SHARON CLEMENTS *v.* ARAMARK CORPORATION ET AL.
(SC 20167)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiff appealed from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner dismissing the plaintiff's claim for certain disability benefits.

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

While working for the defendant employer, the plaintiff, who had a history of cardiac disease, among other conditions, and who was standing on a level surface, became lightheaded, passed out, fell backward, and hit her head on the ground. The plaintiff was then taken to a hospital, where she suffered cardiac arrest and was treated for her cardiac episode and head trauma. In denying the plaintiff's claim for benefits, the commissioner determined that the plaintiff's head injury did not arise out of her employment but, rather, was caused by her cardiac condition, and, therefore, was not a compensable injury. After the board upheld the commissioner's decision, the plaintiff appealed to the Appellate Court, which reversed the board's decision and remanded the case with direction to sustain the plaintiff's appeal. In doing so, the Appellate Court relied on this court's decision in *Savage* v. *St. Aeden's Church* (122 Conn. 343), in which this court concluded that a head injury sustained by an employee at his or her workplace due to a fall caused by the employee's purely personal medical condition, i.e., an idiopathic fall, was per se compensable. On the granting of certification, the defendant employer and the defendant insurer appealed from the Appellate Court's judgment to this court. *Held* that this court overruled its decision in *Savage* to the extent that it held that an idiopathic fall on a level surface occurring during the course of employment is compensable as a matter of law, and, accordingly, this court reversed the Appellate Court's judgment with direction to affirm the board's decision upholding the commissioner's denial of the plaintiff's claim for benefits: because *Savage* was predicated on a misapplication of prior precedent and out of step with modern day, workers' compensation jurisprudence, this court instead followed the prevailing view, adopted by a majority of jurisdictions, that an employee's idiopathic fall at a workplace, occasioned by a personal medical infirmity wholly unrelated to the employment, does not arise out of that employment and is not compensable in the absence of some evidence that the workplace conditions contributed to the harm by increasing the risk of the resulting injuries; in the present case, the plaintiff acknowledged that her head injury was precipitated by a personal medical infirmity unrelated to her employment, and, because she did not challenge in the Appellate Court the board's determination that there was no evidence in the record on the basis of which the commissioner could have found that the hardness of the ground on which she fell increased the risk of injury from her fall, she abandoned any claim that her head injury was causally related to her employment and, therefore, compensable.

Argued October 25, 2019—officially released June 24, 2021**

** June 24, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Second District dismissing the plaintiff's claim for certain disability benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision; thereafter, the plaintiff appealed to the Appellate Court, *Keller*, *Prescott* and *Bright*, *Js.*, which reversed the board's decision and remanded the case to the board with direction to sustain the plaintiff's appeal, and the defendants, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Wesley W. Horton, with whom were *Brendon P. Levesque* and, on the brief, *Dominick C. Statile*, for the appellants (defendants).

Gary W. Huebner, for the appellee (plaintiff).

Robert F. Carter filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

PALMER, J. This certified appeal requires us to decide whether injuries that an employee sustains in the course of her employment also arise out of that employment, and therefore are compensable under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., when the injuries result from an idiopathic fall[1] from a standing position onto a level floor. The plaintiff, Sharon Clements, suffered a syncopal episode[2] at her place of employment, which caused her to lose consciousness, fall backward and strike her head

[1] In the present context, the term "idiopathic fall" refers to a fall that is brought about by a purely personal medical condition, such as a seizure or a heart attack, and not by any condition or risk of employment.

[2] "Syncope" is defined as the "[l]oss of consciousness and postural tone caused by diminished cerebral blood flow." Stedman's Medical Dictionary (28th Ed. 2006) p. 1887.

on the ground. The Workers' Compensation Commissioner for the Second District (commissioner) denied her application for benefits, concluding that the head injury she suffered due to the fall did not arise out of her employment because the fall was brought on by a personal medical infirmity unrelated to her employment. The Compensation Review Board (board) affirmed the commissioner's decision, and the plaintiff appealed to the Appellate Court, which reversed the decision of the board. The Appellate Court concluded that, under *Savage* v. *St. Aeden's Church*, 122 Conn. 343, 189 A. 599 (1937), injuries sustained by an employee as a result of an idiopathic fall onto a level surface are compensable as a matter of law, as long as the fall occurred in the course of the employment, as it did in the present case. See *Clements* v. *Aramark Corp.*, 182 Conn. App. 224, 231–37, 189 A.3d 644 (2018). We granted the petition for certification to appeal, filed by the named defendant, Aramark Corporation, the plaintiff's employer, and its insurer, the defendant Sedgwick CMS, Inc.,[3] to decide whether the plaintiff's injury is compensable notwithstanding the commissioner's finding that the injury did not arise out of the plaintiff's employment.[4] Although we acknowledge that, under our reasoning in *Savage*, the Appellate Court was required to reach the result that it did, we now overrule *Savage* insofar as it concluded that an employee is entitled to compensation as a matter of law when, during the course of his or her employment, the employee is injured due to an idiopathic fall onto a level floor. In light of that determination, we further conclude that the decision of the board in the present case affirming

[3] In the interest of simplicity, we refer to Aramark Corporation as the defendant.

[4] See *Clements* v. *Aramark Corp.*, 330 Conn. 904, 192 A.3d 425 (2018). As we explain more fully hereinafter; see footnote 8 of this opinion; we must revise the question as originally certified to more accurately reflect the issue presented by this appeal.

the decision of the commissioner must be affirmed. Accordingly, we are constrained to reverse the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following undisputed facts and procedural history. "The plaintiff, while employed by the defendant, served as a mess attendant at the Coast Guard Academy in New London (academy). Her duties included serving food and beverages, and cleaning up after meals. She typically worked during both breakfast and lunch. On the morning of September 19, 2012, the plaintiff drove to work, parked her vehicle at the academy at approximately 5:40 a.m., and exited her vehicle. She walked a short distance from her vehicle to a building. The path was short, not uphill or inclined in any way. The plaintiff did not trip. The plaintiff testified that, after entering the building and walking down a hallway, she 'went through the door to go out to get into the next building,' where she became lightheaded and passed out, falling backward 'on the [asphalt],'[5] and hitting her head on the ground. No one witnessed her fall. After she was discovered by coworkers, someone called for assistance. Members of the New London Fire Department arrived and found the plaintiff 'lying on the ground' with 'a bump on the back of her head,' 'unable to sign

[5] "In its brief [in the Appellate Court], the defendant concede[d] that '[t]he facts as stated by the [plaintiff] are undisputed with the exception of references made regarding the locus of the [plaintiff's] fall giving rise to the subject claim. The [plaintiff] has averred that her fall occurred on 'concrete' giving rise to the subject injury. No facts were found as to the actual nature of the surface [on] which the [plaintiff] fell. As such, no finding of fact in the record supports reference to the surface as concrete.' " *Clements* v. *Aramark Corp.*, supra, 182 Conn. App. 226 n.1. As we discuss in greater detail subsequently in this opinion, although the decision of the board refers to that surface as concrete, it was the plaintiff's position in the Appellate Court "that it did not make a difference to her claim whether the ground was concrete or some other material." Id. The plaintiff also makes no claim that the nature of the surface on which she fell has any bearing on the proper analysis and outcome of the present appeal.

[a] consent form because of her level of consciousness . . . .' The plaintiff was taken to Lawrence + Memorial Hospital (hospital). Hospital reports indicate that the plaintiff suffered from a syncopal episode and that she was diagnosed with ecchymosis and swelling.[6] A treating physician, Neer Zeevi, and hospital records, indicate that the plaintiff's syncope likely was cardiac or cardiogenic in etiology.

"While in the emergency room, the plaintiff suffered from cardiac arrest. During her stay in the hospital, the plaintiff had a pacemaker inserted. In a discharge summary report, John Nelson, a neurologist, opined: 'Apparently she had significant head trauma secondary to her fall. While in the emergency department, she again lost consciousness and was seen to have asystole[7] on monitoring. [Cardiopulmonary resuscitation (CPR)] was initiated and the patient had return of spontaneous rhythm and blood pressure shortly afterwards. Per the [emergency room] physician, CPR was reportedly begun within [twenty] seconds [of] onset of asystole and was . . . carried out [only] for approximately [ten] seconds before the patient experienced spontaneous return of rhythm.' . . .

"The plaintiff has a history of cardiac disease, hypertension, hyperlipidemia, hypothyroidism, and an irregular heartbeat. She also has a family history of coronary disease. Her discharge records set forth, inter alia, the following diagnosis: asystolic arrest, cardiogenic syncope with concussive head injury, and hypothyroidism. On the basis of these findings, the commissioner determined that 'the [plaintiff's] injury did not arise out of

[6] "Ecchymosis" is defined as "[a] purplish patch caused by extravasation of blood into the skin . . . ." Stedman's Medical Dictionary (28th Ed. 2006) p. 606.

[7] "Asystole" is defined as the "[a]bsence of contractions of the heart." Stedman's Medical Dictionary (28th Ed. 2006) p. 172.

her employment with the [defendant] but was caused by a cardiogenic syncope.'

"The plaintiff appealed from the commissioner's decision to the board. She claimed, in relevant part, that the commissioner had misapplied the law and [incorrectly] determined that her injury did not arise out of her employment. The board disagreed, concluding that '[t]here is no question that the [plaintiff] has been left with a significant disability as a result of the concussive injury [that] is the subject of this appeal. Nevertheless, the [plaintiff] provided the . . . commissioner with no evidence [that] would substantiate the claim that her employment contributed in any fashion to the fall [that] led to the injury or that the injury would not have occurred [if] the [plaintiff had] been somewhere else at the time.' Accordingly, the board affirmed the decision of the commissioner, ruling in favor of the defendant." (Footnotes altered.) Id., 225–28.

On appeal to the Appellate Court, the plaintiff claimed that the board incorrectly concluded that, because the plaintiff's fall was caused by her personal medical condition and not by any condition of her workplace, the injury she suffered from the fall did not arise out of her employment and, consequently, was not compensable. Id., 229. According to the plaintiff, her "injury arose out of her employment because it occurred on the premises of her employer when she hit her head on the ground before the start of her morning shift." Id., 231. In support of this contention, the plaintiff relied primarily on *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 346–50; see *Clements* v. *Aramark Corp.*, supra, 182 Conn. App. 231; in which this court concluded that the head injury sustained by the employee in that case due to his fall onto a level concrete floor at his workplace was compensable, even if the fall was caused by a preexisting medical condition, because the injury itself was caused by the employee's fall to the floor, which,

we explained, was a potential hazard of his employment. See *Savage* v. *St. Aeden's Church*, supra, 345, 347. The defendant maintained that *Savage* was distinguishable on its facts and that the injury the plaintiff sustained in the present case did not arise out of her employment because the ground on which she struck her head was a not a hazard or condition of that employment for purposes of the act. See *Clements* v. *Aramark Corp.*, supra, 231, 234. The Appellate Court agreed with the plaintiff that *Savage* controlled the outcome of the present case; see id., 231, 236–37; and, further, that she was entitled to compensation even though the condition of her employment that caused her injury was not " 'peculiar' " to her employment; id., 236 n.6; a term this court previously has used in explaining the requirement that the injury must *arise out of* the employment to be compensable under the act. See, e.g., *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 274 Conn. 219, 238, 875 A.2d 485 (2005) ("conditions that arise out of employment are peculiar to [it], and not such exposures as the ordinary person is subjected to" (internal quotation marks omitted)). Accordingly, the Appellate Court reversed the decision of the board and remanded the case to the board with direction to sustain the plaintiff's appeal from the commissioner's adverse decision. *Clements* v. *Aramark Corp.*, supra, 237.

We granted the defendant's petition for certification to decide whether, as the Appellate Court concluded, the plaintiff was entitled to compensation for the injury she suffered as a result of her fall, despite the finding of the commissioner that the injury did not arise of out of her employment. See *Clements* v. *Aramark Corp.*, 330 Conn. 904, 192 A.3d 425 (2018).[8] In support of its

[8] Our grant of certification was limited to the following issue: "Did the Appellate Court properly determine that the condition causing the plaintiff's injury did not need to be peculiar to her employment; *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, [supra, 274 Conn. 238], quoting *Larke* v. *John Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 310, 97 A. 320 (1916); in order for her injury to arise out of her employment for purposes of workers'

contention that the Appellate Court should have affirmed the decision of the board, the defendant renews its claim that the present case is distinguishable from *Savage* and, in addition, maintains that we should reconsider and reject our determination in *Savage* that an idiopathic fall to a level floor that occurs in the course of employment is compensable per se. Although *Savage* dictated the Appellate Court's conclusion that the plaintiff was entitled to compensation, we now disavow *Savage* insofar as we determined in that case that injuries resulting from such a fall arise out of the employment as a matter of law. As a consequence of our determination in that regard, we also conclude, in accordance with the decisions of the commissioner and the board, that the plaintiff's injury is not compensable.

The compensability issue raised by the present appeal is a relatively narrow one, but its resolution requires our consideration and application of a number of settled principles that are integral to the broader workers' compensation scheme. "[T]he purpose of the [workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . [Under the act, which]

compensation benefits?" (Internal quotation marks omitted.) *Clements* v. *Aramark Corp.*, supra, 330 Conn. 904. As we explain more fully hereinafter, it is apparent that, as the Appellate Court concluded, the plaintiff was not required to establish that the condition of her employment that caused her injury was different in kind or degree from that to which she otherwise may have been exposed outside of her employment. Our determination in that regard, however, does not resolve the more fundamental issue posed by the present case, that is, whether, in light of the idiopathic nature of the plaintiff's fall, a causal relationship existed between her injury and her employment sufficient to bring the plaintiff's claim within the purview of the act. Consequently, we must reformulate the certified question in this manner to conform to the issue actually presented to and decided by the Appellate Court. See, e.g., *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191, 884 A.2d 981 (2005) (this court may reframe certified question to more accurately reflect issue presented).

is to be broadly construed to effectuate [this] purpose . . . employers are barred from presenting certain defenses to the claim for compensation, the employee's burden of proof is relatively light, and recovery should be expeditious. In a word, these statutes compromise an employee's right to a [common-law] law tort action for [work related] injuries in return for relatively quick and certain compensation." (Internal quotation marks omitted.) *Feliciano* v. *State*, 336 Conn. 669, 682–83, 249 A.3d 340 (2020). The act therefore "manifests a legislative policy decision that a limitation on remedies under tort law is an appropriate trade-off for the benefits provided by workers' compensation." *Driscoll* v. *General Nutrition Corp.*, 252 Conn. 215, 220–21, 752 A.2d 1069 (2000). Because of the nature of the liability that the act imposes on employers, "to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment." *Spatafore* v. *Yale University*, 239 Conn. 408, 417, 684 A.2d 1155 (1996); see also *Fair* v. *People's Savings Bank*, 207 Conn. 535, 545, 542 A.2d 1118 (1988) ("[t]he essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative" (internal quotation marks omitted)). To establish such a connection, the plaintiff must prove that the injury (1) arose out of the employment, and (2) occurred in the course of the employment. E.g., *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, supra, 274 Conn. 227. This two part test derives from § 31-275, which provides in relevant part: "(1) 'Arising out of and in the course of his employment' means an accidental injury happening to an employee or an occupational disease of an employee originating while the employee has been engaged in the line of the employee's duty in the business or affairs of the employer . . . ."

"An injury is said to arise out of the employment when (a) it occurs in the course of the employment

and (b) is the result of a risk involved in the employment or incident to it or to the conditions under which it is required to be performed. . . . The . . . requirement [that the injury must arise out of the employment] relates to the origin and cause of the accident, [whereas] the . . . requirement [that the injury must occur in the course of employment] relates to the time, place and [circumstance] of the accident." (Citations omitted; internal quotation marks omitted.) *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, supra, 274 Conn. 228. "[W]hether a plaintiff's injuries resulted from an incident that occurred in the course of the employment [therefore presents] a separate and distinct question from whether [those] . . . injuries arose out of [the] employment." *Daubert* v. *Naugatuck*, 267 Conn. 583, 591, 840 A.2d 1152 (2004).

General Statutes § 31-275 (16) (A) provides that " '[p]ersonal injury' or 'injury' includes, in addition to accidental injury that may be definitely located as to the time when and the place where the accident occurred, an injury to an employee that is causally connected with the employee's employment and is the direct result of repetitive trauma or repetitive acts incident to such employment, and occupational disease." Thus, by its express terms, the act limits coverage to accidental injury, repetitive trauma injury or occupational disease that an employee sustains in the course of his or her employment. For purposes of the act, this court has characterized "accidental bodily injury" as "a localized abnormal condition of the living body directly and contemporaneously caused by accident; and an accident may be defined as an unlooked-for mishap or an untoward event or condition not expected. The concurrence of accident and injury is a condition precedent to the right to compensation." *Linnane* v. *Aetna Brewing Co.*, 91 Conn. 158, 162, 99 A. 507 (1916); see also *Vermont Mutual Ins. Co.* v. *Walukiewicz*, 290

Conn. 582, 594, 966 A.2d 672 (2009) ("[I]n construing the phrase 'accidental injury' . . . this court has defined 'accident' as '[a] . . . mishap or an untoward event or condition not expected.' . . . In short, the relevant inquiry in determining whether an accident has occurred is whether the injuries at issue were caused by . . . a sudden, unforeseen event." (Citation omitted.)).

Furthermore, it is "[a] 'fundamental principal of workers' compensation [law], present since the beginning . . . that the employer takes the employee in whatever physical condition, with whatever predispositions and susceptibilities the employee may bear prior to his injury.' R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008) § 1:6, p. 13." *Sullins* v. *United Parcel Service, Inc.*, 315 Conn. 543, 551, 108 A.3d 1110 (2015). Under this rule, sometimes referred to in tort cases—in which it also is applicable—as the eggshell plaintiff doctrine; see, e.g., *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 258 n.11, 117 A.3d 470 (2015); an employee who establishes a work related injury is entitled to compensation, even though a preexisting condition increased her susceptibility to incurring an injury or resulted in a more serious injury than otherwise would have been the case in the absence of the preexisting condition. See, e.g., *Richardson* v. *New Haven*, 114 Conn. 389, 391–92, 158 A. 886 (1932).

Because the defendant does not dispute that the plaintiff's injury occurred in the course of her employment, we confine our analysis to whether the injury—which, for purposes of this appeal, the plaintiff acknowledges was precipitated by a personal medical infirmity unrelated to her employment—also arose out of her employment. In other words, we must determine whether there is a sufficient causal connection between the plaintiff's injury and her employment so as to bring her claim within the purview of the act. See General

Statutes § 31-275 (1) (B) ("[a] personal injury shall not be deemed to arise out of the employment unless causally traceable to the employment").

"[A]lthough we often state that traditional concepts of proximate cause govern the analysis of causation in workers' compensation cases, our case law makes clear that, with respect to primary injuries, the concept of proximate cause is imbued with its own meaning. In such cases, [t]he employment may be considered as causal in the sense that it is a necessary condition out of which, necessarily or incidentally due to the employment, arise the facts creating liability, and that is the extent to which the employment must be necessarily connected in a causal sense with the injury. If we run over the cases in which compensation has been awarded, it will be found to be rarely true—although it may be true—that the employment itself was, in any hitherto recognized use of the words in law, either the cause or the proximate cause; and yet the decisions are right, because, to the rational mind, the injury did arise out of the employment. The real truth appears to be that . . . [t]he causative danger need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that as a rational consequence." (Internal quotation marks omitted.) *Sapko* v. *State*, 305 Conn. 360, 379–80 n.13, 44 A.3d 827 (2012).

Thus, "[a]n injury arises out of an employment when it . . . is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. . . . Sometimes the employment will be found to directly cause the injury [such as when an employee is injured while operating machinery], but more often it arises out of the conditions incident to the employment. But in every case there must be apparent some causal connection between the injury

and the employment, or the conditions under which it is required to be performed, before the injury can be found to arise out of the employment." (Internal quotation marks omitted.) *Mascika* v. *Connecticut Tool & Engineering Co.*, 109 Conn. 473, 476–77, 147 A. 11 (1929).

"[A]n injury [that] is a natural and necessary incident or consequence of the employment, though not foreseen or expected, arises out of it. . . . An injury of this description is one of the risks of the employment, for it is due to it and arises from it, either directly, or as incident to it, or to the conditions and exposure surrounding it." (Internal quotation marks omitted.) *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, supra, 274 Conn. 237–38. "Incidental" in this context "has been defined as something [that] happens as a chance or undesigned feature of something else; casual, hence not of prime concern; subordinate; collateral." *Stakonis* v. *United Advertising Corp.*, 110 Conn. 384, 390, 148 A. 334 (1930). "[An] activity is incidental to the employment [and therefore compensable] . . . [i]f the activity is regularly engaged in on the employer's premises within the period of the employment, with the employer's approval or acquiescence . . . ." *McNamara* v. *Hamden*, 176 Conn. 547, 556, 398 A.2d 1161 (1979). We have said, therefore, that, if an employee "slip[s] and [is] injured while walking from one place of work to another on his employer's premises in the course of his work, it [can] hardly be claimed that the injury did not arise out of the employment."[9] (Internal quotation marks omitted.) *Gonier* v. *Chase Cos.*, 97 Conn. 46, 51, 115 A. 677 (1921); see also *McNamara* v. *Hamden*, supra, 555–56 (concluding that injured work-

[9] We note, however, that the legislature has barred recovery under the act by an employee whose injuries were caused by that employee's own intoxication or "wilful and serious misconduct . . . ." General Statutes § 31-284 (a).

er's participation in ping pong game on employer's premises before start of workday was incidental to worker's employment on basis of finding by commissioner that employer sanctioned such games by regulating permitted playing times, allowing ping pong equipment on premises, and setting aside actual work hours for games).

In this respect, and in keeping with the remedial nature and humanitarian spirit of the act; see, e.g., *DiNuzzo* v. *Dan Perkins Chevrolet GEO, Inc.*, 294 Conn. 132, 150, 982 A.2d 157 (2009); our decisions reflect a relatively "[broad] conception of employment and of the nature of the risks arising out of it . . . ." *Mascika* v. *Connecticut Tool & Engineering Co.*, supra, 109 Conn. 479. Indeed, as this court previously has observed, "[a]n injury [that] occurs in the course of the employment will ordinarily [also] arise out of the employment . . . ." (Internal quotation marks omitted.) *Blakeslee* v. *Platt Bros. & Co.*, 279 Conn. 239, 244, 902 A.2d 620 (2006); see, e.g., *Puffin* v. *General Electric Co.*, 132 Conn. 279, 280, 282, 43 A.2d 746 (1945) (injuries sustained by factory worker whose sweater caught on fire during smoking break were compensable when commissioner found, inter alia, that cigarettes were sold to employees at factory and employer maintained break room "where smoking was permitted and ash trays provided"); *Mascika* v. *Connecticut Tool & Engineering Co.*, supra, 475, 481 (injury that employee suffered when he was struck by stick thrown by coworkers engaging in horseplay before start of workday arose out of employment because employer was aware that employees frequently engaged in such activity and failed to stop it). We also have made clear, however, that an injury that occurs in the course of the employment does not invariably or necessarily arise out of it; see, e.g., *Blakeslee* v. *Platt Bros. & Co.*, supra, 279 Conn. 244; because the latter requirement will be met only if

"[t]he rational mind [is] able to trace . . . [the] injury to a proximate cause set in motion by the employment and not by some other agency . . . ." (Internal quotation marks omitted.) *Fair* v. *People's Savings Bank*, supra, 207 Conn. 546; see, e.g., id., 537, 544–46 (death of bank employee who was fatally shot by her boyfriend inside bank did not arise out of her employment because dispute culminating in shooting was unrelated to her employment); *Porter* v. *New Haven*, 105 Conn. 394, 395, 397, 135 A. 293 (1926) (death of fireman who hit his head on fire station floor after being pushed in jocular manner by visitor to fire station did not arise out of fireman's employment because risk to which he was subjected was "not . . . incidental to his employment as a fireman [or] to the conditions under which he was required to perform his duties, and there was no causal connection between the injury and the employment").

Consistent with the liberality with which the act is to be construed, this court held more than one century ago, in *Saunders* v. *New England Collapsible Tube Co.*, 95 Conn. 40, 110 A. 538 (1920), that, when an employee is injured at a place where her duties required her to be, or where she might properly have been while performing those duties, there is a presumption, albeit a rebuttable one,[10] that the injury occurred during the course of her employment and arose out of it. Id., 43; see id. ("[t]here is a natural presumption that one charged with the performance of a duty, and found injured at the place where duty may have required him to be, is injured in the course

[10] "A rebuttable presumption is equivalent to prima facie proof of a fact and can be rebutted only by the opposing party's production of sufficient and persuasive contradictory evidence that disproves the fact that is the subject of the presumption. . . . A presumption requires that a particular fact be deemed true until such time as the proponent of the invalidity of the fact has, by the particular quantum of proof required by the case, shown by sufficient contradictory evidence, that the presumption has been rebutted." (Internal quotation marks omitted.) *Fish* v. *Fish*, 285 Conn. 24, 46 n.21, 939 A.2d 1040 (2008).

of and as a consequence of the employment"); see also *Keeler* v. *Sears, Roebuck Co.*, 121 Conn. 56, 59, 183 A. 20 (1936) (same); *Judd* v. *Metropolitan Life Ins. Co.*, 111 Conn. 532, 536, 150 A. 514 (1930) (same). "[T]he presumption is one resting on common experience and inherent probability [that] as such ceases to have force when countervailing evidence is produced, although the facts [that] gave rise to it remain in the case." *Labbe* v. *American Brass Co.*, 132 Conn. 606, 611–12, 46 A.2d 339 (1946); see id., 608, 612 (when employee was found dead inside of grease tank, employer rebutted presumption that employee's death arose out of employment with evidence that employee's duties did not require him to be anywhere near tank, and he was not otherwise discharging any employment related duties or furthering employer's business at time of his death).

Thus, in *Reeves* v. *John A. Dady Corp.*, 95 Conn. 627, 113 A. 162 (1921), we upheld the commissioner's denial of benefits to a widow whose husband fainted and fell to his death from a second floor doorway, explaining that, "[had there been] no direct evidence of the cause of his injury and death, it [nonetheless could] be inferred [in accordance with *Saunders* v. *New England Collapsible Tube Co.*, supra, 95 Conn. 40] that [the decedent] went there for some purpose connected with his employment." *Reeves* v. *John A. Dady Corp.*, supra, 629. We concluded, however, that the commissioner reasonably found that the inference had been rebutted by evidence indicating that the decedent had not proceeded to the doorway for any work related reason and that his idiopathic fall was not otherwise brought about by his employment.[11] Id.; see also, e.g., *Allen* v. *Northeast Utili-*

[11] As we discuss in greater detail subsequently in this opinion, an idiopathic fall like the fall at issue in *Reeves* is compensable if the conditions of employment expose the employee to an increased danger from the fall. Because *Reeves* involved a fall through an open, second floor doorway—a circumstance that obviously increased the likelihood of serious injury—the injuries resulting from that fall ordinarily would be compensable. See *Reeves* v. *John A. Dady Corp.*, supra, 95 Conn. 631. In that case, however, we

ties, 6 Conn. App. 498, 502–503, 506 A.2d 166 ("The import of [the rebuttable presumption recognized by] *Saunders* and its progeny leads to the conclusion that without evidence to the contrary, the fact that [an employee] is found deceased at his or her place of employment will support a finding that the injury arose out of and was a consequence of the employment. . . . The . . . burden [of the plaintiff, the decedent's widow] was to establish by competent evidence that the death for which compensation was sought arose out of and in the course of the employment. . . . Although she may have received the benefit of the presumption, the facts introduced by [the decedent's employer] provide[d] sufficient evidence from which the trier could reasonably conclude that the [employer] satisfied its burden of proving the contrary, and we will not override the commissioner in deciding that factual issue." (Citations omitted.)), cert. denied, 199 Conn. 810, 508 A.2d 771 (1986).

We are not alone in applying such a presumption in cases involving injuries from unexplained causes and, in particular, injuries from unexplained falls. In his comprehensive treatise on the law of workers' compensation, Professor Arthur Larson observes that most jurisdictions "confronted with the [unexplained fall] prob-lem have seen fit to award compensation"; 1 L. Larson & T. Robinson, Larson's Workers' Compensation Law (2019) § 7.04 [1] [a], p. 7-26; and some states, like Connecticut, do so "on the strength of a presumption, either judicial or statutory, that injury or death occurring in the course of employment also arises out of the employment in the

concluded that the employee's widow was not entitled to compensation because the evidence established that the employee had no legitimate work related reason to be standing in the second floor doorway when he fainted and fell. See id., 629, 632. For present purposes, we need not express a view as to the merits of that determination; rather, we cite *Reeves* merely as an example of the applicability of the rebuttable presumption that we recognized in *Saunders*.

absence of evidence to the contrary." Id., c. 7, p. 7-1. The rationale for awarding compensation to an employee who "falls while walking [on] the sidewalk or across a level factory floor for no discoverable reason" is that "[t]he particular injury would not have happened if the employee had not been engaged upon an employment errand at the time." Id., § 7.04 [1] [a], p. 7-25; see also id., § 7.04 [1] [a], pp. 7-25 through 7-26 ("[i]n a pure [unexplained fall] case, there is no way in which an award can be justified as a matter of causation theory except by a recognition that this [but for] reasoning satisfies the 'arising' requirement"). In other words, "[a]n injury [from an unexplained fall] arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed [the employee] in the position where [the employee] was injured." (Emphasis in original; internal quotation marks omitted.) *Circle K Store No. 1131* v. *Industrial Commission*, 165 Ariz. 91, 96, 796 P.2d 893 (1990). The employee "would not have been at the place of injury *but for* the duties of her employment." Id. As we previously noted, injuries sustained as a result of an unexplained fall are compensable in the majority of jurisdictions, primarily because of the remedial purpose of workers' compensation statutes.

Unlike an unexplained fall, "[a]n idiopathic fall is one that is brought on by a purely personal condition unrelated to the employment, such as heart attack or seizure. . . . Idiopathic [falls] are generally noncompensable absent evidence the workplace contributed to the severity of the injury. . . . The idiopathic fall doctrine is based on the notion that an idiopathic injury does not stem from an accident, but is brought on by a condition particular to the employee that could have manifested itself anywhere. . . . The adjective accidental qualifies and described the injuries contemplated by the statute as having the quality or condition of happening or coming

by chance or without design, taking place unexpectedly or unintentionally. If one becomes ill while at work from natural causes, the state or condition is not accidental since it is a natural result or consequence and might be termed normal and to be expected." (Citations omitted; internal quotation marks omitted.) *Barnes* v. *Charter 1 Realty*, 411 S.C. 391, 395–96, 768 S.E.2d 651 (2015).

Thus, "[w]hen an employee, solely because of a nonoccupational heart attack, epileptic fit, or fainting spell, falls and sustains a skull fracture or other injury, the question arises whether the skull fracture . . . is an injury arising out of the employment.

"The basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. . . .

"It should be stressed that the present question, although often discussed in the same breath with unexplained falls, is basically different, since [unexplained fall] cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin [that] is admittedly personal *and* [*that*] *therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin*." (Emphasis added; footnotes omitted.) 1 L. Larson & T. Robinson, supra, § 9.01 [1], pp. 9-2 through 9-3.

As this discussion suggests, the case law generally distinguishes between two types of idiopathic falls, namely, those that result in injuries unrelated to workplace conditions, and those in which workplace conditions contribute to the harm by increasing the risk of resultant injuries. See, e.g., *Stapleton* v. *Industrial Commission*, 282 Ill. App. 3d 12, 16, 668 N.E.2d 15 (1996) (if employment significantly contributed to injur-

ies from idiopathic fall by placing employee in position of greater risk from falling, injuries are compensable); *Maroulakos* v. *Walmart Associates, Inc.*, 300 Neb. 589, 596, 915 N.W.2d 432 (2018) (injuries from idiopathic fall are compensable if employment placed employee in position that increases dangerous effects of such fall); *Waller* v. *Mayfield*, 37 Ohio St. 3d 118, 123, 524 N.E.2d 458 (1988) (injuries from fall with idiopathic cause are compensable if employment significantly contributed to injury by placing employee in position that increases dangerous effects of fall).

The increased danger rule, also known as the increased risk rule, is widely accepted; see, e.g., *Maroulakos* v. *Walmart Associates, Inc.*, supra, 300 Neb. 596 ("[a] vast majority of courts nationally have adopted the [increased danger] rule"); and was applied by this court in *Gonier* v. *Chase Cos.*, supra, 97 Conn. 52–53, in which we upheld an award to a widow whose husband, Joseph Gonier, fell to his death from a scaffolding suspended "some eleven feet above the [ground] . . . ." Id., 48 (summary of facts before official opinion). Shortly before his fall, Gonier had gone to his employer's dispensary complaining of indigestion. Id. "[Upon] returning from the dispensary he worked awhile, and then, apparently again feeling uncomfortable, he sat down on the platform where he was painting, smoked a cigarette, stood up, or partly stood up, to resume work, and then fell backward to the [ground] below . . . ." Id., 49 (summary of facts before official opinion).

The issue before this court in *Gonier* was whether the commissioner properly had determined that "the death of Gonier resulting from a fall from the staging, caused by a temporary unconsciousness due to disease, constitute[d] an injury arising out of his employment . . . ." Id. (official opinion). In support of its contention that it did not, Gonier's employer argued that the proximate cause of the injury was the idiopathic condition

that brought about the fall and not the fall itself. See id., 49–50. Applying the increased danger rule, we ruled against the employer, concluding that Gonier's death arose out of his employment because "[his] employment brought him [on] this scaffolding, from which, if he fell, he was in danger of serious injury. The danger of falling and the liability of [the] resulting injury [were] risk[s] arising out of the conditions of his employment." Id., 54–55.

Professor Larson observes that, "[i]nevitably there arrive the cases in which the employee suffers an idiopathic fall while standing on a level surface, and in the course of the fall, hits no machinery, bookcases, or tables. At this point there is an obvious temptation to say that there is no way of distinguishing between a fall onto a table and a fall onto a floor, since in either case the hazard encountered in the fall was not conspicuously different from what it might have been at home. A distinct majority of jurisdictions, however, have resisted this temptation and have denied compensation in [level fall] cases. The reason is that the basic cause of the harm is personal, and that the employment does not significantly add to the risk." (Footnote omitted.) 1 L. Larson & T. Robinson, supra, § 9.01 [4] [a], pp. 9-7 through 9-8; see also, e.g., *Evans* v. *Hara's, Inc.*, 123 Idaho 473, 480, 849 P.2d 934 (1993) ("A fall onto a level surface precipitated by an alcohol withdrawal seizure is just as likely to happen at home, on the sidewalk, or in any other situs [that] a worker may frequent outside of the workplace. We therefore hold that an injury resulting from an idiopathic fall at the workplace does not arise out of employment and is not compensable under [the Idaho workers'] compensation system without evidence of some contribution from the workplace. In so holding, we are consistent with the majority of jurisdictions [that] have considered this question."); *Prince* v. *Industrial Commission*, 15 Ill. 2d 607, 611–12,

155 N.E.2d 552 (1959) ("concrete floors present no risk of hazard that is not encountered in many places, and . . . such risks and perils as they do present are only those [that] confront all members of the public"); *Cinmino's Case*, 251 Mass. 158, 159, 146 N.E. 245 (1925) (causal connection between work conditions and injury was too remote and speculative to warrant compensation when injury resulted from idiopathic fall to concrete floor); *Appeal of Kelly*, 167 N.H. 489, 495, 114 A.3d 316 (2015) ("[w]hen we reach consideration of the idiopathic fall to the level floor, not from a height, not [onto] or against an object, not caused or induced by the nature of the work or any condition of the floor, we are dealing with an injury [that] is in no real sense caused by any condition, risk or hazard of the employment" (internal quotation marks omitted)); *Dasaro* v. *Ford Motor Co.*, 280 App. Div. 266, 268, 113 N.Y.S.2d 413 ("[The injured employee] makes the point that the floor of the employer's premises is as useful and as special in the employer's enterprise as the radiator, the chair, the laundry table or the wagon wheel. But the ground below is a universal and normal boundary on one side of life. In any epileptic [or grand mal seizure] anywhere the ground or a floor would end the fall."), appeal denied, 280 App. Div. 902, 115 N.Y.S.2d 309 (1952); *Stanfield* v. *Industrial Commission*, 146 Ohio St. 583, 585–86, 67 N.E.2d 446 (1946) ("[T]he floor was in no sense an added risk or hazard incident to the employment. The decedent's head simply struck the common surface [on] which he was walking—an experience that could have occurred to him in any building or on the street irrespective of his employment. The fall resulted from the seizure alone and not from any circumstance of his employment."); *In re Compensation of Hamilton*, 256 Or. App. 256, 262, 302 P.3d 1184 ("[The employee's] work environment, which required standing on a hard kitchen floor, is unlike situations

[in which] the employer has placed the worker in settings that may greatly increase the danger of injury, such as by requiring her to stand on a ladder or an elevated platform or to stand next to a dangerous object that would have caused severe injury had she fallen on it. Instead, she fell on level ground onto the floor. There was nothing special about the floor or the height from which she fell that greatly increased the danger of injury."), review denied sub nom. *Hamilton* v. *SAIF Corp.*, 354 Or. 148, 311 P.3d 525 (2013); *Zuchowski* v. *United States Rubber Co.*, 102 R.I. 165, 173–74, 229 A.2d 61 (1967) ("The majority of cases deny compensation for level floor, idiopathic falls. . . . The fact that the floor [on which the] petitioner fell was cement does not . . . supply the necessary element of special risk [that] would make his injuries compensable. Floors of all nature and kind are a normal and customary part of one's life be one at home or work. We do not believe that the composition of the floor in and of itself should be the determining factor as to whether there is a special risk incident [to] one's employment." (Citation omitted; footnote omitted.)); *Bagwell* v. *Ernest Burwell, Inc.*, 227 S.C. 444, 454, 88 S.E.2d 611 (1955) ("To say that an injury arises out of the employment in every case [in which] an employee was required to be at the place where the injury occurred would effectively eliminate [the 'arising out of'] requirement of the statute. We are not prepared to accept the contention that, in the absence of special condition or circumstances, a level floor in a place of employment is a hazard. Cement floors or other hard floors are as common outside industry as within it. The floor in [this] case did not create a hazard [that] would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or a hard floor existed.").

Thus, under the majority view, if an employee is injured from a fall onto a level floor caused by a personal

medical infirmity unrelated to the employment, and the conditions of that employment did not increase the risk or severity of the injuries, so that the fall would have occurred in the same manner and with a similar result if it had occurred outside of the employment, the causal relationship between the employment and the injury is insufficient to support a finding that the latter arose out of the former. In other words, in such circumstances, although the floor is a but for cause of the employee's injuries, it is not a *proximate* cause of those injuries.

A few courts, however, have held that an idiopathic fall to a level floor is compensable. In one such case, *Employers Mutual Liability Ins. Co. of Wisconsin* v. *Industrial Accident Commission*, 41 Cal. 2d 676, 263 P.2d 4 (1953), the California Supreme Court explained its reasoning as follows: "[I]t is not a ground for annulling the award of compensation that the employee might have had a fall (resulting in bodily injury) caused by an idiopathic condition but occurring at home, on the street or elsewhere when he was tending to his private affairs. The fact remains that he injured himself at work, on his employer's premises, the injury being the striking of his head against the [concrete] floor, a condition incident to the employment. His condition may have been a contributory cause, but it was not the sole cause of his injury. It would not be doubted that if an employee fell to the ground or floor in the course of his employment, and as a result was injured, the injury would be compensable whether the cause of the fall was a slippery or defective floor, or was due to nothing more than his innate awkwardness or even carelessness. Certainly, resolving all doubts in favor of the [Industrial Accident] [C]ommission's finding that the injury arose out of the employment, compels an affirmance of the award [of compensation]." Id., 680; see also *Dependents of Chapman* v. *Hanson Scale Co.*, 495 So. 2d 1357, 1360 (Miss. 1986) ("Without contradic-

tion [the employee's] death was caused when his head struck the concrete floor of his employer's premises [as a result of an idiopathic fall]. We regard the floor as an appurtenance of the employer's premises the same as any other piece of equipment or fixture. We see no appreciable difference between a worker's collision with another piece of equipment, a table or a trash can, which would be compensable . . . on the one hand, and a collision with a concrete floor, on the other. Both are collisions by the worker with an appurtenance of the employment, both are encounters by the worker with an employment risk, both contribute to injury or death and, as a matter of law, both arise out of and in the course of employment." (Citation omitted.)); *George* v. *Great Eastern Food Products, Inc.*, 44 N.J. 44, 47, 207 A.2d 161 (1965) ("If the employee is caused to fall idiopathically and is located in the course of his employment at even a slight height at the fall's inception or is standing at floor level and on the way down falls into a pit or strikes a table, chair, desk, stove, machinery or some other object situate on the employment premises, the resulting injury is compensable. . . . Seemingly also, he would be compensated if, through sheer awkwardness, he tripped over his own feet and fell to the floor or, by reason of a congenitally weak back, fell on his head when leaning over to pick up a pencil. But not so [the defendant employer claims] . . . if he suffered a spontaneous attack of vertigo and struck nothing but the floor during his descent from a standing posture. The distinctions are neither consistent nor meaningful. Either no consequence of an idiopathic fall should bring compensability, or the nature of the result alone should be looked to as the determinant. We think the latter principle ought to govern . . . ." (Citations omitted.)).

This court employed an analysis similar to this minority view in *Savage* v. *St. Aeden's Church*, supra, 122

Conn. 343, in upholding an award of compensation for injuries resulting in the death of the employee in that case. Id., 346–50. We therefore must decide whether to adhere to that reasoning for purposes of the present case. As we explain hereinafter, although we remain confident that we reached the right result in *Savage*, we now conclude that we did so on the basis of reasoning that was not necessary to the proper outcome of the case. Moreover, the rationale underlying our decision in *Savage*, which was predicated on a misapplication of our prior precedent, is out of step with modern day workers' compensation jurisprudence relating to injuries stemming from idiopathic causes. In fact, until the Appellate Court was called on to apply *Savage* in the present case, to our knowledge, it had never been cited by any other court of this state for the proposition that injuries sustained as a result of an idiopathic fall are compensable, even if a condition of the employment did not increase the risk of injury from the fall. Insofar as there remains a question as to *Savage*'s continued vitality, our decision today should serve to dispel it.

The facts of *Savage*, as recounted in the opinion, are as follows: "Joseph Savage was in the employ of the defendant St. Aeden's Church, and on the morning of October 21, 1935, entered the rectory of the church shortly after 8 [a.m.]. He was not seen alive again. About [4:30 p.m.] . . . his body was found on the floor of the recreation room which was in the basement of the rectory. He was lying flat on his back, his overalls partly on, a painter's cap by his head, and on the [pool table nearby] his bag with the paint brushes he expected to use in his work at the rectory. He had apparently fallen backward on the concrete floor and fractured his skull. [The plaintiff, his widow, brought a workers' compensation claim on his behalf.] The commissioner found that the proximate cause of his death was the fracture of his skull [on] the concrete floor, and that the cause of

his fall was unknown, though he also found that [in] . . . 1934, [Savage] was suffering from a cystolic murmer at the apex of his heart. He further found that the fatal injury arose out of and in the course of the employment [and, accordingly, awarded compensation under the act. The Superior Court upheld the commissioner's award.]" Id., 344–45.

On appeal from the judgment of the Superior Court, the defendant "[sought] a correction of the finding that the cause of [Savage's] fall was unknown, to the effect that it was due to a fainting spell or a heart attack" because, "if the fall was due to causes outside of the employment [that is, the heart attack], the resulting [head] injury was not due to a hazard of the employment, and there [could] be no recovery." Id., 346. In her brief to this court, the plaintiff argued that the commissioner reasonably could have concluded that Savage "lost his balance putting on overalls" for no discernible reason and, therefore, that the presumption of compensability recognized in *Saunders* v. *New England Collapsible Tube Co.*, supra, 95 Conn. 40, should apply. *Savage* v. *St. Aeden's Church*, Conn. Supreme Court Records & Briefs, December Term, 1936, Pt. 2, Plaintiff's Brief p. 179 ("[i]t is submitted that a presumption arose in favor of the claimant after the presentation of her case, which became conclusive when [the defendant] rested without offering evidence [to rebut it]"). She further argued, however, in the alternative, that, under *Gonier* v. *Chase Cos.*, supra, 97 Conn. 46, "[w]hether the fall was caused by [a] progressive heart ailment, as claimed by the [defendant], or by [Savage's] losing his balance in putting on his overalls, is not material" because the commissioner found "that [Savage's] fatal injury [arose out of] a condition of [his] employment, viz., the hard concrete floor. The record in its entirety amply supports this finding. In short, the [present] case is the *Gonier* case, with the concrete

floor factor displacing the scaffold" in *Gonier*. (Internal quotation marks omitted.) *Savage* v. *St. Aeden's Church*, Conn. Supreme Court Records & Briefs, supra, p. 178.

This court agreed with the plaintiff's alternative contention that she was entitled to prevail under *Gonier* but not for the reason the plaintiff had advanced, that is, because the church's concrete floor increased the risk of injury from a fall just as the scaffolding had increased that risk in *Gonier*. Rather, our conclusion in *Savage* upholding the commissioner's decision was predicated on our characterization of *Gonier* as "holding that an injury received in the course of the employment does not cease to be one arising out of the employment merely because some infirmity due to disease has originally set in action the final and proximate cause of the injury. The employer of labor takes his [employee]
as he finds him and compensation does not depend [on] his freedom from liability to injury through a constitutional weakness or latent tendency. 'Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it.' *Hartz* v. *Hartford Faience Co.*, 90 Conn. 539, 543, 97 [A.] 1020 [1916]; [see also] *Richardson* v. *New Haven*, [supra, 114 Conn. 392]." *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 346–47. We then proceeded to explain: "[In this case], as in the *Gonier* case, the fall was the immediate cause of the injury; and the constitutional weakness of the employee, which was claimed by the [defendant] to be the cause of the fall, is not an element to be considered in determining whether the injury arose out of the employment." Id., 347. "It is not necessary that the place where the employee is working be in itself a dangerous one. It is enough if it turns out that there was a hazard from the fact that the accident happened.

The height from which the employee fell would not change the liability, though it might aggravate the extent of the injury. [Thus] [c]ompensation was awarded in the *Gonier* case, not because [Gonier's] employment brought him [on] a scaffold, a fall from which would expose him to serious injury, but because the possibility of a fall while engaged in his work was one of the hazards of his employment. The decision would have been the same had the fall been, as in the present case, simply to the floor [on] which the employee was standing."[12] Id., 349–50.

In *Gonier*, however, as we have explained, we concluded that Gonier's injuries were compensable because his employment required him to work on scaffolding eleven feet off the ground such that, if he were to fall for any reason at all, including an idiopathic one, he faced a significantly increased risk of injury. See *Gonier* v. *Chase Cos.*, supra, 97 Conn. 52–55. Indeed, we emphasized this very point in *Gonier*, quoting as follows from a factually similar case: "How does it come about in the present case that the accident arose out of the employment? *Because by the conditions of his employment the* [*employee*] *was bound to stand on the edge of . . . a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If that is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position.* Upon the authorities . . . the case is clear: an accident does not cease to be such because its remote cause was the idiopathic condition of the injured

[12] In support of our conclusion in *Savage*, we observed that, "[o]ur decisions make it clear that we have adopted a broader conception of employment, and the nature of the risks arising out of it, than is the case in some other jurisdictions, and an adherence to the spirit of those decisions requires a conclusion that the commissioner did not err in holding that [Savage's] injuries arose out of and in the course of his employment." *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 350.

[employee]; we must dissociate that idiopathic condition from the other facts *and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment*." (Emphasis added; internal quotation marks omitted.) Id., 52–53. In other words, we determined that a condition of Gonier's employment—namely, that he was required to stand on scaffolding eleven feet off the ground in order to accomplish the painting task assigned to him—increased the risk that he would be injured, and, for purposes of the act, that increased risk became the operative cause of his death, effectively superseding the idiopathic cause that originally had set in motion the chain of events culminating in his death and thereby rendering the fall compensable.[13] See id., 54–55.

In *Savage*, however, the commissioner *rejected* the employer's contention that Savage's fall was caused by an idiopathic condition, finding instead that the cause was unknown and, therefore, that the injuries were compensable because the employer had not rebutted the presumption, established by this court in *Saunders* v. *New England Collapsible Tube Co.*, supra, 95 Conn. 40, that Savage's injuries arose out of his employment. See *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 345. So long as the record fairly supported the commissioner's finding, which it clearly did, that finding was unas-

[13] In his dissenting opinion in *Savage*—which was a three to two decision—Justice Hinman, who was joined by Justice Brown, emphasized this very point, explaining that, in *Gonier*, the risk of injury posed by Gonier's employment was "the danger of falling from the scaffolding [on] which [his] employment brought him," and, further, that "the decision [in *Gonier*] would [not] have been the same had he been simply standing on the floor, as in [*Savage*]." *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 351 (*Hinman, J.*, dissenting). We think that Professor Larson's observation concerning Justice Hinman's dissent bears mention: "The court [in *Savage*] divided three to two, with a strong dissent expressing the view that such a doctrine destroys the [arising out of] test in this area." 1 L. Larson & T. Robinson, supra, § 9.01D [4] [a], p. D9-27.

sailable on appeal. See, e.g., *Sapko* v. *State*, supra, 305 Conn. 373 ("The question of [whether the employment proximately caused the injury] . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Internal quotation marks omitted.)); *Fair* v. *People's Savings Bank*, supra, 207 Conn. 539–40 ("If supported by evidence and not inconsistent with the law, the . . . [c]ommissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the . . . [c]ommissioner is factually questionable." (Internal quotation marks omitted.)). Rather than uphold the decision of the commissioner on that basis, however, this court, relying on certain language from our earlier decision in *Hartz* v. *Hartford Faience Co.*, supra, 90 Conn. 539, reasoned that it was immaterial whether the cause of Savage's fall was unknown—which, as the commissioner properly found, made his injuries compensable under *Saunders*—or the result of a heart attack, which, we concluded, also gave rise to a compensable injury. *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 346–47. As we explain hereinafter, we misapplied *Hartz* in *Savage* because, as we underscored in *Hartz*, injuries from whatever derivation do not arise out of the employment merely because they occur in the course of it; they arise out of the employment, rather, only if the circumstances or requirements attendant to the employment, acting on the condition of the employee, proximately cause the injuries. See *Hartz* v. *Hartford Faience Co.*, supra, 543.

In *Hartz*, the injured employee, Hartz,[14] a shipping clerk, attempted to lift a heavy barrel during the course of his employment and, while doing so, aggravated a preexisting hernial condition that resulted in his death. Id., 540; see id., 542–43. His widow sought compensation under the act, and, by way of defense to the claim, his employer argued that, because it was unaware that Hartz had a hernial condition when it hired him, "he was not, as [a] matter of law, entitled to compensation as a result of a strain from lifting, which aggravated his condition and led to his death." Id., 542. In rejecting the employer's contention, this court invoked the principle that an employer takes an employee as he finds him, stating in relevant part: "By the terms of [the] . . . [a]ct, compensation is not made to depend [on] the condition of health of the employee, or [on] his freedom from liability to injury through a constitutional weakness or latent tendency. It is awarded for a personal injury arising out of and in the course of his employment, and for an injury [that] is a hazard of that employment. As Chief Justice [Arthur Prentice] Rugg point[ed] out in [*In re Madden*], 222 Mass. 487, [494] 111 N.E. [379] [1916], [i]t is the hazard of the employment acting [on] the particular employee in his condition of health and not what that hazard would be if acting [on] a healthy employee or [on] the average employee. *Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment because it develops within it.*" (Emphasis added; internal quotation marks omitted.) *Hartz* v. *Hartford Faience Co.*, supra, 90 Conn. 543. It was this last sentence from *Hartz* that we quoted in *Savage* as support for the proposition that an injury resulting from an idiopathic fall is compensable, so long as the employment is the "immediate occa-

[14] Our decision in *Hartz* identifies the injured employee by his last name only.

sion of the injury . . . .'' (Internal quotation marks omitted.) *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 347. In *Savage*, however, the court omitted the next several sentences from this court's decision in *Hartz*, in which we made clear that the term ''occasion of the injury'' means the *cause* of the injury, not merely the time or place of the injury. See *Hartz* v. *Hartford Faience Co.*, supra, 347. Specifically, we explained as follows in *Hartz*: ''When the exertion of the employment acts [on] the weakened condition of the body of the employee, or [on] an employee predisposed to suffer injury, in such way that a personal injury results, the injury must be said to arise out of the employment. An employee may be suffering from heart disease, aneurism, hernia, as was . . . Hartz, or other ailment, *and the exertion of the employment may develop his condition in such a manner that it becomes a personal injury. The employee is then entitled to recover for all consequences attributable to the injury.*''[15] (Emphasis added.) Id., 543–44.

This court subsequently has had occasion to apply this principle with specific reference to our opinion in *Hartz*. For example, in *Triano* v. *United States Rubber Co.*, 144 Conn. 393, 132 A.2d 570 (1957), the record revealed that the plaintiff, Louis Triano, sustained a work related back injury in 1943 from which he never

[15] We note that, in *Savage*, we also cited *Richardson* v. *New Haven*, supra, 114 Conn. 392, along with *Hartz*, to support our assertion that an injury resulting from an idiopathic cause that occurs in the course of the employment is deemed to arise out of the employment, no less than an injury brought about by any other cause, even though the conditions of the employment did not increase the risk of injury. See *Savage* v. *St. Aeden's Church*, supra, 122 Conn. 347. *Richardson*, however, stands for no such proposition. Rather, like *Hartz*, *Richardson* merely holds that an employee with a preexisting condition that makes him more prone to injury, or more susceptible to serious injury, is no less entitled to compensation for an injury that occurred in the course of the employment and arose out of it than is an employee without such a preexisting condition. See *Richardson* v. *New Haven*, supra, 391–92.

fully recovered. Id., 395. Although he suffered back pain from time to time during the next ten years as a result of that injury, he never sought compensation on the basis of those episodes. Id. On June 10, 1953, however, while at work, Triano developed more severe back and leg pain, and, by the next day, his discomfort was so great that he was unable to work. Id. Approximately one week later, Triano had surgery for a herniated disc; id., 395–96; and he subsequently sought compensation under the act, claiming, in reliance on his surgeon's opinion concerning the cause of the herniation, that, while working on June 10, 1953, Triano "was cutting [certain] material [that] required squeezing down hard on a knife" and that "the pressure so exerted probably caused the disc to herniate, thereby producing the injury" that required surgery. Id., 396. The commissioner, however, was not persuaded by the surgeon's testimony regarding the cause of the injury, apparently because the surgeon had conceded that the herniation could have been brought about by a sneeze, cough or some other movement not itself caused by the employment. Id., 398–99. After the commissioner denied the employee's claim for compensation, the trial court rendered judgment affirming the commissioner's decision; see id., 399; and we affirmed the trial court's judgment. See id.

In doing so, we explained, first, that Triano "correctly claim[ed] that an injury may arise out of an employment although the risk of injury from that employment is no different in degree or kind [from that] to which [the employee] may be exposed outside of his employment." (Internal quotation marks omitted.) Id., 397. Thus, we agreed with Triano that he was entitled to compensation if he could establish that he had herniated his disc while cutting material at work, even if he would have suffered the same injury while engaged in the same or similar activity outside of work. See id. We then stated that

Triano was "also correct in claiming that the antecedent physical condition of an employee is immaterial in that there is no norm or minimum standard of physical stamina or freedom from disease [that] he must meet." Id., 397–98. Citing *Hartz* v. *Hartford Faience Co.*, supra, 90 Conn. 543, we also reiterated that a work related injury is no less compensable merely because the employee's preexisting condition made him more susceptible to such an injury or because the injury caused an aggravation of that condition. *Triano* v. *United States Rubber Co.*, supra, 144 Conn. 398. However, as we further explained: "[Triano] gains nothing from this rule, since it does not appear that the commissioner denied compensation under any theory that if the employment caused an aggravation or lighting up of an antecedent back weakness there would be no compensable injury. The commissioner merely failed to find that the employment had anything to do with the injury." Id. In other words—and contrary to our reasoning in *Savage*—an *otherwise compensable injury*, that is, one that is causally related to the employment, is no less compensable merely because the employee had a preexisting condition that increased the risk or likelihood of injury or made him more susceptible to serious injury. Clearly, the foregoing discussion in *Triano* represents a proper explication of our statement in *Hartz* that an injury arises out of the employment if that employment is the "immediate occasion" of the injury, whereas our reference to *Hartz* in *Savage* reflects an incorrect application of that principle. Fortunately, we have never repeated the analytical error we made in *Savage*.[16]

[16] It also appears that the board itself has never followed the reasoning that we employed in *Savage*, electing instead to attempt to distinguish *Savage* on the law or the facts. See, e.g., *Kielbowicz* v. *Tilcon Connecticut, Inc.*, No. 5855, CRB 6-13-6 (June 12, 2014) (distinguishing *Savage* on its facts and rejecting employee's contention under *Savage* "that basically any fall at a Connecticut worksite [that] may be described as idiopathic [is] compensable").

In that regard, we cannot agree with the statement of the Appellate Court in the present case that we "reaffirmed [our] reasoning in *Savage* in the case of *Blakeslee* v. *Platt Bros. & Co.*, [supra, 279 Conn. 239]." *Clements* v. *Aramark Corp.*, supra, 182 Conn. App. 235. It is true that we quoted from *Savage* in *Blakeslee*, but we did not utilize the same flawed reasoning as in *Savage*. In *Blakeslee*, the plaintiff, Michael G. Blakeslee, Jr., suffered a grand mal seizure at work and fell to the ground, unconscious, near a large steel scale. *Blakeslee* v. *Platt Bros. & Co.*, supra, 240–41. The seizure itself did not give rise to a compensable injury. Id., 240. As he regained consciousness, however, "he began flailing around, swinging his arms and kicking his legs," prompting three coworkers to come to his aid. Id., 241. "The three men, in an attempt to prevent [Blakeslee] from injuring himself, as well as others, restrained [Blakeslee]. They held [Blakeslee's] arms down to the floor while [he] attempted to break free from the restraint. As a result, [Blakeslee] suffered dislocations of both of his shoulders. [He] initially sought treatment and ultimately surgery from . . . an orthopedic surgeon. [The surgeon] thereafter reported that he had concluded, on the basis of a reasonable medical certainty, that [Blakeslee's] shoulder dislocations were a result of the restraint, not the seizure." Id. Blakeslee thereafter filed a claim for compensation under the act. See id., 240.

Notwithstanding the surgeon's opinion concerning the cause of Blakeslee's injuries, the commissioner concluded that those injuries did not arise out of his employment because "[t]he chain of causation [that] resulted in . . . [his] shoulder injuries was set in motion by the . . . grand mal seizure," which was unrelated to Blakeslee's employment. (Internal quotation marks omitted.) Id., 241. The board upheld the commissioner's decision, concluding that, because Blakeslee's seizure was not compensable, "the resulting

injury from his coworkers' application of first aid similarly was not compensable." Id., 242. We reversed the decision of the board. Id., 252. In doing so, we observed that, because the underlying facts were not in dispute; see id., 242; the sole question presented was the propriety of the "single proposition" that "the commissioner and the board began with . . . [and] from which all other conclusions inexorably followed, namely, that, if [Blakeslee's] seizure was a noncompensable injury, any injuries causally connected thereto similarly must [have been] noncompensable." Id., 245.

Before answering that question in *Blakeslee*, we set forth a number of well established workers' compensation principles, quoting *Savage* for the proposition that an employer is not relieved of liability merely because an employee's preexisting condition had made his injury, otherwise traceable to the employment, more likely or more serious. See id., 245–46. We cited this principle, however, not because it was dispositive of Blakeslee's claim but only to establish that compensation was not *necessarily* precluded merely because the events culminating in Blakeslee's injury were set in motion by a personal infirmity. See id., 245–47. We explained, rather, that, in determining whether an injury arises out of the conditions of employment, "the normal reactions of men to those conditions are to be considered. . . . [Thus] the right of an employee to recover compensation is not nullified by the fact that his injury is augmented by natural human reactions to the danger or injury threatened or done. . . . In assessing such natural human reactions, we have stated that, [w]henever an employer puts his employees at work with fellow servants, the conditions actually existing—apart from the possibility of wilful assaults by a fellow servant independent of the employment—[that] result in injury to a fellow employee, are a basis for compensation under the implied contract of th[e] [a]ct. . . .

"It seriously cannot be questioned that a risk exists in the workplace that an employee might fall stricken to the ground, thereby prompting the natural, foreseeable reaction of coworkers to render aid. With respect to the employer's liability for injuries arising from such actions, in his treatise, Professor . . . Larson sets forth the general proposition that . . . the scope of an employee's employment is impliedly extended in an emergency to include the performance of any act designed to save life or property in which the employer has an interest. . . . The most common type of rescue case is the rescue of coemployees, and compensation is clearly payable for injuries so sustained, on the theory that the employer has a duty to aid its own employees in peril and that any employee is impliedly authorized to discharge this duty in an emergency. . . . Courts have recognized under similar statutory schemes that . . . [a] reasonable rescue attempt . . . may be one of the risks of employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute. . . . *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507, 71 S. Ct. 470, 95 L. Ed. 483 (1951)." (Citations omitted; internal quotation marks omitted.) *Blakeslee* v. *Platt Bros. & Co.*, supra, 279 Conn. 246–48.

Thus, we did not conclude that Blakeslee's injuries were compensable as a matter of law, as we had in *Savage*. Had we done so in *Blakeslee*, there would have been no reason for the extended discussion of the rescue doctrine; our initial reference to *Savage* would have been the beginning and the end of our analysis. We determined in *Blakeslee*, rather, that an injury sustained in the course of the employment may be found to arise out of the employment, even though the chain of events culminating in the injury were set in motion by an idiopathic condition, *if the employment, or a condition incidental thereto*—such as the efforts of Blakeslee's coworkers to assist him after he collapsed—was also

a proximate cause of the injury. See id., 245–47. In other words, a "[p]reexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with the [idiopathic] disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as it finds that employee." (Footnotes omitted.) 1 L. Larson & T. Robinson, supra, § 9.02 [1], p. 9-16.[17]

[17] Similarly, we did not employ *Savage*'s faulty reasoning in *Stankewicz* v. *Stanley Works*, 139 Conn. 215, 92 A.2d 736 (1952), a case decided fifteen years after *Savage* and involving nearly identical facts. In that case, Michael Stankewicz was found dead in the turbine room of his employer's plant, where his primary responsibility was to monitor the boilers. Id., 215–16. When his body was discovered, his left foot was resting on a step leading into the room "and his right foot was turned under his left leg. There was evidence of injury in the right temporal region of his head caused by striking the concrete floor. The commissioner concluded that Stankewicz had slipped [on] or stumbled over the step while entering the turbine room from the [adjacent] locker room and had fallen, striking his head and sustaining an injury [that] caused his death." Id., 216. The commissioner therefore determined that the plaintiff, Stankewicz' widow, was entitled to compensation, and the trial court upheld the decision of the commissioner. Id., 215. On appeal, the employer argued that the commissioner's conclusion regarding the manner of death was speculative, that there was evidence that "Stankewicz died of a heart attack, [which] . . . caused his fall and the resulting evidence of head injury, and that his death [therefore] did not arise out of his employment so as to be compensable under the act." Id., 216. We rejected this claim, not because it was immaterial whether Stankewicz' fall and resultant injuries were accidental or the result of a heart attack—as we had reasoned in *Savage*—but because "[t]he place where [Stankewicz] was found, the position in which his body and limbs were lying, his custom of going from the locker room to the turbine room after he had eaten his lunch, and his duty of watching the pressure gauges on the boilers reasonably support[ed] the inference, as a question of fact, that he slipped or stumbled over the step and fell, striking his head and sustaining a head injury." Id., 217.

Our analysis in *Stankewicz* accords with our statement in *Reeves* that "[a]n injury [that] occurs in the course of the employment will ordinarily arise out of the employment; *but not necessarily so* . . . ." (Emphasis added; internal quotation marks omitted.) *Reeves* v. *John A. Dady Corp.*, supra, 95 Conn. 632. An injury that occurs in the course of employment but that is set in motion by a personal infirmity unrelated to the employment

For all these reasons, we agree with the defendant that the present case provides an appropriate occasion for this court to disavow our reasoning in *Savage*. As we have explained, that reasoning was based on a misreading of this court's prior precedent, it was not otherwise persuasive, and it was unnecessary to the correct outcome of the case. Moreover, we have never applied that reasoning in any subsequent case, and it is contrary to the substantial weight of authority. Although, as we also have noted, a small handful of courts hold that injuries resulting from an idiopathic fall to a level floor are compensable, Professor Larson—who characterizes those cases as representing the "significant minority" view—observes that "on close examination of the facts and opinions in these cases, the number is not as large as it has sometimes been thought to be." Id., § 9.01 [4] [a], p. 9-8. In fact, Professor Larson identifies *Savage* as one of those cases, explaining that *Savage* "is weakened by the fact that the [level fall] holding was not necessary to the decision" and, consequently, that "[m]ost of the [decision] partakes of the nature of dictum, since the [commissioner's] finding was that the cause of [Savage's] fall was unknown"; id., § 9.01D [4] [a], p. D9-27; a finding that itself would have resulted in an award of compensation.

We agree with Professor Larson's comments about *Savage*, and we also agree with his observation that,

does *not* arise out of the employment unless there is evidence that the employment contributed to the injury in some meaningful way. In the absence of such evidence, the injury occurs simultaneously with the employment but does not arise out of it. See, e.g., *McDonough* v. *Connecticut Bank & Trust Co.*, 204 Conn. 104, 117–18, 527 A.2d 664 (1987) ("[T]here [must be] a direct causal connection between the injury . . . and the employment. The question [the trier of fact] must answer is, was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment? If it was the latter there can be no award made. . . . [Thus] [i]t is not sufficient that the conditions of the employment contributed to some undefined degree to bring on the disability from which the employee suffers. In the production of results many circumstances often play a part of so minor a character

when a fall is brought about by a personal medical infirmity wholly unrelated to the employment, there is "ample reason to assign the resulting loss to the employee personally. . . . To shift the loss in the [idiopathic fall] cases to the employment, then, it is reasonable to require a showing of at least some substantial employment contribution to the harm." Id., § 9.01 [4] [b], p. 9-8. Although workers' compensation law does not attempt to ascertain "the relative contributions of employment and personal causes" to an injury, "the employment factor . . . must be real, not fictitious." Id., § 9.01 [4] [b], p. 9-9. In other words, "[c]ompensation law attempts no . . . weighing of intangibles [with respect to such causes]. But it does know the difference between something and nothing, and it rightly requires that the employment contribute something to the risk, before pronouncing the injury one arising out of the employment." Id. As we have explained, it is for this reason that, historically, compensation for idiopathic falls to a level floor generally has been denied, and virtually every court that has addressed the issue in the last several decades has adopted that same position. See, e.g., *Askins* v. *Kroger Ltd. Partnership I*, 535 S.W.3d 629, 631–33 (Ark. 2018) (employee who suffered idiopathic fall was not entitled to compensation for her resulting head injuries because no work related condition increased dangerous effect of fall); *Burdette* v. *Perlman-Rocque Co.*, 954 N.E.2d 925, 930–32 (Ind. App. 2011) (employee's idiopathic fall to concrete was not compensable because area where fall occurred did not increase his risk of falling or dangerous effects of fall); *Dugan* v. *Sabre International*, 39 P.3d 167, 169–70 (Okla. Civ. App. 2001) (injuries resulting from idiopathic fall were not compensable because there was no evidence establishing that hazard from falling was increased by any condition of employment); *In re Com-*

that the law cannot recognize them as causes." (Citation omitted; internal quotation marks omitted.)).

pensation of Sheldon, 364 Or. 831, 835, 441 P.3d 210 (2019) (because risk of injury from idiopathic fall to floor is personal to employee, employee cannot establish that injury resulting from such fall arose out of employment).

Under this prevailing view, courts have determined, as a matter of law, that the hardness of the floor onto which the employee fell does not alone render the employee's injuries compensable if the sole cause of the fall was an idiopathic one. See, e.g., *Gates Rubber Co.* v. *Industrial Commission*, 705 P.2d 6, 7 (Colo. App. 1985) (concrete floor); *Evans* v. *Hara's, Inc.*, supra, 123 Idaho 477, 480 (cement floor); *Prince* v. *Industrial Commission*, supra, 15 Ill. 2d 611–12 (concrete floor); *Kovatch* v. *A.M. General*, 679 N.E.2d 940, 943–44 and n.6 (Ind. App.) (concrete floor), transfer denied sub nom. *Kovatch* v. *General Worker's Comp.*, 690 N.E.2d 1184 (Ind. 1997); *Ledbetter* v. *Michigan Carton Co.*, 74 Mich. App. 330, 336–37, 253 N.W.2d 753 (1977) (concrete or cement floor); *Luvaul* v. *A. Ray Barker Motor Co.*, 72 N.M. 447, 454–55, 384 P.2d 885 (1963) (concrete floor); *Harris* v. *Ohio Bureau of Workers' Compensation*, 117 Ohio App. 3d 103, 104–105, 690 N.E.2d 19 (1996) (concrete floor), appeal denied, 78 Ohio St. 3d 1467, 678 N.E.2d 223 (1997); *In re Compensation of Hamilton*, supra, 256 Or. App. 261–62 (brick floor); *Zuchowski* v. *United States Rubber Co.*, supra, 102 R.I. 174 (cement floor); *Bagwell* v. *Ernest Burwell, Inc.*, supra, 227 S.C. 447, 454–55 (concrete floor); *Kraynick* v. *Industrial Commission*, 34 Wis. 2d 107, 112–13, 148 N.W.2d 668 (1967) (hard tile floor).

A recent decision of the Iowa Supreme Court introduces the possibility that the question addressed in the foregoing cases should be determined as a factual rather than a legal matter. See *Bluml* v. *Dee Jay's, Inc.*, 920 N.W.2d 82, 92 (Iowa 2018). In *Bluml*, which involved an idiopathic fall to a ceramic tile floor; id., 83; the

court concluded, under the increased risk test previously adopted in Iowa, that, whether the hardness of the floor increased the risk of injury is a question of fact to be decided by the commissioner on a case-by-case basis. See id., 92 ("[i]n sum, we conclude that whether injuries suffered in an idiopathic fall directly to the floor at a workplace [arise] out of . . . employment is a factual matter, not a legal one" (internal quotation marks omitted)); see also id., 91 ("[I]n [idiopathic fall] cases . . . the [employee] should have both the burden and the opportunity to meet the [increased risk] test. . . . That is, there is no [hard and fast] rule in Iowa that idiopathic falls onto level floors are never compensable. Nor is there a legal principle that idiopathic falls to hard floors are always compensable. Rather, the [employee] may recover if he or she proves that a condition of his [or her] employment increased the risk of injury." (Citation omitted; internal quotation marks omitted.)). Because the workers' compensation commissioner in *Bluml* had denied compensation on the ground that it was precluded as a matter of law, the court remanded the case for further fact finding. Id., 92.

For present purposes, we need not foreclose the possibility that an employee may be able to establish, in any given case, that, as a factual matter, the hardness of the floor increased the risk of harm from the fall so as to render the resulting injuries compensable under the increased risk rule. In the present case, however, the commissioner made no finding in that regard, and the plaintiff did not seek a correction or articulation from the commissioner with respect to that issue.[18] On

[18] In fact, as the defendant points out, the decision of the commissioner indicates only that, according to the plaintiff, she became dizzy, fainted and fell to the ground. The plaintiff, however, had claimed that she had fallen on "hard cement," and, consistent with that contention, the decision of the board states that the plaintiff "sustained her injury while walking on a cement surface . . . ." We may assume, for purposes of this appeal, that the ground on which the plaintiff fell was paved with cement.

appeal to the board, the plaintiff claimed that the evidence did not support the commissioner's finding that she suffered an idiopathic fall rather than an accidental one but that, even if it did, "the cement floor where she struck her head constituted a condition of her employment" that increased the risk of injury from the fall, such that the resulting injury was compensable. In rejecting this claim, the board observed that "it may be reasonably inferred [from the record] that the trier did not consider the surface [on] which the [plaintiff] fell to be a 'dangerous condition' of the employment, and there is nothing in the evidentiary record to persuade [the board] that the . . . commissioner should, or even could, have found otherwise." The plaintiff did not challenge this determination in the Appellate Court, stating instead that the composition of the ground—concrete or otherwise—made no difference with respect to the merits of her argument on appeal. See *Clements* v. *Aramark Corp.*, supra, 182 Conn. App. 226 n.1; see also footnote 5 of this opinion. Under the circumstances, the plaintiff must be deemed to have abandoned any claim that her injury was causally related to her employment—and therefore compensable—based on the theory that the hardness of the ground on which she fell increased the risk of injury from the fall.

The plaintiff contends more broadly that it would be anomalous to construe the act as covering injuries "caused by the inadequacy of personal judgment or clumsiness"—in other words, injuries resulting from employee negligence, due to inadvertence, ineptitude or otherwise—but not those precipitated by a fall caused by personal illness or disease. To the contrary, the purpose of the act was to create a no-fault system to compensate employees for accidental injuries that occur in the course of and in connection with the employment. See, e.g., *Powers* v. *Hotel Bond Co.*, 89 Conn. 143, 146, 93 A. 245 (1915) ("by eliminating the

proof of negligence, by minimizing the delay in the award and by making it reasonably certain, [the act] seeks to avoid the great waste of the tort action and to promote better feeling between [employee] and employer, and accepts, as an inevitable condition of industry, the happening of accident, and charges its cost to the industry"). As we have explained, and consistent with this purpose, the act expressly limits coverage to three categories of personal injury, namely, accidental injury, which we have defined as injury caused by a sudden and unforeseen mishap, repetitive trauma injury causally connected with the employment, and occupational disease; see General Statutes § 31-275 (16) (A); and it is axiomatic that "the act's definition of three categories of compensable personal injury is exclusive." *Grady* v. *St. Mary's Hospital*, 179 Conn. 662, 668, 427 A.2d 842 (1980). "[A]n idiopathic injury," however, "does not stem from an accident, but is brought on by a condition particular to the employee that could have manifested itself anywhere." *Barnes* v. *Charter 1 Realty*, supra, 411 S.C. 396.

The plaintiff further maintains that the related principles of stare decisis[19] and legislative acquiescence[20]

[19] "The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of [decision-making] consistency in our legal culture and . . . is an obvious manifestation of the notion that [decision-making] consistency itself has normative value." (Internal quotation marks omitted.) *Spiotti* v. *Wolcott*, 326 Conn. 190, 201, 163 A.3d 46 (2017).

[20] Because the question presented requires us to construe the act, the principle of legislative acquiescence is implicated. "[I]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do. Sometimes, when we have made such a determi-

counsel against departing from the reasoning that we employed in *Savage*. We disagree. With respect to the former, we already have explained that our reasoning therein was fundamentally flawed, we have not again employed that reasoning in the eighty-four years since we decided *Savage*, and it was unnecessary to our resolution of that case. Though a most important principle, stare decisis is neither "an inexorable command [nor] an absolute impediment to change"; (internal quotation marks omitted) *Mangiafico* v. *Farmington*, 331 Conn. 404, 425 n.8, 204 A.3d 1138 (2019); and we are not persuaded that it should be controlling here. For similar reasons—in particular, because we reached the right result in *Savage* and our reasoning was not outcome determinative—we also are unpersuaded that the legislature's failure to take corrective action following *Savage* fairly can be viewed as approval of our reasoning and analysis in that case.

We also note that, although "the act indisputably is a remedial statute that should be construed generously to accomplish its purpose"; (internal quotation marks omitted) *Blakeslee* v. *Platt Bros. & Co.*, supra, 279 Conn. 245; it is equally well established that "the legislature did not intend . . . to transform the [act] into a general health and benefit insurance program . . . ." (Internal quotation marks omitted.) *Estate of Doe* v. *Dept. of Correction*, 268 Conn. 753, 767, 848 A.2d 378 (2004);

nation, the legislature instructs us that we have misconstrued its intentions. We are bound by the instructions so provided. . . . More often, however, the legislature takes no further action to clarify its intentions. Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 417–18, 195 A.3d 664 (2018).

see also, e.g., *Madore* v. *New Departure Mfg. Co.*, 104 Conn 709, 715, 134 A. 259 (1926) (explaining that test requiring direct causal relationship between injury and employment ensures that act will not be "convert[ed] . . . into an [a]ct for health insurance, and [made] . . . a substitute for disability or old age pensions"); *Mann* v. *Glastonbury Knitting Co.*, 90 Conn. 116, 118, 96 A. 368 (1916) ("the words 'arising out of and in the course of his employment' do not make the employer an insurer against all . . . risks . . . but include only those injuries arising from the risks of the business which are suffered while the employee is acting within the scope of his employment"). We agree with the defendant that, were we to follow our reasoning in *Savage* and to conclude that injuries sustained as a result of an idiopathic fall to a level floor are per se compensable if they occur in the course of employment, we would virtually be eliminating, for such cases, the arising out of prong of the test. Thus, even though the Appellate Court properly followed *Savage* in applying our reasoning therein to the facts of the present case, we nevertheless must reverse the judgment of the Appellate Court in light our disavowal of that reasoning.

In closing, we briefly address the question that we originally certified; see footnote 8 of this opinion; namely, whether an injury arises out of one's employment, and is therefore compensable, only if the condition or hazard of the employment that caused the injury is "peculiar" to that employment. As the Appellate Court recognized in its opinion; see *Clements* v. *Aramark Corp.*, supra, 182 Conn. App. 236 n.6; this court, on occasion, has indicated as much, most recently in *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, supra, 274 Conn. 238. See id. ("conditions that arise out of employment are peculiar to [it], and not such exposures as the ordinary person is subjected to" (internal quotation marks omitted)); see also *Larke* v. *Hancock Mutual*

Life Ins. Co., 90 Conn. 303, 310, 97 A. 320 (1916) (same). As the Appellate Court further observed, however; see *Clements* v. *Aramark Corp.*, supra, 236 n.6; this court also has stated repeatedly that an injury is compensable even though the condition to which the employee was exposed in the workplace posed no greater risk than that to which she might be exposed in the ordinary course outside of her employment. See, e.g., *Blakeslee* v. *Platt Bros. & Co.*, supra, 279 Conn. 246 (injury suffered by employee may be compensable even though work related condition that resulted in injury presented no greater risk of harm to employee than risk to which employee was subjected when not at work); *Triano* v. *United States Rubber Co.*, supra, 144 Conn. 397 (same); *Puffin* v. *General Electric Co.*, supra, 132 Conn. 281 (same).

It should be apparent from the reasoning employed in the present case what we mean when we say that the risk or condition must be "peculiar to the employment" for the injury to be compensable. Indeed, we accurately explained the meaning of the term long ago: "The hazard is peculiar to the employment because it is incidental to and grows out of the conditions of the employment and not because it should [have been] foreseen or expected, or because it involves [a] danger of serious bodily injury. We have never held that the conditions of the employment must be such as to expose the employee to extraordinary risks in order to entitle him to compensation in case of injury. *The risk may be no different in degree or kind* [*from*] *those to which he may be exposed outside of his employment.* The injury is compensable, not because of the extent or particular character of the hazard, but because it exists as one of the conditions of the employment." (Emphasis added; internal quotation marks omitted.) *Puffin* v. *General Electric Co.*, supra, 132 Conn. 281–82. The foregoing statement is a fair exposition of the law

as it generally has been characterized and applied in this state for many decades; see, e.g., *Blakeslee* v. *Platt Bros. & Co.*, supra, 279 Conn. 251 ("it is not a prerequisite to compensability that the risk of injury be greater to the employee than to a member of the public"); *Fiarenzo* v. *Richards & Co.*, 93 Conn. 581, 587, 107 A. 563 (1919) ("[t]he employment may be considered as causal in the sense that it is a necessary condition out of which, necessarily or incidentally due to the employment, arise the facts creating liability, and that is the extent to which the employment must be necessarily connected in a causal sense with the injury"); *Fiarenzo* v. *Richards & Co.*, supra, 585 (explaining that employee would be entitled to compensation if he slipped and fell while walking at work); and it is consistent with the fact that the so-called "peculiar-risk test," insofar as that test requires "that the source of harm be in its nature . . . peculiar to the occupation" in the sense of being uncommon outside of the employment, is "now largely obsolete."[21] 1 L. Larson & T. Robinson, supra,

[21] We also agree with the following explication of the issue: "The right to compensation benefits depends on one simple test: Was there a [work connected] injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. Let the employer's conduct be flawless in its perfection, and let the employee's [conduct] be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.

"Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. The essence of applying the test is not a matter of assessing blame, but of marking out boundaries." 1 L. Larson & T. Robinson, supra, § 1.03 [1], p. 1-5; see also, e.g., *Nicholson* v. *South Carolina Dept. of Social Services*, 411 S.C. 381, 390, 769 S.E.2d 1 (2015) ("Quite simply, [the employee] was at work on the way to a meeting when she tripped and fell. The circumstances of her employment required her to walk down the hallway to perform her responsibilities and in the course of those duties she sustained an injury. . . . [T]hese [undisputed] facts establish a causal connection between her employment and her injuries—the law requires nothing more. Because [the employee's] fall happened at work and was not caused by [an idiopathic] condition peculiar to her, it was causally connected to her employment. Therefore, her injuries

c. 3, p. 3-1. It remains so today. Consequently, to the extent that we previously have suggested that an injury is not compensable under the act unless it was caused by a hazard unique or distinctive to the employment, we disavow any such suggestion.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment affirming the decision of the Compensation Review Board.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JAMES HENRY WATSON
(SC 20400)

Robinson, C. J., and McDonald, D'Auria, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to statute ((Rev. to 2015) § 53a-64bb (b)), "[n]o person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident . . . ."

Convicted of assault in the third degree, unlawful restraint in the first degree, strangulation in the second degree, and threatening in the second degree, the defendant appealed to the Appellate Court. The defendant and the victim had been socializing and drinking together in an apartment building in which the defendant lived. When the victim indicated that she need to go to the bathroom, the defendant told her that he could use his bathroom. When the victim finished using the bathroom, the defendant prevented her from leaving, restrained her and, over the course of eight or nine hours, alternated between hitting and choking her in various areas of his apartment. After the jury returned its verdict, the defendant moved for a judgment of acquittal on the assault and unlawful restraint charges on the ground that they were "upon the same incident" as the strangulation charge for purposes of § 53a-64bb (b). The trial court denied the motion, concluding that the evidence was sufficient to support the jury's verdict because the incident occurred over an extended period of time and the acts of assault and unlawful restraint were readily

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arose out of her employment as a matter of law and she is entitled to workers' compensation.").

separable from the acts of strangulation. The Appellate Court affirmed the judgment of conviction, and the defendant, on the granting of certification, appealed to this court, claiming, inter alia, that the language in § 53a-64bb (b) prohibiting a person from being found guilty of strangulation in the second degree "upon the same incident" as unlawful restraint or assault is an element of the offense of strangulation that must be found by the jury beyond a reasonable doubt, rather than by the trial court, pursuant to *Apprendi* v. *New Jersey* (530 U.S. 466). *Held* that the Appellate Court correctly concluded that the defendant's constitutional right to a jury trial was not violated when the trial court, rather than the jury, determined that the assault and unlawful restraint charges were not "upon the same incident" as that giving rise to the strangulation charge, as that determination did not implicate the constitutional principles underlying *Apprendi* and its progeny: the core concern of *Apprendi* and its progeny is to safeguard the constitutional rights of a criminal defendant to a jury determination that he or she is guilty of every element of the crime charged beyond a reasonable doubt, those cases generally define an element as any fact, other than a prior conviction, that increases the maximum punishment that may be imposed on a defendant, and whether a fact constitutes an element is informed by whether the jury had a historical role in finding that fact; in the present case, an analysis of the statutory design revealed that the "upon the same incident" prohibition in § 53a-64bb (b) did not constitute an element within the scope of *Apprendi*, as that language was not included in subsection (a) of the statute, which defines the crime of second degree strangulation and its three elements, or in subsection (c), which classifies that offense as a class D felony, but was included in subsection (b), a separate, procedural subsection that included no act, mental state, or attendant circumstances that must be present for the crime to occur; moreover, the legislature routinely has employed, and this court consistently has interpreted, the same "upon the same incident" language or similar language in other penal statutes to express the intention to bar multiple punishments for double jeopardy purposes, and this court was aware of no evidence that juries historically played any role in resolving double jeopardy issues, which the applicable rule of practice (§ 42-20) commits to the judicial authority for resolution; furthermore, in light of the evidence that the defendant attacked the victim in multiple locations in the apartment over an extended period of time and that, in addition to restraining the victim by the throat, he punched her and prevented her from leaving the apartment, the trial court correctly determined that the defendant's conduct was readily separable and sufficient to support the jury's verdict as to each of the offenses, that determination did not increase the defendant's sentencing exposure, and the defendant's total

effective sentence fell within the maximum sentence he could receive for the crimes of which he was convicted.

Argued November 18, 2020—officially released June 29, 2021*

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree, strangulation in the second degree, assault in the third degree, unlawful restraint in the first degree and threatening in the second degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky*, *J.*; verdict and judgment of guilty of strangulation in the second degree, assault in the third degree, unlawful restraint in the first degree and threatening in the second degree, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Noble*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. A jury found the defendant, James Henry Watson, guilty of three distinct crimes in connection with his attack on a single victim over the course of an eight or nine hour period on a single day in October, 2016, namely, assault in the third degree in violation of General Statutes § 53a-61 (a) (1), unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), and strangulation in the second degree in viola-

* June 29, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tion of General Statutes (Rev. to 2015) § 53a-64bb (a).[1] This verdict implicates the provision in § 53a-64bb (b) providing in relevant part that "[n]o person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident . . . ." The trial court determined that the jury's findings were not "based upon the same incident" and rendered a judgment of conviction on all three counts in accordance with the jury's verdict. The defendant appealed on the ground that the prohibition in § 53a-64bb (b) designates an element of the offense of strangulation that must be decided by the jury. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

In this certified appeal,[2] we consider whether the Appellate Court correctly concluded that the defen-

[1] General Statutes (Rev. to 2015) § 53a-64bb provides: "(a) A person is guilty of strangulation in the second degree when such person restrains another person by the neck with the intent to impede the ability of such other person to breathe or restrict blood circulation of such other person and such person impedes the ability of such other person to breathe or restricts blood circulation of such other person.

"(b) No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information. For the purposes of this section, 'unlawful restraint' means a violation of section 53a-95 or 53a-96, and 'assault' means a violation of section 53a-59, 53a-59a, 53a-59b, 53a-59c, 53a-60, 53a-60a, 53a-60b, 53a-60c, 53a-61 or 53a-61a.

"(c) Strangulation in the second degree is a class D felony."

Hereinafter, all references to § 53a-64bb in this opinion are to the 2015 revision of the statute.

[2] This court granted the defendant's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issue: "Should this court overrule *State* v. *Morales*, 164 Conn. App. 143, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016), in which the Appellate Court held that a trial court's postverdict determination of whether the crimes of strangulation, unlawful restraint, and assault occurred 'upon the same incident' under . . . § 53a-64bb (b) does not violate a criminal defendant's constitutional right to a jury trial?" *State* v. *Watson*, 333 Conn. 941, 218 A.3d 1049 (2019).

dant's constitutional right to a jury trial was not violated when the trial court rather than the jury determined that the charges of assault in the third degree and unlawful restraint in the first degree were not "upon the same incident" as that giving rise to the charge of strangulation in the second degree. See *State* v. *Watson*, 192 Conn. App. 353, 361, 217 A.3d 1052 (2019). We affirm the judgment of the Appellate Court.

I

The jury could reasonably have found the following facts.[3] On October 19, 2016, at approximately 3 p.m., the defendant, the victim and some others were "hanging out" and drinking beer on the front porch of the Bridgeport apartment building where the defendant lived. When the victim said that she needed to use the bathroom, the defendant told her that she could use his bathroom upstairs. The defendant let her into his apartment, and the victim went into the bathroom. When she was finished, she opened the bathroom door, but the defendant blocked her exit and said, "I'm going to get some of your fucking pussy." The defendant allowed the victim to leave the bathroom, but he used his body to block the apartment's exit, forcing her into the living room. He closed the curtains, grabbed the victim, and pushed her onto the smaller of the two sofas in the living room. She tried to push him off her, but he held her down, pulled off her pants and ripped off her underpants. Then he punched her and hit her in the face.

The defendant continued his assault, alternating between hitting the victim in the face and choking her. The victim described the defendant's conduct as follow-

[3] For the sake of clarity, our recitation of the facts does not include the testimony and other evidence pertaining to the allegations of sexual assault because that evidence is not relevant to the issue on appeal in light of the jury verdict of not guilty with respect to the charge of sexual assault.

ing a pattern. He would choke her until she could not breathe, at which point she began kicking her feet, causing the defendant to loosen his chokehold a bit. Then he would resume choking and hitting her. At one point during this lengthy sequence of events, the defendant said, "I want to kill you," and, "I know I'm going to pay for this." The victim tried to fight back and pleaded with the defendant to return her cell phone, which he had taken from her, telling him that she wanted to call her son. The defendant refused to give the victim her phone and continued to hit her repeatedly. In an attempt to resist the defendant, the victim bit his pinky finger. She also tried to run toward the door in order to escape from the apartment, but the defendant prevented her from doing so by grabbing the hood of the sweatshirt she was wearing.

The defendant then moved the victim to his bedroom. He threw her on the bed and again choked and beat her. He removed her T-shirt, which she wore under the sweatshirt, and choked her with it. The defendant told her repeatedly that he wanted to kill her. The defendant moved the victim back to the living room and threw her onto the larger sofa. He resumed beating and choking her. The defendant finally stopped choking and beating the victim, but he continued to prevent her from leaving the apartment.

Many hours later—sometime after midnight—the victim, hoping to find a chance to escape, told the defendant that she wanted a type of drink called an Icee, which was sold at a nearby convenience store. He agreed and accompanied her out of the apartment. Once outside the building, the victim was able to flee. She flagged down a passing ambulance, which brought her to the hospital, where she received medical attention and spoke with the police.

The state charged the defendant with sexual assault in the first degree in violation of General Statutes § 53a-

70 (a) (1) (sexual assault), assault in the third degree in violation of § 53a-61 (a) (1) (assault), unlawful restraint in the first degree in violation of § 53a-95 (a) (unlawful restraint), strangulation in the second degree in violation of § 53a-64bb (a) (strangulation), and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1) (threatening). Following a jury trial, the defendant was found guilty of strangulation, assault, unlawful restraint, and threatening, and found not guilty of sexual assault. Prior to the sentencing hearing, the court directed the parties to submit memoranda addressing whether and to what extent § 53a-64bb (b) applies in the present case and, if so, the appropriate remedy to be implemented by the court at the time of sentencing.

In response to the court's order, the defendant filed a motion for a judgment of acquittal as to the charges of assault and unlawful restraint. He contended that the court was required to acquit him of those two charges pursuant to § 53a-64bb (b) because the entire sequence of events giving rise to the charges against him constituted a single transaction and therefore triggered the statute's prohibition against such guilty verdicts "upon the same incident . . . ."[4] In response, the state argued that the prohibition contained in § 53a-64bb (b) was not implicated because the jury's verdict finding the defendant guilty of unlawful restraint, assault and strangulation was supported by sufficient evidence establishing that the defendant committed separate acts supporting each of the distinct offenses.

The court denied the defendant's motion for a judgment of acquittal on the ground that the evidence was sufficient to support the jury's verdict of guilty as to the counts of assault, unlawful restraint and strangulation. The court explained: "This is not a situation [in which]

[4] The defendant did not argue in the trial court that the jury rather than the court was required to decide the issue.

the factual predicates for the convictions were so intertwined under any view of the evidence, temporally or physically or otherwise . . . as to make them, as a matter of law, one and the same incident." The court emphasized that the defendant's actions took place over an extended period of time and that the acts of assault and unlawful restraint were readily separable from the acts of strangulation. Consistent with its ruling on the motion, the court sentenced the defendant on each of the counts of conviction, imposing "a total effective term of twelve years of incarceration, execution suspended after seven years of mandatory incarceration, followed by three years of probation." *State* v. *Watson*, supra, 192 Conn. App. 361; see footnote 13 of this opinion.

The defendant appealed to the Appellate Court, claiming, among other things, that the federal constitution required that the jury, not the trial court, determine whether the charges of assault in the third degree and unlawful restraint in the first degree were "upon the same incident" as the charge of strangulation in the second degree. General Statutes § 53a-64bb (b); see *State* v. *Watson*, supra, 192 Conn. App. 361. The Appellate Court disagreed with the defendant's claim and held that, because there was no constitutional violation, the defendant's unpreserved claim failed on the third prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *State* v. *Watson*, supra, 363. The court relied on its decision in *State* v. *Morales*, 164 Conn. App. 143, 160, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016), to conclude that, "in the present case, it was proper for the trial court, rather than the jury, to determine whether the charges were 'upon the same incident' for the purposes of § 53a-64bb (b)." *State* v. *Watson*, supra, 365. This certified appeal followed.

II

A

The defendant argues that the language in § 53a-64bb (b) prohibiting a person from being found guilty of strangulation in the second degree "upon the same incident" as unlawful restraint or assault sets forth an element of the offense of strangulation and, therefore, presents a factual issue that must be decided by a jury pursuant to *Apprendi*. See *Apprendi* v. *New Jersey*, supra, 530 U.S. 490 (holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). We disagree.

As the Appellate Court correctly observed, because the defendant did not object to the trial court determining whether the charges of assault and unlawful restraint were "upon the same incident" as the charge of strangulation, his claim is not preserved for appeal, and review is available, if at all, pursuant to *Golding*.[5] See *State* v. *Watson*, supra, 192 Conn. App. 363. Applying the *Golding* analysis, we conclude, as did the Appellate Court, that the record is adequate for review and the issue is one of constitutional magnitude, but the defendant's claim fails because there was no constitutional violation.

[5] Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding*).

The core concern of *Apprendi* and its progeny is to safeguard the constitutional rights entitling "a criminal defendant to a jury determination that [he or she] is guilty of every element of the crime . . . charged, beyond a reasonable doubt." (Internal quotation marks omitted.) *Apprendi* v. *New Jersey*, supra, 530 U.S. 477. In particular, *Apprendi* involved application of this principle to ensure that a jury, not a judge, finds any fact that increases the length of a defendant's sentence. See id., 490. The defendant in *Apprendi* was convicted of possession of a firearm for an unlawful purpose in violation of N.J. Stat. Ann. § 2C:39-4 (a) (West 1995), an offense that carried a maximum penalty of ten years. See id., 468. A separate statute, N.J. Stat. Ann. § 2C:44-3 (e) (West Supp. 1999–2000), authorized the trial court to impose an extended term of imprisonment of between ten and twenty years if the court found by a preponderance of the evidence that the defendant "acted with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity." (Internal quotation marks omitted.) Id., 468–69. The state defended the procedure on the basis that the trial court's finding pertained, not to whether the state had proven an element of an offense, but to the imposition of a sentencing factor. See id., 492.

The court rejected that argument and held that the procedure violated the sixth and fourteenth amendments to the federal constitution. See id., 475–76. In its analysis, the court reviewed the historical foundations of the "indisputabl[e]" right enjoyed by a criminal defendant to have a jury make those findings necessary to establish the defendant's guilt beyond a reasonable doubt as to every element of the crime charged. Id., 477. The court explained that the "distinction between an 'element' . . . and a 'sentencing factor' was unknown" when our nation was founded. Id., 478. Judges at that time had little discretion in sentencing—

the jury's verdict essentially determined the nature and extent of the punishment. See id., 478–79. Therefore, "[j]ust as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment." Id., 480.

The court in *Apprendi* reviewed its own precedent on the subject, including the landmark case *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), in which the court held that "the [d]ue [p]rocess [c]lause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id., 364; see *Apprendi* v. *New Jersey*, supra, 530 U.S. 477–78, 484–88. If the historical foundations of the reasonable doubt standard left any doubt that its protections extended to the length of a defendant's sentence, the court stated, *In re Winship* and its progeny made it "clear beyond peradventure" that the constitutional protection extended to the circumstances mandating a particular punishment. *Apprendi* v. *New Jersey*, supra, 484; see, e.g., *Mullaney* v. *Wilbur*, 421 U.S. 684, 699, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (rejecting narrow, formalistic reading of *In re Winship* in favor of extending its protections to determinations that went to length of defendant's sentence).

Apprendi holds that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, supra, 530 U.S. 490. Following *Apprendi*, in *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), the court offered additional insight into the connection between elements of the offense and the *Apprendi* rule: "Our decision in *Apprendi* . . . clarified what consti-

tutes an 'element' of an offense for purposes of the [s]ixth [a]mendment's [jury trial] guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the [s]tate labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." Id., 111. Under *Apprendi*, therefore, a fact that increases a defendant's punishment beyond the statutory maximum constitutes an element of the offense.

In subsequent decisions, the United States Supreme Court has clarified the contours of the *Apprendi* rule. For example, in the context of sentencing guidelines, a trial court properly may make factual findings and exercise its discretion to select a specific sentence within a defined range supported by the jury's verdict without violating a defendant's constitutional right to a jury trial. See *United States* v. *Booker*, 543 U.S. 220, 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). On the other hand, the court has repeatedly rejected the proposition that facts found by the court may properly support a sentence outside the range supported by the jury's verdict. "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (Citations omitted; emphasis omitted.) *Blakely* v. *Washington*, 542 U.S. 296, 303–304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); see also *Cunningham* v. *California*, 549 U.S. 270, 274–75, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) (holding that California's sentencing scheme, which authorized judges to find facts in support of applying upper sentencing range, as

opposed to lower or middle range defined for offense, violated *Apprendi*).

The United States Supreme Court has also extended the *Apprendi* rule to judicial fact-finding that triggers mandatory minimum sentences. See *Alleyne* v. *United States*, 570 U.S. 99, 108, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) ("*Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor"); see also *United States* v. *Haymond*, U.S. , 139 S. Ct. 2369, 2381, 204 L. Ed. 2d 897 (2019) (extending *Alleyne* to imposition of mandatory minimum sentence for violation of conditions of supervised release based on judicially found facts, where mandatory minimum exceeded range authorized by original conviction); cf. *State* v. *Evans*, 329 Conn. 770, 798–99, 189 A.3d 1184 (2018) (rejecting defendant's claim that, under *Apprendi* and *Alleyne*, state was required to prove defendant's lack of drug dependency beyond reasonable doubt to jury because drug dependency, rather than element of offense, was affirmative defense that would mitigate sentence), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

Finally, as part of its jury right analysis, the court has emphasized the importance of the historical role played by the jury to set limits on the reach of *Apprendi* in particular contexts. In *Oregon* v. *Ice*, 555 U.S. 160, 163–64, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), the court held that a sentencing judge's factual findings in support of the imposition of consecutive rather than concurrent sentences did not violate the defendant's constitutional right to a jury trial. In rejecting the defendant's argument that *Apprendi* precluded judicial fact-finding in support of the imposition of consecutive sentences, the court relied heavily on the fact that the jury historically "played no role in the decision to impose sentences consecutively or concurrently." Id., 168. The

court observed that the decision to impose consecutive sentences has rested in the sound discretion of trial judges since before the founding of our nation. See id., 168–69. Accordingly, "[t]here is no encroachment . . . by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the [s]tate and the accused." Id., 169. The scope of the constitutional right to a jury trial, the court explained, "must be informed by the historical role of the jury at common law." Id., 170.

B

In the present case, the Appellate Court relied largely on its holding in *State* v. *Morales*, supra, 164 Conn. App. 143, to conclude that *Apprendi* did not require the jury, rather than the trial judge, to determine whether the strangulation conviction was part of the "same incident" as the unlawful restraint and assault for purposes of § 53a-64bb (b). See *State* v. *Watson*, supra, 192 Conn. App. 364–65. In *Morales*, as in the present case, the defendant was convicted of strangulation in the second degree, unlawful restraint in the first degree and assault in the third degree. *State* v. *Morales*, supra, 146. On appeal to the Appellate Court, the defendant claimed that the sentencing court's determination that the three charges were based on distinct and separate " 'incidents,' " for purposes of § 53a-64bb (b), violated his right to a jury trial under *Apprendi*. Id., 159. The court rejected the claim, concluding that, at sentencing, the trial court "simply looked at the evidence and concluded that the evidence [was sufficient to support] the jury's verdict on each of the separate charges," and then sentenced the defendant within the statutory maximum for each offense. Id., 161. The court in *Morales* reasoned that the *Apprendi* rule was not violated because the trial court did not "find any fact that enhanced the defendant's sentence beyond the statutory maximum permitted by the jury's verdict." Id.

The defendant contends that *Morales* was wrongly decided. To resolve that claim, we must decide whether the "upon the same incident" prohibition contained in § 53a-64bb (b) sets forth an element of the offense of strangulation in the second degree within the scope of the *Apprendi* rule. As we previously mentioned, the United States Supreme Court has supplied a succinct definition of what constitutes an "element" of a criminal offense in this context: "Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the [s]tate labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." *Sattazahn* v. *Pennsylvania*, supra, 537 U.S. 111. Other definitions vary in focus and level of detail. See, e.g., *Almendarez-Torres* v. *United States*, 523 U.S. 224, 240, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (element of offense is "a fact necessary to constitute the crime" (internal quotation marks omitted)).

The traditional, common-law definition is somewhat more elaborate: "It is commonly stated that a crime consists of both a physical part and a mental part; that is, both an act or omission (and sometimes also a prescribed result of action or omission, or prescribed attendant circumstances, or both) and a state of mind." 1 W. LaFave, Substantive Criminal Law (3d Ed. 2018) § 5.1, p. 446; see also *United States* v. *Apfelbaum*, 445 U.S. 115, 131, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980) ("both a culpable mens rea and a criminal actus reus are generally required for an offense to occur"); *Morissette* v. *United States*, 342 U.S. 246, 251, 72 S. Ct. 240, 96 L. Ed. 288 (1952) (prerequisite of criminal conduct is "concurrence of an evil-meaning mind with an evil-doing hand"); *State* v. *Pond*, 315 Conn. 451, 461–62, 108 A.3d 1083 (2015) (recognizing "the well established

. . . distinction between three types or categories of essential elements that define each criminal offense [i.e.] conduct, results, and attendant circumstances," and describing "attendant circumstances" as encompassing "elements such as the time or location of a crime, characteristics of the perpetrator or victim (e.g., the victim's age or the perpetrator's status as a convicted felon), or circumstantial features of the weapon used (e.g., whether a firearm is registered or operational)").[6]

With this guidance in mind, we turn to the language and structure of § 53a-64bb to assess whether the "same incident" prohibition contained in subsection (b) of the statute sets forth an element of the offense of strangulation in the second degree within the meaning of *Apprendi* and its progeny.

The language of subsection (b) itself, read in a vacuum, provides no clear answer to the question. It provides in relevant part: "No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information. . . ." General Statutes (Rev. to 2015) § 53a-64bb (b). On the one hand, by prohibiting a finding of guilty for the related offenses upon the same incident, the provision suggests that the determination is one for the jury because it is ordinarily

[6] The Model Penal Code defines an " 'element of an offense' " more broadly as "(i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as (a) is included in the description of the forbidden conduct in the definition of the offense; or (b) establishes the required kind of culpability; or (c) negatives an excuse or justification for such conduct; or (d) negatives a defense under the statute of limitations; or (e) establishes jurisdiction or venue . . . ." 1 A.L.I., Model Penal Code and Commentaries (1985) § 1.13 (9), p. 209. With respect to each of the "material element[s]"—conduct, attendant circumstances and result—the state must prove that the defendant acted with the legally required type of culpability, or mens rea. See id., § 2.02 (1), p. 225.

the jury, not the judge, that finds a defendant guilty.[7] On the other hand, the "same incident" proviso exhibits none of the usual indicia that denote an element of a crime.

First, as we will discuss shortly in greater detail, the prohibition is not included as part of the substantive portion of the statute defining the crime and its elements, § 53a-64bb (a); nor is it included as a sentencing factor in the statute's sentencing provision, § 53a-64bb (c). Instead, it is contained in a procedural provision instructing the court and prosecuting authority that the crime defined in subsection (a) may be charged in the same information as assault or unlawful restraint but that a person may not be found guilty of that crime *and* either of the other two designated offenses for the same incident. The operative portion of subsection (b) is a single sentence containing two parts; reading the sentence as a whole indicates that it contains an administrative directive regarding the proper procedure for charging and adjudicating the designated offenses. It establishes a particular limitation on the *prosecution* of the crime by prohibiting the state from obtaining

[7] The defendant suggests that, if the legislature had intended for the court rather than a jury to make the required determination, it could have written the statute to provide that no person may be "convicted" of strangulation upon the same incident as assault or unlawful restraint. A person is "convicted" only when a judgment of conviction has been rendered by a court of competent jurisdiction. See, e.g., General Statutes § 53a-217 (a) ("[f]or the purposes of this section, 'convicted' means having a judgment of conviction entered by a court of competent jurisdiction"); General Statutes § 54-250 (1) (" '[c]onviction' means a judgment entered by a court upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court notwithstanding any pending appeal or habeas corpus proceeding arising from such judgment"); General Statutes § 54-280 (2) (" '[c]onvicted' means that a person has a judgment entered in this state against such person by a court upon a plea of guilty, a plea of nolo contendere or a finding of guilty by a jury or the court notwithstanding any pending appeal or habeas corpus proceeding arising from such judgment"). We shall see, upon further analysis, that the legislature uses the terms "found guilty" and "convicted" interchangeably in this particular context. See footnote 8 of this opinion.

guilty verdicts on a specified combination of designated charges; a person may be found guilty, convicted and punished for the crime of strangulation in the second degree, even if he also engaged in conduct that *could* support a jury finding that he committed the crime of unlawful restraint or assault as part of the same incident, as long as he is not prosecuted and found guilty of either of those two other crimes. The statutory provision at issue, in other words, does not define the elements of the crime; it limits the state's ability to successfully prosecute the crime.

Second, the "same incident" proviso does not set forth a circumstance that must be *present* for the crime to come into being but, instead, focuses on a procedural occurrence that must be *absent* at the conclusion of the trial. That is, a defendant can be found guilty of the crime of strangulation in the second degree only if he or she is *not* also found guilty of either of the two related crimes enumerated in the statute. This statutory limitation does not categorically preclude the "same incident" determination from being an element of the crime, but it would be very unusual for a legislature to define an element in such a manner. The defendant has not pointed to any statute that has been construed to do so.

Third, as noted, the structure of § 53a-64bb lends substantial force to the conclusion that subsection (b) does not set forth an element of the crime. The statute contains three subsections. See footnote 1 of this opinion. Subsection (a) defines the offense: "A person is guilty of strangulation in the second degree when such person restrains another person by the neck or throat with the intent to impede the ability of such other person to breathe or restrict blood circulation of such other person and such person impedes the ability of such other person to breathe or restricts blood circulation of such other person." General Statutes (Rev. to 2015)

§ 53a-64bb (a). This provision plainly and unambiguously sets forth three elements of the offense of strangulation in the second degree. The state must prove that (1) the defendant restrained the victim by the neck or throat, (2) the defendant did so with the intent to impede the victim's ability to breathe or to restrict her blood circulation, and (3) the victim's breathing or blood flow was impeded as a result of the prohibited conduct. See, e.g., *State* v. *Dubuisson*, 183 Conn. App. 62, 69, 191 A.3d 229, cert. denied, 330 Conn. 914, 193 A.3d 560 (2018); *State* v. *Linder*, 172 Conn. App. 231, 239, 159 A.3d 697, cert. denied, 326 Conn. 902, 162 A.3d 724 (2017). These three elements describe the conduct, mens rea and result necessary to commit the offense.

Subsection (b) sets forth the prohibition at issue in this appeal: "No person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information." General Statutes (Rev. to 2015) § 53a-64bb (b). Subsection (b) also identifies which statutory violations constitute "unlawful restraint" and "assault" for purposes of the prohibition.

Finally, subsection (c) of § 53a-64bb provides that strangulation in the second degree is a class D felony.

This statutory design illuminates the nature of the "same incident" prohibition for purposes of *Apprendi*. Rather than including the prohibition as one of the elements of the offense in subsection (a), the legislature chose to locate the provision in a separate subsection devoted to procedural issues involving the proper treatment of designated related offenses, namely, strangulation in the second degree, unlawful restraint and assault. Subsection (b)—unlike subsection (a)—identifies no conduct, result, attendant circumstances or mental state required as elements of strangulation in the

second degree. The provision, instead, establishes the purely procedural limitations discussed previously.

C

It is readily apparent that the "same incident" prohibition was included by the legislature in subsection (b) rather than subsection (a) because the provision is not intended to set forth an element of the crime but, rather, to express legislative intentions relating specifically to double jeopardy. Indeed, the Appellate Court recently identified nineteen penal statutes using the same basic verbal formulation for precisely this purpose. See *State* v. *Burgos*, 170 Conn. App. 501, 555 n.37, 155 A.3d 246 (citing General Statutes §§ 53a-55a (a), 53a-56a (a), 53a-59a (b), 53a-59b (b), 53a-60a (a), 53a-60b (b), 53a-60c (b), 53a-61a (b), 53a-61aa (a), 53a-64aa (b), 53a-64bb (b), 53a-64cc (b), 53a-70a (a), 53a-72b (a), 53a-92a (a), 53a-94a (a), 53a-102a (a), 53a-103a (a) and 53a-216 (a)), cert denied, 325 Conn. 907, 156 A.3d 538 (2017).[8] Both this court and the Appellate Court consistently have construed the meaning of such statutory language to trigger the protections of the double jeopardy clause.[9]

[8] We note that, although many of these statutes prohibit a *conviction* upon the same incident; see, e.g., General Statutes § 53a-70a (a) ("[n]o person shall be convicted of sexual assault in the first degree and aggravated sexual assault in the first degree upon the same transaction"); many others, like 53a-64bb (b), prohibit a finding of *guilty* upon the same incident. See, e.g., General Statutes § 53a-55a (a) ("[n]o person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction"); General Statutes § 53a-60b (b) ("[n]o person shall be found guilty of assault in the second degree or larceny in the second degree under section 53a-123 (a) (3) and assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability in the second degree upon the same incident of assault or larceny"); General Statutes § 53a-60c (b) ("[n]o person shall be found guilty of assault in the second degree or assault in the second degree with a firearm and assault of an elderly, blind, disabled or pregnant person or a person with intellectual disability in the second degree with a firearm upon the same incident of assault"). Although the term "convicted" conveys the intended meaning more effectively than "guilty," it is clear that the legislature uses the terms interchangeably for this purpose.

[9] We have thoroughly examined the legislative history of § 53a-64bb to ensure that the legislature did not reveal a different intention when it enacted

The purpose and meaning of this legislative formulation are so well understood that its absence in a particular statutory scheme has been construed to indicate a legislative intention to permit multiple convictions for related crimes arising out of the same incident. In *State* v. *Bernacki*, 307 Conn. 1, 23–24, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013), for example, we considered the absence of any such language in either General Statutes (Rev. to 2005) § 53a-217 (a) or General Statutes (Rev. to 2005) § 53a-223 (a) to support our conclusion, following our application of the two-pronged test established in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), that the defendant's conviction under both statutes did not violate his federal and state constitutional protections against double jeopardy. Specifically, we relied on the absence of express statutory language signifying a legislative intent to preclude multiple punishments as support for our conclusion that the defendant had failed to rebut the presumption of legislative intent created by our application of the *Blockburger* test. See *State* v. *Bernacki*, supra, 23–24. We explained that "the statutory scheme lacks language expressly indicating that the legislature intended to preclude multiple punishments for violating both [General Statutes (Rev. to 2005)] §§ 53a-223 (a) and 53a-217 (a) (3) (A), when those violations arise out of the same act or transaction. We repeatedly have observed that the lack of statutory language providing that the conviction of one offense precludes conviction of, or punishment for, committing a separate offense in the same act or

that statute. There is nothing in the legislative history indicating any contrary or conflicting intention in this regard. In addition, we conducted a similar review of the legislative history of the many statutes with similar wording. See *State* v. *Burgos*, supra, 170 Conn. App. 555 n.37 (citing statutes). That research yielded the same result.

transaction is a strong indication that the legislature intended to permit multiple punishments." Id.[10]

We have interpreted this statutory language in precisely this manner for thirty years. In *State* v. *Greco*, 216 Conn. 282, 287–88, 579 A.2d 84 (1990), this court rejected the defendant's claim that the double jeopardy clause barred the trial court from imposing consecutive sentences for his convictions of felony murder, first degree robbery and first degree burglary.[11] In our analysis of the felony murder statute, General Statutes (Rev. to 1989) § 53a-54c, we noted the absence of any language prohibiting a defendant from being found guilty or being convicted upon the same transaction or incident as the offenses of first degree burglary or first degree robbery. See id., 295. We cited examples of such prohibitions in twelve different statutes employing language similar to that in § 53a-64bb (b); id., 295 n.14; and concluded that, "[s]ince the legislature has shown that it knows how to bar multiple punishments expressly

[10] To illustrate the point, the court in *State* v. *Bernacki*, supra, 307 Conn. 24 n.18, cited numerous statutes with language similar to that in § 53a-64bb (b). See General Statutes § 53a-55a (a) ("[n]o person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction"); General Statutes (Rev. to 2011) § 53a-59a (b) ("[n]o person shall be found guilty of assault in the first degree and assault of an elderly, blind, disabled, pregnant or mentally retarded person in the first degree upon the same incident of assault"); General Statutes § 53a-59b (b) ("[n]o person shall be found guilty of assault in the first degree and assault of an employee of the Department of Correction in the first degree upon the same incident of assault"); General Statutes § 53a-72b (a) ("[n]o person shall be convicted of sexual assault in the third degree and sexual assault in the third degree with a firearm upon the same transaction"); General Statutes § 53a-92a (a) ("[n]o person shall be convicted of kidnapping in the first degree and kidnapping in the first degree with a firearm upon the same transaction").

[11] In *Greco*, the trial court had calculated the maximum sentence that the defendant faced consistent with its conclusion that consecutive sentences would be permissible. On appeal, the defendant challenged the trial court's denial of his motion to withdraw his plea. See *State* v. *Greco*, supra, 216 Conn. 286–87. The defendant conceded at oral argument before this court that his challenge to the trial court's decision depended on whether this court agreed with his double jeopardy claim. Id., 288.

when it does not intend such punishment, the absence of similar language in § 53a-54c provides evidence that the legislature intended cumulative punishment." Id., 295; see also *State* v. *Kirsch*, 263 Conn. 390, 418–19, 820 A.2d 236 (2003) (rejecting defendant's claim that his dual convictions under General Statutes §§ 53a-55 (a) (3) and 53a-56b (a) violated his right against double jeopardy in part due to absence of language prohibiting multiple punishment, noting that "our Penal Code is replete with other statutes in which the legislature expressly has barred conviction of two crimes for one action," and citing statutes with language similar to § 53a-64bb (b)); *State* v. *Re*, 111 Conn. App. 466, 471, 959 A.2d 1044 (2008) (relying on absence of prohibitory language in statute to reject defendant's double jeopardy claim and citing as contrast multiple statutes with language similar to that in § 53a-64bb (b)), cert. denied, 290 Conn. 908, 964 A.2d 543 (2009); *State* v. *Quint*, 97 Conn. App. 72, 80–81, 904 A.2d 216 (same), cert. denied, 280 Conn. 924, 908 A.2d 1089 (2006); *State* v. *Servello*, 80 Conn. App. 313, 323, 835 A.2d 102 (2003) (same), cert. denied, 267 Conn. 914, 841 A.2d 220 (2004).

D

It should be clear by now that the trial court's determination at sentencing that the offenses of strangulation, assault and unlawful restraint were not "upon the same incident" simply does not implicate the constitutional principles underlying *Apprendi*. The statutory provision, rather, is directed at double jeopardy concerns. The defendant, moreover, has not provided us with any evidence that the jury historically played a role in resolving double jeopardy issues, and we have found none. See *Oregon* v. *Ice*, supra, 555 U.S. 168–69 (relying on absence of historical role played by jury in imposition of consecutive versus concurrent sentences to reject defendant's reliance on *Apprendi*). His claim on appeal fails as a result.

The defendant's legal argument ultimately rests on a flawed syllogism: (1) factual findings in criminal cases must be made by the jury as matter of constitutional right, (2) the "upon the same incident" determination required by § 53a-64bb (b) is a factual determination, and (3) the jury did not make the required factual determination in this case. The flaw in this reasoning, of course, is that not all factual questions presented for adjudication during the life of a criminal case must be decided by the jury. *Apprendi* and its progeny require no such thing. To the contrary, the trial court is required to make many factual findings as part of its obligation to decide legal issues arising before, during and after trial. A claim of double jeopardy is among the legal issues that are committed to the judicial authority for resolution. See, e.g., Practice Book § 42-20 ("[t]he judicial authority shall decide all issues of law and all questions of law arising in the trial of criminal cases"); *State* v. *Cody M.*, 337 Conn. 92, 99, 259 A.3d 576 (2020) ("[a] defendant's double jeopardy claim presents a question of law" (internal quotation marks omitted)); *State* v. *Butler*, 262 Conn. 167, 174, 810 A.2d 791 (2002) (defendant's double jeopardy "claim presents an issue of law").

The trial court in the present case found that the evidence presented to the jury established that an extendedlength of time passed between the victim's initial unlawful restraint by the defendant and her eventual escape, from approximately 3 p.m. to sometime after midnight. The evidence also revealed that the defendant attacked the victim in multiple locations in the apartment and that, in addition to restraining the victim by the throat, the defendant engaged in distinct conduct that did not constitute strangling, namely, hitting and punching the victim and preventing her from leaving the apartment. The trial court correctly determined that this assaultive conduct was readily separable from the defendant's conduct of restraining the

victim by the throat. Given this evidence, the trial court correctly concluded that the charges of assault and unlawful restraint were not "upon the same incident" as the charge of strangling for purposes of § 53a-64bb (b).

The trial court's postverdict factual findings under § 53a-64bb (b) did not determine an element of the crime of strangulation in the second degree; nor did they lengthen the sentence to which the defendant was exposed with respect to any of the counts of conviction. Based on the jury's verdict finding the defendant guilty of the charges of strangulation, assault, unlawful restraint and threatening, the maximum sentence to which the court could have sentenced the defendant was twelve years.[12] The defendant's total effective sentence of twelve years, execution suspended after seven years, followed by three years of probation—which the court arrived at after determining that the evidence was sufficient to support the jury's verdict as to each of the four separate offenses—fell within that maximum.[13]

Under these circumstances, we agree with the Appellate Court that the defendant failed to demonstrate a violation of his constitutional rights.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[12] Strangulation in the second degree and unlawful restraint are class D felonies, each carrying a maximum sentence of five years incarceration. See General Statutes (Rev. to 2015) § 53a-64bb (c); General Statutes §§ 53a-35a (8) and 53a-95 (b). Assault in the third degree and threatening in the second degree are class A misdemeanors, each carrying a maximum sentence of one year incarceration. See General Statutes §§ 53a-36 (1), 53a-61 (b) and 53a-62 (c).

[13] The court sentenced the defendant to a term of five years incarceration, execution suspended after four years, followed by three years probation, for strangulation in the second degree; five years incarceration, execution suspended after three years, followed by three years probation, for unlawful restraint in the first degree; one year incarceration, execution suspended, and three years probation, for assault in the third degree; and one year incarceration, execution suspended, and three years probation, for threatening in the second degree, all counts to run consecutive to each other.

VICTOR DEMARIA *v.* CITY OF BRIDGEPORT (SC 20359)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

Pursuant to statute (§ 52-174 (b)), "any party offering in evidence a signed report . . . for treatment of any treating physician . . . may have the report . . . admitted into evidence as a business entry and it shall be presumed that the signature on the report is that of such treating physician . . . and that the report . . . [was] made in the ordinary course of business."

The plaintiff sought to recover damages, pursuant to the municipal defective highway statute (§ 13a-149), from the defendant city for personal injuries he sustained when he fell on a city sidewalk. After his fall, the plaintiff received treatment for certain symptoms from a number of medical professionals, including his primary care provider, V, at a Veterans Administration hospital. V ultimately wrote a final report for the plaintiff's medical file, in which she concluded that his injuries, namely, a permanent disability of neuropathy and permanent weakness in his left hand, were caused with a reasonable degree of medical certainty by the fall. Prior to trial, the city filed a motion in limine to preclude the admission of V's treatment records and reports, as well as her medical opinions and conclusions, on the ground that they were inadmissible under § 52-174 (b) because the city would have no opportunity, either at a deposition or at trial, to cross-examine V, who was precluded from testifying by virtue of the applicable federal regulation (38 C.F.R. § 14.808 (2017)) prohibiting Department of Veterans Affairs personnel from providing testimony in certain legal proceedings. The trial court denied that motion, and, on the first day of trial, the city moved to preclude the admission of V's final report on the ground that V, a physician assistant, was not competent to render an opinion on the permanency of the plaintiff's injuries. The court denied that motion, as well. The jury returned a verdict for the plaintiff, and the trial court rendered judgment in accordance with the verdict. The city thereafter appealed to the Appellate Court, which reversed and remanded the case for a new trial, concluding that the trial court had improperly admitted the plaintiff's medical records under *Rhode* v. *Milla* (287 Conn. 731), in which this court held that certain medical bills were inadmissible under § 52-174 (b) because the defendant did not have an adequate opportunity to cross-examine the treating health care provider. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court incorrectly concluded that the plaintiff's medical records and V's final report, which were made and maintained in the ordinary course

of the business of diagnosing, treating and caring for the plaintiff, were inadmissible under § 52-174 (b) on the ground that the city was unable to cross-examine V: § 52-174 (b), which was enacted to avoid the expense and delay caused by procuring the testimony of a treating physician, permits the admission of medical reports, which otherwise would constitute inadmissible hearsay, under the hearsay exception for business records, the statutory (§ 52-180) business records exception to the hearsay rule, by expressly providing that business records are not rendered inadmissible by virtue of a party's failure to produce the author or to show that the author was unavailable, specifically contemplates that the opponent of the proffered evidence need not be given the opportunity to cross-examine the author of the record, and, to the extent that *Rhode* and its progeny, including *Milliun* v. *New Milford Hospital* (310 Conn. 711), suggested that an opportunity for cross-examination of the author of a medical record prepared for purposes of the diagnosis, treatment or care of a patient is an absolute prerequisite for the admission of such record, this court disavowed that proposition; moreover, the city did not claim or present any evidence in the trial court that V's final report was prepared in contemplation of litigation, and the mere fact that the final report contained V's opinion on causation and the permanency of the plaintiff's injuries did not establish that the report was not prepared for purposes of the diagnosis, treatment or care of the plaintiff.

Argued June 12, 2020—officially released June 29, 2021*

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of an allegedly defective highway, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. William B. Rush*, judge trial referee, denied the defendant's motion to preclude certain evidence; thereafter, the case was tried to the jury; verdict for the plaintiff; subsequently, the court, *Hon. William B. Rush*, judge trial referee, denied the defendant's motion to set aside the verdict and, exercising the powers of the Superior Court, rendered judgment in accordance with the verdict, from which the defendant appealed to the Appellate Court, *Lavine*, *Sheldon* and *Prescott*, *Js.*, which reversed the trial court's judgment

* June 29, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

and remanded the case for a new trial, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Brenden P. Leydon, with whom, on the brief, was *John H. Harrington*, for the appellant (plaintiff).

Eroll V. Skyers, assistant city attorney, for the appellee (defendant).

David N. Rosen filed a brief for the Connecticut Veterans Legal Center as amicus curiae.

Opinion

ROBINSON, C. J. This certified appeal requires us to consider the extent to which a medical record is admissible as evidence pursuant to General Statutes § 52-174 (b)[1] when that record contains an expert opin-

[1] General Statutes § 52-174 (b) provides: "In all actions for the recovery of damages for personal injuries or death, pending on October 1, 1977, or brought thereafter, and in all court proceedings in family relations matters, as defined in section 46b-1, or in the Family Support Magistrate Division, pending on October 1, 1998, or brought thereafter, and in all other civil actions pending on October 1, 2001, or brought thereafter, any party offering in evidence a signed report and bill for treatment of any treating physician or physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, an emergency medical technician, optometrist or advanced practice registered nurse, may have the report and bill admitted into evidence as a business entry and it shall be presumed that the signature on the report is that of such treating physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse and that the report and bill were made in the ordinary course of business. The use of any such report or bill in lieu of the testimony of such treating physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse shall not give rise to any adverse inference concerning the testimony or lack of testimony of such treating physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse. In any action to which this subsection applies, the total amount of any bill generated by such physician, physician assistant, dentist, chiropractor, naturopath,

ion and the author cannot be subject to cross-examination. The plaintiff, Victor DeMaria, appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court, which reversed the judgment of the trial court rendered in accordance with a jury verdict awarding the plaintiff damages for injuries stemming from his fall on a sidewalk of the defendant, the city of Bridgeport. See *DeMaria* v. *Bridgeport*, 190 Conn. App. 449, 451, 211 A.3d 98 (2019). On appeal, the plaintiff claims that the Appellate Court incorrectly determined that the trial court should not have admitted into evidence a medical record containing the medical opinion of the plaintiff's treating physician assistant, Miriam Vitale, pursuant to § 52-174 (b), when the defendant was unable to cross-examine Vitale. We agree with the plaintiff and, accordingly, reverse the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following background facts and procedural history. "On March 27, 2014, the plaintiff tripped while walking on the sidewalk adjacent to Fairfield Avenue in Bridgeport, when he caught his foot on a raised portion of the sidewalk. As a result, the plaintiff fell forward onto his face and hands, causing him to suffer abrasions to his nose and

physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse shall be admissible in evidence on the issue of the cost of reasonable and necessary medical care. The calculation of the total amount of the bill shall not be reduced because such physician, physician assistant, dentist, chiropractor, naturopath, physical therapist, podiatrist, psychologist, social worker, mental health professional, emergency medical technician, optometrist or advanced practice registered nurse accepts less than the total amount of the bill or because an insurer pays less than the total amount of the bill."

[2] We granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the plaintiff's Veterans Administration hospital records improperly were admitted into evidence pursuant to . . . § 52-174 (b)?" *DeMaria* v. *Bridgeport*, 333 Conn. 916, 217 A.3d 1 (2019).

hands, a broken nose and a broken finger on his left hand. Approximately two months after his fall, the plaintiff began to experience a burning sensation in his left arm, weakened grip strength and limited range of motion in his left hand. He sought medical attention at the hospital, where he consulted neurologists, radiologists, physical therapists, occupational therapists and his primary care provider, Vitale, concerning his symptoms. After the plaintiff received approximately two and one-half years of treatment, including extensive physical and occupational therapy, Vitale wrote a document for his medical file titled 'Final Report of Injury,' in which she opined that the plaintiff had reached the maximum potential use of his left hand, retained only 47 percent of his former grip strength and continued to experience pain and neuropathy in that hand. She further concluded that 'these injuries were caused with a reasonable degree of medical certainty by the March 27, 2014 accident, [specifically], [to the] left [fourth] and [fifth] digit, a permanent disability of neuropathy, as well as left hand permanent weakness occurring as a result of [the] fall and impact of [the plaintiff] during the fall.'

"The plaintiff brought this action against the defendant for economic and noneconomic damages under General Statutes § 13a-149,[3] alleging that his injuries had been caused by the defendant's failure to remedy a defect in its sidewalk, which it knew or should have known would cause injuries to pedestrians. Prior to trial, the defendant filed a motion in limine to preclude the admission of Vitale's treatment records, treatment reports, findings, conclusions, and medical opinions as evidence at trial. The defendant argued that Vitale's

[3] "General Statutes § 13a-149 provides in relevant part: 'Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . .' " *DeMaria* v. *Bridgeport*, supra, 190 Conn. App. 452 n.2.

medical records were inadmissible under § 52-174 (b) because the defendant would have no opportunity to cross-examine her, either at a deposition or at trial, because she was prevented from testifying by 38 C.F.R. § 14.808.[4] The plaintiff responded that precluding the medical records would result in an injustice to him merely because his treating physician was made unavailable to testify by federal regulation and that that is the very type of injustice that § 52-174 (b) was intended to remedy. After a hearing, the court denied the defendant's motion in limine." (Footnote altered; footnote in original.) *DeMaria* v. *Bridgeport*, supra, 190 Conn. App. 452–53.

On the first day of trial, the defendant filed another motion in limine, seeking to preclude Vitale's "Final Report of Injury" (final report) on the ground that Vitale was not competent to render an opinion on the permanency of the plaintiff's injuries. The trial court also denied that motion.

"Following a three day trial, the jury returned a verdict for the plaintiff, awarding him $15,295.47 in economic damages and $77,500 in noneconomic damages, for a total award of $92,795.47. The court denied the defendant's subsequent motion to set aside the verdict, in which it argued, inter alia, that the trial court erred in admitting the medical records [prepared] by Vitale

[4] Title 38 of the 2017 edition of the Code of Federal Regulations, § 14.808 (a), provides in relevant part: "[Department of Veterans Affairs] personnel shall not provide, with or without compensation, opinion or expert testimony in any legal proceedings concerning official [Department of Veterans Affairs] information, subjects or activities, except on behalf of the United States or a party represented by the United States Department of Justice. Upon a showing by the requester . . . that, in light of the factors listed in § 14.804, there are exceptional circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Veterans Affairs or to the United States, the responsible [Department of Veterans Affairs] official designated in § 14-807 (b) may, in writing, grant special authorization for [Department of Veterans Affairs] personnel to appear and testify. . . ."

because the defendant had had no opportunity to cross-examine her at a deposition or at trial in violation of its common-law right to cross-examination." Id., 453.

The defendant then appealed from the judgment of the trial court to the Appellate Court, claiming that "[t]he trial court should have either excluded the entirety of . . . Vitale's reports, records, and opinions from evidence or, at the very least, excluded the opinions contained in her records and reports" because the defendant was unable to depose or cross-examine Vitale. *DeMaria* v. *Bridgeport*, Conn. Appellate Court Briefs & Appendices, January Term, 2019, Defendant's Brief pp. 3–4. The Appellate Court concluded that the trial court had improperly admitted the medical records under *Rhode* v. *Milla*, 287 Conn. 731, 744, 949 A.2d 1227 (2008), in which this court held that certain medical bills were inadmissible under § 52-174 (b) because the defendant did not have an adequate opportunity to cross-examine the treating health care provider. See *DeMaria* v. *Bridgeport*, supra, 190 Conn. App. 455–59. The Appellate Court further concluded that this error was harmful. Id., 462. Accordingly, the Appellate Court reversed the judgment of the trial court and remanded the case for a new trial. Id. This certified appeal followed.[5] See footnote 2 of this opinion.

On appeal, the plaintiff claims that the Appellate Court incorrectly determined that his medical records were inadmissible under § 52-174 (b) because the defendant was unable to cross-examine Vitale.[6] Specifically,

[5] After the appeal was filed, we granted permission to the Connecticut Veterans Legal Center to file an amicus curiae brief in support of the plaintiff's position.

[6] The plaintiff also contends that the defendant cannot claim that its due process rights were violated by the admission of his medical records because the defendant failed to exhaust all available methods to secure Vitale's testimony. The plaintiff did not raise this claim in either the trial court or the Appellate Court; indeed, he conceded in his Appellate Court brief that Vitale "was beyond the effective subpoena power of the trial court." *DeMaria* v. *Bridgeport*, Conn. Appellate Court Briefs & Appendices, January Term,

he contends that there is no "absolute right of cross-examination in civil cases" and that the medical records fall into the category of admissible hearsay evidence that does not require cross-examination because it is inherently reliable and trustworthy. (Internal quotation marks omitted.) The plaintiff also contends that the Appellate Court improperly relied on dictum in *Rhode* v. *Milla*, supra, 287 Conn. 731, to support its decision and that, if this court determines that *Rhode* is binding, we should overrule that decision. Finally, the plaintiff contends that the defendant is barred from seeking relief because it did not adequately pursue its opportunity to cross-examine Vitale by following the procedures outlined in 38 C.F.R. § 14.808. See footnote 4 of this opinion.

In response, the defendant concedes in its brief to this court that all of the plaintiff's medical records were admissible pursuant to § 52-174 (b) "save one," namely, the final report that Vitale authored.[7] The defendant contends that this medical record was inadmissible because it contains Vitale's expert opinion, it was prepared for use in this litigation and the defendant did not have an opportunity to cross-examine Vitale either in a deposition or at trial. The defendant further contends that the trial court's error was harmful.

We conclude that the medical records that were created in the ordinary course of diagnosing, caring for and treating the plaintiff were admissible pursuant to § 52-174 (b), even if there was no opportunity to cross-examine the records' author. Because the defendant made no claim and presented no evidence at trial that

2019, Plaintiff's Brief p. 5. Accordingly, we decline to review the claim. See, e.g., *State* v. *Fauci*, 282 Conn. 23, 26 n.1, 917 A.2d 978 (2007).

[7] The defendant did not clearly identify in its brief to this court the specific record that it claims was inadmissible. It became clear at oral argument before this court, however, that the defendant objected to the admission of the final report authored by Vitale.

Vitale prepared the final report exclusively for use in litigation, rather than in the ordinary course of providing care and treatment to the plaintiff, and the trial court accordingly made no finding on that point, we conclude that the Appellate Court incorrectly determined that the plaintiff's medical records were inadmissible.

Whether medical records prepared by a treating health care provider in the ordinary course of providing care and treatment to the plaintiff are admissible pursuant to § 52-174 (b) when the defendant is unable to cross-examine the provider is a question of statutory interpretation to which we apply well established rules of construction and over which we exercise plenary review. See General Statutes § 1-2z (plain meaning rule); *Canty* v. *Otto*, 304 Conn. 546, 557–58, 41 A.3d 280 (2012) (general rules of construction aimed at ascertaining legislative intent).

We begin with the text of § 52-174 (b), which provides in relevant part that, in certain civil actions, "any party offering in evidence a signed report . . . for treatment of any treating physician . . . may have the report . . . admitted into evidence as a business entry and it shall be presumed that the signature on the report is that of such treating physician . . . and that the report . . . [was] made in the ordinary course of business. . . ."

Although such medical reports would ordinarily be inadmissible hearsay, § 52-174 (b) permits their admission under the hearsay exception for business records. Accordingly, we have held that the provisions of General Statutes § 52-180,[8] and the general legal principles

[8] General Statutes § 52-180 provides in relevant part: "(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or

that govern the admission of business records; see Conn. Code Evid. § 8-4;[9] apply to medical records that fall within the scope of § 52-174 (b).[10] See *Struckman* v. *Burns*, 205 Conn. 542, 548, 534 A.2d 888 (1987) (because medical records are admissible as " 'business entries,' " § 52-180 (b) applies to them). "The initial rationale for the [business records] exception was that, although hearsay, business records [are] trustworthy because their creators had relied on the records for business purposes." (Internal quotation marks omitted.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 390, 222 A.3d 950 (2020).

record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"(b) The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility. . . ."

[9] Section 8-4 of the Connecticut Code of Evidence provides in relevant part: "(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"(b) The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility. . . ."

[10] We recognize that the criteria for admissibility pursuant to §§ 52-174 (b) and 52-180 differ in some respects. For example, it is presumed under § 52-174 (b) that medical records are prepared in the ordinary course of business, whereas, under § 52-180 (a), the trial judge must make a finding to that effect. To the extent the statutes differ, the more specific statute, § 52-174 (b), applies.

"The statute [allowing the admission of business records][11] expressly provides that business entries [that] are admissible under it shall not be rendered inadmissible by reason of the failure to produce as witnesses the persons who made them. It contemplates, therefore, *that there need be no opportunity afforded to cross-examine those who made the entries* if as a matter of fact the entries are admissible as business entries under its provisions." (Emphasis added; footnote added.) *D'Amato* v. *Johnston*, 140 Conn. 54, 62, 97 A.2d 893 (1953); see also *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792, 795–96 (2d Cir. 1962) ("[although] hearsay, business records were believed to have been prepared by methods and under circumstances that made them more trustworthy than other hearsay, and therefore business records could safely be admitted into evidence as tending to prove the transaction recorded without the [truth testing] provided by a cross-examination of the maker or keeper of the records"); *Troyan* v. *Reyes*, 367 Ill. App. 3d 729, 733, 855 N.E.2d 967 (2006) ("In order to fulfill the foundational requirements of a business record, it is not necessary that the author or creator of the record testify or be cross-examined about the contents of the record. . . . [T]he circumstantial probability of their trustworthiness is a practical substitute for cross-examination of the individual making the entries." (Citation omitted; internal quotation marks omitted.)); cf. *Struckman* v. *Burns*, supra, 205 Conn. 550–51 ("hospital records, including medical opinions contained therein relevant to diagnosis . . . may be admitted into evidence without the testimony of the persons who made the entries even in a criminal proceeding, and . . . this procedure does not violate a defendant's right of cross-examination" (citation omit-

[11] The court in *D'Amato* was construing General Statutes (1949 Rev.) § 7903, the predecessor provision to § 52-180. See *D'Amato* v. *Johnston*, 140 Conn. 54, 56–57 n.1, 62, 97 A.2d 893 (1953).

ted)); *State* v. *Jeustiniano*, 172 Conn. 275, 280, 374 A.2d 209 (1977) ("The defendants also assign error to the admission of the hospital record on the ground that they were denied an opportunity to cross-examine the persons who made the entries. This claim is without foundation in the law. The legislature, in General Statutes § 4-104, has specifically made hospital records admissible without supporting testimony.").

Indeed, the very purpose for which § 52-174 (b) was enacted was to avoid the delay and expense that obtaining the testimony of the author of the medical record would entail. As this court stated in *Lopiano* v. *Lopiano*, 247 Conn. 356, 752 A.2d 1000 (1998), § 52-174 (b) "serves the purpose of getting medical evidence before the jury in the absence of the treating physician. . . . The need for this statutory exception allowing for a substitute for testimony was clearly driven by economics due to the necessity for medical evidence in every personal injury action for damages." (Citation omitted.) Id., 383; see also *Bruneau* v. *Seabrook*, 84 Conn. App. 667, 671–72, 854 A.2d 818 ("[t]he rationale for allowing self-authenticating documents from physicians in personal injury . . . actions is to avoid trial delays due to the difficulty in scheduling doctors' appearances; especially because in the majority of cases the physician's testimony is consistent with his treatment report" (internal quotation marks omitted)), cert. denied, 271 Conn. 930, 859 A.2d 583 (2004).

Nevertheless, we recognize that, notwithstanding this case law, this court has, on a number of occasions, suggested that medical records are *not* admissible pursuant to § 52-174 (b) if the defendant is unable to cross-examine the author. In *Struckman* v. *Burns*, supra, 205 Conn. 544, the trial court admitted certain medical records prepared by several of the plaintiff's out-of-state chiropractors and dentists. The defendant contended that the statute applied only to medical prac-

titioners within the state, as out-of-state practitioners were beyond the reach of the court's subpoena power. Id., 545. This court observed that the statutory text did not require the practitioner to be available "in the jurisdiction"; id., 546; and that, during the debate on the proposed legislation, the legislature expressly considered out-of-state practitioners to be covered by the statute. Id., 547–48. The court concluded that "§ 52-174 (b) characterizes such medical reports as 'business entries' and the legislature in . . . § 52-180 (b) has provided that such business entries ought not be rendered inadmissible either by a party's failure to produce the person or persons making the writing or by a party's failure to show that such persons are unavailable as witnesses. . . . [Section] 52-174 (b) permits the admission of the medical reports and bills of nonresident treating medical practitioners even if they are beyond the subpoena power of our courts, and cannot be called to testify at a trial." Id., 548.

The defendant in *Struckman* also argued that, if § 52-174 (b) allows the admission of medical records even if the defendant is unable to cross-examine the author, the statute would violate his right to cross-examination under the federal and state constitutions. Id., 548–49. Specifically, although the defendant conceded that the hospital bills that had been admitted as evidence were admissible because they were prepared in the ordinary course of business and, therefore, were presumptively reliable, he contended that the medical reports that had been admitted "were not prepared in the ordinary course of business, but for litigation" and, therefore, were not entitled to the presumption of reliability. Id., 551. This court observed that, under the common law, there is an "absolute right" to cross-examination in civil cases. (Internal quotation marks omitted.) Id., 549. This court declined, however, to consider "whether the provisions of our federal and state constitutions against

depriving a person of his property without due process of law afford some protection against legislative restriction of cross-examination in civil cases" because § 52-174 (b) "does not preclude taking the deposition of a nonresident medical practitioner whose report or bill may be offered into evidence at a trial" and, therefore, "does not significantly curtail the right of cross-examination . . . ." Id.

In *Rhode* v. *Milla*, supra, 287 Conn. 744, this court construed *Struckman* to require cross-examination as a prerequisite to admitting medical records pursuant to § 52-174 (b) under the particular circumstances presented. The trial court in *Rhode* had admitted medical bills from the plaintiff's chiropractor, even though the defendants were unable to cross-examine him because he had "asserted his fifth amendment privilege in response to all questions posed to him at his deposition . . . ." Id., 734. This court cited *Struckman* for the proposition that there is an "absolute common-law right to cross-examination in a civil case." (Internal quotation marks omitted.) Id., 743. Because the defendants were unable to exercise this right at trial or in a deposition, this court held that the medical bills should not have been admitted. Id., 744; see also *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 726, 80 A.3d 887 (2013) (physician's expert opinion is admissible pursuant to § 52-174 (b), "as long as the defendant is afforded an opportunity to cross-examine the author of the report"); *Milliun* v. *New Milford Hospital*, 129 Conn. App. 81, 106, 20 A.3d 36 (2011) ("*Rhode* stands for the proposition that the opportunity to cross-examine an expert is a necessary procedural predicate to the admissibility of reports and records pursuant to § 52-174 (b)"), aff'd, 310 Conn. 711, 80 A.3d 887 (2013).

We conclude that this court's decision in *Rhode* v. *Milla*, supra, 287 Conn. 731, overstated the holding of *Struckman* v. *Burns*, 205 Conn. 542. As we have

explained, the court in *Struckman* expressly concluded that, as a general rule, "medical opinions . . . relevant to diagnosis . . . may be admitted into evidence without the testimony of the persons who made the entries . . . and . . . this procedure does not violate a defendant's right of cross-examination." (Citation omitted.) *Struckman* v. *Burns*, supra, 550–51. Moreover, the defendant in *Struckman* did not challenge the proposition that medical records are admissible pursuant to § 53-174 (b) if they are prepared in the ordinary course of business, that is, for the purpose of diagnosing, caring for and treating the plaintiff. It was only because the defendant in *Struckman* contended that the medical reports at issue were *not* created in the ordinary course of business, but for use in the litigation, that this court assumed, without deciding, that the ordinary rule allowing the admission of medical records without an opportunity for cross-examination would violate the defendants' due process rights. See id., 551–52.

This court's assumption in *Struckman* that there is a distinction between medical records prepared for use in diagnosis, care and treatment, and those records prepared for use in litigation finds support in this court's decision in *D'Amato* v. *Johnston*, supra, 140 Conn. 54, which the court in *Struckman* cited. See *Struckman* v. *Burns*, supra, 205 Conn. 549–50. In *D'Amato*, this court held that there is "a distinction between entries [that] contain information pertinent to and in aid of the conduct of the real business of the concern keeping the record [which are admissible as business records, even if the defendant had no opportunity to cross-examine the author] and entries [that] are not pertinent to or in aid of that business." *D'Amato* v. *Johnston*, supra, 60–61. This court observed that "[t]he real business of a hospital is the care and treatment of sick and injured persons. It is not to collect and preserve information for use in litigation. Accordingly, even though it might

be the custom of a hospital to include in its records information relating to questions of liability for injuries [that] had been sustained by its patients, such entries . . . would not be made admissible by the statute [allowing admission of business records] unless they also contained information having a bearing on diagnosis or treatment." Id., 61.

We recognize that, in *Struckman*, this court made reference to the "absolute" common-law right to cross-examination. (Internal quotation marks omitted.) *Struckman* v. *Burns*, supra, 205 Conn. 549; see also *Gordon* v. *Indusco Management Corp.*, 164 Conn. 262, 271, 320 A.2d 811 (1973) ("[t]he right of cross-examination is not a privilege but is an absolute right and if one is deprived of a complete cross-examination he has a right to have the direct testimony stricken"); *Fahey* v. *Clark*, 125 Conn. 44, 47, 3 A.2d 313 (1938) ("[a] fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error" (internal quotation marks omitted)). Contra *State* v. *Jordan*, 305 Conn. 1, 27, 44 A.3d 794 (2012) ("[t]he defendant's right to cross-examine a witness . . . is not absolute" (internal quotation marks omitted)). It is clear, however, that *Struckman* itself recognized that the right to cross-examination is not absolute in the sense that a party *always*, and under *all* circumstances, has the right. Rather, evidence is admissible without providing an opportunity for cross-examination, when, as with the business records exception to the hearsay rule, the presumption of reliability is not undermined by other circumstances. See *Struckman* v. *Burns*, supra, 551–52 (medical opinions pertaining to diagnosis may be admitted without providing opportunity for cross-examination); see also *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, supra, 334 Conn. 390 ("[t]he

initial rationale for the [business records] exception was that . . . business records [are] trustworthy because their creators had relied on the records for business purposes" (internal quotation marks omitted)); *State* v. *Cooper*, 182 Conn. 207, 213, 438 A.2d 418 (1980) (right to cross-examination "is a substantial legal right [that] may not be abrogated or abridged at the discretion of the court *to the prejudice of the cross-examining party*" (emphasis added; internal quotation marks omitted)); cf. Conn. Code Evid. § 8-3 (enumerating exceptions to hearsay rule even though declarant is available). To the extent that *Rhode* v. *Milla*, supra, 287 Conn. 731, and *Milliun* v. *New Milford Hospital*, supra, 310 Conn. 711, suggest that an opportunity for cross-examination is an absolute prerequisite for the admission of medical records prepared for use in the diagnosis, care and treatment of a patient, we now disavow that proposition. We conclude, therefore, that the Appellate Court incorrectly determined that the medical records of the plaintiff in the present case were inadmissible under § 52-174 (b) because the defendant did not have an opportunity to cross-examine Vitale.

The defendant contends that the final report was not admissible under § 52-174 (b) because it contained her expert opinions on causation and permanency, and was not prepared in the ordinary course of business, namely, for medical diagnosis and treatment, but instead for use in this litigation. See *D'Amato* v. *Johnston*, supra, 140 Conn. 61 (medical records "relating to questions of liability for injuries [that] had been sustained by [a patient] . . . would not be made admissible by the statute [allowing admission of business records] unless they also contained information having a bearing on diagnosis or treatment"); cf. *Jefferson Garden Associates* v. *Greene*, 202 Conn. 128, 140–41, 520 A.2d 173 (1987) ("documents prepared for litigation are excluded, not on a per se basis, but rather upon an

inquiry into whether such documents bear circumstantial indicia of lack of trustworthiness").[12] The defendant, however, made no claim and presented no evidence to the trial court that the final report was prepared in contemplation of litigation and not for use in the care and treatment of the plaintiff.[13] Although the defendant contended at oral argument before the trial court on its motion to preclude the final report that the report contained Vitale's opinion, as this court recognized in *D'Amato*, virtually *all* medical reports contain the opinion of the author, yet they are generally admissible. See *D'Amato* v. *Johnston*, supra, 58 ("[t]he making of a diagnosis certainly involves the formulation of an expert opinion, and yet we have said that the entry in a hospital record setting forth the diagnosis of a patient's illness is an entry [that] is admissible" under statute allowing admission of business records). The fact that the final report contained Vitale's opinion on causation and permanency, which are issues that typically require expert

[12] In *Struckman* v. *Burns*, supra, 205 Conn. 551, this court assumed, without deciding, that § 52-174 (b) would be *unconstitutional* as applied to medical records that are prepared for use in litigation. This constitutional assumption, insofar as it is predicated on § 52-174 (b), is inconsistent with this court's holding in *D'Amato* that medical records prepared exclusively for use in litigation simply *do not constitute* "*business entries*" subject to that statute allowing the admission of business records because health care providers are not in the business of preparing such records. (Emphasis added.) *D'Amato* v. *Johnston*, supra, 140 Conn. 57; see id., 61 ("The real business of a hospital is the care and treatment of sick and injured persons. It is not to collect and preserve information for use in litigation.")

[13] Instead, the defendant contended in its motion in limine that the final report was inadmissible because it had no way of knowing whether Vitale, a physicians assistant, was competent to render an opinion on the permanency of the plaintiff's hand injury, which is a claim that it does not renew on appeal. It also argued generally that all of Vitale's "treatment records, treatment reports, findings, conclusions, and medical opinions . . . that reference any medical treatment, diagnosis, prognosis, or permanent injury" suffered by the plaintiff were inadmissible because the defendant was unable to cross-examine Vitale, whom the plaintiff had disclosed as an expert witness. The defendant did not specifically refer to the final report or contend that any of the records had been prepared for use in this litigation.

testimony, fails to establish, in and of itself, that the report was not prepared for use in the care and treatment of the plaintiff. In any event, the defendant did not claim in the proceedings before the trial court that medical records containing opinions on causation and permanency are inadmissible per se under § 52-174 (b) if there is no opportunity for cross-examination. Even putting aside the preservation issues that arise from the defendant's failure to make a distinct argument at trial that the final report was inadmissible under § 52-174 (b) on the ground that it was prepared exclusively for use in this litigation,[14] we conclude that the record simply does not support that particular claim.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion the other justices concurred.

JOHN L. THORNTON ET AL. *v.* BRADLEY JACOBS ET AL.

BRADLEY JACOBS ET AL. *v.* JOHN L. THORNTON ET AL.

(SC 20457)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiffs served a subpoena on the defendant L in Connecticut to depose her in connection with an action the plaintiffs were litigating in Florida against a company owned by L, after a Florida court ruled that it lacked jurisdiction to subpoena L, who resided primarily in Connecticut. L filed a motion to quash the Connecticut subpoena, which the trial court

[14] See *Jefferson Garden Associates* v. *Greene*, supra, 202 Conn. 140 (declining to review defendant's claim that certain documents were inadmissible under § 52-180 because they were prepared for use in litigation when defendant had objected to admission of documents only on ground that witness lacked competency to offer documents into evidence).

denied, and L appealed to the Appellate Court. The plaintiffs then filed a motion to dismiss the appeal, which L opposed, and the Appellate Court dismissed L's appeal as frivolous. After the Appellate Court's dismissal of L's appeal but before this court granted L's petition for certification to appeal, the plaintiffs served L with a subpoena in Florida while L was visiting that state and withdrew, without prejudice, the Connecticut subpoena. On appeal from the Appellate Court's dismissal of L's appeal, *held* that, because the plaintiffs' withdrawal of their Connecticut subpoena rendered L's appeal to this court moot, that appeal was dismissed, and, because L was thereby prevented from challenging, before this court, the Appellate Court's dismissal of her appeal as frivolous, the Appellate Court's judgment was vacated; the plaintiffs, having unilaterally withdrawn the Connecticut subpoena, prevented L, through no fault of her own, from challenging the Appellate Court's adverse determination, and the plaintiffs, after having received favorable rulings from the Appellate Court and the trial court, should not have been able to moot L's appeal to this court to prevent the possibility of an unfavorable decision.

Argued February 19—officially released July 2, 2021*

Procedural History

Motion, in the first case, to enforce compliance with subpoenas for video depositions duces tecum, brought to the Superior Court in the judicial district of Stamford-Norwalk, and motion, in the second case, to quash subpoenas and for a protective order, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Stamford-Norwalk, where the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted in part the motion in the first case and denied in part the motion in the second case, and the defendant Lamia Jacobs in the first case and plaintiff in the second case appealed to the Appellate Court, which dismissed the appeal; thereafter, the defendant Lamia Jacobs in the first case and plaintiff in the second case, on the granting of certification, appealed to this court. *Appeal dismissed*; *judgment vacated.*

* July 2, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Tadhg Dooley, with whom were *Jeffrey R. Babbin* and, on the brief, *James I. Glasser*, for the appellant (defendant Lamia Jacobs in the first case, plaintiff in the second case).

James J. McGuire, pro hac vice, with whom were *Daniel J. Krisch* and, on the brief, *Joshua M. Auxier*, for the appellees (plaintiffs in the first case, defendants in the second case).

Opinion

PER CURIAM. This appeal stems from an underlying action being litigated in Florida by the plaintiffs in the present case, John L. Thornton and Margaret B. Thornton. The parties to the Florida action are the plaintiffs in the present case, who are the defendants and counterclaimants in the Florida action, and 100 Emerald Beach, LC, which is the plaintiff and counterclaim defendant in the Florida action. Lamia Jacobs, the defendant in the present case, is the sole owner of 100 Emerald Beach, LC, but is not named individually as a party in the Florida case. Jacobs and her husband, Bradley Jacobs, reside primarily in Connecticut. The Florida trial court ruled that it lacked personal jurisdiction to subpoena the defendant and Bradley Jacobs but granted the plaintiffs permission to seek to subpoena them in Connecticut. The plaintiffs served a subpoena to depose the defendant in Connecticut, and she filed a motion to quash in the Superior Court in Stamford, objecting to the subpoena.[1] She argued that the plaintiffs, instead of issuing a subpoena to her, should instead subpoena 100 Emerald Beach, LC, in order to obtain the information being sought. The trial court, *Hon. Kenneth B. Povodator*, judge trial referee, denied the motion to quash, and the defendant filed a timely appeal with the Appellate Court.

[1] The plaintiffs also served a subpoena to depose Bradley Jacobs in Connecticut. He filed a motion in the trial court to quash the subpoena, but the trial court did not rule on that motion.

The plaintiffs moved in the Appellate Court for permission to file a late motion to dismiss, arguing that the appeal was frivolous. The defendant opposed the motion. The Appellate Court granted the motion to file an untimely motion to dismiss and, thereafter, without issuing an opinion, dismissed the appeal. The defendant filed a petition for certification to appeal to this court, which we granted on the following issue: "Did the Appellate Court properly dismiss, as frivolous, the appeal of a nonparty witness from the trial court's order enforcing a subpoena for an out-of-state lawsuit?" *Thornton* v. *Jacobs*, 334 Conn. 929, 224 A.3d 538 (2020). After we granted certification, the plaintiffs withdrew the subpoena they had sought to enforce against the defendant in Connecticut. In light of this withdrawal, we now dismiss this certified appeal as moot and vacate the judgment of the Appellate Court dismissing the defendant's appeal.

The following further facts and procedural background, which are based in part on the parties' postargument filings with this court, inform our resolution of this appeal. In December, 2019, after the Appellate Court had dismissed the defendant's appeal but before we granted her petition for certification, the plaintiffs succeeded in serving her with a subpoena while she was visiting Florida.[2] On June 17, 2020, after this court granted certification to appeal but before the parties filed any briefs with this court, the plaintiffs withdrew the Connecticut subpoena as to the defendant without

[2] According to the parties' postargument filings, the defendant's deposition took place pursuant to the Florida subpoena on March 11, 2021, days after oral argument in this court. The parties report that there remains an unresolved dispute over whether her deposition should continue, including whether she should have to answer certain questions her counsel had instructed her not to answer on privilege grounds. The parties have filed papers in the Florida trial court seeking a ruling in connection with that dispute. These events have no impact on our determination to dismiss this appeal.

prejudice.[3] We conclude that the plaintiffs' withdrawal of their subpoena directed at the defendant renders this certified appeal moot. See *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 142, 60 A.3d 946 (2013) (defendant's appeal challenging trial court's order to comply with subpoena was rendered moot when plaintiff no longer sought to enforce subpoena after defendant settled underlying claim with third party); see also *In re Grand Jury Proceedings*, 574 F.2d 445, 446 (8th Cir. 1978) (holding that challenge to merits of court order directing party to comply with subpoena became moot when District Court granted issuing party's motion to withdraw subpoena); *United States* v. *DiScala*, Docket No. 14-cr-399 (ENV), 2018 WL 1187394, *1 n.6 (E.D.N.Y. March 6, 2018) ("The government moved to quash an earlier subpoena . . . [that the defendant] withdrew. As a result, the government's motion to quash that subpoena is denied as moot." (Citation omitted.)); *Cutsforth, Inc.* v. *Westinghouse Air Brake Technologies Corp.*, Docket No. 12-cv-1200 (SRN/LIB), 2017 WL 11486322, *8 (D. Minn. March 15, 2017) ("because the [c]ourt has deemed the subpoenas at issue withdrawn pursuant to [the] [p]laintiff's representations to the [c]ourt, [the nonparty's] [m]otion [to quash] is moot").

The plaintiffs argue that this appeal is not moot because (1) they might seek to reissue the Connecticut subpoena if they cannot obtain the information they want through the Florida subpoena, (2) they might want

[3] The withdrawal pleading provides: "The plaintiffs/applicants John [L.] Thornton and Margaret [B.] Thornton hereby give notice, on this [seventeenth] day of June, 2020, that they are withdrawing without prejudice, and releasing the defendant/respondent Lamia Jacobs from complying with, the subpoena duces tecum, dated April 18, 2019, served upon her in the state of Connecticut on April 29, 2019, in the [above captioned] action. Said withdrawal without prejudice and release is not intended to, and does not, affect in any fashion any other subpoena(s) that the plaintiffs/applicants have caused to be served in Connecticut or elsewhere upon Lamia Jacobs or anyone else."

to move for sanctions against the defendant for having filed a frivolous appeal, and (3) the underlying judgments may have collateral consequences in regard to their subpoena against Bradley Jacobs, which has not been withdrawn.

In regard to the plaintiffs' argument that they may be unable to obtain all necessary information through the Florida subpoena, the plaintiffs' potential desire to reissue the Connecticut subpoena does not save this appeal from being moot. It is the plaintiffs' own unilateral actions that render this appeal moot; the defendant is not attempting to evade judicial review by her actions. See *Boisvert* v. *Gavis*, 332 Conn. 115, 139, 210 A.3d 1 (2019) (explaining that parties should not be able to evade judicial review by their unilateral, voluntary actions). Any need the plaintiffs might have to reissue the Connecticut subpoena is merely speculative at this point. See, e.g., *United States* v. *Garde*, 848 F.2d 1307, 1309–10 n.5 (D.C. Cir. 1988) (holding that appeal challenging order denying enforcement of subpoena was rendered moot when government was voluntarily provided certain information that satisfied relief it sought on appeal, and there were too many variables to determine whether government would seek another subpoena to procure related information).

Similarly, as to the plaintiffs' fear that dismissing this appeal will deprive them of the ability to seek sanctions against the defendant, that consequence—if it is one—stems from their own action in withdrawing the Connecticut subpoena. The plaintiffs had their reasons for withdrawing that subpoena, which we do not question. But that action resulted in there no longer being a live case or controversy pending in this state regarding enforcement of a subpoena against the defendant in the Florida action, and we conclude that the plaintiffs'

potential desire to seek sanctions does not save this appeal from dismissal on the ground of mootness.[4]

Finally, as to the deposition of Bradley Jacobs, the plaintiffs appear to argue that there remain collateral consequences stemming from the underlying judgments, thereby saving the appeal from mootness. See, e.g., *Putman* v. *Kennedy*, 279 Conn. 162, 169, 900 A.2d 1256 (2006) ("despite developments during the pendency of an appeal that would otherwise render a claim moot, the court may retain jurisdiction when a litigant shows that there is a reasonable possibility that prejudicial collateral consequences will occur" (internal quotation marks omitted)). But not only is Bradley Jacobs not part of this appeal, the trial court never ruled on the subpoena served on him. Thus, our holding does not prevent the plaintiffs from taking further steps to seek to depose Bradley Jacobs in Connecticut.

Having decided that the plaintiffs' withdrawal of the subpoena renders this appeal moot, we must determine whether vacatur of the underlying judgment is appropriate. We conclude that it is. This court previously has held that, when an appeal is dismissed as moot, the party who is unable to obtain judicial review "should not be barred from relitigating the factual and legal issues decided in rendering that judgment." *Commissioner of Motor Vehicles* v. *DeMilo & Co.*, 233 Conn. 254, 269, 659 A.2d 148 (1995). The party seeking vacatur must move for vacatur and has the burden "to demonstrate . . . equitable entitlement to the extraordinary

[4] We note that it is not clear from our case law or rules of practice whether, after the dismissal of an appeal for mootness, the plaintiffs may seek sanctions against the defendant for actions taken while the action or appeal was pending. See *Commissioner of Motor Vehicles* v. *DeMilo & Co.*, 233 Conn. 254, 269–70, 659 A.2d 148 (1995) (for underlying judgment that had become moot to have no collateral effect, judgment must be vacated); see also Practice Book §§ 85-2 (5) and 85-3.

remedy of vacatur." (Internal quotation marks omitted.) Id., 273.[5]

"Vacatur is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences. . . . In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . . The same is true when mootness results from unilateral action of the party who prevailed below. . . . Nevertheless, our law of vacatur, though scanty . . . recognizes that [j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur. . . . Thus, [i]t is the [appellant's] burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." (Citations omitted; internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 303, 898 A.2d 768 (2006); see also *In re Emma F.*, 315 Conn. 414, 430–31, 107 A.3d 947 (2015); *State* v. *Boyle*, 287 Conn. 478, 485–89, 949 A.2d 460 (2008).

In the present case, the Appellate Court's judgment was adverse to the defendant—that court dismissed her appeal as frivolous. As a result of the plaintiffs having

[5] Although the defendant has not filed a formal motion to vacate, in postargument orders, this court asked the parties whether the appeal was moot and whether this court should order the underlying judgment vacated. The defendant has clearly communicated her position and requested that this court vacate the Appellate Court's judgment.

unilaterally withdrawn the subpoena, which we have determined rendered the defendant's appeal moot, the plaintiffs have prevented the defendant, through no fault of her own, from challenging the Appellate Court's dismissal of her appeal, which, in turn, had challenged the trial court's denial of her motion to quash. The defendant did not voluntarily forfeit her appeal, and, under our case law, the plaintiffs, after receiving favorable rulings from the lower courts, should not be able to moot the appeal to prevent the possibility of an unfavorable decision. Accordingly, we dismiss this appeal as moot and vacate the Appellate Court's judgment.

The appeal is dismissed and the judgment of the Appellate Court is vacated.

DEBRA COHEN *v.* STATEWIDE GRIEVANCE COMMITTEE
(SC 20356)

McDonald, D'Auria, Mullins, Ecker and Keller, Js.

Syllabus

The plaintiff attorney appealed to the trial court, challenging the reprimand imposed on her by the defendant, the Statewide Grievance Committee, for having violated rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct. The plaintiff, who was a court-appointed trustee of an estate, had filed an amended final accounting with the Probate Court that sought fiduciary fees for her work after she previously had represented to that court that she would waive the fees and remove them from the final accounting. The defendant upheld the determination of its reviewing committee that the amended final accounting constituted a knowingly false statement in violation of rule 3.3 (a) (1) and that the false statement also was dishonest in violation of rule 8.4 (3). The trial court dismissed the plaintiff's appeal, concluding, inter alia, that the reviewing committee's decision was not clearly erroneous and that the record supported the reviewing committee's findings of fact. The plaintiff thereafter appealed to the Appellate Court, claiming that the trial court improperly expanded the application of rule 3.3 to include attorneys functioning in a fiduciary role and improperly upheld the reviewing committee's determinations that she violated rules 3.3 (a) (1) and 8.4

(3). The Appellate Court affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that rule 3.3 (a) (1) did not apply to her because the Probate Court had appointed her to act as a fiduciary for an estate and the commentary to that rule indicates that it governs the conduct of a lawyer representing a client in the proceedings of a tribunal: although the commentary illustrates the most common context in which the rule would apply, that is, lawyers appearing before a tribunal in the course of client representation, there are many other contexts in which a lawyer might appear before a tribunal, and a fiduciary role is one such example; moreover, case law supported the conclusion that the commentary to rule 3.3 (a) (1) was insufficient to exempt attorneys serving as court-appointed fiduciaries, and this court would not conclude, without more evidence in the rule's text or commentary, that the drafters of the rule intended that an attorney serving as a court-appointed fiduciary was not subject to discipline for making false statements to the Probate Court when the same attorney, serving in a traditional representational capacity, would be subject to discipline for the same conduct.

2. The reviewing committee correctly concluded that the plaintiff had made a false statement in violation of rule 3.3 (a) (1); contrary to the plaintiff's claim that she did not make a false statement because the amount of the fiduciary fees listed in the accounting was accurate, the false statement at issue was not the amount of the fees claimed but her assertive conduct of including them in the amended final accounting in the context of her prior representations to the Probate Court, and, even if her statement in filing the accounting was not false within the meaning of rule 3.3 (a) (1), her failure to qualify the inclusion of the fees with some form of clarification that they had been waived amounted to an affirmative misrepresentation and, therefore, was a false statement.

3. The evidence supporting the conclusion that the plaintiff violated rule 3.3 (a) (1) was sufficient to support the reviewing committee's conclusion that her conduct was dishonest, in violation of rule 8.4 (3): the plaintiff's knowingly false statement amounted to conduct involving a lack of straightforward dealing, honesty and integrity, and, given that the plaintiff knew that the Probate Court judge considered her fiduciary fees waived, the reviewing committee did not incorrectly conclude that it was dishonest for the plaintiff to include fiduciary fees in her amended final accounting; moreover, even if the final accounting did not amount to a violation of rule 3.3 (a) (1), her course of conduct, as found by the reviewing committee and supported by the record, was sufficient to support the conclusion that she violated rule 8.4 (3), as the plaintiff acknowledged that she sought fiduciary fees because she was otherwise unable to reimburse the estate for the tax penalties and interest she had incurred in her role as the estate's fiduciary, and the inconsistencies between the different final accountings the plaintiff had submitted to

the Probate Court supported the conclusion that she was not straightforward with that court.

Argued December 7, 2020—officially released July 2, 2021*

Procedural History

Appeal from the decision of the defendant reprimanding the plaintiff for violation of the Rules of Professional Conduct, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Robaina*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to the Appellate Court, *Alvord*, *Sheldon* and *Bear*, *Js.*, which affirmed the judgment of the trial court, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Debra Cohen, self-represented, the appellant (plaintiff).

Brian B. Staines, chief disciplinary counsel, for the appellee (defendant).

Opinion

D'AURIA, J. In this certified appeal, the plaintiff, Attorney Debra Cohen, appeals from the Appellate Court's judgment affirming the trial court's dismissal of her appeal from a reprimand the defendant, the Statewide Grievance Committee, imposed on her for violating rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct.[1] On appeal, the plaintiff claims that (1) rule 3.3 (a) (1) does not apply when, as in the

* July 2, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] Rule 3.3 (a) of the Rules of Professional Conduct provides in relevant part: "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 . . . ."

Rule 8.4 of the Rules of Professional Conduct provides in relevant part: "It is professional misconduct for a lawyer to:

* * *

"(3) [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."

present case, she was at all relevant times an attorney admitted to practice in this state but was serving as a court-appointed fiduciary, (2) the defendant incorrectly concluded that she violated rule 3.3 (a) (1) by making a "false statement," and (3) the defendant incorrectly concluded that her conduct was dishonest in violation of rule 8.4 (3). We disagree and, accordingly, affirm the judgment of the Appellate Court.

The Appellate Court's decision contains the pertinent facts and procedural history, which we summarize in relevant part. See *Cohen* v. *Statewide Grievance Committee*, 189 Conn. App. 643, 646–55, 208 A.3d 676 (2019). The plaintiff was hired as a staff attorney for the Office of the Probate Court Administrator (administrator) in 2005. Her responsibilities included auditing random Probate Court files to determine whether the required accountings complied with applicable law and procedures. At the time of her hiring, the plaintiff had been serving as a court-appointed trustee for the sole beneficiary of the estate of John DeRosa, and she continued to serve in that capacity after her employment commenced.[2] In 2012, a few days after the plaintiff had filed a proposed periodic accounting and affidavit of fees in the DeRosa matter, the chief clerk of the Probate Court asked the chief counsel for the administrator in an e-mail whether the administrator's attorneys were permitted to serve as court-appointed fiduciaries. Chief counsel for the administrator then instructed the plaintiff to resign as trustee in the DeRosa matter.

The plaintiff filed a motion to resign as the fiduciary in the DeRosa matter on May 18, 2012. Following a hearing, the Probate Court judge, Timothy R.E. Keeney, ordered the plaintiff to file a final accounting, noting

[2] The heir to the DeRosa estate could not be located. The principal asset of the estate was a mortgage on which monthly payments were made. The plaintiff had been appointed trustee for the trust created for the purpose of receiving and holding these payments for the missing beneficiary.

in the order that he would consider the plaintiff's motion to resign when she filed the final accounting. The plaintiff thereafter filed an "Interim Account, for Filing Purposes Only."[3] Next, the plaintiff submitted a proposed final accounting, dated April 12, 2013, through her retained counsel, Attorney Timothy A. Daley. The April 12 proposed final accounting included fiduciary fees she claimed in the amount of $5980. The same day, Attorney Daley disclosed to the Probate Court that the plaintiff had failed to file income tax returns for the trust and that, as a result, the trust had incurred tax penalties in the amount of $5531.84. Attorney Daley told the Probate Court that the proposed final accounting credited and paid back the penalties incurred as a result of the plaintiff's failure to file the required tax returns.

On May 15, 2013, during a hearing before the Probate Court, the plaintiff filed an amended final accounting, which showed a reimbursement to the estate of $5531.84 for the tax interest and penalties, and a request for fiduciary fees in the amount of $5980. Following the hearing, the chief counsel for the administrator instructed the plaintiff not to charge fiduciary fees in any Probate Court matter for the time period during which she had been employed by the administrator.

On May 24, 2013, the plaintiff e-mailed the chief clerk of the Probate Court, stating that she intended to file a second amended final accounting and that "[t]he amendment will make no entry for the payment of fees for the fiduciary and will set aside a reserve for the payment of state and federal income taxes and the cost for preparing the final income tax returns."

On June 1, 2013, the plaintiff filed an amended final accounting, which, if approved, would reduce to $4283.74

[3] The "Interim Account, for Filing Purposes Only," did not reimburse the estate for any interest or penalties owed for taxes and did not claim any fiduciary fees.

the amount she was required to reimburse the estate. The plaintiff asserted that this reduction reflected that the Department of Revenue Services "had granted amnesty to [the] [e]state for the 2000–2007 tax years [and that] the value of the tax pardoned . . . is $1248.10." (Internal quotation marks omitted.) *Cohen* v. *Statewide Grievance Committee*, supra, 189 Conn. App. 648. The plaintiff did not include an entry for fiduciary fees in the June 1 amended final accounting.

Judge Keeney did not accept the June 1, 2013 amended final accounting. In a June 5, 2013 letter to the plaintiff, Judge Keeney questioned why she sought to reduce the reimbursement she owed the estate, noting that the actual amount paid by the estate for interest and penalties for state and federal taxes was $5531.84, regardless of whether the tax obligation itself was later reduced. Judge Keeney's letter continued: "It is duly noted that the [f]iduciary fees per [e]xhibit A of the January 1, 2012 to April 22, 2013 [a]mended [f]inal [a]ccount[ing] totaling $5980 have now been waived in the [a]mended [f]inal [a]ccount[ing] of January 1, 2012 to May 31, 2013."

On June 24, 2013, the plaintiff filed another amended final accounting. This time, the amended final accounting listed a reimbursement to the estate in the amount of $5531.84 as well as an entry for claimed fiduciary fees in the identical amount of $5531.84. Thereafter, the chief clerk of the Probate Court e-mailed the plaintiff, explaining that no hearing had yet been set because "the [j]udge still has some questions/concerns." (Internal quotation marks omitted.) *Cohen* v. *Statewide Grievance Committee*, supra, 189 Conn. App. 650. On August 6, 2013, the plaintiff filed one more amended final accounting, this time removing the claimed fiduciary fees. The Probate Court approved this final accounting on September 5, 2013.

Chief disciplinary counsel at the time, Patricia A. King, filed a grievance complaint with the defendant

on January 2, 2015, alleging that the plaintiff's conduct in the DeRosa matter violated numerous provisions of the Rules of Professional Conduct.[4] The complaint alleged specifically that the plaintiff had violated rule 8.4 (3) when she "tried to substantiate her fees in the DeRosa matter by indicating to the Probate Court that her position as attorney for the [Probate Court administrator] justified, in part, her requested fee. Moreover, [the plaintiff] billed for time spent discussing the DeRosa matter with her supervisor, who was instructing her to withdraw from the matter."

A grievance panel for the Hartford and New Britain judicial districts found probable cause that the plaintiff had violated rule 1.7 (a) (2) of the Rules of Professional Conduct, and also found that the plaintiff did not violate rules 1.11, 1.3 and 8.4 (4). The panel's determination of probable cause was silent as to rule 8.4 (3). Pursuant to Practice Book § 2-35 (d),[5] the Office of Disciplinary Counsel then filed additional allegations of misconduct. Disciplinary counsel alleged that the plaintiff's "refusal to adhere to Probate Court requests and orders" in the DeRosa matter violated rules 3.3 and 8.4 (3). The additional allegations included seventeen attached documents in support of those allegations.

After a hearing at which the plaintiff testified, a reviewing committee of the defendant concluded that

[4] King's grievance complaint alleged violations of rules 1.3, 1.7 (a) (2), 1.11 (d) (1), 1.11 (d) (2) (i), 8.4 (1), 8.4 (3) and 8.4 (4) of the Rules of Professional Conduct. The complaint also alleged additional violations of the rules regarding several other matters in which the plaintiff served as a fiduciary.

[5] Practice Book § 2-35 (d) provides in relevant part: "Disciplinary counsel may add additional allegations of misconduct to the grievance panel's determination that probable cause exists in the following circumstances:

"(1) Prior to the hearing before the Statewide Grievance Committee or the reviewing committee, disciplinary counsel may add additional allegations of misconduct arising from the record of the grievance complaint or its investigation of the complaint. . . ."

the plaintiff had violated rules 3.3 (a) (1) and rule 8.4 (3). Specifically, the reviewing committee concluded: "It is clear . . . that the [plaintiff] was attempting to offset the amount she owed to the estate for the income tax interest and penalties with her fiduciary fees. The [plaintiff] maintained that the request for fiduciary fees was a mistake. This reviewing committee does not find the [plaintiff's] statement credible, considering the fact that the amount of the fiduciary fees requested equaled the amount of interest and penalties owed to the estate by the [plaintiff]. Furthermore, the [plaintiff] is an experienced Probate Court attorney who clearly understood the directives of Judge Keeney. We find [that] the [plaintiff's] actions were knowing, deliberate and contrary to her representation to the court in her May 24, 2013 e-mail and June 1, 2013 accounting. Accordingly, we conclude that the amended final account[ing] filed by the [plaintiff] on June 24, 2013, constituted a knowingly false statement to the Probate Court, in violation of rule 3.3 (a) (1) of the Rules of Professional Conduct, and was dishonest, in violation of rule 8.4 (3) of the Rules of Professional Conduct." The reviewing committee reprimanded the plaintiff and ordered her to attend a continuing legal education course in legal ethics.

The defendant upheld the reviewing committee's decision after the plaintiff filed a request for review pursuant to Practice Book § 2-35 (k).[6] The plaintiff next appealed to the Superior Court pursuant to Practice Book § 2-38, arguing in relevant part that (1) the reviewing committee's finding that the June 24, 2013 amended final accounting "constituted a knowingly false statement" to a tribunal was clearly erroneous, (2) the record did not support the reviewing committee's

[6] Practice Book § 2-35 (k) provides in relevant part: "Within thirty days of the issuance to the parties of the final decision by the reviewing committee, the respondent may submit to the Statewide Grievance Committee a request for review of the decision. . . ."

finding that her conduct was dishonest in violation of rule 8.4 (3), and (3) rule 3.3 is limited to attorneys engaged in an attorney-client relationship.[7] The court, *Robaina*, *J.*, dismissed the plaintiff's appeal, determining that the reviewing committee's decision was not clearly erroneous, the record amply supported the reviewing committee's findings of fact, and the reprimand imposed fell "within proper guidelines."

The plaintiff then appealed to the Appellate Court, claiming in relevant part that the trial court (1) improperly expanded the application of rule 3.3 to an attorney functioning in a fiduciary role, (2) improperly upheld the reviewing committee's determination that the June 24, 2013 amended final accounting constituted a knowingly false statement to the Probate Court in violation of rule 3.3 (a) (1), and (3) improperly upheld the reviewing committee's determination that the June 24, 2013 amended final accounting was dishonest in violation of rule 8.4 (3).[8] The Appellate Court affirmed the trial court's judgment. *Cohen* v. *Statewide Grievance Committee*, supra, 189 Conn. App. 666. The plaintiff petitioned for certification to appeal to this court, which we granted.[9] Additional facts will be set forth as necessary.

[7] Practice Book § 2-38 (a) provides in relevant part: "A respondent may appeal to the Superior Court a decision by the Statewide Grievance Committee or a reviewing committee imposing sanctions or conditions against the respondent, in accordance with Section 2-37 (a). . . ."

[8] The plaintiff additionally claimed that (1) disciplinary counsel violated her due process rights by refusing to conduct an investigation into the allegations of misconduct against her, (2) disciplinary counsel violated her due process rights by failing to produce any witnesses other than the plaintiff at her hearing before the reviewing committee, and (3) the court improperly inferred the existence of an attorney-client relationship between the plaintiff and the Probate Court. The plaintiff did not petition for certification to appeal as to these issues.

[9] We granted certification, limited to the following issues: (1) "Did the Appellate Court correctly conclude that rule 3.3 (a) (1) of the Rules of Professional Conduct, which provides that '[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal,' applies when the lawyer makes the statement while acting in a capacity other than as a lawyer representing a client?" And (2) "[d]id the Appellate Court correctly conclude

I

The plaintiff first claims that rule 3.3 (a) (1) does not apply because the Probate Court had appointed her to act as fiduciary for an estate. We disagree with the plaintiff and agree with the Appellate Court's well reasoned conclusion that rule 3.3 (a) (1) is not limited to statements made in the course of attorney-client relationships.

Rule 3.3 (a) provides in relevant part: "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 . . . ." The defendant contends that the text of the rule itself is definitive, and, therefore, consistent with General Statutes § 1-2z, we should not consider the commentary to rule 3.3 without first determining that the text of the rule is ambiguous, which, in the defendant's view, is not. The defendant argues that, because the plaintiff is a lawyer, she can be sanctioned for making a false statement to a tribunal, in this case a probate court. The plaintiff argues, on the other hand, that rule 3.3 is limited by its commentary, which provides in relevant part: "This [r]ule governs the conduct of a lawyer who is representing a client in the proceed-

that the entry for fiduciary fees made by the plaintiff in the amended final accounting constituted a knowingly false statement within the meaning of rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct?" *Cohen* v. *Statewide Grievance Committee*, 333 Conn. 901, 214 A.3d 381 (2019).

Upon review of the record and the briefs of the parties, and after due consideration of the claims raised by the parties at oral argument before this court, we conclude that the second certified issue is not an adequate statement of the issue presented. Specifically, the second certified issue does not conform to the issue actually presented and decided in the appeal to the Appellate Court. See, e.g., *State* v. *Ouellette*, 295 Conn. 173, 183–85, 989 A.2d 1048 (2010). We therefore consider whether the entry for fiduciary fees made by the plaintiff in the amended final accounting constituted a knowingly false statement within the meaning of rule 3.3 (a) (1) and was dishonest within the meaning of rule 8.4 (3).

ings of a tribunal. . . .”[10] Rules of Professional Conduct 3.3, commentary. The plaintiff claims that rule 3.3 does not apply in this context because, in making the statement to the Probate Court, she was not representing a client.

The proper construction of the Rules of Professional Conduct presents a question of law over which our review is plenary. See, e.g., *Disciplinary Counsel* v. *Elder*, 325 Conn. 378, 386, 159 A.3d 220 (2017). “The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.” Rules of Professional Conduct, preamble, p. 2. The Rules of Professional Conduct are adopted by the judges of the Superior Court, not by the legislature. See *Statewide Grievance Committee* v. *Shluger*, 230 Conn. 668, 674 n.11, 646 A.2d 781 (1994) (“[t]he professional rights and obligations of attorneys practicing within Connecticut are governed by the Rules of Professional Conduct, adopted by the judges of the Superior Court in 1986”). In construing our rules of practice, which include the Rules of Professional Conduct, we have consistently applied well established principles of statutory interpretation. See, e.g., *State* v. *Heredia*, 310 Conn. 742, 755, 81 A.3d 1163 (2013); see also *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 459, 148 A.3d 1105 (2016), aff’d, 329 Conn. 726, 189 A.3d 1173 (2018). However, our interpretation of the Rules of Professional Conduct, unlike our

[10] The commentary to rule 3.3 also provides in relevant part: “[Rule 3.3] also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. . . .” Rules of Professional Conduct 3.3, commentary.

interpretation of our statutes and rules of practice, is complicated by the fact that the judges of the Superior Court have also formally adopted the commentary to the Rules of Professional Conduct. Connecticut Practice Book, explanatory notes, p. iii. To decide whether rule 3.3 (a) (1) applies to the present case, then, we must first determine the appropriate weight to give to the commentary. On this issue, the parties disagree.

Although we have not had occasion to consider whether, in construing a particular rule of professional conduct, statutory construction principles such as those embodied in § 1-2z limit our ability to consult the commentary to the rules, our precedent concerning the adoption of the Connecticut Code of Evidence by the judges of the Superior Court suggests that, when the judges have formally adopted the commentary submitted by the Rules Committee of the Superior Court, the rule "must be read together with its [c]ommentary in order for it to be fully and properly understood." (Internal quotation marks omitted.) *State* v. *DeJesus*, 288 Conn. 418, 442 n.16, 953 A.2d 45 (2008); *State* v. *Pierre*, 277 Conn. 42, 60, 890 A.2d 474 (quoting D. Borden, "The New Code of Evidence: A (Very) Brief Introduction and Overview," 73 Conn. B.J. 210, 213 (1999)), cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).[11] As with the Connecticut Code of Evidence at the time we decided *DeJesus*, the "[*c*]*ommentaries to the Rules of Professional Conduct . . . are adopted by the* [*j*]*udges and* [*j*]*ustices* . . . ." (Emphasis in original.) Connecticut Practice Book, explanatory notes, p. iii. Because the commentary to the Rules of Professional

[11] Although *DeJesus* concerned our construction of the Connecticut Code of Evidence and not the Rules of Professional Conduct, when we decided *DeJesus*, the Connecticut Code of Evidence had been promulgated in the same way the Rules of Professional Conduct are promulgated today, with the commentary adopted by the judges of the Superior Court. See *State* v. *DeJesus*, supra, 288 Conn. 442 n.16; see also Connecticut Practice Book, explanatory notes, p. iii. We therefore look to *DeJesus* for guidance.

Conduct has been formally adopted by the judges of the Superior Court, the rules must be read together with their commentary. Thus, we agree with the plaintiff that we are not prevented from considering the commentary, even if we have not found the relevant language to be ambiguous.[12]

However, we do not agree with the plaintiff that the commentary at issue is dispositive and limits the applicability of rule 3.3 to lawyers serving in a representational capacity. According to the preface to the Rules of Professional Conduct, "[t]he [c]ommentary accompanying each [r]ule *explains and illustrates* the meaning and purpose of the [r]ule. . . . The [c]ommentaries are *intended as guides* to interpretation, but the text of each [r]ule is authoritative. Commentaries do not add obligations to the [r]ules but *provide guidance* for practicing in compliance with the [r]ules." (Emphasis added.) Rules of Professional Conduct, scope, p. 3. Therefore, although we must read the text of the rules and the commentary together, the commentary is not intended to be definitive, authoritative, or limiting but, rather, is intended to be illustrative and to guide our interpretation of the rules.

We note that the text of rule 3.3 (a) (1) itself does not indicate that it applies only to lawyers serving in a representational capacity. Nor is the pertinent language of the commentary necessarily limiting in nature. The commentary provides in relevant part that "[t]his [r]ule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. . . ." Rules of Professional Conduct 3.3, commentary. Given the

[12] Because the commentary to the Rules of Professional Conduct is formally adopted by the judges of the Superior Court, we have no occasion to examine a question we have not closely examined before: whether, in general, § 1-2z applies to the rules of practice or to the Rules of Professional Conduct. But see *Wiseman* v. *Armstrong*, 295 Conn. 94, 100, 989 A.2d 1027 (2010) (reviewing language of rules of practice "[i]n accordance with § 1-2z").

stated purpose of the commentary—to explain, illustrate and guide—a better interpretation of this commentary language is that it illustrates the most common context in which rule 3.3 would apply—lawyers appearing before a tribunal in the course of client representation. There are, however, many other contexts in which a lawyer might appear before a tribunal. A fiduciary role is one such example.[13]

Our case law also supports the conclusion that the commentary to rule 3.3 is insufficient to exempt attorneys serving as court-appointed fiduciaries. "[I]t is well established that [t]he Rules of Professional Conduct bind attorneys to uphold the law and to act in accordance with high standards in both their personal and professional lives." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 231, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006). "Disciplinary proceedings not only concern the rights of the lawyer and the client, but also the rights of the public and the rights of the judiciary to ensure that lawyers uphold their unique position as officers and commissioners of the court." *In re Presnick*, 19 Conn. App. 340, 345, 563 A.2d 299 (citing *Heslin* v. *Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 461 A.2d 938 (1983)), cert. denied, 213 Conn. 801, 567 A.2d 833 (1989). Further, "the Rules of Professional Conduct apply to attorneys whether they are representing clients or acting as [self-represented] litigants unless the language of the rule or its relevant commentary *clearly* suggests otherwise." (Emphasis added.) *Notopoulos* v. *Statewide Grievance Committee*, supra, 231; cf. *Pinsky* v. *Statewide Grievance Committee*, 216 Conn. 228, 236, 578 A.2d 1075 (1990) (rule 4.2 of Rules of Professional Con-

[13] Other examples might include lawyers making representations to a tribunal while serving as a guardian ad litem, conservator, and committee for sale in a foreclosure matter.

duct, which proscribes communication between attorney and represented party, expressly applies only when attorney is representing client). Here, neither rule 3.3 nor its commentary expressly limits the application of the rule to situations in which an attorney is representing a client.[14]

The title of rule 3.3, "Candor toward the Tribunal," also lends support to the argument that the rule applies to statements made by attorneys serving as court-appointed fiduciaries before the Probate Court because it suggests that the rule seeks to protect the judiciary, not just the client. In this case, then, as a member of the Connecticut bar, the plaintiff had duties to the Probate Court itself, which had appointed her. It makes no difference that the plaintiff may not have represented any client with regard to the administration of the DeRosa estate. See *In re Speights*, 189 A.3d 205, 209 (D.C. 2018) ("a lawyer in this jurisdiction who serves as the court-appointed personal representative of an estate is held to the same ethical standards as a lawyer representing a client"). As a court-appointed fiduciary, the plaintiff's responsibilities to the Probate Court are substantially similar to the responsibilities of a lawyer representing a client before the Probate Court. Without more evidence in the rule's text or commentary, we will not conclude that the drafters of the rule intended that an attorney serving as a court-appointed fiduciary is not subject to discipline for making false statements to the Probate Court when the same attorney, serving in a traditional representational capacity, would be subject to discipline for the same conduct.

The case law the plaintiff relies on is unpersuasive and distinguishable. Although, in certain circumstances,

[14] The facts of this case do not present, and we therefore do not decide, the issue of whether rule 3.3 (a) (1) applies to attorneys representing themselves before a tribunal.

case law from other jurisdictions can be persuasive if those jurisdictions have adopted similar provisions that are based on the same uniform act;[15] see *Friezo* v. *Friezo*, 281 Conn. 166, 187–88, 914 A.2d 533 (2007); the plaintiff cites cases that are clearly distinguishable from the present case. For example, the plaintiff cites cases involving lawyers who appeared in a self-represented capacity, who testified falsely in a personal capacity and who made a false report to the police in a personal capacity. See, e.g., *In re Ivy*, 350 P.3d 758, 760–61 (Alaska 2015) (false report to police alleging attorney was being stalked and assaulted by her brother); *People* v. *Head*, 332 P.3d 117, 129 (Colo. O.P.D.J. 2013) (attorney representing his own interests); *In re Disciplinary Action Against Albrecht*, 845 N.W.2d 184, 190–91 (Minn. 2014) (attorney misled legal ethics office regarding whether he had registered to take examination required for reinstatement to practice of law); *State ex rel. Oklahoma Bar Assn.* v. *Dobbs*, 94 P.3d 31, 51–52 (Okla. 2004) (attorney gave false testimony as witness in criminal proceeding against mayor).[16] Although we need not decide whether rule 3.3 can never apply in circumstances in which a lawyer clearly acts only on the lawyer's own behalf, these cases do not inform our consideration of whether rule 3.3 applies when a lawyer is acting as a fiduciary.

[15] Connecticut's Rules of Professional Conduct, like the analogous rules of many other jurisdictions, are adapted from the American Bar Association's Model Rules of Professional Conduct. See, e.g., *Briggs* v. *McWeeny*, 260 Conn. 296, 299 n.3, 796 A.2d 516 (2002).

[16] In addition, one case on which the plaintiff relies, *Taurus IP, LLC* v. *DaimlerChrysler Corp.*, 726 F.3d 1306, 1346 (Fed. Cir. 2013), involves rule 3.3 (b) of the Michigan Rules of Professional Conduct, which is substantively different from Connecticut's rule 3.3 (a) (1). Michigan's rule 3.3 (b) provides: "If a lawyer knows that the lawyer's client or other person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to an adjudicative proceeding involving the client, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Michigan Rules of Professional Conduct 3.3 (b).

The plaintiff also cites *Attorney Grievance Commission* v. *Ruddy*, 411 Md. 30, 64, 981 A.2d 637 (2009), cert. denied, 562 U.S. 833, 131 S. Ct. 125, 178 L. Ed. 2d 33 (2010), arguing that "the Maryland Court of Appeals confirmed that '[rule 3.3 (a) (1) of the Maryland Rules of Professional Conduct] governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal.' " The plaintiff misstates the holding of *Ruddy*, however. In that case, the attorney served as the personal representative of the estate of his aunt. Id., 39. The attorney testified that his son, who was living in the aunt's house, no longer owed rent to the estate, which was inaccurate. Id., 62–63. The court held that the attorney's conduct did not violate rule 3.3 (a) (1) not because there was no attorney-client relationship but because the attorney's false testimony was " 'not material' . . . ." Id., 64. Therefore, the court held that his failure to correct the testimony did not violate the requirement of rule 3.3 (a) (1) of the Maryland Rules of Professional Conduct that an attorney must "correct a false statement of *material* fact or law previously made to the tribunal by the lawyer . . . ." (Emphasis added; internal quotation marks omitted.) Id., 61. The court in *Ruddy* does quote the portion of the rule 3.3 commentary at issue in this case; id., 64; but *Ruddy* clearly does not hold that rule 3.3 does not apply if there is no attorney-client relationship.

We therefore hold that, in the present case, rule 3.3 (a) (1) governed the conduct of the plaintiff, a lawyer appointed by the Probate Court to serve as a fiduciary for an estate.

II

The plaintiff next claims that the reviewing committee clearly erred when it found that she made a false statement to the Probate Court in violation of rule 3.3

(a) (1).[17] Specifically, the plaintiff contends that the statement the reviewing committee found to be false was "the fiduciary account[ing] dated June 24, 2013." The plaintiff claims that this statement cannot be false because she in fact rendered fiduciary services to the estate and because the amount listed on the June 24, 2013 amended final accounting was a reasonable fee for those services.[18] The defendant contends that the reviewing committee was entitled to draw reasonable inferences from the plaintiff's various representations to determine that the June 24, 2013 amended final accounting—in the context of her prior course of conduct—amounted to a false statement within the meaning of rule 3.3 (a) (1). We agree with the defendant.

The reviewing committee's conclusion that the plaintiff made a "knowingly false statement" is a factual finding. See *Henry* v. *Statewide Grievance Committee*, 111 Conn. App. 12, 22–23, 957 A.2d 547 (2008). Factual findings of the reviewing committee are reviewed under the clearly erroneous standard. "Although the [S]tatewide [G]rievance [C]ommittee is not an administrative agency . . . the court's review of its conclusions is similar to the review afforded to an administrative agency decision." (Citation omitted.) *Weiss* v. *Statewide Grievance Committee*, 227 Conn. 802, 811, 633

[17] The plaintiff does not argue that she did not knowingly include the fiduciary fees, and she cannot, because the reviewing committee found her statement that she included the fees by mistake to be not credible. "An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 227. We therefore defer to the reviewing committee's determination that the plaintiff's statement was made knowingly and consider only whether the plaintiff made a false statement.

[18] In fact, the reviewing committee made no findings as to the reasonableness of the fees included in the June 24, 2013 final accounting.

A.2d 282 (1993). "The burden is on the [S]tatewide [G]rievance [C]ommittee to establish the occurrence of an ethics violation by clear and convincing proof." (Internal quotation marks omitted.) *Somers* v. *Statewide Grievance Committee*, 245 Conn. 277, 290, 715 A.2d 712 (1998). "Upon appeal, the court shall not substitute its judgment for that of the Statewide Grievance Committee or reviewing committee as to the weight of the evidence on questions of fact. The court shall affirm the decision of the committee unless the court finds that substantial rights of the respondent have been prejudiced because the committee's findings, inferences, conclusions, or decisions are . . . (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . ." Practice Book § 2-38 (f); see also *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 227. Finally, when we are required to interpret the Rules of Professional Conduct, our review is plenary, and the rules of statutory interpretation apply. See part I of this opinion.

Our analysis, therefore, is limited to whether the reviewing committee clearly erred when it found that the plaintiff's conduct constituted a "false statement" in violation of rule 3.3 (a) (1). We first must interpret the phrase "false statement" within the meaning of rule 3.3 (a) (1). "False statement" is not defined in the rules. We therefore look to the "commonly approved usage" of the phrase as found in dictionaries. See, e.g., General Statutes § 1-1 (a); *State* v. *Menditto*, 315 Conn. 861, 866, 110 A.3d 410 (2015). Black's Law Dictionary defines "false statement" as "[a]n untrue statement knowingly made with the intent to mislead." Black's Law Dictionary (11th Ed. 2019) p. 1699. Black's Law Dictionary further defines "untrue" as "not correct; inaccurate." Id., p. 1851. "Statement" also is not defined in the Rules of Professional Conduct. Black's Law Dictionary defines

"statement" as a "verbal assertion or nonverbal conduct intended as an assertion." Id., p. 1699.

As an initial matter, we must identify the statement at issue. The plaintiff argues that the statement is the amount of the fees listed on the amended final accounting, which she contends reflects an accurate amount and thus cannot constitute a false statement. The plaintiff misunderstands the reviewing committee's finding. As the reviewing committee's full holding makes clear, the statement at issue is the act of including the fiduciary fees in the June 24, 2013 amended final accounting in the context of her prior representations to the Probate Court. In other words, the statement is the assertive conduct of including the fees in the amended final accounting, not the amount of the fees claimed. Whether the amount the plaintiff claimed was reasonable or reflective of the actual work performed was not the point.

We next must determine whether the reviewing committee's finding that the plaintiff's statement was false is supported by clear and convincing evidence; in other words, that the statement was "untrue," "not correct," or "inaccurate." We agree with the Appellate Court that the reviewing committee correctly concluded that the plaintiff made a false statement to the Probate Court in violation of rule 3.3 (a) (1).

The reviewing committee relied on the following evidence. Prior to filing the June 24, 2013 amended final accounting, in which the plaintiff claimed fiduciary fees, the plaintiff told the Probate Court in her May 24, 2013 e-mail that she would not include the fees in her amended final accounting. In her June 1, 2013 amended final accounting, the plaintiff in fact did not include any fiduciary fees, consistent with the representation in her e-mail. In his June 5, 2013 letter to the plaintiff, Judge Keeney wrote: "It is duly noted that the [f]iduciary fees

per [e]xhibit A of the January 1, 2012 to April 22, 2013 [a]mended [f]inal [a]ccount[ing] totaling $5980 *have now been waived* in the [a]mended [f]inal [a]ccount[ing] of January 1, 2012 to May 31, 2013." (Emphasis added.) After receiving Judge Keeney's letter, the plaintiff again included fiduciary fees in the June 24, 2013 amended final accounting. The reviewing committee found that the plaintiff's inclusion of the fees in the June 24, 2013 final accounting was not a mistake. In addition, the reviewing committee found that the plaintiff was attempting to offset the amount she owed to the estate for the income tax interest and penalties with her fiduciary fees.

As the Appellate Court quite aptly explained, the evidence supports the conclusion that the plaintiff "represented that she would waive her fiduciary fees and remove the entry for such fees from the amended final account[ing]. Her actions were inconsistent with her representations." *Cohen* v. *Statewide Grievance Committee*, supra, 189 Conn. App. 666. Like the Appellate Court, the reviewing committee did not clearly err in concluding that, in the context of the plaintiff's prior representations, the plaintiff's June 24, 2013 amended final accounting constituted a false statement in violation of rule 3.3 (a) (1).

Even if the plaintiff's statement in filing the June 24, 2013 amended final accounting were not false within the meaning of rule 3.3 (a) (1), her failure to qualify the statement to clarify that the fees had been waived amounts to a false statement. The commentary to rule 3.3 provides that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Rules of Professional Conduct 3.3, commentary; see also *Daniels* v. *Alander*, 268 Conn. 320, 330, 844 A.2d 182 (2004) (holding that rule 3.3 (a) (1) can apply to misrepresentations that take form of failure to disclose). As the defendant noted, in the pres-

ent case, the plaintiff failed to disclose to the Probate Court that the fiduciary fees had been waived when she included those fees in the actual calculation of the assets of the estate. Not only did the plaintiff include the fiduciary fees as a line item in the amended final accounting, but this line item was used in the calculation of the assets of the estate, making it appear as though the plaintiff did not owe a reimbursement for tax penalties and interest. Under these circumstances, the failure to qualify the inclusion of the fiduciary fees with some form of clarification that the fees had been waived also amounted to an affirmative misrepresentation and is therefore a false statement in violation of rule 3.3 (a) (1).

III

Finally, the plaintiff claims that the reviewing committee clearly erred when it concluded that her conduct was "dishonest," in violation of rule 8.4 (3).[19] Under rule 8.4, "[i]t is professional misconduct for a lawyer to . . . (3) [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ." The plaintiff contends that the reviewing committee's factual findings do not support the conclusion that the June 24, 2013 amended final accounting was dishonest. The plaintiff appears to argue that, for her conduct to be dishonest, there must be evidence that her conduct actually deceived or misled the Probate Court, had the potential to induce the beneficiary of the DeRosa trust to disburse money in accordance with the June 24, 2013 amended final accounting, or that she had been disloyal to the trust or to the beneficiary. The evidence does not support a conclusion that any of these requirements were met, the plaintiff contends, and, therefore, the amended

[19] As discussed in footnote 9 of this opinion, the certified issue did not specifically ask the parties whether the plaintiff's conduct was dishonest. However, this is a more accurate statement of the certified issue, and both parties adequately briefed that issue.

final accounting was not dishonest. The defendant contends that the evidence that the plaintiff filed different final accountings, each of which reduced or eliminated her required contribution to the DeRosa estate, and that she did so because she did not have the funds to reimburse the estate, sufficiently supports the conclusion that her conduct was dishonest. We agree with the defendant.

The same standard of review applicable in part II of this opinion governs this claim. Dishonesty is not defined in the Rules of Professional Conduct; we therefore look to the dictionary definition of the word for its common usage. See, e.g., General Statutes § 1-1 (a); *State* v. *Menditto*, supra, 315 Conn. 866. Merriam-Webster's Collegiate Dictionary defines "dishonesty" as a "lack of honesty or integrity: disposition to defraud or deceive." Merriam-Webster's Collegiate Dictionary (11th Ed. 2011) p. 359. Black's Law Dictionary defines "dishonest" as "not involving straightforward dealing; discreditable; underhanded; fraudulent." Black's Law Dictionary, supra, p. 588.

It is not unusual for a lawyer who violates rule 3.3 (a) (1) to also violate rule 8.4 (3). See D. Richmond, "The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks," 34 Tex. Tech L. Rev. 3, 28 (2002) ("[r]ule 3.3 (a) often overlaps with [r]ule 8.4 (c)," and "lawyer [who] violates [r]ule 3.3 (a) generally violates [r]ule 8.4 (c)"); see also *Burton* v. *Mottolese*, 267 Conn. 1, 51–52, 835 A.2d 998 (2003) (holding that trial court reasonably concluded that plaintiff violated rule 3.3 (a) (1) and that same conduct supported conclusion that plaintiff violated rule 8.4 (3)), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004). In the present case, the evidence supporting the conclusion that the plaintiff violated rule 3.3 (a) (1) is also sufficient to support the conclusion that her conduct was dishonest in violation of rule 8.4 (3). The knowingly false state-

ment the plaintiff made amounts to conduct involving a lack of straightforward dealing, honesty, and integrity. Given that the plaintiff knew that Judge Keeney considered her fiduciary fees waived, the reviewing committee did not clearly err in concluding that it was dishonest for the plaintiff to include fiduciary fees in the June 24, 2013 amended final accounting.

Even if the plaintiff's June 24, 2013 amended final accounting was not in violation of rule 3.3 (a) (1), her course of conduct, as found by the reviewing committee and supported by the record, is sufficient to support the conclusion that she violated rule 8.4 (3). The plaintiff admitted that she sought fiduciary fees because she was otherwise unable to reimburse the estate for the tax penalties and interest she incurred in her role as the estate's fiduciary. The plaintiff had represented to the Probate Court that she would not include fiduciary fees on her amended final accounting but, then, contrary to this representation, included them nonetheless. In her June 1, 2013 amended final accounting, the plaintiff properly excluded her fiduciary fees but improperly reduced the reimbursement she owed to the estate. In her June 24, 2013 amended final accounting, the plaintiff again included fiduciary fees but altered the amount such that they equaled, exactly, the amount she was required to reimburse the estate. The plaintiff's entire course of conduct as found by the reviewing committee, including the inconsistencies between the six final accountings she submitted to the Probate Court, supports the conclusion that she was not straightforward with the Probate Court and that she attempted to offset the amount she owed to the estate with her fiduciary fees. Such conduct is dishonest because it demonstrates a lack of integrity and a disposition to deceive.

Nevertheless, the plaintiff argues that more is required to support the conclusion that she violated rule 8.4 (3), such as evidence that the June 24, 2013 amended final

accounting could have induced the beneficiary of the DeRosa trust to disburse money in accordance with the accounting or evidence that the Probate Court was actually deceived or misled by the June 24, 2013 amended final accounting. We disagree that more was required in the present case.

Rule 8.4 (3) prohibits four different types of conduct: dishonesty, fraud, deceit and misrepresentation. The plaintiff is likely correct that more evidence would be required to show that her violation of rule 8.4 (3) was based on fraud, but, here, the reviewing committee based its conclusion on the fact that her conduct was dishonest. "It is well settled that statutory interpretations that render language superfluous are disfavored . . . ." (Internal quotation marks omitted.) *Dish Network, LLC* v. *Commissioner of Revenue Services*, 330 Conn. 280, 312, 193 A.3d 538 (2018). Here, although the common meaning of the term "dishonesty" may include fraud, as defined previously, it must mean something other than fraud for the term not to be superfluous. Rule 1.0 (e) defines "fraud" as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." Rules of Professional Conduct 1.0 (e). Under substantive law in Connecticut, the four elements of fraud are that "(1) a false representation was made . . . as a statement of fact; (2) the statement was untrue and known to be so by [the person making the statement]; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821, 116 A.3d 1195 (2015). "All of these ingredients must be found to exist." (Internal quotation marks omitted.) *Capp Industries, Inc.* v. *Schoenberg*, 104 Conn. App. 101, 116, 932 A.2d 453, cert. denied, 284 Conn. 941, 937

A.2d 696 (2007), and cert. denied, 284 Conn. 941, 937 A.2d 697 (2007).

Thus, if the reviewing committee had found that the plaintiff's conduct constituted fraud, she would be correct that rule 8.4 (3) requires an element of causation. The reviewing committee, however, found that the plaintiff's conduct was dishonest, not fraudulent. As such, the reviewing committee's finding of dishonesty was required to be supported by evidence that the plaintiff's conduct showed a lack of honesty or integrity, a disposition to deceive, or that it was underhanded or involved dealings that were not straightforward. As there was such evidence in the record, the reviewing committee did not clearly err in concluding that the June 24, 2013 amended final accounting was dishonest, in violation of rule 8.4 (3).

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.