CIT BANK, N.A. *v.* JOHANNA FRANCIS ET AL. (AC 43121)

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

Syllabus

The defendant J, an heir of the decedent mortgagors, appealed to this court following the trial court's judgment of strict foreclosure in favor of the plaintiff bank. J claimed that the trial court improperly granted the plaintiff's motion for a protective order that precluded her from obtaining the discovery materials she needed to develop and pursue her special defenses. J had filed special defenses that alleged, inter alia, that her father, F, had threatened and fraudulently induced the decedents, who were J's grandparents, to enter into the mortgage transaction. J filed discovery requests that sought information from the plaintiff about its communications with F and its knowledge of his actions. In response, the plaintiff sought a protective order, claiming that J's requests exceeded those normally made in mortgage foreclosure actions and that state and federal law prohibited disclosure of the requested information. In opposing the plaintiff's motion, J produced a letter from the executor of her grandmother's estate consenting to the discovery requests. The trial court granted the plaintiff's motion for the protective order as to documents other than the promissory note, the mortgage, assignments of the mortgage and the decedents' payment history. The court subsequently granted a motion the plaintiff filed to strike the special defenses relating to F, reasoning that the special defenses failed to allege that the plaintiff or its predecessor in interest knew of or participated in F's alleged misconduct and that F was acting on behalf of the plaintiff or as its agent. The court also granted motions the plaintiff filed seeking summary judgment as to liability only on the complaint and as to J's remaining special defenses. The court concluded, inter alia, that J could not prevail on her special defenses that alleged that the decedents lacked the mental capacity to enter into the loan and that there was an absence of consideration for the loan. *Held* that the trial court's granting of the plaintiff's motion for a protective order constituted an abuse of discretion that, under the particular circumstances of this case, was harmful to J, as it prevented her from discovering facts that would permit her to pursue, develop and support her special defenses: contrary to the plaintiff's assertion, state and federal law did not prohibit compliance with J's discovery requests, as those laws permitted disclosure based on consent, which J had obtained from the executor of her grandmother's estate, the plaintiff provided no authority for the court's refusal to permit any disclosure of documents beyond the note, the mortgage and assignments thereof and the decedents' payment history, and the plaintiff asserted no claim that J's discovery requests were not made in good faith

or were overbroad, unreasonable, oppressive or improper; moreover, the plaintiff's claim that J could have amended the stricken special defenses or obtained discovery from other sources was unavailing because J was not a party to the mortgage transaction, the special defenses necessarily encompassed information relevant to the plaintiff's participation in or knowledge of F's alleged conduct, and, once the court precluded full discovery, J could no longer develop an evidentiary basis from which to amend the stricken special defenses; furthermore, because J was denied the discovery needed to develop and pursue her special defenses, she was not, as the plaintiff claimed, required to file an affidavit pursuant to the applicable rule of practice (§ 17-47) in response to the plaintiff's motion for summary judgment as to the special defenses.

(*One judge concurring separately*)

Argued January 5, 2021—officially released August 9, 2022

Procedural History

Action to foreclose a mortgage on certain real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Mintz*, *J.*, granted the plaintiff's motion to cite in James M. Francis as a defendant; thereafter, the defendant James M. Francis et al. were defaulted for failure to appear; subsequently, the court, *Randolph*, *J.*, granted the plaintiff's motion for a protective order; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion to strike certain of the named defendant's special defenses; subsequently, the court, *Lee*, *J.*, granted the plaintiff's motion for summary judgment as to liability only on the named defendant's first and second special defenses; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion for summary judgment as to the complaint; subsequently, the court, *Lee*, *J.*, granted the plaintiff's motion to substitute Cascade Funding RM1 Alternative Holdings, LLC, as the plaintiff; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed*; *further proceedings*.

Timothy D. Miltenberger, for the appellant (named defendant).

Christopher J. Picard, for the appellee (substitute plaintiff).

Opinion

ELGO, J. In this mortgage foreclosure action, the defendant Johanna Francis[1] appeals from the judgment of the trial court in favor of the plaintiff, CIT Bank, N.A.[2] On appeal, the defendant claims that the court improperly granted the plaintiff's motion for a protective order regarding certain discovery requests, thereby preventing her from pursuing her special defenses. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff commenced this action on June 13, 2016, seeking to foreclose a residential mortgage on property located at 243 New Norwalk Road in New Canaan. According to the complaint, on April 8, 2008, Norbert Francis and Evelyn Francis (decedents) executed and delivered to Financial Freedom Senior Funding Corporation, a subsidiary of IndyMac Bank, F.S.B., a promissory note for a loan not to exceed a maximum principal amount of $818,550. To secure the note, the decedents executed a reverse annuity mortgage (mortgage) on the property. Thereafter, the mortgage was assigned from Financial Freedom Senior

[1] The Department of Revenue Services and the Judicial Branch also were named as defendants. The trial court thereafter granted the motion filed by the plaintiff, CIT Bank, N.A., to cite in James M. Francis as a defendant. On September 26, 2017, those three defendants were defaulted for failure to appear. We refer in this opinion to Johanna Francis as the defendant.

[2] We note that, after the court ruled on the motions at issue in this appeal, CIT Bank, N.A., assigned the mortgage at issue to Cascade Funding RM1 Alternative Holdings, LLC. The court thereafter granted the plaintiff's motion to substitute Cascade Funding RM1 Alternative Holdings, LLC, as the plaintiff. For clarity, we refer in this opinion to CIT Bank, N.A., as the plaintiff.

Funding Corporation to Mortgage Electronic Registration Systems, Inc., as nominee for Financial Freedom Acquisition, LLC. The mortgage then was assigned from Mortgage Electronic Registration Systems, Inc., to the plaintiff.

Norbert Francis died on January 30, 2009, and Evelyn Francis died on February 1, 2016. The complaint alleged that the note was in default and that the plaintiff, as the holder of the note, had elected to accelerate the balance due on the note, to declare the note to be due in full and to foreclose the mortgage securing the note. The complaint further alleged that the defendant, who was the decedents' granddaughter, and James M. Francis (Francis), the defendant's father, might claim an interest in the property by virtue of being the heirs at law to the decedent Evelyn Francis.

On September 20, 2017, the defendant filed an answer to the plaintiff's complaint. On December 12, 2017, the defendant filed a revised answer, in which she raised four special defenses. In those special defenses, she alleged that (1) the note and mortgage were unenforceable because the decedents "had mental illness that prevented them from understanding the true nature of the loan documents alleged in the complaint"; (2) "neither [of the decedents] received any consideration" for the note and mortgage; (3) Francis "made a false representation of fact to induce [the decedents] to sign the note and mortgage," and "Francis knew that his representations . . . were untrue and [that the decedents] relied on the false representation to their detriment"; and (4) "Francis wrongfully acted and threatened [the decedents] to sign the note and mortgage . . . leaving them with no reasonable alternative, and to which acts and, or, threats they acceded, resulting in a transaction that was unfair to [the decedents]."

The defendant also filed discovery requests, in which she asked, inter alia, that the plaintiff identify all communications between Francis and the plaintiff, and to produce all written communications received by the plaintiff or any of its predecessors from Francis or the decedents or any attorney purporting to represent any of them. In response, the plaintiff filed a motion for a protective order pursuant to Practice Book § 13-5, contending, inter alia, that disclosure of the requested information was precluded by state and federal law. On November 22, 2017, the defendant filed an objection to the plaintiff's motion for a protective order. At a hearing on the plaintiff's motion on January 29, 2018,[3] the plaintiff indicated that it was willing to provide "the note, the mortgage, the assignments, and the payment history" to the defendant. The plaintiff nevertheless informed the court that it objected to the defendant's requests for "any and all communications between [the] decedents, who were the ones who took out the note and the mortgage," "any communications between [the plaintiff] and [Francis]," and "any and all attorneys that were involved in the making and execution of the note and the mortgage." The plaintiff also argued that the defendant's discovery requests went "above and beyond asking for the normal documents that are required to give to the court in conjunction with a foreclosure action." The plaintiff made no claim that the defendant's discovery requests were made in bad faith or that they were overbroad, unreasonable, oppressive or improper. In response, the court stated: "What the court is taking into consideration is this: if the defenses that have been talked about include [incapacity], the court's not going to jump into the deep end of the pool and provide

[3] On November 27, 2017, the court summarily granted the plaintiff's motion for a protective order. On December 13, 2017, the defendant filed a motion to reargue. By order dated December 20, 2017, the court vacated its ruling on the plaintiff's motion for a protective order and conducted a hearing on January 29, 2018.

anything beyond the note, the mortgage, the assignments, and the payment history." The court thereafter granted the plaintiff's motion for a protective order as to documents other than the note, mortgage, assignments and payment history.

On January 26, 2018, three days before the trial court granted the plaintiff's motion for a protective order, the plaintiff filed a motion to strike pursuant to Practice Book § 10-39, claiming that the defendant's third and fourth special defenses were legally insufficient for failing to allege that the plaintiff or its predecessor in interest knew of or participated in Francis' alleged misconduct. The defendant did not file a response to the motion to strike. The court granted the plaintiff's motion to strike by order dated April 9, 2018. As to the third special defense, the court held that the defendant had failed to plead facts regarding the subject matter of the alleged misrepresentation or demonstrating that the plaintiff or Francis, acting on behalf of the plaintiff, made the subject misrepresentation. As to the fourth special defense, the court held that the defendant had failed to allege that Francis was acting on behalf of or as the agent of the plaintiff.[4]

On September 11, 2018, the plaintiff filed a motion for summary judgment as to liability on the defendant's

[4] In its order granting the motion to strike, the court stated: "In the third special defense, the [defendant alleges] that a third party made misrepresentations to the [decedents], but there is no allegation concerning the subject of the misrepresentation. There is no allegation that the plaintiff made the misrepresentation or that the third party who allegedly made the misrepresentation was in any way acting on behalf of or as the agent of the plaintiff or the plaintiff's predecessors in interest. These are essential elements of the special defense. Similarly, the fourth special defense alleges that the [decedents] were acting under the undue influence of the third party. But, again, the defense is lacking in any allegation that even infers that the third party was acting on behalf of or as the agent of the plaintiff or [its] predecessors, or even that they knew or had reason to know of the influence. The court also observes that the [defendant has] not filed a memorandum in opposition to the plaintiff's motion to strike, though [she] sought and received additional time to do so."

first and second special defenses. The defendant did not file a response to that motion and, on December 6, 2018, the court rendered summary judgment in favor of the plaintiff as to liability only. In so doing, the court concluded that the plaintiff had established that it was the holder of the note and mortgage, and that a default had occurred. The court further concluded that the defendant could not prevail on the first and second special defenses, which alleged that the decedents lacked the mental capacity to enter into the loan and that there was an absence of consideration for the loan.[5]

The plaintiff then filed a second motion for summary judgment as to liability on the sole count of the foreclosure complaint. Once again, the defendant did not file a response to the plaintiff's motion, which the court granted on January 28, 2019, stating: "The court has

[5] In its decision, the court stated that the defendant's first special defense "rests solely on speculation. [The defendant] acknowledges [that] she has no personal knowledge of the closing or, by extension, of [the decedents'] condition at the closing. On the other hand, the plaintiff submits the affidavit of Attorney Christopher J. Albanese, who handled the closing for the [decedents] and the bank. His affidavit attests that, although elderly, the [decedents] were lucid and pleased to be able to withdraw additional funds by refinancing the loan on their home. As a result, the first special defense is not supported by evidence and is insufficient to defeat the motion for summary judgment.

"[The] defendant's second special defense fares no better. [The] defendant claims that the loan is invalid because of lack of consideration and suggests that the money was stolen by [Francis]. . . . The evidence set forth in [Albanese's] affidavit is that the loan was funded, a prior mortgage was paid off, and the [decedents] received cash and retained a balance in the new home equity account. In [her response to the plaintiff's interrogatories], the defendant says that [Francis] has been charged with first and second degree larceny for stealing money from [the] home equity account [belonging to his mother, the decedent Evelyn Francis]. [The defendant] states that he used a power of attorney that had been executed by [the decedent Evelyn Francis]. As a result, any money taken by [Francis] would have come from [the decedent Evelyn Francis'] accounts after the loan had been funded by the lender. Accordingly, there was no lack of consideration demonstrated by the defendant. [The] defendant's complaint is with her father, not the bank." (Citation omitted.)

reviewed the affidavits on file and finds no genuine issue of material fact as to the essential allegations of the complaint. [The] court also observes that there were no counteraffidavits or no opposition filed." Thereafter, on June 11, 2019, the court rendered judgment of strict foreclosure in favor of the plaintiff. This appeal followed.

On appeal, the defendant claims that the court improperly granted the plaintiff's motion for a protective order regarding the defendant's discovery requests. According to the defendant, the plaintiff did not establish good cause for the granting of a protective order as required pursuant to Practice Book § 13-5.[6] She further contends that, in the absence of the discovery sought, she could not succeed on her third special defense, which alleged that Francis fraudulently had induced the decedents to enter into the mortgage transaction.[7] In response, the plaintiff argues that the defendant failed to preserve her claim because she did not challenge the propriety of the court's decision to strike that special defense or oppose the plaintiff's motions for summary judgment. The plaintiff further argues that, even if the trial court abused its discretion in granting the protective order, the defendant has failed to demonstrate that she was harmed by this decision. We agree with the defendant that the court improperly granted the motion for a protective order. We also conclude, under the circumstances of this case, that the defendant was harmed by the error because it prevented her from

[6] Practice Book § 13-5 provides in relevant part: "Upon motion by a party from whom discovery is sought, and for good cause shown, the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following . . . (2) that the discovery may be had only on specified terms and conditions. . . ."

[7] At oral argument before this court, counsel for the defendant clarified that the "key special defenses" were the third and fourth special defenses alleging fraud and duress.

discovering facts that would permit her to pursue, develop and support her special defenses.

We begin by setting forth the applicable standard of review. "We have long recognized that the granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such an order constitutes an abuse of that discretion." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 16–17, 905 A.2d 55 (2006). "[T]he [trial] court's inherent authority to issue protective orders is embodied in Practice Book § 13-5 . . . . The use of protective orders and the extent of discovery is within the discretion of the trial judge. . . . We have long recognized that the granting or denial of a discovery request . . . is subject to reversal only if such an order constitutes an abuse of that discretion." (Citation omitted; internal quotation marks omitted.) *Coss* v. *Steward*, 126 Conn. App. 30, 46, 10 A.3d 539 (2011).

As stated previously in this opinion, in her special defenses, the defendant alleged that Francis knowingly made a false representation of fact to induce the decedents to sign the note and mortgage, and that they relied on the false representation to their detriment. The defendant further alleged that Francis wrongfully acted and threatened the decedents to sign the note and mortgage. In support of the special defenses, the defendant sought, inter alia, information relating to the plaintiff's knowledge of Francis' actions. Specifically, the defendant requested that the plaintiff identify all communications between Francis and the plaintiff and to produce all written communications received by the plaintiff or any of its predecessors from Francis or the decedents, or any attorney purporting to represent any of them.

In its motion for a protective order, the plaintiff argued that disclosure of this information was prohib-

ited by (1) General Statutes § 36a-42,[8] (2) the Fair Debt Collections Practices Act, 15 U.S.C. § 1692c (b),[9] and (3) the Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. § 6802.[10] These provisions, however, all contain an exception that permitted the bank to comply with the defendant's discovery requests based on consent. Section 36a-42 provides in relevant part that "[a] financial institution may not disclose to any person,

[8] General Statutes § 36a-42 provides: "A financial institution may not disclose to any person, except to the customer or the customer's duly authorized agent, any financial records relating to such customer unless the customer has authorized disclosure to such person or the financial records are disclosed in response to (1) a certificate signed by the Commissioner of Administrative Services or the Commissioner of Social Services pursuant to the provisions of section 17b-137, (2) a lawful subpoena, summons, warrant or court order as provided in section 36a-43, (3) interrogatories by a judgment creditor or a demand by a levying officer as provided in sections 52-351b and 52-356a, (4) a certificate issued by a medical provider or its attorney under subsection (b) of section 17b-124, provided nothing in this subsection shall require the provider or its attorney to furnish to the financial institution any application for medical assistance filed pursuant to an agreement with the IV-D agency under subsection (c) of section 17b-137, (5) a certificate signed by the Commissioner of Veterans Affairs pursuant to section 27-117, (6) the consent of an elderly person or the representative of such elderly person provided to a person, department, agency or commission pursuant to section 17b-454, provided the financial institution shall have no obligation to determine the capacity of such elderly person or the representative of such elderly person to provide such consent, (7) a request for information served upon a financial institution in accordance with subsection (e) of section 12-162, or (8) a request for information made by the Commissioner of Revenue Services pursuant to section 12-39cc."

[9] Section 1692c (b) of title 15 of the United States Code provides: "Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."

[10] Section 6802 (a) of title 15 of the United States Code provides: "Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title."

except to the customer or the customer's duly authorized agent, any financial records relating to such customer *unless the customer has authorized disclosure* . . . ." (Emphasis added.) Title 15 of the United States Code, § 1692c (b), provides in relevant part: "Except as provided in section 1692b of this title, *without the prior consent of the consumer* given directly to the debt collector . . . a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." (Emphasis added.) Title 15 of the United States Code, § 6802 (a), provides: "Except as otherwise provided in this subchapter, a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title." Title 15 of the United States Code, § 6802 (e) (2), permits such disclosure, however, "with the consent or at the direction of the consumer . . . ."

In her objection to the plaintiff's motion for a protective order, the defendant argued that Attorney Jeremiah S. Miller, the executor of Evelyn Francis' estate, had consented to her discovery requests. She also attached a letter from Miller dated November 16, 2017, memorializing that consent.[11] At the hearing on the plaintiff's motion, counsel for the defendant argued that, because the defendant, who is the sole beneficiary of the estate,[12]

[11] The letter, addressed to counsel for the plaintiff and counsel for the defendant, stated: "This is to inform you that I, as the executor of the Estate of Evelyn S. Francis, give permission to [the plaintiff] to comply with the [d]efendant's [f]irst [s]et of [i]nterrogatories and [r]equests for [p]roduction dated September 21, 2017, filed by [the defendant]."

[12] Evelyn Francis intentionally made no provision for Francis in her last will and testament.

and the executor, both had consented to the defendant's discovery request, the plaintiff's motion for a protective order was without merit. Moreover, the plaintiff has provided no authority, nor have we found any, for the court's refusal to provide anything beyond "the note, the mortgage, the assignments, and the payment history" in the context of an incapacity claim, especially here, where the defendant was not present during any stage of the transaction, including the closing. In light of the foregoing, as well as the fact that there is no claim that the defendant was pursuing discovery in bad faith, we conclude that the court abused its discretion in granting the plaintiff's motion for a protective order.[13]

Our conclusion that the trial court abused its discretion in granting the protective order, however, does not end our analysis. According to the plaintiff, even if the trial court erred in granting the motion for a protective order, the defendant abandoned her claim by failing to revise her special defenses or to appeal from the granting of the motion to strike. The plaintiff further argues that the defendant cannot show that the granting of the protective order precluded her from presenting a

[13] Although the plaintiff argues on appeal that the consent of the estate of Norbert Francis was also required in order to comply with the defendant's discovery request, the plaintiff did not make this argument before the trial court. During the hearing, after counsel for the defendant pointed out that Miller had consented to the discovery, the court asked counsel for the plaintiff, "[w]hat's wrong with that?" In response, counsel for the plaintiff stated that the reason he filed the motion for a protective order was because the defendant's discovery request went beyond requesting the note, mortgage, assignments and payment history. Because the plaintiff did not argue before the trial court that it needed the consent of the estate of Norbert Francis in order to comply with the discovery request, we decline to address this issue on appeal. See *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661 ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.)), cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016).

genuine issue of material fact in response to the plaintiff's two motions for summary judgment. Finally, the plaintiff argues that, even if the trial court abused its discretion in granting the protective order, the defendant has failed to demonstrate that she was harmed by this decision. We disagree.

Preliminary to our consideration of these issues, we recognize that "[a]n action for foreclosure is peculiarly an equitable action" and that "[a] party that invokes a court's equitable jurisdiction by filing an action for foreclosure necessarily invites the court to undertake . . . an inquiry [into his conduct]. . . . Equity will not afford its aid to one who by his conduct or neglect has put the other party in a situation in which it would be inequitable to place him. . . . A trial court conducting an equitable proceeding may therefore consider all relevant circumstances to ensure that complete justice is done." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 670–71, 212 A.3d 226 (2019). Relevant circumstances that may form a proper basis for defenses in a foreclosure action include "conduct occurring after the origination of the loan, after default, and *even after the initiation of the foreclosure action* . . . ." (Emphasis added.) Id., 672. We also observe that the defendant in the present case does not claim on appeal that the trial court erred in granting the motion to strike or in granting the motions for summary judgment. Instead, the defendant contends that the trial court's ruling on the protective order precluded her from obtaining the discovery materials that would permit her to determine whether she had any viable special defenses.

In order to prevail on her third special defense, the defendant was required to allege and prove "(1) that a false representation of fact was made; (2) that the party making the representation knew it to be false; (3) that the representation was made to induce action by the

other party; and (4) that the other party did so act to her detriment." (Internal quotation marks omitted.) *Chase Manhattan Mortgage Corp.* v. *Machado*, 83 Conn. App. 183, 188, 850 A.2d 260 (2004). The defendant also had to establish that the plaintiff knowingly participated in or knew of the fraud. See id., 190 (spouse's fraud in inducing spouse to execute mortgage does not invalidate mortgage against mortgagee unless mortgagee participated in or knew of fraud). Similarly, in order to prevail on her fourth special defense, the defendant was required to allege and prove: "[1] a wrongful act or threat [2] that left the victim no reasonable alternative, and [3] to which the victim in fact acceded, and that [4] the resulting transaction was unfair to the victim." (Internal quotation marks omitted.) Id., 189. As with fraud, in order for the defendant to prevail on this special defense, she needed to establish that the plaintiff participated in or knew of the alleged duress. See id., 190.

When the court granted the plaintiff's motion for a protective order, it effectively prevented the defendant from obtaining information regarding the plaintiff's participation in or knowledge of Francis' alleged conduct. The plaintiff argues that the defendant could have obtained discovery from other sources, such as by deposing the decedent's doctors or Francis; this argument is not persuasive, however, because her special defenses necessarily encompassed information relevant to the *plaintiff's* participation in or knowledge of Francis' alleged conduct. Moreover, we reiterate that the plaintiff has sued a defendant with respect to a transaction to which she was not a party. As such, the defendant has a right to obtain discovery from the party most likely to have it. See Practice Book § 13-2 ("[d]iscovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action *and if it can be provided by the disclosing party*

or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure" (emphasis added)). Under these circumstances, once full discovery was precluded, the defendant had no evidentiary basis on which to amend her special defenses to allege that the plaintiff knew of or participated in Francis' alleged misconduct.[14] Put differently, the striking of the defendant's special defenses without the evidentiary basis to amend is simply a foregone conclusion and, thus, a red herring in our consideration of her appellate claims. Because the defendant's claim is that the court abused its discretion in granting the plaintiff the protective order and precluding discovery, and not whether it erred in granting the motion to strike, we are not persuaded that the defendant was required to take an appeal on that determination.

The plaintiff further argues that, in order to preserve this claim of error, the defendant should have filed an objection to the plaintiff's motions for summary judgment with supporting affidavits. Specifically, the plaintiff argues that the defendant should have filed an affidavit, pursuant to Practice Book § 17-47,[15] setting forth the information that is solely under the control of the plaintiff. We disagree.

[14] In *Chase Manhattan Mortgage Corp.* v. *Machado*, supra, 83 Conn. App. 188–90, this court held that the defendant in a foreclosure action could not prevail on her special defenses of fraud and duress because there was no allegation that the plaintiff or its predecessor had knowingly participated in the alleged fraud or duress. The facts of this case are distinguishable from those of *Machado* because in this case, unlike *Machado*, the defendant sought, by way of discovery, information regarding the plaintiff's participation in or knowledge of Francis' alleged conduct. The court, however, granted the plaintiff's motion for a protective order, thus precluding the defendant from obtaining this discovery.

[15] Practice Book § 17-47 provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

"A party opposing a summary judgment motion [pursuant to Practice Book § 17-47] on the ground that more time is needed to conduct discovery bears the burden of establishing a valid reason why the motion should be denied or its resolution postponed, including some indication as to what steps that party has taken to secure facts necessary to defeat the motion. Furthermore, under § 17-47, the opposing party must show by affidavit precisely what facts are within the exclusive knowledge of the moving party and what steps he has taken to attempt to acquire these facts." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Briarwood Connecticut, LLC*, 135 Conn. App. 670, 675, 43 A.3d 215 (2012). "[A] party contending that it needs to conduct discovery to respond to a motion for summary judgment must do more than merely claim the information needed is within the possession of the opposing party." (Internal quotation marks omitted.) Id., 677.

In citing to the provisions of Practice Book § 17-47, the plaintiff contends that the defendant was required to pursue "other options available to her" such as deposing the decedents' physicians or Francis, and, notably, emphasizes that the defendant failed to dispute the affidavit of Christopher J. Albanese, the closing attorney for both the bank and the decedents, which was filed with the plaintiff's first motion for summary judgment. See footnote 5 of this opinion. By its terms, however, the relief available in § 17-47 assumes that discovery has not yet been attempted or is complete; it does not contemplate the present situation in which the defendant was precluded from full and complete discovery in the first instance. For that reason, the present case is unlike *Briarwood Connecticut, LLC*, in which the defendant already had successfully conducted extensive discovery and, as the court observed, the plaintiff had not hindered the defendant in its discovery efforts. See *Bank of America, N.A.* v. *Briarwood Connecticut*,

LLC, supra, 135 Conn. App. 677. In the present case, by contrast, the record indicates that the precluded discovery included communications between any attorney purporting to represent the plaintiff or its predecessors, the decedents and Francis. The protective order thus deprived the defendant of the ability to explore and potentially challenge the circumstances of the closing, as attested to by Albanese. Under the particular circumstances of this case, the defendant was not required to file an affidavit pursuant to § 17-47 in response to the plaintiff's motion for summary judgment as to her special defenses because the record already makes clear that the defendant sought, but was denied, the discovery needed to develop and pursue her special defenses.

Finally, we address whether the defendant has shown that she was harmed by the granting of the protective order. See *Coss* v. *Steward*, supra, 126 Conn. App. 47. "The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, 268 Conn. 244, 249, 842 A.2d 1100 (2004). In considering the question of harm, we reiterate that the defendant's issue on appeal is not whether the court erred in rendering judgment based on the record before it. Instead, the defendant's claim of error is that the court's protective order prevented her from having the opportunity to pursue, develop and support the defenses she raised. Under the particular circumstances of this case, we conclude that the defendant has satisfied her burden of establishing that she was harmed by the granting of the protective order.

We initially note that our rules broadly allow for the discovery of information that is "reasonably calculated

to lead to the discovery of admissible evidence." Practice Book § 13-2.[16] "[T]he purpose of the rules of discovery is to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (Internal quotation marks omitted.) *Krahel* v. *Czoch*, 186 Conn. App. 22, 36, 198 A.3d 103, cert. denied, 330 Conn. 958, 198 A.3d 584 (2018); see also *Standard Tallow Corp*. v. *Jowdy*, 190 Conn. 48, 58–59, 459 A.2d 503 (1983) (court's discretion in granting or denying discovery request limited by provisions of discovery rules, especially mandatory provision that discovery "*shall* be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action" (emphasis in original; internal quotation marks omitted)). Furthermore, the boundaries of discovery are clearly broader than the boundaries of admissible evidence. See *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 139, 491 A.2d 389 (1985).

Our rules of practice further provide the procedures governing the discovery process. As applied to the present case, Practice Book § 13-6 (a) provides in relevant part that "[w]ritten interrogatories may be served upon any party without leave of the judicial authority at any time after the return day. . . ." Similarly, Practice Book § 13-9 (d) provides in relevant part that "[r]equests for production may be served upon any party without leave of court at any time after the return day. . . ." By allowing discovery immediately after the return date, these rules implicitly acknowledge that a defendant

[16] Practice Book § 13-2 provides in relevant part that "[d]iscovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . ."

might not know what special defenses are available in the absence of the discovery, and provide the defendant an opportunity to obtain any and all information that might be of assistance in the development and pursuit of special defenses. Cf. *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 672 (relevant circumstances that may form proper basis for defenses in foreclosure action include "conduct occurring . . . e*ven after the initiation of the foreclosure action* . . . ." (emphasis added)). In accordance with these rules, on September 21, 2017, the defendant served interrogatories and requests for production on the plaintiff, seeking information relating to the plaintiff's knowledge of Francis' actions. Specifically, the defendant requested that the plaintiff identify all communications between Francis and the plaintiff and produce all written communications received by the plaintiff or any of its predecessors from Francis or the decedents or any attorney purporting to represent any of them.

It is important to note that the plaintiff does not argue on appeal that the information sought by the defendant in her discovery request was not "reasonably calculated to lead to the discovery of admissible evidence." Practice Book § 13-2. Furthermore, during oral argument before this court, counsel for the plaintiff conceded that the grounds stated in the motion for a protective order related only to the confidentiality of the requested information pursuant to federal and state law; the motion did not assert that the requested information was not likely to lead to the discovery of relevant and admissible evidence. Indeed, there can be no dispute that the discovery requests were reasonably seeking evidence in support of recognized and valid equitable defenses to the plaintiff's mortgage foreclosure action.

Similarly, the plaintiff does not argue on appeal that the special defenses alleged by the defendant were not pleaded in good faith. In fact, a review of the record

amply supports the defendant's good faith belief in her special defenses. Specifically, after the granting of the protective order, the defendant responded to the plaintiff's first set of interrogatories and requests for production. Her response explained how the decedents had no need for the additional money generated by the mortgage and set forth how the decedents managed their finances over the course of their lives with the intent of avoiding the type of mortgage transaction at issue.[17] The defendant's response also stated that Francis had been charged with first and second degree larceny for stealing an amount in excess of $500,000 from Evelyn Francis' home equity account and that both the defendant and an investigator had been unsuccessful in their attempts to contact the plaintiff to obtain information regarding the subject transaction.[18] At the hearing on the motion for the protective order, counsel

[17] The defendant's response stated in part: "[The decedents] were both elderly retirees at the time the loan documents at issue were executed. They were also wealthy individuals. I do real estate development and million dollar loan transactions, and I was not told that they were applying for anything. They had no need for additional money, either in a lump sum or as a stream of payments to supplement their income. During their entire adult lives, both [decedents] were frugal individuals that did not incur unnecessary expenses or incur unnecessary debts. They lived in such a manner as to protect them from needing any type of financial assistance whatsoever in their elderly years and to insure that the family would not be burdened with financial expenses upon their death[s]. As a result, over the course of their lifetimes, both [decedents] accumulated significant assets for the purpose—and with the intent—of avoiding the need to engage in the type of mortgage transaction [at] issue in this civil action. With my going so far as to even pay for funeral expenses upon my grandfather's death and make prearrangements for my grandmother's plot.

"In sum, [the decedents] would not have entered into the mortgage transaction at issue had they understood their true nature. I became fully aware of [the decedents'] mental incapacity when I learned that they had been duped into signing the loan documents."

[18] The defendant's response stated in part: "The state of Connecticut's Department of Social Services concluded that [Francis] may have stolen an amount in excess of $500,000 from [the decedent Evelyn Francis] and the amount stolen 'may have been from a home equity.' The Department of Social Services urged the chief state's attorney 'to commence a criminal investigation into this especially egregious case.' [Francis] has been charged

for the defendant advised the court that the state was prosecuting Francis for larceny. The plaintiff does not contend that any of these statements were not made in good faith.

When the trial court in the present case granted the plaintiff's motion for a protective order, it effectively prevented the defendant from pursuing, developing and supporting her special defenses. To be clear, in order for the defendant to pursue her special defenses of fraud and duress, she needed to establish that the plaintiff participated in or knew of the alleged fraud or duress. See, e.g., *Chase Manhattan Mortgage Corp.* v. *Machado*, supra, 83 Conn. App. 188–90. Although it is true that the defendant did not allege facts in her special defenses regarding the plaintiff's involvement in Francis' conduct, the record amply supports the defendant's good faith basis for requesting the discovery that would have enabled her to amend her special defenses to include those allegations. Moreover, we reiterate that the court's order granting the plaintiff's motion specifically precluded the defendant from obtaining the requested discovery of all communications between Francis and the plaintiff, and all written communications received by the plaintiff or any of its predecessors from Francis or the decedents or any attorney purporting to represent any of them. Under the limited circumstances of this case, and given the broad scope of our discovery rules, as well as the equitable nature of a foreclosure proceeding; see, e.g., *U.S. Bank National Assn.* v. *Blowers*,

with larceny in the [first] and [second] degree. His criminal trial is currently scheduled for November, 2019. I am aware that the Ct investigator tried to contact [the plaintiff] on various occasions, and I personally tried to contact them on various occasions prior to her death and upon her death and no information [was] forthcoming nor was I added as per POA which was provided to them on more than one occasion prior to her death and after her death. I also did not receive information as was requested by the estate executor to communicate with me right after her death."

supra, 332 Conn. 670–71; we conclude that the defendant has satisfied her burden of establishing that she was harmed by the granting of the protective order.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.[19]

In this opinion the other judges concurred.

BRIGHT, C. J., concurring. I concur with the result and the sound reasoning of the majority. I agree that the trial court abused its discretion in granting the motion filed by the plaintiff, CIT Bank, N.A., for a pro-

[19] We note that the plaintiff contends, in an alternative argument, that the defendant does not have standing to raise any claims concerning this loan as she was not a party to this transaction. In support of this alternative argument, the plaintiff cites *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 401, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014), and *Deutsche Bank National Trust Co.* v. *Cornelius*, 170 Conn. App. 104, 118, 154 A.3d 79, cert. denied, 325 Conn. 922, 159 A.3d 1171 (2017). These cases are readily distinguishable from the present case. In *Strong*, this court held, inter alia, that the defendant in a foreclosure action, who had raised a defense based on the plaintiff's alleged noncompliance with a pooling and servicing agreement, had failed to meet her burden of establishing that summary judgment as to liability should not have been rendered for the plaintiff. We stated in *Strong* that "[i]t is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, supra, 401. In *Cornelius*, this court held that the plaintiff's purported failure to comply with the mortgage's notice provision did not implicate the jurisdiction of the trial court or deprive this court of jurisdiction over the foreclosure action. See *Deutsche Bank National Trust Co.* v. *Cornelius*, supra, 116. In so holding, we noted that the defendant was not a party to the mortgage. See id., 116 n.10.

In the present case, the defendant was named as a party in this action by virtue of her being an heir of the decedents. "[I]f a mortgagee brings a foreclosure action against a decedent's property during the settlement of the decedent's estate, the mortgagee must name the heirs or devisees as defendants because they hold title to the equitable right of redemption . . . ." *Connelly* v. *Federal National Mortgage Assn.*, 251 F. Supp. 2d 1071, 1075 (D. Conn. 2003). As a defendant and proper party in this foreclosure action, the defendant had the right to seek discovery relevant to her special defenses of fraud and duress.

tective order and that, on the unique and specific facts of this case, the court's error was not harmless.

In particular, I find it significant that the defendant Johanna Francis was not a party to the underlying transaction that gave rise to the plaintiff's foreclosure action and, therefore, lacked knowledge of those events. Accordingly, I agree that the defendant, in light of the arrest of her father, James M. Francis, had a reasonable basis to suspect that her grandparents, the decedents, Norbert Francis and Evelyn Francis, had been defrauded and to question the plaintiff's involvement in that fraud. Under these circumstances the defendant's discovery requests were reasonable because the best source of information relevant to the plaintiff's possible involvement, if any, in James M. Francis' alleged scheme was the plaintiff itself. Furthermore, the plaintiff does not claim that the defendant's discovery requests were propounded in bad faith, constituted a "fishing expedition," or were interposed for the purpose of delay. Nor does the plaintiff claim that the defendant's special defenses that alleged fraud and duress, even though insufficiently pleaded, were made in bad faith. Given these facts, I agree with the majority that the defendant acted reasonably in seeking discovery before further alleging improper conduct on the part of the plaintiff. Consequently, I agree that the court's improper ruling depriving her of that discovery was not harmless. I write separately, however, to emphasize the uniqueness of these facts and to make clear that the denial of a discovery request typically will not justify a failure to plead a legally sufficient cause of action or special defense.

Connecticut is a fact pleading jurisdiction. See Practice Book § 10-1 ("[e]ach pleading shall contain a plain and concise statement of the material facts on which the pleader relies"). Our rules of practice do not require, however, that parties be certain as to the truth of the

facts that they allege. Instead, allegations must be made "with reasonable cause" and with a good faith belief in their truth. See Practice Book §§ 4-2 (b) and 10-5.[1] "Good faith pleading requires that counsel must not allege claims of fact which he has no reasonable grounds to assert and cannot prove. . . . If under all such circumstances counsel then has reasonable grounds to file the pleading or make the representation, he cannot later be faulted for his failure to satisfy his burden of proof." *State* v. *Anonymous (1974-5)*, 31 Conn. Supp. 179, 180–81, 326 A.2d 837 (1974).

Consistent with our rules of practice, rule 3.1 of the Rules of Professional Conduct provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." In applying rule 3.1, this court has stated: "[A] claim or defense is frivolous (a) if maintained primarily for the purpose of harassing or maliciously injuring a person, (b) if the lawyer is unable either to make a good faith argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith argument for an extension, modification or reversal of existing law." *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 614, 931 A.2d 319, cert. denied, 284 Conn. 929, 934 A.2d 244 (2007). Furthermore, as the

[1] Practice Book § 4-2 (b) provides in relevant part: "The signing of any pleading, motion, objection or request shall constitute a certificate that the signer has read such document, that to the best of the signer's knowledge, information and belief there is good ground to support it, [and] that it is not interposed for delay . . . ."

Practice Book § 10-5 provides in relevant part: "Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the judicial authority, as may have been necessarily incurred by the other party by reason of such untrue pleading . . . ."

commentary to rule 3.1 explains: "The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." Rules of Professional Conduct 3.1, commentary.

Parties and lawyers have the same good faith obligation when it comes to conducting discovery. Practice Book § 13-2, which defines the scope of discovery, provides in relevant part that a party may seek discovery of nonprivileged information "material to the subject matter involved in the pending action . . . relate[d] to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." Discovery of such information is permitted so long as "the information sought appears *reasonably* calculated to lead to admissible evidence." (Emphasis added.) Practice Book § 13-2. As set forth previously in this opinion, courts in Connecticut equate reasonable conduct with conduct undertaken in good faith. See, e.g., *State* v. *Anonymous (1974-5)*, supra, 31 Conn. Supp. 180–81; see also *Clinton* v. *Aspinwall*, 200 Conn. App. 205, 224, 238 A.3d 763 ("[a] determination will be considered to be in good faith unless it went so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith" (internal quotation marks omitted)), cert. granted, 335 Conn. 979, 241 A.3d 704 (2020), and cert. granted, 335 Conn. 980, 241 A.3d 703 (2020). Similarly, rule 3.4 (4) of the Rules of Professional Conduct provides that a lawyer shall not make a frivolous discovery request in pretrial proceedings. As previously noted, this court has interpreted "frivolous" under the Rules of Professional Conduct as being synonymous with a lack of good faith. See *Brunswick* v. *Statewide Grievance Committee*, supra, 103 Conn. App. 614. Thus, whether pleading or engaging in discovery, a party, or his or her attorney, has the

same duty to proceed in good faith. Accordingly, in most cases, a party either has good faith both to plead and pursue discovery as to a claim or defense or that party lacks good faith to do either.

Moreover, discovery is used to develop claims that have been properly pleaded, not to create them. As noted previously, pursuant to Practice Book § 13-2, a party is entitled in discovery to seek information that is material to the subject matter involved in the pending action and that is reasonably calculated to lead to the discovery of admissible evidence. If a party has not alleged a legally sufficient claim or defense, that claim or defense is not part of "the subject matter involved in the pending action . . . ." Practice Book § 13-2; see also *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 570, 657 A.2d 212 (1995) ("[t]he issues are framed by the pleadings and are controlled by substantive law" (internal quotation marks omitted)). As to whether discovery is reasonably likely to lead to the discovery of *admissible evidence*, "[i]t is axiomatic that [e]vidence is admissible only to prove material facts, that is to say, those facts directly in issue or those probative of matters in issue; evidence offered to prove other facts is immaterial." (Internal quotation marks omitted.) *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 316, 788 A.2d 1199 (2002); see also *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 211, 596 A.2d 396 (1991) ("[r]elevant evidence is admissible only to prove facts material to liability; that is, facts directly in issue or probative of matters in issue"). Consequently, a party ordinarily will not be harmed by the denial of discovery as to a matter it never put at issue in its pleading.

Thus, in the typical case in which the party whose pleading has been challenged was involved in the transaction or events underlying the case, that party should be expected to sufficiently plead their cause of action

or defense on which their discovery requests are based and should not be permitted to use the lack of discovery as a reason not to do so. Of course, I would expect that, in that typical case, the party to whom the discovery is directed would object to the discovery as overly broad, unduly burdensome, and not likely to lead to the discovery of admissible evidence if it was not tethered to a properly pleaded claim or defense.

As noted previously, however, this is not that typical case. The defendant was not involved in the underlying transaction, and the plaintiff never claimed that her discovery requests were unreasonable and not made in good faith. Consequently, for the reasons set forth in the majority opinion, I agree that the judgment of the trial court must be reversed because the court's erroneous discovery order was not harmless.

Accordingly, I concur.

MICHAEL G. *v.* COMMISSIONER OF CORRECTION* (AC 43327)

Alvord, Cradle and Eveleigh, Js.

Syllabus

Pursuant to statute (§ 52-470 (d) (1)), when a habeas petitioner files a subsequent petition for a writ of habeas corpus more than two years after the date on which judgment on a prior habeas petition challenging the same conviction is deemed final, there is a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause.

The petitioner, who had been convicted of the crimes of sexual assault in the first degree and risk of injury to a child, filed a third petition for a writ of habeas corpus. Because the third petition was filed beyond the two year time limit for subsequent petitions set forth in § 52-470 (d) (1), the habeas court, upon the request of the respondent Commissioner

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline use the petitioner's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

of Correction, issued an order to show cause why the petition should be permitted to proceed and scheduled an evidentiary hearing on the issue. Prior to the show cause hearing, the petitioner moved to disqualify the habeas judge on the ground that he had presided over the petitioner's first habeas trial and that his comments related to the credibility of the petitioner's testimony in that case would create the appearance of impropriety if he were to preside over the present case. The habeas court denied the petitioner's motion for disqualification. At the show cause hearing, the petitioner testified that he had filed a timely second habeas petition, but it was withdrawn prior to trial on the advice of his counsel and that his counsel had advised him to wait at least sixty days before filing another petition to avoid the suspicion of the court. The habeas court dismissed the third habeas petition as untimely, concluding that the petitioner failed to demonstrate good cause for the nearly ten month delay in filing the petition and that the withdrawal of the second petition was strategically filed to manipulate or delay proceeding to trial. Thereafter, the habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. 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.
2. The habeas court did not abuse its discretion in determining that the petitioner failed to demonstrate good cause for the delay in filing his third habeas petition: contrary to the petitioner's claim that he established good cause because the delay was due to his second habeas counsel's incorrect advice, the petitioner failed to establish that something outside of his or his counsel's control caused or contributed to the delay in filing the third petition, and, even assuming that it was reasonable for him to withdraw the second petition prior to his pending trial and to wait at least sixty days before filing another petition, the petitioner did not file his third petition until nearly ten months after the statutory deadline had elapsed, and he provided no explanation as to why he waited an additional eight months beyond his counsel's suggested sixty day period before filing it; moreover, in making its determination, the habeas court reasonably considered the fact that the petitioner made no claim that the delay was due to missing witnesses or newly discovered evidence and reasonably concluded that the petitioner's actions were an attempt to manipulate or delay proceeding to trial.
3. The habeas court did not abuse its discretion in denying the petitioner's motion for disqualification of the habeas judge: contrary to the petitioner's contention that certain comments made by the judge during the petitioner's first habeas trial created the appearance of impropriety, the judge indicated that he had no recollection of the prior proceeding,

which had occurred seven years earlier, and the subject comments were made in the purview of his judicial role and reflected credibility determinations made with respect to the specific testimony given and the demeanor exhibited at the first habeas trial, and, therefore, it was clear that the judge's previous credibility determinations would not cause a reasonable person to question his impartiality in presiding over the present case nor were his comments so extreme as to display a clear inability to render fair judgment.

Argued March 10, 2021—officially released August 9, 2022

Procedural History

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

Jennifer B. Smith, assistant public defender, for the appellant (petitioner).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, *Leah Hawley*, senior assistant state's attorney, and *Amy L. Bepko-Mazzocchi*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Michael G., appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus pursuant to General Statutes § 52-470 (d) and (e).[1] On appeal, the

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review . . . . For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. . . .

petitioner claims that the court abused its discretion in denying his petition for certification to appeal because (1) the habeas court erred in determining that the petitioner failed to demonstrate good cause to overcome the statutory presumption of unreasonable delay and (2) the habeas judge improperly failed to disqualify himself. We disagree and, therefore, dismiss the appeal.

The following facts and procedural history are relevant to our resolution of this appeal. "On December 20, 2005, [a] jury returned a guilty verdict on four counts of sexual assault in the first degree and four counts of risk of injury to a child. On March 10, 2006, the [petitioner] was sentenced to a total effective term of eighty years imprisonment, execution suspended after forty years, followed by six years of special parole and twenty years probation." *State* v. *Michael G.*, 107 Conn. App. 562, 566, 945 A.2d 1062, cert. denied, 287 Conn. 924, 951 A.2d 574 (2008). This court affirmed the judgment of conviction on direct appeal. Id., 563. Our Supreme Court denied certification to appeal this court's decision.

Thereafter, on January 21, 2010, the petitioner filed his first petition for a writ of habeas corpus, which he amended on March 16, 2012 (first petition), alleging that his trial counsel had rendered deficient performance. Following a trial on the merits, the habeas court denied

"(e) In a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section."

that first petition. *Michael G.* v. *Commissioner of Correction*, 153 Conn. App. 556, 558, 102 A.3d 132 (2014), cert. denied, 315 Conn. 916, 107 A.3d 412 (2015). The habeas court denied his petition for certification to appeal, and this court dismissed his appeal on October 21, 2014. Id., 563. Our Supreme Court denied the petitioner certification to appeal on January 21, 2015.

The petitioner filed a second petition for a writ of habeas corpus on September 23, 2014 (second petition). A habeas trial with respect to that second petition was scheduled to begin on May 9, 2017. The petitioner, however, withdrew that petition on February 7, 2017.

The petitioner filed a third petition for writ of habeas corpus, the subject of this appeal, on December 1, 2017 (third petition). The respondent, the Commissioner of Correction, thereafter filed a request with the habeas court, pursuant to § 52-470 (d) and (e), for an order to show cause as to "why [the petitioner] should be permitted to proceed despite his delay in filing the instant habeas corpus petition." Subsequently, the habeas court, *Newson*, *J.*, ordered an evidentiary hearing (show cause hearing).

On February 20, 2019, prior to the show cause hearing, the petitioner moved that the habeas judge disqualify himself, arguing that, because Judge Newson had presided over the habeas trial on the petitioner's first petition, he should disqualify himself from presiding over this case. On March 15, 2019, at the start of the show cause hearing, the court addressed the motion for disqualification and concluded that disqualification was not necessary. The court then proceeded to conduct the show cause hearing on March 15, 2019. The only evidence presented at the hearing was the testimony of the petitioner. The court also heard legal arguments from both sides.

Thereafter, on June 21, 2019, the court issued a memorandum of decision dismissing the petitioner's third petition. In its decision, the court concluded that the petitioner's third petition was untimely by approximately ten months[2] and, further, that the petitioner did not demonstrate good cause for the delay in filing the petition. Thereafter, the petitioner filed a petition for certification to appeal, which the court denied. This appeal followed.

Following oral argument before this court held on March 10, 2021, at the petitioner's request, this appeal was stayed pending our Supreme Court's consideration of *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 274 A.3d 85 (2022).

Following our Supreme Court's decision in *Kelsey*, the parties were ordered to file supplemental briefs addressing *Kelsey*'s impact on this appeal. Additional procedural history will be set forth as necessary.

We begin by setting forth the legal principles that govern our review of a habeas court's denial of a petition for certification to appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the [denial] of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994),

[2] Specifically, the court determined that the statutory deadline applicable to the filing of subsequent habeas petitions was January 21, 2017. On appeal, the petitioner argues that this was a clearly erroneous factual finding because he had two years and twenty days from the day our Supreme Court denied the petitioner's petition for certification to appeal to file another petition, rendering the operative deadline February 10, 2017. As the respondent maintains, however, we need not consider this assertion because, regardless of which date is used, the petitioner's third petition was late by several months, a fact the petitioner concedes. See footnote 3 of this opinion. Furthermore, in his supplemental brief to this court, the petitioner notes that "[t]he statutory deadline expired on January 21, 2017," therefore seeming to abandon this claim.

and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. 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." (Internal quotation marks omitted.) *Olorunfunmi* v. *Commissioner of Correction*, 211 Conn. App. 291, 303, 272 A.3d 716, cert. denied, 343 Conn. 929, A.3d (2022).

I

The petitioner's first claim is that he established good cause for his delay in filing his third petition because the delay was due to incorrect advice from his counsel in his second habeas case.[3] We disagree.

The petitioner was the only witness who testified at the show cause hearing, and no other evidence was

[3] The petitioner does not dispute that his third petition was untimely.

offered by the parties. With respect to his second petition, the petitioner testified that it was filed before our Supreme Court denied his petition for certification to appeal this court's decision in his first habeas case. He testified that he was represented by counsel in the second habeas case, his counsel advised him to withdraw the second petition, and, "as far as [he knew], it was" withdrawn. In addition, when asked during direct examination, he agreed that his counsel further had advised him that he should wait "at least sixty days" after withdrawing the second petition before filing another "in order to avoid suspicion of the court."

Following the petitioner's testimony, each side presented argument. The respondent's counsel maintained that "[t]he [petitioner's] attorney was not here to testify as to what he did and didn't tell [the petitioner]. The only thing we have is the self-serving testimony that, you know, he, he was given this advice. I mean, clearly, the petition is late. It was filed after the statutory time period and there has been . . . no testimony as to newly discovered evidence, and nothing that shows good cause for the time delay. So, the petitioner's failed to meet his burden of proof." The petitioner's counsel discussed the issue of what exact date established when a petition was timely or not, asserting that the petitioner had until February 10, 2017, three days after he withdrew his second petition, to file another subsequent petition. In closing, the petitioner's counsel noted: "I think that the issue is . . . that he was given the incorrect advice during the time frame in which he could have filed another one timely."

Thereafter, on June 21, 2019, the habeas court dismissed the petitioner's third petition, determining that he lacked good cause for the delay in the filing of the petition. In its memorandum of decision, the habeas court first determined that "the petitioner had two years from when the Supreme Court issued notification [that]

it had denied certification to file a subsequent habeas action attacking the same conviction, which would have given him until January 21, 2017, but the present action was not filed until December 1, 2017." The habeas court then concluded that the petitioner did not meet his evidentiary burden of demonstrating good cause for the delay because "[t]here is no claim that the petitioner was 'forced' or 'misled' into withdrawing this prior petition. There is also no claim that the petitioner was lacking necessary information or witnesses when he filed the withdrawal, or that he has discovered otherwise unknown evidence between then and now. Instead, the court is left with the only reasonable conclusion that the withdrawal of the prior action was strategically filed simply to manipulate or delay proceeding to trial."

We begin by setting forth the applicable standard of review. "[A] habeas court's determination regarding good cause under § 52-470 (e) is reviewed on appeal only for abuse of discretion. Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did."[4] (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 440.

[4] Initially, the petitioner argued that the habeas court's determination regarding good cause was subject to plenary review because "the question of whether the petitioner has established 'good cause' under . . . § 52-470 presents an issue of statutory interpretation . . . ." As discussed previously in this opinion, this appeal was stayed pending our Supreme Court's decision in *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 424. In *Kelsey*, our Supreme Court rejected the argument that a decision to dismiss a habeas petition for failure to establish good cause required statutory interpretation and clarified that the proper standard of review is abuse of discretion. Id., 432, 440. In his supplemental brief, the petitioner acknowledges that the applicable standard of review is abuse of discretion.

Section 52-470 (d) provides in relevant part: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after . . . [t]wo years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review . . . ." Section 52-470 (e) provides in relevant part that, "[i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition."

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 441–42. The following nonexhaustive list of factors aid in determining whether a petitioner has satisfied the definition of good cause: "(1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition."[5] (Internal quotation marks omitted.) Id., 442.

[5] In his initial appellate briefing, the petitioner argued for "an expansive definition" of what constitutes good cause. In his supplemental briefing, however, the petitioner does not challenge the definition of good cause or the relevant factors for consideration set forth in *Kelsey*, which Supreme Court decision is binding on this court. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by [its] precedent").

"[A]lthough . . . the legislature certainly contemplated a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing, the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause. As with any excuse for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge."[6] (Footnote omitted.) Id., 444–45.

In *Kelsey*, the petitioner filed a second petition for a writ of habeas corpus approximately five years after our Supreme Court denied his petition for certification to appeal from this court's judgment affirming the habeas court's denial of his first petition for a writ of habeas corpus. Id., 429. The habeas court determined that the petitioner did not demonstrate good cause for the delay in filing his second petition and, therefore, dismissed the petition. Id., 431. Before our Supreme Court, the petitioner argued that, "in addition to his prior habeas counsel's failure to inform him of any statutory filing deadlines, his status as a self-represented party when he filed this petition caused the delay in filing insofar as his conditions of confinement had caused him to be unaware of the deadline set by the 2012 amendments to § 52-470." Id., 441. The court

[6] In addition to these factors, but not relevant to our review of the petitioner's claim, our Supreme Court established that "the habeas court may also include in its good cause analysis whether a petition is wholly frivolous on its face. . . . [T]he good cause determination can be, in part, guided by the merits of the petition." *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 444 n.9.

rejected this argument, noting that the "petitioner had access to a resource center that included the General Statutes" and that "the petitioner stated [as explanation for the delay] that he was housed in and out of administrative segregation due to a disciplinary problem." Id., 446.

In the present case, the petitioner argues that he established good cause because "his second habeas counsel failed to explain the statutory time limits in . . . § 52-470 and incorrectly advised him to withdraw his prior petition and refile it outside of the two year statutory deadline."[7] Specifically, he argues that his "second habeas counsel's deficient advice caused the delay in filing the instant petition. At the time the petitioner withdrew his prior petition, counsel failed to inform him of the statutory deadline that could preclude him from pursuing [an additional] habeas corpus [petition]." The petitioner further states that his habeas counsel was "required to understand the time constraints governing habeas corpus . . . ." The respon-

[7] In his principal brief to this court, the petitioner also argues that the delay was due to his then pending sentence review application, as he was waiting to see if his sentence would be modified before filing a third habeas petition. The respondent argues that "this claim is unreviewable because the habeas court did not issue a ruling on it, and the petitioner never sought articulation of the record on either the claim itself or the respondent's written objection thereto."

On March 18, 2019, following the show cause hearing, the petitioner filed a "supplemental brief in support of good cause" in which he argued that the habeas court could "infer that the petitioner waited to file a new petition for a writ of habeas corpus . . . because of his pending sentence review application." The petitioner attached the sentence review decision, which was issued on January 23, 2018, to the brief. The respondent objected to the brief and the arguments therein and requested that the brief be stricken. The court did not rule on the objection and did not address the sentence review argument in its memorandum of decision. Given that the petitioner did not raise the argument during the show cause hearing and the court did not address it in its memorandum of decision, we agree with the respondent that the issue is not reviewable.

dent replies that the petitioner's arguments "cannot be reconciled with the *Kelsey* court's statement that good cause must be something outside the control of both the petitioner and habeas counsel" because "*both* the petitioner and [his habeas counsel] bear personal responsibility for the consequences of the withdrawal of the prior petition." (Emphasis in original.) We agree with the respondent.

As the respondent notes, the record does not establish that the petitioner or his counsel was unaware of § 52-470 and the time limits included therein.[8] Even if we were to assume without determining, however, that neither the petitioner nor his habeas counsel was aware of the time limits,[9] the petitioner still cannot demonstrate that the habeas court abused its discretion in determining that the erroneous advice the petitioner received did not establish good cause for the delay in filing the third petition. The first two *Kelsey* factors are particularly instructive: On the basis of the evidence presented at the show cause hearing, there are no external factors at play and the petitioner and his habeas counsel together exclusively bear responsibility for the delay in filing the petition.[10] See *Kelsey* v. *Commis-*

[8] The respondent also asserts that we should apply the principle that "everyone is presumed to know the law"; (internal quotation marks omitted) *State* v. *Legrand*, 129 Conn. App. 239, 271, 20 A.3d 52, cert. denied, 302 Conn. 912, 27 A.3d 371 (2011). Because lack of knowledge alone does not establish good cause, we need not consider whether the presumption applies in this case. See *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 444.

[9] The evidence at the show cause hearing established only that the petitioner was advised to withdraw his second petition and file a third petition after the expiration of at least sixty days. There was no evidence as to the petitioner's knowledge, or lack thereof, of the time limitations contained in § 52-470 and, similarly, no evidence regarding his habeas counsel's knowledge of § 52-470.

[10] The petitioner argues that his habeas counsel provided ineffective assistance and that such defective assistance, being the result of the delay, established good cause for the delay in filing. The petitioner has failed, however, to provide any binding or persuasive law to support this position.

sioner of Correction, supra, 343 Conn. 445 ("whether and to what extent the petitioner or his counsel bears any responsibility for that lack of knowledge" is relevant to good cause inquiry); see also *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 591–92, 684 A.2d 1191 (1996) (neglect by party or party's attorney does not meet traditional definition of good cause), cert. denied, 240 Conn. 913, 691, A.2d 1079 (1997). It has not been established that "something outside of the control of the petitioner or habeas counsel caused or contributed to the delay." *Kelsey* v. *Commissioner of Correction*, supra, 442.

In addition, the length of the delay further supports the habeas court's determination that the petitioner failed to demonstrate good cause for the delay. Even assuming, without determining, that it was reasonable for the petitioner to withdraw the second petition prior to his pending trial and to wait "at least [sixty] days" before filing another petition, he did not file his third petition until almost ten months had elapsed, and, further, he provides no explanation as to why he waited an additional eight months after his habeas counsel's suggested sixty day waiting period.[11]

Finally, the habeas court reasonably considered the fact that the petitioner made no claim that the delay was due to missing witnesses or newly discovered evidence and reasonably concluded that the petitioner's actions were an attempt to "manipulate or delay pro-

[11] The petitioner initially argued that "[i]t is irrelevant when the petitioner filed the instant habeas petition because, even as the habeas court acknowledged, the petitioner 'would have been beyond the two year window . . . .' " In *Kelsey*, however, our Supreme Court affirmed that the length of time between the filing deadline and the filing of the petition is relevant to the good cause inquiry. *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 438.

ceeding to trial."[12] Thus, we conclude that the habeas court did not abuse its discretion in determining that the petitioner had failed to demonstrate good cause for the delay in filing his third petition for a writ of habeas corpus.

II

The petitioner's second claim is that the court "improperly failed to recuse itself from deciding the respondent's good cause motion." We disagree.

The following additional procedural history is relevant to our resolution of this claim. Subsequent to the trial on the petitioner's first petition for a writ of habeas corpus, during which the petitioner testified as a witness, Judge Newson issued an oral decision denying the petition. In that ruling, Judge Newson made the following comments: "[F]rankly, to put it bluntly, the petitioner's testimony lacked even the slightest semblance of credibility as to anything that came out of his mouth. . . . [H]e lacked even the slightest semblance of credibility. I watched his demeanor and his action, and I'm not just talking about his words. I don't think [the petitioner] even believed himself . . . and that's the court's assessment of him and his demeanor while he was testifying here.

"So that it's clear for the record, I am not judging the words; I am judging the person I saw on the stand and whether or not I found him the least bit credible as to those allegations . . . ." In addition, Judge Newson commented that the petitioner's parents, who also testified at the habeas trial, similarly lacked credibility.

In the present case, prior to the show cause hearing, the petitioner filed a motion pursuant to Practice Book

[12] The petitioner does not claim that this conclusion was unfounded but, rather, asserts that "why the petitioner sought to withdraw his prior petition is irrelevant."

§§ 1-22[13] and 1-23[14] and rule 2.11 of the Code of Judicial Conduct to disqualify Judge Newson "from hearing any aspect of this case." The petitioner argued that, because Judge Newson had "remarked on multiple occasions" that the petitioner lacked credibility and because "[t]he petitioner's credibility, in the present case, will be critical to the outcome . . . [i]n order to maintain the fairness of these proceedings and ensure that the petitioner receives due process, the court must not place itself in the precarious position of opining on the credibility of the petitioner [whom] it once found 'lacked any semblance of credibility.' " In the motion, the petitioner conceded that "there is no Practice Book rule or statute that explicitly prohibits the court from presiding over the petitioner's case" and that there is "no evidence that the court is actually biased against him." (Emphasis omitted.) Instead, his position was that "presiding over the present case would, at the very least, present an appearance of impropriety that this court could easily avoid by assigning the matter to another judge for all future proceedings . . . ."

At the start of the show cause hearing, Judge Newson addressed the motion for disqualification. The petitioner argued that Judge Newson's previous credibility

[13] Practice Book § 1-22 (a) provides: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct or because the judicial authority previously tried the same matter and a new trial was granted therein or because the judgment was reversed on appeal. A judicial authority may not preside at the hearing of any motion attacking the validity or sufficiency of any warrant the judicial authority issued nor may the judicial authority sit in appellate review of a judgment or order originally rendered by such authority."

[14] Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time."

determinations created the "appearance of impropriety," warranting disqualification. The respondent's attorney stated, "[w]e take no position."

Judge Newson then made the following oral ruling: "All right. I can, I can say this, I, I did read the, I did read the transcript. I can tell you in reading the transcript, I don't necessarily have any direct memory of the case or the proceedings. I will honestly say, notwithstanding the court's rather strong language, I think that language, as it was expressed in the opinion, was related to whatever the stories or the stories or testimony, for lack of a better word, that was related to the court in that matter.

"I don't know that I think I found, generally, that as a person [the petitioner] was not credible, but—and I think there's even mention of comments about, I think his parents testified—that watching their demeanor and other things that were in front of me at that time, I found that they lacked credibility. I also would note that, notwithstanding the strong language under those circumstances, that's a court's job in matters like this, which is to find whether or not persons are or not credible. And, I would imagine that if the fact that a court used strong language related to a matter as opposed to generally, were grounds for disqualification, there would be many.

"So I will, again, deny the request. Again, this is a substantially different matter, some seven years in the future. And, again, I can tell you—and I know, I know counsel's doing her job. At, at this point, I don't honestly have a direct memory of what even the facts and circumstances of that matter were. Although, I can tell you, it's not the—well, I'll just leave it at that."

On appeal, the petitioner asserts that "[a] reasonable person would have believed that the habeas court had a preconceived view that the petitioner was not credible

at the time he presided over the petitioner's show cause hearing, based on his repeated findings in the petitioner's prior habeas action that the petitioner 'lacked even the slightest semblance of credibility as to anything that came out of his mouth.' "[15] In reply, the respondent asserts that "the habeas court properly exercised its discretion in denying the motion for recusal because its comments on the petitioner's credibility were limited to the evidence presented during the first habeas trial, of which the habeas court had no direct recollection and which occurred seven years before the [show] cause hearing. Moreover, the comments would not have impacted the outcome of the instant proceeding, which did not depend on the court's assessment of the petitioner's credibility." We agree with the respondent.

"Appellate review of the trial court's denial of a defendant's motion for judicial disqualification is subject to the abuse of discretion standard. . . . That standard requires us to indulge every reasonable presumption in favor of the correctness of the court's determination." (Internal quotation marks omitted.) *State* v. *Lane*, 206 Conn. App. 1, 8, 258 A.3d 1283, cert. denied, 338 Conn. 913, 259 A.3d 654 (2021); see also *Joyner* v. *Commissioner of Correction*, 55 Conn. App. 602, 609, 740 A.2d 424 (1999).

[15] We note that many of the arguments set forth in the petitioner's appellate brief assert the existence of actual bias. Because the petitioner specifically disclaimed any argument that Judge Newson was actually biased during the hearing before the habeas court, however, any argument that Judge Newson was actually biased against the petitioner is waived. See *State* v. *Andres C.*, 208 Conn. App. 825, 853–54, 266 A.3d 888 (2021) ("[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice. . . . In determining waiver, the conduct of the parties is of great importance. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Internal quotation marks omitted.)), cert. granted, 342 Conn. 901, 270 A.3d 97 (2022).

We begin our analysis with Practice Book § 1-22 (a), which provides in relevant part that "[a] judicial authority shall . . . be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ." Rule 2.11 (a) of the Code of Judicial Conduct provides in relevant part: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."[16]

"In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted." *State* v. *Milner*, 325 Conn. 1, 12, 155 A.3d 730 (2017).

"[O]pinions that judges may form as a result of what they learn in earlier proceedings in the same case rarely constitute the type of bias, or appearance of bias, that requires recusal. . . . To do so, an opinion must be so extreme as to display clear inability to render fair judgment. . . . In the absence of unusual circumstances, therefore, equating knowledge or opinions

[16] The rule provides a nonexhaustive list of examples of situations warranting disqualification. See Code of Judicial Conduct, Rule 2.11 (a).

acquired during the course of an adjudication with an appearance of impropriety or bias requiring recusal finds no support in law, ethics or sound policy." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Rizzo*, 303 Conn. 71, 121, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012); see *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 529, 911 A.2d 712 (2006) (plain error for judge, who had represented petitioner during criminal proceedings, to not recuse himself given that habeas petition over which he presided had initially alleged that "his own prior representation of the petitioner was so deficient that it deprived the petitioner of counsel in violation of the sixth amendment to the federal constitution" as reasonable person would question judge's impartiality).

As noted, the petitioner argues that Judge Newson's previous comments regarding the petitioner's testimony during his first habeas trial created the appearance of impropriety. After considering the record, we cannot conclude that Judge Newson abused his discretion in denying the petitioner's motion for disqualification. As Judge Newson noted in his oral ruling, the allegedly offending comments properly were made in the purview of his judicial role as it is squarely within a habeas judge's authority to make credibility determinations concerning witness testimony. See, e.g., *Chase* v. *Commissioner of Correction*, 210 Conn. App. 492, 500, 270 A.3d 199 ("[t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony" (internal quotation marks omitted)), cert. denied, 343 Conn. 903, 272 A.3d 199 (2022). Judge Newson's comments reflect credibility determinations made with respect to the specific testimony given and the demeanor exhibited at the habeas trial, further demonstrating that the judge acted in accordance with his role rather than making

an unbounded determination that the petitioner is incapable of giving credible testimony. Furthermore, Judge Newson stated that he had no recollection of the prior proceeding, which occurred seven years earlier. See *State* v. *Webb*, 238 Conn. 389, 461, 680 A.2d 147 (1996) ("[t]he greater the length of time that has passed since the prior appearance, the less likely it is that the judge possesses any bias against the party"). Given these circumstances, it is clear that Judge Newson's previous credibility determinations would not cause a reasonable person to question the impartiality of the arbiter of the current proceeding nor were his comments "so extreme as to display a clear inability to render fair judgment." (Internal quotation marks omitted.) *State* v. *Rizzo*, supra, 303 Conn. 121. As the respondent aptly suggested: "An objective observer, upon reviewing the transcript from the habeas court's decision in 2012, would not reasonably doubt the court's ability to assess the petitioner's credibility anew in an unrelated proceeding held seven years later."

Accordingly, we conclude that the petitioner has failed to demonstrate that his claims involve issues that 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.

The appeal is dismissed.

In this opinion the other judges concurred.

BRASS MILL CENTER, LLC *v.* SUBWAY REAL ESTATE CORP. ET AL.
(AC 44436)

Suarez, Clark and Sheldon, Js.

Syllabus

The plaintiff shopping mall sought indemnification from the defendant A Co., a security company it contracted with to provide security services to the mall property, including crime prevention. The plaintiff had incurred economic losses as a result of a separate wrongful death action brought against it by the administrator of the estate of a pedestrian who had been struck and killed while crossing the roadway surrounding the mall while on her way to work in the mall. The wrongful death action alleged that the plaintiff's negligence caused the collision by, inter alia, its design of the mall's parking lots and roads and its failure to implement various traffic calming measures. The plaintiff demanded defense and indemnification from A Co. in connection with the wrongful death action; A Co. denied the plaintiff's demand, explaining that A Co. was not responsible for the design of the roadway or the absence of traffic calming measures. The plaintiff filed a motion for summary judgment in the indemnification action, asserting that, inter alia, A Co. had a contractual duty to defend and indemnify the plaintiff in connection with the wrongful death action, and A Co. filed a cross motion for summary judgment. The trial court denied A Co.'s motion, granted the plaintiff's motion as to liability and awarded damages to the plaintiff. On A Co.'s appeal to this court, *held* that the trial court erred in granting the plaintiff's motion for summary judgment and denying A Co.'s motion for summary judgment, as A Co. was entitled to judgment in its favor as a matter of law: A Co.'s obligation to defend the plaintiff was not triggered by the wrongful death action, as the wrongful death action did not contain allegations of negligence or other conduct that even arguably fell within the scope of A Co.'s contractual responsibilities to provide security services, and the court erroneously conflated the allegations in the wrongful death action regarding traffic control with A Co.'s contractual obligations for crime prevention as the security contractor for the property; moreover, as A Co. did not have a duty to defend the plaintiff pursuant to the indemnification provision of the security contract, A Co. did not have a duty to indemnify the plaintiff.

Argued March 2—officially released August 9, 2022

Procedural History

Action for, inter alia, indemnification for economic losses allegedly incurred by the plaintiff, and for other

relief, brought to the Superior Court in the judicial district of Waterbury, where the action was withdrawn as against the named defendant et al.; thereafter, the court, *Roraback*, *J.*, denied in part the motion for summary judgment filed by the defendant AlliedBarton Security Services, LLC, and granted the plaintiff's motion for summary judgment as to liability; subsequently, after a hearing in damages, the court, *Roraback*, *J.*, rendered judgment for the plaintiff, from which the defendant AlliedBarton Security Services, LLC, appealed to this court. *Reversed*; *judgment directed.*

Ashley A. Noel, with whom was *Cassandra Pilczak*, for the appellant (defendant AlliedBarton Security Services, LLC).

Michael Smith, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant AlliedBarton Security Services, LLC,[1] appeals from the judgment rendered by the trial court in favor of the plaintiff, Brass Mill Center, LLC, granting summary judgment as to liability and awarding damages. The defendant argues that the trial court improperly concluded that it had a contractual duty (1) to defend the plaintiff in an underlying wrongful death action brought against the plaintiff and (2) to indemnify the plaintiff in that same wrongful death action, including for attorney's fees and costs that the plaintiff incurred in pursuing claims against third parties. We agree and, accordingly, reverse the judgment of the trial court.

[1] Subway Real Estate Corp. (Subway) and Foot Locker Retail, Inc. (Foot Locker), were also named as defendants in the present action. The plaintiff's claims for defense and indemnity against Subway and Foot Locker were eventually settled leaving AlliedBarton Security Services, LLC, as the sole defendant in this case. Accordingly, we refer to AlliedBarton Security Services, LLC, as the defendant in this opinion.

The following facts and procedural history are relevant to this appeal. The plaintiff, the owner of the Brass Mill Center & Commons shopping mall in Waterbury (mall), and the defendant, a security company, are parties to a security agreement, which sets forth the security services that the defendant is obligated to provide the plaintiff. The security agreement states that "[The defendant's] personnel assigned to the Property[2] shall be responsible for promoting a pleasant shopping atmosphere and crime prevention efforts through patrol of the Property; seeking out and providing appropriate customer service to patrons; reasonable inspection of the Property for safety hazards and enforcement of the Property's rules and regulations; appropriate response to incidents and emergencies; preliminary investigation and appropriate disposition of incidents; access control/physical security as appropriate during operating and non-operating hours; official reporting of activities, incidents, and inspection logs; and any special assignments and/or events related to the security/safety function of the Property as agreed upon by the parties." (Footnote added.)

The security agreement also contains an indemnification provision that provides in relevant part that "[the defendant] agrees that [i]t shall defend, indemnify, and hold harmless [the plaintiff] . . . from and against any claims, liabilities, losses, damages, actions, causes of action, or suits to the extent caused by (A) any actual or alleged negligent or grossly negligent act or omission or willful misconduct of [the defendant] or its agents or employees at the Property or in connection with this Agreement or breach thereof in any way . . . ."[3]

[2] The security agreement defines " 'Property' " as the "Brass Mill Center & Commons located at 495 Union Street, Waterbury, CT 06706."

[3] Section 8 (e) of the security agreement provides in its entirety: "[The defendant] agrees that [i]t shall defend, indemnify, and hold harmless [the plaintiff], GGP Limited Partnership and General Growth Properties, Inc. ('Indemnitees') and the agents, officers and employees of all of the Indemnitees from and against any claims, liabilities, losses, damages, actions, causes

At approximately 8:20 a.m. on December 21, 2012, Yaneli Nava Perez, who was a pedestrian crossing the travel lane of the mall on her way to work in the mall's food court, was struck by a vehicle driven by a seventeen year old unlicensed driver. The weather conditions at the time of the accident were poor, with heavy to torrential rains and high wind gusts. The windows of the vehicle were obscured by "fog," preventing the young

of action, or suits to the extent caused by (A) any actual or alleged negligent or grossly negligent act or omission or willful misconduct of [the defendant] or its agents or employees at the Property or in connection with this Agreement or breach thereof in any way, (B) [the defendant's] failure to purchase and maintain all insurance required by this Agreement and (C) negligence or willful misconduct of [the defendant] or its agents or employees in any operation of a Security Vehicle under this Agreement. It is intended that all claims and demands, legal proceedings and lawsuits in which any party to this Agreement or additional insured under this Agreement is named or described as a defendant which alleges or describes any claim in which [the defendant] or a security officer has done or has failed to do any act or thing required pursuant to this Agreement or failed to provide the Services at the Property shall be a claim tendered to, accepted by or defended by [the defendant]. [The plaintiff] shall within thirty (30) days after notice of any incident, potential claim or suit, or service of legal process, provide [the defendant], at AlliedBarton Security Services LLC, Eight Tower Bridge, 161 Washington Street, Suite 600, Conshohocken, PA 19428 to the attention of Michael A. Meehan, Vice President/Deputy General Counsel with written notice that an action has been brought and shall require [the defendant], at its own expense, to employ such attorneys as [the defendant] may see fit to employ, and as reasonably approved by [the plaintiff's] Director of Risk Management, to defend such claim or action on behalf of the Indemnitees. If a tender of defense and/or indemnity is refused by [the defendant] or its insurer, or if a defense is provided under any reservation of rights and [the plaintiff] does not consent to such refusal or reservation of rights, [the defendant] shall pay liquidated damages in the sum of $2,000.00 to [the plaintiff] for the amount of the added internal expense incurred by the Indemnitees in dealing with the claim or action for which tender was refused or rights reserved. This liquidated damages provision shall be in addition to the Indemnitees' actual costs of defense, investigation, litigation, litigation management expenses for in-house counsel, costs of trial and/or settlement of the claim which are incurred by the Indemnitees which shall be billed to [the defendant] as incurred until the tender is accepted without reservation. The provisions of this paragraph shall survive the termination or expiration of this Agreement and shall not be construed to provide for any indemnification which would, as a result thereof, make the provisions of this paragraph void or to reduce or eliminate any other indemnification or right which the indemnified parties have be law."

driver from seeing Perez at the time of the collision. After the Waterbury police and emergency responders arrived at the scene, Perez was transported by ambulance to St. Mary's Hospital for emergency treatment, where she later succumbed to her injuries.

In 2014, Gabriel Avendano, the administrator of the estate of Yaneli Nava Perez, filed a four count complaint (Avendano complaint) against the plaintiff, General Growth Services, Inc., General Growth Management, Inc., and Anthony Guerriero (Avendano action).[4] As we discuss in greater detail later in this opinion, the Avendano complaint alleged eight separate allegations of negligence against the plaintiff, including, inter alia, that the plaintiff failed to install or use any traffic calming measures on the roadway within the mall premises that ran parallel to Union Street and designed the premises in such a way so as to allow motorists to easily travel at unsafe rates of speed through areas routinely filled with pedestrians. The Avendano complaint did not name the defendant as a defendant.

On October 5, 2015, pursuant to the security agreement, the plaintiff demanded defense and indemnification from the defendant with respect to the Avendano action. By letter dated October 23, 2015, the defendant denied the plaintiff's tender, explaining, inter alia, that the Avendano complaint did not allege that the plaintiff "failed to do something that was required of [the defendant] under the [security] [a]greement. [The defendant] was clearly not responsible for the design of the roadway or the absence of traffic calming measures."

On August 25, 2016, the plaintiff filed the present action against the defendant, Subway Real Estate Corp.

[4] The complaint alleged that the plaintiff, General Growth Services, Inc., and General Growth Management, Inc., were owners and operators of the mall and its parking lots and internal roadways and that Guerriero was the manager of the mall on the day of the accident.

(Subway), and Foot Locker Retail, Inc. (Foot Locker). The complaint asserts two causes of action against the defendant: count VI alleges that the defendant had a contractual duty to defend and indemnify the plaintiff in connection with the Avendano complaint, and count VII alleges a common-law indemnification claim.

On October 28, 2019, the parties filed cross motions for summary judgment. In a memorandum of decision dated June 11, 2020, the court, *Roraback*, *J.*, granted the plaintiff's motion as to liability on the contractual indemnification claim but denied its motion with respect to the common-law indemnification claim. In so doing, the court concluded, as a matter of law, that the Avendano complaint could "fairly [be] read to allege negligent acts or omissions for which [the defendant] was responsible under its contractual duties to inspect, monitor and secure the property . . . ." Accordingly, it held that the defendant had a duty to defend the plaintiff. The court also held that the defendant had a duty to indemnify the plaintiff.[5] The court also denied the defendant's motion for summary judgment in its entirety.

On July 1, 2020, the defendant filed a motion to reargue/reconsider the court's June 11, 2020 decision arguing, inter alia, that, because the court had denied the plaintiff's motion for summary judgment with respect to the common-law indemnification claim on the basis that the plaintiff was unable to satisfy two of

[5] In the defendant's motion for summary judgment, the defendant also argued that it was entitled to summary judgment because the plaintiff failed to provide the defendant with the requisite thirty day written notice set forth in the indemnification provision of the security agreement. The court rejected that argument, stating, inter alia, that the defendant failed "to plead lack of proper notice as a special defense," which "precludes it from prevailing on this ground in the context of either winning its motion for summary judgment or defeating [the plaintiff's] motion for summary judgment." The defendant does not challenge this portion of the court's judgment on appeal.

the four elements required to prevail on its claim, the court should have granted the defendant's motion for summary judgment with respect to that claim. On July 17, 2020, the court issued a decision granting the defendant's motion for summary judgment as to the plaintiff's common-law indemnification claim.[6]

On September 9, 2020, the court held a hearing in damages. In a memorandum of decision dated December 3, 2020, the trial court awarded the plaintiff damages totaling $426,807.97,[7] plus offer of compromise interest on that amount at a rate of 8 percent per annum from May 24, 2019, until the date that judgment entered, and postjudgment interest at a rate of 5 percent per annum from the date that judgment entered until the date the judgment is satisfied. This appeal followed.

We begin by setting forth our standard of review. "Summary judgment rulings present questions of law; accordingly, [o]ur review of the . . . decision to grant [a] . . . motion for summary judgment is plenary." (Internal quotation marks omitted.) *Farrell* v. *Twenty-First Century Ins. Co.*, 301 Conn. 657, 661, 21 A.3d 816 (2011); see also Practice Book § 17-49. In addition, the interpretation of definitive contract language presents a question of law, over which our review also is plenary. See, e.g., *CCT Communications, Inc.* v. *Zone Telecom*,

[6] The plaintiff has not appealed from that decision.

[7] The court found that the plaintiff paid the sum of $500,000 to settle the Avendano action, and received contributions from three third parties in the aggregate amount of $255,000 toward the settlement. Accordingly, the court found that the plaintiff's damages were the unpaid portion of the Avenado settlement—$245,000. The court also found that the legal fees expended by the plaintiff were reasonable, including the legal fees expended by the plaintiff in obtaining contributions from Subway, Foot Locker, and the plaintiff's prior counsel, reasoning that the contributions the plaintiff received inured to the benefit of the defendant. In total, the court awarded legal fees and expenses in the amount of $179,807.97. Last, the court held that the plaintiff was entitled to $2000 in liquidated damages pursuant to the security agreement.

Inc., 327 Conn. 114, 133, 172 A.3d 1228 (2017); see also *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 308 Conn. 146, 154, 61 A.3d 485 (2013).

We must also determine the appropriate standard of review and analysis to employ when deciding whether one sophisticated business party to a contract has a contractual duty to defend a claim brought against another sophisticated business party to that contract. The duty to defend most commonly arises in the context of a contract of insurance; see, e.g., *DaCruz* v. *State Farm Fire & Casualty Co.*, 268 Conn. 675, 687, 846 A.2d 849 (2004); and our courts have made clear that "whether an insurer has a duty to defend its insured is purely a question of law . . . ." (Internal quotation marks omitted.) *Lift-Up, Inc.* v. *Colony Ins. Co.*, 206 Conn. App. 855, 866, 261 A.3d 825 (2021). Our appellate courts have not previously addressed whether our standard of review and analysis regarding a duty to defend in the context of insurance contracts should apply to contracts between sophisticated business entities that contain similar provisions. See, e.g., *Henderson* v. *Bismark Construction Co.*, Superior Court, judicial district of Fairfield, Docket No. CV-17-6062488-S (July 10, 2019) (68 Conn. L. Rptr. 852, 853) ("[a]lthough research did not reveal any appellate authority, and the parties have not provided any appellate authority, a few Superior Court decisions have discussed whether the law on an insurer owing a duty to defend applies to the analysis of whether one of two commercial parties owes a duty to defend to the other based on a contract for indemnity"). In reviewing our case law, we discern no reason to apply a different analysis in such cases.[8] Accordingly,

[8] We note that numerous Superior Court decisions also have held that that our jurisprudence regarding a duty to defend in the context of insurance contracts applies equally to contracts between sophisticated business parties that contain similar defense and indemnification provisions. See, e.g., *Henderson* v. *Bismark Construction Co.*, supra, 68 Conn. L. Rptr. 853–54 (collecting cases); *Gemma Power Systems, LLC* v. *Smedley Co.*, Superior Court, judicial district of Hartford, Docket No. CV-15-6059165 (July 26, 2017) (same).

we hold that "[t]he question of whether [one sophisticated business party] has a [contractual] duty to defend [another sophisticated business party] is purely a question of law, which is to be determined by comparing the allegations of [the] complaint with the terms of the [parties' agreement]." (Internal quotation marks omitted.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, supra, 308 Conn. 154.

With this standard of review in mind, we next turn to the legal principles that inform our analysis. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the 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." (Internal quotation marks omitted.) *Tallmadge Bros., Inc.* v. *Iroquois Gas Transmission System, L.P.*, 252 Conn. 479, 498, 746 A.2d 1277 (2000).

Moreover, as noted, we conclude that a duty to defend in the context of insurance contracts applies equally to contracts between sophisticated business parties that contain similar defense and indemnification provisions. To that end, it is well settled that an insurer's duty to defend "is determined by reference to the allegations

contained in the [underlying] complaint." (Internal quotation marks omitted.) *DaCruz* v. *State Farm Fire & Casualty Co.*, supra, 268 Conn. 687. The duty to defend "does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether [the complaint] stated facts which bring the injury within the coverage." (Internal quotation marks omitted.) *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 712, 826 A.2d 107 (2003). "If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured." (Internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000). However, an insurer "has a duty to defend only if the underlying complaint *reasonably* alleges an injury that is covered by the policy." (Emphasis in original.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, supra, 308 Conn. 156. "[W]e will not predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) Id.

"In contrast to the duty to defend, the duty to indemnify is narrower: while the duty to defend depends only on the allegations made against the insured, the duty to indemnify depends upon the facts established at trial and the theory under which judgment is actually entered in the case." (Internal quotation marks omitted.) *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 48–49, 801 A.2d 752 (2002). "[W]here there is no duty to defend, there is no duty to indemnify, given the fact that the duty to defend is broader than the duty to indemnify." *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, 256 Conn. 343, 382, 773 A.2d 906 (2001).

With these principles in mind, we turn our attention to the language of the indemnification provision in the

parties' security agreement. By its terms, "[The defendant] agrees that [i]t shall defend, indemnify, and hold harmless [the plaintiff], GGP Limited Partnership and General Growth Properties, Inc. ('Indemnitees') and the agents, officers and employees of all of the Indemnitees from and against any claims, liabilities, losses, damages, actions, causes of action, or suits to the extent caused by (A) any actual or alleged negligent or grossly negligent act or omission or willful misconduct of [the defendant] or its agents or employees at the Property or in connection with this Agreement or breach thereof in any way . . . ." It further provides that "[i]t is intended that all claims and demands, legal proceedings and lawsuits in which any party to this Agreement or additional insured under this Agreement is named or described as a defendant which alleges or describes any claim in which [the defendant] or a security officer has done or has failed to do any act or thing required pursuant to this Agreement or failed to provide the Services at the Property shall be a claim tendered to, accepted by or defended by [the defendant]." See footnote 3 of this opinion.

As the language of the indemnification provision makes clear, the defendant agreed to defend the plaintiff against claims brought against the plaintiff alleging conduct falling within the scope of the defendant's obligations under the security agreement. With respect to the scope of the defendant's obligations under the contract, section 3 of the security agreement sets forth the "On-Site Contracted Services." In particular, subsection B of section 3, titled "Security Functions," provides: "[The defendant's] personnel assigned to the Property shall be responsible for promoting a pleasant shopping atmosphere and crime prevention efforts through patrol of the Property; seeking out and providing appropriate customer service to patrons; reasonable inspection of the Property for safety hazards and enforcement of the

Property's rule and regulations; appropriate response to incidents and emergencies; preliminary investigation and appropriate disposition of incidents; access control/physical security as appropriate during operating and non-operating hours; official reporting of activities, incident, and inspection logs; and any special assignments and/or events related to the security/safety function of the Property as agreed upon by the parties."

Additionally, section 3 of the security agreement addresses "Duties/Responsibilities." Specifically, subsection H of section 3 of the security agreement states that the defendant "shall provide a comprehensive security policy and procedures manual for the Property ('Manual'). The Manual shall consist of [the defendant's] mall security guidelines and site-specific 'security orders'. Site-specific 'security orders' shall include, but not be limited to, mall organizational structure, radio call signs and procedures, code of conduct, tenant rules, commonly encountered state laws, banning guideline, shift procedures to include opening and closing procedures, and site specific inspections. The Property Manager[9] shall have the right to approve any site-specific 'security orders' related to the operation of the Property. [The defendant's] Security Staff shall be familiar with, understand and adhere to the requirements of The Manual at all times. The Manual shall be developed within thirty (30) days following the Effective Date and shall be updated during the Term at the request of [the defendant], the Property Manager, or the GGP Corporate Security Director." (Footnote added.)

At this point, we must determine whether the Avendano complaint triggered the defendant's duty to defend the plaintiff under the terms of the security agreement.

[9] "Property Manager" is defined as "[the plaintiff's] property manager."

The defendant argues that the allegations in the Avendano complaint did not fall within its contractual obligations under the security agreement because the complaint did not contain any allegations of negligence, or other conduct, that even arguably falls within the scope of the defendant's contractual responsibilities under the security agreement. The plaintiff disagrees. In its view, the security agreement "is notably broad and certainly encompasses the mall parking lot/roadway safety claims asserted in the [Avendano complaint]." On the basis of our review of the security agreement and the allegations in the Avendano complaint, we conclude that the defendant's obligation to defend the plaintiff was not triggered by the Avendano complaint.

The Avendano complaint alleged that the plaintiff negligently caused the subject collision because it "failed to install or use any traffic calming measure on the roadway within the mall premises that ran parallel to Union Street"; "failed to install or use sufficient traffic calming measures on the roadway within the mall premises that ran parallel to Union Street"; "knew that numerous accidents occurred on the roadway within the mall that ran parallel to Union Street but failed to make any measures to slow traffic down"; "failed to properly inspect the traffic, accidents, parking areas and internal roadways"; "designed the premises in such a way so as [to] allow motorists to easily travel at unsafe rates of speed through areas routinely filled with pedestrians"; "knew or should have known that motorists sped through the mall property, yet took no steps to slow them down"; "ignored the need for traffic calming measures at the Brass Mill Center for economic reasons"; and/or "knew that other mall properties within the General Growth Properties company installed and used traffic calming measures to protect pedestrians, yet failed to implement any such procedures at the Brass Mill Center."

It is clear from these allegations that the theory of liability against the plaintiff was premised on the layout and design of the mall's internal roadways and parking lots and the plaintiff's alleged failure to monitor and implement traffic calming measures on the property to prevent motor vehicles from operating at excessive rates of speed. We have found nothing in the security agreement or the procedures manual that suggests that the defendant had any obligation to monitor or control traffic, to design or redesign the layout of the parking lots or roads, or otherwise to implement traffic calming measures.[10]

Upon our review of the Avendano complaint and the security agreement, we agree with the defendant that the court erroneously conflated the allegations of the Avendano complaint regarding traffic control and design with the defendant's responsibility for crime prevention as the security contractor for the property. The

[10] To the extent there is any ambiguity with respect to the defendant's obligations under the security agreement, undisputed evidence in the record resolves that ambiguity in favor of the defendant. The plaintiff's own representative, Guerriero, the general manager of the mall, testified at a deposition that traffic calming measures, including implementing signage on the mall's roadways to slow vehicular traffic down, fell within the plaintiff's purview and was not the defendant's contractual obligation. Similarly, Steven Crumrine, the corporate security director for General Growth Properties, Inc., who oversees the defendant's compliance with the security agreement, testified at a deposition that the defendant was not responsible for installation, implementation, and/or design of the roadway within the mall property and testified that there was no language within the security agreement that required the defendant to employ, install, and/or use traffic calming measures or slow down traffic on the roadway. When asked whether there was an expectation for a security officer of the defendant to attempt to stop a speeding motorist if the officer observed one, Crumrine testified, "No." He indicated that "[t]hey're not trained nor do they have the legal authority to do that. Their own policies and procedures manual would prohibit them from pulling over a vehicle, and we wouldn't expect them to do that either because it presents an elevated risk. It's not what they're trained to do." Tawana Perry, the defendant's national account portfolio manager for General Growth Properties, Inc., similarly confirmed in her deposition testimony that the defendant was not responsible for traffic calming measures.

defendant's obligations under the security agreement to respond to "incidents and emergencies"; to notify law enforcement; to make "reasonable inspection of the Property for safety hazards"; to prepare incident reports and inspection logs after those occurrences; and to "track statistical trending for the Property" do not include or impose upon the defendant any obligation to control the traffic on the property, install traffic calming measures, or design or redesign the mall's parking lots or thoroughfares.

Although the plaintiff points to the allegation in the Avendano complaint that the plaintiff "failed to properly inspect the traffic, accidents, parking areas and internal roadways" as the basis for its contention that the Avendano complaint triggered the defendant's duty to defend, we are not persuaded that this allegation falls within the defendant's obligation under the security agreement to make "reasonable inspection of the Property for safety hazards." Rather, that allegation, read within the context of the entire Avendano complaint, clearly pertains to the plaintiff's alleged failure to properly design the mall's parking lots and roads and implement traffic calming measures—obligations not coming within the defendant's contractual obligations. Indeed, it is difficult to conjure a contrary interpretation in light of the nature of the claims made in the Avendano complaint. We decline to "predicate the duty to defend on a reading of the complaint that is . . . conceivable but tortured and unreasonable." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 171 Conn. App. 61, 91, 156 A.3d 539 (2017), aff'd, 333 Conn. 343, 216 A.3d 629 (2019). As such, we cannot conclude that the Avendano "complaint *reasonably* alleges an injury that is covered by the [indemnification provision]." (Emphasis in original; internal quotation marks omitted.) *Kling* v. *Hartford*

Casualty Ins. Co., 211 Conn. App. 708, 714, 273 A.3d 717, cert. denied, 343 Conn. 926, 275 A.3d 627 (2022).

Because we conclude that, as a matter of law, the defendant did not have a duty to defend the plaintiff pursuant to the indemnification provision of the security agreement, it inexorably follows that the defendant did not have a duty to indemnify the plaintiff either. See, e.g., *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 256 Conn. 382 ("where there is no duty to defend, there is no duty to indemnify, given the fact that the duty to defend is broader than the duty to indemnify"). We therefore conclude that the trial court improperly granted summary judgment in favor of the plaintiff. In light of the absence of any genuine issue of material fact as well as our conclusion that the defendant did not owe the plaintiff a duty to defend or indemnify, the defendant is entitled to judgment in its favor as a matter of law.

The judgment is reversed and the case is remanded with direction to deny the plaintiff's motion for summary judgment and to grant the defendant's motion for summary judgment and to render judgment thereon for the defendant.

In this opinion the other judges concurred.

CHARLES D. GIANETTI *v.* ALAN NEIGHER
(AC 44320)

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

Syllabus

The plaintiff physician sought to recover damages from the defendant attorney for his alleged legal malpractice in connection with his representation of the plaintiff in a prior breach of contract action against a hospital. During the pendency of the breach of contract action, the trial court denied the plaintiff's motion for leave to amend his complaint to add a count asserting a violation of the Connecticut Unfair Trade Practices

Act (CUTPA) (§ 42-110a et seq.). After the court found in favor of the plaintiff and awarded him damages on his breach of contract claims, the defendant commenced a separate action against the hospital, alleging a violation of CUTPA. The trial court in that action rendered judgment for the hospital, concluding that the CUTPA claim was barred by the applicable statute of limitations (§ 42-110g (f)). The plaintiff thereafter brought this legal malpractice action, claiming that the defendant had committed professional negligence by failing to timely bring the CUTPA claim and a claim of tortious interference with business expectancies against the hospital. Pursuant to the applicable rule of practice (§ 13-4), the plaintiff disclosed an attorney, S, as an expert witness who would testify at trial. The plaintiff did not disclose S's opinions at that time. After the trial court extended the trial date and discovery deadlines several times, the defendant filed motions to preclude S from testifying at trial and for summary judgment. The defendant claimed that the plaintiff's expert witness disclosure was not in conformance with the requirements of Practice Book § 13-4 and that summary judgment was required because, in the absence of expert testimony, the plaintiff could not prevail on his legal malpractice claims. The court again continued the trial date and extended the plaintiff's deadline for the disclosure of expert witnesses. Two weeks after the court-ordered deadline for the disclosure of expert witnesses, the plaintiff again disclosed that S would be the expert he planned to call to testify at trial. The plaintiff disclosed that S would testify that the defendant had breached the standard of care he owed to the plaintiff in the prior action and that the breach caused the plaintiff to sustain damages. The defendant thereafter deposed S, who testified in his deposition, inter alia, that, although he had received sixteen boxes of materials from the defendant's representation of the plaintiff in the prior action, he was not authorized to read that material, he would not read it until he received authorization to do so and that the plaintiff's counsel had instructed him not to review the documents or spend much time preparing for the deposition. S further testified that the plaintiff's counsel had told him that he could opine as to the elements of legal malpractice in light of certain facts that S could assume the plaintiff hoped to prove at trial. S also testified that he had not read the fact finder's decision in the prior action or spoken to the expert witnesses who testified in that action. The defendant again filed motions to preclude S from testifying at trial as an expert witness and for summary judgment. The trial court granted both motions and rendered judgment for the defendant, concluding, inter alia, that the plaintiff's disclosure did not comply with the requirements of § 13-4 in that it failed to set forth an expert opinion concerning causation and damages as well as the factual bases for S's opinions. On the plaintiff's appeal to this court, *held*:

1. This court could not conclude that the trial court abused its discretion by precluding S from testifying at trial and determining that the sanction

of preclusion was proportional to the plaintiff's noncompliance with the disclosure requirements of Practice Book § 13-4: the plaintiff failed to set forth any expert opinion as to the legal malpractice elements of causation and damages, he did not supplement his disclosure of S to add such opinions, he failed to provide the substance of the grounds for each of the disclosed opinions, and he abused the discovery process by engaging in gamesmanship that prevented S from learning the pertinent facts of the prior action, thereby thwarting the defendant's ability to ascertain what S likely would opine at trial; moreover, S admitted that he had done limited legal research and lacked knowledge about the prior action, and the affidavit he submitted in opposition to the defendant's summary judgment motion showed that S reviewed only limited and selective materials from the prior action and that his opinions were untethered to facts in the record, as he admitted that they were based on hypothetical facts and facts that he expected to be brought out at trial; furthermore, the court reasonably could have concluded that the plaintiff's noncompliance and discovery abuse could not be addressed by a less severe sanction or combination of sanctions, as the trial date had been continued eight times, the plaintiff had ample opportunity to disclose a prepared, informed expert or to ensure that S was apprised of the pertinent facts, and a less severe sanction or combination of sanctions would have the practical effect of rewarding the plaintiff's pattern of game-playing, as S did not review the file during the two months between the two days of his deposition and another continuance to allow him more time to review the file would require the defendant to conduct additional discovery.

2. The plaintiff could not prevail on his claim that the trial court improperly granted the defendant's motion for summary judgment; summary judgment was required because, in the absence of expert testimony, the plaintiff could not prevail on his legal malpractice claims, as he could not establish the applicable standard of care that the defendant owed to the plaintiff and whether the defendant breached that standard of care by not initiating CUTPA and tortious interference with business expectancies claims against the hospital in the prior action, and, thus, contrary to the plaintiff's contention, there was no genuine issue of material fact as to causation and damages.

Argued March 3—officially released August 9, 2022

Procedural History

Action to recover damages for the defendant's alleged legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward T. Krumeich II*, judge trial referee, granted the defendant's motions to

preclude certain evidence and for summary judgment and rendered judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, with whom, on the brief, was *Anthony J. Beale*, for the appellant (plaintiff).

Robert C. E. Laney, with whom, on the brief, was *Ryan T. Daly*, for the appellee (defendant).

Opinion

PRESCOTT, J. This appeal arises out of a legal malpractice action brought by the plaintiff, Charles D. Gianetti, against the defendant, Alan Neigher, an attorney who represented the plaintiff in a prior civil action (prior action) against Norwalk Hospital (hospital). The plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendant. On appeal, the plaintiff claims that the court improperly granted the defendant's motion to preclude the testimony of the plaintiff's expert witness, Attorney Bruce H. Stanger, because (1) the sanction of precluding the testimony was not proportional to the plaintiff's noncompliance with the expert disclosure requirements set forth in Practice Book § 13-4,[1] which the plaintiff contends

[1] Practice Book § 13-4, titled "Experts," provides in relevant part: "(a) A party shall disclose each person who may be called by that party to testify as an expert witness at trial . . . .

"(b) A party shall file with the court and serve upon counsel a disclosure of expert witnesses which identifies the name, address and employer of each person who may be called by that party to testify as an expert witness at trial, whether through live testimony or by deposition. In addition, the disclosure shall include the following information:

"(1) . . . [T]he field of expertise and the subject matter on which the witness is expected to offer expert testimony; the expert opinions to which the witness is expected to testify; [and] the substance of the grounds for each such expert opinion . . . .

"(3) . . . [T]he party disclosing an expert witness shall, upon the request of an opposing party, produce to all other parties all materials obtained, created and/or relied upon by the expert in connection with his or her opinions in the case within fourteen days prior to that expert's deposition . . . .

"(c) (1) Unless otherwise ordered by the judicial authority upon motion, a party may take the deposition of any expert witness disclosed pursuant to subsection (b) of this section . . . .

could have been adequately remedied by a less severe sanction, and (2) in so sanctioning the plaintiff, the court improperly determined that the expert's opinion was not supported by a sufficient factual basis.[2] The plaintiff additionally claims that the court improperly rendered summary judgment because (1) the court failed to consider the testimony of his expert witness, and (2) even if the court properly precluded the testimony of his expert witness, a genuine issue of material fact nonetheless existed as to the legal malpractice elements of causation and damages.[3] We affirm the judgment of the court.

The following facts and procedural history, both in the present legal malpractice action and arising out of

"(h) A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions. . . ."

[2] The plaintiff also argues that the court improperly determined that Stanger was not qualified to offer an expert opinion as to the elements of legal malpractice or the likelihood of success of a claim under the Connecticut Unfair Trade Practices Act; General Statutes § 42-110a et seq.; or a tortious interference with business expectancies claim had the plaintiff brought either claim against the hospital in the prior action. As we note later in this opinion; see footnote 15 of this opinion; it is unclear whether the court, in its memorandum of decision, conflated the requirement that an expert witness be qualified to render an expert opinion with the requirement that there be a factual basis for the opinion; see Conn. Code Evid. §§ 7-2 and 7-4; *Weaver* v. *McKnight*, 313 Conn. 393, 406, 97 A.3d 920 (2014); or, instead, whether the court independently determined that Stanger was not qualified to render an expert opinion. Nonetheless, because we conclude that the court properly precluded Stanger's testimony on other grounds, we need not consider whether the court improperly concluded that Stanger was unqualified to offer expert testimony.

[3] "In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) *causation*; and (4) *damages*." (Emphasis added; internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012).

the defendant's representation of the plaintiff in the prior action, are relevant to our resolution of this appeal. "The plaintiff [was] a physician who specialize[d] in the field of plastic and reconstructive surgery. In 1974, the plaintiff was granted provisional clinical privileges as a member of the . . . medical staff [of the hospital]. In 1976, the plaintiff was granted full clinical privileges as an assistant attending staff physician [for the hospital]. The plaintiff's privileges were renewed on an annual basis through 1983. . . .

"In 1983, the plaintiff applied for the renewal of privileges for 1984. On the basis of the recommendations of the hospital's department of surgery, section of plastic and reconstructive surgery and credentials committee, the medical staff of the hospital declined to renew the plaintiff's privileges for 1984. The hospital's board of trustees subsequently ratified the decision of the medical staff. . . .

"In response to the [hospital's decision not to renew his] privileges [for 1984], the plaintiff [initiated] the [prior] action against the hospital[4] in December, 1983 . . . ." (Footnote added; footnote omitted.) *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 547–48, 833 A.2d 891 (2003). The defendant represented the plaintiff in the prior action. In his complaint, the plaintiff alleged breach of contract and antitrust violations. See *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 52, 557 A.2d 1249 (1989). The matter thereafter was assigned to an attorney trial referee. See *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 548.

On March 11, 1987; see *Gianetti* v. *Norwalk Hospital*, supra, 211 Conn. 52; "[the] attorney trial referee . . .

[4] The plaintiff additionally named as defendants in the prior action the president of the hospital, certain hospital administrators, and certain hospital physicians. See *Gianetti* v. *Norwalk Hospital*, 211 Conn. 51, 52 and n.1, 557 A.2d 1249 (1989).

concluded in [a] report that . . . the hospital, through its employees and agents, had breached [its] contract [with the plaintiff] by failing to follow the procedural requirements of its bylaws in declining to renew the plaintiff's privileges." *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 548. On July 18, 1993, the trial court accepted the attorney trial referee's report; see *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 760, 43 A.3d 567 (2012); and "rendered [an interlocutory] judgment in favor of the plaintiff on [his breach of contract claim as to] the issue of liability."[5] (Internal quotation marks omitted.) Id.; see also *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 549. The court subsequently conducted a hearing to determine the appropriate remedy and, on September 9, 1999, awarded the plaintiff nominal damages. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 761.

The plaintiff appealed from the court's award of nominal damages and, after this court; see *Gianetti* v. *Norwalk Hospital*, 64 Conn. App. 218, 779 A.2d 847 (2001), rev'd in part, 266 Conn. 544, 833 A.2d 891 (2003); and our Supreme Court; see *Gianetti* v. *Norwalk Hospital*, supra, 266 Conn. 544; decided the appeal, the matter was remanded to the trial court. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 763. On remand, the court

[5] Between March 11, 1987, the date of the release of the attorney trial referee's report, and July 18, 1993, the date on which the court accepted the attorney trial referee's report, the parties filed a joint motion for reservation of legal issues, pursuant to General Statutes § 52-235, arising out of certain issues raised in the attorney trial referee's report. *Gianetti* v. *Norwalk Hospital*, supra, 211 Conn. 53 and n.2. In the motion, the parties sought advice from this court as to certain questions of law. Id., 53 n.2. Our Supreme Court "transferred [the matter] to itself on April 14, 1988"; id.; and, on April 25, 1989, released a decision in which it resolved the legal questions presented by the parties. See id., 66–67. The matter subsequently was returned to the trial court. See *Gianetti* v. *Norwalk Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-84-0214340-S (September 9, 1999), rev'd on other grounds, 64 Conn. App. 218, 779 A.2d 847 (2001), rev'd in part, 266 Conn. 544, 833 A.2d 891 (2003).

held a hearing in damages and, in a memorandum of decision dated April 15, 2009, awarded the plaintiff $258,610 plus costs on the breach of contract count.[6] See id.

In August, 1996, during the pendency of the prior action and before the court had awarded him damages for the hospital's breach of contract, the plaintiff sought leave to amend his complaint to add an additional count asserting a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. See *Gianetti* v. *Norwalk Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-84-0214340-S (September 9, 1999), rev'd on other grounds, 64 Conn. App. 218, 779 A.2d 847 (2001), rev'd in part, 266 Conn. 544, 833 A.2d 891 (2003). The court, *Rush*, *J.*, denied the plaintiff's motion for leave to amend the complaint. See id. Subsequently, the defendant commenced, on the plaintiff's behalf, a separate action against the hospital, alleging a violation of CUTPA. On April 9, 2002, the court, *Sheedy*, *J.*, granted the hospital's motion for summary judgment as to the plaintiff's CUTPA claim; see *Gianetti* v. *Norwalk Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV-98-0354312-S (April 9, 2002) (31 Conn. L. Rptr. 676, 678); and concluded that the claim was time barred by the applicable three year statute of limitations. See General Statutes § 42-110g (f).

On May 14, 2015, the plaintiff initiated the present legal malpractice action (present action) against the defendant in connection with the defendant's representation of the plaintiff in the prior action. In his revised, operative complaint, dated February 27, 2017, the plaintiff alleged two counts of legal malpractice,[7] one count

[6] In its decision released on May 15, 2012, our Supreme Court affirmed this damages award. See *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 819.

[7] In his answer, the defendant raised one special defense—that the plaintiff's claims of legal malpractice were time barred by the applicable three year statute of limitations. See General Statutes § 52-577. On January 8,

of violating CUTPA, one count of breach of fiduciary duty, and one count of breach of contract. With respect to the legal malpractice counts, the plaintiff contended that, despite his having prevailed on the breach of contract count against the hospital in the prior action and having recovered $258,610 plus costs on that count; see *Gianetti* v. *Norwalk Hospital*, supra, 304 Conn. 763; the defendant nonetheless committed professional negligence by failing to timely bring against the hospital claims of violation of CUTPA and tortious interference with business expectancies in the prior action.

The court, *Heller*, *J.*, entered a scheduling order on October 15, 2015, which required the plaintiff to disclose any expert witnesses he anticipated calling to testify at trial by April 1, 2016, and scheduled the trial to commence on April 25, 2017. On July 12, 2016, the court granted the defendant's motion to amend the court's scheduling order and, accordingly, modified the plaintiff's deadline to disclose any expert witnesses he anticipated calling to testify at trial to August 8, 2016.

On November 1, 2016, the defendant filed a motion for nonsuit, arguing that the plaintiff had failed to respond sufficiently to interrogatories—including an interrogatory in which the defendant requested that the plaintiff identify the expert witnesses he anticipated calling to testify at trial—and requests for production that the defendant had served on the plaintiff on July 6, 2015.

2018, and after the case had been scheduled for trial, the defendant moved for summary judgment, arguing that the plaintiff's claims of legal malpractice were time barred. The court denied the defendant's motion for summary judgment on June 12, 2018, on the procedural basis that the applicable scheduling order required that motions for summary judgment be filed no later than September 30, 2016, and the defendant had not filed with the court a motion for permission to file his late motion for summary judgment, despite the fact that the case already had been assigned for trial. See Practice Book § 17-44 ("[i]f no scheduling order exists but the case has been assigned for trial, a party must move for permission of the judicial authority to file a motion for summary judgment").

The court, *Jacobs*, *J.*, denied the defendant's motion without prejudice and ordered "[t]he plaintiff . . . to comply with [the defendant's] interrogatories . . . and requests [for] production . . . by" December 27, 2016. On January 25, 2017, the defendant moved for a continuance of the trial date, which the court, *Mintz*, *J.*, granted on February 1, 2017. The trial date was continued to November 28, 2017.

The plaintiff responded to the defendant's interrogatories on March 8, 2017. In his response, the plaintiff for the first time named Stanger as an expert witness he planned to call to testify at trial. The plaintiff, however, merely stated the following in his response: "I expect . . . Stanger . . . will testify as an expert witness at the trial in this matter"; the "[s]ubject matter [of Stanger's testimony] [would] be [the] defendant's [alleged] professional negligence and legal malpractice"; that "[s]uch facts and opinions [would] be supplemented as required after review of [the plaintiff's] revised complaint and [after] discovery"; and "[s]uch grounds for each opinion [would] be supplemented as required after review of [the plaintiff's] revised complaint and [after] discovery." The plaintiff promised the defendant that he would supplement his response by disclosing Stanger's opinions at a later date. The plaintiff, however, did not supplement this response.

On April 10, 2017, the defendant moved to strike all counts of the plaintiff's complaint, including the legal malpractice counts. On October 23, 2017, the court, *Jacobs*, *J.*, granted the defendant's motion to strike the plaintiff's CUTPA, breach of fiduciary duty, and breach of contract counts but denied the defendant's motion as to the legal malpractice counts. On October 26, 2017, the defendant moved for a continuance of the trial date from November 28, 2017, to July 16, 2018. On October 31, 2017, the court granted the motion and extended the trial date to July 17, 2018.

On January 3, 2018, the defendant filed a motion for judgment as to the CUTPA, breach of fiduciary duty, and breach of contract counts, contending that the plaintiff had failed to file a new pleading within fifteen days of the court's decision granting the defendant's motion to strike those counts. See Practice Book § 10-44. The court granted the defendant's motion on January 22, 2018.

On July 2, 2018, the defendant filed a motion to preclude the plaintiff from introducing expert testimony at trial as to the remaining malpractice counts. The defendant contended that the plaintiff had failed to disclose the expert witnesses that he planned to call to testify at trial by August 8, 2016, as required by the amended scheduling order. The defendant further argued that, although the plaintiff had identified Stanger in his March 8, 2017 response to the defendant's interrogatories, the plaintiff nonetheless had failed to satisfy the requirements of Practice Book § 13-4.[8] On or about July 12, 2018, less than one week before trial was scheduled to begin, the plaintiff moved for a continuance of the trial date and filed a case flow request seeking the same. The court, *Genuario*, *J.*, granted the plaintiff's case flow request, stating that the new trial schedule would be determined soon thereafter at a status conference. Subsequently, the trial was continued to February 26, 2019, and, in a joint motion to modify the scheduling order, the parties requested that a new deadline of September 7, 2018, be imposed for the plaintiff to disclose

[8] The defendant specifically argued that the plaintiff had failed to satisfy the requirements set forth in Practice Book § 13-4 (a) and (b) (1). As we have explained; see footnote 1 of this opinion; § 13-4 (a) requires a party to disclose "each person who may be called by that party to testify as an expert witness at trial." Section 13-4 (b) (1) requires the party to file an expert witness disclosure, in which the party must identify the expert witnesses he may call and specify the "field of expertise and the subject matter on which the witness is expected to offer expert testimony; the expert opinions to which the witness is expected to testify; [and] the substance of the grounds for each such expert opinion."

any expert witnesses that he planned to call to testify at trial. The court, *Jacobs*, *J.*, granted the parties' motion on August 6, 2018, thereby setting a deadline of September 7, 2018, for the plaintiff to disclose expert witnesses. In a motion to modify the scheduling order dated December 7, 2018, the parties jointly requested that the trial be continued to June 4, 2019, and a new deadline of January 25, 2019, be imposed for the plaintiff to disclose expert witnesses.[9] The court, *Genuario*, *J.*, granted the motion on January 7, 2019. On May 29, 2019, the plaintiff moved for a continuance of the trial date, and, on May 30, 2019, the court granted the plaintiff's motion and rescheduled the commencement of trial to August 21, 2019.

On August 8, 2019, the defendant filed a second motion to preclude the plaintiff from introducing expert testimony at trial. The defendant argued that the plaintiff had failed to disclose the expert witnesses he planned to call to testify at trial, despite his obligation to do so under the court's order. The defendant contended that the sanction of preclusion of expert testimony was proportional to the plaintiff's failure to file an expert witness disclosure, as required by Practice Book § 13-4, particularly in light of the facts that (1) the plaintiff had failed to file an expert witness disclosure by January 25, 2019, as mandated by the court, (2) the plaintiff had failed to supplement his interrogatory response and disclose Stanger's opinions and their factual bases, and (3) the trial was scheduled to commence in two weeks.

The defendant also filed a motion for summary judgment on August 8, 2019. In his motion and accompanying memorandum of law, the defendant argued that,

[9] As the parties explained in a joint motion to modify the scheduling order that the court, *Genuario*, *J.*, granted on May 30, 2019, counsel for the plaintiff in the present action, Attorney Michael Kogut, was suspended from the practice of law on July 31, 2018. The plaintiff subsequently hired Attorney Kenneth A. Votre to represent him in the present action, and Votre appeared on the plaintiff's behalf on October 25, 2018.

because the plaintiff failed to timely file an expert witness disclosure, the plaintiff should not be permitted to present expert testimony at trial. The defendant specifically asserted that, in the absence of expert testimony, the plaintiff would be unable to meet his burden of proof with respect to the standard of care that the defendant owed to the plaintiff, causation, or damages, each of which the plaintiff was required to prove to prevail on his legal malpractice claims.

On August 12, 2019, the plaintiff moved for a continuance of the trial date "in order to finish discovery . . . and respond to" the defendant's August 8, 2019 motions. The court granted the plaintiff's motion and ordered that the trial be scheduled either in January or February, 2020. The trial date subsequently was scheduled for February 4, 2020. The court also extended the plaintiff's deadline to disclose expert witnesses to October 4, 2019.

On October 18, 2019—two weeks after the plaintiff's October 4, 2019 deadline to disclose expert witnesses—the plaintiff filed a disclosure of expert witnesses in which he disclosed Stanger as the expert witness he planned to call to testify at trial. The plaintiff summarily stated in the disclosure that he expected Stanger to opine "as to the [standard] of care" that the defendant owed to the plaintiff and that the defendant "failed to meet the applicable standard of care" he owed to the plaintiff when he represented the plaintiff in the prior action. The plaintiff also stated therein that he expected Stanger to testify about "Connecticut law applicable to the [prior action]," including CUTPA. Finally, the plaintiff stated that Stanger would testify that the defendant breached the standard of care he owed to the plaintiff by failing to timely bring a CUTPA claim against the hospital, which "caused damages to the plaintiff." The plaintiff provided in the disclosure that Stanger's opinions would "be based [on] his knowledge of the

case from review of the [prior action] and his experience as an attorney admitted in Connecticut." On the same day that the plaintiff filed the expert disclosure, the defendant provided notice to the plaintiff that the defendant would depose Stanger on November 6, 2019. The deposition, however, did not take place on that day.

On November 25, 2019, the plaintiff filed a motion for a protective order in which he claimed that the defendant had withheld certain documents from him and requested that the deposition be postponed until after the defendant had produced the documents and Stanger had an opportunity to review them. The court, *Hon. Edward T. Krumeich II*, judge trial referee, later determined in its memorandum of decision that the defendant *had in fact* produced electronically the documents at issue long before the plaintiff filed the expert disclosure. Additionally, Stanger testified during his deposition that he had received the documents prior to the first day of the deposition, but counsel for the plaintiff had instructed him not to review the documents. In an order dated December 2, 2019, the court ordered in relevant part: "By no later than [December 6, 2019], counsel shall select a mutually agreeable date and time between [December 6 and 31, 2019] to schedule and conduct [Stanger's] deposition. If [Stanger] fails to appear for [the] deposition on the date selected, the defendant may move for the entry of sanctions, including a judgment of nonsuit, by filing a motion that references this order and the plaintiff's failure to comply."

The defendant conducted the first day of the deposition of Stanger on December 20, 2019. Stanger testified at the deposition that he had spent "many, many hours" preparing to testify. He specifically stated that, to prepare to testify at the deposition, he had reviewed some

of the decisions of our Supreme Court, this court,[10] and the Superior Court in the prior action, certain demand letters in the prior action, and the complaint in the present action. Stanger, however, admitted that he had not reviewed the transcripts of the depositions taken during the pendency of the prior action, the trial transcripts from the prior action—apart from "[seeing] one page" from a deposition transcript, the date and the content of which he could not identify—or the deposition exhibits, trial exhibits, discovery materials, and expert reports from the prior action. Stanger testified that, apart from counsel for the plaintiff, he did not speak to any individuals about the prior action, including the expert witnesses called to testify at trial in that action. Stanger further testified that he did not review the hospital bylaws or the minutes of the hospital meetings during which the medical staff decided not to renew the plaintiff's hospital privileges. Stanger also stated that he had not read the fact finder's decision in the prior action, but that he "long[ed] to see" it.

Stanger additionally testified that, a few weeks before the first day of the deposition, he had received a file that consisted of "sixteen boxes" of materials from the defendant's representation of the plaintiff in the prior action (file), which included, inter alia, deposition and trial transcripts from the prior action. When Stanger was asked whether he "only looked at what [counsel for the plaintiff] asked [him] to look at," Stanger replied, "[n]o. . . . [Counsel for the plaintiff] didn't direct me to [look at] very much. Whatever I looked at was probably, as I recall it, things that I already had in my [personal] file." Additionally, the following colloquy occurred:

[10] Stanger testified, however, that he merely "skimmed" one decision of this court in the prior action.

"[Stanger]: . . . I look forward to hearing the evidence or reading the evidence after . . . *I'm told to read the* . . . [*file*].

"[The Defendant's Counsel]: Have you been limited in any way in the work that you've done so far?

"[Stanger]: Yes.

"[The Defendant's Counsel]: How so?

"[Stanger]: When [counsel for the plaintiff and I] saw the scope of those [sixteen] boxes . . . we realized that it was going to take a lot of time to review [the materials therein]. . . . *So*, *I have not been authorized.* I said to [counsel for the plaintiff], one of us has got to look at this, either your office or me or mine, or a third party, or somebody in order to understand this better as you go forward with the depositions, and I look forward to us dividing up that work.

"[The Defendant's Counsel]: So, let me see if I understand that. *You have not been authorized to look through the sixteen boxes of* . . . [*materials from the defendant's representation of the plaintiff in the prior action*], correct?

"[Stanger]: *I have not been authorized to read them. I can flip through them*, as I did a couple of times, just to see how they work . . . .

"[The Defendant's Counsel]: Okay. Has there been any resolution to the issue of who is going to review these sixteen boxes of [materials]?

"[Stanger]: *All I can say is*, *I have not been authorized to review one or all.* . . .

"[The Defendant's Counsel]: [Counsel for the plaintiff] hasn't directed you to [specific items] in [the file] as to where to look?

"[Stanger]: Right." (Emphasis added.)

Stanger iterated multiple times during the first day of the deposition that he had not reviewed any of the materials within the file, neither before the plaintiff had filed the expert disclosure nor before the first day of the deposition. Stanger additionally reiterated that he would review materials in the file only once he was "authorized to" do so.

Stanger further testified that counsel for the plaintiff had instructed him that he could "assume" certain facts that the plaintiff hoped to prove at trial and, in light of those facts, opine as to the elements of legal malpractice. For example, when counsel for the defendant asked Stanger "[h]ow heinous" the hospital's conduct was in the prior action, Stanger replied, "[t]hat's something that I look forward to understanding better. I've been told to assume that it was heinous." Stanger also testified that counsel for the plaintiff had informed him that, for the purposes of identifying the immoral, unethical, oppressive, or unscrupulous conduct that the hospital had committed in contravention of CUTPA; see *Votto* v. *American Car Rental, Inc.*, 273 Conn. 478, 484, 871 A.2d 981 (2005); he could "assume" that the hospital had decided not to renew the plaintiff's privileges due to demands from other doctors who were "interested in eliminating [the plaintiff from the hospital staff] for inappropriate reasons." Stanger, however, could not identify with certainty the names of the other doctors[11] or the "inappropriate reasons" for their wanting the plaintiff's privileges not to be renewed. Instead, Stanger stated: "I just was told that there [were] inappropriate reasons . . . ." When counsel for the defendant asked Stanger to identify evidence of this allegedly unlawful conduct, the following colloquy occurred:

[11] When he was asked to identify the doctors, Stanger responded, "I assume—*again*, *assume*—[the doctors are] the other defendants . . . [named] in the complaint . . . filed" by the plaintiff in the prior action. (Emphasis added.)

"[The Defendant's Counsel]: What evidence is there that [this allegedly immoral, unethical, oppressive, or unscrupulous conduct occurred]?

"[Stanger]: I'm sure it's in those sixteen boxes . . . .

"[The Defendant's Counsel]: It's in those sixteen boxes that you've never looked at?

"[Stanger]: Correct."

Stanger explained that, in his view, he need not "have personal knowledge" of the facts pertinent to the prior action; he simply needed to know of the facts that "[would] be proven at trial," and he either had been told by counsel for the plaintiff the pertinent facts he should "assume" or had learned the pertinent facts by reviewing the plaintiff's allegations in the complaint filed in the present action. When counsel for the defendant asked Stanger whether, as an expert witness, he believed it would be permissible to base his opinions at trial solely on the facts represented to be true by counsel for the plaintiff, Stanger replied, "[n]o. But the good news is . . . by the time we get to the trial, then . . . evidence [will have] come in . . . ."

With respect to whether the plaintiff would have prevailed had he brought a tortious interference with business expectancies claim against the hospital in the prior action, counsel for the defendant asked Stanger, "you don't have any way to divine for us how a tortious interference claim would have turned out [in the prior action] because you don't know the [pertinent] facts [to the prior action], correct?" Stanger replied, "[c]orrect." With respect to whether the plaintiff would have prevailed had he brought a CUTPA claim against the hospital in the prior action, counsel for the defendant asked Stanger, "with respect to an unadvanced CUTPA claim, you don't have any opinions at this moment that such a claim would have been successful?" Stanger replied,

"I'm waiting to see other evidence." Stanger later agreed when asked if he believed that "the evidence [would] establish that it was more likely than not that" the defendant could have brought successfully a CUTPA claim in the prior action because the defendant eventually commenced on the plaintiff's behalf a separate action, alleging a violation of CUTPA, against the hospital. With respect to the basis of Stanger's opinion that the plaintiff likely would have prevailed had he brought a CUTPA claim against the hospital in the prior action, the following colloquy occurred:

"[The Defendant's Counsel]: What unlawful acts did [the hospital] commit vis-à-vis [the plaintiff]?

"[Stanger]: I can't enumerate them. I haven't looked at all the evidence.

"[The Defendant's Counsel]: Give me one. I'm not asking you to enumerate them. Give me one unlawful act on the part of [the hospital].

"[Stanger]: I'm—I've been told that there are rules to be followed with regard—state of Connecticut laws that are required to be followed with regard to a doctor being dismissed or being treated as . . . the facts will show [the plaintiff] was treat[ed] . . . .

"[The Defendant's Counsel]: What Connecticut laws?

"[Stanger]: *I wasn't told them. I was told that I can assume them.*

"[The Defendant's Counsel]: You can assume that they exist? Or assume—

"[Stanger]: That the facts will—I don't know which particular law it was. . . . I can't help you. . . .

"[The Defendant's Counsel]: You don't know?

"[Stanger]: —I'm sure [you'll find out], when [you complete] your depositions." (Emphasis added.)

Stanger additionally stated that he was "told by [counsel for the plaintiff] that there are certain specific regulations regarding doctors that the state of Connecticut has in terms of [employment] dismissal or negative action. I don't know the details. But [counsel for the plaintiff] said they would be . . . relevant to a CUTPA claim . . . [a]nd [counsel for the plaintiff] said he would get me that information." When counsel for the defendant asked Stanger, "as you sit here today, you don't know what those regulations are or what they say," Stanger once again replied, "[c]orrect." Finally, with respect to Stanger's opinions concerning damages, the following colloquy took place:

"[The Defendant's Counsel]: Do you intend to give an opinion on damages at the trial of this case . . . [o]r is your engagement [as an expert witness limited to] proving a deviation from the standard of care?

"[Stanger]: I understand [that the] scope [of my engagement as an expert witness] would include [opining as to] the damages, and *it would be subject to my hearing from other* [*expert witnesses*] *who I may rely upon.*

"[The Defendant's Counsel]: What other [expert witnesses]?

"[Stanger]: That's for . . . counsel [for the plaintiff] to decide and to present to me. . . .

"[The Defendant's Counsel]: Have you advised [counsel for the plaintiff] that it would be helpful to engage [any other expert witnesses]?

"[Stanger]: I've said to him that *we may need somebody on damages.* That *I need to understand the damages better* . . . .

"[The Defendant's Counsel]: As you sit here today, do you still believe . . . that [counsel for the plaintiff]

and [the plaintiff] may need [another expert witness to provide an opinion as to] damages and that you need to understand the damage analysis better in this case?

"[Stanger]: It's a—there's a may in that. There's not a will. I think it's possible, depending upon . . . the evidence . . . . And when I have a chance to review all or some of [the file], depending upon what I'm authorized to do, before that decision can be made. . . . [T]here's multiple ways that that can go depending upon what's in those boxes and what the testimony is of the two parties. *I believe there's damage here. The amount of the damage is the thing that's uncertain to me.*" (Emphasis added.)

Stanger also testified that he believed it was "likely that . . . additional damages" would be available to the plaintiff, aside from the damages the plaintiff had obtained as a result of his successful breach of contract claim against the hospital, but that he "would have to [review] each of the decisions [in the prior action]" to be sure. When counsel for the defendant asked Stanger if a "fair synopsis" of his deposition testimony related to damages was that Stanger "believe[d] that" damages would have been available to the plaintiff, "but [he] [could not] quantify them," Stanger answered affirmatively.

On January 8, 2020, following the first day of Stanger's deposition, the defendant filed a supplemental memorandum of law in support of his motion for summary judgment and motion to preclude Stanger's expert testimony. The defendant argued in his supplemental memorandum of law that, because Stanger had not reviewed the file, he lacked sufficient knowledge concerning the defendant's representation of the plaintiff in the prior action such that he could not opine as to whether the defendant had committed legal malpractice in the prior action. The defendant additionally argued that Stanger

had no independent opinion as to damages. The defendant asserted that, because the plaintiff had disclosed Stanger as an expert before Stanger had formed any meaningful, relevant opinions about the defendant's representation of the plaintiff in the prior action, the plaintiff had made the disclosure in bad faith.

On January 13, 2020, the defendant filed a supplemental motion to preclude the plaintiff from introducing expert testimony at trial and a supplemental motion for summary judgment. The defendant argued in his supplemental motions that, because Stanger had testified during his deposition that he could not opine as to whether the plaintiff would have prevailed had he pursued a CUTPA claim or a tortious interference with business expectancies claim against the hospital in the prior action, the plaintiff could not meet his burden of proof as to his claims of legal malpractice in the present action. The plaintiff filed objections to the defendant's supplemental motions, as well as an affidavit from Stanger dated January 20, 2020.

In his affidavit, Stanger stated that, in his opinion, the defendant was required to comply with an applicable standard of care in his representation of the plaintiff in the prior action. He opined that, by failing to raise a CUTPA or tortious interference with business expectancies claim on behalf of the plaintiff in the prior action, the defendant had failed to comply with that standard of care. Stanger stated in his affidavit that the plaintiff had "suffered [financial] injury, loss and damage, for which [the defendant] is liable," arising out of the defendant's failure to raise a CUTPA or tortious interference with business expectancies claim. Stanger averred several times in his affidavit that he based his opinions on "[t]he facts [he] expected [would] be asserted at trial . . . ." He also averred that he had reviewed "the appellate decisions," "the complaints,"

and "portions of the present proceedings." In his affidavit, however, Stanger did not opine that the plaintiff would have prevailed had he brought a CUTPA or tortious interference with business expectancies claim against the hospital in the prior action. Likewise, Stanger did not to any reasonable degree of specificity aver to an amount of damages that the plaintiff would have recovered above and beyond the $258,610 plus costs he recovered on the breach of contract count; see *Ulbrich* v. *Groth*, 310 Conn. 375, 411, 78 A.3d 76 (2013) ("CUTPA was intended to provide a remedy that is *separate and distinct* from the remedies provided by contract law when the defendant's contractual breach was accompanied by aggravating circumstances" (emphasis added)); had he prevailed against the hospital on a claim of CUTPA violations or tortious interference with business expectancies.

On January 21, 2020, two weeks before the trial was scheduled to begin on February 4, 2020, the court heard argument on the defendant's motion to preclude expert testimony and motion for summary judgment.[12] Counsel for the plaintiff contended that, because Stanger's deposition was incomplete at that time, the court could not consider Stanger's testimony in considering the defendant's motions. The court subsequently ordered that Stanger's deposition be completed on Wednesday, January 29, 2020, after confirming that counsel for both parties were available on that date. The court continued argument on the defendant's motions to Friday, January 31, 2020, four days before trial was scheduled to commence.

On Tuesday, January 28, 2020—the day before the scheduled second day of Stanger's deposition and three

[12] On January 17, 2020, the plaintiff filed a motion for a continuance of the hearing on the defendant's motions, as well as a case flow request requesting the same. The court denied the plaintiff's continuance motion and case flow request on January 21, 2020.

days before trial was scheduled to commence—counsel for the plaintiff notified counsel for the defendant that Stanger was unavailable to be deposed the following day. The plaintiff also filed a motion for relief, in which he requested that the court allow Stanger's deposition to take place at a later date because Stanger was on vacation. The defendant subsequently filed an objection to the plaintiff's motion. The plaintiff additionally moved for a continuance of the trial date. On January 30, 2020, the defendant filed a supplemental memorandum of law in support of his motion to preclude expert testimony and motion for summary judgment, in which he argued that the plaintiff had violated the court's January 21, 2020 order requiring Stanger to appear for the continued deposition on January 29, 2020, and that preclusion of Stanger's testimony was a proportional sanction in accordance with Practice Book § 13-4.

On Friday, January 31, 2020, on which date argument on the defendant's motion to preclude expert testimony and motion for summary judgment was continued, counsel for the plaintiff once again argued that the court could not consider the incomplete deposition testimony of Stanger. The court, *Genuario*, *J.*, granted the plaintiff's motion for a continuance and continued the trial date to October 6, 2020.

The second day of Stanger's deposition eventually took place on February 12, 2020. Counsel for the plaintiff asked Stanger whether his opinions were based on "reasonable legal probabilities" that he had deduced from his experience as an attorney, and Stanger answered affirmatively. Stanger, however, also testified that, although two months had passed between the first and second days of his deposition, he still had not read the file, aside from "skim[ming] a few" items and "review[ing] pieces" of select materials. He additionally testified that he had not reviewed the communications between the parties, read the hospital bylaws—aside

from the portions of the bylaws that either the plaintiff had included in the complaint in the prior action and were included in the decisions from that action that he had reviewed—or reviewed any of the defendant's bills from the defendant's representation of the plaintiff in that action.

Stanger explained that counsel for the plaintiff had sent him a letter several weeks prior to the second day of his deposition listing certain materials within the file that Stanger should review before the second day of his deposition and the start of trial. Stanger, however, explained that he had not reviewed these materials, or others in his possession, because counsel for the plaintiff had not authorized him to do so. Specifically, Stanger testified:

"[Stanger]: . . . I have got all these piles of paper . . . of the various parts of the file . . . . I just flipped through them to see what's there.

"[The Defendant's Counsel]: Did you read them?

"[Stanger]: I did not. I just breezed through them. I skimmed a few. . . .

"[The Defendant's Counsel]: Have you reviewed [the] boxes and boxes of [materials from the file]?

"[Stanger]: I have reviewed pieces of [them] . . . .

"[The Defendant's Counsel]: . . . [A]m I to understand that [the] letter [from counsel for the plaintiff] [was] your authorization to look at . . . specific boxes and . . . specific items in those boxes?

"[Stanger]: That's not how I understood it.

"[The Defendant's Counsel]: Okay, then how did you understand it?

"[Stanger]: I understood it as, this is a foreshadow of what is to come, and that *I will be told when I am authorized to dig in deeply.*

"[The Defendant's Counsel]: So, as we sit here today, *you still have not been authorized to dig in deeply, correct*?

"[Stanger]: *Correct.* . . .

"[The Defendant's Counsel]: . . . [W]hen you got this list [in the letter] from [counsel for the plaintiff] a couple [of] weeks ago . . . [d]id you look at all of these things on this list?

"[Stanger]: Well, I certainly looked at the list and I clicked through the different folders [in the electronic version of the file] . . . . [J]ust glancing at it, I thought what I was facing . . . was a couple thousand pages . . . . [With respect to any of the electronic folders within the file] that had subfolders . . . I . . . shut down the printing [of those materials].

"[The Defendant's Counsel]: Why?

"[Stanger]: *Because I was told not to spend a lot of time on this.*

"[The Defendant's Counsel]: *Who told you that?*

"[Stanger]: [*Counsel for the plaintiff's*] *office.*

"[The Defendant's Counsel]: What kind of limitation did [counsel for the plaintiff] give you?

"[Stanger]: The limitation that I understood that I was under was [that] the opinion that [I have been] giving [was] sufficient for the purposes of the deposition. That [counsel for the plaintiff] will be able to present the evidence at the time that it's needed that provides the factual basis for the claims made in the complaint. And just like any expert, I am to rely upon the actual facts that are proven in court. . . .

"[The Defendant's Counsel]: . . . [D]id you review most of [the items delineated in the letter from counsel for the plaintiff]?

"[Stanger]: . . . It depends on how you're defining review. Did I take a look at the size of the paper and think about whether I am going to read these thoroughly—yes. Did I skim through looking at a page here and there and looking at different things—yes. Did I keep records of that—no.

"[The Defendant's Counsel]: Okay, but in your skimming through, I mean, you said to me that you were told not to spend a lot of time on this, right?

"[Stanger]: Right.

"[The Defendant's Counsel]: And [counsel for the plaintiff] told you that?

"[Stanger]: Correct.

"[The Defendant's Counsel]: Did [counsel for the plaintiff] tell you that before or after he sent you [the] letter . . . ?

"[Stanger]: After." (Emphasis added.)

When counsel for the defendant asked Stanger whether, at any point, Stanger substantively had reviewed the items listed in the letter, Stanger answered, "[i]f by substantive review, you mean looking through [the items] in a thorough way, taking notes, considering how I [would] use them in opinions so that I could recite . . . [the] page and chapter and whatever," then he had not substantively reviewed the items, but that he "did spend some time on a couple of areas . . . ." Stanger also testified that counsel for the plaintiff never gave him the "green light" to conduct more than a cursory review of the files listed in the letter.

Nonetheless, Stanger opined that the hospital had violated CUTPA by failing to provide the plaintiff with a hearing before declining to renew his hospital privileges because, according to Stanger, "the law generally provides for that kind of hearing if a doctor is being found to have lost [his] privileges," and, thus, the defendant should have asserted on behalf of the plaintiff a CUTPA claim against the hospital in the complaint in the prior action. Stanger then stated that a statute required that a hearing be held before the Department of Public Health before a hospital decided to decline to renew a doctor's privileges. When counsel for the defendant asked Stanger to identify the statute, Stanger stated that he had "looked it up . . . in the [previous] week" but that he did not have a copy of it in his personal file. Ultimately, he could not identify the statute, outside of stating, "I think 20D and E comes to mind, but that's not the title. . . . [S]omething dash 20D and E," until counsel for the plaintiff "refresh[ed] [Stanger's] recollection" by providing him the statutory sections.[13] Nonetheless, Stanger could not articulate how, by statute, the hearing must be conducted. Stanger also testified that he was unaware of any decisions of our Supreme Court, this court, or the Superior Court in which a hospital's failure to provide a hearing to a doctor before his privileges were not renewed was determined to be a violation of CUTPA.

Stanger further opined that the plaintiff likely would have prevailed had he brought a CUTPA claim against

[13] Specifically, the following colloquy occurred between counsel for the plaintiff and Stanger:

"[The Plaintiff's Counsel]: . . . I know when you were being [questioned by counsel for the defendant], an issue came up about a state statute. Is that correct?

"[Stanger]: Two state statutes.

"[The Plaintiff's Counsel]: Okay, and I know you didn't remember the state statutes. If I told you it was [General Statutes §§] 20-13[d] and 20-13[e], would that refresh your recollection? . . .

"[Stanger]: . . . Yes, it does."

the hospital in the prior action, and, in connection with his opinion, Stanger theorized that "unfair motives" underpinned the hospital's decision not to renew the plaintiff's privileges and that the hospital had acted in bad faith in deciding not to renew the plaintiff's privileges. When, however, counsel for the defendant asked Stanger to explain "everything [he knew] about [the hospital's] unfair motives and [to identify] the evidence in [his personal] file of those motives," Stanger stated that he did not "believe [it was his] responsibility to do" so and that he believed that, at trial, counsel for the plaintiff would present evidence of the hospital's improper motives. Additionally, when counsel for the defendant asked Stanger whether he had "any evidence . . . that show[ed] bad faith conduct [committed by the hospital] vis-à-vis [the plaintiff], other than the fact that [the hospital] did not hold a hearing," Stanger replied, "I believe that I probably do have that evidence in the . . . boxes [of materials] . . . that the [p]laintiff will make part of his case [at trial] . . . . It was represented to me that . . . [the plaintiff would] present . . . this evidence, and I was asked to assume that fact." Stanger then stated that he "[did not] recall having been shown" any actual evidence. Stanger additionally testified that, if the plaintiff had prevailed on a CUTPA claim, he likely would have recovered $258,000 trebled—approximately three times the amount he had recovered in the prior action. In support of this opinion, Stanger testified that he estimated that the total amount would be trebled because the total trebled amount "seemed like a reasonable number for a judge to do in this case." He further opined that the plaintiff additionally would have recovered attorney's fees, which he estimated totaled $800,000—despite not reviewing the defendant's bills for his representation of the plaintiff in the prior action.[14] Ultimately, Stanger testified that

[14] After confirming with Stanger that he had not reviewed any of the defendant's bills in the prior action, counsel for the defendant asked Stanger whether "somebody [else had] told" Stanger that the defendant's attorney's

he had based his opinions on his review of the decisions of our Supreme Court, this court, and the Superior Court in the prior action and the allegations made in the plaintiff's complaint in the prior action, which Stanger "accept[ed] . . . as . . . true . . . ."

On February 25, 2020, after the conclusion of Stanger's deposition, the defendant filed an additional memorandum of law in support of his motion to preclude expert testimony and motion for summary judgment in which he argued that, despite Stanger's having had two additional months to prepare for the second day of the deposition, Stanger remained ignorant as to the facts of the prior action. On August 25, 2020, the court, *Hon. Edward T. Krumeich II*, judge trial referee, held a remote hearing on the defendant's motion to preclude expert testimony and motion for summary judgment.

In a memorandum of decision dated September 1, 2020, the court granted the defendant's motion to preclude Stanger's testimony and motion for summary judgment. The court first determined that Stanger lacked the requisite factual predicate to opine as to the legal malpractice element of causation—specifically, that the plaintiff likely would have prevailed on CUTPA and tortious interference with business expectancies claims had he brought them against the hospital in the prior action. The court also determined that Stanger lacked the factual predicate to opine as to the legal

fees totaled $800,000. Stanger testified, "I think [the $800,000 value is] in the complaint that was filed in [the present] action."

We note that, in his principal appellate brief to this court, the plaintiff likewise asserted that, "[o]ver the course of the [pendency of the prior action], [the plaintiff] paid [the defendant] over eight hundred thousand dollars ($800,000) in legal fees, costs, and expenses . . . ." (Footnote omitted.) To support this assertion, the plaintiff merely cited to the operative complaint in the present action—namely, the allegation in his complaint that, "over the course of [the pendency of the prior action], [the plaintiff] was billed and paid the defendant nearly eight hundred thousand ($800,000) dollars in legal fees, costs, and expenses."

malpractice element of damages and to estimate the damages that the plaintiff would have been able to recover, above and beyond the $258,610 plus costs he recovered on the breach of contract count, had he brought and prevailed on CUTPA and tortious interference with business expectancies claims in the prior action.[15] The court then concluded that preclusion of expert testimony was a proper and proportional sanction to impose on the plaintiff. Because the plaintiff was unable to meet his burden of presenting expert testimony as to the elements of legal malpractice in light of the court's sanction precluding the plaintiff from presenting expert testimony; see, e.g., *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012) ("[a]s a general rule, for the plaintiff to prevail in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care [an attorney must exercise]" (internal quotation marks omitted)); see also *Bozelko* v. *Papastavros*, 323 Conn. 275, 285, 147 A.3d 1023 (2016) ("expert testimony also is a general requirement for establishing the element of causation in legal malpractice cases"); the court concluded that summary judgment was proper.

In determining that Stanger lacked the factual predicate to provide an expert opinion as to causation and

[15] The court also stated that Stanger "lack[ed] . . . knowledge concerning the law to be applied to the facts relating to the CUTPA claim and . . . general[ly] lack[ed] . . . experience litigating CUTPA claims." It is unclear whether, by this statement, the court concluded that Stanger was unqualified to render expert opinions or instead conflated the requirements that an expert witness be qualified "by knowledge, skill, experience, training, education or otherwise"; Conn. Code Evid. § 7-2; and that "there . . . be a factual basis for the [expert witness'] opinion[s]." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 406, 97 A.3d 920 (2014). Because we conclude that the court properly determined that Stanger's testimony should be precluded on other grounds, we need not consider whether the court properly determined that Stanger was unqualified to render expert opinions, to the extent that it made such a finding. See footnote 2 of this opinion.

damages, the court reviewed the expert disclosure dated October 18, 2019, Stanger's affidavit, and the transcripts from each day of Stanger's deposition. Looking first at the expert disclosure, the court noted that the plaintiff set forth therein Stanger's opinion that, by failing to bring the CUTPA and tortious interference with business expectancies claims against the hospital on behalf of the plaintiff in the prior action, the defendant had violated the applicable standard of care; the plaintiff, however, failed to set forth therein any expert opinion concerning the legal malpractice elements of causation and damages. The court noted that the plaintiff did not supplement his expert disclosure to add any such opinions. The court also concluded that the plaintiff had failed to provide in the expert disclosure the factual bases for Stanger's opinions—"if any"—concerning liability, causation, and damages.

The court similarly determined that Stanger's affidavit failed to set forth an expert opinion as to causation and damages. The court stated, "[t]here is no opinion [set forth in Stanger's affidavit] . . . as to the basis for and viability of . . . [a] CUTPA claim and [a tortious] interference [of business expectancies] claim," had they been brought in the prior action. As to damages, the court continued, Stanger merely had provided a conclusory statement that the plaintiff had suffered financial harm and damage. Regarding the factual basis for Stanger's opinions, the court noted that Stanger had averred that he had based his opinions on "some of the facts [he] expected [would] be brought out at trial," as opposed to facts that he himself had gleaned from the record. (Internal quotation marks omitted.) Further, the court noted that Stanger had reviewed only "limited and selective" materials—"the appellate decisions, the complaints and portions of the present proceedings"—before providing his opinions. (Internal quotation marks omitted.)

Turning to the first day of Stanger's deposition, the court noted that Stanger had admitted that he lacked knowledge about the prior action and had relied on the representations of counsel for the plaintiff as to what the plaintiff "hoped to prove at trial" instead of reviewing the record. The court highlighted Stanger's testimony that counsel for the plaintiff did not authorize Stanger to review the file and, consequently, Stanger had not done so. Finally, the court concluded that Stanger had provided no opinion as to whether the plaintiff would have prevailed had he brought a CUTPA or tortious interference with business expectancies claim against the hospital in the prior action, or as to damages. By contrast, Stanger had testified that he would have to rely on the opinion of another expert to provide an opinion as to damages.

With respect to the second day of Stanger's deposition, the court noted that counsel for the plaintiff once again had failed to authorize Stanger to review the file and, instead, had "caution[ed] [Stanger] not to spend . . . too much time reviewing the [file] to prepare for the deposition . . . ." Consequently, the court explained, "Stanger curtailed his review and remained largely ignorant of" the facts pertinent to the prior action and instead based his opinions "on hypothetical facts that [the] plaintiff [purportedly] hoped to [prove] at trial." As the court noted, "Stanger testified that his opinions [were] based on his belief [that] the facts alleged in the [plaintiff's] complaint in the [prior action] would have supported" a CUTPA claim and that the claim would have been successful so long as "there was evidence to support" it. Likewise, the court noted, Stanger admitted that he had completed "limited research" with respect to the applicable law. The court thus concluded that, to the extent Stanger had opined as to the essential elements of a legal malpractice claim, Stanger lacked the necessary factual basis to provide

expert testimony and his opinions were "untethered to facts" in the record.

The court next noted that it was "mindful" that the decision to preclude the plaintiff from presenting expert testimony pursuant to Practice Book § 13-4 would be a "severe sanction that [would] doom [the] plaintiff's case . . . ." The court, however, explained that, pursuant to § 13-4 (h), the sanction of preclusion, "including any consequence thereof on the [plaintiff's] ability to prosecute . . . [his] case, [was] proportional to [the plaintiff's] noncompliance" with the disclosure requirements of § 13-4, and the plaintiff's noncompliance could not "adequately be addressed by a less severe sanction or combination of sanctions." Practice Book § 13-4 (h).

With respect to proportionality, the court concluded that the sanction of preclusion was proportional to the plaintiff's noncompliance with the disclosure requirements set forth in Practice Book § 13-4. In so concluding, the court noted that the plaintiff's disclosure had failed to set forth any expert opinion as to the legal malpractice elements of causation and damages, and the plaintiff did not at any point supplement the disclosure to add such opinions. See Practice Book § 13-4 (b) (requiring a party to "disclos[e] . . . [the] expert witnesses . . . [whom the party] may . . . [call] . . . to testify . . . at trial" and requiring disclosure to include "the expert opinions to which the witness is expected to testify"). The court determined that the plaintiff had "ample opportunity" throughout the duration of the pending action to "disclose an expert [witness who was] prepared to" provide an informed expert opinion as to "the central issues" of the case, including causation and damages, based on his independent review of the record of the prior action. Instead, and before Stanger had received the file from the prior action, the plaintiff disclosed Stanger as the sole expert witness he planned to call to testify at trial. After he filed the

disclosure and provided Stanger the file in November, 2019, the plaintiff then "delay[ed] and limit[ed] . . . Stanger's review of the [file]" through both days of Stanger's deposition. As a result, throughout the pendency of the action, Stanger possessed only a cursory understanding of the facts of the prior action and based his opinions on his assumptions and the allegations that counsel for the plaintiff assured him would be proven at trial. The court thus determined that the plaintiff had failed to disclose to the defendant the factual substance on which Stanger based his opinions, in contravention of the disclosure requirements set forth in § 13-4. See Practice Book § 13-4 (b) (requiring a party to "disclos[e] . . . [the] expert witnesses . . . [whom the party] may . . . [call] . . . to testify . . . at trial" and requiring disclosure to include "the substance of the grounds for each expert opinion").

The court determined that Stanger's lack of preparation, and the plaintiff's contributions thereto, prevented the defendant from ascertaining what Stanger likely would opine at trial. The court noted that "[the] plaintiff's plan appeared to be to delay educating [Stanger] until trial and to delay [Stanger from] review[ing] and analy[zing] [the] material evidence until trial . . . ." The court emphasized that such a strategy could have resulted in further delay of the trial date or caused the defendant to be ambushed by a "newly informed expert" witness at trial. The court recognized that, between May 14, 2015, the date on which the present action was commenced, and September 1, 2020, the date of the court's memorandum of decision on the defendant's motions, the trial date was scheduled and rescheduled eight separate times.[16] The court thus concluded that continuing the trial date "for the ninth time"

[16] Between May 14, 2015, and September 1, 2020, the court scheduled trial for the following dates: April 25, 2017; November 28, 2017; July 16, 2018; February 26, 2019; June 4, 2019; August 21, 2019; February 4, 2020; and October 6, 2020.

to allow Stanger more time to review the file would "not [be] an adequate sanction,"[17] as such a continuance would require that the defendant conduct additional discovery in light of any additional expert opinions or analysis and would be akin to "[r]ewarding [the plaintiff's] strategy of unduly limiting expert preparation" and encouraging an expert witness to "parrot the pleadings without independent[ly] review[ing] and anal[yzing] . . . the . . . [pertinent] evidence" from the underlying action. For the same reasons, the court also noted that it was "far too late" for the plaintiff to disclose another expert. The court, thus, determined that the plaintiff's noncompliance could not adequately be addressed by a less severe sanction or combination of sanctions. See Practice Book § 13-4 (h) (2).

Consequently, the court granted the defendant's motion to preclude the plaintiff from presenting expert testimony at trial. Because the plaintiff would be unable to prove his legal malpractice claims "[w]ithout [the] admissible testimony [of] a competent expert" witness as to the elements of legal malpractice, the court granted the defendant's motion for summary judgment as to the plaintiff's claims. Following the court's decision, the plaintiff filed a motion to reargue the motion to preclude expert testimony and motion for summary judgment, which the court denied on September 22, 2020. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court improperly granted the defendant's motion to preclude Stanger's testimony at trial. In connection with this claim, the

[17] Although the court recognized that "[s]ome of the delay [of the trial date was] attributable to the substitution of [the plaintiff's] counsel . . . the delay of trial from August 21, 2019, to February 4, 2020," was caused by the plaintiff's failure to timely disclose an expert.

plaintiff argues that the sanction of preclusion was not proportional to the plaintiff's alleged noncompliance with the disclosure requirements set forth in Practice Book § 13-4 and that the noncompliance adequately could have been addressed by a less severe sanction. The plaintiff additionally contends that, in imposing a sanction for failing to comply with the disclosure requirements, the court improperly concluded that Stanger's opinions were not based on sufficient facts.

Before we address the merits of the plaintiff's claim, we first set forth the appropriate standard of appellate review, an issue about which the parties disagree. The plaintiff argues that, in accordance with this court's decision in *Fortin* v. *Hartford Underwriters Ins. Co.*, 139 Conn. App. 826, 59 A.3d 247, cert. granted, 308 Conn. 905, 61 A.3d 1098 (2013) (appeal withdrawn November 26, 2014), we should exercise plenary review over the trial court's decision to preclude Stanger's testimony because the court considered the defendant's motion to preclude Stanger's testimony in the same proceeding in which it considered the defendant's motion for summary judgment. The defendant contends that *Fortin* is distinguishable from the present case and that we should review the court's decision granting the defendant's motion to preclude Stanger's testimony for an abuse of discretion because, generally speaking, "[w]e afford our trial courts wide discretion in determining whether to admit expert testimony . . . ." *Weaver* v. *McKnight*, 313 Conn. 393, 405, 97 A.3d 920 (2014).

In resolving this dispute, we first look to this court's decisions in *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 2 A.3d 963 (2010), rev'd on other grounds, 306 Conn. 107, 49 A.3d 951 (2012), and *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 826. In *DiPietro*, the plaintiff's minor daughter injured her ankle while playing soccer at an indoor soccer facility operated by the defendants. *DiPietro* v.

Farmington Sports Arena, supra, 585–86. The plaintiff initiated separate actions against the defendants, alleging that the defendants negligently had installed and maintained the carpet that covered the facility's floor, creating an unreasonably dangerous surface on which to play soccer. Id., 586–87. The defendants filed motions for summary judgment as to the plaintiff's actions, claiming that there was no genuine issue of material fact as to, inter alia, the applicable duty that the defendants owed—which this court clarified on appeal was "the duty to provide and to maintain [their] premises in a reasonably safe condition"; id., 619; and whether the defendants had breached that duty. Id., 587, 619. In opposition, the plaintiff submitted the deposition testimony and affidavit of an expert witness, who opined that the carpeted surface was unreasonably dangerous. Id., 605–606.

In its consideration of the defendants' motions for summary judgment, the trial court determined that the expert witness' testimony was inadmissible because the expert lacked the requisite personal knowledge about the case to render an expert opinion of substantial value. See id., 609. Having determined that the testimony of the expert witness was inadmissible, the court granted the defendants' motions for summary judgment because, among other reasons, "expert testimony was required to establish the . . . applicable . . . [duty of the defendants as it pertained to the safety of the] indoor soccer facility and the breach thereof . . . ." Id., 609–10.

On appeal, this court "consider[ed] [its] scope of review of the question of the admissibility of [the expert witness'] testimony in [the] summary judgment proceeding . . . ." Id., 610. This court stated, "[o]rdinarily, a trial court's ruling on the admissibility of an expert's testimony at trial is subject to the deferential scope of review of abuse of discretion. . . . *That scope of*

review does not apply, however, [*if*] *the trial court has excluded such testimony in connection with a summary judgment proceeding*." (Citation omitted; emphasis added.) Id. This court explained, "[i]t is well settled that our scope of review of a trial court's determination on a motion for summary judgment is plenary. . . . [In a case], as here, [in which] the trial court ruled the expert's testimony inadmissible in the course of summary judgment proceedings, it would be inconsistent with that plenary scope of review to subject a particular subset of the trial court's determinations in those proceedings, *namely*, *the admissibility of an expert's opinion*, to the highly deferential abuse of discretion scope of appellate review." (Citation omitted; emphasis added.) Id., 610–11. This court further noted, "because the movant in a summary judgment proceeding has the burden to show that there is no genuine issue of fact and the facts are to be viewed in the light most favorable to the nonmoving party, a trial court in such a proceeding would be obligated to exercise its discretion in favor of the nonmoving party's offer of evidence. Similarly, in applying our plenary scope of review to the question of the admissibility of [the expert witness'] testimony, the same considerations compel us to resolve any doubts about that question in favor of admissibility." Id., 611.[18]

In *Fortin*, the plaintiffs initiated a civil action against the defendants, North River Insurance Company (North

[18] Following the release of this court's decision in *DiPietro*, our Supreme Court "granted the defendants' petition for certification to appeal . . . [as to the following question: *whether this court*] *properly rule*[*d*] *that plenary review applied to the trial court's decision concerning the admissibility of expert testimony in a summary judgment motion* . . . ." (Emphasis added; internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 111 n.2, 49 A.3d 951 (2012). Our Supreme Court, however, ultimately "[did] not reach [this] certified [issue] because . . . [it] conclude[d] that, despite the trial court's stated concerns as to the admissibility of the expert's opinion, the court did consider [the expert's opinion] in ruling on the defendants' motions for summary judgment but found it to be substantively insufficient." Id.

River) and Hartford Underwriters Insurance Company (Hartford). *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 829 and n.1. The plaintiffs alleged that they had purchased liability insurance policies from each of the insurance companies. Id., 830. Pursuant to its policy, Hartford agreed to defend the plaintiffs in specific legal actions and to pay certain damages resulting therefrom, and, pursuant to its policy, North River provided umbrella coverage above and beyond the policy issued by Hartford. Id. The plaintiffs alleged that they had been named as third-party defendants in a separate action, which they contended "gave rise to coverage under the policies"; id.; but that Hartford declined to provide representation to the plaintiffs or to indemnify them for the financial obligations they incurred as a result of the action, and North River declined to participate in settlement negotiations in the separate action on their behalf or to contribute moneys toward the plaintiffs' settlement obligation. Id., 830–31. After the parties to the separate action settled, the plaintiffs subsequently sued the insurance companies for, inter alia, breach of contract. Id., 831.

The plaintiffs disclosed an expert witness, whom they asserted would opine as to, inter alia, the objective reasonableness of the settlement amount paid by the plaintiffs—an essential element of their case against North River. Id., 832–33, 837. In response, North River filed two motions: a motion to preclude the plaintiff's expert witness from testifying, in which it argued, inter alia, that the opinion of the plaintiff's expert witness was based on insufficient facts, and a motion for summary judgment, in which it argued that the plaintiffs were unable to prove an essential element of their case—that the settlement amount was unreasonable. Id., 832. "The [trial] court considered [North River's] motion to preclude in the context of a hearing on the motion for summary judgment . . . [and ultimately]

granted both . . . motions." Id., 832–33. The court determined that the expert witness' testimony was inadmissible because "the plaintiffs were unable to demonstrate that [the expert witness'] opinion was based on sufficient facts and, thus, that his testimony would assist the trier of fact in understanding the evidence or in determining the objective reasonableness of the settlement paid by the plaintiffs." Id., 833. The court consequently concluded that, because the plaintiffs had failed to present expert evidence demonstrating that the settlement amount was objectively reasonable, summary judgment in favor of North River was warranted. See id.

On appeal, this court first set forth the applicable standard of review. See id. This court noted that the plaintiffs "urge[d]" it to apply the plenary standard of review; id., 834 n.4; enunciated in *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 123 Conn. App. 610–11, and North River urged it "not to apply the plenary standard of review . . . ." *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 834–35 n.4. This court observed that, in *DiPietro*, it had concluded "that its [determination as to the proper standard of review in this context] was consistent with Connecticut's summary judgment jurisprudence." Id., 835 n.4. Thus, this court determined, "*DiPietro*'s relevant [analysis] govern[ed] the legal standard by which a court should evaluate a motion to preclude in conjunction with a motion for summary judgment." Id., 836 n.4.

Because the trial court had ruled the expert's testimony inadmissible within the context of the summary judgment proceedings, this court determined that the proper standard of appellate review was plenary. See id., 833–34. Accordingly, viewing the record "in the light most favorable to the plaintiffs"; id., 840; this court concluded that the expert did not have an "adequate

factual basis [on] which to . . . [base an] opinion concerning the reasonableness of the settlement," and, thus, the trial court "properly [had] precluded" the expert witness' opinion. Id.

Significantly, and as the plaintiff conceded during oral argument before this court, the trial courts in *DiPietro* and *Fortin* had not precluded the plaintiffs' expert witnesses from testifying as a discovery sanction for the plaintiff's failure to comply with the disclosure rules set forth in Practice Book § 13-4. By contrast, in both *DiPietro* and *Fortin*, the courts precluded the testimony of the plaintiffs' expert witnesses *solely* because the opinions of the plaintiffs' expert witnesses were not based on sufficient facts. See id., 833; *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 123 Conn. App. 609.

In the present case, although the court determined that Stanger's opinions were not based on sufficient facts, our thorough review of the court's memorandum of decision reveals that the court principally precluded the plaintiff's expert witness from testifying as a sanction for the plaintiff's noncompliance with the disclosure requirements set forth in Practice Book § 13-4. As we have explained, the court stated in its memorandum of decision that it was "mindful" that its decision to preclude the plaintiff from presenting expert testimony would be a "severe sanction . . . ." The court further emphasized that the plaintiff had failed to comply with the disclosure requirements set forth in § 13-4 and, consequently, considered whether, pursuant to § 13-4 (h), it should impose on the plaintiff the sanction of preclusion of the expert testimony. The court specifically considered whether the sanction was "proportional to [the plaintiff's] noncompliance" with the disclosure requirements of § 13-4 and whether the plaintiff's noncompliance with the disclosure requirements otherwise could be addressed adequately by a less severe sanction or

combination of sanctions. The court determined that Stanger's lack of knowledge as to the pertinent facts of the prior action evidenced the discovery abuse in which the plaintiff had engaged—specifically, eventually disclosing Stanger as an expert witness but keeping Stanger uninformed as to the pertinent facts of the case to prevent the defendant from conducting meaningful discovery.

Ultimately, the court concluded that, in light of the discovery abuses in which the plaintiff engaged, including but not limited to his attempt to keep his own expert uneducated about the facts underlying the matter, the sanction of preclusion was proportionate to the plaintiff's failure to timely comply with the requirements of Practice Book § 13-4, and the plaintiff's noncompliance otherwise could not be addressed adequately by a less severe sanction or combination of sanctions. Thus, the court exercised its discretion in determining that the sanction of preclusion was justified pursuant to § 13-4 (h). Accordingly, we conclude that the case before us is distinguishable from *DiPietro* and *Fortin* because, in the present case, the court treated in large part its decision to preclude the plaintiff's expert witness from testifying as a sanction for the plaintiff's failure to comply with the disclosure requirements of § 13-4. To review this decision on a plenary basis simply because it was made at or about the time the court adjudicated the defendant's motion for summary judgment would deprive the court of its discretion, or severely curtail the court's discretion, to govern effectively the discovery process, supervise the conduct of the litigants, and manage its dockets. We therefore decline to extend *DiPietro* and *Fortin* to the circumstances of this case.[19]

[19] We note that, in his appellate briefs to this court, the plaintiff additionally argues that the trial court applied the wrong legal standard when it reviewed the evidence in deciding the defendant's motion to preclude Stanger's expert testimony. Specifically, the plaintiff asserts that, because the court decided the defendant's motion to preclude in connection with the defendant's motion for summary judgment, the court was required to construe "the facts

It is well accepted that "we . . . [review] the action of the trial court in imposing sanctions for failure to comply with its orders regarding discovery under a broad abuse of discretion standard." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 15, 776 A.2d 1115 (2001); see also *Vitali* v. *Southern New England Ear, Nose, Throat & Facial Plastic Surgery Group, LLP*, 153 Conn. App. 753, 757, 107 A.3d 422 (2014) (trial court's "decision to impose sanctions," including sanction of "preclusion of expert testimony . . . rests solely in the discretion of the court"). "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In reviewing a claim that the court has abused this discretion, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . The determinative question for an appellate court is not whether it would have imposed a similar sanction but whether the trial court could reasonably conclude as it did given the facts presented. Never will the case on appeal look as it does to a [trial court] . . . faced with the need to impose reasonable bounds and order on discovery." (Citations omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 15–16. "Under an abuse of discretion standard,

. . . in the light most favorable to [the plaintiff as] the nonmoving party . . . [and] exercise its discretion in favor of the nonmoving party's offer of evidence." (Internal quotation marks omitted.) *Fortin* v. *Hartford Underwriters Ins. Co.*, supra, 139 Conn. App. 834. Because we have concluded that, unlike in *Fortin* and *DiPietro*, the court in the present case treated its preclusion of Stanger's testimony in large part as a sanction for the plaintiff's failure to comply with the expert disclosure requirements of Practice Book § 13-4, we conclude that the court in the present case was not obligated to employ the standard governing a trial court's decision on a motion for summary judgment when it decided the defendant's motion to preclude Stanger's expert testimony.

a court's decision must be legally sound and [the court] must [have] honest[ly] attempt[ed] . . . to do what is right and equitable under the circumstances of the law, without the dictates of whim or caprice." (Internal quotation marks omitted.) *Vitali* v. *Southern New England Ear, Nose, Throat & Facial Plastic Surgery Group, LLP*, supra, 757.

We now turn to the merits of the plaintiff's claim. The plaintiff contends that the sanction of preclusion was not proportionate to his noncompliance with the expert disclosure requirements set forth in Practice Book § 13-4 and that his "alleged" noncompliance adequately could have been addressed by a less severe sanction. The plaintiff argues that, at the time the court imposed the sanction in its decision dated September 1, 2020, he had disclosed Stanger as an expert witness in the expert disclosure he had filed on October 18, 2019. The plaintiff further asserts that the defendant "was not prejudiced" by any noncompliance on the plaintiff's part because the defendant "had a meaningful opportunity to depose [Stanger as to] the basis [of Stanger's] opinions." Finally, the plaintiff argues that, as a less severe sanction, the court could have precluded "only the testimony and opinions that it believed were not . . . based [on sufficient] . . . facts." We are not persuaded.

As we have explained, Practice Book § 13-4 (h) provides a trial court with the authority to "impose sanctions on a party for [the party's] failure to comply with the" disclosure requirements set forth in § 13-4, such as the requirement that a party must disclose the expert witnesses it may call to testify at trial; see Practice Book § 13-4 (a); or the requirement that a party must file an expert disclosure identifying, inter alia, the expert witness, the subject matter on which the expert is expected to testify, and the substance of the grounds for each expert opinion. See Practice Book § 13-4 (b)

(1). "An order precluding the testimony of an expert witness, [however] may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions." Practice Book § 13-4 (h). As our Supreme Court has reiterated, "the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 18. In considering whether the sanction was proportional to the plaintiff's failure to comply with the disclosure requirements set forth in § 13-4 and his discovery abuse, we are guided by "the factors [our Supreme Court] . . . ha[s] employed when reviewing the reasonableness of a trial court's imposition of sanctions: (1) the cause of the [party's] failure to [comply with the disclosure rules and the party's discovery abuse], that is, whether it [was] due to inability rather than the [wilfulness], bad faith or fault of the [party] . . . (2) the degree of prejudice suffered by the opposing party . . . and (3) which of the available sanctions would, under the particular circumstances, be an appropriate response to the disobedient party's conduct." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 375, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

We also note that, pursuant to § 7-2 of the Connecticut Code of Evidence, "[a] witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of

fact in understanding the evidence or in determining a fact in issue." "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 313 Conn. 405–406. "An expert may testify in the form of an opinion and give reasons therefor, *provided sufficient facts are shown as the foundation for the expert's opinion*." (Emphasis added.) Conn. Code Evid. § 7-4 (a). Thus, "[t]o render an expert opinion the witness must be qualified to do so *and there must be a factual basis for the opinion*." (Emphasis added; internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 406. Accordingly, this court has stated, "[t]he essential facts on which an expert opinion is based are an important consideration in determining the admissibility of the expert's opinion." *Glaser* v. *Pullman & Comley, LLC*, 88 Conn. App. 615, 624, 871 A.2d 392 (2005).

In a case in which "the factual basis of an [expert witness'] opinion is challenged the question before the court is whether the uncertainties in the essential facts on which the opinion is predicated are such as to make an opinion based on them without substantial value." (Internal quotation marks omitted.) *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 244, 963 A.2d 943 (2009). For example, this court has determined that the opinions of a purported expert witness, whose testimony was based on "speculation" and who "lack[ed] [sufficient] personal knowledge . . . of the facts" on which he based his opinions; *Porter* v. *Thrane*, 98 Conn. App. 336, 341, 908 A.2d 1137 (2006); were "without substantial value." Id., 340.

Turning to the present case, the court determined that the plaintiff failed to comply with the disclosure

requirements set forth in Practice Book § 13-4 and, instead, engaged in a course of conduct that rose to a discovery abuse. The court noted that the plaintiff had filed an expert disclosure on October 18, 2019, two weeks after the October 4, 2019 deadline set by the court's scheduling order, and years after the previous deadlines of August 8, 2016, and September 7, 2018. In addition to the plaintiff's historical failure to comply with the court's scheduling orders in filing the disclosure, the court stated that, within the disclosure, the plaintiff had failed to set forth any expert opinion as to the legal malpractice elements of causation and damages, as required by Practice Book § 13-4 (b), and at no point did the plaintiff supplement the disclosure to add such opinions, despite having "ample opportunity" to do so during the pendency of the action. Likewise, the plaintiff had failed to provide the substance of the grounds for each of the disclosed opinions, as required by § 13-4 (b). Instead, the plaintiff merely provided that Stanger's opinions would be "based [on] his knowledge of the case from review of the [prior action] and his experience as an attorney admitted in Connecticut."

More significantly, however, the court determined that the plaintiff had committed what amounted to a discovery abuse by engaging in a particular course of "gamesmanship" that prevented the defendant from completing meaningful discovery. In particular, although the plaintiff eventually "disclosed" Stanger as an expert witness—albeit outside of each of the deadlines to do so—counsel for the plaintiff prevented Stanger from learning the pertinent facts of the prior action during the entirety of his involvement as an expert witness in the present action. The court noted that, at the time the plaintiff had disclosed him as an expert witness, Stanger had not been provided the file from the prior action and, thus, could not have based the expert opinion disclosed in the disclosure on his

independent review of the file. Additionally, in his affidavit dated January 20, 2020, Stanger averred that he had reviewed only a few select materials before developing his opinions—specifically, the "appellate decisions," the "complaints," and "portions of the present [action]"—and that his opinions largely were based on "the facts [he] expected [would be brought out] at trial," as opposed to facts that he himself had gleaned from independently reviewing the record.

The court confirmed, by reviewing the transcripts of Stanger's deposition, that Stanger possessed a limited understanding of the prior action because counsel for the plaintiff had curtailed Stanger's review of the record in the prior action. As the court stated, counsel for the plaintiff had "authorized" Stanger to review only a limited portion of the available materials before he testified and instructed Stanger "not to spend . . . too much time" on the matter. Consequently, Stanger admitted during his deposition that he did not review a myriad of materials associated with the prior action, including the following: the transcripts from the depositions taken in connection with the prior action, the trial transcripts from the prior action—apart from "[seeing] one page" from a deposition transcript, the date and the content of which he could not identify when he was deposed—the deposition exhibits, trial exhibits, discovery materials, and expert reports from the prior action, the hospital bylaws—apart from the portions reprinted in the plaintiff's complaint and the decisions he reviewed—the minutes of the hospital meetings during which the medical staff decided not to renew the plaintiff's hospital privileges, the defendant's bills from the defendant's representation of the plaintiff in the prior action, and the communications between the parties in the present action. Stanger also testified that he had not spoken with any individuals about the prior action, including the expert witnesses called to testify at trial

in the prior action, aside from counsel for the plaintiff. As the court additionally noted, Stanger repeatedly acknowledged during both days of the deposition that, although he had received the file from the defendant's representation of the plaintiff in the prior action, which he testified consisted of sixteen boxes of materials, he did not "substantively review" any of the materials in the file and would not do so until he was "authorized to do" so by counsel for the plaintiff.

As the court further emphasized, Stanger testified that he had based his opinions on the facts that counsel for the plaintiff hoped to prove at trial and that counsel for the plaintiff instructed Stanger he could "assume" existed, as opposed to the facts he gleaned from his own independent review of the record. For example, when counsel for the defendant asked Stanger "[h]ow heinous" the hospital's conduct was in the prior action, Stanger replied, "I've been told to *assume* that it was heinous"; (emphasis added); and when counsel for the defendant asked Stanger to identify the immoral, unethical, oppressive, or unscrupulous conduct that the hospital allegedly had committed in contravention of CUTPA, Stanger stated that he "just was told that" the conduct existed and that he was "sure [that evidence thereof was] in [the] [sixteen] boxes" of materials in the file he did not review. Likewise, during the first day of the deposition and in connection with his opinion that it was "more likely than not" that the plaintiff could have prevailed on a CUTPA claim had one been pursued in the prior action, Stanger stated that counsel for the plaintiff told him "that [he] [could] assume" that certain laws—which he could not identify without his memory being "refreshed" by counsel citing to him the statutory sections—existed that the hospital had violated such that a CUTPA claim would have been successful if it had been brought against the hospital. As the court noted, "Stanger testified that his opinions [were] based

on his belief that [the] facts alleged in the [plaintiff's] complaint in the [prior action] would have supported" a CUTPA claim and that such a claim would have been successful, so long as "there was evidence to support" it.[20]

Additionally, the court explained that, although the plaintiff eventually disclosed Stanger as his expert witness, the plaintiff "delay[ed] and limit[ed] . . . Stanger's review of the [file]" and other salient materials such that, on the two days on which he was deposed, Stanger

[20] In light of Stanger's deposition testimony, the court determined that Stanger's expert opinion lacked substantial value because it was "untethered to facts" in the record. The plaintiff contends that the court improperly determined that the plaintiff's opinions were not based on sufficient facts. The plaintiff specifically argues that Stanger testified during his deposition that the materials he reviewed and on which he based his expert opinion—specifically, the judicial decisions from the prior action and the allegations contained in the plaintiff's complaint in the prior action—provided him the necessary factual basis from which to develop an informed expert opinion.

As we have explained, overwhelming evidence exists in the record to support the court's determination that Stanger possessed limited knowledge of the pertinent facts of the prior action and that Stanger relied on the representations made by counsel for the plaintiff, instead of independently gleaning the pertinent facts from the record, in coming to his expert opinion. Based on this overwhelming evidence, we conclude that the court reasonably could have concluded, as it did, that Stanger's opinions were not based on sufficient facts. See *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 15. Thus, we cannot say that the court abused its discretion by determining that "the uncertainties in the essential facts"; (internal quotation marks omitted) *Wyszomierski* v. *Siracusa*, supra, 290 Conn. 244; on which Stanger based his opinions, rendered his opinions to be without substantial value.

We note that, even if we were to exercise plenary review over this argument, we nonetheless would reach the same conclusion as did the trial court. Significantly, we agree with the court that the evidence is clear that Stanger failed to review the necessary materials to educate himself about the facts of the prior action. Instead, Stanger accepted as true the allegations made in the plaintiff's complaint. Accordingly, Stanger lacked a substantial factual basis on which to evaluate the merits of and opine as to the plaintiff's allegations of legal malpractice. See Conn. Code Evid. § 7-4 (a) (permitting "[a]n expert [to] testify in the form of an opinion . . . *provided sufficient facts are shown as the foundation for the expert's opinion*" (emphasis added)).

possessed only a cursory understanding of the relevant facts of the prior action and was required to base his opinion on his assumptions that counsel for the plaintiff assured him would be proven at trial. Thus, from the time Stanger was disclosed as an expert witness, through his deposition, Stanger remained unapprised of the pertinent facts of the prior action, at the behest of counsel for the plaintiff, such that his expert opinion lacked the necessary factual basis. See, e.g., *Weaver* v. *McKnight*, supra, 313 Conn. 406 ("[t]o render an expert opinion the witness must be qualified to do so *and there must be a factual basis for the opinion*" (emphasis added; internal quotation marks omitted)). The court stated that "[the] plaintiff's plan appeared to be to delay educating [Stanger as to the pertinent facts of the prior action] until trial and to delay [Stanger from] review[ing] and analy[zing] [the] material evidence until trial . . . ." Accordingly, the court determined, the plaintiff had engaged in a course of "gamesmanship" that "thwarted" the defendant's ability to ascertain what Stanger likely would opine at trial and, consequently, impeded the defendant from completing "meaningful discovery" with respect to the expert testimony the plaintiff likely would elicit at trial.

Once it had identified the plaintiff's noncompliance and discovery abuse, the court considered whether the sanction of preclusion, which it recognized was a "severe" sanction, was proportional to the plaintiff's noncompliance and discovery abuse. The court highlighted the fact that the trial date had been continued for the eighth time—including to account for the plaintiff's failure to timely disclose an expert witness, which caused the delay of the trial date from August 21, 2019, to February 4, 2020.[21] The court stated that the plaintiff

[21] The plaintiff argues in his principal appellate brief that the sanction of preclusion was not proportional to his noncompliance because, when the court released its decision on September 1, 2020, "there was no trial date looming due to the" coronavirus pandemic. We acknowledge that, despite the fact that the trial had been scheduled to commence on October 6, 2020,

had "ample opportunity" during the lengthy pendency of the present action to disclose a prepared, informed expert or to ensure that Stanger was apprised of the facts pertinent to the prior action such that Stanger's opinion, as represented in the disclosure, was informed by sufficient facts and such that Stanger could provide an informed expert opinion at the time he was deposed. Instead, the court noted, the plaintiff engaged in a pattern of game-playing by disclosing an expert witness while simultaneously preventing that expert from reviewing the file—to which the expert had access—so that the defendant would remain uninformed as to the factual and legal basis of the expert's opinion until trial. This strategy, the court stated, could have resulted in further delay of the trial date to allow the defendant the opportunity to conduct meaningful discovery or in the defendant's being ambushed by a "newly informed expert" witness at trial. The court likened failing to impose a sanction on the plaintiff to "[r]ewarding [the plaintiff's apparent] strategy of unduly limiting expert preparation . . . ." To reward such a strategy, the court noted, would be to "encourage" parties to disclose uninformed expert witnesses "willing to parrot the pleadings without independent[ly] review[ing] and anal[yzing] . . . the . . . [pertinent] evidence" from the prior action so that the party could comply technically with the disclosure requirements while simultaneously

jury trials were suspended at the time the court imposed the discovery sanction on the plaintiff in its memorandum of decision due to the coronavirus pandemic. Specifically, the Judicial Branch suspended civil jury trials in March, 2020, through the end of the 2020 calendar year and into the 2021 calendar year.

The fact, however, that jury trials were suspended at the time the court imposed the discovery sanction does not alter the reality that the court had rescheduled the trial date eight times *before* the Judicial Branch suspended civil jury trials in March, 2020. We note that the court specifically emphasized that the trial date was delayed—*before* jury trials were suspended—from August 21, 2019, to February 4, 2020, because of the plaintiff's failure to timely disclose an expert witness.

preventing the opposing party from engaging in meaningful discovery as to the expert witness' true opinion.

The court also concluded that a less severe sanction or combination of sanctions could not address adequately the plaintiff's noncompliance. The court noted that allowing Stanger more time to review the file, after the trial date had been scheduled and rescheduled eight times and in light of the fact that Stanger did not review the file during the two months between the first and second days of his deposition, would "not [be] an adequate sanction" because such a continuance likely would require the defendant to conduct additional discovery once Stanger became apprised of the salient facts of the case. The court further noted that continuing the trial date to provide Stanger additional time to review the file would have the practical effect of "[r]ewarding" the plaintiff's gamesmanship. The court also considered whether providing the plaintiff the opportunity to disclose another expert would serve as an adequate sanction and rejected the option, stating that it was "far too late" to do so and, again, would have the practical effect of "[r]ewarding" the plaintiff's pattern of game-playing.[22]

On the basis of the record before it, the court reasonably could have concluded, as it did; see *Millbrook*

[22] With respect to the plaintiff's argument that the court could have precluded only the testimony and opinions it believed were not based on sufficient facts, the court made clear that, in its view, Stanger's opinions as to several elements of legal malpractice—including causation—were not based on sufficient facts. Thus, even if the court precluded *only* Stanger's opinions as to the legal malpractice elements, summary judgment still would be proper because the plaintiff would be unable to prove the essential elements of his case. See, e.g., *Grimm* v. *Fox*, supra, 303 Conn. 329 ("[a]s a general rule, for the plaintiff to prevail in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care [an attorney must exercise]" (internal quotation marks omitted)); see also *Bozelko* v. *Papastavros*, supra, 323 Conn. 285 ("expert testimony also is a general requirement for establishing the element of causation in legal malpractice cases").

Owners Assn., *Inc.* v. *Hamilton Standard*, supra, 257 Conn. 15; that the sanction of preclusion of expert testimony was proportional to the plaintiff's noncompliance with the disclosure rules set forth in Practice Book § 13-4 and his pattern of gamesmanship, which rose to a discovery abuse. The court likewise reasonably could have concluded, as it did, that the plaintiff's noncompliance and discovery abuse could not adequately be addressed by a less severe sanction or combination of sanctions. Thus, we cannot conclude that the court abused its discretion in so determining.

II

The plaintiff additionally claims that the court improperly granted the defendant's motion for summary judgment. In connection with this claim, the plaintiff first argues that, when it rendered summary judgment in favor of the defendant, the court improperly failed to consider Stanger's deposition testimony. As we have explained; see part I of this opinion; the court properly precluded Stanger's testimony as a sanction for the plaintiff's noncompliance with the disclosure requirements set forth in Practice Book § 13-4 and the plaintiff's discovery abuses. Accordingly, we reject this argument.

The plaintiff also contends that, even if the court properly precluded Stanger's testimony, genuine issues of material fact nonetheless exist as to the legal malpractice elements of causation and damages. We note that, in so arguing, the plaintiff nonetheless cites several of the opinions that Stanger articulated during his deposition and relies on these opinions as evidence of the alleged genuine issues of material fact.

"In general, the plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Internal

quotation marks omitted.) *Grimm* v. *Fox*, supra, 303 Conn. 329. As the plaintiff acknowledges in his principal appellate brief, "[a]s a general rule, for the plaintiff to prevail in a legal malpractice case in Connecticut, he must present expert testimony to establish the standard of proper professional skill or care [an attorney must exercise]. . . . The requirement of expert testimony in malpractice cases serves to assist lay people, such as members of the jury . . . to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard."[23] (Internal quotation marks omitted.) Id., 329–30.

"[E]xpert testimony also is a general requirement for establishing the element of causation in legal malpractice cases." *Bozelko* v. *Papastavros*, supra, 323 Conn. 285.[24] With respect to the causation element, "the plaintiff typically proves that the . . . attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the

[23] We note that "[t]here is an exception to [the] rule [requiring the plaintiff to present expert testimony to establish the elements of legal malpractice] . . . [if] there is such an obvious and gross want of care and skill that neglect is clear even to a lay person. . . . Nevertheless, [t]he exception to the need for expert testimony is limited to situations in which the defendant attorney essentially has done *nothing whatsoever to represent his or her client's interests*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Grimm* v. *Fox*, supra, 303 Conn. 330.

To the extent that the plaintiff argues generally in his principal appellate brief that the exception to the rule requiring that he present expert testimony applies in this case, at no point in his principal appellate brief does the plaintiff contend that the defendant "essentially ha[d] done nothing whatsoever to represent his . . . client's interests" in the prior action; (internal quotation marks omitted) id.; such that this exception would be applicable. Accordingly, we reject the plaintiff's argument to the extent that he made it.

[24] Our Supreme Court has recognized that "exceptions [to the requirement that a plaintiff present expert testimony to establish the causation element exist] in obvious cases"; *Bozelko* v. *Papastavros*, supra, 323 Conn. 285; such as in a case in which a New Jersey court determined that a plaintiff in a legal malpractice action need not present expert testimony to establish that an attorney "may not charge for work that has not been performed . . . [or] to establish the causal connection between [an attorney's] charge for [legal representation] services [he had] not [yet] performed [for the plaintiff]

[prior] action had the [attorney] not been negligent. This traditional method of presenting the merits of the [prior] action is often called the case-within-a-case. . . . [T]he plaintiff must prove that, in the absence of the alleged breach of duty by [his or] her attorney, the plaintiff would have prevailed [in] the [prior] cause of action and would have been entitled to judgment. . . . To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the [prior] action." (Citations omitted; internal quotation marks omitted.) Id., 284. Put differently, the plaintiff generally must present expert testimony to "establish that the defendant's conduct legally caused the injury of which [he] complain[s]." (Internal quotation marks omitted.) *Cammarota* v. *Guerrera*, 148 Conn. App. 743, 750, 87 A.3d 1134, cert. denied, 311 Conn. 944, 90 A.3d 975 (2014).

In the present case, the plaintiff alleged that the defendant committed professional negligence by failing to bring on his behalf claims of CUTPA violations and tortious interference with business expectancies against the hospital in the prior action. Thus, to prevail in the present action, the plaintiff was required to "[present] the merits of the [prior] action," or the "case-within-a-case," as to either of those causes of action. (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284. Put differently, the plaintiff was required to prove that, had the defendant brought on his behalf claims of CUTPA violations and

and [the plaintiff's receipt of] lesser proceeds" from a settlement check. *Sommers* v. *McKinney*, 287 N.J. Super. 1, 14, 670 A.2d 99 (App. Div. 1996); see *Bozelko* v. *Papastavros*, supra, 285 n.12 (citing *Sommers*). The plaintiff argues in his principal appellate brief that the issue of causation in the present case "is within the realm of a jury's ordinary knowledge." (Internal quotation marks omitted.) We disagree. Whether the plaintiff in the present case would have prevailed had he pursued a CUTPA claim in the prior action does not appear to fall within the "obvious" category of cases described by our Supreme Court. *Bozelko* v. *Papastavros*, supra, 285.

tortious interference with business expectancies against the hospital in the prior action, he would have prevailed on either cause of action. See id.

"[W]e [first] set forth the legal standard that governs CUTPA claims. . . . [General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . . [I]n determining whether a practice violates CUTPA [our Supreme Court has] adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . ." (Footnote omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, supra, 310 Conn. 409–10. Thus, to meet his burden in the present action of establishing the "case-within-a-case" with respect to CUTPA; (internal quotation marks

omitted) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284; the plaintiff was required to establish the elements of CUTPA, including "an actual deceptive practice . . . or a practice amounting to a violation of public policy." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, supra, 409.

Although "a breach of contract may form the basis for a CUTPA claim"; id., 410; "not every contractual breach rises to the level of a CUTPA violation." (Internal quotation marks omitted.) *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 228, 990 A.2d 326 (2010). "CUTPA was intended to provide a remedy that is *separate and distinct* from the remedies provided by contract law when the defendant's contractual breach was accompanied by aggravating circumstances." (Emphasis added.) *Ulbrich* v. *Groth*, supra, 310 Conn. 411. Thus, to meet his burden in the present action of establishing the "case-within-a-case" with respect to CUTPA; (internal quotation marks omitted) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284; the plaintiff was required to show that he was entitled to additional relief in the prior action, above and beyond the damages award he received in connection with his prevailing on the breach of contract claim. See *Ulbrich* v. *Groth*, supra, 411. Further, because, "[i]n order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights"; (internal quotation marks omitted) id., 446; the plaintiff likewise was required to show that the defendant exhibited a reckless indifference to, or an intentional and wanton violation of, the plaintiff's rights to establish that the plaintiff would have received punitive or exemplary damages in the prior action. See id.

We next set forth the legal standard that governs a claim of tortious interference with business expectancies. "[I]n order to recover for a claim of tortious interference with business expectancies, the claimant must

plead and prove that: (1) a business relationship existed between the plaintiff and another party; (2) the defendant intentionally interfered with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffered actual loss. . . . [I]t is an essential element of the tort of unlawful interference with business relations that the plaintiff suffered actual loss." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Hi-Ho Tower*, *Inc.* v. *Com-Tronics*, *Inc.*, 255 Conn. 20, 32–33, 761 A.2d 1268 (2000). Thus, to meet his burden in the present action of establishing the "case-within-a-case" with respect to tortious interference with business expectancies; (internal quotation marks omitted) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284; the plaintiff was required to establish each of the aforementioned elements of tortious interference with business expectancies. See id.

Finally, we note that "summary judgment [is] proper when [a] plaintiff alleging legal malpractice fails to establish [his] claim by expert testimony." (Internal quotation marks omitted.) *Grimm* v. *Fox*, supra, 303 Conn. 330. "Our review of the trial court's decision to grant [a party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Brooks* v. *Sweeney*, 299 Conn. 196, 210, 9 A.3d 347 (2010).

We have determined that the court properly precluded the admission of the testimony of Stanger. Consequently, the plaintiff failed to present expert testimony regarding several material issues, including the applicable standard of care that the defendant owed to the plaintiff in his representation of him and whether he breached that standard of care; see *Grimm* v. *Fox*, supra, 303 Conn. 329–30; by not initiating on behalf of the plaintiff a CUTPA or tortious interference with business expectancies claim against the hospital in the prior action—particularly in light of the fact that the

plaintiff already had prevailed on a breach of contract count against the hospital in the prior action and recovered $258,610 plus costs. Further, the plaintiff was unable to present expert testimony as to the causation element; see *Cammarota* v. *Guerrera*, supra, 148 Conn. App. 750; and to establish the "case-within-a-case" required to prevail on his legal malpractice claims. (Internal quotation marks omitted.) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284. Put differently, the plaintiff could not present expert testimony as to the elements of CUTPA, including whether the defendant's actions qualified as " 'unfair' " pursuant to the cigarette rule;[25] *Ulbrich* v. *Groth*, supra, 310 Conn. 409; and whether he was entitled to additional relief above and beyond the damages he recovered for breach of contract. See id., 446. The plaintiff likewise could not present expert testimony as to the elements of tortious interference with business expectancies. See *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, supra, 255 Conn. 32–33. In light of the fact that the plaintiff was unable to present expert testimony as to the foregoing material issues, which the plaintiff was "required [to present] to establish a prima facie case of legal malpractice . . . the [defendant was] entitled to judgment as a matter of law." (Citation omitted.) *Grimm* v. *Fox*, supra, 337.

The judgment is affirmed.

In this opinion the other judges concurred.

[25] We note that it is doubtful that Stanger's testimony, had it not been precluded from admission at trial as a sanction for the plaintiff's noncompliance and discovery abuse, would have been sufficient to establish this element of CUTPA. During his deposition, Stanger was unable to articulate the specific conduct in which the hospital had engaged that "offend[ed] public policy . . . [was] immoral, unethical, oppressive, or unscrupulous . . . or cause[d] substantial injury to consumers, [competitors or other businesspersons]"; (internal quotation marks omitted) *Ulbrich* v. *Groth*, supra, 310 Conn. 409; and testified that counsel for the plaintiff instructed him to "assume" that such conduct existed.