CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JAMES ARRICO *v.* BOARD OF EDUCATION OF THE CITY OF STAMFORD ET AL.
(AC 44409)
(AC 44488)

Elgo, Moll and Pellegrino, Js.

Syllabus

The defendants, an employer and its third-party administrator appealed to this court from the decision of the Compensation Review Board, which reversed in part the Workers' Compensation Commissioner's decision approving a form 36 filed by the defendants. During the course of his employment as a custodian, the plaintiff sustained a compensable injury and entered into two voluntary agreements with his employer. The plaintiff thereafter sustained another injury and two voluntary agreements were approved with respect to that injury. Subsequently, the defendants filed a form 36 seeking to discontinue or to reduce the plaintiff's workers' compensation benefits, asserting that the plaintiff had a work capacity and had reached maximum medical improvement. After formal hearings on the form 36 and on the plaintiff's entitlement to total disability benefits pursuant to statute (§ 31-307), the commissioner approved the form 36. The plaintiff appealed to the board, claiming inter alia, that the commissioner incorrectly concluded that further medical care of his compensable injuries would be palliative when that issue was not noticed for or litigated during the formal hearings. The plaintiff further claimed that the commissioner applied an improper standard in determining that his current disability was the result of preexisting, noncompensable injuries and, thus, not compensable under § 31-307. The board concluded that substantial evidence supported the commissioner's decision approving the form 36. The board, however, stated that it was persuaded that the manner in which the commissioner

addressed this evidence impaired the plaintiff's right to a fair hearing. Accordingly, the board vacated the majority of the commissioner's conclusions and remanded the matter for further proceedings. The board subsequently denied the plaintiff's motion for articulation or reconsideration in which he argued that a de novo trial before a different commissioner was required on remand, and the plaintiff filed a separate appeal to this court. *Held*:

1. The defendants could not prevail on their claims that the board improperly reversed in part the commissioner's decision approving their form 36:

a. The defendants' claim that the board misconstrued the commissioner's decision regarding the plaintiff's claim for § 31-307 benefits and in remanding the attendant issues for further proceedings was unavailing; the defendants' contention that the commissioner found that the plaintiff had a work capacity was belied by the commissioner's decision because, although the commissioner noted that certain physicians had opined that the plaintiff had a work capacity, the commissioner neither indicated that she deemed those opinions to be credible nor made a finding that the plaintiff had a work capacity, the board could not have affirmed the commissioner's decision on the basis of a finding that the commissioner never made, and the board correctly concluded that the commissioner determined that the plaintiff remained totally disabled as a result of preexisting, noncompensable injuries.

b. The board did not err in vacating the commissioner's conclusions as to the issue of further medical care for the plaintiff's work-related injuries and remanding that issue for further proceedings on the ground that the parties did not receive notice and an opportunity to present argument and evidence on that issue: the defendants conceded that the question of whether the plaintiff required further medical care was not at issue during the formal hearings; moreover, contrary to the defendant's contention, this court did not construe the commissioner's determination regarding further medical care as reinforcing her finding that the plaintiff had reached maximum medical improvement, rather, this determination implicated the issue of whether further medical care was reasonable or necessary, which was not at issue before the commissioner; furthermore, if the parties agree that the issue of further medical care is not germane to the proceedings and decline to litigate it, they may alert the commissioner in order to remove the issue from consideration on remand.

2. The plaintiff could not prevail on his claim that the board improperly denied his motion for articulation or reconsideration in violation of statute (§ 51-183c): the plaintiff's claim that the board violated § 51-183c by denying his request for an order that the issues that the board remanded be tried de novo before a different commissioner was untenable because § 51-183c applies only to judges, § 51-183c does not apply in the workers' compensation forum, and this court declined to extend the policy underpinning § 51-183c to workers' compensation proceedings.

Argued November 18, 2021—officially released April 26, 2022

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Seventh District finding, inter alia, that the plaintiff had reached maximum medical improvement with respect to his claim for certain workers' compensation benefits, brought to the Compensation Review Board, which reversed in part the commissioner's decision and remanded the case for further proceedings; thereafter, the board denied the plaintiff's motion for articulation or reconsideration, and the plaintiff and the defendants filed separate appeals to this court. *Affirmed*.

Daniel A. Benjamin, for the appellant in Docket No. AC 44488 and for the appellee in Docket No. AC 44409 (plaintiff).

Scott Wilson Williams, for the appellants in Docket No. AC 44409 and for the appellees in Docket No. AC 44488 (defendants).

Opinion

MOLL, J. In this workers' compensation dispute, the plaintiff, James Arrico, and the defendants, the Board of Education of the City of Stamford (city) and PMA Management Corporation of New England,[1] each appeal from separate decisions of the Compensation Review Board (board).[2] In Docket No. AC 44409, the defendants appeal from the decision of the board reversing in part the decision of the Workers' Compensation Commissioner for the Seventh District (commissioner) of the Workers' Compensation Commission approving a form

[1] PMA Management Corporation of New England is a third-party administrator for the city.

[2] The two appeals, although not consolidated, were heard together at oral argument before this court pursuant to an order from this court.

36[3] that the defendants filed.[4] The board vacated the majority of the commissioner's conclusions in her decision approving the form 36 and remanded the matter to the commissioner for further proceedings on several issues. On appeal, the defendants claim that the board (1) misconstrued the commissioner's decision as including a finding that the plaintiff was totally disabled as a result of preexisting, noncompensable injuries, (2) failed to affirm the commissioner's decision on the basis of her purported finding, as supported by sufficient evidence, that the plaintiff had a work capacity, and (3) misconstrued the commissioner's conclusion that further medical care of the plaintiff's compensable injuries was palliative. In Docket No. AC 44488, the plaintiff appeals from the decision of the board denying his motion for articulation or reconsideration vis-à-vis its ruling on the commissioner's decision approving the form 36. On appeal, the plaintiff claims that the board improperly denied his request for an order that the matter be remanded to a different commissioner for a de novo trial. We affirm the decisions of the board.

[3] " 'A [f]orm 36 is a notice to the compensation commissioner and the [plaintiff] of the intention of the employer and its insurer to discontinue [or reduce] compensation payments. The filing of this notice and its approval by the commissioner are required by statute in order properly to discontinue [or reduce] payments.' . . . *Brinson* v. *Finlay Bros. Printing Co.*, 77 Conn. App. 319, 320 n.1, 823 A.2d 1223 (2003); General Statutes § 31-296 (a)." *Rivera* v. *Patient Care of Connecticut*, 188 Conn. App. 203, 204 n.1, 204 A.3d 761 (2019).

[4] We note that General Statutes (Supp. 2022) § 31-275d (a) (1), effective as of October 1, 2021, provides in relevant part that "[w]herever the words 'workers' compensation commissioner', 'compensation commissioner' or 'commissioner' are used to denote a workers' compensation commissioner in [several enumerated] sections of the general statutes, [including sections contained in the Workers' Compensation Act, § 31-275 et seq.] the words 'administrative law judge' shall be substituted in lieu thereof . . . ."

As all events underlying this appeal occurred prior to October 1, 2021, we will refer to the workers' compensation commissioner who approved the defendants' form 36 in this matter as the commissioner, and all statutory references herein are to the 2021 revision of the statutes.

The following facts, which are not in dispute, and procedural history are relevant to our resolution of these appeals. At all relevant times, the plaintiff was employed by the city as a custodian. On July 21, 2008, during the course of his employment, the plaintiff sustained a compensable back injury (2008 injury). Two voluntary agreements[5] were approved in 2016, which established a 16 percent permanent partial disability rating as to the plaintiff's back with a September 30, 2016 maximum medical improvement date.[6] On February 10, 2017, during the course of his employment, the plaintiff sustained another compensable back injury when he fractured his sacrum while lifting a table (2017 injury). Two voluntary agreements were approved in August, 2017, in relation to the 2017 injury.

On February 28, 2018, the defendants filed a form 36 seeking to discontinue or to reduce the plaintiff's workers' compensation benefits. Relying on a report dated February 20, 2018, by Stuart Belkin, an orthopedic surgeon who had examined the plaintiff, the defendants asserted that the plaintiff had a work capacity and had reached maximum medical improvement with an additional 5 percent permanent partial disability rating as to his back. On March 5, 2018, the plaintiff filed an

[5] See General Statutes § 31-296 (a), which provides in relevant part: "If an employer and an injured employee . . . reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. A copy of the agreement, with a statement of the commissioner's approval, shall be delivered to each of the parties and thereafter it shall be as binding upon both parties as an award by the commissioner. . . ."

[6] "Maximum medical improvement is that time when there is no reasonable prognosis for complete or partial cure and no improvement in the physical condition or appearance of the injured body member can be reasonably made." *Cappellino* v. *Cheshire*, 27 Conn. App. 699, 703 n.2, 608 A.2d 1185 (1992), aff'd, 226 Conn. 569, 628 A.2d 595 (1993).

objection to the form 36. On September 7, 2018, following an informal hearing, the form 36 was approved.

Formal hearings on the form 36 were held on December 12, 2018, and January 29, 2019.[7] The commissioner (1) heard testimony from the plaintiff and his wife and (2) admitted exhibits, including medical records, into evidence. During the January 29, 2019 formal hearing, in response to a request by the plaintiff's counsel, the commissioner stated that the notice issued in relation to the formal hearings listed two disputed issues: (1) the form 36 filed by the defendants pursuant to General Statutes § 31-296; and (2) the plaintiff's entitlement to total disability benefits pursuant to General Statutes § 31-307.[8]

On August 20, 2019, the commissioner issued a de novo ruling approving the form 36. As summarized by the board, the commissioner set forth the following relevant facts and overview of the evidence. "[The commissioner] noted that the [plaintiff] had sustained two different back injuries; the first occurred on July 21, 2008, at the L4 level and the second injury on February

[7] An employee who objects to a form 36 may request an informal hearing. See General Statutes § 31-296 (b); *Passalugo* v. *Guida-Seibert Dairy Co.*, 149 Conn. App. 478, 486, 91 A.3d 475 (2014). "While evidence is not taken at an informal hearing . . . the employer/insurer has the burden of proof and must submit documents . . . in support of the discontinuance or reduction. Thereafter, the burden shifts to the injured worker who should be prepared to present competent medical evidence (usually by medical reports) that support the contest of the [f]orm 36. The [commissioner] will weigh the evidence and either approve or disallow the discontinuance or reduction. . . . [A] commissioner's initial ruling on a [f]orm 36 may be challenged at a subsequent formal [evidentiary] hearing, at which the previous ruling has no precedential weight. The issue is tried de novo." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Passalugo* v. *Guida-Seibert Dairy Co.*, supra, 486–87.

[8] General Statutes § 31-307 (a) provides in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ."

10, 2017, when [he] fractured his sacrum lifting a table. . . . The commissioner also noted the numerous ailments unrelated to his work injury the [plaintiff] suffered from during the period between [the 2008 injury and the 2017 injury], which included colitis, essential hypertension, seizures and epilepsy, and spinal stenosis. [The commissioner] noted that one of the [plaintiff's] treaters, Vincent R. Carlesi . . . had diagnosed him in 2008 with a history of chronic low back pain which radiates into his buttocks and down his left lower extremity. An MRI in 2008 noted [among other ailments] 'degenerative disc narrowing at the L4-L5 level . . . .' The commissioner noted the [plaintiff] chose not to undergo surgery at that time and opted for pain management. . . .

"Carlesi examined the [plaintiff] on March 7, 2017, and diagnosed him with lumbar radiculopathy and lumbar spinal stenosis. Carlesi noted the [plaintiff's] medical history included colitis, ulcerative colitis, disc disease, degenerative joint disease, and that he is currently an 'every day smoker.' . . . Carlesi also noted that the [plaintiff's] prior treatment had included the use of a number of steroids. . . .

"The [defendants] had their expert, [Belkin], examine the [plaintiff] on February 20, 2018. Belkin found the [plaintiff] had reached maximum medical improvement . . . with a 5 percent permanent partial disability of the lumbar spine, independent of any previous impairment. . . .

"On March 12, 2018, Carlesi sent a letter to [the plaintiff's] counsel stating that the [plaintiff's] 2017 injury had 'exacerbated his underlying pain and that he has been incapable of returning to work due to the severity of his pain. He is unable to ambulate without a cane and he has severe pain [from his] back radiating [into] both lower extremities. [His] pain worsens with activity,

[and there is a] significant decrease in [his] ability to lift, bend, and carry anything at this point in time. [He] is unable to perform most of his activities of daily living and pretty much rests in a recliner or in a [bed]. He lacks physical endurance and frequently awakens from sleep due to pain.' . . .

"Carlesi deemed the [plaintiff] totally disabled from all work activities as a result of the progressive degenerative disc disease, lumbar spinal stenosis, and sacral insufficiency fractures. He did agree the [plaintiff] was at [maximum medical improvement] and assigned an 11 percent permanent partial disability rating of the lumbar spine. On March 20, 2018, Carlesi further assessed the [plaintiff] as to his pain level and medication use, and noted the [plaintiff] was using a cane and was unable to return to work. Carlesi's notes also indicate the [plaintiff] suffered from a number of digestive system ailments.

"A commissioner's examination was performed by Michael F. Karnasiewicz . . . on June 28, 2018.[9] Karnasiewicz opined that the [plaintiff] had reached [maximum medical improvement] from the 2017 injury and had sustained a 5 percent additional permanent disability to his sacral spine from the incident, and that the

[9] See General Statutes § 31-294f (a), which provides: "An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the reasonable request of the employer or at the direction of the commissioner. The examination shall be performed to determine the nature of the injury and the incapacity resulting from the injury. The physician or surgeon shall be selected by the employer from an approved list of physicians and surgeons prepared by the chairman of the Workers' Compensation Commission and shall be paid by the employer. At any examination requested by the employer or directed by the commissioner under this section, the injured employee shall be allowed to have in attendance any reputable practicing physician or surgeon that the employee obtains and pays for himself. The employee shall submit to all other physical examinations as required by this chapter. The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal."

[plaintiff] had a sedentary work capacity. The commissioner noted these other opinions from [Karnasiewicz]:

"a. The [plaintiff's] underlying spinal stenosis was probably aggravated by the injury of February 10, 2017, and is causing the radiculopathy the [plaintiff] is experiencing. . . .

"b. The [plaintiff's] need for treatment is multifactorial in that both the [2008 injury] and the [2017 injury] were 'substantial factors' in the production of the [plaintiff's] need for treatment. . . .

"c. Other factors complicating the [plaintiff's] current inability to work are ulcerative colitis, acid reflux and seizure disorder. He also has poor concentration skills and a slowed thought process. He is an 'easy' bruiser and bleeder and has unspecified difficulty with his immune system. He uses a cane for ambulation, his ankle reflexes are absent bilaterally with diminished sensation bilaterally in both of his feet. . . .

"d. Between the [plaintiff's] first injury in 2008 and his second injury in 2017, his diagnostics reveal a steady worsening of his stenotic condition. In addition, an EMG study with [another physician] shows multiple level radiculopathy consistent with spinal stenosis.

"e. [Karnasiewicz] gives the [plaintiff] a sedentary work capacity and recommends that the [plaintiff] be reevaluated by [Scott Simon, a neurosurgeon] for decompressive surgery in the treatment of his bilateral pain. . . .

"The [plaintiff] continued to treat for his ailments with Carlesi who [i]n July . . . 2018, examined him and noted he 'continues to experience chronic lower back pain, sacral pain and radicular pain in both lower extremities associated numbness, tingling and pins and needles in his feet.' . . . Carlesi said the [plaintiff] was a surgical candidate for either a lumbar laminectomy

and decompression surgery to treat the spinal stenosis or a spinal cord stimulator trial for pain relief. He also opined that the [plaintiff] was still disabled. . . .

"Belkin was deposed on December 5, 2018, and discussed his prior February, 2018 examination and his review of the [the plaintiff's] medical records. He noted the [plaintiff] had a bilateral sacral fracture on February 10, 2017, and needed no additional treatment as of February, 2018. He deemed the [plaintiff] at [maximum medical improvement] with a 5 percent permanent partial disability rating in addition to any previous rating. He opined that the [plaintiff] could return to work as a custodian based solely on his lumbar spine condition 'but that any current disability at the time [he] examined [the plaintiff] was as a result of [the plaintiff's] [preexisting] chronic spinal problems,' which he testified were 'diffuse degenerative disc disease and spinal stenosis of the lumbar spine.' . . . He agreed with Karnasiewicz' opinions as to the [plaintiff's] level of permanency and having a sedentary work capacity. He was more equivocal on [an opinion by Simon] that the [plaintiff] was disabled from work, deeming it 'possible.' Belkin opined the [plaintiff's] comorbidities are not germane to his orthopedic examination and he did not unequivocally agree that the [plaintiff's] comorbidities and medication regime would necessarily preclude any form of work status for the [plaintiff]. He did not believe the [plaintiff's] spinal stenosis had necessarily worsened and opined the [plaintiff's] sacral fractures should have healed."[10] (Citations omitted; footnote added; footnote omitted.)

On the basis of the record, the commissioner concluded that the plaintiff had "reached maximum medical improvement on his low back with an additional 5

[10] The record contained additional medical evidence, which the commissioner summarized in her decision. We need not detail that additional evidence for purposes of this appeal.

percent due on his sacrum. The combined permanent partial disability rating from the 2008 [injury] and the 2017 [injury] is 21 percent to the low back."

The commissioner made the following additional conclusions. The commissioner rejected (1) Carlesi's opinion that the 2017 injury "had aggravated the plaintiff's underlying pain" and (2) Karnasiewicz' opinion that the plaintiff's "underlying spinal stenosis was 'probably aggravated' by the [2017 injury] and is causing the radiculopathy the [plaintiff] is experiencing and the need for treatment of [the] same." The commissioner rejected those opinions because (1) in 2008, Carlesi had reported that the plaintiff had a " 'history of chronic back pain' " that radiated down his body " 'with associated numbness and weakness,' " which " 'precluded him from working and performing his daily activities,' " (2) a 2008 MRI revealed, among other ailments suffered by the plaintiff, " 'degenerative disc narrowing,' " (3) the plaintiff was a daily smoker, and (4) the plaintiff had declined to undergo surgery in 2008, opting to pursue conservative care and accepting a 16 percent permanent partial disability rating as to his back.

With regard to the plaintiff's decision to reject surgery, the commissioner stated that, "[f]or eleven years, the [plaintiff] has turned down the surgical option to remediate his back condition, despite recommendations from his treating physicians to do this at an earlier point in time. Now, due to the passage of time and the [plaintiff's] various non-work related [comorbidities], some of which are progressively degenerative in nature . . . he is no longer a surgical candidate. The [plaintiff] is entitled to turn down recommended surgery and opt for conservative or palliative care, however, he must do so with the understanding that the [Workers' Compensation Act, General Statutes § 31-275 et seq.] was not designed to cause the [defendants] to pay for palliative

treatment in perpetuity, nor does it require the [defendants] to pay indemnity benefits while the [plaintiff] refuses reasonable and medically necessary surgery to his back and/or while other, non-work related conditions are interfering with the [plaintiff's] ability to participate in curative medical treatment for his work-related low back injuries."

The commissioner then concluded that Belkin, Karnasiewicz, and Carlesi all had determined that the plaintiff had reached maximum medical improvement with respect to his back, which "signal[ed] to the parties and to the commissioner that there is no further 'curative' treatment available to the [plaintiff]." The commissioner further concluded that the plaintiff had been out of work for a "protracted period of time" and that "[t]herapy designed to keep the employee at work or to return him to work is curative," whereas "[t]herapy that does not return a claimant to work may be deemed palliative and therefore not reasonable and necessary medical care." (Internal quotation marks omitted.) Finally, the commissioner concluded that, "[t]o the extent that the [plaintiff] remains totally disabled, it is due to the various non-work related [comorbidities] and the treatment for [the] same. Further treatment on the [plaintiff's] [work related] injuries to the low back is palliative."

On September 3, 2019, the plaintiff filed a motion to correct and a motion for reconsideration, both of which the commissioner denied. On September 10, 2019, the plaintiff filed a petition for review with the board.

On November 17, 2020, the board reversed in part the commissioner's decision approving the form 36. At the outset of its decision, the board concluded that there was substantial evidence supporting the commissioner's decision approving the form 36. Nevertheless, the board was "persuaded by the [plaintiff] . . . that

the manner in which the commissioner addressed this evidence was sufficiently unorthodox as to impair his right to a fair hearing based on established standards in this forum." Specifically, the plaintiff claimed, inter alia, that the commissioner improperly (1) concluded that further medical care of his compensable injuries would be palliative when that issue was neither noticed for, nor litigated, during the formal hearings and (2) failed to apply the proper standard in determining that his current disability was the result of preexisting, noncompensable injuries and, thus, not compensable under § 31-307.

The board first addressed the commissioner's conclusions that further medical care of the plaintiff's compensable injuries was palliative, which the board construed as implicating the question of whether further medical care was reasonable or necessary pursuant to General Statutes § 31-294d.[11] The board concluded that further medical care "was not an issue noticed for consideration at the formal hearing[s]. [The board does] not find the commissioner clearly presented this issue as a matter for consideration when she commenced the formal hearing[s]." Observing that the question of whether medical care satisfies the "reasonable or necessary" standard set forth in § 31-294d is a question of fact, the board concluded that due process required the parties to be afforded an opportunity to present

[11] General Statutes § 31-294d (a) (1) provides in relevant part: "The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician, surgeon or advanced practice registered nurse to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician, or advanced practice registered nurse surgeon deems reasonable or necessary. . . ."

We note that § 31-294d (a) (1) was amended by No. 21-196, § 56, of the 2021 Public Acts by adding references to physician assistants and making a technical change. That amendment has no bearing on the merits of this appeal. For purposes of clarity, we refer to the current revision of the statute.

argument and evidence on that issue. Additionally, the board rejected an argument by the defendants that the commissioner's finding that the plaintiff had reached maximum medical improvement vis-à-vis the 2017 injury necessitated a determination that further medical care was palliative, particularly as the defendants had cited no authority to support their argument. Accordingly, the board vacated the commissioner's conclusions as to further medical care[12] and remanded the issue of "whether further medical care for the [plaintiff] is reasonable or necessary" to the commissioner for further proceedings.

The board next considered whether the commissioner had applied the proper standard in determining that the plaintiff's disability was the consequence of preexisting, noncompensable injuries and, therefore, not compensable under § 31-307. First, the board concluded that the commissioner's ruling was predicated on "conjecture, speculation or surmise." (Internal quotation marks omitted.) The board observed that, in rejecting Karnasiewicz' opinion that the 2017 injury had "probably aggravated" the plaintiff's underlying spinal stenosis and was causing his radiculopathy, the commissioner relied on Carlesi's opinion, rendered in 2008, that the plaintiff was suffering from chronic back ailments. Although the board remarked that it had "frequently affirmed a trial commissioner who found a treating physician or a respondent's examiner more persuasive than a commissioner's examiner," it stated that the commissioners in such cases had (1) relied on medical examinations contemporaneous with the compensable injuries at issue and (2) explained in detail why other medical examiners were more credible or persuasive than the commissioner's examiner. In contrast, the board noted, the commissioner did not assess

[12] More specifically, the board vacated the commissioner's conclusions set forth in paragraphs G, H, and I of her decision approving the form 36.

the relative credibility or persuasiveness of the medical examiners in the present case. The board continued: "Moreover, the rationale for [the commissioner's] decision is based on an old examination [by Carlesi], the failure of the [plaintiff] to seek surgery, and the lapse of time . . . . Had the commissioner cited a medical witness who stated this point, [the board] would find the ruling sustainable. The ruling does not cite such evidence, however."[13] (Citation omitted.)

The board then explained that, in situations where a claimant suffers from both a compensable and a noncompensable injury, the claimant must demonstrate that his or her compensable injury "was a substantial factor in the claimed disability." (Internal quotation marks omitted.) The board cited decisions in which trial commissioners had resolved similar claims, stating that "[i]n all of those cases [the board] could ascertain the manner in which the trial commissioners reached their conclusions, which was by weighing the probative value of conflicting contemporaneous opinions." The board concluded that the commissioner improperly failed to identify "the specific expert witness or witnesses who offered recent testimony supportive of the result in this case. In the absence of the commissioner stating this specifically in the text of the ruling, [the board] cannot, as an appellate panel, sustain the conclusion[s] reached [in the commissioner's decision]." Accordingly, the board vacated the commissioner's conclusions concerning the plaintiff's claim for § 31-307 benefits[14] and remanded "the issues of whether the

[13] The board also determined that the opinion of Belkin, the defendants' medical examiner, did not salvage the commissioner's ruling because (1) Belkin testified at his deposition that he did not " 'unequivocally agree' " that the plaintiff's comorbidities and medications necessarily precluded " 'any form of work status' " for the plaintiff and, in any event, (2) the commissioner did not assess Belkin's credibility and persuasiveness in relation to the other examiners.

[14] More specifically, the board vacated the commissioner's conclusions set forth in paragraphs D, E, and F of her decision approving the form 36.

[plaintiff] is totally disabled [and] whether the [plaintiff's] disability was caused by a compensable injury" to the commissioner for further proceedings. The board affirmed the commissioner's decision only insofar as she concluded that the plaintiff had reached maximum medical improvement with a combined 21 percent permanent partial disability rating as to his back, which the parties did not contest. Thereafter, the defendants appealed from the decision of the board (AC 44409).

On November 25, 2020, the plaintiff filed a motion for articulation or reconsideration. The plaintiff asserted that the board had concluded that the facts found by the commissioner were incorrect and lacked a sufficient evidentiary foundation, such that a de novo trial was required before a different commissioner on remand. Accordingly, the plaintiff requested that the board issue an order to that effect. On December 2, 2020, the defendants filed a response arguing that any additional formal hearings on remand should be held by the commissioner.

On December 23, 2020, the board denied the plaintiff's motion for articulation or reconsideration. In doing so, the board stated that, in its November 17, 2020 decision, it had "remand[ed] the [commissioner's decision] back to the . . . commissioner for findings consistent with the appropriate standard of causation . . . ." The board then reviewed this court's opinion in *Fantasia* v. *Milford Fastening Systems*, 86 Conn. App. 270, 860 A.2d 779 (2004), cert. denied, 272 Conn. 919, 866 A.2d 1286 (2005), which the plaintiff had cited in support of his motion, and deemed it to be distinguishable. In addition, the board noted that, following *Fantasia*, it had "often ordered remands of decisions back to the original trial commissioners with direction to rule based on the appropriate legal standards. . . . [The board] find[s] no compelling reason not to do so likewise in this case." (Citation omitted.)

The board also cited the precept of administrative economy in denying the plaintiff's motion, stating that it had "vacated various conclusions from the commissioner's [decision approving the form 36] as either not having been litigated between the parties or having been based on the application of an erroneous standard of law. The issues which were litigated have already involved the submission of a great deal of testimony and documentary evidence and [the board] believe[s] that a de novo hearing would result in substantial delay and redundancy. Permitting the . . . commissioner familiar with the record to rule on this record serves the purpose of administrative economy." Thereafter, the plaintiff appealed from the board's denial of his motion (AC 44488).

I

AC 44409

In AC 44409, the defendants appeal from the board's November 17, 2020 decision reversing in part the commissioner's decision approving their form 36 and remanding the matter for further proceedings as to the issues of total disability and further medical care. The defendants raise three distinct claims on appeal, two of which are interrelated. First, the defendants assert that the board (1) misconstrued the commissioner's decision to include a finding that the plaintiff was totally disabled as a result of preexisting, noncompensable injuries and (2) failed to affirm the commissioner's decision on the basis of her purported finding that the plaintiff had a work capacity, which the defendants maintain was supported by sufficient evidence. Second, the defendants contend that the board misconstrued the commissioner's conclusion that further medical care of the plaintiff's compensable injuries was palliative. These claims are unavailing.

"The standard of review in workers' compensation appeals is well established. When the decision of a commissioner is appealed to the board, the board is obligated to hear the appeal on the record of the hearing before the commissioner and not to retry the facts. . . . The commissioner has the power and duty, as the trier of fact, to determine the facts. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"[O]n review of the commissioner's findings, the [board] does not retry the facts nor hear evidence. It considers no evidence other than that certified to it by the commissioner, and then for the limited purpose of determining whether or not the finding should be corrected, or whether there was any evidence to support in law the conclusions reached. It cannot review the conclusions of the commissioner when these depend upon the weight of the evidence and the credibility of witnesses. . . . Our scope of review of the actions of the board is similarly limited. . . . The role of this court is to determine whether the . . . [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Citation omitted; internal quotation marks omitted.) *Ayna* v. *Graebel/CT Movers, Inc.*, 133 Conn. App. 65, 69–70, 33 A.3d 832, cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012).

A

The defendants first claim that the board, in vacating the commissioner's conclusions made in connection with her rejection of the plaintiff's claim for § 31-307 benefits and in remanding the total disability issues for further proceedings, misconstrued the commissioner's decision vis-à-vis her conclusion that, "[t]o the extent

that the [plaintiff] remains totally disabled, it is due to the various non-work related [comorbidities] and the treatment for [the] same." The defendants assert that the commissioner found that the plaintiff had a work capacity and that there was sufficient evidence in the record supporting that purported finding, such that the board should have affirmed the commissioner's decision as to the same. The defendants further maintain that the commissioner did not find that the plaintiff was totally disabled because of his non-work related comorbidities, instead positing that the commissioner's statements regarding the plaintiff's disability constituted "extraneous language, or dicta . . . ." We disagree.

First, the defendants' contention that the commissioner found that the plaintiff had a work capacity is belied by the commissioner's decision. Although the commissioner, in summarizing the evidence in the record, noted that certain physicians had opined that the plaintiff had a work capacity, the commissioner neither indicated that she deemed those opinions to be credible nor made a finding, express or implied, that the plaintiff had a work capacity. The board could not have affirmed the commissioner's decision on the basis of a finding that the commissioner never made. Thus, whether the record contained sufficient evidence to support a finding that the plaintiff had a work capacity is of no moment.

Second, we agree with the board that the commissioner made a determination that the plaintiff remained totally disabled as a result of preexisting, noncompensable injuries. This determination was neither extraneous nor stated in dicta as surmised by the defendants. One of the issues before the commissioner was whether the plaintiff was entitled to benefits pursuant to § 31-307. "[A] worker is entitled to total disability payments pursuant to . . . § 31-307 only when his injury results in

a total incapacity to work, which [our Supreme Court has] defined as the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation which he might reasonably follow." (Internal quotation marks omitted.) *Bode* v. *Connecticut Mason Contractors, The Learning Corridor*, 130 Conn. App. 672, 679–80, 25 A.3d 687, cert. denied, 302 Conn. 942, 29 A.3d 467 (2011). Whether the plaintiff was totally disabled and, if so, the cause of his total disability, were questions for the commissioner to resolve. The commissioner addressed these questions in her decision, albeit improperly, as determined by the board.

In sum, we reject the defendants' claim that the board committed error in vacating the commissioner's conclusions regarding the plaintiff's claim for § 31-307 benefits and in remanding the attendant issues for further proceedings.

B

The defendants next claim that the board, in vacating the commissioner's conclusions regarding further medical care and in remanding that issue for further proceedings, misconstrued the commissioner's determination that "[f]urther treatment on the [plaintiff's] [work related] injuries to [his] low back is palliative." The defendants concede that the question of whether the plaintiff required further medical care was not at issue during the formal hearings; however, they contend that the commissioner's determination regarding further medical care was made to support her finding that the plaintiff had reached maximum medical improvement as to the 2017 injury. In addition, the defendants maintain that, even if the board properly vacated the commissioner's conclusions as to further medical care, the board improperly remanded that issue for further proceedings. We are not persuaded.

General Statutes § 31-294d (a) (1) provides in relevant part that "[t]he employer, as soon as the employer has knowledge of an injury, shall provide a competent physician, surgeon or advanced practice registered nurse to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician, or advanced practice registered nurse surgeon deems *reasonable or necessary*. . . ." (Emphasis added.) " 'Reasonable or necessary medical care is that which is curative or remedial. Curative or remedial care is that which seeks to repair the damage to health caused by the job even if not enough health is restored to enable the employee to return to work. Any therapy designed to keep the employee at work or to return him to work is curative. Similarly, any therapy designed to eliminate pain so that the employee can work is curative. Finally, any therapy which is life prolonging is curative.' *Bowen* v. *Stanadyne, Inc.*, No. 232, CRB-1-83 (June 19, 1984)." *Sellers* v. *Sellers Garage, Inc.*, 155 Conn. App. 635, 641 n.4, 110 A.3d 521 (2015). In contrast, "therapy that does not return a claimant to work may be deemed palliative and therefore not reasonable [or] necessary medical care." *Jodlowski* v. *Stanley Works*, No. 5609, CRB 6-10-11 (November 16, 2011).

Mindful of this context, we turn to the defendants' contention that the commissioner's further medical care determination merely supported her finding that the plaintiff had reached maximum medical improvement as to the 2017 injury. This argument is unavailing. The defendants do not cite any authority, and we are aware of none, underpinning the proposition that further medical care of a compensable injury with respect to which a claimant has reached maximum medical improvement is palliative per se. In fact, the board has issued decisions that undermine that notion. See, e.g.,

DeFelippi v. *Wal-Mart Stores, Inc.*, No. 4349, CRB 5-01-1 (January 15, 2002) (rejecting argument that claimant's treatment was unnecessary and palliative after claimant had reached maximum medical improvement); *Flyer* v. *Barrieau Moving & Storage*, No. 3985, CRB 1-99-3 (April 18, 2000) (treatment was reasonable or necessary following claimant reaching maximum medical improvement); see also *Liebel* v. *Stratford*, No. 5070, CRB 4-06-3 (May 17, 2007) ("[o]nce a claimant has reached maximum medical improvement, there is *often* a valid ground to ask whether a physician's course of treatment is 'reasonable [or] necessary' within the meaning of § 31-294d" (emphasis added)). Thus, we do not construe the commissioner's further medical care determination as reinforcing her finding that the plaintiff had reached maximum medical improvement; rather, it implicated the issue of whether further medical care was reasonable or necessary pursuant to § 31-294d, which, as the board concluded and as the defendants concede, was not at issue before the commissioner. Accordingly, we conclude that the board did not err in vacating the commissioner's conclusions as to the issue of further medical care on the ground that the parties did not receive notice and an opportunity to present argument and evidence on that issue.

The defendants further assert that, even if vacating the commissioner's conclusions as to further medical care was proper, the board should not have remanded the issue for further proceedings because (1) further medical care is not a current issue between the parties, (2) no request for medical treatment has been denied, and (3) the plaintiff is not precluded from seeking authorization for further medical care. Under the circumstances of this case, we perceive no harm in the remand order. Should both parties agree that the issue of further medical care is not germane to the proceedings and decline to litigate it, they may alert the commissioner

of the same in order to remove the issue from consideration on remand.[15]

In sum, we reject the defendants' claim that the board committed error in vacating the commissioner's conclusions regarding the issue of further medical care and in remanding that issue for further proceedings.

II

AC 44488

In AC 44488, the plaintiff appeals from the board's denial of his motion for articulation or reconsideration. The plaintiff contends that the board violated General Statutes § 51-183c in denying his request for an order that the issues remanded by the board in its November 17, 2020 decision be tried de novo before a different commissioner. We disagree.

"Whether a case should be remanded, and the scope of that remand, presents questions to be determined by the . . . board in the exercise of its sound discretion." (Internal quotation marks omitted.) *Fantasia* v. *Milford Fastening Systems*, supra, 86 Conn. App. 278. In the present case, however, our resolution of the plaintiff's claim requires us to interpret § 51-183c, which invokes our plenary review. *Chase Home Finance, LLC* v. *Scroggin*, 194 Conn. App. 843, 851, 222 A.3d 1025 (2019). "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the

[15] During oral argument before this court, the parties' respective counsel made comments suggesting that none of the parties believed that it was necessary to pursue the issue of further medical care on remand.

language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) Id., 851–52.

We first turn to the text of § 51-183c, which appears in chapter 882 of the General Statutes governing the Superior Court and provides: ''No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial, either in a civil or criminal case, in which a new trial is granted, may again preside at the trial of the case.''

In light of the plain language of § 51-183c, the plaintiff's argument that the board violated § 51-183c by declining to remand the matter to a different commissioner for a de novo trial is untenable. As our Supreme Court has expressly recognized, ''§ 51-183c, by its plain terms, applies only to judges.'' *State* v. *AFSCME, Council 4, Local 1565*, 249 Conn. 474, 480, 732 A.2d 762 (1999). Moreover, ''[o]ur Supreme Court, as well as this court, have previously held that § 51-183c applies exclusively to 'trials' and not to other types of adversarial proceedings.'' *Chase Home Finance, LLC* v. *Scroggin*, supra, 194 Conn. App. 852. Put simply, § 51-183c has

no applicability in the workers' compensation forum.[16] Insofar as the plaintiff invites this court to extend the policy underpinning § 51-183c to workers' compensation proceedings, we decline to do so. "We consistently have acknowledged that the [Workers' Compensation Act, General Statutes § 31-275 et seq.] is an intricate and comprehensive statutory scheme. . . . The complex nature of the workers' compensation system requires that policy determinations should be left to the legislature, not the judiciary." (Internal quotation marks omitted.) *Salerno* v. *Lowe's Home Improvement Center*, 198 Conn. App. 879, 884, 235 A.3d 537 (2020); see also, e.g., *State* v. *AFSCME, Council 4, Local 1565*, supra, 480 (declining to extend "legislative policy embodied in . . . § 51-183c" to arbitration proceedings); *Board of Education* v. *East Haven Education Assn.*, 66 Conn. App. 202, 215–16, 784 A.2d 958 (2001) (same).

The plaintiff relies on *Fantasia* v. *Milford Fastening Systems*, supra, 86 Conn. App. 270, to support his claim that the board committed error in failing to remand the matter to a different commissioner for a de novo trial. In *Fantasia*, a workers' compensation commissioner awarded a claimant temporary partial disability benefits but denied the claimant's request for temporary total disability benefits. Id., 275. On appeal, the board concluded that the commissioner's decision contained inconsistent findings because the commissioner credited a physician's opinion that the claimant was temporarily totally disabled but failed to award the claimant temporary total disability benefits, and remanded the matter to the original commissioner for an articulation. Id., 276. On remand, the commissioner articulated that he had awarded the claimant temporary total disability

[16] The Workers' Compensation Act, General Statutes § 31-275 et seq., contained in chapter 568 of the General Statutes, has no provision that parallels § 51-183c.

benefits. Id. The board later affirmed the articulation. Id., 277.

On appeal following the board's decision affirming the articulation, this court concluded that (1) the board properly exercised its discretion, pursuant to its statutory authority, to remand the matter to the commissioner for an articulation, (2) the board improperly accepted the commissioner's articulation because the commissioner, rather than issuing an articulation in compliance with the board's remand order, made a new finding and entered a new award for benefits, and (3) the board should have remanded the matter to a different commissioner for a formal hearing on the issue of whether the claimant was entitled to temporary total disability benefits. Id., 278–89. As to the third point, this court determined that (1) "the board's statutory authority over appeals [pursuant to General Statutes § 31-301 (c)[17]] from decisions of commissioners includes the authority to remand a case for a new hearing before a different commissioner" and, (2) "when inconsistent decisions by a trial commissioner would put the board in the untenable position of retrying the facts, which it may not do, the board may exercise its authority to remand the case for a new hearing before a different commissioner." (Footnote added.) Id., 288–89. This court further stated that "remanding th[e] case to the same commissioner for a third decision would appear to be a mere exercise in going through the motions [and] the claimant would not emerge from these proceedings with the feeling that he has had a meaningful day in court. That is a result we seek to avoid." (Internal quotation marks omitted.) Id., 289.

[17] General Statutes § 31-301 (c) provides in relevant part: "Upon the final determination of the appeal by the [board], but no later than one year after the date the appeal petition was filed, the [board] shall issue its decision, affirming, modifying or reversing the decision of the commissioner. . . ."

The plaintiff's reliance on *Fantasia* is misplaced. Although *Fantasia* recognized that the board has statutory authority to remand a matter to a different commissioner for a new hearing, *Fantasia* does not compel such a remand under the circumstances of this case. In *Fantasia*, this court concluded that remanding the case for a new hearing before a different commissioner was the proper remedy when the original commissioner had issued inconsistent decisions that had left the board "in the untenable position of retrying the facts, which it may not do . . . ." Id. In the present case, the board did not remand the matter to the commissioner to issue an articulation, which would have created the possibility of the commissioner issuing two inconsistent decisions; rather, the board reversed in part the commissioner's decision approving the form 36 and remanded the matter to the commissioner to resolve several issues. Because the portion of the commissioner's decision reversed by the board is no longer effective, there is no risk of the board being placed "in the untenable position of retrying the facts" at this juncture. Id. In addition, because this is the first remand to the commissioner ordered by the board, it would be premature to deem the board's remand to the commissioner to be "a mere exercise in going through the motions" and to anticipate "the claimant . . . not emerg[ing] from these proceedings with the feeling that he has had a meaningful day in court." (Internal quotation marks omitted.) Id. In short, *Fantasia* does not advance the plaintiff's claim.

The plaintiff also cites *Cantoni* v. *Xerox Corp.*, 251 Conn. 153, 740 A.2d 796 (1999), in support of his claim. In *Cantoni*, an employer and its insurer appealed from the board's decision reversing a workers' compensation commissioner's dismissal of a workers' compensation claim with an attendant remand for a new hearing before a different commissioner. Id., 155 and n.1. This

court, in an unpublished order, dismissed the appeal for lack of a final judgment. Id. After granting certiorari, our Supreme Court affirmed this court's judgment; id., 154; concluding that the board's decision "direct[ing] a rehearing to be held before a commissioner other than the one who originally heard the case does not raise a colorable claim of jurisdiction and, therefore, is not an appealable final judgment." Id., 168.

In affirming this court's judgment dismissing the appeal in *Cantoni*, our Supreme Court rejected an argument by the employer and its insurer that the board needed to have express statutory authority to remand the matter to a different commissioner. Id., 166–67. Our Supreme Court stated that, "[i]n light of the broad authority conferred upon the . . . board by the terms of § 31-301 (c), we are not persuaded that the legislature intended to impose unstated limitations on the . . . board's discretion to order appropriately adjudicated new hearings. Such an unstated limitation would be difficult to reconcile with the provisions of . . . § 51-183c . . . . Given the legislature's expressed preference that retrials not take place before the same judge who previously tried the case, we decline to conclude, without any supporting statutory evidence, that the legislature intended, as a jurisdictional matter, to preclude, in workers' compensation cases, the very practice that it endorsed in civil and criminal cases." Id. Notably, our Supreme Court did not state that § 51-183c applied so as to require a remand to a different commissioner; instead, it emphasized the absence of statutory authority governing workers' compensation proceedings that precluded such a remand order. Id. Moreover, in later rejecting a separate argument raised by the employer and its insurer, our Supreme Court commented that "administrative convenience might often counsel in favor of . . . a remand [to the original commissioner]

. . . .”[18] Id., 167. Accordingly, *Cantoni* does not support the plaintiff’s claim.[19]

In sum, we reject the plaintiff’s claim that the board improperly denied his motion for articulation or reconsideration, in which he requested an order that the issues remanded by the board in its November 17, 2020 decision be tried de novo before a different commissioner.

The decisions of the Compensation Review Board are affirmed.

In this opinion the other judges concurred.

[18] In denying the plaintiff’s motion for articulation or reconsideration, the board cited *Goulbourne* v. *Dept. of Correction*, No. 5461, CRB 1-09-5 (May 12, 2010), as an example of a case in which it had remanded a matter to the original commissioner with direction to rule on the basis of the appropriate legal standard. The plaintiff claims that the board’s reliance on *Goulbourne* to support the remand ordered in this case was misplaced. Whether the board properly relied on *Goulbourne* does not affect the outcome of this appeal. Accordingly, we need not address this issue further.

[19] In his principal appellate brief, the plaintiff also asserts that the board’s remand order contravened § 31-301 (c). See footnote 17 of this opinion. This assertion is unavailing. The board acted in accordance with § 31-301 (c) by affirming in part and reversing in part the commissioner’s decision approving the form 36 with an accompanying remand order. Nothing in § 31-301 (c) precluded the board from remanding the matter to the commissioner for further proceedings on the relevant issues.

Additionally, in his principal appellate brief, the plaintiff cites § 31-301 (e) and Practice Book § 60-5 for the proposition “that reversals by the [board] must . . . conform to the same laws as those from the Supreme Court, where applicable.” General Statutes § 31-301 (e) provides in relevant part that “[t]he procedure in appealing from an award of the commissioner shall be the same as the procedure employed in an appeal from the Superior Court to the Supreme Court, where applicable. . . .” Practice Book § 60-5, applicable to workers’ compensation appeals pursuant to Practice Book § 76-1, provides in relevant part that “[t]he court may reverse or modify the decision of the trial court if it determines that the factual findings are clearly erroneous in view of the evidence and pleadings in the whole record, or that the decision is otherwise erroneous in law. . . .” We do not construe these provisions as supporting the plaintiff’s claim that the board committed error in remanding the matter to the commissioner.

TOWN OF NEW MILFORD *v.* STANDARD DEMOLITION SERVICES, INC.
(AC 43874)

Bright, C. J., and Elgo and Bear, Js.

Syllabus

The plaintiff town sought to recover damages from the defendant contractor for breach of contract. The plaintiff owned a vacant brass mill factory that was contaminated with, inter alia, polychlorinated biphenyls (PCBs). The plaintiff, on the advice of consultants, applied to the United States Environmental Protection Agency (EPA) for permission to demolish and clean up the property and engage contractors to perform the work. The plaintiff issued a notice inviting prospective contractors to provide bids for the third phase of the project, which involved the demolition, abatement and remediation of the property. The notice indicated that the contractor would be allowed to keep the scrap value of any structural steel salvaged from the site. The plaintiff made all public information about the project available to prospective bidders, including a report from one of its consultants that referenced the presence of PCBs throughout the building. The plaintiff also provided a letter to all prospective bidders clarifying that the selected contractor would be responsible for the sampling and disposal of any PCB contaminated material. The defendant submitted the winning bid for the contract, in which it did not allocate any funds for the remediation or disposal of any contaminated structural steel on the site, as it believed that the steel was not contaminated and could be recycled without remediation. Once selected, the defendant executed a certification acknowledging that it had read and agreed to abide by all conditions set forth in the EPA's approval letter for the third phase of the project, which included attachments regarding the cleanup of PCB contaminated material and correspondence between the EPA and the plaintiff regarding the PCB contamination of various materials, including steel beams. The parties then entered into a contract for the phase three work, which expressly incorporated the EPA approval letter and established a 140 day deadline for the defendant to complete the job. Two months after the plaintiff had issued the defendant a notice to proceed, the defendant still had not obtained EPA approval of its contractor work plan, which was required before it could begin any substantial demolition work, and it had become engaged in a dispute with the plaintiff regarding the testing and disposal of the structural steel on the property. The defendant contended that the plaintiff mischaracterized the steel, leading it to believe that the steel was not contaminated and could be disposed of without remediation. The defendant claimed that it remained ready, able and willing to perform the work on the project, but it refused to do so

if it was required to sample the steel to determine whether it was contaminated and told the plaintiff that it had accidentally executed the contract, as it had submitted its bid without information regarding the contamination of the steel or knowledge that the disposal of any contaminated steel would be its responsibility. Thereafter, the plaintiff sent a letter to the defendant, notifying the defendant that it was in default because, inter alia, it would not be able to timely complete its work under the contract and had anticipatorily breached various provisions of the contract, and, consequently, its employment was terminated. The plaintiff rebid the project and hired C Co. to complete the work on the site, including the testing and disposal of the structural steel. C Co. was unable to finish its work, however, due in part to the increased expense and time required to finish the project as a result of the defendant's intervention, which led to additional testing requirements imposed by both the EPA and the trial court. The trial court found that the plaintiff had established its claim for breach of contract and had suffered damages, limited to the liquidated damages provision of the contract, in an amount equal to 254 days, less the retainage held by the plaintiff. The defendant appealed, and the plaintiff cross-appealed, claiming that the trial court erred in its award of damages. *Held*:

1. The defendant's claim that the trial court misapplied state and federal environmental laws was belied by the trial court's findings, which were supported by the record: the defendant did not raise before the trial court, nor did the trial court address, the defendant's claims that the plaintiff lacked proper authorization from the EPA to work on the undisclosed waste at the site or that the plaintiff and the trial court disregarded certain statutory (§ 22a-467) requirements relating to the disposal of PCB contaminated material, and, accordingly, this court declined to address those claims; moreover, the defendant's claims that the plaintiff failed to adequately characterize the site and that the plaintiff was required under the contract to paint chip test the steel beams prior to the defendant performing any work at the site lacked merit, as the trial court found that the contract did not require paint chip testing, that the testimony of the plaintiff's expert witnesses that paint chip sampling under such circumstances was not customary was credible, that there was no express statement in the contract that the steel was not contaminated, that the plaintiff performed its obligations under the contract, and that the contract overwhelmingly placed the obligation for the testing, handling and processing of the material on the site on the defendant and expressly made clear that the risk of the condition of the materials being different than anticipated was solely on the defendant, and such findings were supported by the clear and unambiguous provisions of the contract and the documents related thereto; furthermore, this action involved a breach of contract claim, and the defendant failed to provide a clear explanation as to how its claims concerning the EPA regulations circumvented the trial court's findings regarding the contract and failed

to raise at trial its claims that the plaintiff's conduct constituted a violation of the EPA regulations and that the trial court erred in failing to find such a violation; additionally, although the defendant may have made its bid and entered the contract on the basis of a mistaken basic assumption, neither the trial court nor this court was permitted to rewrite the contract or to relieve the defendant of its obligations thereunder, as the defendant was a sophisticated and experienced party with respect to the type of work covered by the contract, it had the opportunity to address any issues it had with the proposed terms and interpretation of the contract prior to its execution, and the circumstances of the contract formation were not unconscionable.

2. This court declined to review the defendant's claim that the trial court erred in finding that the contract was not impossible to perform: because the defendant failed to plead impossibility as a special defense, such issue was not properly before the trial court, which, accordingly, did not undertake the necessary analysis of such claim nor did it make any findings thereon, and, as a result, the trial court could not have erred in failing to find that the defendant's performance under the contract was impossible; moreover, it was incumbent on the defendant to seek an articulation of the trial court's decision as to its failure to make a finding on a claim that the defendant alleged was properly before the trial court, and, in the absence of such an articulation, the record was inadequate for this court to review the claim.

3. The defendant's challenge to the trial court's implicit determination that the plaintiff lawfully had terminated the contract was unavailing: the defendant's claim was premised on a faulty assumption, namely, that the plaintiff was in default under the contract, because the trial court expressly found that the plaintiff had performed its obligations under the contract and that there was ample evidence of the defendant's breach of its obligations under the contract, which findings were supported by the record.

4. The defendant's claim that the change orders granted to C Co. in connection with additional paint chip testing requirements imposed by the EPA—which were not a part of the defendant's contract with the plaintiff—constituted an admission by the plaintiff that its contract with the defendant could not have been performed without such testing was contrary to the record and unavailing: the defendant's argument failed to acknowledge the basis for the change orders sought by C Co., namely, that the trial court found that the plaintiff was not required to conduct paint chip sampling under the contract with the defendant because the EPA did not require such testing until after the plaintiff had terminated that contract, as the requirement was instituted as a result of the defendant's unilaterally contacting the EPA with respect to the paint chip sampling it had conducted on the site as part of this litigation; moreover, such finding was supported by the record and was not clearly erroneous.

5. Although the amount of the trial court's award of liquidated damages was proper, that court erroneously failed to determine whether the plaintiff proved that it had suffered any compensable actual or consequential nondelay damages:

a. The trial court improperly determined that liquidated damages were the plaintiff's exclusive remedy under the contract: the language in the liquidated damages provision clearly applied to damages resulting from delay, there was no language in the contract expressly stating that such damages were the plaintiff's exclusive remedy for a breach unrelated to the defendant's delay in performance, and to interpret liquidated damages as the plaintiff's sole remedy would render the contract's damages and losses provision superfluous; accordingly, the trial court erroneously failed to determine whether the plaintiff proved that it had suffered any compensable actual or consequential nondelay damages and, if so, the amount of such damages, and, as a result, the case was remanded to the trial court for a new hearing in damages.

b. The trial court did not err in limiting the award of liquidated damages to 254 days: the plaintiff's claim on appeal that liquidated damages instead should have run through the date of the trial court's decision failed, as the plaintiff did not make such a request at trial and the premise of such claim no longer existed because it was based on the trial court's determination that liquidated damages were the plaintiff's exclusive remedy under the contract, which this court concluded was made in error.

Argued November 30, 2021—officially released April 26, 2022

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the defendant filed a counterclaim; thereafter, the matter was tried to the court, *Shaban*, *J.*; judgment for the plaintiff on the complaint and on the counterclaim, from which the defendant appealed and the plaintiff cross appealed to this court. *Reversed in part*; *further proceedings*.

Raymond A. Garcia, with whom were *Nyle K. Davey*, and, on the brief, *Lauren Lyngholm Crowe* and *Jonathan A. Krumeich*, for the appellant-cross appellee (defendant).

John D. Tower, with whom was *Graham W. Moller*, for the appellee-cross appellant (plaintiff)

Opinion

BEAR, J. The defendant, Standard Demolition Services, Inc., appeals from the judgment of the trial court rendered in favor of the plaintiff, the town of New Milford, on the plaintiff's complaint for breach of a contract entered into by the parties and as to all counts of a counterclaim filed by the defendant. On appeal, the defendant claims that (1) the court misapplied state and federal environmental regulations, (2) the court erred in not finding that the contract was impossible to perform, (3) the court improperly determined that the plaintiff lawfully had terminated the contract,[1] and (4) evidence of certain change orders executed by the plaintiff in connection with a subsequent contract with a different contractor, pursuant to which the plaintiff had agreed to modify terms of that contract, constituted admissions that the plaintiff's contract with the defendant was defective and could not be performed by the defendant as written. The plaintiff has cross appealed, claiming that the court erred in its award of damages to the plaintiff. We affirm the judgment of the court in favor of the plaintiff on its complaint for breach of contract and as to all counts of the defendant's counterclaim, but we reverse it in part with respect to the award of damages and remand the case for a new hearing in damages.

At the trial of this matter, which spanned over twenty-two days, the parties testified, presented lay and expert

[1] In its statement of issues, the defendant lists as its second issue "[w]hether the trial court erred as a matter of law by deciding that [the defendant] repudiated its obligations to perform under the contract . . . ." In its brief, however, the defendant characterizes the issue as whether "[t]he trial court erred in holding that the [plaintiff] lawfully terminated [the contract]." Because the defendant has not briefed the issue relating to its repudiation of the contract, we decline to address it. See *Regional School District 8* v. *M & S Paving & Sealing, Inc.*, 206 Conn. App. 523, 539 n.12, 261 A.3d 153 (2021) (declining to review claim not briefed, which was deemed abandoned).

witnesses, and submitted 273 documents into evidence. In a comprehensive memorandum of decision, the court, *Shaban*, *J.*, found the following facts: "The plaintiff is the owner of an industrial property located at 12 Scovill Street in New Milford, which it acquired through a tax foreclosure in 1999. The property consists of fifty-three acres [and] includes an approximately 315,000 square foot vacant brass mill factory contaminated with polychlorinated biphenyls (PCBs) and asbestos containing materials . . . . The plaintiff renamed the site the 'Century Enterprise Center' and hired consultants to help evaluate the environmental hazards on the site. Under the guidance of the consultants, the plaintiff made decisions about how it would apply to the United States Environmental Protection Agency (EPA) for permission to demolish and clean up the property and engage contractors to perform the work.

"Prior to its involvement with the defendant, the plaintiff had already completed two phases of the work in its effort to clean up the property. In phases I and II of the project, the plaintiff's consultants, Tighe & Bond, had characterized the structural steel on the site as 'non-porous.'[2] The EPA approved the work proposed by the plaintiff through its consultants for phases I and II and it was completed. For phase III of the project, the demolition, abatement, and remediation work, the plaintiff hired TRC Environmental Corporation (TRC) as its consultant and project manager. In performing its evaluation of the site, TRC reviewed and relied on the findings of the prior consultants from the phase I and II portions of the project. During the earlier phases, there had been extensive communication between the prior consultants and the EPA about the project. TRC

[2] "EPA regulations define a 'non-porous' surface, in part, as follows: 'Non-porous surface means a smooth, unpainted solid surface that limits the penetration of liquid containing PCBs beyond the immediate surface. . . .' 40 C.F.R. § 761.3 [2015] . . . ." (Citation omitted.)

found that the work had been allowed to proceed as proposed and that wipe sampling of 'porous' surfaces had been done.[3] In 2015, after TRC set the scope of work for phase III, the plaintiff applied for and secured a $2.5 million grant from the Department of Economic and Community Development . . . for the project.

"Thereafter, the plaintiff issued a Notice to Bidders [notice] inviting prospective contractors to provide bids for the demolition, abatement, and remediation of the property based on the proposed plan developed by TRC. . . . Bid packages were made available to all of the prospective bidders as part of the notice, which included the proposed contract documents.[4] The documents were also available through an on-line website. The notice recited that additional documents were available for review in a public reading room at the New Milford Public Works facility. Electronic thumb drives were also made available that included all historical records, plans, drawings, studies, and other relevant information from phases I and II. . . . The bid forms provided to the prospective contractors included a line item for the scrap value of the structural steel [that] the contractor would be allowed to keep. All of the public information in the plaintiff's possession regarding all three phases of the project, including correspondence with the EPA, was made available to prospective bidders for inspection and review. This included a facility investigation document prepared by Tighe & Bond

[3] "EPA regulations define a 'porous' surface as follows: 'Porous surface means any surface that allows PCBs to penetrate or pass into itself including, but not limited to, paint or coating on metal . . . .' 40 C.F.R. § 761.3 [2015] . . . . Some of the structural steel on the site, including overhead cranes, had painted surfaces." (Citation omitted.)

[4] "[Article 1 of the contract defined 'Contract Documents' as follows]: Whenever the term 'Contract Documents' is used [in the contract], it shall include the Agreement, Information to Bidders, General Specifications, Bid Documents, Technical Specifications, Special Notes, Addenda, and Project Plans, including all modifications thereof incorporated in the documents before their execution."

that referenced the presence of PCBs throughout the building's interior that had likely been spread through dust. . . . This also included an engineering evaluation/cost analysis relative to the interior of the building. . . . On May 26, 2015, a mandatory prebid meeting was held by the plaintiff with the prospective bidders. . . . Following that meeting, on June 2, 2015, the plaintiff held an open house and walk-through at the site for all prospective bidders. . . . The defendant attended the open house and physically viewed the site. Both prior to and following the meeting and open house, and prior to the submission of its bid, the defendant submitted to the plaintiff multiple requests for information about the project to which the plaintiff responded. . . .

"In addition, the plaintiff invited all potential bidders to submit in writing any questions they may have had about the project. By letter of June 12, 2015, the plaintiff provided all potential bidders with the responses to a list of those questions that had been submitted as of June 10, 2015, in a document described as 'Clarification No. 1.' . . . Several questions dealt with the sampling and disposal of PCB contaminated materials. The fundamental response to each of these questions was that the contractor selected for the project would be responsible for the sampling and disposal of all such materials. The plaintiff conveyed that its only obligation was to do verification sampling of items left on-site after the job was completed. . . .

"On June 15, 2015, following completion of its inquiries and review of the bid specifications, the defendant submitted its bid in the amount of $2,713,950 on the forms supplied by the plaintiff, which included Clarifications Nos. 1 and 2 as addenda. . . . The defendant's bid did not provide for the remediation, abatement, and disposal of the contaminated structural steel on the site based on its belief that the information made available

by the plaintiff represented or implied that the structural steel was not contaminated and could be recycled without remediation. . . .

"By letter of July 16, 2015, the plaintiff notified the defendant that it was the successful bidder. . . . On September 1, 2015, the EPA issued a five page approval letter authorizing the plaintiff to move forward with phase III of the project subject to the conditions set forth in the letter. . . . At the time of its bid, the defendant was aware that the EPA could impose additional conditions on the work to be done beyond those set forth in the proposed contract. Paragraph 13 of the approval letter provides: 'The PCB cleanup standard for *porous surfaces* (i.e., concrete) and soil shall be less than or equal to . . . 1 part per million ("ppm") for unrestricted use or disposal. The PCB cleanup standard for *non-porous surfaces* (e.g., overhead cranes, steel beams) shall be less than . . . 10 μ/100 cm for unrestricted disposal and/or recycling. (a) PCB contaminated wastes shall be removed and disposed of as detailed in the [attached Administrative Record], except as follows . . . (ii) Steel beams shall be disposed of as a [greater than or equal to] 50 ppm PCB waste or alternatively shall be sampled to determine PCB disposal requirements [and] (iii) If samples are collected, sampling analytical results and proposed waste disposal details shall be submitted to [the] EPA for review prior to removal of these wastes from the [s]ite.' . . . The EPA's definition of the steel beams as non-porous was consistent with the definition that had been given by Tighe & Bond in phase II of the project. . . .

"The EPA's letter was accompanied by two attachments, the first of which set forth the 'PCB Cleanup and Disposal Approval Conditions,' and the second of which was identified as the 'Administrative Record (Notification).' . . . Paragraph 11 (a) [of attachment one] required the plaintiff to provide to the EPA 'a

certification signed by its selected abatement/demolition contractor [the defendant], stating that the contractor(s) has read and understands the Notification, and agrees to abide by the conditions specified in this [a]pproval . . . .'

"Attachment [two] consists of a series of documents and correspondence reviewed by the EPA prior to the issuance of its approval . . . [some of which included] discussions of PCB contamination of various materials including overhead cranes and steel beams. Also, § 5.8 of the phase I PCB Source Removal Notification dated December, 2004, prepared by Tighe & Bond references PCB wipe sample test results for nonporous materials such as building interior walls and beams. . . .

"In its September 1, 2015 approval letter, the EPA noted that '[a]ttachment [two] provides a list of supporting information for the [p]hase III project . . . which [the] EPA considered for this [a]pproval. All submittals in their entirety are considered "the Notification."' . . . The next day, September 2, 2015, the plaintiff forwarded by e-mail a copy of the approval letter to the defendant. . . . That e-mail had appended to it all of the materials making up the attachments to the approval letter. In the e-mail, Michael Zarba . . . the public works director for the plaintiff, asked that the defendant review the materials and let him know as soon as possible if there were any questions. . . . In response, the defendant sent by e-mail a letter dated September 3, 2015, which was the certification relative to the 'Notification' that was required by the approval letter. . . . The letter expressly states that '[the defendant] has read and understands the "*Self-Implementing On-site Cleanup & Disposal Plan*," dated January, 2015, prepared for the [plaintiff] for the Century Enterprise Center project. [The defendant] agrees to abide by all aspects of the conditions specified in the EPA approval.' . . . This included compliance with EPA regulations under 40

C.F.R. § 761 relative to the removal and abatement of PCBs. The defendant did not raise any questions as to the materials submitted or the conditions of the approval letter. Thereafter, on September 4, 2015, the parties executed a highly extensive and detailed contract for the work on the project that expressly incorporated the approval letter. . . .

"Following receipt of the certification letter and the execution of the contract, the plaintiff issued to the defendant a letter dated September 14, 2015, which constituted a 'Notice to Proceed' as required by the terms of the contract. . . . That notice directed the defendant to commence work on the project and reminded the defendant that pursuant to the terms of the contract it had 140 calendar days to complete the job, thereby creating a deadline of February 1, 2016. Thereafter, the defendant commenced work on the project, including the preparation and submission of certain documents to TRC for its review and approval as the plaintiff's project manager. More specifically, the defendant was required to submit a contractor work plan (CWP) for the PCB remediation to be done by the defendant on the job site. The CWP, subject to the approval of TRC, was in turn to be submitted to the EPA for its review and approval. The first CWP, dated September 24, 2015, was submitted to the plaintiff on September 29, 2015, and was based in part on TRC's own Modified Self-Implementing Phase III Remediation Plan dated January, 2015. . . . The first CWP . . . was reviewed by TRC and found [to be] insufficient in various ways. The comments of TRC were forwarded to the defendant on October 2, 2015, by e-mail and specifically referenced that the CWP should '[i]nclude a discussion of steel beam sampling and disposal means and methods per [paragraph] 13 (a) (ii) of [the] EPA's approval letter' and '[i]nclude a statement that sampling analytical results will be submitted to [the] EPA for review prior

to disposal per [paragraph] 13 (a) (iii) of [the] EPA's approval letter.' . . . With respect to § 2.4 of the proposed plan regarding remediation of overhead cranes, TRC commented that '[t]he EPA's approval states that the beams must be handled and disposed of as a [greater than or equal to] 50 ppm PCB waste or will be sampled to determine disposal requirements.' Following the receipt of TRC's comments, the defendant hired an independent consultant with expertise in the handling of PCBs and submitted the plan and TRC's comments to him for his review. . . .

"The defendant was also required to submit to TRC for its review and approval, a health and safety plan . . . as well as a demolition work plan. TRC reviewed the [health and safety plan], found it lacking and provided comments thereon to the defendant. As of October 19, 2015, TRC had not received a response to those comments. . . . TRC insisted that the [health and safety plan] and other plans had to be approved before substantive physical work on the project could begin despite the defendant's belief that it was for review purposes only. . . .

"While attempting to work this out, the parties continued to work toward an acceptable CWP. Following the review of the original CWP by the defendant's consultant for approximately one month, a second CWP was submitted to TRC on November 6, 2015 . . . . In the second CWP, the defendant proposed that, as part of its operations, it would conduct wipe sampling of the steel columns for PCB characterizations to determine whether the structural steel could be disposed of consistent with [paragraph] 13 (a) (ii) of the EPA's approval letter. . . . The defendant also proposed paint chip sampling of the overhead crane steel to determine how it should be disposed of. On November 9, 2015, TRC rejected the proposed plan. . . . By e-mail on November 12, 2015, to the defendant, TRC provided specific

comments deleting the proposed paint chip sampling language and put in language about wipe sampling consistent with the EPA's approval letter. Richard Gille of TRC credibly testified that the reason for deleting the paint chip test language was that such testing was unnecessary as it would not show any PCB surface contamination on the steel (given that paint chip sampling is designed to determine if a product is manufactured with PCBs, i.e., that it is bulk waste product). That same e-mail also indicated that TRC was still awaiting a revised [health and safety plan] from the defendant. . . .

"Based on the comments of TRC, the defendant submitted a third proposed CWP on November 13, 2015 . . . which deleted the paint chip sampling language. . . . On November 18, 2015, following some additional edits requested by TRC, the defendant submitted its fourth proposed CWP . . . . TRC recommended to the plaintiff that it be submitted to the EPA for approval. . . . That recommendation was based on TRC's contractual authority to review and approve such plans. The plan called for the defendant to conduct wipe sampling of the steel columns. . . . It expressly recited that '[i]n accordance with the EPA [a]pproval [l]etter, the steel within the building is assumed to contain PCB concentrations [greater than] 50 ppm in surface contamination caused by previous transformer remediation and/or historic site activities. Wipe sampling will be conducted in order to prove that the structural elements can be recycled without restriction. . . . Steel found to contain PCB above the remedial goal will be decontaminated again in accordance with [40] C.F.R. [§] 761.79 and/or will be disposed of as PCB remediation waste.' . . . The plan was submitted to the EPA on November 18, 2015. The plan, however, was not approved because the EPA responded with comments

and questions it wanted addressed. This included questions about the possible wipe sampling of cranes and steel beams and testing of the expansion joint caulking. . . . The EPA did not suggest or ask for paint chip sampling. In light of the comments and questions, on December 10, 2015, the parties agreed that they would hold off on resubmitting a CWP or doing further work until after TRC had done testing of the expansion joint caulking to determine if there was PCB contamination and, if so, how it should be treated for purposes of disposal. . . . The additional testing took six days and was done by the plaintiff.

"By letter dated December 15, 2015, the defendant issued a formal notice of delay to the plaintiff claiming the project had been delayed by ninety-four days due to the actions of the plaintiff. . . . Among other things, the formal notice cited the plaintiff's failure to 'initially characterize and remove potentially PCB contaminated paints and dust on the steel beams and expansion joint material in the concrete.' . . . The defendant also submitted with the letter a new work schedule indicating a completion date of on or about May 4, 2016. On December 16, 2015, TRC directed the defendant to 'continue with [the] EPA work plan preparation and submit for review by TRC using your planned method for expansion joint removal. Disposal considerations will be addressed later.' . . . On December 22, 2015, the defendant responded that it would like any test results forwarded to it as it was likely that the EPA would require the information in the CWP. . . .

"Because it had taken approximately two months to obtain a CWP acceptable to TRC and the plaintiff for submission to the EPA for its consideration, the defendant elected to demobilize from the site on November 20, 2015, as it had not yet obtained an approved CWP to allow it to do any substantive demolition work. . . . The defendant had earlier indicated to TRC that it would

not remobilize on the site until the CWP was approved. . . . Edward Doubleday of TRC credibly testified that he spoke with Stephen Goldblum, the president of the defendant, who stated that the defendant would not proceed with further work until the plaintiff took responsibility for anything related to the contaminated steel, including any wipe sampling. Also, during the period from mid-September to mid-December, the parties, through TRC, became engaged in a dispute over the characterization, testing and disposal of the structural steel on the site. The defendant contends that the plaintiff had mischaracterized the structural steel as nonporous and that it should have been characterized as porous given that many steel beams were painted. The defendant claims that the mischaracterization effectively led it to believe that the steel was not contaminated and could be disposed of without remediation. How the steel was characterized had cost implications as any steel with a PCB concentration of greater than 50 ppm could only be disposed of at a limited number of waste facilities, which, in turn, would result in higher disposal fees and transportation costs. There were also higher decontamination costs.

"Under the terms of the contract . . . any '[s]teel for salvage shall become the property of the Contractor. . . . The risk for quantity and value of scrap shall be the Contractor['s]' . . . . Line 8 of the bid form also stated that the '[q]uantity and value of scrap above and below the Lump Sum bid is at Contractor['s] . . . sole risk/reward.' . . . In bidding the project on the presumption the steel was not contaminated, the defendant had not allocated any costs associated with the disposal of contaminated steel. The defendant took the position that, under the contract, the steel was to be tested for PCBs and that it was the responsibility of the plaintiff to do so. The defendant further contended that the failure to properly characterize the steel resulted in its

inability to recycle it in such a way that it would be able to obtain a financial credit of at least $200,000 as anticipated by the bid and contract for an estimated 1000 tons of steel at $200 per ton.

"This issue over who was to do the PCB sampling of the structural steel and the subsequent disposal was discussed as early as September 22, 2015, during the weekly job meeting. At that meeting, TRC made reference to paragraph 13 (a) (ii) of the EPA approval letter and advised the defendant that it was [the defendant's] responsibility as the project contractor to do the sampling of the steel. This is also evidenced, in part, by the weekly meeting minutes, which note that the defendant claimed several of the EPA requirements specified in the EPA approval letter were the basis for a change in the contract. . . . In response, TRC indicated to the defendant on each occasion that if it was seeking a change in the contract it should formally submit a written request in accordance with its terms. . . . Eventually, on November 27, 2015, the defendant submitted a written notice to the plaintiff seeking a change to the contract based on a 'discovery of undocumented conditions,' which were described as follows: 'The structural steel of the building has not been characterized to the satisfaction of the EPA. This characterization sampling is not included as our work in the specification.' . . . This notice was followed by a November 30, 2015 letter from the defendant directly to the plaintiff detailing its issues with the steel sampling and disposal. . . . Generally, the defendant contended that the bid documents did not include the initial characterization of the structural steel, the final approved Modified Self-Implementing Plan, and the disposal of any hazardous (contaminated) steel as the defendant's obligation. The defendant took the position that, because this information had not been provided to it during the bidding

process, 'the final contract was then accidently executed by [the defendant] after the [plaintiff's] incorporation of the EPA [a]pproval [l]etter—without price change—despite significant increased scope and potential adverse cost impact.' . . . Nonetheless, the defendant indicated [that] it remained ready, willing, and able to perform the work on the project. By this point in time, approximately 55 percent of the time allocated for the completion of the work had passed. While stating [that] it remained ready, willing and able to do the work, the defendant also made statements to TRC at weekly job meetings around the same time that it would not perform any work if it was required to sample the steel. . . .

"The plaintiff responded by letter dated December 9, 2015, effectively rejecting the defendant's claims and reminding it that time was of the essence relative to the completion date under the terms of the contract. . . . The defendant responded on December 15, 2015, noting that, because the plaintiff 'failed to initially characterize and remove potentially PCB contaminated paints and dusts on the steel beams and expansion joint material in the concrete,' it was unable to complete the CWP, which was needed in order to allow the start of demolition activities. . . . The defendant claimed that, as a result of the plaintiff's failures, it was entitled to a compensable delay of ninety-four days in the completion of the contract. . . . Thereafter, the plaintiff issued a letter dated January 4, 2016, notifying the defendant that it was in default and was therefore terminated from its employment under the contract, effective January 11, 2016. . . . As of the date of the letter, the defendant had yet to provide to the plaintiff a revised CWP, an acceptable [health and safety plan], or a demolition work plan. The basis for the termination letter was that the defendant would not be able to timely complete the work, it failed or refused to comply with pertinent laws,

ordinances or the instructions of the engineer (TRC), violated or anticipatorily breached various provisions of the contract, and failed to press the work to completion. Further, [the defendant having contended] in its November 30, 2015 letter that [it] had 'accidently executed' the contract, the plaintiff considered the defendant to have renounced and anticipatorily breached the contract. There was credible testimony from both parties that no substantive work was done on the project thereafter. Based on the defendant's own payment application for work done through November 30, 2015, only 9.51 percent of the work on the project had been done. . . . As of January 11, 2016, including the six day contract extension provided by the plaintiff to the defendant, 82 percent of the time allowed for the completion of the work had passed (119 of the 146 days). Shortly thereafter, on January 15, 2016, the plaintiff filed the present complaint against the defendant.

"While pursuing its complaint, the plaintiff undertook the effort to complete the project by putting out to bid what it saw as the remaining work to be done. . . . Following a procedure similar to that of the original bid, including the contractor's bid meeting, on-site visit, and the provision of documents for review and question clarifications, a total of nine contractors submitted bids on the project. [The March 31, 2016 bid of] Costello Dismantling [Company, Inc.] (Costello) . . . of $2,962,207 was accepted by the plaintiff. . . . The scope of work to be done was the same as that of the defendant except for the work that had already been completed by the defendant. Costello commenced work on the project shortly thereafter. Mike Costello, as project manager for Costello, credibly testified that, at the time of its original bid in 2015, Costello understood from its reviews of the bid documents and specifications that PCB contamination existed on the job site in the concrete and expansion joint caulking. Similar to the

defendant, Costello also considered the structural steel to be recyclable. Costello, however, recognized that it bore the risk of the steel being contaminated and might have to bear the cost of any testing or disposal. Upon its rebid, in 2016, Costello understood that it might bear the cost of the testing and disposal given the terms of the EPA approval letter and the contract. Therefore, at the time of both bids, Costello took into consideration that decontamination was required by the contract specifications consistent with what it considered to be the surficial standard for testing as set out in the approval letter. In other words, wipe sampling was going to be required as part of the job.

"Costello's work on the project was interrupted when the defendant directly contacted the EPA by e-mail dated September 1, 2016, to provide it with information about paint sampling that was to be done on the site pursuant to an August [19], 2016 order of this court in this action.[5] . . . This e-mail was sent approximately

[5] On May 23, 2016, the defendant had filed a motion for an order preserving the site and for permission to inspect and test the site for possible PCBs and other environmental contaminants. In its motion, the defendant claimed that "[t]he tests [had to] be conducted to enable the defendant to determine if PCBs are present on structural steel to be demolished at, above or below acceptable levels and local, state and federal regulations," and that "[t]he testing [was] critical because an issue in this case will be whether the structural steel, which may be contaminated or coated by PCBs, can be recycled in an unregulated manner or must be handled as excluded PCB bulk product waste/state of Connecticut regulated waste, PCB bulk product waste, and/or PCB remediation waste." In response, the plaintiff filed a motion for a protective order barring the defendant from performing paint chip sampling for PCBs on the structural steel as proposed by the defendant in its motion for order. In an order dated August 19, 2016, which addressed the defendant's motion for order and the plaintiff's motion for a protective order, as well as the parties' objections thereto, the court ordered the defendant to identify, through counsel, fifteen areas from which it would like to receive pieces of the structural components of the building, which were to be cut in pieces three to five inches in length, and the defendant was to have those pieces tested "in whatever way it want[ed]" at a laboratory agreed to by the parties.

eight months after the defendant had been dismissed from the job. What followed was a series of e-mails and phone calls between the defendant and the EPA through November 21, 2016. This correspondence included reports and findings from the defendant's consultant and trial expert, John Insall of Partner Engineering, regarding the paint sampling and the results thereof, which showed that some of the samples contained PCBs in excess of 50 ppm. . . .

"During this time, Costello continued other work on the project, providing CWPs and revisions of the plans based on the review and comments of both TRC and the EPA. As part of the plans, Costello, which operated with the understanding that it had the contractual responsibility for the sampling of PCBs on the steel beams and other surfaces, submitted to TRC for its approval a PCB sampling plan dated August 17, 2016, prepared by its consultant, Strategic Environmental Services, Inc. . . . That plan noted that previous investigations had reported PCB concentrations in excess of EPA limits on painted metal surfaces of the main carrying beams for the overhead cranes. TRC approved the plan and, in turn, submitted it to the EPA for its approval. . . . A series of correspondence followed from September 9, 2016, to November 9, 2016, between the plaintiff and the EPA in which additional questions and comments, including those about painted surfaces, were made by the EPA. . . . Included was a comment by the EPA that should the paint chip samples sought by the defendant (in the court action) reveal PCBs in the paint, a change to the decontamination plan might be necessary. . . . After the submission of the multiple CWPs, the EPA approved Costello's CWP on October 5, 2016. . . . Costello then began the demolition of the structure at the site. Subsequently, following the receipt of the paint chip sample results from the defendant through Insall on November 21, 2016, the EPA did

require additional testing of the steel beams and other materials. That testing was ultimately done by the plaintiff.

"While the litigation continued, Costello still attempted to do certain work on the property. During the course of its work on the project, Costello submitted eleven change order requests. Most, but not all, were approved by TRC. . . . By September 21, 2017, nearly a year after the EPA first approved Costello's CWP, the EPA approved the plaintiff's plan for decontamination and recycling of the structural steel. . . . The approval was consistent with the original September 1, 2015 approval letter subject to certain additional conditions such as the additional testing of steel beams and other materials, which were the result, in part, of the court-ordered paint chip sample results that the defendant unilaterally provided to the EPA on November 21, 2016. It also required the plaintiff to provide to the EPA and the Connecticut Department of Energy and Environmental Protection [department] the paint chip and wipe sample results of any waste to be shipped off-site. This was, in effect, the requirement to do verification sampling, which the plaintiff was already obligated to do under the terms of the contract[s] with both the defendant and Costello. Such conditions were within the discretion of the EPA to add and required the plaintiff, where paint chip samples revealed the presence of PCBs [greater than or equal to] 50 ppm, to decontaminate or dispose of the steel in accordance with paragraph 13 (a) (ii) and (iii) of the original approval letter. In effect, the EPA required the plaintiff to do nothing more than what it was originally required to do relative to the disposal of the steel. The letter was not amended or modified relative to the characterization and treatment of the steel beams, nor were any other of its terms or provisions changed in that regard. As worded, the original approval letter did not specifically detail the frequency

of sampling or preclude the decontamination of the steel to bring the PCBs down to a level where the steel could be recycled. . . .

"Having done wipe sampling of the structural steel as part of its work, Costello found some beams were beyond acceptable contamination standards. Following completion of the sampling, Costello then began decontamination of those beams through a pilot decontamination program, which proved very successful. The decontamination process, however, was stopped due to this pending litigation, which had prompted the EPA to seek the additional testing. . . . To that point there only remained a few contaminated items. Mike Costello credibly testified, as a disclosed expert, that had Costello been able to complete the decontamination process, there was a disposal facility that would have accepted the steel for recycling. Also, as part of the scope of its work, Costello was to take down the roof of the building, which it had done sometime in the fall of 2016. . . . Because of the defendant's correspondence to the EPA regarding the test results, the EPA also asked for the testing of the roofing material, which added additional cost and delay to the completion of the project. . . . In fact, because of the issue being raised by the defendant, Costello was never able to finish the project, including the treatment and disposal of the steel for recycling. This was in part because, rather than disposing of the steel and debris, it then had to stockpile it on the site for examination and testing. . . . By that point, the plaintiff's available funds for the project were exhausted and the work ceased." (Citations omitted; emphasis in original; footnotes in original; footnote added; footnotes omitted.)

In its complaint, the plaintiff alleged a single count of breach of contract by the defendant. Specifically, the plaintiff alleged that, via a letter dated January 4, 2016, it had declared the defendant to be in default of the

contract and had given the defendant seven days' notice that the defendant's employment under the contract was terminated. The complaint further alleged that the defendant breached the parties' contract in one or more of the ways set forth in the January 4, 2016 termination letter, which stated that the defendant (1) had failed to complete its work under the contract in a timely manner; (2) had failed or refused to comply with pertinent laws, regulations and instructions of the engineer for the project; (3) anticipatorily breached material provisions of the contract; and (4) did not vigorously perform its obligations as required by article 2.1.2 of the contract.

In response, the defendant filed an answer and nine special defenses. The nine special defenses alleged that the plaintiff's action was barred, in whole or in part, by the following: (1) the failure of the complaint to state a claim for which relief could be granted; (2) unilateral mistake in the terms of the contract; (3) fraud in the inducement; (4) equitable estoppel; (5) unclean hands; (6) waiver; (7) a failure to mitigate damages; (8) a material breach of the contract by the plaintiff; and (9) the plaintiff's failure to comply with the conditions for termination of the contract. The defendant also filed a fourth amended, eight count counterclaim alleging, in count one, breach of contract for failure to pay; in count two, breach of contract for the plaintiff's delays in the performance of its work under the contract; in count three, wrongful termination; in count four, negligent misrepresentation; in count five, a violation of General Statutes § 52-557n (b) (8) by the plaintiff for failing to conduct a proper inspection of the property; in count six,[6] a violation of § 52-557n (b) (9) by the plaintiff for failing to detect or prevent pollution of the

[6] Counts five and six of the defendant's counterclaim had been stricken by the court, which rendered judgment in favor of the plaintiff on those counts. They are not at issue in this appeal.

environment; in count seven, breach of the duty of good faith and fair dealing; and in count eight, unjust enrichment.[7]

In its lengthy memorandum of decision, the court found that the plaintiff had established its claim for breach of contract and had suffered damages. After examining and rejecting the defendant's special defenses and the six remaining counts of its counterclaim, the court addressed the issue of damages. The court found that article 2, § 2.1.1 of the contract was a valid provision for liquidated damages, rather than a penalty. It further found that, although the plaintiff had presented considerable evidence of its actual and consequential damages, the plaintiff could not claim both liquidated damages and actual and consequential damages, as the liquidated damages provision of the contract did not "allow an independent claim for actual and consequential damages." The court concluded that the plaintiff was "limited in its claim of damages to those attributable under its liquidated damages provision, article 2, § 2.1.1. Although such damages are often typically determined by when the job is finally completed by the breaching party, here, the plaintiff dismissed the defen-

[7] In response to the defendant's counterclaim, the plaintiff alleged ten special defenses. Specifically, the first, second, third, fourth and fifth special defenses cite to specific provisions of the contract as a bar to recovery by the defendant. The sixth special defense alleges that the plaintiff is protected by governmental immunity, the seventh, that the defendant did not mitigate its damages, the eighth, payment by the plaintiff, the ninth, that the defendant anticipatorily breached the contract, and the tenth, that the defendant contractually had assumed any risks relating to its performance under the contract. In its memorandum of decision, the court addressed the plaintiff's special defenses to the six remaining counts of the defendant's counterclaim and stated that "the court has elected to address the plaintiff's first, second, third, fourth and fifth special defenses, with respect to the fourth count of the defendant's counterclaim alleging negligent misrepresentation. The plaintiff has established those special defenses by a preponderance of the evidence. However, because the court has found [that] the defendant has failed to meet its burden of proof as to each [count] of its [counterclaim], [the court] need not further address any of the plaintiff's special defenses."

dant from the job. Costello was hired to finish the job, but because of the defendant's interaction with the EPA and the subsequent additional work and testing, it was unable to do so, as the funds available to the plaintiff to complete the project were exhausted. Although the job was never completed, the plaintiff has not sought liquidated damages beyond 260 days (adjusted to 254 days), which falls shortly after Costello received notice of the EPA's approval of the CWP. Thus, the total amount of liquidated damages due the plaintiff is found to be $508,000."

Next, the court addressed the retainage[8] held by the plaintiff. Pursuant to General Statutes § 49-41b, the amount of retainage held by a municipality in any public work contract is limited to 5 percent of any periodic or final payment due a general contractor. In the present case, under the contract the plaintiff was entitled to retain 10 percent "of each estimate until final completion and acceptance of all work covered by [the] contract." The court found that $18,628, which represented 10 percent of the cost of the work deemed completed by the defendant, was held by the plaintiff as retainage. The court explained that, although that amount comported with the terms of the contract agreed to by the parties, they were, nevertheless, bound by the terms of the statute. Accordingly, the court concluded that the correct amount of retainage held should have been $9314, and it set off the excess retainage against the amount due the plaintiff in liquidated damages, which resulted in an award in the amount of $498,686. The remaining retainage, $9314, was credited toward the

[8] General Statutes § 42-158i (3) defines " 'retainage' " as "a sum withheld from progress payments to the contractor or subcontractor, otherwise payable to a contractor or subcontractor by an owner conditioned on substantial or final completion of all work in accordance with the terms of a written or verbal construction contract, but does not include any sum withheld due to the contractor's or subcontractor's failure to comply with construction plans and specifications."

plaintiff's damages, which resulted in a further reduction in the award due the plaintiff to $489,372. Judgment was rendered in favor of the plaintiff on its breach of contract claim in that amount. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

THE DEFENDANT'S APPEAL

On appeal, the defendant claims that (1) the court misapplied state and federal environmental regulations, (2) the court erred in not finding that the contract was impossible to perform, (3) the court improperly determined that the plaintiff lawfully had terminated the contract, and (4) evidence of certain change orders executed by the plaintiff in connection with its contract with Costello, pursuant to which the plaintiff had agreed to modify terms of that contract, constituted admissions that the plaintiff's contract with the defendant was defective and could not be performed by the defendant as written.

Before we address the defendant's claims, we first set forth our well established standard of review in cases involving the issue of contract interpretation.[9] "The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages. . . . The interpretation of definitive contract language is a question of law over which our review is

[9] In its brief, the defendant argues that this case involves a question of statutory interpretation and, thus, that the sole applicable standard of review is plenary review. We disagree. As the plaintiff aptly points out in its brief, the plaintiff and the defendant have not asserted causes of action grounded on the application of a statute, regulation, or ordinance, whether federal or state. Instead, the causes of action asserted by the parties stem from the contract, and the court's ruling was based on its interpretation of that contract.

plenary. . . . By contrast, the trial court's factual findings as to whether and by whom a contract has been breached are subject to the clearly erroneous[10] standard of review and, if supported by evidence in the record, are not to be disturbed on appeal." (Citations omitted; footnote added; internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, 327 Conn. 114, 133, 172 A.3d 1228 (2017). "[T]he intent of the parties [to a contract] is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . [T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . If a contract is

[10] "The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court. . . . [I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *DeMattio* v. *Plunkett*, 199 Conn. App. 693, 711–12, 238 A.3d 24 (2020).

unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 183, 2 A.3d 873 (2010).

Moreover, "[c]ourts do not unmake bargains unwisely made. Absent other infirmities, bargains moved on calculated considerations, and whether provident or improvident, are entitled nevertheless to sanctions of the law. . . . Although parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement . . . ." (Internal quotation marks omitted.) *Detar* v. *Coast Venture XXVX, Inc.*, 74 Conn. App. 319, 323, 811 A.2d 273 (2002). "It also is settled that [t]he individual clauses of a contract . . . cannot be construed by taking them out of context and giving them an interpretation apart from the contract of which they are a part. . . . A contract should be construed so as to give full meaning and effect to all of its provisions . . . ." (Internal quotation marks omitted.) *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 811, 17 A.3d 40 (2011).

A

The defendant's first claim is that the court misapplied state and federal environmental laws. Specifically, the defendant focuses on the court's statement, which it characterizes as erroneous, that, "[a]t the heart of the dispute between the parties is whether the plaintiff was obligated to do sampling of the structural steel for PCBs under the terms of the contract, of which the September 1, 2015 EPA approval letter was a part." The defendant claims, instead, that its dispute with the

plaintiff "was about the obligation to characterize the waste coming off the site based on the EPA regulations and state law, not the contract." The defendant further claims that the court, by focusing on the contract, "misapplied the state and federal regulatory scheme as it pertains to cleanup projects affecting regulated PCB contamination," and that, by "focusing on the steel, it disregarded the other PCB contaminated waste revealed by the EPA imposed testing, the requirements of General Statutes § 22a-467, and the effect of EPA regulations."

For example, the defendant asserts that the notification provided by the plaintiff to the regulators was inadequate and did not comply with 40 C.F.R. § 761.61 (a) (3) because the plaintiff, by not testing various PCB contaminated materials, did not provide all required information. As a result, the defendant claims that the notification "did not provide authorization to perform work affecting undisclosed regulated waste," nor did the approval letter "authorize the [plaintiff] to perform work on undisclosed waste." The defendant also claims that the plaintiff disregarded the requirements of § 22a-467 because it never had a permit to remediate the waste from the site.

The defendant's claims are based on its assertion that "[t]he state and federal environmental regulatory schemes both articulate a stringent policy preventing the disturbance of PCB contaminated waste unless and until the nature and extent of the contamination is determined and disclosed to the regulators, and they approve the plan for remediation and disposal of regulated waste." In support of this proposition, the defendant cites to 40 C.F.R. § 761.61 (a) (2), which provides in relevant part that "[a]ny person conducting self-implementing cleanup of PCB remediation waste must characterize

the site adequately . . . .”[11] According to the defendant, the plaintiff, by mischaracterizing the steel beams as nonporous and by failing to paint chip sample the structural steel prior to submitting its plan for approval by the EPA, did not adequately characterize the site and thereby violated 40 C.F.R. § 761.61 (a) (2).

The defendant’s claims of violations by the plaintiff of state and federal statutes and regulations can be distilled to one central claim, namely, that the plaintiff, prior to entering into the contract with the defendant, should have tested and analyzed samples of all of the waste at the site in order to be able to characterize the site adequately. As a result of the plaintiff’s failure to do so, the defendant alleges that the information provided to the EPA was “limited or false,” as it did not cover the undisclosed contaminated waste. Thus, according to the defendant, the Notification and approval letter from the EPA could not and did not provide authorization to perform work on the undisclosed waste, which precluded the defendant from performing any such work until the plaintiff performed the necessary testing and the EPA provided the necessary authorization. We disagree and conclude that the defendant’s claims are belied by the court’s findings, which are supported by the record.

1

First, from our review of the record, it does not appear that the defendant raised its claim before the court that the plaintiff lacked proper authorization from the EPA to perform work on the undisclosed waste at the site, as it was not mentioned in the defendant’s

[11] The defendant’s reliance on 40 C.F.R. § 761.61 (a) (2) is unavailing. Any obligation of the plaintiff to characterize the site adequately pursuant to that regulation relates to the plaintiff’s representations in its notification to the EPA, not to the defendant. The plaintiff’s obligations to the defendant arise under the contract, not the federal regulation.

posttrial brief nor did the court address it in its memorandum of decision. Rather, the defendant argued at trial that the plaintiff's mischaracterization of the steel made it impossible for the defendant to perform under the contract and that the plaintiff breached the contract by failing to characterize the steel properly. This court, therefore, will not address the issue of the adequacy of the EPA approval letter authorizing the plaintiff to commence work on phase III of the project, as that issue was not raised before or decided by the trial court. See *Lebanon Historical Society, Inc.* v. *Attorney General*, 209 Conn. App. 337, 351 n.12, 268 A.3d 734 (2021) (declining to review claim that was not distinctly raised before or decided by trial court). Moreover, because the court did not reference § 22a-467 in its decision, nor did the defendant raise any claim pursuant to that statute before the court in its special defenses, counterclaim or posttrial brief, we also decline to address the defendant's claim that the plaintiff, and the court, disregarded the requirements of § 22a-467. See id.

2

The following facts are relevant to the defendant's claims that the plaintiff did not characterize the site adequately and was required under the contract to paint chip test the steel beams before the defendant could perform any work at the site. The plaintiff submitted a notification to the EPA seeking approval of a proposed plan to address the removal of PCB contaminated building materials from the project site. In response, on September 1, 2015, the EPA issued an approval letter authorizing the plaintiff to move forward with phase III of the project subject to the conditions set forth in the letter and two attachments. The first attachment required the plaintiff to provide to the EPA "a certification signed by its selected abatement/demolition contractor, stating that the contractor(s) has read and understands the Notification, and agrees to abide by

the conditions specified in [the] [a]pproval . . . .'' The second attachment included documents and correspondence reviewed by the EPA prior to the issuance of its approval, which, as the court found, included ''discussions of PCB contamination of various materials including overhead cranes and steel beams.'' By e-mail, dated September 3, 2015, the defendant, as the contractor, provided the certification required by the approval letter, stating that it read and understood the cleanup and disposal plan for the project site and agreed to abide by the conditions set forth by the EPA in the approval letter, which included compliance with EPA regulations under 40 C.F.R. § 761 relative to the removal and abatement of PCBs. Subsequently, the parties entered into the contract, and, by letter dated September 14, 2015, the plaintiff provided the defendant with a notice to proceed as required under the contract.

As stated previously in this opinion, the court found that the parties' dispute centered on whether the contract obligated the plaintiff to do paint chip sampling of the structural steel to determine the presence of PCBs at an improper level. In addressing this issue, the court found that the testimony of Goldblum, the defendant's president, and Lawrence Kurt, who prepared the CWP for the defendant, made ''clear that the defendant's position was that paint chip sampling of the steel was necessary for it to be sold to scrap dealers as recyclable material.'' The general truth of that statement, however, is irrelevant because the court found that the contract does not specify any requirement for paint chip testing, and our examination of the contract confirms that finding. Additionally, the court found the testimony of the plaintiff's expert witnesses ''to be credible[12] and of greater weight than that of the defendant's

[12] ''[T]o the extent that the court's decision is founded on its credibility determinations, we cannot second-guess those determinations on appeal.'' *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 441, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

expert''; (footnote added); on the issue of whether it is customary to require paint chip sampling under circumstances similar to those in the present case.[13] The court further found that, ''[w]ith respect to any testing that might have been required to comply with any regulatory provisions under 40 C.F.R. § 761, the defendant acknowledged that it had such an obligation when it expressly certified in its letter on September 3, 2015, that it had read and understood the terms of the EPA's

[13] The court found: ''The defendant's expert, Insall, testified that it was his opinion that paint chip testing was required. On cross-examination, however, Insall first acknowledged that he could not say whether the painted steel was to be treated as bulk product waste or remediation waste. This of course would affect what test might be appropriate, or, if any test would be required at all. Secondly, Insall acknowledged that the EPA had information available to it from phase II of the project that referenced painted building columns, that the EPA had approved surficial (wipe) samples for painted surfaces including columns, that the EPA had the discretion to allow this, and that it never revoked its September 1, 2015 approval letter.

''Insall also testified that paragraph 13 of the approval letter dealt with site characterization. Yet, a reading of that paragraph says nothing about characterization of the site or any action necessary to make a characterization. Insall even conceded that if material referenced was considered as bulk waste product, there is no characterization requirement under 40 C.F.R. § 761. A site characterization is done in the process of obtaining an approval letter, not as a condition of the approval.

''With respect to the disposal standards relative to contamination and recyclability, Insall opined that the standards referenced were for the overhead steel cranes and not the steel beams. However, this makes little sense as the wording of the letter places the cranes and beams together in the same sentence in the description of cleanup standards for nonporous surfaces. Insall further opined that there was a distinction between 'columns' and 'beams' in that columns were vertical and beams were horizontal. The importance of the distinction to Insall was that dust accumulates on horizontal beams and that paragraph 13 only covers horizontal beams. On its face, Insall's testimony clearly implies that dust did not accumulate on the vertical beams, which borders on being a ludicrous statement. See *State* v. *Zayas*, 195 Conn. 611, 620, 490 A.2d 68 (1985) ('[i]t is an abiding principle of jurisprudence that common sense does not take flight when one enters a courtroom').

''While the report Insall submitted to the EPA (which was put into evidence) was highly detailed, his credibility was put into issue by his testimony. To the extent there was credible evidence put forth, it does not outweigh the collective testimony of the plaintiff's experts on the subjects addressed.''

Notification and agreed to abide by the specifications set out in the approval letter." The court also specifically found that "there is no express statement [in the contract] that the steel is not contaminated," which undermines the primary basis for the defendant's argument about the plaintiff's alleged mischaracterization of the site.[14] Finally, the court found that "the plaintiff performed its obligations under the contract."

[14] The basis for the defendant's claim of negligent misrepresentation by the plaintiff at trial was its assertion that the plaintiff had misrepresented the condition of the steel beams. The court, however, found that the defendant had failed to prove its claim of negligent misrepresentation by a preponderance of the evidence and, in addition, had waived any such claim of misrepresentations by the plaintiff as to the condition of the steel beams under various provisions of the contract. Specifically, the court found that, "[t]he plaintiff had disclosed in advance to all prospective bidders, including the defendant, up to the date of the signing of the contract, all project documents and historical data that had been acquired through phases I and II, as well as a copy of the proposed contract and supporting documents, and eventually, the EPA approval letter." The court examined the bidding documents and contractual provisions, which make clear that the bidder was responsible for investigating the physical condition of the site and could not rely on information provided by the plaintiff. For example, § 3.7.1 of article 3 of the contract provides that "[the defendant] agrees that [it] shall not use or be entitled to use any such information made available to [it] through the contract documents or otherwise or obtained by [it] in [its] own examination of the site, as a basis of or ground for any claim against the [plaintiff] . . . ." The court found that the § 3.7.1 disclaimer provision, along with others in the contract, were sufficient to defeat the defendant's claim of negligent misrepresentation. The court further noted that Kurt, who had prepared the CWP for the defendant, acknowledged in his testimony that he was aware of the provision in the phase III remediation plan that "referenced that the overhead steel cranes reportedly contained [a certain level of] surface contamination" and that, "[w]hen asked why the defendant had not done greater testing in light of the information and his having physically seen the cranes and other painted steel at the walk-through on the site, Kurt simply stated that it was 'my error.' " The court, thus, concluded that the defendant had failed to establish that the plaintiff misled either the EPA or the defendant as to the condition of the site.

With respect to the issue of waiver, the court found that, "[t]hroughout the process, the plaintiff advised the defendant and all other potential bidders they were not to rely on any representations made by the plaintiff, that it offered no warranties and that they should satisfy themselves through their own investigation as to the character and condition of the site." As the court stated, "[w]hile claiming [that] the plaintiff had misrepresented the condition of the steel and thereby affected the ability of the defendant to properly

We conclude that the court's findings are supported by the clear and unambiguous provisions of the contract. For example, the provision of the contract governing the transportation and disposal of hazardous materials requires that "[a]ll labor, materials, tools, equipment, services, *testing*, insurance, and incidentals which are necessary or required to perform the work in accordance with applicable governmental regulations, industry standards and codes, and these specifications, *shall be provided by the Contractor*." (Emphasis added.) The contract further provides that "[a]ll characterization sampling and analysis for disposal shall be conducted by the CONTRACTOR, with supervision from the ENGINEER, where indicated," and that "[t]he Contractor is responsible for verifying actual locations and quantities of the items with hazardous/regulated material/waste constituents and for their proper handling and disposal." Moreover, neither the contract nor the approval letter required the plaintiff to do paint chip sampling. As the court properly found, the contract, when viewed as a whole, "overwhelmingly placed the obligation for the testing, handling and processing of the materials on the site upon the defendant." Indeed, as the court observed, "[f]rom the broadest perspective, while the defendant argues that it was the plaintiff who was responsible for managing and disposing of the PCBs on the site, the very purpose of the plaintiff awarding the contract to the defendant was to have it do that very work," and "[w]hat the defendant viewed as extra work with respect to the testing and treatment of the structural steel was reasonably within the scope of the work called for by the contract and the EPA approval letter."

bid and do the job, the defendant's own affirmative statements, which are contractually binding, run counter to that position. The terms make clear that the defendant had carefully reviewed the documents made available to it, had physically viewed the site and was aware of conditions that might affect the cost and work to be done." The defendant has not challenged the court's findings regarding waiver on appeal.

In the present case, the court correctly found that the contract "overwhelmingly placed the obligation for the testing, handling and processing of the materials on the site upon the defendant." The court also thoroughly discussed the risks assumed by the defendant under the contract and found that the plaintiff was not obligated to test the waste "except in the context of doing verification testing, which the parties do not dispute. All characterization of the waste that had previously been done in phases I and II of the project, which work had been approved by the EPA, was disclosed to the defendant as part of the bid process and within the contract documents. The contract specifically addressed the characterization of the waste . . . [and required it to be conducted by the contractor]. . . . The fact that the defendant may not have accounted for the potential contamination or testing of some structural steel, which had been thought to have been recyclable, and therefore resulted in the need for additional work both in terms of time and labor, was a risk that it contractually bore." (Citation omitted.) The court further stated that "[t]he contract expressly made clear that the risk of the condition of the materials being different than anticipated was solely on the contractor. Hence, if it turned out that the assumption as to the recyclability of the steel was wrong, the risk as to the quantity and value of any recyclable steel was to be borne by the [defendant]. Both the original bid form and the proposed/executed contract documents so stated." These findings are amply supported by the clear language of the contract and the documents related thereto that were submitted into evidence. The defendant's claim on appeal that the plaintiff was required to do the testing that the defendant, itself, had contracted to perform simply lacks merit.

3

Although, on appeal, the defendant casts the primary issue as involving the plaintiff's obligation to characterize waste in accordance with the EPA regulations and

state law, this case involves a claim for breach of contract, and the defendant has not challenged many of the court's findings and conclusions related to the plaintiff's breach of contract claim nor has it provided a clear explanation as to how its claims concerning the EPA regulations circumvent the court's findings regarding the contract. As we stated previously, "[t]he elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." (Internal quotation marks omitted.) *CCT Communications, Inc.* v. *Zone Telecom, Inc.*, supra, 327 Conn. 133. In determining whether those elements had been satisfied, the court thoroughly, and properly, analyzed the provisions of the contract.

The defendant's claim that this case concerns the issue of the plaintiff's obligation to characterize the waste based on the requirements of certain EPA regulations, not on the pertinent language of the contract, is undercut by the defendant's arguments before the court and in its posttrial brief, which is replete with arguments relating to the provisions of the *contract*. Although, in making those arguments, the defendant referred to EPA regulations, its claims at trial were premised on the contract, and the defendant relied on those regulations as a basis for its claim that the plaintiff breached the contract. On appeal, however, the defendant, without reference to the contract and as an excuse to escape its contractual obligations, argues that the plaintiff's conduct constitutes a violation of those regulations and that the court erred in failing to find such a violation. The defendant cannot take one path at trial and, when that fails, choose another on appeal. See *Bligh* v. *Travelers Home & Marine Ins. Co.*, 154 Conn. App. 564, 577, 109 A.3d 481 (2015) ("[o]rdinarily appellate review is not available to a party who follows one strategic path at trial and another on appeal, when the original strategy

does not produce the desired result" (internal quotation marks omitted)). The defendant's claim, therefore, fails.

4

Finally, it is also important to note the court's finding that, "[i]n this transaction, the defendant was a sophisticated and experienced party in a highly specialized area of work, which had, or had available to it if it wished, the advice of consultants or counsel prior to entering into the transaction. In fact, the defendant's president, Goldblum, is himself an attorney. In the bid documents, the defendant provided a detailed and extensive list of its experience in the field of demolition, remediation and abatement, referencing fifty-three projects it had completed or [was] actively working on between 2008 and 2014." The court further found that the defendant "was given every opportunity to address any issues it had with the proposed terms and interpretation of the contract prior to its execution," that "[i]t was not an innocent [party] that was somehow unknowingly duped into entering into an agreement of which it had no real knowledge or understanding," and that, even though the court understood "the source of the frustration and dismay of the defendant as to the condition of the property being other than that which it had assumed," under the contract, the defendant bore the risk of its failure to account "for the potential contamination or testing of some structural steel which had been thought to have been recyclable . . . ."

With the benefit of hindsight, the defendant, in an effort to shift the burden and responsibility for site testing from it to the plaintiff, effectively is requesting this court to rewrite its contract with the plaintiff, which would be contrary to the well established principle that "parties are free to contract for whatever terms on which they may agree. This freedom includes the right to contract for the assumption of known or unknown

hazards and risks that may arise as a consequence of the execution of the contract. Accordingly, in private disputes, a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract, unless the contract is voidable on grounds such as mistake, fraud or unconscionability." *Holly Hill Holdings* v. *Lowman*, 226 Conn. 748, 755–56, 628 A.2d 1298 (1993); see also *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 159, 117 A.3d 876 ("[C]ourts do not unmake bargains unwisely made. . . . Although parties might prefer to have the court decide the plain effect of their contract contrary to the agreement, it is not within its power to make a new and different agreement; contracts voluntarily and fairly made should be held valid and enforced in the courts." (Internal quotation marks omitted.)), cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015). Although "the defendant may have used a mistaken basic assumption in making its bid and entering into the contract," that does not permit this court or the trial court to rewrite the contract or to relieve the defendant of its obligations thereunder, especially when the defendant is an experienced and sophisticated commercial party with respect to the type of work covered by the contract, rather than an unsophisticated party that was misled or deceived into entering into the contract, the circumstances of which, the court concluded, were not unconscionable.

B

The defendant next claims that the court erred in not finding that the contract was impossible to perform. We decline to review the claim.

This court previously has addressed the defense of impossibility, stating: "Practice Book § 10-50 provides

that [f]acts which are consistent with [the claimant's allegations] but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. . . . The defense of impossibility does not aim to establish the absence of a breach of the contract; rather it assumes breach and instead seeks to show that a party is excused from performance because at the time [the] contract [was] made, [his] performance under it is impracticable without his fault because of a fact of which he has no reason to know . . . . 2 Restatement (Second), Contracts, Existing Impracticability or Frustration § 266, p. 338 (1981). Accordingly, such defense must be specially pleaded." (Citation omitted; internal quotation marks omitted.) *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 145 Conn. App. 696, 711–12, 77 A.3d 165 (2013), aff'd, 315 Conn. 596, 109 A.3d 473 (2015).

In the present case, the plaintiff argues that this court should decline to review the defendant's impossibility claim because it was not pleaded as a special defense. It claims that, because the defendant failed to plead a special defense of impossibility, the court did not undertake the necessary analysis of such a claim, nor did it make findings thereon, and, thus, it could not have erred in failing to find that the defendant's performance under the contract was impossible. In opposition, the defendant argues that the issue of impossibility is properly before this court. Specifically, the defendant claims that it raised the claim in its posttrial brief and that the court addressed the issue in its memorandum of decision. We agree with the plaintiff.

First, we note that the defendant has not addressed in its reply brief the issue raised by the plaintiff concerning the defendant's failure to plead impossibility as a special defense, which, by itself, is fatal to its claim, as our case law is clear that impossibility must be pleaded as a special defense. See id. The court, therefore, could not have erred in failing to make a finding on an issue

that was not properly before it. Moreover, the defendant relies on its claims that the court addressed the issue in its decision and that the defendant raised the issue in its posttrial brief as part of its argument that the plaintiff materially had breached the contract. Our review of the court's decision, however, demonstrates that, although the court referenced a number of the defendant's claims, including the claim that the plaintiff's mischaracterization of the steel made it impossible for the defendant to perform under the contract, the court did not make any express findings regarding whether the contract itself was impossible to perform. The only finding regarding impossibility made by the court was its finding that, given the course of events that had transpired, as of December, 2015, it would have been impossible for the defendant to complete the work in a timely manner; the court never made a finding that it would have been impossible for the defendant to perform the work under the contract in the first place beginning in September, 2015, as claimed by the defendant on appeal.

Additionally, even if the issue of whether it was impossible for the defendant to perform its obligations under the contract was properly before the court, because the court failed to make any findings as to that issue, we would have to speculate as to whether the court rejected the claim or simply overlooked it. It was incumbent on the defendant to seek an articulation of the court's decision as to its failure to make a finding on a claim the defendant alleges was properly before the court. In the absence of such an articulation, the record is inadequate for us to review the claim. See *McCarthy* v. *Chromium Process Co.*, 127 Conn. App. 324, 335, 13 A.3d 715 (2011) ("It is well established that [i]t is the appellant's burden to provide an adequate record for review. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to

state the basis of a decision . . . to clarify the legal basis of a ruling . . . or to ask the trial judge to rule on an overlooked matter. . . . In the absence of any such attempts, we decline to review this issue." (Internal quotation marks omitted.)).

C

The defendant next claims that the court improperly determined that the plaintiff lawfully had terminated the contract.[15] In support of this claim, the defendant argues that "[a] party to a contract already in default cannot terminate the other," and that the plaintiff "was clearly in default by the end of November when the CWP was rejected." Thus, according to the defendant, "[u]nless and until the CWP was approved, [the defendant] had no authority to perform any work that affected PCB contaminated waste." We are not persuaded.

We first note that the court did not make an express finding that the plaintiff lawfully had terminated the contract. Such a finding, however, can be inferred from the court's rejection of count three of the defendant's counterclaim, which alleged that the plaintiff wrongfully had terminated the defendant from the job. Although the defendant appears to be challenging that determination, its very limited briefing on the issue fails to address the court's determination that the defendant had failed to establish the allegations of its wrongful termination claim in count three of its counterclaim. We, therefore, do not undertake an analysis of the court's decision relating thereto.

The defendant's claim that the plaintiff did not lawfully terminate the contract is premised on a faulty assumption, namely, that the plaintiff was in default under the contract. The record does not support that

[15] See footnote 1 of this opinion.

assertion, and the court made no such finding of default by the plaintiff. In fact, the court expressly found that the plaintiff had performed its obligations under the contract and that there was ample evidence of the defendant's breach. Specifically, the court stated: "First, the contract contained a 'time is of the essence' clause requiring the defendant to finish the job on or before February 1, 2016. TRC had granted a six day extension to allow for the testing of the expansion joint caulking for PCB contamination as requested by the EPA, which moved the deadline back to February 7, 2016. There was credible testimony from Doubleday, Zarba and [Richard] McManus that the defendant would not have been able to meet that deadline. Collectively they cited several factors, including, but not limited to: (1) the defendant waiting seven weeks (forty-eight days) before obtaining a demolition permit for the job site; (2) the multiple delays in preparing an acceptable CWP, which included over a month's delay while the defendant hired a consultant to review the plan; (3) the defendant's election to demobilize from the site on or about November 20, 2015; (4) McManus' opinion that the milling of the concrete called for in the contract would take sixty-nine days as opposed to the thirty days the defendant had estimated; (5) the ongoing dispute over who was responsible for the testing of the steel for PCB contamination despite the plaintiff's continued insistence that it was the defendant's obligation to do so; (6) the defendant's delay between at least November 3, 2015, and November 27, 2015, in submitting a written change order request based on its repeated oral claim that several of the EPA requirements specified in the approval letter were the basis for a change in the contract despite TRC's equally repeated response that such a claim would only be considered if submitted in writing pursuant to the contract; (7) the failure to submit a revised [health and safety plan]; (8) the failure to submit

a demolition work plan; (9) the November 20, 2015 letter from the defendant and statement at the December 8, 2015 job meeting advising the plaintiff that the defendant would not proceed with any further work on the job until a CWP was done; (10) its statement in that same letter and at the job meetings on November 24, 2015, December 1, 2015, and December 8, 2015, that it would not perform any work if [it] was required to sample the steel; (11) that the issues on the characterization of the steel and the paint chip testing were still to be resolved; (12) that less than 10 percent of the work called for on the project had been completed as of both December of 2015 and the date of the termination; and (13) based on its December 15, 2015 letter to the plaintiff claiming a ninety-four day delay due to plaintiff's actions and the defendant's own proposed revised project schedule that called for a completion date of May 4, 2016. Given these facts, it is clear that it would have been impossible for the defendant to have finished the job by February 6, 2016." (Footnotes omitted.)

These findings provide ample support for the court's determination that, in December, 2015, the defendant could not have finished the job in a timely manner as required under the contract. Therefore, the defendant's challenge to the court's implicit determination that the plaintiff lawfully had terminated the contract is unavailing.[16]

D

The defendant next claims that evidence of certain change orders executed by the plaintiff in connection with its contract with Costello, pursuant to which the

[16] To the extent that the defendant's claim can be construed as a challenge to the court's finding that it breached the contract, that claim fails as well, as the court's finding that the defendant breached the contract was not clearly erroneous.

plaintiff had agreed to modify terms of that contract, constituted admissions that the plaintiff's contract with the defendant was defective and could not be performed by the defendant as written. We disagree.

In its memorandum of decision, the court found that Costello submitted eleven change order requests during the course of its work on the project and that most of those requests were approved by TRC. The court further stated: "The defendant has argued that the court should also consider the conduct of the plaintiff in its handling of the similar contract with Costello following the rebid of the project. The defendant argues that, as to Costello, TRC allowed change orders similar to those asked for [by the defendant] and denied to the defendant by TRC, and that those change orders often revolved around the requirements for testing and decontamination. This, the defendant contends, is an admission on the part of the plaintiff as to the actual intent of the contract, which was that the original obligation for the testing of PCB contamination was that of the plaintiff. To this end, the defendant cites *Putnam Park Associates* v. *Fahnestock & Co.*, 73 Conn. App. 1, 10–11, 807 A.2d 991 (2002), for the general proposition that a court may use the parties' actions as an aid to determine the meaning of the contract. While that general proposition is true, the defendant's reference to the case is misplaced, as the defendant asks the court to look at the actions of the plaintiff with respect to a different party on a different, albeit similar, contract. . . . The plaintiff's actions do not involve the same two parties and, therefore, the principle cited is inapplicable." (Citation omitted.) We agree with the court.

The fatal flaw in the defendant's argument is its failure to acknowledge the basis for the change orders sought by Costello. Approximately eight months after the defendant's contract with the plaintiff was terminated, the defendant directly contacted the EPA by

e-mail regarding certain paint chip sampling requested by the defendant as part of this litigation that was to be performed on the site in accordance with an order of the trial court dated August 19, 2016.[17] This resulted in a series of e-mails and telephone calls between the defendant and representatives of the EPA and had the effect of interrupting the work being performed by Costello. Subsequently, TRC submitted to the EPA a plan proposed by Costello for PCB sampling, after which a series of correspondence between the plaintiff and the EPA followed. Those exchanges included "a comment by the EPA that should the paint chip samples sought by the defendant (in the court action) reveal PCBs in the paint, a change to the decontamination plan might be necessary." The results of that paint chip sampling did prompt the EPA to require additional testing of the steel beams and other materials, including testing of roofing material, which caused additional expenses and delayed the project. Significantly, the court found that, "[a]t no time before the defendant unilaterally intervened by contacting the EPA with the court ordered paint chip sample results on November 21, 2016, did the EPA expressly require the plaintiff to do any paint chip sampling and provide the results thereof."

Following its examination of the language of the contract and the approval letter, and its consideration of the expert testimony presented,[18] the court found that paint chip sampling was not required to be done by the

[17] See footnote 5 of this opinion.

[18] With respect to the change orders, the court found that "there was credible documentary and testimonial evidence from Doubleday, Zarba and Mike Costello to establish the validity of those expenses. . . . These expenses were a direct consequence of the defendant's failure to complete the contract and its unilateral correspondence with the EPA subsequent to its dismissal from the job. That contact resulted in not only expanded PCB testing, it raised disposal costs and required both Costello and TRC to remain on the job much longer and to perform more work than originally anticipated." (Citations omitted.)

plaintiff under its contract with the defendant. That finding is supported by the record and is not clearly erroneous. The defendant's claim, therefore, that the change orders granted to Costello in connection with the additional paint chip testing requirements imposed by the EPA, which were not part of the defendant's contract with the plaintiff, constituted an admission by the plaintiff that its contract with the defendant could not be performed without such testing is contrary to the record and fails.

II

THE CROSS APPEAL

In its cross appeal, the plaintiff challenges the court's award and calculation of damages. Specifically, the plaintiff claims that the court erred in its award and calculation of damages with respect to the following: (1) "the court interpreted the contract's liquidated damages . . . provision . . . as the only measure of damages available for all elements of the [plaintiff's] loss when that provision is not the exclusive measure of damages for breach and does not preclude the award of the [plaintiff's] nondelay damages, inclusive of direct and consequential damages unrelated to delay in [the project's] completion"; (2) "there is no lawful basis for limiting per diem [liquidated damages] to 254 days"; and (3) "the court erred in its prospective calculation of damages by not taking into account the $167,652 paid by the [plaintiff] to [the defendant] when it compared [the defendant's] and Costello's contracts for the purpose of determining the [plaintiff's] completion costs."[19] We agree with the plaintiff's first claim.

We first set forth the following findings concerning the issue of damages made by the court in its memoran-

[19] In light of our conclusion that the issue of damages must be remanded to the court for a new hearing, we do not address the plaintiff's third claim.

dum of decision: "[T]he plaintiff has submitted a summary of damages with supporting documentation claiming an amount due of $1,855,936. . . . Categorically, the claimed damages fall into three areas. First, the difference in the contract price between the defendant and Costello for the job to be done. Second, additional expenses for the rebidding of the job and the engineering support that went with it. Third, project damages for both contractual liquidated damages and additional work the plaintiff was required to do as a result of the defendant's unilateral communications with the EPA following its dismissal from the job.

"As to the first category, the difference in the contract price, the defendant's accepted bid in June, 2015, was $2,713,950. Upon rebid in March, 2016, Costello was awarded the contract for $2,962,207. The difference is an additional cost of $248,257. . . . The bid forms provided to the bidders between the original bid and the rebid were identical but for the assumption of the credit for salvageable steel. The original bid form estimated 1000 tons and the rebid form estimated 2400 tons. Both indicated that the quantity and value of the salvageable steel was at the contractor's sole risk/reward.

"As to the second category, the additional expenses for the rebidding of the job and the engineering support that went with it, the plaintiff claims payments of $167,652 made to the defendant, payments of $92,300 toward construction support in 2015, the escalation of unit prices resulting in an additional cost of $17,913, payments of $47,230 toward the support of the rebid process, $23,800 for the disposal of bags with asbestos containing material that had been left on-site by the defendant, $10,259 for fencing, and $583 for advertisement of the project rebid. These expenses total $359,737. The court finds evidentiary support for most of the claimed expenses. However, the expense of $167,652 is not properly claimed as damages as these

were payments for work done by the defendant, which had been approved by TRC following the submission of the defendant's first two pay applications. . . . Accounting for that payment, the total expenses claimed are $192,085.

"As to the final category, project damages for both contractual liquidated damages and the additional work the plaintiff was required to do as a result of both the court action and the defendant's communications with the EPA following its dismissal from the job, the plaintiff claims a total amount due of $1,247,942. The largest component of the figure comes from the claim of liquidated damages in the amount of $520,000 for the 260 day period commencing from February 1, 2016, at the rate of $2000 per day. In order to complete the work that remained to be done after the defendant's dismissal, Costello's March 31, 2016 bid of $2,962,207 was accepted by the plaintiff. . . . Costello later commenced work on the project on essentially the same terms as the defendant. Following Costello's preparation of a CWP and other minor work, it received notice from the plaintiff on October 5, 2016, that the EPA had approved the CWP and [that it] could commence work in earnest. . . . However, in the fall of 2016, additional work was required to be done on the project, which included additional PCB [testing] and . . . testing [of asbestos containing materials], decontamination, shearing and sizing of steel beams, site maintenance, and disposal of additionally identified contaminated waste and other tasks. These specific costs were reflected in, but not limited to, change orders [numbers] 3, 5, 6, 7, 8, 9, 10 and 11. . . . All of the other additional work was necessary as a result of Insall's correspondence on behalf of the defendant to the EPA between September 1, 2016, and November 21, 2016, long after the defendant had been dismissed from the job. That correspondence raised the issue of paint chip testing for PCB

contamination at the site and claimed that other debris had come in contact with contaminated soil. This necessitated stopping work on the project from December 5 to December 16, 2016, and eventually resulted in at least an additional 200 paint chip tests. . . . Some of the other damages claimed, outside of the change orders, related to the paint study that had been initiated but not completed, and the potential for additional disposal costs related to the steel. The total amount claimed as to all of these actual and estimated costs is $1,247,942.

"With respect to that third category, the plaintiff's claim of liquidated damages for the defendant's failure to timely complete the job is for 260 days commencing from February 1, 2016, to October 19, 2016. . . . The contract called for completion of the work by that date (i.e., within 140 days). Article 2, § 2.1.1 of the contract states: 'Failure of the Contractor to meet this established timeframe will result in liquidated damages being assessed in the amount of $2,000/day for each and every calendar day beyond the contract time limit.' . . . In this instance, the plaintiff claims a total of $520,000. As previously noted, the court has found that there was an extension of the contract to February 7, 2016. Therefore, the claim must be adjusted to a commencement date of February 7, 2016, for a revised total of 254 days at $2000 per day for a total of $508,000." (Citations omitted.)

The court next examined the liquidated damages provision of the contract and determined that it was a valid, enforceable provision of the contract, as it met the three criteria necessary to establish that the provision is one for liquidated damages and not a penalty. The court, after citing the principle set forth in *Hanson Development Co.* v. *East Great Plains Shopping Center, Inc.*, 195 Conn. 60, 64, 485 A.2d 1296 (1985), that "a seller may not retain a stipulated sum as liquidated damages

and also recover actual damages," concluded that the plaintiff was "limited in its claim of damages to those attributable under its liquidated damages provision, article 2, § 2.1.1. Although such damages are often typically determined by when the job is finally completed by the breaching party, here the plaintiff dismissed the defendant from the job. Costello was hired to finish the job, but because of the defendant's interaction with the EPA and the subsequent additional work and testing, it was unable to do so as the funds available to the plaintiff to complete the project were exhausted. Although the job was never completed, the plaintiff has not sought liquidated damages beyond 260 days (adjusted to 254 days), which falls shortly after Costello received notice of the EPA's approval of the CWP. Thus, the total amount of liquidated damages due the plaintiff is found to be $508,000.

"As to any finding of damages, it remains for the court to address the retainage[20] held by the plaintiff in excess of the statutory limits set forth in . . . § 49-41b,[21] as noted in the discussion of count one of the defendant's counterclaim. That statute limits the amount of retainage held by a municipality in any public work contract to 5 percent of any periodic or final payment due a general contractor. In this instance, article 4, § 4.1.5 of the contract, entitled 'Retainage,' states,

[20] See footnote 8 of this opinion.

[21] General Statutes 49-41b provides in relevant part: "When any public work is awarded by a contract for which a payment bond is required by section 49-41 and such contract contains a provision requiring the general or prime contractor under such contract to furnish a performance bond in the full amount of the contract price, the following shall apply . . . (3) If the awarding authority is a municipality, (A) the municipality shall not withhold more than five per cent from any periodic or final payment which is otherwise properly due to the general or prime contractor under the terms of such contract . . . ."

We note that, although § 49-41b has been amended by the legislature since the events underlying the present appeal; see, e.g., Public Acts 2016, No. 16-104, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

'[T]he [plaintiff] shall retain ten percent (10%) . . . of each estimate until final completion and acceptance of all work covered by this contract.' . . . A review of the pay applications submitted by the defendant and approved by TRC show that $18,628 was held as retainage, which represented 10 percent of the amount of the work deemed completed by the defendant. . . . The amounts withheld by the plaintiff comport with the terms of the contract, which both parties had voluntarily and mutually agreed to. Nonetheless, they are both bound by the statute. As a result, the correct amount of retainage held should have been $9314. Accordingly, the court will set off the excess retainage of $9314 against the amount due the plaintiff, bringing the total damage award to $498,686. The remaining retainage held by the plaintiff in the equal amount of $9314 shall be credited toward the plaintiff's damages pursuant to article 5, § 5.1. That provision allows the plaintiff to withhold any further payments to the contractor when it has failed to complete the work within the time period called for by the contract. Allowing this second amount as a credit to the defendant, given that the amounts are already in the possession of the plaintiff, an additional adjustment of $9314 is made to the award of damages, further reducing the total amount due the plaintiff to $489,372." (Citations omitted; footnotes added.) In making those findings, the court relied on the testimony of Doubleday, Zarba and Mike Costello, along with other documentary evidence submitted by the plaintiff.

Before we address the merits of the claims on the cross appeal, we set forth our standard of review. "As a general rule, in awarding damages upon a breach of contract, the prevailing party is entitled to compensation which will place [it] in the same position [it] would have been in had the contract been properly performed. . . . Such damages are measured as of the date of the breach. . . . For a breach of a construction contract

involving defective or unfinished construction, damages are measured by computing either (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 224, 990 A.2d 326 (2010); see also *Duffy* v. *Woodcrest Builders, Inc.*, 2 Conn. Cir. 137, 143, 196 A.2d 606 (1963) ("[i]n the case of a defaulting building contractor, the situation is normally that of recovering the reasonable cost of getting the work done by another" (internal quotation marks omitted)).

"The [injured party] has the burden of proving the extent of the damages suffered. . . . Although the [injured party] need not provide such proof with [m]athematical exactitude . . . the [injured party] must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. . . . As we have stated previously, the determination of damages is a matter for the trier of fact. . . . Accordingly, we review the trial court's damages award under the clearly erroneous standard, under which we overturn a finding of fact when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *DeMattio* v. *Plunkett*, 199 Conn. App. 693, 721–22, 238 A.3d 24 (2020).

A

The plaintiff claims that the court erred in determining that the contract's liquidated damages provision

was the exclusive measure of damages for breach of the contract. We agree.

We first set forth general principles governing liquidated damages. "The law is well established in this jurisdiction, as well as elsewhere, that a term in a contract calling for the imposition of a penalty for the breach of the contract is contrary to public policy and invalid, but a contractual provision fixing the amount of damages to be paid in the event of a breach is enforceable if it satisfies certain conditions. . . . A contractual provision for a penalty is one the prime purpose of which is to prevent a breach of the contract by holding over the head of a contracting party the threat of punishment for a breach." (Citations omitted.) *Berger* v. *Shanahan*, 142 Conn. 726, 731, 118 A.2d 311 (1955). "A provision for liquidated damages [on the other hand] . . . is one the real purpose of which is to fix fair compensation to the injured party for a breach of contract. In determining whether any particular provision is for liquidated damages or for a penalty, the courts are not controlled by the fact that the phrase liquidated damages or the word penalty is used. Rather, that which is determinative of the question is the intention of the parties to the contract. Accordingly, such a provision is ordinarily to be construed as one for liquidated damages if three conditions are satisfied: (1) The damage which was to be expected as a result of the breach of the contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of the contract."[22]

[22] In the present case, the court found that the liquidated damages provision was enforceable because all three criteria had been met to establish the validity of the liquidated damages provision: damages resulting from a

(Internal quotation marks omitted.) *Tsiropoulos* v. *Radigan*, 163 Conn. App. 122, 127–28, 133 A.3d 898 (2016); see also *Banta* v. *Stamford Motor Co.*, 89 Conn. 51, 54, 92 A. 665 (1914) (" 'As a general rule parties are allowed to make such contracts as they please, including contracts to liquidate and fix beforehand the amount to be paid as damages for a breach of such contracts; but the courts have always exercised a certain power of control over contracts to liquidate damages, so as to keep them in harmony with the fundamental general rule that compensation shall be commensurate with the extent of the injury. . . . When the nature of the engagement is such that upon a breach of it the amount of damages would be uncertain or difficult of proof, and the parties have beforehand expressly agreed upon the amount of damages and that amount is not greatly disproportionate to the presumable loss, their expressed intent will be carried out.' ").

Because the plaintiff's challenge to the court's interpretation of the liquidated damages provision in the contract as being the plaintiff's exclusive remedy for the defendant's breach of the contract involves a matter of contract interpretation, we set forth our well established standard of review governing such claims. "[W]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . Because a question of law is presented, review of the trial court's ruling is plenary, and this court must determine whether the trial court's conclusions are legally and logically correct, and whether they find support in the facts

breach of contract were uncertain at the time the parties entered into the contract; the parties clearly expressed their intent to liquidate damages in advance as expressed in article 2, § 2.1.1; and the amount stipulated was reasonable. The defendant did not challenge the enforceability of the liquidated damages provision at trial, nor has it challenged on appeal the court's finding concerning its validity and enforceability. The court's finding that the provision was valid and enforceable, thus, is not at issue in this appeal.

appearing in the record. . . . [T]he intent of the parties [to a contract] is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Citation omitted; internal quotation marks omitted.) *Detar* v. *Coast Venture XXVX, Inc.*, supra, 74 Conn. App. 322–23.

In the present case, liquidated damages are covered by article 2 of the contract. Article 2, § 2.1, which governs the time frame of the contract, provides: "The contract period is established from the Notice to Proceed issued by the Engineer for a period of 140 days, including weekends and holidays. The work should be substantially complete at that time, unless the Contractor has been granted an extension by methods defined and prescribed herein." That provision is followed by § 2.1.1, titled "Liquidated Damages," which provides: "Failure of the Contractor to meet this established timeframe will result in liquidated damages being assessed in the amount of $2,000/day for each and every calendar day beyond the contract time limit." Section 2.1.2 of article 2 further provides that time is of the essence[23] for the general performance of the contract and, additionally, that, "[i]n the event the Contractor fails to perform the work in a timely manner due to the Contractor's poor planning, financial status, errors in construction or any other reason directly attributed to the Contractor's circumstances, the [plaintiff] may institute

[23] "When it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at the time specified in the contract or within the period specified in the contract is essential in order to enable him to require performance from the other party. . . . Its commonly understood meaning is that insofar as a time for performance is specified in the contract, failure to comply with the time requirement will be considered to be a material breach of the agreement." (Internal quotation marks omitted.) *Blackwell* v. *Mahmood*, 120 Conn. App. 690, 699 n.4, 992 A.2d 1219 (2010).

default proceedings against the Contractor to recover *damages* and *losses*." (Emphasis added.)

In making its determination that liquidated damages were the plaintiff's exclusive remedy under the contract, the court cited *Hanson Development Co.* v. *East Great Plains Shopping Center, Inc.*, supra, 195 Conn. 64, for the principle that "a seller may not retain a stipulated sum as liquidated damages and also recover actual damages." Specifically, the court stated: "Where the parties have entered into a voluntary agreement as to how to address any potential damages from a breach of contract, such agreement if validly entered into is to be enforced. Therefore, the plaintiff's claim for both liquidated damages and consequential damages is an attempt to have its cake and eat it too. In *Saturn Construction Co.* [v. *Dept. of Public Works*, Superior Court, judicial district of Hartford, Docket No. CV-93-0704690-S (October 17, 1994), in which the court found enforceable a liquidated damages provision in a state contract that provided for liquidated damages of $1000 per day for failure to complete a construction job in a timely manner], Judge Sheldon noted that it is possible, depending on the wording of the liquidated damages provision, to obtain both under narrow circumstances: '[A]lthough an unrestricted liquidated damages clause operates as a bar to the recovery of all actual or consequential damages for breach of the contract; *Camp* v. *Cohn*, 151 Conn. 623, 626, 201 A.2d 187 (1964); parties to a contract may choose to narrow the scope of their liquidated damages clause by clearly expressing that intention either in the language of the clause itself or in the remaining language of the contract.' For example, the clause could be limited to the loss of use of a proposed property. In the present case, interpreting the contract as a matter of law, the language of the liquidated damages clause is not limited in any way that

would allow an independent claim for actual and consequential damages. The parties having agreed upon the terms of the liquidated damages clause, the court is not free to disregard it or read other terms into the contract."

We conclude that the court improperly determined that liquidated damages were the plaintiff's exclusive remedy under the contract. Our Supreme Court has "long . . . held that contracting parties may decide on a specified monetary remedy for the failure to perform a contractual obligation." *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 203, 931 A.2d 916 (2007). Moreover, "[p]arties to a contract may agree on the remedies available in the event of a breach of contract. If the language of the agreement discloses that the parties intended to limit the remedies to those stated, the agreement will be enforced and the party will be limited to the exclusive remedies outlined in the agreement. . . . A contract will not be construed to limit remedial rights *unless there is a clear intention that the enumerated remedies are exclusive*." (Emphasis added; internal quotation marks omitted.) *International Marine Holdings, Inc.* v. *Stauff*, 44 Conn. App. 664, 676, 691 A.2d 1117 (1997). That principle is supported by the language of the Uniform Commercial Code and General Statutes § 42a-2-719 (1), under which the language of a limited remedy in a contract that is designed to be the sole exclusive remedy must be clearly expressed. See *Gaynor Electric Co.* v. *Hollander*, 29 Conn. App. 865, 871–72, 872 n.4, 618 A.2d 532 (1993).

The language of the contract in the present case does not support the court's conclusion that liquidated damages were the plaintiff's exclusive remedy. The liquidated damages provision in § 2.1.1 of article 2, which provides that the failure of the contractor to meet the time frame established therein will result in liquidated damages, clearly applies to damages resulting from

delay; there is no language expressly stating that such damages are the plaintiff's exclusive remedy for a breach of the contract not related to the defendant's delay in performance, and the fact that the contract provided for liquidated damages caused by the defendant's failure to perform the work within the time frame set forth in the contract does not, by itself, demonstrate a clear intent that such delay damages are the exclusive remedy available to the plaintiff under the contract, which must be viewed in its entirety. See *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 49, 148 A.3d 1123 (2016) ("[t]he contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so" (internal quotation marks omitted)), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017). In the present case, the time is of the essence provision in § 2.1.2 of article 2 of the contract specifically allows the plaintiff to institute default proceedings against the defendant to recover "damages and losses" if the defendant fails "to perform the work in a timely manner due to the [defendant's] poor planning, financial status, errors in construction or any other reason directly attributed to the [defendant's] circumstances . . . ." Notably, § 2.1.2 of article 2 does not reference "liquidated damages"; instead, it refers to "damages and losses." Because § 2.1.1 of article 2 of the contract specifically references "liquidated damages," the fact that § 2.1.2, instead, references "damages and losses" is evidence of a contractual intent to allow for the recovery of nondelay damages and losses, in addition to the liquidated damages due to delays allowed in § 2.1.1. To construe the contract otherwise would render that provision in § 2.1.2 superfluous. See *Assn. Resources, Inc.* v. *Wall*, supra, 298 Conn. 183 ("the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision

superfluous" (internal quotation marks omitted)); see also *Old Colony Construction, LLC* v. *Southington*, 316 Conn. 202, 214–15, 113 A.3d 406 (2015) ("[w]hen a contract expressly preserves remedies following termination, such a reservation must be given full effect absent evidence of a more limited intent").

We next must reconcile our conclusion with the general principle cited by the trial court that "a plaintiff may not recover both liquidated damages and actual damages."[24] *McClintock* v. *Rivard*, 219 Conn. 417, 430 n.13, 593 A.2d 1375 (1991). We hold that, under the specific language of the contractual provisions at issue here, our conclusion is not inconsistent with that principle. When, as here, a liquidated damages provision is limited in its application to damages resulting from delays and does not expressly provide that liquidated damages are the exclusive remedy, it does not prevent the recovery of actual damages for items to which the liquidated damages provision does not apply, i.e., nondelay damages. See 22 Am. Jur. 2d, Damages § 539 (2022) ("[a] provision for liquidated damages does not prevent the recovery of actual damages caused by events that are not covered by the liquidated damages clause unless the contract expressly precludes the recovery of damages other than those enumerated"). It stands to reason that, so long as the predicate for both awards is not the same, the recovery of both liquidated damages and actual or consequential damages will not result in an impermissible double award. Accordingly, although, because of the liquidated damages provision, the plaintiff cannot additionally recover actual or compensatory damages resulting from the delays caused by the defendant, the liquidated damages provision of the

[24] "Actual or compensatory damages, the terms being synonymous, are damages in satisfaction of, or in recompense for, loss or injury sustained." (Internal quotation marks omitted.) *Manning* v. *Pounds*, 2 Conn. Cir. 344, 346, 199 A.2d 188 (1963).

contract does not preclude the plaintiff from recovering from the defendant nondelay actual and consequential damages.

Although Connecticut courts have not yet squarely addressed this issue,[25] our conclusion is consistent with holdings of many state courts.[26] For example, in *Framan Mechanical, Inc.* v. *Dormitory Authority of the*

[25] In its brief, the plaintiff argues that *Dean* v. *Connecticut Tobacco Corp.*, 88 Conn. 619, 625, 92 A. 408 (1914), and *Banta* v. *Stamford Motor Co.*, supra, 89 Conn. 51, both support the principle that a liquidated damages provision in a contract does not preclude the nonbreaching party from seeking and being awarded damages for defective or unfinished construction, or for nondelay damages not covered by the liquidated damages provision. We disagree. One of the issues before our Supreme Court in *Dean* was whether the defendant was harmed by a jury instruction relating to the third count of its counterclaim, which alleged a claim for special damages through injury to harvested tobacco resulting from delay in the completion of a warehouse beyond the stipulated date. *Dean* v. *Connecticut Tobacco Corp.*, supra, 624. The court concluded that, because the evidence in support of the claim for special damages was speculative, the jury instruction that there could be no recovery of those damages was amply justified. Id., 624–25. Furthermore, the court noted that the parties had a provision in their contract for liquidated damages to be recoverable for any delay in the completion of the work and stated that "[t]he parties having stipulated in advance as to the amount of damages recoverable, further recovery, or recovery upon some other basis, could not, of course, be had." Id., 625–26. In *Banta*, the issue before our Supreme Court was whether the liquidated damages provision in the parties' contract providing for the recovery of liquidated damages in the event of delay in the completion of the construction of a pleasure boat was a penalty, which the law would not enforce. *Banta* v. *Stamford Motor Co.*, supra, 54. The court determined that the provision was enforceable, as the amount of liquidated damages provided for in the contract was not unreasonable; id., 57; and stated that, because "[t]he defendant, by its contract with the plaintiff, agreed to pay these sums in the event named . . . [i]t must abide by its bargain . . . ." Id., 54. In neither case did our Supreme Court address the issue or conclude that a party may recover both liquidated damages and completion or other nondelay damages.

[26] See *Delaware Limousine Service, Inc.* v. *Royal Limousine Service, Inc.*, Docket No. C.A. 87C-FE-104, 1991 WL 89787, *1 (Del. Super. May 2, 1991) (following general rule that liquidated damages provision does not prevent recovery of actual damages caused by events that are not covered by liquidated damages clause unless contract expressly provides that damages other than those enumerated shall not be recovered); *Lawson* v. *Durant*, 213 Kan. 772, 775, 518 P.2d 549 (1974) (same); *Meyer* v. *Hansen*, 373 N.W.2d

State of New York, Docket No. A1114-14, 2019 WL 1747007, *10 (N.Y. Sup. March 7, 2019) (decision without published opinion, 114 N.Y.S.3d 814 (2019)), the Supreme Court of New York for Albany County stated: "Ordinarily, a party is awarded either actual damages or liquidated damages, but not both when the predicate for the awards is the same . . . . The rationale for this rule is that liquidated damages, by their nature, are in lieu of, not in addition to, other compensatory damages . . . . As a corollary, both actual and liquidated damages are recoverable damages when the predicate for

392, 395 (N.D. 1985) (same); *Visa, Inc.* v. *Sally Beauty Holdings, Inc.*, Docket No. 02-20-00339-CV, 2021 WL 5848758, *12 (Tex. App. December 9, 2021) (same), petition for review filed (Tex. February 23, 2022) (No. 22-0024); *VanKirk* v. *Green Construction Co.*, 195 W. Va. 714, 719, 466 S.E.2d 782 (1995) (same), cert. denied, 518 U.S. 1028, 116 S. Ct. 2571, 135 L. Ed. 2d 1087 (1996); see also *A. Miner Contracting, Inc.* v. *Toho-Tolani County Improvement District*, 233 Ariz. 249, 258, 311 P.3d 1062 (Ariz. App. 2013) ("a party may not receive actual and liquidated damages for the same injury; however, actual damages related to the cost of completion are separate and distinct from liquidated damages intended to compensate for injury resulting from delay"), review denied, Arizona Supreme Court (March 21, 2014); *Draper* v. *Westwood Development Partners, LLC*, Docket No. CIV.A. 4428-MG, 2010 WL 2432896, *3 (Del. Ch. June 3, 2010) ("[u]nless a contract provides that liquidated damages are to be the exclusive remedy for a breach, a liquidated damages provision does not preclude other relief to the nonbreaching party, if the actual damages are caused by an event not contemplated by the parties in the liquidated damages clause"); *Phillips* v. *Gomez*, 162 Idaho 803, 810, 405 P.3d 588 (2017) ("a liquidated damages clause does not preclude a party from suing for actual damages if that right is preserved in the contract between the parties" (internal quotation marks omitted)); *Spinella* v. *B-Neva, Inc.*, 94 Nev. 373, 376, 580 P.2d 945 (1978) (claim that liquidated damages clause was sole measure of damages available was refuted by plain and unambiguous language of provision, which manifested intent that liquidated damages compensated only for delay in performance, and, thus, award of actual damages resulting from contractor's defective workmanship was proper); *Construction Contracting & Management, Inc.* v. *McConnell*, 112 N.M. 371, 377, 815 P.2d 1161 (1991) ("an award of actual damages unrelated to delay does not preclude an award of liquidated damages for delay-related damages" as "[t]he vice to be guarded against is a duplication of damages" (internal quotation marks omitted)); *Noble* v. *Ogborn*, 43 Wn. App. 387, 390, 717 P.2d 285 (liquidated damages clause does not preclude party from seeking actual damages when that right is preserved in contract), review denied, 106 Wn. 2d 1004 (1986).

the awards differ in kind . . . . As the United States Supreme Court has observed: There is no reason why parties competent to contract may not agree that certain elements of damage difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner. Provisions of a contract clearly expressed do not cease to be binding upon the parties, because they relate to the measure of damages . . . *J.E. Hathaway & Co.* v. *United States*, 249 U.S. 460, 464 [39 S. Ct. 346, 63 L. Ed. 707 (1919)]." (Citations omitted; internal quotation marks omitted.)

Our conclusion also gives effect to the plain language of article 2, § 2.1.2 of the contract, providing that, if the defendant failed to complete its work in a timely manner due to the various reasons set forth, including poor planning or "any other reason directly attributed to the [defendant's] circumstances," the plaintiff could institute default proceedings to recover damages and losses, which necessarily must mean damages and losses other than those attributable to the delays. See *Old Colony Construction, LLC* v. *Southington*, supra, 316 Conn. 212 (determination of whether defendant was entitled to default based remedies was governed by express terms of parties' contract). It can be inferred from the court's many findings in its comprehensive decision that the defendant's failure to complete the work in a timely manner was due to poor planning or other reasons attributable to the work it agreed to perform, as the court found that the plaintiff had performed its obligations under the contract; that "the defendant may have used a mistaken basic assumption in making its bid and entering into the contract, which ultimately resulted in consequences adverse to it"; that the defendant's delay in doing the necessary testing and work was primarily the result of the defendant failing to "submit an acceptable CWP, [health and safety plan] and

demolition work plan to TRC so that it could, in turn, submit any needed documents to the EPA for its approval, which was necessary for substantive work to begin''; that the defendant elected to demobilize from the site on or about November 20, 2015; that the defendant had refused to proceed with any further work until a CWP was done or if it was required to sample the steel; that, as of December, 2015, the defendant had finished less than 10 percent of the work required under the contract; and that the defendant had failed to account for the potential contamination or testing of some structural steel, which had been thought to have been recyclable and which, thereby, resulted in the need for additional work both in terms of time and labor.

We conclude, therefore, that the court erroneously failed to determine whether the plaintiff proved that it had suffered any compensable actual or consequential nondelay damages and, if so, the amount of such damages. Because the court did not make any factual findings about the existence and amount of the plaintiff's compensable nondelay related damages, we must remand this case to the trial court for a new hearing in damages.[27] At trial, the plaintiff sought three categories of alleged nondelay damages: (1) the difference in the contract price between what the plaintiff agreed to pay

[27] In determining whether the liquidated damages clause was a reasonable estimate of damages and not a penalty, the court noted that the plaintiff presented credible evidence supporting specific items of damage and the amounts thereof. The context in which the court's determinations were made, in its analysis of the reasonableness of liquidated damages, however, is different from that where the court actually would be making the required finding that the plaintiff proved its damages by a preponderance of the evidence. Thus, we cannot rely on the court's findings regarding this evidence to direct that judgment be rendered for the plaintiff on the items and amounts identified by the court as supported by the evidence with respect to the reasonableness of liquidated damages. Furthermore, the plaintiff argues on appeal that the court miscalculated the amount of its actual damages with respect to at least one category of actual damages. For these reasons, we believe that a remand for a new damages hearing is required.

the defendant and what it agreed to pay Costello allegedly for similar work; (2) additional costs associated with rebidding the job and the engineering support that went with it after the contract between the defendant and the plaintiff was terminated; and (3) additional costs to complete the job beyond Costello's accepted bid. On the basis of the issues raised on appeal, we provide the following guidance as to questions the court should consider with respect to each category of damages, given that these issues are certain to arise on remand.[28]

With respect to the first category of damages—the difference in contract price between the plaintiff's contract with the defendant and its contract with Costello—the plaintiff argues on appeal that "[t]he court erred in failing to account for [the $167,652 sum it had paid to the defendant] when it calculated the difference between [the defendant's] and Costello's contract price." On remand, not only will the court need to calculate the difference in price between the two contracts, but it also will need to consider any differences in the scope of the two contracts, as well as the fact that the defendant's contract with the plaintiff had been partially performed, which will factor into the court's calculation of the cost of the remaining work covered under the plaintiff's contract with Costello. Put another way, the plaintiff is entitled to damages for services that the defendant was supposed to complete but that Costello completed for a higher price.

As to the second category of damages—damages associated with rebidding the project—the court will need to determine whether the requested damages are either delay or nondelay damages. For example, a claim

[28] We do not intend this to be an exhaustive list of relevant issues for the court to consider at the damages hearing. We merely identify and address specific issues raised by the parties in this appeal.

that the plaintiff incurred additional costs to oversee the project because it was delayed would be covered by the liquidated damages clause of the parties' contract and may not be additionally awarded as actual damages. On the other hand, the costs of drafting, printing, and distributing the new bid package and of reviewing bids submitted in response thereto would not be delay damages because they are damages caused by the defendant's failure to perform, rather than its delayed performance.

Finally, for the third category of damages—the plaintiff's claimed additional costs to complete the job over Costello's contract price—the court will need to determine whether such costs naturally flow from the defendant's default of its performance obligation under the parties' agreement and whether they were foreseeable to the defendant. On remand, therefore, the court must determine if the alleged damages flowing from the defendant's posttermination conduct have a sufficient nexus to its breaches of the contract, which the court found occurred in November and December, 2015, prior to when the plaintiff terminated its contract with the defendant in January, 2016. See *Calig* v. *Schrank*, 179 Conn. 283, 286, 426 A.2d 276 (1979) ("[i]t is hornbook law that to be entitled to damages in contract a plaintiff must establish a causal relationship between the breach and the damages flowing from that breach"); *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 186, 90 A.3d 219 (2014) ("proof of causation . . . properly is classified as part and parcel of a party's claim for breach of contract damages"); 3 Restatement (Second), Contracts § 346, p. 110 (1981) (in order to receive anything other than nominal damages, party must prove both that breach of contract "caused" loss and amount of loss). Additionally, "[a]s our Supreme Court has explained, [i]n an action founded . . . on breach of contract . . . the recovery of the plaintiffs [is] limited

to those damages the defendant had reason to foresee as the probable result of the breach at the time when the contract was made. *Neiditz* v. *Morton S. Fine & Associates, Inc.*, 199 Conn. 683, 689 n.3, 508 A.2d 438 (1986); see also *Meadowbrook Center, Inc.* v. *Buchman*, [supra, 188–89] (under Connecticut law, the causation standard applicable to breach of contract actions asks . . . whether [the plaintiff's damages] were foreseeable to the defendant and naturally and directly resulted from the defendant's conduct)." (Internal quotation marks omitted.) *Bruno* v. *Whipple*, 186 Conn. App. 299, 311–12, 199 A.3d 604 (2018), cert. denied, 331 Conn. 911, 203 A.3d 1245 (2019). For example, if, because of the defendant's breach, the cost of completion became greater due to adverse weather conditions that would not have impacted the project had the defendant properly performed its obligations, the court would have to determine if such damages were foreseeable to the defendant and a natural consequence of the breach. On remand, the court will have to determine whether the plaintiff has made that necessary connection.

B

The last issue we must address is the plaintiff's claim that the court erred in limiting the award of liquidated damages to 254 days. We disagree.

In its memorandum of decision, the court specifically found that, "[a]lthough the job was never completed, *the plaintiff has not sought liquidated damages beyond 260 days* (adjusted to 254 days), which falls shortly after Costello received notice of the EPA's approval of the CWP. Thus, the total amount of liquidated damages due the plaintiff is found to be $508,000," which the court adjusted to $489,372 after it accounted for the retainage held by the plaintiff. (Emphasis added.) In its cross appeal, however, the plaintiff seeks additional liquidated damages for a time period that was not

requested at trial. Specifically, in its appellate brief, the plaintiff explains that it had calculated liquidated damages "through the date on which Costello reached the same point in the project where [the defendant] left off" on the basis of its "understanding that [liquidated damages] were not the exclusive measure of its damages. The exhibit [submitted into evidence by the plaintiff detailing the damages it sought] was compiled based on the premise that it would be unfair to seek [liquidated damages] against [the defendant] during Costello's performance of project work." Given the court's determination that liquidated damages were the plaintiff's exclusive remedy under the contract, however, the plaintiff now claims on appeal that liquidated damages "should have been run through the date of the court's decision on December 20, 2019, a period of 1413 days."

This claim requires little discussion. It is well settled that "[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would . . . [be] unfair both to the [court] and to the opposing party." (Emphasis omitted; internal quotation marks omitted.) *Overley* v. *Overley*, 209 Conn. App. 504, 512, 268 A.3d 691 (2021). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 511. In the present case, the plaintiff requested that the court award liquidated damages for

a period of 260 days, which was adjusted by the court to account for a period of time in which the contract had been extended. The court awarded the plaintiff exactly what it had requested, with the exception of the adjustment, which the plaintiff has not challenged. We agree with the defendant that the plaintiff cannot on appeal now claim that the court should have based its award on a time period different from the one that the plaintiff relied on and requested at trial. See *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014). Furthermore, the plaintiff's claim is premised on the court's determination that liquidated damages were the plaintiff's exclusive remedy. Because we have concluded that the court erred in reaching that conclusion and that the plaintiff is entitled to actual or consequential nondelay damages to the extent they can be proved by a preponderance of the evidence, the premise of the plaintiff's claim on appeal no longer exists. Accordingly, this claim fails.

III

CONCLUSION

In summary, the court properly rendered judgment in favor of the plaintiff on its breach of contract claim. Although the court's award of liquidated damages in the amount of $489,372 was proper, the court erred in concluding that liquidated damages were the plaintiff's exclusive remedy under the contract, which does not expressly preclude the recovery of damages other than the liquidated damages resulting from delays and, in fact, expressly allows the plaintiff to seek recovery for "damages and losses" in addition to the delay related liquidated damages. The court, thus, erroneously failed to determine whether the plaintiff proved that it had suffered any compensable actual or consequential nondelay damages and, if so, the amount of such damages.

As a result, we must remand this case to the court for a new hearing in damages.

The judgment is reversed in part and the case is remanded for a new hearing in damages consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ANTWAN SEASE *v.* COMMISSIONER OF CORRECTION
(AC 44160)

Cradle, Clark and Flynn, Js.

Syllabus

The petitioner, who had been convicted of the crimes of felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree, and sentenced to sixty years' incarceration, sought a writ of habeas corpus, claiming ineffective assistance of his trial counsel for, inter alia, failing to adequately investigate his mental health history and to adequately present such evidence as mitigation at sentencing. The habeas court denied the petitioner's claim of ineffective assistance of counsel, determining that certain mental health records offered by the petitioner at the habeas trial did not "materially expand" on the information that had been presented to the sentencing court in the presentence investigation report. The court further determined that the petitioner had failed to prove that there was any reasonable probability that his sentence would have been different had his trial counsel provided those mental health records to the sentencing court, and that no prejudice to the petitioner had been established. The court did not address the issue of deficient performance. Following the denial of his petition for certification to appeal, the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal: the record revealed an unusually troubled, traumatic and extensive mental health history, significant parts of which were not in the presentence investigation report, such that the petitioner's ineffective assistance of counsel claim involved issues that were debatable among jurists of reason, were such that a court could resolve the issues in a different manner and raised questions that deserved encouragement to proceed further; moreover, it was premature to decide whether the judgment of the habeas court should be reversed on the merits because

findings were necessary from the habeas court about whether the petitioner's trial counsel rendered constitutionally deficient performance, and this court deferred its decision until it reviewed the habeas court's findings ordered in its remand.

2. The habeas court erred in determining that no prejudice to the petitioner had been established under *Strickland* v. *Washington* (466 U.S. 668), there being a reasonable probability that his sentence would have been less severe in light of the mitigating evidence that was presented at the habeas trial and not presented at sentencing: the presentence investigation report before the sentencing court did not relate how any of the petitioner's traumatic life events and psychiatric history might mitigate or lessen his punishment, and it failed to provide the detailed and expanded psychiatric history that was presented in the mental health records that were admitted as full exhibits at the habeas trial, as these records provided a fuller picture of the past trauma experienced by the petitioner as a child, as well as a detailed analysis of his command hallucinations and paranoid delusions; moreover, the progress notes from the records, which ended only a few months before the date of his crimes, detailed how his hallucinations gradually decreased and eventually ceased when he took a specific dosage of a specific medication daily, and the information in the presentence investigation report that the petitioner had not taken any medication in some time and was not seeing a mental health counselor coupled with the information in his mental health records that he experienced hallucinations when he did not take a specific medication provided relevant information as to how the additional information contained in the mental health records might reasonably have justified a less severe sentence.

3. This court remanded this case to the habeas court for the purpose of making underlying factual findings from the record and, based on those findings, for a determination of whether the petitioner has shown that his trial counsel's representation of him at sentencing constituted constitutionally deficient performance; moreover, this court had no findings of fact from the habeas court regarding trial counsel's performance to make a determination under *Strickland*, and, as members of an appellate tribunal, could not make factual findings for the first time on appeal.

(*One judge dissenting*)

Argued November 16, 2021—officially released April 26, 2022

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. *Remanded*; *further proceedings*.

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

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Sharmese Hodge*, state's attorney, and *JoAnne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, J. Sentencing is a critical stage of the criminal process. *Gardner* v. *Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). In *United States* v. *Pinkney*, 551 F.2d 1241, 1249 (D.C. Cir. 1976), the court held that "the first step toward assuring proper protection for the rights to which defendants are entitled at sentencing is recognition by defense counsel that this may well be the most important part of the entire proceeding." Before this court is the appeal of the petitioner, Antwan Sease, following the habeas court's denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner raises three principal issues on appeal: (1) the court abused its discretion in denying certification to appeal; (2) his right of due process was violated by the prosecuting authority's knowing presentation of false testimony at his criminal trial; and (3) the court improperly denied his claim that his right to effective assistance of trial counsel at sentencing was violated. We make no determination as to whether the petitioner prevails on his third claim, but we conclude that the habeas court improperly denied his petition for certification to appeal, and remand the matter to the habeas court for additional factual findings regarding the performance prong of his ineffective assistance of counsel at sentencing claim. We leave the petitioner's second claim to another day in light of our remand order on his third claim.

For our purposes here, the underlying facts can be summarized from this court's opinion affirming the judgment of his conviction in *State* v. *Sease*, 147 Conn. App. 805, 83 A.3d 1206, cert. denied, 311 Conn. 932, 87 A.3d 581 (2014), as follows. On October 3, 2009, the petitioner met with another man, Quan Morgan. Id., 807. Each armed himself with a .38 caliber handgun that the petitioner had provided. Id. At approximately 2:30 a.m., the petitioner and Morgan walked to the rear of a club on Main Street in Hartford where they robbed two men in the presence of several witnesses. Id., 807–808. The petitioner walked up to a car in which the victim, Edward Haslam, was seated. Id. After telling Haslam to " 'empty your [f—] pockets,' " the petitioner fatally shot Haslam in the chest. Id., 808. Following a jury trial, he was convicted of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (2) and 53a-48. The petitioner was sentenced to thirty years' incarceration for felony murder, twenty years' incarceration for robbery, and ten years' incarceration for conspiracy to commit robbery, which sentences were to run consecutively to each other, for a total effective sentence of sixty years' incarceration. A total effective sentence of sixty years imprisonment is equivalent to a life sentence. See General Statutes § 53a-35b.

In 2016, the petitioner commenced the present habeas action. In the operative third amended petition for a writ of habeas corpus, filed in 2018, the petitioner alleged in count three that his trial counsel provided ineffective assistance for several reasons, including failing to investigate adequately the petitioner's mental health history and failing to present such evidence adequately as mitigation at sentencing.

In denying the petitioner's claim of ineffective assistance of trial counsel, the habeas court determined that the two mental health records offered by the petitioner at the habeas trial did not "materially expand" on the information that had been presented to the sentencing court in the presentence investigation report and, therefore, the petitioner had failed to prove that there was any reasonable probability that his sentence would have been different had his trial counsel provided those mental health records to the sentencing court. The court concluded that no prejudice to the petitioner had been established. The court did not address the issue of deficient performance. The petitioner filed a petition for certification to appeal, which the habeas court denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We first address the habeas court's denial of the petitioner's petition for certification to appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 564, 941 A.2d 248 (2008), quoting in part *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994).

"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. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 449, 936 A.2d 611 (2007).

We conclude on the basis of our review of the petitioner's substantive claims on the merits that he has demonstrated that the court abused its discretion in denying certification to appeal. The record in the present case reveals an unusually troubled, traumatic, and extensive mental health history, significant parts of which were not also in the presentence investigation report. The petitioner had both audio and visual hallucinations throughout his life, was professionally diagnosed with schizophrenia, psychotic disorder, and posttraumatic stress disorder, and he was prescribed a variety of psychiatric medications including Risperdal, Ritalin, Risperidone, and Trazodone. For reasons that follow, we conclude that the habeas court abused its discretion in denying his petition for certification to appeal. His ineffective assistance of counsel claim involves issues that are debatable among jurists of reason, are such that a court could resolve the issues in a different manner and raise questions that deserve encouragement to proceed further. See *Simms* v. *Warden*, supra, 230 Conn. 616. Although the petitioner has surmounted that hurdle, we note on the basis of our review of the record that it would be premature to proceed to the final step wherein this court would decide whether the judgment of the habeas court should be reversed on the merits. It is premature because find-

ings are necessary from the habeas court about whether the petitioner's trial counsel rendered constitutionally deficient performance. We defer our decision with respect to whether the judgment of the habeas court should be reversed on the merits until we have reviewed the habeas court's findings that we order in our remand.

We next turn in our analysis to the petitioner's claim that the habeas court improperly denied his claim that his right to effective assistance of trial counsel had been violated. The petitioner argues that his trial counsel was ineffective by failing to properly investigate and to adequately present evidence of the petitioner's mental health history in mitigation at the sentencing hearing.[1] The habeas court noted that among the petitioner's claims was that his trial counsel "failed to investigate and use the petitioner's mental health background as mitigation at sentencing." We see two aspects to the petitioner's claim. One is the alleged failure to investigate further. The other aspect is the failure of trial counsel to use all of the petitioner's mental health history that was presented to the habeas court as mitigation at sentencing. Because both aspects of this claim concern the petitioner's mental health records, the effectiveness of trial counsel at sentencing, and involve arguments that are linked in that they both involve some of the same facts, we will treat them together.

Our review of the petitioner's sixth amendment ineffective assistance of counsel claim is guided by the factors set forth by the United States Supreme Court in *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A convicted [petitioner's] claim that counsel's assistance was so defective as to

[1] The petitioner also argues that the habeas court improperly denied his claim that his trial counsel rendered ineffective assistance by failing to cross-examine and challenge testimony of a certain state's witness adequately. We leave this claim to another day in light of our remand order.

require reversal of a conviction . . . has two components. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Id., 687. To establish prejudice, one "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 694.

Practice Book § 43-13 requires that a defense counsel familiarize himself not only with the contents of the presentence investigation report, but also with "any special medical or psychiatric reports pertaining to the client." Prevailing norms of practice as reflected in the American Bar Association Standards are guides for determining what is reasonable. We, therefore, look to the following American Bar Association Standards for defense counsel at sentencing. "Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client's background . . . ." A.B.A. Standards for Criminal Justice: Defense Function (4th Ed. 2017) standard 4-8.3 (a), available at americanbar.org/groups/criminal_justice/Standards/DefenseFunctionFourthEdition/ (last visited April 21, 2022). "Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused." Id., standard 4-8.3 (c). "Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as

reasonably possible . . . .'' Id., standard 4-8.3 (d). ''If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. . . . In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court's presentence report . . . .'' Id., standard 4-8.3 (e).

We turn to the prejudice prong of *Strickland*. The petitioner argues that ''the habeas court failed to recognize the significance of the petitioner's mental health records.'' He further argues that ''the petitioner's involvement in this crime could be directly traced to changes in his mental health treatment, and the resulting reemergence of command hallucinations that played a causal role in the petitioner's criminal activity. That was powerful mitigating information . . . .'' The petitioner contends that the following testimony from Morgan at the criminal trial indicates that the shooting resulted from a command hallucination: ''All we was doin' was supposed to go get something to eat, but in the mix of going to get something to eat it was when [the petitioner] started talking to himself. He says, they got to be him, they got to be him. I asked him, what are you talking about?''

The respondent, the Commissioner of Correction, counters that the petitioner cannot show that he was prejudiced. The respondent contends that any failure of trial counsel to investigate the petitioner's lengthy psychiatric history and any failure to bring the extent of that history to the attention of the sentencing court was harmless because the presentence investigation report summarizes that history. We agree with the petitioner that he has satisfied the prejudice prong of *Strickland*, and we are not convinced by the respondent's argument.

In analyzing the prejudice prong in the present case, we must determine whether, in light of the mitigating

evidence that was presented at the habeas trial and not presented at sentencing, there is a reasonable probability that the sentence would have been less severe. See, e.g., *Wiggins* v. *Smith*, 539 U.S. 510, 534–36, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). The United States Supreme Court has observed that, "[e]ven though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because any amount of [additional] jail time has [s]ixth [a]mendment significance." (Internal quotation marks omitted.) *Lafler* v. *Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

In determining the petitioner's sentence, the sentencing court had before it the remarks of the petitioner's trial counsel as well as the contents of the presentence investigation report. That report,[2] under the heading of "Medical/Mental Health," alerted the sentencing court that when the petitioner was six years old, he witnessed his uncle shoot and kill his aunt and that when he was eight years old he witnessed his babysitter being shot and killed by his uncle. The presentence investigation report noted that the petitioner had been treated "on and off" with Ritalin for attention deficit disorder, and that he also had been diagnosed with post-traumatic stress disorder, and that he had been prescribed Risperdal and Trazodone, but that the last time he took any medication was in early 2009. It further stated that in

[2] Practice Book § 43-3 (a) provides in relevant part: "If the defendant is convicted of a crime other than a capital felony, the punishment for which may include imprisonment for more than one year, the judicial authority shall order a presentence investigation, or the supplementation of any existing presentence investigation report. . . ." See also General Statutes § 54-91a.

"The primary value of a [presentence investigation report] stems from the information contained therein, not from the report itself. Most of this information can be brought to the trial court's attention by either party by means other than a [presentence investigation report]." (Footnote omitted.) *State* v. *Patterson*, 236 Conn. 561, 574–75, 674 A.2d 416 (1996).

2007, he received medical treatment after being stabbed in his right arm, chest, and pelvic area; that in May, 2009, he received medical treatment as a result of a bullet wound to his left thigh; and that in October of that same year he was treated for a bullet wound to his left knee. Additionally, the presentence investigation report stated that records from the Department of Children and Families indicated that the petitioner had been diagnosed with schizophrenia and psychotic disorder and that he had attacked innocent people due to his hallucinations. It further stated that in September, 2006, it was reported that he spent 90 percent of his time locked in the bathroom listening to music as that was where he felt safe. The presentence investigation report revealed that the petitioner had a history of being a danger to himself and others. The probation officer writing the presentence investigation report concluded that the petitioner was in great need of mental health treatment to deal with his past trauma and respectfully recommended that, considering the nature of the offenses, the petitioner receive a lengthy period of incarceration.

In his statement to the sentencing court on the petitioner's behalf, trial counsel commented: "[S]ociety sort of let him go. I mean he had mental problems. He was hiding in a bathroom, he witnessed murders, he was abused, his mother had problems with substance abuse . . . . I mean I know that there was probably some attempts here and there and at one point, probably when it was too late and he didn't want any counseling. . . . [W]here was the system? . . . But you know anybody that reads this presentence report has got to come away and say, well he didn't have much of a chance, did he? . . . And some of the things in this report, Your Honor, I was unaware of. I was unaware that . . . some of the mental problems that he had that are mentioned. In talking to him over the last year or so, I did go to see him three or four times, Your Honor, at

the jail. And sometimes—you know, I'm not sure if we were on the same wavelength. You know, I would talk to him and we would—so we got through and I'm not a psychiatrist and I'm not a doctor. You know I talk to people all the time. Like I say, I was unaware of some of the things that came out of this [presentence investigation report] but looking back now, what I read, I could filter it through and put it together in my equation of when I talked to him and some of the things that we talked about or some of the times we talked. Sometimes, you know, I wasn't reaching him and now I know that maybe there was a reason I wasn't able to reach him. But I'd ask the court to be merciful. I know it's hard but I think he deserves some mercy, Your Honor." The petitioner's trial counsel did not go further into the petitioner's history and treatment for mental illness.

The record indicates that the petitioner's trial counsel had represented approximately 10,000 defendants in criminal cases prior to his trial and that he met with the petitioner several times at the jail in which he was incarcerated awaiting trial. He further testified that he did not recall if he was ever alerted by the petitioner or the petitioner's mother about the extent of the petitioner's mental health history. The habeas court, however, made no findings as to any of this. It appears from the record at sentencing that although the petitioner ultimately agreed that trial counsel would speak for him, he had first requested new counsel be appointed by the court, considered representing himself, and finally agreed that his trial counsel could represent him at sentencing.

The effectiveness of trial counsel at the sentencing hearing is not rendered harmless by the presentence investigation report, which was compiled by the Office of Adult Probation. The presentence investigation report does not relate how any of the petitioner's traumatic life events and psychiatric history might mitigate

or lessen his punishment. A presentence investigation report gives a sentencing judge the benefit of a summary background it has gathered on a defendant. It makes a recommendation as to whether incarceration is appropriate; however, the Office of Adult Probation is not an advocate for a criminal defendant before the sentencing court. The role as trial counsel and as an advocate includes relating to the sentencing court how a client's lengthy mental health history could justify some mitigation of the court's sentence unless there are strategic or other good reasons not to do so.

We examine the differences in the information contained in the petitioner's presentence investigation report, which was considered by the sentencing court, and the petitioner's mental health records,[3] to determine whether there was a reasonable probability that the additional information contained in the mental health records but not in the presentence investigation report could have had an effect on the severity of the petitioner's sentence had those records been provided to the sentencing court as mitigating evidence. The following matter is included in the petitioner's mental health records, but was not mentioned in the presentence investigation report. Unlike the summary description contained in the presentence investigation report, his mental health records provide illuminating details of his battle with mental health concerns. The presentence investigation report made no mention of the petitioner having experienced visual hallucinations in which he had visions of his deceased aunt speaking to him. In

[3] By order of the habeas court, the petitioner's mental health records were sealed and only available to the parties. In order properly to review the claim raised by the petitioner on appeal, we ordered the mental health records unsealed and inspected them. Because the petitioner has raised the issue of the failure of his trial counsel to bring his mental health records adequately to the attention of the sentencing court and his failure to urge the sentencing court to consider such evidence in mitigation of the petitioner's sentence, we necessarily refer to them in this opinion.

contrast, the mental health records described how he was disturbed by his visual hallucinations of his murdered aunt accusing him of causing her death and that he began hearing audio command hallucinations when he was eight years old, but that those hallucinations went away spontaneously only to reappear in 2005, when the petitioner was approximately sixteen years old. The presentence investigation report made no mention that the mental health records indicated that the petitioner began treating with a psychiatrist in 2006, when he was seventeen years old and in the ninth grade. Unlike the presentence report, the mental health records note that he had received special education services since he was in the fifth grade. The presentence investigation report under the heading "Substance Abuse" mentioned the petitioner's use of alcohol and marijuana, but did not mention, as did his mental health records, that he smoked marijuana in attempt to quiet his hallucinations. The presentence investigation report briefly mentioned that the petitioner experienced hallucinations and had attacked innocent people based on them, but the mental health records explained that the petitioner was arrested after obeying an audio command hallucination to assault a police officer, thereafter, attempted to set the jail in which he was held on fire, and, subsequently, after attempting suicide, was transferred to a psychiatric facility where he was given medication for sleep, but where he received no antipsychotic medication.

The mental health records also provided the following details concerning the petitioner's hallucinations and paranoia, which were not mentioned in the presentence investigation report. These records indicated that prior to seeking treatment from a psychiatrist in 2006, the petitioner hallucinated daily, experienced paranoia, and was frightened that people wanted to kill him. The mental health records further indicated that the peti-

tioner stated during a 2006 visit with a psychiatrist that, since leaving jail, he felt that he could resist any command hallucinations that told him to do something dangerous to himself or others. Unlike the presentence investigation report, the progress notes detailed his battle with these symptoms and stated that, at various points during his treatment, the petitioner thought that the radio and television talked about him, was fearful that someone might want to harm him, wanted to stay in the apartment to avoid problems, and thought that one of his therapists was a witch who intended to steal his soul. The mental health records noted that the petitioner was paranoid, was not able to make eye contact comfortably, and seemed quite scared and distracted. The presentence investigation report mentioned that the petitioner had taken medication, but did not detail the effect that medication had on his hallucinations. In contrast, the mental health records included an initial assessment from 2006 when the petitioner was seventeen years old as well as progress notes until June, 2009, a few months before the underlying crimes. The mental health records detail how, after gradually increasing the dosage of medication, the petitioner's audio hallucinations became muffled and described how once the petitioner began taking a specific dosage of medication, he experienced substantial improvement, began smiling, and had no residual hallucinations. The records further detail how the petitioner's hallucinations and paranoia returned and began increasing after he ran out of medication.

We emphasize that the presentence investigation report failed to provide the detailed and expanded psychiatric history that was presented in the two mental health records that were admitted as full exhibits at the habeas trial. The mental health records provided a fuller picture of the past trauma experienced by the petitioner as a child, as well as a detailed analysis of his

command hallucinations and paranoid delusions that others were after him. The mental health records also detailed the harm that the petitioner caused to others as a result of his command hallucinations, which instructed him to assault a police officer and then, while he was in jail for that offense, caused him to attempt to set the jail on fire. The progress notes from the mental health records detail how the hallucinations gradually decreased when he took increased dosages of a specific medication daily and eventually ceased when he took a specific dosage of that medication daily. The progress notes of his treatment end in June, 2009, only a few months before the robbery and murder, indicating that he did not show for his appointment with his psychiatrist. The presentence investigation report indicated that the petitioner was not currently seeing a mental health counselor. The murder of the victim had occurred in October, 2009, and the presentence investigation report indicated that the last time the petitioner had taken any medication was early in 2009. That information from the presentence investigation report, when coupled with the information in his mental health records that the petitioner experiences hallucinations when he does not take a specific dosage of a specific medication, provides relevant information as to how the additional information contained in the mental health records might reasonably justify a less severe sentence. The sixty year sentence that the petitioner received constitutes a life sentence. See General Statutes § 53a-35b. Instead of having illuminating evidence from the mental health records before it, the sentencing court had only the summary presentence investigation report that recommended a lengthy sentence and trial counsel's statement that he was unaware "of some of the things that came out of this [presentence investigation report]" concerning the petitioner's mental health concerns. Had the sentencing court been aware of the lengthy, detailed psychiatric history in the petitioner's

mental health records, there is a reasonable probability that his sixty year sentence would have been less severe.[4]

We now turn to *Strickland*'s performance prong. In its memorandum of decision, the habeas court did not analyze why the petitioner's trial counsel failed to argue that his sentence should be mitigated by relating that entreaty to the petitioner's lengthy history of hallucinations and mental health diagnoses of attention deficit disorder, schizophrenia, psychotic disorder, and posttraumatic stress disorder for which he had been prescribed medication. There may be strategic or other

[4] We note that in the recently decided case of *Cruz* v. *Commissioner of Correction*, 206 Conn. App. 17, 34–36, 257 A.3d 399, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021), this court determined that the habeas court properly concluded that the petitioner was not prejudiced by the failure of the sentencing counsel to present additional mitigating evidence concerning his mental health. *Cruz* is inapposite to the petitioner's case. In *Cruz*, the petitioner had pleaded guilty pursuant to a plea agreement between the state and the petitioner. Id., 20. In exchange for his plea of guilty, the court informed the petitioner that it would sentence him to between twenty-five and forty-two years of incarceration with the opportunity to argue for less than the maximum of forty-two years. Id. He was sentenced to thirty-eight years of incarceration. Id. The issue decided in *Cruz* was that the petitioner could not prove that his defense was prejudiced because he could not show that he would have rejected the plea bargain in the face of overwhelming evidence that he would not have gone to trial for the crime of murder. Id., 23. The habeas court reasoned that Cruz, on the advice of new counsel, had abandoned his idea to withdraw his guilty plea and proceed to trial. Id.

The present case is factually different. In the present case, the petitioner did not plead guilty, nor did he have a plea agreement. Instead, he went to trial. When guilty pleas are the subject of a habeas petition, *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), modified the prejudice prong of *Strickland* by requiring a showing that had it not been for counsel's ineffective assistance, he would not have pleaded guilty and gone to trial. The modification of the prejudice prong in *Hill* does not apply in the present case as it did in *Cruz*. Additionally, unlike in *Cruz*, in the present case, the additional mental health history of the petitioner that was not brought to the attention of the sentencing court revealed significant additional information that was not merely cumulative of the information contained in the presentence investigation report and that additional information related to matters that had a reasonable probability of lessening the petitioner's total effective sentence.

reasons why the petitioner's trial counsel did not investigate and argue that some of the petitioner's mental health history that had caused other criminal acts mitigated his sentence for the underlying crimes, including the murder of the victim. The record before us, however, is not clear because the habeas court did not make any factual findings concerning trial counsel's performance.

The respondent urges this court that if we conclude that trial counsel's failure to present the petitioner's mental health records at sentencing was prejudicial, we "should remand to the habeas court to make factual findings as to the reasonableness of counsel's performance." Quoting *Small* v. *Commissioner of Correction*, 286 Conn. 707, 716, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008), the respondent states that "[w]hen the record on appeal is devoid of factual findings by the habeas court as to the performance of counsel, it is improper for an appellate court to make its own factual findings." We agree with this contention.

In *Small*, our Supreme Court determined that, because the habeas court made no factual findings with respect to the performance prong of *Strickland* and because it is improper for an appellate court to make its own factual findings when the record is devoid of factual findings by the habeas court as to the performance of counsel, it was limited to reviewing the prejudice prong for which there was an adequate record. Id., 716–17. In the present case, we have no findings of fact from the habeas court regarding trial counsel's performance, and we agree with the respondent that, as members of an appellate tribunal, we cannot make factual findings for the first time on appeal. Accordingly, in the interests of justice, we remand the matter to the habeas court for the purpose of making factual findings regarding

the effectiveness of trial counsel's performance at sentencing as it relates to *Strickland*'s first prong in light of the evidence introduced at the habeas trial.

The case is remanded to the habeas court for the making of underlying factual findings from the record and based on those findings for a determination of whether the petitioner has shown that his counsel's representation of him at sentencing constituted constitutionally deficient performance under the first prong of *Strickland* in accordance with this opinion. This court retains jurisdiction over the appeal, pending the remand and subsequent appellate proceedings.

In this opinion, CLARK, J., concurred.

CRADLE, J., dissenting. I agree with the majority's conclusion that the habeas court erred in concluding that the petitioner, Antwan Sease, failed to demonstrate that he was prejudiced by his counsel's failure to provide the sentencing court with the complete records of his mental health history. On the basis of that conclusion, I believe that the judgment of the habeas court should be reversed and the matter remanded for further proceedings on the issue of whether the performance of the petitioner's counsel was deficient. Because I disagree with the relief afforded by the majority, I must respectfully dissent.

MARQUIS JONES *v.* COMMISSIONER OF CORRECTION (AC 43862)

Alvord, Moll and Vertefeuille, Js.

Syllabus

The petitioner, who had been convicted, following a jury trial, of felony murder, sought a writ of habeas corpus, claiming that his trial counsel, J, had provided ineffective assistance and that his rights to due process

and to a fair trial had been violated by the prosecutor's failure to disclose material evidence that was favorable to the defense. Following a hearing, the habeas court denied the petition. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his claims involved issues that were debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised were adequate to deserve encouragement to proceed further: this court declined to review the petitioner's claim that the habeas court deprived him of his statutory and constitutional rights in failing to admit into evidence or to consider the transcript of his underlying criminal trial, as the petitioner did not raise any claims relating to the habeas court's treatment of the criminal trial transcript in his petition for certification to appeal; moreover, based on the underlying facts as found by the habeas court, this court concluded that the habeas court properly found that the petitioner failed to establish that J rendered ineffective assistance, as that court correctly determined that the petitioner failed to establish prejudice on the basis of J's failure to explore the condition of the victim's body when cross-examining the state's main witness, B, as the petitioner failed to present B as a witness at the habeas trial, or on the basis of J's failure to consult and call as a witness a forensic expert as, although the petitioner asserted that an expert could have provided important information to his counsel, he failed to state how such information would have impacted the case, or on the basis of J's failure to follow up on bloodstains found in the victim's car, the petitioner having failed to link the victim's car and the bloodstains in it to the murder, and this court declined to review the petitioner's claim that J failed to follow up on the handling of the victim's car by the police, as the claim was not distinctly raised before or addressed by the habeas court; furthermore, this court concluded that the habeas court properly determined that there was no violation of *Brady* v. *Maryland* (373 U.S. 83), because, although the prosecutor failed to disclose to the petitioner that DNA evidence obtained from bloodstains in the victim's car generated a match to a convicted offender, the petitioner failed to establish a connection between the murder and those bloodstains and thus failed to show that evidence of that match was material to his defense.

Argued January 26—officially released April 26, 2022

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.*

Katharine S. Goodbody, assistant public defender, for the appellant (petitioner).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Marquis Jones, 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 habeas court (1) abused its discretion in denying his petition for certification to appeal, (2) deprived him of his constitutional and statutory rights by failing to admit into evidence or consider the transcripts of the underlying criminal trial, (3) improperly concluded that his trial counsel did not provide ineffective assistance, and (4) improperly concluded that there were no violations of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), at his underlying criminal trial. We conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal and, therefore, dismiss the appeal.

This court set forth the following facts, which the jury reasonably could have found, in the petitioner's direct appeal from his conviction. "On the evening of December 26, 2002, the eighteen year old victim, accompanied by his cousin, Sam Moore, attended a party at a club in Bridgeport. The [petitioner] was at the club at the same time as the victim and Moore. After leaving the club, the victim and Moore went to a nearby restaurant. The [petitioner], who was armed with a gun,

arrived at the same restaurant at approximately 1 a.m. While there, the [petitioner] learned that the victim and Moore were interested in purchasing marijuana. The [petitioner] told an acquaintance, Gary Browning, that the victim and Moore had money and that he wanted to rob them. Browning arranged to sell marijuana to the victim and led him to a nearby backyard to complete the sale. Thereafter, the [petitioner] approached the victim from behind and stated: 'You know what time it is, run that shit.' As Browning walked away from the victim, the [petitioner] shot the victim in the back of the head and took money and drugs from him. The gunshot caused the victim's death. The victim's body was found on the snow coated ground the next morning." (Footnote omitted.) *State* v. *Jones*, 135 Conn. App. 788, 791, 44 A.3d 848, cert. denied, 305 Conn. 925, 47 A.3d 885 (2012).

The petitioner was arrested on June 4, 2008. On May 28, 2010, following a jury trial, the petitioner was convicted of felony murder. He was sentenced to a total effective sentence of forty years of incarceration. Following a direct appeal, the judgment of conviction was affirmed by this court. Id., 790.

The present habeas proceeding was commenced in May, 2013, and, on May 10, 2019, the petitioner filed a three count, third amended petition for a writ of habeas corpus. The first count included a number of claims of ineffective assistance of counsel, three of which are at issue in this appeal. The second and third counts each alleged that his rights to due process and a fair trial were violated by the prosecutor's failure to disclose material evidence that was favorable to the defense. A trial was held over the course of two days, on August 27, 2018, and June 4, 2019. On November 26, 2019, the habeas court, *Newson*, *J.*, issued a memorandum of decision in which it denied the petitioner's habeas petition.

The petitioner subsequently filed a petition for certification to appeal, which the court also denied. This appeal followed. Additional facts and procedure will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal from the court's judgment denying his petition for a writ of habeas corpus. We disagree.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals. . . . [Section] 52-470 [g] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal. . . .

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [disposition] of his [or her] 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, he [or she] must demonstrate that the denial of his [or her] petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he [or she] must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove 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. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Footnote omitted; internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 414–15, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

For the reasons set forth in parts II, III, and IV of this opinion, we conclude that the petitioner has failed to demonstrate that his claims are debatable among jurists of reason, a court could resolve the issues in a different manner, or the questions are adequate to deserve encouragement to proceed further. Thus, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

II

Turning to the merits of the petitioner's first substantive claim, the petitioner claims that the habeas court deprived him of "his constitutional and statutory rights to the opportunity to be heard" by failing to admit into evidence or consider the transcript of the underlying criminal trial. The respondent, the Commissioner of Correction, contends, inter alia, that this claim is not reviewable. We agree with the respondent.

The following additional procedural history is relevant to our resolution of this claim. On the first day of the habeas trial, August 27, 2018, the petitioner's habeas counsel offered the underlying criminal trial transcript as a full exhibit, and the respondent's attorney objected, noting that the transcript, which was saved on a flash drive, did not appear to be certified and the paper copy offered by the petitioner had notes on it. The respondent's attorney told the court that if there was a brief recess she would be able to review the flash drive to determine whether the transcript was certified. The court advised the parties that it planned a lunch recess to afford them review time. One of the attorneys, however, had to attend another hearing in the afternoon; therefore, the trial was adjourned without a resolution of the transcript issue. On June 4, 2019, the second, and last, day of the trial, the petitioner's habeas counsel "offer[ed] the expanded record pursuant to . . . Practice Book § 23-36,[1] including the transcripts of the criminal case"; (footnote added); and the court stated that it would accept the transcripts as part of the "underlying

[1] Practice Book § 23-36 provides that "[a] party may, consistent with the rules of evidence, offer as an exhibit, or the habeas court may take judicial notice of, the transcript and any portion of the Superior Court, Appellate Court or Supreme Court record or clerk's file from the petitioner's criminal matter which is the subject of the habeas proceeding."

record."[2] In the court's memorandum of decision denying the petition for a writ of habeas corpus, the court noted that, "[s]trangely, although submitted as an ID exhibit . . . the transcript from the underlying criminal trial was never offered as a full exhibit at the habeas trial" and further noted that the transcript "likely could have offered some clarification about exactly what happened."

On December 10, 2019, after the habeas court denied his petition for a writ of habeas corpus, the petitioner filed a petition for certification to appeal. Although the petitioner set forth numerous grounds on which he proposed to appeal, he did not in any way implicate the court's treatment of the criminal trial transcript. The court denied the petition for certification to appeal on December 11, 2019. On January 28, 2020, the petitioner appealed to this court. On March 4, 2020, the

[2] In so ruling, the court stated: "I mean, here's the thing, counsel—and I get that there's a Practice Book section. And I'll put the record out this way. You can submit—and I know the Practice Book section allows the expanded record to be submitted. Here's my view and I've written on this. It is not my job as the judge to search through the evidence to find things that support any lawyer's claims. So, to the exten[t] you are admitting the underlying record, you will still need to point the court to the parts of that record that are relevant and you believe support the claims that you make because otherwise I then step into the role of advocate or taking position for one side or the other as opposed to somebody saying to me, 'This particular piece of evidence, Your Honor, supports my claim of X.' So I don't know that I can stop you from saying I want the court as a matter of record to consider the underlying trial record. But, to the extent you believe any of that is relevant, you're going to want to address it. . . . [A]nything can be part of the record. What I'm telling is this is as I said it's not the court's job to sift through the record to find things. So to the extent that you're entering the exhibits from the underlying trial, that's great. Your job is going to be this particular piece of evidence, Judge, is relevant to my claim because X, not my job to look through the record and go, 'Oh, this is kind of neat; I think this is relevant,' or 'I think I should give them points for this.' That's all I'm saying. So, the record is what it is, and the record's always going to be what it is. It's counsel's job to marshal that evidence and to tell me how they are claiming it should be used. And just saying, 'Here's the record, Judge; I think the record as a whole supports my position.' That's not the court's job."

petitioner filed a motion for articulation and a motion for rectification of appeal, arguing therein that the "habeas court erroneously determined that the underlying transcript of the criminal trial was not in evidence and, therefore, [the court] failed to consider the transcript [in] making its decision." On May 29, 2020, the habeas court denied these motions, noting that "the criminal transcript was not a full exhibit." On August 6, 2020, the petitioner filed with this court two motions for review with respect to the habeas court's decisions on those motions. This court granted the motion to review the decision on the petitioner's motion for articulation and ordered the habeas court to articulate whether it considered any portion of the criminal trial transcript when rendering its decision. The habeas court, in its responsive articulation, explained that "the petitioner never entered the criminal trial transcript as a full exhibit. Since the transcripts remained an exhibit for ID only . . . [the court] would not have considered the exhibit in rendering the memorandum of decision following the trial. To the extent the parties referenced said transcript in their briefs, the court simply accepted those as arguments of the parties based on the evidence and full exhibits that were submitted at trial." At no point did the petitioner seek to amend his petition for certification to appeal to include arguments related to the court's treatment of the criminal trial transcript.

Now, on appeal, the petitioner claims that, because "[t]he underlying transcript was offered by counsel for the petitioner, was not objected to by the respondent's counsel, and was relied on both in questioning witnesses during the habeas trial and in the posttrial briefs of the parties," the court's "[f]ailure to admit the transcript denied [the petitioner] . . . his due process right to a meaningful opportunity to be heard. And, failure to consider any portion of the underlying criminal transcript also denied [the petitioner] his due process rights

to be heard." In response, the respondent argues that, inter alia, this claim is not reviewable because "it was not raised as a ground of error in the petition for certification to appeal."

"As our standard of review set forth [in part I of this opinion] makes clear, an appeal following the denial of a petition for certification to appeal from the judgment denying a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal from a criminal conviction. Our limited task as a reviewing court is to determine whether the habeas court abused its discretion in concluding that the petitioner's appeal is frivolous. Thus, we review whether the issues for which certification to appeal was sought are debatable among jurists of reason, a court could resolve the issues differently or the issues are adequate to deserve encouragement to proceed further. . . . Because it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal." (Citation omitted.) *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013); see id., 215–17 (declining to review claim that "court improperly failed to read all of the exhibits introduced at the habeas proceeding . . . [b]ecause the petitioner did not raise the claim when asking the court to rule on his petition for certification to appeal"); see also *Schuler* v. *Commissioner of Correction*, 200 Conn. App. 602, 610–11, 238 A.3d 835 (2020), cert. denied, 336 Conn. 905, 243 A.3d 1180 (2021).

Further, "[i]t is well established that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue raised on appeal was never raised before the court at the time that it considered the petition for

certification to appeal as a ground on which certification should be granted." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, supra, 199 Conn. App. 416.

In the present case, the petitioner did not raise any claims related to the court's treatment of the trial transcript in his petition for certification to appeal. He explains that "[t]he issue was raised and addressed in the posttrial motions for articulation and rectification and in the motions for review of the decisions on these motions," which provided the court with "the opportunity to address this claim." The petitioner asserts that the claim is reviewable because "[t]he court was given the opportunity to address this issue through the motions . . . ." These arguments, however, ignore the statutory nature of habeas appeals. "Section 52-470 (g) conscribes our appellate review to the issues presented in the petition for certification to appeal . . . ." *Whistnant* v. *Commissioner of Correction*, supra, 199 Conn. App. 418. The petitioner's contentions are unavailing, and he cannot demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal on this ground.

III

The petitioner's second substantive claim on appeal is that the court erroneously concluded that he failed to establish that his trial counsel, Attorney Jeffrey Beck, rendered ineffective assistance. Specifically, the petitioner claims that his trial counsel failed (1) to attack Browning's testimony with respect to the condition of the victim's body, (2) to hire a forensic expert, and (3) to conduct a timely and thorough investigation of the case and asserts that, "if [defense counsel] had not failed to take the actions discussed herein, it is probable that the outcome would have been different." We disagree.

"[As it relates to the petitioner's substantive claims] [o]ur standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 169 Conn. App. 444, 449, 150 A.3d 1166 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017). "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . . With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citation omitted; internal quotation marks omitted.)

Schuler v. *Commissioner of Correction*, supra, 200 Conn. App. 617.

A

We first address the petitioner's contention that his trial counsel failed to explore the condition of the victim's body when cross-examining Browning, the state's main witness against the petitioner in the criminal trial.

The following additional procedural history is relevant to our resolution of this claim. At the habeas trial, the exhibits from the criminal trial, which included pictures of the crime scene and the victim, were entered as full exhibits. The pictures show the victim lying face down in the snow, with clothing partially removed, and surrounded with footprints. In addition, Joette Devan, a detective who responded to the crime scene, testified that the victim was lying face down and that there were footprints in the snow around the body. The petitioner also presented evidence, in the form of expert testimony, that the position of the victim's body indicated that it had been moved after the murder occurred.[3]

The petitioner presented expert testimony of Attorney John Watson. When Watson was asked about the footprints around the victim's body, he testified that "[s]ome of [the footprints] were identified as those of Mr. Browning because of the footwear he himself said he was wearing, and some were identified as those of the victim because they matched the type of footwear the victim was wearing." The petitioner's habeas counsel then asked, "[I]f you as a defense attorney . . . have a crime scene where the victim has been rolled and his clothes have been pulled off him . . . to some

[3] Peter Valentin, a lecturer at the Forensic Science Department of the University of New Haven, testified as a forensic science expert on the petitioner's behalf. The habeas court specifically determined that his testimony "was neither compelling nor enlightening." See part III B of this opinion.

degree, what would you do with that?" Watson responded, "I think that's something that the forensic expert could help defense counsel to bring to the jury's attention through cross-examination of the state's witnesses that the footprints around the body were those of Mr. Browning. So, it's a reasonable inference that, in fact, he was the person who tampered with the body after the shooting."

The petitioner's trial counsel also testified at the habeas trial. The case was scheduled for trial at the time when trial counsel was appointed to represent the petitioner. He testified that his defense theory was "that [the petitioner] had nothing to do with the incident at all, wasn't present when [the victim] was shot, and wasn't aware of what was going on." He further testified that his approach in cross-examining Browning was to attack Browning's testimony because, according to trial counsel, "[Browning's] testimony . . . was very weak" and "very incredulous." The petitioner's trial counsel testified further that he questioned Browning about footprints found around the body and that Browning admitted that the footprints were his own. Trial counsel recalled that, in his closing argument at trial, he mentioned that the victim's body may have been moved after the shooting. Further, on inquiry from the respondent's counsel, trial counsel agreed that pursuing a line of questioning as to what may have happened to the victim's body after the shooting would not have been relevant to the defense that the petitioner was not at the scene and had nothing to do with the murder. Finally, trial counsel conceded that the state never claimed that the petitioner's footprints were at the scene of the crime. The petitioner never called Browning as a witness at the habeas trial.

In denying the petitioner's amended petition for a writ of habeas corpus, the habeas court concluded that the petitioner's failure to present Browning as a witness

at the habeas trial was fatal to his claim, citing *Nieves* v. *Commissioner of Correction*, 51 Conn. App. 615, 623–24, 724 A.2d 508, cert. denied, 248 Conn. 905, 731 A.2d 309 (1999), which held that "[t]he failure of the petitioner to offer evidence as to what [the witnesses] would have testified is fatal to his claim," as, without the evidence, the court was "unable to conclude that he was prejudiced."

On appeal, the petitioner asserts that "[a] review of the photograph of the [victim's] body indicates that it 'most likely ha[d] been moved at some point after the injury occurred' " and that Browning's footprints were " 'abundant' around the victim's body." Thus, he argues that, because "the state had a weak case, it is reasonably probable that the jury would have found reasonable doubt had [his trial counsel] adequately attacked [Browning's] testimony." The respondent maintains that the habeas court correctly determined that prejudice could not be assessed given the fact that the petitioner did not call Browning as a witness at the habeas trial. In response, the petitioner asserts that, "[i]f [Browning] had testified at the habeas trial, his answers would not have changed the fact that [the petitioner's trial counsel] failed to bring to the jury's attention the discrepancies in [Browning's] version of the shooting and the physical evidence." Accordingly, it is the petitioner's position that "how [Browning] would have answered is irrelevant and was not required" because "the failure of [trial counsel's] cross-examination of [Browning] was the failure to challenge his testimony with the physical evidence." We agree with the respondent.

"It is axiomatic that a habeas petitioner who claims prejudice based on counsel's alleged failure to present helpful evidence from a particular witness, must call that witness to testify before the habeas court or otherwise prove what the witness would or could have stated had he been questioned at trial, as the petitioner claims

he should have been." *Benitez* v. *Commissioner of Correction*, 197 Conn. App. 344, 351, 231 A.3d 1285, cert. denied, 335 Conn. 924, 233 A.3d 1091 (2020); see id., 350–51 ("petitioner failed to call the complainant to testify at the habeas trial, or otherwise to establish what the complainant would or could have testified to on cross-examination, had he been questioned about his access to and possible use" of chemicals involved in underlying arson and, therefore, could not show prejudice); see also *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 554, 124 A.3d 1 (petitioner failed to prove prejudice when he "did not offer evidence regarding how [the witnesses] would have testified if they had been cross-examined [differently]"), cert. denied, 320 Conn. 910, 128 A.3d 954 (2015); *Nieves* v. *Commissioner of Correction*, supra, 51 Conn. App. 623 (petitioner's failure "to offer evidence as to what [witnesses] would have testified is fatal to his claim"). In order for the habeas court to assess the claim that the petitioner's trial counsel did not properly cross-examine Browning, the petitioner needed to call Browning as a witness at the habeas trial or otherwise demonstrate how Browning would have testified had his cross-examination been conducted as now suggested by the petitioner.

Accordingly, we conclude that the habeas court properly determined that the petitioner failed to establish prejudice, and, therefore, the court did not abuse its discretion in denying the petition for certification to appeal as to this claim.

B

The petitioner next claims that his trial counsel failed to consult and call as a witness a forensic expert. Specifically, in this third claim he asserts that a forensic expert could have (1) "told [trial counsel] that the victim's body had been moved subsequent to the shooting," (2) "testified as to the relevance and importance of the

shoe print that was approximately [twenty] feet from the victim," and (3) "told [trial counsel] the possible significance and could have testified regarding the victim's car with the bloodstained seats." According to the petitioner, a forensic expert "would have bolstered the idea that the state's version of what happened here is not trustworthy." (Internal quotation marks omitted.) The petitioner, however, has failed to demonstrate that he was prejudiced by his trial counsel's failure to consult and call a forensic expert.

In addition to the evidence discussed in part III A of this opinion, the petitioner presented the following evidence. Devan, a detective involved in the investigation, testified that the victim's car keys were next to the victim's body and that the victim's car was located nearby. Devan testified that two of the car's seats had what appeared to be bloodstains on them and that the car was towed to the police department for further investigation. The petitioner presented evidence that the two stains found on the car seats were human blood and that the police removed the bloodstained fabric from the vehicle for DNA testing, which occurred in 2003 and ruled out the victim as the source of the blood.

Michael Bourke, a forensic science examiner at the Department of Emergency Services and Public Protection, testified that DNA testing on the bloodstains resulted in several profiles that were entered into the Combined DNA Index System (CODIS) database[4] "in order to search against other forensic profiles and the profiles from the offenders that are included [in the database] in hopes of furthering the investigation." Bourke also testified that "a match was generated to a

[4] "CODIS contains DNA profiles from unsolved crimes and compares them to known samples from convicted felons that are periodically added to the database. See, e.g., *State* v. *Webb*, 128 Conn. App. 846, 852–53 n.3, 19 A.3d 678, cert. denied, 303 Conn. 907, 32 A.3d 961 (2011)." *State* v. *Rodriguez*, 337 Conn. 175, 180 n.2, 252 A.3d 811 (2020).

convicted offender in this case" on January 12, 2009, identifying "Rafail E. Ferrer" as having DNA in the system that matched the sample from the victim's car.

The petitioner also established that his trial counsel did not hire or consult a forensic expert in the present case, and he presented testimony from Peter Valentin, a lecturer at the Forensic Science Department of the University of New Haven, as an expert in crime scene forensic science. Valentin testified, on reviewing a photograph of the victim's body at the crime scene that was a full exhibit in the criminal trial, that there had been "some movement after the injury" and "the [victim] most likely ha[d] been moved at some point after the injury occurred."[5] Valentin also briefly testified about a shoe print containing a bloodstain that was approximately twenty feet from the victim. When asked if the shoe print was "something that would be significant in trying to resolve this crime," Valentin responded that "[t]he existence of that bloodstain at such a distance from . . . where the injury occurred strongly suggests relevance" and provided several theories as to how the bloodstained footprint came to be.[6]

[5] Valentin specifically testified: "[I]n the photograph on the right side of the image there is a large—there's a collection of blood adjacent to a baseball cap. That is inconsistent toward—it is not in the same position as the decedent was found or as he's photographed here. Additionally, there is a smaller blood stain in the vicinity of the decedent's left arm that also suggests some movement after the injury occurred. And then there's also some—there are additional stains in the vicinity of that what I would call a linear pattern near his arm that also are suggestive of movement."

[6] Specifically, Valentin testified that he "would have suggested to [trial] counsel that the distance that that bloodstain is from the cluster of activity for lack of a better way of describing it where [the victim's] body was located suggests that that stain has relevance because my assessment would be that there's essentially two ways for that bloodstain to get there or there's two sources for that blood. Either that blood is [the victim's] blood and it has been brought to that location twenty some odd feet away from the scene because it was on an object or that blood belongs to somebody who was bleeding at a time recently because the snow would suggest temporally when that would have occurred."

When asked about what he would have done if hired by the petitioner's trial counsel, Valentin said that he "would have advised [trial] counsel . . . that the automobile is a relevant item of physical evidence that needs to be safeguarded and searched until such time as . . . you can determine that there's nothing of relevance inside the vehicle." With respect to the bloodstains in the victim's car, Valentin provided suggestions only as to how he would have investigated the source of the blood (i.e., by interviewing the person whose DNA was matched with one of the bloodstains).

The habeas court determined that the petitioner failed to establish prejudice and provided that, "[a]lthough the petitioner did present the testimony of . . . Valentin as an expert in crime scene forensic investigation, his testimony was neither compelling nor enlightening. He was not at the scene of the crime and did not examine any of the actual physical evidence from the scene. He also did not speak directly to anyone who was present at the scene. In fact, from the best the court can determine, he only reviewed photographs and reports from the crime scene, from which he generated opinions of possible alternative meanings to the evidence or alternative avenues of investigation that he would have advised defense counsel to pursue. What was wholly lacking, however, were any concrete scientific or factual findings that undermined the jury's determination of guilt in this case."

We agree with the habeas court's conclusion that the petitioner failed to show that he was prejudiced by the failure of his trial counsel to consult or hire a forensic expert. At best, Valentin's testimony provided thoughts on how he would have investigated the crime scene. With respect to the condition of the victim's body, Valentin's testimony merely demonstrated that the body may have been moved slightly, which is consistent with the state's theory that Browning and the petitioner

robbed the victim after he had been incapacitated.[7] With respect to the bloodstained footprint, Valentin testified only that it might be relevant without explaining why. Finally, with respect to the bloodstains in the victim's car, Valentin merely suggested that the car should have been investigated and the person whose DNA matched with one of the bloodstains should have been interviewed, but the petitioner did not provide any information concerning what evidence these two actions would have unearthed.[8] Further, although the petitioner asserts that an expert could have given important information to his trial counsel, he failed to state how such information would have impacted the case. None of the petitioner's evidence, especially in light of the court's determination that the expert's testimony "was neither compelling nor enlightening," demonstrates a reasonable probability that, had trial counsel hired an expert, the outcome of the proceedings would have been different. See *Schuler* v. *Commissioner of Correction*, supra, 200 Conn. App. 617.

Accordingly, we conclude that the habeas court properly determined that the petitioner failed to establish prejudice and, therefore, did not abuse its discretion by denying the petition for certification to appeal as to this claim.

C

The petitioner's final claim of ineffective assistance is that his trial counsel failed to conduct a timely and thorough investigation. Specifically, the petitioner argues

[7] In discussing another claim, the habeas court noted that evidence regarding the condition of the victim's body supported the state's theory at trial that the petitioner and Browning robbed the victim after he was killed.

[8] In addition, this testimony did not take into account the fact that the petitioner's trial counsel was not informed about the DNA match to the bloodstain; see part IV A of this opinion; nor did it contemplate the fact it was undisputed that the car had been destroyed by the time trial counsel started representing the petitioner.

that his trial counsel should have followed up on the police's "handling of the victim's car" and the bloodstains found inside the car. We address each specific allegation separately.

1

The petitioner argues that his trial counsel should have investigated what happened to the victim's car after it was in police custody and that, if his trial counsel had done so, he would have discovered relevant information supporting the claim of inadequate police investigation and "thereby establish[ing] reasonable doubt."[9] The respondent argues, inter alia, that this claim is not reviewable because it was not (1) raised in the habeas petition, (2) addressed in the petitioner's posttrial brief, and (3) addressed by the habeas court in its memorandum of decision denying the petition for a writ of habeas corpus. We agree with the respondent.

In the petition for a writ of habeas corpus, the petitioner alleges that his trial counsel rendered deficient performance because, inter alia, "[h]e failed to conduct a timely and thorough investigation." Although the petitioner specifically references the failure of his trial counsel "to follow up on the information regarding the bloodstain[s] on the seat[s] of the victim's car that was seized by the police at the time of the crime," he did not include any allegation that his trial counsel was ineffective for failing to investigate what happened to the car after it entered police custody. In his posttrial brief, the petitioner, with respect to the argument that

[9] In making this argument, the petitioner points to information that his trial counsel would have discovered, had he conducted a "proper investigation." The habeas court, however, excluded the evidence purporting to establish what his trial counsel would have discovered. Although the petitioner notes in his principal appellate brief that "[i]nformation regarding what happened to the victim's car after it was impounded by the police was improperly excluded," he did not raise a claim of error with respect to this ruling on appeal.

his trial counsel failed to conduct a timely and thorough investigation, argued only that his trial counsel failed to "pursue information regarding the bloodstains" and failed to "pursue the issue of the blood swabbings." Unsurprisingly, the habeas court did not address any claim that the petitioner's trial counsel should have investigated the police's "handling of the victim's car."

"It is well settled that this court does not consider claims not raised in the habeas court." *Toles* v. *Commissioner of Correction*, 113 Conn. App. 717, 730, 967 A.2d 576, cert. denied, 293 Conn. 906, 978 A.2d 1114 (2009); see id., 729–30 (claim of ineffective assistance was not reviewed because it was not included in operative petition or posttrial brief and was not ruled on by habeas court). In addition, a claim is not reviewable when "not raised sufficiently in the habeas court." Id., 730; see also id. (specific claim of ineffective assistance not reviewed because habeas court considered only "broad allegation concerning [attorney's] 'failure to investigate' "). Further, "[i]t is well settled that this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim." (Internal quotation marks omitted.) *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 857–58, 171 A.3d 525 (2017); see id. (due process claim deemed abandoned because not addressed in posttrial briefing and not addressed by habeas court).

In the present case, given that this particular claim was never distinctly raised before or addressed by the habeas court, we decline to review this claim.

2

With respect to the petitioner's claim that his trial counsel "failed to follow up on information regarding bloodstains on the seat[s] of the victim's vehicle that

were seized by the police at the time of the crime," the habeas court determined that the petitioner failed to make the required showing of prejudice.[10] Specifically, the court stated: "[T]he petitioner has failed to present any evidence that the victim's vehicle, or anything inside of it, bore any material relationship to the crime. There appears to be no dispute that the victim, [Browning, and the petitioner] drove to the scene in an unrelated vehicle, that the keys to the victim's car were found near his body, or that the victim's car was locked when the police later located it. Other than the fact that these two blood samples were inside the victim's vehicle, the petitioner has provided no rational connection between them and [the victim's] murder. Finally, while Ferrer was identified as the likely source of one of the bloodstains, the petitioner has provided no credible evidence establishing when that sample was deposited in the car or placing Ferrer even within the state of Connecticut at the time of the crime. Therefore, even if the court were to assume that counsel should have followed up on this line of inquiry independently, the petitioner did not suffer any prejudice, because the information is irrelevant to the case." (Footnote omitted.) The court also emphasized that the petitioner's own testimony at the habeas trial "supports the irrelevance of anything found inside of [the victim's] car," as the petitioner never mentioned the victim's car or any unknown individual in his testimony about the night of the murder.

On appeal, the petitioner argues that the bloodstains inside the car were relevant because the police obtained a warrant to inspect the car and had the bloodstains tested for DNA, determining that the blood was not

[10] The court also determined that the petitioner failed to prove that his trial counsel's performance was deficient. Because we agree that the petitioner failed to prove prejudice, we need not consider the court's determination concerning trial counsel's deficient performance. See *Schuler* v. *Commissioner of Correction*, supra, 200 Conn. App. 617.

the victim's. Further, the petitioner asserts that it was relevant because his forensic science expert testified at the habeas trial that "who was in [the victim's car] with [the victim], what happened there, that's all a matter for investigation." The respondent argues that the petitioner cannot show prejudice because he failed to link the car and the bloodstains in it to the murder. We agree with the respondent.

The petitioner's argument requires us to assume that, because the car was within the vicinity of the murder and because the car had blood in it that matched with someone in the CODIS system, it was somehow associated with the murder. Without more evidence, however, we cannot so assume. Given the habeas court's findings, namely, that the victim arrived at the scene in a different vehicle, the keys to the vehicle were found on the victim's body, and the car was found locked, and given the fact that the petitioner presented no evidence connecting Ferrer to the murder—in fact, the petitioner presented no evidence about Ferrer whatsoever aside from the "hit notification" that included his name—it would be impossible to determine that, had the petitioner's trial counsel followed up on the bloodstains and subsequently procured the "hit notification," the criminal trial could have had a different outcome. See *Holley* v. *Commissioner of Correction*, 62 Conn. App. 170, 175, 774 A.2d 148 (2001) ("The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner. . . . [See] *Nieves* v. *Commissioner of Correction*, [supra, 51 Conn. App. 624] (petitioner could not succeed on claim of ineffective assistance on basis of counsel's failure to conduct proper investigation in absence of showing that he was prejudiced by counsel's failure to interview witnesses) . . . ." (Citation omitted.)).

Accordingly, we conclude that the habeas court properly determined that the petitioner failed to prove that

he was prejudiced and, therefore, did not abuse its discretion by denying the petition for certification to appeal as to this claim.

IV

The petitioner next claims that his rights to due process and to a fair trial were violated by the prosecutor's failure to disclose material evidence that was favorable to the defense in accordance with *Brady* v. *Maryland*, supra, 373 U.S. 83. Specifically, he claims that the state failed to disclose (1) exculpatory DNA evidence and (2) a transcript from a separate criminal proceeding that would have served as impeachment evidence. We address each of the petitioner's claims in turn.

A

The petitioner first claims that the state improperly failed to provide the defense with "[e]vidence that another convicted felon's blood was in the car of the victim" in violation of *Brady* v. *Maryland*, supra, 373 U.S. 83. We disagree.

At the habeas trial, Bourke, the forensic examiner, testified that the "hit notification," which identified Ferrer as a DNA match with a sample taken from one of the car seat bloodstains, was sent to the agencies that investigated and prosecuted the crime, specifically, the police department, the prosecutor, and the major crimes unit. The habeas court determined that "[t]here was no evidence that [the petitioner's trial counsel] ever received a copy of the hit notification form or that he was aware of its existence."

In denying the petitioner's amended petition for a writ of habeas corpus, the habeas court determined that "the petitioner cannot establish a reasonable probability that this evidence would have had any impact on the outcome of his case or the establishment of a defense theory," noting, "the petitioner has not established any

reasonable connection between the bloodstains on the seat[s] and the victim's murder, nor has he placed . . . Ferrer near the scene of the crime."

On appeal, the petitioner argues that the DNA match was material because "the fact that another person's blood was in the vehicle" "undermines [Browning's] version of the crime," but he does not elaborate on how this information undermines Browning's account. The respondent argues that "the petitioner has failed to establish that the blood evidence was material," as (1) the blood was not at the crime scene but was in the victim's locked car some distance from the crime scene, (2) the blood was dry, (3) the victim only recently had purchased the car, and (4) the petitioner did not present testimony from Ferrer nor did he present any evidence linking Ferrer to the crime. We agree with the respondent.

We first set forth the standard of review applicable to *Brady* claims. "As set forth by the United States Supreme Court in *Brady* v. *Maryland*, supra, 373 U.S. 87, [t]o establish a *Brady* violation, the [defendant] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [defendant], and (3) it was material [either to guilt or to punishment]. . . . Whether the [defendant] was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *State* v. *Bryan*, 193 Conn. App. 285, 315, 219 A.3d 477, cert. denied, 334 Conn. 906, 220 A.3d 37 (2019).

"Under the last *Brady* prong, the evidence must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. . . . The mere possibility that the undisclosed information might have helped the defense or

might have affected the outcome of the trial does not meet the materiality standard. . . .

"The favorable evidence must cast the whole case in a different light. It is not enough for the defendant to show that the undisclosed evidence would have allowed the defense to weaken or destroy a particular prosecution witness or item of evidence to which the undisclosed evidence relates." *State* v. *Rosa*, 196 Conn. App. 480, 503–504, 230 A.3d 677, cert. denied, 335 Conn. 920, 231 A.3d 1169 (2020); see id., 504, 506 (CODIS match with DNA found on sweatshirt was not material because there was no testimony that person who committed crime was wearing sweatshirt, "the sweatshirt was not found at the actual crime scene but more than half a block away," "[t]here [wa]s no evidence to indicate how long the sweatshirt had been there or that it was even present when the police first responded to the crime scene," there was no other evidence connecting sweatshirt to crime, and petitioner could not connect person identified in CODIS match to crime).

In the present case, we agree with the habeas court that the petitioner has failed to show that the CODIS match was material to his defense. The car that contained the bloodstains was not found at the crime scene but on a nearby street. There is no evidence that the victim or anyone else associated with the murder was in or near the car that night. There is no evidence establishing how long the car had been parked there. There is no indication that the victim's murder is connected to the victim's car or that the blood was left during or as a result of the murder—indeed, there was no evidence to suggest that the bloodstains occurred near the time of the murder. Further, the petitioner presented no evidence connecting Ferrer to the crime or the crime scene. Finally, as the habeas court stated, "[t]he petitioner's own testimony at the habeas trial supports the irrelevance of anything found inside of [the victim's]

vehicle. . . . Nowhere in his testimony did the petitioner reference anything to do with the [victim's] vehicle, nor did he ever reference any 'unknown male' supposedly being in the vehicle with them or at the scene of the shooting."

Thus, because the petitioner cannot establish a connection between the murder and the bloodstains, the evidence of the CODIS match does not satisfy *Brady*'s materiality test. See *State* v. *Rosa*, supra, 196 Conn. App. 504;[11] see also *Carmon* v. *Commissioner of Correction*, 114 Conn. App. 484, 492, 969 A.2d 854 (Counsel was not deficient for failing to investigate cartridge box that "was not found at the crime scene, and there was no evidence as to when or how it was deposited in the area . . . . The box was empty, the caliber of the ammunition that had been contained in that box was unknown, there was no eyewitness testimony that the shooter had been seen taking cartridges from a box, and there was no testimony or evidence linking that box to the crime scene." (Footnote omitted.)), cert. denied, 293 Conn. 906, 978 A.2d 1108 (2009).

Accordingly, we conclude that the habeas court properly determined that the petitioner failed to establish

[11] The petitioner attempts to distinguish *Rosa*, arguing that the evidence in the present case "was definitely connected to the crime" because the car belonged to the victim while the sweatshirt in *Rosa* "was not connected to the crime" and that the state's case was not strong in the present case while "there was strong evidence inculpating the defendant" in *Rosa*. These arguments are unavailing.

First, the fact that the vehicle belonged to the victim is not enough to connect it to the crime, as mere ownership and some proximity to the crime scene do not in and of themselves implicate the vehicle's involvement. Second, the court in *Rosa* determined that the sweatshirt was not connected to the case because of the collective facts. *State* v. *Rosa*, supra, 196 Conn. App. 504, 509. Similarly, in the present case, the collective facts result in a conclusion that the car is not connected to the case. Further, in *Rosa*, the "strong evidence inculpating the defendant" was only one factor of many bearing on the determination that the sweatshirt was not material to the case. Id., 509.

materiality and, therefore, did not abuse its discretion by denying the petition for certification to appeal as to this claim.

B

Finally, the petitioner claims that the state committed a *Brady* violation by failing to disclose, as impeachment evidence, certain testimony Browning gave in a separate, prior criminal trial, *State* v. *Holbrook*, Superior Court, judicial district of Fairfield, Docket No. CR-00-0163353-T (*Holbrook* case). We agree with the respondent that this claim is unreviewable because the habeas court correctly concluded that it was abandoned.

In his petition for a writ of habeas corpus, the petitioner alleged that his "due process rights in [the underlying criminal case] were violated because the state had information that [Browning], the only witness who put the petitioner at the scene of the crime, had previously testified in [the *Holbrook* case]. . . . At that time [Browning] admitted that he had lied under oath . . . and said he would lie to protect himself. This information was not disclosed to trial or appellate counsel." At the habeas trial, the petitioner sought to admit the transcript of Browning's testimony in the *Holbrook* case as a full exhibit, but the court sustained the respondent's objection.[12] Following the trial, the petitioner did not address the claim in his posttrial brief and, therefore, presented no argument as to why the state's failure to provide the testimony violated his due process rights. In its memorandum of decision, the court deemed the claim abandoned, stating that "[t]he petitioner failed to address this issue at all in his posttrial brief" and citing *Walker* v. *Commissioner of Correction*,

[12] The petitioner has not raised on appeal a claim that the court erred in excluding from evidence the transcript of Browning's testimony from the *Holbrook* case.

supra, 176 Conn. App. 856, to support its conclusion that the claim was abandoned.

"It is well settled that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . These same principles apply to claims raised in the trial court. . . .

"[T]he idea of abandonment involves both a factual finding by the trial court and a legal determination that an issue is no longer before the court, [therefore] we will treat this claim as one of both law and fact. Accordingly, we will accord it plenary review." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id.

As noted, in the present case the petitioner did not address this claim in his posttrial brief and provided no support for or reference to the claim in his habeas petition. Furthermore, the petitioner has not contested or addressed the court's conclusion that the claim was abandoned and has provided us with no reasons as to why the habeas court erred in so finding. On these facts, we conclude that the habeas court properly deemed the claim abandoned.

The appeal is dismissed.

In this opinion the other judges concurred.

GLENN GILMAN ET AL. *v.* BRIAN SHAMES ET AL. (AC 44456)

Alvord, Elgo and Cradle, Js.

Syllabus

The defendant state of Connecticut appealed from the judgment of the trial court denying its motion to dismiss the plaintiff's action on the ground of sovereign immunity. Pursuant to the applicable statute (§ 4-147), the plaintiff filed a notice of claim with the Office of the Claims Commissioner, seeking permission to sue the defendants, the state and S, a physician employed by the University of Connecticut Health Center, for damages for emotional distress and loss of consortium resulting from the death of his domestic partner, which he claimed was caused by the medical malpractice of S and the hospital that provided her care, which was a part of the University of Connecticut Health Center. The commissioner authorized the plaintiff to sue for damages of up to $500,000 for alleged medical malpractice. The plaintiff commenced an action against the defendants for bystander emotional distress. The defendants filed a motion to dismiss, which the trial court granted, concluding, inter alia, that the plaintiff's claim was barred by sovereign immunity. This court affirmed the trial court's decision, concluding that the plaintiff's derivative claim was not viable because it was not accompanied by a wrongful death action brought by the decedent's estate. The plaintiff commenced the present action against the defendants, alleging wrongful death in his capacity as administrator of the decedent's estate and bystander emotional distress in his individual capacity. The defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the commissioner had not granted the plaintiff permission to bring a claim on behalf of the decedent's estate and that the wrongful death action was barred by the applicable statute of limitations (§ 52-555). The plaintiff withdrew its claims against S and, thereafter, the trial court denied the motion to dismiss, determining that the plaintiff's notice was sufficient and that the commissioner's waiver of sovereign immunity validly encompassed the claims. On the defendant state's appeal to this court, *held*:

1. The trial court improperly denied the defendants' motion to dismiss: the plaintiff's notice of claim that was filed with the commissioner indicated only that he sought to bring a claim against the defendants in his capacity as an individual and did not properly apprise the commissioner of the plaintiff's intention to sue the state in an administrative capacity; moreover, contrary to the plaintiff's assertion, his notice of claim was not analogous to that provided to the commissioner in *Arroyo* v. *University of Connecticut Health Center* (175 Conn. App. 493), which set forth the same claim that was argued at trial merely in a slightly different fashion,

because, in the present case, the plaintiff's wrongful death action brought as administrator of the decedent's estate and his derivative bystander emotional distress action brought in his individual capacity were two wholly separate claims; accordingly, the commissioner's waiver of sovereign immunity could not be said to encompass the wrongful death claim at issue in the appeal, and the trial court did not have subject matter jurisdiction over the plaintiff's claims.

2. The accidental failure of suit statute (§ 52-592) did not save the plaintiff's action from his lack of compliance with the statute of limitations for wrongful death actions: the trial court's reliance on *Isaac* v. *Mount Sinai Hospital* (210 Conn. 721) in determining that § 52-592 applied to the present action was misplaced, as, in *Isaac*, our Supreme Court liberally construed § 52-592 to find that the statute saved the plaintiff's second wrongful death action because the cause of action, claimed factual background and defendants were identical to those of her first action and, in the present case, the plaintiff did not bring the same claim in two consecutive actions; moreover, at the time of his first action, the plaintiff did not meet the statutory requirement to bring a claim on behalf of the decedent's estate because he did not become the administrator of the estate until after the first action was dismissed and at no point during the pendency of the first action did he hold himself out to be the administrator of the estate; accordingly, the plaintiff's wrongful death action did not overlap with his individual claim in his first action in a manner that would implicate § 52-592, and the judgment of the trial court was reversed and the case was remanded with direction to render a judgment of dismissal.

Argued December 7, 2021—officially released April 26, 2022

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful death of the plaintiff administrator's decedent as a result of the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Frechette*, *J.*, denied the defendants' motion to dismiss; thereafter, the plaintiffs withdrew their complaint with respect to the named defendant, and the defendant state of Connecticut appealed to this court. *Reversed*; *judgment directed.*

Michael G. Rigg, with whom, on the brief, was *Robert D. Silva*, for the appellant (defendant state of Connecticut).

Harris Appelman, for the appellees (plaintiffs).

Opinion

ELGO, J. The defendant state of Connecticut[1] appeals from the judgment of the trial court denying its motion to dismiss the action of the plaintiff Glenn Gilman[2] on the ground of sovereign immunity. On appeal, the defendant claims that the court improperly determined that (1) the Claims Commissioner (commissioner) had waived sovereign immunity with respect to the plaintiff's claims, and (2) the accidental failure of suit statute, General Statutes § 52-592,[3] exempted the plaintiff from the two year time limit for bringing a wrongful death action under General Statutes § 52-555.[4] We reverse the judgment of the trial court.

[1] The plaintiff also named Brian Shames, a physician, as a defendant in his complaint. On November 9, 2020, the plaintiff filed a withdrawal of his complaint with respect to Shames only. For clarity, we refer to the state of Connecticut as the defendant and Shames by name in this opinion.

[2] Gilman commenced this action both as administrator of the estate of the decedent, Lisa Gail Wenig, and in his individual capacity. We refer to Gilman in both capacities as the plaintiff.

[3] General Statutes § 52-592 provides in relevant part: "(a) If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment. . . ."

[4] General Statutes § 52-555 provides in relevant part: "(a) In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of. . . ."

The following facts, as found by this court in *Gilman* v. *Shames*, 189 Conn. App. 736, 208 A.3d 1279 (2019), are relevant to this appeal. "From about December 15, 2014, through August 19, 2015, Shames—who was at all relevant times a physician employed by the University of Connecticut Health Center, of which the John Dempsey Hospital (hospital) is a part—provided medical care and treatment to the decedent, who was the plaintiff's fiancée and domestic partner. The decedent died on October 1, 2015.

"In June, 2016, pursuant to General Statutes § 4-147, the plaintiff filed a notice of claim with the Office of the Claims Commissioner seeking permission to sue the [defendant] for damages on the basis of injuries he claimed to have suffered, including emotional distress and loss of consortium, stemming from medical malpractice allegedly committed against the decedent by Shames and the hospital. By way of a memorandum of decision dated February 23, 2017, the [commissioner], absent objection, authorized the plaintiff to sue the [defendant] for damages of up to $500,000 for alleged medical malpractice by general surgeons or other similar health care providers who constitute state officers and employees, as defined by General Statutes (Rev. to 2015) § 4-141, of the hospital.

"On June 26, 2017, the plaintiff, representing himself, commenced the [first] action against Shames and the hospital. In his original two count complaint, the plaintiff raised claims sounding in bystander emotional distress directed to Shames and the hospital.

"On August 25, 2017, Shames and the hospital filed a motion to dismiss the action, which was accompanied by a separate memorandum of law, asserting that the court lacked subject matter jurisdiction over the plaintiff's bystander emotional distress claims. Specifically, they asserted that the plaintiff's claim directed to

Shames was barred by sovereign immunity and/or by statutory immunity pursuant to [General Statutes] § 4-165, and that the plaintiff could not pursue a bystander emotional distress action in the absence of a wrongful death action commenced by the decedent's estate, which had not brought a wrongful death action or received authorization from the [commissioner] to commence such an action. In addition, Shames and the hospital argued that the plaintiff improperly had brought suit against the hospital because the plaintiff had received authorization from the [commissioner] to sue the [defendant] only. On October 11, 2017, the plaintiff filed a motion to substitute the [defendant] as a party defendant in lieu of the hospital, which the trial court granted on October 24, 2017. On October 23, 2017, the plaintiff filed an objection and a separate memorandum of law in opposition to the motion to dismiss. On November 6, 2017, the [defendant and Shames] filed a reply brief, in which they argued additionally that the decedent's estate would be time barred from bringing a wrongful death action as a result of the expiration of the subject matter jurisdictional limitations period set forth in § 52-555.

"On November 13, 2017, the plaintiff filed his operative two count complaint raising claims sounding in bystander emotional distress directed to [the defendant and Shames]. He alleged, inter alia, that Shames had administered ineffective treatments to the decedent for approximately eight months and that, notwithstanding the lack of improvement in her condition, Shames had failed to alter the course of the treatments or to take 'further diagnostic action as is consistent with standard practice,' which constituted a substantial factor in the decedent's death. The plaintiff additionally alleged that he had been harmed by Shames' conduct and by the [defendant's] breach of its duty to the decedent to ensure that the [defendant's] agents, servants, and/or

employees acted as 'reasonably prudent medical professionals.' More particularly, the plaintiff alleged that he had sustained injuries stemming from his 'contemporary sensory perception of observing and/or experiencing the demise of the decedent, the decedent's suffering, the decedent's health deteriorating, the decedent's pain and suffering, the administration of life support and, ultimately, [the decedent's] death . . . .'

"On December 4, 2017, the court heard argument on the [defendant's and Shames'] motion to dismiss. On February 9, 2018, the court granted the motion to dismiss. With respect to the plaintiff's bystander emotional distress claim directed to Shames, the court concluded that (1) to the extent that the plaintiff was suing Shames in Shames' official capacity as an employee of the hospital, which was an agent of the [defendant], the plaintiff's claim was barred by sovereign immunity, and (2) to the extent that the plaintiff was suing Shames in Shames' individual capacity, the plaintiff's claim was barred by statutory immunity pursuant to § 4-165. In addition, without limiting its analysis to the plaintiff's claim against the [defendant], the court concluded that the plaintiff's bystander emotional distress 'claims' were derivative claims that were not viable absent a predicate wrongful death action commenced by the decedent's estate, which had not commenced such an action and, as a result of the expiration of the limitations period set forth in § 52-555, could not commence such an action." (Footnotes omitted.) Id., 738–42.

The plaintiff then appealed to this court, which affirmed the trial court's decision. Id., 754. In doing so, this court concluded that the plaintiff's claim for bystander emotional distress was a " 'derivative claim' " that " 'can be compensable only if it flows from the bodily injury of another person.' " Id., 748–49. Relying on our Supreme Court's decision in *Jacoby* v. *Brinkerhoff*, 250 Conn. 86, 735 A.2d 347 (1999), which established that "[a]

plaintiff's failure to join his [derivative] claim with a predicate action . . . was fatal"; *Gilman* v. *Shames*, supra, 189 Conn. App. 750–51; this court held that the plaintiff's claim was "not viable" because it was not accompanied by a wrongful death action brought by the decedent's estate. Id., 752.

On May 19, 2020, the plaintiff commenced the present action by way of a five count complaint. The first count, brought against the defendant by the plaintiff in his capacity as the administrator of the decedent's estate,[5] sounded in wrongful death.[6] The third count, brought by the plaintiff in his individual capacity, alleged bystander emotional distress as a result of the defendant's negligent oversight of the decedent's care. The fifth count, brought by the plaintiff as the administrator of the decedent's estate, asserted that the defendant's conduct also constituted a breach of contract between the defendant and the decedent.[7]

On June 18, 2020, the defendant and Shames filed a motion to dismiss for lack of subject matter jurisdiction. They argued, inter alia, that the commissioner had not granted the plaintiff permission to bring his claim on behalf of the decedent's estate, that the wrongful death action was not brought within two years of the decedent's death as mandated by § 52-555, and that the plaintiff's failure to bring the initial action in his capacity as the administrator of the decedent's estate prevented § 52-592 from extending the statute of limitations set forth in § 52-555. The plaintiff filed an opposition to the

[5] The plaintiff was appointed as the administrator of the decedent's estate on May 23, 2018.

[6] The second and fourth counts, which asserted claims against Shames, were withdrawn.

[7] The plaintiff specifically alleged that, "[t]hroughout the course of [the decedent's] treatment by the defendant, the defendant provided her numerous patient documents . . . [that] formed a contract which imposed obligations on the defendant to properly monitor her health and provide the appropriate treatment."

motion to dismiss accompanied by a memorandum of law on November 3, 2020, in which he argued that a "nontechnical interpretation" of the plaintiff's notice of claim was proper and that the accidental failure of suit statute applied regardless of his status with respect to the decedent's estate at the time of the initial action.

On December 16, 2020, the court issued its memorandum of decision on the defendant's motion to dismiss. Noting that both of the plaintiff's actions were centered on alleged medical malpractice on the part of the defendant's agents, the court broadly construed the plaintiff's notice of claim and concluded that, however "inartfully drawn," (1) the notice properly apprised the commissioner of the plaintiff's intention to bring a wrongful death claim on behalf of the decedent's estate and (2) the waiver of sovereign immunity by the commissioner validly encompassed that claim. With respect to the accidental failure of suit statute, the court emphasized that § 52-592 " 'is remedial and is to be liberally interpreted.' " The court then analogized the present matter to *Isaac* v. *Mount Sinai Hospital*, 210 Conn. 721, 732–33, 557 A.2d 116 (1989), wherein our Supreme Court held that if a sufficient "identity of interest" exists between the parties bringing two actions, "total identity of plaintiffs is not a prerequisite to application of [§ 52-592]." The court reasoned that, because the plaintiff—like the plaintiff in *Isaac*—was not the administrator at the time of his first action but was appointed prior to bringing the present action, § 52-592 should apply in the present case. The court thus denied the defendant's motion to dismiss, and this appeal followed.

I

The defendant first claims that the court improperly determined that it had subject matter jurisdiction over the plaintiff's action. The defendant argues that the court misconstrued the commissioner's prior waiver of

sovereign immunity to permit the plaintiff to proceed with his claims in the present action. We agree with the defendant.

We begin our analysis with the relevant standard of review and legal principles. "The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . Therefore, [o]ur Supreme Court expressly has stated that a plaintiff seeking monetary damages against the state must first obtain authorization from the [commissioner]. . . . [Section] 4-147 provides in relevant part: Any person wishing to present a claim against the state shall file with the office of the [commissioner] a notice of claim . . . containing the following information: (1) *The name and address of the claimant*; the name and address of his principal, *if the claimant is acting in a representative capacity*, and the name and address of his attorney, if the claimant is so represented; (2) *a concise statement of the basis of the claim*, including the date, time, place and circumstances of the act or event complained of; (3) a statement of the amount requested; and (4) a request for permission to sue the state, if such permission is sought. . . . [T]he [commissioner] may deny or dismiss the claim, order immediate payment of a claim not exceeding [$7500], recommend to the General Assembly payment of a claim exceeding [$7500] or grant permission to sue the state. . . . As a general matter, [s]overeign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise [plenary] review." (Citations omitted; emphasis added; emphasis in original; internal quotation marks omitted.) *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 501–502, 167 A.3d 1112, cert. denied, 327 Conn. 973, 174 A.3d 192 (2017).

"The doctrine of sovereign immunity is a rule of common law that operates as a strong presumption in favor

of the state's immunity from liability or suit. . . . [It is a] well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 387–88, 978 A.2d 49 (2009).

In his notice of claim filed with the commissioner on June 9, 2016, the plaintiff stated in relevant part: "I am making a claim for my pain and suffering and emotional distress that I experienced because of medical malpractice committed by [the hospital and Shames] regarding the treatment and diagnosis of [the decedent]. I am also making a claim for loss of consortium." At no point therein did the plaintiff indicate that he sought to bring a claim against the defendant in any capacity other than as an individual.[8] In light of the plain text of the plaintiff's notice of claim, we cannot agree with the court that the notice properly apprised the commissioner of the plaintiff's intention to sue the defendant in an administrative capacity.

Although the plaintiff argues that the court correctly relied on *Arroyo* in holding that the February 23, 2017 waiver of sovereign immunity encompassed the claims brought in the present action, the situation set forth in *Arroyo* materially differs from that which is before us. In that case, the plaintiff patient and his spouse brought an action against the defendant hospital and the state

[8] Furthermore, it is undisputed that the June 9, 2016 notice of claim constitutes the plaintiff's sole attempt to request permission to bring an action against the defendant. The plaintiff did not seek to provide the commissioner with notice of any claims he sought to bring in his capacity as administrator of the decedent's estate at a later date.

alleging medical malpractice with respect to a vasectomy performed on him by one of the defendant hospital's doctors. *Arroyo* v. *University of Connecticut Health Center*, supra, 175 Conn. App. 495–96. After the court rendered judgment for the plaintiffs, the defendants appealed, claiming, inter alia, that the plaintiffs had failed to properly obtain a waiver of sovereign immunity. Id., 495. Comparing the evidence introduced at trial to the allegations set forth in the plaintiffs' notice of claim, this court concluded that "the plaintiffs' theory of liability in their notice accurately sums up the theory of liability presented at trial, albeit in a truncated manner . . . ." Id., 506. This court further noted that, although "the basis of the claim in the notice to the commissioner was not as particularized as it might have been," the lack of discovery available to the plaintiffs in advance of filing their notice of claim counseled against "attaching any binding significance" to the initial formulation of their claim set forth in the notice. Id., 506–507.

Here, we are not faced with the same claim that is merely presented under one legal theory in the notice of claim and argued in a slightly different fashion at trial. See id., 505–506. Moreover, unlike *Arroyo*, the claimants are not the same. The plaintiff's wrongful death action brought as administrator of the decedent's estate and his derivative bystander emotional distress claim brought in his individual capacity are two wholly separate claims. See *Champagne* v. *Raybestos-Manhattan, Inc.*, 212 Conn. 509, 563–64, 562 A.2d 1100 (1989) ("[T]he plaintiff's claim as administratrix . . . and the plaintiff's individual claim . . . are two separate causes of action. . . . [A]lthough [the plaintiff's individual claim] . . . is 'derivative,' it is still a separate cause of action . . . ." (Citations omitted.)). It follows that, for the court to have had jurisdiction over his

wrongful death claim brought on behalf of the decedent's estate, the plaintiff was obligated, pursuant to § 4-147 (2), to provide a concise statement of the basis of that *particular* claim and to identify himself as acting in a representative capacity. See, e.g., *Morneau* v. *State*, 150 Conn. App. 237, 252, 90 A.3d 1003 (plaintiff seeking waiver of sovereign immunity "needed to include information that would clarify the nature of the waiver sought and ensure that the [commissioner], and subsequently the General Assembly . . . would have an understanding of the nature of that waiver"), cert. denied, 312 Conn. 926, 95 A.3d 522 (2014).

In the absence of proper notice to the commissioner, the commissioner's waiver of sovereign immunity cannot be said to encompass the claim at issue in this appeal. In the absence of such a waiver, we conclude that the court did not have subject matter jurisdiction over the plaintiff's claims. For that reason, the court improperly denied the defendant's motion to dismiss.

II

In light of our resolution of the defendant's sovereign immunity claim, we need not address its second claim of error. However, because of the possibility that this issue may arise in the future, we also consider the defendant's claim that the court improperly concluded that the accidental failure of suit statute exempted the plaintiff from the two year time limit for bringing a wrongful death action under § 52-555. The defendant contends that, because the plaintiff's prior action was brought solely in his individual capacity, § 52-592 cannot save his current action. We agree.

" '[T]he question of whether [a] court properly applied § 52-592 presents an issue of law over which our review is plenary.' " *White* v. *Dept. of Children & Families*, 136 Conn. App. 759, 764, 51 A.3d 1116, cert. denied, 307 Conn. 906, 53 A.3d 221 (2012). " '[T]he accidental failure

of suit statute can be traced as far back as 1862 . . . and is a savings statute that is intended to promote the strong policy favoring the adjudication of cases on their merits rather than the disposal of them on the grounds enumerated in § 52-592 (a). . . . We note, however, that this policy is not without limits. If it were, there would be no statutes of limitations. Even the saving[s] statute does not guarantee that all plaintiffs have the opportunity to have their cases decided on the merits. It merely allows them a limited opportunity to correct certain defects in their actions within a certain period of time.' " *Riccio* v. *Bristol Hospital, Inc.*, 341 Conn. 772, 780, 267 A.3d 799 (2022).

In concluding that the accidental failure of suit statute applied in the present case, the court relied entirely on *Isaac* v. *Mount Sinai Hospital*, supra, 210 Conn. 721. That reliance is misplaced. In *Isaac*, the plaintiff brought her first wrongful death action prior to officially being named administratrix of the decedent's estate.[9] Id., 723. At the time the plaintiff formally became the administratrix, the statute of limitations laid out in § 52-555 already had run. Id. The defendant hospital filed a motion to dismiss alleging a lack of subject matter jurisdiction, which the trial court granted, and this court upheld that judgment on appeal. Id., 724. Four years after bringing that initial action, the plaintiff filed a second wrongful death action, which the trial court dismissed. Id. On appeal, our Supreme Court emphasized that § 52-592 " 'is remedial and is to be liberally interpreted.' " Id., 728. The Supreme Court then reasoned that, even though the plaintiff brought her first action in her individual capacity and her second action

[9] The court in *Isaac* found that, although "[t]he plaintiff alleged in the complaint that she had been appointed administratrix of the decedent's estate on May 17, 1979 . . . [i]n 1982, she discovered that she had been involved only in the transfer of survivorship property and had not been named administratrix." *Isaac* v. *Mount Sinai Hospital*, supra, 210 Conn. 723.

as administratrix, she maintained an "identity of interest" that allowed her second action to be saved by § 52-592. Id., 732–33. The court stated: "[W]e conclude that total identity of plaintiffs is not a prerequisite to application of the statute. We look, instead, to the essence of the plaintiff's status and the interest she represented. [The plaintiff] was the purported administratrix of [the decedent's] estate in the first instance and the actual administratrix in the second case. The cause of action and the claimed factual background, as well as all defendants, were identical in both instances. Accordingly, application of § 52-592 to this case is not precluded." Id., 733.

Unlike the plaintiff in *Isaac*, the plaintiff in the present case did not bring the same claim in two consecutive actions. In *Gilman*, the plaintiff brought a claim for bystander emotional distress solely as an individual, and this court specifically concluded that the plaintiff had brought no claim for wrongful death in a representative capacity. *Gilman* v. *Shames*, supra, 189 Conn. App. 751–52. The record does not reflect that, at any point during the pendency of *Gilman*, the plaintiff held himself out as the "purported administrat[or]" of the decedent's estate. *Isaac* v. *Mount Sinai Hospital*, supra, 210 Conn. 733. It is undisputed that the plaintiff did not become the administrator of the decedent's estate until May 23, 2018, at which point the trial court in *Gilman* already had dismissed the action. Accordingly, at the time of the first action, the plaintiff did not meet the statutory requirement to bring a claim on behalf of the decedent's estate. *Ellis* v. *Cohen*, 118 Conn. App. 211, 216, 982 A.2d 1130 (2009) ("§ 52-555 creates a cause of action for wrongful death that is maintainable on behalf of the estate *only by an executor or administrator*" (emphasis added)). Without the ability to have brought

an action as administrator in the first instance, we cannot agree that the plaintiff's attempt to litigate his individual claim in *Gilman* properly overlaps with his current wrongful death action such that § 52-592 is implicated. See *White* v. *Dept. of Children & Families*, supra, 136 Conn. App. 766 ("[I]n the present case, the plaintiff is alleging a new cause of action that is separate from the cause of action that was the basis of her [original] complaint. Because the present case involves a new cause of action, the plaintiff may not invoke § 52-592 to save any untimely claims."). We therefore conclude that the accidental failure of suit statute does not apply in the present case to save the plaintiff's action from his lack of compliance with the statute of limitations for wrongful death actions.[10]

The judgment is reversed and the case is remanded with direction to render a judgment of dismissal.

In this opinion the other judges concurred.

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[10] The plaintiff concedes that, without the applicability of § 52-592, his claims for breach of contract and bystander emotional distress fail. Because we conclude that § 52-592 does not govern the matter before us, these claims necessarily fail. See *Parnoff* v. *Mooney*, 132 Conn. App. 512, 518, 35 A.3d 283 (2011).