the language and form thereof do not align, even in a loose sense, with the requirements of the "notice of cancellation" set forth in the HSSA. See General Statutes § 42-135a (1) and (2); *Kronberg Bros., Inc.* v. *Steele*, supra, 72 Conn. App. 59. Furthermore, pursuant to § 42-135a (1) and (2), a notice of cancellation must explain that the owner has three business days from the date of the transaction to cancel it. Here, the date by which the defendants could have cancelled the contract was, at best, ambiguous because the defendants signed the contract on a different date than the plaintiff, and the date by which the defendants could have cancelled was not otherwise made obvious in the contract. Compare *Wright Bros. Builders, Inc.* v. *Dowling*, supra, 247 Conn. 233 (cancellation notice that did not contain date by which homeowners could cancel contract deemed not in violation of HIA because transaction date was on first page of contract), with *Kronberg Bros., Inc.* v. *Steele*, supra, 59 (both cancellation notice and contract lacked transaction date).

Second, and more significantly, the plaintiff did not provide *any* detachable notice of cancellation to the defendants as required by the HSSA. See General Statutes § 42-135a (2) and (3). Pursuant to § 20-429 (a) (vi), a home improvement contract is unenforceable against an owner if it does not contain a notice of the homeowner's cancellation rights in accordance with the HSSA, which specifies, inter alia, that a duplicate copy of the

notice of cancellation must be attached to the contract and easily detachable therefrom. See General Statutes § 42-135a (2); see also *Wright Bros. Builders, Inc.* v. *Dowling*, supra, 247 Conn. 227–28 ("the plain language of [the HSSA] requires home improvement contractors to furnish two copies of the notice of cancellation to the homeowners with whom they contract to undertake home improvement services by attaching two copies of the notice to the back of the homeowner's copy of the contract and that each of the copies specifies the date of the transaction and the date by which the contract may be canceled"). Here, as found by the trial court, no copy was furnished.

As one Superior Court decision aptly explained, "[w]ith regard to the contracts in this case, the plaintiff has failed to prove by a preponderance of the evidence that it has provided a copy of the 'Notice of Cancellation' in duplicate in accordance with § 42-135a (2) and (3). While a contractor need not strictly comply with the requirements under § 42-135a (2) and (3) so long as the owner can reasonably ascertain the date by which the contract can be canceled; see *Wright Bros. Builders, Inc.* v. *Dowling*, supra, 247 Conn. 231; there is no authority for the proposition that a contractor can completely fail to provide any copy of the 'Notice of Cancellation' whatsoever." *East Coast Custom Builders, LLC* v. *Bachman*, Superior Court, judicial district of New Haven, Docket No. CV-08-5003207-S (March 31, 2011). Because "[t]he requirement that a consumer is fully notified and understands his or her right to cancel a contract is central to the [HIA]"; *Kronberg Bros., Inc.* v. *Steele*, supra, 72 Conn. App. 60; the failure to provide any detachable notice of cancellation—particularly in light of the other, previously discussed defects—cannot be said to be minor or of a highly technical nature. See also *Wadia Enterprises, Inc.* v. *Hirschfeld*, 27 Conn. App.

162, 166–67, 604 A.2d 1339 (failure of home improvement contract to provide that contract could be cancelled within three business days was "violative of the [HIA]"), aff'd, 224 Conn. 240, 618 A.2d 506 (1992).

In light of the foregoing, we conclude that the trial court properly determined that the contract violated § 42-135a of the HIA, rendering it unenforceable against the defendants.[7]

II

The plaintiff next asserts a mélange of evidentiary challenges. Although the precise errors claimed are difficult to discern from his appellate briefs, they can largely be distilled as follows: the trial court erred in (1) finding that the plaintiff caused the delay in performance of the work, (2) refusing to admit into evidence several affidavits, records relating to weather conditions, building department inspection records, and "requested clarifications of inspections", (3) crediting the testimony of Karen Plunkett and not crediting the plaintiff's testimony, and (4) permitting, and then crediting, the testimony of Donald Panapada, a project manager at VAS Construction, Inc. (VAS). According to the plaintiff, had these errors not occurred, he would have prevailed on his breach of contract claim and the defendants would not have prevailed on their breach of contract claim. The defendants contend that, to the extent

[7] We pause briefly to make clear what we do not purport to decide. The trial court explained that the use of the term "rescission," rather than "cancellation" as required by the HIA, resulted in material noncompliance with § 42-135a (1) and (2) because "[a] lay person, untrained in the law, whom the HIA was designed to protect, could not be expected to be familiar with the equitable doctrine of rescission but much more likely would be expected to understand the common, ordinary word 'cancellation.' " The court expressly concluded that "[t]he substitution of one word for the other is therefore a material departure from the statutory requirement and is not merely a technical noncompliance." Because our conclusion does not rest on this distinction, we leave for another day whether the use of the term "rescission," instead of "cancellation," in a notice of cancellation, without more, would amount to material noncompliance with the HIA.

these issues were preserved, the court committed no error. We agree with the defendants and address each of the claimed errors in turn.[8]

A

We first address the plaintiff's challenge to the court's finding that the plaintiff caused the delay in the completion of the work. The following additional facts found by the trial court are relevant to our consideration of the plaintiff's claim. The trial court distilled the defendants' breach of contract claim as essentially alleging that the plaintiff had failed to perform the work in a timely manner, thereby causing an unreasonable delay and damages. The contract provided that the plaintiff would begin work on March 9, 2015, and complete the work by May 11, 2015—approximately nine weeks. As found by the trial court, the work did not begin until May 18, 2015. The plaintiff's last day on the job was October

[8] At this juncture, two points require a brief discussion. First, for the reasons explained in part I of this opinion, the contract was unenforceable against the defendants by the plaintiff as a result of the contract's noncompliance with the HIA—a conclusion that is unaffected by the plaintiff's evidentiary claims. We therefore examine these claims in the context of challenging the judgment rendered in favor of the defendants on their breach of contract counterclaim.

Second, it is helpful to explain why the defendants are not barred from recovering damages on their breach of contract counterclaim even though that contract has been rendered unenforceable against them by the HIA. In *Hees* v. *Burke Construction, Inc.*, 290 Conn. 1, 10, 961 A.2d 373 (2009), our Supreme Court held that "in a breach of contract case brought by a homeowner against a contractor, § 20-429 (a) does not preclude a trial court from reducing the homeowner's damages by the amount left unpaid under the contract." Although the contractor in *Hees* was barred by the HIA from recovering contract damages from the homeowners, they nevertheless could recover damages from the contractor, albeit by a reduced amount. Id., 15–17. Thus, pursuant to our application of *Hees*, it is permissible, in the context of § 20-429 (a), for a homeowner to prevail on a breach of contract claim based on a contract deemed otherwise unenforceable by the contract's noncompliance with the HIA. See *Hees* v. *Burke Construction, Inc.*, supra, 18 ("The plaintiffs, in other words, simultaneously claimed that the contract was enforceable to support their breach of contract claim but unenforceable, pursuant to § 20-429 (a), with respect to the contractor's counterclaims. This is a valid *dual* argument." (Emphasis in original.)) (*Schaller, J.*, concurring).

21, 2015. On or about that date, the plaintiff demanded from the defendants the fourth installment payment, pursuant to the contract, of $15,600. The defendants refused to pay that amount because, in their view, the plaintiff had not completed the work entitling him to it. The parties presented contradictory testimony as to whether the defendants then terminated the plaintiff or whether the plaintiff "walked off the job." Shortly thereafter, on November 16, 2015, the defendants hired VAS to finish the work. Panapada estimated that the work left by the plaintiff was only 50 percent complete. The contract with VAS provided a completion date of January 31, 2016.

The trial court concluded that, although the contract between the plaintiff and defendants did not specify that time was of the essence, it evidenced an intention by the parties to have the work completed by the specified date or within a reasonable time thereafter. The contract described the start and end dates of the project as "safe dates" and stated that the start date may be "significantly expedited" to begin the addition related portion of the work. The court next concluded that completing only 50 percent of the project between May and October, 2015, when the contract called for nine weeks of total work beginning in March, 2015, resulted in a material breach of the contract so as to excuse the defendants from remitting the fourth installment payment. The court did not credit the plaintiff's various explanations for the delay.[9]

[9] Our review of the plaintiff's principal appellate brief and reply brief reveals that, with respect to the defendants' breach of contract claim, he challenges only the trial court's factual findings in rendering that judgment. "Although a finding of breach of contract is subject to the clearly erroneous standard of review, whether the court chose the correct legal standard to initially analyze the alleged breach is a question of law subject to plenary review." *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 180, 78 A.3d 167 (2013), aff'd, 322 Conn. 541, 153 A.3d 574 (2016). The plaintiff does not advance any legal argument or analysis or cite any relevant case law regarding the court's legal conclusions. That is, the plaintiff does not appear to challenge the trial court's legal conclusion

"The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

"In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court. . . .

"[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or

that his material breach of the contract resulting from delay in performance excused the defendants from making the remaining installment payments.

"Although we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 570, 877 A.2d 761 (2005). Consequently, even if we could discern a proffered legal basis to challenge the trial court's conclusion that the defendants prevailed on their breach of contract claim, "[w]here the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 711, 900 A.2d 498 (2006). Therefore, because the court's factual findings were not clearly erroneous, its conclusion that, based on those facts, the plaintiff materially breached the contract must be affirmed.

pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *FirstLight Hydro Generating Co.* v. *Stewart*, 328 Conn. 668, 679–80, 182 A.3d 67 (2018).

In light of this deferential standard of review, we conclude that the trial court's finding supporting its conclusion that the plaintiff materially breached the contract by a material delay in performance was not clearly erroneous. Although the plaintiff argues that the court did not take into account his reasons for the project's delay and improperly weighed witness credibility on the explanation for these reasons, the court ultimately found them to be unpersuasive in light of the other evidence presented. Specifically, the trial court accorded great weight to Panapada's testimony that the project was only 50 percent complete when VAS took over the work in November, 2015. Indeed, the court explicitly credited Panapada's testimony that there were eight to ten weeks of work remaining when the plaintiff ceased work in October, 2015, over the plaintiff's testimony that there were four weeks left. The court found that the plaintiff did not sufficiently explain why the project was only halfway completed when he worked three and one-half times longer than provided by the contract.

Our review of the record indicates that these factual findings were properly grounded in the evidence presented at trial. The court did not find the plaintiff's explanation for the delay in the commencement of the project to be reasonable in light of the other evidence presented. Further still, the trial court's calculations that the plaintiff could manage to complete only one-half of the project in thirty-two and one-half weeks, between March 9—when the contract provided work would begin—and October 21, 2015, was supported by

the contract and the testimony elicited at trial.[10] The court also considered the defendants' frustrations as to the length of the project and stated that the defendants' version of events was more credible than the plaintiff's. Although the plaintiff provided the trial court with his own evidence to explain the delays of the project, "[t]he determination of a witness' credibility is the special function of the trial court. This court cannot sift and weigh evidence." (Internal quotation marks omitted.) *State* v. *Thompson*, 307 Conn. 567, 575, 57 A.3d 323 (2012). Therefore, the findings related to the credibility of the witnesses and the weight afforded to competing evidence were supported by the evidence and were not clearly erroneous. See *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 12, 151 A.3d 358 (2016).

B

The plaintiff's second contention is that the trial court improperly refused to admit certain evidence proffered by him, including several affidavits, records relating to weather conditions, building department inspection records, and "requested clarifications of inspections." This contention requires little discussion.

As a threshold matter, the plaintiff has not identified with any specificity (e.g., by citing to a particular numbered plaintiff's exhibit that was marked for identification) those exhibits that he claims were improperly excluded, and the trial transcript excerpts cited by the

[10] The plaintiff cursorily asserts that the purported delays cited by the trial court were "simply outlandish." Although the trial court stated that the plaintiff did not begin work until May *18*, 2015, the plaintiff testified that he commenced work on May *28*, 2015. Karen Plunkett also testified that the plaintiff began work on May 28, 2015. At another point in its memorandum of decision, the court stated that it "must determine whether the delay in completion from May *11* to October 21 was reasonable where the job was only approximately 50 percent complete at that point." Our review of the record as a whole indicates that these minor discrepancies were not material to the trial court's conclusion that the plaintiff breached the contract by his lack of substantial performance.

plaintiff in connection with this claim do not provide the necessary clarity.[11] Moreover, the plaintiff provides virtually no legally relevant analysis as to why the court's alleged refusal to admit such evidence was in error. The plaintiff only vaguely references an agreement between counsel to waive hearsay objections and relies on instances in which the trial court purportedly allowed the admission of hearsay evidence.[12] Accordingly, we conclude that this particular contention by the plaintiff is inadequately briefed, and we decline to review it. See *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 248–49, 182 A.3d 1208 ("Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . . [T]he dispositive question in determining whether a claim is adequately briefed is whether the claim is reasonably discernible [from] the record . . . ." (Internal quotation marks omitted.)), cert. denied, 328 Conn. 931, 184 A.3d 758 (2018).

C

The plaintiff next argues at length that the court improperly credited the testimony of Karen Plunkett and failed to credit his testimony. In support of his claim, the plaintiff cites not only numerous examples

[11] Those excerpts merely reflect (1) certain testimony of Karen Plunkett containing no references to exhibits, (2) a proffer by the plaintiff's trial counsel of a certain invoice not produced during discovery and counsel's withdrawal of the proposed exhibit, and (3) the court striking as hearsay certain testimony of the plaintiff that was based on his review of National Weather Service records.

[12] The plaintiff claims that the trial court improperly admitted hearsay testimony from Karen Plunkett. The record reveals, however, that the plaintiff's trial counsel expressly waived his hearsay objection with respect to the portion of Karen Plunkett's testimony that the plaintiff now contends was inadmissible.

from the trial transcript in which, in his view, Karen Plunkett was lying, but also examples that, in his view, highlight his own veracity. Against this backdrop, the plaintiff seems to suggest that the trial court was bound to reject all of Karen Plunkett's testimony and that, as a result, the court's express finding that it credited the defendants' denial of having received a copy of the cancellation notice required by the HIA; see part I of this opinion; was clearly erroneous. This contention can be disposed of in short order.

"It is well established that, even if there are inconsistencies in a witness' testimony, [i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . It is not our role to reevaluate the credibility of witnesses or to overturn factual findings of a [trial] court unless they are clearly erroneous. . . . If there is any reasonable way that the [trier of fact] might have reconciled the conflicting testimony before [it], we may not disturb [its] [credibility determination]." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 741, 154 A.3d 989 (2017).

We conclude that, on the basis of the testimony before it, and consistent with the lack of a copy of a cancellation notice in evidence, the trial court, within its exclusive province as the trier of fact, reasonably could have credited the testimony of Karen Plunkett and found that the contract did not contain the required cancellation notice. Accordingly, we leave undisturbed that factual finding.

D

Finally, the plaintiff argues that the court should not have permitted Panapada, the defendants' expert witness, to testify because he was not qualified as an

expert. We decline to consider this claim because the plaintiff did not preserve it before the trial court.

"[O]ur rules of practice require a party, as a prerequisite to appellate review, to distinctly raise its claim before the trial court. . . . Practice Book § 60-5 ('[t]he court shall not be bound to consider a claim unless it was distinctly raised at trial or arose subsequent to trial'). For that reason, we repeatedly have held that 'we will not decide an issue that was not presented to the trial court. To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge.' " (Citation omitted.) *Welsh* v. *Martinez*, 157 Conn. App. 223, 237 n.9, 114 A.3d 1231, cert. denied, 317 Conn. 922, 118 A.3d 63 (2015); see *Voloshin* v. *Voloshin*, 12 Conn. App. 626, 629–30, 533 A.2d 573 (1987) (declining to review claim that trial court erred by crediting appraisal of plaintiff's expert witness when defendant neither objected to testimony of plaintiff's expert witness nor challenged his qualifications as expert).

In the present case, on July 6, 2017, the defendants disclosed Panapada as an expert witness with regard to the cost of completing the renovation work at the defendants' home. The plaintiff did not file a motion in limine to preclude or limit that testimony, nor did he object to Panapada's testimony at trial or request to conduct a voir dire of Panapada. We conclude that the plaintiff failed to preserve this claim before the trial court, and, therefore, we decline to review it.

III

The plaintiff next claims that the trial court failed to consider the defendants' duty to mitigate their damages. The plaintiff largely asserts that the defendants were required to obtain additional quotes with respect to completing the renovation, rather than retaining VAS, whose pricing the plaintiff contends was unreasonably

high. The defendants maintain that we should decline to review this claim because the plaintiff did not file a postappeal motion for articulation seeking an explication regarding the court's treatment of the defendants' duty to mitigate and, therefore, he has failed to provide an adequate record for review. Although the defendants overlook the directive of Practice Book § 61-10 (b), namely, that "[t]he failure of any party on appeal to seek articulation pursuant to Section 66-5 shall not be the sole ground upon which the court declines to review any issue or claim on appeal," we ultimately reject the plaintiff's claim on the merits.

The following facts and procedural history are relevant to our resolution of this claim. In the plaintiff's posttrial brief, he argued, in part, that the defendants were not entitled to recover on their breach of contract claim because they failed to mitigate their damages. In support of this argument, the plaintiff maintained that the defendants "hired the first contractor they met at a rate that far exceeded that which the plaintiff had agreed to charge them for the same work." In its memorandum of decision, the trial court did not expressly address the duty to mitigate damages. The court concluded that the defendants had prevailed on their counterclaim and were entitled to damages in the amount of $21,720.34. On December 22, 2017, before he had filed this appeal, the plaintiff filed a motion for articulation in which he sought an articulation of, inter alia, "the legal basis by which the failure of the defendants to engage in any effort to mitigate their damages was not considered in the memorandum of decision as reducing their monetary claim to damages . . . ." The trial court denied that motion on January 2, 2018. No other motion practice directed to the memorandum of decision took place before or after the plaintiff filed this appeal.

We begin our analysis by addressing the defendants' contention that this claim is not reviewable. The defendants principally rely on this court's decision in *Brycki*

v. *Brycki*, 91 Conn. App. 579, 594, 881 A.2d 1056 (2005), for the proposition that we should decline to review the plaintiff's claim because, after filing this appeal, he failed to file a motion for articulation pursuant to Practice Book § 66-5,[13] specifically requesting that the trial court address the mitigation of damages issue, the denial of which would have been subject to appellate review upon the filing of a motion for review pursuant to Practice Book § 66-7. See also *Swanson* v. *Groton*, 116 Conn. App. 849, 865, 977 A.2d 738 (2009) ("If the trial judge denies the motion for articulation, the appellant has a remedy by way of motion for review, which may be filed with this court pursuant to Practice Book § 66-7.[14] This motion for review specifically can be utilized only for those motions for articulation filed pursuant to § 66-5." (Footnote added.)).

Simply put, the defendants' position that the plaintiff's claim is unreviewable overlooks Practice Book § 61-10, which provides in relevant part: "(b) The failure of any

[13] Practice Book § 66-5 provides in relevant part: "A motion seeking . . . an articulation or further articulation of the decision of the trial court shall be called a motion for rectification or a motion for articulation, whichever is applicable. Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk. . . .

"The sole remedy of any party desiring the court having appellate jurisdiction to review the trial court's decision on the motion filed pursuant to this section or any other correction or addition ordered by the trial court during the pendency of the appeal shall be by motion for review under Section 66-7. . . .

"Any motion for rectification or articulation shall be filed within thirty-five days after the delivery of the last portion of the transcripts or, if none, after the filing of the appeal, or, if no memorandum of decision was filed before the filing of the appeal, after the filing of the memorandum of decision. . . ."

[14] Practice Book § 66-7 provides in relevant part: "Any party aggrieved by the action of the trial judge regarding rectification of the appeal or articulation under Section 66-5 may, within ten days of the issuance of notice by the appellate clerk of the decision from the trial court sought to be reviewed, file a motion for review with the appellate clerk, and the court may, upon such a motion, direct any action it deems proper. . . ."

party on appeal to seek articulation pursuant to Section 66-5 *shall not be the sole ground upon which the court declines to review any issue or claim on appeal. . . .*" (Emphasis added.) The cases on which the defendants rely in support of their position were decided *prior* to the adoption of Practice Book § 61-10 (b), which became effective on January 1, 2013. See *State* v. *Walker*, 319 Conn. 668, 678, 126 A.3d 1087 (2015). Accordingly, we reject the defendants' contention that we should decline to review the plaintiff's claim solely on the basis of his failure to file a motion for articulation after he filed his appeal and, therefore, we turn to the plaintiff's claim on the merits, having determined that an articulation is not necessary.

The principles underlying the duty to mitigate damages are well settled. "A party being damaged has an obligation to make reasonable efforts to mitigate its damages, and the question of what constitutes such efforts is a question of fact that is subject to the clearly erroneous scope of review." *Connecticut Light & Power Co.* v. *Westview Carlton Group, LLC*, 108 Conn. App. 633, 642, 950 A.2d 522 (2008). "We have often said in the contracts and torts contexts that the party receiving a damage award has a duty to make reasonable efforts to mitigate damages. . . . What constitutes a reasonable effort under the circumstances of a particular case is a question of fact for the trier. . . . Furthermore, we have concluded that the breaching party bears the burden of proving that the nonbreaching party has failed to mitigate damages." (Internal quotation marks omitted.) *Webster Bank, N.A.* v. *GFI Groton, LLC*, 157 Conn. App. 409, 424, 116 A.3d 376 (2015).

Although the court did not expressly reject the plaintiff's failure to mitigate argument, it found for the defendants on their breach of contract claim and awarded damages thereon in the amount of $21,720.34, necessarily rejecting the plaintiff's argument that the defendants

could not sustain their burden to prove damages as a result of their failure to mitigate. After a careful review of the record, we are not persuaded that the trial court's inherent rejection of the plaintiff's argument that the defendants improperly failed to mitigate their damages was in error. The defendants promptly sought out VAS' services after recognizing the deficiencies in the plaintiff's work and, as we have explained, the trial court expressly credited the testimony of Panapada, a project manager at VAS, with respect to the amount of work necessary to complete the project. Specifically, the court found Panapada's testimony that approximately 50 percent of the work was completed by the plaintiff to be "unbiased and reliable" and accepted it as an accurate approximation. The court also credited Panapada's testimony over the plaintiff's regarding the eight to ten week time frame to complete the work. The court characterized the project as "a continuum of delay," which permeated the plaintiff's work on the project. There also was evidence that VAS sought to remedy shortcomings in the plaintiff's work that went beyond "trifling particulars" and "minor deviations" from the original contract. By virtue of its damages calculations, the court implicitly found Panapada's estimates and VAS' pricing to be reasonable.

Moreover, the burden of proving the defendants' purported failure to mitigate damages rested with the plaintiff, as the breaching party. See *Webster Bank, N.A.* v. *GFI Groton, LLC*, supra, 157 Conn. App. 424. The only evidence that the plaintiff presented relating to his argument that VAS' pricing was unreasonably high was his own testimony, which the trial court was free not to accept. The plaintiff could have presented, but did not present, expert testimony or other evidence with respect to the reasonableness of VAS' pricing. Finally, the plaintiff has not cited to any authority—and we are not aware of any—standing for the proposition that a

nonbreaching party is required under these circumstances to obtain multiple bids to complete the work left undone by the breaching party. Simply put, the plaintiff did not satisfy his burden to demonstrate that the defendants failed to mitigate their damages.

In sum, we cannot conclude that the trial court's implicit rejection of the plaintiff's argument that the defendants failed to mitigate their damages was in error. See *Hilario Truck Center, LLC* v. *Kohn*, 190 Conn. App. 443, 448–49, 210 A.3d 678 (2019) ("It is a fundamental principle of appellate review that our appellate courts do not presume error on the part of the trial court. . . . Rather, we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts. . . . [T]he trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." (Internal quotation marks omitted.)). In light of the foregoing, the plaintiff's claim fails.

IV

The plaintiff also claims that the trial court erred with respect to its calculation of damages awarded to the defendants. First, the plaintiff contends that in his opinion, based on his review of the breakdown in costs submitted by VAS to the defendants, VAS' proposal was excessive and/or inflated. Second, the plaintiff contends that the trial court utilized an incorrect amount relating to hardware, screens, and grills, i.e., $867, arguing that such amount, if included at all, should have been $514. We are unpersuaded.

We begin by setting forth the standard of review and relevant legal principles. "The [injured party] has the burden of proving the extent of the damages suffered. . . . Although the [injured party] need not provide such proof with [m]athematical exactitude . . . the [injured

party] must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. . . . As we have stated previously, the determination of damages is a matter for the trier of fact. . . . Accordingly, we review the trial court's damages award under the clearly erroneous standard, under which we overturn a finding of fact when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 224–25, 990 A.2d 326 (2010).

"It is axiomatic that the sum of damages awarded as compensation in a breach of contract action should place the injured party in the same position as he would have been in had the contract been performed. . . . The injured party, however, is entitled to retain nothing in excess of that sum which compensates him for the loss of his bargain. . . . Guarding against excessive compensation, the law of contract damages limits the injured party to damages based on his actual loss caused by the breach. . . . The concept of actual loss accounts for the possibility that the breach itself may result in a saving of some cost that the injured party would have incurred if he had had to perform. . . . In such circumstances, the amount of the cost saved will be credited in favor of the wrongdoer . . . that is, subtracted from the loss . . . caused by the breach in calculating [the injured party's] damages. . . . It is on this ground that . . . when an owner receives a defective or incomplete building, any part of the price that is as yet unpaid is deducted from the cost of completion that is awarded to him. . . . Otherwise, the owner would be placed in a better position than full performance would have put him, thereby doubly compensating him

for the injury occasioned by the breach." (Internal quotation marks omitted.) *Hees* v. *Burke Construction, Inc.*, 290 Conn. 1, 7–8, 961 A.2d 373 (2009).

Our review of the record indicates that the trial court's damages calculations were supported by the evidence presented at trial. With respect to the plaintiff's first contention, notwithstanding the plaintiff's claim throughout his principal appellate brief that VAS provided an unreasonably high cost of completion, we have already explained that the trial court was free to weigh that evidence and the accompanying testimony from Panapada. Further, the evidence at trial established that VAS completed the work in accordance with the plaintiff's original contract, with the exception of certain items for which the trial court accounted in its damages calculations.

With respect to the plaintiff's second contention, we conclude that the trial court's use of the amount of $867.34 in connection with the cost of window hardware and screens was not clearly erroneous. That figure, predicated on the court's finding that the plaintiff impermissibly took those items from the defendants' home when he left the job site, was supported by the evidence at trial and, therefore, was not clearly erroneous. See *Nikola* v. *2938 Fairfield, LLC*, 147 Conn. App. 681, 685, 83 A.3d 1170 (2014).

Finally, contrary to the plaintiff's position, the court properly calculated the defendants' damages by subtracting the unpaid balance due on the plaintiff's contract from the adjusted cost of completion based on the VAS estimate for a total actual loss of $21,720.34. See *Hees* v. *Burke Construction, Inc.*, supra, 290 Conn. 8.

V

The plaintiff's final claim is that the trial court exhibited a pattern of judicial bias against him throughout the trial. The defendants maintain that this claim is not

reviewable because it was raised for the first time on appeal and that reversal under the plain error doctrine otherwise is not appropriate.[15] We agree with the defendants.

It is well settled that "[c]laims alleging judicial bias should be raised at trial by a motion for disqualification or the claim will be deemed to be waived." (Internal quotation marks omitted.) *Wendt* v. *Wendt*, 59 Conn. App. 656, 692, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000); *Cameron* v. *Cameron*, 187 Conn. 163, 168, 444 A.2d 915 (1982). We review, however, an unpreserved claim of judicial bias under the plain error doctrine. See *Knock* v. *Knock*, 224 Conn. 776, 792–93, 621 A.2d 267 (1993). A claim of judicial bias "strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary. . . . No more elementary statement concerning the judiciary can be made than that the conduct of the trial judge must be characterized by the highest degree of impartiality. If he departs from this standard, he casts serious reflection upon the system of which he is a part. A judge is not an umpire in a forensic encounter. . . . He is a minister of justice. . . . He may, of course, take all reasonable steps necessary for the orderly progress of the trial. . . . In whatever he does, however, the trial judge should be cautious and circumspect in his language and conduct. . . . A judge should be scrupulous to refrain from hearing matters which he feels he cannot approach in the utmost spirit of fairness and to avoid the appearance of prejudice as regards either the parties or the issues before him. . . . A judge, trying the cause without a jury, should be careful to refrain from any statement or attitude which would tend to deny [a litigant] a fair trial. . . . It is his responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartial-

[15] It is undisputed that the plaintiff did not present a claim of judicial bias at trial.

ity which is so much to be desired in a judicial proceeding." (Citations omitted; internal quotation marks omitted.) *Cameron* v. *Cameron*, supra, 168–69. "The standard to be employed is an objective one . . . . Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Burton*, 299 Conn. 405, 416, 10 A.3d 507 (2011).

In support of his claim of judicial bias, the plaintiff largely relies on a compilation of his other appellate claims, which we have found unavailing, as discussed previously in this opinion. The plaintiff also points to several additional instances of purportedly improper remarks and/or rulings made by the trial judge. These instances include the trial court stating that the plaintiff's motions for articulation and for reargument "constitute[d] a wholesale attack on the factual findings made by the court", allowing a witness to testify as to the interpretation of a payment term in the contract, and making certain remarks from the bench. On the basis of our comprehensive review of the record, we conclude that the plaintiff's claim that the trial court acted in a biased manner against him is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

SANDRA AUGUSTINE *v.* CNAPS, LLC
(AC 42987)

Elgo, Bright and Moll, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant restaurant owner for personal injuries she allegedly sustained when she fell on a stairway in the restaurant as a result of loosely affixed carpeting and uneven

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

padding under the carpeting. The trial court granted the defendant's motion for summary judgment, concluding that the plaintiff's amorphous descriptions of the alleged defect failed to present sufficient evidence to allow a reasonable jury to conclude that the allegedly defective condition was the proximate cause of her injuries. *Held* that the trial court improperly rendered summary judgment for the defendant, as the plaintiff established the existence of a genuine issue of material fact as to causation through the affidavits of two guests who used the same stairway and her deposition testimony that her heel caught in the carpeting, which was squishy, uneven and bumpy, and that her shoe remained in the carpeting as she stepped forward while descending the stairway; moreover, the trial court's characterization of the plaintiff's descriptions of the alleged defect as amorphous suggested that it failed to consider the evidence in the light most favorable to her, and a singular instance of inconsistency in the plaintiff's deposition testimony could not be given dispositive weight over her other largely consistent statements.

Argued June 19—officially released August 25, 2020

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Michael J. Reilly, for the appellant (plaintiff).

Christopher S. Acquanita, for the appellee (defendant).

Opinion

ELGO, J. In this negligence action sounding in premises liability, the plaintiff, Sandra Augustine, appeals from the summary judgment rendered by the trial court in favor of the defendant, CNAPS, LLC. On appeal, the plaintiff claims that the court improperly concluded that there was no evidence that the alleged premises defect was the proximate cause of the plaintiff's fall.

We conclude that the plaintiff presented sufficient evidence to show the existence of a genuine issue of material fact on the question of causation. Accordingly, we reverse the judgment of the trial court.

The record reveals the following facts and procedural history. On August 27, 2017, the plaintiff attended a bridal shower held at Donovan's Reef, a restaurant in Branford operated by the defendant.[1] While descending a stairway from an event space located inside of the restaurant, the plaintiff fell down the stairs after the heel of her shoe became caught in the carpeting.[2] As a result of her fall, the plaintiff sustained injuries. She thereafter commenced the present action against the defendant on January 17, 2018. In her complaint, the plaintiff alleged that, while descending the stairway located at the aforementioned restaurant, she tripped and fell on the stairway as a result of loosely affixed carpeting and the uneven padding underneath the carpeting. The plaintiff further alleged that, at all times relevant, the defendant "maintained complete control of the interior premises . . . including the stairways located within the restaurant." The defendant filed an answer in which it denied that it was negligent and that its actions were the proximate cause of the plaintiff's injuries. It also asserted, by way of a special defense, that the plaintiff's injuries were caused by her own negligence.

The defendant, after deposing the plaintiff, moved for summary judgment on the grounds that the plaintiff could not establish the existence of a genuine issue of

[1] The restaurant is located at 1212 Main Street in Branford. The defendant operates the restaurant but leases the building from the owner, HB Nitkin. Pursuant to the terms of that lease, the defendant has "total possession and control of the interior" of the restaurant.

[2] The parties used the terms "carpeting" and "rug" interchangeably in their documents and depositions. For purposes of consistency, we use the term "carpeting" throughout this opinion.

material fact as to whether the defendant had actual or constructive notice of a specific defect that caused her injury and/or the plaintiff failed to disclose any experts in support of her claim of a defect in the premises. In support of its motion, the defendant submitted a memorandum of law that was accompanied by portions of the plaintiff's deposition transcript, as well as a report from an investigator, who was hired by the plaintiff, assessing the condition of the carpeting on the stairs after the incident. The defendant argued that the plaintiff (1) could not allege a specific defect that caused her injury, (2) failed to show that the defendant had notice of the purported defect, and (3) failed to present any experts to attest to the existence of any defect in the carpeting on the stairway.

In response, the plaintiff filed an objection to the defendant's motion for summary judgment, which was accompanied by a memorandum of law, affidavits from two individuals who also attended the bridal shower, and the full transcript of the plaintiff's deposition. After hearing argument on the defendant's motion, the court rendered summary judgment in favor of the defendant on the basis of its determination that the plaintiff's "amorphous descriptions" of the alleged defect "failed to present sufficient evidence to allow a reasonable jury to conclude that the allegedly defective condition was the proximate cause of her injuries . . . ." This appeal followed.

We begin by setting forth the relevant standard of review. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most

favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material [fact] which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . Our review of the decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 178 Conn. App. 647, 654–55, 176 A.3d 586 (2017), cert. denied, 328 Conn. 906, 177 A.3d 1159 (2018).

On appeal, the plaintiff argues that the trial court improperly concluded that there was insufficient evidence to raise a genuine issue of material fact that the alleged defect was the proximate cause of the plaintiff's fall. We agree.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . If a plaintiff cannot prove all of those elements, the cause of action fails." (Internal quotation marks omitted.) Id. "To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries. . . . [L]egal cause is a hybrid construct, the result of balancing philosophic, pragmatic and moral approaches to causation. The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct. . . .

"Because actual causation, in theory, is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions. . . . The fundamental inquiry of proximate

cause is whether the harm that occurred was within the scope of foreseeable risk created by the defendant's negligent conduct." (Internal quotation marks omitted.) *Malloy* v. *Colchester*, 85 Conn. App. 627, 633, 858 A.2d 813, cert. denied, 272 Conn. 907, 863 A.2d 698 (2004). "[T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . This causal connection must be based upon more than conjecture and surmise." (Emphasis omitted; internal quotation marks omitted.) Id., 634.

Moreover, "[t]he issue of proximate causation is ordinarily a question of fact for the trier. . . . Conclusions of proximate cause are to be drawn by the jury and not by the court. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement, the question is one to be determined by the trier as a matter of fact." (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 345, 107 A.3d 381 (2015).

In rendering summary judgment in favor of the defendant, the trial court relied on the reasoning in *Oglesby* v. *Teikyo Post University*, Superior Court, judicial district of New Haven, Docket No. CV-00-0445518-S (September 30, 2002), and *Kubera* v. *Barnes & Noble Booksellers, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-07-5012729 (March 10, 2009), to support the premise that the plaintiff's vague descriptions of the alleged defect and the failure to "[link] up" the defect to the plaintiff's fall would result in a fact finder relying on conjecture to find proximate cause.

In *Oglesby*, the plaintiff was injured after she tripped and fell while walking on a pathway located on prop-

erty owned by the defendant. *Oglesby* v. *Teikyo Post University*, supra, Superior Court, Docket No. CV-00-0445518-S. The court granted the defendant's motion for summary judgment, finding that the plaintiff failed to establish that her fall was proximately caused by any purported defect on the pathway. The court reasoned that, because the plaintiff stated that she did not know why she fell and failed to provide any supporting evidence as to what proximately caused her fall, no evidence was submitted to establish that her fall was proximately caused by a defect on the pathway. Id. The court further noted that the plaintiff relied solely on her fall and an alleged slope in the pathway without connecting the reason for her fall to the slope or any other objects in the pathway. Id.

In *Kubera*, the plaintiff entered a bookstore and noticed that the café located inside was in disarray with books all over the tables and scattered tables and chairs. *Kubera* v. *Barnes & Noble Booksellers, Inc.*, supra, Superior Court, Docket No. CV-07-5012729. The plaintiff, who fell while walking down an aisle in the bookstore, stated only that she " 'hit something' " but could not identify the defect because she was looking at a sign. Id. Moreover, the plaintiff specifically acknowledged that none of the disarray she viewed was connected to her fall. Id. The defendant moved for summary judgment, arguing that, "even if the café was in a defective condition at the time of her fall," the plaintiff failed to establish that those conditions caused her fall. Id. In granting the defendant's motion, the court found that the plaintiff failed to show that "the alleged defective condition of the café was the proximate cause of her fall . . . ." Id.

Unlike the plaintiffs in *Oglesby* and *Kubera*, the plaintiff in the present case testified during her deposition that her "heel got caught in the [carpeting on the stairway] because the [carpeting on the stairway] was so

uneven." The plaintiff plainly indicated that the reason for her fall was that her heel got caught in the carpeting and, consequently, her shoe remained in the carpeting as she stepped forward while descending the stairs. The deposition transcript further reflects that the plaintiff testified that the carpeting on the stairs felt "squishy," "uneven," "bumpy," "wavy," and "didn't feel secure." Furthermore, the plaintiff also established a genuine issue of a material fact with respect to proximate causation by proffering affidavits from two guests who also attended the bridal shower and used the same stairs on which the plaintiff fell. Kathleen E. Reilly stated in her affidavit that the "carpet that covered the stairway was not tightly affixed to the underlying stair structure" and that "the padding underneath the carpet was unusually thick, spongy, loose and uneven, and as a result, it would be easy for a person's shoe to sink into the carpet and get stuck . . . ." A second guest, Patricia E. Marinelli, averred that "the carpet that covered the stairway was not tightly affixed to the underlying stair structure" and that "the padding underneath the carpet was unusually thick, spongy, loose and uneven, and as a result, it would be easy for a person's shoe to sink into the carpet, get stuck, and/or otherwise hinder a person's ability to walk on the stairs in a normal manner."

The aforementioned evidence allows "room for a reasonable disagreement" as to whether the condition of the carpeting on the stairs was the proximate cause of the plaintiff's injuries. (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 345. Construing this evidence in the light most favorable to the plaintiff as the nonmoving party, we conclude that this evidence is sufficient to allow a reasonable jury to conclude that the condition of the stairs proximately caused the plaintiff's injuries.

Moreover, the trial court's characterization of the plaintiff's descriptions of the alleged defect as "amorphous" suggests that it failed to consider the evidence

in the light most favorable to her. The defendant argues that the court was correct when it reduced the plaintiff's description of the carpeting's condition to just "squishy" and "not firmly affixed" because the other descriptive terms provided by the plaintiff (i.e., wavy, uneven, bumpy) were all synonymous to "the claim that the [carpeting] was squishy and not firmly affixed to the stairs." The defendant further points to inconsistencies in the plaintiff's description of the carpeting's condition.[3] In suggesting that the court may resolve inconsistencies or the significance of various descriptors in favor of the movant, the defendant misunderstands the legal standard applied to a motion for summary judgment. "[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, supra, 178 Conn. App. 655. Accordingly, the evidence must be viewed in the light most favorable to the nonmoving party. For that reason, the singular instance of inconsistency during the plaintiff's deposition testimony cannot be given dispositive weight over the plaintiff's other, largely consistent statements given throughout the deposition. Inconsistencies in a party's deposition testimony typically do not warrant the rendering of summary judgment for the opposing party. Rather, "[t]he usual legal remedy for inconsistent statements by a witness is for the adversary to

[3] The following exchange occurred between the defendant's counsel and the plaintiff during the plaintiff's deposition:

"Q. Would you say the carpeting was loosely affixed to the stairway?

"A. Yeah. To me it was loose under my feet, yes.

"Q. Was the carpeting uneven, or was it flat?

"A. It was flat, but it was—when you went down, it was squishy, and moved.

"Q. Okay. But it wasn't uneven?

"A. No."

The defendant asserts that this portion of the testimony is inconsistent with the plaintiff's earlier assertions when she stated that the carpeting on the stairs was uneven.

point them out for purposes of impeaching the witness' credibility" before the trier of fact. *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 617, 2 A.3d 963 (2010), rev'd on other grounds, 306 Conn. 107, 49 A.3d 951 (2012).

When viewed in the light most favorable to the plaintiff, the record clearly presents sufficient evidence to create a triable issue as to whether the condition of the carpeting on the stairs as alleged by the plaintiff factually and proximately caused the plaintiff's injuries. Accordingly, a genuine issue of a material fact exists as to causation. On the basis of our plenary review of the record, we conclude that the trial court improperly rendered summary judgment in favor of the defendant.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings according to law.

In this opinion the other judges concurred.