WILLIAM P. RIDGAWAY, SR., ADMINISTRATOR (ESTATE OF WILLIAM P. RIDGAWAY, JR.), ET AL. *v.* MOUNT VERNON FIRE INSURANCE COMPANY (SC 19728)

Rogers, C. J., and Palmer, McDonald, Robinson and D'Auria, Js.

Syllabus

The plaintiffs, the decedent's father, individually and as administrator of the decedent's estate, and the decedent's mother, had settled a dram shop action, brought in connection with the decedent's death, against S Co., the owner and operator of a nightclub, and several insurance companies that provided liability coverage to S Co. As part of the settlement agreement, S Co. assigned to the plaintiffs its rights under an insurance policy issued by the defendant insurer, M Co., which had been a party in the dram shop action but contested coverage and did not participate in the settlement agreement. After the plaintiffs brought this action against M Co. seeking to enforce S Co.'s rights under the policy, M Co. sought certain documents related to the dram shop action as part of the discovery process. The plaintiffs' counsel responded that the settlement agreement contained a confidentiality provision that prohibited disclosure of those documents unless ordered by the court. The trial court then granted M Co.'s motion for an order requiring the plaintiffs to file a copy of the settlement agreement with the confidentiality provision, subject to certain redactions, with the court. When the plaintiffs failed to meet the court's deadline, M Co. filed a motion for nonsuit based on the plaintiffs' noncompliance. In response, the plaintiffs sent a copy of the redacted settlement agreement to M Co. and, thereafter, filed an objection to the motion for nonsuit on the ground that they had complied with the court's order by providing a copy of the agreement to M Co., but they did not file a copy of the agreement with the court. The court thereafter issued a summary order granting M Co.'s motion for nonsuit, and overruled the plaintiffs' objection thereto, explaining that the plaintiffs, in providing the settlement agreement to the defendant, did not comply with the order to file the agreement with the court. The plaintiffs then filed a motion to open the judgment of nonsuit. Prior

to ruling on the motion, the court required the plaintiffs to file the settlement agreement with the court. After the plaintiffs timely filed the settlement agreement with the court, the court denied the motion to open, relying on the rule of practice (§ 17-19) regarding sanctions for failure to comply with a court order as the authority pursuant to which it granted M Co.'s motion for nonsuit. The plaintiffs appealed to the Appellate Court from the trial court's judgment of nonsuit and its denial of their motion to open, claiming, inter alia, that the court's decision rested on facts that were not supported by the record and was an abuse of discretion. The Appellate Court reversed the judgment of nonsuit on the merits and concluded that the trial court had abused its discretion because the sanction of nonsuit was not proportionate to the misconduct at issue. Thereafter, M Co., on the granting of certification, appealed to this court. *Held* that the trial court's decision to grant M Co.'s motion for nonsuit having been based, in part, on facts that were not supported by the record, the Appellate Court properly reversed the judgment of nonsuit, but, because this court could not determine as a matter of law whether the trial court would have imposed the sanction of nonsuit in the absence of those facts, it remanded the case for the trial court to determine the appropriate sanction or sanctions, including the possibility of nonsuit, proportionate to the facts supported by the record: although the record supported the trial court's findings with respect to whether the conduct of the plaintiffs' counsel was improper, the trial court's findings with respect to the motive for counsel's misconduct and that an adequate sanction short of a judgment of nonsuit was unavailable were supported only in part by the record; furthermore, even though the Appellate Court properly considered whether the trial court's sanction of nonsuit was proportionate to the plaintiffs' misconduct, the Appellate Court based its proportionality analysis on two factors, namely, that the misconduct had been attributed solely to the plaintiffs' counsel and that there had been no harm to M Co., and a trial court must consider the totality of the circumstances, including the nature and frequency of the misconduct, notice of the possibility of nonsuit, lesser available sanctions, and the party's participation in or knowledge of the misconduct, in assessing proportionality; moreover, this court concluded that, although there was no doubt that serious misconduct by the plaintiffs' counsel warranted some form of sanction, there was no way of knowing whether the trial court would have imposed the sanction of nonsuit in the absence of the facts that were not supported by the record, and this court could not conclude that counsel's conduct was of such an egregious nature that it was clear that no sanction other than nonsuit would have been adequate.

Argued October 12, 2017—officially released January 30, 2018*

*January 30, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Action to recover damages for, inter alia, breach of the covenant of good faith and fair dealing, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Hon. Thomas F. Parker*, judge trial referee, granted the defendant's motion for an order to compel the plaintiffs to produce certain documents; subsequently, the court, *Hon. Thomas F. Parker*, judge trial referee, granted the defendant's motion for the entry of nonsuit and rendered judgment thereon, from which the plaintiffs appealed to the Appellate Court, *Gruendel*, *Lavine* and *Sheldon*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings, and the defendant, on the granting of certification, appealed to this court. *Affirmed in part*; *further proceedings*.

Robert B. Flynn, with whom were *Joseph J. Andriola* and *Dennis M. Carnelli*, for the appellant (defendant).

Wesley W. Horton, with whom, were *Karen L. Dowd* and, on the brief, *Kimberley A. Knox*, for the appellees (plaintiffs).

Opinion

McDONALD, J. Trial court judges have the difficult task of maintaining order over the judicial proceedings before them and ensuring the integrity of those proceedings. To do so, judges have broad discretion to impose the sanctions necessary to ensure parties' compliance with court orders and the rules of the court. In this certified appeal, the defendant, Mount Vernon Fire Insurance Company, contends that the Appellate Court improperly determined that the trial court abused its discretion when it rendered a judgment of nonsuit against the plaintiffs, William P. Ridgaway, Sr., individually and as administrator of the estate of William P. Ridgaway, Jr., and Rita Grant, for their counsel's con-

duct in relation to counsel's failure to comply with an order of the court. The plaintiffs contend, as an alternative ground for affirmance, that the trial court based its sanction of nonsuit on facts that were not supported by the record. Although we agree with the plaintiffs that certain factual findings were not supported by the record, we cannot determine as a matter of law whether the trial court would have imposed the same sanction in the absence of those facts. Accordingly, we affirm the judgment of the Appellate Court insofar as that court reversed the judgment of nonsuit, but we direct that court to remand the case to the trial court for further proceedings to consider a sanction proportionate to the facts supported by the record.

We begin with the undisputed facts and procedural history giving rise to this appeal. Prior to the present action, the plaintiffs settled a dram shop action[1] brought against the owner and operator of a nightclub, Silk, LLC, and several insurance companies providing coverage to Silk. The settlement agreement contained a confidentiality provision, which provided in relevant part: "It is a material condition of this [a]greement that, *except as required by law or court order*, the [p]arties shall not disclose to any person or entity, and shall take all reasonable measure to prevent the disclosure of, the existence, terms and/or subject matter of this [a]greement . . . ." (Emphasis added.)

The defendant in the present action was also named as a defendant in the dram shop action, but it contested coverage for the liability and refused to participate in the settlement. As part of the settlement agreement, Silk assigned to the plaintiffs its rights against the defendant. In June, 2011, the plaintiffs brought the present

[1] The Dram Shop Act; General Statutes § 30-102; provides for liability against a person who sells alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another.

action against the defendant seeking to enforce Silk's rights and claiming a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., for the defendant's refusal to provide coverage. The defendant alleged in its special defenses and counterclaim that the insurance policy it issued to Silk did not provide coverage for the alcohol related liability.

During discovery, in the summer of 2013, the defendant sought disclosure of a transcript of a deposition that had been taken in the dram shop action, along with supporting exhibits (collectively, deposition documents). The plaintiffs' counsel[2] responded by letter that "[b]ecause the [p]laintiffs are subject to a confidentiality agreement, [counsel would] not be turning over any documents *unless ordered to do so by the* [*c*]*ourt*." (Emphasis added.)

In September, 2013, the defendant moved for a court order requiring the plaintiffs to produce the deposition documents. The defendant appended as an exhibit to the motion the letter from the plaintiffs' counsel. The plaintiffs filed an objection to the motion on the ground that the settlement agreement precluded disclosure of the documents. In a subsequent surreply in support of the objection, the plaintiffs' counsel asserted that should the court require a copy of the settlement agreement to determine whether to grant the motion for an order of disclosure, then counsel would request permission to file the agreement under seal and to have

[2] We note that the trial court's findings were inconsistent in terms of when it ascribed actions to the plaintiffs and to the plaintiffs' counsel, although the court ultimately attributed all improper conduct solely to counsel. For purposes of our recitation of facts and procedural history, when an action was undertaken by the plaintiffs' counsel outside of the court proceedings (i.e., a letter signed by counsel) or a statement was made by counsel in court proceedings, we identify counsel as the actor. In other instances we refer to the plaintiffs as the actors.

the court conduct an in camera review. In the plaintiffs' objection and all subsequent correspondence to the court, the plaintiffs' counsel never informed the court that the settlement agreement permitted disclosure if required by court order.

On February 26, 2014, the court, *Hon. Thomas F. Parker*, judge trial referee, issued an order directing that the plaintiffs "shall file a copy of the confidentiality agreement upon which [they rely] by March 7, 2014," but permitted them to redact any dollar amounts. As of March 7, 2014, the plaintiffs had not filed the settlement agreement or any other document related to the order (i.e., motion for extension of time, motion to file under seal) with the court.

One week after the court's deadline lapsed, the defendant filed a "Motion for Entry of Nonsuit and Sanctions for Failing to Comply with Discovery Order" on the ground that the plaintiffs had wilfully failed to comply with the February 26, 2014 "discovery" order. In that motion, the defendant requested that the trial court order the plaintiffs to provide the deposition documents to the defendant within ten days of a court order to do so, to render a judgment of nonsuit if the plaintiffs failed to comply with such order, and to further order the plaintiffs to pay the defendant's attorney's fees associated with the motion for nonsuit.

In response to that motion, the plaintiffs took two actions. On April 8, 2014, the plaintiffs' counsel faxed a copy of the settlement agreement, with dollar amounts redacted, *to the defendant*. In the accompanying cover memorandum, counsel stated the agreement was being provided pursuant to the court's February 26, 2014 order. Shortly thereafter, the plaintiffs filed an objection to the motion for nonsuit and sanctions on the ground that they had complied with the February 26, 2014 order by providing a copy of the agreement to the defendant.

The plaintiffs did not file with the court a copy of the agreement along with their objection.

Approximately two weeks later, the plaintiffs' counsel undertook certain steps that would permit disclosure of the deposition documents to the defendant. Counsel sent a letter to all parties to the settlement agreement (copied to the defendant) indicating that counsel intended to provide the deposition documents to the defendant in ten days unless the parties to the settlement agreement objected. After two of the settlement parties indicated that they would be opposed to disclosure without a court order or subpoena, the defendant provided a subpoena for the documents. The plaintiffs did not inform the court of these events.

On April 28, 2014, without oral argument on the motion for nonsuit or for sanctions, the trial court issued a summary order that granted the defendant's "motion for nonsuit for failure to comply with [the court's February 26, 2014] order." The court did not issue a written decision explaining the reasons for granting the motion or for rejecting the lesser preliminary sanction sought by the defendant, namely, an order for the plaintiffs to provide the defendant with the deposition documents and to pay attorney's fees. The parties did not have notice of the order for several weeks, however, because the court system was delayed in uploading it to the case management system.

Several events occurred during the intervening period between the date that the court issued its order and the date the court clerk posted the order and entered the judgment of nonsuit. The defendant filed a reply to the plaintiffs' objection to the motion for nonsuit or for sanctions, to which it appended the redacted agreement that the plaintiffs' counsel had provided to the defendant. The plaintiffs' counsel mailed the deposition docu-

ments to the defendant, but did not concurrently notify the court of this action.

On the same date that the court clerk processed the nonsuit order and entered judgment against the plaintiffs, the clerk processed the court's order overruling the plaintiffs' objection to the defendant's motion for nonsuit. In this order, the trial court explained that, while it was aware that the plaintiffs had provided a copy of the settlement agreement to the defendant, such action did not comply with the clear order to file the agreement with the court.

Later that month, the plaintiffs filed a motion to open the judgment of nonsuit in which they asserted that they had provided the defendant with a redacted copy of the settlement agreement and the deposition documents. In a supplemental memorandum of law in support of their motion to open, they further asserted that the judge trial referee lacked jurisdiction and authority to impose such a sanction.

Before ruling on the motion to open, on June 5, 2014, the court ordered the plaintiffs to file the settlement agreement with the court by June 12, 2014. After the plaintiffs timely filed an unredacted copy of the settlement agreement,[3] the court denied the motion to open the judgment of nonsuit. The court issued a seventy-one page memorandum of decision setting forth the facts and its reasoning, the latter which we address in

[3] The court ordered the plaintiffs to file another copy of the settlement agreement because the first one included several illegible pages. The plaintiffs' counsel timely filed a second unredacted copy along with a signed letter stating that the copy was as legible as the one in counsel's possession. It is unclear from the record whether the court ordered the plaintiffs to file the settlement agreement because it was unaware that the case file contained a copy of the agreement that had been filed by the defendant, even though the plaintiffs had filed a motion to seal following that filing, or because the court wanted to see whether the plaintiffs would violate a second order to file the agreement with the court.

part II of this opinion. The court cited Practice Book § 17-19 (sanctions for failure to comply with court order) rather than Practice Book § 13-14 (sanctions for failure to comply with discovery order)—the authority cited by the defendant in its motion for nonsuit or for sanctions—as the authority under which it had granted the motion for nonsuit.[4] In its memorandum of decision, the court indicated that a copy of its decision was going to be sent to the Chief Disciplinary Counsel.

The plaintiffs appealed to the Appellate Court from the judgment of nonsuit and the denial of their motion to open, claiming that the judge trial referee lacked subject matter jurisdiction or authority to render a judgment of nonsuit, and that the trial court improperly had rendered a judgment of nonsuit and denied the motion to open. The plaintiffs challenged the merits of the decisions both as resting on facts that were not supported by the record and as an abuse of discretion.

The Appellate Court reversed the judgment of nonsuit on the merits. *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 165 Conn. App. 737, 761, 140 A.3d 321 (2016). It

[4] Practice Book § 17-19 provides in relevant part: "If a party fails to comply with an order of a judicial authority . . . the party may be nonsuited or defaulted by the judicial authority."

Practice Book § 13-14 provides in relevant part: "(a) If any party has . . . failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such an order as the ends of justice require.

"(b) Such orders may include the following:

"(1) The entry of a nonsuit or default against the party failing to comply;

"(2) The award to the discovering party of the costs of the motion, including a reasonable attorney's fee;

"(3) The entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(4) The entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence;

"(5) If the party failing to comply is the plaintiff; the entry of a judgment of dismissal. . . ."

held that the trial court had both subject matter jurisdiction and authority to render a judgment of nonsuit. Id., 750–55. The Appellate Court did not reach the plaintiffs' factual claim, instead concluding that the trial court had abused its discretion because the sanction of nonsuit was not proportionate to the misconduct at issue. Id., 755–61. In support of that conclusion, the Appellate Court pointed to the fact that the trial court had attributed the improper conduct solely to the plaintiffs' counsel and that there had been no harm to the defendant. Id., 760–61. The defendant's certified appeal to this court followed. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, 322 Conn. 980, 140 A.3d 978 (2016).

The defendant claims that the Appellate Court improperly held that the trial court had abused its discretion in rendering judgment of nonsuit. Specifically, the defendant asserts that the Appellate Court improperly applied a proportionality test that applies only to sanctions for violations of discovery orders, but that, under either the proportionality test or the proper general abuse of discretion standard, the trial court properly rendered judgment of nonsuit. In response, the plaintiffs assert that proportionality is a requirement of all sanctions and that the Appellate Court properly held that it was an abuse of discretion to nonsuit the plaintiffs. In the alternative, the plaintiffs assert that the trial court's judgment is based on facts that are clearly erroneous and that the facts supported by the record are an inadequate basis for a sanction of nonsuit. We agree with the plaintiffs that the trial court's judgment is based, in part, on facts that are not supported by the record, and conclude that the case must be remanded for further proceedings to determine whether the remaining improper conduct constituted an adequate and proper basis for a sanction of nonsuit.[5]

[5] Insofar as the plaintiffs also renew their argument that the judge trial referee lacked jurisdiction or authority to render judgment of nonsuit, we fully agree with the reasoning of the Appellate Court that there is no merit

I

We begin with the standard of review and governing principles. Insofar as the plaintiffs challenge certain of the trial court's factual findings that formed the basis for the sanction of nonsuit, such findings are reviewed under the typical clearly erroneous standard. *Faile* v. *Stratford*, 177 Conn. App. 183, 200, 172 A.3d 206 (2017). A finding of fact is clearly erroneous when there is no evidence in the record to support it. *Wasniewski* v. *Quick & Reilly, Inc.*, 292 Conn. 98, 103, 971 A.2d 8 (2009). To the extent that the trial court's findings relate to a credibility assessment, the trial court is in the best position to evaluate the evidence and the demeanor of the parties, and, therefore, we defer to the credibility determinations made by the trial court. *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 10, 151 A.3d 358 (2016).

The ultimate decision to order a nonsuit on the basis of facts supported by the record, whether pursuant to the trial court's inherent authority or the rules of practice,[6] is reviewed under the abuse of discretion standard, requiring every reasonable presumption to be made in favor of the court's action. *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 14–15, 776 A.2d 1115 (2001) (*Millbrook*). Similarly, a decision whether to open a judgment of nonsuit is reviewed under the abuse of discretion standard. *Biro* v. *Hill*, 231

to this argument. See *Ridgaway* v. *Mount Vernon Fire Ins. Co.*, supra, 165 Conn. App. 750–55.

[6] In the present case, although the court cited only Practice Book § 17-19 as the authority under which it ordered the nonsuit, it appears that the court also relied on its inherent authority, as it cited both noncompliance with a court order and misrepresentations as grounds for the nonsuit. See part II A of this opinion; see also *Jaconski* v. *AMF, Inc.*, 208 Conn. 230, 233, 543 A.2d 728 (1988) ("trial court has the inherent power to provide for the imposition of reasonable sanctions, to compel the observance of its rules").

Conn. 462, 467–68, 650 A.2d 541 (1994); see generally Practice Book § 17-43 (a).

In considering whether the trial court properly exercised that discretion, "[t]he 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." (Internal quotation marks omitted.) *Millbrook*, supra, 257 Conn. 15. Even so, "the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) Id., 16. "Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort." (Citations omitted; internal quotation marks omitted.) Id., 16–17.

In *Millbrook*, this court explained that a trial court properly exercises its discretion in imposing a sanction for a violation of a court order when (1) the order to be complied with is reasonably clear, (2) the record establishes that the order was in fact violated, and (3) the sanction imposed is proportionate to the violation. Id., 17–18. The court in *Millbrook* considered the propriety of a nonsuit in the context of a sanction for the violation of a discovery order. Id., 17.

This court has not had occasion to expressly state whether the "proportionality" requirement first expressed in *Millbrook* applies equally to nonsuits that are imposed outside the discovery context. Nonetheless, it is evident that proportionality is not substantively different from the requirements previously articulated in cases addressing the general rubric of abuse of discretion—that nonsuit must be a "last

resort"; *Fox* v. *First Bank*, 198 Conn. 34, 39, 501 A.2d 747 (1985); and "the only reasonable remedy available to vindicate the legitimate interests of [the other parties and the court]." *Pietraroia* v. *Northeast Utilities*, 254 Conn. 60, 75, 756 A.2d 845 (2000); see also *Zocaras* v. *Castro*, 465 F.3d 479, 483 (11th Cir. 2006) ("[d]ismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances" [internal quotation marks omitted]), cert. denied, 549 U.S. 1228, 127 S. Ct. 1300, 167 L. Ed. 2d 113 (2007). Accordingly, rather than establishing a different standard for nonsuit in the context of a discovery sanction, this court articulated in *Millbrook* a term that provides more meaningful guidance regarding the exercise of discretion that applies to all sanctions of nonsuit. See, e.g., *McHenry* v. *Nusbaum*, 79 Conn. App. 343, 351–52, 830 A.2d 333 (applying proportionality analysis to nonsuit entered pursuant to Practice Book § 17-19 for violation of court order), cert. denied, 266 Conn. 922, 923, 835 A.2d 472, 473 (2003). Indeed, we cannot imagine a circumstance under which it would not be an abuse of discretion to impose a sanction that is disproportionate to the misconduct.[7] We note that courts in other jurisdictions review for proportionality an order of nonsuit or dismissal as a sanction for a violation of a court order that occurs outside the context of discovery. See, e.g., *Lang* v. *Rogue Valley Medical Center*, 361 Or. 487, 501, 395 P.3d 563 (2017) ("before a court dismisses an action for failing to comply with one of its orders, it must consider whether a lesser sanction will suffice and explain why it concluded that dismissal was the appro-

[7] We note that, when the court exercises its inherent authority to impose sanctions for misconduct before the court, other than for the failure to obey a court order, as was partly so in the present case, the court's analysis will focus on whether there was wilful conduct showing deliberate disregard for the court's authority and whether a nonsuit is a sanction proportionate to that conduct. See, e.g., *Santiago* v. *E.W. Bliss Co.*, 973 N.E.2d 858, 862 (Ill. 2012).

priate sanction"). Therefore, the Appellate Court properly considered whether nonsuit was a proportionate sanction in the present case.

Having established that the Appellate Court properly considered proportionality, we next examine the factors that courts have identified as relevant to that consideration, namely, the nature and frequency of the misconduct, notice of the possibility of a nonsuit, lesser available sanctions, and the plaintiff's participation in or knowledge of the misconduct.

Our appellate courts have upheld the imposition of a sanction of nonsuit when there is evidence of repeated refusals to comply with a court order. See, e.g., *Fox* v. *First Bank*, supra, 198 Conn. 37–38 (failure to make payments to defendant in accordance with temporary restraining order, resulting in three findings of contempt in seven month period); *Rodriguez* v. *Mallory Battery Co.*, 188 Conn. 145, 150–51, 448 A.2d 829 (1982) (failure to revise complaint despite multiple orders over nine months); *Bongiovanni* v. *Saxon*, 99 Conn. App. 221, 226–29, 913 A.2d 471 (2007) (plaintiff's filing of false certificate of closed pleadings did not comply with order to file certificate by certain date); *Burton* v. *Dimyan*, 68 Conn. App. 844, 845–46, 793 A.2d 1157 (over period of nine months, plaintiff failed to comply with order to file certificate of closed pleadings), cert. denied, 260 Conn. 925, 797 A.2d 520 (2002). Courts in other jurisdictions similarly have upheld sanctions for repeated, wilful violations of court orders. See, e.g., *Wood* v. *UHS of Peachford, L.P.*, 315 Ga. App. 130, 131–32, 726 S.E.2d 422 (2012) (dismissal was appropriate sanction for counsel's repeated and flagrant violations of trial court's orders during discovery and voir dire).

Although this court has not considered whether a single act of misconduct could warrant the sanction of

nonsuit, courts in other jurisdictions have concluded that a single act could warrant nonsuit or dismissal if the act is sufficiently egregious, particularly when the improper conduct involves the perpetration of a deception on the court. See *State ex rel. King* v. *Advantageous Community Services, LLC*, 329 P.3d 738, 744–45 (N.M. App. 2014) (fabrication of evidence was so egregious that single instance warranted dismissal); see also *Santiago* v. *E.W. Bliss Co.*, 973 N.E.2d 858, 862 (Ill. 2012) (intentionally filing complaint using fictitious name without court approval could warrant dismissal if lesser sanctions were inadequate to remedy "both the harm to the judiciary and the prejudice to the opposing party").

In instances in which our appellate courts have upheld the sanction of a nonsuit, a significant factor has been that the trial court put the plaintiff on notice that noncompliance would result in a nonsuit. See *Fox* v. *First Bank*, supra, 198 Conn. 38–39 (court order directed plaintiff to comply with terms of restraining order or be subject to judgment of dismissal); *Rodriguez* v. *Mallory Battery Co.*, supra, 188 Conn. 148 (final order stated that failure to revise would result in nonsuit); *Burton* v. *Dimyan*, supra, 68 Conn. App. 845–46 (order to file certificate of closed pleadings provided notice that failure to do so would result in nonsuit). However, appellate courts in other jurisdictions that have considered an egregious act or acts of deception toward the trial court have upheld the sanction of a nonsuit or dismissal without discussing notice. See *Bryant* v. *Mezo*, 226 So. 3d 254, 256 (Fla. App. 2017) (dismissal was proper when personal injury plaintiff's failure to disclose prior relevant injuries constituted fraud on court); *Illinois Central Gulf Railroad Co.* v. *McLain*, 174 So. 3d 1279, 1287 (Miss. 2015) (totality of conduct, including improper contact with juror, committing perjury, and soliciting material witness to commit perjury to corroborate story sufficiently egregious

to warrant dismissal). The deception in such cases has not been as to a collateral matter, but as to a material issue that went to the heart of the case. Accordingly, it may be that when the act is of a particularly egregious nature, notice of this ultimate sanction is imputed.

This court has refused to uphold a sanction of nonsuit when there were available alternatives to dismissal that would have allowed a case to be heard on the merits while ensuring future compliance with court orders. See *Pietraroia* v. *Northeast Utilities*, supra, 254 Conn. 77–78 (reversing judgment dismissing case for failure to appear for deposition and medical examination because plaintiff's failure to appear was due to residence in Australia, and he had presented reasonable alternatives to traveling to Connecticut to comply with requirements). Courts in other jurisdictions similarly have reversed a sanction of nonsuit or dismissal when it has not been established that a lesser sanction would be inadequate to vindicate the interests of the other party and the trial court. See, e.g., *McKoy* v. *McKoy*, 214 N.C. App. 551, 554, 714 S.E.2d 832 (2011) (vacating trial court's order dismissing counterclaim for failure to prosecute or schedule required conference for twenty-six months when trial court made no findings that lesser sanctions were considered and found inadequate and ordering remand); see also *Zocaras* v. *Castro*, supra, 465 F.3d 484 (lack of express finding regarding lesser sanction was not fatal when it was implicit in grounds stated for dismissal that no other sanction would be adequate).

Whether the misconduct was solely attributable to counsel and not to the party also has been a factor in assessing whether a less severe sanction than a nonsuit or dismissal should have been ordered. See *Herrick* v. *Monkey Farm Cafe, LLC*, 163 Conn. App. 45, 49–50, 53, 134 A.3d 643 (2016) (trial court abused its discretion in rendering judgment of nonsuit when attorney failed

to timely pay opposing parties' attorney's fees for time spent pursuing various requests to revise); *EMM Enterprises Two, LLC* v. *Fromberg, Perlow & Kornik, P.A.*, 202 So. 3d 932, 934 (Fla. App. 2016) (before dismissal for fraud on court, factors to be considered include prior sanctions against attorney and personal involvement of plaintiff); *Eaton Corp.* v. *Frisby*, 133 So. 3d 735, 759 (Miss. 2013) (dismissal was proper exercise of court's discretion when plaintiff knew, through its corporate officers, that counsel had engaged in improper ex parte communication with judge). However, some courts will apply a presumption that the client had notice of and, in turn, liability for counsel's actions. See, e.g., *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633–34, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (no merit to contention that dismissal of petitioner's claim on basis of counsel's unexcused conduct imposes unjust penalty because party is deemed bound by acts of his lawyer and is considered to have notice of all facts known to his attorney); see also *Sousa* v. *Sousa*, 173 Conn. App. 755, 773 n.6, 164 A.3d 702 ("[a]n attorney is the client's agent and his knowledge is imputed to the client" [internal quotation marks omitted]), cert. denied, 327 Conn. 906, 170 A.3d 2 (2017).

II

With this background in mind, we turn to the sanction of a nonsuit in the present case. Although the Appellate Court concluded that it was an abuse of discretion for the trial court to order a sanction of nonsuit on the basis of two factors, namely, that the improper conduct had been attributed solely to the plaintiffs' counsel and that there had been no harm to the defendant, the principles we articulated in part I of this opinion reflect that, in assessing proportionality, a trial court must consider the totality of the circumstances, including, most importantly, the nature of the conduct itself. Accordingly, in order to determine whether the sanction of a

nonsuit was a proper exercise of discretion in this case, we must determine the factual basis on which the trial court relied when imposing the sanction. See *Millbrook*, supra, 257 Conn. 15 (whether nonsuit was abuse of discretion based on whether "the trial court could reasonably conclude as it did given the facts presented" [internal quotation marks omitted]). In light of the plaintiffs' challenge to many of those factual findings, we first set forth the facts on which the trial court's sanction rested, then consider whether those facts are supported by the record and, finally, assess whether the trial court's judgment of nonsuit, if based on facts properly found, should be upheld.

A

The trial court made no factual findings when it summarily granted the defendant's "motion for nonsuit for failure to comply with [the court's February 26, 2014] order." However, in the court's decision overruling the plaintiffs' objection to the motion, the court found that its February 26, 2014 order to file the settlement agreement was "succinct, clear, and unambiguous," and that "[t]here has not been a semblance of compliance." The court rejected the plaintiffs' argument that their provision of the settlement agreement to the defendant constituted compliance with the court's order.

The court's seventy-one page memorandum of decision denying the plaintiffs' motion to open the judgment of nonsuit clearly reflected the court's exasperation regarding the actions of the plaintiffs' counsel and an unwillingness to ascribe any innocent motive for that conduct. Focusing exclusively on the court's factual findings and conclusions, the court's grounds for ordering a nonsuit essentially distill into three categories: (1) improper conduct; (2) improper motive; and (3) inadequacy of lesser sanctions.

With regard to the first category, the court cited three improper actions. It found that the plaintiffs' counsel had knowingly misrepresented to the court that the settlement agreement barred disclosure of the deposition documents when the agreement contained a clear exception that permitted disclosure when so ordered by the court. It found that counsel had wilfully failed to comply with the February 26, 2014 order to file the agreement with the court. And it found that counsel had made further misrepresentations in connection with its motion to open, such as falsely claiming that counsel misunderstood the February 26, 2014 order as requiring disclosure of the agreement to the defendant, to justify the failure to comply with the order. The court expressly declined to find that the plaintiffs either personally knew or did not know of their counsel's improper conduct.[8]

Turning to the second category, the court ascribed two improper motives for the failure of the plaintiffs' counsel to file the settlement agreement with the court in accordance with the February 26, 2014 order. It found that counsel had not done so to avoid revealing the misrepresentation that the agreement barred disclosure. In addition, the court found that counsel sought to prevent the defendant from discovering the settlement amounts paid by other parties to the plaintiffs, which, in turn, would reveal the extent to which those funds had reduced the amount of damages recoverable under the policy issued by the defendant.

As to the third category, the trial court rejected alternatives to a judgment of nonsuit. It concluded that an order for the payment of costs incurred by the defendant in seeking the deposition documents would not

[8] The court noted that the plaintiffs' counsel had a duty to keep the plaintiffs informed about the case but that the plaintiffs would have grounds to bring a claim against counsel if they were not complicit in their counsel's conduct.

constitute a sufficient sanction because those costs would be minor. The court also rejected a sanction of removing the plaintiffs' counsel on the ground that it would be unlikely that the plaintiffs would be able to secure new counsel. The court cited the duration and complexity of the prior and present cases, as well as the defendant's maximum liability, which the court calculated to be no more than $600,000 under the $1 million insurance policy that Silk held, in light of the amounts paid by other parties to the settlement agreement.

B

In light of these facts that the trial court found, we turn to the question of whether they are supported by the record or clearly erroneous. We conclude that most, but not all, of the facts are supported by the record.

All of the trial court's findings related to improper conduct are supported by the record. Given that the agreement expressly and unambiguously authorized disclosure pursuant to a court order, counsel's unqualified statement to the court that the agreement barred disclosure was at the very least a misrepresentation by omission. It is undisputed that the plaintiffs did not file the settlement agreement with the court by the date specified in the February 26, 2014 order. The court reasonably could have found that counsel's subsequent statement that counsel misunderstood the February 26, 2014 order as requiring that the agreement be provided to the defendant to be a purposeful misrepresentation because (1) the order directed the plaintiffs to "file" the agreement, a term that plainly does not import to an attorney the production of the document to the opposing party, (2) counsel subsequently averred, in support of the plaintiffs' motion to open, that the order required that the agreement be filed *with the court*, and (3) the defendant never sought disclosure of the settlement agreement, only the deposition documents.

Although the plaintiffs' counsel provided the court with an alternative, innocent explanation for such conduct, the trial court was not required to find that explanation credible. As noted by the trial court, its assessment of counsel's lack of candor (by way of omission) finds support in the fact that the plaintiffs' counsel failed to disclose in a letter to the settlement parties seeking permission to disclose the deposition documents that counsel had provided a redacted copy of the settlement agreement to the defendant.

However, the court's findings with regard to the motives for counsel's actions are supported only in part by the record. The court reasonably could have drawn the inference from the foregoing facts that counsel's purposeful failure to file the settlement agreement was for the purpose of preventing the court from discovering counsel's earlier misrepresentation regarding the per se bar on disclosure under the settlement agreement. This inference is further supported by the fact that counsel took steps to disclose the deposition documents to the defendant rather than submit the settlement agreement to the court, presumably to resolve the discovery matter without revealing the terms of the settlement agreement to the court.[9]

Conversely, the court's finding related to improper financial motive is not supported by the record. There

[9] Counsel contended that these steps had been taken to eliminate the need to file the settlement agreement with the court as that order was ultimately aimed at deciding whether the deposition documents must be produced. Even if true, this assertion is not inconsistent with the trial court's finding that counsel was motivated, at least in part, by a desire to hide the earlier misrepresentation regarding the scope of the settlement agreement. The trial court properly could draw an adverse inference from the fact that counsel declined to inform the court about these efforts. Insofar as counsel also argued that the motivation was to protect the settlement agreement from disclosure to the public, not the court, the court was not bound to accept that explanation, especially in the absence of a motion to file the agreement under seal following the court's February 26, 2014 order.

is no basis to conclude that the plaintiffs failed to comply with the February 26, 2014 order for the purpose of hiding the amount paid to them by other parties to the agreement. The February 26, 2014 order specifically allowed the plaintiffs to redact the dollar amounts from the agreement before filing it with the court. Therefore, the plaintiffs could fully comply with the order without giving the defendant access to this information. Moreover, the fact that the plaintiffs' counsel filed an *unredacted* copy of the agreement with the court during the proceedings on the motion to open squarely negates the court's finding related to financial motive.

As with the issue of motive, the court's findings in support of its conclusion that an adequate sanction short of a judgment of nonsuit was unavailable are supported only in part by the record. Although the court reasonably could have concluded that an order for payment of costs would be inadequate because such costs would be minimal, there is no factual support for the court's reasons rejecting an order removing the plaintiffs' counsel. The court found that no other attorney would be willing to take on the case because of its length and complexity, and the maximum recovery available, given the settlement. Despite the lengthy history of the two cases at issue, however, the claims against the defendant in this case raise narrow, relatively uncomplicated issues—whether the policy issued by the defendant provided coverage for the alcohol related death of the plaintiffs' decedent and whether the defendant's conduct in denying coverage in the dram shop action was an unfair or deceptive trade practice. In addition, a finding that no other attorney would take on the case because it had a maximum possible recovery of $600,000 not only is speculative and counterintuitive, it ignores the CUTPA claim for which the plaintiffs also sought attorney's fees and punitive damages. Finally, there is no logical basis to conclude that the plaintiffs,

whom the court declined to find culpable, would not have preferred the opportunity to obtain new counsel rather than lose their ability to enforce their purported rights against the defendant.

C

Finally, we turn to the question of whether the trial court's judgment of nonsuit should have been upheld in light of the facts supported by the record. Insofar as the sanction was premised in part on counsel's violation of the February 26, 2014 court order to file the agreement, the first two prongs necessary for a sanction of nonsuit—a clear and unambiguous court order and a knowing violation of that order; *Millbrook*, supra, 257 Conn. 17–18;—are easily satisfied.

The question of whether a judgment of nonsuit was a proportionate sanction in light of the entirety of the factual findings supported by the record is more difficult to answer. We have no doubt that the serious misconduct by the plaintiffs' counsel warranted some form of sanction.[10]

The trial court's determination that a judgment of nonsuit was the only appropriate, proportionate sanction, however, was premised in part on erroneous facts or assumptions. We have no way to know with any degree of confidence that the trial court would have imposed the same sanction in the absence of those facts or assumptions. Nor can we conclude that the conduct was of such an egregious nature that it is clear as a matter of law that no other sanction would have been

[10] We also observe that misrepresentations to the court by an attorney are a violation of counsel's professional obligations and, even absent direct harm to the opposing party, harm the integrity of the judicial proceeding. See Rules of Professional Conduct 3.3 (a) ("[a] lawyer shall not knowingly . . . [1] [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer").

adequate.[11] Cf. *Zocaras* v. *Castro*, supra, 465 F.3d 484 (lack of express finding regarding lesser sanction not fatal when it is implicit in grounds stated for dismissal that no other sanction would be adequate). The delicate balance that is struck in assessing the proportionality of a sanction of nonsuit is one for the trial court to make in such instances.

Accordingly, the case should be remanded to the trial court for a hearing on the matter of sanctions, guided by the principles set forth in part I of this opinion. We express no opinion as to what sanction(s) would be proportionate to the misconduct at issue, and do not suggest that the court's options are limited to the alternative sanctions previously considered and rejected by the trial court. Whether further proceedings on the merits ensue, as the Appellate Court directed, will depend on the outcome of that hearing.

The judgment of the Appellate Court is affirmed insofar as that court reversed the trial court's judgment of nonsuit; the case is remanded to that court with direc-

[11] We note, however, an important distinction between the trial court's initial decision to order a judgment of nonsuit and its decision denying the plaintiffs' motion to open that judgment. At the time that the court ordered the judgment of nonsuit, the only misconduct then known to the court was that the plaintiffs' counsel had failed to comply with its order to file the settlement agreement, the deadline lapsing approximately seven weeks earlier. The court did not yet know the term of the settlement agreement's confidentiality provision and, thus, counsel's misrepresentation of those terms, and counsel had yet to make the misstatements to excuse the noncompliance with the order. Accordingly, if our review had been limited to the judgment of nonsuit, we could conclude that the court abused its discretion in ordering nonsuit on the basis of the single act of noncompliance with the order. Our review is not so limited, however, as it was proper for the trial court to consider the additional facts known to it when it decided whether to open the judgment. See generally *Pantlin & Chananie Development Corp.* v. *Hartford Cement & Building Supply Co.*, 196 Conn. 233, 237, 492 A.2d 159 (1985) (trial court weighs evidence presented by parties to determine if ground for opening judgment of default or nonsuit has been established by moving party).

tion to remand the case to the trial court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

MELVIN JONES *v.* STATE OF CONNECTICUT (SC 19725)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Espinosa, Js.*

Syllabus

The petitioner, who had been convicted of capital felony and carrying a pistol without a permit, filed a petition for a new trial based on newly discovered evidence, specifically, DNA testing that purportedly demonstrated that he did not commit the underlying murder. The victim had been found shot to death in his car. One witness testified at the petitioner's criminal trial that, after hearing gunshots, she saw the petitioner, whom she recognized from the neighborhood, run to a dumpster, where he took off a camouflage jacket and threw it into the dumpster. The witness recovered the jacket from the dumpster and gave it to the police, who found a receipt for work done on the victim's car in one of the jacket pockets. The jacket tested negative for blood or gunshot residue, and the petitioner's fingerprints were not found in the victim's car. Several years after the petitioner's conviction, he sought to have the jacket and hairs found in the victim's car tested for the presence of DNA by state forensic examiners using techniques not available at the time of his criminal trial. The tests excluded the victim and the petitioner as possible contributors to the DNA found on the jacket, and the petitioner was excluded as the source of the hairs tested. In denying the petition for a new trial, the trial court determined that, although the DNA evidence was credible, the new evidence did not satisfy the fourth element of the test for granting a new trial petition under *Asherman* v. *State* (202 Conn. 429) because the petitioner failed to establish that the new evidence would probably produce a different result in a new trial. The petitioner appealed to the Appellate Court, which concluded that the trial court had not abused its discretion in denying the petition for a new trial, and the petitioner, on the granting of certification, appealed to this court. The petitioner claimed that the Appellate Court should have engaged in a de novo review of whether the new evidence was likely to produce a different result, rather than applying an abuse of discretion standard, because the credibility of the new evidence was

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

undisputed, and the judge deciding the new trial petition did not preside over the petitioner's criminal trial. He also claimed that, if the Appellate Court had engaged in a de novo review, it would have concluded that the new evidence would lead to a different result at a new trial. *Held*:

1. This court concluded that de novo review of the trial court's application of the fourth element of the *Asherman* test is appropriate when the judge deciding the petition for a new trial did not preside over the petitioner's criminal trial and the trial court found, or the parties agreed, that a new jury would credit the new evidence, and, accordingly, this court overruled its prior decisions to the extent they established that an abuse of discretion standard of review would be appropriate in such circumstances: the traditional considerations for applying an abuse of discretion standard of review were not implicated in the present case, in which the trial judge, who did not preside over the petitioner's criminal trial, did not have a superior opportunity to assess the strength and credibility of the evidence presented at that trial, and the parties agreed that a new jury would credit the newly discovered evidence, and, in such circumstances, the fourth element of the *Asherman* test presented a mixed question of law and fact that required an appellate court to defer to the trial court's factual findings and credibility determinations but to review the legal import of those findings de novo; moreover, the state could not prevail on its claim that the statute (§ 52-270) that authorizes petitions for a new trial based on newly discovered evidence limits an appellate court's review to determining whether the trial court had abused its discretion, as that statute vests the Superior Court with authority to grant petitions for new trials but does not limit the scope of any appellate review once the trial court has granted a petition for certification to appeal from its decision.

2. The trial court correctly concluded under the fourth element of the *Asherman* test that the DNA evidence would not have led to a different result, as that evidence did not prove that the petitioner never touched the jacket and did not indicate that it was meaningfully less likely that he had ever touched the jacket, and the state acknowledged during the petitioner's criminal trial that there was a lack of forensic evidence linking him to the crime scene: neither of the forensic examiners who conducted the DNA testing on the jacket testified that the test results indicated a greater likelihood that the petitioner had never touched the jacket, but, rather, they testified that the method used to store the jacket may have promoted degradation of the DNA, that, for purposes of the petitioner's criminal trial, certain areas of the jacket had previously been tested for gunshot residue, which possibly removed any DNA present at that time, and that the DNA results did not exclude the possibility that the petitioner touched other parts of the jacket or that he could have worn the jacket without transferring any of his DNA onto it; moreover, the fact that the DNA of at least two people other than the petitioner and the victim had been detected on the jacket was of uncertain eviden-

tiary value, as the DNA could have been deposited by someone other than the person seen discarding the jacket in light of the forensic examiners' testimony that DNA testing did not establish when the DNA was placed on the jacket, and that the jacket had been handled in conjunction with the police investigation and the petitioner's criminal trial by multiple people who could have transferred their DNA onto it; furthermore, the lack of a DNA match between the petitioner and the hairs found in the victim's car was of little consequence because there was no evidence of when those hairs were deposited in the car or that the shooter was the source of those hairs.

(*One justice concurring separately*)

Argued September 14, 2017—officially released February 2, 2018**

Procedural History

Petition for a new trial, and for other relief, following the petitioner's conviction of the crimes of capital felony and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the case was transferred to the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Lavine* and *Sheldon*, *Js.*, which affirmed the trial court's judgment, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Allison M. Near, assigned counsel, with whom, on the brief, was *Michael O. Sheehan*, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom were *Stacey M. Miranda*, senior assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In October, 1990, the petitioner, Melvin Jones, was arrested and charged with the murder of

** February 2, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Wayne Curtis, who had been found shot to death in New Haven just a few days before the petitioner's arrest. The case was tried to a jury, which found the petitioner guilty. Nearly twenty years after the crime occurred, in 2010, certain pieces of evidence from the petitioner's trial were tested for the presence of DNA pursuant to an agreement with the state. He later relied on that testing to petition for a new trial on the basis of newly discovered evidence. In his petition, he claimed that the new DNA testing demonstrated that he did not commit the murder. The trial court disagreed, concluding that the new DNA results, although valid, failed to establish that the new evidence would likely produce a different result in a new trial. The Appellate Court, reviewing the trial court's decision for an abuse of discretion, upheld that decision. *Jones* v. *State*, 165 Conn. App. 576, 604, 140 A.3d 238 (2016).

In his certified appeal to this court, the petitioner contends that the Appellate Court should have engaged in a de novo review of whether the new evidence was likely to produce a different result. He argues that de novo review is appropriate because the credibility of the new evidence is undisputed, requiring only the application of the legal standards to the facts found by the trial court. He further asserts that, had the Appellate Court properly engaged in a de novo review, it would have decided the case in his favor.

We agree with the petitioner that de novo review is appropriate in the specific circumstances of this case, namely, when the petition for a new trial is decided by a judge who did not preside over the original trial and no fact-finding was necessary because both parties agreed that the new evidence was fully credible. Applying a de novo standard of review, we nevertheless disagree that the petitioner is entitled to a new trial. We therefore affirm the Appellate Court's judgment.

I

FACTUAL AND PROCEDURAL HISTORY

The following facts from the petitioner's criminal trial and new trial proceedings are relevant to this appeal. On October 17, 1990, police officers were called to Howard Avenue in New Haven where they found Wayne Curtis shot to death in the driver's seat of his car, which was parked on the street. The victim had a bullet wound through his abdomen and several head wounds from blunt force trauma. Police investigators found bloodstains on the victim's clothing and on the interior of the car, including on the driver's side door. At the petitioner's criminal trial, a witness testified that he saw the petitioner wearing a camouflage jacket and standing outside the victim's car, arguing with the victim, shortly before he heard gunshots. Another witness who was a few blocks away from the crime scene testified that, shortly after hearing gunshots, she saw the petitioner, whom she recognized from the neighborhood, run to a dumpster, take off a camouflage jacket and throw it into the dumpster. She recovered the jacket and later gave it to the police. In the pocket of the jacket, officers found a receipt for mechanical work done on the victim's car two years earlier. The jacket was tested for blood and for gunshot residue, but the tests returned negative results for the presence of either. The police examined the victim's car but found no fingerprints or hair from the petitioner.

The petitioner was first tried for the murder and found guilty by a jury in 1992 (first criminal trial). This court later reversed the judgment of conviction and ordered a retrial.[1] *State* v. *Jones*, 234 Conn. 324, 359, 662 A.2d 1199 (1995).

[1] While his appeal from the first criminal trial was pending, the petitioner also filed an earlier petition for new trial, which the trial court granted. See *State* v. *Jones*, 50 Conn. App. 338, 340, 718 A.2d 470 (1998), cert. denied, 248 Conn. 915, 734 A.2d 568 (1999).

The retrial was held in March, 1996 (second criminal trial). At his second criminal trial, the petitioner presented testimony from a new witness who claimed that he saw the shooting and that the petitioner was not the shooter. The jury nevertheless found the petitioner guilty of the victim's murder[2] and of carrying a pistol without a permit. The trial court sentenced the petitioner to a total effective sentence of life imprisonment without the possibility of release. The Appellate Court upheld the petitioner's conviction and sentence. *State* v. *Jones*, 50 Conn. App. 338, 369, 718 A.2d 470 (1998), cert. denied, 248 Conn. 915, 734 A.2d 568 (1999).

In 2010, the petitioner sought, and the state agreed to, DNA testing of the jacket recovered from the dumpster and of the hairs found in the victim's car using techniques not available at the time of his second criminal trial. The test of the jacket identified a mixture of DNA material from multiple contributors. The victim and the petitioner were both excluded as contributors to the mixture. The petitioner also was excluded as the source of the hairs tested.

On the basis of this new evidence, the petitioner filed a petition for new trial based on newly discovered evidence. He claimed that the new DNA evidence established that he had not worn the jacket linked to the victim, but that others had, demonstrating that he was not the perpetrator of the crime. In support of his petition, he presented the testimony of two forensic examiners from the Department of Emergency Services and Public Protection, Division of Scientific Services (state forensic science laboratory), who performed the DNA analysis on the jacket. The petitioner's witnesses confirmed the results of the testing but also explained that

[2] After the jury found the petitioner guilty of the victim's murder, the state introduced evidence that he had been previously convicted of murder in 1976. As a result, the defendant was convicted of capital felony. See General Statutes (Rev. to 1989) § 53a-54b (3).

a lack of any of the petitioner's DNA on the jacket did not establish that the petitioner had never worn or touched the jacket. The jacket was tested only for "wearer DNA" by swabbing the inside cuffs and collar of the jacket. Additionally, the witnesses testified that any DNA previously deposited on the jacket could have degraded over time and that the mixture of the DNA that was detected from other individuals could have been deposited by anyone who had touched the areas of the jacket that were tested, including investigators, forensic personnel who originally examined the jacket for gunshot residue, attorneys, court personnel, and jurors. In addition to these two witnesses, the petitioner also presented a DNA test report indicating that certain hairs taken from the victim's vehicle did not come from the petitioner.

The state did not present any witnesses or dispute the testimony of the petitioner's witnesses. The state, instead, argued that the petitioner's evidence failed to establish a probability of a different result in a retrial because the test results neither established that the petitioner had never touched the jacket nor established that one of the persons who contributed to the DNA mixture found on the jacket was the perpetrator of the crime.

The trial court denied the petition. The court first determined that the new evidence met the first three elements for granting a new trial in that the evidence was (1) newly discovered, (2) material to the issues at trial, and (3) not cumulative. See *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987). The court further concluded, however, that the petitioner had failed to establish that the new evidence would probably produce a different result in a new trial, the fourth and final element required for the granting of a new trial. See id. In its analysis, the court credited the conclusions presented by the petitioner's witnesses, finding that

"the methods used to perform the DNA analyses were scientifically appropriate, that the methods were expertly executed, and that the outcomes obtained were accurate." The court observed that the absence of a DNA match to the petitioner or the victim "does not, of course, necessarily imply that neither had contact with the jacket or that the petitioner was never in the victim's car. The results simply demonstrate [that] their DNA was not detected on or in the items tested." The trial court determined that the new evidence would not impact the outcome of the case because the lack of any forensic link to the petitioner had already been argued at the second criminal trial, and the jury had found the petitioner guilty on the basis of eyewitness testimony despite the lack of any supporting physical evidence. The court lastly explained that the state would be able to argue, in a new trial, that the lack of the petitioner's DNA on the jacket could be the result of a number of factors, including that any DNA deposited could have substantially degraded or have been removed by earlier forensic testing and that the discovery of other DNA profiles on the jacket could be the result of handling by other persons in the decades after the crime occurred. The trial court later granted a request by the petitioner to appeal the trial court's decision pursuant to General Statutes § 54-95 (a).

The Appellate Court upheld the denial of the petition. *Jones* v. *State*, supra, 165 Conn. App. 604. In his arguments to the Appellate Court, the petitioner asserted that the court should not defer to the trial court's conclusions on whether the new evidence would produce a different result but should review that aspect of the trial court's decision de novo and conclude that he is entitled to a new trial. Id., 598–600 n.13. The Appellate Court disagreed that de novo review was appropriate. Id., 599 n.13. It instead applied the abuse of discretion standard and concluded that the trial court had not

abused its discretion in denying the petition for a new trial. Id., 600.

We granted certification to appeal on the following question: "Did the Appellate Court properly determine that its review of the decision of the [trial] court is limited to abuse of discretion as distinguished from de novo review?" *Jones* v. *State*, 322 Conn. 906, 140 A.3d 977 (2016).[3]

II

STANDARD OF REVIEW

The petitioner first asserts that, contrary to the Appellate Court's conclusion and our prior case law, the trial court's determination that the newly discovered evidence is unlikely to produce a different result should be reviewed de novo. The petitioner's claim for de novo review is premised upon the fact that the parties do not dispute the credibility of the petitioner's new evidence, only its impact on the second criminal trial evidence, and the judge hearing the new trial petition did not preside over the second criminal trial. We agree that de novo review of the trial court's application of the legal standard is appropriate in these circumstances.

Our cases establish that, to obtain a new trial on the basis of newly discovered evidence, the petitioner must establish that the newly proffered evidence (1) is actually newly discovered, (2) would be material in a new trial, (3) is not merely cumulative, and (4) would probably produce a different result in a new trial. *Asherman* v. *State*, supra, 202 Conn. 434. This standard is strict and is "meant to effectuate the underlying equitable

[3] The certified question originally referenced the decision of the "*habeas* court . . . ." (Emphasis added.) *Jones* v. *State*, supra, 322 Conn. 906. This was an error, as this case arises from a petition for a new trial and not a petition for a writ of habeas corpus. We have therefore corrected our formulation of the certified question. See, e.g., *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 637 n.2, 153 A.3d 1264 (2017).

principle that once a judgment is rendered it is to be considered final, and should not be disturbed by post-trial [proceedings] except for a compelling reason." (Internal quotation marks omitted.) Id. The parties in the present case do not dispute that the petitioner's new DNA evidence meets the first three elements for granting a new trial. They disagree only on the fourth *Asherman* element, namely, whether it would produce a different result in a new trial.

To meet the fourth element of *Asherman*, "[t]he [petitioner] must persuade the court that the new evidence he submits will *probably*, not merely possibly, result in a different verdict at a new trial . . . . It is not sufficient for him to bring in new evidence from which a jury *could* find him not guilty—it must be evidence which persuades the judge that a jury *would* find him not guilty." (Citation omitted; emphasis in original.) *Lombardo* v. *State*, 172 Conn. 385, 391, 374 A.2d 1065 (1977); see also *Skakel* v. *State*, 295 Conn. 447, 468, 991 A.2d 414 (2010). This analysis requires the trial court hearing the petition to weigh the impact the new evidence might have on the original trial evidence. See *Asherman* v. *State*, supra, 202 Conn. 434.

The petitioner has not asked us to revisit the underlying standard requiring a probability of a different result but has asserted that this court should review the trial court's weighing process anew, without deference to the trial court's decision. This claim requires us to examine our standard of review for a trial court's decision on a petition for a new trial based on newly discovered evidence.

A

Abuse of Discretion Standard of Review

We have repeatedly observed that a trial court's decision granting or denying a petition for new trial, includ-

ing on the ground of newly discovered evidence, is a matter of discretion for the trial court and is reviewable only for an abuse of discretion. *Skakel* v. *State*, supra, 295 Conn. 468; *Shabazz* v. *State*, 259 Conn. 811, 820, 792 A.2d 797 (2002); *Asherman* v. *State*, supra, 202 Conn. 434; *Kubeck* v. *Foremost Foods Co.*, 190 Conn. 667, 669–70, 461 A.2d 1380 (1983). This includes deference to the trial court's process of weighing the impact of the new evidence on the original trial evidence. *Skakel* v. *State*, supra, 487 n.25 ("[f]or more than one century, it has been settled law that an abuse of discretion standard applies not only to the trial court's ultimate decision whether to grant the petition for a new trial, but also to its subsidiary determinations in support of that decision"); *Pradlik* v. *State*, 131 Conn. 682, 686, 41 A.2d 906 (1945) (in weighing impact of new evidence, "the court compares the old testimony with the new and decides, in the exercise of a sound discretion . . . whether the newly discovered evidence is likely to change the result" [internal quotation marks omitted]).

Our deference to the trial court traces to some of our earliest cases. This court originally considered judgments on petitions for a new trial to be discretionary and not subject to review for error whatsoever, regardless of the grounds claimed to justify a new trial. See, e.g., *Lewis* v. *Hawley*, 1 Conn. 49, 50 (1814) ("A petition for a new trial on the ground of . . . newly discovered evidence is an address to the sound discretion of the court. . . . These are to be tested by the discretion of the court, of which error is not predicable."); see also *Magill* v. *Lyman*, 6 Conn. 59, 60 (1825) ("[i]t has been so frequently, and so recently, decided by this [c]ourt, that the granting or refusing of a new trial, is entirely a matter of discretion, and is not the subject of error, that it cannot now be questioned"); *Kimball* v. *Cady*, 1 Kirby (Conn.) 41, 43 (1786) ("[i]f the petition was for a new trial, it was [a] matter of discretion with the court

to which it was preferred, to grant or negative, and error cannot be predicated upon such decision"). This court later determined, however, that decisions granting or denying a petition for a new trial could be reviewed for error. *Husted* v. *Mead*, 58 Conn. 55, 60, 66–67, 69, 19 A. 233 (1889) (reviewing and reversing trial court decision granting new trial because of newly discovered evidence). This court expressly articulated an abuse of discretion standard for appeals involving new trial petitions in *Gannon* v. *State*, 75 Conn. 576, 578–79, 54 A. 199 (1903). We have applied that standard ever since. See, e.g., *Skakel* v. *State*, supra, 295 Conn. 468, 487 n.25.

Many of our decisions regarding new trial petitions cite the abuse of discretion standard without expounding on the reasons that support treating the trial court's decision as discretionary. See, e.g., id.; *Shabazz* v. *State*, supra, 259 Conn. 820; *Asherman* v. *State*, supra, 202 Conn. 434; *Kubeck* v. *Foremost Foods Co.*, supra, 190 Conn. 669–70; *Lombardo* v. *State*, supra, 172 Conn. 390; *Pradlik* v. *State*, supra, 131 Conn. 686; *Gannon* v. *State*, supra, 75 Conn. 578–79; *Magill* v. *Lyman*, supra, 6 Conn. 60; *Kimball* v. *Cady*, supra, 1 Kirby (Conn.) 43.

Nevertheless, a close review of our case law reveals that our deference to the trial court appears to arise historically and primarily from two considerations: (1) the trial judge's superior opportunity to assess the strength of the original trial evidence; and (2) the trial court's role as the arbiter of credibility.

First, when the judge hearing the new trial petition also presided over the original trial, that judge is unquestionably better suited to assess the impact of the newly discovered evidence in light of the evidence originally presented at trial. The trial judge, having seen the original evidence presented as the jury did, will have a better understanding of how the new evidence might impact

a new jury's assessment of the original trial evidence and whether the new evidence would likely change the result. Thus, we explained in *Lewis* v. *Hawley*, supra, 1 Conn. 50, that "[a] petition for a new trial on the ground of surprise and newly discovered evidence is an address to the sound discretion of the court. The court in fact [is] presumed to possess the whole of the testimony offered on the trial. They have a full view of the case as it appeared to them; with which they are to compare the surprise and newly discovered evidence stated . . . ." Id.; see *Gannon* v. *State*, supra, 75 Conn. 579 ("The court before which the first trial was had, upon the facts thus presented for its consideration, refused to grant a new trial. That action cannot be reviewed, unless it appears that the court plainly abused its discretion or misjudged the limits of its discretionary power."); see also *State* v. *McIntyre*, 250 Conn. 526, 533, 737 A.2d 392 (1999) ("Appellate review of a trial court's decision granting or denying a motion for a new trial must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided. . . . Thus, [a] motion for a new trial is addressed to the sound discretion of the trial court . . . ." [Citation omitted; internal quotation marks omitted.]).

Second, the trial court hearing a petition for a new trial has the responsibility of assessing the credibility of the newly discovered evidence when determining the likelihood that the new evidence would produce a different result. See, e.g., *Shabazz* v. *State*, supra, 259 Conn. 822–28; *Lombardo* v. *State*, supra, 172 Conn. 390–91; *Pradlik* v. *State*, supra, 131 Conn. 686. This responsibility arises not only from the superior vantage point of the trial court, but also from its role as the final arbiter of questions of credibility and fact. *Shabazz* v. *State*, supra, 827–28; see also *Skakel* v. *State*, supra, 295 Conn. 487 n.25 (noting trial court's role as fact

finder and deference shown by this court to that role); *State* v. *Lawrence*, 282 Conn. 141, 156–57, 920 A.2d 236 (2007) (same); *Smith* v. *State*, 141 Conn. 202, 214, 104 A.2d 761 (1954) (upholding trial court's conclusion that new witness was not credible).

We have recognized that whether the new evidence would produce a different result at a new trial often will depend on the *degree* of credibility that the new evidence has. *Shabazz* v. *State*, supra, 259 Conn. 822–24. In *Shabazz*, we explained that whether new evidence would change the result of the trial often turns not just on whether a new jury *could* credit, for example, a new witness, but whether the jury would find the new witness' testimony *sufficiently* credible that it would be persuaded to reach a different result. Id., 823. In such cases, the trial court's credibility assessment and determination of the likelihood of a different result are tied together, essentially as one analysis, and the trial court must make a predictive judgment about whether a new jury would find the new witness so credible that it would be persuaded to reach a different result. Id., 827–28 ("[i]f . . . the trial court determines that the evidence is sufficiently credible so that, if a second jury were to consider it together with all of the original trial evidence, it probably would yield a different result or otherwise avoid an injustice, the fourth element of the *Asherman* test would be satisfied"). When the newly discovered evidence is in the form of witness testimony, the trial court must typically fulfill its role to assess the credibility of that new evidence by receiving the witness' new testimony first hand, in court. *Adams* v. *State*, 259 Conn. 831, 842, 792 A.2d 809 (2002).

Because the role of determining the credibility of the new evidence falls on the trial court, we have traditionally deferred to its ultimate conclusion on credibility and the likelihood of a different result. For instance, in *Skakel*, whether evidence from a new witness would

change the result depended on the credibility that could be given to the new evidence. *Skakel* v. *State*, supra, 295 Conn. 486–87. Consistent with *Shabazz*, we deferred to the trial court's credibility assessment and determination of whether the new evidence would change the result, even though the new evidence was presented in the form of a video recording. Id., 470, 487 n.25. We therefore applied the long-standing abuse of discretion standard and concluded that the trial court's denial of the petition in that case was reasonable. Id., 452, 468.

B

De Novo Standard of Review Under the Circumstances in the Present Case

In the present case, however, these traditional reasons for our deference to the trial court's discretion are not implicated, leading us to conclude that it is more appropriate to apply a de novo standard of review, despite our prior case law establishing an abuse of discretion standard.

First, the trial judge deciding the petition did not preside at the petitioner's second criminal trial, and, therefore, did not enjoy any superior opportunity to assess the credibility and strength of the second criminal trial evidence. Any assessment of that evidence by the trial judge deciding the new trial petition must therefore be made from a review of the printed trial transcripts and exhibits. This traditional consideration thus provides no basis for deferring to the trial court's assessment in the present case.

Second, unlike the context in *Shabazz*, the result under the fourth *Asherman* element in the present case does not turn on the *degree* of credibility of the new evidence. Cf. *Shabazz* v. *State*, supra, 259 Conn. 828. The parties do not dispute the credibility a jury might attach to the testimony from the new witnesses con-

cerning the DNA evidence, nor do they contend that the degree of their credibility might alter the outcome. Rather, both parties' arguments presuppose that a jury would fully credit the new testimony. The petitioner's witnesses, both of whom were employed as forensic examiners by the state, testified concerning the methods they applied to test certain evidence for DNA material, the results of those tests, and the scientifically supported conclusions that might be drawn from those test results. The trial court credited the methods applied and the conclusions reached by the petitioner's expert witnesses. Neither of the parties disputed the credibility of these witnesses or their conclusions, and both parties rely on the witnesses' testimony to make their respective arguments to this court.

This case, therefore, does not present the same circumstances present in *Shabazz* and *Skakel*, which required the trial court to assess how credible a new jury might find the new evidence when considered alongside the original trial evidence. See *Skakel* v. *State*, supra, 295 Conn. 467–68, 486–87; *Shabazz* v. *State*, supra, 259 Conn. 827–28. Nor do the circumstances of this case require this court to resolve disputes concerning the credit a jury is likely to give to competing expert witness opinions, a question we have reviewed de novo only in limited circumstances. See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 268–69, 112 A.3d 1 (2015).

Instead, all that remains to consider under the fourth element of *Asherman* is whether, in light of this new, credible evidence, a new jury would likely reach a different result—a question that requires the application of a legal standard to the established facts of this case. Although we have described new trial proceedings as generally equitable in nature inasmuch as they promote principles of fairness by permitting relief from potentially unjust judgments; *Black* v. *Universal C.I.T. Credit Corp.*, 150 Conn. 188, 192–94, 187 A.2d 243 (1962); the

question remaining in the present case does not call for the exercise of the trial court's equitable discretion in a traditional sense. "The very core consideration of choice in discretion logically means that neither party is absolutely entitled to have that discretion exercised in its favor." *State* v. *S & R Sanitation Services, Inc.*, 202 Conn. 300, 311, 521 A.2d 1017 (1987). Discretion implies that the trial court has a broad choice in deciding the matter before it, usually reached by balancing competing interests or multiple factors and resolving disputed factual issues—a process no doubt aided by the trial court's superior opportunity to view the proceedings. See, e.g., *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 372, 377–78, 999 A.2d 721 (2010) (trial court's distribution of marital property in dissolution proceeding, which requires resolving disputed facts and weighing several statutory factors, is reviewed for abuse of discretion); see also *State* v. *Jones*, 314 Conn. 410, 419, 102 A.3d 694 (2014) (noting trial court's discretion over matters of trial management).

The question remaining in the present case does not require the balancing of competing interests or factors, nor does it implicate the trial court's fact-finding role. Rather, applying the fourth *Asherman* element in the present case calls for a determination of whether the petitioner is entitled to a new trial when the legal standard is applied to the established facts. If the new evidence is unquestionably credible and likely to produce a different result, then the petitioner is entitled to a new trial, and a trial court does not have discretion to deny the petition. See *Shabazz* v. *State*, supra, 259 Conn. 827–28 (if trial court concludes new evidence is sufficiently credible to produce different result, fourth *Asherman* element is satisfied). To be sure, judges often disagree on the correct outcome under the governing legal standard, but that room for disagreement does not, in itself, convert a question of law into an exercise

of discretion. See, e.g., *Anderson* v. *Commissioner of Correction*, 313 Conn. 360, 375, 392, 380, 98 A.3d 23 (2014) (applying plenary review to *Strickland* prejudice analysis, concerning reasonable probability of different result, even though majority and dissenting opinion disagreed about proper outcome), cert. denied sub nom. *Anderson* v. *Semple*, U.S. , 135 S. Ct. 1453, 191 L. Ed. 2d 403 (2015).

In these circumstances—when the judge deciding the new trial petition did not preside over the original trial and the likelihood of a different result does not depend on how credible the new evidence appears—we conclude the fourth *Asherman* element becomes a mixed question of law and fact; we defer to any factual findings and credibility determinations made by the trial court, but we review the legal import of those findings de novo. See, e.g., *State* v. *Ortiz*, 280 Conn. 686, 720–22, 911 A.2d 1055 (2006) (describing standard of review for mixed question of law and fact). Ordinarily, when the facts are undisputed, determining the legal import of those facts presents a question of law subject to de novo review. See, e.g., *One Country, LLC* v. *Johnson*, 314 Conn. 288, 300, 101 A.3d 933 (2014) (when "facts are undisputed," application of legal standard is "question of law over which we exercise plenary review"); *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 219 Conn. 51, 62, 591 A.2d 1231 (1991) ("because the underlying facts are undisputed, leaving only a determination of the legal effect of those facts," issue presents "a question of law" and appellate review is de novo); *Steelcase, Inc.* v. *Crystal*, 238 Conn. 571, 577, 680 A.2d 289 (1996) (when parties stipulate to facts, inferences that may be drawn from facts present question of law and review of trial court's decision is plenary). This is so even in the context of fact laden disputes ordinarily subject to a trial court's discretion. See *Crews* v. *Crews*, 295 Conn. 153, 164, 989 A.2d 1060

(2010) (In family law cases, "[the] abuse of discretion standard applies only to decisions based solely on factual determinations made by the trial court. . . . When the trial court conducts a legal analysis or considers a mixed question of law and fact, plenary review is appropriate, even in the family law context." [Citations omitted.]). We therefore may apply the fourth *Asherman* element to this case de novo without encroaching on the deference we afford to the trial court's role as the arbiter of credibility and finder of facts.

In fact, the standard of review we apply in the present case is no different from that applied to claims of prejudice under *Strickland* v. *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and materiality under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)—an analysis that is similar to the fourth element of *Asherman*. The *Strickland* prejudice/*Brady* materiality standard requires a showing that there is a reasonable likelihood that the outcome of the proceeding would have been different if no constitutional violation had occurred. *Cone* v. *Bell*, 556 U.S. 449, 474, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009); *Strickland* v. *Washington*, supra, 694. We have previously noted that addressing the fourth *Asherman* element entails "exactly the same analysis as claims under *Brady* and *Strickland*, as they entail the same considerations." *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 308. Both require the court to assess the impact that changed circumstances—e.g., the introduction of either newly discovered or withheld evidence—might have on the result of the original trial. The only significant difference between the two standards is the level of certainty that the outcome of the proceeding would be different. Id., 308 n.62. In *Strickland* and *Brady*, there must be a "reasonable likel [ihood]" of a different result, a standard that is slightly more lenient than the more likely than not standard

required for newly discovered evidence claims. (Internal quotation marks omitted.) *Harrington* v. *Richter*, 562 U.S. 86, 111–12, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

In *State* v. *Ortiz*, supra, 280 Conn. 720–22, we concluded that a *Brady* materiality determination presents a mixed question of law and fact—we defer to the trial court's factual and credibility findings, but review its application of the legal standard de novo. Id. In doing so, we distinguished prior cases that had applied an abuse of discretion standard and directed de novo appellate review in future cases. Id. We also noted that we will give great weight to an assessment of materiality when the judge deciding a *Brady* claim also presided at the original trial. Id., 721–22. We address claims of prejudice under *Strickland* with the same standard of review. *Small* v. *Commissioner of Correction*, 286 Conn. 707, 717, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

Applying the de novo standard of review in the present case thus would be consistent with our *Strickland* and *Brady* standards of review. Indeed, if the very same DNA results in this case had been in the state's possession and not disclosed to the defendant—a potential *Brady* claim—or in defense counsel's possession but not introduced at trial—a potential *Strickland* claim—under our precedents in *Ortiz* and *Small* we would have reviewed the trial or habeas court's determination of the likelihood of a new outcome using a de novo standard of review. We see no principled reason why we should apply a different standard of review to an identical analysis simply because of the procedural mechanism used to bring the issue before the courts.

In her concurring opinion, Justice Espinosa asserts that we should nevertheless defer to the trial court's

discretion on a petition for new trial in the interest of promoting finality of the underlying judgment that a petitioner seeks to overturn. We agree that the impact of new trial petitions on the finality of judgments merits serious consideration. But we believe that concerns of finality are already appropriately accounted for in the substantive standard required to obtain a new trial—a standard we have already acknowledged as "strict" inasmuch as it requires proof of a probability, not just a reasonable possibility, of a different result. *Asherman* v. *State*, supra, 202 Conn. 434. In our view, interests of finality are better addressed by the substantive standard required to obtain a new trial rather than through a narrower appellate standard of review. In fact, an abuse of discretion standard might prevent an appellate court from vindicating interests of finality when, for example, a trial court grants a petition and sets aside a judgment, but an appellate panel is nevertheless convinced that, if reviewed de novo, the petition should have been denied and the underlying judgment left intact.

In sum, we are persuaded that we should review de novo the trial court's conclusion on the fourth *Asherman* element when (1) the judge hearing the petition for a new trial did not preside at the original trial, and (2) the trial court found, or the parties agree, that a new jury would credit the new evidence and that the only question remaining is whether, in light of that new evidence, a new jury hearing the case would probably reach a different result.[4] To the extent that our prior decisions have established that an abuse of discretion standard of review would be appropriate in such circumstances, they are overruled in favor of a de novo standard of review. Our traditional abuse of discretion

[4] Because this case turns on only the fourth element of *Asherman*, we do not consider whether under any other particular circumstance a de novo standard of review should apply to a decision under the first three *Asherman* elements.

standard continues to apply, however, in any case when the judge hearing the new trial petition also presided at the original trial or when the likelihood of a different result depends on the degree of credibility that may be given to the new evidence. See, e.g., *Skakel* v. *State*, supra, 295 Conn. 467.

C

New Trial Statute

The state nevertheless argues that, under the statute that authorizes a petition for a new trial based on newly discovered evidence, General Statutes § 52-270, our review is limited to whether there has been an abuse of discretion. We disagree that the legislature intended for this statute to limit the scope of appellate review.

Petitions for a new trial based on newly discovered evidence are governed by statute. See, e.g., *Wojculewicz* v. *State*, 142 Conn. 676, 677, 117 A.2d 439 (1955) ("[p]roceedings in this state for procuring a new trial, whether in a civil or a criminal case, are controlled by statute"). Section § 54-95 (a) authorizes defendants in criminal cases to file petitions for new trials in the same manner as in civil cases, and General Statutes § 52-270 (a), which governs new trials in civil actions, provides in relevant part: "*The Superior Court may* grant a new trial of any action that may come before it, for . . . the discovery of new evidence . . . or for other reasonable cause, according to the usual rules in such cases . . . ." (Emphasis added.)

The state relies upon the emphasized language in § 52-270 to argue that the legislature intended the statute to provide the Superior Court the *exclusive* authority to grant new trials within that court's sole discretion, limiting *any* appellate review to an abuse of that discretion. We think this reads far too much into the statutory language.

We interpret the emphasized language as intending to simply vest the Superior Court with authority to grant new trials, not to limit the scope of any appellate review in such cases. See *Zaleski* v. *Clark*, 45 Conn. 397, 401–402 (1877) (prior to original enactment of new trial statute in 1762, General Assembly had sole authority to grant new trials). Indeed, § 52-270 makes no reference to appeals. Petitions for a new trial in criminal cases are treated in the same manner as in civil proceedings, and a judgment on the petition is subject to appeal under General Statutes §§ 52-263 and 54-95 (a). See, e.g., *State* v. *Asherman*, 180 Conn. 141, 142–43, 429 A.2d 810 (1980). Neither statute purports to limit our standard of review. Section 54-95 (a) does, however, place limits on when a petitioner may appeal from the denial of a petition for a new trial, requiring the petitioner to first obtain certification from the trial court that the case involves a question that "ought to be reviewed by the Supreme Court or by the Appellate Court. . . ." General Statutes § 54-95 (a). But nothing in that section limits the scope of appellate review once certification is obtained.

In addition, none of our cases reviewing the trial court's decision on a petition for new trial for an abuse of discretion has indicated that our standard of review is tied to the language in § 54-95 (a) on which the state relies. This court has not limited its review to an abuse of discretion standard either when determining the substantive standards the trial court must apply when deciding a petition for new trial or when considering whether the trial court applied the proper standard. See, e.g., *Shabazz* v. *State*, supra, 259 Conn. 820 ("[T]ypically, we review a trial court's decision with respect to a petition for a new trial for an abuse of discretion. . . . This particular appeal, however, raises the issue of whether the trial court correctly applied the standard for determining whether to grant a petition for a new

trial as set forth in *Asherman* v. *State* [supra, 202 Conn. 434] to the petition at issue. Because this issue presents a question of law, our review is plenary." [Citation omitted.]); see also *Adams* v. *State*, supra, 259 Conn. 837 (whether trial court applied appropriate standard when deciding petition is question of law subject to plenary review). We doubt the legislature intended the language in § 54-95 (a) emphasized by the state to establish that this court may set the substantive standards for granting new trials for newly discovered evidence and review de novo whether the trial court applied the proper standard but, nevertheless, to limit our review of whether the trial court properly applied those standards to an abuse of discretion standard of review. For these reasons, we are not persuaded that the statutory language relied on by the state was intended to operate as a limit to the scope of appellate review.

III

ANALYSIS UNDER THE FOURTH *ASHERMAN* ELEMENT

The petitioner next contends that the new evidence he has presented, if presented at a new trial, would lead to a different result. We disagree.

Before turning to the reasons for our decision, we first recount in greater detail the critical evidence presented at the petitioner's second criminal trial and the newly discovered evidence.

A

Second Criminal Trial Evidence

The state's case against the petitioner consisted primarily of eyewitnesses placing the petitioner, or someone resembling him, near or with the victim on the morning of the murder and around the time of the shooting.

The New Haven Police Department received a call on October 17, 1990, at about 7:27 a.m. reporting a shooting on Howard Avenue. Upon arriving at the scene, an officer discovered a car parked in front of a house on Howard Avenue. Inside the car, the officer found the victim dead in the driver's seat. The victim had blood on him from wounds to his head and abdomen. Blood was also found on the interior side of the driver's side door and window.

Larry Hodge, who at the time of the second criminal trial was incarcerated for a burglary conviction, testified that the victim had given him a ride earlier in the morning on the day of the murder. Hodge explained that he saw the victim at a gas station in New Haven at about 5 a.m. that morning, paying for gas with pennies. Hodge, a drug user, believed that the victim was on drugs, likely cocaine. Hodge asked the victim for a ride to another place in New Haven and offered to pay him for it. The victim took Hodge to his destination, which was near a highway underpass. As Hodge got out of the car at about 5:30 a.m., he heard someone call to the victim. The person calling to the victim emerged from the underpass and walked toward the car. Hodge described the person as a black male wearing a camouflage jacket with braids in his hair. Several hours later, Hodge saw the victim's car depicted in a television news report of the murder. He called a police detective he was familiar with because he was concerned that investigators would find his fingerprints in the vehicle and suspect him of committing the murder.

Hodge testified that he did not see in the courtroom that day the person whom he saw call out to the victim. But the state presented evidence that, in the days after the murder, police investigators had interviewed Hodge, and he identified the petitioner as the person he saw from a twelve person photographic array. The state also presented evidence that Hodge had previously

approached investigators and the State's Attorney's Office to report that he had been threatened by people who wanted him to change his story about the case.[5] Hodge had also failed to appear to give testimony at a prior proceeding in this case, despite a subpoena requiring his presence, and the police had to arrest him and bring him to court to testify. There was also some evidence that, about one-half hour prior to Hodge's testimony, the state's attorney had met with him and asked him if he intended to tell the truth. Hodge responded only by stating that he had not received early release from his incarceration for his burglary conviction.

Another witness, Bonaventure Console III, lived on Howard Avenue when the murder occurred. He testified that, before the day of the shooting, he had routinely seen the petitioner in the neighborhood when leaving for work in the morning and sometimes in the afternoon, and he had spoken to the petitioner once when the petitioner tried to sell him some tapes. Console testified that, when he saw the petitioner in the neighborhood, he had braids in his hair and frequently wore camouflage clothing. On the morning of the murder, Console left his house for work at about 6:30 to 6:45 a.m., about forty-five minutes to one hour before the call reporting the murder. While on his way out, he saw the victim's car parked on Howard Avenue and noticed someone in the driver's seat moving. As he drove away from his home, he saw the petitioner pacing back and forth at the corner of Howard Avenue and Lambert Street, just four houses away from where the victim's

[5] At trial, Hodge claimed that the detective he spoke to, who he had previously worked for as an informant, had shown him the suspect's photograph before showing him the photographic array. Hodge acknowledged, however, that he had not told anyone that version of events before the second criminal trial, that the detective had told him that being a witness was different than informing, and that he was told that he would not be compensated for his cooperation.

car was parked. On cross-examination, Console acknowledged that he had multiple felony charges pending against him at the time. In response, the state entered into evidence, as a prior consistent statement, testimony that Console had given at the first criminal trial, before his felony charges, which was materially identical to his testimony at the second criminal trial.

Another state's witness, Angel Delgato, testified that he lived on Howard Avenue at the time of the murder. On the morning of the shooting, he was getting ready for school when he looked out of his window and saw the victim's car parked across the street from his house on Howard Avenue. He saw and heard two people arguing—a person in the driver's seat of the car and a black male standing outside the passenger side door. Delgato recognized the black male, who had distinctive braids and was wearing a camouflage jacket, as someone he had seen in the neighborhood before, though that day he was only able to see the person from the back and side. At trial, Delgato identified the petitioner as the person he saw by the victim's car. After seeing the men arguing, Delgato went back to getting ready for school. A few minutes later, he heard gunshots from outside. When he looked outside, the black male was gone, and he saw the driver in the car with his head resting on his shoulder. He also saw a young girl he recognized from the neighborhood running down the street. Delgato initially told the police he had seen the shooting occur but later stated that he had only heard the gunshots. Delgato had also previously told the police he could not identify the black male, but then admitted that he could, explaining that he had felt intimidated when the police began recording his statement and that he was initially afraid to become involved with the case.

Nilda Mercado, eleven years old at the time of the murder, saw the victim being attacked in the car and

heard the shooting as she walked to school that morning. She lived on Howard Avenue at the time and testified that, when walking down Howard Avenue that morning, she saw the victim's car parked on the street and two men fighting inside. She saw a black male on his knees in the passenger seat of the car, and he was choking a white male in the driver's seat. She watched as the black male then held the victim's head down outside of the driver's side door and struck the victim's head repeatedly with the door by opening it and then striking it against the victim's head. Mercado noticed a small object in the black male's hand. She began to walk away from the area, and, then, when she heard two gunshots, she ran to her aunt's house nearby. Mercado could not identify the black male because she did not get a good look at his face, but she testified that he had braids and was wearing a camouflage jacket. She did testify, however, that the petitioner had similar complexion and braids to the black male she saw attacking the victim.[6]

Frankie Harris was a few blocks away from the location of the shooting when she heard gunshots that morning. At the time, Harris was addicted to drugs and living at a nearby YMCA.[7] She was out that morning collecting cans to return for the deposit, which she hoped to use to buy more drugs. When she heard the gunshots, she hid behind a nearby dumpster where she had been searching for cans. A short while later, she saw a black male come running toward the dumpster. She recognized him as the petitioner, who was someone she knew from the neighborhood. When asked if she had any

[6] In a meeting with police, Mercado reviewed a photographic array and was unable to identify the petitioner as the attacker. Instead, she pointed to a photograph of another person who had a similar complexion to the person she saw, but with different hair. She did not claim the person in the photograph that she had pointed to was the attacker.

[7] By the time of her trial testimony, Harris had stopped using drugs and was working as an HIV/AIDS and substance abuse referral counselor.

doubt about the identity of the person she saw, she responded, "I'll never forget him." She explained that the petitioner approached the dumpster, took off a camouflage jacket, threw it into the dumpster, and ran away. Harris, believing the shooting might have been drug related, retrieved the jacket hoping that it contained narcotics, but she did not find any, only some papers inside the jacket. She took the jacket back to the YMCA.

Later, Harris was stopped on the street by Gilbert Burton, a New Haven police detective she knew, who asked her if she had any information about the shooting.[8] She retrieved the jacket for the detective. When showed a photographic array of suspects, she initially selected photographs of two persons who possibly had discarded the jacket—the petitioner's photograph and another one. She later told the police that she had been afraid to positively identify the petitioner because her boyfriend had told her not to get involved and that "Melvin was a killer." After she learned that the petitioner had been arrested and was incarcerated, she identified him as the person she had seen with the jacket.

After receiving the jacket from Harris, Burton gave the jacket to the detective working on the case. The jacket size was "large." The detective searched the jacket and found a receipt in one of the pockets. The receipt was for a car repair shop and was for mechanical work done on the victim's car two years before the shooting.

Officer Brenden Canning of the New Haven Police Department testified that he arrested the petitioner on

[8] There was some confusion about when Harris told Burton that she found the jacket. At some point, she told police that she had found the jacket three days before she gave it to Burton, which would have been before the murder. But Harris testified that, at the time, her drug use led her to lose track of days and time.

October 19, 1990, two days after the crime, pursuant to an outstanding warrant for breach of the peace. At the time of his arrest, the petitioner was wearing a camouflage jacket, size "regular/extra small," which was seized for evidence. The petitioner was later charged with the murder.

Besides eyewitnesses, the state also presented testimony concerning forensic examinations of the victim's body, the victim's car, and the jacket found by Harris.

Arkady Katsnelson, an associate medical examiner, conducted an autopsy of the victim's body. The victim had a gunshot wound to his abdomen, and the bullet punctured the abdominal aorta, likely causing death within seconds. He testified that the wound would have bled but would not have produced much blood spatter. The victim also had several lacerations on the left side of his head and face, which had bled, indicating the victim received those wounds before being shot. Katsnelson explained that the lacerations were consistent with being hit by the interior side of the passenger door. He further testified that the head wounds may have caused some blood spatter as they began to bleed and the victim continued to be hit, but he did not believe the spatter would be extensive. A separate toxicology test of the victim's blood revealed the presence of cocaine, indicating that the victim was under the influence at the time of his death. Katsnelson determined that the cause of death was homicide from the gunshot wound.

Officer Bennie Smith of the New Haven Police Department examined the inside of the victim's car. He noticed blood on the interior of the driver's side door and blood spatter on the window, driver's seat, and near the dashboard. He also identified nine fingerprints and three palm prints on the interior and exterior of the car, but none of them matched those of the peti-

tioner; two fingerprints matched those of the victim. Smith also used a vacuum to collect trace evidence from the car, including hairs. While searching the car, Smith found a small vile with white powder residue.

Kiti Settachatgum, a trace evidence analyst for the state forensic science laboratory, examined the hairs taken from the victim's car and compared them to samples taken from the petitioner. Of the hairs found in the car, two of them were identified as "negroid type" hairs. He determined they were not similar to sample hairs from the petitioner but testified that he had received a small number of sample hairs, which may not have provided a representative sample.

Robert O'Brien, a criminalist with the state forensic science laboratory, examined the jacket found by Harris and the jacket the petitioner wore at the time of his arrest. The jacket the petitioner was wearing when arrested was lost before the petitioner's first criminal trial, however, and, thus, was not entered into evidence. He tested stains on both jackets for the presence of blood, but each stain returned negative results. He also tested the cuffs of both jackets for gunshot residue, but the test results on both jackets again were negative. O'Brien clarified, however, that the lack of gunshot residue on either jacket did not establish that a person wearing one of them had not fired a weapon. In fact, O'Brien testified that, more often than not, he would not find residue on the garment sleeve cuffs even in cases in which it was nearly certain that a gun was fired by someone while wearing the garment. On cross-examination, O'Brien testified that he could not give an opinion, based on the evidence, whether the attacker was likely to have blood spatter on his clothing from slamming the victim's head with the car door. He also explained that the "negroid type" hairs found in the victim's car were not tested for DNA because they were not microscopically similar to the petitioner's hairs.

In his defense, the petitioner presented testimony from his own eyewitness. Pasquale DeMaio, a house painter, testified that he was on Howard Avenue the morning of the murder painting a front porch. At about 7:15 a.m., he was on the porch when he heard two people arguing in the victim's car, which was parked two houses away. He saw a black male and a white male inside the car, and they began to physically fight. DeMaio testified that he watched them struggle and then heard two gunshots. The black male got out of the vehicle, glanced at DeMaio, and then walked away through an alleyway between houses on Howard Avenue. DeMaio testified that the person he saw had braids and was wearing a camouflage jacket with a large image of the African continent on the back—a feature missing from the jacket found by Harris and the jacket the petitioner was wearing at the time of his arrest. He also testified that he got a good look at the shooter and that the person he saw was not the petitioner. DeMaio did not call the police to report the shooting but was able to see into the car after the shooting before others later appeared on the street and drew his attention to what had happened.

DeMaio acknowledged, however, that he was questioned by police on the day of the murder and that he told them he had not seen anything suspicious that morning. He told the police he had left the area to get coffee shortly after arriving there in the morning and that, shortly after he returned, someone on the street was calling his attention to the shooting. He testified that he was afraid to get involved at the time. DeMaio came forward with his account of what happened after he was contacted several times by phone and in person by two people trying to help the petitioner after he was convicted at his first trial. The two people told DeMaio that the petitioner had been wrongfully convicted, that the state's witnesses had been paid for their testimony,

and that there was no evidence to connect the petitioner to the murder. They got DeMaio to sign an affidavit stating that he had, in fact, seen the shooting but that the petitioner was not the shooter. Despite giving this affidavit, DeMaio nevertheless refused to meet with police investigators to look at photographs of possible suspects. The state also presented some evidence indicating that DeMaio would have had trouble seeing inside the victim's car from where he claimed to have been standing and that his view of the car may have been blocked entirely by a soffit on the porch where he was painting.

The petitioner also presented testimony from an expert witness, Louis Roh, a medical examiner from another jurisdiction, who testified concerning the victim's wounds and likely blood spatter. Roh testified that the victim's head injuries were most likely not caused by the car door hitting the victim's head but some other, more pointed object. Roh also testified that blood spatter from the blows to the victim's head would likely have spread in all directions, including onto the attacker. On cross-examination, however, Roh acknowledged that he did not examine the victim's body or the car door; he instead formed his opinions from reading documentation about the case and after viewing photographs of the victim and the crime scene two days earlier for about one-half hour during a break in the trial. The state also cross-examined Roh about his performance in other cases, in which his conclusions later changed or were discredited by the court, though Roh denied that he had done anything improper in those cases.

During closing arguments, the petitioner's second criminal trial counsel argued that the state had failed to meet its burden of proof because no forensic evidence linked the petitioner to the murder, despite his alleged presence at the crime scene. He reminded the jury that neither the petitioner's fingerprints nor any hairs from

the petitioner were found anywhere on or in the victim's car. The petitioner's trial counsel also asserted that the camouflage jacket in evidence had nothing to do with the crime and could not connect the petitioner to the murder, emphasizing that, even though the petitioner supposedly bludgeoned the victim with the car door, no blood was found on either of the jackets allegedly associated with the petitioner, and no gunshot residue was found on the jacket thrown into the dumpster. As for the receipt found in the jacket pocket, the petitioner's counsel accused police investigators of planting it in the jacket to help tie the jacket and the petitioner to the murder. Counsel also questioned whether Harris, a drug addict, had correctly identified the petitioner as the person she saw throw the jacket into the dumpster.

Reviewing the eyewitness testimony, the petitioner's counsel pointed to DeMaio as a more reliable witness, who testified that the petitioner was not the shooter and that the jacket DeMaio saw the shooter wearing did not match the jacket from the dumpster or the one worn by the petitioner when he was arrested. In response to the testimony from the state's eyewitnesses, the petitioner's counsel claimed they identified his client only because the petitioner also had braids and typically wore a camouflage jacket, and he also pointed to factors impacting their credibility.

The state argued that the several eyewitnesses who testified that the petitioner was with the victim at or around the victim's car near the time of the shooting collectively provided strong and consistent evidence of the petitioner's guilt. The state criticized DeMaio's contrary account of what had happened by reminding the jury that DeMaio had initially told police he saw nothing, indicating that he either lied to the police or was lying to the jury. Moreover, the state pointed out, DeMaio came forward only after associates of the petitioner repeatedly contacted him about the case, and

the state argued there was some doubt about whether he could have seen what he claimed. Relying on the receipt, the state argued that it provided a compelling connection between the petitioner and the victim. The state acknowledged the lack of physical evidence connecting the petitioner to the crime scene. Regarding the lack of gunshot residue or blood, however, the state pointed to testimony indicating that the absence of either on the jacket found in the dumpster did not establish a lack of the petitioner's involvement. The state also chided the petitioner's counsel for suggesting, without any evidence, that the police had planted the receipt in the jacket.

After deliberating, the jury found the petitioner guilty of murdering the victim, necessarily having rejected the petitioner's evidence.

B

Newly Discovered Evidence

We next review the new evidence presented by the petitioner and accepted by the trial court. At the hearing on the petition for a new trial, the petitioner presented testimony from two witnesses concerning the DNA testing.

Lucinda Lopes-Phelan, a forensic examiner with the state forensic science laboratory, testified that she was tasked in 2010 with examining the camouflage jacket discarded in the dumpster and taking samples from it to test for the presence of DNA. She tested primarily for "touch" DNA, which is usually found in skin cells that can be transferred to an object when a person's skin comes into contact with that object. To test for this, she used moist cotton swabs to swab what she termed as the "wearer" areas of the jacket: the interior of the jacket cuffs and the interior band of the collar where the skin of a person wearing the jacket is most

likely to regularly touch the jacket. She swabbed the entire interior of the cuffs and the collar band to collect any biological material from the jacket's surface and then sent the swabs for DNA testing, along with known DNA samples from the victim and the petitioner. Apart from the interior of the cuffs and collar, she did not test anywhere else on the jacket for DNA evidence because the request she received was only for the wearer locations.

Lopes-Phelan testified as to possible concerns and the limitations of the DNA testing on the jacket nearly twenty years after its recovery. First, she was concerned that DNA that might have previously been placed on the jacket could have degraded over time. She observed that the jacket arrived in a sealed plastic bag, which can promote the degradation of any DNA on objects in the bag. She explained that sealing an item locks in moisture, which can lead to the growth of bacteria and mold that can eat away organic material containing DNA, rendering it more difficult to detect during testing. Second, Lopes-Phelan was concerned about contamination—that DNA from others besides the person who discarded the jacket may have been placed on the jacket after it was found. She noted that just a light touch or speaking over the object can result in the transfer of DNA. She pointed out a number of evidence stickers on the bag containing the jacket, indicating it had been presented at a number of court proceedings, and possibly touched by law enforcement officers, attorneys, court personnel, and jurors. She therefore could not be sure how many people might have touched the jacket after it was discarded in the dumpster. Lopes-Phelan testified that other people touching the jacket could have contaminated the results by introducing their DNA in addition to the DNA of the person who had discarded it in the dumpster. She also testified that, in the 1990s, forensic science had not yet developed the ability to

test for touch DNA, so law enforcement and lab personnel were not as careful in handling evidence and did not always wear gloves. Third, she was concerned that prior forensic testing might have affected the presence of any DNA on the jacket at the time. She noted that O'Brien, who had tested the jacket for gunshot residue, had wiped the interior portion of the cuffs, and this process can both remove DNA and deposit new DNA on the object being tested. Lastly, Lopes-Phelan testified that some individuals are not "good skin cell shedders," meaning they will leave less DNA on an object they touch, and that wearing clothing under a jacket can inhibit or block the transfer of skin cells.

The petitioner called a second witness, Heather Degnan, a forensic examiner for the state forensic science laboratory, who tested the samples collected from the jacket for the presence of DNA. She began by describing the process used to conduct the testing. DNA material is first extracted from the cotton swabs. Then, any DNA material is "amplified," and the amplified DNA is processed through an instrument that identifies the DNA profile of the sample. In the present case, testing of the sample from the jacket cuffs and collar each identified a mixture of DNA from at least two individuals. Both the victim and the petitioner were excluded as having contributed to either mixture.[9]

Degnan shared Lopes-Phelan's concerns regarding the possibility of degradation of DNA previously transferred to the jacket and the possibility of contamination by DNA from others besides the person who discarded the jacket in the dumpster, which could have occurred well after the jacket was collected. She also reiterated that the DNA testing could not determine when any DNA was placed on the jacket and that the absence of

[9] Because of some concerns regarding the reagents used to test the DNA samples, the samples were later retested and produced the same results.

a DNA match does not prove that a person did not have contact with the tested parts of the jacket, only that their DNA was not detected on the jacket during testing.

Lastly, the petitioner entered into evidence a laboratory report explaining that the several hairs recovered from the victim's vehicle were tested for DNA against the petitioner's, and the DNA from the hairs did not match the petitioner's DNA.

C

Analysis

Upon conducting our own, independent review of the new evidence and second criminal trial evidence, we agree with the trial court and are not persuaded that, if the evidence were presented to a new jury, it would lead to a different result.

To help create the probability of a different result in the circumstances of the present case, the new DNA evidence needed to either (1) prove that the petitioner had never touched the jacket, or (2) show, to a meaningful degree, that it was less likely that he had ever touched the jacket. At the second criminal trial, the state relied heavily on eyewitnesses who testified that they saw the petitioner wearing a camouflage jacket while he was with or near the victim. Frankie Harris testified that, shortly after hearing gunshots, she saw the petitioner approach the dumpster, "tak[e] off" a camouflage jacket, and discard it in the dumpster. The jacket recovered from the dumpster contained a receipt linked to work done on the victim's car two years prior. This evidence created a link between the person who discarded the jacket and the victim. Evidence tending to show that the petitioner never wore the jacket would support his argument that he was not the person who Harris saw discarding the jacket and would bolster the petitioner's argument that a lack of any forensic evi-

dence linking him to the crime should create reasonable doubt about his guilt.

Nevertheless, the new evidence falls short. Although the negative DNA result with respect to the petitioner certainly preserves the possibility that he had never touched the jacket, it does not prove that the petitioner never touched the jacket, or even indicate that it is meaningfully less likely that he had ever touched it. In other words, the new evidence does not exclude the possibility, or even probability, that the petitioner had, at some time, touched the jacket. The new DNA testing took place nearly twenty years after the crime, during which time any DNA deposited by the petitioner could have degraded or have been removed. The jacket was brought to the state forensic science laboratory for retesting in a sealed plastic container, which may have promoted degradation. No evidence was presented about how long it had been stored in that manner. Additionally, the jacket cuffs had previously been swabbed in a search for gunshot residue, possibly wiping away any DNA that was there at the time. The test results also do not exclude the possibility that the petitioner touched other parts of the jacket that were not tested. Finally, the forensic examiners testified that the petitioner could have worn the jacket at some point but not transferred any of his DNA because of undergarments or because he might not be a "good shedder" of skin cells. Also, given these uncertainties, neither of the forensic examiners who conducted the retesting testified about whether the negative results indicated any greater likelihood that the petitioner had never touched the jacket. In short, all we know from the negative DNA results is that the petitioner's DNA was not detected on the jacket. In light of the passage of time and other factors, the new evidence does not shed light on the likelihood that the petitioner did or did not touch the jacket.

Similarly, the new evidence indicating the presence of DNA on the jacket from at least two other people besides the petitioner and the victim is of uncertain evidentiary value given that this DNA could have been deposited there by someone other than the person who discarded the jacket. The forensic examiners testified that DNA testing does not reveal *when* that DNA was placed on the jacket. After its recovery from the dumpster and before its testing nearly twenty years later, the jacket had been handled by Harris, who found it, as well as by police officers, forensic technicians, and possibly court personnel, attorneys, witnesses, and jurors. The testimony also established that even a light touch or speaking over an object can result in the transfer of DNA. According to the testimony, the police and forensic technicians might also have been less careful in the 1990s when handling the jacket given that the potential evidentiary value of touch DNA was not known at the time. For these reasons, the experts were unable to exclude the possibility that the DNA profiles detected were placed on the jacket after Harris retrieved it by someone other than the person who had discarded the jacket. This distinguishes the present case from others in which biological material tested for DNA is known to belong to the person who committed a crime, as in the case of blood or semen left at a crime scene by an attacker. In those cases, the evidence typically establishes that the only person who could have contributed to the DNA detected was the person who committed the crime. See, e.g., *State* v. *Hammond*, 221 Conn. 264, 280, 286, 288–89, 604 A.2d 793 (1992) (lack of DNA match between defendant and stains on victim's clothing was exculpatory when evidence indicated that stains were left at or near time of murder), overruled in part on other grounds by *State* v. *Ortiz*, 280 Conn. 686, 720 and n.19, 911 A.2d 1055 (2006). This is not the case here.

Neither is the lack of a DNA match between the petitioner and the hairs found in the victim's car of much consequence in light of the second criminal trial evidence. Witnesses at the second criminal trial testified as to a lack of similarity between the hairs found in the car and the sample hairs from the petitioner, and this lack of similarity was attributed either to the hairs not being from the shooter or to the small number of sample hairs taken from the petitioner. The new DNA testing would conclusively establish that the petitioner was not the source of the hairs, but this would add little value to the petitioner's case. There is no evidence that those hairs came from the shooter, or even when they were deposited in the car. The hairs could have come from anyone who had occupied the car up to the time they were found. There was evidence presented at the second criminal trial that the victim did not keep a clean car and that the car did not appear to have been vacuumed anytime recently.

Because the new evidence is of uncertain import, we are not persuaded that the petitioner carried his burden of showing that it would have changed the result of the second criminal trial. The state's case at trial relied on the cumulative strength of eyewitness testimony, and the state acknowledged the lack of a forensic link between the petitioner and the crime scene. The petitioner attacked the credibility of the state's eyewitnesses on a number of bases, including their past criminal or drug activity and inconsistencies in their testimony. But evidence from at least three witnesses placed the petitioner near or with the victim shortly before the murder. And a fourth witness testified to having seen the petitioner discard the jacket in the dumpster shortly after hearing gunshots. Three of these witnesses had previously seen the petitioner in the neighborhood before the murder and testified that they

had recognized him when they saw him near the time of the murder.

At the second criminal trial, the petitioner presented contrary eyewitness testimony from DeMaio that he was not the shooter, although the state elicited testimony from DeMaio calling his testimony into doubt, both because of how his testimony came to light and the possibility that his view of the crime scene might have been obstructed. Additionally, the petitioner's counsel argued that, if the petitioner had been involved, then he would likely have left fingerprints or hair in the car but did not. He also argued that if the jacket had been discarded by the petitioner after having been worn during the murder, there should have been gunshot residue and blood spatter on the jacket, but neither was found. And it is unclear why, if the shooter had been wearing the jacket found in the dumpster, the shooter took a receipt from the victim's car and placed in the jacket pocket before fleeing, only to discard the jacket soon after. The petitioner suggested, without any evidence, that the police planted the receipt.

For its part, however, the state did not rely on a forensic link between the petitioner and the crime scene and did not argue that the petitioner must have been wearing the jacket found in the dumpster at the time of the shooting. As suggested by the state in the present appeal, the jury could have found that the jacket might have come from inside the victim's car, and the shooter (who may already have been wearing a camouflage jacket) took it from the car, wore it briefly, but decided to discard it while fleeing. Indeed, the petitioner was arrested just two days after the murder wearing a different camouflage jacket of a different size.

In any event, despite the petitioner's eyewitness evidence and the lack of a forensic link between him and the crime scene, the jury found the petitioner guilty.

The jury was able to assess the credibility of the eyewitnesses firsthand and necessarily credited the state's evidence while rejecting the petitioner's eyewitness and concerns about a lack of forensic evidence implicating him. At best, the new evidence provides additional support for the petitioner's argument at the second criminal trial that no forensic evidence linked him to the crime. But given that the new evidence cannot establish that the petitioner never touched the jacket or entered the victim's car, or even show that it is meaningfully less likely that he did either, we are not persuaded that additional evidence demonstrating the absence of a forensic link between the petitioner and the crime scene would, more likely than not, have led to a different result.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER, EVELEIGH, McDONALD and ROBINSON, Js., concurred.

ESPINOSA, J., concurring in the judgment. The majority agrees with the claim of the petitioner, Melvin Jones, that, under the circumstances of this case, the trial court's decision denying his petition for a new trial is subject to de novo review. Applying this standard of review, the majority concludes that the trial court properly determined that the petitioner failed to establish that, if the new evidence were presented to a jury, it would probably lead to a finding that the defendant was not guilty. I disagree that the trial court's ruling is subject to de novo review. Instead, I would apply the same standard of review in the present case that this court has applied to rulings on petitions for a new trial for two centuries—whether the trial court abused its discretion. I agree with the majority, however, that, regardless of whether we apply the abuse of discretion

standard or de novo review, the petitioner cannot prevail on his claim. Accordingly, I concur in the judgment.

As this court observed in 1903, "[w]hen . . . a judgment has been rendered upon the verdict of a jury, and that verdict is based upon evidence sufficient to support it, and no error in law has intervened in the trial and no mistake in pleading has occurred, or other mistake or accident to prevent the party from having a fair trial upon the merits, and the proceedings in the cause have been regular and lawful from its commencement to its close, any legal inference of injustice is excluded. The policy of the law treats it as final for all purposes, and forbids the court which rendered it from entertaining any further proceedings. It is possible that a losing party by some mistake or misfortune, and without fault of his own, may have been unable to produce on the trial evidence now attainable, which, if produced and believed, would demonstrate the injustice of the judgment, and so a new trial may be granted for the discovery of new evidence of this character.

"*The application is addressed to the discretion of the court* . . . and must allege and set forth the evidence produced on the former trial, together with the newly-discovered evidence, in order that the court may see whether injustice has probably been done, and whether the newly-discovered evidence is likely to reverse the result. If the adverse party desires to controvert the accuracy of the statement of the former testimony, or of the new testimony set forth, or to produce other testimony to be considered with that alleged, he may do so, and for this purpose no pleadings are essential. . . . Or he may admit the accuracy of the statement of the testimony, both old and new, and for this purpose a demurrer is used. In either case, whether upon the testimony old and new—as found by the court after hearing witnesses—or upon such testimony as set forth in the application and admitted, *the court decides*

in the exercise of a sound discretion whether a new trial should be granted or denied. . . . This discretion is a legal one; it is controlled by the well-established rules defining the requisites essential to granting a new trial. It may be abused by refusing a new trial where all essential requisites exist and the injustice of the judgment is apparent, and error may be affirmed where the trial court has erroneously held it had no power to exercise discretion. . . . But within these limits the power is discretionary, and its exercise in the denial of a new trial on the ground of newly-discovered evidence cannot be reviewed upon proceedings in error. This principle is firmly settled by many decisions of this court, extending from its organization to the present time." (Citations omitted; emphasis added.) *Gannon* v. *State*, 75 Conn. 576, 577–79, 54 A. 199 (1903); see also *Shabazz* v. *State*, 259 Conn. 811, 821–22, 792 A.2d 797 (2002) ("it is solely within the discretion of the trial court to determine, upon examination of both the newly discovered evidence and that previously produced at trial, whether the petitioner has established substantial grounds for a new trial").

In the present case, the majority does not dispute the general validity of the principle that a trial court's ruling on a petition for a new trial pursuant to General Statutes § 52-270 is subject to review for an abuse of discretion. It concludes, however, that "our deference to the trial court appears to arise historically and primarily from two considerations: (1) the trial judge's superior opportunity to assess the strength of the original trial evidence; and (2) the trial court's role as the arbiter of credibility." Accordingly, the majority concludes that, when, as here, the judge who ruled on the petition for a new trial was not the judge who presided over the criminal trial and neither party contests the credibility of the new evidence, this court is in as good a position as the trial court to determine whether a

jury confronted with the new evidence would probably reach a different result, and, therefore, this court's review is de novo. Thus, the majority is persuaded by the petitioner's argument that there is no reason, under these circumstances, to treat petitions for a new trial based on newly discovered evidence differently from petitions for a writ of habeas corpus seeking a new trial on the ground that newly discovered evidence that the state failed to disclose before trial or that the defendant's attorney failed to discover could make a difference in the result. See, e.g., *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 309 n.63, 112 A.3d 1 (2015) ("Under *Brady* [v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] and *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], it must be determined whether the evidence at issue, when considered in the context of the original trial, is of sufficient import relative to that original trial evidence to undermine confidence in the verdict. As in all such cases, our review of that determination is de novo because we are as well situated as the habeas court to make that decision.").

I disagree. It is well settled that the substance, format and timing of a defendant's request for a new trial on the basis of newly discovered evidence can significantly affect the various legal standards that apply to the claim. For example, if a petitioner files a petition for a writ of habeas corpus claiming that he has discovered new evidence that casts doubt on his criminal conviction, but he makes no claim pursuant to *Brady* or *Strickland* that he did not receive a fair trial, the petitioner must prove by clear and convincing evidence that he "is actually innocent of the crime of which he stands convicted," and that "after considering all of that evidence and the inferences drawn therefrom . . . no reasonable fact finder would find the petitioner guilty." *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 791–92,

700 A.2d 1108 (1997). In contrast, if a habeas petitioner raises a claim under *Brady* or *Strickland*, he is required to prove only that that "the withheld evidence is of sufficient import or significance in relation to the original trial evidence that it reasonably might give rise to a reasonable doubt about the petitioner's guilt." *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 263. The reason for this much lower standard in cases involving *Brady* and *Strickland* claims is that the petitioner's right to a fair trial may have been violated. See *Summerville* v. *Warden*, 229 Conn. 397, 430–31, 641 A.2d 1356 (1994) (explaining why habeas petitioner who has not raised claim that his right to fair trial was violated has higher burden of proof).

The timing of the postconviction relief sought by a convicted defendant also matters. If a convicted defendant files a petition for a new trial on the basis of newly discovered evidence, he need not meet the extremely high level of proof required of a habeas petitioner raising a similar claim, but must prove only that the evidence would probably cause the jury to find him not guilty. See *Asherman* v. *State*, 202 Conn. 429, 434, 521 A.2d 578 (1987) (petitioner must demonstrate that newly discovered evidence "is likely to produce a different result in a new trial"). This lower standard applies to petitions for a new trial because the state's interest in finality increases as time passes. See *Summerville* v. *Warden*, supra, 229 Conn. 427 ("[F]or a petition for a new trial, within the three year limitations period, the petitioner's interests trump those of the public and the state. Beyond that period, however, the interests of the public and the state [in preserving the finality of judgments, in not degrading the properly prominent place given to the original trial as the forum for deciding the question of guilt or innocence within the limits of human fallibility, and in the fact that in many cases an order for a new trial may in reality reward the accused

with complete freedom from prosecution because of the debilitating effect of the passage of time on the state's evidence] trump those of the petitioner.").

It is clear to me, therefore, that, when considering what standard of review should apply to a petition for a new trial on the basis of newly discovered evidence, the primary factors that this court should consider are whether the defendant received a fair trial and the concomitant presumption of finality, *not* whether the trial court was in a better position to weigh the new evidence against the evidence that was presented at trial or to judge the credibility of the new evidence. This court has recognized for two centuries that, in light of these factors, the trial court has broader discretion to deny relief when a petitioner has filed a petition for a new trial on the basis of newly discovered evidence than it does when a petitioner has claimed that his constitutional right to a fair trial was violated. See *Gannon* v. *State*, supra, 75 Conn. 578 (since this court was created, trial court's ruling on petition for new trial has been subject to review for abuse of discretion because "[t]he policy of law treats . . . as final for all purposes" any conviction that has been obtained in proceedings that "have been regular and lawful from . . . commencement to . . . close," unless "the injustice of the judgment is *apparent*" [emphasis added]); see also *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 308 n.62 ("Of course, a defendant seeking a new trial on the basis of newly discovered evidence bears a significantly higher burden of establishing the materiality of the evidence at issue than a defendant raising a claim under *Brady* or *Strickland*. This is . . . because *Brady* and *Strickland* seek to vindicate the defendant's fair trial rights, whereas a new trial petition based on newly discovered evidence does not."); *Skakel* v. *State*, 295 Conn. 447, 522, 991 A.2d 414 (2010) ("[t]his strict standard [applicable to petitions for a new trial brought

pursuant to § 52-270] is meant to effectuate the underlying equitable principle that once a judgment is rendered it is to be considered final, and should not be disturbed by posttrial motions except for a compelling reason" [internal quotation marks omitted]), quoting *Asherman* v. *State*, supra, 202 Conn. 434.

In my view, the statement in *Gannon* that finality is presumed when a petitioner has received a fair trial is not inconsistent with the court's statement in *Summerville* that "the petitioner's interests trump those of the public and the state [in the finality of the conviction]." *Summerville* v. *Warden*, supra, 229 Conn. 427. As I have indicated, in *Summerville*, this court focused on the *timing* of petitions for a new trial on the ground of newly discovered evidence and petitions for a writ of habeas corpus raising the same claim to explain why a lower *standard of proof* applies to a petition for a new trial. It does not follow from the fact that a lower burden of proof applies to petitions for a new trial that the trial court has no more discretion to rule on a petition for a new trial that follows a fair trial than it does to rule on a habeas petition raising a claim that the petitioner's right to a fair trial was violated. I also recognize, of course, that a higher burden of proof is not the same thing as a more deferential standard of review. What *Lapointe*, *Skakel* and *Asherman* make clear, however, is that the fact that the defendant has received a fair trial is a critical factor in determining what legal standards apply to the defendant's postconviction claims. Accordingly, I would conclude that, as long as the trial court's ruling on a petition for a new trial on the basis of newly discovered evidence was reasonable, it should stand, even if the reviewing court might disagree with it. See *State* v. *Annulli*, 309 Conn. 482, 491, 71 A.3d 530 (2013) ("[u]nder the abuse of discretion standard, [an appellate court] makes every reasonable presumption in favor of upholding the trial

court's rulings, considering only whether the court reasonably could have concluded as it did"); *State* v. *Deleon*, 230 Conn. 351, 363, 645 A.2d 518 (1994) ("[t]he issue . . . is not whether we would reach the same conclusion in the exercise of our own judgment, but only whether the trial court acted reasonably").

The majority points out that the fact that "judges often disagree on the correct outcome under the governing legal standard . . . does not, itself, convert a question of law into an exercise of discretion." Conversely, however, this court's adoption of guidelines, like those set forth in the four part test in *Asherman* v. *State*, supra, 202 Conn. 434, for determining whether a petition for a new trial should be granted, does not convert a discretionary judgment into a question of law. There clearly are circumstances under which reasonable people might disagree as to whether certain undisputed evidence would be likely to produce a different result in a new trial under the fourth prong of that test. In my view, when that is the case, the trial court's judgment should prevail.

Under the majority's decision, however, a petitioner may prevail on appeal from the denial of a petition for a new trial on the basis of newly discovered evidence even though the petitioner received a fair trial and *even though the trial court's decision was reasonable*. Of course, it is *only* when reasonable minds might disagree as to the proper result that application of the de novo standard of review could make a difference in the outcome on appeal. If no reasonable person could disagree with the trial court's ruling on a petition for a new trial, it would survive under both the abuse of discretion and de novo standards of review, while, if no reasonable person could agree with the ruling, the ruling would be reversed under both standards. The majority's decision clearly undermines the state's strong interest in finality in cases in which the defendant received a fair trial

by encouraging the filing of appeals in cases where reasonable minds could disagree regarding the proper result. For these reasons, I disagree with the majority's determination that rulings on petitions for a new trial based on newly discovered evidence are subject to de novo review under the specific circumstances of the present case. Instead, I would conclude that such petitions are subject to review for an abuse of discretion.

I therefore respectfully concur in the judgment.

CONNECTICUT HOUSING FINANCE AUTHORITY *v.* ASDRUBAL ALFARO ET AL. (SC 19720)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Espinosa, Js.*

Syllabus

Pursuant to statute (§ 42-150bb), whenever any consumer contract or lease provides for an award of attorney's fees to a commercial party, "an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease."

The plaintiff sought to foreclose a mortgage on a parcel of real property owned by the defendant A, who pleaded certain special defenses challenging the plaintiff's standing. The plaintiff filed a motion for summary judgment, which A opposed on the same ground. Before a hearing on the merits of that motion, the plaintiff exercised its statutory (§ 52-80) right to withdraw the action as to all parties. Subsequently, A filed a motion for attorney's fees pursuant to § 42-150bb. The trial court denied A's motion, concluding that the plaintiff's withdrawal did not constitute a successful defense of the action. A appealed to the Appellate Court, which affirmed, concluding that, in the absence of evidence indicating that the plaintiff's withdrawal resulted from A's defense, A had failed to establish an entitlement to attorney's fees under § 42-150bb. Thereafter, A, on the granting of certification, appealed to this court. *Held* that the Appellate Court improperly upheld the trial court's denial of A's motion for attorney's fees, as, in certain circumstances, a plaintiff's withdrawal of an action pursuant to § 52-80 may constitute a successful

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

defense, thereby entitling the defendant to attorney's fees pursuant to § 42-150bb: this court concluded, on the basis of its review of the language within § 42-150bb, that statute's relationship with other statutes, the legislative history surrounding that statute's enactment, and case law from other jurisdictions, that § 42-150bb permits an award of attorney's fees to a consumer when a commercial party withdraws an action in response to a defense mounted by that consumer; moreover, this court concluded that, when a consumer moves for attorney's fees under § 42-150bb and is able to show that a commercial party has withdrawn the underlying action, the burden then shifts to the commercial party to demonstrate, by a preponderance of the evidence, that its withdrawal was unrelated to the defense mounted by the consumer, accordingly, the judgment of the Appellate Court was reversed and the case was remanded for the trial court to make factual findings regarding the plaintiff's reasons for withdrawing the action and to determine whether an award of attorney's fees is proper in light of the totality of the circumstances presented.

(*Two justices dissenting in one opinion*)

Argued September 14, 2017—officially released January 26, 2018**

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Bank of America, N.A., et al. were defaulted for failure to appear; thereafter, the plaintiff withdrew the complaint as to all defendants; subsequently, the court, *Tyma*, *J.*, denied the named defendant's motion for attorney's fees, and the named defendant appealed to the Appellate Court, *Gruendel*, *Lavine* and *Prescott*, *Js.*, which affirmed the judgment of the trial court, and the named defendant, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

James Mandilk and *Nathan Nash*, certified legal interns, with whom were *Jeffrey Gentes*, *Peter V. Lathouris*, and, on the brief, *Richard M. Breen*, and *Wesleigh Anderson*, *Rebecca Cao*, and *Vinita Singh*,

** January 26, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

certified legal interns, for the appellant (named defendant).

Michael G. Tansley, with whom, on the brief, was *Mary Barile Pierce*, for the appellee (plaintiff).

Cecil J. Thomas, *David A. Pels*, and *Giovanna Shay* filed a brief for the Connecticut Fair Housing Center et al. as amici curiae.

Opinion

EVELEIGH, J. In this certified appeal, we are tasked with determining whether, pursuant to General Statutes § 42-150bb,[1] a defendant may be awarded attorney's fees when the plaintiff withdraws an action as a matter of right pursuant to General Statutes § 52-80.[2] The plaintiff, the Connecticut Housing Finance Authority, had obtained a promissory note guaranteeing the payment of $216,500 by the named defendant, Asdrubal Alfaro.[3]

[1] General Statutes § 42-150bb provides in relevant part: "Whenever any contract or lease entered into on or after October 1, 1979, to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. . . . For the purposes of this section, 'commercial party' means the seller, creditor, lessor or assignee of any of them, and 'consumer' means the buyer, debtor, lessee or personal representative of any of them. The provisions of this section shall apply only to contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes."

[2] General Statutes § 52-80 provides in relevant part: "The plaintiff may withdraw any action . . . entered in the docket of any court, before the commencement of a hearing on the merits thereof. . . ."

[3] We note that the original summons and complaint also named Bank of America, N.A., and Rosibel Aguero as defendants. Bank of America, N.A., was defaulted for failure to appear and Rosibel Aguero was defaulted for failure to plead. Neither of those parties participated in the proceedings before the Appellate Court. See *Connecticut Housing Finance Authority* v. *Alfaro*, 163 Conn. App. 587, 589 n.1, 135 A.3d 1256 (2016). For the sake of simplicity, we refer to Alfaro as the defendant in this opinion.

After the defendant failed to make the required payments on the note, the plaintiff filed a foreclosure action. When the action had been pending for almost one year, the plaintiff withdrew its action as a matter of right under § 52-80 prior to any hearing on the merits. The defendant thereafter sought an award of attorney's fees pursuant to § 42-150bb. The trial court denied the defendant's motion for attorney's fees, and the Appellate Court affirmed the judgment of the trial court. See *Connecticut Housing Finance Authority* v. *Alfaro*, 163 Conn. App. 587, 589, 135 A.3d 1256 (2016). We conclude that, in certain circumstances, § 42-150bb permits an award of attorney's fees to a defendant when a plaintiff withdraws an action as of right prior to a hearing on the merits and, accordingly, reverse the judgment of the Appellate Court.

The following undisputed facts and procedural history are relevant to this appeal. On May 24, 2004, the defendant executed a mortgage, which was secured by a parcel of residential property located at 465 Greenwood Street in the city of Bridgeport, and a promissory note in the amount of $216,500, which was made payable to Guaranty Residential Lending, Inc. On June 27, 2012, the plaintiff commenced the present foreclosure action alleging, inter alia, that the mortgage had been assigned to it and that the defendant had failed to make payments on the note. The plaintiff further alleged that, pursuant to an acceleration clause, it had demanded full payment of the note's balance.[4]

The defendant filed an answer to the plaintiff's complaint, admitting only that he was in possession of the property. The defendant also asserted two special defenses, each contending that the plaintiff lacked standing to bring the action. The plaintiff filed a motion

[4] The note provides in relevant part: "If [b]orrower defaults by failing to pay in full any monthly payment, then [the lender] may . . . require immediate payment in full of the principal balance remaining due and all accrued interest."

for summary judgment, arguing that there was no genuine issue of material fact and that it was entitled to foreclose on the mortgage as a matter of law. The defendant objected to the plaintiff's motion for summary judgment, contending that there were several unresolved genuine issues of material fact, including whether the plaintiff owned the note and was entitled to enforce it.

Before the trial court ruled, however, the plaintiff withdrew its motion for summary judgment. Shortly thereafter, the plaintiff withdrew the present action as a matter of right pursuant to § 52-80. The plaintiff did not provide any reason for these withdrawals. The defendant subsequently filed a motion for an award of attorney's fees pursuant to § 42-150bb, claiming that he had "successfully defended" the present action as a result of the plaintiff's withdrawal of the underlying complaint. The plaintiff objected to the defendant's motion, asserting, among other things, that it had an absolute right to withdraw the action pursuant to § 52-80, and that such a withdrawal, prior to any hearing on the merits or the rendering of a judgment, does not constitute a successful defense.

The trial court denied the defendant's motion for an award of attorney's fees. The trial court agreed that the plaintiff's withdrawal of the action as a matter of right pursuant to § 52-80, prior to any hearing on the merits, did not mean that the defendant had "successfully defended" the action. According to the court, there were "a myriad of reasons that the plaintiff withdrew the action, including but not limited to the plaintiff deciding that it did not want to redeem the property."[5] The trial

[5] In objecting to the defendant's motion for attorney's fees, the plaintiff had also argued that, pursuant to federal law, the defendant's discharge in bankruptcy precluded the plaintiff from continuing to pursue its action. Nevertheless, the plaintiff did not introduce any evidence on this point, only an argument by counsel, and the trial court did not make a specific finding on this issue.

court reasoned further that, "[i]f the defendant's claim were accepted, lenders would be unreasonably exposed to claims for attorney's fees every time a lender withdrew a foreclosure action."

The defendant appealed from the trial court's judgment to the Appellate Court, which affirmed. *Connecticut Housing Finance Authority* v. *Alfaro*, supra, 163 Conn. App. 594. The Appellate Court reviewed the trial court's decision for clear error only, reasoning that the question of whether the defendant had "successfully defend[ed]" the action was a factual one to which deference should be afforded. Id., 592. The Appellate Court concluded that, because the plaintiff's withdrawal of the action could have been for any reason, and there was no evidence offered to prove that withdrawal resulted from the special defenses, the defendant had failed to meet his evidentiary burden of establishing an entitlement to attorney's fees. Id., 593–94. The Appellate Court did not engage in any statutory construction of § 42-150bb, although it observed that, "to successfully defend an action, a consumer party must prevail on the merits of [an] answer or special [defense]." (Internal quotation marks omitted.) Id., 593. Specifically, the Appellate Court declined to reach the question of whether a plaintiff's withdrawal of an action, as of right, in response to a special defense could ever constitute a successful defense as contemplated by § 42-150bb, because the defendant had not established the factual predicate for such a claim in the present case. Id., 591.[6] This appeal followed.[7]

[6] We note that the Appellate Court restricted its analysis to whether the defendant had "successfully defend[ed]" the present action within the meaning of § 42-150bb, and therefore assumed, without deciding, that all other requirements for an award of attorney's fees pursuant to that statute had been met. *Connecticut Housing Finance Authority* v. *Alfaro*, supra, 163 Conn. App. 592.

[7] We granted the defendant's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly determine that the trial court correctly denied the defendant's request for attorney's fees

The defendant argues that, given the language used in § 42-150bb and that provision's legislative history, he was not required to prevail on the merits of his special defense, or to defeat the underlying obligation, in order to show that he had successfully defended the present foreclosure action. According to the defendant, a plaintiff's withdrawal of its action, as of right, can qualify as a successful defense. Specifically, the defendant contends that the withdrawal of the present action followed, and was prompted by, his contesting of the plaintiff's standing. Moreover, the defendant claims the Appellate Court improperly required him to provide further evidence of the reason for the plaintiff's withdrawal of the action, because this information was uniquely in control of the plaintiff and provides an unworkable standard that is inconsistent with the statute's remedial purpose.[8] We agree that, in certain circumstances, a plaintiff's withdrawal of an action as of right under § 52-80 prior to a hearing on the merits may constitute a successful defense, entitling the defendant to attorney's fees pursuant to § 42-150bb. Consequently, we conclude that the Appellate Court improperly affirmed the judgment of the trial court on the ground that the defendant had failed to meet his burden of establishing his right to attorney's fees.

We begin with the standard of review. Because the defendant's claim requires us to construe the meaning and scope of the phrase "successfully . . . defends"

pursuant to . . . § 42-150bb?" *Connecticut Housing Finance Authority* v. *Alfaro*, 321 Conn. 925, 138 A.3d 286 (2016).

[8] In his appeal to this court, the defendant further contends that a defendant should be entitled to recover attorney's fees pursuant to § 42-150bb in any case in which a plaintiff withdraws its action as a matter of right, for whatever reason, without securing any material relief from the defendant. Because this new claim is broader than the one made before the trial court and the Appellate Court, we decline to address it.

in § 42-150bb, our review is de novo.[9] See *James* v. *Commissioner of Correction*, 327 Conn. 24, 29, 173 A.3d 662 (2017) (questions of statutory construction present issues of law subject to plenary review). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance

[9] The plaintiff contends that the clearly erroneous standard of review should apply because the determination of whether the defendant "successfully prevailed" is a factual one to which this court should defer. Additionally, the plaintiff claims that the defendant did not raise the issue of statutory construction before the trial court or the Appellate Court and, therefore, did not preserve it for appeal.

Contrary to the plaintiff's assertions, the issue of statutory construction is properly preserved. Although the defendant did not make a detailed statutory construction argument at the trial court, he cited § 42-150bb, along with cases applying that statute, as authority in his motion for attorney's fees. The plaintiff responded by distinguishing those cases, and other cases applying the statute, from the present case. The trial court, when denying the defendant's motion for attorney's fees, performed a similar analysis, concluding that an award of fees pursuant § 42-150bb would be proper only if there had been some type of hearing on the merits. Finally, on appeal to the Appellate Court, the defendant clearly raised a statutory construction claim although, as we have explained previously in this opinion, that court declined to address it. Although the Appellate Court's decision was based on a factual determination regarding whether the defendant had proven that the plaintiff had withdrawn the action in response to the defendant's defense, that decision does not negate the fact that the defendant has properly raised a question of statutory construction.

to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Citations omitted; internal quotation marks omitted.) *In re Elianah T.-T.*, 326 Conn. 614, 620–21, 165 A.3d 1236 (2017).

The term "successfully . . . defends" is not defined within § 42-150bb or elsewhere in the General Statutes.[10] It is well established that "[w]here a statute does not define a term it is appropriate to look to the common understanding expressed in the law and in dictionaries." *Caldor, Inc.* v. *Heffernan*, 183 Conn. 566, 570–71, 440 A.2d 767 (1981). The word "successful" is defined with substantial similarity in a number of dictionaries. The American Heritage College Dictionary (4th Ed. 2002) defines "successful" as "[h]aving a favorable outcome," and "[h]aving obtained something desired or intended . . . ." Similarly, Webster's Third New International Dictionary (2002) defines "successful" as "resulting or terminating in success," "gaining or having gained suc-

[10] The term "successfully defends" has been employed three other times by our legislature. See General Statutes § 17b-261q (d) (in context of action by nursing home facility to collect debt for unpaid care, "[c]ourt costs and reasonable attorneys' fees shall be awarded as a matter of law to a defendant who successfully defends an action or a counterclaim brought pursuant to this section"); General Statutes § 17b-261r (e) (in context of action by nursing home facility to recover applied income, "[c]ourt costs and reasonable attorneys' fees shall be awarded as a matter of law to a defendant who successfully defends an action or a counterclaim brought pursuant to this section"); General Statutes § 42-410 (d) (in context of action for late fees, "[i]f a consumer lease provides for recovery of attorney's fees by the holder, a lessee who successfully defends a collection action is entitled to reasonable attorney's fees from the holder").

cess," and "having the desired effect . . . ." The word "defend" is also defined with substantial similarity in a number of dictionaries. The American Heritage College Dictionary, supra, defines "defend" as "[t]o make or keep safe from danger, attack, or harm." Webster's New Third International Dictionary, supra, defines "defend" as "to deny or oppose the right of the plaintiff [in regard to] a suit or a wrong charged," "to oppose or resist [a] claim at law," and "to contest [a] suit." Black's Law Dictionary (4th Ed. 1968) similarly defines "defend" as follows: "To prohibit or forbid. To deny. To contest and endeavor to defeat a claim or demand made against one in a court of justice." Likewise, Black's Law Dictionary (10th Ed. 2014) defines "defend" as follows: "To do something to protect someone or something from attack. . . . To use arguments to protect someone or something from criticism or to prove that something is right. . . . To do something, to stop something from being taken away or to make it possible for something to continue." These definitions suggest that the legislature intended "successfully . . . defends" to include any resolution of the matter in which the party obtains the desired result of warding off an attack made by the action, regardless of whether there was a resolution on the merits.

We next examine § 42-150bb in relation to other statutes. First, we examine § 52-80, which allowed the plaintiff in the present case to withdraw the action prior to a hearing on the merits. The language codified in § 52-80 was in existence long before the legislature enacted § 42-150bb in 1979, yet the legislature did not seek to exclude actions that were withdrawn as a matter of right from the attorney's fees provisions in § 42-150bb. See General Statutes (1949 Rev.) § 7801; Public Acts 1979, No. 79-453. In construing statutes, we presume that the legislature has created "a harmonious and consistent body of law . . . ." (Internal quotation marks

omitted.) *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010). "We are entitled to presume that, in passing a statute, the legislature not only did so with knowledge of the existing statutes but also that it did not intend to enact a conflicting statute." *Perille* v. *Raybestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 541, 494 A.2d 555 (1985). With this principle in mind, the legislature's decision not to exclude matters that are withdrawn pursuant to § 52-80 from the provisions of § 42-150bb lends further support to interpreting § 42-150bb in a manner that allows for attorney's fees when an action is withdrawn, as of right, prior to a hearing on the merits.

Furthermore, General Statutes § 52-81 is also relevant to understanding how a defendant in a civil action that is withdrawn under § 52-80 is treated. Section 52-81 provides in relevant part: "Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor, but not otherwise. . . ." Therefore, § 52-81 entitles a defendant in an action voluntarily withdrawn by a plaintiff to recover costs in the same manner as a defendant in an action in which there has been a determination on the merits in the defendant's favor. See General Statutes § 52-257. Section 52-81 was in existence at the time the legislature adopted § 42-150bb in 1979. See General Statutes (1949 Rev.) § 7802; Public Acts 1979, No. 79-453. As a result, we presume that the legislature was aware of that provision. Accordingly, the presence of § 52-81 further supports the idea that the legislature intended for a defendant in an action that has been withdrawn to be treated similarly to when there has been a determination on the merits in the defendant's favor.

The plaintiff asserts, however that the term "successfully . . . defends" in § 42-150bb may be read interchangeably with "prevailing party." Indeed, the plaintiff cites to cases that have interpreted § 42-150bb in a manner requiring consumers to "prevail" in order to obtain attorney's fees. See *Wilkes* v. *Thomson*, 155 Conn. App. 278, 283, 109 A.3d 543 (2015); see also *Retained Reality, Inc.* v. *Spitzer*, 643 F. Supp. 2d 228, 239 n.6 (D. Conn. 2009). Relying on language from those cases, the plaintiff contends that a prevailing party includes only those defendants that have succeeded "on the merits of their answer or special defenses." *Wilkes* v. *Thomson*, supra, 283. In further support of its position, the plaintiff cites various definitions of the term "prevailing party." See Black's Law Dictionary (4th Ed. 1968) (defining "prevailing party" as "[t]hat one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention"); see also Black's Law Dictionary (10th Ed. 2014) (defining "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded"). Although not controlling, these prior interpretations of § 42-150bb, together with the definitions on which they are based, demonstrate that the plaintiff's proposed interpretation of § 42-150bb is plausible.

On the basis of our review of the plain language of § 42-150bb and other related statutes, we conclude that both parties' proffered interpretations are reasonable and that § 42-150bb is, therefore, ambiguous. Specifically, we deem plausible the defendant's reading of § 42-150bb, which reads the term "successfully . . . defends" in a manner permitting an award of attorney's fees following a withdrawal of an action before a hearing on the merits. We also find reasonable, however, the plaintiffs' understanding of § 42-150bb, which requires a party to demonstrate that it has prevailed on the

merits of an action in order to be awarded attorney's fees. Accordingly, pursuant to § 1-2z, we turn to extratextual sources.

The legislative history surrounding the enactment of 42-150bb was discussed by this court in *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 74, 689 A.2d 1097 (1997). "In 1979, [the legislature] enacted No. 79-453 of the 1979 Public Acts, entitled 'An Act Concerning Attorney's Fee Clauses in Consumer Contracts.' . . . [S]peaking on behalf of the original bill, Senator Alfred Santaniello, Jr., remarked: 'This bill makes attorney's fee clauses reciprocal. For example, a clause for the benefit of the creditor will automatically allow the attorney's fees to the prevailing debtor who successfully prosecutes or defends an action or counterclaim based upon the contract or lease.' 22 S. Proc., Pt. 8, 1979 Sess., p. 2542. . . .

"Representative [Richard D.] Tulisano expressly stated that the statute was now 'self-enforcing' in that contractual attorney's fee provisions would be reciprocal. He stated: '[T]he legislation before us today provides [for] the first time the ability for consumers in this state to obtain attorney's fees, of [a] reasonable amount, as a result of defending or prosecuting any action in which the commercial party has provided for attorney's fees for their own behalf. What this does is give some equity to the situation. At the present time, many form contracts include attorney's fees provisions for the commercial party, and even though . . . that party may be wrong and a consumer successfully defends an action against him, or her, they would not be entitled to receive attorney's fees in defending that action. This will put some equity in the situation to the same extent that any commercial party will receive.' [22 H.R. Proc., Pt. 22, 1979 Sess., pp. 7487–90].

"Furthermore, during . . . subsequent consideration of [an amendment proposed Representative Tuli-

sano], Senator Salvatore C. DePiano stated: '[That amendment] would, in effect, eliminate a provision of the bill which would have made it an unfair or deceptive trade practice for a commercial party to have included a clause in a contract or lease which provides for the recovery of attorney's fees by a consumer on terms less favorable than those for the commercial party. . . . This bill would require that in a specified situation attorney's fees be awarded to a consumer who successfully brings or defends an action based upon a contract or lease whenever such contract or lease provides for the attorney's fees of a commercial party . . . .' " *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 74–76.

As we explained in *Aaron Manor, Inc.* v. *Irving*, 307 Conn. 608, 617–18, 57 A.3d 342 (2013), "[t]his court has previously discussed the legislative history of § 42-150bb and recognized that it was designed to provide equitable results for a consumer who successfully defended an action under a commercial contract and the commercial party who was entitled to attorney's fees. . . . The purpose of § 42-150bb is to bring parity between a commercial party and a consumer who defends successfully an action on a contract prepared by the commercial party." (Citation omitted; internal quotation marks omitted.) It would be wholly incongruous with the design of § 42-150bb to allow a commercial party to avoid paying attorney's fees simply by withdrawing the action pursuant to § 52-80. Indeed, if we were to interpret "successfully . . . defends" in the manner the plaintiff proposes, a commercial party that becomes aware, either through the consumer's defense or through its own discovery, of problems in successfully prosecuting its action, could simply withdraw the action to avoid paying the attorney's fees that it has required the consumer to incur. We conclude that allowing for such a result when a consumer has been required to defend an action would be wholly inconsis-

tent with the recognized legislative purpose behind § 42-150bb. Instead, we conclude that, when a consumer moves for attorney's fees under § 42-150bb and is able to show that a commercial party has withdrawn an action, the burden then shifts to the commercial party to demonstrate that the withdrawal was unrelated to the defense mounted by the consumer.[11]

Furthermore, interpreting § 42-150bb in a manner that allows for attorney's fees in the event of a voluntary withdrawal pursuant to § 52-80 is consistent with the approach taken by other states. "In applying a statute providing for an award of costs to the 'prevailing party' or the 'successful party' to cases in which the plaintiff had voluntarily dismissed his action, the courts have generally held that the defendant in such a case is entitled to recover his costs as the 'prevailing party' . . . ." (Footnote omitted.) Annot., 66 A.L.R.3d 1087, § 2, p. 1090 (1975); see also id., § 3 (a), pp. 1091–95 (compiling cases in which plaintiff has voluntarily withdrawn action and attorney's fees have been awarded to defendant as "prevailing party"). For example, the Florida Supreme Court has explained that, "[i]n general, when a plaintiff voluntarily dismisses an action, the defendant

[11] The plaintiff asserts that allowing a defendant to recover attorney's fees when an action has been voluntarily withdrawn is contrary to the legislative intent of parity between the commercial entity and the consumer because the commercial entity is only entitled to attorney's fees in the event there is a determination on the merits in its favor. We disagree. First, as we have explained previously in this opinion, although § 42-150bb was intended to provide parity, the genesis of that provision was to protect consumers in light of the fact that form contracts typically provided for attorney's fees to commercial entities. See 22 H.R. Proc., supra, pp. 7487–90. Second, because the plaintiff has the ability to voluntarily withdraw the action, it is necessary to allow for attorney's fees, even without a determination on the merits, so as to protect the defendant if a plaintiff withdraws the action after learning that the action will be unsuccessful as a result of the defendant's actions. Third, allowing the plaintiff to avoid paying the defendant's attorney's fees in the event it can demonstrate that the withdrawal was unrelated to the defense mounted by the defendant furthers the legislative intent of parity.

is the prevailing party. . . . A determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the prevailing party." (Citation omitted.) *Thornber* v. *Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990). Likewise, the Florida District Court of Appeal has held that the fact that an action is voluntarily dismissed without prejudice does not affect whether the defendant is entitled to an award of attorney's fees under a statute that awards fees to a prevailing party. See *State ex rel. Marsh* v. *Doran*, 958 So. 2d 1082, 1082 (Fla. App. 2007) ("We hold that a defendant is entitled to recover attorney's fees under [the state statute awarding such] fees to the prevailing party, after the plaintiff takes a voluntary dismissal without prejudice. The refiling of the same suit after the voluntary dismissal does not alter the appellees' right to recover prevailing party attorney's fees incurred in defense of the first suit."); see also *Dean Vincent, Inc.* v. *Krishell Laboratories, Inc.*, 271 Or. 356, 358, 532 P.2d 237 (1975) ("The trial court denied attorney's fees because it did not believe [the] defendant qualified as the 'prevailing party.' However, [the] defendant was the prevailing party because a voluntary nonsuit terminates the case in a defendant's favor. Even though the termination was without prejudice and [the] plaintiff could file another case upon the same cause of action, these facts did not prevent [the] defendant from being the party in whose favor the judgment was rendered in that particular case.").

A review of the cases from other jurisdictions also demonstrates that, even if we were to conclude that the term "successfully . . . defends" in § 42-150bb is the functional equivalent of "prevailing party," as the plaintiff asserts, our resolution of this appeal need not change. Many of the jurisdictions that conclude a defendant is entitled to attorney's fees when an action is voluntarily withdrawn have statutes that provide for an

award of attorney's fees to a "prevailing party." See Fla. Stat. Ann. § 57.105 (5) (West 2016) (providing, in certain administrative proceedings, that "administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative"); Or. Rev. Stat. § 20.096 (1) (2015) ("[i]n any action or suit in which a claim is made based on a contract that specifically provides that [attorney's] fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the claim shall be entitled to reasonable [attorney's] fees in addition to costs and disbursements, without regard to whether the prevailing party is the party specified in the contract and without regard to whether the prevailing party is a party to the contract").

In the present case, the defendant properly moved for attorney's fees and made a proper assertion as to the success of his defense in causing the plaintiff to withdraw the action. Thereafter, the plaintiff did not provide any evidence that it had withdrawn the action for a reason unrelated to the defense mounted by the defendant. Indeed, although the plaintiff's counsel may have asserted that the defendant's bankruptcy in federal court prohibited the current action, it did not introduce any evidence on that issue, and the trial court did not make a specific factual finding on that issue. See footnote 5 of this opinion. Accordingly, we conclude that the trial court incorrectly denied the defendant's motion for attorney's fees. The Appellate Court affirmed the judgment of the trial court, concluding that the defendant did not meet his burden of demonstrating that the withdrawal of the action was as a result of his defense. Having now clarified that once the consumer asserts that the action was withdrawn pursuant to § 52-80 as a result of the consumer's actions, the burden then

shifts back to the commercial party to demonstrate that the withdrawal was not a result of the consumer's defense, we conclude that the Appellate Court incorrectly affirmed the judgment of the trial court and that the case must be remanded to the trial court for further proceedings consistent with this opinion.[12]

Once the defendant seeks attorney's fees on the ground that the action has been voluntarily withdrawn by the plaintiff as a result of the defendant's actions, the trial court must then make a factual determination, by a preponderance of the evidence, as to whether the withdrawal is a result of the defendant's defense. This court's decision in *Anderson* v. *Latimer Point Management Corp.*, 208 Conn. 256, 265–66, 545 A.2d 525 (1988), is instructive regarding what conduct is necessary to obtain attorney's fees pursuant to § 42-150bb. In *Anderson*, this court applied § 42-150bb to a lease agreement. Id., 265. Specifically, this court determined that the plaintiff in that case could not obtain attorney's fees following a judgment in his favor on certain counterclaims brought by a corporate defendant because that judgment was based on certain inadequacies in that

[12] Although the dissent acknowledges that the legislative history demonstrates that § 42-150bb was enacted to provide parity for consumers because commercial contracts typically already provided attorney's fees for commercial entities, the interpretation of § 42-150bb proposed by the dissent does not provide such parity. Instead, the dissent requires that there be a "material alteration of the legal relationship between the parties." Under the interpretation proposed by the dissent, a commercial entity could initiate an action requiring its consumer to incur significant attorney's fees, the consumer could then demonstrate that the action would ultimately be unsuccessful by filing a persuasive dispositive motion, and then the commercial entity could avoid attorney's fees by voluntarily withdrawing the action before the court has had a chance to rule. On the other hand, our interpretation provides for parity between commercial entities and consumers by allowing commercial entities to demonstrate that a withdrawal was not as a result of its consumer's defense. Furthermore, that determination by the trial court and the ability for a consumer to move for a judgment for costs under § 52-81 are arguably a "material alteration of the legal relationship between the parties."

defendant's bylaws, not the plaintiff's pursuit of the underlying complaint, which had alleged violations of the lease. Id., 265–66. In deciding that the plaintiff was not entitled to attorney's fees pursuant to § 42-150bb, this court examined the exact nature of the proceedings and what specifically caused the judgment to be rendered in the plaintiff's favor. Id.

We disagree with the plaintiff that permitting a defendant to recover attorney's fees in the present circumstances could lead to the "award of fees to those who raised meritless defenses or no defense at all, and that will result in wholly unreasonable and impractical results." The award of attorney's fees by the trial court is governed by this court's decision in *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 76–77. In that case, this court determined that the amount of the fees paid pursuant to § 42-150bb must be reasonable in relation to the amount of work performed by the defendant's counsel. Id. If the defendant's counsel performed any amount of work that resulted in the plaintiff's withdrawal of that action, then the defendant's counsel should be permitted to recover the costs of doing that work so long as it is reasonable—a determination to be made by the trial court. The plaintiff's concern that fees will be awarded for "meritless defenses or no defenses at all" is baseless, as the trial court has the discretion to disallow attorney's fees in cases in which defense counsel took little or no action that resulted in the plaintiff's voluntary withdrawal.[13]

[13] The dissent asserts that our interpretation of § 42-150bb "employs a rationale similar to the catalyst theory, which was discarded by the United States Supreme Court in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)." We disagree. Our interpretation of § 42-150bb is not based on the catalyst theory; it is based on unique statutory language in § 42-150bb, the legislative history underlying its enactment, and precedent from other jurisdictions. Furthermore, although a majority of the United States Supreme Court rejected the catalyst theory, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented. In that dissent, Justice Ginsburg explained as follows: "The [c]ourt today holds that a plaintiff

We conclude, therefore, that the trial court is permitted to make findings regarding the reasons for the plaintiff's withdrawal of an action. The findings need not be made after a full evidentiary hearing. Instead, once a defendant moves for an award of attorney's fees pursuant to § 42-150bb after a termination of proceedings that in some way favors the defendant, there exists a rebuttable presumption that the defendant is entitled to such fees unless the plaintiff can show, by a preponderance of the evidence, that the withdrawal occurred because of some reason other than the actions taken by the defendant's counsel. The plaintiff can show its reasons for withdrawing the action through affidavits, and it is for the trial court to determine whether an award of attorney's fees is proper in light of the totality of the circumstances. The trial court, after reviewing the affidavits, may wish to conduct a hearing to resolve any questions created; however, the trial court is not required to do so.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court for further proceedings consistent with this opinion.

In this opinion ROGERS, C. J., and PALMER, McDONALD and ROBINSON, Js., concurred.

whose suit prompts the precise relief she seeks does not 'prevail,' and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory. . . . The decision allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint. Concomitantly, the [c]ourt's constricted definition of 'prevailing party,' and consequent rejection of the 'catalyst theory,' impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general. . . . Nothing in history, precedent, or plain English warrants the anemic construction of the term 'prevailing party' the [c]ourt today imposes." *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health & Human Resources*, supra, 622–23.

ESPINOSA, J., with whom, D'AURIA, J., joins, dissenting. This certified appeal requires us to interpret the meaning of the phrase "successfully . . . defends an action," as used in General Statutes § 42-150bb,[1] where a commercial party plaintiff, here, the plaintiff, the Connecticut Housing Finance Authority, has withdrawn an action as a matter of right prior to any hearing on the merits pursuant to General Statutes § 52-80,[2] and a defendant-consumer, the defendant Asdrubal Alfaro, thereafter seeks attorney's fees. The majority concludes that, when a plaintiff withdraws its action as a matter of right, it creates "a rebuttable presumption" that the defendant has "successfully . . . defend[ed] an action" and, accordingly, is owed fees under § 42-150bb. I interpret the operative statutory language in § 42-150bb to require a defendant to win—or actually to prevail in—the action, as evidenced by a "[material] alter[ation] [of] the legal relationship between the parties . . . ." (Internal quotation marks omitted.) *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 304, 780 A.2d 916 (2001). A material alteration of the legal relationship between the parties does not occur when a plaintiff withdraws its action as a matter of right. Put another way, all that the defendant gains when the plaintiff withdraws its action as of right is a return to the status quo, which means that an action could be

[1] General Statutes § 42-150bb provides in relevant part: "Whenever any contract or lease . . . to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. . . ."

[2] General Statutes § 52-80 provides in relevant part: "The plaintiff may withdraw any action . . . returned to and entered in the docket of any court, before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action, or any other party thereto may withdraw any cross complaint or counterclaim filed therein by him, only by leave of court for cause shown."

brought against him again tomorrow. That is not winning. Thus, I disagree with the majority and, accordingly, respectfully dissent.

To begin, I agree with the facts and procedural background as set forth by the majority opinion and, thus, I need not repeat them in this dissent. I also agree with the majority that, in determining the meaning of the phrase "successfully . . . defends" in § 42-150bb, we apply plenary review in accordance with General Statutes § 1-2z.[3] See, e.g., *Mayer* v. *Historic District Commission*, 325 Conn. 765, 774, 160 A.3d 333 (2017).

I turn first to the statutory text, as § 1-2z requires. Section 42-150bb provides in relevant part that in an action on a consumer contract that provides for recovery of attorney's fees by the commercial party, "an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends" that action. Because "the statute does not define the phrase ['successfully . . . defends an action'], in accordance with General Statutes § 1-1 (a), we look to the common understanding expressed in dictionaries in order to afford the term its ordinary meaning." *In re Elianah T.-T.*, 326 Conn. 614, 622, 165 A.3d 1236 (2017).

I agree with the majority that the definitions of the component terms "successfully" and "defend" fail to provide a single unambiguous meaning to the phrase as used in § 42-150bb. My review of the definitions of the terms in § 42-150bb leads me to conclude, however, that "successfully defend" is the functional equivalent of "prevailing party." Specifically, the occurrence of the phrase "successfully . . . defends" in the definition of

[3] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

"[p]revailing party" in Black's Law Dictionary (5th Ed. 1979), a review of related statutes, and the contextual usage of "successfully . . . defends an action" in § 42-150bb provide further clarity.

The phrase "successfully defends" appears in Black's Law Dictionary, supra, as part of the definition of "[p]revailing party," which specifically provides in relevant part: "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. . . ." This definition of prevailing party hews very closely to the ordinary understanding that is created when one combines the definitions of the component words of the phrase "successfully . . . defends an action," and is functionally equivalent. See *Graham Court Owner's Corp.* v. *Taylor*, 24 N.Y.3d 742, 752, 28 N.E.3d 527, 5 N.Y.S.3d 348 (2015) (interpreting phrase "successful defense" in New York's landlord-tenant reciprocity statute, N.Y. Real Property Law § 234 [McKinney 2006], to mean "prevailing party, who has achieved 'the central relief sought' ").

Because "successfully defends" and "prevailing party" are functional equivalents, this court's interpretations of other fee statutes that utilize the term "prevailing party" in their text provide additional support to the proper meaning of "successfully . . . defends an action" in § 42-150bb. In the context of other fee statutes, this court has recognized that "[i]t is elementary that, whether fees and costs are a matter of right or discretion, they ordinarily are awarded to the party that prevails in the case and, until there is a prevailing party, they do not arise." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 24, 905 A.2d 55 (2006) (referring to General Statutes § 52-257, fees of parties in civil actions); see also *Frillici* v. *Westport*, 264 Conn. 266, 284, 823 A.2d 1172 (2003) (quoting to same effect in context of product liability

action under General Statutes § 52-240a). In other words, the prevailing party is the one who wins the lawsuit.

In construing the phrase "successfully defends," we also must consider the meaning of the accompanying phrase "successfully prosecutes," and such consideration lends further support to the functional equivalence of "successfully defends" and "prevailing party." The two verbs share a single modifier. Because this language is linked, one phrase cannot be defined accurately without reference to the other.

"Prosecute" is defined in Black's Law Dictionary, supra, as: "To follow up; to carry on an action or other judicial proceeding; to proceed against a person criminally. *To 'prosecute' an action is not merely to commence it, but includes following it to an ultimate conclusion.*" (Emphasis added.) This court also has interpreted the phrase "successfully prosecute" to require the party in question to prove the underlying claim in an action. See *Blake* v. *Levy*, 191 Conn. 257, 261, 464 A.2d 52 (1983) (holding that, in tortious interference case, "[f]or a plaintiff successfully to prosecute such an action it must prove that the defendant's conduct was in fact tortious" [internal quotation marks omitted]). Moreover, the term "successfully prosecutes" accompanies the term "successfully defends" in the definition of "[p]revailing party" in Black's Law Dictionary, supra, strongly supporting an understanding that "successfully prosecutes" and "successfully defends" are interrelated terms and, depending on the context, functional equivalents to "[p]revailing party." Following this relationship to its logical conclusion in the context of § 42-150bb, if a successful prosecution requires a party to prove the underlying claim in an action; see *Blake* v. *Levy*, supra, 261; then a successful defense may be interpreted similarly to require a party to *disprove* the underlying claim in an action.

Disproving a claim on its merits is not the same as winning a case by default because the opposing party has withdrawn as a matter of right. In the latter situation, the defendant's efforts have not caused the withdrawal, and no change to the parties' legal relationship has occurred. Rather, the withdrawal results from the plaintiff's voluntary choice and not from a successful defense. Accordingly, I reject the majority's contention that one may win an action by virtue of the opposing party's voluntary withdrawal.

The majority relies on General Statutes § 52-81 as support for its contention that costs are due to a defendant whenever a civil action is withdrawn. Although § 52-81 sets forth when costs are due following a withdrawal under § 52-80, its scope has not been interpreted by this court. Further, nothing in § 52-81 indicates that the defendant will be awarded costs when a determination in his favor is made on the merits. Moreover, costs are different from attorney's fees, and neither § 52-80 nor § 52-81 discusses attorney's fees. Thus, I am persuaded that the specific attorney's fees statutes discussed previously, § 52-257 for civil actions and § 52-240a for product liability, are relevant to interpreting the award of attorney's fees under § 42-150bb, but § 52-81 is not.

The majority contends that individual definitions of "successful" and "defend" support an understanding that "successfully . . . defends" means "any resolution of the matter in which the party obtains the desired result of warding off an attack made by the action, regardless of whether there was a resolution on the merits." I agree generally that the definitions of these individual terms may reasonably support a commonly understood meaning of "successfully . . . defends an action" as encompassing temporary relief from a legal action, unaccompanied by a resolution on the merits. I contend, however, as previously explained, that an

interpretation of the operative statutory phrase is incomplete without consideration of the related term "prevailing party," a review of related statutes and the linked phrase, "successfully prosecutes." Thus, although I ultimately determine that my view of the common understanding of "successfully . . . defends an action" is persuasive, I agree with the majority that the phrase "successfully . . . defends an action" is susceptible to more than one reasonable interpretation and, therefore, ambiguous when read in the context of a withdrawal as a matter of right prior to a hearing on the merits. This ambiguity requires us to consider extratextual evidence. See, e.g., *Mayer* v. *Historic District Commission*, supra, 325 Conn. 775 ("When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." [Internal quotation marks omitted.]). Unlike the majority, however, I conclude, after reviewing such evidence, that one who "successfully . . . defends an action," as contemplated by § 42-150bb, is functionally equivalent to a prevailing party. A prevailing party is one who wins a lawsuit, which is demonstrated by a material alteration of the parties' legal relationship. A successful defense, in my view, cannot occur when the plaintiff withdraws its action as a matter of right prior to a hearing on the merits.

I observe initially that the legal origin of the rebuttable presumption recognized by the majority, which is that attorney's fees are owed to a defendant once he has asserted that the plaintiff withdrew its action as a

matter of right pursuant to § 52-80 as a result of the defendant's actions, unless the plaintiff provides as alternative reason for the withdrawal, is far from clear. The text and legislative history of § 42-150bb do not provide support for the majority's interpretation, and it is otherwise unexplained. Despite citing to decisions in the courts of other states, the majority does not provide any case law that explicates this rebuttable presumption.

The majority's interpretation employs a rationale similar to the catalyst theory, which was discarded by the United States Supreme Court in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). The catalyst theory posits that attorney's fees are owed to a party who demonstrates that its actions catalyzed the "desired result" by bringing "about a voluntary change in the [opposing party's] conduct." Id., 601. In rejecting the catalyst theory, the court observed that it was not reconcilable with "the 'American [r]ule' that attorney's fees will not be awarded absent 'explicit statutory authority' . . . ." Id., 608. It is particularly instructive that in rejecting the catalyst theory, the court cited to the principle that "[o]nly when a party has prevailed on the merits of at least some of his claims . . . has there been a determination of the substantial rights of the parties . . . ." (Internal quotation marks omitted.) Id. The majority claims that its interpretation is necessary to ensure that a commercial party does not unilaterally withdraw in order to avoid paying attorney's fees where problems in successfully prosecuting an action have been revealed. I note that the United States Supreme Court, in construing the analogous term, "prevailing party," rejected a similar argument that "the 'catalyst theory' is necessary to prevent [parties] from unilaterally mooting an action before judgment in an effort to avoid an award of attor-

ney's fees" as "entirely speculative and unsupported by any empirical evidence . . . ." Id. Although federal precedent is not binding on this court, I find this analysis persuasive and applicable to the present case. See *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 759, 159 A.3d 666 (2017) ("Connecticut follows the American rule").

Moreover, this method of proving that one party catalyzed the result sets up a system of competing affidavits where the trial court must then make factual determinations on why, precisely, an action was withdrawn. To make these determinations where both parties offer plausible reasons for the withdrawal, the trial court may need to hold an evidentiary hearing to hear a witness or to obtain other evidence. This not only causes more litigation in a situation where a case would otherwise be concluded, but also may raise questions of fact and credibility determinations. For instance, when faced with a need to prove its withdrawal was not due to the defendant's actions, a plaintiff may contend that it realized it would require too much money or effort or time to pursue the case to a conclusion, because it knows the defendant will fight every step of the process. Making the necessary factual findings in this situation places a burden on the trial court that is detrimental to judicial economy and requires the parties, including consumers, to use more resources. See *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health & Human Resources*, supra, 532 U.S. 609 (observing that "[a] request for attorney's fees should not result in a second major litigation," and that the court has "accordingly avoided an interpretation of the fee-shifting statutes that would have spawn[ed] a second litigation of significant dimension" [citation omitted; internal quotation marks omitted]). Moreover, a policy permitting voluntary withdrawals is intended to avoid litigation.

In my review of extratextual evidence, I turn first to the legislative history of § 42-150bb. As discussed by the majority, the legislative history has been interpreted previously by this court. We explained that § 42-150bb "was designed to provide equitable results for a consumer who successfully defended an action under a commercial contract [providing that] the commercial party . . . was entitled to attorney's fees." *Aaron Manor, Inc.* v. *Irving*, 307 Conn. 608, 617–18, 57 A.3d 342 (2013); see also *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 74–76, 689 A.2d 1097 (1997) (discussing legislative history of § 42-150bb).

The majority claims that the legislative intent of assuring parity between commercial parties and consumers supports its interpretation of § 42-150bb as being pro-consumer. I disagree. The majority's rule could give rise to incentives that have a decidedly anti-consumer effect. For instance, the majority's rule may cause a plaintiff to continue pursuing a case in order to avoid liability for the defendant's attorney's fees even in situations in which the plaintiff might have determined on its own not to pursue the case. I also disagree with the majority's claim that its interpretation protects consumers because it prevents a commercial party plaintiff from withdrawing to avoid attorney's fees. This argument ignores an already existing deterrent. Under the existing rules, commercial party plaintiffs are already selective about the lawsuits they bring. Specifically, a plaintiff is disincentivized from bringing a lawsuit by the fact that, pursuant to § 42-150bb, if the case goes to judgment and the defendant prevails, the plaintiff would be liable for attorney's fees.

The majority also alleges that my interpretation of § 42-150bb is anti-consumer. I disagree. By enabling withdrawals as of right without additional burdens of proof, my interpretation supports the goal of ending litigation sooner. From a policy standpoint, this pro-

motes judicial economy, which benefits all parties, including consumers. The majority's interpretation runs counter to principles of judicial economy.

In interpreting the phrase "successfully . . . defends an action" in the present case, I observe that the word "defends" was added only after the suggestion of Attorney Raphael Podolsky, speaking on behalf of the Legal Services Legislative Office in support of Senate Bill No. 1559.[4] Attorney Podolsky explained that, as originally drafted, the bill said "that it makes [attorney's fees] reciprocal to the consumer who successfully prosecutes an action or a counterclaim. Most cases in which the consumer will be involved, the consumer will be the defendant. And, if the consumer prevails in defending a suit, he should also get the benefit of the reciprocal attorney's fees, so it ought to say who successfully prosecutes or defends an action or a counterclaim. You need that to have a true reciprocity under the bill." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3, 1979 Sess., p. 801. It is logical to infer that the subsequent incorporation of the phrase "successfully . . . defends an action" into the draft statute was intended to ensure that the "consumer [who] prevails in defending a suit" is the recipient of fees, as advocated by Podolsky. The concept of "prevailing" relating to the operative phrase was reinforced by Senator Alfred Santaniello, Jr., who similarly stated that fees would be owed "to the prevailing debtor who successfully prosecutes or defends an action . . . ." 22 S. Proc., Pt. 8, 1979 Sess., p. 2542.

[4] This court has previously recognized that "[a]lthough we generally restrict our review of a statute's legislative history to the discussions conducted on the floor of the House of Representatives or of the Senate, we will consider such committee hearing testimony of individuals addressing the proposed enactment when such testimony provides particular illumination for subsequent actions on proposed bills, such as in this instance." *Elections Review Committee of the Eighth Utilities District* v. *Freedom of Information Commission*, 219 Conn. 685, 695 n.10, 595 A.2d 313 (1991).

My interpretation of § 42-150bb also finds support in background principles concerning attorney's fees. Connecticut follows "[t]he general rule of law known as the American rule . . . . [Under this rule] attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Internal quotation marks omitted.) *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 72. One of the statutory exceptions to the American rule is § 42-150bb. See id., 73–76; see also *Traystman, Coric & Keramidas, P.C.* v. *Daigle*, 282 Conn. 418, 429, 922 A.2d 1056 (2007) ("Costs are the creature of statute . . . and unless the statute clearly provides for them courts cannot tax them. . . . Section 42-150bb clearly authorizes an award of attorney's fees to the consumer who successfully prosecutes or defends an action or a counterclaim on a consumer contract or lease." [Citation omitted; internal quotation marks omitted.]). This court has acknowledged that "[t]he purpose of § 42-150bb is to bring parity between a commercial party and a consumer who defends successfully an action on a contract prepared by the commercial party." (Internal quotation marks omitted.) *Aaron Manor, Inc.* v. *Irving*, supra, 307 Conn. 618.

As discussed previously in this dissenting opinion, this court has interpreted other fee statutes that award fees to the "prevailing party" in the case. See *Barry* v. *Quality Steel Products, Inc.*, supra, 280 Conn. 24. In *Frillici* v. *Westport*, supra, 264 Conn. 285, this court analyzed which party prevailed in the action. Specifically, where the trial court rendered judgment in the defendants' favor on all counts of the plaintiffs' amended complaint and was upheld on appeal, and the plaintiffs did not receive any of the relief they had sought, the defendants "prevailed." Id. In other words, the defendants won the lawsuit.

As examined previously, the definitions of terms in the phrase "successfully prosecutes or defends" closely comport with the definition of "prevailing party," making the terms functional equivalents. See *Retained Realty, Inc.* v. *Spitzer*, 643 F. Supp. 2d 228, 232, 239 (D. Conn. 2009) (analogizing, without analysis, party who " 'successfully prosecut[ed] or defend[ed]' " to "prevailing party"); *Wilkes* v. *Thomson*, 155 Conn. App. 278, 283, 109 A.3d 543 (2015) (determining that there was no successful defense by defendants when they "did not prevail on the merits of their answer or special defenses"). Even some of the cases cited by the defendant in purported support of his position contain language analogizing one who mounts a successful defense to a prevailing party. See, e.g., *Citimortgage, Inc.* v. *Speer*, Superior Court, judicial district of New London, Docket No. CV-09-6001411 (April 30, 2012) (53 Conn. L. Rptr. 888, 889) ("the defendant is the prevailing party in the defense of this action" under § 42-150bb). Therefore, I maintain that the proper interpretation of § 42-150bb requires construing one who "successfully prosecutes or defends" as functionally equivalent to a prevailing party. See *Wilkes* v. *Thomson*, supra, 283 (The Appellate Court applied § 42-150bb to conclude "that a party does not 'prevail' by filing a dispositive motion that is denied by the trial court, even if the court errs in denying the motion. [Instead] [w]ere the party successfully to appeal and to have judgment rendered in its favor on remand, it would be in a tenable position to claim attorney's fees." Likewise, a party does not prevail "by obtaining a dismissal of the action as moot" after "vacat[ing] the premises [and] voluntarily providing the only relief sought by the plaintiff." Rather, prevailing parties are recognized as those who "prevail on the merits of their answer or special defenses.").

This court has previously interpreted who is a "prevailing party" for attorney's fees purposes. Specifically,

this court has recognized the United States Supreme Court's determination, "in construing the [attorney's] fees provision of the Fair Housing Amendments Act; 42 U.S.C. § 3613 (c) (2); and the Americans with Disabilities Act; 42 U.S.C. § 12205; that the term prevailing party is a legal term of art . . . [referring to] one who has been awarded some relief by the court . . . . Other courts have held that, under various federal fee shifting statutes, the term prevailing party includes a plaintiff who has secured actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff . . . ." (Citations omitted; internal quotation marks omitted.) *Wallerstein* v. *Stew Leonard's Dairy*, supra, 258 Conn. 304. By extension, I believe that this same standard should apply when a defendant seeks fees for successfully defending an action pursuant to § 42-150bb, requiring a demonstration that the action's disposition provided "actual relief [to the defendant] on the merits of [the] claim [that] materially alter[ed] the legal relationship between the parties . . . ." Id.; see *Sole* v. *Wyner*, 551 U.S. 74, 82, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007) ("'[t]he touchstone of the prevailing party inquiry' . . . is 'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute' "); *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health & Human Resources*, supra, 532 U.S. 605 (precedent "counsel[s] against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties" [emphasis in original]).

I acknowledge that conflicting authority does exist, holding that a party may prevail when a withdrawal as a matter of right, also known as a voluntary dismissal without prejudice, has occurred. The majority relies on

an annotation in 66 A.L.R.3d 1087, 1089, § 2 (1975): "In applying a statute providing for an award of costs to the 'prevailing party' or the 'successful party' to cases in which the plaintiff had voluntarily dismissed his action, the courts have generally held that the defendant in such a case is entitled to recover his costs as the 'prevailing party' . . . ." However, the majority omits the remainder of the sentence, which provides: "although there is some authority holding that the defendant cannot be considered the 'prevailing party' in such a situation, since a voluntary dismissal of the plaintiff's action does not result in a final disposition of the case on its merits." Id. Moreover, the majority omits § 3 (b) of the annotation, which, in contrast to § 3 (a), compiles cases in which the plaintiff has voluntarily withdrawn an action and the defendant was not a "prevailing party." See id., § 3 (b), p. 1095.

Upon review, I contend that stronger and more persuasive authority supports my position that a prevailing party is one who effects a material alteration of the legal relationship between the parties. See 10 C. Wright et al., Federal Practice and Procedure § 2667 (3d Ed. 2017) ("[A] dismissal of the action, whether on the merits or not, generally means that [the] defendant is the prevailing party. . . . However, courts also have ruled that a dismissal without prejudice does not qualify the defendant as a prevailing party because [the] defendant remains potentially subject to liability." [Footnotes omitted.]); 20 Am. Jur. 2d 26–27, Costs § 19 (2015) ("[although as] a general rule, where a plaintiff voluntarily dismisses his or her action, [and] the defendant is entitled to recover costs [as a prevailing party] . . . it has been held that a dismissal without prejudice does not sufficiently conclude the matter such that a determination of the prevailing party, as a basis for a statutory attorney's fee award, can be stated with certainty; the potential for further litigation on the same issues with

possibly contrary outcomes precludes the identification of a prevailing party"); see also *Szabo Food Service, Inc.* v. *Canteen Corp.*, 823 F.2d 1073, 1076–77 (7th Cir. 1987) ("A dismissal without prejudice under Rule 41 [a] [1] [i] does not decide the case on the merits" because a "plaintiff may refile" and "[t]he defendant remains at risk. . . . Because the . . . dismissal is without prejudice . . . it is not the practical equivalent of a victory for [the] defendant on the merits."), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1101, 99 L. Ed. 2d 229 (1988); *RFR Industries, Inc.* v. *Century Steps, Inc.*, 477 F.3d 1348, 1353 (Fed. Cir. 2007) ("hold[ing] that a plaintiff's voluntary dismissal without prejudice . . . does not bestow 'prevailing party' status upon the defendant," and reasoning that it "does not constitute a change in the legal relationship of the parties because the plaintiff is free to refile its action"); *Mitchell-Tracey* v. *United General Title Ins. Co.*, 839 F. Supp. 2d 821, 826 (D. Md. 2012) ("when a defendant remains at risk of another suit on the same claim, he can hardly be considered to be in the same position as a defendant who no longer faces the claim due to a dismissal with prejudice" [internal quotation marks omitted]); *Burnette* v. *Perkins & Associates*, 343 Ark. 237, 242, 33 S.W.3d 145 (2000) ("[O]ne must prevail on the merits in order to be considered a prevailing party under Ark. Code Ann. § 16-22-308. A dismissal without prejudice does not sufficiently conclude the matter such that a determination of the prevailing party can be stated with certainty. The potential for further litigation on the same issues with possible contrary outcomes precludes the identification of a prevailing party for purposes of the statute." [Footnote omitted.]); *D.S.I.* v. *Natare Corp.*, 742 N.E.2d 15, 24 (Ind. App. 2000), ("prevailing party" is one who "successfully prosecutes its claim or asserts its defense" where form of judgment "resolved the dispute generally in the favor of the one requesting [attorney's] fees and altered the

litigants' legal relationship in a way favorable to the requesting party").[5]

The defendant asserts that a number of trial court decisions have "recogniz[ed] plaintiffs' unilateral withdrawal[s] as successful defenses . . . ." The plaintiff counters, however, that "none of the cases contain an in-depth examination of the precise statutory language at issue or analyze the established meaning of the term 'prevailing party.' " I agree with the plaintiff. In the absence of detailed analysis into the meaning of "successfully . . . defends," these cases provide no support for the defendant's position.

Although the trial court in *Bank of New York* v. *Bell*, 52 Conn. Supp. 32, 39–40, 23 A.3d 121 (2011), analyzed the meaning of "successfully . . . defends," the case is distinguishable from the present procedural situation. In *Bell*, the plaintiff sought to withdraw the action pursuant to § 52-80 after a "judgment had been entered against the defendant," which "constituted a hearing on issues of fact and, as a result," required the trial court to hold an additional hearing to determine

[5] Relatedly, I observe also that case law from other jurisdictions is inconsistent even as to whether prevailing party status is accorded following involuntary dismissals without prejudice, with some courts concluding that it is not. See, e.g., *Oscar* v. *Alaska Dept. of Education & Early Development*, 541 F.3d 978, 981 (9th Cir. 2008) (holding involuntary "dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing" and, therefore, prevailing status is not conferred). Case law is also mixed for voluntary dismissals with prejudice, as noted by the United States Court of Appeals for the Sixth Circuit. See *United States* v. *Alpha Medical, Inc.*, 102 Fed. Appx. 8, 9–10 (6th Cir. 2004); see also *McKnight* v. *12th & Division Properties, LLC*, 709 F. Supp. 2d 653, 656 (M.D. Tenn. 2010) (citing case law from various courts with opposing views as to whether defendant in action ended by voluntary dismissal with prejudice should be recognized as prevailing party). I note that I make no conclusions as to whether involuntary dismissals without prejudice or voluntary dismissals with prejudice constitute successful defenses under § 42-150bb because those questions are not before the court in the present case.

"whether there was cause for the withdrawal." Id., 33–34. By contrast, the plaintiff in the present case withdrew the action as a matter of right prior to any hearing on the facts or the merits. There is a difference between withdrawal as a matter of right and withdrawal for cause shown. Where the plaintiff's withdrawal is a matter of right, no justification or hearings are required to effectuate the plaintiff's voluntary and unilateral decision. Where the plaintiff's withdrawal is for cause shown, the plaintiff must justify its withdrawal to the court in a hearing. Whether attorney's fees may be obtained by a defendant in the latter situation is not before the court in the present case.

The defendant also claims that "[d]efendants succeed by maintaining the status quo" and need not defeat the underlying obligation to successfully defend an action pursuant to § 42-150bb. However, the cases cited in support of this allegation are distinguishable in that each case ended with a *court's* dismissal of the plaintiff's action, not the plaintiff's withdrawal of its action. See, e.g., *Centrix Management Co., LLC* v. *Valencia*, 145 Conn. App. 682, 689, 76 A.3d 694 (2013) (defendants obtained judgment dismissing plaintiff's action, which was affirmed on appeal, thereby successfully defending against it). Moreover, from a logical standpoint, it is misleading to assert that the defendant obtained the result he sought in the present case because in fact he did not; a legal action could still be brought against him again at any time.[6] Therefore, he has not succeeded in any real sense.

Although the Appellate Court and the trial courts have construed "successfully prosecutes" or "successfully

[6] The plaintiff, in fact, did bring a second action against the defendant and, thereafter, succeeded in obtaining summary judgment as to liability in its favor. *Connecticut Housing Finance Authority* v. *Alfaro*, Superior Court, judicial district of Fairfield, Docket No. CV-14-6045155-S (April 20, 2017) (64 Conn. L. Rptr. 324, 326).

defends" in the context of § 42-150bb, this court has not directly interpreted those isolated phrases. In *Anderson* v. *Latimer Point Management Corp.*, 208 Conn. 256, 265, 545 A.2d 525 (1988), however, this court considered the meaning of the broader phrase "successfully prosecutes or defends an action or a counterclaim based upon the contract or lease," in a case for attorney's fees under § 42-150bb involving a lease agreement. The plaintiff sought attorney's fees for a successful prosecution and successful defense, respectively, after the court entered orders in his favor as to his underlying claim and the defendants' counterclaim. Id., 265–66. As relevant to the present appeal, this court determined that the counterclaim had been resolved in favor of the plaintiff "on the basis of the inadequate bylaws [and the plaintiff's complaint] and not on considerations involving the sublease [on which the plaintiff had relied or] . . . the counterclaim." Id., 266. Accordingly, this court denied attorney's fees on the counterclaim because "the [trial] court's rendering of a judgment in favor of the plaintiff on the counterclaim does not, in reality, constitute a successful defense of a counterclaim under the lease." Id. The court's formulation in *Anderson* both interprets the impact of the truncated phrase "under the lease" and supports the general concept that a party must have actively contributed to the arguments which led to the result in order to collect attorney's fees pursuant to § 42-150bb. This general concept supports my contention in the present appeal that a withdrawal as of right "does not, in reality, constitute a successful defense" because the result, withdrawal, arises from the plaintiff's voluntary choice and is not forced by arguments of the opposing party. Although I agree with the majority that *Anderson* is instructive regarding the conduct necessary to obtain attorney's fees pursuant to § 42-150bb where the trial court has entered orders resolving a case, I distinguish it proce-

durally from the present appeal where the plaintiff acted unilaterally.

In sum, I would interpret "successfully . . . defends an action," as used in § 42-150bb, to require the defendant to actually prevail in the action, demonstrated via a material alteration to the legal relationship between the parties, which does not occur when the plaintiff has withdrawn the action as a matter of right prior to a hearing on the merits. I therefore would affirm the judgment of the Appellate Court.

Accordingly, I respectfully dissent.