CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* WAYNE A. KING
(AC 42764)

Bright, C. J., and Lavine and Alexander, Js.*

Syllabus

Convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and of previously having been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and sentenced pursuant to the statute (§ 14-227a (g)) that imposes enhanced penalties on a third time offender, the defendant appealed to this court. Specifically, he claimed that the trial court should not have sentenced him as a third time offender because the essential elements of the crime of driving while under the influence are not substantially the same in Connecticut and Florida, where he was convicted in 2000 and 2006. *Held:*

1. The defendant cannot prevail on his claim that prior convictions under Florida's statute for driving while under the influence did not qualify as prior convictions for the same offense under § 14-227a (a) and, therefore, he was entitled to be resentenced as a first time offender:

a. Contrary to the defendant's claim, the trial court's application of the current revision of § 14-227a to the defendant's conduct, rather than the revision that was in existence at the time of his Florida convictions, did not violate the ex post facto clause; the court's application of the current revision did not enhance the defendant's punishment for his prior Florida convictions and did not punish him for conduct that was not criminal in Connecticut at the time he committed the Florida offenses; instead,

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

the court, applying the statute as the legislature intended, merely enhanced his sentence for his current illegal conduct because it was considered more serious in light of his earlier offenses in Florida; moreover, on the basis of the statute's clear and unambiguous language, as well as precedent from this court, our Supreme Court, and the United States Supreme Court, the legislature intended that the applicable revision of § 14-227a was the one under which the defendant was charged in this case.

b. The "operation" element in § 14-227a was substantially the same as the "actual physical control" element in the Florida statute; the elements of each statute need not be identical to be substantially similar, and, in examining the manner in which Florida courts have applied the actual physical control element and the manner in which Connecticut courts have applied the operation element, it was clear that both statutes criminalize substantially the same conduct.

c. Contrary to the defendant's claim, neither § 14-227a (a) nor the Florida statute requires a vehicle to be motorized, and, accordingly, the statutes are substantially the same in their definitions of "vehicle" and "motor vehicle" for purposes of both statutes.

d. Contrary to the defendant's claim that the Florida statute and § 14-227a are dissimilar because at the time of his wrongful conduct in Florida, § 14-227a (a) required operation in specific proscribed areas, but the Florida statute did not, § 14-227a (g) directs a comparison of a prior conviction with the current revision of § 14a-227 (a) (1) or (2), and, pursuant to the revision of § 14-227a under which the defendant was charged for his 2016 conduct, there was no requirement that he operate his vehicle on a public highway or another similar road, as the public highway element of § 14-227a (a) was eliminated by the legislature in 2006.

e. The defendant's claim that the statutes are dissimilar because at the time of his 2000 conviction in Florida, § 14-227a (a) required a blood alcohol content of at least 0.10 percent, but the Florida statute required only a blood alcohol content of 0.08 percent, was without merit; as an enhancement penalty for a repeat offender penalizes only the last offense committed by a defendant, and, when the defendant was charged in the present case for his Connecticut conduct, § 14-227a (a) applied to a blood alcohol content of 0.08 percent or higher, the 0.10 percent element of § 14-227a (a) having been lowered to 0.08 percent by the legislature in 2002.

2. This court, as an intermediate court of appeal, was unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court and, accordingly, declined the defendant's request to overrule *State* v. *Burns* (236 Conn. 18) and *State* v. *Mattioli* (210 Conn. 573) on the basis that they contravene the plain language of § 14-227 (g).

Argued November 18, 2020—officially released April 20, 2021

Procedural History

Substitute two part information charging the defendant, in the first part, with the crimes of operating a motor vehicle under the influence of intoxicating liquor or drugs and operating a motor vehicle while having an elevated blood alcohol content, and, in the second part, with previously having been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the first part of the information was tried to the jury before *Crawford*, *J.*; verdict of guilty; thereafter, the defendant was tried to the court, *Crawford*, *J.*, on the second part of the information; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Joshua R. Goodbaum, for the appellant (defendant).

Tanya K. Gaul, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *LeeAnn S. Neal*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Wayne A. King, appeals from the judgment of conviction, rendered by the trial court following a jury trial, of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a (a) (1) and (2).[1] The defendant claims that (1) the court should not have sentenced him as a third time offender because the essential elements of driving under the influence

[1] The defendant waived his right to a jury trial as to the part B information under which he also was charged, and the court enhanced the defendant's sentence as a third time offender on the basis of two prior convictions in the state of Florida.

are not substantially the same in Florida and Connecticut, and (2) *State* v. *Burns*, 236 Conn. 18, 670 A.2d 851 (1996), and *State* v. *Mattioli*, 210 Conn. 573, 556 A.2d 584 (1989), should be overruled because those cases contravene the plain language of § 14-227a (g), which requires that a defendant's prior convictions, on which the enhanced penalty relies, occur less than ten years before the current Connecticut conviction. We disagree with the defendant's first claim, and we, as an intermediary appellate court, are unable to overrule the decisions of our Supreme Court and, therefore, reject the defendant's second claim.[2] Accordingly, we affirm the judgment of the trial court.

The following facts, as reasonably found by the jury, and relevant procedural history inform our review of the defendant's claims. On April 1, 2016, the Naugatuck police pulled over the defendant's vehicle. The defendant smelled of alcohol, so the police transported him to the police station where the defendant agreed to take a Breathalyzer test. The defendant's blood alcohol content registered at 0.1801 percent and then at 0.1785 percent, both of which were above the legal limit. The defendant thereafter was charged with a violation of § 14-227a (a) (1) and (2). Following a guilty verdict returned by the jury, the state proceeded on a part B

[2] Although § 14-227a has been amended by the legislature since the events underlying the present case; see Public Acts 2016, No. 16-126, § 4; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

In his appellate brief, the defendant recognizes that we are "foreclosed by controlling authority." See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by [its] precedent"); *State* v. *Smith*, 107 Conn. App. 666, 684, 946 A.2d 319 ("[w]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them") (internal quotation marks omitted)), cert. denied, 288 Conn. 902, 952 A.2d 811 (2008). He raises his second claim only to preserve it for review by our Supreme Court. See part II of this opinion.

information, which the defendant elected to have tried to the court, charging the defendant with being a third time offender, pursuant to § 14-227a (g), on the basis of two prior convictions in the state of Florida.[3] Despite the defendant's objections on various grounds,[4] the court found that the state had established, beyond a reasonable doubt, that the defendant twice had been convicted of driving under the influence in Florida and that the essential elements of the Florida statute; see Fla. Stat. Ann. § 316.193 (West Supp. 2020);[5] were substantially the same as the essential elements of § 14-227a (a). Accordingly, the court sentenced the defendant to three years of imprisonment, execution suspended after eighteen months, twelve months of which is mandatory, followed by three years of probation. This appeal followed.

I

The defendant claims that his convictions under Fla. Stat. Ann. § 316.193, "upon which [his] conviction as a third time offender is predicated, [do] not satisfy" the requirements of § 14-227a (g) (3), which mandates that the out-of-state convictions of driving under the influence, on which the state relies in its part B information, contain "substantially the same" essential elements as § 14-227a (a). He argues that Fla. Stat. Ann. § 316.193 "criminalizes vast amounts of conduct that either are not illegal in Connecticut now or were not illegal in Connecticut at the time of [his] Florida arrests. Put

[3] General Statutes § 14-227a (g) provides in relevant part: "For purposes of the imposition of penalties for a second or third and subsequent offense . . . a conviction in any other state of any offense the essential elements of which are determined by the court to be substantially the same as subdivision (1) or (2) of subsection (a) of this section . . . shall constitute a prior conviction for the same offense."

[4] The defendant also filed a motion for a judgment of acquittal.

[5] The defendant and the state agree that Fla. Stat. Ann. § 316.193 has not undergone any significant changes since the time of the defendant's convictions. Accordingly, we employ the current revision of that statute.

another way, what qualifies as a crime in Florida often does not in Connecticut. On that basis, convictions under [Fla. Stat. Ann. § 316.193] do not qualify as prior convictions under [§ 14-227a (g)] because the essential elements of the respective crimes are not substantially the same."

More specifically, the defendant argues that the statutes are dissimilar in the following ways: (1) § 14-227a (a) requires operation, but Fla. Stat. Ann. § 316.193 does not require operation; (2) § 14-227a (a) requires the vehicle to be a "motor vehicle," but Fla. Stat. Ann. § 316.193 does not require the vehicle to be motorized; (3) at the time of the defendant's June 23, 1999, and May 16, 2005 "wrongful conduct" in Florida, which resulted in convictions on March 14, 2000, and October 25, 2006, respectively, § 14-227a (a) required operation in specified proscribed areas, but Fla. Stat. Ann. § 316.193 did not proscribe specific areas; and (4) at the time of the defendant's 2000 conviction in Florida, § 14-227a (a) required a blood alcohol content of at least 0.10 percent, but Fla. Stat. Ann. § 316.193 required a blood alcohol content of only 0.08 percent. See General Statutes (Rev. to 2005) § 14-227a (a); General Statutes (Rev. to 1999) § 14-227a (a). Accordingly, the defendant claims that "a conviction under [Fla. Stat. Ann.] § 316.193 . . . does not qualify as 'a prior conviction for the same offense' under § 14-227a (g) (3) . . . and [he] is therefore entitled to be resentenced as a first time offender."

"The issue of whether the elements of the [Florida] and Connecticut statutes under which the defendant was convicted were substantially the same calls for the comparison and interpretation of those statutes, which is a question of law." *State* v. *Commins*, 276 Conn. 503, 513, 886 A.2d 824 (2005), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

Therefore, our review is plenary. Id., 510. "When interpreting a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . To do so, we first consult 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Haight*, 279 Conn. 546, 550, 903 A.2d 217 (2006).

A

Before we can compare the statutory language of the relevant Connecticut and Florida statutes, we must determine which revision of our General Statutes is applicable in this case.[6] Since the time of the defendant's conduct in Florida in 1999 and 2005, the essential elements of § 14-227a (a) have been revised in two relevant ways, namely, the legislature eliminated the requirement that the operation of a motor vehicle occur on a "public highway," and the legislature reduced the blood alcohol content level from 0.10 percent to 0.08 percent. See Public Acts 2006, No. 06-147, § 1; Public Acts, Spec. Sess., June, 2002, No. 02-1, § 108.

The defendant argues that the applicable revision of § 14-227a (a) is the revision that was in place before October 1, 2006, "when both of [his] Florida arrests occurred . . . ." He contends that the use of the current statute, rather than the one in existence at the time of his Florida arrests, would amount to an ex post facto application of the current statute. Specifically, he argues: "In order for the state to increase [his] punishment for his 2018 [Connecticut] conviction on the basis

[6] See footnote 5 of this opinion.

of his prior wrongful conduct in Florida, that prior conduct must have been illegal *in Connecticut* at the time it was committed." (Emphasis in original.) The state argues that the applicable revision of § 14-227a is the one that was in effect on the date of the defendant's Connecticut conduct, namely, April 1, 2016. We agree with the state.

Initially, we note that the defendant does not claim that the legislature intended that the revision of § 14-227a in existence at the time of the Florida offenses was to apply to the defendant's sentencing; nor could he, based on the plain language of the statute. The text of § 14-227a (g) provides in relevant part that "[f]or purposes of the imposition of penalties for a second or third and subsequent offense . . . a conviction in any other state of any offense the essential elements of which are determined by the court *to be substantially the same as subdivision (1) or (2) of subsection (a) of this section* . . . shall constitute a prior conviction for the same offense." (Emphasis added.) The legislature clearly has instructed that one must look to the current revision of § 14-227a (a) (1) or (2) to determine if the prior conviction in any other state is substantially the same. Thus, the only question is whether application of the current revision of § 14-227a (g) to the defendant's prior conduct in Florida violates the ex post facto clause.

"The ex post facto clause prohibits, inter alia, the enactment of any law [that] imposes a punishment for an act [that] was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." (Internal quotation marks omitted.) *State* v. *Hickey*, 80 Conn. App. 589, 593, 836 A.2d 457 (2003), cert. denied, 267 Conn. 917, 841 A.2d 1192 (2004). "Habitual criminal statutes increase the punishment for an offense because of previous convictions for other offenses. In *McDonald* v. *Massachusetts*, [180

U.S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901)], the Supreme Court held that the ex post facto law clause did not prevent the imposition of punishment under [a] habitual criminal statute even though the prior offenses had been committed prior to its passage. The [c]ourt explained that the accused was being punished only for the last offense, which occurred subsequent to the enactment of the habitual criminal statute. Similarly, a crime whose definition includes a predicate offense may be applied to an accused who commits the charged offense subsequent to the passage of the statute, even though the predicate offense was committed prior to the passage of the statute. This principle has also been applied to acts, as well as crimes, occurring prior to the passage of the habitual criminal statute. A different result is reached if the habitual criminal statute was enacted subsequent to commission of the offense [that] leads to the charge of habitual criminality.

"The reasoning in *McDonald* is also applicable to cases in which an element of the offense is the previous conviction for the same or different offense. That the prior offense was committed before the enactment of the offense for which the accused is prosecuted does not make the law ex post facto." (Footnotes omitted.) J. Cook, 1 Constitutional Rights of the Accused (3d Ed. December 2020) § 1:20.

In *Hickey*, this court addressed whether an amendment to § 14-227a that extended the " 'look back' " period for enhancing a defendant's sentence due to prior convictions from five years to ten years violated the ex post facto clause. *State* v. *Hickey*, supra, 80 Conn. App. 592–95. The defendant claimed that the court could not use convictions of driving under the influence in 1991 and 1994 to enhance his sentence arising from a conviction for driving under the influence in 2000 because at the time of the earlier convictions the " 'look back' " period for prior convictions was only five years.

Id. The defendant claimed that the court's reliance on a 1995 amendment to § 14-227a extending the look back period to ten years violated the ex post facto clause of the United States constitution because it increased his punishment for the earlier offenses. Id., 590–91. In rejecting the defendant's claim, we explained: "The United States Supreme Court has held that a statute enhancing a defendant's sentence because he is a repeat offender does not violate the ex post facto clause even if one of the convictions on which the sentence is based occurred before the enactment passage of the statute. See *Gryger* v. *Burke*, 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948). Moreover, the United States Supreme Court has consistently sustained repeat offender laws as penalizing only the last offense committed by a defendant. See *Nichols* v. *United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994)." *State* v. *Hickey*, supra, 593.

We also are guided, as we were in *Hickey*, by our Supreme Court's decision in *State* v. *Holloway*, 144 Conn. 295, 300–301, 130 A.2d 562 (1957). In *Holloway*, our Supreme Court rejected the defendant's contention that his enhanced sentence as a third time offender, on the basis of convictions that had occurred in 1947 and 1950, under a statute that had been enacted in 1955, constituted a violation of the ex post facto clause. Id. The court explained: "[T]he crucial fact is that [the 1955 statute] does not undertake to provide punishment for any crime committed prior to the date when it went into effect. The punishment provided is for a violation of the . . . law [that] occurs subsequent to the effective date of the [1955 statute]. The only effect that a conviction antedating the statute has is to enhance the penalty to be imposed for a violation of the . . . [1955] law. The theory of [the 1955 statute] is not that a person shall be punished a second time for an earlier offense but that the principal offense for which the person is

being prosecuted under the statute is made more serious by reason of its being a repetition of an earlier offense or earlier offenses." Id., 301. Consequently, this court held in *Holloway*, "in no sense does the [1955] statute operate ex post facto. 16A C.J.S. 161, [Constitutional Law], § 450." *State* v. *Holloway*, supra, 301.

Similarly, in the present case, the court's application of the current revision of § 14-227a to the defendant did not enhance his punishment for his prior Florida convictions. It also did not punish him for conduct that was not criminal in Connecticut at the time he committed the Florida offenses. Instead, the court, in applying the statute as the legislature intended, merely enhanced his sentence for his current illegal conduct because it is considered more serious in light of his earlier offenses in Florida.

On the basis of our clear authority, including the plain and unambiguous language of § 14-227a (g), as well as precedent from this court, our Supreme Court, and the United States Supreme Court, we conclude that the legislature clearly intended that the applicable revision of the General Statutes is the one under which the defendant was charged in this case, namely, the current revision of § 14-227a, and that application of the current revision of the statute does not violate the ex post facto clause.

B

We next set forth the elements of Fla. Stat. Ann. § 316.193 and § 14-227a (a), followed by our consideration of each of the defendant's arguments related to his claim that the Connecticut and Florida statutes are not substantially the same.

Fla. Stat. Ann. § 316.193 (West Supp. 2020) provides in relevant part: "(1) A person is guilty of the offense

of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and: (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired; (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath. . . ."

Section 14-227a provides in relevant part: "(a) No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. For the purposes of this section, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight, except that if such person is operating a commercial motor vehicle, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is four-hundredths of one per cent or more of alcohol, by weight, and 'motor vehicle' includes a snowmobile and all-terrain vehicle, as those terms are defined in section 14-379. . . ."

The defendant argues that the elements of the Florida and Connecticut statutes are not substantially the same, meaning "[they] are not 'the same' in their substance." The state argues that the statutes are substantially the same and that the defendant is comparing the statutes for exactness, rather than for substantial similarity.

"Black's Law Dictionary (6th Ed. 1990) defines 'substantially' as '[e]ssentially; without material qualification; in the main . . . in a substantial manner.' Likewise, 'substantial' is defined as, '[o]f real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. . . . Synonymous with material.' . . . Thus, the requirement of a 'substantial' association creates a threshold far below . . . exclusive or complete association . . . ." (Citation omitted.) *Hartford Electric Supply Co.* v. *Allen-Bradley Co.*, 250 Conn. 334, 359, 736 A.2d 824 (1999). We next consider whether certain elements of Fla. Stat. Ann. § 316.193 are substantially the same as the purported corresponding elements of § 14-227a (a).

1

The defendant argues that the statutes are dissimilar in that § 14-227a (a) requires "opera[tion]" of a motor vehicle, but Fla. Stat. Ann. § 316.193 does not require operation of a motor vehicle; it can be satisfied by proof of "actual physical control . . . ." He contends that being inside of a vehicle with keys in your hand is insufficient to support "operation" of a motor vehicle in Connecticut, but that such conduct is sufficient to support "control" of a vehicle in Florida. Therefore, he argues, "[b]ecause 'operating' a vehicle requires more than being 'in actual physical control of a vehicle,' the essential elements of [§ 14-227a (a)] and [Fla. Stat. Ann. § 316.193] are not substantially the same." The state argues that "the element of 'actual physical control' [in Fla. Stat. Ann. § 316.193] is substantially the same as the element of 'operation' [in § 14-227a]." We agree with the state.

A review of the case law in Florida reveals that "the reasonably capable of being rendered operable standard is applied when a person is charged with driving

under the influence and claims . . . that . . . he was not in actual physical control of the vehicle. For example, if a person is found passed out behind the steering wheel of a vehicle with the keys either in the ignition or on the floor of the vehicle, he may be found guilty of violating [Fla. Stat. Ann. § 316.193] because he is in actual physical control of a vehicle which can readily be made operational. See *State*, *Dept. of Highway Safety & Motor Vehicles* v. *Prue*, 701 So. 2d 637 (Fla. [App.] 1997) (conviction upheld for being in actual physical control while under the influence where a defendant was found passed out in a vehicle on the shoulder of a highway, with her face resting on the steering wheel and the keys either in the ignition or on the floor of the vehicle, because she could have used the keys to start the vehicle and drive away); *Baltrus* v. *State*, 571 So. 2d 75 (Fla. [App.] 1990) (upholding the reversal of a motion to dismiss where the defendant was found passed out and slumped over the steering wheel of his car, with the keys to the car in his hands); *Fieselman* v. *State*, 537 So. 2d 603 (Fla. [App.] 1988) (finding that the trial court erred by dismissing a charge of being in actual physical control of a vehicle while under the influence, where the defendant was found lying down, asleep in the front seat of his automobile, with the engine off but with the keys in the ignition, explaining that the presence of the keys in the ignition led to the inference that the defendant could have started the automobile and have driven away at any time); *Griffin* v. *State*, 457 So. 2d 1070, 1072 (Fla. [App.] 1984) (affirming a conviction based upon actual physical control where the defendant was in the driver's seat of a car that was stationary in the roadway with the keys in the ignition and the lights on, finding that, since the defendant had placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away, he was in actual physical control of the vehicle)." (Internal

quotation marks omitted.) *Hughes* v. *State*, 943 So. 2d 176, 194–95 (Fla. App. 2006), review denied, 959 So. 2d 716 (Fla. 2007); see *Cloyd* v. *State*, 943 So. 2d 149, 168 (Fla. App. 2006), review denied, 959 So. 2d 715 (Fla. 2007); see also *In re Standard Jury Instructions in Criminal Cases–Report No. 2016-08*, 211 So. 3d 995, 998 app. (Fla. 2017) (jury instruction set forth in appendix provides that " '[a]ctual physical control of a vehicle' means the defendant must be physically in [or on] the vehicle and have the capability to operate the vehicle, regardless of whether [he] [she] is actually operating the vehicle at the time").

In Connecticut, the definition of "operating" in § 14-227a (a) has been derived from our case law. Our case law has established that "the term operating encompasses a broader range of conduct than does [the term] driving." (Internal quotation marks omitted.) *State* v. *Cyr*, 291 Conn. 49, 57, 967 A.2d 32 (2009). "Neither § 14-227a nor any related statute defines operation of a motor vehicle. It is undisputed that the word 'operating' as used in [General Statutes] § 14-227b has the same meaning that it does in § 14-227a. The definition was formulated many years ago: Our Supreme Court . . . approved the following jury instruction in *State* v. *Swift*, 125 Conn. 399, 402–403, 6 A.2d 359 (1939): '[T]he statute [in question] refers to persons who shall operate a motor vehicle, and is not confined to persons who shall drive a motor vehicle. A person operates a motor vehicle within the meaning of this statute, when in the vehicle he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.'

"The definition [later] was refined in [*State* v. *Ducatt*, 22 Conn. App. 88, 90–91, 575 A.2d 708 (1990)] where the defendant was unconscious or sleeping in his parked,

running vehicle with his arm wrapped around the steering wheel and his fingers curled around the gear shift lever. '[T]he controls of a car capable of immediate powered movement are under the control of an intoxicated motorist, which is precisely the evil the legislature sought to avoid through [§] 14-227a (a). We conclude, therefore, that the statute does not require the state to prove that the defendant intended to move the vehicle in order to prove operation under [§] 14-227a (a).'

"The court [in *Ducatt*] concluded: 'An accused operates a motor vehicle within the meaning of . . . § 14-227a (a) when, while under the influence of alcohol or any drug and while in the vehicle and in a position to control its movements, he manipulates, for any purpose, the machinery of the motor or any other machinery manipulable from the driver's position that affects or could affect the vehicle's movement, whether the accused moves the vehicle or not.' [*State* v. *Ducatt*, supra, 22 Conn. App. 93]." (Footnotes omitted.) S. Tomeo & J. Sills, 21 Connecticut Practice Series: Connecticut [Driving Under the Influence] Law (2020 Ed.) § 8:3, pp. 215–16.

" 'Nothing in our definition of "operation" requires the vehicle to be in motion or its motor to be running.' *State* v. *Haight*, [supra, 279 Conn. 552]. 'It is well settled that operating encompasses a broader range of conduct than does driving. . . . [T]here is no requirement that the fact of operation be established by direct evidence.' . . . *State* v. *Sienkiewicz*, 162 Conn. App. 407, 410, 131 A.3d 1222, cert. denied, 320 Conn. 924, 134 A.3d 621 (2016). 'Operation occurs when a person in the vehicle intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle. . . . This court has clarified the meaning of operation by holding that an intent to drive is not an element of operation. . . . An accused operates a

motor vehicle within the meaning of . . . § 14-227a (a) when, while under the influence of alcohol or any drug and while in the vehicle and in a position to control its movements, he manipulates, for any purpose, the machinery of the motor or any other machinery manipulable from the driver's position that affects or could affect the vehicle's movement, whether the accused moves the vehicle or not.' " *State* v. *Smith*, 179 Conn. App. 734, 748–49, 181 A.3d 118, cert. denied, 328 Conn. 927, 182 A.3d 637 (2018).

Statutory prohibitions regarding driving while under the influence "are preventive measure[s] . . . [that] deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers . . . and which enable the drunken driver to be apprehended before he strikes . . . ." (Internal quotation marks omitted.) *State* v. *Cyr*, supra, 291 Conn. 61; id., 58 (defendant who remotely started vehicle and then sat in driver's seat met definition of "operation" even though he had not put key in ignition and car was not capable of moving without key). "When an obstacle or impediment [to driving the vehicle] is temporary . . . it remains possible that it can be surmounted, and that movement of the vehicle will ensue." Id., 60.

The defendant argues that these definitions show that the two statutes are not substantially the same because in Florida one can be convicted simply because he *was in a position to operate* the machinery of the vehicle, whereas in Connecticut one can be convicted only if he *actually operated* said machinery. We are not persuaded.

First, the defendant's argument requires that the elements of the offenses be identical. That is not the proper test. Second, in examining the manner in which Florida courts have applied the actual physical control element and the manner in which Connecticut courts have

applied the operation element, it is clear that both statutes criminalize substantially the same conduct. As noted previously in this opinion, Florida courts regularly have held that one who is sitting in the driver seat of his vehicle with the keys to the vehicle in his hand, or within reach, is in actual physical control of the vehicle because he is in a position to turn on the ignition immediately and drive the vehicle. At the same time, at least one case in the District Court of Appeal of Florida has held that "sleeping in a prone position in the front seat of a vehicle parked in a parking lot, the engine of which is not running, is not itself sufficient to establish actual physical control of the vehicle" if the key to the vehicle is not in the ignition. *Fieselman* v. *State*, supra, 537 So. 2d 606. The court concluded that such evidence was insufficient for "a legitimate inference to be drawn that [the] defendant had of his own choice placed himself behind the wheel [of the vehicle], and had either started the motor or permitted it to run." (Internal quotation marks omitted.) Id.

Thus, the manner in which Florida courts have interpreted actual physical control is substantially the same as the manner in which our Supreme Court has defined operation—a conviction can be based on the driver sitting in the driver seat and placing the key in the ignition, even though the vehicle is not yet operative, because the driver is in a position to turn on the ignition immediately and drive the vehicle. Both statutes are aimed at preventing the same conduct. As our Supreme Court has noted: "[T]he threat targeted by statutes disallowing not just driving, but also operating a motor vehicle while intoxicated—that is, 'the danger that a parked vehicle will be put in motion by an intoxicated occupant and thereby pose a risk to the safety of the occupant and others'—remains present when the condition rendering the vehicle inoperable is a temporary one that quickly can be remedied. *State* v. *Adams*, 142 Idaho 305, 308,

127 P.3d 208 (App. 2005), review denied, 2005 Idaho Lexis 206 (June 8, 2005)." *State* v. *Cyr*, supra, 291 Conn. 60. Significantly, our Supreme Court relied on *Adams* even though the statute the court had to apply in that case, like the Florida statute at issue in the present case, criminalized the actual physical control of a vehicle by a person under the influence of drugs or alcohol.

Similarly, in *State* v. *Haight*, supra, 279 Conn. 553–54, our Supreme Court, in comparing our driving under the influence statute with those of other states, treated the operation requirement of § 14-227a as the equivalent of the actual physical control element in other states' statutes. See id., 553 ("[n]umerous courts in other jurisdictions have concluded that a motorist who is found sleeping or unconscious in a stationary vehicle with the motor not running violates the applicable prohibition on operating or being in actual physical control of a motor vehicle while intoxicated or under the influence of intoxicating liquor or drugs"). Furthermore, our Supreme Court in *Cyr* found that the defendant's conduct met the operation requirement of § 14-227a even though, after the defendant started his vehicle remotely, the key still needed to be inserted into the ignition to make the vehicle operative. *State* v. *Cyr*, supra, 291 Conn. 61. As was the circumstance in the Florida cases we have cited, as well as in the *Adams* case, the focus of our Supreme Court has been on the fact that the defendant was in position to overcome a temporary obstacle to making the vehicle operative by taking an immediate step while he was in the driver's seat behind the steering wheel. See id.

Finally, we note that at least one other state appellate court has considered and rejected an almost identical argument to that made by the defendant in this case. In *State* v. *Slyter*, Docket No. 102,732, 2010 WL 4977154

(Kan. App. November 19, 2010) (unpublished opinion),[7] review denied (Kan. February 15, 2011), the defendant was convicted of operating his bicycle under the influence of drugs or alcohol. His sentence was enhanced due to three prior driving under the influence convictions, including one in Florida. Id., *1. The applicable part of the Kansas statute defined a prior conviction as " 'being convicted of a violation of a law of another state . . . which prohibits the acts that this section prohibits.' " Id. The defendant argued that the Florida conviction was not a prior conviction under the statute because "a person could be convicted under the Florida statute for merely being in 'actual physical control' of a vehicle while intoxicated, while [the Kansas statute] is limited to persons who 'operate or attempt to operate' a vehicle while intoxicated." Id., *2. Comparing a Kansas case, which found that having a key in the ignition and sitting in the driver's seat constituted attempting to operate under Kansas' statute, with the Florida cases cited previously in this opinion, the Court of Appeals of Kansas concluded that the defendant's Florida conviction could be used to enhance his sentence because both statutes criminalized substantially the same acts. Id., *2–4.

For all of the foregoing reasons, we conclude that the "operation" element in § 14-227a (a) is substantially the same as the "actual physical control" element in Fla. Stat. Ann. § 316.193.

2

The defendant next argues that the statutes are dissimilar because § 14-227a (a) requires the vehicle to be

[7] The decision in *Slyter* was an unpublished disposition. "Pursuant to Kansas Supreme Court Rule 7.04 (f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion." *State* v. *Slyter*, supra, 2010 WL 4977154, *1. Because we were unable to locate any published opinions of a Kansas appellate court on this issue, we cite *Slyter* as persuasive authority.

a "motor vehicle," but Fla. Stat. Ann. § 316.193 does not require the vehicle to be motorized. He contends that "Florida courts have straightforwardly concluded that 'vehicle' includes not just an automobile, but also a bicycle or a nonmotorized boat. See *State* v. *Howard*, 510 So. 2d 612, 612 (Fla. App. 1987) (affirming [driving under the influence] charge under [Fla. Stat. Ann.] § 316.193 for operation of bicycle while intoxicated, and reasoning that '[t]his section contemplates applicability to all "vehicles" since it is not limited to "motor vehicles," as are many of the other statutes dealing with driving while under the influence'); *State* v. *Davis*, 110 So. 3d 27, 32 n.9 (Fla. App. 2013) (holding that 'boating under the influence' under Florida law applies to operation of nonmotorized vessels, and citing with approval *Howard*'s holding that bicycles qualify as 'vehicles' under [Fla. Stat. Ann.] § 316.193)." The state argues that the definition of "vehicle" in Florida substantially is the same as the definition of "motor vehicle" in Connecticut in that "both statutes cover vehicles used on a highway" regardless of whether they are motorized. We agree with the state.

Pursuant to Fla. Stat. Ann. § 316.003 (75) (West 2005), a vehicle is defined as: "[e]very device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks."[8] Florida's driving under the influence statute, Fla. Stat. Ann. § 316.193, applies to nonmotorized vehicles as well as motorized vehicles. See *State* v. *Howard*, supra, 510 So. 2d 612–13.

General Statutes § 14-212 (5) defines "[m]otor vehicle" as "all vehicles used on the public highways . . . ."

[8] The definition of "vehicle," pursuant to Fla. Stat. Ann. § 316.003, has been revised slightly. The revised definition is: "Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except personal delivery devices, mobile carriers, and devices used exclusively upon stationary rails or tracks." Fla. Stat. Ann. § 316.003 (103) (West Supp. 2020).

Section 14-212 further provides that " '[v]ehicle' has the same meaning as 'motor vehicle.' " General Statutes § 14-212 (10).

In *State* v. *Fontaine*, 112 Conn. App. 190, 962 A.2d 197, cert. denied, 290 Conn. 921, 966 A.2d 238 (2009), this court, relying on our Supreme Court's decision in *State* v. *Knybel*, 281 Conn. 707, 916 A.2d 816 (2007), explained that the statutory definition contained in § 14-212 (5) is much broader than that contained in General Statutes § 14-1.[9] "[T]he definition of 'motor vehicle' in chapter 248, when read in the context of the General Statutes as a whole, not only suggests a broad definition of the term 'motor vehicle' for purposes of chapter 248 but also that all 'vehicles' in the various chapters of the General Statutes are included within that term. . . . Whether a vehicle is wholly self-propelled does not change whether it is a 'vehicle,' and thus a 'motor vehicle,' for the purposes of chapter 248; per § 14-212 (5), any vehicle that is driven on the public highways is a 'motor vehicle' under chapter 248." (Citations omitted.) *State* v. *Fontaine*, supra, 112 Conn. App. 201. As we noted in *Fontaine*, § 14-227a, under which the defendant in the present case was charged, is included in chapter 248 of our General Statutes.

Employing the broad definition set forth in § 14-212 (5), we conclude that neither § 14-227a (a) nor Fla. Stat. Ann. § 316.193 requires the vehicle to be motorized. Accordingly, these statutes are substantially the same

[9] Relying on this court's decision in *State* v. *Young*, 186 Conn. App. 770, 794, 201 A.3d 439, cert. denied, 330 Conn. 972, 200 A.3d 1151 (2019), the defendant argues in his principal brief that the statutory definition of "motor vehicle" found in § 14-1 is applicable in this case. In his reply brief, the defendant concedes that § 14-212 is, in fact, the applicable statutory section in this case. In *Young*, this court was not asked to decide whether the definition in § 14-212 or that in § 14-1 was applicable. Consequently, we attach no significance to the fact that the court referred only to § 14-1. See id. Instead, we agree with the parties that the definition of motor vehicle in § 14-212 controls the resolution of the defendant's claim.

in their definitions of "vehicle" and "motor vehicle" for purposes of Fla. Stat. Ann. § 316.193 and § 14-227a (a).

3

The defendant next argues that the statutes are dissimilar because, at the time of his June 23, 1999, and May 16, 2005 "wrongful conduct" in Florida, which resulted in convictions in Florida on March 14, 2000, and October 25, 2006, § 14-227a (a) required operation in specified proscribed areas, but Fla. Stat. Ann. § 316.193 did not proscribe specific areas. More specifically, the defendant argues that, "[i]n order for the state to increase [his] punishment for his 2018 conviction on the basis of his prior wrongful conduct in Florida, that prior conduct must have been illegal in Connecticut at the time it was committed. . . . To establish a violation of § 14-227a before 2006, the state had to prove that the defendant's operation of a motor vehicle under the influence occurred 'on a public highway' or another similar road." Under Florida law, he argues, there was no such requirement that his conduct occur on a public highway or another similar road. The defendant's argument is without merit because it rests on a flawed premise.

As we explained in part I A of this opinion, § 14-227a (g) directs a comparison of the prior conviction with the current revision of § 14-227a (a) (1) or (2). Furthermore, a conviction under a new or revised statute does not result in a second punishment merely because an enhancement is applied that was based on a prior conviction. See *State* v. *Hickey*, supra, 80 Conn. App. 589. "The United States Supreme Court has held that a statute enhancing a defendant's sentence because he is a repeat offender does not violate the ex post facto clause even if one of the convictions on which the sentence is based occurred before the enactment passage of the statute. See *Gryger* v. *Burke*, [supra, 334 U.S. 732]."

State v. *Hickey*, supra, 593. Repeat offender laws penalize only the *last offense* committed by a defendant. Id.; see *Nichols* v. *United States*, supra, 511 U.S. 747; see also *State* v. *Holloway*, supra, 144 Conn. 300–301.

Pursuant to the revision of § 14-227a (a), under which the defendant was charged for his April 1, 2016 conduct, there was no requirement that he operate his vehicle on a public highway or another similar road. The public highway element of § 14-227a was eliminated by the legislature in 2006. See Public Acts 2006, No. 06-147, § 1. Accordingly, the defendant's claim has no merit.

4

The defendant next argues that the statutes are dissimilar because, at the time of his 2000 conviction in Florida, § 14-227a (a) required a blood alcohol content of at least 0.10 percent, but Fla. Stat. Ann. § 316.193 required a blood alcohol content of only 0.08 percent. For the reasons previously stated, the premise of this claim also is flawed. See parts I A and I B 3 of this opinion.

An enhancement penalty for a repeat offender penalizes only the *last offense* committed by a defendant. See *Nichols* v. *United States*, supra, 511 U.S. 747; *State* v. *Hickey*, supra, 80 Conn. App. 593; see also *State* v. *Holloway*, supra, 144 Conn. 300–301. When the defendant was charged in the present case for his Connecticut conduct, § 14-227a (a) applied to a blood alcohol content of 0.08 percent or greater. The 0.10 percent element of § 14-227a was lowered to 0.08 percent by the legislature in 2002. See Public Acts, Spec. Sess., June, 2002, No. 02-1, § 108. Accordingly, this claim is without merit.

II

The defendant next claims that *State* v. *Burns*, supra, 236 Conn. 18, and *State* v. *Mattioli*, supra, 210 Conn. 573, should be overruled because the plain language of

§ 14-227a (g) requires that *all* of the defendant's previous convictions on which the enhanced penalty relies occur within ten years of the current Connecticut *conviction*. In *Burns*, our Supreme Court held that the prior convictions just had to be within five[10] years of the defendant's *conduct* that resulted in the conviction on which his sentence was enhanced. *State* v. *Burns*, supra, 236 Conn. 26. In *Mattioli*, the Supreme Court held that only the defendant's *last* conviction before the conviction at issue had to have occurred within the statutory look back period. *State* v. *Mattioli*, supra, 210 Conn. 576.

"[A]s an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court. . . . As our Supreme Court has stated: [O]nce this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an improper and fruitless endeavor." (Internal quotation marks omitted.) *State* v. *Edwards*, 202 Conn. App. 384, 410, A.3d , cert. denied, 336 Conn. 920, A.3d. (2021).

The judgment is affirmed.

In this opinion the other judges concurred.

USSBASY GARCIA *v.* ROBERT COHEN ET AL.
(AC 41079)

Lavine, Prescott and Bishop, Js.*

Syllabus

The plaintiff tenant sought to recover damages from the defendant landlords, R and D, for personal injuries that she suffered when she slipped on the rear exterior staircase of her apartment building. The plaintiff

[10] When *Burns* was decided, the statutory look back period was only five years. The defendant does not dispute that the holding in *Burns* applies to the current ten year look back period, and this court has so held. See *State* v. *Tenay*, 156 Conn. App. 792, 799, n.5, 114 A.3d 931 (2015).

* The listing of judges reflects their seniority status on this court as of the date the appeal was submitted on the briefs.

claimed that the defendants were negligent in failing to keep the steps of the staircase free from dirt and sand and by allowing the surface of the steps to become pitted, worn and uneven. At trial, R testified that other individuals helped him with snow removal at the property and that, together, they would remove snow and spread salt and sand on the staircase but that no one would return thereafter to clear the staircase after spreading salt and sand. After a jury trial, judgment was rendered in favor of the defendants. The plaintiff appealed to this court, claiming that the trial court improperly rejected her request to charge and failed to instruct the jury that the possessor of real property has a nondelegable duty to maintain the premises in a reasonably safe condition. This court affirmed the trial court's judgment, concluding that the general verdict rule precluded the plaintiff's claim on appeal. The plaintiff, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment and concluded that the general verdict rule did not preclude the plaintiff's claim on appeal, and remanded the case to this court with direction to consider the plaintiff's claim of instructional error. *Held*:

1. The trial court erred by failing to instruct the jury on the nondelegable duty doctrine; R's testimony that he employed contractors to remove snow and otherwise maintain the staircase implicated the nondelegable duty doctrine because that testimony implicitly raised the issue of whether he or the individuals who helped him remove snow was responsible for the condition of the staircase, and the plaintiff's proposed jury charge was relevant to the issues in the case, an accurate statement of the law and reasonably supported by the evidence adduced at trial.
2. The trial court's instructions to the jury and its refusal to instruct the jury on the defendants' nondelegable duty to maintain the premises constituted harmful error; the jury could have concluded that the snow removal team acted negligently, but the court did not instruct the jury that such a finding would have resulted in an allocation of liability to the defendants under the nondelegable duty doctrine; accordingly, this court concluded that there was a consequent likelihood of actual harm to the plaintiff significant to warrant a new trial.

(*One judge dissenting*)

Submitted on briefs October 5, 2020—officially released April 20, 2021

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn in part; thereafter, the matter was tried to the jury before *Dubay*, *J.*; verdict for the defendants; subsequently, the court denied the plaintiff's motions to set aside the verdict and for a new

trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court, *Lavine*, *Prescott* and *Bishop*, *Js.*, which affirmed the trial court's judgment; thereafter, the plaintiff, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Reversed*; *new trial.*

John Serrano submitted a brief for the appellant (plaintiff).

Allison Reilly-Bombara submitted a brief for the appellees (defendants).

Opinion

BISHOP, J. This appeal returns to us on remand from our Supreme Court. At trial in this negligence action, a jury returned a verdict finding the defendants, Robert Cohen and Diane Cohen, not liable as landlords for injuries the plaintiff, Ussbasy Garcia, suffered when she slipped and fell on the staircase outside her apartment building on the defendants' premises. On appeal, the plaintiff claimed that the court erred by rejecting her request to charge and failing to instruct the jury that the owner of real property has a nondelegable duty to maintain the premises. We affirmed the judgment of the trial court on March 12, 2019, holding that the plaintiff's claims were not reviewable on the basis of the general verdict rule. See *Garcia* v. *Cohen*, 188 Conn. App. 380, 386–87, 204 A.3d 1245 (2019), rev'd, 335 Conn. 3, 225 A.3d 653 (2020). On certification, our Supreme Court reversed our holding with regard to the general verdict rule and remanded the case to this court with direction to consider the plaintiff's claim of instructional error. See *Garcia* v. *Cohen*, 335 Conn. 3, 28, 225 A.3d 653 (2020). On review of the merits, we agree with the plaintiff that the trial court should have issued a jury instruction on the defendants' nondelegable duty to

maintain the premises, and, accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are set forth in our Supreme Court's opinion. "In the middle of winter, the plaintiff exited her second floor rental apartment shortly before noon carrying a basket of laundry. She went out the rear exit and descended the exterior staircase. Before reaching the bottom of the staircase, she slipped and fell, fracturing her left ankle and tearing her left ankle deltoid ligament. She testified that she slipped because the fourth step had a lot of sand on the surface and was not safe. The plaintiff brought a premises liability action, alleging that her landlords, the defendants, negligently and carelessly (1) failed to maintain the steps clean, clear, and free of dirt and sand, (2) allowed the surface of the steps to become pitted, worn, and uneven, and (3) failed to post a notice or otherwise warn of the slippery condition of the steps. The defendants denied the allegations in the complaint and asserted a special defense alleging that the plaintiff's injuries resulted from 'her own negligence and carelessness . . . .'

"A jury trial ensued in which Robert Cohen testified about how he maintained the property during the winter months. He testified that three or four individuals helped him with snow removal at the property. Together, they would remove snow after a snowstorm and spread salt and sand on the stairs. Robert Cohen also testified that, after spreading salt and sand on the stairs, no one would return in the winter to clear off the stairs.

"In light of that testimony, the plaintiff submitted a proposed jury instruction regarding the defendants' nondelegable duty to maintain the safety of the premises. The plaintiff also proposed that the trial court submit three interrogatories to the jury. The proposed

interrogatories addressed three grounds on which the jury could have determined liability: (1) Were the plaintiff's fall and injuries caused by the defendants' negligence and carelessness in failing to maintain the steps clean, clear and free of dirt and sand? (2) Were the plaintiff's fall and injuries caused by the defendants' negligence in allowing the steps to become pitted, worn and uneven? And (3) were the plaintiff's fall and injuries caused by her own failure to exercise care under the circumstances and conditions then existing?

"The trial consisted of two days of evidence. The trial court began the second, and last, day of trial by asking if the attorneys had any preliminary matters to discuss. Because the court would instruct the jury and submit the case to it for deliberation after the conclusion of evidence later that day, the plaintiff's attorney responded: 'Just the fact that I had filed jury instructions—proposed jury instructions and jury interrogatories, and my understanding is, the court is going to disallow those.' The court replied by confirming the plaintiff's understanding and explaining: 'I don't think the interrogatories are necessary, and I don't think that the nondelegable duty charge is necessary because I'm specifically charging the jury—or I intend to specifically . . . charge the jury on the duties that are owed to an invitee.' The plaintiff's attorney answered: 'Very well. Thank [you].'

"As it indicated it would, the trial court, after the close of evidence, charged the jury on the applicable law. That charge included an explanation of the duty owed to an invitee but not an explanation of the nondelegable duty doctrine.[1] Following the instructions, the

[1] Additionally, in its explanation of proximate cause, the trial court charged: "Therefore, when a defendant's negligence combines together with one or more other causes to produce an injury, such negligence is a proximate cause of the injury if its contribution to the production of the injury, in comparison to all the other causes, is material and substantial—or substantial, I should say. When, however, some other cause contributes so powerfully to the production of an injury as to make the defendants' negligent

trial court asked the attorneys if there were any exceptions to the charge. The plaintiff's counsel answered: 'Other than what I had filed previously, no, Your Honor.' The jury proceeded to deliberate. During deliberations, the jury submitted the following question to the court: 'How do we indicate on the [verdict] form that we find neither party negligent?' The court instructed the jury that if it had found neither party negligent, it would have to return a defendants' verdict. The jury then returned a defendants' verdict." (Footnote added; footnotes omitted.) Id., 6–9.

After trial, the plaintiff filed motions to set aside the verdict and for a new trial. The trial court denied both motions. The plaintiff then appealed to this court, claiming that the trial court improperly had rejected her request to charge and improperly failed to instruct the jury on the defendants' nondelegable duty to maintain the premises. *Garcia* v. *Cohen*, supra, 188 Conn. App. 381–82. At oral argument, this court asked the parties whether the general verdict rule would apply to bar consideration of the plaintiff's instructional claim, and we later permitted the parties to submit supplemental briefs on that issue. Subsequently, this court concluded that the general verdict rule applied and held on that basis that the plaintiff's claims of instructional error were unreviewable. Id., 386–87.

The plaintiff filed a petition for certification to appeal from the judgment of this court, which was granted by our Supreme Court. Our Supreme Court held that "the Appellate Court incorrectly concluded that the plaintiff's instructional error claim was not reviewable." *Garcia* v. *Cohen*, supra, 335 Conn. 28. The court reasoned: "'The general verdict rule does not apply in the present

contribution to the injury merely trivial or inconsequential, the defendants' negligence must be rejected as a proximate cause of the injury, for it has not been a substantial factor in bringing that injury about."

case because the plaintiff had requested that the trial court submit her properly framed interrogatories to the jury and had objected when it denied her request. She properly framed her interrogatories by submitting questions addressing her claim of negligence and the defendants' denial of negligence and special defense of contributory negligence. The claims of negligence and contributory negligence are so intertwined with the plaintiff's nondelegable duty jury charge claim on appeal that the general verdict rule does not bar review. Additionally, the plaintiff was not required on appeal to assert an independent claim of error on the basis of the trial court's rejection of her request to submit the interrogatories to the jury. Rather, the plaintiff's submission of interrogatories and her objection upon the court's refusal to submit them to the jury is a defense to the application of the general verdict rule, not an independent claim of error." Id., 6. Accordingly, our Supreme Court remanded the case to this court with direction to review the trial court's denial of the plaintiff's request for a jury instruction on the nondelegable duty doctrine. Id., 28. Additional facts will be set forth as necessary.

I

First, the plaintiff claims that the trial court erred when it refused to give her requested jury instruction on the nondelegable duty doctrine. Specifically, she argues that "the ruling on the instruction rested on the incorrect assertion that the evidence showed that only the defendants were responsible for maintaining the stairway and the ruling violated the principle that a request to charge must be given if it accurately states the law and is founded, even weakly, on the evidence, and is relevant to the issues to be decided by the jury." We agree.

We begin by setting forth our standard of review. "In determining whether the trial court improperly refused

a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence." (Internal quotation marks omitted.) *Brown* v. *Robishaw*, 282 Conn. 628, 633, 922 A.2d 1086 (2007).

"The court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding. . . . The court should, however, submit to the jury all issues as outlined by the pleadings and as reasonably supported by the evidence." (Citations omitted; internal quotation marks omitted.) *Goodmaster* v. *Houser*, 225 Conn. 637, 648, 625 A.2d 1366 (1993).

Whether the evidence presented by a party reasonably supports a particular request to charge "is a question of law over which our review is plenary." *Brown* v. *Robishaw*, supra, 282 Conn. 633. Similarly, whether there is a legal basis for the requested charge is a question of law also entitled to plenary review. Id., 633–34.

The nondelegable duty doctrine is well established. "[T]he owner or occupier of premises owes invitees a nondelegable duty to exercise ordinary care for the safety of such persons." (Internal quotation marks omitted.) *Gazo* v. *Stamford*, 255 Conn. 245, 257, 765 A.2d 505 (2001). "[T]he nondelegable duty doctrine means that [the employer] may contract out the performance of [its] nondelegable duty, but may not contract out [its] ultimate legal responsibility." (Emphasis omitted;

internal quotation marks omitted.) *Machado* v. *Hartford*, 292 Conn. 364, 371–72, 972 A.2d 724 (2009). In *Smith* v. *Greenwich*, 278 Conn. 428, 460, 899 A.2d 563 (2006), our Supreme Court stated that "the owner or occupier of a premises owes a nondelegable duty to keep the premises safe by protecting third persons from foreseeable slip and fall injuries. Should the owner or occupier of the premises hire a contractor to maintain the property, the owner or occupier is vicariously liable for the consequences arising from that contractor's tortious conduct." In *Sola* v. *Wal-Mart Stores, Inc.*, 152 Conn. App. 732, 743, 100 A.3d 864, cert. denied, 314 Conn. 941, 103 A.3d 165 (2014), this court summarized that "the nondelegable duty doctrine creates a form of vicarious liability pursuant to which a property owner may be liable to an invitee for the negligence of its independent contractors or subcontractors in their performance of the employer's nondelegable duty, regardless of whether the property owner actually is at fault or the degree of fault." (Internal quotation marks omitted.)

In the present case, there is no dispute that the plaintiff's proposed jury charge was an accurate statement of the law regarding the nondelegable duty doctrine. At issue, however, is whether that proposed charge was reasonably supported by the evidence presented, viewing that evidence in the light most favorable to supporting the proposed charge. During trial, Robert Cohen testified that he hired individuals to assist him in removing snow from the plaintiff's steps and in spreading salt and sand on them. On its face, that testimony implicates the nondelegable duty doctrine because Robert Cohen testified that there were individuals performing maintenance work on the rear exterior staircase. Thus, he raised the issue, by implication, of whether he or the others may have been responsible for the claimed defect. It is well fixed in our decisional

law, however, that the defendants cannot shift legal responsibility to others when someone is injured due to the condition of property owned and controlled by the defendants.

Nevertheless, the defendants argue that the nondelegable duty doctrine does not apply to the facts of this case because (1) "there was no evidence, nor was it argued at trial, that anyone other than the [defendants] was responsible for maintaining the premises" and (2) the defendants never attempted to shift the burden of maintaining the premises onto a third party. That first argument is plainly incorrect. Viewed in the light most favorable to supporting the proposed charge, Robert Cohen's testimony that he employed contractors to remove snow and otherwise maintain the staircase establishes that those contractors, in addition to the defendants, were "responsible for maintaining the premises."

With respect to the defendants' second argument, the plaintiff relies on a series of cases to argue that, so long as a jury instruction is legally valid and is supported by admitted evidence, a court must give that instruction, even if the party requesting the instruction did not press an argument related thereto at trial. In other words, even though the plaintiff did not expressly argue at trial that the defendants were attempting to shift responsibility to their contractors, the plaintiff argues that the court improperly failed to give the nondelegable duty instruction because Robert Cohen's testimony at trial reasonably supported that charge. First, in *Wasko* v. *Farley*, 108 Conn. App. 156, 169–70, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008), and *Futterleib* v. *Mr. Happy's, Inc.*, 16 Conn. App. 497, 501–502, 548 A.2d 728 (1988), this court held that, because the evidence supported a jury charge on an injured party's duty to mitigate damages, it was not necessary for the defendants to have pleaded mitigation as a special

defense. Second, in *Al-Janet, LLC* v. *B & B Home Improvements, LLC*, 101 Conn. App. 836, 842, 925 A.2d 327, cert. denied, 284 Conn. 904, 931 A.2d 261 (2007), this court rejected a jury instruction as to agency, stating that "the plaintiffs have pointed to nothing in the record to demonstrate that they either requested an explicit instruction on the law of agency *or that the evidence supported such an instruction*." (Emphasis added.) Finally, in *Griffin* v. *Yankee Silversmith, Ltd.*, 109 Conn. App. 9, 15, 951 A.2d 1, cert. denied, 289 Conn. 925, 958 A.2d 151 (2008), a hostile workplace sexual harassment case, this court held that the trial court properly declined to instruct the jury on the definition of quid pro quo sexual harassment, because the quid pro quo theory "was neither alleged in her complaint *nor supported by the evidence*." (Emphasis added.)

In light of those cases and of Robert Cohen's trial testimony in the present case, it is immaterial to the plaintiff's claim that the defendants never explicitly attempted to shift blame to their contractors or employees. The proposed nondelegable duty charge was relevant to the issues in this case, was an accurate statement of the law, and was reasonably supported by the evidence adduced at trial. Accordingly, the trial court should have instructed the jury on the nondelegable duty doctrine.

II

Second, the plaintiff claims that the court's refusal to give her requested jury charge constituted harmful error that requires us to set aside the jury's verdict and remand the case for a new trial. Specifically, the plaintiff states that "the court's failure to charge on nondelegability, coupled with its instruction that the defendants could be relieved of liability if some other cause so powerfully caused the plaintiff's injury that it trivialized

the defendants' negligence, resulted in an unjust presentation of the plaintiff's case to the jury." We agree.

We begin by setting forth our standard of review. "[N]ot every improper jury instruction requires a new trial because not every improper instruction is harmful. [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 656, 935 A.2d 1004 (2007).

"In determining whether an instructional impropriety was harmless, we consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Internal quotation marks omitted.) *Smith* v. *Greenwich*, supra, 278 Conn. 439.

In reversing this court's prior decision, our Supreme Court stated that, "[o]n the basis of Robert Cohen's testimony that he hired workers for snow removal and sanding, it is possible that the jury could have concluded that the snow removal team, rather than the defendants, acted negligently, and for that reason found that the defendants had *not* acted negligently or had acted less negligently than the plaintiff. The plaintiff argued before the Appellate Court that the jury did not have the benefit of being instructed by the trial court that, under the nondelegable duty doctrine, the defendants were liable for any negligence attributed to the snow removal team. . . . Although the trial court instructed the jury on the

duties that the defendants owed to the plaintiff as a tenant-invitee, the invitee instruction itself (the defendant has a duty to maintain and a duty to warn) is distinct from the nondelegable duty instruction (the defendant cannot avoid liability by hiring others to maintain the premises). If the jury found that the snow removal crew had been negligent, that negligence under the nondelegable duty doctrine would have resulted in some allocation of liability to the defendants. The jury's estimation and allocation of negligence are intertwined with the nondelegable duty instruction, and the jury had no untainted route to the verdict." (Citations omitted; emphasis in original; footnote omitted.) *Garcia* v. *Cohen*, supra, 335 Conn. 23–24.

We find instructive our Supreme Court's reasoning on this issue and conclude that the trial court's failure to instruct the jury on the defendants' nondelegable duty to maintain the premises was harmful. The jury's determination that neither *party* was negligent could have related only to the named plaintiff and defendants—no instruction was given that would inform the jury of its ability to attribute any potential negligence of the defendants' employees or contractors to the defendants themselves. The court's instruction to the jury that if "some other cause contributes so powerfully to the production of an injury as to make the defendants' negligent contribution to the injury merely trivial or inconsequential, the defendants' negligence must be rejected as a proximate cause of the injury," coupled with its refusal to instruct the jury on the nondelegable duty doctrine, compels our conclusion that the likelihood of actual prejudice to the plaintiff is significant enough to warrant a new trial in this case.

The judgment is reversed and the case is remanded for a new trial.

In this opinion, PRESCOTT, J., concurred.

LAVINE, J., dissenting. Because I believe a nondelegable duty charge was not required and indeed unwarranted, I agree with the trial court that the facts did not support the giving of such a charge and that to have given it simply would have confused the jury. Moreover, the plaintiff has failed to carry her burden of showing that the failure to give the requested charge affected the verdict. Therefore, for the following reasons, I respectfully dissent.

I agree with the facts as recited in the majority opinion.

Preliminarily, it should be noted that the purpose of a nondelegable duty charge is to prevent a defendant from arguing that she should be freed from liability because she had transferred to a third party the job of maintaining her premises in a safe condition. See, e.g., *Smith* v. *Greenwich*, 278 Conn. 428, 456–458, 899 A.2d 563 (2006). In other words, in simple English, it is to prevent a landowner from saying: "It's not my fault because Joe Doakes was supposed to do it." But, in the present case, the defendant landowner is in effect saying: "Don't blame Joe Doakes. *Blame me*. I'm the one who is fully responsible for the problem."

The majority states that, "[d]uring trial, Robert Cohen testified that he hired individuals to assist him in removing snow from the plaintiff's steps and in spreading salt and sand on them. *On its face, that testimony implicates the nondelegable duty doctrine because Robert Cohen testified that there were individuals performing maintenance work on the rear exterior staircase. Thus, he raised the issue, by implication, of whether he or others may have been responsible for the claimed defect. It is well fixed in our decisional law, however, that the defendants cannot shift legal responsibility to others when someone is injured due to the condition*

of property owned and controlled by the defendants." (Emphasis added.)

I disagree with the italicized portion of this assertion. In effect, the majority is asserting that a nondelegable duty charge must be given whenever a landowner hires individuals to maintain his property. Moreover, the unstated but erroneous premise of the majority's argument is that Robert Cohen may have been seeking to avoid legal responsibility by pointing the finger at a third party. The nondelegable duty doctrine stands for the proposition that an employer "may contract out the *performance* of [its] nondelegable duty, but may not contract out [its] ultimate legal responsibility." (Emphasis in original.) *Gazo* v. *Stamford*, 255 Conn. 245, 255, 765 A.2d 505 (2001). But, as noted, this case falls outside the purview of the nondelegable duty doctrine because, as the trial court pointed out in its response to the motion for articulation: "There was no evidence or argument that anyone other than the defendant was responsible for the maintenance of the stairway." At no time did Robert Cohen attempt to dodge or to deny responsibility for the condition of the stairway on which the plaintiff fell. In fact, he, in effect, claimed responsibility, as he testified in response to questioning on cross-examination from his counsel[1]:

"Q.: Thank you. As part of your process for taking care of this back staircase at 390 West Main Street if there was snow or ice, you would spread—or you or your workers would spread salt and sand on the stairs?

"A.: Yes, yes.

"Q.: And isn't it true, though, that after salt and sand was spread on the stairs you would not go back or you would not have your helpers go back and clear them off?

[1] It should be noted that Robert Cohen did not mention that he hired individuals to help him maintain his property until the plaintiff's counsel asked him on direct examination.

"A.: Not in January because there was anticipation of more snow and ice.

"Q.: So the salt and sand would go on, presumably, the snow and ice would melt, but neither you nor your workers would go and clear off the sand from the staircase? Is that—

"A.: Not in the—

"Q.: —correct?

"A.: —winter.

"Q.: I'm sorry?

"A.: Not in the winter."

Therefore, the plaintiff's proposed jury instruction that "[the defendant] cannot escape liability for any such injury by claiming he had contracted with someone else to maintain the premises in a reasonably safe condition," was unwarranted and unsupported by the facts of the case. Robert Cohen maintained control of the stairs, and those who helped him merely followed his instructions. The majority seems to be suggesting that notwithstanding Robert Cohen's decision-making authority, the helpers should have, on their own initiative and contrary to their employer's wishes, remedied the problem. I am unaware of any Connecticut case in which the defendant did *not* point at a third party in an effort to avoid legal responsibility, yet the failure to give a nondelegable duty charge was found to be reversible error.

Next, I agree with the trial court that to have given the instruction in this case would have confused the jury because the issue was neither presented nor argued by the defendants. While, as a general proposition, a trial court should give a requested charge if the law is relevant to the issues before the jury and there is a factual basis for it, the trial court must maintain some

reasonable degree of latitude based on pragmatic considerations. A trial court has "wide discretion" in the exercise of its jury charging function. *Ladd* v. *Burdge*, 132 Conn. 296, 298, 43 A.2d 752 (1945). The trial court, having sat in the court and observed the proceedings, counsels' arguments, and the jurors' reactions to the testimony, and generally gauged the jurors' understanding of the legal concepts presented, must be given discretion in a case where the giving of a requested charge might theoretically be permissible, but where, on balance, the trial court sees no need for it given the facts of the case and because of its capacity to confuse the jury. In other words, the fact that such a charge could theoretically have been given does not mean it was error to have failed to give it.[2] In ambiguous situations such as the present case, I believe the question to ask is whether the court abused its discretion in failing to give the nondelegable duty charge. In this case, I believe the answer to this question is "no."

"When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted

[2] This case is factually distinguishable from *Sola* v. *Wal-Mart Stores, Inc.*, 152 Conn. App. 732, 100 A.3d 864, cert. denied, 314 Conn. 941, 103 A.3d 165 (2014), in which this court concluded that the trial court had misconstrued and misapplied the nondelegable duty doctrine. In *Sola*, "[p]rior to the start of the trial, the court and the defendant had notice that one of the plaintiff's theories of recovery was that the nondelegable duty doctrine imposed liability on the defendant for the negligence of its independent contractor." Id., 749. Moreover, the theory was stated in a motion in limine filed prior to trial, and evidence was presented at trial that supported giving a nondelegable duty charge. Id., 749–50.

to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 656, 935 A.2d 1004 (2007). It must be remembered that the trial court in the present case included in its charge a discussion of the legal duty owed by a possessor of land to an invitee. Viewed as a whole, I believe the charge was adequate.

Under the circumstances of the present case, in which the defendants' responsibility for the condition of the stairs was unquestioned and Robert Cohen never argued that his helpers were legally responsible, it is hard to see why the requested charge was required, particularly when the trial court thought it would confuse the jury.

Finally, I do not agree with the majority that the failure to give the requested charge was harmful. Examination of excerpts from counsel's closing arguments confirms that the plaintiff's argument was directed solely at Robert Cohen. In his closing arguments, the plaintiff's counsel placed the blame for the accident squarely on Robert Cohen *himself*, and no one else. For example, counsel argued: "The steps were never swept. . . . In terms of responsibility for the accident, I almost don't have to say anything else. A storm would come, he would have his men come and clean up the ice and snow, put sand and salt on the steps, leave the sand there."

Later, in his rebuttal closing argument, the plaintiff's counsel stated: "The bottom line is . . . negligence, about neglecting to do something. He has his workers to help him maintain these sixty units and he can't be bothered to come by, have some—pay someone to come by and sweep the steps so that they're safe, and that's why . . . she has these lifelong effects . . . ." I disagree with the majority's assertion that there was

harmful error that requires the jury's verdict to be set aside and the case remanded for a new trial. It must be remembered that the jury sent the court a note asking how to mark the jury form if it found "neither party negligent." I see nothing whatever in the record to suggest that had a nondelegable duty charge been given, the result would have been different. The burden to prove the charge given by the court was harmful rests squarely on the plaintiff; see *Burke* v. *Mesniaeff*, 334 Conn. 100, 119, 220 A.3d 777 (2019); and she has failed entirely to carry that burden. Indeed, the majority has failed to identify any evidence from the record in support of its assertion that the failure to give the requested instruction "likely . . . affected the verdict." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 243, 828 A.2d 64 (2003). The majority relies on language in our Supreme Court's decision remanding this case in support of its conclusion that the failure to give the requested charge was harmful. See *Garcia* v. *Cohen*, 335 Conn. 3, 225 A.3d 653 (2020). I respectfully suggest this supposition is not sufficient. Under the particular facts and circumstances of this case, I do not believe the trial court abused its discretion by refusing to give the nondelegable duty charge.

In sum, I believe the majority is applying the nondelegable duty doctrine under attenuated and unclear circumstances, in which it was not factually justified, in which the trial court appropriately exercised its discretion not to give it because it concluded that the charge would unnecessarily confuse the jury, and in which the failure to give it did not affect the verdict. This is not a case in which the law clearly required that the charge be given. It is a case in which whether or not to give it was a matter upon which reasonable judges could disagree. I would defer to the instincts of the judge in the courtroom, who concluded first, that the charge

was not warranted under the facts, and second, that, in any event, it would confuse the jury.

For the foregoing reasons, I respectfully dissent.

LUIS LEBRON *v.* COMMISSIONER OF CORRECTION
(AC 43579)

Bright, C. J., and Alvord and Prescott, Js.

Syllabus

The petitioner, who previously had been convicted, on a guilty plea, of the crimes of manslaughter in the first degree with a firearm and conspiracy to commit witness tampering, filed his third petition for a writ of habeas corpus, claiming, inter alia, that he had received ineffective assistance from D, his first habeas counsel. At the petitioner's criminal trial, the trial court permitted his defense counsel, S, to withdraw on the ground that he could be called as a witness at trial. The petitioner indicated to the court that he waived any conflict, and wanted to proceed to trial and was prepared to represent himself, which the court did not allow. The petitioner thereafter was charged with additional crimes in a separate docket, and C was appointed to represent him on all of the charges, after which the petitioner entered his plea. In the first habeas action, the petitioner alleged that S and C had rendered ineffective assistance. The habeas court denied the petition, and D failed to file a timely petition for certification to appeal. In the second habeas action, in which the petitioner alleged that S, C and D had provided ineffective assistance, the habeas court rendered judgment restoring the petitioner's appellate rights with respect to the issues raised in the first habeas petition. The petitioner thereafter appealed from the denial of his first habeas petition, but did not raise the merits of his claims in that first petition against S and C. This court affirmed the judgment of the first habeas court. The petitioner then filed his third habeas petition, and the habeas court rendered a judgment of dismissal, concluding that there was no good cause to proceed to trial. This court reversed in part the judgment of the habeas court and remanded the case for a trial on the merits of the petitioner's claim that his right to the effective assistance of habeas counsel had been violated. The petitioner claimed that D failed to pursue a claim that his right to the effective assistance of criminal trial counsel had been violated when C failed to advise him properly that his plea would operate as a waiver of his appellate rights, specifically, his right to challenge the trial court's granting of S's motion to withdraw. After a trial on the merits, the habeas court rendered judgment denying the

petitioner's claim on the ground that he had failed to prove prejudice because he failed to establish that he would not have pleaded guilty but for counsel's alleged deficient performance. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly denied the petitioner's ineffective assistance of habeas counsel claim because he failed to establish that he was prejudiced by the alleged deficient performance of C; the petitioner faced a possible sentence of 140 years of incarceration with no possibility of parole if convicted at trial, and C was able to negotiate a reduction in the charges and a state recommended sentence of thirty years of incarceration with the possibility of parole in exchange for the petitioner's plea, and the record supported the court's finding that the petitioner would not have declined that plea offer on the chance that he could convince a jury on a retrial, after he was convicted once and successfully appealed on the grounds he claimed he would have pursued if he had been counseled properly by C, that he was not guilty, as the state's case against the petitioner was strong, the petitioner's claim of self-defense had significant weaknesses, and the court was free to discredit the petitioner's testimony that he would have gone to trial had he been counseled by C that his issues regarding S's withdrawal and his right to self-representation could have been raised on appeal had he been convicted.

Argued February 4—officially released April 20, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland where the court *Sferrazza*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court, *Keller*, *Prescott* and *Kahn*, *Js.*, which reversed in part the judgment of the habeas court and remanded the case for a trial on the merits; subsequently, the matter was tried to the court before *Bhatt*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Leah Hawley*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Luis Lebron, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The habeas court granted his petition for certification to appeal. On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to the effective assistance of counsel was violated when his first habeas counsel, Attorney Sebastian DeSantis, failed to pursue a claim that the petitioner's criminal trial counsel, Attorney Thomas Conroy, had provided ineffective assistance when he failed to advise the petitioner that he would be waiving his appellate rights by pleading guilty. We affirm the judgment of the habeas court.

The following facts and somewhat complicated procedural history inform our review. The state, in 1997, originally charged the petitioner with murder in violation of General Statutes § 53a-54a (a) and criminal use of a firearm in violation of General Statutes § 53a-216 after he shot and killed another man. The petitioner claimed that he shot the victim in self-defense. Attorney Kenneth Simon represented the petitioner in connection with these charges. During jury selection, in January, 1999, it became apparent to Simon that the petitioner would be charged with conspiracy to commit additional crimes relating to two witnesses to the shooting, namely, two counts of conspiracy to commit witness tampering and two counts of conspiracy to commit murder. Simon then filed a motion to withdraw from representing the petitioner, stating that he believed that he likely would be called as a witness during the trial on the anticipated new charges. The petitioner opposed Simon's motion and argued, in the alternative, that he should be able to represent himself temporarily, until a special public defender could be appointed. On January 27, 1999, the court denied the petitioner's request to represent himself temporarily, granted Simon's

motion to withdraw, and declared a mistrial. In a separate information, the state additionally charged the petitioner with two counts of conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, and two counts of conspiracy to commit witness tampering in violation of General Statutes §§ 53a-48 and 53a-151. Attorney Conroy later was appointed to represent the petitioner on all of the charges

Conroy negotiated a plea agreement with the state that resolved all charges against the petitioner, pursuant to which the petitioner pleaded guilty under the *Alford* doctrine[1] to one count of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a and one count of conspiracy to commit witness tampering. The court sentenced the petitioner to a term of thirty years of incarceration on the manslaughter charge and to an unconditional discharge on the conspiracy charge. The state entered a nolle prosequi as to all of the other charges.

In June, 2000, the petitioner filed his first petition for a writ of habeas corpus. The petitioner's first habeas counsel, Attorney DeSantis, filed an amended petition, in which the petitioner alleged ineffective assistance of counsel as to Simon and Conroy. Specifically, the amended petition contained allegations that counsel had rendered ineffective assistance by failing to pursue discovery and to communicate with the petitioner about discovery, by failing to challenge the petitioner's arrest and the circumstances surrounding his arrest, by failing

[1] "Under *North Carolina* v. *Alford*, [400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)], a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Walker*, 187 Conn. App. 776, 778 n.2, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019).

to challenge the arrest warrant, and by failing to communicate with the petitioner regarding legal and evidentiary standards so that he could make an informed decision on whether to plead guilty or to proceed to trial. On February 20, 2003, the habeas court denied the amended habeas petition (first habeas court's decision). DeSantis did not file a timely petition for certification to appeal from the first habeas court's decision. The petitioner, however, filed a pro se petition for certification to appeal on February 26, 2003, which was denied. No appeal from that denial was timely taken.

On July 18, 2006, the petitioner, represented by Attorney Paul Kraus, filed a second petition for a writ of habeas corpus, alleging the ineffective assistance of counsel as to Simon, Conroy, and DeSantis. The habeas court and the petitioner entered a stipulated agreement to restore the petitioner's appellate rights in the first habeas case (second habeas case). The court also granted a petition for certification to appeal from the first habeas court's decision. On September 8, 2006, the petitioner filed an appeal from the first habeas court's decision limited only to whether the first habeas court improperly had denied his postjudgment motions for reconsideration and reargument. This court denied review of those claims because they fell outside the scope of the stipulated agreement in the second habeas case, and our Supreme Court denied the petition for certification to appeal from our decision. See *Lebron* v. *Commissioner of Correction*, 108 Conn. App. 245, 249, 947 A.2d 349, cert. denied, 289 Conn. 921, 958 A.2d 151 (2008).

Nearly ten years later, on January 8, 2016, the petitioner filed a six count amended petition for a writ of habeas corpus, his third such petition. On May 5, 2016, the habeas court rendered a judgment of dismissal on the amended petition, concluding that there was no good cause to proceed to trial. The habeas court granted

the petition for certification to appeal on May 18, 2016. On appeal, this court reversed in part the judgment of the habeas court and remanded the case for, inter alia, a trial on the merits of the petitioner's claim that his right to the effective assistance of habeas counsel had been violated because DeSantis had failed to pursue a claim that the petitioner's right to the effective assistance of criminal trial counsel had been violated when Conroy failed to advise the petitioner properly that his *Alford* plea would operate as a waiver of his appellate rights, specifically, his right to challenge the criminal trial court's granting of Simon's motion to withdraw. See *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 319–24, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018).

The habeas court proceeded to a hearing on the merits of the petitioner's remaining claim. On August 28, 2019, the habeas court issued a memorandum of decision denying the petition on the ground that the petitioner had failed to prove prejudice because he failed to establish that he would not have pleaded guilty but for counsel's alleged deficient performance. The court, thereafter, granted the petitioner's petition for certification to appeal. This appeal followed.

On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to the effective assistance of counsel was violated when his first habeas counsel, DeSantis, failed to pursue a claim that the petitioner's criminal trial counsel, Conroy, had failed to advise him that, by pleading guilty, he would be waiving his rights to challenge on appeal the decision of the criminal trial court allowing Simon to withdraw and denying the petitioner's alternative request to represent himself. He alleges that the actions of the criminal trial court violated his constitutional rights to his counsel of choice and to self-representation. The respondent, the Commissioner of Correction, maintains that the

petitioner failed to meet the prejudice prong of his ineffective assistance of counsel claim, and, therefore, the habeas court properly rejected the claim. We agree with the respondent.

We now turn to the merits of the petitioner's claim, recognizing that the claimed ineffective assistance regarding his first habeas counsel, DeSantis, must fail if the claims of ineffective assistance of his replacement trial counsel, Conroy, are without merit. See *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992).

In *Lozada*, our Supreme Court "established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas, namely, a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . Any new habeas trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement." (Citations omitted; internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, supra, 178 Conn. App. 319–20.

"A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. . . . For ineffectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) . . . . To satisfy the performance prong, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . To satisfy the prejudice prong, the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Bigelow* v. *Commissioner of Correction*, 175 Conn. App. 206, 212–14, 167 A.3d 1054, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017).

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Godfrey* v. *Commissioner of Correction*, 202 Conn. App. 684, 693, A.3d (2021).

In evaluating the prejudice prong and the credibility of the petitioner's assertion that he would have insisted on going to trial but for Conroy's deficient performance, it is appropriate for the habeas court to consider whether a decision to reject a plea offer, under the circumstances presented, would have been rational. See *Padilla* v. *Kentucky*, 559 U.S. 356, 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). "Additionally, a petitioner's assertion after he has accepted a plea that he would have insisted on going to trial suffers from obvious

credibility problems . . . . In evaluating the credibility of such an assertion, the strength of the state's case is often the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial . . . . Likewise, the credibility of the petitioner's after the fact insistence that he would have gone to trial should be assessed in light of the likely risks that pursuing that course would have entailed." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36–37, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018).

In the present case, the petitioner argues that his underlying claims regarding the alleged violations of his rights to self-representation and to counsel of choice had considerable merit. The petitioner asserts that if Conroy had informed him of the merits of his constitutional claims and explained that, by pleading guilty, he would be giving up his right to assert those claims on appeal, he would not have entered an *Alford* plea but, instead, would have proceeded to trial. In its memorandum of decision, the habeas court concluded that the petitioner failed to demonstrate prejudice because he did not establish that, even if it assumed that the petitioner had been counseled by Conroy that his claims had merit and that, *following a conviction*, the petitioner could raise those claims in an appeal and, if successful on appeal, would be entitled to a retrial on the charges, the petitioner would not have accepted the plea offer but, instead, would have elected to proceed to trial.

In particular, the court credited the testimony of Simon and Conroy that the petitioner's self-defense claim had significant weaknesses and that there was a strong likelihood that the petitioner would be convicted of murder, or at least manslaughter in the first degree, on the original charges. In addition, the petitioner faced another eighty years of exposure arising out of the

additional charges of conspiracy to commit murder and conspiracy to tamper with witnesses. The court also noted that the petitioner's potential constitutional claims for appeal relating to Simon's withdrawal and to the petitioner's right of self-representation, at best, would have resulted only in another trial on the same charges with the same evidence available to the prosecution. On the basis of these underlying facts, the court clearly did not credit the petitioner's testimony that he would not have pleaded guilty had he been advised properly by Conroy. Specifically, the court stated that it "fail[ed] to see how the petitioner would want to risk exposing himself to a significantly longer sentence at a trial when the basis for a new trial would do nothing to make it more likely that he would be acquitted at the first or second trial. Put another way, pursuing the two claims he wished to [pursue] would only result in a second trial at which the state's evidence would be the same as that at the first. In light of that, it is not reasonable to conclude that the petitioner would have rejected the favorable offer and proceeded to trial." We conclude that the court's finding that the petitioner failed to establish that but for Conroy's alleged deficient performance, he would not have pleaded guilty but would have gone to trial was not clearly erroneous.

The petitioner faced a total possible sentence of 140 years of incarceration, with no possibility of parole if convicted at trial. Conroy was able to negotiate a reduction in the charges and a state recommended sentence of thirty years, with a right for the petitioner to argue for a lesser sentence, in exchange for the petitioner entering an *Alford* plea. At sentencing, Conroy argued for an unconditional discharge on the conspiracy charge, which the court granted and thereafter sentenced the petitioner to thirty years to serve on the manslaughter charge; the state nolled the remaining charges.

In addition, Conroy testified that he believed the state had a strong case against the petitioner and that he had urged the petitioner to take the plea bargain to avoid the risk of a murder conviction. In its memorandum of decision, the habeas court also discussed Conroy's testimony during the petitioner's first habeas trial that one of the benefits of the petitioner's plea of guilty to the manslaughter charge was that he would be eligible for parole, but if he had been convicted of the murder charge, he would have been ineligible for parole.

The record further demonstrates that the state's case against the petitioner was strong. In the petitioner's own statement to the police, he admitted that he drew his firearm first and pointed it at the victim. A witness identified the petitioner as the shooter, and the charges against the petitioner for conspiracy to commit murder were related to the petitioner's attempt to prevent that witness and another person from testifying at his criminal trial.

During the habeas trial, although the petitioner testified that he believed he had a strong case, and he wanted to continue to trial after Simon withdrew because he "felt that . . . the case would go in [his] favor," he also testified that Conroy told him that the state's case against him was "voluminous." Further, although the petitioner testified that he would have gone to trial if he had known that his issues regarding Simon's withdrawal and his right to self-representation could be raised on appeal if he were convicted, the court was free to discredit this testimony.

The record clearly supports the court's finding that the petitioner would not have declined a plea offer of thirty years of incarceration, with the possibility of parole, on a roll of the dice that he could convince a jury on a retrial, after he was convicted once and successfully appealed from that conviction, that he was

not guilty. A reversal of the judgment of conviction by this court on the grounds that the petitioner claims he would have raised on appeal, if successful, would not have resulted in an acquittal, but would have resulted in a retrial with the same evidence and with the petitioner again facing a possible sentence of 140 years in prison with no possibility of parole on the murder and conspiracy to commit murder charges. We conclude that the habeas court's finding that the petitioner failed to establish that there was a reasonable probability that he would not have pleaded guilty but for Conroy's alleged deficient performance was not clearly erroneous. Accordingly, we conclude, as a matter of law, that the habeas court properly determined that the petitioner failed to satisfy the prejudice prong of *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

STONE KEY GROUP, LLC *v.* REID TARADASH (AC 42524)

Lavine, Elgo and Alexander, Js.*

Syllabus

The plaintiff banking firm sought to recover damages from the defendant, a former employee of the plaintiff, for, inter alia, breach of contract in connection with bonus agreements between the parties. The plaintiff, which had paid annual discretionary bonuses to its employees, was unable to pay the plaintiff his 2014 bonus until 2016 because of financial difficulties. When the defendant shortly thereafter requested his bonus for 2015, U, the plaintiff's chief executive officer, told him that the plaintiff was not paying 2015 bonuses at that time because it had just paid 2014 bonuses. The defendant thereafter told U that, in exchange for the 2015 bonus, he would bring his family to the United States from the Philippines, buy a home in Connecticut and redouble his efforts at the plaintiff's firm. Pursuant to written agreements the parties executed, U agreed to pay the defendant an advance on the 2015 bonus and an

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

additional payment at a later date. Six days after receiving the advance on the 2015 bonus, the defendant informed U that he was resigning and moving to the Philippines. On his last day of employment, the defendant returned to the plaintiff a laptop computer that the plaintiff had provided to him. U thereafter discovered on the laptop e-mails from the defendant to friends and coworkers indicating that he had been preparing to start an information technology business in the Philippines upon receipt of the 2015 bonus. U concluded that the defendant had used the plaintiff's resources to develop that business. The plaintiff thereafter sought repayment of the 2014 bonus and the 2015 bonus advance. The trial court rendered judgment for the plaintiff on its complaint in part and thereafter granted in part the plaintiff's motion for attorney's fees. On the defendant's appeal and the plaintiff's cross appeal to this court, *held* that the trial court properly rendered judgment for the plaintiff and granted its motion for attorney's fees, and, because the court's memoranda of decision fully addressed the arguments raised in this appeal, this court adopted the trial court's memoranda of decision as proper statements of the facts and applicable law.

Argued September 17, 2020—officially released April 20, 2021

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 defendant filed a counterclaim; thereafter, the court, *Lee*, *J.*, granted the defendant's motion to cite in Stone Key Securities, LLC, et al., as counterclaim defendants; subsequently, the matter was tried to the court; thereafter, the complaint was withdrawn in part; judgment for the plaintiff on the complaint in part and on the counterclaim, from which the named defendant appealed to this court; subsequently, the court, *Lee*, *J.*, granted in part the plaintiff's motion for attorney's fees, and the named defendant filed an amended appeal and the plaintiff cross appealed to this court. *Affirmed.*

James Nealon, for the appellant-cross appellee (defendant).

Daniel L. Schwartz, with whom, on the brief, was *Howard Fetner*, for the appellee-cross appellant (plaintiff).

Opinion

PER CURIAM. This case involves a dispute between the plaintiff employer, Stone Key Group, LLC, and the defendant employee, Reid Taradash, concerning the payment of two discretionary bonus agreements to the defendant. On appeal, the defendant claims that the trial court improperly (1) ruled in favor of the plaintiff on his wage claim pursuant to General Statutes § 31-72,[1] (2) concluded that he fraudulently induced the plaintiff into paying an advance on his 2015 bonus, (3) permitted the plaintiff to rescind that advance, (4) awarded the plaintiff punitive damages, and (5) assessed postjudgment interest. In its cross appeal, the plaintiff claims that the court improperly (1) rejected its claim that the defendant breached the terms of an agreement regarding his 2014 bonus, (2) denied its motion for prejudgment interest, and (3) failed to award the full amount of its requested attorney's fees and costs. We affirm the judgment of the trial court.

The plaintiff is a private merchant banking firm in Greenwich. At all relevant times, the defendant, who now resides in the Philippines, was an employee of the plaintiff. As part of its benefits package, the plaintiff paid large, annual discretionary bonuses to its employees. Beginning in 2010, the plaintiff required its employees to sign contracts in order to receive those annual bonuses. The amount of each bonus was left to the discretion of the plaintiff on the basis of (1) an individual employee's performance, (2) the plaintiff's performance overall, (3) macroeconomic conditions, (4) the

[1] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages . . . or fails to compensate an employee . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

plaintiff's anticipated future revenues, and (5) bonuses paid by other competing investment banks.

From 2012 to 2014, the plaintiff suffered significant financial difficulties.[2] As a result, the defendant did not receive a bonus for the 2013 year until December 23, 2014, as memorialized in a contract titled "Revised 2013 Bonus Terms" (2013 bonus agreement). The 2013 bonus agreement contained a "clawback provision" that allowed the plaintiff to recover all or part of future annual bonuses for a specific year if an employee engaged in certain wrongful conduct specified therein.

The plaintiff did not pay any 2014 bonuses to its employees until the first quarter of 2016. On February 29, 2016, the defendant signed two documents. The first was titled "2014 Bonus Terms—Reid M. Taradash," and the second was titled "2014 Grant of Bonus Agreement" (2014 bonus agreement). The defendant subsequently received payment of his 2014 bonus in the amount of $524,999.92. The 2014 bonus agreement contained a clawback provision that allowed the plaintiff to recover 100 percent of the bonus it paid the defendant in the event that the defendant's employment was terminated "for cause."[3]

Shortly after receiving his 2014 bonus, the defendant asked the plaintiff's chief executive officer, Michael

[2] Specifically, in 2012, the plaintiff expected to earn $20 million but earned slightly more than $6 million. In 2013, the plaintiff's earnings were approximately $350,000, resulting in a loss of more than $11 million. In 2014, the plaintiff earned $3.5 million in revenue, resulting in a $3.3 million loss for the year.

[3] The 2014 bonus agreement defined "cause" as either (1) a "violation of a material policy of the [plaintiff]," (2) the "engagement in a dishonest or wrongful act involving fraud, misrepresentation or moral turpitude causing damage or potential damage [to the plaintiff]," (3) the "willful failure to perform a substantial part of [the defendant's] duties," (4) the engagement in "any conduct . . . which violates any federal or state securities law," or (5) "being materially deficient in . . . compliance or employment obligations to the [plaintiff]."

Urfirer, for a 2015 bonus. Urfirer replied that the plaintiff was not paying 2015 bonuses at that time because it had just paid 2014 bonuses. Urfirer and the defendant later had a second discussion about paying the defendant a 2015 bonus, during which the defendant told Urfirer that, in exchange for a 2015 bonus, he would bring his family to the United States from the Philippines, buy a home in Connecticut, and redouble his efforts at the firm.[4] The evidence presented at trial nonetheless revealed, as he stated in multiple e-mails to his friends and coworkers, that the defendant was preparing to move to the Philippines to start an information technology business with a coworker, Sumit Laddha, upon receipt of his 2015 bonus.

Urfirer ultimately agreed to pay the defendant a $250,000 advance on his 2015 bonus subject to the clawback provision, as well as an additional payment of at least $250,000 at a later date. As part of that transaction, the plaintiff and the defendant signed two documents on March 14, 2016: the "2015 Bonus Advance Terms—Reid M. Taradash" and the "2015 Grant of Bonus Advance Agreement" (2015 bonus advance agreement). The defendant was the only employee who received a 2015 bonus advance in March, 2016.

On March 21, 2016, six days after receiving the advance on his 2015 bonus, the defendant informed Urfirer that he was resigning and moving to the Philippines. In response, Urfirer told the defendant that he believed that the defendant had procured the bonuses under false pretenses and demanded that the defendant either return the bonuses or retract his resignation. The defendant did neither and relocated to the Philippines.

On his last day of employment, the defendant returned his employer provided laptop to the plaintiff.

[4] Although the defendant at trial denied making these promises to Urfirer, the court did not credit his denials and expressly credited Urfirer's contrary recollection of that conversation.

When Urfirer later used the laptop during a client presentation, the defendant's Google e-mail account appeared onscreen. At that time, Urfirer discovered many of the defendant's e-mails related to his new information technology business and concluded that the defendant had used the plaintiff's resources to develop that business. As a result, the plaintiff's legal counsel sent the defendant a letter notifying him that the plaintiff had reviewed his e-mails and demanding that he repay the 2014 bonus and 2015 bonus advance in full. When the defendant did not respond, Urfirer sent him a letter on September 12, 2016, in which he retroactively terminated the defendant's employment for cause.

On September 26, 2016, the plaintiff commenced the present action. The complaint alleged, inter alia, (1) breach of contract with respect to the 2014 bonus agreement and 2015 bonus advance agreement, (2) fraudulent inducement with respect to the 2015 bonus advance, (3) intentional misrepresentation, (4) negligent misrepresentation, (5) breach of fiduciary duty, (6) conversion, and (7) a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The defendant filed an answer denying the material allegations of the complaint, along with six special defenses and a thirteen count counterclaim.

An eight day court trial was held from December 12, 2017, to January 19, 2018. The court thereafter issued a comprehensive memorandum of decision on November 2, 2018, in which it set forth detailed findings of fact and a thorough analysis of the claims brought by the plaintiff and the defendant. On July 25, 2019, the court issued a second memorandum of decision in which it addressed the plaintiff's subsequent motion for attorney's fees, costs, and interest.[5] Our examination

[5] See *Stone Key Group, LLC* v. *Taradash*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6029872-S (July 25, 2019).

of the record on appeal, and the briefs and oral arguments of the parties, persuades us that the judgment of the trial court should be affirmed. Because the court's memoranda of decision fully address the arguments raised in the present appeal, we adopt the court's thorough and well reasoned decisions as proper statements of the facts and applicable law. See *Stone Key Group, LLC* v. *Taradash*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6029872-S (November 2, 2018) (reprinted at 203 Conn. App. 61, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 647–48, 235 A.3d 599, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020).

The judgment is affirmed.

APPENDIX

STONE KEY GROUP, LLC *v.* REID TARADASH*

Superior Court, Judicial District of Stamford-Norwalk
File No. CV-16-6029872-S

Memorandum filed November 2, 2018

Proceedings

Memorandum of decision on plaintiff's action for breach of contract. *Judgment for the plaintiff on its complaint in part and on the named defendant's counterclaim.*

Daniel L. Schwartz and *Howard Fetner*, for the plaintiff.

James Nealon, for the named defendant.

* Affirmed. *Stone Key Group, LLC* v. *Taradash*, 203 Conn. App. 55, A.3d (2021).

Opinion

LEE, J. This litigation arises out of a dispute between the plaintiff, Stone Key Group, LLC (Stone Key), a private merchant banking firm located in Greenwich, Connecticut (Company), and the defendant Reid Taradash, a former employee and vice president, currently residing in the Philippines. Mr. Taradash resigned from Stone Key in April, 2016, shortly after receiving a bonus payment for the year 2014 and an advance against the 2015 bonus. A few months later, while examining Mr. Taradash's laptop computer provided for his use by the Company, Stone Key discovered that Mr. Taradash had devoted substantial efforts to establish a business in the Philippines with his wife and another Stone Key employee, while still employed by Stone Key, as well as apparently misleading Stone Key about his intention to leave the Company once he received his bonus and advance. On September 12, 2016, Stone Key retroactively terminated Mr. Taradash's employment for cause.

Stone Key commenced the present litigation by service of the summons and complaint on the defendant on about September 26, 2016. The complaint originally contained ten counts, but the ninth count, sounding in conversion, was withdrawn on June 22, 2017. The first count of the complaint asserts that Mr. Taradash's termination for cause was justified by his several breaches of corporate obligations, including breach of agreements relating to the 2014 bonus and, pursuant to a clawback provision, seeks a repayment of the 2014 bonus in the amount of $524,499.92. In posttrial briefing, Stone Key withdrew the second and fourth counts, which had alleged that Mr. Taradash had worked for competitors after leaving Stone Key. The third count alleges breach of the 2015 bonus advance terms and bonus advance agreement, and seeks repayment of $249,500 pursuant to a clawback provision in those agreements. The fifth count sounds in fraudulent inducement

and alleges that Mr. Taradash misled Stone Key as to his intention to remain with the Company in order to induce it to pay him the advance against the 2015 bonus. The sixth and seventh counts arise out of the same behavior and sound in intentional and negligent misrepresentation, respectively. The eighth count alleges breach of the fiduciary duty of loyalty arising out of Mr. Taradash's efforts to start a business in the Philippines while employed by the Company. The tenth count alleges a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b (a), based on Mr. Taradash's outside business activities. In summary, the complaint alleges two clusters of activities by Mr. Taradash, i.e., the effort to develop an outside business while employed by the Company and deception in connection with obtaining an advance against the 2015 bonus payment.

On July 11, 2017, the defendant filed the operative answer, six special defenses against all counts, and thirteen counterclaims against three Stone Key entities and its principal, Mr. Michael Urfirer. The special defenses allege that employment related claims are not regulated by CUTPA; that Mr. Taradash did not violate any rules relating to the disclosure of outside business interests; the plaintiff is equitably estopped from complaining of the defendant's use of office facilities for personal purposes; that the defendant's status as an at-will employee permitted him to seek outside employment or business opportunities while in the plaintiff's employ; that the plaintiff breached its promises to the defendant and related agreements as to compensation; and that the noncompete provisions contained in the bonus agreements are invalid.

Mr. Taradash's counterclaims are based on claims of (1) breach of 2013 bonus obligations by the Company and two related entities, Stone Key Securities and Stone Key Partners, (2) in relation to the 2013 bonus, violation

of General Statutes § 31-71a (3) (wage statute) by, inter alia, failing to timely pay what was owed and requiring agreement to additional conditions in order to receive the compensation, (3) and (4) similar conduct with respect to the 2014 bonus, (5) with respect to the 2015 bonus, failure to pay what was owed, indeed paying only 50 percent of the correct amount, and improper imposition of onerous terms on payments already owed, (6) such conduct constituted a violation of the wage statute, (7) discontinuance at the end of 2012 of the prior practice of a Company match of Mr. Taradash's 401 (k) contributions, (8) such discontinuance constituted a violation of the wage statute, (9), (10) and (11) Mr. Taradash's entitlement to the full 2015 bonus under the doctrines of unjust enrichment, quantum meruit and promissory estoppel, (12) as against the Stone Key entities and Mr. Urfirer personally, fraud as to promises made to Mr. Taradash about the payment of the 2013, 2014 and 2015 bonuses, and (13) as against the same four counterclaim defendants, civil theft under General Statutes § 52-564 for theft of services by reason of their dishonesty in connection with the aforementioned bonuses.

The plaintiff and the counterclaim defendants filed the operative reply to the special defenses and answer and special defenses to the counterclaims on November 29, 2017. The counterclaim plaintiff filed his reply on January 16, 2018. The matter was tried to the court over eight trial days commencing on December 12, 2017, and concluding on February 5, 2018. The parties filed proposed findings of fact, memoranda of law and replies. The court heard closing argument on May 16, 2018.

As more fully explained below, the court finds for the defendant, Mr. Taradash, on Count I (Breach of Contract as to the 2014 Bonus), Count III (Breach of the 2015 Bonus Advance Agreement), Count VIII (Breach

of Fiduciary Duty), and Count X (Violation of CUTPA). The court finds for the plaintiff, Stone Key, on Count V (Fraudulent Inducement of the 2015 Bonus Advance Agreement), Count VI (Intentional Misrepresentation), Count VII (Negligent Misrepresentation), and the defendant's Fifth Counterclaim (Breach of Contract re 2015 Bonus) and Sixth Counterclaim (Violation of General Statutes §§ 31-72 and 31-73 re 2015 Bonus). It awards damages in favor of the plaintiff and against the defendant in the amount of $250,000, plus appropriate interest and attorney's fees.

FINDINGS OF FACT

Upon a review of the pleadings, the trial testimony and exhibits received into evidence, the court makes the following findings of material facts:

A

Parties and Their Relationship

1. Stone Key is a boutique investment banking firm based in Greenwich, Connecticut, focused on providing strategic advisory services to government and commercial technology clients, including defense and aerospace companies such as General Dynamics and Lockheed Martin.

2. Stone Key Partners, LLC, is an entity through which Stone Key performs investment banking advisory and strategic advisory consulting services.

3. Stone Key Securities, LLC, is registered with the Financial Industry Regulatory Authority (FINRA) as a broker dealer to enable Stone Key to advise on transactions that require FINRA membership, such as the merger of two public companies.

4. Mr. Michael Urfirer is an experienced investment banker. He was a cofounder and eventual sole principal of the Stone Key entities.

5. Nearly all of Stone Key's work involves advising clients in connection with mergers and acquisitions, although it also does some short-term strategic consulting work. On a majority of Stone Key's engagements, Stone Key's fees are 100 percent success based, with no retainer up front: Stone Key gets paid only if and when the deal closes, if the transaction does not close, Stone Key gets nothing. As a result, Mr. Urfirer described Stone Key's revenues as "extremely lumpy," with no source of reoccurring revenues; "you get very big peaks and very, very big valleys."

6. The defendant-counterclaim plaintiff, Reid Taradash, is a former employee of Stone Key. Mr. Taradash and Mr. Urfirer had worked together at Bear Stearns. When Mr. Urfirer started Stone Key, he invited Mr. Taradash to join him, and Mr. Taradash accepted. Mr. Taradash did not have a written employment agreement with Stone Key.

7. Mr. Taradash contends that Mr. Urfirer promised him that he would be paid "Street pay," meaning that his total compensation would consist of a salary and a bonus, the total of which would be within a range of compensation received by employees at comparable levels at Wall Street financial firms.

8. Mr. Taradash began working for Stone Key in 2008 as an Associate. In 2009 or 2010, he was promoted to vice president, and he received a raise in his base salary to $175,000. At the time, there were four or five other vice presidents at Stone Key.

9. Mr. Taradash's responsibilities as a vice president included working on transactions, as well as supervising the work of analysts and associates, helping other employees, and helping coordinate other vice presidents' work on transactions and new business presentations. Mr. Taradash was not responsible for bringing in business or generating revenues.

10. In performing his responsibilities at Stone Key, Mr. Taradash interacted with Stone Key's clients, including attending presentations to clients, coordinating due diligence requests, and obtaining financial information from clients.

11. Initially, the relationship between. Mr. Urfirer and Mr. Taradash was positive. In 2013, while waiting for their new residence to be ready, Mr. Taradash, his wife and their newborn son lived rent free for several weeks in the guest house on Mr. Urfirer's property. Mr. Taradash's mother-in-law visited from the Philippines and stayed there as well.

12. Mr. Taradash was registered with FINRA during employment with Stone Key.

B

Stone Key's Policies Regarding Outside Business Interests

13. Mr. Taradash's employment with Stone Key was governed by the Stone Key Compliance Manual and the TriNet Employee Handbook. Stone Key distributes copies of the Compliance Manual to employees annually and makes it available at all times on the firm's shared computer drive. Mr. Taradash received a copy each year when he worked for Stone Key.

14. TriNet is a professional employer organization that Stone Key uses for human resources related functions. Although Mr. Taradash claims he never received it, the TriNet Employee Handbook was available at all times to Mr. Taradash through the TriNet employee portal.

15. The Stone Key Compliance Manual requires employees to disclose all outside business interests to Stone Key and to refrain from engaging in any outside

business interests without the prior written approval of Stone Key's Chief Compliance Officer (CCO).

16. Section 4.2 of the Compliance Manual states:

"Employees must disclose all outside business interests ('Outside Business Interests') to the Firm on the Employee Interests Attestation. No Employee may be engaged in any other business, or be employed or compensated by any other person, or serve as an officer or director of any other business organization without the prior written approval of the CCO."

"Outside Business Interests include, but are not limited to, the following:

• working for another company, organization or person

• having a control relationship (acting as an officer, director, 10% or greater shareholder, partner or member of a group that has or seeks such a relationship (such as a creditors' committee)) in any publicly or privately held company or organization

• acting as sole proprietor or owner of a business

• accepting compensation from any other person as a result of any business activity other than a proportionate share of a passive investment

• receiving consulting fees."

17. Stone Key has revised the Compliance Manual from time to time, but Section 4.2, addressing Outside Business Interests, did not change materially during the term of Mr. Taradash's employment.

18. The Compliance Manual also states:

"If approved for an Outside Business Interest, an Employee may not represent himself or herself as an Employee or as acting on behalf of Stone Key while

working at the outside position. In general, the Employee may not use Stone Key facilities, equipment, stationery, or any other Stone Key assets to perform the outside position. In addition, Employees with approved Outside Business Interests are required to exercise their best efforts to avoid circumstances that give rise to an actual or potential conflict of interest, or the appearance of a conflict of interest between their Outside Business Interest and their responsibilities as an Employee of the Firm (and to disclose immediately any such actual or potential conflict or the appearance of such a conflict to a member of senior management)."

19. Mr. Taradash reviewed the Compliance Manual during his employment at Stone Key, and was aware that it prohibited employees from using Stone Key facilities, equipment, stationery, and other Stone Key assets to perform any outside business.

20. The Stone Key Compliance Manual states, "On an annual basis, Employees are required to attest . . . that all of their respective Employee and Employee-Related Investment Accounts, Outside Business Interests and Private Securities Transactions are properly disclosed in their respective Employee Interests Attestation and that all restrictions or conditions applicable are being complied with or have been satisfied."

21. The TriNet Employee Handbook prohibits Stone Key employees from "[c]onducting personal business, including outside employment, on company time or with company equipment, supplies, or other resources, unless allowed to do so by law."

22. The TriNet Employee Handbook states, "Your Company insists on the undivided loyalty of all employees, including management and non-management staff, except to the extent doing so would be inconsistent with applicable law."

23. Each year during Mr. Taradash's employment with Stone Key, he was asked to inform the company as to whether he was involved in any outside business interests. Each year during Mr. Taradash's employment with Stone Key, including on or about November 20, 2015, he signed an attestation that he had disclosed all of his Outside Business Interests and complied with all applicable restrictions or conditions. Mr. Taradash never identified any outside business interests on his annual attestations.

24. However, in 2013, Mr. Taradash requested and received Stone Key's approval to join the board of directors of a company called Premium Beverage Group, Inc. In a December 12, 2013 memorandum, Stone Key's General Counsel and Chief Compliance Officer, Allen Weingarten, informed Mr. Taradash that Stone Key had approved his joining the board of directors of Premium Beverage Group, Inc., subject to certain conditions, including the condition that Mr. Taradash not serve on the board's audit committee and the condition that Mr. Taradash's time commitment to Premium Beverage not interfere with his work for Stone Key. Mr. Taradash did not end up serving on Premium Beverage's board because the company did not go public and did not need a board.

C

Mr. Taradash's Bonuses

25. Stone Key paid bonuses to Mr. Taradash and other employees. As mentioned previously, Mr. Taradash testified that, when he began working at Stone Key, Mr. Urfirer guaranteed him that he would receive a bonus every year comparable to what was being paid by Wall Street firms, no matter what, regardless of the quality of his performance and regardless of Stone Key's finances.

26. Testimony at trial established that Wall Street bonuses to investment bankers and other participants

in the financial industry are based on multiple variables. Mr. Urfirer testified that he had received bonuses while working on Wall Street that had great variation in amount but that he always received an annual bonus of some sort.

27. At Stone Key, Mr. Urfirer determined its employees' bonuses based on a series of factors, including, but not limited to, the individual's performance, the performance of the firm overall; macroeconomic conditions, and the pipeline of anticipated future revenues. Stone Key asked its employees to gather information about what bonuses were being paid by other investment banks and present it to Mr. Urfirer. He considered that information, along with the factors discussed previously.

28. The course of dealing between Mr. Urfirer and Mr. Taradash demonstrates to the court's satisfaction that Mr. Urfirer did promise Mr. Taradash Wall Street compensation, but that Wall Street compensation is highly variable, and that Mr. Taradash accepted the method to determine his compensation as Mr. Urfirer described.

29. Mr. Taradash admitted that he ultimately received "Wall Street level" total compensation for each year that he worked at Stone Key through and including 2014.

30. Mr. Urfirer would discuss with Mr. Taradash the amount of the bonus that he was to receive a short time prior to the payment of Mr. Taradash's bonus. Before Mr. Urfirer told Mr. Taradash what his bonus was going to be for a given year, Mr. Taradash did not know the amount of bonus he would receive.

31. From 2010 through 2013, Stone Key typically paid each year's bonuses in the first quarter of the following year. Starting with the bonuses paid in connection with 2010, Stone Key began having employees sign written

agreements when they received their bonuses with clawback and noncompete provisions to encourage employee retention. As a result, beginning with 2010, Mr. Taradash's bonus agreements included provisions requiring him to repay a substantial portion of each discretionary bonus in the event his employment was terminated for cause.

D

Stone Key's Economic Difficulties

32. After several successful years, Stone Key had a very difficult business year in 2012. The company expected to earn more than $20 million in revenues in 2012, but it ended up earning only slightly more than $6 million. The results were even worse in 2013, when Stone Key's total revenues were approximately $350,000. Between 2012 and 2013, Stone Key lost more than $11 million.

33. Following the difficult economic years of 2012 and 2013, at the start of 2014, there were difficulties in the business relationship between Mr. Urfirer and his cofounder and partner, Denis Bovin. Mr. Urfirer and Mr. Bovin ultimately reached an agreement pursuant to which Mr. Bovin left Stone Key in April, 2014, and Mr. Urfirer remained with the firm. Mr. Urfirer bought Mr. Bovin's interest in Stone Key and injected a significant amount of his own money into the firm.

34. The agreement between Mr. Urfirer and Mr. Bovin included an agreement as to the total amount of money that Stone Key could use to pay employees' bonuses for 2013, although Mr. Urfirer had discretion as to how to allocate the bonus pool. The agreement between Mr. Urfirer and Mr. Bovin included a variety of conditions that were prerequisites for the payment of bonuses for 2013, including, but not limited to, the receipt of future revenues by Stone Key.

35. In 2014, Stone Key earned about $3.5 million in revenues, resulting in a $3.3 million loss for the year.

E

Mr. Taradash's 2013 Bonus

36. Mr. Taradash's bonus for 2013 was addressed in a series of written agreements. On April 22, 2014, Mr. Taradash and Mr. Urfirer signed documents titled 2013 Bonus Terms—Reid M. Taradash, and Retention Bonus Terms—Reid M. Taradash. In the 2013 Bonus Terms, Stone Key committed to pay Mr. Taradash a bonus in the amount of $328,124.92, subject to certain identified conditions, including a financial target, which was not met, and the bonus was not paid. In the Retention Bonus Terms, Stone Key committed to pay Mr. Taradash a bonus in the amount of $186,875 if the firm was able to raise $10 million of additional capital, but that target was also not met, and that bonus was not paid.

37. On December 23, 2014, Mr. Urfirer and Mr. Taradash signed a document titled Revised 2013 Bonus Terms—Reid M. Taradash. Pursuant to that agreement, Stone Key paid Mr. Taradash a bonus in the amount of $203,608.75, substantially less than the total 2013 bonus of $515,000, which had been discussed. The 2013 bonus payment was not subject to a clawback, but the agreement stated that future bonus payments would have such a provision. The Revised 2013 Bonus contained a seventy-five day notice provision in the event Mr. Taradash wished to resign from the Company. Mr. Taradash also released any claims that he might have against Stone Key through December 23, 2014.

38. On October 23, 2015, Mr. Urfirer and Mr. Taradash signed a document titled Final Revised 2013 Bonus Terms—Reid M. Taradash, pursuant to which Stone Key paid Mr. Taradash an additional 2013 bonus in the amount of $221,391.17.

39. The delay in paying the 2013 bonuses put significant financial pressure on Mr. Taradash. When ultimately paid in December, 2014, and October, 2015, the bonuses aggregated approximately two-thirds of Mr. Taradash's total compensation for 2013.

F

Mr. Taradash's Family Moves to the Philippines; Mr. Taradash Plans for a Business There

40. Mr. Taradash's wife, Alarice Lacanlale Taradash, is from a prominent family in the Philippines, and her mother is a successful entrepreneur there. In 2014, Mr. Taradash and his wife began planning to move to the Philippines, ideally in the summer of 2015, to start an information technology (IT) training business there with Mr. Taradash's friend and fellow Stone Key employee, Sumit Laddha.

41. Over the ensuing months, Mr. Taradash e-mailed various friends about his plans, which messages indicated his concern about violating the Company's policy about pursuing outside business interests.

42. On September 2, 2014, Mr. Taradash e-mailed his friend, Jackie Chan, about the IT training business and his plan to move to the Philippines to start the business. Mr. Taradash told Chan to keep quiet about the information he was providing because he and Mr. Laddha "would like to get our 2014 bonuses before we do anything."

43. In a September 30, 2014 e-mail, Mr. Taradash wrote to several other friends about his plan to move to the Philippines to start the IT training business and his plan to fund the business with some of his accumulated savings. Mr. Taradash wrote, "the amount of money that I've saved as a banker for 10 years is pathetic, but when taken to Manila, is a princely sum and can fund what I hope will be a successful business."

Similar to his e-mail to Chan, Mr. Taradash wrote, "please don't mention—I need to keep on the DL [i.e., down low] as I need my 1 bonus for this year before packing up."

44. On February 23, 2015, Mr. Taradash e-mailed another friend that he was "shipping my wife and son out to Manila the weekend of July 4th," and that he would "join them the following March." Mr. Taradash explained that he and his wife were moving to Manila because "we do want to start getting the business going." Mr. Taradash told his friend that, at that time, February, 2015, he had people in India identifying potential business partners, whom he was about to start interviewing. Mr. Taradash told his friend that he wanted to get another bonus payment before leaving for the Philippines.

45. On April 1, 2015, Mr. Taradash e-mailed his wife a series of questions to discuss with a lawyer in Manila about their move to the Philippines. In the e-mail, Mr. Taradash stated that he, his wife, and their son would be moving to the Philippines, and that they were "going to spread the move between July 2015 and April 2016." Mr. Taradash stated that they "plan on starting a Philippines-based business, or businesses, and we'd like to repatriate between US $500k—US $1M (from the US to the Philippines) as start-up capital for the businesses. We plan on deploying the majority of this capital over the next 3 years." Mr. Taradash also mentioned his "India-citizen partner," i.e., Mr. Laddha, "who will relocate from New York City to the Philippines and will repatriate the same amount of money."

46. At the end of June, 2015, Mr. Taradash told Mr. Urfirer about his wife's impending move to the Philippines. He said that she was moving because he could not break even on his "below market" base salary and, without payment of the bonuses, he was out of money.

As a result, there was no choice but to have his family move to the Philippines where they could live with Alarice's mother.

47. Mr. Urfirer offered to have them stay at his guest house again as they had in 2013, but Mr. Taradash declined because, he said, his wife wanted to "save face" by telling her friends that she "has some 'family business' that she has to attend to." Mr. Taradash said that he would have to go to the Philippines to visit his wife and son every two months, and that he hinted or hoped to bring them back to Connecticut in the first quarter of 2016, when bonuses were paid and they might be able to afford a house.

48. Mr. Taradash's wife and son moved to the Philippines in early July, 2015. After Mr. Taradash's wife and son moved to the Philippines, he traveled there multiple times, for one to two weeks at a time, over the rest of 2015. Mr. Taradash told Mr. Urfirer that he was traveling to the Philippines to visit his family. He did not tell him that he was going there to meet with third parties in order to develop the IT training business.

49. During the second half of 2015, even when Mr. Taradash was not in the Philippines, Mr. Urfirer testified that there was a change in his work habits. He would show up in the office in the middle of the day, sometimes wearing his tennis outfit. In a February 6, 2016 e-mail to Mr. Laddha, Mr. Taradash wrote, "There is actually a lot that I could be working on now for stone key [sic], but I can't bring myself to do much with this unresolved." However, Stone Key did not demonstrate any job responsibilities that Mr. Taradash did not fulfill during this period.

50. On December 8, 2015, Mr. Taradash and Mr. Laddha exchanged drafts of a "Company Overview" of their IT training business, which they had named "Edify." They also shared the company overview with a recruiter

they had engaged to help find an IT trainer for their business. In that document, Mr. Taradash and Mr. Laddha described Edify as "in the early implementation stage . . . after spending the last 15 months heavily diligencing the opportunity." They wrote, "By the end of Q1 2016, all three co-founders [i.e., Mr. Taradash, his wife, and Mr. Laddha] will have relocated to Manila."

51. On January 10, 2016, Mr. Taradash e-mailed a family friend and said, "I'm going to be making a similar move to you—leaving New York for Manila. I would love to hear about the transition and adjustment."

52. On January 26, 2016, Mr. Taradash e-mailed a friend that he would "be out there [i.e., Manila] q1 for sure."

53. As of February 1, 2016, Mr. Taradash gave his landlord notice that he would be moving out of his Connecticut apartment on April 1, 2016.

G

Stone Key Pays Mr. Taradash 2014 Bonus

54. Stone Key did not pay employee bonuses for 2014 in the first quarter of 2015 because it maintained it did not have the wherewithal to do so. The company ultimately paid bonuses for 2014 in the first quarter of 2016, after having received a significant fee in the fall of 2015.

55. On February 29, 2016, Mr. Urfirer and Mr. Taradash signed documents titled "2014 Bonus Terms—Reid M. Taradash" and "2014 Grant of Bonus Agreement," in which Stone Key committed to pay Mr. Taradash a 2014 bonus in the amount of $524,999.92, subject to certain conditions. Stone Key paid Mr. Taradash the $524,999.92 bonus on or about March 10, 2016.

56. The 2014 Grant of Bonus Agreement contains a seventy-five day notice period and a 100 percent claw-back provision in the event Stone Key terminates Mr. Taradash for cause, as follows:

"In consideration of my receipt of a 2014 bonus from Stone Key Group LLC (Firm), the undersigned hereby agrees that if, prior to December 31, 2016, (i) I voluntarily terminate my employment with the Firm in order to work for a Competitor (as defined below) or (ii) the Firm terminates my employment for Cause (as defined below), assuming in either case that the Firm continues as a going concern as of the date of such termination, I will pay to the Firm, promptly following my receipt of the Firm's request, an amount in cash equal to 100% of the gross amount of such bonus, less $500."

57. The 2014 Grant of Bonus Agreement defines "Cause" as follows:

" 'Cause' means . . . (v) my violation of a material policy of the Firm, (vi) my engagement in a dishonest or wrongful act involving fraud, misrepresentation or moral turpitude causing damage or potential damage to the Firm or any subsidiary or affiliate, (vii) my willful failure to perform a substantial part of my duties, (viii) any conduct by me which violates any federal or state securities law or other applicable regulation governing my conduct and of the business of the Firm or any subsidiary or affiliate . . . or (xi) my being materially deficient in my compliance or employment obligations to the Firm."

58. On February 29, 2016, the same day that Mr. Taradash signed the 2014 Bonus Terms and 2014 Grant of Bonus Agreement, he wrote a friend that his move to the Philippines had been pushed back to May 1, 2016.

59. Before Mr. Urfirer signed the 2014 Bonus Terms and the 2014 Grant of Bonus Agreement on behalf of

Stone Key, Mr. Taradash did not tell him that he was planning to move to the Philippines to join his wife, and he did not tell him that he had been developing a business in the Philippines. Mr. Urfirer testified that if Mr. Taradash had told him about his efforts to develop a business in the Philippines or about his plan to move to the Philippines, Mr. Urfirer would not have provided him the $524,999.92 discretionary bonus payment dated February 29, 2016.

60. Mr. Urfirer determined the amount of Mr. Taradash's 2014 bonus based on the various factors involved in the computation of prior years' bonuses, as discussed previously. He arrived at the amount of discretionary bonuses for the Stone Key employees by deciding the amount of total compensation to award a given employee for the year, then deducting the individual's salary. Mr. Urfirer decided to award Mr. Taradash total compensation of $700,000. He therefore deducted Mr. Taradash's salary of $175,000 from that total to arrive at a bonus of $524,999.92. At the time, Mr. Taradash was the sole vice president remaining with Stone Key.

H

Stone Key Pays Mr. Taradash Advance Against 2015 Bonus

61. Shortly after Mr. Taradash received his 2014 bonus, he approached Mr. Urfirer and requested a 2015 bonus. Mr. Urfirer replied that he was not paying any 2015 bonuses at that time because he had just paid 2014 bonuses, Stone Key had many other expenses, he was concerned about future revenue, and "he didn't have the money to pay 2015 bonuses." In response, Mr. Taradash again talked about the hardship he was facing with his family in the Philippines, and Mr. Urfirer said he would think about it.

62. Mr. Urfirer and Mr. Taradash had a subsequent discussion in March, 2016, during which Mr. Urfirer

reiterated that he wasn't paying other employees their 2015 bonuses at that time. Mr. Taradash said that, if Stone Key paid him a 2015 bonus, he would bring his family back from the Philippines, buy a house in Connecticut, and redouble his efforts to do his job. Mr. Urfirer ultimately told Mr. Taradash that he would pay him a $250,000 advance on his 2015 bonus, based on the conditions that they had discussed, and that he would pay Mr. Taradash an additional payment of at least $250,000 at a later date.

63. Mr. Taradash denies making the statements attributed to him about bringing his family back to Connecticut in the event he received the compensation under discussion. However, the court does not credit this testimony in light of the numerous e-mails to the contrary, which Mr. Taradash sent to his friends and colleagues, as well as the court's observation of the parties' demeanor during several days of testimony.

64. On the basis of clear and satisfactory evidence, the court finds that Mr. Taradash's statements to Mr. Urfirer were false and misleading, known to be false by Mr. Taradash, and made with the intent to deceive Mr. Urfirer because, at that time (March, 2016), Mr. Taradash had already decided to leave Stone Key and relocate to the Philippines, where his wife and son lived and where he, his wife and Mr. Laddha were planning to open an IT training business. In March, 2016, Mr. Taradash did not intend to bring his family back to Connecticut, buy a house here, or remain at Stone Key for any extended period of time.

65. Mr. Urfirer credibly testified that his understanding was that, if he paid Mr. Taradash a $250,000 bonus advance in March, 2016, Mr. Taradash would be diligent in performing his work duties going forward, he would move his family back to Connecticut, and he would stop his frequent trips to the Philippines—and that, if

Mr. Taradash had said that he wasn't planning to bring his family back, and that he would continue to conduct himself the way he had been doing, Mr. Urfirer would not have paid Mr. Taradash the $250,000 bonus advance.

66. On March 14, 2016, Mr. Urfirer and Mr. Taradash signed documents titled 2015 Bonus Advance Terms—Reid M. Taradash, and 2015 Grant of Bonus Advance Agreement, in which Stone Key committed to pay Mr. Taradash a 2015 bonus advance in the amount of $250,000, subject to certain conditions. Stone Key also committed to pay a second bonus installment in the amount of $250,000, subject to certain conditions, including, but not limited to, Stone Key's receiving an additional $10 million in revenues.

67. Stone Key paid Mr. Taradash the $250,000 bonus advance on March 15, 2016. The 2015 Grant of Bonus Advance Agreement includes a clawback provision in the amount of 100 percent of the bonus amount, less $500. Mr. Taradash was the only Stone Key employee who received a 2015 bonus advance in March, 2016.

68. The 2015 Grant of Bonus Advance Agreement also contained a 100 percent clawback provision in the event of a termination for cause, as follows:

"In consideration of my receipt of the 2015 bonus advance from Stone Key Group, LLC (the 'Firm'), the undersigned hereby agrees that if, prior to March 31, 2016, (i) I voluntarily terminate my employment with the Firm in order to work for a Competitor (as defined below) or (ii) the Firm terminates my employment for Cause (as defined below), assuming in either case that the Firm continues as a going concern as of the date of such termination, I will pay to the Firm, promptly following my receipt of the Firm's request, an amount in cash equal to 100% of the gross amount of the total 2015 bonus (including the 2015 bonus advance) received by me prior to the termination date, less $500."

The parties agree that the clawback provision includes a typographical error, i.e., instead of March 31, 2016, it was intended to reference March 31, 2017. The 2015 Grant of Bonus Advance Agreement contains the same definition of "Cause" as does the 2014 Grant of Bonus Agreement.

69. At the same time that Mr. Taradash was telling Mr. Urfirer that he would bring his family back from the Philippines and redouble his efforts to Stone Key if he received a 2015 bonus, he confirmed to others that those representations were false. In a March 11, 2016 e-mail to Mr. Laddha, Mr. Taradash stated that a $300,000 advance on his 2015 bonus from Stone Key "would allow me to go two or three years without needing a job/source of income versus now, where I'll have to find a job 6-9 months after we launch" the IT training business.

70. On March 14, 2016—the same day that Mr. Taradash signed the 2015 Bonus Advance Terms and 2015 Grant of Bonus Advance Agreement—Mr. Taradash wrote in an e-mail to his sister, "I will quit next week. Then I have to do 75 days, per my contract. Then I move to the Philippines. . . ." (Plaintiff's exhibit 30.) That same day, Mr. Taradash also e-mailed his sister that he would be "in the Philippines 100% in June, now that I have my financial situation in the best spot that it can be in."

71. Mr. Taradash admits that he was paid at Wall Street level for every full year that he worked at Stone Key through 2014. Mr. Taradash also admits that, because he only worked at Stone Key for part of 2016, he is not entitled to any bonus for that year. However, Mr. Taradash contends that he is entitled to receipt of the second half of his 2015 bonus.

I

Mr. Taradash Resigns from Stone Key; Subsequent Events

72. On March 21, 2016, six days after Stone Key had paid Mr. Taradash the 2015 bonus advance of $250,000, Mr. Taradash called Mr. Urfirer at home and resigned. In that conversation, Mr. Taradash told Mr. Urfirer for the first time that he was moving to the Philippines. Mr. Urfirer immediately said that Mr. Taradash had lied to him and procured his bonus under false pretenses, and that he needed to either return the money or live up to what he had agreed to do. Mr. Taradash said he would talk to his wife and get back to him.

73. Shortly after his resignation, Mr. Taradash went to the Philippines, while still employed by Stone Key because of the seventy-five day notice period before his resignation became effective. When Mr. Taradash returned from the Philippines, he told Mr. Urfirer that he would be willing to continue working for Stone Key but only from the Philippines. Mr. Urfirer rejected that demand as "absurd on its face."

74. Mr. Taradash later proposed additional conditions under which he might continue to work for Stone Key, including payment of the remainder of the 2015 bonus in $300,000 cash up front, promotion to managing director, permission to spend one-third of each month in the Philippines, waiver of the 2014 clawback, and a guaranteed bonus each year going forward. Mr. Taradash said that he would not tell anyone about the promotion until he was living in Asia and that he wanted it so that he could better market himself to other employers. Mr. Urfirer told Mr. Taradash that his demands were absurd and that no one would agree to them. Mr. Taradash acknowledged that Mr. Urfirer was correct.

75. On April 7, 2016, a day after Mr. Taradash had e-mailed a moving and storage company that he would

be "moving to Asia for the next few years," Mr. Taradash submitted a written notice of resignation to Stone Key. Mr. Taradash's last day of employment at Stone Key was June 29, 2016.

76. Stone Key had issued Mr. Taradash a laptop computer to use in connection with his work for the firm. On Mr. Taradash's last day at Stone Key, he returned the laptop to the Company, without erasing its memory. Mr. Urfirer later turned on the computer to use it for a client presentation. When he opened the Internet browser, Mr. Taradash's Gmail account appeared, without requiring a password. In Mr. Taradash's Gmail account, Mr. Urfirer saw e-mail messages relating to Mr. Taradash's resignation from Stone Key and many others, going back to 2014, relating to the IT training business.

77. One of the e-mails that Mr. Urfirer saw in Mr. Taradash's Gmail account was an August 13, 2014 e-mail from Mr. Taradash to Mr. Laddha and Mr. Taradash's wife concerning Edify. Mr. Urfirer was surprised when he saw that e-mail because he had not known that Mr. Taradash, his wife, and Mr. Laddha had been working to develop an IT training business. The e-mail demonstrated that Mr. Taradash had used his Stone Key computer and a Stone Key template to prepare a presentation for his IT training business, without Stone Key's permission. In fact, Mr. Taradash stated in the e-mail, "[d]on't mind the SKP [Stone Key Partners] logos."

J

Mr. Taradash Attempts to Develop Edify, an IT Training Business in Philippines

78. While Mr. Taradash was employed by Stone Key, he spent approximately eighteen months conducting due diligence and other activities in connection with

his work for Edify, the IT training business in the Philippines. Mr. Taradash's computer contained over one thousand e-mails relating to his efforts to establish Edify.

79. Mr. Taradash, along with his wife, Alarice, and Mr. Laddha, had developed the idea of Edify in 2014 and held themselves out to third parties as the three "Co-Founders" of the business. The objective of the business was to "provide supplemental Information Technology ('IT') training." Beginning in 2014, Mr. Taradash performed a substantial amount of work on Edify during his employment with Stone Key, without disclosing this activity to Mr. Urfirer or the Chief Compliance Officer, Mr. Alan Weingarten.

80. In August, 2014, Mr. Taradash traveled to the Philippines for a week of meetings relating to Edify. Mr. Taradash and his partners met with representatives of IT services companies such as Convergys, Accenture, Genpact, and Cognizant, as well as with Philippine government and educational officials. Several of these meetings were with companies that were clients of Stone Key or had a business relationship with it.

81. As mentioned previously, in August, 2014, Mr. Taradash prepared a draft presentation for Edify, using his Stone Key issued computer and Stone Key's presentation template and logo. Mr. Taradash prepared the document to show to IT services firms in order to help recruit a potential partner or employee for Edify. He also used his Stone Key computer to prepare a similar document titled "Vision, Partner Requirements and Benefits," in order to recruit a potential partner or employee for Edify.

82. In March, 2015, Mr. Taradash used his Stone Key computer to prepare a script for a discussion with a potential employee whom he and his partners were attempting to recruit to Edify. Mr. Taradash e-mailed

the script to his partners, Mr. Laddha and his wife, during the Stone Key workday.

83. On April 24, 2015, Mr. Taradash e-mailed Anubhav Pradhan, an IT trainer for Wipro in India, to recruit him to join Edify. Stone Key was not aware of Mr. Taradash's and Edify's efforts to recruit Pradhan, while Stone Key was attempting to develop a business relationship with Wipro.

84. Mr. Taradash and his partners—his wife and Mr. Laddha—contacted various companies in the Philippines to find out if they would be interested in hiring employees with the skills that they planned to impart through Edify.

85. On July 13, 2015, Mr. Laddha e-mailed Jacob Dalevi Artelius, an employee of Accenture, to "pick his brain" about how to make IT talent in the Philippines more employable to companies like Accenture. At that time, Accenture was a client of Stone Key. Also in July, 2015, Mr. Taradash's wife sent similar e-mails to representatives of IBM and HP, also potential clients, in order to set up meetings with them for August, 2015.

86. In August, 2015, Mr. Taradash again traveled to the Philippines for meetings relating to Edify, including with IBM, HP, and Accenture, and did not disclose those meetings to Mr. Urfirer. Instead, Mr. Taradash told Mr. Urfirer that he was taking a vacation to visit his family.

87. In October, 2015, Mr. Taradash's wife e-mailed employees of Ernst & Young in the Philippines with a company overview of Edify. The overview identified three courses that Edify planned to offer, based on the due diligence that Mr. Taradash and his partners had conducted, including their discussions with IT companies. The overview stated that Edify initially planned to have one location in Metro Manila, and then to expand to four or five sites in Metro Manila within a

few years, and it described Edify as being "in the early execution stages."

88. Mr. Taradash and his wife committed to invest $500,000 of their own money in Edify, which they represented to third parties. Their plan was for Mr. Taradash, his wife, and Mr. Laddha collectively to invest $1 million of their own money to launch Edify, half from Mr. Taradash and his wife and half from Mr. Laddha.

89. Mr. Taradash prepared a financial model for Edify, which indicated that he and his partners planned to launch Edify in 2016. Mr. Taradash's plan was for Edify to generate profits.

90. Mr. Taradash interviewed a number of people who were being considered for the position of Edify's principal IT trainer. Mr. Taradash participated, along with his wife and Mr. Laddha, in the process of evaluating candidates, deciding whom to interview, and interviewing them. They interviewed candidates via Skype, with each interview lasting an hour or more.

91. Mr. Taradash and his partners engaged a recruiting firm, Ad Astra Consultants, to identify potential IT trainers for Edify. Mr. Laddha paid a $2000 retainer to the recruiting firm, and Mr. Taradash reimbursed him for half of that amount. The firm identified candidates, and Mr. Taradash and his partners interviewed them. Mr. Laddha conducted initial interviews of the candidates, then Mr. Taradash and his wife joined him in follow-up videoconference interviews of the candidates. Mr. Taradash conducted those interviews through his Stone Key computer or his Stone Key cell phone.

92. Mr. Taradash and his partners were interested in hiring one of the candidates whom the recruiting firm had identified, Sarvesh Shrivastava. On March 13, 2016, the day before Mr. Taradash signed the 2015 Bonus

Advance Terms and 2015 Grant of Bonus Advance Agreement, he e-mailed Mr. Shrivastava about a possible interview. In the e-mail to Mr. Shrivastava, Mr. Taradash stated that Edify had "current funding," a "business plan," and "a detailed financial model that includes an annual bottoms-up cost build, as well as a revenue forecast built upon student uptake and cost of offering assumptions."

93. In March, 2016, also during the same time period when he was seeking a 2015 bonus advance from Mr. Urfirer, Mr. Taradash discussed with Mr. Laddha a trip to India to interview Mr. Shrivastava in person. On March 16, 2016, two days after Mr. Taradash signed the 2015 Bonus Advance Terms and 2015 Grant of Bonus Agreement, and one day after Stone Key paid Mr. Taradash the 2015 bonus advance, Mr. Taradash wrote to Mr. Laddha, "If I go to India, MJU [i.e., Mr. Urfirer] will definitely sue us." Mr. Taradash nevertheless agreed to travel with Mr. Laddha to India to interview Mr. Shrivastava, but the trip was canceled in mid-April, 2016, when Mr. Shrivastava decided to stay with his existing employer.

94. Mr. Taradash and Mr. Laddha testified that Mr. Shrivastava's decision not to join Edify was a fatal blow to their plans and that they abandoned the project in approximately May, 2016.

95. Mr. Taradash never disclosed Edify to Stone Key.

96. Edify was never incorporated. The trade name was never registered. No licenses were obtained or bank accounts established. No employees were hired, although a search firm was retained with a $2000 retainer. No revenues were generated by the Edify project.

97. Stone Key was not in the information technology training business. It had no business presence in the Philippines.

K

Other Outside Activities by Mr. Taradash

98. On February 19, 2016, Mr. Taradash e-mailed an Asian company called Green Energy Storage as follows: "I am a Senior Vice President at Stone Key Partners, a merchant banking firm based in Greenwich, CT (a hedge fund and asset management hub near New York City). I am very interested in investing in Green Energy Storage, preferably personally, but potentially through my company."

99. Mr. Taradash explored an investment in Green Energy Storage, including a potential joint venture, on his own behalf. Upon review of the evidence, the court finds that Mr. Taradash did not disclose his discussions with Green Energy to Stone Key.

100. Between February 19, 2016, and June 29, 2016, Mr. Taradash sent and received 106 e-mails in connection with his work related to Green Energy Storage.

101. Also while Mr. Taradash was employed by Stone Key, he worked with a group interested in buying a failing insurance company in the Philippines, which they referred to as "Project Pac-Man." Mr. Taradash prepared a due diligence tracker and a preliminary plan, and drafted seventy-five questions as part of the diligence process.

102. Between April 3, 2016, and June 29, 2016, Mr. Taradash sent and received 535 e-mails in connection with his work on Project Pac-Man.

103. Based on a review of the evidence, the court concludes that Mr. Taradash did not disclose his work on Project Pac-Man to Stone Key.

104. Stone Key did not submit any evidence at trial that any of Mr. Taradash's extracorporate activities, such as Edify, caused Stone Key to suffer any damage.

No evidence of lost profits or loss of clients or any other negative impact on the Company was presented to the court.

L

Stone Key Terminates Mr. Taradash's Employment for Cause

105. On August 29, 2016, Stone Key's counsel, Attorney Daniel Schwartz at Day Pitney, sent Mr. Taradash a letter advising him that Stone Key had reviewed his e-mails, and demanded that he repay the 2014 bonus of $524,999.92 and the 2015 advance of $250,000. The letter claimed he had breached the agreements relating to the 2014 bonus and the 2015 bonus because of Mr. Taradash's participation in outside business activities, failure to disclose his outside business activities to Stone Key, using Stone Key's facilities and equipment in furtherance of his outside business activities, submitting false attestations to Stone Key, and making misrepresentations to Stone Key in order to fraudulently obtain bonus payments.

106. On September 12, 2016, Mr. Urfirer sent Mr. Taradash a letter terminating his employment with Stone Key for cause ("the Termination Letter"). The letter was based on the grounds set forth in the letter dated August 29, 2016, from counsel to Mr. Taradash based on information that Stone Key had acquired after Mr. Taradash's last day at Stone Key, when Mr. Urfirer discovered the e-mails in Mr. Taradash's Gmail account. Specifically, the Termination Letter claimed that (1) he had gone to work for a competitor, and (2) Stone Key was terminating his employment for cause because he (i) violated material policies of Stone Key, (ii) engaged in dishonest or wrongful acts involving fraud, misrepresentation or moral turpitude causing damage to Stone Key, (iii) wilfully failed to perform a substantial part of his duties for Stone Key, and (iv) had been materially

deficient in his compliance and/or employment obligations. The letter claimed that Stone Key would have terminated his employment for cause prior to his resignation if it had been aware of Mr. Taradash's wrongdoing.

107. On December 7, 2017, shortly before the commencement of trial, Stone Key issued Mr. Laddha a formal written warning as a result of his role in Edify and reserved the right to take further disciplinary action against him. Mr. Laddha testified that he had suggested the Edify concept to Mr. Taradash because of his wife's contacts in the Philippines and that he suggested the name of the venture. Stone Key did not report any violation of FINRA Rule 3270 by Mr. Laddha to FINRA. Mr. Weingarten explained why Stone Key did not report Mr. Laddha's alleged violation: "We looked at the requirements of the rule and we don't think that it is necessary. . . . [W]e're very confident that there's no widespread impact on our clients or the marketplace, et cetera, and, therefore, we are very comfortable that we don't have to make disclosure."

M

Expert Testimony Regarding Mr. Taradash's Compliance with FINRA Rule 3270

108. In its letter to Mr. Taradash dated August 29, 2016, Stone Key did not list as a cause any security or regulatory violations. Nevertheless, at trial, Stone Key claimed that FINRA Rule 3270 was comparable to Section 4.2 of the Company's Compliance Manual, the violation of which was listed as a cause for termination. As mentioned previously, Section 4.2 requires employees to disclose "all outside business interests" and includes various examples.

109. FINRA Rule 3270, as adopted in 2010, provides in pertinent part:

"Outside Business Activities of Registered Persons

"No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member."

110. With respect to Mr. Taradash's compliance with Rule 3270, Stone Key presented an expert witness, Attorney Miriam Lefkowitz, with extensive experience in the regulatory aspects of the securities industry. She opined that Mr. Taradash had violated Rule 3270 because (a) he "engaged in many activities of a business nature in connection with a business with . . . a reasonable expectation of compensation" and (b) he had served as a partner in an unrelated business endeavor.

111. Ms. Lefkowitz identified a number of steps that Mr. Taradash took that gave rise to an obligation under Rule 3270 to disclose Edify to Stone Key. In addition to holding himself out as a partner, and claiming that he was committing capital to the enterprise, he met with Accenture, which was a client of Stone Key. Ms. Lefkowitz also testified that it is "a compelling factor" that one presumably sets up a business in anticipation of making money, not as a hobby, and that Rule 3270 clearly applied to startups.

112. In discussing the drafting history of Rule 3270, Ms. Lefkowitz said Rule 3270 represented an intentional broadening by FINRA of the regulatory scope of its predecessor, Rule 3030. That rule provided: "No person associated with a member in any registered capacity shall be employed by, or accept compensation from, another person as a result of any business activity . . .

outside the scope of his relationship with his employer firm" without giving prior notice to his employer firm. Ms. Lefkowitz stated that, in her opinion, Mr. Taradash had not violated Rule 3030 because he was not "employed by" and had not "accepted compensation from" another person as a result of an outside business activity. Ms. Lefkowitz also observed that, in adopting Rule 3270, FINRA declined to define the terms "business activity" or "reasonable expectation of compensation" because clarification might facilitate evasion.

113. When asked to further specify what activities of Mr. Taradash with respect to Edify violated Rule 3270, Ms. Lefkowitz stated that one had to consider the totality of circumstances but that Mr. Taradash was obligated to disclose his activities with Edify to Stone Key, "[c]ertainly by the spring of 2015 and probably earlier. When he goes to a third party, the prospective IT trainer . . . there have been enough—you're going out trying to recruit someone presenting yourself as an entrepreneur who has partners whose [sic] in the midst of launching an IT training focused venture in the Philippines. Again, you have partners. You've spent a year and a half diligencing it. You've reached out to Accenture, IBM, et cetera . . . you've already gotten feedback from your likely sources of revenue, for potential sources of revenue. You know, if you're getting paid for placement, and they've already [committed] financing."[1]

114. Stone Key has not advised FINRA of Mr. Taradash's alleged violation of FINRA Rule 3270, claiming it might trigger an investigation by FINRA, and they did not want to ruin his career. Mr. Weingarten stated: "The

[1] Attorney Lefkowitz was not permitted to render an opinion as to whether Mr. Taradash violated Section 4.2 of the Compliance Manual because that topic was not contained in her expert disclosure, as required by Practice Book § 13-4 (b).

whole purpose behind the litigation was to recover some money. It wasn't to destroy his life."

DISCUSSION

This case turns, in the first instance, on the resolution of four questions:

(1) Is Mr. Taradash entitled to retain his 2014 bonus or must he repay it to Stone Key?

(2) Is Mr. Taradash entitled to retain the advance paid to him against his 2015 bonus?

(3) Is Mr. Taradash entitled to receive the balance of his 2015 bonus? And

(4) has Stone Key proven that Mr. Taradash's Edify activities while in Stone Key's employ constitute a breach of CUTPA?

To answer these questions, the court will evaluate the law, the facts and the defendant's special defenses relative to each remaining count of the complaint. The court will also evaluate any operative counterclaims as asserted by the defendant.

Count I

Breach of Contract as to 2014 Bonus

As found previously, on February 29, 2016, Mr. Taradash signed the 2014 Bonus Terms and 2014 Grant of Bonus Agreement (collectively, the 2014 Contract), pursuant to which he was paid $524,999.92 as his 2014 bonus. The 2014 Contract provides that this amount is subject to a clawback if Mr. Taradash (1) were to resign prior to December 31, 2016, to work for a competitor, or (2) be terminated for cause, as defined in the 2014 Contract, prior to December 31, 2016.

Stone Key no longer contends that Mr. Taradash worked for a competitor after his resignation and, in

posttrial briefing, it indicated the withdrawal of Counts II and IV, accordingly. As a result, Stone Key seeks the return of the 2014 bonus on the basis of its termination for cause of Mr. Taradash by the Termination Letter dated September 12, 2016. The Termination Letter articulated four grounds for termination, the validity of which the court must evaluate: (i) violation of material policies of Stone Key; (ii) dishonest or wrongful acts involving fraud, misrepresentation or moral turpitude causing damage to Stone Key; (iii) wilful failure to perform a substantial part of his duties for Stone Key; and (iv) material deficiency in compliance and/or employment obligations.

Before turning to the individual grounds, a discussion is helpful of the principles relating to the use of after-acquired evidence and to the nature of "cause" adequate to justify termination.

After-Acquired Evidence

In the leading case of *Preston* v. *Phelps Dodge Copper Products Co.*, 35 Conn. App. 850, 647 A.2d 364 (1994), the Appellate Court said: "The proper role of after acquired evidence as it affects damages for breach of a contract of employment raises an issue of first impression in Connecticut. Public policy would seem to disfavor compensating an employee for the loss of future wages, even though he was wrongfully discharged, when the employer proves by a fair preponderance of the evidence that it subsequently discovered evidence of employee misconduct that would have justified the termination of employment.

"In the federal system, as a general rule, after acquired evidence is relevant to the relief due a successful plaintiff in an employment discrimination discharge case. . . . If the after acquired evidence, in and of itself, would have caused the employer to discharge

the employee, it would be inappropriate to order reinstatement of employment or front pay. *Wallace* v. *Dunn Construction Co.*, 968 F.2d 1174, 1181 (11th Cir. 1992). '[I]f [an employer] has a legitimate motive that would cause [an employee's] discharge, then . . . front pay would go beyond making [the employee] whole and would unduly trammel [the employer's] freedom to lawfully discharge employees. Because [the employee] would no longer be employed at [the employer's place of business], [he] also would not be entitled to an injunction against further unlawful practices.' Id., 1182." (Citations omitted.) *Preston* v. *Phelps Dodge Copper Products Co.*, supra, 35 Conn. App. 858; see also *Torrington* v. *AFSCME, Council 4, Local 1579*, Superior Court, judicial district of Litchfield, Docket No. CV-00-0083909-S (July 11, 2002) (*Trombley, J.*) (32 Conn. L. Rptr. 681, 686) ("[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone [if] the employer [had] known of it at the time of the discharge" (emphasis omitted; internal quotation marks omitted)); *Chabot* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. 101562 (March 29, 1996) (*Vertefeuille, J.*) (court applied stated public policy to limit wrongfully terminated employee's recovery of back wages to date when after-discovered evidence would justify his termination).

Thus, the key to the proper use of after-acquired evidence, upon which so much of this case rests, is a finding that the subsequently discovered evidence of employee misconduct would have justified the termination of employment at the time of the misconduct.

Adequate Cause for Termination

In *Slifkin* v. *Condec Corp.*, 13 Conn. App. 538, 538 A.2d 231 (1988), the Appellate Court defined "cause"

in the employment context as follows: "Good cause, as distinguished from the subjective standard of unsatisfactory service, is defined as [s]ubstantial reason, one that affords a legal excuse . . . [l]egally sufficient ground or reason. Black's Law Dictionary (5th Ed. 1979). Good cause or [j]ust cause substantially limits employer discretion to terminate, by requiring the employer, in all instances, to proffer a proper reason for dismissal, by forbidding the employer to act arbitrarily or capriciously. . . . *Sheets* v. *Teddy's Frosted Foods*, *Inc.*, [179 Conn. 471, 475, 427 A.2d 385 (1980)]." (Citation omitted; internal quotation marks omitted.) *Slifkin* v. *Condec Corp.*, supra, 549.

In discussing *Slifkin*, the Appellate Court recently held in *Madigan* v. *Housing Authority*, 156 Conn. App. 339, 113 A.3d 1018 (2015): "[T]he reason or reasons for termination must be substantial. *Slifkin* v. *Condec Corp.*, supra, 13 Conn. App. 549. A reason that is less than substantial would be an improper reason for dismissal, i.e., arbitrary and capricious." (Emphasis omitted.) *Madigan* v. *Housing Authority*, supra, 356–57.

As a result of the foregoing authority, in order to constitute "cause," the reason for termination must be substantial. It is against these principles that the court will assess the validity of the grounds set forth in the Termination Letter with respect to the 2014 Bonus Agreement.

(i)

Violation of Material Policies of Stone Key

The Termination Letter explained the first ground for termination as follows:

"For instance, while you were employed by Stone Key, you wrongfully initiated and participated in outside business activities; you failed to disclose your outside

business activities to Stone Key . . . [and] you submitted false attestations to Stone Key."

Unlike FINRA Rule 3270, which does not define "outside business activities," Stone Key's Compliance Manual defines "Outside Business Interests." As set forth previously, Section 4.2 of the Compliance Manual states:

"Employees must disclose all outside business interests ('Outside Business Interests') to the Firm on the Employee Interests Attestation. No Employee may be engaged in any other business, or be employed or compensated by any other person, or serve as an officer or director of any other business organization without the prior written approval of the CCO."

The evidence at trial clearly showed that Mr. Taradash made no money on Edify or his other pursuits. Nor was he an officer or director of Edify. In his extracorporate activities, Mr. Taradash was not "employed or compensated by any other person," nor was he an officer or director of any other business organization. Whether he was "engaged in any other business" depends on the definition of "business interests," as discussed in the next paragraph of Section 4.2:

"Outside Business Interests include, but are not limited to, the following:

• working for another company, organization or person

• having a control relationship (acting as an officer, director, 10% or greater shareholder, partner or member of a group that has or seeks such a relationship (such as a creditors' committee)) in any publicly or privately held company or organization

• acting as sole proprietor or owner of a business

• accepting compensation from any other person as a result of any business activity other than a proportionate share of a passive investment

• receiving consulting fees."

None of these activities appears to apply to Mr. Taradash's activities. He was not working for another company, organization or person; he was trying to start one. He did not have a control relationship "in any publicly or privately held company or organization" because Edify did not exist. He was not acting as sole proprietor or owner of a business, because, again, Edify did not exist. He did not accept compensation from any other person or receive consulting fees.

The list of examples of prohibited business activities is not exclusive. They include, "but are not limited to," these examples. However, the termination is limited by the terms of the 2014 Bonus Agreement to breach of "material" policies of Stone Key. The listed examples all involve compensated or gainful positions or activities. Edify was neither. Significantly, Stone Key presented no evidence of harm to it arising from Edify or the other opportunities pursued by Mr. Taradash. Accordingly, the court concludes that these activities do not constitute a sufficient breach of a material policy to justify termination. Further, the fact that Stone Key did not report these activities by Mr. Taradash or Mr. Laddha to FINRA[2] strongly supports the conclusion that Stone

[2] FINRA Rule 4530.—Reporting Requirements—provides in pertinent part:

"(a) Each member shall promptly report to FINRA, but in any event not later than 30 calendar days, after the member knows or should have known of the existence of any of the following . . .

"(2) an associated person of the member is the subject of any disciplinary action taken by the member involving suspension, termination, the withholding of compensation or of any other remuneration in excess of $2,500.

"(b) Each member shall promptly report to FINRA, but in any event not later than 30 calendar days, after the member has concluded or reasonably should have concluded that an associated person of the member . . . has violated any securities-, insurance-, commodities-, financial-, or investment-related laws, rules, regulation or standards of conduct of any domestic or foreign regulatory body or self-regulatory organizations."

Key would not have terminated Mr. Taradash if it had found out about the activities while they were occurring in 2014, 2015 and early 2016.

It follows from this discussion that Mr. Taradash cannot be punished for failure to list these activities on the annual attestation form because the Stone Key policies did not require him to list them, as he believed to be the case.

(ii)

Dishonest or Wrongful Acts Involving Fraud, Misrepresentation or Moral Turpitude Causing Damage to Stone Key

This ground is asserted in connection with the receipt of the advance of the 2015 bonus, as pleaded in Count IV and clarified by the letter of counsel dated August 29, 2016, and will be discussed in the next section of this decision.

(iii)

Wilful Failure to Perform Substantial Part of His Duties for Stone Key

Mr. Taradash undoubtedly spent much time during business hours working on Edify. The plaintiff produced over a thousand e-mails on Mr. Taradash's company computer relating to that effort over a substantial period of time. However, no Stone Key witness could identify any deficiency in the performance of Mr. Taradash's duties. Indeed, Mr. Urfirer was profoundly displeased that Mr. Taradash was not staying with the company. Once again, the court concludes that Stone Key would not have terminated Mr. Taradash for dereliction of his duties if it had been aware of his Edify activities at the time they were occurring.

(iv)

Material Deficiency in His Compliance and/or Employment Obligations

The Termination Letter does not specify any deficiencies of this nature, other than with reference to the Compliance Manual. Neither the Termination Letter nor the complaint mentions noncompliance with FINRA Rule 3270. Indeed, Mr. Weingarten testified that he intentionally left out subparagraph (viii) from the definitions of cause in the 2015 Grant of Bonus Agreement, which lists "any conduct by me which violates any federal or state securities law or other applicable regulation governing my conduct and of the business of the firm or any subsidiary or affiliate."

However, even if it were determined that section (iv) would refer to a violation of FINRA Rule 3270, the court cannot conclude that a material violation occurred. Attorney Lefkowitz opined that Mr. Taradash's status as a partner in the Edify enterprise and his reasonable expectation of compensation from it might trigger the disclosure requirement. However, the cases upon which she relied involved a far greater engagement in the actual business of the other enterprise. Here, quite simply, nothing happened. As mentioned previously, no harm to the Company, its customers or to consumers was articulated. As with the purported violation of the Compliance Manual, Stone Key has failed to prove that it would have terminated Mr. Taradash for violating Rule 3270 if it had been aware of his activities. Again, the failure to report his activities or those of Mr. Laddha belie any such contention. In summary, the court concludes that Mr. Taradash's extracorporate activities did not constitute a material deficiency of his compliance obligations.

As a result, the court rules against the plaintiff on the first count of the complaint.

Count III

Breach of 2015 Bonus Advance Agreement

The August 29, 2016 letter from Stone Key's counsel to Mr. Taradash contended that termination of the 2015 Bonus Advance Agreement was justified by his previous breaches of the 2014 Bonus Agreement and because he "fraudulently induced Stone Key" to make the 2015 bonus advance payment. Count III of the complaint is pleaded somewhat differently. It also relies on Mr. Taradash's acts prior to March 31, 2016, which it alleges he fraudulently concealed, and adds as a ground the fact that he was terminated prior to March 31, 2017.

However, because the court concludes that the termination on the basis of alleged breaches of the 2014 Bonus Agreement was invalid, the concealment of those underlying activities and a termination based on them cannot, in themselves, justify termination of the 2015 Bonus Advance Agreement. Mr. Taradash's commission of fraud, discussed below, is a different matter.[3]

Count V

Fraudulent Inducement of 2015 Bonus Advance Agreement

Count V alleges that, in order to persuade Mr. Urfirer to give him an advance against his 2015 bonus, Mr. Taradash promised that he would remain with Stone Key for the rest of 2016, would relocate his family back to Connecticut, and would otherwise devote his time to advancing Stone Key's interests. The complaint alleges that all of these representations were false, were known by Mr. Taradash to be false, were made for the purpose

[3] Because the court determines that Stone Key has not adequately proven breaches of the 2014 and 2015 Contracts, it does not reach the defendant's special defenses relating to those agreements, including the contention that the contracts involved "wages" within the meaning of § 31-71a, except as specifically discussed below.

of inducing the advance, and that Mr. Urfirer believed them and agreed to the advance to the plaintiff's detriment.

The law with respect to fraudulent inducement is well established. As stated by the Appellate Court: "Fraud and misrepresentation cannot be easily defined because they can be accomplished in so many different ways. They present, however, issues of fact. . . . The trier of facts is the judge of the credibility of the testimony and of the weight to be accorded it." (Citation omitted; internal quotation marks omitted.) *Maturo* v. *Gerard*, 196 Conn. 584, 587–88, 494 A.2d 1199 (1985). "The essential elements of a cause of action in fraud are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . All of these ingredients must be found to exist; and the absence of any one of them is fatal to a recovery. . . . Additionally, [t]he party asserting such a cause of action must prove the existence of the first three of [the] elements by a standard higher than the usual fair preponderance of the evidence, which higher standard we have described as clear and satisfactory or clear, precise and unequivocal. . . . *Citino* v. *Redevelopment Agency*, 51 Conn. App. 262, 275–76, 721 A.2d 1197 (1998)." (Internal quotation marks omitted.) *Harold Cohn & Co.* v. *Harco International, LLC*, 72 Conn. App. 43, 51, 804 A.2d 218, cert. denied, 262 Conn. 903, 810 A.2d 269 (2002).

As set forth in the findings of fact, the court finds that Stone Key proved by clear and satisfactory evidence the first three elements of fraudulent inducement, i.e.:

1. Mr. Taradash stated his intention to move his family back to Connecticut, to buy a house and to devote

himself to the best interests of the Company if he received an advance on his 2015 bonus;

2. These representations were untrue and known to Mr. Taradash to be untrue when he stated them; and

3. Mr. Taradash made these statements to induce Stone Key to give him an advance against his 2016 bonus.

Additionally, the court finds that Stone Key relied on these statements to its detriment by paying Mr. Taradash a bonus in advance of when it would otherwise have paid it.

The defendant contends that he could not have fraudulently induced payment of the advance (or engaged in any kind of misrepresentation) because Stone Key was obligated to pay him his 2015 bonus. However, this argument fails because the course of dealing between the parties demonstrates that the timing of payment of these bonuses was highly variable and was at the discretion of Mr. Urfirer. The court finds no obligation on the part of Stone Key to pay Mr. Taradash an advance prior to payment of the full 2015 bonus.

Having demonstrated fraudulent inducement as to the 2015 bonus advance, Stone Key has the option of voiding the 2015 Advance Agreement or affirming it and suing for damages for noncompliance. As our Supreme Court stated in *Texaco, Inc.* v. *Golan*, 206 Conn. 454, 538 A.2d 1017 (1988): "We have stated that 'fraud in the inducement of a contract ordinarily renders the contract merely voidable at the option of the defrauded party, who also has the choice of affirming the contract and suing for damages. If he pursues the latter alternative, the contract remains in [force. *A. Sangivanni & Sons* v. *F. M. Floryan & Co.*, 158 Conn. 467, 472, 262 A.2d 159 (1969)].' " *Texaco, Inc.* v. *Golan*, supra, 459 n.5.

Stone Key has chosen to rescind the 2015 Bonus Advance Terms. That agreement, as executed by the parties, states that the 2015 bonus would be paid in two installments: the advance of $250,000 would be paid as soon as "reasonably practicable" after March 15, 2016; the second installment of at least $250,000 was to be paid after receipt of transaction fees of at least $10,000,000 unless Stone Key terminates Mr. Taradash's employment for cause.

Because the court finds that Stone Key has proven by clear and satisfactory evidence that Mr. Taradash obtained his bonus through fraudulent inducement, the court finds that the 2015 Bonus Advance Agreement is void and ineffective. Stone Key is entitled to the return of the $250,000 advance and is not obligated to make the second installment payment of the 2015 bonus to Mr. Taradash, as specified in the 2015 Bonus Advance Terms.

Count VI

Intentional Misrepresentation

Stone Key has also pleaded Count VI, sounding in intentional misrepresentation or fraud arising out of Mr. Taradash's representations in connection with his efforts to convince Mr. Urfirer to pay him an advance against the 2015 bonus.

As indicated in the citation to *Harold Cohn & Co.* previously, the elements of fraudulent inducement and intentional misrepresentation are the same. *Peterson* v. *McAndrew*, 160 Conn. App. 180, 204, 125 A.3d 241 (2015) (claim for intentional misrepresentation or fraudulent inducement requires proof of same elements). Because the court has found that Stone Key has demonstrated the elements of fraud in the inducement by clear and satisfactory evidence, the court makes the same finding

as to a showing of the elements of intentional misrepresentation.

However, these claims differ in legal basis. Fraud in the inducement is a defense to a contract claim. Intentional misrepresentation is a tort. Accordingly, the measure of allowable damages differs in at least one major respect: an award of punitive damages in the amount of attorney's fees may be granted for intentional misrepresentation in appropriate circumstances. In *Whitaker* v. *Taylor*, 99 Conn. App. 719, 916 A.2d 834 (2007), the Appellate Court held: "In an action for fraud, the plaintiffs are entitled to punitive damages, in addition to general and special damages. . . . The [purpose] of awarding punitive damages is not to punish the defendant for his offense, but to compensate the plaintiff for his injuries. . . . The rule in this state as to torts is that punitive damages are awarded when the evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . *DeSantis* v. *Piccadilly Land Corp.*, 3 Conn. App. 310, 315, 487 A.2d 1110 (1985)." (Internal quotation marks omitted.) *Whitaker* v. *Taylor*, supra, 730. "Common-law punitive damages, however, are limited . . . to litigation expenses, such as attorney's fees, less taxable costs." (Internal quotation marks omitted.) *McLeod* v. *A Better Way Wholesale Autos, Inc.*, 177 Conn. App. 423, 453, 172 A.3d 802 (2017); see also *O'Leary* v. *Industrial Park Corp.*, 211 Conn. 648, 651, 560 A.2d 968 (1989).

Part of the plaintiff's damage has been the cost of bringing this case, as requested in the complaint's ad damnum clause. An award of these costs is justified by a showing of intentional and wanton violation of the plaintiff's rights. The court finds that Stone Key has proven that the defendant's misrepresentations were intentional and wanton. The plethora of e-mails contemporaneous with his representations to Mr. Urfirer in connection with his efforts to induce him to pay an

advance against the 2015 bonus demonstrate in a remarkably clear way the deceit of Mr. Taradash's remarks. These messages include ones sent to his sister and to his colleague, Mr. Laddha, with whom Mr. Taradash would presumably be truthful. It is also corroborated by Mr. Taradash's termination of his lease.

The court finds for the plaintiff on Count VI sounding in intentional misrepresentation. As a result, the court orders the return of the $250,000 bonus and will render an award of reasonable attorney's fees incurred in connection with the prosecution of Count VI of this action, upon submission of a proper affidavit attesting to the hours and rates involved, and following a hearing thereon.

Count VII

Negligent Misrepresentation

Stone Key also alleges a claim for negligent misrepresentation with respect to Mr. Taradash's statements made in connection with the bonus advance. The elements of this tort are somewhat different from those for fraudulent inducement and intentional misrepresentation.

"To establish liability for negligent misrepresentation, a plaintiff must be able to demonstrate by a preponderance of the evidence: '(1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result.' *Nazami* v. *Patrons Mutual Ins. Co.*, [280 Conn. 619, 626, 910 A.2d 209 (2006)] . . . *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 443, 449 n.8, 27 A.3d 1 [standard of proof for claim of negligent misrepresentation is preponderance of evidence], cert. denied, 303 Conn. [915], 33 A.3d 739 (2011)

. . . .'' (Citation omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821–22, 116 A.3d 1195 (2015).

In addition to requiring a lower showing of scienter and a lower burden of proof, negligent misrepresentation differs from fraud in that it requires that the reliance be ''reasonable'' or ''justifiable.'' *National Groups*, *LLC* v. *Nardi*, 145 Conn. App. 189, 192 n.4, 75 A.3d 68 (2013) (''Our case law uses the term 'reasonably' interchangeably with 'justifiably' when considering whether a plaintiff's reliance is sufficient for purposes of negligent misrepresentation. See, e.g., *Glazer* v. *Dress Barn*, *Inc.*, 274 Conn. 33, 73, 873 A.2d 929 (2005).'').

''Reliance on a statement may become reasonable based on context, the statement's formal nature, the relationship between the parties; see *Williams Ford*, *Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 580, 657 A.2d 212 (1995); or when the statement is made by an individual with specialized knowledge; *Richard* v. *A. Waldman & Sons*, *Inc.*, 155 Conn. 343, 346–47, 232 A.2d 307 (1967). We have consistently held that reasonableness is . . . determine[d] based on all of the circumstances. *Williams Ford*, *Inc.* v. *Hartford Courant Co.*, supra, 580.'' (Internal quotation marks omitted.) *National Groups*, *LLC* v. *Nardi*, supra, 145 Conn. App. 194.

In this case, the court finds that the plaintiff has proved the elements of negligent misrepresentation by a preponderance of the evidence. As discussed previously, Mr. Taradash misrepresented his intentions about continuing to work for the Company and relocating his family to Connecticut, and he plainly knew what the truth of his intentions was. Mr. Urfirer's reliance on his remarks was reasonable under the circumstances because he had no reason to disbelieve them. Mr. Taradash's e-mails show that he took precautions to assure that his true plans were kept secret from the Company.

Finally, Stone Key suffered pecuniary loss because it paid the advance prior to when it was planning to pay the bonuses.

As a result, the court finds for the plaintiff on Count VII of the complaint but awards no damages thereunder because Stone Key has not articulated any damages that would not be duplicative of damages awarded under other counts.

Count VIII

Breach of Fiduciary Duty

In its complaint, Stone Key alleges that Mr. Taradash owed it a fiduciary duty of loyalty because he was an employee and a vice president. It claims he breached that duty because he pursued outside business interests (as defined by the Compliance Manual), used Stone Key resources in that pursuit, and did not disclose those interests. As a result, Stone Key claims it is entitled to damages, including the return of all compensation received by Mr. Taradash from Stone Key during the period of his Edify efforts from August, 2014, to the termination of his employment in 2016, which it claims aggregated $1,534,753.75.

The employment relationship regularly gives rise to a fiduciary relationship without regard to at-will status. In the leading case of *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 154 A.3d 989 (2017), our Supreme Court stated: "This court previously has recognized the viability of a claim by an employer against its employee for a breach of the duty of loyalty, which is grounded in agency principles. See *Town & Country House & Homes Service, Inc.* v. *Evans*, 150 Conn. 314, 317–18, 189 A.2d 390 (1963) (employee breached duty of loyalty by soliciting employer's customers for his own competing business while still working for employer); *Breen* v. *Larson College*, 137 Conn. 152, 153–55, 157, 75 A.2d

39 (1950) (academic dean breached duty of loyalty to college by secretly undermining administration's position as to potential legal claim, defaming college in process); *Phoenix Mutual Life Ins. Co.* v. *Holloway*, 51 Conn. 310, 314–15 (1884) (insurance agent breached duty of loyalty to insurer by failing to remit premium payments as previously agreed). . . .

" 'The general principle for the agent's duty of loyalty according to the Restatement is that the agent must act solely for the benefit of the principal in matters connected with the agency.' . . . *News America Marketing In-Store, Inc.* v. *Marquis*, 86 Conn. App. 527, 535, 862 A.2d 837 (2004), aff'd, 276 Conn. 310, 885 A.2d 758 (2005); see also 2 Restatement (Third), Agency § 8.01, comment (b), p. 250 (2006) ('the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship')." (Footnote omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 730–31.

Here, an agency relationship existed between Stone Key and Mr. Taradash. His position as vice president, his training of the Company's analysts and associates, and his participation in business pitches and other important activities of the Company attest to the trust reposed in him by the management of the Company. Accordingly, the court holds that Mr. Taradash owed Stone Key a fiduciary duty of loyalty.

However, as expressed in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 731, the duty pertains to " 'matters connected with the agency relationship' " of the employee. See *Town & Country House & Homes Service, Inc.* v. *Evans*, supra, 150 Conn. 317 ("[t]he defendant, as an agent of the plaintiff, was a fiduciary with respect to matters within the scope of his agency"). The investigation of a potential IT training business in

the Philippines had no connection with Mr. Taradash's employment with Stone Key. Stone Key has shown no diversion of corporate opportunity or competition with its business while Mr. Taradash was employed by Stone Key. As a result, Stone Key has not proven a breach of Mr. Taradash's fiduciary duty of loyalty.

Even if the court were to find a breach of the defendant's duty of loyalty, which it does not, the remedy of forfeiture of Mr. Taradash's compensation for an eighteen month period would be inappropriate. In *Wall Systems, Inc.*, the court held that such a remedy is within the trial court's discretion and set forth the factors to be considered in deciding whether to order the forfeiture: "For the foregoing reasons, we conclude that discretionary application of the remedies of forfeiture and disgorgement is both proper and desirable. In determining whether to invoke these remedies, a trial court should consider all of the facts and circumstances of the case before it. The following list of factors, which we have gleaned from existing jurisprudence, is not intended to be exhaustive, nor will every factor necessarily be applicable in all cases: the employee's position, duties and degree of responsibility with the employer; the level of compensation that the employee receives from the employer; the frequency, timing and egregiousness of the employee's disloyal acts; the wilfulness of the disloyal acts; the extent or degree of the employer's knowledge of the employee's disloyal acts; the effect of the disloyal acts on the value of the employee's properly performed services to the employer; the potential for harm, or actual harm, to the employer's business as a result of the disloyal acts; the degree of planning taken by the employee to undermine the employer; and the adequacy of other available remedies, as herein discussed." *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 737.

In that case, our Supreme Court upheld the decision of the trial court not to order forfeiture of the defendant's compensation from the plaintiff employer even though the defendant worked for a competitor while employed by the plaintiff and accepted three kickbacks from a subcontractor in connection with work for the plaintiff. Id., 718. The court found that the plaintiff had failed to prove that its business had been harmed and, in connection with the kickbacks, found that the "plaintiff's proven damages were negligible when compared to the large amount the plaintiff was seeking to recover." Id., 740. Additionally, the court below found that other damages awarded were adequate, including the denial of the defendant's counterclaim for lost wages. Id.

Applying the *Wall Systems*, *Inc.*, factors to this case, the court finds that the defendant was privy to the Company's analytical methods, but there is no evidence that he disclosed them to others. Mr. Taradash was well compensated, albeit irregularly. His Edify activities varied in intensity over the eighteen month period at issue. They were wilful and carefully planned, partly to avoid conflict with, or discovery by, Stone Key. There is no evidence of any impact on the value of Mr. Taradash's services performed for Stone Key or that such activities undermined Stone Key. There are alternative remedies available, which are awarded by this decision.

In conclusion, the court determines that it would be inequitable to order the forfeiture of Mr. Taradash's compensation under these circumstances. As noted by our Supreme Court in *Wall Systems*, *Inc.*: "The remedy is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned." (Internal quotation marks omitted.) Id., 734. Stone Key has not contended that Mr. Taradash did not earn his compensation despite exploring the possibility of establishing Edify in the Philippines. As

a result, forfeiture of his substantial compensation, especially in light of the plaintiff's negligible or nonexistent damages, would be unjust.

Count X

Violation of CUTPA

Finally, the complaint alleges that the defendant violated CUTPA because he engaged in outside business activities, breached his duty of loyalty, used the Company's facilities without authorization, and failed to disclose his outside activities to Stone Key. Although the plaintiff has largely proven the facts alleged in the complaint, the court does not agree that they constitute a violation of CUTPA.

In the first place, CUTPA does not apply to the employer-employee relationship. As found in *Quimby* v. *Kimberly Clark Corp.*, 28 Conn. App. 660, 613 A.2d 838 (1992): "The relationship in this case is not between a consumer and a commercial vendor, but rather between an employer and an employee. There is no allegation in the complaint that the defendant advertised, sold, leased or distributed any services or property to the plaintiff." Id., 670. As a result, the court held that CUTPA would not apply to the facts of the case. The same result is appropriate here. The actions claimed to violate CUTPA all relate to the employer-employee relationship, e.g., violation of the Compliance Manual by engaging in outside business activities and failing to disclose them, and violating the TriNet Handbook by using company materials for personal purposes. See *United Components, Inc.* v. *Wdowiak*, 239 Conn. 259, 264, 684 A.2d 693 (1996) (CUTPA does not apply to conduct in employment relationship because such conduct is not in trade or commerce); see also R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2017–

2018 Ed.) § 3.3, pp. 131–47 (employment, partnership, intracorporate, and association relationships).

Here, the conduct of which Stone Key complains occurred while Mr. Taradash was employed by Stone Key, and said conduct was regulated by the plaintiff's Compliance Manual and employee handbook. As a result, these events occurred in the context of the employer-employee relationship, and CUTPA does not apply to them.

Second, General Statutes § 42-110g (a) provides in relevant part: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. . . ." Thus, ascertainable loss is a prerequisite to the prosecution of a CUTPA claim. In *National Waste Associates, LLC* v. *Scharf*, 183 Conn. App. 734, 194 A.3d 1 (2018), the Appellate Court held that a waste management broker failed to establish that it suffered an ascertainable loss as a result of a former employee's alleged actions, specifically, using the broker's trade secrets and confidential information to solicit its customers and prospective customers to do business with a competitor, where the former employee's misconduct did not cost the broker any specific customer. Similarly, because Stone Key was unable to prove any loss suffered by it as a result of the activities alleged in its CUTPA count, i.e., the defendant's exploration of the Edify matter without disclosure and the use of company equipment in that endeavor, it has not proved that it suffered an ascertainable loss and so has not established its case under CUTPA.

DEFENDANT'S COUNTERCLAIMS

The defendant pleaded thirteen counterclaims in his answer. Although the defendant has not indicated which counterclaims he contends are still at issue, several have been explicitly dropped or many not pursued, either through failure to present evidence at trial or absence of discussion of them in posttrial briefing. As a result, under the recent holding of the Appellate Court in *Seven Oaks Enterprises, L.P.* v. *DeVito*, 185 Conn. App. 534, 558, 198 A.3d 88 (2018), the court finds that the following counterclaims have been abandoned: claims relating to the 2013 bonus (Nos. 1 and 2); breach and conduct relating to the 2014 bonus (Nos. 3 and 4);[4] discontinuance of 401 (k) contributions (Nos. 7 and 8); unjust enrichment, quantum meruit, and promissory estoppel relating to the 2015 bonus (Nos. 9, 10 and 11); and fraud and civil theft occurring during the employment relationship (Nos. 12 and 13). Counterclaims remaining at issue are those relating to nonpayment of the full amount of the 2015 bonus (Nos. 5 and 6).

Fifth Counterclaim

Breach of Contract re 2015 Bonus

The Fifth Counterclaim claims that the plaintiff broke its promise to pay the defendant "Street level" compensation for 2015 because to date he has received only his salary of $175,000 and the bonus of $250,000, which he contends is $325,000 to $375,000 below "Street level."[5] The defendant also asserts that Stone Key

[4] If the defendant contends that he has not abandoned Counterclaims 1, 2, 3 and 4, regarding payment of the 2013 and 2014 bonuses, the court finds them without merit because the defendant admitted at trial that he had received "Street level" compensation for those years, and because those bonuses did not constitute "wages" as discussed in connection with the Sixth Counterclaim.

[5] The defendant also asserted that the imposition of the seventy-five day notice period prior to his resignation being effective deprived him of the ability to earn wages during that period. However, he submitted no proof of losses of this kind at trial and received salary from Stone Key during this period. Accordingly, the court does not consider this claim.

breached its contractual promise to pay him a "minimum" bonus of $500,000, depending on the receipt of $10,000,000 in advisory fees. The defendant claims that Stone Key has in fact received that fee income (without submission of proof), and so owes him the second installment of $250,000.

Neither of these theories has merit. As to the first one, Mr. Taradash executed the 2015 Bonus Agreements, which supplanted any oral contracts he claimed existed. Although he has claimed that the terms of the agreement are invalid because they lack additional compensation, the promise of an advanced payment disposes of that argument. Additionally, Mr. Taradash admitted that no Wall Street compensation survey was prepared for 2015, so his claim relating to the promised amount of his 2015 bonus is without evidentiary support.

As to the second argument, which is that Mr. Taradash is entitled to the second 2015 bonus payment under the 2015 Bonus Agreements, his fraudulent inducement of that agreement and intentional misrepresentation with respect to that agreement have deprived him of any right to enforce it because it is void by reason of his fraudulent conduct.

Sixth Counterclaim

Claims under §§ 31-72 and 31-73 re 2015 Bonus

The Sixth Counterclaim contends in part that the bonus Stone Key promised to pay the defendant for services rendered during 2015 constitutes "wages" as defined by § 31-71a (3). As a result, the defendant claims that any alteration of employment terms that Stone Key required prior to making payment was invalid under public policy and General Statutes § 31-71d. Further, Stone Key's failure to pay the entire bonus in March, 2016, constituted an improper withholding of wages in

violation of General Statutes § 31-71e. Accordingly, the defendant claims that he is entitled to an award of double the promised wages, plus fees and costs, and a declaration that none of the written agreements entered into in 2016 relating to the 2015 bonus may be asserted in defense to his claims. The defendant also claims that Stone Key's demand for the refund of the advance against the 2015 bonus constituted an unlawful demand for a " 'refund of wages' " in violation of § 31-73 (a) through (d).

A

2015 Bonus Did Not Constitute "Wage"

The court initially finds for the plaintiff on the Sixth Counterclaim because the evidence submitted at trial demonstrated that the 2015 bonus was not a "wage" within the meaning of § 31-71a (3). Our Supreme Court has addressed the circumstances under which a bonus award constitutes a "wage" within the meaning of § 31-71a (3). See *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 2 A.3d 873 (2010); *Ziotas* v. *Reardon Law Firm, P.C.*, 296 Conn. 579, 997 A.2d 453 (2010); *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 961 A.2d 349 (2008).

In *Assn. Resources, Inc.* v. *Wall*, supra, 298 Conn. 173, our Supreme Court determined that the bonuses at issue were wages because they were nondiscretionary and calculated in accordance with a formula set forth in the employment agreement. The plaintiff was "a senior level, executive manager of one of the defendant's divisions, with the bonus tied directly to the success of that specific division, rather than the performance of the defendant as a whole." (Emphasis omitted.) Id., 177–78.

In *Weems* v. *Citigroup, Inc.*, supra, 289 Conn. 769, our Supreme Court held "that bonuses that are awarded solely on a discretionary basis, and are not linked solely

to the ascertainable efforts of the particular employee, are not wages under § 31-71a (3)." Id., 782. "Our superior courts interpreting *Weems* have concluded that 'an employee who seeks to recover a bonus under the wage statutes must prove that the bonus meets two criteria. First, the bonus cannot be a wage if its award is solely within the employer's discretion. . . . Second, the bonus must be linked *solely* to the employee's performance or efforts and not linked to other factors unrelated to the particular employee's performance.' . . . *Commissioner of Labor* v. *Fireman's Fund Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-08-4039312-S (February 18, 2010) (*Prescott*, *J.*) (49 Conn. L. Rptr. 303, 306); see also *Hayes* v. *Pfizer*, *Inc.*, Superior Court, [judicial district of Middlesex] Docket No. CV-15-6014614-S (March 16, 2017) (*Domnarski*, *J.*)]." (Emphasis in original.) *Anderson* v. *Hartford Financial Services Group*, *Inc.*, Superior Court, judicial district of Harford, Docket No. CV-14-6052974-S (December 18, 2017) (*Bright*, *J.*) (65 Conn. L. Rptr. 652, 662). However, a bonus is not a "wage" even "when an employee is contractually entitled to a [bonus when] the amount is indeterminate and discretionary." *Ziotas* v. *Reardon Law Firm*, *P.C.*, supra, 296 Conn. 589.

As a result, the court must examine the 2015 Bonus in a two step process. First, to determine whether the defendant's bonus was awarded solely on a discretionary basis and, second, whether the amount was linked solely to the efforts of the individual employee or was indeterminate and discretionary. The plaintiff claimed that the payment of any bonus and the amount of any such bonus was entirely in its discretion. The defendant claimed that he had an enforceable oral contract that he would receive a bonus equivalent to "Street pay" levels without consideration of any discretionary factors.

The court finds that the evidence demonstrates a reality between these two extremes. Because of Mr. Urfirer's testimony that he always received a bonus of some sort while working on Wall Street, and because the magnitude of the bonus as a percentage of Mr. Taradash's compensation, generally in excess of 66 percent, was so large, the court finds that Mr. Taradash was contractually entitled to receive an annual bonus. However, the amount of the bonus was within Stone Key's discretion, within the boundaries of "Street pay." The calculation of the bonus was dependent upon the determination of several factors by Mr. Urfirer, including the employee's performance, the performance of the Company, general economic conditions, and anticipated future revenues. See Finding of Fact No. 27. Further, the course of dealing of the parties shows that the timing of payment was entirely within Mr. Urfirer's discretion.

As a result of the foregoing, the court finds that the 2015 Bonus did not constitute a "wage" within the meaning of § 31-71a because its amount and time of payment were within the discretion of Stone Key.

B

Defendant's Claim for Improper Refund of Wages is Moot

Finally, the defendant appears to claim that the 2015 Bonus Advance Agreement created an unlawful refund of wages under § 31-73. (Refund of wages for furnishing employment.) However, the court has not ordered the refund of the $250,000 advance under the "cause" provisions of the Bonus Advance Agreement but as a result of the defendant's fraudulent behavior. Accordingly, the defendant's contention that the return of the bonus would constitute an unlawful return of wages is not at

issue in the case and is moot.[6] As a result, the court finds against the defendant with respect to his second contention, relating to a violation of § 31-73, and the court finds for the plaintiff with respect to the Sixth Counterclaim.

CONCLUSION

By reason of the foregoing, the court finds for the defendant on Count I (Breach of Contract as to the 2014 Bonus), Count III (Breach of the 2015 Bonus Advance Agreement), Count VIII (Breach of Fiduciary Duty), and Count X (Violation of CUTPA). The court finds for the plaintiff on Count V (Fraudulent Inducement of the 2015 Bonus Advance Agreement), Count VI (Intentional Misrepresentation), Count VII (Negligent Misrepresentation), and the defendant's Fifth Counterclaim (Breach of Contract re 2015 Bonus) and Sixth Counterclaim (Violation of §§ 31-72 and 31-73 re 2015 Bonus), and directs the dismissal of all other claims against the counterclaim defendants.

Accordingly, judgment shall enter against the defendant consistent with the above, with damages in favor of the plaintiff, Stone Key Group, LLC, against the defendant, Reid Taradash, in the amount of $250,000, plus appropriate interest and attorney's fees

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GABRIEL COULOUTE ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF GLASTONBURY ET AL.
(AC 43375)

Elgo, Alexander and Sheldon, Js.

Syllabus

The plaintiffs, G, a high school student, and his mother, sought damages from the defendants, the Board of Education of the Town of Glastonbury and several school administrators and educators as a result of injuries

[6] In any event, the statute would not apply to the facts here because it prohibits the demand of return of paid compensation "to secure employment or continue in employment." General Statutes § 31-73 (b). The 2015 Bonus

G sustained while playing football at the high school. The plaintiffs had brought a previous action in connection with G's injuries in which the trial court granted the defendants' motion to strike and thereafter rendered judgment for the defendants after the plaintiffs failed to replead. The plaintiffs then appealed to this court but thereafter withdrew the appeal. The defendants in both actions were the same with the exception of a football coach who was named as a defendant in each case. The defendants in the present action filed a motion for summary judgment, claiming that the doctrine of res judicata barred the present action regardless of any additional facts or different theories of liability that the plaintiffs alleged. The trial court granted the defendants' motion for summary judgment, concluding that the plaintiffs' claims were barred by the doctrine of res judicata. The plaintiffs thereafter appealed to this court. *Held* that the judgment of the trial court was affirmed, as the issues were properly resolved in that court's thorough and well reasoned memorandum of decision, which this court adopted as a proper statement of the facts, issues and applicable law.

Argued March 10—officially released April 20, 2021

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Hartford, where the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Mark S. Kliger, with whom, on the brief, was *Irving J. Pinsky*, for the plaintiffs (appellants).

Keith R. Rudzik, for the defendants (appellees).

Opinion

PER CURIAM. The plaintiffs, Gabriel Couloute and his mother, April Couloute,[1] appeal from the summary judgment rendered by the trial court in favor of the

Advance Agreement required return of the Advance in the event of termination for cause.

[1] For clarity, we refer to Gabriel Couloute and April Couloute individually by their first names and collectively as the plaintiffs.

defendants, the Board of Education of the Town of Glastonbury; Alan Bookman, Superintendent of Schools; Nancy E. Bean, Principal of Glastonbury High School (high school); Trish Witkin, athletic director at the high school; and Mark Alexander, junior varsity football coach at the high school. On appeal, the plaintiffs claim that the court improperly concluded that the doctrine of res judicata barred the present action. We affirm the judgment of the trial court.

In 2016, the plaintiffs commenced a civil action (2016 action) regarding injuries that Gabriel allegedly sustained while engaging in interscholastic football activities at the high school during the 2016–2017 school year. The defendants in that action were identical to those in the present case, with one exception—Varsity Football Coach Scott Daniels was named as a defendant instead of Alexander. In their complaint, the plaintiffs set forth twenty-four counts alleging battery, fraud, negligence, due process violations, and violations of the Racketeer Influenced and Corrupt Organizations Act. See 18 U.S.C. § 1961 et seq. (2012). The defendants filed a motion to strike the complaint in its entirety, which the court granted by memorandum of decision dated January 5, 2018. When the plaintiffs failed to replead, the court rendered judgment in favor of the defendants. Although the plaintiffs filed an appeal of that judgment with this court, they subsequently withdrew that appeal.

Approximately two months after they withdrew the appeal, the plaintiffs initiated the present action. They alleged twenty counts in their complaint sounding in negligence and recklessness, all related to a concussion that Gabriel allegedly sustained while playing football at the high school on October 20, 2016. The defendants thereafter moved for summary judgment, claiming that the judgment in the 2016 action "was rendered on the merits, and the doctrine of res judicata is an absolute bar to this second action on the same matters/causes

of actions and any others that could have been raised in the [2016 action] regardless of what additional facts or different theories of liability are raised in this second action." The plaintiffs filed an opposition to that motion, and the court heard argument from the parties on July 8, 2019. On August 29, 2019, the court issued a memorandum of decision rendering summary judgment in favor of the defendants, concluding that the doctrine of res judicata barred the plaintiffs' claims. The plaintiffs now challenge the propriety of that determination.

Our examination of the pleadings, affidavits, and other proof submitted, as well as the briefs and arguments of the parties, persuades us that the judgment should be affirmed. The issues properly were resolved in the court's thorough and well reasoned memorandum of decision. See *Couloute* v. *Board of Education*, Superior Court, judicial district of Hartford, Docket No. CV-18-6106959-S (August 29, 2019) (reprinted at 203 Conn. App. 124, A.3d). We therefore adopt that memorandum of decision as a proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed.

APPENDIX

GABRIEL COULOUTE ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF GLASTONBURY ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-18-6106959-S

Memorandum filed August 29, 2019

Proceedings

Memorandum of decision on defendants' motion for summary judgment. *Motion granted.*

Irving J. Pinsky, for the plaintiffs.

Keith R. Rudzik, for the defendants.

Opinion

HON. ROBERT B. SHAPIRO, JUDGE TRIAL REFEREE. Before the court is the defendants' motion for summary judgment (#104). The issue presented is whether the court should grant the defendants' motion on the ground that the action is barred by the doctrine of res judicata. The court heard oral argument at short calendar on July 8, 2019.

I

BACKGROUND

Gabriel Couloute alleges that he suffered a football related concussion from playing football at Glastonbury High School during the 2016–2017 school year. During this time, Gabriel Couloute was a minor. His mother, April Couloute, the coplaintiff in this action, alleges that she incurred damages and losses as a result of her

* Affirmed. *Couloute* v. *Board of Education*, 203 Conn. App. 120, A.3d (2021).

son's medical care. In the plaintiffs'[1] complaint, they allege twenty counts against the defendants, the Board of Education of the Town of Glastonbury; Alan Bookman, Superintendent of Schools for the Glastonbury School District; Nancy E. Bean, Principal of Glastonbury High School; Trish Witkin, athletic director; and Mark Alexander, junior varsity football coach.

Each of the plaintiffs have alleged claims of negligence and recklessness against each of the defendants. The first, fifth, ninth, thirteenth, and seventeenth counts are negligence based claims against each of the defendants for their multitude of various failures arising out of Gabriel Couloute's participation in an October 20, 2016 football practice where he sustained a concussion. In the second, sixth, tenth, fourteenth, and eighteenth counts, Gabriel Couloute brought a recklessness claim against each of the defendants on similar grounds. In the third, seventh, eleventh, fifteenth, and nineteenth counts of the complaint, April Couloute brought a negligence claim against each of the named defendants for damages she incurred for paying for treatment and medical care for Gabriel Couloute. And in the fourth, eighth, twelfth, sixteenth, and twentieth counts of the complaint, April Couloute asserted a claim of recklessness against the defendants.

The defendants moved for summary judgment (#104) on the ground that the doctrine of res judicata bars this action. The defendants claim that the plaintiffs already brought these claims and/or had the opportunity to bring these claims against each of the defendants. The defendants further provide that all the defendants in the first action are the same in the second action with the exception of Mark Alexander, who has been substituted for Scott Daniels in the prior action.[2] In the prior

[1] Gabriel Couloute and April Couloute are identified collectively as the plaintiffs and individually by name where appropriate.

[2] In the first action, Scott Daniels, varsity football coach, was a defendant in the action instead of Mark Alexander.

action, April Couloute filed a twenty-four count complaint, on behalf of Gabriel Couloute, against the Glastonbury Board of Education, Bookman, Bean, Witkin, and Daniels. In that first action, counts twenty through twenty-four were negligence based claims against each of the aforementioned defendants. Ultimately, the prior action was disposed of by a motion to strike in *Couloute* v. *Board of Education*, Superior Court, judicial district of Hartford, Docket No. CV-17-6074140-S (January 5, 2018) (*Shapiro*, *J.*). The plaintiffs took no further action to replead the complaint. In the present case, the plaintiffs filed papers in opposition (#106). The defendants filed a reply (#107).

II

STANDARD OF REVIEW

"Summary judgment is a method of resolving litigation when 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. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "[S]ummary judgment is an appropriate vehicle for raising a claim of res judicata . . . ." (Citations omitted.) *Joe's Pizza*, *Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 867 n.8, 675 A.2d 441 (1996). "Because res judicata or collateral estoppel, if raised, may be dispositive of a claim, summary judgment [is] the appropriate method for resolving

a claim of res judicata." *Jackson* v. *R. G. Whipple, Inc.*, 225 Conn. 705, 712, 627 A.2d 374 (1993).

III

DISCUSSION

The defendants argued that the motion for summary judgment should be granted on the ground of res judicata. The plaintiffs countered that summary judgment is inappropriate because, when the first action and the motion to strike were filed, the information they now have was not available to them. The plaintiffs claimed that this lack of information hindered their ability to fairly litigate the matter. Further, the plaintiffs argued that, pursuant to public policy, the court should not apply res judicata to this case.

A

Res Judicata

"[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to *any other admissible matter which might have been offered for that purpose*. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue."

(Emphasis in original; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019).

1

Element One

With respect to the first element, a judgment rendered on the merits, it is well established "[t]hat a judgment rendered pursuant to a motion to strike is a judgment on the merits . . . ." *Santorso* v. *Bristol Hospital*, 127 Conn. App. 606, 617, 15 A.3d 1131 (2011), aff'd, 308 Conn. 338, 63 A.3d 940 (2013). In the first action, the court granted the motion to strike the complaint in its entirety. See *Couloute* v. *Board of Education*, supra, Superior Court, Docket No. CV-17-6074140-S. The plaintiffs do not argue that the motion to strike was not a judgment on the merits. The first element is satisfied because the ruling on the motion to strike was a judgment on the merits.

2

Element Two

"The following principles govern the second element of res judicata, privity . . . . Privity is a difficult concept to define precisely. . . . There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather it is, in essence, a shorthand statement for the principle that [preclusion] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to

justify preclusion. . . . While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented . . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Citation omitted; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 75–76.

"Consistent with these principles, this court and other courts have found a variety of factors to be relevant to the privity question. These factors include the functional relationships between the parties, how closely their interests are aligned, whether they share the same legal rights, equitable considerations, the parties' reasonable expectations, and whether the policies and rationales that underlie res judicata—achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments—would be served. . . . [T]he crowning consideration, [however, is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." (Citations omitted; internal quotation marks omitted.) Id., 76–77.

The first action was against the Glastonbury Board of Education, Bookman, Bean, Witkin, and Daniels. In the current action, the defendants are all the same with the exception of Daniels, who has been replaced with another Glastonbury High School football coach, Alexander. The plaintiffs argued that Daniels and Alexander are not in privity because the facts alleged against Daniels are factually different from the facts alleged against Alexander. The defendants counter that Alexander was an agent of the same municipal board of education as was Daniels, and, therefore, Alexander was in privity

for purposes of the first action. "It is well settled law that an action against a government official in his or her official capacity is not an action against the official, but, instead is one against the official's office and, thus, is treated as an action against the entity itself. . . . [In general] an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is not a suit against the official personally, for the real party in interest is the entity. . . . Since [officials] represent not their own rights but the rights of the municipality the agents of the same municipal corporation are in privity with each other and with the municipality." (Internal quotation marks omitted.) *C & H Management, LLC* v. *Shelton*, 140 Conn. App. 608, 614, 59 A.3d 851 (2013). Similarly, Daniels and Alexander were in privity because both individuals were agents for Glastonbury High School on behalf of the town of Glastonbury. It is clear that all the defendants in the current case were all of the defendants in the first action with the exception of the aforementioned substitution of coaches. The second element of privity is satisfied.

3

Element Three

The third element requires an adequate opportunity to litigate the matter fully. The defendants argued that this third element is satisfied because, during the first case, the plaintiffs took all the steps and opportunities to fully litigate the matter. The plaintiffs counter that they did not have a fair opportunity to litigate the claims due to the unavailability of facts at the time of the prior action since Gabriel Couloute would not speak in any details as to the events that occurred during the football practice on October 20, 2016.

In *Tirozzi* v. *Shelby Ins. Co.*, 50 Conn. App. 680, 719 A.2d 62, cert. denied, 247 Conn. 945, 723 A.2d 323 (1998), the plaintiff brought the same claims against the same

parties in two separate causes of actions. The first action was disposed of by a motion to strike. The Appellate Court concluded that the second action was barred by the doctrine of res judicata. The court reasoned that "[t]he motion to strike required the trial court to decide the merits of the plaintiff's claim. The parties had the opportunity to fully litigate the matter. The motion to strike was contested, and both parties participated in oral argument. . . . After the trial court granted the motion to strike, the plaintiff neither repleaded pursuant to Practice Book § 10-44 nor took an appeal. The plaintiff, therefore, had an adequate opportunity to litigate the matter in the first action and to seek appellate review." Id., 686–87.

In the first action, the plaintiffs brought a twenty-four count complaint against the defendants. The court granted the motion to strike the entire complaint, which included a negligence claim. The plaintiffs filed a motion in opposition and supporting memorandum of law. After the ruling, the plaintiffs filed a request for reconsideration on the motion to strike. The plaintiffs further filed an appeal. Similar to *Tirozzi*, in the present action, the defendants contend that the plaintiffs had the opportunity to fully litigate the matter because the plaintiffs prepared a memorandum of law in opposition to the motion to strike, attended oral argument on the motion, filed a motion for reconsideration, and had the opportunity to replead the causes of action. The defendants further point out that the plaintiffs subsequently filed an appeal in the first action, regardless of the fact that it was later withdrawn.

As for the recklessness claims, our Supreme Court has emphasized that it is a "well settled rule that [a] judgment is final not only as to every matter which was offered to sustain the claim, *but also as to any other admissible matter which might have been offered for*

that purpose . . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 607–608, 922 A.2d 1073 (2007). More recently, our Supreme Court, again, reiterated this proposition, stating that, "[u]nder claim preclusion analysis, a claim—that is, a cause of action—includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. . . . Moreover, claim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or *might have been made*." (Emphasis in original; internal quotation marks omitted.) *Ventres* v. *Goodspeed Airport, LLC*, 301 Conn. 194, 205–206, 21 A.3d 709 (2011).

Accordingly, the plaintiffs had an adequate opportunity to fully litigate the claims in the first action and to seek appellate review. The recklessness claims are identical to the negligence claims, except for the language providing that the actions were done "consciously" or "knowingly." Although the plaintiffs did not make a claim for recklessness in the first action, it could have been asserted in the first action; thus, it is also extinguished under the doctrine of res judicata. As such, the third element is satisfied.

4

Element Four

"To determine whether claims are the same for res judicata purposes, this court has adopted the transactional test. . . . Under the transactional test, res judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out

of which the action arose. . . . What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . [E]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action. . . . In applying the transactional test, we compare the complaint in the [present] action with the pleadings and the judgment in the earlier action." (Citations omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 159–60, 129 A.3d 677 (2016).

The defendants argued in support of their motion that these are the same claims. They argued that "[t]he central transactions to all of the claims in the first action was the purported inadequacy of and lack of establishing/following rules and procedures concerning head injuries, the failure to provide information concerning the dangers of concussions caused by repeated or severe head blows in the sport of high school football, and the mishandling of young Gabriel Couloute's football related injuries by school administrators and the coaches." See Defendants' Memorandum of Law (#105) p. 17. The plaintiffs countered that "[t]he first action [was] predicated on repeated physical contact generally occurring at unspecified and undetermined times during the 2016–2017 football season, and cumulatively leading to injury. There was no specific factual event or events identified as to place, date or time as causing a specific injury." See Plaintiffs' Memorandum of Law (#106) p. 5. They contend that the second action is based on a very specific set of facts detailing the date, time, place, manner and precise injury causing event.

Applying the transactional test, the actions are clearly related in time. Specifically, the first action alleged negligence that occurred in the time frame of the 2016–2017 school year. In the present action, the plaintiffs alleged negligence and recklessness claims for injuries that occurred on October 20, 2016. Further, these head injuries in the current action have the same origin as in the first action, to wit, the participation in playing high school football. Additionally, the defendants argued that the plaintiffs have the same motivation, which is the recovery of damages from head trauma resulting in brain injuries in 2016, and the rectification of inadequate protocols and procedures related to concussions.

Although the plaintiffs argued that the current action alleged narrower claims that are factually different from the claims in the first action, due to new information provided by Gabriel Couloute, and facts regarding exacerbation of his injury and/or impediment to his recovery resulting from the failure and/or delay in implementing educational accommodations, these arguments, nevertheless, fail. "The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Internal quotation marks omitted.) *New England Estates, LLC* v. *Branford*, 294 Conn. 817, 842, 988 A.2d 229 (2010). Similarly, the Appellate Court has stated that "[t]he plaintiffs cannot reassert their claim by proffering additional or new evidence." *Honan* v. *Dimyan*, 63 Conn. App. 702, 709, 778 A.2d 989, cert. denied, 258 Conn. 942, 786 A.2d 430 (2001).

Viewing the complaint in the light most favorable to the plaintiffs and assuming that the plaintiffs truthfully did not have certain factual information surrounding a specific incident within that 2016–2017 football year time frame available to them, Connecticut law does not allow for the plaintiffs to circumvent the doctrine of

res judicata by the reassertion of the same claims even after new information or evidence has been discovered.

B

Recognized Exceptions to Res Judicata

"In establishing exceptions to the general application of the preclusion doctrines, we have identified several factors to consider, including: (1) whether another public policy interest outweighs the interest of finality served by the preclusion doctrines . . . (2) whether the incentive to litigate a claim or issue differs as between the two forums . . . (3) whether the opportunity to litigate the claim or issue differs as between the two forums . . . and (4) whether the legislature has evinced an intent that the doctrine should not apply." (Citations omitted.) *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 603. As discussed previously, the plaintiffs' motivation to litigate the claim was the same in the first action, the plaintiffs had an opportunity to litigate the claims in the prior action, and there has been no argument that the legislature has evinced an intent that the doctrine should not apply. Therefore, the only arguably applicable exception concerns whether another public policy interest outweighs the interest of finality.

"Because [the] doctrines [of res judicata and collateral estoppel] are judicially created rules of reason that are enforced on public policy grounds . . . whether to apply either doctrine in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide

repose by preventing a person from being harassed by vexatious litigation. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest . . . . [T]he application of either doctrine has dramatic consequences for the party against whom it is applied, and . . . we should be careful that the effect of the doctrine does not work an injustice. . . . Thus, [t]he doctrines of preclusion . . . should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Citations omitted; internal quotation marks omitted.) Id., 601–602.

Balancing the public policy considerations of the interests of the defendants and the judicial system in bringing litigation to a close, and the plaintiffs in vindication of a just claim, the evidence of these repetitive claims provides support for bringing litigation to an end. Granting the motion for summary judgment in this case is in conformity with the exact purpose for which the doctrine of res judicata exists. This case does not present itself as one that would frustrate social policies that are based on values equally or more important than that which is afforded by finality in legal controversies.

CONCLUSION

For the reasons stated previously, there is no genuine issue as to any material fact. The defendants have demonstrated that they are entitled to judgment as a matter of law. The defendants' motion for summary judgment is granted on the ground of res judicata.[3]

[3] During argument at short calendar on July 8, 2019, on the record, the defendants stated their intention to go forward on the theory of res judicata and stated that the court could consider the previously raised issue of collateral estoppel waived. As such, the collateral estoppel issue has not been addressed in this memorandum.