ASPIC, LLC *v.* BRACK G. POITIER
(AC 42495)

Prescott, Bright and Moll, Js.*

Syllabus

The plaintiff, a single member limited liability company, sought to recover monetary damages from the defendant, a general partner in four limited partnerships, for default on promissory notes that had been executed by H, the managing general partner of the limited partnerships, and the plaintiff's predecessor in interest. Before the trial court, the defendant raised several special defenses, including that the plaintiff was barred from recovery because H breached his fiduciary duties to the defendant, who was H's general partner in the limited partnerships. The defendant alleged that H, without providing him any notice, executed certain notes on behalf of the limited partnerships for H's own benefit, entered into another note using the original notes as collateral, and sold real property assets of the limited partnerships to entities controlled by H's son or an affiliate of the plaintiff for inadequate consideration. Following a trial, the court rendered judgment in favor of the defendant on his special defense of breach of fiduciary duty, and the plaintiff appealed to this court. *Held*:

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

1. This court concluded that the trial court's finding that H failed to disclose to the defendant all relevant information related to the note transactions was not clearly erroneous, and this failure constituted a breach of fiduciary duty that precluded enforcement of the notes against the defendant.
a. The plaintiff could not prevail on its claim that the trial court could not have reasonably found that the defendant lacked notice of the notes, there being no evidence that the defendant was aware of their execution: the record did not reflect that, prior to executing certain of the notes, H ever communicated to the defendant that he intended, as the managing general partner of the limited partnerships, to issue promissory notes to himself and another company, R Co., memorializing the amounts he claimed were owed by the limited partnerships; moreover, the evidence the plaintiff pointed to that allegedly showed a free and frank disclosure of relevant information, certain letters of correspondence and audited financial statements, fell short of clear and convincing evidence of fair dealing, and, by issuing the notes, H circumvented the contractual limits of liability for obligations arising under the management agreement and converted a nonrecourse debt obligation into a recourse debt obligation; furthermore, the mere fact that certain partnership agreements authorized H to execute the notes, coupled with the defendant's knowledge of debts owed to H and R Co. and of H's contemplation of a potential loan transaction, did not relieve H of his fiduciary duty to disclose to the defendant all relevant information specific to the notes; accordingly, H's fiduciary duty was not simply to inform the defendant that the limited partnerships were in debt, but, rather, to keep the defendant apprised of the details of the limited partnerships' repayment plans, especially when those plans implicated the defendant to the extent they did here.
b. The trial court did not err in failing to address the relevant factors under *Konover Development Corp.* v. *Zeller* (228 Conn. 206), which outlines, in certain circumstances involving sophisticated business ventures, how a fiduciary demonstrates that a particular transaction is fair: in light of this court's conclusion that H failed to disclose all relevant information regarding the notes, the other *Zeller* factors could not outweigh, as a matter of law, the failure to make a free and frank disclosure, as a party cannot have competent and independent advice about a transaction as to which there has not been a free and frank disclosure of all relevant information, and a party's level of sophistication to understand a transaction is of little value if the party does not know about the transaction; moreover, adequate consideration is a necessary, not sufficient, condition to establish fair dealing, as although the lack of adequate consideration may lead to a conclusion that a fully disclosed transaction nevertheless constitutes a breach of fiduciary duty, adequate consideration alone will not establish fair dealing as to a transaction that was not fully disclosed to the principal and to which the principal did not agree.
c. The plaintiff could not prevail on its claim that the trial court, in reaching the conclusion that H breached his fiduciary duty to the defendant, committed a number of legal errors that required reversal: the

plaintiff misconstrued the import of the court's conclusion and minimized the central finding of the court that H failed to disclose to the defendant that he was converting his accounts receivable claims against the limited partnerships into promissory notes that he then would use to secure loans for himself and R Co., as the court's reference to the sale of the limited partnerships' real property assets was not the basis for its conclusion that H breached his fiduciary duty to the defendant, but that H's breach of fiduciary duty occurred much earlier when he endorsed the notes over to himself and/or R Co.; moreover, it was not just that H benefitted from the transaction, but that he did so without making the necessary free and frank disclosure of all relevant information to the defendant; accordingly, the plaintiff could not exclude from the court's analysis its key finding, which was not clearly erroneous, that H failed to disclose all relevant information relating to the notes, and the failure to make a free and frank disclosure of all the information regarding the transactions, which unquestionably personally benefited H to the detriment of the defendant, was fatal to the plaintiff's claims of legal error.

2. The plaintiff's claim that the trial court improperly rendered judgment for the defendant on the notes issued to R Co., even though it concluded that R Co. had not breached any fiduciary duty it owed to the defendant, was without merit; the court rejected the special defense that R Co. breached its fiduciary duty to the defendant because R Co. owed no fiduciary duty to the defendant, and, nonetheless, the transaction by which it received promissory notes from the limited partnerships was orchestrated by H, for his own benefit and without making a free and frank disclosure to the defendant, and the plaintiff, standing in H's shoes, could not avoid the effects of H's breach of fiduciary duty simply because H created an obligation to a third party he controlled instead of a direct obligation to himself.

Argued December 11, 2019—officially released November 23, 2021

Procedural History

Action to collect on promissory notes, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Ecker*, *J.*, granted the plaintiff's application for a prejudgment remedy, and the defendant appealed to this court, *Alvord*, *Bright* and *Sullivan*, *Js.*, which reversed the decision and remanded the case for further proceedings; thereafter, the matter was tried to the court, *S. Richards*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Timothy A. Diemand, with whom were *Jeffrey R. Babbin* and *Richard Luedeman*, for the appellant (plaintiff).

Matthew T. Wax-Krell, with whom were *Mark A. Rosenblum*, and, on the brief, *Michael D. Blumberg*, for the appellee (defendant).

Opinion

BRIGHT, J. In this debt collection action, the plaintiff, ASPIC, LLC, appeals from the judgment of the trial court rendered in favor of the defendant, Brack G. Poitier. The plaintiff claims that the court erred in concluding that it cannot hold the defendant personally liable for amounts due on promissory notes entered into by the plaintiff's predecessor in interest, Wendell Harp, because Harp breached his fiduciary duties to the defendant, who was Harp's general partner in certain limited partnerships. We disagree and, accordingly, affirm the judgment of the court.

This case returns to us after our decision in *ASPIC, LLC* v. *Poitier*, 179 Conn. App. 631, 181 A.3d 593 (2018) (*ASPIC*). This court reversed the judgment of the trial court, *Ecker, J.*, granting a prejudgment remedy in the amount of $1 million in favor of the plaintiff.[1] Id., 633. Following our remand for further proceedings, the case was tried to the court, *S. Richards, J.*, on March 20, 2018.

[1] In *ASPIC*, this court noted that the plaintiff owed a fiduciary duty to the defendant because it stood in the shoes of the defendant's former business partner, Harp, and thus, was subject to any personal defenses asserted by the defendant against Harp. *ASPIC, LLC* v. *Poitier*, supra, 179 Conn. App. 641 n.6. In reaching this conclusion, we determined that the defendant's breach of fiduciary duty defense required the trial court to shift the burden of proving fair dealing by clear and convincing evidence to the plaintiff. Id., 642. Because the court did not place any burden on the plaintiff to prove that there was probable cause to believe that the transactions at issue were conducted fairly, this court reversed the judgment of the trial court and remanded the case for further proceedings. Id., 644, 647.

The following facts, which are either undisputed or were found by the trial court, are relevant to this appeal. "The plaintiff is a single member limited liability company, whose sole member is Municipal Capital Appreciation Partners III, L.P. (Muni). The defendant is a general partner in four limited partnerships, GAB Hill Limited Partnership [(GAB)], BHP Limited Partnership [(BHP)], WCH Limited Partnership [(WCH)], and Renaissance [Hill] Limited Partnership [(Renaissance Hill)]. These partnerships collectively are known as the Court Hill Partnerships (Court Hill). The partnership agreements provide that each general partner has unlimited personal liability for all obligations of the partnerships. Court Hill owns properties that served low income individuals in the New Haven area. In addition to the defendant, George Bumbray and . . . Harp[2] also are general partners in Court Hill, with Harp having been appointed as the managing partner. Harp's company, Renaissance Management Company, Inc. (Renaissance [Management]), acts as the managing agent for all of the properties owned by Court Hill." (Footnote in original.) *ASPIC, LLC* v. *Poitier*, supra, 179 Conn. App. 634.

"[Renaissance Management] handled all of the day-to-day tenant and operational needs of Court Hill's rental properties including, but not limited to, paying Court Hill's tax liabilities, complying with its annual housing audit requirements, screening tenants, overseeing property leasing and rent collection, performing routine maintenance work, managing federal and state regulations and performing routine maintenance work on the units, elevators, [and] roofs along with other capital improvements. For years, Court Hill's independent auditors' report noted that Court Hill was experiencing substantial operating deficits and net losses compared to the net cash provided by its operating activities."

[2] "By the time of the hearing on the prejudgment remedy application, Harp was deceased." *ASPIC, LLC* v. *Poitier*, supra, 179 Conn. App. 634 n.2.

"On December 24, 2008, Harp, on behalf of Court Hill, signed an amended and restated promissory note in the amount of $2,039,763 in substitution for an August, 2008 promissory note.[3] The note purported to memorialize Court Hill's debt for 'operating expenses as of November 30, 2008, plus accrued interest' by entering into an 'amended and restated promissory note' with Renaissance [Management] for that amount. Harp endorsed this note four times, once for each of the Court Hill member partnerships. Also on December 24, 2008, Harp, on behalf of Court Hill, then entered into an 'amended and restated promissory note,' in the amount of $817,692, with Harp, individually. This note also was for 'operating expenses as of November 30, 2008, plus accrued interest thereon.' Harp also endorsed this note four times, once for each of the Court Hill member partnerships.[4]

"On December 30, 2008, Harp, on behalf of himself and Renaissance [Management], executed a loan agreement and a $1.5 million promissory note with Muni (Muni note). The loan agreement provided in part that $695,963.94 of the loan would be advanced to Harp and Renaissance [Management] 'to be used by [Harp and Renaissance Management] to repay the promissory note made by [Muni] to Harp,' and that proceeds from this loan also were to be used to pay federal, state, and local tax liabilities of Harp and/or Renaissance [Management]. Schedule 7 (f) of the loan agreement contains, inter alia, a listing of the tax obligations of Renaissance

[3] "The amended and restated promissory note provided that it was 'given in substitution for (but not in satisfaction of) a [p]romissory [n]ote of [m]aker to [l]ender in the original principal amount of [$2,007,820] dated on or about August 1, 2008.' It does not appear, however, that the August 1, 2008 note was submitted into evidence at the [prejudgment remedy] hearing [or at trial]." *ASPIC, LLC* v. *Poitier*, supra, 179 Conn. App. 634 n.3.

[4] "These two December 24, 2008 amended and restated promissory notes collectively are referred to as the Court Hill notes." *ASPIC, LLC* v. *Poitier*, supra, 179 Conn. App. 635 n.4.

[Management]: $950,000 to the Department of Revenue Services; $732,000 to the Internal Revenue Service [IRS]; and $3700 to the city of New Haven.

"Harp, Renaissance [Management], and Muni also entered into a 'pledge and security agreement' on December 30, 2008, whereby Renaissance [Management] and Harp pledged as collateral for the Muni note their interests in and rights under the Court Hill notes. Additionally, on April 1, 2009, Harp, Renaissance [Management], and Muni entered into a 'first amendment to pledge and security agreement' (amended security agreement), which amended the December 30, 2008 pledge and security agreement to include a collateral pledge of two additional notes payable by Court Hill (2009 advance notes), one in favor of Renaissance [Management] in the amount of $251,010 for operating expenses between December 1, 2008, and February 28, 2009, and one in favor of Harp in the amount of $13,572, also for operating expenses during that same period." (Footnotes in original.) *ASPIC, LLC* v. *Poitier*, supra, 179 Conn. App. 634–35.

The defendant was unaware that Harp executed the Court Hill notes and the 2009 advance notes on behalf of the partnerships and in favor of Harp and Renaissance Management. There also was no evidence that the defendant was aware of the execution of the loan agreement or the pledge and security agreement between Harp and Muni in December, 2008.[5] The entire principal

[5] The defendant admitted receiving a communication from Harp in March, 2008, in which Harp notified the defendant that Harp had borrowed $625,000 from Muni in 2007, and that he assigned "a receivable interest in funds owed [to Renaissance and Harp] . . . ." That purported loan is not the subject of this litigation. In the same communication, Harp informed the defendant that if he and Bumbray did not agree to convert their general partner interests in Court Hill to limited partner interests, he would borrow approximately $1.5 million from Muni to cover various expenses arising out of Court Hill's operations and would "assign my collateral debts from Court Hill to [Muni]." Harp further told the defendant that, "after May 1, 2008, I will have put in place the final agreement on [the Muni] loan/investment—and they will probably move aggressively to consolidate their loans and enforce general

balance of the Muni note was due and payable on December 31, 2010, but no payment was made at that time.[6]

In May or June, 2011, Harp told his son Wendell Matthew Nathaniel Harp that he had been diagnosed with terminal cancer and asked his son to return home and take over Harp's businesses. In November, 2011, Harp, as the Court Hill managing general partner, divested Court Hill of its real property assets through four separate purchase and sale agreements. In three of these transactions, Harp transferred the real property assets of GAB, BHP, and WCH to limited liability companies owned and controlled by his son.[7] Additionally, on November 4, 2011, Harp executed a purchase and sale agreement transferring Renaissance Hill's real property assets to ASPIC Renaissance, LLC—an affiliate of the plaintiff—for the purchase price of $2,800,000. Although the total stated consideration for all of the real property assets sold was $6,850,000, which represented the purported fair market value of the properties, neither the Court Hill partnerships nor their partners received any proceeds from the transactions. Instead, the buyers paid off mortgages owed on the properties in the amount of $1,830,272.23 and became co-obligors on the Court Hill notes. Thus, as a result of these transactions, Court Hill lost more than $5 million of equity in real estate assets and remained liable, along with its general partners and

partner financial responsibility and collection." The significance of this communication is discussed further in part I A of this opinion.

[6] Muni's managing partner, Richard Corey, testified at trial that, in early 2017, a payment in the amount of $710,443 was made toward the Muni note after one of the properties that secured the note was sold.

[7] In the first sale, acting on behalf of GAB, Harp sold one property to HOW WH, LLC, for the purchase price of $850,000. In the second sale, acting on behalf of WCH, Harp sold another property to ROB WH, LLC, for the purchase price of $1.3 million. In the third sale, acting on behalf of BHP, Harp sold a third property to LEG WH, LLC, for the purchase price of $1.9 million.

the purchasers of those assets, for the Court Hill notes executed by Harp on behalf of Court Hill. Harp did not notify the defendant that he sold Court Hill's real property assets to entities controlled by his son and the plaintiff. On December 2, 2011, Harp died, and his son became the president of Renaissance Management.

On January 8, 2014, after not receiving any payment from Harp or Renaissance Management on the Muni note, Muni declared the note in default and held a public sale of the collateral securing the Muni note—the Court Hill and 2009 advance notes. Muni was the highest bidder at the auction and took title to the Court Hill notes and the 2009 advance notes. Muni thereafter transferred legal title of those notes to its subsidiary, the plaintiff, which brought this action to enforce the Court Hill notes and the 2009 advance notes against the defendant, as a general partner in Court Hill. The plaintiff did not seek to enforce the notes against the Court Hill partnerships, Harp's estate, Bumbray, or any of the entities that became co-obligors on the notes when they purchased the Court Hill properties in 2011, including the plaintiff's affiliate, ASPIC Renaissance, LLC.

In response to the plaintiff's complaint, the defendant filed an answer and amended special defenses. At issue in this appeal is the defendant's eighth special defense that the plaintiff is barred from recovery by virtue of Harp's breach of his fiduciary duties to the defendant. The defendant argued that Harp breached his fiduciary duties by (1) executing the Court Hill notes and the 2009 advance notes on behalf of the Court Hill partnerships, for his own benefit, without providing sufficient notice to the defendant that he was doing so, (2) entering into the Muni note and using the Court Hill notes and the 2009 advance notes as collateral, also without notifying the defendant, and (3) selling the real property assets of the Court Hill partnerships to entities controlled by his son or an affiliate of the plaintiff for

inadequate consideration, again without informing the defendant that he was doing so.

Before the trial court, the parties agreed that, because the plaintiff acquired the notes after the notes were in default, the plaintiff stood in Harp's shoes and, therefore, owed a fiduciary duty to the defendant. Accordingly, the plaintiff conceded that, if Harp breached his fiduciary duty to the defendant, it would be precluded from enforcing the notes. The plaintiff also conceded that, because Harp owed a fiduciary duty to the defendant, it bore the burden of proving, by clear and convincing evidence, that the transactions at issue constituted fair dealing by Harp. The plaintiff claimed that Harp dealt fairly with the defendant, arguing that the evidence established that the defendant was well aware of the substantial amounts Court Hill owed Harp and Renaissance Management, and that Harp explicitly told the defendant that he intended to borrow money from Muni and to assign to Muni, as collateral for the loan, the receivables owed to him and Renaissance Management. The plaintiff also argued that the liquidation of Court Hill's real property assets in 2011 was separate and distinct from the transactions involving the Court Hill and 2009 advance notes and in no way tainted its right to enforce those notes.

On March 20, 2018, the court held a one day bench trial. On November 8, 2018, the court rendered judgment in favor of the defendant on his special defense asserting a breach of fiduciary duty, concluding that Harp breached his fiduciary duty to the defendant. The court reasoned: "The plaintiff produced no rebuttal evidence that either Bumbray or the defendant was aware of Harp's endorsement of the Court Hill notes over to himself and/or to Renaissance. The court finds the testimony of Bumbray and the defendant, both of whom denied any prior

knowledge of Harp's endorsements, to be highly credible.[8] The plaintiff presented no transcripts from any meetings of the general partners regarding said endorsements and there was no evidence that any such meetings were held." (Footnote added.) The plaintiff now appeals. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the court improperly (1) concluded that Harp, as the plaintiff's predecessor in interest, breached his fiduciary duties to the defendant and (2) rendered judgment for the defendant on the Court Hill notes and the 2009 advance notes issued to Renaissance Management even though it concluded that Renaissance Management had not breached any fiduciary duty it owed to the defendant. We address each claim in turn.

I

The plaintiff first claims that the court's conclusion that Harp breached his fiduciary duties to the defendant was premised on multiple legal errors and clearly erroneous factual findings. The plaintiff argues that the court improperly (1) found that the defendant lacked notice of the Court Hill notes, the 2009 advance notes, and the Muni note, (2) failed to consider all of the relevant factors under *Konover Development Corp.* v. *Zeller*, 228 Conn. 206, 635 A.2d 798 (1994), and (3) analyzed Harp's performance of his fiduciary duties to the defendant.

We begin with the standard of review and legal principles relevant to our resolution of the plaintiff's claims. "The scope of our appellate review depends upon the

[8] The parties agree that the court's statements regarding Bumbray's testimony are clearly erroneous because Bumbray did not testify. Nevertheless, because the plaintiff had the burden to prove, by clear and convincing evidence, what the defendant knew, and because the plaintiff presented no evidence that the defendant was aware of the execution of the notes, the court's error was harmless.

proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts as they appear in the record. . . .

"[W]hen the resolution of a question of law, such as the existence of a fiduciary duty, depends on underlying facts that are in dispute, that question becomes, in essence, a mixed question of fact and law. Thus, we review the subsidiary findings of historical fact, which constitute a recital of external events and the credibility of their narrators, for clear error, and engage in plenary review of the trial court's application of . . . legal standards . . . to the underlying historical facts." (Citation omitted; internal quotation marks omitted.) *Saggese* v. *Beazley Co. Realtors*, 155 Conn. App. 734, 751–52, 109 A.3d 1043 (2015). "Appellate review of facts on which a claim of breach of fiduciary duty is based is subject to the clearly erroneous standard." *Chioffi* v. *Martin*, 181 Conn. App. 111, 136, 186 A.3d 15 (2018).

As a preliminary matter, we reiterate—as we did in *ASPIC*—that it is undisputed that Harp owed a fiduciary duty to the defendant, and that the plaintiff is bound by that fiduciary duty. See *ASPIC, LLC* v. *Poitier*, supra, 179 Conn. App. 641 n.6 ("The court found, and the parties do not dispute, that the plaintiff, having acquired the Court Hill collateral notes after the notes were in default, is not a holder in due course under General Statutes § 42a-3-302 (a), and that the plaintiff is subject to any personal defenses that the defendant could have asserted against Harp and Renaissance. The parties also agree that the plaintiff stands in Harp's shoes and owes a fiduciary duty to the defendant.").

"Our Supreme Court has recognized that partners are generally bound in a fiduciary relationship and act as trustees toward each other and toward the partnership. . . . Proof of a fiduciary relationship imposes a twofold burden on the fiduciary. First, the burden of proof shifts to the fiduciary; and second, the standard of proof is clear and convincing evidence. Once a fiduciary relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of proof of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." (Citation omitted; internal quotation marks omitted.) *Spector* v. *Konover*, 57 Conn. App. 121, 127, 747 A.2d 39, cert. denied, 254 Conn. 913, 759 A.2d 507 (2000).

Thus, the central issue for this court is whether the trial court properly concluded that Harp breached his fiduciary duty to the defendant because the plaintiff failed to prove fair dealing by clear and convincing evidence. Accordingly, we review the court's factual findings for clear error and conduct a plenary review of the court's ultimate conclusion as to whether the plaintiff proved that Harp did not breach his fiduciary duty to the defendant. See *Saggese* v. *Beazley Co. Realtors*, supra, 155 Conn. App. 751–52.

A

The plaintiff first contends that the court erred by finding that the defendant lacked notice of the Court Hill notes, the 2009 advance notes, and the Muni note. Specifically, the plaintiff argues that the court's determination was inconsistent with both the factual record—in that the court cited to nonexistent testimony while ignoring clear and convincing evidence of notice to the

defendant—and the well established legal principles regarding fair dealing. We disagree.

The following additional facts are relevant to our resolution of the plaintiff's claim. At trial, the plaintiff proffered the following evidence in support of its claim that the defendant had notice of the transactions at issue. In a February 4, 2008 letter to the defendant and Bumbray, Harp requested financial assistance to pay off some of Court Hill's debts, including delinquent sewer fees assessed to Renaissance Hill. In order to prevent one of Renaissance Hill's creditors from seizing its property, Harp claimed that he immediately borrowed $60,000 to settle pending foreclosure sale judgments. Harp requested that Bumbray and the defendant each loan him $150,000 to help cover existing debts, allowing him more time to negotiate "a less stringent loan plan." At trial, the defendant acknowledged receipt of the letter and testified that he did not offer to help pay off the sewer debt.

In another correspondence from Harp to the defendant dated March 20, 2008, Harp explained the extent of Court Hill's debts and outlined a plan to effect a buyout of Bumbray and the defendant. Harp wrote: "I am in need of borrowing another [$1.5 million plus or minus] to cover partial payments on the [Connecticut] taxes, installment payment of IRS withholding taxes, sewer [and] utility fees, vendor debts, partial reimbursement to me, and related expenses. [Muni] has expressed a willingness to fund these subject to their ability to [effect] a [buyout] of the other Court Hill general partners and overall agreement of you and [Bumbray] converting to [limited] partners or [you and Bumbray] paying substantially on the general partner obligations! In the event the [buyout] is not agreed upon I will simply borrow the additional funds available to me and assign my collateral debts from Court Hill to [Muni]." (Emphasis omitted.)

The defendant testified that Harp told him in 2008, that Court Hill needed operating funds and that he intended to borrow money from Muni if necessary. When shown the March 20, 2008 letter, the defendant acknowledged that he did not agree to the buyout proposed by Harp and that the letter informed him that, if he did not agree to the buyout, Harp intended to borrow additional funds and assign his collateral debts from Court Hill to Muni.

The record does not reflect any evidence that, prior to executing the Court Hill notes or the 2009 advance notes, Harp ever communicated to the defendant that he intended, as Court Hill's managing general partner, to issue promissory notes to himself and Renaissance Management memorializing the amounts he claimed were owed by Court Hill. The record also does not reflect any further communications between Harp and the defendant regarding the possible assignment of Harp's and Renaissance Management's claims to Muni between March and December, 2008, when the Muni note was executed.

As previously stated in this opinion, the plaintiff had the burden to prove, by clear and convincing evidence, that Harp dealt fairly with the defendant with respect to the transactions at issue. See *Konover Development Corp.* v. *Zeller*, supra, 228 Conn. 219 ("[o]nce a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary" (internal quotation marks omitted)). "Our Supreme Court has stated that [i]t is a thoroughly [well settled] equitable rule that any one acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest. This rule is strict in its requirements and in its operation. It extends to all transactions where the individual's personal interests may be brought into conflict with his acts in the fiduciary capacity, and it works independently of the question whether

there was fraud or whether there was good intention. . . . The rule applies alike to agents, *partners*, guardians, executors and administrators." (Emphasis in original; internal quotation marks omitted.) *Spector* v. *Konover*, supra, 57 Conn. App. 128.

In *Spector*, this court, referencing our Supreme Court's decision in *Konover Development Corp.* v. *Zeller*, supra, 228 Conn. 228, noted that, in certain circumstances involving sophisticated business ventures, "a fiduciary may demonstrate that a particular transaction is fair by showing (1) that the fiduciary made a free and frank disclosure of all the relevant information he had, (2) that the consideration was adequate, (3) that the principal had competent and independent advice before completing that transaction, and (4) the relative sophistication and bargaining power among the parties." *Spector* v. *Konover*, supra, 57 Conn. App. 128–29. As this court noted, however, this standard does not diminish the nature of a partner's fiduciary duties. Rather, "[t]he *Zeller* standard effectively preserves the heightened standards required of fiduciaries while allowing parties in a fiduciary relationship the flexibility to contract freely among themselves. . . . To invoke the *Zeller* standard in an attempt to justify the fairness of a particular transaction, the fiduciary must first be able to show that there was some agreement among the parties allowing the fiduciary to act in a manner that may otherwise be a breach of fiduciary duty." Id., 129.

The plaintiff, relying on the *Zeller* standard, points to the February and March, 2008 letters of correspondence from Harp to the defendant and the Court Hill audited financial statements as evidence of a free and frank disclosure of the relevant information relating to Harp's execution of the Court Hill and 2009 advance notes and the pledge of those notes as collateral for the Muni note. We agree that the February and March, 2008 letters are evidence that Harp notified the defendant about

a tentative plan to enter into a pledge and security agreement with Muni to secure a loan. We also agree that the audited financial statements are evidence that Court Hill owed a debt to Harp and Renaissance Management. Significantly, however, neither the letters nor the audited financial statements constitute evidence of Harp notifying the defendant of his intent to issue promissory notes totaling more than $3 million on behalf of Court Hill to himself and to Renaissance Management or that he intended to pledge these notes as collateral for the Muni note.

Consequently, the plaintiff cannot claim that the court's specific finding that the defendant was unaware "of Harp's endorsement of the Court Hill notes over to himself and/or to Renaissance [Management]" was clearly erroneous. There was no evidence, let alone clear and convincing evidence, that the defendant was aware of the execution of those notes, the 2009 advance notes, or the Muni note. Instead, the plaintiff essentially argues that the defendant's knowledge of (1) Court Hill's debts owed to Renaissance Management and Harp and (2) Harp's plan to borrow money from Muni using those debts as collateral for the Muni note constitutes a free and frank disclosure of the terms of the Court Hill notes, the 2009 advance notes, and the Muni note to the defendant before they were executed. We disagree.

Owning accounts receivable, even if confirmed by Court Hill's audited financial statements, is materially different from being the holder of a promissory note that provides a clear and explicit obligation to pay the amount set forth in the note pursuant to specific terms. For example, a claim by Harp or Renaissance Management for operating expenses incurred on behalf of Court Hill would require proof of such expenses and the amount due. See, e.g., *Day* v. *Len-Metal-Fab, Inc.*, 3 Conn. Cir. 249, 253, 212 A.2d 426 (1965) ("[t]he burden of proof was upon the plaintiff to establish by a fair

preponderance of the evidence the substantial allegations of his complaint, among which were the rendition of services alleged, the rate of compensation, and the time required to perform such services"). After the execution of the Court Hill and 2009 advance notes in specific amounts, the ability of Court Hill or its general partners to challenge the amount owed to Harp and Renaissance Management became much more difficult. See, e.g., *Financial Freedom Acquisition, LLC* v. *Griffin*, 176 Conn. App. 314, 323, 170 A.3d 41 ("The possession by the bearer of a note [e]ndorsed in blank imports prima facie [evidence] that he acquired the note in good faith for value and in the course of business, before maturity and without notice of any circumstances impeaching its validity. The production of the note [endorsed in blank] establishes [the possessor's] case prima facie against the makers and he may rest there." (Internal quotation marks omitted.)), cert. denied, 327 Conn. 931, 171 A.3d 454 (2017).

In addition, the Court Hill and 2009 advance notes gave Harp and Renaissance Management remedies not available to them without the notes. For example, the notes include: a standard interest rate of 10 percent and a default interest rate of an additional 5 percent; a waiver of Court Hill's right to a jury trial; a waiver of notice and a hearing should Harp or Renaissance Management seek a prejudgment remedy; and a provision requiring Court Hill to pay reasonable attorney's fees if the holder of the notes employs counsel to enforce them. None of these remedies would have been available to Harp or Renaissance Management in the absence of the notes.

Moreover, § 33 of the "Management and Affirmative Fair Marketing Agreement" between one of the partnerships, Renaissance Hill, and Renaissance Management,[9]

[9] This was the only management agreement introduced at trial.

provides: "If Owner is a partnership, *no partner of Owner shall be held to any personal liability, nor shall resort be had to his, her or its private property for satisfaction of any obligation or claim arising out of this Agreement*, unless such partner has specifically undertaken performance of the obligations of Owner by executing this Agreement in his or her personal capacity. Only the Development assets of Owner shall be liable and subject to levy or execution on account of any liability of Owner arising hereunder. A deficit capital account [of a] partner of Owner shall not be deemed to be an asset or property of Owner." (Emphasis added.) Thus, by issuing the Court Hill and 2009 advance notes, Harp circumvented the contractual limits of liability for obligations arising under the management agreement and converted a nonrecourse debt obligation into a recourse debt obligation.

Finally, the mere fact that the partnership agreements authorized Harp to execute the Court Hill notes, coupled with the defendant's knowledge of debts owed to Harp and Renaissance Management and of Harp's contemplation of a potential loan transaction with Muni, did not relieve Harp of his fiduciary duty to disclose to the defendant all relevant information specific to the Court Hill and 2009 advance notes. As this court has previously stated: "The terms of a . . . partnership agreement cannot negate the fiduciary duty of the general partner even where the relationship and terms of a contract between the fiduciary and its affiliate are disclosed and even where the partnership involves sophisticated parties. . . . *Zeller* requires more than a disclosure of the relationship and terms underlying the transaction. *Zeller* requires that the fiduciary make a free and frank disclosure of all the relevant information it has about *the particular transaction*." (Citation omitted; emphasis in original.) *Springfield Oil Services, Inc.* v. *Conlon*, 77 Conn. App. 289, 302–303, 823 A.2d 345

(2003). Put another way, Harp's fiduciary duty was not simply to inform the defendant that Court Hill was in debt but, rather, to keep the defendant apprised of the details of Court Hill's repayment plans, especially when those plans implicated the defendant to the extent that they did here.

In sum, the February and March, 2008 letters of correspondence and annual audited financial statements fall short of clear and convincing evidence of fair dealing. Accordingly, we reject the plaintiff's contention that the court could not have reasonably found that the defendant lacked notice of the Court Hill notes, the 2009 advance notes, and the Muni note.

B

The defendant next argues that the court erred in failing to consider all of the relevant factors under *Konover Development Corp.* v. *Zeller*, supra, 228 Conn. 206. We disagree.

As previously noted in this opinion, in certain circumstances, "a fiduciary may demonstrate that a particular transaction is fair by showing (1) that the fiduciary made a free and frank disclosure of all the relevant information he had, (2) that the consideration was adequate, (3) that the principal had competent and independent advice before completing that transaction, and (4) the relative sophistication and bargaining power among the parties." *Spector* v. *Konover*, supra, 57 Conn. App. 128–29.

Having concluded in part I A of this opinion that Harp failed to make a free and frank disclosure of all relevant information to the defendant, the plaintiff's claim regarding application of the other *Zeller* factors fails. We conclude that the other *Zeller* factors cannot outweigh, as a matter of law, the failure to make a free and frank disclosure. This is particularly true as to the

third and fourth factors. Indeed, a party cannot have competent and independent advice about a transaction as to which there has not been a free and frank disclosure of all relevant information. Similarly, a party's level of sophistication to understand a transaction is of little value if the party does not know about the transaction.

As to the second *Zeller* factor regarding the adequacy of consideration, adequate consideration is a necessary, not sufficient, condition to establish fair dealing. As we have previously stated: "The standard articulated in *Zeller* is most appropriately applied in situations where a principal challenges the fairness of a particular transaction in which both the principal and the fiduciary made *a fully informed decision to act* in a manner that is seemingly contrary to the normal fiduciary relationship. *Implicit in the Zeller standard is the requirement that the principal consent to the transaction carried out by the fiduciary.* To invoke the *Zeller* standard in an attempt to justify the fairness of a particular transaction, *the fiduciary must first be able to show that there was some agreement among the parties allowing the fiduciary to act in a manner that may otherwise be a breach of fiduciary duty.*" (Emphasis added.) *Spector* v. *Konover*, supra, 57 Conn. App. 129. Thus, although the lack of adequate consideration may lead to a conclusion that a fully disclosed transaction nevertheless constitutes a breach of fiduciary duty, adequate consideration alone will not establish fair dealing as to a transaction that was not fully disclosed to the principal and to which the principal did not agree. Consequently, in light of the court's conclusion that Harp failed to disclose all relevant information regarding the Court Hill and 2009 advance notes, the trial court did not err in failing to address the other *Zeller* factors.

C

The plaintiff also claims that the court, in reaching its conclusion that Harp breached his fiduciary duty to

the defendant, committed a number of legal errors that require reversal. In particular, the plaintiff claims that the trial court incorrectly (1) relied on the 2011 sales of Court Hill's real property assets because those transactions were separate and distinct from the execution of the Court Hill and 2009 advance notes and, therefore, any breach of fiduciary duty by Harp in completing those transactions cannot be attributed to the plaintiff, (2) concluded that it was a breach of fiduciary duty that Harp benefitted from the Court Hill and 2009 advance notes, even though Court Hill also benefitted from those notes, (3) based its conclusion on a nonexistent duty that Harp ensure that the defendant was released from liability under the Muni note, and (4) imposed a nonexistent duty on Harp to have a formal meeting with his partners before executing the Court Hill notes. We are not persuaded.

The plaintiff misconstrues the import of the court's conclusion and minimizes the central finding of the court that Harp failed to disclose to the defendant that he was converting his accounts receivable claims against Court Hill into promissory notes that he then would use to secure loans for himself and Renaissance Management. Although the court did mention in its memorandum of decision that Harp did not provide the defendant with notice prior to selling Court Hill's real property assets, the court made clear that Harp's breach of fiduciary duty, as it relates to the plaintiff's right to enforce the Court Hill and 2009 advance notes, occurred much earlier. The court specifically held: "The defining moment happened once Harp endorsed the notes over to himself and/or Renaissance [Management]: Harp's duty to deal fairly with Court Hill, Bumbray, and the defendant collided with his personal objective in reducing or eliminating his own tax liabilities; he pursued the Muni loan *for a dual purpose*. The notes and Muni loan proceeds benefitted Harp and Court Hill not just

Court Hill. The court concludes that the point at which Harp acted on his own behalf, in his own interest too, as Harp, the 'individual,' the 'person,' the 'maker' in his own name, he breached the trust that Court Hill and the other general partners placed in him." (Emphasis in original.) Thus, the court's reference to the sale of the Court Hill real property assets was not the basis for its conclusion that Harp breached his fiduciary duty to the defendant.

Similarly, the plaintiff's claim that the court incorrectly concluded that a fiduciary may not benefit from a transaction that also benefits his principal ignores the court's earlier finding that Harp failed to disclose to the defendant his plan to execute the Court Hill notes and the 2009 advance notes, and pledge them as security for the Muni note. Thus, it was not just that Harp benefitted from the transaction, but that he did so without making the necessary free and frank disclosure of all relevant information to the defendant. This failure to disclose also undermines the plaintiff's arguments as to whether Harp was required to receive a release of liability for the defendant as part of the Muni loan transaction and its claim that no formal meeting was required to discuss Harp's execution of the Court Hill and 2009 advance notes. Had Harp properly disclosed all relevant information to the defendant and had the defendant agreed to the transactions at issue, the plaintiff might be correct that a formal meeting or a release of liability would not have been required. That, however, did not occur. Simply put, the plaintiff cannot exclude from the court's analysis its key finding, which was not clearly erroneous, that Harp failed to disclose all relevant information relating to the Court Hill notes, the 2009 advance notes, and the Muni note to the defendant. The failure to make a free and frank disclosure of all the information regarding these transactions, which unquestionably

personally benefitted Harp to the detriment of the defendant, is fatal to the plaintiff's claims of legal error.

In sum, we conclude that the court's finding that Harp failed to disclose to the defendant all relevant information related to the transactions at issue was not clearly erroneous. We also agree with the court that this failure constituted a breach of fiduciary duty that precludes enforcement of the Court Hill and 2009 advance notes against the defendant.

II

The plaintiff finally claims that the court improperly rendered judgment for the defendant on the Court Hill and 2009 advance notes issued to Renaissance Management even though it concluded that Renaissance Management had not breached any fiduciary duty it owed to the defendant. This claim is without merit.

In its memorandum of decision, the trial court addressed each of the defendant's special defenses. Although the court found that the defendant prevailed on his breach of fiduciary duty special defense against Harp, it denied his breach of fiduciary duty special defense as to Renaissance Management. It nevertheless rendered judgment for the defendant on all of the plaintiff's claims, both those arising from Harp's Court Hill and 2009 advance notes and those arising from Renaissance Management's Court Hill and 2009 advance notes. The reason for this should be clear. The court rejected the special defense that Renaissance Management breached its fiduciary duty to the defendant because Renaissance Management owed no fiduciary duty to the defendant. Its only relationship to Court Hill and the defendant was as a provider of services to Court Hill. Nonetheless, the transaction by which it received promissory notes from Court Hill was orchestrated by Harp, for his own benefit and without making a free and frank disclosure to the defendant. The plaintiff,

standing in Harp's shoes, cannot avoid the effects of Harp's breach of fiduciary duty simply because Harp created an obligation to a third party he controlled instead of a direct obligation to himself. Allowing Renaissance Management to recover on the Court Hill and 2009 advance notes would provide a road map for how a fiduciary may breach his duty to his principal and then insulate his misconduct from attack. We are unwilling to provide such assistance.

The judgment is affirmed.

In this opinion the other judges concurred.

CITY OF HARTFORD POLICE DEPARTMENT *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.
(AC 43420)

Prescott, Clark and DiPentima, Js.

Syllabus

The plaintiff employer appealed to the trial court from the decision of the defendant Commission on Human Rights and Opportunities sustaining a claim of ancestry discrimination brought by the plaintiff's employee, the defendant P, who is Vietnamese. P filed an affidavit of illegal discriminatory practice with the commission following the termination of his employment as a probationary police officer. P claimed that, after two negative interactions with a sergeant, K, during which K questioned P's ancestry and language skills and P stated that he would file a grievance against K, other sergeants began complaining about his performance, motivating the plaintiff to terminate his employment. The trial court rendered judgment affirming the decision of the commission, from which the plaintiff appealed to this court. *Held* that the trial court improperly held that there was substantial evidence in the record that P's termination from employment arose under circumstances that gave rise to an inference of discrimination: although K's remarks to P were despicable and K filed a memorandum criticizing P following their negative interactions, there was not substantial evidence in the record to support a finding of a causal connection between K's remarks and the plaintiff's decision to terminate P from employment or that K played any role in the decision to terminate P's employment, as there was no evidence that the chief of police, who did terminate P's employment, ever saw

K's memorandum, K's memorandum did not recommend that P be terminated, P had received both negative reports before his interactions with K and positive reports after those interactions, and, contrary to the findings of the commission's human rights referee that the sergeants who gave P negative reports following his interactions with K were influenced by K's animus because they were promoted at the same time and socialized with K, the other sergeants testified that there was no particular comradery among that group and that K had no influence on how they viewed P or that they had no contact at all with K regarding P; moreover, although the referee was not required to credit the testimony of the police officers, she was not permitted to infer the opposite of their testimony solely from her disbelief of the testimony; furthermore, the evidence in the record did not support the referee's conclusion that the legitimate, nondiscriminatory reasons for P's discharge set forth by the plaintiff were pretextual and that the decision was motivated by illegal discriminatory bias, as issues regarding P's truthfulness and unprofessional demeanor were documented in contemporaneous reports from both before and after P's interactions with K, P testified that none of the plaintiff's employees other than K ever treated him differently due to his ancestry, and K had no role in the decision to terminate P.

Argued April 19—officially released November 23, 2021

Procedural History

Appeal from the decision of the human rights referee of the named defendant sustaining a complaint of ancestry discrimination filed by the defendant Khoa Phan against the plaintiff, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment affirming the decision of the referee, from which the plaintiff appealed to this court. *Reversed*; *judgment directed.*

Daniel J. Krisch, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, with whom, on the brief, was *Megan K. Grant*, human rights attorney, for the appellee (named defendant).

James V. Sabatini, for the appellee (defendant Khoa Phan).

Opinion

PRESCOTT, J. The plaintiff, City of Hartford Police Department (city), appeals from the judgment of the trial court affirming a decision of the named defendant, the Commission on Human Rights and Opportunities (commission), which concluded that the city had discriminated against the defendant Khoa Phan on the basis of his Asian and Vietnamese ancestry by terminating Phan's employment as a probationary police officer. The primary issue on appeal is whether the trial court improperly concluded that substantial evidence supported the commission's determination that the city intentionally had discriminated against Phan. We conclude that the substantial evidence in the record does not support a determination of intentional discrimination by the city and, accordingly, we reverse the judgment of the trial court.

The following facts, as found by the presiding human rights referee (referee), are relevant to this appeal. Phan, who is Vietnamese, was hired as a police officer for the city on December 14, 2009. He graduated from the police academy on July 2, 2010, and thereafter became a probationary police officer. The full probationary period for new officers lasts one year starting with the commencement of the field training program, which lasts for several weeks. The field training program has four phases. During each phase Phan worked with different sergeants who served as field training officers. Phan's field training officer for phase one was Officer Steven Citta. Phan's field training officer for phase two was Officer Christian Billings.[1] Phan's field training officer for phase three was Officer Vincent

[1] Phan's first field training officer for phase two was Officer Tyrone Boland. Phan did not pass phase two of the field training program with Boland. Phan repeated phase two of the training program with Billings and passed on his second attempt. The fact that Phan had to repeat a phase of the program was not an automatic ground for termination.

Benvenuto. Phan's field training officer for phase four was Citta. Phan completed the training and received a satisfactory rating.

On or about October 29, 2010, Phan received a probationary employee performance evaluation indicating that his performance was satisfactory. Although Phan received a satisfactory evaluation, during phase two of the training program he lost his hat piece.[2] In his report regarding the missing hat piece, Phan wrote that he had reported the lost hat piece to Sergeant Gregory Weston, his supervisor, even though this was not true. According to Phan, another officer had told him to state in his report that he had reported it to Weston, and he did what he was told to do. Weston was angry at Phan for including untrue information about him in the report and instructed Phan to correct the report, which Phan did. Phan received a new hat piece on or about September 20, 2010.

During Phan's probationary period, the sergeant in charge of each shift completed daily observation reports evaluating Phan's performance in the areas of appearance, overall attitude, interpersonal skills, care of equipment, and performance of certain skills such as patrol, investigation, phones and radio, conflict, report writing, and policies and procedures. In these reports, the sergeant indicated whether Phan's work was superior, acceptable, or unsatisfactory in each area. Phan received satisfactory reviews for October, 2010, and November, 2010, with a few mistakes noted on the reports that were typical of new officers. In December, 2010, Phan received seven unsatisfactory ratings; the daily observation report dated December 5, 2010, however, contained a notation that Phan's performance had

[2] The hat piece is the shield on top of the hat. At the hearing, Phan acknowledged that losing a hat piece is significant because the person who finds the hat piece could use it to impersonate a police officer.

improved. Phan's ratings in January, 2011, were generally acceptable, and he passed his first probationary employee performance evaluation for the period ending on January 2, 2011.

On January 23, 2011, Phan had the first of two negative encounters with Steven Kessler, a sergeant. On that date, Phan asked Kessler to review his report on a motor vehicle accident. Upon review, Kessler made negative comments about the report, asked Phan how long he had been working at the Hartford Police Department (department), and told Phan that his report "is probably the shittiest thing I've ever read. How did you come up with such bullshit with seven months of training, Phan?" Kessler criticized Phan's grammar and threw the report in the trash. After Phan revised the report, Kessler approved the report with very few changes. Kessler then asked Phan if the victim in the report was Chinese, and Phan responded that he did not know but thought that the victim spoke Cantonese. Kessler asked Phan, "What are you?" Phan replied that he was Vietnamese. In response, Kessler said, "Vietnamese, Cantonese, it's all the same shit, Phan." Kessler then refused to sign Phan's overtime card, stated that Phan was lucky he "didn't wipe [his] ass with [Phan's] report," and swore at Phan.

Phan's next encounter with Kessler was in February, 2011, on the midnight shift, when Phan asked Kessler to sign a domestic abuse arrest warrant. At that time, Kessler again criticized Phan's report writing skills and grammar and gave Phan a grammar lesson. Kessler asked Phan if he had gone to college and taken an English class. He also asked Phan if he had been born in the United States. After Phan indicated that he came to the United States when he was eleven years old, Kessler stated that this "explains [the problem], you know. I know English is a tough language to learn

. . . .'' Kessler laughed at Phan, asked Phan if the citizens of Hartford have a hard time understanding him, and remarked that hard core criminals must be laughing at Phan when Phan tells them what to do. When Phan asked Kessler to stop, Kessler indicated that he was in charge and would determine when to stop. When Phan stated that he would file a grievance against him, Kessler ordered Phan out of his office and warned Phan that he should be careful about what he said to him or he would not ''be around long.''

Kessler told the other sergeants about his concerns regarding Phan, including the fact that Phan had raised his voice when speaking with Kessler and that their interaction became heated. Kessler also spoke to Edward Yergeau, a sergeant and Phan's immediate supervisor, about Phan's performance.[3] Sergeants Paul Cicero, David Marinelli and Kessler were promoted to sergeant together and occasionally socialized outside of work. All sergeants are supervisors who communicate with one another.

On February 14, 2011, Kessler sent an interoffice memorandum to Peter Bergenholtz, a lieutenant and commander of the police academy, regarding deficiencies in Phan's work performance.[4] In the memorandum,

[3] Although the hearing officer did not explicitly find that Yergeau was Phan's immediate supervisor, Kessler testified that he believed Yergeau was Phan's immediate supervisor.

[4] The memorandum provides: ''On or around [February 14, 2011], I had the opportunity to provide report review for Probationary Officer Phan. Through this review it has come to my attention that . . . Phan is not at the level of competency and knowledge that can be expected of a probationary police officer with . . . seven months worth of experience. I am troubled by the deficiencies that were exposed during review of a simple domestic arrest warrant. These deficiencies include but are not limited to:

(1) Inability to explain the importance of completely and adequately completing all of the identifying boxes for the [a]ccused on the face sheet of the arrest warrant.

(2) Not having knowledge of the different databases contained within the in-house system and what information those databases hold.

(3) Inability to log on to the in-house system.

Kessler noted that he had followed up with other sergeants who had more frequent contact with Phan and learned that Phan was struggling with his job competency. Kessler also stated that, while he was reviewing the arrest warrant with Phan, Phan was confrontational and argumentative and raised his voice throughout their meeting. Kessler concluded by recommending, in conjunction with Lieutenant Edwin Dailey, the headquarters lieutenant, that Phan be "unplugged" from his current assignment and afforded the opportunity to be retrained on the noted deficiencies as well as supervisor/subordinate relationships.[5]

After the incidents with Kessler, Phan's favorable ratings decreased because numerous supervisors described Phan as argumentative and confrontational. He received an unsatisfactory rating in February, 2011. The summary report for February, signed by Bergenholtz, also indicated that Phan was argumentative with two supervisors on separate occasions.[6] Cicero prepared the daily observation report regarding Phan dated February 4, 2011. In this report, Cicero made negative comments regarding Phan's work performance and

(4) Failing to document investigative steps that provide for the state mandated safety of a domestic violence victim, i.e., inquiring whether accused has access to the residence and offering temporary housing/shelter for the victim, ensuring a quality canvass for the accused is undertaken, attempting to contact the accused.

(5) Noting and documenting observations of injuries and utilizing others such as doctors to provide nature and extent of injuries.

(6) Checking for the presence of [p]rotective/[r]estraining orders."

[5] Kessler testified that being "unplugged" means that the officer is removed from the field pending additional training and that it was not uncommon for officers to be unplugged. He further testified that he did not recommend that Phan be disciplined even though he "probably could initiate [that] himself."

[6] The summary report for February indicated that Phan had received unsatisfactory marks in overall attitude throughout the probationary period. Phan received no unsatisfactory ratings in overall attitude in January, 2011, one unsatisfactory rating in overall attitude in December, 2010, and one unsatisfactory rating in overall attitude in November, 2010.

indicated that Phan "has a problem comprehending supervisory orders and becomes confrontational and argumentative. [He] [h]as [a] hard time in decision making and understanding complex situations. When unsure of an answer, he has the habit of blaming his [field training officers] for not showing him the proper manner." On February 8, 2011, Marinelli also provided an unfavorable report regarding Phan.

On February 16, 2011, Cicero sent an interdepartmental memorandum to Lieutenant Michael Cacioli describing an incident in which Phan only had five daily observation reports in his folder while the other probationary police officers had approximately forty daily observation reports in their folders. According to the memorandum, Lieutenant Emory Hightower, Cicero, and Marinelli met with Phan about the missing reports. In his memorandum, Cicero concluded that it was apparent that Phan purposely had failed to retrieve all of the reports regarding him when asked to do so.[7] Kessler

[7] The memorandum provides: "On [February 6, 2011], while conducting routine maintenance and review of probationary officers [daily observation reports], it was observed that Officer Phan only had five . . . [daily observation reports] in his file folder. A review of his classmates' folders yielded everything filed appropriately and accordingly, with each having roughly forty completed [daily observation reports]. Lieutenant Hightower was made aware of the incident at which time Officer Phan was called into the [l]ieutenant's office after roll call. When asked as to the location of his [daily observation reports], Officer Phan left the office, only to return minutes later with thirteen . . . completed [daily observation reports], still far less than his expected tally. Officer Phan stated that he kept them in his department issued mailbox.

"When asked . . . why they were not in the appropriate file folder and cabinet, Officer Phan would not answer. When asked . . . whether . . . he knew they were supposed to be filed in the cabinet designated particularly for [daily observation reports], he would not answer. It was soon thereafter determined that the five completed [daily observation reports] that were in his folder were placed there by Sergeant [Mark] Vilcinskas, [who] had completed them.

"That while counseled by Lieutenant Hightower and Sergeant Marinelli, I took it upon myself to visually inspect Officer Phan's department issued open mailbox in the roll call room. Fourteen . . . more [daily observation reports] were located, some of which were rated unsatisfactory with addi-

was not involved in the incident regarding the missing daily observation reports.

On February 18, 2011, Cacioli sent an interdepartmental memorandum to Captain James Bernier expressing concern that Phan lacked the character necessary to continue as a probationary police officer. The memorandum listed the following categories in which Phan's performance was unsatisfactory based on a review of Phan's daily observation reports: appearance—out of uniform, failure to adhere to policies and procedures, ability to solve problems and decision making, report writing, and overall attitude. Cacioli's memorandum referenced Kessler's memorandum of February 14, 2011, and concluded by stating: "My main concern is not necessarily Officer Phan's appearance or minor report writing corrections. I believe these can be addressed through counseling and retraining. The unsatisfactory marks, as it relates to poor attitude and being confrontational with supervisors, calls into question Officer Phan's integrity and overall attitude to be a police officer. There is no retraining or teachable protocol that can rectify this character flaw and potential liability if Officer Phan is allowed to remain as a Hartford Police Officer."

Also on February 18, 2011, the police academy contacted Phan regarding the hat piece that Phan lost during phase two of his training program. Specifically, Phan was asked whether he still had his hat and hat piece that were issued to him upon his graduation from the Hartford Police Academy. In response to questioning, Phan indicated that he had reported his lost hat to

tional commentary. When retrieved and brought to Officer Phan's attention, he looked surprised and stated, 'Where did you find those?' It is uncertain as to whether or not Officer Phan had recently pulled his completed [daily observation reports] from his file folder prior to the meeting with him. It is, although, apparent that Officer Phan had purposely failed to retrieve all of the [daily observation reports] from his mailbox as originally asked."

Officer Tyrone Boland, and that Boland had instructed Phan to continue to look for it. Phan later testified that he told Bergenholtz and Jeffrey Rousseau, a sergeant, that Boland had instructed him to write that he had reported his lost hat piece to Sergeant Weston. The referee found that Boland was never interviewed regarding the missing hat piece and the investigation report regarding the missing hat piece did not mention Boland. Kessler was not involved in the investigation regarding Phan's lost hat piece.

On February 25, 2011, Phan met with Bergenholtz and Rousseau to discuss his performance for the period ending on January 2, 2011. At this time, Bergenholtz told Phan that he had heard that Phan had been yelling at Kessler. Although Phan denied yelling at Kessler, Phan stated that he was going to file a grievance against Kessler. In response, Bergenholtz told Phan that he, unlike Kessler, would have fired him immediately for making that remark.

The daily observation summary report regarding Phan for March, 2011, signed by Bergenholtz, indicated that Phan's performance was unsatisfactory.[8] This summary report contained a note that Phan continued to receive unsatisfactory ratings in overall attitude and that he was involved in an incident in which he demonstrated a dismissive attitude toward a senior officer who was coaching him through an officer safety deficiency.[9]

[8] The referee found that Phan's daily observation summary report for March, 2011, indicated one unsatisfactory rating, one superior rating and the remainder satisfactory ratings in the area of overall attitude. The summary reveals, however, that Phan received unsatisfactory ratings in the area of interpersonal skills, performance of patrol, investigative or assigned tasks, ability to perform duties in a safe manner, report writing, and ability to adhere to policies and procedures.

[9] In the daily observation report regarding Phan dated March 3, 2011, prepared by Sergeant Fernando Rodriguez, Jr., Phan received unsatisfactory ratings in the areas of overall attitude and interpersonal skills. Rodriguez explained the unsatisfactory rating as follows: "As for interpersonal skills, it concerns a senior officer, Officer Ward. There was an incident the previous day that involved a deficiency in officer safety . . . . Officer Ward, who

Kessler was not involved in the incident noted in this summary report. On March 28, 2011, Cicero sent another interdepartmental memorandum to Cacioli, summarizing the issues with Phan as set forth in Kessler's memorandum of February 14, 2011, Cicero's memorandum of February 16, 2011, and Cacioli's memorandum of February 18, 2011. This memorandum also described an incident involving Phan's deficient performance in the use of the mobile data terminal (MDT) system.[10] Kessler was not involved in the incident regarding Phan's inability to use the MDT system.

was involved in the incident, was attempting to give Officer Phan some sound advice in officer safety. While Officer Ward was in mid-sentence, Officer Phan turned away from Officer Ward, looked at me and apologized for his mistake. He totally disregarded Officer Ward as if he wasn't there. In my opinion, Officer Ward was giving advice to Officer Phan that could very well save his life. I advised Officer Phan that he should pay attention to the advice and criticism given by Officer Ward, a senior officer as well as [a field training officer], as if it was coming from a supervisor. The incident made me feel as if Officer Phan's interpersonal skills, as well as his overall attitude with senior officers, was lacking on this date. He was counseled on all deficiencies."

[10] The memorandum provided: "On or about February 15, 2011, I asked Officer Phan to send out a message on his MDT to surrounding towns in regards to an attempt to locate on a case that he was working on. Officer Phan stated that he did not know how that function existed on the MDT. I then asked Officer Phan to meet me in the rear of headquarters so that I may show him the proper method. Officer Phan sat in the passenger seat of Unit 420, and was then instructed as to how to send MDT messages to not only Hartford, but surrounding towns as well. When asked as to why he did not know how to properly utilize the system, Officer Phan stated that his field training officers never showed him. I advised Officer Phan that it was also his responsibility to ask his [field training officers], seeing that they may have been under the assumption that the prior [field training officer] had covered that particular area of training.

"Later that evening, I contacted one of his [field training officers], Officer Steve Citta. When asked as to whether or not he trained Officer Phan in regards to the MDT, Officer Citta stated that he had shown Officer Phan all functions of the MDT, and that he had shown proficiency in its usage, as evidenced on his field training [daily observation reports]. It is unclear as to why Officer Phan blamed his [field training officers] for not showing him the proper functions, when it is evident that he was properly trained in the system. I was not Officer Phan's supervisor that evening, therefore

According to Cicero's March 28, 2021 memorandum, Phan was interviewed by the Internal Affairs Division regarding the daily observation reports that were missing from his file folder, as recounted in the February 16, 2011 memorandum. When asked why he did not answer the questions directed to him on February 16, 2011, Phan indicated that he was "slacking, embarrassed, and was 'having a bad day.' " Cicero concluded this memorandum by finding clear and evident violations of two provisions of the department's Code of Conduct.[11]

The summary reports regarding Phan in April and May, 2011, indicated that Phan's performance was acceptable. He received an unfavorable report on June 10, 2011, however, based on an incident that occurred on June 4, 2011. In particular, on that date, Phan assisted Detective Luis Ruiz and Officer Jeffrey Hopkins while in the field in subduing a person who was under the influence of phencyclidine (PCP). Phan was the only Taser certified officer on the scene. During this incident, the person struck Hopkins in the jaw. After Hopkins and Ruiz expressed concern over Phan's failure to use his Taser during the incident, Yergeau, Phan's shift sergeant, met with Phan. On inquiry, Phan explained that he did not hear the instruction to use the Taser and he did not think he had a clear shot.

[I] did not complete a [daily observation report] in regards to training documentation."

[11] The memorandum provided:

"In regards to the incident . . . which occurred on February 16, 2011, I find clear and evident violations of the two following Code of Conduct Violations.

"Article VI, Section 6.09 For the intentional and willful failure to comply with any lawful order, procedure, directive, or regulation, oral or written.

"-Failing to follow directive and procedure in regards to the proper maintenance and record keeping of completed [daily observation reports].

"Article VI, Section 6.17 Refusal to obey a lawful order of a supervisor.

"-Failing to retrieve all [of] the missing [daily observation reports] when clearly ordered to do so."

On June 10, 2011, Yergeau wrote a memorandum to Bergenholtz regarding the incident. According to the memorandum, "Phan initially denied hearing Officer Hopkins telling him to use his Taser weapon. Officer Phan acknowledged he did hear Officer Hopkins tell him to deploy his Taser only after I told him both officers on scene heard the directive and I did not doubt their recall of the incident. Officer Phan then told me he did not use the Taser because he felt he did not have a clear shot at the suspect without the possibility of hitting Officer Hopkins or Detective Ruiz." Yergeau further stated that "Officer Phan's failure to deploy his weapon and his lack of truthfulness with this supervisor leaves this supervisor to question his ability to properly serve and protect the citizens of Hartford and officers in this department. Officer [Phan] failed to act and he then failed to admit . . . a crucial error in [judgment]. It is my recommendation that Officer Phan be retrained on the use of force and Taser training. His failure to admit an error in judgment or to immediately tell the truth is an issue that goes well beyond the Hartford Police Academy."[12] Kessler was not involved in the June 4, 2011 incident regarding the Taser.

On June 7, 2011, Phan met with Bergenholtz to discuss his April and May performance evaluations. Phan's probationary employee performance evaluation dated

[12] The referee found that most of what happened during the incident with the Taser occurred behind a tree, next to a parked ambulance, which sometimes obscured the view from the dash camera recording. The referee found, however, that the video footage of the incident was consistent with Phan's version of the event. The referee further found that "[w]itnesses testified that the undersigned was wrong even when the recording clearly rebutted the witness' testimony of what [had] occurred" and that "[t]his recording and the refusal of the witnesses to acknowledge they remembered incorrectly seriously damaged the [city's] credibility." Although the referee questioned the credibility of the city's witnesses regarding whether Phan could have used his Taser during the incident in question, the referee did not question the fact, as stated in Yergeau's memorandum, that Phan had not been truthful when initially asked why he did not use his Taser.

June 6, 2011, signed by Rousseau as Phan's immediate supervisor and Bergenholtz as the reviewing authority, indicated a need for improvement for the period ending April 2, 2011.

On June 18, 2011, Chief of Police Daryl K. Roberts dismissed Phan from his position as a probationary police officer. At the time of his dismissal, Roberts gave Phan a copy of Yergeau's June 10, 2011 memorandum regarding the Taser incident and told him that his lack of truthfulness was one of the main reasons he was being dismissed. At the time of Phan's dismissal, Roberts also had a memorandum dated June 16, 2011, from Bergenholtz evaluating Phan's performance. This performance evaluation noted that Phan "demonstrated a need for improvement in the area of Job Knowledge and Skills and the area of Human Relations."[13]

On November 25, 2011, Phan filed an Affidavit of Illegal Discriminatory Practice with the commission alleging that the city terminated his employment as a result of his Asian/Vietnamese ancestry. On March 4, 2015, following a hearing and the filing of posthearing briefs, the referee found in favor of Phan, concluding that the city illegally had discriminated against Phan

[13] The performance evaluation provided:

"Job Knowledge and Skills: Officer Phan demonstrated poor tactics when dealing with a person who was allegedly under the influence of an intoxicating substance. Officer Phan was less than truthful when questioned about the incident by a supervisor.

"Officer Phan was found to have been less than truthful with several other supervisors during his probationary review period, the circumstances of which were documented in the previous Interim Probationary Employee Performance Evaluation.

"Human Relations: Officer Phan demonstrated poor interpersonal skills by displaying a discourteous attitude and an unprofessional demeanor when dealing with a supervisor.

"Officer Phan previously demonstrated a poor attitude and an unprofessional demeanor when dealing with supervisors, the circumstances of which were documented in the previous Interim Probationary Employee Performance Evaluation."

when it terminated him from his position as a probationary police officer. The referee ordered, inter alia, that the city pay Phan back pay in the amount of $210,596 plus $25,000 as damages for emotional distress.

On June 1, 2016, the trial court, *Schuman, J.*, sustained the city's appeal from the referee's decision and remanded the matter for a new hearing after concluding that the referee improperly had applied the "mixed motive" analysis to the discrimination claim rather than a "pretext" analysis.

By decision dated October 24, 2017, the referee, on remand, again found in favor of Phan, concluding that, under either analysis, the city had discriminated against him. In her decision, the referee stated that "[Phan's] overall performance had been satisfactory until his meetings with Sergeant Kessler. [Phan's] [daily observation reports] actually improved steadily after March until his completion of the probationary period. He was not terminated at the actual time of the lost hat piece, for failing a section of the field training, despite being a probationary employee who could be terminated for almost any reason. The untimely investigation into [Phan's] hat piece, followed by the one-sided investigation into [Phan's] decision not to use his Taser, and the completely discredited testimony of several of [the city's] witnesses attempting to illustrate [Phan's] untruthfulness regarding the Taser incident, is more than sufficient evidence to prove pretext. There are too many contradictions and inconsistencies to believe that [the city's] termination of [Phan] was legitimate."[14]

[14] The referee also noted that Kessler "had previously been disciplined for making discriminatory and/or racist remarks. In the past, other officers filed complaints about disparaging statements . . . Kessler made. . . . Kessler had to attend sensitivity training as a result of the past complaints and was suspended for ten days. . . . Kessler's history supports the argument that [the city's] reasons for terminating [Phan] were grounded in discriminatory animus and that [Phan's] poor performance was pretextual." With regard to the prior complaints, the record reflects that an anonymous complaint of racism against Kessler was made on April 4, 2011. Following

The city appealed the referee's second decision to the trial court. On September 4, 2019, the trial court, *Hon. Henry S. Cohn*, judge trial referee, affirmed the decision of the referee.[15] The city then filed the present appeal in which it argues that the trial court improperly held that substantial evidence supports the commission's finding of intentional discrimination. According to the city, the trial court improperly affirmed the commission's decision despite two "gaping holes" in the evidence. Specifically, the city contends that Kessler's " 'stray remarks' " do not permit an inference of discrimination, as Kessler played no part in the decision to terminate Phan. The city further argues that Phan's acts of dishonesty and unprofessional behavior were not pretexts for discrimination, as some incidents occurred before Phan's encounters with Kessler and the incident involving the Taser involved a supervisor with no connection to Kessler. We conclude that Phan failed to satisfy his burden of establishing a prima facie case of discrimination. Moreover, even if Phan had established a prima facie case of discrimination, the record does not support the referee's conclusion that the city's reasons for terminating Phan from employment were pretextual.

"Our review of an agency's factual determination is constrained by General Statutes § 4-183 (j), which mandates that a court shall not substitute its judgment for that of the agency as to the weight of the evidence on

an investigation, the Internal Affairs Division determined that this complaint should be closed as unfounded. The other complaints concern Kessler's conduct on September 25 and October 2, 2012, and May 7, 2013, after Phan had been terminated from his position as a probationary police officer.

[15] The trial court also remanded the matter to the commission to issue a new order regarding damages because the referee's original order was more than four years old. Despite this remand, the trial court's decision on the merits of the city's appeal was an appealable final judgment. See General Statutes § 4-183 (j); *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 674–75, 855 A.2d 212 (2004).

questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . . This limited standard of review dictates that, [w]ith regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole. . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The burden is on the [plaintiff] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record. . . . With respect to questions of law, [w]e have said that [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Citation omitted; internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 266 Conn. 492, 503–504, 832 A.2d 660 (2003).

"We look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both. . . . Under this analysis, the employee must first make a prima facie case of discrimination. . . . In order for the employee to first make a prima facie case of discrimination, the [employee] must

show: (1) the [employee] is a member of a protected class; (2) the [employee] was qualified for the position; (3) the [employee] suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015), citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). "The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . This burden is one of production, not persuasion; it can involve no credibility assessment. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, supra, 74.

"Although intermediate evidentiary burdens shift back and forth under this framework, [t]he ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [complainant] remains at all times with the [complainant]. . . . [I]n attempting to satisfy this burden, the complainant—once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision—must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." (Internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 266 Conn. 506–507.

Phan's theory of liability before the commission was that Kessler's discriminatory animus infected or influenced the other sergeants to complain about his performance, motivating the city to terminate his employment. In order to succeed on this claim, Phan had to

establish a causal connection between Kessler's remarks and Roberts' decision to terminate Phan's employment. In finding in favor of Phan, the referee concluded that Kessler had "poisoned the well for [Phan]" and that the city was liable for the discriminatory animus of Kessler. The city's appeal challenges the referee's conclusion that Phan had satisfied the fourth prong of the prima facie case, namely, that the adverse action occurred under circumstances giving rise to an inference of discrimination. According to the city, there was no evidentiary basis to find a causal connection between Kessler's offensive remarks and Roberts' decision to terminate Phan's employment. We agree.

In order to establish that an employment action was discriminatory on the basis of a coworker's discriminatory statements, an employee must demonstrate that a nexus exists between the allegedly discriminatory statements and the employer's decision to terminate the employee. See *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 76. "[S]tray remarks, even if made by a decision maker, do not constitute sufficient evidence [to support] a case of employment discrimination." (Internal quotation marks omitted.) *Rajaravivarma* v. *Board of Trustees for Connecticut State University System*, 862 F. Supp. 2d 127, 152 (D. Conn. 2012). "Verbal comments constitute evidence of discriminatory motivation when [an employee] demonstrates that a nexus exists between the allegedly discriminatory statements and [an employer's] decision to discharge [the employee]. . . . Often, however, an employer will argue that a purportedly discriminatory comment is a mere stray remark that does not constitute evidence of discrimination. . . . Although courts have often used the term stray remark to refer to comments that do not evince a discriminatory motive, the Second Circuit has found that the term stray remark represented an attempt—perhaps by oversimplified generalization—to explain

that the more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination. . . .

"Accordingly, the task is not to categorize remarks either as stray or not stray, and disregard [remarks] if they fall into the stray category, but rather to assess the remarks' tendency to show that the [decision maker] was motivated by assumptions or attitudes relating to the protected class. . . . Courts have found the following factors relevant to such a determination: (1) who made the remark, i.e., a [decision maker], a supervisor, or a low-level coworker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, i.e., whether [the finder of fact] could view the remark as discriminatory; and (4) the context in which the remark was made, i.e., whether it was related to the [decision-making] process." (Citations omitted; internal quotation marks omitted.) Id. In *Jones* v. *Dept. of Children & Families*, 172 Conn. App. 14, 28–31, 158 A.3d 356 (2017), this court rejected an employee's claim that the employer's decision to terminate the employee from employment was tainted by the impermissible bias of the employee's supervisor when "the final termination decision was made after an independent review of the [employee's] performance based on concrete, objective factors . . . ."

Phan and the commission rely on *United Technologies Corp.* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 212, 804 A.2d 1033, cert. denied, 262 Conn. 920, 812 A.2d 863 (2002), in support of their argument that, under the theory of transferred intent, the city is liable for Kessler's unlawful discrimination. In that case, this court stated that "[o]ur law allows for the transfer of intent to discriminate . . . . It is true that [w]ithout some proof of an improper motive, [a

plaintiff's] case must fail. . . . Nevertheless, companies may be held liable for discrimination even where the decision-making official did not intentionally discriminate if the information used by that official in deciding to terminate a worker's employment was filtered through another employee who had a discriminatory motive." (Citation omitted; internal quotation marks omitted.) Id., 234–35.

The defendants' reliance on *United Technologies Corp.* v. *Commission on Human Rights & Opportunities*, supra, 72 Conn. App. 212, is misplaced because, as we later noted in *Jones* v. *Dept. of Children & Families*, supra, 172 Conn. App. 29–30, this court utilized the transferred intent theory prior to the United States Supreme Court's decision in *Staub* v. *Proctor Hospital*, 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011), which articulated the " 'cat's paw' " theory of liability. The "cat's paw" theory applies when "an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action." (Internal quotation marks omitted.) *Zuro* v. *Darien*, 432 F. Supp. 3d 116, 129 (D. Conn. 2020). We stated in *Jones* that, "[p]rior to the United States Supreme Court's decision in *Staub*, this court embraced a transferred intent theory that was loosely analogous to the cat's paw theory of liability articulated in *Staub*." *Jones* v. *Dept. of Children & Families*, supra, 30, citing *United Technologies Corp.* v. *Commission on Human Rights & Opportunities*, supra, 234–35.[16]

[16] In *Jones* v. *Dept. of Children & Families*, supra, 172 Conn. App. 28–29, an employee claimed that, under the "cat's paw" theory of liability, the employer was responsible for intentional discrimination because its decision to terminate the employee's employment was tainted by the impermissible bias of his supervisor. This court held that the cat's paw theory of liability had not been satisfied because the final termination decision was made after an independent review of concrete, objective factors. Id., 31.

In *Feliciano* v. *Autozone*, *Inc.*, supra, 316 Conn. 65, our Supreme Court made clear that transferred intent was not a sufficient legal basis to hold an employer liable for the discriminatory animus of one of its employees. In *Feliciano*, an employee of a company was accused by the company of improperly using a customer loyalty reward card for her own use. Id., 69. The employee was a black female who was born in the U.S. Virgin Islands and practiced the Rastafarian religion. Id., 68. As part of her religion, she wore her hair in dreadlocks. Id. Following her termination from employment, she commenced an action against the company contending, inter alia, that the company unlawfully had terminated her employment on the basis of her national origin, religion and race. Id., 70. The trial court granted the company's motion for summary judgment in which it claimed that the employee had failed to make out a prima facie case of discrimination. Id., 68. This court affirmed the judgment of the trial court and, following the granting of certification, the plaintiff appealed to the Supreme Court. Id.

On appeal to the Supreme Court, the plaintiff argued that "she presented ample evidence of [a store manager's] discriminatory animus toward her, and that this animus may be imputed to the defendant." Id., 75. Specifically, there was evidence that the plaintiff's supervisor "repeatedly referred to the plaintiff as an 'f'ing Jamaican'; suggested that Jamaicans live in grass huts, wear grass skirts, drink out of coconut shells, and eat cats and dogs; ridiculed the plaintiff's dreadlocks and suggested that her hair was dirty; told the plaintiff that there is no God and that she just had 'false hopes'; suggested that all Rastafarians steal; and mocked the plaintiff by wearing a dreadlocks wig and saying, 'I'm . . . a Rastafarian. Watch me because I steal.' " Id., 76.

In rejecting this claim, the Supreme Court concluded that, "although there was ample evidence that [the store

manager] had treated the [employee] in a despicable manner because of her perceived national origin, religion or race, [this court] properly concluded that there was no evidence of a causal connection between [the manager's] discriminatory animus and the [company's] termination of the [employee's] employment." Id., 78. The court further stated that, "[a]lthough disbelief of an employer's explanation for an adverse employment action, *in combination with the plaintiff's prima facie case of discrimination*, may, under some circumstances, be sufficient to meet the [employee's] ultimate burden of proving intentional discrimination . . . disbelief of the employer's evidence is not sufficient to establish a prima facie case of discrimination in the first instance. . . . In the absence of any affirmative evidence of a causal connection between [the manager's] discriminatory animus toward the [employee] and the [company's] termination of her employment, no inference of the defendant's discriminatory intent can be made." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 79–80.

These cases, read together, establish that an employer is not strictly liable for the discriminatory animus of one employee against another employee. Instead, for the employer to be found liable for discrimination, there must be a causal connection between the discriminatory animus of one employee and the adverse employment action suffered by the other employee. As in *Feliciano*, we conclude that Phan has failed to present affirmative evidence of a causal connection between Kessler's remarks and Roberts' decision to terminate Phan's employment. In reaching this conclusion, we in no way condone Kessler's despicable remarks. The legal issue before us, however, is whether, under the facts and circumstances of this case, the city can be held liable for the despicable remarks of its rogue employee. We conclude that it cannot.

We first note that the trial court, in affirming the decision of the referee, stated that a "sufficient nexus" existed to establish a prima facie case because Bergenholtz' "memorandum to [Roberts] included, in addition to other information, Kessler's memorandum to the lieutenant." The referee, however, did not find that Kessler's memorandum was included in the materials that were provided to Roberts; rather, the referee found that, "[w]hen [Phan] met with [Roberts] on June 18, 2011, he was given a copy of . . . Yergeau's memo and was told that his lack of truthfulness was one of the main reasons he was being dismissed." The referee stated that Roberts "also had the June 16, 2011 memo from . . . Bergenholtz evaluating [Phan's] performance" and that "Bergenholtz attached . . . Yergeau's memo to [Phan's] final performance review, which was sent to [Roberts]." Roberts did not testify at the hearing, and there is no evidence in the record indicating that Roberts ever saw Kessler's memorandum. Kessler's memorandum, therefore, does not provide the causal connection necessary to establish a prima facie case.[17]

The referee also relied on her finding that Phan's performance reviews and daily observation reports were satisfactory until the incidents with Kessler and that, "[a]s a result of . . . Kessler's comments and report that [Phan] was argumentative and confrontational, [Phan] began receiving [daily observation reports] with negative comments about his attitude." According to the city, the referee's reliance on the fact that Phan's evaluations worsened after the Kessler incidents is an example of the post hoc ergo propter hoc fallacy, i.e., "the fallacy of saying that because effect A happened at some point after alleged cause B, the

[17] In its brief, the commission tacitly acknowledges this error but states that the trial court's finding "is of little consequence given the substantial other evidence in the record linking Kessler to the decision to terminate Phan."

alleged cause was the actual cause." (Internal quotation marks omitted.) *Higgins* v. *Koch Development Corp.*, 794 F.3d 697, 703 (7th Cir. 2015). In this regard, we note that "[a] causal connection can be established indirectly by showing that the protected activity was followed close in time by adverse action . . . but the inquiry into whether temporal proximity establishes causation is factual in nature. There is no bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between [protected activity] and an allegedly retaliatory action. . . . The trier of fact, using the evidence at its disposal and considering the unique circumstances of each case, is in the best position to make an individualized determination of whether the temporal relationship between an employee's protected activity and an adverse action is causally significant." (Citations omitted; internal quotation marks omitted.) *Ayantola* v. *Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 539, 976 A.2d 784 (2009). "Timing may be an important clue to causation . . . but does not eliminate the need to show causation . . . ." (Citation omitted.) *Bermudez* v. *TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998). Furthermore, an inference of discrimination "may not be based on mere conjecture or surmise." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. App. 80.[18]

[18] We note that in *Gibilisco* v. *Tilcon Connecticut, Inc.*, 203 Conn. App. 845, 846–47, 251 A.3d 994, cert. denied, 336 Conn. 947, 251 A.3d 77 (2021), which was on appeal following the granting of a motion for summary judgment rather than following a trial, an employee asserted that his former employer wrongfully terminated his employment because he had filed for workers' compensation benefits. After the trial court granted summary judgment in favor of the employer, the employee appealed and argued, in part, that the close temporal proximity of approximately two weeks between his final work injury and the employer's decision to terminate his employment was, on its own, enough to satisfy his minimal burden of raising a genuine issue of material fact regarding setting forth a prima facie case. Id., 861–62. In response, the employer contended that temporal proximity does not, on its own, give rise to an inference of discrimination where no other evidence is offered to support a claim of retaliation. Id., 862–63. Because the employee

On the basis of our review of the record, we agree with the city that the evidence in the record does not support the referee's conclusion that the incidents with Kessler resulted in Phan's subsequent negative evaluations and eventual termination. Kessler was not one of Phan's field training officers, and he had no role in the decision to terminate Phan. Of the 130 daily observation reports pertaining to Phan that are included in the record, only 7 were prepared by Kessler. These reports, which postdate the incidents in question, reveal that Kessler gave Phan sixty-two acceptable ratings and only two negative ratings.[19] Further, Kessler's memorandum of February 14, 2011, did not recommend that Phan be terminated. Rather, the memorandum "recommend[ed] that . . . [Phan] be 'unplugged' from his current assignment and afforded the opportunity to be retrained on the [noted] deficiencies via [the] Police Academy. Additionally . . . [Phan] should be afforded retraining in supervisor/subordinate relationships."

The testimony also does not support the referee's conclusion that Kessler's discriminatory animosity toward Phan motivated or influenced the other officers to complain about Phan's performance.[20] The referee

in *Gibilisco* had produced evidence of a close temporal proximity between the exercise of his rights and the employer's adverse action, as well as additional evidence sufficient to raise a disputed issue of fact as to whether the employer's adverse action took place under circumstances permitting an inference of discrimination, we reversed the judgment of the trial court and did not need to address the merits of the employer's contention. Id., 863 n.15.

[19] Kessler prepared daily observation reports for Phan on March 24, March 25, March 26, May 16, May 17, May 23 and May 25, 2011. In the report dated March 25, 2011, Kessler gave Phan an unsatisfactory rating for his adherence to policies and procedures. In the report dated March 26, 2011, Kessler gave Phan an unsatisfactory rating in the performance of patrol, investigative or assigned tasks. We note that Kessler's signature does not appear on the bottom of the March 25, 2011 report included in the record; Kessler, however, testified that he gave the unsatisfactory rating in that report.

[20] The referee stated that "[e]xhibits illustrate the changes in [Phan's] performance evaluations, and testimony from the public hearing about the camaraderie and socializing of . . . Kessler with other sergeants demon-

found it significant that Cicero and Marinelli, who gave negative reports to Phan in February, 2011, were friends of Kessler. In reaching her conclusion, the referee relied on the testimony from Marinelli that he, Kessler and Cicero were all promoted to sergeant at the same time and that they socialized out of work once in a while. Although it is true that Marinelli testified that the sergeants socialized every once in a while, he also testified that he did not "go out much with officers after work" and "kind of keep[s] to [himself]." Marinelli further indicated that there was "not really" a comradery by virtue of having been promoted to sergeant together.[21] Similarly, Cicero testified that he and Kessler are coworkers and do not socialize outside of work.[22] Thus,

strate that . . . Kessler's discriminatory animosity towards [Phan] motivated or influenced other officers to complain about [Phan's] performance."

[21] Marinelli testified:

"Q. And you said you were promoted to a sergeant about four years ago, correct?

"A. Yes, November of 2010.

"Q. And that was around the same time as Sergeant Kessler and Sergeant Cicero?

"A. Yes, we were all promoted together.

"Q. The same time, so you guys are kind of colleagues, classmates?

"A. Okay.

"Q. Do you socialize outside of work?

"A. Every once in a while, very—you know, I don't go out much with officers after work. I kind of keep to myself.

"Q. Okay but for the sergeants that—you know, you kind of got promoted together, you kind of—are you kind of in a—was there a comradery between getting promoted?

"A. In our group?

"Q. Yeah.

"A. Not really.

"Q. You're like, you know, a class of sergeants or—

"A. Well, we're that group that got promoted at the same time, but—you know, it's not like we go to dinner once a week or anything like that."

[22] Cicero testified:

"Q. Did you and Sergeant Kessler graduate from the academy at the same time?

"A. No, we were not classmates.

"Q. You're not classmates, are you friends?

"A. We're coworkers.

although the evidence establishes that the sergeants were promoted at the same time and communicated with one another, it does not support the referee's finding that Kessler's discriminatory comments motivated the other sergeants to complain about Phan, resulting in his termination from employment.

In considering whether Kessler's discriminatory animus motivated Marinelli and Cicero to complain about Phan's attitude, it is also important to note that, according to Phan's own testimony, nobody else in the department or the city of Hartford treated him differently because of his Asian ancestry. Brian Heavren, assistant chief of police, testified that, throughout Phan's probationary period, Phan made no complaints that he was being treated unfairly because of his Asian ancestry. Although Phan received negative reports in February and March, 2011, following his encounters with Kessler, his performance improved and his summaries for April, 2011, and May, 2011, indicated that his performance was acceptable. Furthermore, although Phan received overall acceptable ratings in November, 2010, and December, 2010, prior to his encounters with Kessler, his November, 2010 summary included eight unsatisfactory ratings, including one in the "overall attitude" category and his December, 2010 summary included seven unsatisfactory ratings, including one in the "overall attitude" category.

Kessler testified that he had discussed his concerns regarding Phan with the other sergeants, specifically, that Phan's developmental progress on the job was not reflective of the length of time that he had been on the job. Kessler also testified that he told the other sergeants that he and Phan had raised their voices when

"Q. Okay, were you promoted to sergeant at the same time?

"A. Yes, we were.

"Q. Do you socialize outside of work together?

"A. I do not, no ma'am."

speaking with one another and that "things got heated." Kessler also discussed the situation with Yergeau, who was Phan's immediate supervisor at the time. See footnote 3 of this opinion. Although Kessler may have spoken to Yergeau about Phan at some point, Yergeau testified that he did not recall any specific conversations. Yergeau further testified that Kessler did not encourage him to judge Phan more harshly because of the incidents with Kessler and stated that Kessler "has no influence on how I read people" and that he could "make up his own mind." Rousseau, who was involved in the investigation of the missing hat piece, testified that he had no contact with Kessler regarding Phan. Marinelli, who gave Phan unsatisfactory ratings in February, 2011, testified that he did not recall a disagreement between Kessler and Phan over a warrant report. He further testified that the unsatisfactory ratings that he gave to Phan were based on his own observations and that Kessler never made disparaging remarks about Phan in an effort to terminate Phan.

Cicero, Phan's immediate patrol supervisor, made negative comments regarding Phan's performance in his February 4, 2011 daily observation report. Cicero testified that he prepared this report based on his own observations of Phan and that it had nothing to do with Kessler. He testified that he did not have any discussions with Kessler about conversations between Kessler and Phan. Cicero further testified that Kessler did not tell him that he did not want Phan working for the department, nor did he indicate that he had any type of animosity toward Phan. Cacioli, who wrote the memorandum to Bernier based on his review of Phan's daily observation reports, testified that Kessler did not influence his view regarding Phan and that there were no concerns that any of the sergeants were conspiring together to falsify documents or daily observation reports against Phan. Ruiz, the detective involved in the Taser incident

on June 4, 2011, testified that, prior to that date, he had no knowledge that Phan had a prior incident involving Kessler. Ruiz further testified that Kessler never talked to him prior to June 4, 2011, regarding Phan and that no one talked to him prior to that date about Phan's performance or a desire not to have him in the department.

There is simply no evidence in the record, therefore, to support the referee's conclusion that Kessler influenced the city's decision to terminate Phan. To the contrary, the testimony of the officers was consistent regarding the fact that Kessler had not influenced them. Furthermore, although we certainly agree that Kessler's comments were despicable, neither Kessler nor the other officers referenced in this opinion were decision makers with regard to the decision to terminate Phan. Bergenholtz testified that he prepared the report that was used for the decision to terminate Phan. Bergenholtz also testified that he and Kessler are not friends and that Kessler never told him that he wanted disciplinary action taken against Phan. Bergenholtz testified that his memorandum was given to the chief of police, but he did not make a recommendation regarding whether to terminate Phan. Heavren testified that the chief of police makes the decision to terminate an employee on behalf of the department, but the director of human resources must concur with that action. Once a decision is made by the chief of police, it is sent to the director of human resources for his final concurrence and, once those signatures are obtained, an employee can be separated from their probationary period. Roberts, the chief of police, did not testify at the hearing.

As stated earlier in this opinion, "[a]lthough disbelief of an employer's explanation for an adverse employment action, *in combination with the plaintiff's prima facie case of discrimination*, may, under some circumstances, be sufficient to meet the plaintiff's ultimate

burden of proving intentional discrimination . . . disbelief of the employer's evidence is not sufficient to establish a prima facie case of discrimination in the first instance. . . . In the absence of any affirmative evidence of a causal connection between [the supervisor's] discriminatory animus toward the plaintiff and the defendant's termination of her employment, no inference of the defendant's discriminatory intent can be made." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 79–80. The referee in this case was certainly free to disbelieve the testimony of the police officers; she could not, however, infer the opposite of the officers' testimony solely from her disbelief of that testimony. See id., 80.

On the basis of our review of the record, we agree with the city that there was not substantial evidence in the record to support a finding of a causal connection between Kessler's remarks and the city's decision to terminate Phan from employment. The trial court, therefore, improperly held that there was substantial evidence that Phan's termination from employment arose under circumstances that give rise to an inference of discrimination; a requirement for establishing a prima facie case of discrimination. See id., 73.

Moreover, even if Phan had established a prima facie case of discrimination, the evidence in the record does not support the referee's conclusion, as affirmed by the trial court, that the legitimate, nondiscriminatory reasons for Phan's termination set forth by the city were pretextual. Bergenholtz' June 16, 2011 memorandum to Roberts indicates that Phan "was found to have been less than truthful" with several supervisors and had "demonstrated a poor attitude and an unprofessional demeanor" when dealing with supervisors. In the city's brief to the commission following remand, it "set forth its reason for terminating . . . Phan: his overall pattern

of poor performance, as well as three incidents: (1) lying in an official police report about having his lost hat and hat piece; (2) concealing [d]aily [o]bservation [r]eports; and (3) being untruthful when questioned about a Taser incident."

"Once the employer produces legitimate, nondiscriminatory reasons for its adverse employment action, the [employee] then must prove, by a preponderance of the evidence, that the employer intentionally discriminated against him." *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 266 Conn. 506. "The employee . . . must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Alvarez* v. *Middletown*, 192 Conn. App. 606, 613, 218 A.3d 124, cert. denied, 333 Conn. 936, 218 A.3d 594 (2019). "Upon the [employer's] articulation of . . . a non-discriminatory reason for the employment action, the presumption of discrimination arising with the establishment of the prima facie case drops from the picture." (Internal quotation marks omitted.) Id.

The record in the present case does not support the conclusion that the reasons given for Phan's termination were a pretext and that the decision was motivated by illegal discriminatory bias. As stated earlier in this opinion, Phan testified that, other than Kessler, nobody else in the department or the city of Hartford treated him differently because of his Asian ancestry. Kessler was not one of Phan's field training officers, and he had no role in the decision to terminate Phan. Further, Kessler's February 14, 2011 memorandum regarding Phan did not recommend that Phan be terminated from employment; the memorandum, rather, "recommend[ed] that . . . [Phan] be 'unplugged' from his current assignment and afforded the opportunity to be retrained on the [noted] deficiencies via [the] Police

Academy. Additionally . . . [Phan] should be afforded retraining in supervisor/subordinate relationships."

The issues regarding Phan's truthfulness and unprofessional demeanor were documented in contemporaneous daily observation reports and memoranda, some of which occurred before Kessler made his discriminatory remarks and some of which occurred after Kessler uttered those remarks. In particular, the issue involving Phan's missing hat piece occurred in July, 2010, during phase two of his field training program. Although Phan testified that he believed the incident was not investigated until February, 2011, because of his encounters with Kessler, there is no evidence in the record to support Phan's belief. On the contrary, Rousseau, who investigated the missing hat piece, testified that the delay in investigating the missing hat piece was due to Phan's deceptive behavior.[23] Furthermore, as stated earlier in this opinion, although Phan received negative

[23] Rousseau testified that any time an issued item is lost or stolen there must be an investigation. When asked about the delay between when Phan lost his hat piece on July 19, 2010, and the investigation into the matter in February, 2011, Rousseau testified:

"Q. Okay, but it looks like Officer Phan lost his hat back in July and he reported it to them in August—

"A. Correct.

"Q. —based on this. So shouldn't that—this investigation have been done back in July and August?

"A. You know, I'm confident that [it] would have been done back in July and August—you know, I think a lot of the blame needs to be on his shoulders because he [misled] supervisors in the department throughout. And, you know, there was an assumption that an investigation was going, there was an assumption that he had found his hat piece and the case was closed.

"So yeah, it probably should have been done way back when he lost it. Unfortunately, you know, he took measures and steps to deceive a lot of people and if he hadn't taken those steps and measures the investigation, I'm confident, would have been done way back then. It wasn't brought to my attention until February when the sergeant was doing inspection at roll call and he noticed he had a spare hat piece. And if I had known about it within those months it took place, I would have conducted the investigation myself. Unfortunately, I wasn't notified, I was under the assumption that he'd found his hat and hat piece."

reports in February and March, 2011, following his encounters with Kessler, his performance improved and his summaries for April, 2011, and May, 2011, were acceptable. Even though Phan received overall acceptable ratings in November, 2010, and December, 2010, prior to his encounters with Kessler, his November, 2010 summary included eight unsatisfactory ratings, including one in the "overall attitude" category, and his December, 2010 summary included seven unsatisfactory ratings, including one in the "overall attitude" category.

Finally, the referee and the trial court noted the conflicting testimony regarding whether Phan could have used his Taser during the incident on June 4, 2011, and the fact that the video footage of the incident was consistent with Phan's version of the event. See footnote 12 of this opinion. As pointed out by the city, however, Phan was not terminated from employment for failing to fire his Taser; he was terminated because he was dishonest and lied about whether he heard the order to fire the Taser. Yergeau's memorandum regarding this incident emphasizes this point: "Officer Phan's failure to deploy his weapon and his lack of truthfulness with this supervisor leaves this supervisor to question his ability to properly serve and protect the citizens of Hartford and officers in this department. Officer [Phan] failed to act and he then failed to admit a crucial error in [judgment]. It is my recommendation that Officer Phan be retrained on the use of force and Taser training. His failure to admit an error in judgment or to immediately tell the truth is an issue that goes well beyond the Hartford Police Academy."

"In assessing pretext, a court's focus must be on the perception of the [decision maker], that is, whether the employer believed its stated reason to be credible . . . . Although an employer's good faith belief is not automatically conclusive . . . [i]t is not enough for [an

employee] merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a [finder of fact] to find that the reason given is not only a sham, but a sham intended to cover up the employer's real [and unlawful] motive of discrimination . . . ." (Citations omitted; internal quotation marks omitted.) *Azimi* v. *Jordan's Meats, Inc.*, 456 F.3d 228, 246 (1st Cir. 2006), cert. denied, 549 U.S. 1279, 127 S. Ct. 1831, 167 L. Ed. 2d 319 (2007). In the present case, we disagree with the trial court that there was substantial evidence in the record to establish that the city's reasons for terminating Phan from his employment were pretextual and that the decision was motivated by illegal discriminatory bias.[24]

The judgment is reversed and the case is remanded with direction to render judgment sustaining the city's appeal.

In this opinion the other judges concurred.

BROOKSTONE HOMES, LLC, ET AL. *v.* MERCO HOLDINGS, LLC, ET AL.

MERCO HOLDINGS, LLC, ET AL. *v.* CT KARKA, LLC, ET AL.

(AC 44704)

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

Syllabus

In this joint appeal, the appellants were the plaintiffs in a breach of contract action and the defendants in a separate action brought by various limited liability companies to discharge lis pendens filed against their properties in connection with the breach of contract action. The appellees were various limited liability companies with rental properties. Sixteen of the appellees filed an application pursuant to statute (§ 52-325a) to discharge

[24] In light of this conclusion, it is unnecessary to address the city's remaining claim that the court improperly held that the commission correctly had applied the law on remand.

the lis pendens. The trial court granted the application, concluding that the appellants had not shown probable cause that their breach of contract case was an action intended to affect the real property on which the lis pendens had been filed. Pursuant to the applicable statute (§ 52-325c), the appellants appealed to this court from the order discharging the lis pendens and indicated on the appeal form that the appeal was also being filed in connection with their breach of contract action. Thereafter, the appellants filed a motion to stay the order discharging the lis pendens pending the appeal pursuant to § 52-325c, which the trial court denied. The appellants then filed a motion for review pursuant to the applicable rule of practice (§ 66-6), challenging the denial of their motion to stay, but failed to request a stay of execution of the trial court's judgment until this court had ruled on their motion for review. The appellees recorded the order discharging the lis pendens on the land records. Thereafter, this court dismissed the appellants' motion for review and ordered the parties to file memoranda to address whether the appeal should be dismissed as moot as to the lis pendens case and for lack of a final judgment as to the breach of contract case. The appellants filed a memorandum of law opposing dismissal. The appellees did not file a response to the order. *Held*:

1. The portion of the appeal challenging the trial court's judgment in the lis pendens case was moot: pursuant to § 52-325c, a stay is automatic for only seven days from the date of the court's order discharging the lis pendens unless, during that period, the aggrieved party appeals the order and applies for a further stay pending appeal; moreover, because the trial court denied the appellants' motion for stay and the appellants never sought a stay from this court, there was no stay in effect when the clerk delivered the order discharging the lis pendens or when the appellees recorded the order on the land records; furthermore, that the appellants timely filed their appeal within the seven day period mandated by § 52-325c did not overcome the fact that this court could not grant the appellants any practical relief in the appeal because the appellees effected the discharge of the lis pendens on filing the trial court's order on the land records, when there was no appellate stay in effect, and the lis pendens could not be resurrected after they were discharged; additionally, the question presented in this appeal did not qualify for review under the capable of repetition yet evading review exception to mootness because the appeal was rendered moot not due to the inherently limited duration of the proceeding but due to the appellants' failure to seek the appropriate remedy from this court and, therefore, the appellants failed to demonstrate that the substantial majority of appeals from orders discharging lis pendens would become moot before those appeals could be decided.
2. The portion of the appeal with respect to the breach of contract case was not taken from a final judgment and, accordingly, this court lacked subject matter jurisdiction to entertain it: at the time the appeal was filed,

the appellees had not filed any pleadings in response to the complaint and the trial court had not issued any order from which an appeal could be filed.

Considered August 31—officially released November 23, 2021

Procedural History

Application, in one case, to discharge lis pendens filed against certain of the plaintiffs' real property, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble, J.*, granted the plaintiffs' application to discharge the lis pendens and rendered judgment thereon, and, action, in a second case, to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury and transferred to the judicial district of Hartford, Complex Litigation Docket; thereafter, the defendants in the first case and the plaintiffs in the second case filed a joint appeal to this court; subsequently, the court, *Noble, J.*, denied the motion to stay the order discharging the lis pendens filed by the defendants in the first case; thereafter, this court dismissed the motion for review filed by the named defendant et al. in the first case, and ordered the parties to file memoranda to address whether the appeal should be dismissed. *Appeal dismissed.*

Taryn D. Martin, for the appellants (defendants in the first case and plaintiffs in the second case).

Robert M. Fleischer, for the appellees (plaintiffs in the first case and defendants in the second case).

Opinion

BRIGHT, C. J. This joint appeal was filed in two trial court cases to challenge the trial court's order in one case granting an application to discharge the lis pendens filed against multiple properties. We ordered the parties to file memoranda to address (1) whether this appeal should be dismissed as moot as to the order granting

the application to discharge the lis pendens because that order has been recorded on the land records and (2) whether the appeal should be dismissed for lack of a final judgment as to the portion of the appeal taken as to the underlying breach of contract case that is still pending before the trial court.[1] Having considered the memorandum submitted by the appellants, we dismiss the appeal.[2]

This appeal involves two related cases, though the cases were not consolidated at the trial court. In *Merco Holdings, LLC* v. *CT Karka, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-21-6149041-S (breach of contract case), five plaintiffs, who are the appellants here, filed a complaint against twenty-six limited liability companies (LLCs) sounding in, inter alia, breach of contract.[3] The plaintiffs in the breach of

[1] Our July 28, 2021 order reads as follows: "In the following matter, counsel are hereby ordered, sua sponte, to file memoranda of not more than ten (10) pages on or before August 27, 2021, giving reasons, if any, why the portion of this appeal challenging the trial court's May 6, 2021 judgment in *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, Docket No. HHD-CV-21-6139513-S, should not be dismissed as moot because the order discharging the lis pendens has been recorded on the land records (see *Lichtman* v. *Beni*, 280 Conn. 25, 905 A.2d 647 (2006); *Lucas* v. *Deutsche Bank National Trust Co.*, 103 Conn. App. 762, 931 A.2d 378, cert. denied, 284 Conn. 934, 935 A.2d 151 (2007)); and why the portion of this appeal from *Merco Holdings, LLC* v. *CT Karka, LLC*, Docket No. HHD-CV-21-6149041-S, should not be dismissed because a final judgment has not entered in that matter. (See General Statutes § 52-263; *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983))." (Footnote omitted.)

[2] The appellees did not file a memorandum in response to our July 28, 2021 order. After the appellants filed a memorandum and the deadline imposed by our order had passed, the appellees filed a motion for leave to respond to the appellants' memorandum. Because we are dismissing this appeal, no action is necessary on the appellees' motion for leave.

[3] Most of the defendants in the breach of contract case are plaintiffs in *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-21-6139513-S (lis pendens case). The sixteen plaintiffs in the lis pendens case are Brookstone Homes, LLC; Bunker Hill Properties, LLC; Austin Heights CT, LLC; Diamond Court CT, LLC; Waterbury Plaza, LLC; Valley View Townhouse, LLC; Pine Meadow Townhouse, LLC; Forest Park Apartment Homes, LLC; Forest Park Office Green,

contract case are Merco Holdings, LLC; DetailManagement, LLC; Elite Investment Properties, Inc.; David Merenstein; and Esther Merenstein. The defendants in the breach of contract case are CT Karka, LLC; CT Deros, LLC; Meknes, LLC; Farmington Real Estate Holdings, LLC; Renwood Real Estate Holdings, LLC; North Haven Apts, LLC; Bunker Hill Properties, LLC; Austin Heights CT, LLC; Diamond Court CT, LLC; Waterbury Plaza, LLC; Valley View Townhouse, LLC; Pine Meadow Townhouse, LLC; Forest Park Apartment Homes, LLC; Briarwood Hills, LLC; Hunters Crossing, LLC; Renwood Apartments, LLC; Oakridge Realty, LLC; Brookstone Homes, LLC; Ivy Woods CT, LLC; Forest Park Office Green, LLC; Fieldside Apartments, LLC; Seramonte Estates, LLC; Seramonte Estates AB, LLC; Alabama Brook, LLC; Alabama Brook #2, LLC; and Orohena, LLC. The claims in the breach of contract case are essentially that the five plaintiffs were partial owners of, had interests in, or provided management services to the twenty-six defendant LLCs but had been deprived of their share of the profits from or management fees related to the rental properties owned by the LLCs. In connection with the filing of the complaint, the five plaintiffs filed eleven lis pendens against sixteen properties owned by the LLC defendants. No judgment had been rendered in the breach of contract case when this appeal was filed.

In *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-21-6139513-S (lis pendens case), sixteen of the LLCs

LLC; Briarwood Hills, LLC; Hunters Crossing, LLC; Renwood Apartments, LLC; Oakridge Realty, LLC; Ivy Woods CT, LLC; Fieldside Apartments, LLC; and Seramonte Estates, LLC. These sixteen plaintiffs are the appellees in this appeal.

CT Karka, LLC; CT Deros, LLC; Meknes, LLC; Farmington Real Estate Holdings, LLC; Renwood Real Estate Holdings, LLC; North Haven Apts, LLC; Seramonte Estates AB, LLC; Alabama Brook, LLC; Alabama Brook #2, LLC; and Orohena, LLC are not parties to the lis pendens case but are appellees in this appeal.

named as defendants in the breach of contract case, namely, those owning the properties that are the subjects of the lis pendens in the breach of contract case, filed as an independent action an application pursuant to General Statutes § 52-325a to discharge the lis pendens filed against their properties.[4] The application to discharge the lis pendens named as defendants the five plaintiffs in the breach of contract case. The defendants in the lis pendens case filed an objection to the application to discharge the lis pendens. On May 6, 2021, the trial court granted the application to discharge the lis pendens on the basis of the court's finding that the defendants had not shown probable cause that their breach of contract case was an action intended to affect the real property on which the lis pendens had been filed.

On May 12, 2021, the appellants timely filed this appeal within seven days of the judgment in the lis pendens case granting the application to discharge lis pendens, as required by General Statutes § 52-325c (b).[5]

[4] See footnote 3 of this opinion.

[5] General Statutes § 52-325c provides: "(a) Any order entered as provided in subsection (b) of section 52-325b shall be deemed a final judgment for the purpose of appeal.

"(b) No appeal shall be taken from such order except within seven days thereof. The effect of such order shall be automatically stayed for such seven-day period. If an appeal is taken within such seven-day period, the party taking such appeal may, within such period, file an application with the clerk of the court in which such order was issued, requesting a stay of the effect of such order pending such appeal, which application shall set forth the reasons for such request. A copy of such application shall be sent to the adverse party by the applicant. Upon the filing of such application, the effect of such order shall be further stayed until a decision is rendered thereon. A hearing on such application shall be held promptly. Such order shall be stayed if the party taking such appeal posts a bond, as provided in subsection (c) of this section.

"(c) Upon the hearing on such application, the court shall: (1) Upon motion of the party taking the appeal set an amount of bond with surety for the stay of such order as provided in subsection (b) of this section, which amount shall be as the court deems sufficient to indemnify the adverse party for any damages which may result from the stay. If the party taking the appeal gives such bond the order shall be stayed; or (2) grant the stay;

The appeal form also indicated that the appeal was being filed in connection with the breach of contract case.

Also on May 12, 2021, the appellants filed in the lis pendens case a timely motion to stay the order discharging the lis pendens pending appeal, pursuant to § 52-325c (b). The appellees objected to that motion. The trial court denied the motion for stay on June 14, 2021.

The appellants filed a timely motion for review pursuant to Practice Book § 66-6 on June 23, 2021, challenging the denial of their motion for stay. The appellants, however, did not file a request, pursuant to Practice Book § 61-14, for a stay of execution of the trial court's judgment until this court had ruled on their motion for review. On July 6, 2021, the appellees filed a memorandum in opposition to the motion for review in which they stated that they already had recorded the discharges of lis pendens on the land records. We dismissed the appellants' motion for review on July 28, 2021, and ordered the parties to file memoranda to address whether the appeal should be dismissed as moot as to the lis pendens case and for lack of a final judgment as to the breach of contract case. The appellants filed a memorandum of law opposing dismissal.

or (3) deny the stay; or (4) condition the granting of the stay upon the giving of such a bond.

"(d) Any order of discharge or any order of any stay shall take effect upon recording of a certified copy thereof in the office of the town clerk in which such notice of lis pendens was recorded. The clerk of the court in which any such order is issued shall not deliver any certified copies thereof until the time for taking an appeal has elapsed or, if an appeal is taken and an application for a stay of such order is filed, until such time as a decision granting or denying such stay has been rendered.

"(e) When a certified copy of such order of discharge of notice of lis pendens has been recorded, such discharged notice of lis pendens shall not be deemed to constitute constructive notice of the claim of the party recording such notice to any third party who acquires his interest in the particular property either before or after the recording of such discharge."

The appellees did not file a memorandum in response to our July 28, 2021 order.

I

We first address whether the portion of this appeal challenging the trial court's May 6, 2021 judgment in the lis pendens case is moot. The appellants argue that we should not dismiss the appeal as moot because (1) they timely filed a motion for review of the order denying their motion for stay, (2) they have a statutory right to appeal the judgment granting the application to discharge their lis pendens, and (3) even if this appeal is moot, the appeal satisfies the exception to mootness for matters that are capable of repetition yet evading review. We are not persuaded by the appellants' arguments.

A

The appellants argue that, because they filed a timely motion for review of the trial court's order denying their motion for stay, they have complied with the necessary requirements to preserve their appellate rights and their appeal is, therefore, not moot. Essentially, the appellants' argument is that, in light of their timely motion for review, the trial court's judgment discharging the lis pendens could not be recorded on the land records until this court decided the motion for review. The problem with the appellants' argument is that it is predicated on the erroneous premise that, after the trial court denied their motion for a discretionary stay, there was an automatic stay of that order while the motion for review was pending. A discussion of the interplay of the applicable statutes and rules of practice makes clear the appellants' error.

Section 52-325c provides the procedures by which a party whose lien has been ordered discharged pursuant to General Statutes § 52-325b (b) may stay the effect

of that order. Section 52-325c (b) requires that an appeal be taken within seven days of the court's judgment and provides for an automatic stay during that period. The appealing party may also, within that seven day window, apply for a stay of the effect of the order pending appeal. See General Statutes § 52-325c (b). The filing of an application for a stay automatically extends the initial seven day stay until a decision on the application is rendered. See General Statutes § 52-325c (b). Accordingly, a stay is only automatic, under § 52-325c, for seven days from the date of the court's order discharging the lis pendens unless, within those seven days, the aggrieved party appeals the order *and* applies for a further stay pending appeal, in which case the seven day stay automatically is extended until the court renders its decision as to whether to stay the effect of its order until the appeal is decided. If the court denies a request for a stay, however, there is no further automatic stay provided by § 52-325c. Once the trial court denies a motion for stay, the clerk of the court may deliver to the parties certified copies of the order discharging the lis pendens. General Statutes § 52-325c (d).

The automatic appellate stay generally provided in noncriminal cases by Practice Book § 61-11 (a) does not apply to orders discharging lis pendens because the stay of execution in lis pendens cases is provided by statute.[6] The appellants' motion for review filed pursuant to Practice Book §§ 61-14 and 66-6 did not create a stay of execution because the trial court had denied the appellants' request for a discretionary stay pursuant to § 52-325c (b). If the appellants wanted a further stay while their motion for review was pending before this court, they needed to file a motion directed to this court

[6] "*Except where otherwise provided by statute* or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. . . ." (Emphasis added.) Practice Book § 61-11 (a).

requesting a temporary stay of execution until their motion for review was decided. Indeed, Practice Book § 61-14 provides in relevant part: "In any case in which there is no automatic stay of execution and in which the trial court denies, or refuses to rule on, a motion for stay, an aggrieved party may file a motion requesting a stay of execution of the judgment from the court having appellate jurisdiction pending the filing of and ruling upon a motion for review. . . ."

The clerk of the court delivered the order discharging the lis pendens to the parties on June 23, 2021, nine days after the trial court had denied the appellants' motion for stay. On June 29, 2021, the appellees recorded the order discharging the lis pendens on the land records. Because the trial court denied the appellants' motion for stay on June 14, 2021, and the appellants never sought a stay from this court pursuant to Practice Book § 61-14, there was no stay in effect when the clerk delivered the order discharging the lis pendens or when the appellees recorded the order on the land records. Thus, the appellees were well within their rights when they filed on the land records the order discharging the lis pendens.

B

The appellants also argue that we should not dismiss their appeal as moot because they timely filed their appeal within the seven day appeal period mandated by § 52-325c. This argument, however, does not overcome the fact that we cannot grant the appellants any practical relief in this appeal because the appellees effected the discharge of the lis pendens on filing the court's order on the land records on June 29, 2021, when there was no appellate stay in effect.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the

existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Citation omitted; internal quotation marks omitted.) *Lichtman* v. *Beni*, 280 Conn. 25, 30, 905 A.2d 647 (2006).

The timely filing of an appeal does not, by itself, preclude an appeal from becoming moot. See, e.g., id., 31–33 (appeal was dismissed where plaintiffs recorded order discharging mechanic's lien on land records after defendant filed timely appeal of order); *Lucas* v. *Deutsche Bank National Trust Co.*, 103 Conn. App. 762, 767–68, 931 A.2d 378 (appeal was moot where defendant recorded certified copy of order discharging judgment lien after plaintiff filed timely appeal of order), cert. denied, 284 Conn. 934, 935 A.2d 151 (2007). Without a valid stay in effect, the appellants were able to perfect the court's order of discharge by recording it on the land records. See *Lichtman* v. *Beni*, supra, 280 Conn. 31–33; *Lucas* v. *Deutsche Bank National Trust Co.*, supra, 767–68. That action renders this appeal moot as to the appellants' lis pendens. The lis pendens cannot be resurrected after they have been discharged.

Our Supreme Court's decision in *Lichtman* v. *Beni*, supra, 280 Conn. 25, is instructive. *Lichtman* concerned a trial court's order discharging a mechanic's lien pursuant to General Statutes § 49-35b. Id., 29. Our Supreme Court dismissed the defendant's appeal as moot because the plaintiffs had properly filed the certified copy of the court's discharge order on the land records after the defendant failed to request a stay following the trial court's order discharging the mechanic's lien. Id., 33. The court concluded: "Because the discharge order was duly issued and recorded, the lien no longer exists. We are unwilling to undermine the integrity of the land records and, therefore, are unable to provide the defendant with any practical relief." Id., 36.

Practice Book § 61-14 provides appellants challenging judgments discharging lis pendens with a remedy of receiving a temporary stay from this court pending the filing of and ruling on a motion for review. In failing to avail themselves of that option, the appellants bore the risk that the appellees would record the discharge order on the land records before their motion for review could be decided. As with the mechanic's lien in *Lichtman*, because the order discharging the appellants' lis pendens was duly issued and recorded, the lis pendens no longer exist. We are, therefore, unable to provide the appellants with any practical relief.

C

The appellants argue that, even if their appeal from the order discharging the lis pendens is moot, we should nevertheless consider the merits of their appeal because it presents a matter that is capable of repetition yet evading review. We do not agree.

"We note that an otherwise moot question may qualify for review under the capable of repetition, yet evading review exception. To do so, however, it must meet three requirements. First, the challenged action, or the effect

of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, [the appeal] must be dismissed as moot." (Internal quotation marks omitted.) *Tappin* v. *Homecomings Financial Network, Inc.*, 265 Conn. 741, 747, 830 A.2d 711 (2003). We conclude that this lis pendens case does not meet the first requirement for review under the capable of repetition yet evading review exception.

The appellants claim that an order discharging lis pendens is necessarily of limited duration because the party challenging the order must move quickly to prevent the order from being recorded on the land records. They note that in this case the same trial court discharged the lis pendens and then denied their motion to stay. They argue that, "[w]hen it denied the motion to stay, the trial court also effectively denied the [appellants] an opportunity to appeal the ruling on discharging the lis pendens." We disagree.

As set forth in parts I A and B of this opinion, the appellants had procedures available to them to prevent their appeal from becoming moot. Although they availed themselves of many of those procedures by taking a timely appeal, filing a timely motion for stay in the trial court, and seeking review from this court of the trial court's denial of their motion for stay, the appellants failed to take the necessary next step of seeking a stay from this court pursuant to Practice Book

§ 61-14. Thus, their appeal was rendered moot not due to the "inherently limited duration" of the proceeding before the trial court but due to their failure to seek the appropriate remedy from this court. Consequently, the appellants have failed to demonstrate that the substantial majority of appeals from orders discharging lis pendens will become moot before those appeals can be decided.

II

We also ordered the parties to file memoranda to address why this appeal should not be dismissed as to the breach of contract case because a final judgment had not been rendered in that matter. The appellees did not file a memorandum, and the appellants' memorandum did not address this issue. We conclude that the portion of this appeal filed in connection with the breach of contract case was not taken from a final judgment and, therefore, we lack subject matter jurisdiction to entertain it.

The subject matter jurisdiction of this court and our Supreme Court is limited by statute to final judgments. General Statutes § 52-263. Our appellate courts lack jurisdiction to hear an appeal that is not brought from a final judgment. See *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983). "Thus, even where the appellee fails to bring to our attention the lack of [a] final judgment, either by motion to dismiss or in its brief, or at oral argument, we must, nonetheless, act sua sponte." *Mac's Car City, Inc.* v. *DiLoreto*, 33 Conn. App. 131, 132, 634 A.2d 1187 (1993).

The appellants' appeal form indicated that they were challenging the trial court's order in the lis pendens case granting the application to discharge the lis pendens, but the appellants also listed the case name and docket number for the breach of contract case in the section of the appeal form entitled "Additional Trial

Court Docket Numbers Appealed." The appellants had filed an amended complaint in the breach of contract case fewer than two weeks before they filed this appeal. The appellees had not filed any pleadings in response to the amended complaint when this appeal was filed, and the trial court had not issued any orders from which an appeal could be filed in the breach of contract case. Thus, no final judgment had been rendered in the breach of contract case when this appeal was filed.

The appeal is dismissed as moot to the extent that it challenges the judgment in *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-21-6139513-S; the appeal is dismissed for lack of a final judgment to the extent that it was filed in connection with *Merco Holdings, LLC* v. *CT Karka, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-21-6149041-S.

In this opinion the other judges concurred.

JULIO TORRES *v.* COMMISSIONER OF CORRECTION (AC 43902)

Alvord, Cradle and Bear, Js.

Syllabus

The petitioner, who had been convicted of the murder of the victim, sought a writ of habeas corpus, claiming that his trial counsel rendered ineffective assistance by permitting certain prejudicial prior misconduct evidence to be admitted at trial. The state had indicated that it would seek to introduce testimony from E, who had been the victim of a prior drive-by shooting allegedly perpetrated by the petitioner, on the ground that E's testimony was relevant to prove that the petitioner had the means to commit the murder of the victim. The trial court ruled that E's testimony was relevant but limited the state's inquiry to whether E had seen the petitioner holding a revolver. Prior to E's testimony, the petitioner's counsel cross-examined two other state's witnesses, C, the petitioner's parole officer, and J, a police detective. C testified that he had been asked by J to violate the petitioner's parole on the basis of allegations

that J never substantiated, one of which involved the drive-by shooting. J testified that he was never able to substantiate many of those allegations. The state then called E, who testified that, on the day of the drive-by shooting, he saw the petitioner carrying a revolver. The habeas court rejected the petitioner's claim that his counsel's cross-examination of C and J opened the door to the admission of evidence that the petitioner had been in possession of a weapon. The habeas court reasoned that evidence that the petitioner was in possession of the weapon was not admitted because of his counsel's cross-examination of C and J but because it was probative of the petitioner's means to commit the murder. The habeas court further reasoned that it was not objectively unreasonable for the petitioner's counsel to attempt to discredit J's testimony with evidence of the unsubstantiated allegations because counsel knew that E was going to testify about the weapon and that E's testimony would be in the back of the jurors' minds. The habeas court thus concluded that the petitioner failed to establish that his trial counsel rendered deficient performance or that he was prejudiced thereby. The court denied the petition for a writ of habeas corpus and denied the petitioner certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner failed to demonstrate that the habeas court's denial of his petition for certification to appeal constituted an abuse of discretion, as he failed to demonstrate that the issues raised in his petition for certification to appeal were debatable among jurists of reason, that a court could resolve them in a different manner or that they were adequate to deserve encouragement to proceed further; it could not reasonably be disputed that the inquiry of C and J by the petitioner's counsel, viewed with an eye toward emphasizing J's history of lodging unsubstantiated allegations of wrongdoing against the petitioner, could have inured to the favor of the petitioner, and, thus, that a trial strategy aimed at undermining the veracity or accuracy of the state's witnesses, although ultimately unsuccessful, was not sound or constituted ineffective assistance of counsel.

Argued October 13—officially released November 23, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Leah Hawley*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Julio Torres, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification on the ground that he failed to demonstrate that he had been denied the effective assistance of counsel in his underlying criminal trial. We disagree and, accordingly, dismiss the appeal.

The following facts were set forth by this court in the petitioner's direct appeal from his conviction. "On the night of October 9, 2009, the [petitioner], Jorge Zayas, Ricco Correa, and Jose Serrano were drinking alcohol on the porch behind the [petitioner's] apartment in Hartford. At one point, the victim and Michael Rodriguez drove into the well lit parking lot adjacent to the [petitioner's] apartment building. When the victim exited the car, the [petitioner], Zayas, Correa, and Serrano approached him, and an argument ensued. During the argument, Correa passed a gun to the [petitioner]. After taking the gun, the [petitioner] shot the victim once in the head at close range, killing him.[1]

[1] "The [petitioner] was on parole at the time of the shooting and was required to wear an ankle bracelet to ensure that he complied with a 9 p.m. to 5 a.m. curfew. There was a monitoring unit inside the [petitioner's] apartment that would indicate to the monitoring agency if the [petitioner] exceeded a range of approximately 150 feet. Police determined that the victim's body was located approximately 125 feet from the monitoring unit." *State* v. *Torres*, 168 Conn. App. 611, 614 n.1, 148 A.3d 238 (2016), cert. granted in part and remanded, 325 Conn. 919, 163 A.3d 618 (2017).

"Rodriguez, who was standing in the parking lot when the shooting took place, did not see who shot the victim, but heard the gunshot and immediately turned around and saw that the [petitioner] was the only person close to the victim's body. Seeing Zayas, Correa, and Serrano standing twenty to twenty-five feet away, Rodriguez fled the scene on foot. Correa, who had taken back the gun used to shoot the victim, pursued Rodriguez while the [petitioner], Zayas, and Serrano stood in the parking lot yelling, '[k]ill him. Kill him.'

"The [petitioner's] girlfriend . . . observed the whole incident from the doorway of the [petitioner's] apartment. After witnessing the [petitioner] shoot the victim, [she] went back into the [petitioner's] apartment and pretended to be asleep. The [petitioner] ran into the apartment and stated to [her], 'I killed him. I killed him. Get up.' The [petitioner] told [her] that the victim 'came over there fighting for the turf and that he shot him.' A few minutes later, the [petitioner] received a phone call from Correa, who told the [petitioner] that he had 'mistakenly shot someone else thinking it was [Rodriguez], but that he was tossing the gun in the river.' [The petitioner's girlfriend] could not remember the type of gun the [petitioner] used to shoot the victim.

"At approximately 1:15 a.m. on October 10, 2009, police arrived at the scene of the shooting in response to a 911 call. Officers found the victim in the parking lot behind the apartment building, bleeding from the right side of his head. The victim was pronounced dead at the scene. Susan Williams, an associate medical examiner for the state, determined that the cause of death was a single gunshot wound to the right side of the head. Williams estimated that, on the basis of soot and stippling patterns around the entrance wound, the muzzle of the gun was approximately six to ten inches from the right side of the victim's head when it was fired." (Footnote in original; footnote omitted; internal

quotation marks omitted.) *State* v. *Torres*, 168 Conn. App. 611, 613–15, 148 A.3d 238 (2016), cert. granted in part and remanded, 325 Conn. 919, 163 A.3d 618 (2017).

In 2013, the petitioner was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a and thereafter sentenced to a total effective term of fifty years of incarceration. Id., 615. This court affirmed the petitioner's conviction. See id., 637.

On April 16, 2015, the petitioner filed this action for a writ of habeas corpus. By way of an amended petition dated August 1, 2018, the petitioner claimed that his trial counsel, Bruce Lorenzen, provided ineffective assistance by, inter alia, allowing certain prior misconduct evidence to be admitted into evidence.[2] Specifically, the petitioner alleged that Lorenzen was ineffective in that he "opened the door" to the admission of evidence pertaining to an incident that occurred three months prior to the incident in this case in which he allegedly shot an individual with a .38 revolver, the type of weapon that may have been used in this case.

The transcripts from the petitioner's criminal trial, which were admitted into evidence at the habeas trial, reveal that the admission of the prior misconduct evidence was a contested issue in the criminal trial and in the petitioner's direct appeal. Prior to the commencement of the petitioner's criminal trial, the state indicated that it would seek to introduce the testimony of Eduardo Colon, who had been the victim of a prior drive-by shooting allegedly perpetrated by the petitioner.[3] The state proffered that Colon would testify that, on

[2] The petitioner alleged additional bases for his claim that Lorenzen failed to provide effective assistance, but those other bases are not the subject of this appeal.

[3] In his direct appeal, the petitioner argued that the trial court had "abused its discretion in admitting Colon's testimony that he previously had possessed a revolver because the evidence is not relevant and, alternatively, is more prejudicial than probative." *State* v. *Torres*, supra, 168 Conn. App. 619.

July 19, 2009, the petitioner had shot him with a chrome revolver during a nonfatal drive-by shooting for which the petitioner was charged with assault in the first degree. The state argued that Colon's testimony was relevant to prove that the petitioner had the means to commit the murder of the victim.

On behalf of the petitioner, Lorenzen argued that this evidence was more prejudicial than probative. Lorenzen further contended that there was not an established connection between the revolver previously observed in the petitioner's possession and the shooting of the victim here. He also asserted that the prior incident was remote in time from the present murder.

The court ruled that Colon's testimony was relevant but limited the state's inquiry to whether Colon saw the petitioner holding a revolver. To alleviate the petitioner's concern that undue prejudice could result from a detailed discussion of that prior possession of the weapon, the court prohibited the state from probing into the circumstances and the assault allegations surrounding that prior possession.

Before the state called Colon as a witness at trial, it called Edwin Cardona, the petitioner's parole officer, and Detective Andrew Jacobson of the Hartford Police Department to testify. Through his cross-examination of Cardona, Lorenzen elicited testimony that Jacobson previously had asked Cardona to violate the petitioner's parole on the basis of allegations that Jacobson never substantiated. One such instance involved the July, 2009 incident. When Lorenzen cross-examined Jacobson, he inquired about several unproven allegations made by Jacobson in multiple letters Jacobson had addressed to the parole board seeking to have the petitioner's parole violated. Lorenzen asked Jacobson about allegations that he made pertaining to the petitioner's involvement in the July, 2009 incident, an allegation that the

petitioner killed the victim after a physical altercation arising from a drug dispute, and an allegation that the petitioner was observed with a firearm the day following that murder. Jacobson acknowledged that he was never able to substantiate many of those allegations. Thereafter, consistent with the court's previous ruling, Colon testified that, on July 19, 2009, he saw the petitioner carrying a chrome plated revolver.

At the habeas trial, the petitioner argued that Lorenzen was ineffective in that he "opened the door" to the admission of prejudicial misconduct evidence when he cross-examined Cardona and Jacobson regarding the 2009 incident involving Colon. When asked about his cross-examination of Jacobson, Lorenzen testified that, "at some point, we—[the] defense essentially abandoned whatever harbor [the court created] for us." Lorenzen explained: "[T]he best way I could describe it is that it had gotten to the point that it was—the issue was lurking and it was better to meet it head on rather than to try and continue to stay within whatever the boundaries [the court] had set." When questioned why he asked the state's witnesses about the July, 2009 shooting, Lorenzen reiterated: "[T]he most basic reason was, it had come out in a way that I felt it was better to deal with it in the open rather than to leave the jury to, perhaps, speculate on what had happened." Lorenzen acknowledged that he "could have relied on a curative instruction rather than bring this information out [him]self," but he did not rely on a curative instruction because "juries don't always follow instruction[s]." Lorenzen testified that his cross-examination of the lead detective in the petitioner's case was a strategic decision.

The habeas court rejected the petitioner's argument that Lorenzen "opened the door" to the admission of prejudicial misconduct evidence. The court ruled that evidence that the petitioner was in possession of a .38

caliber weapon in July, 2009, was not admitted because of Lorenzen's cross-examination of Cardona and Jacobson but because it was probative of the petitioner's means to commit the crime of murder. The court explained: "Since the trial court admitted the evidence on an independent legal theory offered by the state, the petitioner has failed to establish that it would not have been admissible *but for* counsel's cross-examination questions. . . . As such, he has failed to establish either deficient performance or prejudice and the [ineffective assistance] claim fails." (Citation omitted; emphasis in original.) The court denied his petition for certification to appeal and this appeal followed.

The petitioner thereafter sought multiple articulations of the habeas court's decision. The petitioner first sought to have the trial court articulate certain findings related to Lorenzen's cross-examination, including whether it was "objectively reasonable . . . for Lorenzen to elicit misconduct evidence beyond [that allowed by] the trial court's ruling limiting the misconduct evidence to . . . testimony that [the] petitioner [was previously] in possession of a revolver." The habeas court denied the motion, finding that all but one request for articulation went to the performance prong of *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which the court had not reached, and that the final request was "inappropriate for a motion for articulation." On September 3, 2020, the petitioner filed with this court a motion for review of the habeas court's decision. This court granted the motion and ordered the habeas court "to articulate whether it considered [certain allegations in the petition] and, if so, to articulate its findings and conclusions under both the performance and prejudice prongs of *Strickland*."

On October 26, 2020, the habeas court issued an articulation in response to this court's order. The habeas

court articulated that it had addressed the allegations that were subject to this court's order and referenced the specific pages of its memorandum of decision at which it did so. The court further explained: "While not specifically clear from this court's memorandum of decision in retrospect, the trial court's decision to allow testimony from witnesses on the prior misconduct came *before* . . . Lorenzen cross-examined the witnesses in question. The witnesses in question were allowed to testify only after the trial court had ruled in the state's favor after hearing argument from both sides. In other words, the trial court admitted the evidence *because* it accepted the legal theory of relevance offered by the state, not *because* . . . Lorenzen did, or failed to do, anything during his subsequent cross-examination. Since the evidence was not admitted *because of* what . . . Lorenzen did on cross-examination, as asserted by the petitioner, the petitioner failed to prove [that] his performance was deficient. For the same reason—that the trial court had ruled beforehand that the evidence in question was admissible on the legal basis offered by the state—this court also found that the petitioner failed [to prove] prejudice because, notwithstanding . . . Lorenzen's cross-examination, the evidence was going to be presented to the jury." (Emphasis altered.)

On November 4, 2020, the petitioner sought further articulation from the habeas court on the ground that the court "still [did] not address the petitioner's ineffectiveness claim regarding uncharged misconduct evidence" in that, inter alia, it "[did] not address the additional misconduct evidence that [Lorenzen] elicited that was not the subject of any court ruling." The habeas court granted the motion for further articulation in part and denied it in part, and issued a written decision. The habeas court articulated, inter alia, that "the court did not find anything objectively unreasonable about . . .

Lorenzen's performance representing the petitioner, including his conduct [in] handling the entirety of the prior misconduct issue. That decision, as decisions are meant to be, was based on the sum of the whole of the evidence before the court." The court further explained: "The court found nothing objectively unreasonable about an experienced defense attorney's judgment that, from his reading of the room, he believed it better to deal with things the [jurors were] likely considering in the back of their minds 'head on' instead of allowing them to linger. . . . [N]one of this evidence had any material impact on the outcome of the trial."[4] Finally, the court held: "Given the substantial circumstantial evidence against the [petitioner]—he was the only person standing close to the victim; the uncontroverted evidence that the gunshot was from close range; and the eyewitness account and incriminating statements provided by his girlfriend—the court finds that the misconduct evidence as a whole was immaterial to the overall outcome of the case. Therefore, the petitioner suffered no prejudice from this evidence within the meaning of *Strickland* . . . ." The petitioner did not seek further review from this court.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate

[4] The court denied the petitioner's request that it articulate whether Lorenzen's cross-examination "open[ed] the door for the state to elicit testimony that the petitioner had been arrested for the July, 2009 shooting and that cocaine and heroin had been found in a search of his apartment." The court explained: "Given the finding . . . that [Lorenzen's] overall conduct was not deficient as to the uncharged misconduct issue, this question seeking to parse the pieces of that evidence into smaller bits is no longer relevant." To the extent the petitioner argues that Lorenzen's cross-examination opened the door to questions regarding the petitioner's drug dealing, the jury had already heard that he was involved in a "turf" war with the victim. The petitioner's girlfriend testified that the victim "came over there fighting for the turf and that he shot him."

We separately note that, by virtue of the fact that the petitioner had a parole officer, the jury was aware that he had a criminal history. Cardona also testified regarding the ankle monitoring bracelet that the petitioner was required to wear as a condition of his parole.

review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 181 Conn. App. 572, 577–78, 187 A.3d 543, cert. denied, 329 Conn. 909, 186 A.3d 13 (2018).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against the petitioner on either ground . . . . "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . . Nevertheless, [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise

of reasonable professional judgment." (Citation omitted; internal quotation marks omitted.) *Charles* v. *Commissioner of Correction*, 206 Conn. App. 341, 346–47, A.3d (2021).

On appeal, the petitioner takes issue with Lorenzen's decision to question Cardona and Jacobson regarding the July, 2009 incident. He argues that the issue was not "lurking," as suggested by Lorenzen, because the court had already issued an order limiting Colon's anticipated testimony, and the cross-examination of Cardona and Jacobsen occurred prior to Colon's testimony. Although this is accurate, Lorenzen knew, on the basis of the court's prior ruling, that Colon was going to testify that he observed the petitioner with a .38 revolver in July, 2009. Rather than leave the jury to speculate as to why the petitioner possessed such a weapon, Lorenzen made the strategic decision to fill in the gaps. We agree with the habeas court's conclusion that there is "nothing objectively unreasonable about an experienced defense attorney's judgment that, from his reading of the room, he believed it better to deal with things that the [jurors were] likely considering in the back of their minds 'head on' instead of allowing them to linger."

Moreover, the record reveals that Lorenzen attempted to discredit Jacobsen's testimony by eliciting from him and Cardona evidence of other unsubstantiated allegations that Jacobson had made against the petitioner. It cannot reasonably be disputed that Lorenzen's inquiry of Cardona and Jacobson, viewed with an eye toward emphasizing Jacobson's history of lodging unsubstantiated allegations of wrongdoing against the petitioner, could have inured to the favor of the petitioner. We cannot conclude that a trial strategy aimed toward undermining the veracity or accuracy of the state's witnesses, although ultimately unsuccessful in this case,

was not sound, or that it constituted ineffective assistance of counsel.[5] Accordingly, the petitioner failed to demonstrate that Lorenzen's representation of him was deficient.

For the foregoing reasons, we conclude that the petitioner has failed to demonstrate that the issues raised in his petition for certification to appeal are debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions are adequate to deserve encouragement to proceed further. Thus, the petitioner has failed in his burden of demonstrating that the court's denial of his petition for certification to appeal constituted an abuse of discretion. See *Johnson* v. *Commissioner of Correction*, supra, 181 Conn. App. 577–78.

The appeal is dismissed.

In this opinion the other judges concurred.

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[5] Because we conclude that the petitioner failed to meet the performance prong of *Strickland*, we need not address the prejudice prong.