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PROCEEDINGS

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DECEMBER, 2003—MARCH, 2004

BY

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Acting Reporter of Judicial Decisions

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NOTES

[1] Retired February 25, 2004, under constitutional limitation as to age.
[2] Resigned January 5, 2004.

* See General Statutes § 51-50i.

Unless otherwise indicated, the statute book referred to in this volume as the General Statutes is the Revision of 1958, revised to 2003; the Practice Book is the Connecticut Practice Book (Current Ed.) as supplemented by rules of court published in the Connecticut Law Journal.

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State *v.* Vargas (Order) 913
State *v.* Vazquez (Order) 917
State *v.* William C.. 686
Sexual assault fourth degree; risk of injury to child; claim that records of department of children and families were admissible under business records exception to hearsay rule; claim that records detailing victim's problems with veracity were critical to theory of defense; appeal to Appellate Court; certification from Appellate Court; whether trial court abused discretion in excluding records; whether defendant met burden of proving that evidentiary impropriety in excluding records was harmful error.

State *v.* Wright (Order) 911
State *v.* Wyatt (Order) 918
Statewide Grievance Committee, Burton *v.* (Order) 903
Statewide Grievance Committee, Paige *v.* (Order) 911
Steenson, Dey, Smith & Collier, LLC *v.* (Order). 903
Stewart *v.* Cendant Mobility Services Corp. 96
Promissory estoppel; negligent misrepresentation; wrongful termination of employment; whether jury reasonably could have found that defendant's representations to plaintiff constituted clear and definite promise for purposes of doctrine of promissory estoppel; whether evidence was sufficient to establish that plaintiff reasonably had relied on defendant's representations to her detriment.

Strobel *v.* Strobel (Order) 901

Suffield, Ress *v.* (Order) 920
Szczapa *v.* United Parcel Service, Inc. 666
Insurance; uninsured motorist benefits; whether trial court properly granted defendant's motion for summary judgment; appeal to Appellate Court; whether Appellate Court properly granted defendant's motion to dismiss appeal; certification from Appellate Court; certification improvidently granted.

Turner, State *v.* 414

United Parcel Service, Inc., Szczapa *v.* 666
Usowski *v.* Jacobson 73
Action to recover for alleged breach of oral partnership agreement; discovery; claimed failure to comply with discovery orders; propriety of imposition of sanctions for discovery violations; propriety of dismissal of action for discovery violations.

Vargas, State *v.* (Order). 913
Vasquez *v.* Rocco 59
Medical malpractice; claim that trial court abused discretion in precluding plaintiff from cross-examining defendants' expert witness about his relationship with defendant surgeon's malpractice insurance carrier; whether expert witness had sufficient connection to malpractice insurance carrier to warrant introduction of evidence regarding witness' relationship with insurance carrier for purpose of demonstrating witness' potential interest in outcome of case; whether record was adequate to determine whether trial court's improper exclusion of evidence was harmful.
Vazquez, State *v.* (Order) 917

Walker, Estate of (Order) 919
Ward *v.* Greene 539
Wrongful death; summary judgment for failure to allege viable theory of legal fault as required by wrongful death statute (§ 52-555); whether defendant private, nonprofit organization that contracted with individuals to provide foster care services owed duty of care, under statute ([Rev. to 1997] § 17a-101) concerning mandatory reporting of suspected child abuse, to child who died after sustaining injury at day care facility operated by one of defendant's foster care providers; class of persons protected by § 17a-101.
Waterbury, Charette *v.* (Order) 910
Wentland *v.* American Equity Ins. Co. 592
Insurance; duty of insurer to defend and indemnify insured in personal injury action; challenge to trial court's interpretation of liquor liability exclusion in general liability insurance policy; whether trial court improperly granted defendant's motion for

summary judgment; claim that term "intoxication" encompassed something more than "consumption of alcohol"; claim that allegations of complaint fell within coverage of insurance policy triggering insurer's duty to defend.

Westport, Martin *v.* (Order) 909
William C., State *v.* 686
Williams *v.* Commissioner of Correction (Order) 905
World Properties, LLC, National Loan Investors, L.P. *v.* (Order) 910
Wright, State *v.* (Order). 911
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Yale Diagnostic Radiology *v.* Estate of Fountain 351
Appeal from Probate Court; whether provider of emergency medical services to minor may collect for those services from minor when parents refuse or are unable to pay; statutory (§ 47b-37 [b]) obligation of parent to provide for support of children; doctrine of necessaries; primary and secondary liability under statute and common law; implied in law contract.

APPENDIX

Hon. Joseph F. Dannehy 921

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

NANCY BURTON *v.* HONORABLE A. WILLIAM MOTTOLESE
(SC 16655)

Sullivan, C. J., and Borden, Norcott, Katz, Palmer, Vertefeuille and Zarella, Js.

Syllabus

The plaintiff in error brought a writ of error from the order of the trial court disbarring her from the practice of law, claiming that that court had denied her due process in the disciplinary proceeding it had conducted in connection with her representation of several individuals in an action to prevent the development of a subdivision in the town of Monroe. *Held*:

1. The plaintiff could not prevail on her claim that the trial court failed to give her adequate notice of the charges against her; that court's written orders concerning the subject matter of the hearings it had scheduled to investigate allegations of misconduct and its oral notification to the plaintiff, prior to the adjudicatory phase of those proceedings, that the issues that would be considered were her authority to represent the plaintiffs in the underlying action, her continued activity in that action after her clients had directed her to take no further action and the division of her loyalty between her interests and the interests of her clients sufficiently apprised the plaintiff of the transactions that formed the basis of the allegations of misconduct.
2. The plaintiff's claim that the trial court lacked the authority to initiate disciplinary proceedings against her because such proceedings may be instituted only by filing a formal written complaint with the statewide grievance committee was unavailing; the Superior Court has inherent authority to discipline members of the bar, and the creation of the statewide grievance committee was not intended to provide an exclusive mode of attorney discipline, but, rather, the rules of practice (§ 2-45)

provide that the statewide grievance committee and its grievance panels shall defer to the court if the court chooses to exercise its jurisdiction.

3. The plaintiff could not prevail on her claim that the trial court displayed actual bias toward her in violation of her right to due process of law; the actions and statements of the trial court relied on by the plaintiff to support her claim of bias did not show actual bias against her, nor did they raise a reasonable question as to the trial court's impartiality.

4. The trial court properly concluded that the plaintiff had engaged in professional misconduct, the evidence presented having been sufficient to support that court's findings, by clear and convincing evidence, that the plaintiff's conduct was in violation of the Rules of Professional Conduct; the plaintiff engaged in the unauthorized representation of eighteen of the twenty-two plaintiffs in the underlying case, the plaintiff's conduct in the underlying litigation resulted in a conflict between her interest in pursuing the litigation and the interests of the plaintiffs in that action in ceasing it, the plaintiff made misrepresentations to the court and engaged in inappropriate conduct in connection with her allegations of gender bias that were wholly conclusory and without factual support, and the plaintiff's professional performance during the underlying proceedings fell below the acceptable standard of competence.

5. The trial court did not abuse its discretion in ordering the plaintiff's disbarment; under the circumstances here, the sanction of disbarment was not disproportionate to the violations found.

Argued September 23—officially released December 16, 2003

Procedural History

Writ of error from an order of the Superior Court in the judicial district of Fairfield, *Mottolese, J.*, disbarring the plaintiff in error from the practice of law; thereafter, this court granted the defendant in error's motion to dismiss a portion of the writ of error. *Writ of error dismissed.*

Nancy Burton, with whom was *Conrad Ost Seifert*, for the plaintiff in error.

Eliot D. Prescott, assistant attorney general, with whom were *Jane R. Rosenberg*, assistant attorney general, and, on the brief, *Richard Blumenthal*, attorney general, for the defendant in error.

Opinion

SULLIVAN, C. J. The plaintiff in error, Nancy Burton (plaintiff), an attorney, brings this writ of error claiming that the defendant in error, Honorable A. William Mot-

tolese (trial court), improperly concluded that the plaintiff had violated several Rules of Professional Conduct and that the imposition of the sanction of disbarment violated her due process rights. Specifically, the plaintiff claims that the trial court: (1) violated her due process rights by failing to give her prior written notice of the charges against her; (2) lacked the authority to initiate disciplinary proceedings because such proceedings may be instituted only by filing a formal written complaint with the statewide grievance committee; (3) violated her due process rights because the trial court displayed actual bias toward her; (4) improperly concluded that she had engaged in professional misconduct; and (5) improperly imposed the sanction of disbarment. We reject all these claims and, accordingly, dismiss the writ of error.

The record discloses the following relevant facts and procedural history. On December 22, 1999, in response to a decision of the zoning board of appeals of the town of Monroe (board) to allow the use of a rock crusher during the construction of a new residential subdivision, two of the plaintiffs in the underlying action, Joseph Sullivan and Lenore Sullivan (Sullivans), organized a neighborhood meeting at a restaurant in Monroe. The purpose of the meeting was to recruit others to become coplaintiffs in an appeal from the decision of the board to allow the use of the rock crusher. Before the meeting, Joseph Sullivan prepared a sign-up sheet for those interested in becoming coplaintiffs in the appeal.[1] Also prior to the meeting, Joseph Sullivan contacted the plaintiff, who agreed to make an oral presen-

[1] Specifically, the sign-up sheet stated: "Signatures To Become Co-Plaintiffs Wednesday, December 22, 1999: The following signatures represent people who agree to become co-plaintiffs with Lenore & [Joseph] Sullivan, in an appeal to the Superior Court of Connecticut of the approval by the [board] to grant a waiver to allow 'Rock Processing' equipment to be placed in a residential zone; an action which normally is prohibited by the Codes of the Town of Monroe. The undersigned hereby agree to become co-plaintiffs in the legal proceeding pertaining to the waiver granted by the [board]

tation at the meeting. During the December 22 meeting, twenty people signed the sign-up sheets that had been circulated, agreeing to become coplaintiffs in the action to appeal from the board's zoning decision.

In addition to filing an appeal from the board's zoning decision, the plaintiff, on behalf of the Sullivans and the twenty additional people who had signed the sign-up sheets, filed the action underlying this writ of error, which sought declaratory and injunctive relief to prevent the development of the subdivision until additional permits were obtained. Thereafter, the defendants in the action for declaratory relief, the town of Monroe and Hammertown Estates, LLC, moved to dismiss counts one and two of the complaint, claiming that the plaintiffs in that underlying action had failed to exhaust their administrative remedies. On June 30, 2000, the trial court granted the defendants' motion, dismissing counts one and two of the complaint seeking declaratory and injunctive relief.

Thereafter, on July 18, 2000, the Sullivans sent a letter to the plaintiff indicating that the Sullivans no longer wanted to pursue litigation regarding the new subdivision. The Sullivans also sent a copy of the letter to the trial court.[2] Moreover, Joseph Sullivan testified that he

for placing 'Rock Processing' equipment on the construction site for File #1075-407 Hammertown Road Project."

[2] The letter to the plaintiff stated in part: "The purpose of this letter is to inform you in writing what Lenore & I told you on Sunday evening, July 16th, namely, that we do not wish to be active participants in any legal actions to make [a] motion to reargue the Memorandum of Decision by Judge Mottolese, dated June 30th. We do not want to appeal the Decision in anyway. Furthermore, we agree with the Judge's findings, and feel we have had our day in court, so to speak, on the action for a temporary and permanent injunction seeking to prevent commencement of development of a resubdivision consisting of 18 residential building lots. . . . In summary, Lenore and I do not want to be part of any further legal actions to make motions to reargue, or change, or amend any part of Judge Mottolese Memorandum of Decision. I hope I have left no room for doubt as to my desire on legal actions NOT to be taken here. . . . Following any decision on the Motion to Dismiss, I would like to discontinue any further legal services by you, and I thank you for your efforts on our behalf."

orally had told the plaintiff on July 16, 2000, that he and Lenore Sullivan no longer were interested in pursuing declaratory and injunctive relief. Joseph Sullivan also testified that he had sent the plaintiff an e-mail, a facsimile (fax) and a certified letter asking her not to represent them in any motion for reargument or any other appeal of the trial court's decision on the motion to dismiss.

Notwithstanding these communications, the plaintiff, on July 20, 2000, moved to reargue the trial court's decision dismissing counts one and two of the complaint seeking declaratory and injunctive relief. The trial court denied the plaintiff's motion on August 16, 2000. Thereafter, on August 30, 2000, the plaintiff moved to withdraw her appearance, claiming that there had been "a complete breakdown in communications" between those listed as plaintiffs in the underlying action and the plaintiff in the present case.

Additionally, prior to the trial court's decision dismissing counts one and two of the complaint seeking declaratory and injunctive relief, the defendants in that underlying action had moved for sanctions against the plaintiff for filing motions and other pleadings subsequent to the defendants' filing of a motion to dismiss. The trial court scheduled a hearing on the motions for sanctions for September 28, 2000. On September 22, 2000, the plaintiff moved, nominally on behalf of the purported plaintiffs in the underlying litigation, for a continuance of that hearing, claiming that she already was engaged in a jury trial for that day.[3] Thereafter, on September 28, the plaintiff failed to appear at the hearing on the motion for sanctions. As a result, the trial

[3] The trial court, in its memorandum of decision concluding that the plaintiff had violated several Rules of Professional Conduct, explained that the plaintiff's September 22, 2000 motion for continuance was never adjudicated because it was not filed on the prescribed form and contained incomplete information.

court, pursuant to Practice Book § 5-10[4] and General Statutes § 51-84 (b),[5] fined the plaintiff $100. Moreover, at the September 28, 2000 hearing, counsel for the defendants claimed that one of the purported plaintiffs in the underlying action had not authorized the plaintiff to file an action seeking declaratory and injunctive relief in her name. Accordingly, the trial court ordered that the hearing on the motions for sanctions be rescheduled for October 31, 2000. Further, the trial court stated that the issues to be determined on that date included "all motions for sanctions; motions for allowance of counsel fees by parties appearing on September 28, 2000, including Katherine Finch; letter received by the court from Lenore and [Joseph] Sullivan; motion of [the plaintiff] to withdraw as counsel."

Thereafter, on October 31, 2000, the plaintiff moved, again nominally on behalf of the purported plaintiffs in the underlying action, to disqualify Judge Mottolese from the proceedings. In her motion, the plaintiff claimed that the judge improperly had sanctioned her for failing to appear at the September 28 hearing because she was properly engaged elsewhere, namely, jury selection for another trial. Moreover, the plaintiff claimed that the sanction of $100 was "tantamount to a tax on [the plaintiff's other client] for the privilege of having his attorney attend his trial during jury selection" and that the court's sanction manifested a bias against her. The plaintiff also moved to vacate the order sanctioning her for failing to appear at the September 28, 2000 hearing. In addition, the plaintiff alleged that the

[4] Practice Book § 5-10 provides: "Counsel who fails to appear on a scheduled date for any hearing or trial or who requests a continuance without cause or in any other way delays a case unnecessarily will be subject to sanctions pursuant to General Statutes § 51-84."

[5] General Statutes § 51-84 (b) provides: "Any such court may fine an attorney for transgressing its rules and orders an amount not exceeding one hundred dollars for any offense, and may suspend or displace an attorney for just cause."

trial court had engaged in gender bias against her. In response to the charge of gender bias, the trial court ordered the plaintiff to submit an affidavit within that next week specifying each instance of gender bias that the plaintiff was alleging.[6]

Subsequently, on November 9, 2000, the trial court notified the parties in the underlying action that the hearing on all motions for sanctions was rescheduled to November 27, 2000. In that order, the court specified that "[i]f necessary, the court will adjudicate the status of each plaintiff to ascertain if they are properly plaintiffs in this case on December 12, 2000 . . . ." On November 29, 2000, the plaintiff filed a second motion, on behalf of the purported plaintiffs in the underlying action, to disqualify the trial court, claiming that the sanctions ordered by the court on September 28 and October 31 were a "reflection and product of serious personal animosity, gender bias, prejudice and such orders are unconstitutional." On that same day, the trial court held a hearing on the motions for sanctions, at which it ordered the plaintiff to contact all the purported plaintiffs in the underlying action and to notify the trial court whether they wanted to pursue litigation in the declaratory judgment action.[7] Also at that hearing, the trial court noted that there were two issues that remained in the case that the court felt it had the obligation to address. The first issue, the court explained, was "whether [the plaintiff] continued to participate in the litigation by filing pleadings and taking action without the consent of her clients." The second issue

[6] The trial court also granted the defendants' motions for attorney's fees arising out of the September 28, 2000 hearing in the amount of $450 per attorney.

[7] In response to this order, the plaintiff, on behalf of the purported plaintiffs, moved the court, on December 6, 2000, for an extension of time claiming that, in order for her to comply with the court's order, she required more time to communicate with the defendants in the underlying action regarding a "stipulated withdrawal."

was the plaintiff's assertion of gender bias by the trial court.[8]

Subsequently, on December 12, 2000, the court began its inquiry into whether the plaintiff was authorized to bring the action for declaratory and injunctive relief. The inquiry commenced with the testimony of several of the purported plaintiffs from the underlying action, who revealed either that they were not aware that, by signing the circulated sign-up sheets, they were authorizing the plaintiff to file an action in their names, or that they had asked the plaintiff to withdraw their names from the action and that she had failed to do so.[9] The plaintiff cross-examined these witnesses. After the testimony of the plaintiffs in the underlying action,

[8] Specifically, the trial court stated: "Issue number two is, the court ordered [the plaintiff] to file within one week an affidavit setting forth specific instances of gender bias engaged in by the court. I want the record to note that [the plaintiff] filed a paper which is not an affidavit because it's not under oath and it's not the equivalent of an affidavit because even though it indicated that it was signed under penalties of perjury . . . that has no legal effect whatsoever unless that penalty of perjury statute is complied with, and it was not. So [the plaintiff] did not comply with the order of this court. The . . . court considers the allegations extremely, extraordinarily serious, as well as the allegations renewed in the November 29 motion to disqualify. I believe those allegations to be totally baseless and without foundation and made recklessly or—and/or intentionally against the court, and I am going to carefully consider whether or not the allegations made against the court, which the court believes tend to seriously undermine confidence in the institution of the court, whether those allegations and the transcripts of the proceedings should be referred to the grievance committee for further action. The court is also going to consider whether the court itself should take disciplinary action against [the plaintiff] by way of reprimand or other appropriate sanction."

[9] One of the plaintiffs in the underlying action, Jule Toma, testified that although she "probably unwittingly" had authorized the plaintiff to include her name as a plaintiff in the underlying action, she had asked the plaintiff to withdraw her from the litigation after she was subpoenaed for a deposition in October, 2000. Specifically, in response to the trial court's question of whether the plaintiff was authorized to include her name in the declaratory relief action, Toma stated: "Probably unwittingly. I think we all went to a meeting and signed a sheet in support of possibly not having the rock crusher there because we've all been exposed to rock crushing right in that area for years, and I think probably I could say unwittingly I became a part of

the trial court continued the judicial inquiry until December 21, 2000. On that date, the plaintiff filed her third motion to disqualify Judge Mottolese, claiming that the trial court falsely accused her of having filed a complaint against it in a prior case. In addition, the plaintiff moved to suspend the proceedings, claiming that the trial court had engaged in "improper judicial intimidation of [the] plaintiffs in [the underlying case] . . . ." Notwithstanding these motions, on December 21, 2000, the trial court continued its inquiry into the plaintiff's authorization to bring the underlying action. As in the December 12 hearing, the inquiry involved witnesses testifying that the plaintiff was not authorized to bring an action in their names and that they had asked her to withdraw them from the case and that the

this whole thing, and was surprised to get a subpoena in October for a deposition. And at that time stated I wanted to withdraw . . . ."

Additionally, five other purported plaintiffs in the underlying action testified that they believed they were signing a petition in support of removing the rock crusher rather than an authorization to file an action in their names. Specifically, David G. Boston, Jr., testified: "Yeah, my signature's there, and I do recall signing the document at the meeting in question, December 22nd, but as Mrs. Toma stated, and I think—and I don't want to speak for all the plaintiffs [in the underlying action], but I think at least myself, also thought that it was, in fact, more of a petition to come to [the Sullivans'] aid to stop the rock crushing than, you know, it was anything that would involve us deeper in any kind of litigation." Moreover, Leon Ambrosey testified: "Well, I thought I was just signing like everybody else, like a petition just to like help them out, like if they needed you as a witness or some kind of thing like that, nothing to retain a lawyer." Cynthia Ambrosey testified that: "I thought [the sign-up sheet] was a petition against the rock crusher because when, you know, we were building our house we had problems with the Renz' with the rock crushing, and it was like, oh no, another crusher in the neighborhood, and that's it." Additionally, John S. Bodie stated that he thought the sign-up sheet was "[j]ust the . . . backing up of people who didn't want a rock crusher and I believe it was supposed to be within so many feet of their house. So, I thought we were just signing a petition just to get the town to get someone to do it right. . . . So I just thought we were showing interest that there may be a concern." Bodie also testified that at the time he signed the circulated sign-up sheet, he did not think he was authorizing the plaintiff to commence litigation in his name. Finally, Irene Jackiewicz testified that she did not authorize the plaintiff to include her name in the litigation and that she also thought she was signing a petition.

plaintiff had failed to secure their withdrawal.[10] Additionally, the plaintiff was permitted to, and did in fact, cross-examine all the witnesses. At one point in that hearing, when Joseph Sullivan was being examined by counsel for the defendants in the underlying action, the plaintiff objected to the questioning, claiming that she was "not exactly sure where we are in these proceedings." The trial court explained: "It is the court's inquiry into your alleged unauthorized representation of numer-

[10] As in the December 12, 2000 hearing, the purported plaintiff Finch testified that she believed the sign-up sheet circulated at the December 22, 1999 meeting was "in the form of a petition. The more names, the stronger the cause for the objection to the rock crusher and the blasting that was gonna be going on at the development site . . . ."

Moreover, Joseph Sullivan, one of the plaintiffs in the underlying case, testified that he had instructed the plaintiff to withdraw the case on July 16, 2000. He stated: "There was a conversation on Sunday July the 16th, early in the evening with my wife and [the plaintiff] on the phone . . . . And what it was, there was a disagreement between my wife and myself and [the plaintiff]. Not between my wife and myself, we both agreed. [The plaintiff] was suggesting, or giving legal counsel, that we should make a motion to reargue on a decision that had been made by a judge about the zoning redefinition case. I had no interest in pursuing that line of argument. I read thoroughly the judge's finding and agreed with the logic that he had there. My only interest at that time was removing a rock crusher . . . at that very day was still on the property some two months after it had been authorized by the town . . . . So I clearly told her, in the strongest of terms I could communicate, I don't know what more I could have said, that I absolutely did not want her acting on my behalf to reargue the judgment. She then did say that she owed it [to] all of the other plaintiffs [in the underlying action] to reopen it, and it wasn't just up to me. So I said, well, since I'm paying for it all . . . that I was saying you're not acting on my behalf and what do I have to do to formally stop you from doing this. She told me I had to inform her in writing. So that very night, I sent e-mails to her, which I have copies of here. I also sent a certified letter telling her not to represent—not to reargue this motion. And then I also faxed the same information."

The following colloquy also occurred when counsel for the defendants in the underlying action examined Joseph Sullivan.

"[Counsel for the defendant town of Monroe]: Now after July 27th, did you authorize any additional filings and motions in this case?

"[Joseph Sullivan]: Absolutely not.

"Q. So there was no authorization for a motion for protective order?

"A. No

"Q. Motions for continuances?

"A. No, sir."

ous plaintiffs, your alleged unauthorized continuation of activity in this lawsuit on behalf of those plaintiffs, including the Sullivans, and what sanctions should ensue from those . . . should the court find that, in fact, you have engaged in this type of conduct."

The trial court's inquiry into the plaintiff's conduct during the course of the underlying litigation continued on December 22, 2000, with the testimony of the named plaintiff in the underlying case, Lenore Sullivan. At that hearing, Lenore Sullivan testified that she had explained to the plaintiff that she no longer wanted to take part in the litigation and wanted it "over with." She also testified that she had never felt that the trial court was biased against any of the female plaintiffs in the underlying litigation, contrary to the plaintiff's allegation of gender bias. Lenore Sullivan also expressed confusion regarding an appeal to the Appellate Court that the plaintiff had taken challenging the decision of the trial court ordering sanctions for the plaintiff's failure to appear at the September 28, 2000 hearing. Specifically, Lenore Sullivan testified that she did not know of the appeal and had not authorized the plaintiff to take an appeal of the trial court's order.

At the conclusion of the December 22, 2000 hearing, the trial court summarized what it felt were the remaining issues in the case. The trial court stated: "[A]s far as the court is concerned, the court has heard from the plaintiffs [in the underlying action], and that completes that phase of the court's inquiry. Now, [the plaintiff's] conduct has been seriously called into question by the evidence that's been presented so far. And so . . . I want to give [the plaintiff] every opportunity to present whatever evidence [the plaintiff] feel[s] is appropriate within the bounds of admissibility, obviously. . . . I'm going to give you the three issues as I see them. There may be others that are collateral to them. But the first issue is your authority or lack of authority to represent the numerous plaintiffs other

than the two Sullivans. Secondly, your continued activity in the case after being directed by the Sullivans to take no further action in the case. And third, the issue of your apparent divided loyalty between your duty to your client and your own self-protection or aggrandizement. Those are the three major issues that I see. But you may feel free to offer evidence on any other issue that has come up in the case as well. And you don't have to do it today; I'll give you an opportunity on another day if you wish to come back with an attorney. It's up to you. You may testify in your own behalf without one if you wish."

Subsequently, on January 4, 2001, the court conducted a hearing on those three issues.[11] The plaintiff testified in her own behalf over the course of six days. At the end of the plaintiff's testimony, the trial court again notified the parties regarding the specific issues involved in the judicial inquiry. Specifically, the trial court outlined the particular Rules of Professional Conduct that it felt were implicated in the plaintiff's conduct, namely, rules 1.2,[12] 1.5 (b),[13] 1.7 (b),[14] 1.8

[11] Prior to the start of this hearing, the plaintiff again moved to disqualify the trial court, which the trial court denied.

[12] Rule 1.2 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement . . . ."

[13] Rule 1.5 (b) of the Rules of Professional Conduct provides in relevant part: "When the lawyer has not regularly represented the client, the basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matter to be undertaken shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. . . ."

[14] Rule 1.7 (b) of the Rules of Professional Conduct provides: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

"(1) The lawyer reasonably believes the representation will not be adversely affected; and

"(2) The client consents after consultation. When representation of multi-

(f),[15] 1.16 (a) (3),[16] 3.3,[17] 3.5 (3)[18] and 8.2.[19]

After all parties in the underlying case filed briefs[20] on the issues raised by the judicial inquiry, the trial

ple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

[15] Rule 1.8 (f) of the Rules of Professional Conduct provides: "A lawyer shall not accept compensation for representing a client from one other than the client unless:

"(1) The client consents after consultation;

"(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

"(3) Information relating to representation of a client is protected as required by Rule 1.6."

[16] Rule 1.16 (a) of the Rules of Professional Conduct provides in relevant part: "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation . . . if . . . (3) [t]he lawyer is discharged."

[17] Rule 3.3 (a) of the Rules of Professional Conduct provides: "A lawyer shall not knowingly:

"(1) Make a false statement of material fact or law to a tribunal;

"(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

"(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

"(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

[18] Rule 3.5 of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not . . . (3) Engage in conduct intended to disrupt a tribunal."

[19] Rule 8.2 (a) of the Rules of Professional Conduct provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

[20] As the trial court noted, the brief submitted by the plaintiff to the trial court failed to discuss the facts of the inquiry or the applicable rules of professional conduct. Rather, the plaintiff's "supplemental brief" again attacked the trial court, as well as other judges, for their alleged personal and professional bias against the plaintiff. For instance, the plaintiff alleged that the trial court "harbors a personal bias against [the plaintiff], which is substantial, which frequently manifested itself throughout the course of these entire proceedings, which existed prior to the institution of these

court, on July 17, 2001, issued a memorandum of decision concluding that the plaintiff had violated several Rules of Professional Conduct and that her "numerous transgressions" compelled a finding that the plaintiff's "professional performance fell below the accepted standard of competence envisioned by rule 1.1." To begin, the trial court found that the plaintiff had engaged in unauthorized representation of twenty of the plaintiffs except for the Sullivans and another couple, Richard Hunter and Patricia S. Hunter (Hunters).[21] The unauthorized representation was a result of the plaintiff's failure to explain adequately to those in attendance at that first meeting the nature and scope of the proceeding and the potential conflict of interests in representing multiple parties. Consequently, the trial court found, the twenty people who had signed the sign-up sheet honestly believed, not that they were lending their names to litigation, but instead, that they were merely signing a petition for presentation to the town's land use authorities. The trial court concluded, moreover, that the plaintiff failed to comply with rule 1.5 (b) of the Rules of Professional Conduct, requiring a written agreement describing the scope of the representation and potential exposure to costs. The trial court also found that the plaintiff had engaged in unauthorized representation of clients as a result of continuing to file pleadings in the

proceedings, which the trial court should have openly and directly addressed at the outset of these proceedings and which required the disqualification [of] the trial court from these proceedings. The trial court's participation in this matter has been rife with judicial misconduct." The plaintiff also alleged that, "[t]he trial court's misconduct cannot be separated from an ongoing judicial vendetta involving itself and Hons. Howard J. Moraghan, Edward F. Stodolink and Socrates H. Mihalakos . . . ." The plaintiff also concluded that "Hon. Judges Skolnick and Moran may be credited with questionable conduct which has promoted the abuse of power and abuse of the plaintiffs [in the underlying action] and their counsel in this matter."

[21] The trial court inferred the authorization of the Hunters because Patricia S. Hunter testified at the hearing on the defendants' motion to dismiss counts one and two of the complaint seeking declaratory and injunctive relief.

underlying action after being instructed by the Sullivans to cease litigation. These actions, the trial court concluded, were wilful and violated rules 1.2 and 1.16 (a) (3) of the Rules of Professional Conduct. The trial court also found that the plaintiff had engaged in unauthorized representation by failing to communicate to the plaintiffs in the underlying action the written offers of settlement by the defendants in that action, including the offers by those defendants to waive all claims for fees and costs in return for a withdrawal of the case,[22] in violation of rules 1.2 and 1.4.[23] Additionally, the trial court determined that the plaintiff had failed to advise the other plaintiffs in the underlying case that the Sullivans had notified her to take no further action in the case, resulting in a violation of rule 1.4.

The trial court also concluded that the plaintiff's conduct resulted in a conflict of interest.[24] In addition, the

[22] As described later in more detail, this finding arises out of the trial court's determination that counsel for the defendants in the underlying action made written offers of settlement to the plaintiff, including offers to waive all claims for fees and costs and to waive the $450 counsel fees awarded to them as sanctions, which were not communicated to the plaintiffs in the underlying action by the plaintiff in the present writ of error. See footnote 42 of this opinion.

[23] Rule 1.4 of the Rules of Professional Conduct provides: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

"(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[24] The trial court concluded that the plaintiff's behavior constituted a conflict of interest for several reasons. First, the trial court found that Diane Mellon, a neighborhood resident who wanted to join the litigation, paid the plaintiff $1000 with the intention of joining the action as a plaintiff, but that the plaintiff in the present case failed to add her as a plaintiff in the underlying action. Additionally, the trial court found that the plaintiff failed to notify other purported plaintiffs of the receipt of this money.

The trial court also determined that the plaintiff filed pleadings after being instructed not to do so, not because she was concerned with the interests of her clients, but rather because she was concerned about protecting her own individual interests. As evidence of this violation, the court looked to the fact that the plaintiff not only sought a release of costs and penalties for her clients, but also a personal release for any costs and penalties she herself may have been assessed.

trial court concluded that the plaintiff had made several misrepresentations to the court. Those misrepresentations to the court included her claim that there had been a complete breakdown in communication between her and the plaintiffs in the underlying case and her allegation of gender bias against the court. The trial court also concluded that the plaintiff had made misrepresentations to the plaintiffs in the underlying case by warning them that they could be subject to sanctions when, as the trial court found, the plaintiff knew or should have known that the defendants had no intention of seeking sanctions against the plaintiffs in that action. The trial court also found that the plaintiff's unsubstantiated claim of gender bias by the trial court and other judges in this state constituted a "serious [offense] against the institution of our Connecticut judicial system in that she has impugned its integrity, undermined public confidence in the system as a minister of justice, has degraded it and brought it into public disrespect and dishonor." This conduct, the trial court concluded, violated rules 3.5 (3), 8.2 and 8.4 (3) and (4).[25] Finally, the trial court found that the plaintiff's behavior throughout the underlying proceedings evinced a lack of competence in the practice of law.

After concluding that the plaintiff had violated several Rules of Professional Conduct, the court set a date for a hearing to determine the proper sanction that should be imposed on the plaintiff.[26] Specifically, the trial court, in its memorandum of decision, notified the plaintiff

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

"(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]

"(4) Engage in conduct that is prejudicial to the administration of justice . . . ."

[26] In the interim, on January 29, 2001, the trial court, *Brennan, J.*, granted the defendants' previously filed motion for summary judgment on the third count of the underlying complaint seeking declaratory and injunctive relief.

that the range of sanctions available to the court included those set forth in Practice Book §§ 2-37[27] and 2-44,[28] and in General Statutes § 51-84, including suspension, disbarment and counsel fees. Subsequently, on November 2, 2001, the trial court issued a separate memorandum of decision regarding the appropriate sanction to be imposed as a result of the plaintiff's misconduct. In that memorandum of decision, the trial court concluded that the evidence revealed a pattern of "pervasive misconduct" on the part of the plaintiff. This misconduct, the trial court determined, was of heightened seriousness because it was "directed toward the administration of justice." Consequently, the trial court ordered that the plaintiff be disbarred from the practice of law and that she be prohibited from applying for readmission for a period of five years.[29] This writ of error followed.

[27] Practice Book § 2-37 (a) provides: "A reviewing committee or the statewide grievance committee may impose one or more of the following sanctions and conditions in accordance with the provisions of Sections 2-35 and 2-36:

"(1) reprimand;

"(2) restitution;

"(3) assessment of costs;

"(4) an order that the respondent return a client's file to the client;

"(5) a requirement that the respondent attend continuing legal education courses, at his or her own expense, regarding one or more areas of substantive law or law office management;

"(6) an order to submit to fee arbitration;

"(7) with the respondent's consent, an order to submit to periodic audits and supervision of the attorney's trust accounts to insure compliance with the provisions of Section 2-27 and the related Rules of Professional Conduct;

"(8) with the respondent's consent, a requirement that the respondent undertake treatment, at his or her own expense, for medical, psychological or psychiatric conditions or for problems of alcohol or substance abuse."

[28] Practice Book § 2-44 provides: "The superior court may, for just cause, suspend or disbar attorneys and may, for just cause, punish or restrain any person engaged in the unauthorized practice of law."

[29] The trial court also specifically ordered that, as conditions on the plaintiff's application for readmission to the bar, the plaintiff: (1) complete a course in Connecticut civil practice and procedure at an accredited law school; (2) complete a course in professional responsibility and legal ethics at an accredited law school; (3) pass the multistate examination in professional

In this writ of error, the plaintiff claims that the trial court: (1) violated her due process rights by failing to give her prior written notice of the charges against her; (2) lacked the authority to initiate disciplinary proceedings because such proceedings may be instituted only by filing a formal written complaint with the statewide grievance committee; (3) violated her due process rights because the trial court displayed actual bias toward her; (4) improperly concluded that she had engaged in professional misconduct; and (5) improperly imposed the sanction of disbarment.[30] Additional facts will be set forth as necessary.

I

The plaintiff first claims that her due process rights were violated because the trial court failed to give her prior written notice of the charges against her. The trial court claims in response that it complied with due process requirements by providing the plaintiff with reasonable notice of the charges against her. We agree with the trial court.

"At their core, the due process clauses of the state and federal constitutions require that one subject to a

responsibility administered under the auspices of the Connecticut bar examining committee; and (4) "[d]emonstrate to the satisfaction of the reinstatement panel appointed pursuant to Practice Book § 2-53 that the [plaintiff] has achieved such a degree of rehabilitation as to encourage a belief that (a) she will conduct her professional life with due respect for the Connecticut judiciary and the judicial process which she has been sworn to uphold, (b) she is prepared to accept responsibility for her actions and will refrain from blaming judges and others for any adverse result which she may suffer in a particular case, (c) she will be truthful in all of her dealings with the court."

[30] The plaintiff also, in her writ of error, sought to reverse the trial court's October 31, 2000 grant of the motions for sanctions and attorney's fees by the defendants in the underlying action. The trial court moved this court to dismiss the portion of the plaintiff's writ of error challenging the sanction and award of attorney's fees, because the plaintiff had failed to challenge them within the time allowed by the rules of practice. Because the plaintiff had failed timely to challenge the sanction and award of attorney's fees, we granted the trial court's motion to dismiss. Accordingly, the plaintiff's writ of error includes only the trial court's order of disbarment.

significant deprivation of liberty or property must be accorded adequate notice and a meaningful opportunity to be heard. . . . [S]ee *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 393, 685 A.2d 1108 (1996) (As a procedural matter, before imposing . . . sanctions, the court must afford . . . a proper hearing on the . . . [proposed] sanctions. . . . There must be fair notice and an opportunity for a hearing on the record. . . .), overruled on other grounds, *State* v. *Salmon*, [250 Conn. 147, 154–55, 735 A.2d 333 (1999)]; see also *Statewide Grievance Committee* v. *Botwick* [226 Conn. 299, 308, 627 A.2d 901 (1993)] (before [discipline may be imposed], attorney [is] entitled to notice of charges, fair hearing and appeal to court for determination of whether he was deprived of due process)." (Internal quotation marks omitted.) *Briggs* v. *McWeeny*, 260 Conn. 296, 318, 796 A.2d 516 (2002).

"Because a license to practice law is a vested property interest and disciplinary proceedings are 'adversary proceedings of a quasi-criminal nature,' an attorney subject to discipline is entitled to due process of law." *Kucej* v. *Statewide Grievance Committee*, 239 Conn. 449, 462, 686 A.2d 110 (1996), cert. denied, 520 U.S. 1276, 117 S. Ct. 2457, 138 L. Ed. 2d 214 (1997). "Due process is inherently fact-bound because due process is flexible and calls for such procedural protections as the particular situation demands. . . . The constitutional requirement of procedural due process thus invokes a balancing process that cannot take place in a factual vacuum." (Internal quotation marks omitted.) *Thalheim* v. *Greenwich*, 256 Conn. 628, 648, 775 A.2d 947 (2001). Accordingly, "[t]he determination of the particular process that is due depends on the nature of the proceeding and the interests at stake. . . . In attorney disciplinary proceedings, two interests are of paramount importance. On the one hand, we must not tie the hands of grievance committees and trial courts with

procedural requirements so strict that it becomes virtually impossible to discipline an attorney for any but the most obvious, egregious and public misconduct. On the other hand, we must ensure that attorneys subject to disciplinary action are afforded the full measure of procedural due process required under the constitution so that we do not unjustly deprive them of their reputation and livelihood." (Citation omitted; internal quotation marks omitted.) *Kucej* v. *Statewide Grievance Committee*, supra, 462–63; see also *Mathews* v. *Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [Rather] [d]ue process is flexible and calls for such procedural protections as the particular situation demands." [Citation omitted; internal quotation marks omitted.]).

To satisfy the requirements of due process, attorneys subject to disciplinary action must receive notice of the charges against them. "In the context of attorney misconduct proceedings, this court previously has stated that notice must be sufficiently intelligible and informing to advise the . . . attorney of the accusation or accusations made against [her], to the end that . . . [she] may prepare to meet the charges against [her] . . . . If this condition is satisfied, so that the accused is fully and fairly apprised of the charge or charges made, the complaint is sufficient to give [her] an opportunity to be fully and fairly heard . . . . This court also has explained that a hearing such as this is not the trial of a criminal or civil action or suit, but an investigation by the court into the conduct of one of its own officers, and that, therefore, while the complaint should be sufficiently informing to advise the . . . attorney of the charges made against [her], it is not required that it be marked by the same precision of statement, or conformity to the recognized formalities or technicalities of

pleadings, as are expected in complaints in civil or criminal actions." (Citation omitted; internal quotation marks omitted.) *Thalheim* v. *Greenwich*, supra, 256 Conn. 649–50; see also *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (due process entitles tenured public employee to "*oral or written notice* of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story" before being terminated [emphasis added]). Thus, the notice afforded to an attorney subject to a disciplinary hearing may be oral or written, as long as it adequately informs the attorney of the charges against him or her and allows him or her to prepare to address such charges.

Similarly, an attorney subject to disciplinary proceedings must be given reasonable notice of the charges against him or her "before *the proceedings* commence . . . ." (Emphasis in original.) *In re Flanagan*, 240 Conn. 157, 174, 690 A.2d 865, cert. denied sub nom. *Flanagan* v. *Judicial Review Council*, 522 U.S. 865, 118 S. Ct. 172, 139 L. Ed. 2d 114 (1997). " '[T]he proceedings' in advance of which reasonable notice must be given . . . are not the probable cause proceedings because those proceedings are investigatory, rather than adjudicatory, in nature." Id., 175. Accordingly, the issue presented by the present case is whether the plaintiff was afforded reasonable notice of the charges against her prior to the adjudicatory proceedings.

In *Briggs* v. *McWeeny*, supra, 260 Conn. 303, the trial court, at a hearing on an application for a prejudgment remedy, was notified by one of the defendants in the underlying litigation in that case that the plaintiff, an attorney, had attempted to suppress a report that was of evidentiary value to the defendants. After learning of those allegations, the trial court scheduled a hearing on the allegations of misconduct. Id. In its order, the

trial court identified specific Rules of Professional Conduct that were relevant to the inquiry; the order also provided that the trial court would entertain any motions for sanctions or disciplinary action against the plaintiff. Id. After the three day hearing on the allegations of misconduct, the trial court issued a memorandum of decision concluding that the plaintiff had violated several Rules of Professional Conduct by suppressing the report. Id. The trial court also determined that the plaintiff had failed to comply with her continuing duty to disclose, pursuant to Practice Book § 13-15,[31] which in turn constituted a violation of rule 3.4 (1)[32] of the Rules of Professional Conduct. Id., 304.

In her writ of error to this court, the plaintiff in *Briggs* claimed that the trial court's failure to notify her specifically that her alleged noncompliance with § 13-15 would be included in the misconduct inquiry violated her due process rights. Id., 317. This court first explained that the notice given to an attorney need not refer to specific Rules of Professional Conduct. Id., 319. Rather, to satisfy due process standards, the notice "must apprise the attorney of the transactions that form the basis of the allegations of misconduct." Id. Because the notice given to the plaintiff in that case, namely, the trial court's order regarding the hearing on the allegations of misconduct, "clearly stated that the trial court's inquiry would concern" the plaintiff's attempt to suppress the

[31] Practice Book § 13-15 provides in relevant part: "If, subsequent to compliance with any request or order for discovery and prior to or during trial, a party discovers additional or new material or information previously requested and ordered subject to discovery or inspection . . . that party shall promptly notify the other party, or the other party's attorney, and file and serve . . . a supplemental or corrected compliance."

[32] Rule 3.4 of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not:

"Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . ."

report, the plaintiff was adequately apprised that her actions regarding the report at issue. Id., 320. Thus, the absence of a specific reference to § 13-15 in the trial court's order regarding the hearing on the allegations of misconduct did not violate the plaintiff's due process rights.

In the present case, the plaintiff equally was informed adequately of the charges against her. Specifically, after the court's inquiry into the allegations of misconduct, including several days of testimony from the purported plaintiffs in the underlying case, the trial court specifically outlined what it considered to be the three issues relevant to the plaintiff's adjudicatory proceeding. Thus, the trial court stated: "[T]he first issue is [the plaintiff's] authority or lack of authority to represent the numerous plaintiffs other than the two Sullivans. Secondly, your continued activity in the case after being directed by the Sullivans to take no further action in the case. And third, the issue of your apparent divided loyalty between your duty to your client and your own self-protection or aggrandizement." The trial court then gave the plaintiff an opportunity to present evidence and to testify in her own behalf regarding those specific issues. As previously noted, the plaintiff was afforded a full and fair opportunity to challenge the evidence presented at the court's inquiry into her conduct, and the plaintiff in fact testified on her own behalf in response to the trial court's articulation of those three issues over the course of six days.

Our conclusion that the plaintiff was afforded adequate notice of the charges against her is supported by additional evidence that the plaintiff had received notice of the allegations of misconduct even before the initial inquiry into her conduct was completed. For instance, the trial court's order of September 28, 2000, stated that a hearing scheduled for October 31, 2000, would include the matter of the "letter received by the

court from Lenore and [Joseph] Sullivan" claiming that they had directed the plaintiff no longer to pursue litigation. Further, after the October 31 hearing was rescheduled because of the plaintiff's allegation of gender bias, the court issued an order scheduling a hearing involving all motions for sanctions. The trial court's order also stated that the court would adjudicate the status of each plaintiff in the underlying litigation to determine if they were properly plaintiffs in the underlying action. Moreover, at the inquiry into whether the purported plaintiffs in the underlying action were properly plaintiffs, the trial court informed those purported plaintiffs who had been subpoenaed, in the presence of the plaintiff, that they were in court because the trial court had "determined at one of the prior proceedings that it was vital to the administration of justice that it determine whether [the purported plaintiffs in the underlying case] (a) initially authorized [the plaintiff] to include your name as plaintiffs, [and] (b) . . . if you did whether at anytime you instructed [the plaintiff] to withdraw your name from the litigation." Additionally, after the court heard the testimony and evidence of the plaintiff, the court identified the specific Rules of Professional Conduct that it perceived to be implicated by the plaintiff's behavior, hoping to assist her in the preparation of her brief to the court. In this way, the plaintiff in the present case was afforded significantly more notice than the plaintiff received in *Briggs*, where we concluded that the notice received by the plaintiff was sufficient. Thus, we conclude that both the written orders of the court issued during the investigation into the allegations of misconduct and the oral notice given directly to the plaintiff prior to the adjudicatory phase of the inquiry into her misconduct sufficiently apprised the plaintiff of the transactions that formed the basis of the allegation of misconduct. Accordingly, we reject the plaintiff's claim that her due process rights were violated by the

failure of the trial court to give specific written notice of the charges against her.

II

The plaintiff next claims that the trial court lacked the authority to initiate disciplinary proceedings against her because such proceedings may be instituted only by filing a formal written complaint with the statewide grievance committee. The trial court claims in response that it has the inherent authority to discipline an attorney regardless of whether a complaint has been filed with the statewide grievance committee. We agree with the trial court.

As a threshold matter, we address the standard of review. In the present case, the issue before us is whether the trial court properly determined that it had the inherent authority to initiate disciplinary proceedings against the plaintiff in the absence of a formal written complaint to the statewide grievance committee. Because this presents a question of law, our review is plenary. Therefore, "we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 156, 757 A.2d 14 (2000).

Turning to the merits of the plaintiff's claim, we first note that "[t]he Superior Court possesses inherent authority to regulate attorney conduct and to discipline the members of the bar." (Internal quotation marks omitted.) *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 553, 663 A.2d 317 (1995). Thus, "[t]he judiciary has the power to admit attorneys to practice and to disbar them . . . to fix the qualifications of those to be admitted . . . and to define what constitutes the practice of law." (Citations omitted; internal quotation marks omitted.) Id., 553–54. Moreover, "a

comprehensive disciplinary scheme has been established to safeguard the administration of justice, and designed to preserve public confidence in the system and to protect the public and the court from unfit practitioners. . . . General Statutes § 51-90g and the parallel rules of practice authorize the grievance committee to act as an arm of the court in fulfilling this responsibility. . . . These rules exist within the broader framework of the relationship between attorneys and the judiciary. . . . This unique position as officers and commissioners of the court . . . casts attorneys in a special relationship with the judiciary and subjects them to its discipline." (Citations omitted; internal quotation marks omitted.) Id., 554.

Consequently, "[t]he proceeding to disbar . . . an attorney is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is not the punishment of the offender, but the protection of the court. . . . Once the complaint is made, the court controls the situation and procedure, in its discretion, as the interests of justice may seem to it to require. . . . [T]he power of the courts is left unfettered to act as situations, as they may arise, may seem to require, for efficient discipline of misconduct and the purging of the bar from the taint of unfit membership. Such statutes as ours are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct." (Internal quotation marks omitted.) *Doe* v. *Statewide Grievance Committee*, 240 Conn. 671, 678, 694 A.2d 1218 (1997).

In *In re Peck*, 88 Conn. 447, 449, 91 A. 274 (1914), an attorney challenged the order of the trial court disbarring him for his conduct during the course of the settlement of an estate. This court began its review of the attorney's claims by explaining that an action seeking disbarment is neither a criminal nor civil action,

but rather an inquiry that "is directed solely to [the attorney's] continued fitness." Id., 452. In this way, this court explained, notwithstanding the specific procedures of the grievance committee, the trial court, in an attorney disciplinary proceeding, "controls the situation and procedure . . . as the interests of justice may seem to it to require. It may even act upon its own motion without complaint, and *thus be the initiator of proceedings*." (Emphasis added.) Id.

In addition, the attorney in *In re Peck* challenged the authority of the trial court to hear the complaint against him, claiming that the passage of the statutes creating the statewide grievance committee gave the grievance committee the exclusive right to investigate allegations of attorney misconduct. Id., 456. In response to this claim, this court concluded that it was "apparent that the statute [creating the statewide grievance committee] did not intend to provide an exclusive mode of instituting inquiries into the conduct of attorneys. . . . Neither by expression nor by implication does it contain a restriction of the right of complaint to these committees, or a prohibition to the courts of the right to entertain complaints not thus presented. Such an apparent invasion of the power inherent in courts to supervise the conduct of their own officers is not to be presumed, and the provisions of the statute give no countenance to the existence of a legislative intention to that end." Id., 456–57. Thus, in *In re Peck*, this court rejected the claim that the statewide grievance committee had the sole means of investigating and determining attorney misconduct. Accord *Grievance Committee* v. *Goldfarb*, 9 Conn. App. 464, 474–75, 519 A.2d 624, cert. denied, 203 Conn. 802, 522 A.2d 292 (1987) ("it is apparent that the rules of court [delegating authority to grievance committee to investigate attorney misconduct] do not

provide exclusive methods for conducting attorney discipline proceedings in the Superior Court").[33]

We conclude that the reasoning employed in *In re Peck* applies equally to the plaintiff's claim in the present case. Here, after receiving information that the plaintiff may not have been authorized to bring the underlying claim in the name of some of the purported plaintiffs, the trial court, sua sponte, initiated an inquiry into the conduct of the plaintiff. As the court noted in its memorandum of decision, the trial court "availed itself of its seldom used power, acting on its own motion, without a complaint, and thus became the initiator of the proceedings." Because a complaint before the statewide grievance committee is not the exclusive method of investigating attorney misconduct, the trial court properly initiated disciplinary proceedings against the plaintiff.

Our conclusion that the statewide grievance committee is not the exclusive tribunal in which attorney misconduct claims may be investigated is further supported by Practice Book § 2-44.[34] That section allows the Superior Court, for just cause, to suspend or disbar attorneys. Moreover, Practice Book § 2-45[35] provides in

[33] The Appellate Court also explained that "[g]rievance committees (now grievance panels) obviously perform a necessary and valuable function by providing the courts with able and competent experts to investigate and evaluate claims of attorney misconduct. This delegation of power, however, is not a deprivation of power. The Superior Court retains inherent and plenary power to regulate and discipline its officers." *Grievance Committee* v. *Goldfarb*, supra, 9 Conn. App. 477. We find this reasoning persuasive and adopt it in the present case.

[34] See footnote 28 of this opinion.

[35] Practice Book § 2-45 provides: "If such cause occurs in the actual presence of the court, the order may be summary, and without complaint or hearing; but a record shall be made of such order, reciting the ground thereof. Without limiting the inherent powers of the court, if attorney misconduct occurs in the actual presence of the court, the statewide grievance committee and the grievance panels shall defer to the court if the court chooses to exercise its jurisdiction."

relevant part that "[w]ithout limiting the inherent powers of the court, if attorney misconduct occurs in the actual presence of the court, the statewide grievance committee and the grievance panels shall defer to the court if the court chooses to exercise its jurisdiction." These rules of practice impliedly contemplate the trial court's inherent authority to discipline an attorney who commits misconduct in its presence. Thus, we reject the plaintiff's claim that the exclusive method of disciplining attorneys is by filing a formal written complaint with the grievance committee.

III

The plaintiff next claims that her due process rights were violated by the trial court's display of actual bias toward her during the underlying proceedings. Specifically, the plaintiff points to several instances that she claims reveals the trial court's bias. The plaintiff claims that the trial court: (1) manifested its bias toward her in its July 17, 2001 memorandum of decision when it found that she represents people who challenge land use decisions;[36] (2) falsely accused her of having filed a complaint against the trial court with the judicial review council; (3) prejudged the issues against her before the presentation of evidence; (4) influenced and slanted against the plaintiff the testimony of the purported plaintiffs in the underlying case; and (5) unduly

[36] As previously noted, in its July 17, 2001 memorandum of decision, the trial court found that the plaintiff's conduct during the underlying litigation constituted a conflict of interest. In explaining this conflict, the trial court noted: "[T]he court is aware from its period of judicial service, that [the plaintiff] is recognized as having attained a level of success in forestalling, curtailing and delaying certain land development projects in our state. In this case, [the plaintiff] identified wetlands and natural features of the subdivision terrain which she believed ought to be protected. The Sullivans evinced no concern over these and only the Hunters were concerned over the pond. Thus, [the plaintiff] exploited her clients' mild concerns for protection of the environment to promote her own personal environmental value preferences."

restricted the permissible scope of questioning. All of the plaintiff's contentions are without merit.

Canon 3 (c) (1) of the Code of Judicial Conduct provides in relevant part: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (A) the judge has a personal bias or prejudice concerning a party . . . ." "To prevail on its claim of a violation of this canon, the plaintiff need not show actual bias. The plaintiff has met [her] burden if [she] can prove that the conduct in question gave rise to a reasonable appearance of impropriety." *Abington Ltd. Partnership* v. *Heublein*, 246 Conn. 815, 819–20, 717 A.2d 1232 (1998).

"We use an objective rather than a subjective standard in deciding whether there has been a violation of canon 3 (c) (1). Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification. Thus, an impropriety or the appearance of impropriety . . . that would reasonably lead one to question the judge's impartiality in a given proceeding clearly falls within the scope of the general standard . . . . The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his . . . impartiality, on the basis of all of the circumstances." (Internal quotation marks omitted.) Id., 820; see also *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 745–46, 444 A.2d 196 (1982). "Even in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority." (Inter-

nal quotation marks omitted.) *State* v. *Webb*, 238 Conn. 389, 460–61, 680 A.2d 147 (1996).

We first address the plaintiff's claim that the trial court's personal bias against her was revealed in its July 17, 2001 memorandum of decision. See footnote 36 of this opinion. The trial court's statement that the plaintiff had attained a level of success in "forestalling, curtailing and delaying certain land development projects" was made in the context of its finding that the plaintiff's conduct in the underlying litigation constituted a conflict of interest. In the underlying proceedings, Joseph Sullivan testified that his sole purpose in the litigation was to stop the use of the rock crusher, *not* to stop the development from occurring. In the complaint seeking declaratory and injunctive relief, however, the plaintiff claimed that the actions of the defendants in the underlying case were causing "great and irreversible damage to the inland wetlands and watercourses" of the state and should halt until further permits were acquired. Accordingly, by pointing out that the plaintiff was well-known for her prior success in delaying development projects, the trial court was not revealing any personal bias against the plaintiff, but rather was explaining the apparent conflict of interest between the plaintiff's goals and those of her clients. Thus, we conclude that the trial court's comments do not reflect actual bias and do not raise a reasonable question of impartiality.

The plaintiff next claims that the trial court falsely accused her of filing a complaint against him before the judicial review council, thereby revealing the trial court's personal bias against her. The following facts are relevant to this claim. On October 31, 2000, the plaintiff, allegedly representing the purported plaintiffs in the underlying action, moved to disqualify the trial court, claiming that the court's order of sanctions for the plaintiff's failure to appear at the September 28,

2000 hearing manifested a personal bias against her. During a scheduled hearing on the same day that the motion was filed, the trial court heard arguments from both the plaintiff and counsel for the defendants in the underlying case regarding the motion to disqualify. The plaintiff argued that the sanction was improper and unconstitutional because she was attending jury selection for another client on the day she failed to appear for the hearing. Additionally, the plaintiff, in support of her motion to disqualify the trial court, claimed that the trial court had had an ex parte communication with the plaintiff's opposing counsel in a prior case.[37] In

[37] During oral argument on the plaintiff's motion to disqualify the trial court, the following colloquy between the plaintiff and the trial court occurred:

"[The Plaintiff]: Your Honor, this motion is not interposed to frustrate these proceedings. It's simply to protect the proceedings from what seems to be inappropriate sanctioning conduct by this court for exercise [of] the first amendment rights and liberties by the plaintiffs in this case to chill them in the future . . . to chill my rights and to single me out for very special treatment in this court which I'm very well aware of Your Honor.

"And therefore, this motion . . . has been characterized by the defendants; and it of course is no surprise that they are very, very generous in their compliments to the court and appealing to Your Honor's . . . sense of good relations with them, Your Honor, because after all they did win quite a favorable decision from Your Honor in this case. So, it really shouldn't be any surprise that they should sound so, if you'll forgive me, obsequious. . . .

"The Court: . . . I must say . . . while I would intend to agree with you that it is. Perhaps [sycophantic] might be the appropriate word for [defense counsel] to have complimented the court as he did, nevertheless, I think it borders on the unprofessional for you to engage in these type of remarks. I really do. I think it borders on unprofessional and I resent them.

"[The Plaintiff]: My remarks, Your Honor, in all respect are based on an appreciation and sensitivity to the constitutional rights of litigants including the plaintiffs; including mine . . . and all those who come to our courts to adjudicate disputes, including those involving town authorities where there is a dispute as to whether they give due heed to their rules and regulations. There's nothing I have said to justify the comment Your Honor just made, which simply magnifies the reason why it was necessary for me to file this motion to disqualify.

"I will add something and Your Honor is aware that some time ago in Danbury Your Honor engaged in an ex parte communication with [another attorney] . . . and that was a case involving—

response, the trial court denied that he had had any ex parte communication; additionally, when denying the plaintiff's allegation, the trial court stated its belief that the plaintiff had filed a complaint in the judicial review council as a result of the alleged communication and that it was dismissed as being without merit. In fact, the plaintiff had not, in that prior case, filed a grievance against the trial court, but had filed a complaint with the grievance committee against her opposing counsel as a result of the alleged ex parte communication.

Thereafter, the plaintiff, on December 21, 2000, again moved to disqualify the trial court claiming that because she never in actuality had filed a complaint against the trial court, the allegation that she had done so revealed the trial court's personal bias against her. In response to that motion, the trial court corrected itself, stating that it had been wrong when it stated its belief that the plaintiff had filed a complaint against him. Moreover, it apologized to the plaintiff for its "faulty memory."[38]

Upon our thorough review of the record, we conclude that the trial court's statements do not reflect any actual

"The Court: Well please . . . would you please tell me—first of all I stoutly deny it. In fact, I think you even filed a complaint with [the] judicial review council on that and it was dismissed as being un-meritorious and well it should have been because it was not an ex parte conversation; and you and I had quite a discussion on the record over that very issue. That . . . took place nine or ten years ago. What in heaven's name does it have to do with today's proceeding?

"[The Plaintiff]: A great deal, Your Honor because it was—

"The Court: Well I'm ordering you to go on to something else. So it will have nothing to do with it."

[38] Specifically, the trial court stated: "And the purpose for which she [filed a motion to disqualify], so that there be no question about it, was to prove to the court that the court was wrong when the court tried to recollect ten years ago that particular incident that she accused the court of engaging in an ex-parte conversation with [another attorney] in which I clearly said, because I did review the transcript, I clearly said that I believed that [the plaintiff] had filed a complaint with the judicial review council over that. In fact the court was wrong on that. The court's recollection was faulty, and to that extent I apologize to [the plaintiff] for my faulty memory."

bias against the plaintiff; nor do they raise a reasonable question concerning the court's impartiality. Rather, it appears to us that the trial court's recollection as to the entity and persons involved in the plaintiff's grievance simply was mistaken. As the trial court noted, the allegation, raised by the plaintiff in oral argument before the trial court, that the trial court had engaged in an ex parte communication was in reference to an incident that had occurred ten years prior to the hearing in the present action and involved a completely different case. Additionally, the trial court promptly corrected the record with respect to its statement that the plaintiff had filed a complaint against it and apologized to the plaintiff for its mistake. Thus, we conclude that the statement by the trial court was due merely to a mistaken recollection of a prior case and does not reflect any bias against the plaintiff.

The plaintiff next claims that the trial court was biased against her in that it prejudged the issues prior to the presentation of evidence. In the present case, the trial court advised the purported plaintiffs, who had been subpoenaed to the court to testify regarding whether the plaintiff was authorized to bring the underlying case, that they would be subject to cross-examination and could request an attorney to be present at any time. This statement by the trial court, the plaintiff claims, indicates that the trial court already had decided that the plaintiff was not in fact the attorney for the purported plaintiffs in the underlying case and, therefore, had already prejudged the issue before it.

We note that the specific issue to be determined by the trial court was not whether the plaintiff was the *attorney* for the purported plaintiffs in the underlying case, but whether she was *authorized* to bring an action for declaratory and injunctive relief. Put differently, even if we assume the trial court believed that the purported plaintiffs were not represented by the plain-

tiff when they were subpoenaed to the court, this belief had no bearing on the issue before the court, namely, whether, *at the time the case was brought*, the plaintiff was authorized to include their names as plaintiffs in an action seeking declaratory and injunctive relief. Moreover, the trial court's instruction to the witnesses that they would be subject to cross-examination and could request that an attorney other than the plaintiff be present was proper because it was in fact the *plaintiff* who would be cross-examining them; thus, if the plaintiff was in fact still retained by the witnesses, they might not have realized that they could request an attorney *other than* the plaintiff. Accordingly, our review of the record reveals that the actions of the trial court in advising the witnesses that they could have an attorney present did not reflect bias by the court and does not raise a reasonable question of impartiality.[39]

The plaintiff next claims that the trial court influenced and slanted against her the testimony of the plaintiffs in the underlying case, thereby revealing the trial court's bias against her. To support this claim, the plaintiff extracts from the transcript isolated statements and questions by the trial court that, she claims, reveal its bias against her. Thus, the plaintiff claims that the trial court improperly characterized the sign-up sheet signed

[39] The plaintiff also claims that the statement by the trial court that all the names of the purported plaintiffs should be withdrawn from the case revealed that it had prejudged the issue before it, thereby revealing a personal bias against the plaintiff. Specifically, in response to a request by counsel for the defendants in the underlying case to remove the name of one of the purported plaintiffs from the complaint, the trial court stated: "Well, just like everybody's name should be removed forthwith." First, we note that this was one isolated remark in proceedings that took place over the course of several months. Second, the court's statement likely was referring solely to the testimony of three witnesses who had testified that day that the plaintiff was not authorized to bring an action in their names seeking declaratory and injunctive relief. Viewing the remark in this context, we conclude that it does not reveal any bias against the plaintiff, nor does it raise a reasonable question as to the trial court's impartiality.

by the plaintiffs at the December 22, 1999 meeting as a petition rather than as a listing of coplaintiffs. As a result, the plaintiff contends, subsequent witnesses testified that they believed that they were simply signing a petition in support of the Sullivans. The evidence on which the plaintiff relies is the court's order that the sign-up sheet be made a court exhibit.

After a thorough review of the record, we conclude that the trial court's characterization of the sign-up sheet as a petition does not reveal bias against the plaintiff. Rather, the trial court likely used the word petition in the generic sense as a synonym for a sign-up sheet and did not intend to influence subsequent witnesses into testifying that they believed it was a petition rather than an authorization to bring an action. Thus, the court's remark characterizing the sign-up sheet as a petition does not reflect any bias against the plaintiff.

Finally, the plaintiff contends that the trial court's bias against her was revealed when it "severely limited the scope of questions" the plaintiff was permitted to ask the witnesses.[40] The plaintiff, however, did not raise any evidentiary claims; rather her contention is that the trial court's personal bias against her was reflected in its limitation of the scope of questions that she was allowed to ask. The limitation on the scope of questions, in our view, did not reveal bias, but merely was intended to limit the line of questioning to the issues articulated by the trial court, namely, whether the plaintiff was

[40] Specifically, the plaintiff claims that she was not permitted to ask whether the witnesses would be willing to withdraw from the underlying litigation if there might be adverse ramifications as a result, whether the Sullivans had asked other witnesses to join the action seeking declaratory and injunctive relief, whether the witnesses received a copy of the plaintiff's motion to withdraw her appearance, whether there was a "question and answer" period at the December 22, 1999 meeting, and what environmental issues were discussed at that meeting.

authorized to bring the action seeking declaratory and injunctive relief in the names of the purported plaintiffs, whether she continued activity in the case after she was told that certain purported plaintiffs wanted to withdraw and whether her conduct constituted a conflict of interest. Accordingly, upon thorough review of the record, we conclude that the trial court's actions in limiting the permissible scope of questioning does not reflect any actual bias toward the plaintiff, nor does it raise a reasonable question concerning its impartiality.

IV

The plaintiff's next claim is that the trial court improperly concluded that she had engaged in professional misconduct. Specifically, the plaintiff claims that her conduct during the course of the underlying proceedings accorded with the applicable standards of professional conduct. The trial court contends in response that it properly determined that the plaintiff had engaged in multiple acts of misconduct. We agree with the trial court.

We cull from the plaintiff's brief that she claims that the evidence was insufficient to support the trial court's findings that she had violated several rules of professional misconduct. Accordingly, as a preliminary matter, we set forth the standard of review for the plaintiff's claims of evidentiary insufficiency. "[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *State* v. *Floyd*, 253 Conn. 700, 737, 756 A.2d 799 (2000). "We also must determine whether those facts correctly found are, as a matter of law, sufficient to support the judgment." *Briggs* v.

McWeeny, supra, 260 Conn. 322. "Although we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . we will not uphold a factual determination if we are left with the definite and firm conviction that a mistake has been made." (Citation omitted; internal quotation marks omitted.) Id. "Additionally, because the applicable standard of proof for determining whether an attorney has violated the Rules of Professional Conduct is clear and convincing evidence . . . we must consider whether the trial court's decision was based on clear and convincing evidence." (Citation omitted.) Id., 322–23.

The trial court concluded that the plaintiff's misconduct involved five specific areas; namely, unauthorized representation of clients, conflict of interest, misrepresentations made to the court, conduct toward the court, and incompetence as an attorney. We address each in turn.

A

The trial court's finding that the plaintiff was not authorized to bring the action seeking declaratory and injunctive relief on behalf of the purported plaintiffs, with the exception of the Sullivans and the Hunters, was based on its determination that the plaintiff, during the course of that litigation, had violated several Rules of Professional Conduct. The trial court first concluded that the plaintiff had violated rule 1.5 (b), which provides in relevant part: "When the lawyer has not regularly represented the client, the basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matter to be undertaken shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

. . .'' As the trial court noted in its memorandum of decision, although the plaintiff assured the attendees of the December 22, 1999 meeting that the Sullivans were assuming all the expenses of litigation, that oral representation does not replace the rule's requirement of a written communication from the attorney to the clients regarding, inter alia, the scope of the representation. Moreover, before this court, the plaintiff conceded that she did not have written retainer agreements with all twenty-two plaintiffs listed in the complaint. We agree with the trial court that the oral representations made at the December 22, 1999 meeting and the communications from Joseph Sullivan do not satisfy the rule's requirement that attorneys submit a written communication to their clients regarding the costs of litigation and the scope of representation. Thus, the trial court properly concluded that the plaintiff violated rule 1.5 (b) of the Rules of Professional Conduct.

The trial court next found that the plaintiff had violated rule 1.7 (b) (2) of the Rules of Professional Conduct. Rule 1.7 (b) provides in relevant part: ''A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless . . . (2) [t]he client consents after consultation. *When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.*'' (Emphasis added.) In the present case, the trial court concluded that there had been no consultation with the purported plaintiffs in the underlying case concerning the implications and risks of multiple representation. In support for this determination, the trial court credited the testimony of several witnesses who testified that the plaintiff had failed to explain either that each purported plaintiff

potentially could be liable for taxable costs or whether the purported plaintiffs would be able to seek indemnification from the Sullivans, in the event that those costs were assessed. The trial court concluded, moreover, that the plaintiff had failed to explain the potential for conflict among the plaintiffs in the underlying action that could arise because certain plaintiffs were concerned about different aspects of the subdivision development.[41]

It is within the province of the trial court, when sitting as the fact finder, "to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Internal quotation marks omitted.) *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 224, 694 A.2d 1319 (1997). "Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . 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. . . . As a practical matter, it is inappropriate to assess credibility without having watched a witness testify, because demeanor, conduct and other factors are not fully reflected in the cold, printed record." (Internal quotation marks omitted.) *Briggs* v. *McWeeny*, supra, 260 Conn. 327. Accordingly, we defer to the trial court's credibility assessments and conclude that there was ample evidence in the record to support the trial court's conclusion that the plaintiff had failed to explain the implications of multiple representation to the purported plaintiffs.

[41] For instance, as the trial court noted, the Sullivans primarily were concerned with the use of the rock crusher, the Hunters were concerned with their rights to a pond that was near their property, and Jule Toma was concerned with air quality.

Finally, the trial court concluded that the plaintiff was not authorized to represent eighteen of the twenty-two purported plaintiffs in the underlying litigation because the plaintiff violated rule 1.4 of the Rules of Professional Conduct, which provides in relevant part: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Specifically, the trial court credited the testimony of the witnesses who testified that they did not understand that, by signing the sign-up sheet circulated at the December 22, 1999 meeting, they were authorizing the plaintiff to bring an action in their names. Additionally, the trial court found that the witnesses honestly believed that they merely were signing a petition in support of the Sullivans' attempt to enforce certain municipal regulations regarding the rock crusher. The trial court also found that the plaintiff had failed to meet personally with any of the plaintiffs in the underlying case regarding their identity or their goals in the litigation. Instead, the trial court found that the plaintiff had delegated to the Sullivans the responsibility for communicating with the purported plaintiffs. Moreover, the trial court credited the testimony of several witnesses who stated that they were unaware of their status as plaintiffs until they were subpoenaed by the defendants in the underlying action to appear to give depositions. The trial court also determined that the plaintiff had violated rule 1.4 by failing to communicate certain settlement offers[42] to the purported plain-

[42] In November, 2000, counsel for the defendants in the underlying action made written offers of settlement to the plaintiff, including waiver of all claims for fees and costs to which they might be entitled as prevailing parties and waiver of the $450 counsel fees awarded to each as sanctions by the trial court. The plaintiff testified that she did not send the plaintiffs in the underlying case copies of the settlement offers, nor did she communicate the offers to them.

tiffs and by failing to advise other plaintiffs that the Sullivans had expressed their desire to withdraw the litigation.

We conclude that the trial court's finding of a violation of rule 1.4 is amply supported by the record. As noted previously in this opinion; see footnotes 9 and 10 of this opinion; several witnesses testified that they believed they were signing a petition rather than an authorization for the plaintiff to bring an action in their names. Pursuant to rule 1.4, it is incumbent on the attorney to explain the nature of the matter to the extent necessary so that the client may make informed decisions. It is apparent from the testimony of the witnesses, which was credited by the trial court, that the plaintiff failed to explain adequately the nature of the sign-up sheet, as well as the extent to which those who signed it were authorizing the plaintiff to represent them not only in an appeal from the board, but also in an action seeking declaratory and injunctive relief. We also defer to the trial court's determination that credited the testimony of the witnesses who stated that they believed they were signing a petition rather than an authorization to bring suit, therefore resulting in the implication that the plaintiff failed to explain adequately the nature and scope of the proceedings so that her purported clients could make an informed decision regarding the representation. See *Briggs* v. *McWeeny*, supra, 260 Conn. 327

In addition, the plaintiff herself testified that she relied on the Sullivans to communicate with other purported plaintiffs. Specifically, the plaintiff testified that it was the Sullivans who mailed copies of the summons and complaint to the purported plaintiffs in the underlying case and that the scope of the representation, including the appeal of the board's decision and the action seeking declaratory relief, was explained to the plaintiffs in the underlying case not by the plaintiff but by Joseph Sullivan, who was not a lawyer. It is clear to

us, however, that an attorney may not delegate her responsibility to communicate with clients to nonlawyers, even if they are involved in the case. Accordingly, we conclude that the trial court properly found, by clear and convincing evidence, that the plaintiff had violated rules 1.5 (b),[43] 1.7 (b) (2)[44] and 1.4 of the Rules of Professional Conduct by engaging in the unauthorized representation of eighteen of the twenty-two plaintiffs in the underlying case.[45]

[43] See footnote 13 of this opinion.

[44] See footnote 14 of this opinion.

[45] The trial court also concluded that, by continuing to file pleadings in the underlying case after the Sullivans had instructed the plaintiff to cease litigation, the plaintiff violated rules 1.2 (a) and (c) and 1.16 (a) (3). Rule 1.2 (a) provides in relevant part: "A lawyer shall abide by a client's decisions concerning the objectives of the representation . . . and shall consult with the client as to the means by which they are to be pursued. . . ." Subsection (c) of that rule provides: "A lawyer may limit the objectives of the representation if the client consents after consultation." Moreover, rule 1.16 (a) provides in relevant part: "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . (3) [t]he lawyer is discharged." The plaintiff claims that she did not withdraw from the litigation seeking declaratory relief even after the Sullivans had requested that she do so because she believed Joseph Sullivan was "confused" and that he was asking her to do something that would not be in his best interests.

We reject the plaintiff's contentions that the evidence does not support the trial court's determination that the plaintiff violated rule 1.2 (a) and (c) and rule 1.16. It is clear from our review of the record that the trial court's findings regarding this aspect of the plaintiff's unauthorized representation of the purported plaintiffs in the underlying case were clearly and convincingly supported by the evidence. As previously noted, the Sullivans clearly expressed to the plaintiff in a letter dated July 18, 2000, and copied to the trial court, that they no longer wanted to pursue the action seeking declaratory and injunctive relief. Subsequently, however, the plaintiff moved for, among other things, a reargument of the trial court's decision dismissing counts one and two of the complaint seeking declaratory and injunctive relief. Moreover, without the permission of the Sullivans or any of the other purported plaintiffs, the plaintiff appealed to the Appellate Court from the trial court's denial of the plaintiff's motion to disqualify. The plaintiff also appealed, without permission of her clients, from the trial court's order granting the motion for sanctions by the defendants in the underlying case. On the basis of this evidence, and additional evidence in the record, we conclude that there was sufficient evidence to support the conclusion that

B

The trial court also concluded that the plaintiff's conduct in the underlying litigation created a conflict of interest. Specifically, in addition to finding that the plaintiff had violated rule 1.7 by engaging in unauthorized representation, the trial court also concluded that the violation of rule 1.7 resulted in a conflict of interest. This finding was based predominantly on the evidence that the plaintiff continued to file pleadings in the underlying litigation after the Sullivans had communicated to her that they did not wish to continue the litigation. The trial court's finding of a conflict of interest also was supported by the plaintiff's requirement that any settlement agreement in the underlying litigation include a personal release of all costs and penalties the plaintiff might have incurred, in addition to a release of her clients.

As noted previously in this opinion, rule 1.7 of the Rules of Professional Conduct sets forth the general rule on conflicts of interest in an attorney-client relationship. Rule 1.7 (a) provides that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) [t]he lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) [e]ach client consents after consultation." The commentary to rule 1.7 further explains the rule, stating that "[t]he lawyer's own interests should not be permitted to have adverse effect on representation of a client. . . ." Moreover, the commentary provides that "[i]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. . . ."

In the present case, the plaintiff testified that she continued to file pleadings on behalf of the Sullivans

the plaintiff had violated rules 1.2 (a) and (c) and 1.16 (a) (3) of the Rules of Professional Conduct.

and other plaintiffs despite their instruction not to do so because they were "confused" about the legal ramifications of a withdrawal. In addition, the plaintiff has not disputed the fact that she filed an appeal of the order of sanctions against her in the Appellate Court without first consulting with her clients. In addition, the plaintiff herself testified that she would not agree to a settlement in the underlying proceedings without a release of all costs and sanctions against her personally.

On the basis of this and additional evidence in the record,[46] we conclude that there was sufficient evidence to support the conclusion that the plaintiff's conduct in the underlying litigation had resulted in a conflict of interest between the plaintiff's interest in pursuing litigation and the Sullivans' interest in ceasing it.

C

The trial court's sanction of disbarment was also based on its conclusion that the plaintiff had made misrepresentations to the court in violation of rule 3.3 (a) (1) of the Rules of Professional Conduct and had engaged in inappropriate conduct toward the court in violation of rules 8.2 and 8.4 (3) and (4). Rule 3.3 (a) provides in relevant part: "A lawyer shall not knowingly:

[46] In particular, the trial court also determined that the plaintiff violated rule 1.8 (f) of the Rules of Professional Conduct, which provides: "A lawyer shall not accept compensation for representing a client from one other than the client unless:

"(1) The client consents after consultation;

"(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

"(3) Information relating to representation of a client is protected as required by [r]ule 1.6."

As noted previously, the trial court found, and the plaintiff does not dispute, that Diane Mellon had paid the plaintiff $1000 with the intention of joining the underlying litigation as a plaintiff. The plaintiff, after receiving this money, never notified the other plaintiffs in the underlying action of the receipt of the money, nor obtained their consent after consultation. We agree with the trial court that the plaintiff's violation of rule 1.8 (f) also resulted in a conflict of interest.

(1) [m]ake a false statement of material fact or law to a tribunal . . . .'' The commentary further provides: ''[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. . . .'' In addition, rule 8.2 (a) provides in relevant part: ''A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . .'' As the commentary to the rule explains, ''false statements by a lawyer can unfairly undermine public confidence in the administration of justice. . . .'' Rule 8.4 sets forth specific behavior that constitutes misconduct. Thus, the rule provides that it is professional misconduct to ''[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or to] [e]ngage in conduct that is prejudicial to the administration of justice . . . .'' Rules of Professional Conduct 8.4 (3) and (4).

The trial court's conclusion that the plaintiff had made misrepresentations to the tribunal and had engaged in inappropriate conduct toward the court is predicated on the plaintiff's unsubstantiated allegation of gender bias on the part of the court. With regard to these allegations of gender bias toward the court, we agree with the trial court that the plaintiff's assertions were ''wholly conclusory and without factual support.'' To begin, the plaintiff has presented no evidence establishing a factual basis for her claims. In response to the plaintiff's original allegation, the trial court, noting the seriousness of the allegations, ordered her to file an affidavit detailing her claims of bias. Subsequently, the plaintiff filed a document, titled as an affidavit,[47] claim-

[47] The trial court explained that the document filed by the plaintiff was not, in actuality, an affidavit because the contents were not sworn to and did not satisfy the requirements of a proper affidavit.

ing, inter alia: The trial court's failure to rule on the plaintiff's motion for sanctions against counsel for the defendants in the underlying case created the appearance of gender bias; the motions by opposing counsel in the underlying case to dismiss counts one and two of the complaint seeking declaratory and injunctive relief were without merit, and their granting evidenced the court's gender bias; female plaintiffs in the underlying action commented to the plaintiff about the preferential treatment of the male attorneys and defendants; and the imposition of the trial court's sanction for failing to appear at the scheduled September 28, 2000 hearing was a "manifestation of an extraordinary vindictiveness on the part of [the trial court]" and represented gender discrimination.[48]

[48] The plaintiff's purported November 6, 2000 affidavit provides in full: "I, Nancy Burton, do hereby depose as follows:

"1. I am above the age of eighteen years and I believe in the obligation of an oath.

"2. This affidavit is submitted pursuant to order of the trial court (Mottolese, J.) entered on October 31, 2000.

"3. I am aware of conduct at the Bridgeport Superior Court by Hon. William A. Mottolese and others which gives the appearance of gender bias.

"4. For example, on October 25, 2000, Attorney Juda J. Epstein, in the company of Attorney Gregory M. Conte, made the following utterance in a booming voice as he approached Courtroom 5D from the elevator: 'FUCK YOU, BITCH!'

"5. Mr. Epstein's utterance was preceded by a reference to depositions. Mr. Epstein had noticed certain depositions in this case, with respect to which I had filed a motion for continuance.

"6. Mr. Epstein's utterance may have been directed at myself or some other female person.

"7. That Mr. Epstein should conduct himself in such a manner within the Bridgeport Superior Courthouse suggests an awareness on his part that such conduct is acceptable at the Bridgeport Superior Court.

"8. When I called attention to Mr. Epstein's utterance to Hon. John W. Moran shortly thereafter, and moved that Mr. Epstein be sanctioned, neither Mr. Epstein nor Mr. Conte denied that the former made the loud utterance and Judge Moran made no inquiry and did nothing. Present in the courtroom were a clerk, a court reporter and a deputy sheriff, as I recall.

"9. I filed a written motion for sanctions addressed to Mr. Epstein's utterance. A copy is attached hereto.

"10. On October 31, 2000, Judge Mottolese, who said he was familiar with

"[G]ender bias, particularly bias based on stereo-

all the motions for sanctions in the file, which at that time included the motion for sanctions I filed concerning Mr. Epstein's utterance, ordered that a hearing be conducted on all motions for sanctions other than the motion for sanctions addressed to Mr. Epstein's utterance and a separate motion for sanctions I filed concerning Mr. Conte.

"11. Such restricted order strongly suggests Judge Mottolese's reluctance to consider sanctioning Mr. Epstein for his utterance, which was offensive and degrading to women.

"12. The effect of such restricted order was to postpone indefinitely any consideration by any Judge of the Superior Court of Mr. Epstein's offensive utterance.

"13. By indefinitely postponing consideration of such motion, Judge Mottolese created the appearance of gender bias and in fact promoted gender bias by permitting Mr. Epstein to go unsanctioned for an indefinite period.

"14. I am aware of other conduct by Judge Mottolese and others at the Bridgeport Superior Court which gives the appearance of gender bias.

"15. During proceedings in the above-captioned case, Judge Mottolese accorded preferential treatment to the defendants, males, and their attorneys, males.

"16. Both Lenore A. Sullivan and Patricia Hunter, plaintiffs herein, who are women, commented to me about such preferential treatment and their disdain for what appeared to be a judicial attitude that was gender-biased against them and their attorney, a woman.

"17. The plaintiffs established by overwhelming evidence that the motions to dismiss counts 1 and 2 of the complaint were without merit; Judge Mottolese's dismissal of counts 1 and 2 manifested bias and prejudice against Ms. Sullivan and Ms. Hunter because such decision completely discredited their testimony in favor of testimony by male witnesses which was not credible and, even if credible, was insufficient to support dismissal of counts 1 and 2. Such bias and prejudice may manifest gender bias.

"18. On October 31, 2000, Judge Mottolese imposed a $1,000 monetary penalty upon myself for failing to appear at a scheduled September 28, 2000 proceeding for which I had properly sought a continuance given a serious scheduling conflict, namely, my participation in jury selection in the case of *Joseph W. Coniglio* v. *David W. White*, CV 96 0324807, at the Superior Court, Judicial District of Danbury. Such penalty is a clear violation of Mr. White's Constitutional right to have counsel present during jury selection, a right inviolate. See Connecticut Constitution, Article First, Section 19 ('The right to question each juror individually by counsel shall be inviolate.') Judge Mottolese was fully aware of the conflict. Judge Mottolese's sanction, which is the subject of a pending petition for direct appeal to the Supreme Court, is a manifestation of an extraordinary vindictiveness on the part of Judge Mottolese, an expression of contempt for the rights of Mr. White and myself and the rights of plaintiffs herein, a shocking disregard for the sanctity of the jury process and cannot be understood apart from a consideration of

types, has no place in the courtroom." (Internal quotation marks omitted.) *State* v. *Figueroa*, 235 Conn. 145, 185, 665 A.2d 63 (1995). "Of all the charges that might be leveled against one sworn to administer justice and to faithfully and impartially discharge and perform all the duties incumbent upon me . . . a charge of bias must be deemed at or near the very top in seriousness, for bias kills the very soul of judging—fairness." (Internal quotation marks omitted.) *Wendt* v. *Wendt*, 59 Conn. App. 656, 693, 757 A.2d 1225, cert. denied, 255 Conn. 918, 763 A.2d 1044 (2000). In addition, "[i]t is the province of the trier of fact to weigh the evidence presented and determine the credibility and effect to be given the evidence." *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 224.

Although any bias, including that based on gender or stereotypes, cannot be tolerated, we conclude that the plaintiff has failed to provide any support for her allegation of gender bias by the trial court. Upon close review of the purported affidavit, it is apparent to us that it contains allegations that simply are unsupported by any facts or evidence. These unsupported allegations, in our view, do not give rise to an objective, reasonable belief that the assertions were true. To the contrary, as the trial court noted, and we find persuasive, the plaintiff's allegations arose only after the trial court adjudicated the underlying case in the defendants' favor and after the court imposed sanctions against her for failing to appear at a scheduled hearing. Moreover, the plaintiff utilizes the rulings that were adverse to her case as *evidence* of gender bias of the court. It is clear to us, however, that adverse rulings do not amount to evidence of bias. See *State* v. *Fullwood*, 194 Conn. 573,

gender discrimination, which I believe it also represents.

"19. This affidavit does not represent an exhaustive account of instances of gender bias by Judge Mottolese and others at the Bridgeport Superior Court.

"20. I swear to this affidavit under penalty of perjury."

582, 484 A.2d 435 (1984) ("[a]dverse rulings do not themselves constitute evidence of bias").

In addition, the trial court found that the plaintiff knowingly misrepresented to the court in the affidavit that Lenore Sullivan and Patricia S. Hunter had commented on the preferential treatment the males involved in the underlying case were receiving. In fact, Lenore Sullivan testified that she never discussed gender bias by the court with the plaintiff and that she did *not* believe the court treated anyone differently on the basis of their gender. In response to this testimony, the court inquired of the plaintiff, while she was testifying on her own behalf, regarding the affidavit and whether Lenore Sullivan had in fact alleged that the trial court engaged in gender bias.

As the trial court noted, the plaintiff never fully answered the trial court's inquiry regarding the plaintiff's statement, both in her affidavit and in open court, that Lenore Sullivan had complained of gender bias by the court. For instance, the plaintiff explained that "many comments were made" by Lenore Sullivan as to how the case was proceeding. The plaintiff testified, moreover, that she would not say that Lenore Sullivan had "lied" to the court when she denied making the statement but that her testimony was "not consistent with . . . what was said . . . ." The plaintiff also asserted that Lenore Sullivan was put in "an unfair position" by being asked that question by the court. Further, the plaintiff could not remember specific comments made by Lenore Sullivan but that there were "several occasions when we very clearly discussed the topic" of gender discrimination. After further questioning, the plaintiff conceded that she did not remember a specific statement being made, but that both Lenore Sullivan and Patricia S. Hunter had communicated to her that they did not think the underlying proceedings were "fair," and that their opinions related

to gender bias, in the plaintiff's view, because it was the "undercurrent of what [they] were discussing."

As a result of the plaintiff's testimony, the trial court, in its memorandum of decision, concluded that, because the plaintiff responded to the court's questioning by "evad[ing] the answer with misleading statements concerning her many discussions with [Lenore] Sullivan," the trial court was at liberty to accept the testimony of Lenore Sullivan as the truth. Put differently, the trial court credited the testimony of Lenore Sullivan denying that she had ever made allegations of gender bias against the court, over the testimony of the plaintiff.

With these principles in mind, and after a thorough review of the record, we conclude that the trial court's determination that the plaintiff misrepresented a material fact to the tribunal was not clearly erroneous. The trial court concluded, after hearing all the evidence, that the plaintiff knowingly had attributed to Lenore Sullivan a statement regarding gender bias that Lenore Sullivan testified she did not make. We will not disturb the trial court's credibility assessment; accordingly, we conclude that the trial court reasonably could have concluded that the plaintiff violated rule 3.3 (a) (1).

Moreover, these misrepresentations by the plaintiff further support our conclusion that the plaintiff's claims of gender bias were based, not on a bona fide claim of prejudice, but instead were a result of adverse trial court rulings. On this record, the trial court reasonably could have concluded that the plaintiff's claims of bias were meritless, and her allegations of gender bias against the court were either knowingly false or made with "reckless disregard as to its truth or falsity." See rule 8.2 (a) of the Rules of Professional Conduct. Accordingly, the trial court reasonably could have concluded that the plaintiff violated rules 8.2 and 8.4 (3)

and (4). See *Office of Disciplinary Counsel* v. *Price*, 557 Pa. 166, 177–78, 732 A.2d 599 (1999) (upholding sanctions against attorney whose allegations against judge were "either knowingly false or made without an objective reasonable belief that they were true" and constituted "misconduct prejudicial to the administration of justice").

D

Finally, the trial court concluded that the plaintiff's professional performance during the course of the underlying proceedings fell below the acceptable standard of competence envisioned by rule 1.1 of the Rules of Professional Conduct, which provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Further, the commentary to the rule clarifies the relevant factors to be utilized when an attorney's competence is questioned. "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. . . ." Rules of Professional Conduct 1.1, commentary.

In concluding that the plaintiff lacked competence to practice law, the trial court determined that the plaintiff lacked a basic knowledge of the rules of practice and procedure. For support for this lack of knowledge, the trial court cited several examples: the numerous motions to disqualify that the plaintiff filed with the court that did not meet the requirements of Practice

Book § 1-23;[49] her oral motions to disqualify; the lack of compliance with certain formalities when the plaintiff drafted and filed her affidavits; her failure to cease speaking, either as an attorney or when the plaintiff was testifying in her own behalf, when an objection was made; and the plaintiff's taking exception to the court's order that she answer certain questions when the necessity of taking an exception was eliminated from the rules of practice.

Upon our thorough review of the record, and in light of our earlier conclusions regarding the plaintiff's misconduct, we conclude that there was sufficient evidence upon which the trial court could have concluded by clear and convincing evidence that the plaintiff had violated rule 1.1. We further conclude that the facts found by the trial court are, as a matter of law, sufficient to support its finding that the plaintiff committed professional misconduct.

V

Last, we address the plaintiff's claim that because her conduct was in compliance with the Rules of Professional Conduct, the trial court improperly disbarred her. The trial court contends that it reasonably concluded that the sanction of disbarment was warranted. In light of our earlier conclusion that the trial court reasonably could have concluded that the plaintiff committed numerous acts of misconduct, we will consider whether the sanction of disbarment was disproportionate to the violations found. We conclude that the trial court did not abuse its discretion when it disbarred the plaintiff from the practice of law.

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

As we previously have noted, "[a] court disciplining an attorney does so not to punish the attorney, but rather to safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession." (Internal quotation marks omitted.) *Thalheim* v. *Greenwich*, supra, 256 Conn. 655. Thus, "[a] court is free to determine in each case, as may seem best in light of the entire record before it, whether a sanction is appropriate and, if so, what the sanction should be." (Internal quotation marks omitted.) Id., 656. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . Therefore, whether this court would have imposed a different sanction for [the plaintiff] is irrelevant. . . . Rather, we must determine whether the trial court abused its discretion in concluding that the appropriate sanction"; (citations omitted; internal quotation marks omitted) id.; for the plaintiff was disbarment.

"An attorney as an officer of the court in the administration of justice, is continually accountable to it for the manner in which [s]he exercises the privilege which has been accorded [her]. [Her] admission is upon the implied condition that [her] continued enjoyment of the right conferred is dependent upon [her] remaining a fit and safe person to exercise it, so that when [s]he, by misconduct in any capacity, discloses that [s]he has become or is an unfit or unsafe person to be entrusted with the responsibilities and obligations of an attorney, [her] right to continue in the enjoyment of [her] professional privilege may and ought to be declared forfeited. . . . Therefore, [i]f a court disciplines an attorney, it does so not to mete out punishment to an offender, but [so] that the administration of justice may be safeguarded and the courts and the public protected from

the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession." (Citation omitted; internal quotation marks omitted.) *Massameno* v. *Statewide Grievance Committee*, supra, 234 Conn. 554–55.

In sanctioning the plaintiff, the trial court was guided by the American Bar Association's Standards for Imposing Lawyer Sanctions (Standards).[50] The Standards provide that, after a finding of misconduct, a court should consider: (1) the nature of the duty violated; (2) the attorney's mental state; (3) the potential or actual injury stemming from the attorney's misconduct; and (4) the existence of aggravating or mitigating factors. A.B.A., Standards for Imposing Lawyer Sanctions (1986) standard 3.0, p. 25; see also *Briggs* v. *McWeeny*, supra, 260 Conn. 333–34. The Standards list the following as aggravating factors: "(a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; [and] (j) indifference to making restitution." A.B.A., Standards for Imposing Lawyer Sanctions, (1986) standard 9.22, p. 49. The Standards list the following as mitigating factors: "(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify conse-

[50] We note that, although the trial court was guided by the Standards, "[t]he Standards, originally promulgated in 1986, have not formally been adopted by the judges of this state." (Internal quotation marks omitted.) *Statewide Grievance Committee* v. *Spirer*, 247 Conn. 762, 782 n.13, 725 A.2d 948 (1999).

quences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical or mental disability or impairment; (i) delay in disciplinary proceedings; (j) interim rehabilitation; (k) imposition of other penalties or sanctions; (l) remorse; [and] (m) remoteness of prior offenses." Id., standard 9.32, p. 50.

In considering the nature of the duty violated, the trial court found that the plaintiff, by committing several acts of misconduct, had violated the duty to her clients, the public, the legal system and the profession. The trial court additionally found, with regard to the plaintiff's mental state, that the plaintiff's misconduct was wilful and "performed with full knowledge of the circumstances and consequences." Regarding the factor involving the injury caused by the misconduct, the trial court noted that the plaintiff's misconduct caused direct monetary loss to one plaintiff in the underlying case who incurred legal expenses in retaining another lawyer. The trial court further determined, however, that the plaintiff's misconduct caused intangible injury to the Sullivans and the other purported plaintiffs who were subpoenaed to court to testify regarding the plaintiff's authorization to bring an action. The trial court also found that the misconduct caused "serious harm to public confidence in the bar and to the integrity of the civil justice system."

Regarding the existence of aggravating factors, the trial court found that the plaintiff had been disciplined several times prior to these proceedings,[51] had acted

[51] The trial court listed the following prior disciplinary actions as of the time the trial court disbarred the plaintiff: "(1) *Michael* v. *Burton*, Superior Court, judicial district of Danbury, Docket No. CV88 295948 (1989), (*Mottolese*, *J.*) Reprimand. Unfounded, outrageous allegations of misconduct by Judge Howard Moraghan and other court personnel. . . . (2) *Voog* v. *Burton*, Docket No. CV90 0113 (1991), Reprimand. Violation of rule 3.4 (a), (c) and (f) of the Rules of Professional Conduct. (3) *Fairfield Grievance Panel* v. *Burton*, CV96 0024 (1997) Reprimand. Violation of rules 8.2 (a) and 8.4

out of selfish and dishonest motives,[52] had engaged in a pattern of misconduct,[53] had committed multiple offenses,[54] had engaged in a bad faith attempt to obstruct the disciplinary proceedings by filing a federal

(d). This reprimand was affirmed by Judge McWeeny. *Burton* v. *Statewide Grievance Committee*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV97-057337 (September 24, 1998), reversed on procedural grounds in *Burton* v. *Statewide Grievance Committee*, 60 Conn. App. 698, 760 A.2d 1027 (2000). The complaint is currently being reheard by the statewide grievance committee. (4) *Moraghan* v. *Burton*, Docket No. CV97-0338 (2000), Reprimand. Violation of rule 8.2 (a), appeal to the Superior Court pending. (5) *Fairfield Judicial District Grievance Panel* v. *Burton*, Docket No. CV98-0368, Reprimand. Violation of rule 3.1, appeal to Superior Court pending. (6) *Bartel* v. *Renard*, United States District Court for the Southern District of New York, Docket No. 96 CIV-6463 (JSM) (S.D.N.Y. October 27, 1999), Order of Honorable John S. Martin, Jr., Joint and several award of attorney's fees of $41,335.03 for obstruction of court order and wilful-wanton misconduct. (7) *Bartel* v. *Renard*, United States District Court, Docket No. 96 CV 6463 (JSM) (S.D.N.Y. December 16, 1999), Order of Honorable John S. Martin, Jr., Contempt of court order joint and several award of $5050. (8) *Monsky* v. *Moraghan*, United States Court of Appeals, Docket No. 99-7822 (2d Cir. 2000), Summary order. Show cause order for sanctions of $5000 and double costs for blatantly frivolous appeal. (9) *Burton* v. *Moraghan*, Docket No. CV No. 3:98 CV 1490 (AHN) September 6, 2000. United States Magistrate Judge Holly B. Fitzsimmons, award of attorney's fees and expenses $5200 for violation of court order; confirmed by the court, Nevas, J."

We also note that, subsequent to the trial court's action in the present case, the plaintiff has been sanctioned in other cases. See *In re Egri*, United States Court of Appeals, Docket Nos. 02-7227, 02-7653, 02-7703, 02-7751, 02-9020 (2d Cir. July 1, 2003) (affirming District Court's sanction of $171,546.80 for violating permanent injunction); *Burton* v. *Statewide Grievance Committee*, 48 Conn. Sup. 94, 103, 830 A.2d 1205 (2002) (reprimand for bringing "charges against judges with reckless abandon, thereby undermining public confidence in the administration of justice"), aff'd, 79 Conn. App. 364, 365, 829 A.2d 927 (2003).

[52] For support for this factor, the trial court pointed to the evidence supporting its conclusion that the plaintiff had engaged in a conflict of interest, engaged in inappropriate conduct toward the court and made misrepresentations to the court.

[53] For support for this factor, the trial court stated: "[The plaintiff's] continued course of conduct as evidenced by (1) her considerable record of prior disciplinary sanctions, (2) the unprofessional practices described in [the memorandum of decision finding that the plaintiff had engaged in misconduct], [and] (3) . . . her complete refusal to recognize the wrongfulness of her conduct establishes a clear and resolute pattern of misconduct."

[54] See footnote 51 of this opinion.

action against the trial court,[55] had submitted false statements to the court during disciplinary proceedings,[56] had refused to acknowledge the wrongful nature of her conduct,[57] had engaged in misconduct against the civil justice system, which is vulnerable to unsubstantiated attacks by attorneys,[58] had acquired extensive experience in the field of litigation[59] and was indifferent to making restitution.[60] With respect to the existence of mitigating factors, the trial court found, among other things, that the plaintiff maintains a good reputation as

[55] The trial court noted that immediately prior to the distribution of its memorandum of decision, it was served with a "Motion for Stay and/or Disqualification," which made reference to an action for declaratory and injunctive relief filed in the United States District Court for the District of Connecticut by the plaintiff against the trial court. The complaint, as explained by the trial court, alleged that the trial court suffered from a " 'constitutional infirmity' " prohibiting it from participating in the proceedings because of a " 'previously repeatedly manifested actual bias and hostility' " against the plaintiff. The trial court deemed the federal court action "a transparent attempt to obstruct and intimidate the court from carrying out its final responsibility to impose appropriate sanctions."

[56] This factor, according to the trial court, was supported by the plaintiff's baseless claims of gender bias and the plaintiff's numerous evasive and equivocal answers, given in the investigatory and sanction phases of the proceeding, which were intended to mislead the court.

[57] For support for this factor, the trial court explained that the plaintiff has "lashed out" against each participant in the proceeding and had accused several parties of misconduct, including her accusation that the statewide grievance committee had engaged in a " 'serious pattern of abuse for many years against her.' "

[58] Regarding this factor, the trial court noted that although there were no traits of vulnerability among the plaintiffs, "the civil justice system is the real victim here." Additionally, the trial court noted that "[t]he judges who make the system work are especially vulnerable to this type of conduct because they have limited, if any, ability to protect themselves from unsubstantiated attacks. The system suffers immeasurable harm when its constituent members are treated with open and aggressive disdain by an attorney who practices within it."

[59] For support for this factor, the trial court noted that the plaintiff was admitted to the New York bar in 1977 and to the Connecticut bar in 1985.

[60] Regarding this factor, the trial court noted that because the plaintiff believed she had not engaged in any misconduct, she would be unwilling to carry out any restitution that the court could order.

an attorney in the community and had two disciplinary actions that were remote in time to the offenses constituting misconduct in the present case.

In the present case, the trial court concluded that the plaintiff had engaged in the unauthorized representation of clients and in conduct that resulted in a conflict of interest, that she had made several misrepresentations of material fact, that she had engaged in inappropriate conduct toward the court and that she had demonstrated a lack of competence to practice law. The trial court also determined that during the course of her conduct, the plaintiff had violated several Rules of Professional Conduct including rules 1.1, 1.4, 1.7, 1.8 (f), 3.3 (a) (1), 8.2 and 8.4 (3) and (4). Additionally, the trial court found the existence of several aggravating factors and only two mitigating factors. Although, without question, the sanction of disbarment is the most serious penalty an attorney can endure, in these circumstances we do not believe that it was unreasonable for the trial court to have disbarred the plaintiff. We conclude, therefore, that the trial court did not abuse its discretion when it ordered that the plaintiff be disbarred from the practice of law.

The writ of error is dismissed.

In this opinion the other justices concurred.

GLADYS VASQUEZ *v.* PATRICK M. ROCCO ET AL. (SC 16981)

Sullivan, C. J., and Norcott, Katz, Palmer and Vertefeuille, Js.

Syllabus

The plaintiff, whose common bile duct had been severed during a surgical procedure performed by the defendant surgeon, appealed from the judgment of the trial court rendered in favor of the defendants. At trial, the plaintiff sought to cross-examine L, one of the defendants' expert witnesses, by eliciting testimony that L was insured by C Co., the defen-

dant surgeon's malpractice insurance carrier, that he had served on C Co.'s business development committee and that he recently had been appointed to serve on C Co.'s board of directors. The trial court declined to allow the plaintiff to adduce evidence regarding L's relationship with C Co., concluding, inter alia, that the prejudice to the defendants arising out of the fact that the defendant surgeon carried liability insurance outweighed any probative value that the evidence might have had regarding L's potential interest in the outcome of the case. On appeal, the plaintiff claimed that the trial court improperly precluded her from cross-examining L about his relationship with C Co. *Held*:

1. The trial court abused its discretion in precluding the plaintiff from cross-examining L concerning his relationship with C Co., L having had a sufficient connection to C Co. to warrant the introduction of evidence regarding that relationship for the purpose of demonstrating L's potential interest in the outcome of the case; when a witness, such as L, has a substantial connection to the defendant's insurance carrier, such as that of agency, employment or control, as opposed to that of a mere policyholder, evidence of that relationship is considered sufficiently probative of bias or interest that it is admissible despite the risk of prejudice to the defendant.
2. The plaintiff having failed to provide an adequate record for review, this court was unable to determine whether the trial court's improper exclusion of evidence was harmful, and, therefore, the judgment of the trial court was affirmed.

Argued September 8—officially released December 23, 2003

Procedural History

Action to recover damages for medical malpractice, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Quinn*, *J.*, granted the defendants' motion in limine to preclude the plaintiff from presenting certain evidence at trial; thereafter, the matter was tried to the jury before *Quinn*, *J.*; verdict for the defendants; subsequently, the court denied the plaintiff's motion to set aside the verdict and rendered judgment for the defendants in accordance with the verdict, from which the plaintiff appealed. *Affirmed*.

Gary J. Strickland, with whom, on the brief, was *Vincent M. DeAngelo*, for the appellant (plaintiff).

Herbert J. Shepardson, with whom, on the brief, was *Lorinda S. Coon*, for the appellees (defendants).

Opinion

PALMER, J. The plaintiff, Gladys Vasquez, commenced this medical malpractice action against the named defendant, Patrick M. Rocco,[1] a surgeon, alleging that he negligently had severed her bile duct while performing laparoscopic surgery to remove her gallbladder. The jury returned a verdict for the defendant, and the trial court rendered judgment thereon. The plaintiff appealed,[2] claiming that the trial court improperly had precluded her from cross-examining one of the defendant's expert witnesses about his relationship to the defendant's malpractice insurance carrier. Although we agree with the plaintiff that she was entitled to question the defendant's expert witness about his relationship to the defendant's malpractice insurer, we conclude that the plaintiff has failed to provide this court with a record adequate to determine whether the trial court's contrary ruling was harmful. Accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. In June, 1997, the defendant surgically removed the plaintiff's gallbladder, a procedure known as a cholecystectomy. Stedman's Medical Dictionary (27th Ed. 2000) p. 337. The defendant performed the cholecystectomy laparoscopically by inserting a special camera and certain surgical instruments into small incisions in the plaintiff's abdomen. Several days after the surgery, the plaintiff was jaundiced and suffering from considerable pain. After being readmitted to

[1] Rocco's employer, New Britain Surgical Group, Inc., also is a defendant. For ease of reference, we refer to Rocco as the defendant.

[2] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

the hospital, it was discovered that the plaintiff's common bile duct had been severed during the cholecystectomy. The plaintiff subsequently underwent another surgery to repair the severed bile duct.

The plaintiff thereafter brought this action, claiming that the defendant negligently severed her bile duct in performing the cholecystectomy. The defendant admitted that he inadvertently severed the plaintiff's bile duct while performing the surgery but claimed that he had not been negligent in doing so. Consequently, on the question of negligence, the sole issue for the jury was whether the defendant had adhered to the standard of care when, in the course of performing the cholecystectomy, he had severed the plaintiff's bile duct. The plaintiff adduced expert testimony from two physicians, Irvin Modlin and Richard Cohen, that the defendant's negligence was the cause of the severed bile duct. The defendant likewise adduced expert testimony from two physicians, Robert Lincer and Michael Tortora, each of whom testified that the defendant's surgical performance had been within the standard of care required of surgeons who remove gallbladders laparoscopically and that the severing of the bile duct is a risk inherent in such a procedure.

With respect to Lincer's testimony, the plaintiff sought to cross-examine him about his relationship with the defendant's malpractice insurance carrier, Connecticut Medical Insurance Company (Connecticut Medical), a mutual insurance company that is owned by its policyholders. Specifically, the plaintiff sought to elicit that: Lincer, himself, was insured by Connecticut Medical;[3] he had been insured by Connecticut Medical for twelve years; he had served on Connecticut Medical's

[3] The record indicates that approximately 60 percent of physicians licensed to practice medicine or surgery in this state are insured by Connecticut Medical.

business development committee for two years; and he recently had been appointed to serve on Connecticut Medical's board of directors.[4] The plaintiff maintained that she was entitled to have the jury apprised of Lincer's relationship with Connecticut Medical to demonstrate Lincer's alleged interest in the outcome of the case.

The trial court rejected the plaintiff's claim and barred her from adducing evidence regarding Lincer's relationship with Connecticut Medical. The court concluded that such evidence would create a "collateral or . . . side issue not germane to the central issues of [the] case," and that it "would take considerable time to hear" that collateral or side issue. The court further concluded that the prejudice to the defendant arising from the fact that he carried liability insurance outweighed any probative value that the evidence might have had regarding Lincer's potential interest in the outcome of the case. At the conclusion of the trial, the jury returned a verdict for the defendant.

On appeal, the plaintiff maintains that the trial court improperly declined to permit her to cross-examine Lincer about his relationship with Connecticut Medical. In particular, she claims that she was entitled to elicit testimony from Lincer regarding that relationship because the defendant and Lincer both are insured by Connecticut Medical. Alternatively, the plaintiff contends that she should have been allowed to question Lincer about his ties to Connecticut Medical because

[4] On voir dire examination, outside the presence of the jury, Lincer testified that he had not yet attended his first Connecticut Medical board meeting and, therefore, was not certain whether he officially was a board member as of the time of trial. Lincer also testified, however, that he was planning to attend his first board meeting within one week thereafter. With respect to his participation as a member of Connecticut Medical's business development committee, Lincer testified that that committee convened approximately four times a year to discuss Connecticut Medical's interests in pursuing other insurance products and ventures.

Lincer had a substantial connection to Connecticut Medical by virtue of his membership in Connecticut Medical's business development committee and his recent appointment to Connecticut Medical's board of directors. The defendant maintains that the trial court properly excluded the evidence regarding Lincer's relationship with Connecticut Medical. Alternatively, the defendant contends that, even if the court incorrectly prohibited the plaintiff from questioning Lincer about his relationship with Connecticut Medical, the plaintiff has failed to furnish an adequate record on appeal for a determination of whether any such impropriety was harmful. Although we agree with the plaintiff that the trial court improperly prohibited her from adducing testimony about the nature of Lincer's relationship with Connecticut Medical, we nevertheless affirm the judgment of the trial court because we also conclude that the record on appeal is inadequate for our determination of the extent to which the plaintiff may have been harmed by the court's improper ruling. We address each of these issues in turn.[5]

The trial court excluded evidence of Lincer's relationship to Connecticut Medical pursuant to § 4-3 of the Connecticut Code of Evidence, which provides: "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." For purposes of § 4-3, "unfair prejudice is that which unduly arouse[s] the jury's emotions of prejudice, hostility or sympathy . . . or tends to have some adverse effect

[5] We note that, in light of our conclusion that the record is inadequate for our review of the plaintiff's claim, we are not required to address the first issue, namely, whether the trial court improperly precluded the plaintiff from questioning Lincer about his relationship with Connecticut Medical. We address that issue, however, because of the likelihood that it will arise in future cases.

upon [the party against whom the evidence is offered] beyond tending to prove the fact or issue that justified its admission into evidence." (Citation omitted; internal quotation marks omitted.) *Ancheff* v. *Hartford Hospital*, 260 Conn. 785, 804, 799 A.2d 1067 (2002). "Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted." (Internal quotation marks omitted.) *State* v. *Copas*, 252 Conn. 318, 329–30, 746 A.2d 761 (2000).

In evaluating the propriety of the trial court's ruling, our role on appeal is "limited to determining whether the court clearly abused its discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Ancheff* v. *Hartford Hospital*, supra, 260 Conn. 805. Applying these principles, we conclude that the trial court abused its discretion in excluding evidence of Lincer's relationship to Connecticut Medical.

We begin our review of the trial court's ruling by noting that evidence that a defendant carries liability insurance is inadmissible on the issue of the defendant's negligence. Conn. Code Evid. § 4-10 (a). There are two primary reasons for this principle of exclusion. First, evidence of liability insurance generally is not probative of whether the insured acted negligently. E.g., *Walker* v. *New Haven Hotel Co.*, 95 Conn. 231, 235, 111 A. 59 (1920) (evidence that defendant is insured has no "force or weight as evidence of negligence"). Second, the exclusion of evidence of a defendant's insurance coverage "prevents the jury from improperly rendering a decision or award based upon the existence or nonexis-

tence of liability coverage rather than upon the merits of the case." Conn. Code Evid. § 4-10 (a), commentary.

Our rules of evidence do not mandate the exclusion of evidence of liability insurance coverage, however, when it is offered for another purpose, such as to prove the bias or prejudice of a witness. Conn. Code. Evid. § 4-10 (b); see also *Magnon* v. *Glickman*, 185 Conn. 234, 242, 440 A.2d 909 (1981) ("[i]t is usually held that it is permissible for plaintiff's counsel . . . to show the relationship between a witness and defendant's insurance company where such evidence tends to show the interest or bias of the witness and affects the weight to be accorded his testimony" [internal quotation marks omitted]). A concern remains, however, that jurors might be influenced by such evidence because they may believe that an insurance company is better able than the parties to bear any loss resulting from the defendant's alleged negligence. Although today's jurors probably assume that all physicians carry malpractice insurance,[6] "the introduction of evidence on the subject tends to emphasize something that is usually irrelevant and that may have an adverse effect on the quality of the jury's deliberations and conclusions." *Barsema* v. *Susong*, 156 Ariz. 309, 313, 751 P.2d 969 (1988).

Nevertheless, the risk of undue prejudice to the defendant resulting from the introduction of such evidence must be weighed against the plaintiff's right of cross-examination regarding motive, interest, bias or prejudice, a right that may not be unduly restricted. E.g., *Pet* v. *Dept. of Health Services*, 228 Conn. 651, 663, 638 A.2d 6 (1994); see also General Statutes § 52-145 (b) ("[a] person's interest in the outcome of the action . . . may be shown for the purpose of affecting his

[6] Indeed, physicians licensed to practice medicine or surgery in Connecticut are statutorily required to obtain malpractice insurance. See General Statutes § 20-11b.

credibility"); Conn. Code Evid. § 6-5 ("[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely"). Furthermore, "[a] basic and proper purpose of cross-examination of an expert is to test that expert's credibility." (Internal quotation marks omitted.) *State* v. *Copas*, supra, 252 Conn. 327.

The majority of courts that have addressed this issue apply a "substantial connection" test to determine whether evidence of an expert witness' relationship to the defendant's insurer is more probative of potential bias than it is prejudicial. "The substantial connection analysis looks to whether a witness has a sufficient degree of *connection* with the liability insurance carrier to justify allowing proof of this relationship as a means of attacking the credibility of the witness." (Emphasis added; internal quotation marks omitted.) *Bonser* v. *Shainholtz*, 3 P.3d 422, 425 (Colo. 2000). Underlying this analysis is the premise that only some relationships between a defendant's expert witness and the defendant's insurance carrier give rise to an inference of bias that outweighs the countervailing risk that jurors might use the evidence for an improper purpose. Thus, when a witness has a substantial connection to the defendant's insurer, such as that of agency, employment or control, evidence of that relationship is considered sufficiently probative of bias that it is admissible despite the risk of prejudice to the defendant. See, e.g., *Barsema* v. *Susong*, supra, 156 Ariz. 314 (trial court improperly excluded evidence that defendant's witness was vice president and member of board of directors of defendant's insurance carrier); *Evans* v. *Colorado Permanente Medical Group, P.C.*, 902 P.2d 867, 874 (Colo. App. 1995) (witness' position on insurer's board of directors sufficiently probative of bias to outweigh danger of unfair prejudice to defendant); *Golden* v. *Kish-*

waukee Community Health Services, 269 Ill. App. 3d 37, 44–45, 645 N.E.2d 319 (1994) (trial court improperly excluded evidence that defendant's witness had received significant remuneration from defendant's insurer for services witness had performed for insurer); *Yoho* v. *Thompson*, 345 S.C. 361, 366, 548 S.E.2d 584 (2001) (trial court improperly precluded plaintiff from cross-examining defendant's expert witness about his employment relationship with defendant's insurer); *Lombard* v. *Rohrbaugh*, 262 Va. 484, 495, 551 S.E.2d 349 (2001) (probative value of evidence that witness, although not employee of defendant's insurer, received more than $100,000 per year in payments from that insurer outweighed possible prejudice to defendant).

On the other hand, when the witness is merely a policyholder of the defendant's insurer, the witness is unlikely to be influenced by that relationship and, consequently, the risk of prejudice to the defendant from the admission of such evidence is deemed to outweigh its probative value. Thus, in the absence of any other connection between the witness and the defendant's insurer, evidence that the witness and the defendant are insured by the same carrier is insufficient to justify the admission of that evidence under the "substantial connection" test. See, e.g., *Barsema* v. *Susong*, supra, 156 Ariz. 313 (relevance of evidence that witness and party had common insurance carrier generally too attenuated on issue of bias to be admissible); *Shamblin* v. *Albright*, 278 Ark. 565, 567, 647 S.W.2d 470 (1983) (possibility that witness' insurance rates may increase if judgment rendered against defendant, who was insured by same carrier, highly speculative, and, thus, any possible relevance of such evidence was far outweighed by prejudicial impact); *Hawes* v. *Chua*, 769 A.2d 797, 810 (D.C. 2001) (under substantial connection test, trial court did not abuse discretion in excluding evidence that defendant physicians and defendants'

expert witness all were insured by same company); *Conley* v. *Gallup*, 213 Ga. App. 487, 488, 445 S.E.2d 275 (1994) (any probative value of evidence that same company insured both defendant and defendant's witnesses was outweighed by prejudicial effect); *Reimer* v. *Surgical Services of the Great Plains*, 258 Neb. 671, 676, 605 N.W.2d 777 (2000) (slight probative value of evidence that defendant's witness and defendant insured by same company was outweighed by prejudicial effect of evidence); *Mendoza* v. *Varon*, 563 S.W.2d 646, 649 (Tex. Civ. App. 1978) (possible bias arising out of fact that defendant's expert witness and defendant were insured by same company insufficient to warrant admission of such evidence in light of potential prejudice to defendant). We find the rationale of the "substantial connection" test persuasive and, therefore, adopt it.

Applying that test, we conclude that Lincer's connection to Connecticut Medical was substantial enough to warrant the admission of evidence of that connection for the purpose of demonstrating Lincer's potential interest in the outcome of the case. As we have indicated, Lincer was a member of Connecticut Medical's business development committee for two years and had been appointed to the board of directors. As a board member, Lincer had a special relationship with Connecticut Medical by virtue of his statutory duty to act in Connecticut Medical's best interests. See General Statutes § 33-1104. Furthermore, Connecticut Medical is a mutual insurance company, and, consequently, as a policyholder, Lincer also was a fractional owner of the company.[7] On the basis of the foregoing, we con-

[7] The plaintiff suggests that because Connecticut Medical is a mutual insurance company and, thus, owned by its policyholders, Lincer's financial stake in Connecticut Medical as a fractional owner, alone, was sufficient to warrant admission of the fact that Lincer and the defendant both are insured by Connecticut Medical. We acknowledge that the potential for bias or interest is greater when a witness and the defendant are insured by the same *mutual* insurance company than when they are both insured by an

clude that Lincer had a substantial connection to Connecticut Medical, and, consequently, the trial court's exclusion of the evidence constituted an abuse of discretion.[8]

Our conclusion that the trial court improperly precluded the plaintiff from adducing evidence of Lincer's relationship with Connecticut Medical, however, does

insurance company in which policyholders have no ownership interest. As a general matter, however, we are not persuaded that the outcome of any one case is sufficiently likely to have an effect on the witness' insurance premiums so as to warrant the admission of evidence establishing that the witness and the defendant are insured by the same mutual insurance company. See, e.g., *Otwell* v. *Bryant*, 497 So. 2d 111, 115 (Ala. 1986) (fact that witness and defendant insured by same mutual insurance company insufficient to warrant admission of such evidence in light of potential prejudice to defendant); *Chambers* v. *Gwinnet Community Hospital, Inc.*, 253 Ga. App. 25, 27–28, 557 S.E.2d 412 (2001) (fact that expert witness was insured by same mutual insurance company as defendant was insufficient to establish significant enough financial stake in company to warrant inference of bias or interest, and, thus, relevance of evidence thereof was outweighed by risk of undue prejudice); *Warren* v. *Jackson*, 125 N.C. App. 96, 101, 479 S.E.2d 278 (1997) (connection between defendant's insurance company and witness insured by that insurance company, mutual or otherwise, too attenuated to justify admission of evidence of that relationship in light of potential prejudice to defendant); *Mills* v. *Grotheer*, 957 P.2d 540, 543 (Okla. 1998) (trial court properly excluded evidence that defendant's expert witness and defendant both were insured by same mutual insurance company); *Patton* v. *Rose*, 892 S.W.2d 410, 414–15 (Tenn. App. 1994) (trial court properly precluded plaintiff from eliciting testimony that defendant's witnesses and defendant were insured by same mutual insurance company). Nevertheless, we do not rule out the possibility that a plaintiff may be able to establish that a plaintiff's verdict potentially could result in an increase in the witness' malpractice premiums—for example, when a mutual insurance company is very small and its exposure in the case is very great—such that, in fairness, the plaintiff should be permitted to apprise the jury of the fact that the witness and the defendant are insured by the same insurance company. We emphasize, however, first, that the plaintiff bears a heavy burden of demonstrating that the witness has a real and substantial financial stake in the outcome of the case, and second, that such a case will be the rare exception rather than the rule.

[8] The defendant's argument to the contrary notwithstanding, Lincer's uncertainty as to the precise date of his board membership does not require a different conclusion. The possibility that Lincer's formal appointment to the board may not have occurred until a few days after his testimony does not detract appreciably from the substantial nature of his relationship with Connecticut Medical.

not end our inquiry. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *Urich* v. *Fish*, 261 Conn. 575, 580–81, 804 A.2d 795 (2002). "When judging the likely effect of such a trial court ruling, the reviewing court is constrained to make its determination on the basis of the printed record before it." *Adams* v. *State*, 259 Conn. 831, 841–42, 792 A.2d 809 (2002). "In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." *Higgins* v. *Karp*, 243 Conn. 495, 506, 706 A.2d 1 (1998).

As we have explained, two experts, namely, Lincer and Tortora, testified that the defendant had adhered to the standard of care in performing the cholecystectomy. Two other experts, Cohen and Modlin, testified that the defendant had failed to adhere to that standard of care. Thus, the case hinged on the relative credibility of four expert witnesses.

Nevertheless, the plaintiff has not provided this court with transcripts of the entire trial testimony of each of these witnesses. Although the plaintiff has furnished us with transcripts of Lincer's entire testimony and the direct examination testimony of Cohen and Modlin,[9] she has failed to provide us with transcripts of Tortora's testimony and the cross-examination testimony of Cohen and Modlin. In determining whether the trial court's improper exclusion of evidence concerning Lincer's relationship with Connecticut Medical was

[9] The plaintiff also has furnished this court with transcripts of the entire testimony of the defendant and David Hull, the surgeon who repaired the plaintiff's severed bile duct. Neither the defendant nor Hull, however, testified regarding the standard of care or on the issue of whether the defendant adhered to that standard.

harmful, we necessarily must view that impropriety in the context of the totality of the evidence adduced at trial. Because we are unable to review the substance of Tortora's testimony, we cannot evaluate how forceful or persuasive his expert opinion may have been, nor can we discern the extent, if any, to which Lincer's testimony merely was cumulative of Tortora's testimony. Similarly, because we are unable to review the cross-examination testimony of Cohen and Modlin, we cannot evaluate the extent to which those two expert witnesses may have been discredited by the defendant.

The plaintiff maintains that the harm of the trial court's ruling is evident from the defendant's attorney's characterization of the expert witnesses in his closing argument to the jury, a transcript of which the plaintiff has provided. During that argument, the defendant's attorney characterized the plaintiff's experts as "professional witnesses" who frequently have testified on behalf of other alleged victims of medical malpractice. By contrast, he described the defendant's experts as "doctors who are doctors," a characterization predicated on their testimony that they rarely had served as expert witnesses. According to the plaintiff, the trial court's decision to preclude the plaintiff from introducing evidence of Lincer's relationship to Connecticut Medical allowed the defendant to attack the credibility of the plaintiff's experts while denying the plaintiff the ability to respond effectively by proving Lincer's potential interest in the outcome of the case. Consequently, the plaintiff asserts, the jury was left with the distorted impression that the defendant's experts were objective and credible while the plaintiff's experts were "hired guns" whose involvement in the case stemmed from their philosophical or financial interest in an outcome favorable to the plaintiff.

Although the defendant's attorney's closing argument may have been persuasive, we have not been provided

with a transcript of the closing argument of the plaintiff's attorney, and, therefore, we cannot determine how effective he may have been in addressing the arguments of the defendant's attorney. More importantly, the content and forcefulness of a party's closing argument is only one aspect of the case that a reviewing court must consider in determining the harmfulness of an improper evidentiary ruling. The record with which we were provided on appeal, therefore, is inadequate to determine whether the evidence of Lincer's relationship to Connecticut Medical was so vital to the plaintiff's case that its exclusion likely caused the jury to reach a verdict in favor of the defendant rather than a verdict in favor of the plaintiff.

The judgment is affirmed.

In this opinion the other justices concurred.

FRANK USOWSKI ET AL. *v.* BARRY JACOBSON ET AL. (SC 16789)

Borden, Norcott, Katz, Vertefeuille and Zarella, Js.

Syllabus

The plaintiffs, U and S, sought to recover from the defendants for, among other things, breach of an oral partnership agreement. The plaintiffs claimed that they had entered into an oral partnership agreement with the named defendant to own and operate a business known as P Co. and that the named defendant thereafter created a limited liability company to conduct P Co.'s business, which ousted the plaintiffs from the business by denying them an ownership interest. In the absence of a written agreement, the plaintiffs sought to prove that the named defendant had held them out to third parties as partners in P Co. The defendants sought, by way of interrogatories, to discover the names of individuals with knowledge of the plaintiffs' status as employees of, partners in, or members of P Co. Initially, the plaintiffs responded by listing categories of individuals, such as past and present employees, vendors and customers of P Co. In response to the defendants' objections, the plaintiffs submitted several revised responses, ultimately listing the names of 122 individuals who allegedly had knowledge of the plaintiffs' status with respect to P Co. In response to a motion by the

defendants to compel full compliance with the interrogatories, the trial court directed them to select four of the individuals on the plaintiffs' list to be deposed in order to test the validity of the list. The trial court also advised the plaintiffs that they could reduce the number of names on the list to protect themselves in the event that that court ordered the plaintiffs to pay the cost of taking the remaining depositions. The plaintiffs thereafter submitted a revised list of thirty-nine names. The defendants deposed the four individuals whom they had selected and then filed a motion for monetary sanctions against the plaintiffs and for a judgment of dismissal against S. The trial court granted the motion, rendering a judgment of dismissal as to S and ordering U to deposit with that court $72,216 to pay for the cost of deposing the remaining 118 individuals from the list of 122. That court thereafter modified its order of monetary sanctions allowing U to make the payment in two installments. Following U's failure to make the first deposit, the defendants moved for a judgment of dismissal, which the trial court granted on the basis of U's "continuing violation" of discovery orders. U appealed to the Appellate Court, which affirmed the judgment of dismissal on the basis of his continued resistance to disclosure and his attempts to burden the defendants with unnecessary discovery. That court reversed the order of monetary sanctions, however, determining that the trial court had abused its discretion because the monetary sanction was out of proportion to U's violation of the orders. On the granting of certification, U appealed and the defendants cross appealed to this court. *Held*:

1. Contrary to the claim of the defendants, the Appellate Court properly reversed the trial court's order of monetary sanctions against U on the ground that that court abused its discretion, and it properly directed that the case be remanded for further proceedings; the trial court having instructed the plaintiffs, before it had imposed the order of monetary sanctions against U, that they could reduce the number of names on the list to protect themselves from exactly the type of financial consequences that that court ultimately imposed, and the plaintiffs having complied with that instruction by reducing the number of names on the list from 122 to thirty-nine, the order of monetary sanctions not only was excessive and invited delay by the defendants, but also rendered meaningless the expressed rationale behind the trial court's prior instruction.
2. The Appellate Court improperly affirmed the trial court's judgment of dismissal against U, the record not having established that his failure to comply with the discovery orders constituted a pattern of abuse so egregious as to warrant dismissal of the action; U having offered to disclose to the defendants a list of individuals with knowledge of the alleged partnership whom he intended to call as witnesses at trial, dismissal was not the only reasonable remedy available to vindicate the legitimate interests of the defendants in avoiding undue expense during discovery, and U had refused to pay the ordered monetary sanction for

the express purpose of obtaining a final judgment so that the order could be challenged on appeal.

Argued May 23—officially released December 23, 2003

Procedural History

Action to recover damages for, inter alia, the defendants' alleged breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed certain counterclaims; thereafter, the case was transferred to the Complex Litigation Docket, where the court, *Tierney, J.*, granted in part the defendants' motion for sanctions and for judgment of dismissal as to the plaintiff Douglas Staley, and ordered the imposition of a financial sanction as against the named plaintiff; subsequently, the court granted the defendants' motion for a judgment of dismissal as to the named plaintiff and rendered judgment thereon in favor of the defendants, from which the named plaintiff appealed to the Appellate Court, *Mihalakos*, *Dranginis* and *Hennessy*, *Js.*, which affirmed the judgment of dismissal as to the named plaintiff but vacated the trial court's imposition of a sanction as against the named plaintiff and remanded the case for further proceedings, and, on the granting of certification, the named plaintiff appealed and the defendants cross appealed to this court. *Affirmed in part; reversed in part; further proceedings.*

Brenden P. Leydon, for the appellant-appellee (named plaintiff).

David P. Friedman, with whom was *Marcy T. Stovall*, for the appellees-appellants (defendants).

Opinion

ZARELLA, J. In this action to recover damages for the alleged breach of an oral partnership agreement,

the named plaintiff, Frank Usowski,[1] appeals, and the defendants[2] cross appeal, following our grant of certification, from the judgment of the Appellate Court. The plaintiff claims on his appeal that the Appellate Court improperly affirmed the judgment of the trial court dismissing the complaint. The defendants claim on their cross appeal that the Appellate Court improperly reversed the trial court's order of monetary sanctions imposed against the plaintiff for continuing discovery violations. We affirm in part and reverse in part the judgment of the Appellate Court.

In June, 1998, the plaintiff and Douglas Staley filed this thirteen count complaint against the defendants. The complaint alleged that, in 1995, the plaintiff and Staley had entered into an oral partnership agreement with the named defendant, Barry Jacobson, for the purpose of jointly owning and operating a business known as Pet Pantry Warehouse (Pet Pantry) in Greenwich. Under the terms of the agreement, the plaintiff and Staley each was to have a 24.5 percent ownership interest in the business and Jacobson was to have a 51 percent ownership interest in the business. Jacobson subsequently created a limited liability company known as Pet Pantry Super Discount Stores, LLC, to conduct Pet Pantry's business. The plaintiff and Staley were not given an ownership interest in the newly created entity. The plaintiff and Staley, therefore, alleged that Jacobson wrongfully had ousted them from the business by denying them an interest in the new legal entity.[3] The defendants denied those allegations in their answer.

[1] In addition to Usowski, Douglas Staley also was a plaintiff, but Staley is not a party to this appeal. We therefore refer to Usowski as the plaintiff.

[2] The defendants are Barry J. Jacobson, his son, Adam Jacobson, Pet Pantry Warehouse, and Pet Pantry Super Discount Stores, LLC. We refer to them collectively as the defendants and individually by name where appropriate.

[3] The complaint alleged, inter alia, breach of contract, breach of fiduciary duty, fraudulent inducement and unfair trade practices, and requested an accounting, a dissolution of the oral partnership and damages. The defen-

In the absence of a written agreement, the plaintiff and Staley sought to prove that Jacobson had held them out to third parties as partners in Pet Pantry. Accordingly, the defendants commenced discovery by serving the plaintiff and Staley with interrogatories seeking information supporting their claims.

The first six interrogatories requested the names of individuals with knowledge of the status of the plaintiff and Staley as employees, partners or members of Pet Pantry.[4] The plaintiff and Staley responded by objecting to the question or by simply referring to categories of individuals, such as "[m]any past and present employees, vendors and customers of Pet Pantry" or "[p]ast and present employees and vendors of Pet Pantry, Jac Cohen, Doug Staley, Frank Usowski, Stephanie Staley, Usowski family members and Staley family members." In a letter to the counsel for the plaintiff and Staley, the defendants complained that the responses were inadequate. The defendants objected, in particular, to answers that did not name specific individuals, such as "[p]ast and present employees and vendors of Pet Pantry" and "Usowski family members and Staley family members." They accordingly requested that the plaintiff and Staley identify additional individuals with knowledge of the alleged partnership whom they could call as potential witnesses at trial.

The plaintiff and Staley revised their responses in reply to the defendants' objections. Although they continued to refer to "[p]ast and present employees and vendors of Pet Pantry, including but not limited to . . .

dants filed an answer, special defenses and counterclaims alleging failure to repay a loan, destruction of property and theft.

[4] The interrogatories provided as follows: "Identify all persons with knowledge regarding [the plaintiff's or Staley's] status as [an employee, partner or member] of the Pet Pantry, including but not limited to, all persons who have witnessed Barry Jacobson refer to [either the plaintiff or Staley] as [an employee, partner or member] of the Pet Pantry."

Usowski family members and Staley family members," they also named seventeen additional persons with knowledge of the alleged partnership.

Still dissatisfied, the defendants filed a motion to compel the production of more "specific answers to these pivotal questions." The defendants described the answers by the plaintiff and Staley as "a calculated effort to stall this litigation and increase [the] defendants' costs" by withholding "relevant information" to which the defendants were entitled. The defendants also objected to the continued references by the plaintiff and Staley to "past and present employees and vendors" and to unidentified "Usowski family members" and "Staley family members."

Although the court took no action on the motion to compel, the plaintiff and Staley again revised their responses to the first six interrogatories. Each of the new responses included approximately 122 names of persons with knowledge of the status of the plaintiff and Staley as employees, partners or members of Pet Pantry. Among those named were vendors, employees and customers of the business.

Asserting that the plaintiff and Staley had "dumped" the names of numerous individuals in an effort that was "designed to further delay the litigation and drive up [the] defendants' litigation costs," the defendants filed a motion seeking an order to compel "full compliance" with the interrogatories and an order granting the defendants monetary damages for costs and reasonable attorney's fees. The defendants argued that the plaintiff and Staley had named so many individuals that, without taking depositions from every person on the list, it would be impossible to ascertain which, if any, actually had witnessed or heard Jacobson refer to the plaintiff and Staley as partners of Pet Pantry. The defendants also argued that the belated provision of so many names

raised serious questions as to whether the plaintiff and Staley initially had responded to the interrogatories in good faith.[5]

The court conducted a hearing on the motion to compel in November, 1999. Counsel for the plaintiff and Staley explained that his clients' initial responses had identified the names of persons who were most involved with the business. When the defendants had deemed the responses inadequate, counsel for the plaintiff and Staley had asked the plaintiff and Staley to search through a vendor list and to select additional names, which they did. When the defendants had deemed the new responses inadequate, counsel had asked the plaintiff and Staley to examine the vendor list again and to be "all inclusive" in placing additional names on the list so as not to preclude any potential witnesses.

After hearing the arguments of counsel, the court marked off the motion to compel and ordered the defendants to take four depositions from persons on the most recent list of 122 names submitted by the plaintiff and Staley. Individuals whose names had been included in prior responses were not to be considered. The court directed that the four individuals selected by the defendants be deposed "cold," at the defendants' expense. The court stated that it would examine the depositions and, if it concluded that none of those deposed had knowledge of the alleged partnership, it would be "inclined" to order the plaintiff and Staley to pay, in advance, the cost of taking the remaining depositions. The court advised the plaintiff and Staley, however,

[5] The defendants argued that, if there were such a large number of individuals with knowledge regarding key elements of the case, the plaintiff and Staley should not have listed so few names in their prior responses to the interrogatories. On the other hand, the defendants contended, if the additional persons listed did not have relevant knowledge, listing them would drive up the defendants' litigation costs by forcing the defendants to take unnecessary depositions.

that they were free to amend their most recent list by reducing the number of names "to protect themselves from the financial consequences" of the order. The court also advised the defendants that they need not wait for submission of the revised list before making their selections. Neither party objected to the trial court's order.

On another matter, the court sanctioned the plaintiff and Staley for their failure to produce certain documents that would have demonstrated whether they had held themselves out to various governmental authorities, including the Internal Revenue Service, as owners or employees of the business. The sanction consisted of an order entered pursuant to Practice Book § 13-14 (b) (3)[6] that all of the requested documents, whether produced or not, were to be taken by the jury as establishing that the plaintiff and Staley were employees of Pet Pantry, rather than partners or owners. At the same time, the court observed that the counsel for the plaintiff and Staley had made "diligent efforts in producing the documents. I am satisfied that his two clients . . . are not good at keeping records . . . ." When defense counsel subsequently inquired as to the court's disposi-

[6] Practice Book § 13-14 provides in relevant part: "(a) If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead . . . the judicial authority may, on motion, make such order as the ends of justice require.

"(b) Such orders may include the following:

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

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

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

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

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

tion of their application for costs on the motion to compel production, the court responded, "[D]enied. They made [a] good faith effort. I am satisfied they made a good faith effort."

After the defendants identified the four potential deponents, the plaintiff and Staley submitted a revised list of thirty-nine names. The defendants then deposed the four identified persons, only one of whom was on the revised list. Following the four depositions, the defendants filed a motion for sanctions against the plaintiff and Staley and for a judgment of dismissal against Staley. The defendants argued that none of the four deponents indicated that he had heard Jacobson refer to either the plaintiff or Staley as a partner or an owner of Pet Pantry, and that three of the deponents believed that the plaintiff and Staley were employees of the business. The defendants therefore argued that the plaintiff and Staley had abused the discovery process and that the court should order them to pay in advance for the costs of deposing the remaining individuals on the list. The defendants also requested that a judgment of dismissal be rendered against Staley because of his numerous acts of perjury and his continuing failure to produce various documents. The plaintiff and Staley did not respond to the motion.

In a memorandum of decision dated June 5, 2000, the court granted the motion for sanctions as to both the plaintiff and Staley and rendered a judgment of dismissal against Staley. The court found that the plaintiff and Staley had committed discovery violations by listing 122 names as potential witnesses in their responses to the interrogatories. It further concluded that "the 'name dumping' by [the plaintiff and Staley] was false, answered the interrogatories unfairly and was done to mislead the defendants and prevent the taking of the depositions due to the high costs involved. One of the sanctions is to pass on to the offending party

the cost of the noncompliance." See Practice Book § 13-14 (a).[7] The court thus ordered the plaintiff to pay in advance for the remaining 118 depositions to be taken by the defendants and to deposit $72,216 for that purpose with the court within two weeks.

Fourteen days later, the plaintiff and Staley filed separate motions to reargue, which were granted by the court. In his motion, the plaintiff argued that he had not been given an opportunity to be heard on the sanctions motion. He further argued that, because he could not afford to make the advance deposit of $72,216, the sanction effectively would deny him his right of access to the courts. Thereafter, the court held a hearing on the motions to reargue.

At the hearing, the court acknowledged that, because it had not held a hearing prior to granting the defendants' motion for sanctions, it would consider the hearing on the motions to reargue a de novo hearing on the motion for sanctions. In the course of the hearing, the court conceded that its reference, during the November, 1999 hearing on the motion to compel, to a potential sanction requiring the payment of deposition costs had not been "a promise that that would happen, but I mentioned that was a possibility." Counsel for the plaintiff and Staley then offered to resolve the parties' dispute by providing the defendants with a list of persons that he would call as witnesses at trial. On August 3, 2000, the court issued a memorandum of decision. The court reaffirmed the findings, conclusions of law and reasoning in its June 5, 2000 decision, but vacated the prior order of sanctions against the plaintiff and entered a new order. The new order did not change the requirement that the plaintiff deposit $72,216 with the court to pay for the cost of the remaining 118 depositions, but it allowed him to make the deposit in two install-

[7] See footnote 6 of this opinion.

ments. The first installment of $23,256 reflected the cost of deposing the thirty-eight individuals[8] identified in the amended interrogatory response by the plaintiff and Staley and was to be paid within two weeks. The second installment for any other depositions the defendants might wish to take from the complete list of 122 names was to be paid in an amount to be determined by the court upon a written application by the defendants.

The plaintiff applied for certification to appeal to this court from the trial court's order of sanctions pursuant to Practice Book § 83-1 and General Statutes § 52-265a, but the application was denied. Thereafter, the defendants moved for a judgment of dismissal for the plaintiff's failure to deposit $23,256 with the court. The court granted the motion in a ruling from the bench. The court found a "continuing violation" by the plaintiff of the discovery orders on the basis of his failure to comply with three different orders, the first being the order to produce documents more than one year earlier. The second violation was the plaintiff's failure to comply with the June 5, 2000 order of sanctions. The third violation was his failure to comply with the August 3, 2000 order modifying the order of sanctions. Accordingly, the court rendered a judgment of dismissal against the plaintiff pursuant to Practice Book § 13-14 (b) (5). See footnote 6 of this opinion.

The plaintiff appealed from the judgment of dismissal. The Appellate Court affirmed the judgment of dismissal because of the plaintiff's continued resistance to disclosure and his attempts to burden the defendants with unnecessary discovery. *Usowski* v. *Jacobson*, 68 Conn. App. 785, 794, 793 A.2d 268 (2002). The Appellate Court also reversed the order of sanctions, concluding

[8] The court referred to thirty-eight rather than the thirty-nine names on the plaintiff's most recent amended list because one of the defendants' four deponents had been included in that list.

that the trial court had abused its discretion because the plaintiff had modified his discovery response by reducing the number of persons who could testify in support of his claim from 122 to thirty-nine. Id., 791–92. The Appellate Court thus determined that the monetary sanction was an abuse of discretion because it was out of proportion to the discovery violation, and it remanded the case to the trial court for reconsideration and articulation of the sanction, if any, to be imposed on the plaintiff. Id., 791, 794. Thereafter, the plaintiff and the defendants sought, and were granted, certification to appeal and to cross appeal, respectively, from the decision of the Appellate Court.[9] *Usowski* v. *Jacobson*, 261 Conn. 902, 802 A.2d 856 (2002); *Usowski* v. *Jacobson*, 261 Conn. 901, 802 A.2d 855 (2002). This appeal and cross appeal followed.

I

We first consider the defendants' claim that the Appellate Court improperly reversed the trial court's order imposing a monetary sanction on the plaintiff for discovery abuses.[10] The defendants argue that: (1) the sanction was narrowly tailored and proportional to the plaintiff's abusive discovery tactics; (2) the Appellate Court's finding that the trial court had abused its discretion in imposing the sanction rested on the flawed and improper presumption that the sanction would invite delay by encouraging the defendants to take unnecessary depositions; and (3) the Appellate Court improperly relied upon the wrong standard of review in deciding whether the sanction was appropriate. We disagree.

[9] Dismissal of the case as to all parties gave the Appellate Court jurisdiction to entertain an appeal on the sanctions issue, over which it would not otherwise have had jurisdiction. See *Green Rock Ridge, Inc.* v. *Kobernat*, 250 Conn. 488, 496–99, 736 A.2d 851 (1999).

[10] Ordinarily, we would address the issue regarding dismissal first, but, because the dismissal in this case was predicated on the sanctions order, we will consider the sanctions order first.

We begin with the applicable standard of review. "In order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met. First, the order to be complied with must be reasonably clear. . . . This requirement poses a legal question that we will review de novo. Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001).

"[T]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the [plaintiff] for its allegedly improper conduct." (Internal quotation marks omitted.) *State* v. *Respass*, 256 Conn. 164, 186, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001). "The determinative question for an appellate court is not whether it would have imposed a similar sanction but whether the trial court could reasonably conclude as it did given the facts presented. Never will the case on appeal look as it does to a [trial court] . . . faced with the need to impose reasonable bounds and order on discovery." (Internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 15–16.

We conclude that the Appellate Court properly reversed the trial court's August 3, 2000 order of monetary sanctions. The Appellate Court explained that, in view of the fact that the plaintiff and Staley had modified their interrogatory responses by leave of the court to include only thirty-eight names,[11] the trial court's order

[11] See footnote 8 of this opinion.

that the plaintiff pay the cost of taking 118 depositions was "excessive." *Usowski* v. *Jacobson*, supra, 68 Conn. App. 792. The Appellate Court also reasoned that the trial court's order "gave the defendants the option to depose any or all of the individuals at the plaintiff's cost, thus, inviting more abuse and delay." Id.

We agree with the Appellate Court's reasoning but add that, prior to ordering the imposition of sanctions, the trial court had instructed the plaintiff and Staley that they were free to reduce the number of names on the list to protect themselves from exactly the type of burdensome financial consequences that the court ultimately imposed. Accordingly, the order not only was excessive and invited delay, but also rendered meaningless the expressed rationale behind the court's prior instruction. We therefore conclude that the Appellate Court properly reversed the order of monetary sanctions for abuse of the trial court's discretion and properly directed that the case be remanded for further proceedings.

The defendants argue that the sanction was proportional to the discovery violation because the trial court (1) prior to ordering the sanction required the parties to follow specified procedures and warned them of the consequences if they did not comply, (2) "carefully calibrated" the sanction to address the consequences of the discovery violations, and (3) substantially modified the initial sanction to require that the plaintiff pay only that portion of the sanction that would cover the cost of thirty-eight depositions, with further payment subject to additional court review. We are not persuaded.

The defendants first argue that the court forewarned the plaintiff and Staley that they would be required to bear the costs of deposing all 118 persons in their penultimate list if the four initial deponents could not

provide the requested information. The defendants thus argue that the court, hearing no objection from the plaintiff or Staley to that proposal, had the right to conclude that the plaintiff and Staley were satisfied with the procedure. The argument that the plaintiff and Staley were forewarned and did not object to the sanction, however, has no bearing on whether the sanction was proportional to the violation. Moreover, the court did not state conclusively that it would impose such a sanction, but suggested that there might be room for further discussion when it stated at the November, 1999 hearing that it was "inclined" to order the sanction. Indeed, the court later conceded when hearing oral argument on the motions to reargue that the proposed sanction had been "a possibility," not "a promise," when initially discussed at the November, 1999 hearing. Furthermore, even if we agreed with the defendants that warning the plaintiff and Staley of future consequences should be considered in assessing the proportionality of the sanction, the court instructed the plaintiff and Staley that they could forestall a more costly sanction by submitting a list containing fewer names. In light of their compliance with the court's instruction, the plaintiff and Staley could not have expected such an onerous sanction after submitting the revised list.

We also reject the defendants' argument that the sanction was appropriate because it was "carefully calibrated" to respond to the discovery violation by the plaintiff and Staley by shifting to the plaintiff a portion of the costs that the defendants might incur. The court's instruction to test the validity of the list by deposing four individuals, thus providing an indication of how many persons on the entire list might have to be deposed in preparation for trial, cannot and should not detract from its contemporaneous instruction that the plaintiff and Staley could limit the financial consequences of any future sanction by reducing the number

of names. The plaintiff and Staley did as the court advised, and the plaintiff must not be penalized now by the trial court's subsequent failure to act in accordance with its own directive.

The defendants next argue that the Appellate Court disregarded the court's modification of the original sanction to require the payment of a smaller initial installment and to subject further payment requests to additional court review. We disagree. What the defendants fail to recognize is that, although the Appellate Court acknowledged the modification, it also pointed out that the total amount of the sanction had not been reduced. The plaintiff thus remained exposed to a heavy financial burden, which the defendants themselves described as "tremendous" and "staggering," if the defendants decided to take a large number of subsequent depositions. The trial court should not have overlooked the significant reduction in the number of names on the list submitted by the plaintiff and Staley, a modification that was made at the court's suggestion to avoid the possibility of harsh financial consequences.

The defendants also argue that the Appellate Court's finding of an abuse of discretion rests on the flawed presumption that the order giving the defendants an option to depose all 122 persons on the list invited abuse and delay. They argue that there was no basis in the record on which the court could have reached such a conclusion and, furthermore, that the defendants had no incentive to conduct unnecessary depositions that would have delayed the proceedings. The defendants' argument is unavailing.

The Appellate Court's decision to reverse the order of sanctions rested principally on its conclusion that the amount of the sanction was excessive, especially in light of the submission by the plaintiff and Staley of

a modified list with only thirty-eight names.[12] *Usowski* v. *Jacobson*, supra, 68 Conn. App. 792. The court observed, secondarily, that the open-ended nature of the order gave the defendants the opportunity to depose at the plaintiff's expense any or all of the remaining 118 individuals named in the earlier list. Id. Only then did the court suggest that the open-ended sanction might "invit[e]," not necessarily result in, abuse and delay. Id. Consequently, the Appellate Court's statement cannot be characterized as a presumption regarding what would occur in the future based on the defendants' past behavior, because it merely referred to what might occur if the defendants were granted such an open-ended remedy. Accordingly, we do not agree that the Appellate Court's conclusions rest on improper presumptions about the defendants' past behavior.

Finally, the defendants claim that the Appellate Court relied upon the wrong standard of review in deciding that the monetary sanction was inappropriate. They argue that the Appellate Court improperly took into account policy considerations as demonstrated by its recitation of the following passage from *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16: "[T]he court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Usowski* v. *Jacobson*, supra, 68 Conn. App. 792. The defendants contend that the monetary sanction did not implicate the policy considerations described, because the sanction was not a dismissal or an order that precluded a trial on the merits. The defendants also argue that no evidence was taken indicating that the plaintiff would be deprived of his day in court because he could not pay the sanction. The defendants' claim has no merit.

[12] See footnote 8 of this opinion.

The defendants have lifted the quoted language out of context and overlooked evidence in the record regarding the plaintiff's claims as to his financial status. In concluding that the monetary sanction was disproportionate to the discovery violation, the Appellate Court first stated that the sanction was excessive and invited abuse and delay by giving the defendants the option of deposing 118 individuals at the plaintiff's expense. It then quoted a passage from *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16, which began as follows: "[D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Internal quotation marks omitted.) *Usowski* v. *Jacobson*, supra, 68 Conn. App. 792. The passage ended with the language regarding policy preferences.

The disputed language in *Millbrook Owners Assn., Inc.*, was part of a broader discussion of the trial court's discretion to make certain decisions during the course of a trial. The court merely stated that, in exercising its discretion, one consideration to be taken into account was the policy preference of bringing about a trial on the merits. Considered in its entirety, the disputed language and the Appellate Court's analysis cannot be construed as improperly suggesting that the only underlying rationale for the Appellate Court's decision to reverse the order of sanctions was the policy preference to secure for the plaintiff his day in court. The language in question was at the end of the quoted passage and was very likely motivated by the plaintiff's statement in his motion to reargue that he would not be able to continue the litigation if the court imposed a sanction of $72,216. Accordingly, we reject the defen-

dants' argument that the Appellate Court improperly reversed the monetary sanction.[13]

II

We next consider the plaintiff's claim that the Appellate Court improperly affirmed the trial court's judgment of dismissal. The plaintiff argues that, because the decision of the Appellate Court was premised on his failure to pay a sanction that it had just held to be an abuse of the trial court's discretion, the dismissal should not have been affirmed. We agree that the Appellate Court improperly affirmed the judgment of dismissal, but we base our conclusion on different grounds.

As previously stated, in order to withstand appellate review, a trial court's order of sanctions for the violation of a discovery order must be reasonably clear, the record must establish that the order was violated and the sanction imposed must be proportional to the violation. See *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18. Where the ultimate sanction of dismissal is involved, "[o]ur practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only . . . where it would be the only reasonable remedy available to vindicate the legitimate

[13] We, therefore, do not address the plaintiff's alternative ground for affirmance on this issue, namely, that the trial court improperly found that the plaintiff answered the interrogatories falsely and with the intent to mislead.

interests of the other party and the court." (Citations omitted; internal quotation marks omitted.) Id., 16–17.

In the present case, the trial court dismissed the action on the ground that the plaintiff had engaged in a pattern of discovery abuse because he failed to comply with three separate discovery orders, two of which involved the payment of monetary sanctions. On appeal, the Appellate Court concluded, following an examination of the entire record, that the plaintiff had engaged in a pattern of discovery abuse by resisting disclosure of information and by attempting to burden the defendants with unnecessary discovery. *Usowski* v. *Jacobson*, supra, 68 Conn. App. 791.

The Appellate Court correctly acknowledged that the plaintiff claimed that the court had abused its discretion in ordering the monetary sanction. Id., 792. It stated, however, that the plaintiff had not appealed from a finding of contempt for failure to comply with a discovery order, but from a judgment of dismissal for alleged discovery abuse. Id., 792–93. The Appellate Court then proceeded to affirm the judgment by considering not only the failure by the plaintiff and Staley to comply with the document production order, but other evidence in the record that the trial court had not expressly considered when it rendered the judgment of dismissal. Id., 793. The additional evidence examined on appeal included the wide variation in the number of names contained in the multiple responses to the interrogatories and the deponents' lack of knowledge regarding the alleged partnership. Id., 793–94. The Appellate Court did not directly consider the plaintiff's failure to pay the two monetary sanctions. Id. We conclude that the Appellate Court did not consider the proper factors in reviewing the trial court's decision.

The trial court dismissed the plaintiff's action pursuant to § 13-14 of the Practice Book. Under that provi-

sion, dismissal is warranted if a party fails to comply with discovery orders. The provision contains no reference to dismissal for failure to comply with an order of sanctions. We stated, however, in *Green Rock Ridge, Inc.* v. *Kobernat*, 250 Conn. 488, 498, 736 A.2d 851 (1999), that, although a sanctions order is not itself a discovery order, it is an order entered for failure to comply with discovery procedure. Accordingly, there is no reason why a sanctions order should be treated any differently, for purposes of considering the finality of a judgment, from the discovery procedure of which it is a part. Id. Although in *Green Rock Ridge, Inc.*, we were comparing a sanctions order and a discovery order in the context of the finality of judgments, our conclusion that sanctions and discovery orders are similar in nature and thus should be treated in a similar manner remains valid in the present context. Accordingly, the trial court properly employed the ultimate sanction of dismissal for the plaintiff's failure to obey its prior discovery orders, including the orders imposing monetary sanctions.

Under *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18, the Appellate Court, in determining whether the sanction of dismissal was proportional to the violation, should have focused its analysis on the plaintiff's violation of the three orders that the trial court identified when it rendered the judgment of dismissal. We now undertake that analysis and conclude that the trial court abused its discretion because the record does not establish that the failure to comply with the discovery orders constituted a continuing pattern of violations that warranted dismissal of the action.

In each instance where the plaintiff and Staley failed to comply with the trial court's order, other factors of a mitigating nature also were present. The trial court first noted that the plaintiff and Staley had failed to

comply fully with the document production order, but at the time the court imposed the sanction for their failure to comply, it also acknowledged that they had made "diligent efforts" to locate and provide the documents requested and were simply "not good at keeping records." Even more significantly, the court denied the defendants' related application for costs on the ground that it was "satisfied [the plaintiff and Staley had] made a good faith effort" to produce the documents in question.

The plaintiff next failed to comply with the June 5, 2000 order of sanctions requiring him to deposit $72,216 with the court to pay for the cost of taking 118 depositions. The defendants correctly argue that "a party has a duty to obey a court order even if the order is later held to have been unwarranted." *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 230 Conn. 641, 658 n.20, 646 A.2d 133 (1994); *Mulholland* v. *Mulholland*, 229 Conn. 643, 649, 643 A.2d 246 (1994). The plaintiff's violation, however, must be viewed in a broader context when one considers whether it ultimately justified dismissal of his action. Shortly after the June 5 order was imposed, the plaintiff and Staley timely filed motions to reargue.[14] The plaintiff contended that he had not been given an opportunity to be heard on the sanctions motion. At the outset of the hearing on the motions to reargue, the court therefore stated that, because it had not conducted a hearing on the defendants' motion for sanctions, it would consider the present hearing as a hearing de novo on the motion for sanctions. At the conclusion of the hearing, the court vacated the original

[14] Practice Book § 11-12 (a) provides: "A party who wishes to reargue a decision or order rendered by the court shall, within twenty days from the issuance of notice of the rendition of the decision or order, file a motion to reargue setting forth the decision or order which is the subject of the motion, the name of the judge who rendered it, and the specific grounds for reargument upon which the party relies." See also *Rosa Bros., Inc.* v. *Mansi*, 61 Conn. App. 412, 767 A.2d 116 (2002).

order and issued a new order directing the payment of the $72,216 in two installments. Accordingly, in conducting a hearing de novo on the sanctions motion and in modifying the terms of the original order, the court implicitly conceded deficiencies, both as to the procedure and the result, in the earlier proceeding.

The plaintiff also failed to comply with the trial court's August 3, 2000 order of sanctions, following which the defendants filed their motion to dismiss the case. The plaintiff persuasively argues, however, and the defendants do not disagree, that failure to comply with an interlocutory order to obtain a final judgment so that the order can be appealed is an appropriate way to raise an issue before a reviewing court. See *Pavlinko* v. *Yale-New Haven Hospital*, 192 Conn. 138, 142–43, 470 A.2d 246 (1984) (appeal taken after court dismissed case for plaintiff's refusal to answer deposition questions); C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (3d Ed. 2000) § 3.8, pp. 88–89 (appeal from discovery order possible only when noncompliance results in contempt citation or dismissal of action). In this case, the plaintiff, having failed in his attempt to obtain appellate review of the discovery order immediately after the order was entered, deliberately chose to seek review by failing to comply with the order and by appealing from the subsequent judgment of dismissal.

We conclude that the plaintiff's conduct, considered in its entirety, does not evince a "contumacious or unwarranted disregard for the court's authority"; (internal quotation marks omitted); that justified dismissal of the action. *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16. Dismissal was not the only reasonable remedy available to vindicate the legitimate interests of the defendants in avoiding undue expense during discovery. The plaintiff offered to disclose to the defendants a list of potential witnesses

with knowledge of the alleged partnership whom he intended to call at trial. Such a list would have assisted the defendants and substantially reduced their discovery costs by limiting the number of depositions required in preparation for the trial. Moreover, the plaintiff refused to pay the sanction for the express purpose of obtaining a final judgment so that the order could be appealed. The plaintiff thus took a calculated risk that, having been dismissed by the trial court, the action might not survive on appeal. Accordingly, the plaintiff's failure to comply with the three discovery orders did not constitute a pattern of abuse so egregious as to warrant dismissal, the remedy of last resort. We, therefore, conclude that the Appellate Court improperly determined that the trial court had not abused its discretion in dismissing the action.

The judgment of the Appellate Court insofar as it vacated the order of monetary sanctions and remanded the case for reconsideration and further proceedings is affirmed; the judgment of the Appellate Court insofar as it affirmed the dismissal of the plaintiff's action is reversed and the case is remanded to the Appellate Court with direction to reverse the trial court's judgment of dismissal and to remand the case to the trial court for further proceedings according to law.

In this opinion the other justices concurred.

ELIZABETH M. STEWART *v.* CENDANT MOBILITY SERVICES CORPORATION
(SC 16913)

Borden, Norcott, Katz, Palmer and Vertefeuille, Js.

Syllabus

The defendant, a company specializing in corporate employee relocation services, appealed from the judgment rendered in favor of the plaintiff salesperson on her claims of promissory estoppel and negligent misrep-

resentation in connection with the termination of her employment with the defendant, which also had employed the plaintiff's husband. After the defendant terminated the husband's employment, the plaintiff approached her supervisor, S, and asked him whether her employment with the defendant would be affected adversely if her husband were to secure a position with a competitor of the defendant. S made certain representations to the plaintiff in which he allegedly assured her that her husband's employment with a competitor would have no bearing on her employment with the defendant. Thereafter, the defendant learned that the plaintiff's husband was performing consulting services for a competitor and, in response, reduced the plaintiff's duties and limited her interaction with clients. The defendant allegedly terminated the plaintiff when she declined to agree verbally to the provisions of a document purporting to delineate the plaintiff's obligations to the defendant in relation to her husband's work on behalf of any competitor. In her complaint, the plaintiff alleged, inter alia, that she had relied to her detriment on S's representations that her employment with the defendant would not be affected adversely by her husband's probable future employment with a competitor. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support the plaintiff's claim of promissory estoppel. *Held*:

1. The jury reasonably could have found that S's representations to the plaintiff constituted a clear and definite promise that her employment with the defendant would not be affected adversely if her husband were to secure employment with a competitor; contrary to the defendant's claim, to be actionable under the doctrine of promissory estoppel, promises in the employer-employee context need not contain all of the elements of an offer necessary to enter into a contract, and, consequently, the jury's findings that there was no offer for purposes of the plaintiff's breach of contract claim but that there was a promise for purposes of the plaintiff's promissory estoppel claim were not inconsistent.
2. The defendant could not prevail on its claim that the evidence was insufficient to establish that the plaintiff reasonably had relied on S's representations to her detriment; the jury reasonably could have found that the plaintiff could have secured employment with another relocation services company and have received a signing bonus, that she would have left the defendant and sought other employment if she had not received S's assurances, and that she suffered financial harm by remaining with the defendant in reliance on S's assurances.

Argued May 22—officially released December 23, 2003

Procedural History

Action to recover damages for, inter alia, the plaintiff's allegedly wrongful discharge from employment, and for other relief, brought to the Superior Court in

the judicial district of Danbury, where the court, *Radcliffe, J.*, granted in part the defendant's motion for summary judgment and denied the plaintiff's motion for partial summary judgment; thereafter the case was tried to the jury before *Radcliffe, J.*; after the court granted in part the plaintiff's motion for a directed verdict, verdict and directed verdict for the plaintiff in part and the defendant in part; subsequently, the court rendered judgment in accordance with the verdicts, from which the defendant appealed. *Affirmed.*

A. Robert Fischer, with whom were *William J. Anthony* and, on the brief, *James F. Shea*, for the appellant (defendant).

Scott R. Lucas, with whom was *Mary Alice S. Canaday*, for the appellee (plaintiff).

Opinion

PALMER, J. This appeal arises out of an action brought by the plaintiff, Elizabeth M. Stewart, against the defendant, Cendant Mobility Services Corporation (Cendant), her former employer, for damages resulting from Cendant's allegedly wrongful termination of her employment. Following a trial, a jury returned a verdict in part for the plaintiff, finding in her favor on her claims of promissory estoppel and negligent misrepresentation and awarding her $850,000 on those claims.[1] The trial court rendered judgment in accordance with the jury verdict from which Cendant appeals.[2] On appeal, Cendant claims that the evidence was insufficient to support the jury's verdict. We conclude that there was sufficient evidence from which the jury reasonably

[1] The jury found damages in the amount of $850,000 on each of the two claims. It is undisputed, however, that $850,000 comprises the award for both claims because each claim is predicated on the same relevant facts.

[2] The defendant appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

could have found for the plaintiff on her promissory estoppel claim. Because the jury's award of $850,000 is sustainable on the basis of that claim alone,[3] we need not reach Cendant's claim that the evidence was insufficient to support the jury's verdict with respect to the plaintiff's negligent misrepresentation claim. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The plaintiff and her husband were employed by Cendant, which provides relocation services to domestic and international corporations and their employees. Among other things, Cendant assists its corporate clients in finding new homes for their relocating employees and in selling those employees' old homes. The plaintiff worked in the sales division and was considered one of the top producers in the relocation services industry. The plaintiff's husband was an executive in the operations division at Cendant.

In April, 1998, Cendant underwent a major corporate reorganization. Soon thereafter, Cendant terminated the plaintiff's husband from employment. At the time of her husband's termination, the plaintiff held the position of vice president of sales.

Because the plaintiff believed that her husband was likely to seek employment with one of Cendant's competitors in the relocation services field, she spoke with James Simon, Cendant's executive vice president of sales and the plaintiff's immediate supervisor, about the matter shortly after her husband's termination. The plaintiff explained to Simon that she was concerned about how her employment with Cendant might be affected if her husband ultimately accepted a position with a competitor. Simon told the plaintiff that she should not be concerned and that her husband's reemployment in the relocation services business would

[3] See footnote 1 of this opinion.

have no bearing on her employment with Cendant. Simon further represented to the plaintiff that Kevin Kelleher, Cendant's president and chief executive officer, also wished to assure the plaintiff that she had no reason to be concerned about her continued status as a highly valued employee in the event that her husband were to become associated with a competitor. On the basis of Simon's assurances, the plaintiff continued in her position with Cendant and did not pursue other employment opportunities.

On or about March 5, 1999, Cendant learned that the plaintiff's husband was performing consulting services for a competing firm. Upon obtaining this information, Cendant reduced the plaintiff's duties and limited her interaction with clients. Cendant also requested that the plaintiff verbally agree to the provisions of a document drafted by Cendant that purported to delineate her obligations to Cendant in relation to her husband's work on behalf of any competitor of Cendant. On June 11, 1999, Cendant allegedly terminated the plaintiff's employment when she declined to agree to the provisions of that document.

Thereafter, the plaintiff commenced this action against Cendant. In count one of her complaint, the plaintiff alleged that her conversation with Simon gave rise to an oral contract of employment and that her discharge by Cendant constituted a breach of that contract. In count two, the plaintiff claimed that her discharge violated an implied covenant of good faith and fair dealing. In count three, which is predicated on a theory of promissory estoppel, the plaintiff alleged that she had relied to her detriment on Simon's promise that her employment with Cendant would not be affected adversely by her husband's probable future employment with a competitor. In count four, the plaintiff asserted a claim of negligent misrepresentation, alleg-

ing that Simon's statements were false and that she had relied on those statements to her detriment.

Following a trial, the jury returned a verdict in favor of Cendant with respect to the plaintiff's claims of breach of contract and breach of an implied covenant of good faith and fair dealing. The jury returned a verdict in favor of the plaintiff with respect to her claims of promissory estoppel and negligent misrepresentation and awarded her $850,000.[4] Cendant filed motions to set aside the verdict and for judgment notwithstanding the verdict on the promissory estoppel and negligent misrepresentation claims, contending that the evidence was insufficient to support the jury's verdict in favor of the plaintiff on those claims. The trial court denied Cendant's postverdict motions and rendered judgment in accordance with the jury's verdict, from which Cendant appealed.

On appeal, Cendant challenges the trial court's denial of its motions to set aside the verdict and for judgment notwithstanding the verdict. Cendant renews its contention that the evidence was insufficient to support the jury's verdict with respect to the plaintiff's promissory estoppel claim. Cendant's contention is essentially twofold. First, Cendant claims that its purported promise to the plaintiff lacked the requisite clarity and definiteness

[4] We note that the plaintiff asserted five other claims in her complaint. The trial court granted Cendant's motion for summary judgment in part and rendered judgment thereon in favor of Cendant with respect to two of those claims. With respect to two other claims, the trial court granted Cendant's motion for a directed verdict. The plaintiff has not appealed from that part of the trial court's judgment rendered in accordance with the disposition of the foregoing claims. With respect to the last of these five claims, namely, that Cendant had failed to pay the plaintiff wages in violation of General Statutes § 31-72, the jury returned a verdict in favor of the plaintiff, and the trial court rendered judgment thereon in favor of the plaintiff. Cendant has not appealed from that part of the judgment relating to the plaintiff's claim under § 31-72. Thus, none of the plaintiff's five other claims or the balance of the award that is unrelated to the plaintiff's claims of promissory estoppel and negligent misrepresentation is the subject of this appeal.

necessary to establish promissory estoppel. Second, Cendant claims that the plaintiff failed to present evidence sufficient to establish that she had relied to her detriment on any such promise. We reject both of these claims and, therefore, affirm the judgment of the trial court inasmuch as the jury award of $850,000 is sustainable on the basis of the plaintiff's promissory estoppel claim. Because the jury awarded the plaintiff $850,000 in damages on each of her claims of promissory estoppel and negligent misrepresentation; see footnote 1 of this opinion; we need not address Cendant's claim that the evidence was insufficient to support the jury's verdict with respect to the plaintiff's negligent misrepresentation claim.

Before addressing the merits of Cendant's claims, we set forth the applicable standard of review. "The standard for reviewing the denial of motions to set aside the verdict and for judgment notwithstanding the verdict on evidentiary grounds is clear. Our review of the trial court's [decision to deny the motions] requires us to consider the evidence in the light most favorable to the prevailing party, according particular weight to the congruence of the judgment of the trial judge and the jury, who saw the witnesses and heard their testimony. . . . The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached [its] conclusion." (Internal quotation marks omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 277, 698 A.2d 838 (1997). With this standard of review in mind, we turn to Cendant's challenge to the evidentiary sufficiency of the plaintiff's promissory estoppel claim.

I

Cendant first contends that the jury reasonably could not have found that Simon's representations to the plaintiff were sufficiently clear and definite to consti-

tute a promise for purposes of a claim of promissory estoppel. We disagree.

The following additional evidence and procedural history are necessary to our resolution of this issue. On direct examination, the plaintiff testified that, after her husband was fired, she became concerned that his termination and likely reemployment in the relocation services industry adversely would affect her employment with Cendant. The plaintiff testified that she "specifically asked [Simon] what would happen [to her] if [her husband competed] in the industry." According to the plaintiff, Simon replied that "he had absolutely no concerns about [her husband] entering the marketplace." The plaintiff also testified that Simon told her that "he had tremendous respect for both [the plaintiff] and [the plaintiff's husband and] that [they] had a lot of integrity." The plaintiff testified further that Simon told her that "[h]e had trust and faith in [her] and in [the plaintiff's husband] and he knew that [they] would be able to keep [their] lives separate and [that] he had absolutely no concerns about [her husband] entering the marketplace." According to the plaintiff, Simon "said that he would talk to [Kelleher] on her behalf . . . [and] assured [her] that this was not going to be a problem and that [she] was a highly valued employee and there was nothing to worry about."

The plaintiff further explained that Simon thereafter reported to her that "he had spoken to [Kelleher] about [her] concerns and that [Kelleher] wanted [Simon] to assure [her] that [she] was very highly valued, that [she] was an integral part of the company, [that] he had tremendous respect for [her] integrity and [that] there were no problems whatsoever with [the plaintiff] continuing the job in the event [that her husband] competed." On cross-examination, the plaintiff acknowledged that when she and Simon spoke, they were discussing a hypothetical future occurrence because she

was not certain whether her husband would join another relocation services company. The plaintiff further testified on cross-examination that she did not believe that she was negotiating an employment contract when she spoke with Simon.

At the conclusion of the court's instructions to the jury, the jury was provided with a special verdict form containing interrogatories relating to each of the plaintiff's claims. With respect to the plaintiff's breach of contract claim, the jury was asked, inter alia, whether it found that Cendant had "made a definite offer sufficient to form a contractual agreement with the plaintiff . . . ." The jury answered no. With respect to the plaintiff's promissory estoppel claim, the jury was asked, inter alia, whether it found that Cendant had "made a clear, definite promise to [the plaintiff] . . . upon which it should have expected she would rely . . . ." The jury responded in the affirmative.

The following legal principles govern our analysis of Cendant's claim. "Under the law of contract, a promise is generally not enforceable unless it is supported by consideration. . . . This court has recognized, however, the development of liability in contract for action induced by reliance upon a promise, despite the absence of common-law consideration normally required to bind a promisor . . . . Section 90 of the Restatement [(Second) of Contracts] states that under the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. [1 Restatement (Second), Contracts § 90, p. 242 (1981).] A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a

promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all." (Citations omitted; internal quotation marks omitted.) *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, 202 Conn. 206, 213, 520 A.2d 217 (1987).

Although the promise must be clear and definite, it need not be the equivalent of an offer to enter into a contract because "[t]he prerequisite for . . . application [of the doctrine of promissory estoppel] is a *promise* and not a bargain and *not* an *offer*." (Emphasis added.) 3 A. Corbin, Contracts (Rev. Ed. 1996) § 8.9, p. 29; cf. *Suffield Development Associates Ltd. Partnership* v. *Society for Savings*, 243 Conn. 832, 845–46, 708 A.2d 1361 (1998) (concluding that contract did not exist because agreement was not sufficiently definite and remanding case for new trial to permit consideration by fact finder of promissory estoppel claim predicated on same facts). This, of course, is consistent with the principle that, although "[a]n offer is nearly always a promise"; 1 E. Farnsworth, Contracts (2d Ed. 1998) § 3.3, p. 188; all promises are not offers. See 1 Restatement (Second), supra, § 24, comment (b), p. 72 ("[w]hether or not a proposal is a promise, it is not an offer unless it specifies a promise or performance by the offeree as the price or consideration to be given by him").

Additionally, the promise must reflect a present intent to commit as distinguished from a mere statement of intent to contract in the future. See *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, supra, 202 Conn. 214–15. "[A] mere expression of intention, hope, desire, or opinion, which shows no real commitment, cannot be expected to induce reliance"; 3 A. Corbin, Contracts, supra, § 8.9, pp. 29–30; and, therefore, is not sufficiently promissory. The requirements of clarity and definiteness are the determinative

factors in deciding whether the statements are indeed expressions of commitment as opposed to expressions of intention, hope, desire or opinion. See *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, supra, 214–15. Finally, whether a representation rises to the level of a promise is generally a question of fact, to be determined in light of the circumstances under which the representation was made. *Torosyan* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 17 n.6, 662 A.2d 89 (1995).

Applying the foregoing principles, we conclude that there was sufficient evidence to support the jury's finding that Simon's representations to the plaintiff were sufficiently clear and definite to constitute a promise that her employment with Cendant would not be affected adversely if her husband subsequently secured employment with a competing relocation services firm. The plaintiff testified that: (1) she had approached Simon because she was concerned that her husband's employment with a competitor would have a negative effect on her employment with Cendant; (2) she expressed that concern in plain terms to Simon; and (3) Simon responded in equally unambiguous terms, in his own capacity and on behalf of Kelleher, that the plaintiff had no need to worry because her husband's future employment with a competitor would pose "no problems whatsoever" for her. On the basis of this testimony, the jury reasonably could have found that Simon's representations to the plaintiff constituted a clear and definite promise that her position with Cendant would not be affected adversely if her husband were to secure employment with a competing firm.

Relying primarily on our decision in *D'Ulisse-Cupo*, Cendant contends that, under our law of promissory estoppel, all promises in the employer-employee context, to be actionable, must contain the standard material terms of a contract of employment and clearly

reflect an intent by the promisor to undertake conventional contractual liability.[5] In other words, Cendant contends that any such promise must contain all of the elements of an offer to enter into a contract. We conclude that our holding in *D'Ulisse-Cupo* is not so broad.

In *D'Ulisse-Cupo*, the plaintiff, Maria D'Ulisse-Cupo, brought an action against the board of directors (board) and principal of Notre Dame High School (school) in West Haven. *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, supra, 202 Conn. 207. The board declined to offer D'Ulisse-Cupo a new contract after her prior contract to teach at the school had expired. Id., 208–209. D'Ulisse-Cupo alleged that authorized representatives of the board had made certain representations to her prior to the expiration of her teaching contract that suggested that she would be offered a new contract. Id., 208, 214. D'Ulisse-Cupo alleged further that she relied on those representations to her detriment. Id., 209.

We concluded that the "representations [did] not invoke a cause of action for promissory estoppel because they [were] neither sufficiently promissory nor sufficiently definite to support contractual liability." Id., 214. We explained that the "representations manifested no present intention on the part of the [board] to undertake immediate contractual obligations to [D'Ulisse-Cupo]"; id., 214–15; and that "none of the representations contained any of the material terms that would be essential to an employment contract, such as terms regarding the duration and conditions of [D'Ulisse-Cupo's] employment . . . and her salary and fringe benefits." Id., 215. Finally, we concluded that, "[a]t most, the [board] made representations to [D'Ulisse-

[5] We note that at least one commentator also has construed *D'Ulisse-Cupo* in such a manner. See 3 A. Corbin, supra, § 8.12, p. 99.

Cupo] concerning the expectation of a future contract, but . . . stopped short of making [D'Ulisse-Cupo] a definite promise of employment on which she could reasonably have relied." Id.

Although we acknowledge that certain language in *D'Ulisse-Cupo* might suggest that, for purposes of a claim of promissory estoppel, the promise upon which the promisee relies must be no less specific and definite than an offer to enter into a contract, we reject Cendant's claim urging that interpretation. Our observations in *D'Ulisse-Cupo* that the representations did not contain the material terms of a new employment contract and otherwise did not reflect an intent by the board to undertake immediate contractual liability were necessary to our determination of whether, in circumstances involving an alleged promise to rehire a employee under contract, the representations constituted a promise to commit or mere expressions of a future intent to enter into a contract. See id., 214–15. In other words, because D'Ulisse-Cupo alleged that she had been promised a contract of employment, our consideration of whether the contract terms were part of that purported promise and whether the representations reflected an intention to bind the board to a future contract was central to our resolution of D'Ulisse-Cupo's claim that those representations were sufficiently clear and definite such that her reliance on them was reasonable. Thus, when *D'Ulisse-Cupo* is viewed in the context of the particular claim addressed in that case, it is apparent that the language upon which Cendant relies is properly understood as explaining why the representations regarding a future employment contract were insufficiently promissory and definite to be actionable, and not properly understood as indicating that, for purposes of the doctrine of promissory estoppel, any promise relating to employment must be the

equivalent of an offer to enter into a contract.[6] Cf. *Torosyan* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, supra, 234 Conn. 17 n.6 ("[n]otwithstanding the broad language of *D'Ulisse-Cupo* . . . the question of whether statements are promissory should be considered as a question of fact").

Finally, the present case is readily distinguishable from *D'Ulisse-Cupo*. Although Simon's representations related to the plaintiff's employment, they were far more limited in scope than the representations at issue in *D'Ulisse-Cupo*. Simon promised the plaintiff only that her employment would not be affected adversely by her husband's future employment with a competitor of Cendant. The plaintiff otherwise remained an at-will employee subject to termination at Cendant's sole discretion. Consequently, the issue of whether Simon's representations were sufficiently clear and definite to constitute a promise upon which the plaintiff reasonably could have relied is significantly narrower than the issue that was presented in *D'Ulisse-Cupo*, namely, whether the representations of the representatives of the school board constituted a promise of an entirely new employment contract even when those representations did not contain terms and conditions that necessarily comprise any such contractual arrangement. See *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, supra, 202 Conn. 214–15.

Cendant further contends that the jury's finding, as reflected in its response to an interrogatory relating to the plaintiff's breach of contract claim, that there was no *offer* for purposes of that claim is inconsistent with its finding that there was a *promise* for purposes of the

[6] We note, in addition, that no case or commentator cited in our discussion of promissory estoppel in *D'Ulisse-Cupo* suggests or otherwise intimates that, for purposes of the doctrine of promissory estoppel, the promise upon which the promisee relies must be equivalent to an offer to enter into a contract.

plaintiff's promissory estoppel claim. Cendant contends, therefore, that the jury's finding of a promise cannot stand. This claim is without merit.

Although "in civil cases when a verdict rests upon a factual finding contradictory to another finding of the same issue by the trier the judgment cannot stand"; *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 577, 479 A.2d 781 (1984); the jury's findings in the present case are not inconsistent. As we have explained, a promise need not be the functional equivalent of an offer to enter into a contract for it to support a claim of promissory estoppel.[7] See 3 A. Corbin, supra, § 8.9, p. 29. Thus, the jury reasonably could have concluded *both* that Simon's representations constituted a promise upon which the plaintiff reasonably could and did rely *and* that his representations were not an expression of the terms of an employment contract that Cendant was offering to the plaintiff. Consequently, the jury's finding that Cendant did not make an offer to enter into a contract with the plaintiff is not inconsistent with its finding that Cendant had promised the plaintiff that her employment would not be affected adversely if her husband were to accept a position with a competitor.[8]

[7] Indeed, the trial court's jury instructions were consistent with this distinction. Specifically, the court defined an "offer" as "a clear expression of terms under which a contract will be entered into . . . ." By contrast, the court defined a "promise" as a "clear and definite" statement "upon which Cendant . . . should have expected the plaintiff to rely . . . ."

[8] Cendant also contends that Simon's representations were not sufficiently clear and definite inasmuch as the plaintiff did not believe that she was negotiating an employment contract and inasmuch as Simon's representations related to a hypothetical future event, namely, her husband's acceptance of a position with another relocation services firm. This claim lacks merit. First, the fact that the plaintiff did not believe that she was negotiating an actual employment contract with Simon is not inconsistent with the finding that Simon's more limited representation to her was sufficiently clear and definite such that the plaintiff reasonably and foreseeably would rely on it. Moreover, although Simon's representations concerned a hypothetical future event, his representations nevertheless reflected Cendant's commitment to refrain from taking adverse action against the plaintiff even though that commitment was contingent on the plaintiff's husband's reem-

II

The defendant next claims that the evidence was insufficient to establish that the plaintiff detrimentally relied on Simon's representations. We also reject this claim.

The following additional facts are necessary to our disposition of this claim. As we previously have noted, the plaintiff testified on direct examination that she had approached Simon because she wanted to know whether, in light of her husband's likely future employment with a competing relocation services firm, she should stay at Cendant or seek other opportunities within the industry. After Simon assured her that she would suffer no adverse consequences in the event that her husband were to accept employment with a competitor, the plaintiff decided to remain at Cendant and "did not pursue other employment opportunities . . . ." The plaintiff testified during cross-examination, however, that, if Simon had told her that her husband's employment with another relocation services firm would pose a problem, she was not sure "what [she] would have done." The plaintiff also testified that when Simon made his representations to her, she was not investigating other employment opportunities. Additionally, the plaintiff acknowledged that she was an at-will employee and, therefore, subject to discharge at any time.

The plaintiff also adduced evidence that she was one of a relatively small number of highly talented salespeople in the relocation services industry. Indeed, Kelleher testified that the plaintiff would be regarded as a "val-

ployment in the relocation services field. Consequently, those representations were sufficiently clear and definite that they reasonably and foreseeably could have been expected to induce reliance. See 3 A. Corbin, supra, § 8.9, p. 29 ("[s]tatements of present commitment to do or refrain from doing something in the future reasonably can be expected to induce reliance").

ued asset" both within Cendant and in the industry on the basis of her productivity. Simon testified that such salespeople have no difficulty finding employment in the relocation services field. According to Simon, salespeople with the plaintiff's credentials "can walk in virtually anywhere" and receive a job offer.

In addition, offers to top performers in the relocation services industry typically include a signing bonus equivalent to some or all of the value of the employee's "pipeline," the industry term for the estimated total commissions due a salesperson, at a specific point in time, on the basis of consummated sales for which the company has not yet been paid in full. Because salespeople do not receive pipeline commissions if they leave a company to join a competitor before the company is paid by the client, signing bonuses are used as a recruitment tool by relocation service companies to induce salespeople employed by other companies to forgo their pipeline commissions and join the recruiting company. Although there are numerous salespeople who, like the plaintiff, do not receive accrued but uncollected commissions, those salespeople, in contrast to salespeople who are recruited by a competitor, are not sufficiently marketable to command a signing bonus. Finally, evidence adduced at trial established that the approximate value of the plaintiff's pipeline when she allegedly was terminated was $812,700,[9] a sum that she never was paid.

To succeed on a claim of promissory estoppel, the party seeking to invoke the doctrine must have relied on the other party's promise. *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, supra, 202 Conn. 213. That reliance, of course, may take the form of action or forbearance. Id. Nevertheless, the asserted

[9] The plaintiff also testified that, in 1998, her last full year of employment with Cendant, her income was approximately $630,000.

reliance, regardless of its form, must result in a detrimental change in the plaintiff's position. 3 A. Corbin, supra, § 8.9, p. 30 ("[T]he action or forbearance must amount to a detrimental change of position. The abandonment of a peppercorn or the turning over of the hand will not be enough."); see also *W.* v. *W.*, 256 Conn. 657, 661, 779 A.2d 716 (2001) (promisee "must actually change his position or do something to his injury which he otherwise would not have done"). Thus, "[t]o 'rely,' in the law of promissory estoppel, is not merely to do something in response to the inducement offered by the promise. There must be a cost to the promisee of doing it." *Cosgrove* v. *Bartolotta*, 150 F.3d 729, 733 (7th Cir. 1998).

Moreover, "[i]f the claimed reliance consists of the promisee's forbearance rather than an affirmative action, proof that this forbearance was induced by the promise requires a showing that the promisee *could have* acted." (Emphasis added.) 1 E. Farnsworth, supra, § 2.19, p. 164. Implicit in this principle is the requirement of proof that the plaintiff actually *would have acted* in the absence of the promise. Cf. *Middlesex Mutual Assurance Co.* v. *Walsh*, 218 Conn. 681, 699–700, 590 A.2d 957 (1991) (no detrimental reliance when party asserting doctrine of equitable estoppel failed to prove that action would have been different if promisor's statement were different).

In the present case, the plaintiff claimed that she relied on Simon's representations by forgoing other employment opportunities that would have resulted in a signing bonus approximately equivalent to her pipeline. Cendant contends that the plaintiff failed to adduce sufficient evidence to establish that she: (1) could have obtained such other employment; (2) would have sought employment elsewhere if Simon had told her that her position at Cendant would be affected adversely if her husband accepted a position with a

competing firm; and (3) was not harmed by continuing as an employee of Cendant even if she did so in reliance on Simon's representations. We disagree with each of these contentions.

First, with respect to Cendant's claim that the evidence was inadequate to establish that the plaintiff could have secured a sales position with another relocation services firm, Simon testified that talented salespeople in the relocation services industry—and it was undisputed that the plaintiff was such a salesperson—frequently obtained such positions. Although, as Cendant notes, the plaintiff, herself, testified that she was unaware that any of those positions were available at the time she would have been seeking such a position, the jury nevertheless reasonably could have found, on the basis of Simon's testimony, that the plaintiff likely could have secured such a position if she had sought to do so.

With respect to the issue of whether the plaintiff *would* have departed Cendant if she had not received Simon's assurances, the plaintiff testified that she approached Simon about her husband's likely future employment with a competitor because she needed to decide whether to stay with Cendant or to look for a position elsewhere. The plaintiff also indicated that she elected to stay at Cendant rather than to seek other employment because of Simon's representations that her position at Cendant would not be affected negatively in the event that her husband secured employment with a competing firm. Although the plaintiff also testified that she was unsure what she would have done if Simon had not made those assurances, it was within the province of the jury to resolve any possible inconsistencies in the plaintiff's testimony in a manner favorable to the plaintiff. E.g., *State* v. *Meehan*, 260 Conn. 372, 381, 796 A.2d 1191 (2002) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is

within the province of the jury to believe all or only part of a witness' testimony"); *Parker* v. *Slosberg*, 73 Conn. App. 254, 265, 808 A.2d 351 (2002) ("jury [is] free to credit one version of events over the other, even from the same witness"). Thus, the jury reasonably could have found that the plaintiff would have left Cendant if Simon had not assured her as he did.

Finally, Cendant contends that the plaintiff suffered no harm by opting not to seek employment elsewhere after she had spoken with Simon about her husband's likely future employment with a competitor. We disagree. In remaining at Cendant, the plaintiff not only abandoned any opportunity to secure a position with another relocation services company, she also forwent a signing bonus that the jury reasonably could have found approximated the value of her pipeline. Accordingly, we conclude that the evidence was sufficient to warrant the jury's finding that that the plaintiff reasonably relied on Simon's representations to her financial detriment.[10]

The judgment is affirmed.

In this opinion the other justices concurred.

[10] Cendant maintains that any such reliance was unreasonable due to the fact that the plaintiff, herself, conceded that she was an at-will employee and, consequently, could be terminated at any time. This claim also lacks merit. Although the plaintiff acknowledged her status as an at-will employee, she also testified repeatedly, clearly and unwaveringly that, on the basis of Simon's representations, she believed that Cendant could not and would not terminate her if her husband subsequently secured employment with a competitor. Thus, the evidence supported the conclusion that Cendant could have terminated the plaintiff for any reason *except* her husband's employment with a competing firm.

CONNECTICUT COALITION AGAINST MILLSTONE ET AL. *v.* ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, ET AL. (SC 16838)

Borden, Norcott, Palmer, Zarella and Pellegrino, Js.

Syllabus

The plaintiffs, a New York assemblyman and certain organizations that opposed the operation of a Connecticut nuclear powered electricity generating facility, sought, pursuant to the statute (§ 22a-16) that authorizes actions "for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution," to halt operations at the facility, claiming that the facility's water discharge permit and a subsequent emergency authorization, which had been issued by the department of environmental protection, were invalid. The plaintiffs also filed an application for a temporary injunction to prevent the transfer of permits from N Co., the owner of the facility, to D Co., which planned to acquire the facility. That application was denied, as was the plaintiffs' request to appeal directly from that decision. N Co., D Co. and the defendant commissioner of environmental protection each filed motions to dismiss, which the trial court, upon determining that the plaintiffs had no standing under § 22a-16 to challenge the validity of the discharge permit or the emergency authorization or to prevent the transfer of N Co.'s permits to D Co., granted. On the plaintiffs' appeal from the judgment dismissing the action, *held*:

1. Because, following the denial of the plaintiffs' request to enjoin the transfer of N Co.'s permits, the commissioner had approved and N Co. had completed the transfer of its interest in the facility to D Co., N Co. had no remaining connection with the facility, and, therefore, the plaintiffs' claims against N Co. were moot; accordingly, the plaintiffs' appeal from the dismissal of the action against N Co. was dismissed.

2. The plaintiffs did not have standing under § 22a-16 to challenge the validity of the discharge permit and the emergency authorization issued by the commissioner because there is no standing under § 22a-16 to challenge decisions made by the commissioner under his statutory (§ 22a-430) licensing authority; claims under § 22a-16 must be directed primarily at the polluting activity itself and not, as here, at the validity of an agency's authorization of such activity.

Development of the law on standing under § 22a-16, discussed.

Argued March 14—officially released December 23, 2003

Procedural History

Action to enjoin, inter alia, the transfer of a wastewater discharge permit relating to certain nuclear powered electric generating facilities from the defendant Northeast Nuclear Energy Company to the defendant Dominion Nuclear Connecticut, Inc., and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Schuman*, *J.*, denied the plaintiffs' motion for a temporary injunction; thereafter, the case was transferred to the judicial district of New London, Complex Litigation Docket at Norwich, where the court, *Koletsky*, *J.*, following an evidentiary hearing, granted the defendants' motions to dismiss and rendered judgment thereon, and the plaintiffs appealed to the Appellate Court, which denied the motion to dismiss the appeal as moot filed by the defendant Northeast Nuclear Energy Company et al.; subsequently, the appeal was transferred to this court. *Appeal dismissed in part; affirmed in part.*

Nancy Burton, for the appellants (plaintiffs).

Mark P. Kindall, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, attorney general, and *Kimberly P. Massicotte*, assistant attorney general, for the appellee (named defendant).

Linda L. Morkan, with whom, on the brief, were *James P. Ray* and *Joey Lee Miranda*, for the appellee (defendant Dominion Nuclear Connecticut, Inc.).

Elizabeth C. Barton, with whom, on the brief, were *Harold M. Blinderman* and *Sharon M. Seligman*, for the appellee (defendant Northeast Nuclear Energy Company).

Opinion

ZARELLA, J. The principal issue in this appeal is whether the plaintiffs[1] have standing under General

[1] The plaintiffs in this case are Connecticut Coalition Against Millstone, an organization based in Mystic, advocating the use of safe and renewable

Statutes § 22a-16[2] to bring an action directly in the Superior Court against the defendants[3] for declaratory and injunctive relief from alleged violations of the federal Clean Water Act, 33 U.S.C. § 1251 et seq. The plaintiffs claim that the operations of the Millstone Nuclear Power Generating Station (Millstone) have resulted in unreasonable pollution and should be halted because Millstone has been functioning for several years without a valid water discharge permit and emergency authorization. The trial court granted the defendants' motions to dismiss the plaintiffs' complaint on the ground that the plaintiffs lacked standing to bring their action directly in the Superior Court and rendered judgment thereon. The plaintiffs appealed from the judgment of dismissal to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. We affirm the judgment of the trial court.

energy; STAR Foundation, a nonprofit corporation based in East Hampton, New York, representing Long Island residents concerned about the toxic effects of nuclear contamination; New York State Assemblyman Fred Thiele; and North Fork Environmental Council, based in Long Island. North Fork Environmental Council is not a party to this appeal.

[2] General Statutes § 22a-16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business . . . for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

[3] The defendants are Arthur J. Roque, Jr., commissioner of environmental protection; Northeast Nuclear Energy Company; and Dominion Nuclear Connecticut, Inc.

The present action is one of several actions brought over the course of the last three years by organizations and individuals challenging the validity of water discharge authorizations issued by the state department of environmental protection (department) with respect to the operation of the Millstone facility in Waterford.[4] Prior to the commencement of this action, Millstone was operated by the defendant Northeast Nuclear Energy Company (Northeast). The facility utilizes seawater from Niantic Bay to cool its three nuclear reactors and discharges the heated water containing radioactive and toxic wastes into Long Island Sound.

The operations of the facility require department approval in the form of a water discharge permit,[5] which is valid for five years. The department last issued a discharge permit to Northeast on December 14, 1992, with an expiration date of December 13, 1997. Northeast submitted a timely permit renewal application on June 13, 1997.[6] The application is still pending, but Millstone continues to operate pursuant to General Statutes § 4-182 (b), which provides in relevant part that "[w]hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency . . . ."

[4] These actions include *Fish Unlimited* v. *Northeast Utilities Service Co.*, 254 Conn. 1, 756 A.2d 262 (2000) (*Fish I*), and *Fish Unlimited* v. *Northeast Utilities Service Co.*, 254 Conn. 21, 755 A.2d 860 (2000) (*Fish II*).

[5] Any person or municipality must obtain a national pollution discharge elimination permit prior to discharging any substance into the waters of the United States or Connecticut under the federal Clean Water Act, 33 U.S.C. § 1342 and General Statutes § 22a-430. In Connecticut, the department is responsible for issuing the federal and state discharge permits.

[6] General Statutes § 22a-430 (c) provides in relevant part: "An application for a renewal of a permit which expires after January 1, 1985, shall be filed with the commissioner at least one hundred eighty days before the expiration of such permit. . . ."

Millstone also discharges into the public waters certain toxic substances that are not covered by the 1992 permit.[7] On October 13, 2000, the department issued an emergency authorization pursuant to General Statutes § 22a-6k[8] that covers the additional discharges. The emergency authorization provides that it will expire "upon a final determination on [Northeast's] application for reissuance of [its water permit] or upon the [commissioner of environmental protection's] determination that the requirements of Section 22a-6k of the Connecticut General Statutes are no longer applicable to the activities authorized."

In February, 2001, the defendant Dominion Nuclear Connecticut, Inc. (Dominion), in conjunction with its efforts to acquire the Millstone facility,[9] applied to the department for the transfer of environmental permits issued to Northeast. On March 8, 2001, the plaintiffs commenced the present action in the judicial district of Hartford seeking: (1) a judgment declaring that the

[7] The additional toxic substances that are not covered by the 1992 permit include hydrazine and ethanolomine.

[8] General Statutes § 22a-6k provides in relevant part: "(a) The Commissioner of Environmental Protection may issue an emergency authorization for any activity regulated by the commissioner under section . . . 22a-430 . . . provided he finds that (1) such authorization is necessary to prevent, abate or mitigate an imminent threat to human health or the environment; and (2) such authorization is not inconsistent with the federal Water Pollution Control Act . . . . Such emergency authorization shall be limited by any conditions the commissioner deems necessary to adequately protect human health and the environment. . . ."

[9] Prior to submission of the application, Connecticut Coalition Against Millstone (CCAM) had sent a letter and notice of intervention to the commissioner requesting that the department commence an administrative proceeding to consider the anticipated application. The commissioner denied CCAM's request for an administrative proceeding and intervention, however, on the ground that a permit transfer does not require an administrative proceeding and hearing, but that, in the event that the permit was transferred, CCAM could request intervention in any subsequent administrative proceeding conducted with respect to renewal of the permit. The plaintiffs subsequently intervened in the permit renewal proceedings.

1992 permit had expired, that the emergency authorization was invalid and that neither the permit nor the authorization could be transferred; (2) a temporary and permanent injunction to prevent the continued operation of the Millstone facility; and (3) a temporary and permanent injunction to prevent the named defendant, Arthur J. Rocque, Jr., commissioner of environmental protection (commissioner), from approving the transfer of the permit and emergency authorization from Northeast to Dominion. According to the plaintiffs, the purpose of the requested relief was to protect "the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . ."

The plaintiffs' requests for relief were based in part on allegations that the permit renewal application was invalid because the three nuclear reactors were shut down at the time the application was filed. Consequently, the Millstone facility was not engaged in operations of a continuing nature as required for application approval under § 4-182 (b). The plaintiffs also alleged that the emergency authorization had been issued in violation of the letter and spirit of the law because its issuance presumed the validity of the underlying permit and it was one in a series of authorizations routinely issued to Northeast over a period of years without notice to the public and without public participation.[10]

[10] Paragraphs eight, nine and ten of the plaintiffs' complaint allege that Millstone's operations generate pollution. Paragraphs eleven through seventeen and paragraph twenty allege that the operations of the facility require a permit, that the permit expired in December, 1997, that the permit has not been renewed and that Northeast filed an application for renewal of the permit 180 days prior to its expiration. Paragraph twenty-one alleges that the renewal application was invalid under § 4-182a (b) because Millstone was shut down and was not engaged in activities of a continuing nature at the time the application was filed. Paragraphs twenty-two through thirty allege that an emergency authorization improperly was issued to Northeast. Paragraphs thirty-five and thirty-six allege that the commissioner has no legal authority to approve the continued operation of Millstone following expiration of the 1992 permit and to issue the emergency authorizations.

On March 8, 2001, the plaintiffs also filed a separate application for a temporary injunction to enjoin the transfer of the permit and emergency authorization from Northeast to Dominion. Because of the imminent sale of Millstone to Dominion, the court ordered that a hearing be held prior to March 31, 2001, on the plaintiffs' application for a temporary injunction. On March 15, 2001, Northeast filed an application to transfer the case to the complex litigation docket in Norwich. The chief administrative judge of the civil division and presiding criminal judge for the judicial district of Hartford determined that the case should be transferred as requested, but scheduled the injunction hearing for March 27, 2001, in the judicial district of Hartford, as no judge was available in the Norwich court to hold the hearing prior to the end of March.

On March 29, 2001, following the hearing in Hartford, the court, *Schuman*, *J.*, issued a written opinion denying the plaintiffs' application for a temporary injunction. That same day, the department approved the transfer of all environmental permits and emergency authorizations from Northeast to Dominion. On March 30, 2001, the plaintiffs petitioned this court, pursuant to General Statutes § 52-265a, for certification to take a direct appeal from the trial court's denial of the application for a temporary injunction. The petition was denied on April 3, 2001. Meanwhile, by order dated March 27, 2001, the case was transferred to the complex litigation docket in Norwich.[11] Four days later, Northeast closed on the anticipated sale of Millstone to Dominion.

Paragraphs thirty-nine and forty allege that the activities of Millstone result, or are likely to result, in unreasonable pollution and that the action is brought pursuant to § 22a-16 for the protection of the public trust in the air, water and other natural resources from unreasonable pollution.

[11] The transfer order stated that objections to the order should be filed with the complex litigation docket in Norwich within twenty days. The plaintiffs filed an objection with the Hartford Superior Court on April 14, 2001. On April 17, 2001, the presiding judge for the complex litigation docket in the judicial district of Norwich, apparently unaware that the plaintiffs

While those proceedings were pending, all three defendants filed motions to dismiss the case,[12] claiming that the plaintiffs lacked standing under § 22a-16[13] of the Connecticut Environmental Protection Act, General Statutes § 22a-14 et seq. (CEPA), and had failed to exhaust their administrative remedies. The Superior Court in the judicial district of Hartford heard arguments on the motions to dismiss as well as on the motion for a temporary injunction at the March 27, 2001 hearing. Thereafter, the court issued a briefing schedule on the motions to dismiss in a footnote to its written opinion denying the application for a temporary injunction. Both sides filed briefs during the first two weeks in April, 2001. After the case was transferred to the complex litigation docket in Norwich, the court held a two day evidentiary hearing on the motions to dismiss. On July 19, 2001, the court, *Koletsky, J.*, granted the motions to dismiss in a ruling from the bench.

The court determined that the plaintiffs had "no standing to bring a § 22a-16 action to challenge either the transfer of the permit, the validity of the emergency authorization or the validity of the extension of the underlying 1992 permit with the expiration date of 1997," under the principles espoused in *Fish Unlimited* v. *Northeast Utilities Service Co.*, 254 Conn. 21, 755 A.2d 860 (2000) (*Fish II*). The court explained: "[T]here is no question that [*Fish II*] requires the holding that the § 22a-16 action brought by the plaintiffs cannot be brought in an area expressly placed . . . within the

had filed an objection in the Hartford court, notified the parties that the case had been transferred. The Norwich court discovered that the objection had been filed, when the file was transferred sometime after April 17, 2001. The court then ordered a hearing on May 10, 2001, but ultimately overruled the plaintiffs' objections in a written opinion issued on June 20, 2001.

[12] The commissioner and Northeast filed motions to dismiss the case on March 19, 2001. Dominion filed a motion to dismiss the case on March 21, 2001.

[13] See footnote 2 of this opinion.

exclusive domain of the commissioner . . . .'' The court further explained: ''With respect to the challenges to the validity of the 1992 permit and its extension and the emergency authorizations, the court finds and holds that the plaintiffs lack standing to bring a § 22a-16 action in this proceeding or in this area which is committed by the legislature to the exclusive domain of the . . . commissioner. . . . Contrary to the plaintiffs' argument, the statutory scheme is logical, straightforward and uncomplicated. Section 22a-16 actions are not available where the commissioner . . . has the responsibility to act. When the commissioner . . . acts, there is an administrative appeal from that. There is still, the court opines, no § 22a-16 action after action by the commissioner, should the commissioner issue a permit to Millstone. . . . [A]s I said before, standing is not there.'' After the court granted the motions to dismiss, it denied the plaintiffs' motion for reargument, and this appeal followed.

The plaintiffs claim on appeal that the court improperly (1) granted the defendants' motions to dismiss their complaint for (A) lack of standing under § 22a-16 and (B) failure to exhaust their administrative remedies, and (2) denied their application for a temporary injunction. The plaintiffs also claim that alleged procedural irregularities in the hearing proceedings on the motions to dismiss were ''prejudicial to the administration of justice.'' Because we agree with the trial court's ruling on the issue of standing, we do not reach the remaining issues raised in the appeal.

I

We first address the defendants' claim that the request of the plaintiffs for injunctive relief to enjoin the transfer of the permit and emergency authorization should be dismissed on the ground of mootness. The defendants point out that the commissioner long ago

approved the transfer of permits and authorizations and that, shortly thereafter, Northeast conveyed the Millstone facility to Dominion. The defendants therefore argue that there is no longer a controversy between the parties with regard to the transfers and the court can afford the plaintiffs no practical relief. Northeast further claims that the appeal should be dismissed insofar as it pertains to Northeast because Northeast retains no ownership or legal interest in the Millstone facility and has no control over the facility's current operations, and, thus, this court cannot provide the plaintiffs with any practical relief. We agree with the defendants on both claims of mootness.[14]

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the

[14] The defendants raised similar claims earlier in the proceedings. On May 3, 2002, prior to the transfer of the appeal to this court, Northeast and Dominion filed a motion with the Appellate Court seeking dismissal of the appeal on the ground of mootness. They argued that, even if the trial court should have granted the plaintiffs' motion for a temporary injunction, the commissioner's subsequent approval of the permit transfer, followed by the sale of the Millstone facility to Dominion, rendered it impossible for the court to grant the plaintiffs any practical relief. The Appellate Court denied the motion on July 17, 2002. Northeast filed a motion for reconsideration on July 26, 2002, arguing that it no longer owned or operated the facility and no longer held the related permits or authorizations, and, accordingly, a controversy no longer existed between the plaintiffs and Northeast. The Appellate Court denied the motion for reconsideration on September 11, 2002. In raising their present claims, the defendants do not seek to dismiss the appeal in its entirety, but only as to (1) the injunctive relief requested with respect to the permit transfer, and (2) Northeast in its capacity as a defendant. We note that the plaintiffs made no direct response in their briefs to the defendants' claims of mootness.

time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Giaimo* v. *New Haven*, 257 Conn. 481, 492–93, 778 A.2d 33 (2001).

Connecticut courts have rejected injunctive remedies on the ground of mootness where the issue before the court has been resolved or has lost its significance because of intervening circumstances. See *Waterbury Hospital* v. *Connecticut Health Care Associates*, 186 Conn. 247, 249–52, 440 A.2d 310 (1982) (court dismissed as moot plaintiff's request for injunctive relief to restrain picketing during strike because strike and picketing had ended while appeal was pending); *Daley* v. *Gaitor*, 16 Conn. App. 379, 381 n.2, 547 A.2d 1375 (court dismissed as moot plaintiff's request to enjoin city of Hartford from administering promotional examination to police officers following city's promotion of officers during pendency of appeal), cert. denied, 209 Conn. 824, 552 A.2d 430 (1988).

In the present case, following the court's denial of the application for a temporary injunction on March 29, 2001, the department approved the transfer of all environmental permits and authorizations from Northeast to Dominion. Two days later, Northeast conveyed the Millstone facility to Dominion. In light of the fact that the facility has been sold and that the permit and emergency authorization have long since been transferred, we conclude that the plaintiffs' request for injunctive relief to prevent the transfers from taking place is rendered moot. The plaintiffs' request for a judgment declaring that the permit and authorization may not be transferred also is rendered moot. Intervening circumstances have changed the legal landscape, a controversy no longer exists between the parties and

the court cannot grant the plaintiffs any practical relief. "[W]here the question presented is purely academic, we must refuse to entertain the appeal." (Internal quotation marks omitted.) *Waterbury Hospital* v. *Connecticut Health Care Associates*, supra, 186 Conn. 250.

Connecticut courts also have dismissed cases on the ground of mootness where the court can offer no practical relief because the position of one of the parties has changed. *Shays* v. *Local Grievance Committee*, 197 Conn. 566, 570–71, 499 A.2d 1158 (1985) (appeal regarding legality of sentence dismissed as moot because plaintiff completed sentence imposed while appeal was pending). In this case, Northeast's position changed when it sold the Millstone facility to Dominion. Northeast does not now own or operate the facility or hold the attendant permits and authorizations. Consequently, Northeast has no remaining connection with Millstone and a controversy can no longer be said to exist between Northeast and the plaintiffs. We therefore dismiss the appeal insofar as it relates to Northeast because the appeal has been rendered moot.

II

We next address the issue of the plaintiffs' standing. The plaintiffs claim that the trial court improperly granted the defendants' motions to dismiss their complaint because § 22a-16 affords them standing to bring an action alleging unreasonable pollution for lack of a valid permit directly in the Superior Court. The defendants respond that past Supreme Court decisions have held that standing is not available under § 22a-16 to commence such claims directly in the Superior Court. We agree with the defendants.

We begin our analysis by setting forth the appropriate standard of review. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial

court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by the focus on whether the plaintiff is the proper party to assert the claim at issue. . . .

"Two broad yet distinct categories of aggrievement exist, classical and statutory. . . . Classical

aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the agency's decision has specially and injuriously affected that specific personal or legal interest. . . . Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . .

"Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Citations omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 485–87, 815 A.2d 1188 (2003).

"Traditionally, citizens seeking to protect the environment were required to show specific, personal aggrievement to attain standing to bring a legal action. . . . The Connecticut Environmental Protection Act; General Statutes § 22a-1 et seq.; however, waives the aggrievement requirement in two circumstances. First, any private party, including a municipality, without first having to establish aggrievement, may seek injunctive relief in court for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . . General Statutes § 22a-16. Second, any person or other entity, without first having to establish aggrievement, may intervene in any administrative proceeding challenging conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state. General Statutes § 22a-19 (a)." (Citation omitted; inter-

nal quotation marks omitted.) *Fish II*, supra, 254 Conn. 31.

In concluding that the plaintiffs lacked standing to bring their complaint directly in the Superior Court pursuant to § 22a-16, the trial court relied on our reasoning in *Fish II*, a case very similar to the present case. All of the plaintiffs[15] and one of the defendants[16] in the present case were parties in *Fish II*. Furthermore, the dispositive issue in *Fish II*, as here, was whether the plaintiffs had standing under § 22a-16 to commence an action in the Superior Court seeking (1) injunctive relief to prevent the operation of the Millstone facility and (2) a judgment declaring that the water discharge permit was invalid.[17] See id., 22–23.

Our analysis of the standing issue in *Fish II* was guided by our decisions in two earlier cases, *Connecticut Fund for the Environment, Inc.* v. *Stamford*, 192 Conn. 247, 470 A.2d 1214 (1984), and *Middletown* v. *Hartford Electric Light Co.*, 192 Conn. 591, 473 A.2d 787 (1984). In *Connecticut Fund for the Environment, Inc.*, the plaintiffs appealed to the Superior Court from a decision of the defendant Stamford environmental protection board approving an application to develop a large tract of land for use as a regional postal facility. *Connecticut Fund for the Environment, Inc.* v. *Stamford*, supra, 248. The environmental protection board

[15] There also were four additional plaintiffs in *Fish II*: Fish Unlimited, a national clean water fisheries conservation organization based in Shelter Island, New York; Don't Waste Connecticut, an environmental group based in New Haven; the town of East Hampton, New York; and the Green Party of Connecticut. See *Fish II*, supra, 254 Conn. 22 n.1.

[16] The two defendants in *Fish II* were Northeast and its parent company, Northeast Utilities Service Company. Northeast was involved in the management and operation of the three nuclear reactors. See *Fish II*, 254 Conn. 23 n.3.

[17] The plaintiffs in *Fish II* did not seek a declaratory judgment and injunctive relief to prevent the transfer of the permit and emergency authorization from Northeast to Dominion, as the plaintiffs do here.

was the city agency responsible for regulating activities affecting wetlands and watercourses in Stamford under the Inland Wetlands and Watercourses Act, General Statutes § 22a-36 et seq. Id. The plaintiffs, one of whom had intervened in the proceeding pursuant to General Statutes § 22a-19, claimed, inter alia, that the board had not considered air pollution, noise pollution and other environmental problems created by increased traffic that would be generated by the new development. Id., 251. The trial court dismissed the appeal.

In affirming the trial court's judgment, we concluded that "[s]ection 22a-19, which authorizes any person to intervene in any administrative proceeding and to raise therein environmental issues must be read in connection with the legislation which defines the authority of the particular administrative agency. Section 22a-19 is not intended to expand the jurisdictional authority of an administrative body whenever an intervenor raises environmental issues. Thus, an inland wetland agency is limited to considering only environmental matters which impact on inland wetlands. Other environmental impacts must be raised before other appropriate administrative bodies, if any, or in their absence by the institution of an independent action pursuant to § 22a-16. . . . [G]eneral environmental matters [involving air and noise pollution and environmental problems created by increased traffic] were not relevant to the proceedings before [the environmental protection board] and therefore its refusal to entertain comment or evidence of a noninland wetland nature was appropriate."[18] Id., 250–51.

[18] The principle that § 22a-19 does not expand the authority of an administrative body to consider environmental issues outside its jurisdiction and that, in such cases, an independent action may be brought pursuant to § 22a-16, has been affirmed in subsequent decisions of this court. *Connecticut Water Co.* v. *Beausoleil*, 204 Conn. 38, 46, 526 A.2d 1329 (1987); *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 155, 788 A.2d 1158 (2002); *Fort Trumbull Conservancy, LLC* v. *Alves*, supra, 262 Conn. 486–87.

Shortly thereafter, we issued our decision in *Middletown*, in which we employed similar logic to affirm the trial court's judgment that the plaintiffs lacked standing under § 22a-16 to seek an injunctive remedy against the defendants in the Superior Court. The *Middletown* plaintiffs had sought to enjoin the defendant utility company and its parent company from proceeding with a plan to burn contaminated mineral oil containing polychlorinated biphenyls (PCBs) at an electric generating plant, even though the defendants had obtained the approvals required for the disposal of substances containing PCBs from the department and from the United States Environmental Protection Agency. *Middletown* v. *Hartford Electric Light Co.*, supra, 192 Conn. 593–94. The trial court dismissed the complaint, and the plaintiffs appealed to this court from the judgment of dismissal. Id., 594.

The plaintiffs in *Middletown* claimed that they had standing under § 22a-16 to seek an injunction to preclude the proposed burning of oils containing PCBs on the basis of the defendants' "failure to obtain a variety of approvals and permits" including a water discharge permit under General Statutes § 22a-430. Id., 595. We rejected the plaintiffs' claim in reliance on our decision in *Connecticut Fund for the Environment, Inc.* Id., 597.

We first noted that § 22a-16 "permits any private party, including a municipality, to seek injunctive relief 'for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.' We have recently concluded, however . . . that invocation of [CEPA] is not an open sesame for standing to raise environmental claims with regard to any and all environmental legislation. In *Connecticut Fund for the Environment, Inc.* v. *Stamford*, [supra, 192 Conn. 247], we held that § 22a-19 of [CEPA], which permits any person, on the filing of a verified pleading, to intervene in any

administrative proceeding and to raise therein environmental issues 'must be read in connection with the legislation which defines the authority of the particular administrative agency.' " *Middletown* v. *Hartford Electric Light Co.*, supra, 192 Conn. 596–97. We then stated that the same principle that had informed our holding in *Connecticut Fund for the Environment, Inc.*, namely, that § 22a-19 did not expand the jurisdictional authority of an administrative body whenever an intervenor raised environmental issues, was applicable "to bar the [plaintiff] city's standing under the licensing statutes. The trial court was therefore correct in concluding that § 22a-16 did not provide the plaintiffs with standing under any statute other than [CEPA] itself." Id., 597.

We had no further occasion to address the issue of whether § 22a-16 confers standing to bring claims of unreasonable pollution under the licensing statutes until *Fish II*, where we affirmed our holding in *Middletown*. *Fish II*, supra, 254 Conn. 24. After reviewing our reasoning in *Middletown*, we concluded: "[T]he plaintiffs seek to use § 22a-16 to afford standing to raise permitting claims governed by § 22a-430. The department, however, has statutory and regulatory authority to issue water discharge permits, to determine the completeness of renewal applications and to pursue any one of several remedies if it concludes that a discharge is creating unreasonable pollution or is occurring without a valid permit. . . . Thus, we conclude that the plaintiffs lack standing to bring this action pursuant to § 22a-16." (Citation omitted.) *Fish II*, supra, 254 Conn. 32–34.

In the present case, we also conclude that the plaintiffs lack standing to bring their complaint pursuant to § 22a-16. We have stated that "one of the basic purposes of [CEPA] is to give persons standing to bring actions to protect the environment and standing is conferred

only to protect the natural resources of the state from pollution or destruction." *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 499, 400 A.2d 726 (1978). Yet, here, the plaintiffs' claim of unreasonable pollution is based upon allegations that: (1) the 1992 permit became invalid on December 14, 1997, the day it expired, and has remained invalid since that time because the facility was not engaged in operations of a continuing nature as contemplated under § 4-182a (b) when the permit renewal application was filed; and (2) the issuance of the "emergency" authorization violated the letter and spirit of § 22a-6k because it was one in a series of authorizations *routinely* issued to Northeast over a period of years and, hence, did not address an "imminent threat to human health or the environment . . . ." General Statutes § 22a-6k (a) (1). Allegations of improper decisions by the commissioner for failure to comply with the statutory requirements regarding permit renewal proceedings and emergency authorizations cannot be construed as anything other than a licensing claim under § 22a-430.[19] Accordingly, following our

[19] General Statutes § 22a-430 provides in relevant part: "Permit for new discharge. Regulations. Renewal. Special category permits or approvals. Limited delegation. General permits. (a) No person or municipality shall initiate, create, originate or maintain any discharge of water, substance or material into the waters of the state without a permit for such discharge issued by the commissioner. Any person who initiated, created or originated a discharge prior to May 1, 1967, and any municipality which initiated, created or originated a discharge prior to April 10, 1973, for which a permit has not been issued pursuant to this section, shall submit an application for a permit for such discharge on or before July 1, 1987. Application for a permit shall be on a form prescribed by the commissioner, shall include such information as the commissioner may require and shall be accompanied by a fee of twenty-five per cent more than the amount established in regulations in effect on July 1, 1990. On and after July 1, 1991, such fees shall be as prescribed by regulations adopted by the commissioner in accordance with chapter 54. The commissioner shall not issue or renew a permit unless such issuance or renewal is consistent with the provisions of the federal Clean Water Act (33 USC 1251 et seq.).

"(b) The commissioner, at least thirty days before approving or denying a permit application for a discharge, shall publish once in a newspaper having a substantial circulation in the affected area notice of (1) the name

established precedent in *Middletown* and *Fish II*, we

of the applicant; (2) the location, volume, frequency and nature of the discharge; (3) the tentative decision on the application, and (4) additional information the commissioner deems necessary to comply with the federal Clean Water Act (33 USC 1251 et seq.). There shall be a comment period following the public notice during which period interested persons and municipalities may submit written comments. After the comment period, the commissioner shall make a final determination either that (A) such discharge would not cause pollution of any of the waters of the state, in which case he shall issue a permit for such discharge, or (B) after giving due regard to any proposed system to treat the discharge, that such discharge would cause pollution of any of the waters of the state, in which case he shall deny the application and notify the applicant of such denial and the reasons therefor, or (C) the proposed system to treat such discharge will protect the waters of the state from pollution, in which case he shall, except as provided pursuant to subsection (j) of this section, require the applicant to submit plans and specifications and such other information as he may require and shall impose such additional conditions as may be required to protect such water, and if the commissioner finds that the proposed system to treat the discharge, as described by the plans and specifications or such other information as may be required by the commissioner pursuant to subsection (j) of this section, will protect the waters of the state from pollution, he shall notify the applicant of his approval and, when such applicant has installed such system, in full compliance with the approval thereof, the commissioner shall issue a permit for such discharge, or (D) the proposed system to treat such discharge, as described by the plans and specifications, will not protect the waters of the state, in which case he shall promptly notify the applicant that its application is denied and the reasons therefor. . . . The commissioner shall, by regulations adopted in accordance with the provisions of chapter 54, establish procedures, criteria and standards as appropriate for determining if (I) a discharge would cause pollution to the waters of the state, and (II) a treatment system is adequate to protect the waters of the state from pollution. Such procedures, criteria and standards may include schedules of activities, prohibitions of practices, operating and maintenance procedures, management practices and other measures to prevent or reduce pollution of the waters of the state, provided the commissioner in adopting such procedures, criteria and standards shall consider best management practices. The regulations shall specify the circumstances under which procedures, criteria and standards for activities other than treatment will be required. For the purposes of this section, 'best management practices' means those practices which reduce the discharge of waste into the waters of the state and which have been determined by the commissioner to be acceptable based on, but not limited to, technical, economic and institutional feasibility. Any applicant, or in the case of a permit issued pursuant to the federal Water Pollution Control Act, any person or municipality, who is aggrieved by a decision of the commissioner

agree with the trial court's conclusion that the plaintiffs

where an application has not been given a public hearing shall have the right to a hearing and an appeal therefrom in the same manner as provided in sections 22a-436 and 22a-437. Any applicant, or in the case of a permit issued pursuant to the federal Water Pollution Control Act, any person or municipality, who is aggrieved by a decision of the commissioner where an application has been given a public hearing shall have the right to appeal as provided in section 22a-437. The commissioner may, by regulation, exempt certain categories, types or sizes of discharge from the requirement for notice prior to approving or denying the application if such category, type or size of discharge is not likely to cause substantial pollution. The commissioner may hold a public hearing prior to approving or denying any application if in his discretion the public interest will be best served thereby, and he shall hold a hearing upon receipt of a petition signed by at least twenty-five persons. Notice of such hearing shall be published at least thirty days before the hearing in a newspaper having a substantial circulation in the area affected.

"(c) The permits issued pursuant to this section shall be for a period not to exceed five years, except that any such permit shall be subject to the provisions of section 22a-431. Such permits: (1) Shall specify the manner, nature and volume of discharge; (2) shall require proper operation and maintenance of any pollution abatement facility required by such permit; (3) may be renewable for periods not to exceed five years each in accordance with procedures and requirements established by the commissioner; and (4) shall be subject to such other requirements and restrictions as the commissioner deems necessary to comply fully with the purposes of this chapter, the federal Water Pollution Control Act and the federal Safe Drinking Water Act. An application for a renewal of a permit which expires after January 1, 1985, shall be filed with the commissioner at least one hundred eighty days before the expiration of such permit. The commissioner, at least thirty days before approving or denying an application for renewal of a permit, shall publish once in a newspaper having substantial circulation in the area affected, notice of (A) the name of the applicant; (B) the location, volume, frequency and nature of the discharge; (C) the tentative decision on the application, and (D) such additional information the commissioner deems necessary to comply with the federal Clean Water Act (33 USC 1251 et seq.). There shall be a comment period following the public notice during which period interested persons and municipalities may submit written comments. After the comment period, the commissioner shall make a final determination that (i) continuance of the existing discharge would not cause pollution of the waters of the state, in which case he shall renew the permit for such discharge, or (ii) continuance of the existing system to treat the discharge would protect the waters of the state from pollution, in which case he shall renew a permit for such discharge, (iii) the continuance of the existing system to treat the discharge, even with modifications, would not protect the waters of the state from pollution, in which case he shall

lack standing under § 22a-16 to bring their claim directly

promptly notify the applicant that its application is denied and the reasons therefor, or (iv) modification of the existing system or installation of a new system would protect the waters of the state from pollution, in which case he shall renew the permit for such discharge. Such renewed permit may include a schedule for the completion of the modification or installation to allow additional time for compliance with the final effluent limitations in the renewed permit provided (I) continuance of the activity producing the discharge is in the public interest; (II) the interim effluent limitations in the renewed permit are no less stringent than the effluent limitations in the previous permit; and (III) the schedule would not be inconsistent with the federal Water Pollution Control Act. No permit shall be renewed unless the commissioner determines that the treatment system adequately protects the waters of the state from pollution. Any applicant, or in the case of a permit issued pursuant to the federal Water Pollution Control Act, any person or municipality, who is aggrieved by a decision of the commissioner where an application for a renewal has not been given a public hearing shall have the right to a hearing and an appeal therefrom in the same manner as provided in sections 22a-436 and 22a-437. Any applicant, or in the case of a permit issued pursuant to the federal Water Pollution Control Act, any person or municipality, who is aggrieved by a decision of the commissioner where an application for a renewal has been given a public hearing shall have the right to appeal as provided in section 22a-437. Any category, type or size of discharge that is exempt from the requirement of notice pursuant to subsection (b) of this section for the approval or denial of a permit shall be exempt from notice for approval or denial of a renewal of such permit. The commissioner may hold a public hearing prior to approving or denying an application for a renewal if in his discretion the public interest will be best served thereby, and he shall hold a hearing upon receipt of a petition signed by at least twenty-five persons. Notice of such hearing shall be published at least thirty days before the hearing in a newspaper having a substantial circulation in the area affected.

"(d) If the commissioner finds that any person or municipality has initiated, created or originated or is maintaining any discharge into the waters of the state without a permit as required in subsection (a) hereof, or in violation of such a permit, he may issue an order to abate pollution which shall include a time schedule for the accomplishment of the necessary steps leading to the abatement of such pollution, or notwithstanding any request for a hearing pursuant to section 22a-436 or the pendency of an appeal therefrom, he may request the Attorney General to bring an action in the superior court for the judicial district of Hartford to enjoin such discharge by such person or municipality until the person or municipality has received a permit from the commissioner or has complied with a permit which the commissioner has issued pursuant to this section. Any such action brought by the Attorney General shall have precedence in the order of trial as provided in section 52-191.

in the Superior Court. As we stated in *Fish II*, "[t]he plaintiffs . . . cannot use § 22a-16 as an 'open sesame' to litigate environmental issues that are governed by § 22a-430, and which clearly have been placed within the exclusive domain of the department. *Middletown* v. *Hartford Electric Light Co.*, supra, 192 Conn. 597." *Fish II*, supra, 254 Conn. 34.

The plaintiffs claim that we should reevaluate our present interpretation of § 22a-16 with respect to actions brought pursuant to the licensing statutes, because the dissent in *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 170, 788 A.2d 1158 (2002) (*Borden*, *J.*, dissenting), suggests that the time has arrived for this court to revisit the *Middletown* holding. We disagree.

The dissent in *Nizzardo* raised the question of whether standing under § 22a-16 had been construed too narrowly in *Middletown*, stating that "it was self-contradictory to hold, as we did in *Middletown*, that one has standing under § 22a-16 to raise environmental concerns only under [CEPA] itself, and that, when one attempts to bring such an independent action, one has no standing to do so. In other words, it is difficult to see why the action that was held to be without standing in *Middletown* was not an action under [CEPA] itself. The majority [in *Nizzardo*], in relying on and reaffirming the holding of *Middletown*, does not explain this self-contradiction." *Nizzardo* v. *State Traffic Commission*, supra, 259 Conn. 195 (*Borden*, *J.*, dissenting).

The majority in *Nizzardo* concluded, and we continue to maintain, that the claim in *Middletown* was

"(e) When the commissioner determines that any person or municipality has complied with an order issued pursuant to section 22a-428, 22a-431 or 22a-432, he may issue a permit which shall thereafter be deemed equivalent to a permit issued under subsection (b) of this section, provided a public hearing shall not be required prior to issuing such permit unless required by the federal Water Pollution Control Act and the federal Safe Drinking Water Act. . . ."

brought under the licensing statutes. Id., 152–53. Indeed, it was precisely *because* the plaintiffs claimed that the defendants had failed to obtain required permits that we were persuaded in *Middletown* that the plaintiffs lacked standing under § 22a-16. *Middletown* v. *Hartford Electric Light Co.*, supra, 192 Conn. 596.

Moreover, construing the plaintiffs' claim of an invalid permit and emergency authorization as an independent claim of unreasonable pollution under § 22a-16 would effectively remove from the department and give to the court the department's authority under § 22a-430 to make decisions regarding permit applications. It is not our function to take such a step; that determination rests with the legislature.

The plaintiffs next contend that the commissioner has instituted numerous actions pursuant to § 22a-16 in which this court has held that unlawful activities that occur in the absence of permits or in violation of statutes, regulations and abatement orders create unreasonable pollution under CEPA. See *Keeney* v. *Old Saybrook*, 237 Conn. 135, 140–41, 676 A.2d 795 (1996) (claim alleged unreasonable pollution of state waters for town's failure to comply with pollution abatement orders); *Commissioner of Environmental Protection* v. *Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993) (claim alleged unreasonable pollution for failure to obtain permit for operation of solid waste facility that generated leachate, thereby degrading groundwater); *Keeney* v. *L & S Construction*, 226 Conn. 205, 209, 626 A.2d 1299 (1993) (claim alleged unreasonable pollution for depositing construction debris in close proximity to area water supply in absence of permit). In the cases cited by the plaintiffs, however, the claims of unreasonable pollution were directed primarily to the polluting activity itself, and not, as here, to the validity of an existing permit or

authorization, a condition that does *not* directly threaten the public trust in the air, water and other natural resources of the state under § 22a-16.

We stated in *Keeney* v. *Old Saybrook*, supra, 237 Conn. 161, which the plaintiffs themselves cite, that "to establish a prima facie case under § 22a-16, the plaintiff must establish that the conduct of the defendant, acting alone, or in combination with others, has, or is reasonably likely unreasonably to pollute . . . the public trust in the . . . water of the state." (Internal quotation marks omitted.) Allegations of a flawed licensing proceeding do not meet that test.[20] As the defendants persuasively argue, a claim under CEPA that conduct causes unreasonable pollution is not the same as a claim that conduct fails to comply with the requirements of

[20] An even more compelling example of the difference between a permitting claim and a claim of unreasonable pollution under § 22a-16 can be found in *Fish Unlimited* v. *Northeast Utilities Service Co.*, 254 Conn. 1, 756 A.2d 262 (2000) (*Fish I*). All of the parties in *Fish I* were parties in *Fish II*, and several, including STAR Foundation, North Fork Environmental Council, New York Assemblyman Fred Thiel and Northeast, are also parties in the present case.

The plaintiffs in *Fish I* sought to enjoin the defendants from restarting unit 2, one of the three nuclear generating units in the Millstone facility, because the once-through condenser cooler water system in place at unit 2 allegedly had caused " 'unreasonable pollution, impairment and destruction of the public trust in the air, water and other natural resources of the state within the meaning of . . . General Statutes § 22a-16.' " *Fish I*, supra, 254 Conn. 3, 8. The plaintiffs' request for relief was based on allegations that the system contributed significantly to "the virtual demise of the winter flounder population in the Niantic River, and to the serious depletion of other aquatic species that are entrained and impinged at the unit 2 intake structure." Id., 8–9. The plaintiffs thus sought not only to enjoin the restart of unit 2, but to require conversion of the once-through cooling system to a closed cooling system and the installation of a fish return system to reduce the alleged environmental damage. Id., 9–10. The plaintiffs in *Fish I* therefore made a claim of conduct with direct environmental consequences, unlike the plaintiffs in the present case, whose claim of unreasonable pollution is based on the fact that the facility is operating without a valid water discharge permit and emergency authorization.

other environmental statutes.[21] To illustrate the point, the fact that conduct may be permitted under the relevant environmental statute does not preclude a claim that the activity causes unreasonable pollution under CEPA, as when the alleged pollution exceeds the amount approved in the permit. Conversely, a claim that conduct is not properly authorized does not necessarily establish that the conduct causes unreasonable pollution under CEPA. Accordingly, the issues raised in the cases cited by the plaintiffs are different in kind from the issue raised here.

The plaintiffs also attempt to draw a distinction between the claim of unreasonable pollution in *Fish II* and their present claim of unreasonable pollution. They assert that the claim in *Fish II* related to the validity of the permit, whereas the claim in this case alleges serious "ongoing pollution" that is unlawful because it is "unpermitted." We do not agree that the present claim of "ongoing pollution" differs in any significant respect

[21] The plaintiffs argue that *Waterbury* v. *Washington*, 260 Conn. 506, 800 A.2d 1102 (2002), established that, under CEPA, pollution is "unreasonable" when it is illegal. In *Waterbury*, we stated: "[W]hen, as in the present case . . . the legislature has enacted an environmental legislative and regulatory scheme specifically designed to govern the particular conduct that is the target of the action, that scheme gives substantive content to the meaning of the word 'unreasonable' as used in the context of an independent action under CEPA. Put another way, when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." Id., 557. We do not agree with the plaintiffs that the quoted language can be construed to support their claim that they have standing under § 22a-16 to bring the present action. The "conduct" to which we referred in *Waterbury* involved the diversion of waters from a river, which had a direct effect on the environment. Here, the claim of unreasonable pollution is based on allegations that Millstone is operating without a valid permit and emergency authorization, a claim of improper conduct under the licensing statutes that does not directly threaten the environment. The alleged improprieties in the present case were, therefore, not the type of conduct that we were contemplating when we decided *Waterbury*.

from the claim in *Fish II* of an invalid permit. The plaintiffs in this case always have characterized their claim of "ongoing pollution" as a claim of unreasonable pollution on the ground that Millstone has been operating without a valid permit and emergency authorization.[22] Moreover, the claim of "ongoing pollution" cannot be considered in isolation, because it would not, without more, be actionable under § 22a-16, which allows claims to be brought only for protection from "*unreasonable* pollution . . . ." (Emphasis added.) General Statutes § 22a-16. Accordingly, we reject the argument that the claim of unreasonable pollution in *Fish II* is distinguishable from the claim of "ongoing" unreasonable pollution in the present case.

The plaintiffs next contend that they have standing to bring their claim under § 22a-16 because the legislature contemplated that issues of pollution in violation of the public trust might implicate regulatory or administrative proceedings. They argue that, pursuant to General Statutes § 22a-18, the court may, but need not, remand the parties to administrative, licensing or other proceedings to determine the legality of the defendants' conduct. The Superior Court thus is empowered to determine the legality of that conduct, separate and apart from the agency's own proceedings. We do not agree that the plaintiffs' have standing to raise their claim of an invalid permit pursuant to §§ 22a-16 and 22a-18.

[22] The plaintiffs state in their brief that their claim of "unreasonable and lawless pollution" is alleged in paragraphs eight, nine, ten, sixteen, seventeen, twenty-four, twenty-six, twenty-eight, twenty-nine, thirty and thirty-nine of the complaint. Those paragraphs include allegations of the polluting activity (eight, nine, and ten), allegations that the 1992 permit has expired (sixteen and seventeen), allegations that the emergency authorization is invalid (twenty-four, twenty-six and twenty-eight through thirty) and allegations that Millstone operations involve conduct that has, or is reasonably likely to have, the effect of unreasonably polluting the natural resources of the state (thirty-nine).

General Statutes § 22a-18 provides in relevant part: "(b) If administrative, licensing or other such proceedings are required or available to determine the legality of the defendant's conduct, the court *in its discretion* may remand the parties to such proceedings. . . ."[23] (Emphasis added.) We interpreted § 22a-16 in conjunction with § 22a-18 in *Waterbury* v. *Washington*, 260 Conn. 506, 800 A.2d 1102 (2002). In that case, the plaintiff city of Waterbury brought an action seeking a judgment declaring, inter alia, that it had not unreasonably

[23] General Statutes § 22a-18 provides: "(a) The court may grant temporary and permanent equitable relief, or may impose such conditions on the defendant as are required to protect the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.

"(b) If administrative, licensing or other such proceedings are required or available to determine the legality of the defendant's conduct, the court in its discretion may remand the parties to such proceedings. In so remanding the parties the court may grant temporary equitable relief where necessary for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction and the court shall retain jurisdiction of the action pending completion of administrative action for the purpose of determining whether adequate consideration by the agency has been given to the protection of the public trust in the air, water or other natural resources of the state from unreasonable pollution, impairment or destruction and whether the agency's decision is supported by competent material and substantial evidence on the whole record.

"(c) If the agency's consideration has not been adequate, and notwithstanding that the agency's decision is supported by competent material and substantial evidence on the whole record, the court shall adjudicate the impact of the defendant's conduct on the public trust in the air, water or other natural resources of the state in accordance with sections 22a-14 to 22a-20, inclusive.

"(d) Where, as to any administrative, licensing or other proceeding, judicial review thereof is available, the court originally taking jurisdiction shall maintain jurisdiction for purposes of judicial review.

"(e) The court may award any person, partnership, corporation, association, organization or other legal entity which maintains an action under section 22a-16 or intervenes as a party in an action for judicial review under section 22a-19, and obtains declaratory or equitable relief against the defendant, its costs, including reasonable costs for witnesses, and a reasonable attorney's fee."

polluted, impaired or destroyed the public trust, as provided in § 22a-16, by diverting water from the Shepaug River pursuant to a 1921 agreement with the town of Washington to increase Waterbury's public water supply. Id., 511–12. The defendants counterclaimed, alleging, inter alia, that the city's excessive diversion of the water had violated the act and breached the 1921 agreement. Id., 511, 522. The trial court found for the defendants on their counterclaim. Id., 519. The city appealed, asserting that the trial court lacked subject matter jurisdiction over the water diversion claim because the defendants had failed to exhaust their administrative remedies under the "minimum flow statutes," General Statutes §§ 26-141a through 26-141c. Id., 525.

On appeal, the city argued that the defendants' complaint was premised on the lack of flow in the Shepaug River and that, because the rate of flow is governed by the minimum flow statute, which is enforced by the department, the defendants were precluded under our holdings in *Middletown*, *Fish Unlimited* v. *Northeast Utilities Service Co.*, 254 Conn. 1, 756 A.2d 262 (2000) (*Fish I*), and *Fish II* requiring exhaustion of administrative remedies from bringing their action to the court until the department had addressed the issue. *Waterbury* v. *Washington*, supra, 260 Conn. 528, 538. We nonetheless concluded in *Waterbury* that, under § 22a-18, the court *may*, *in its discretion*, remand the parties to administrative proceedings that might be available to determine the legality of a defendant's conduct, and that the defendants need *not* exhaust their administrative remedies before bringing an independent action in the Superior Court pursuant to § 22a-16. Id., 537, 545. We also stated that, under the doctrine of "primary jurisdiction, which is embodied by § 22a-18 of CEPA, the court has discretion, and in certain cases should refer the case, or certain aspects of it, to the administra-

tive agency, yet retain jurisdiction for further action, if appropriate, under that section."[24] Id., 546.

The present case is distinguishable from *Waterbury*. In that case, the defendants' claim of excessive diversion of water was an allegation of direct harm to the environment. The court specifically observed: "To resolve the question of whether Waterbury's diversion of water from the Shepaug River violated CEPA, the trial court [would be] required to determine whether Waterbury's diversion was of such magnitude that it constituted, not merely an impairment, but an unreasonable impairment of the public trust in the river as a natural resource in violation of § 22a-16." Id., 522–23. Here, by contrast, the plaintiffs did not make an allegation of direct harm to the environment, but alleged

[24] We also discussed the matter of primary jurisdiction in *Fish I*, where the defendants had argued, in the alternative, that the plaintiffs' claims should be dismissed under that doctrine. See *Fish I*, supra, 254 Conn. 11 n.15. We stated in *Fish I* that "[t]he doctrine of primary jurisdiction . . . arises in cases in which a plaintiff, in the absence of a pending administrative proceeding, invokes the original jurisdiction of the court. . . . In this case, [the plaintiff] has intervened in the defendants' permit renewal proceeding before the department . . . [B]ecause an administrative action is pending, the primary jurisdiction doctrine does not apply." (Citations omitted.) We subsequently declared in *Waterbury* that "[p]rimary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. . . . [A] court may not refer a controversy within its jurisdiction to an agency under this doctrine where the agency itself lacks jurisdiction; the court's jurisdiction in such cases is exclusive." (Citation omitted; internal quotation marks omitted.) *Waterbury* v. *Washington*, supra, 260 Conn. 574. Accordingly, primary jurisdiction may be retained by the court, even after it decides to remand a case for administrative proceedings. Id., 546. The *Waterbury* court thus overruled *Fish I* to the extent that *Fish I* had been based on the exhaustion theory. The *Waterbury* ruling and the theory of primary jurisdiction are not relevant in the present context, however, because the claim here, unlike the claims in *Fish I* and *Waterbury*, is a permitting claim under § 22a-430, and cannot be brought pursuant to § 22a-16 as a claim of environmental pollution.

unlawful and unreasonable pollution on the ground that Millstone is operating without a valid permit and emergency authorization. Under the reasoning in *Middletown* and *Fish II*, that claim cannot be brought directly in the Superior Court because it is a permitting claim. Accordingly, the plaintiffs cannot prevail on their argument that §§ 22a-16 and 22a-18 provide them with standing to bring their action directly in the Superior Court, as claims brought under the licensing statutes do not involve conduct that directly causes pollution.

In reaching this conclusion, we note that, in *Waterbury*, we agreed with the plaintiff's characterization of our decisions in *Middletown*, *Fish I* and *Fish II* as being based on a theory of exhaustion of administrative remedies.[25] *Waterbury* v. *Washington*, supra, 260 Conn. 538–39. After describing those cases as implicating the exhaustion doctrine, we held in *Waterbury* that, to the extent that the *Waterbury* holding conflicted with our previous decisions applying the exhaustion doctrine to an independent action under § 22a-16, namely, *Middletown*, *Fish I* and *Fish II*, we overruled them. Id., 545.

We now clarify our decision in *Waterbury* to recognize that *Middletown* and *Fish II* involved claims that the plaintiffs lacked standing because the court did not have jurisdiction "to litigate environmental issues that are governed by § 22a-430, and which clearly have been placed within the exclusive domain of the department."[26] *Fish II*, supra, 254 Conn. 34; *Middletown* v. *Hartford Electric Light Co.*, supra, 192 Conn. 597. We

[25] We expressly stated that in *Middletown* and *Fish II* "we concluded that, pursuant to the doctrine of exhaustion of administrative remedies, the defendants were required to bring their claims to the administrative bodies entrusted with enforcement of the environmental statutes on which their claims were based." *Waterbury* v. *Washington*, supra, 260 Conn. 538–39.

[26] In *Fish II*, we stated: "In light of the conclusion that the plaintiffs lacked standing to bring their claim directly in the Superior Court, we do not reach the issue of exhaustion of administrative remedies." *Fish II*, supra, 254 Conn. 30 n.10.

also note, however, that *Waterbury* properly characterized our ruling in *Fish I* as based on the exhaustion doctrine. In *Fish I*, we concluded that the trial court should have dismissed the case for lack of standing under § 22a-16 and remanded the matter to the department for an initial determination before bringing their action to the court, because the department had authority to grant the requested injunctive relief during the permit renewal proceeding in which Fish Unlimited had intervened. *Fish I*, supra, 254 Conn. 17, 21.

Although this clarification does not affect our holding in *Waterbury* that the exhaustion doctrine does not apply where the legislature determines that a court may exercise jurisdiction pursuant to § 22a-16, despite the availability of administrative procedures, there must be no possible confusion as to our reasoning in *Middletown* and *Fish II*, because we rely on those two cases as precedent in the current matter.[27]

With each new case, we have continued to refine the law on standing under § 22a-16. We have determined that a plaintiff has standing to bring an independent action under § 22a-16 where an administrative body does not have jurisdiction to consider the environmental issues raised by the parties. See *Connecticut Fund for the Environment, Inc.* v. *Stamford*, supra, 192 Conn. 250; *Connecticut Water Co.* v. *Beausoleil*, 204 Conn. 38, 46, 526 A.2d 1329 (1987); *Nizzardo* v. *State Traffic Commission*, supra, 259 Conn. 155; *Fort Trumbull Conservancy, LLC* v. *Alves*, supra, 262 Conn. 486–87. We also have concluded that where an administrative body has been granted authority to adjudicate conduct with adverse environmental effects, the exhaustion doctrine does not apply. See *Waterbury* v. *Washington*, supra, 260 Conn. 537. In cases such as *Waterbury*, an indepen-

[27] We take no issue with the characterization in *Waterbury* of our ruling on standing in *Fish I* as based on the exhaustion doctrine.

dent action may be brought directly in the Superior Court, but the court has discretion to retain jurisdiction and remand the matter for administrative proceedings. Id., 546. Where the alleged conduct involves a permitting claim, however, there is no standing pursuant to § 22a-16 to bring the claim directly in the Superior Court, and the claim must be resolved under the provisions of the appropriate licensing statutes. *Fish II*, supra, 254 Conn. 21; *Middletown* v. *Hartford Electric Light Co.*, supra, 192 Conn. 591. The present claim falls within this last category.

Our conclusion that the plaintiffs lack standing to bring their claim under § 22a-16 is dispositive, and precludes our consideration of their remaining claims that the trial court improperly relied on the exhaustion doctrine and improperly conducted proceedings "prejudicial to the administration of justice." We do not reach the plaintiffs' claim that the trial court improperly denied their application for a temporary injunction for the same reason.

The appeal from the judgment dismissing the action against Northeast Nuclear Energy Company is dismissed; the judgment dismissing the action against the named defendant and the defendant Dominion Nuclear Connecticut, Inc., is affirmed.

In this opinion the other justices concurred.

RICCARDO I. AMBROGIO *v.* BEAVER ROAD ASSOCIATES ET AL.
(SC 16853)

Borden, Norcott, Palmer, Vertefeuille and Zarella, Js.

Syllabus

The plaintiff, an oral surgeon who had entered into an agreement with the defendant contractor, D Co., for the construction of an office for the plaintiff's medical practice, appealed to the Appellate Court from the

summary judgment rendered in his favor in a breach of contract action brought against D Co. in which he had alleged that D Co. had failed to supervise properly the installation of flooring in the office. Subsequent to the construction, the plaintiff noticed moisture seepage, offensive odors and bubbling in the floor, which caused him to close one of the surgical rooms in the office. At trial, the plaintiff sought to introduce testimony concerning the lost profits that he had suffered as a result of the defective flooring, and D Co. filed a motion in limine to preclude that testimony. The trial court granted the motion, concluding that while lost profits can be an appropriate measure of damages for breach of a construction contract when those damages were within the contemplation of the parties at the time the contract was made, they were not recoverable here because D Co. reasonably could not have contemplated those damages. The trial court thereafter rendered summary judgment for the plaintiff as to liability only but awarded no damages due to the preclusive effect of the court's ruling on the motion in limine. The Appellate Court reversed in part the trial court's judgment, concluding that, as a matter of law, lost profits can be awarded for breach of a construction contract, but that the trial court here had exceeded its authority by deciding that the lost profits were not reasonably foreseeable at the time the parties entered into the agreement. Accordingly, the Appellate Court remanded the case for a hearing in damages. On the granting of certification, D Co. appealed to this court. *Held*:

1. D Co.'s claim to the contrary notwithstanding, the Appellate Court properly determined that, as a matter of law, the plaintiff was not precluded from recovering lost profits for D Co.'s breach of the construction contract; unless they are too speculative or remote, prospective profits are allowable as an element of damages whenever their loss arises directly from and as a natural consequence of the breach of contract.
2. The Appellate Court properly determined that the trial court, in ruling on D Co.'s motion in limine, abused its discretion by deciding, as a factual matter, that lost profits were not contemplated by the parties at the time the contract was made; the motion in limine solely concerned a question of law, namely, whether lost profits could be included in the measure of damages for the breach of a construction contract, and the question of whether a particular element of loss is reasonably foreseeable is a question of fact that traditionally is within the province of the jury.

Argued September 9—officially released December 30, 2003

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Wollenberg, J.*, granted the motion in limine filed

by the defendant Paul DiMascio Construction Company, Inc., to preclude the plaintiff from introducing evidence of lost business profits; thereafter, the court, *Shapiro*, *J.*, granted the plaintiff's motion for summary judgment as to liability only and rendered judgment for the plaintiff against the defendant Paul DiMascio Construction Company, Inc., from which the plaintiff appealed to the Appellate Court, *Foti*, *Dranginis* and *Flynn*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings, and the defendant Paul DiMascio Construction Company, Inc., on the granting of certification, appealed to this court. *Affirmed.*

Thomas P. Chapman, for the appellant (defendant Paul DiMascio Construction Company, Inc.).

Barbara A. Frederick, with whom, on the brief, were *Richard S. Order* and *Laura F. Baldini*, for the appellee (plaintiff).

Opinion

VERTEFEUILLE, J. In this certified appeal, the defendant,[1] Paul DiMascio Construction Company, Inc., appeals from the judgment of the Appellate Court reversing the trial court's summary judgment rendered in favor of the plaintiff, Riccardo I. Ambrogio, as to liability, but awarding no damages. *Ambrogio* v. *Beaver Road Associates*, 71 Conn. App. 576, 803 A.2d 338 (2002). We conclude that the Appellate Court properly determined that the plaintiff was not precluded, as a matter of law, from recovering lost profits for the defendant's breach of a construction contract with the plaintiff. Accordingly, we affirm the judgment of the Appellate Court.

[1] The other defendants named in the plaintiff's complaint, Beaver Road Associates, Rosario S. Mangiafico, Robert H. Tabshey, John Palazzo and Z-Florz, are not parties to this appeal. Thus, we refer herein to Paul DiMascio Construction Company, Inc., as the defendant.

The Appellate Court set forth the following relevant facts and procedural history of this case. "The plaintiff, an oral surgeon, leased office space at 20-30 Beaver Road in Wethersfield. The lease, which was for a period of ten years with two options to renew for additional terms of five years, stated that the premises were to be used for a dental/oral and maxillofacial surgery practice in accordance with the normal work program of [the plaintiff] and/or associates and for no other purposes.

"Shortly after signing the lease, the plaintiff entered into an agreement with the defendant, a general contractor, for the construction of his office. As part of the contract, the defendant agreed to secure and provide . . . all the materials necessary and perform or cause to be performed all the work necessary for the completion of improvements to the Premises . . . in accordance with the General Specifications and that [a]ll work shall be done in a good and workmanlike manner, using experienced labor and first-quality materials as per the specifications.

"The defendant thereafter contracted with Z-Florz, Inc., to install the flooring in the plaintiff's two surgical rooms. The floors, Forbo Forshaga AB smaragd sheet vinyl flooring with Forbo's heat welding system, were to be installed in accordance with the manufacturer's instructions to ensure coverage under the manufacturer's five year warranty. Z-Florz, Inc., installed the surgical flooring, and the plaintiff opened his practice on November 16, 1992.

"Several months after opening his practice, the plaintiff noticed moisture seepage, slippery conditions, offensive odors and bubbling in the flooring in the surgical areas of the office. As a result, unsafe and unhealthy conditions caused the plaintiff to close one of the surgical rooms.

"The plaintiff subsequently discovered that improper ventilation of the concrete slab under the flooring had caused the seepage problem. Attempts by the plaintiff to rectify the condition of the surgical room floors were to no avail and the plaintiff brought this action. He claimed that the defendant had breached its contractual duty by failing to properly supervise the installation of the flooring in his office.

"After filing this action, the plaintiff notified the defendant that he intended to call two expert witnesses to testify during the trial, Michael C. Matzkin, a dentist, and Conrad A. Kappel, a certified public accountant. Matzkin and Kappel were to testify as to the projected growth of the plaintiff's practice and the profits that were lost as a result of the defective installation of the flooring in the surgical rooms. Prior to the date the trial was to begin, the defendant filed a motion in limine seeking to preclude the plaintiff from introducing any evidence which [purports] to show that the plaintiff lost patients, lost patient referrals or lost business growth opportunities as elements of his damages." (Internal quotation marks omitted.) *Ambrogio* v. *Beaver Road Associates*, supra, 71 Conn. App. 577–79.

At oral argument on the motion in limine before the trial court, *Wollenberg*, *J.*, the defendant contended that "[l]ost business and loss of business opportunities are not included in the measure of damages for the breach of a construction contract." (Internal quotation marks omitted.) Id., 579. The plaintiff disagreed, arguing that lost profits were an appropriate measure of damages for breach of a construction contract. Neither party offered evidence or testimony at the hearing. Following the hearing, the trial court granted the defendant's motion in limine, concluding, first, that lost profits can be an appropriate measure of damages for breach of a construction contract when such damages were within the contemplation of the parties at the time they made

the contract. The trial court further determined that lost profits were *not* recoverable in this case, however, because the defendant reasonably could not have contemplated such damages at the time the parties entered into the contract.

Subsequently, the plaintiff moved for summary judgment against the defendant as to liability for breach of the construction contract. The trial court, *Shapiro*, *J.*, granted the motion for summary judgment and rendered judgment thereon but awarded no damages to the plaintiff due to the preclusive effect of the prior ruling granting the motion in limine.[2]

The plaintiff appealed from the trial court's judgment to the Appellate Court, claiming that, in granting the motion in limine, the trial court improperly had resolved a factual issue not before it, i.e., whether the parties reasonably contemplated lost profits as damages when they entered into the contract. The Appellate Court reversed in part the judgment of the trial court, concluding that, as a matter of law, lost profits can be awarded for breach of a construction contract, but further concluding that the trial court exceeded its authority by deciding that, as a factual matter, the plaintiff in the present case could not recover lost profits because they were not within the contemplation of the parties. Id., 584. The Appellate Court therefore remanded the case for a hearing in damages.[3] Id.

We thereafter granted the defendant's petition for certification to appeal limited to the following issue:

[2] The only damages that the plaintiff sought in this action were lost profits. The granting of the defendant's motion in limine therefore precluded the plaintiff from obtaining an award for any damages.

[3] We construe the Appellate Court's remand to include the requirement that the plaintiff prove, not only the amount of the lost profits, but that such profits were within the reasonable contemplation of the parties when they entered into the contract. Indeed, the plaintiff does not contend otherwise.

"Did the Appellate Court properly conclude that the plaintiff was not precluded, as a matter of law, from recovering lost profits for breach of his construction contract with the defendant?" *Ambrogio* v. *Beaver Road Associates*, 261 Conn. 943, 944, 808 A.2d 1136 (2002). This appeal followed.

On appeal to this court, the defendant claims that the Appellate Court improperly reversed the trial court's judgment, and challenges both aspects of the Appellate Court's ruling. First, the defendant argues that the Appellate Court misstated the law of damages relating to recovery of lost profits. Specifically, the defendant claims that the Appellate Court failed to recognize an established exception to the general rule of compensatory damages that precludes recovery of lost profits in a breach of contract action stemming from a construction contract. Second, the defendant contends that the Appellate Court incorrectly determined that, as a matter of law, the trial court exceeded its authority by precluding evidence of lost profits in the present case on the ground that lost profits were not within the reasonable contemplation of the parties.[4] We are not persuaded by either of the defendant's claims.

We begin by setting forth the applicable standard of review. Both claims raised by the defendant present questions of law. Accordingly, our review is plenary. *DeLeo* v. *Nusbaum*, 263 Conn. 588, 593, 821 A.2d 744 (2003).

[4] The defendant also claims that awarding lost profits in this case would result in economic waste and would offend public policy. In making this argument, the defendant maintains that awarding the plaintiff lost profits effectively would "hold a contractor liable for years and years of lost business growth . . . when a simpler and more appropriate remedy would be to pay for the cost of having the floors fixed." This claim is premature, because it presumes an award of lost profits over an extended time period that has not yet been made. No trial court has, as of yet, determined for how many months or years the plaintiff is entitled to recover his lost profits. Therefore, whether the award will constitute economic waste is a question that cannot be determined on the present record.

As the defendant acknowledges, our case law unequivocally supports awarding lost profits as an element of compensatory damages for general breach of contract claims. "The general rule in breach of contract cases is that the award of damages is designed to place the injured party, so far as can be done by money, in the same position as that which he would have been in had the contract been performed." (Internal quotation marks omitted.) *West Haven Sound Development Corp.* v. *West Haven*, 201 Conn. 305, 319, 514 A.2d 734 (1986). The Restatement (Second) of Contracts divides a defendant's recovery into two components: (1) direct damages, composed of "the loss in value to him of the other party's performance caused by its failure or deficiency"; 3 Restatement (Second), Contracts § 347 (a) (1981); plus, (2) "any other loss, including incidental or consequential loss, caused by the breach . . . ." Id., § 347 (b). Traditionally, consequential damages include "any loss that 'may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself.' " *West Haven Sound Development Corp.* v. *West Haven*, supra, 201 Conn. 319, quoting *Hadley* v. *Baxendale*, 9 Ex. 341, 354, 156 Eng. Rep. 145 (1854). Although there is no unyielding formula by which damages are calculated, "it is our rule that '[u]nless they are too speculative and remote, prospective profits are allowable as an element of damage whenever their loss arises directly from and as a natural consequence of the breach.' " *West Haven Sound Development Corp.* v. *West Haven*, supra, 320, quoting *Kay Petroleum Corp.* v. *Piergrossi*, 137 Conn. 620, 624, 79 A.2d 829 (1951).

Although the defendant acknowledges Connecticut's practice of allowing recovery of lost profits in most breach of contract cases, it nonetheless maintains that the Appellate Court overlooked a salient exception pertaining to construction contracts. Specifically, the

defendant relies on two cases, *M. J. Daly & Sons, Inc.* v. *New Haven Hotel Co.*, 91 Conn. 280, 287, 99 A. 853 (1917), and *Levesque* v. *D & M Builders, Inc.*, 170 Conn. 177, 180–81, 365 A.2d 1216 (1976), to support its contention that the exclusive measure of damages for breach of a construction contract is (1) the reasonable cost of repairs, or (2) the difference between the value of the product contracted for and the value of the product received by the plaintiff. We disagree with the defendant's contention.

We first note that both this court and the Appellate Court previously have upheld damage awards that included lost profits for breach of contract claims arising out of construction related disputes. For example, in *Tompkins, Inc.* v. *Bridgeport*, 94 Conn. 659, 110 A. 183 (1920), this court affirmed the trial court's award of damages, including lost profits, for a breach of contract claim stemming from a contractor's wrongful termination of a contract to build a bridge. Subsequently, in *Gordon* v. *Indusco Management Corp.*, 164 Conn. 262, 277, 320 A.2d 811 (1973), an action to recover damages resulting from a breach of contract and from the failure of the defendant to construct a restaurant outlet store on his land pursuant to a written lease, this court remanded the case for a hearing in damages to determine the proper amount of lost profits that the plaintiff could recover. The Appellate Court similarly has upheld damage awards for lost profits in the construction context. See *Amwax Corp.* v. *Chadwick*, 28 Conn. App. 739, 745, 612 A.2d 127 (1992) (upholding lost profit award for breach of oral lease occasioned by defendant's failure to repair roof and construct sanitary sewer facilities); *Wilson* v. *Kapetan, Inc.*, 25 Conn. App. 529, 534, 595 A.2d 369 (1991) (lost profits, if properly claimed, could be recovered in breach of construction contract action); *Steeltech Building Products, Inc.* v. *Edward Sutt Associates, Inc.*, 18 Conn. App. 469, 471–

72, 559 A.2d 228 (1989) (awarding lost profits for breach of contract premised on withdrawn construction bid). The defendant did not address any of these cases in its brief. Instead, the defendant focused exclusively on this court's decisions in *M. J. Daly & Sons, Inc.*, and *Levesque*, which, although articulating an exception to the general rule of damages in construction cases, are confined to the calculation of direct damages and do not address in any way an award of lost profits.

In *M. J. Daly & Sons, Inc.*, the plaintiff subcontractor, whose contract was terminated by the defendant building owner when the work was near completion, brought an action against the owner to recoup the unpaid balance due based on the contract price. *M. J. Daly & Sons, Inc.* v. *New Haven Hotel Co.*, supra, 91 Conn. 283. This court rejected the contention that the plaintiff's damages should be measured by the reasonable value of its work, stating that "the well-established rule, in this and other jurisdictions, is that the reasonable value for which recovery may be had in cases of substantial performance of building contracts, is to be ascertained with reference to the contract price and by deducting from that price such sum as ought to be allowed for the omissions and variations." Id., 287. The court acknowledged that this rule of damages for building contracts is an exception to that for contracts generally. Id.

In *M. J. Daly & Sons, Inc.*, however, we did not address lost profits as an element of damages for breach of a construction contract and we do not read its language as precluding such damages irrespective of the reasonable expectations of the parties.

The defendant's reliance on *Levesque* is equally unavailing. In *Levesque*, the defendant contractor challenged a damage award assessed against him for constructing the plaintiff's house too close to the street

line, in violation of both the contract and municipal zoning regulations. *Levesque* v. *D & M Builders, Inc.*, supra, 170 Conn. 179–80. The trial court determined that the proper measure of damages was the cost of relocating the house. Id., 180. This court reversed and remanded the case for a hearing in damages stating that, "[f]or a breach of a construction contract involving defective or unfinished construction, damages are measured by computing either (i) the reasonable cost of construction and completion in accordance with the contract . . . or (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received . . . ." (Internal quotation marks omitted.) Id., 181. These formulations, the defendant maintains, are the proper, and exclusive, measure of damages in any case for breach of a construction contract.

Levesque simply does not support the defendant's claim. First, as in *M. J. Daly & Sons, Inc.*, this court did not state that the formulation of damages was the *exclusive* measure of damages for breach of any and all construction contracts. Second, no claim for lost profits was made in *Levesque* and the court therefore did not address lost profits as an element of damages. Third, *Levesque* concerned only the appropriate measure of *direct* damages for breach of a construction contract and this court explicitly limited its review to the issue of direct damages. Indeed, this court in *Levesque* pointed out that, although the trial court awarded both direct damages, consisting of the cost of relocating the house, and consequential damages, being the plaintiffs' living expenses during the relocation, the defendant had not challenged the award of consequential damages.[5] Id., 180 n.2. Accordingly, the court confined

[5] In *Levesque*, this court stated: "The defendant has not directly attacked the propriety of including as an element of special or consequential damages the probable living expenses of the plaintiffs for the period when the relocation of the house, as projected by the court, is taking place. For the general rule on foreseeable special or consequential damages in contract cases, see

its analysis to direct damages. With regard to consequential damages generally, this court cited 1 Restatement, Contracts § 346 (1) (b) (1932)[6] and 11 S. Williston, Contracts (3d Ed. Jaeger 1968) § 1363,[7] both of which *support* damage awards encompassing lost profits for breach of contracts generally and, specifically, in the construction context, depending on the facts of the case. *Levesque* v. *D & M Builders, Inc.*, supra, 170 Conn. 180 n.2. We therefore conclude that the Appellate Court properly determined that the plaintiff was not precluded, as a matter of law, from recovering lost profits for the defendant's breach of the construction contract.

We turn now to the defendant's second claim, namely, that the Appellate Court improperly determined that the trial court abused its discretion by deciding a factual

Restatement, 1 Contracts 346 (1) (b) [1932]; 11 [S.] Williston, Contracts (3d Ed. Jaeger [1968]) §§ 1363, 1344, 1344A." *Levesque* v. *D & M Builders, Inc.*, supra, 170 Conn. 180 n.2.

[6] Section 346 of the Restatement of Contracts (1932), entitled, "Damages for Breach of a Construction Contract," provides in relevant part: "(1) . . . (b) For any delay in completion fairly chargeable to the builder, the plaintiff can get judgment for the value of the use of the product, if it was being constructed for use, and for the decline in sale value, if it was being constructed for sale, in either case determined in accordance with the rules stated in § 331. . . ." Section 331 (1) of the Restatement, supra, provides: "Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty."

[7] Section 1363 of Professor Williston's treatise, entitled, "Contracts for Particular Service; Building Contracts," provides in relevant part: "Where the contractor fails to keep his agreement, the measure of the employer's damages . . . is always the sum which will put him in as good a position as if the contract had been performed. If the defect is remediable from a practical standpoint, recovery generally will be based on the market price of completing or correcting the performance . . . . If the defect is not thus remediable, damages are based on the difference between the value of the defective structure and that of the structure if properly completed. . . . *But consequential or special damages may also be recovered when they were foreseeable when the contract was made.*" (Emphasis added.) 11 S. Williston, supra, § 1363, pp. 344–47.

matter not properly before it on the motion in limine. Specifically, the defendant contends that the trial court properly ruled that, as a factual matter, lost profits could not be recovered in the present case because they were not reasonably foreseeable at the time the parties entered into the contract. We disagree.

"[T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Internal quotation marks omitted.) *State* v. *Pharr*, 44 Conn. App. 561, 581, 691 A.2d 1081 (1997). Accordingly, a party, through a motion in limine, may implore the court to decide a question of law; see *Sheiman* v. *Sheiman*, 72 Conn. App. 193, 201, 804 A.2d 983 (2002) (affirming trial court's ruling on motion in limine precluding testimony from treating psychiatrist as privileged); as well as some preliminary questions of fact. See *State* v. *Kelly*, 256 Conn. 23, 42, 770 A.2d 908 (2001) ("[w]hether an utterance is spontaneous and made under circumstances that would preclude contrivance and misrepresentation is a preliminary question of fact to be decided by the trial judge" [internal quotation marks omitted]). Although broad, the discretion of a trial judge must yield to a litigant's "constitutional right to have factual issues resolved by the jury." *Mather* v. *Griffin Hospital*, 207 Conn. 125, 138, 540 A.2d 666 (1988).

By its explicit terms, the defendant's motion in limine posited solely a question of law. Specifically, the motion sought to preclude evidence of lost profits on the legal premise that "[l]ost business and loss of business opportunities are not included in the measure of damages for the breach of *a* construction contract." (Emphasis added.) Indeed, the notation on the face of the motion reads, "Oral Argument Requested, Testimony Not

Required,"[8] thus demonstrating that the defendant intended to present the trial court with a question of law only. Consistent with this understanding, no evidence was presented at the hearing on the motion in limine and the trial court's memorandum of decision is devoid of any factual findings establishing that lost profits were not contemplated by the parties at the time the contract was made.[9]

As the Appellate Court aptly concluded, "[t]he trial court was not asked to decide the question of whether it was reasonably foreseeable that the defendant, *in this case*, contemplated lost profits as a measure of damages in the event the contract was breached." (Emphasis in original.) *Ambrogio* v. *Beaver Road Associates*, supra, 71 Conn. App. 582. Instead, as the motion in limine indicated, the trial court's inquiry was limited to determining whether, as a matter of law, lost profits could be included in the measure of damages for the breach of *a* construction contract. After properly deciding the legal question presented, however, that lost profits are recoverable in a breach of construction contract action, the trial court went on to conclude that, as a factual matter, lost profits could not be recovered *in*

[8] Practice Book § 11-18 (a) provides in relevant part that, "oral argument shall be a matter of right, provided . . . (2) the movant indicates at the bottom of the first page of the motion or on a reclaim slip that oral argument or testimony is desired . . . ."

[9] In applying the rule regarding lost profits to the present case, the trial court stated the following: "Applying the rule in *Hadley* [v. *Baxendale*, supra, 9 Ex. 354] to the present case, the court concludes that [the defendant] could not reasonably have contemplated lost profits as a measure of damages in the event [it] were to breach the building agreement. Also, lost patients, lost patient referrals, and loss of business growth are not losses of the type usually resulting from a general contractor's breach of contract for failure to properly inspect, direct and supervise a subcontractor's installation of flooring. The contract does not state that [the defendant] was aware of special circumstances at the time of contracting, and, therefore, [the defendant] cannot reasonably be supposed to have foreseen liability for lost profits in the event of [a] breach."

the present case because they were not within the reasonable contemplation of the parties at the time they entered into the contract. "[T]he question whether a particular element of loss was reasonably foreseeable is a question of fact . . . ." *West Haven Sound Development Corp.* v. *West Haven*, supra, 201 Conn. 333. The trial court therefore improperly delved into a question of fact that was not properly before it. It is axiomatic that issues of fact are traditionally the province of the jury. *State* v. *Hines*, 187 Conn. 199, 210, 445 A.2d 314 (1982). Accordingly, we conclude that the Appellate Court properly determined that the trial court abused its discretion by deciding an issue of fact not before it on the motion in limine.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* PAUL FRANCIS
(SC 16830)

Sullivan, C. J., and Borden, Norcott, Palmer and Zarella, Js.

Syllabus

Convicted of the crimes of murder, felony murder, burglary in the first degree, burglary in the second degree, arson in the first degree, larceny in the third degree and criminal mischief in the first degree in connection with the death of the victim in a fire in her apartment, the defendant appealed to the Appellate Court. That court reversed the judgment of the trial court and remanded the case for a new trial on the ground that the trial court's refusal to disclose to the defendant, following an in camera review, the confidential hospital treatment records of one of the victim's sons for alcohol and drug abuse, constituted an abuse of discretion that deprived the defendant of his rights to present a defense and to confront witnesses. The Appellate Court concluded that the records contained relevant information that was material to establish the defense that the victim's son had committed the murder and was probative of the son's ability to perceive and recollect certain events about which he had testified at trial. On the granting of certification, the state appealed to this court. *Held*:

1. The Appellate Court improperly concluded that the trial court abused its discretion by refusing to disclose the treatment records, an independent review of those records having revealed that they contained no relevant information pertaining to the third party culpability defense; the records did not contain any information directly connecting the victim's son to the murder, nor did they establish that he maintained a violent disposition or demonstrated violent tendencies toward her at any time in the past.

2. The Appellate Court properly concluded that, because the treatment records contained information pertaining to the victim's son's ability to observe, recollect and narrate the events about which he had testified at trial, the trial court abused its discretion by refusing to disclose the evidence to the defendant for impeachment purposes; the records having indicated a long, persistent and serious history of alcohol and drug abuse and blackouts, and evidence having been presented that the son was drinking both at the time the defendant allegedly made an inculpatory statement to him and at the time he subsequently recalled that statement, the information in the records was necessary for the jury properly to evaluate the son's general credibility.

3. Although the trial court's refusal to disclose the victim's son's treatment records to the defendant for impeachment purposes constituted an abuse of discretion that violated the defendant's right of confrontation, the state met its burden of proving that the error did not affect the verdict and, therefore, was harmless beyond a reasonable doubt; the defendant's third party defense was weak and uncorroborated, and the state's case was very strong and supported by evidence of several incriminating statements made by the defendant to the police following his arrest, by the testimony of several of the defendant's cellmates that he had confessed to them that he had committed the crime, and by the testimony of numerous disinterested witnesses that was fully consistent with the defendant's guilt.

Argued May 19—officially released December 30, 2003

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, burglary in the first degree, burglary in the second degree, arson in the first degree, larceny in the third degree and criminal mischief in the first degree, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Schaller*, *Pellegrino* and *Flynn*, *Js.*,

which reversed the trial court's judgment and remanded the case for a new trial, and the state, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

John A. East III, senior assistant state's attorney, with whom, on the brief, were *Timothy J. Liston*, state's attorney, and *Russell C. Zentner*, assistant state's attorney, for the appellant (state).

Michael O. Sheehan, special public defender, with whom were *George Kouros* and *Richard A. Reeve*, for the appellee (defendant).

Opinion

ZARELLA, J. The defendant, Paul Francis, was convicted, following a jury trial, of murder in violation of General Statutes § 53a-54a (a),[1] felony murder in violation of General Statutes § 53a-54c,[2] burglary in the first degree in violation of General Statutes § 53a-101 (a) (2),[3] burglary in the second degree in violation of General Statutes (Rev. to 1995) § 53a-102 (a),[4] arson in

[1] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception . . . ."

[2] General Statutes § 53a-54c provides in relevant part: "A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree, aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants . . . ."

[3] General Statutes § 53a-101 (a) provides in relevant part: "A person is guilty of burglary in the first degree when he enters or remains unlawfully in a building with intent to commit a crime therein and . . . (2) in the course of committing the offense, he intentionally, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone."

[4] General Statutes (Rev. to 1995) § 53a-102 (a) provides: "A person is guilty of burglary in the second degree when he enters or remains unlawfully in a dwelling at night with intent to commit a crime therein."

the first degree in violation of General Statutes § 53a-111 (a) (1),[5] larceny in the third degree in violation of General Statutes § 53a-124 (a) (1),[6] and criminal mischief in the first degree in violation of General Statutes § 53a-115 (a) (1).[7] The trial court rendered judgment in accordance with the jury's verdict,[8] from which the defendant appealed to the Appellate Court. On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court had abused its discretion by denying him access to certain psychiatric treatment records of Thomas Uhlman, who was one of the state's key witnesses.[9] *State* v. *Francis*, 70 Conn. App. 571, 576, 800 A.2d 574 (2002). The Appellate Court reversed the judgment of conviction and remanded the case for a new trial concluding that the trial court had abused its discretion by not disclosing Uhlman's records, and that such error was not harmless beyond a reasonable

[5] General Statutes § 53a-111 (a) provides in relevant part: "A person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined in section 53a-100, he starts a fire or causes an explosion, and (1) the building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied . . . ."

[6] General Statutes § 53a-124 (a) provides in relevant part: "A person is guilty of larceny in the third degree when he commits larceny, as defined in section 53a-119, and: (1) The property consists of a motor vehicle, the value of which is five thousand dollars or less . . . ."

[7] General Statutes § 53a-115 (a) provides in relevant part: "A person is guilty of criminal mischief in the first degree when: (1) With intent to cause damage to tangible property of another and having no reasonable ground to believe that such person has a right to do so, such person damages tangible property of another in an amount exceeding one thousand five hundred dollars . . . ."

[8] The trial court sentenced the defendant to a total effective term of ninety years imprisonment.

[9] Subsequent to the Appellate Court's decision, Uhlman waived his statutory privilege of confidentiality; see General Statutes § 17a-688; with regard to his treatment records referenced by the Appellate Court. Consequently, these records were released to both parties in this appeal. Although the defendant's claim of entitlement to the records might appear to be no longer at issue in this appeal due to the subsequent release of those records, because we disagree with the conclusion of the Appellate Court we review the state's appeal on its merits.

doubt. Id., 579. Thereafter, we granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the trial court improperly determined that certain requested psychiatric assessment records did not contain any information that required disclosure to the defense?" *State* v. *Francis*, 261 Conn. 925, 806 A.2d 1062 (2002). We reverse the judgment of the Appellate Court based on our conclusion that, although the trial court abused its discretion in denying the defendant access to the requested records, any error was harmless.

The jury reasonably could have found the following relevant facts. The defendant, who had spent much of his adult life in prison, had been released from his most recent incarceration, when, in the summer of 1995, he began to socialize with Thomas Uhlman and his brother, Glen Uhlman, with whom the defendant previously had been acquainted. Thomas Uhlman testified that, in July or August of 1995, while he was fishing with the defendant, the defendant vowed that he would never return to prison, and that if he committed a future crime he would destroy the scene by fire so as to obliterate any incriminating evidence.

The Uhlman brothers shared an apartment on Spring Street, in Portland, in an old three-story building containing four apartments. The Uhlman brothers occupied the first floor front apartment. Their mother, Ruth Mary Uhlman, who was the victim, occupied the first floor rear apartment. Jeffrey Harmon occupied the second floor apartment, and Linda Wierenga occupied the third floor apartment.

During the fall and winter of 1995, the defendant, who was largely transient and often camped in the woods, stayed with friends or relatives, or lived in abandoned buildings, began to frequent the Uhlman broth-

ers' apartment. Thomas Uhlman became uneasy about the defendant's frequent presence at the apartment and prohibited him from spending nights there. In addition, Uhlman testified, the victim had told him that the defendant "gave her the creeps."

On December 18, 1995, according to the testimony of both Thomas Uhlman and Glen Uhlman, the defendant and the Uhlmans quarreled over the defendant's insistence that he be allowed to remain in the apartment, despite the Uhlmans' demand that he leave. In the course of ejecting the defendant, Thomas Uhlman and the defendant scuffled on the porch. Ten minutes later, the defendant telephoned Thomas Uhlman and informed him that he had thrown a bucket filled with sand through the windshield of Thomas Uhlman's car. Thomas Uhlman called the police and, while he was inspecting his car, the defendant returned and they had a violent encounter in the driveway. During the course of the confrontation, Thomas Uhlman wounded the defendant's leg with a machete. The defendant then left.

Meanwhile, Officer Ron Milardo of the Portland police department responded to Thomas Uhlman's call and, while Milardo was in the Uhlmans' apartment, the defendant telephoned Thomas Uhlman, who gave the telephone to Milardo. The defendant admitted to Milardo that he had caused the damage to the car. The next day, the defendant called Glen Uhlman, complained about having been struck by Thomas Uhlman, and, according to Glen Uhlman's testimony, the defendant stated, "I don't care if he's your brother or not. Tom is all done." When Glen Uhlman informed the victim of this entire incident, she told him that she was fearful of the defendant.

On January 1, 1996, in the early afternoon, Thomas Uhlman gave Glen Uhlman and his girlfriend, June Moynahan, a ride to her home in Meriden. Thomas Uhlman

used the victim's car, which was a noisy 1981 car in poor condition. At approximately 8 p.m., Thomas Uhlman went outside and into the detached garage to fuel the snowblower. He then had a conversation with the victim about borrowing her car the next morning, and he fell asleep in his apartment at approximately 11:30 p.m. Harmon and his guest, Maria Thibodeau, fell asleep in his second floor apartment at approximately 2 a.m. Wierenga had fallen asleep at approximately 10:30 p.m. in her third floor apartment.

At approximately 4:20 a.m., on January 2, 1996, Mary Lou Raicik, a next-door neighbor, was awakened by the sounds of a noisy car backing out of the driveway of the Uhlmans' house and speeding away. In addition, Wierenga testified that she was awakened by the sound of a car door slamming, and that she heard a car drive out of the driveway. She looked out of the window and saw that Thomas Uhlman's car was parked in the driveway. Moments later, she smelled smoke, saw smoke pouring out of the victim's apartment, called 911, and left her apartment. She then went downstairs and pounded on Thomas Uhlman's door, yelling, "Fire! Fire! Get out!" Harmon and Thibodeau already had been alerted by the smoke and were evacuating the building. Wierenga then ran into the front yard.

Upon hearing Wierenga's warning, Thomas Uhlman jumped out of bed, ran to the victim's apartment, pushed the door open and saw that the apartment was already engulfed in flames. He ran back to his apartment, grabbed his dog, ran into the yard, and gave the dog to Wierenga. He then ran around to the side of the victim's apartment, where he tried unsuccessfully to gain entrance through the outer doors and windows. Thereafter, he returned to the front yard. After the arrival of the firefighters and the police, both Thomas Uhlman and Wierenga noticed that the victim's car was missing.

The ensuing investigation disclosed that the victim's hands and feet had been bound, and that she had died of traumatic asphyxia, most likely by manual suffocation by means of some object having been pressed into her face. A combustible liquid had been poured in two separate places in the victim's apartment and intentionally had been ignited. Also, the police discovered a can of "Repel" pepper spray on the floor of the garage. Thomas Uhlman testified that it had not been there at 8 p.m. on January 1, when he had fueled the snowblower. Glen Uhlman testified that the can was identical to one that the defendant had showed him one month earlier. Also, the police recovered the key to the trunk of the victim's car in her bedroom, but not the key to the ignition.

John Levesque testified that, at 5:20 p.m., on the evening of January 1, 1996, the defendant briefly had visited his apartment in Portland, which was less than one mile from the victim's home, and that he had left on foot. In addition, Linda Garneau, who knew the defendant, testified that she saw him walking on Spring Street in Middletown at 5:50 a.m. on the morning of January 2, 1996. At 1:40 p.m., on January 2, the Middletown police discovered the victim's car parked in a residential parking lot on Pearl Street in Middletown, which was less than one mile from the defendant's most recent residence on Spring Street in Middletown.

On January 4, 1996, the defendant burglarized his sister's home and stole a shotgun and ammunition. He left behind a note saying that he was fleeing to Massachusetts, that he was determined not to return to prison, and that he would commit suicide to prevent that from happening. On January 5, 1996, the defendant was sighted walking along a road in Middletown by the Middletown police, who had a warrant for his arrest on an unrelated matter. As the police approached the defendant, he discarded the shotgun and fled. When

the defendant was apprehended, a search of his clothing disclosed the ignition key to the victim's car. He claimed both that the key belonged to him, and that he had found the key.

At trial, the defendant's principal defense was that Thomas Uhlman, rather than the defendant, had committed the murder. In support of this defense, the defendant sought to introduce Uhlman's confidential treatment records from the Connecticut Valley Hospital, where Uhlman had received treatment for substance abuse in February, 1996, approximately one month after the murder. According to the defendant, the records revealed information about the relationship between Uhlman and the victim that supported the defendant's third party culpability defense. Furthermore, the defendant sought access to Uhlman's treatment records because he believed that they contained information that could have been used to impeach Uhlman's credibility as a witness. Pursuant to the state's motion in limine seeking to preclude disclosure of these records, the trial court conducted an in camera review of the records, and subsequently ordered that they remain sealed. Thereafter, the state called Thomas Uhlman as one of its witnesses and he testified as to the incriminating statement allegedly made by the defendant during their 1995 fishing trip that, "if he ever did another crime . . . he would burn the place to the ground to cover the evidence." On cross-examination, Uhlman also testified that he had been drinking on the fishing trip, and that he did not recall the defendant's statement until February, 1996. Uhlman further testified that he had been drinking at the time he recalled the statement, and that his drinking on this occasion would have affected his memory. At the conclusion of the trial, the defendant was found guilty on all counts.

On appeal to the Appellate Court, the defendant claimed that the trial court abused its discretion by not

disclosing Thomas Uhlman's treatment records.[10] The defendant had sought access to the records for the purpose of: (1) establishing a third party culpability defense, specifically, that Uhlman, not the defendant, murdered the victim; and (2) impeaching Uhlman's credibility, specifically, his ability to recollect the inculpatory statement previously made by the defendant to Uhlman. The Appellate Court held that the trial court's refusal to disclose Uhlman's treatment records constituted an abuse of discretion that deprived the defendant of his rights under the sixth amendment to the United States constitution to present a defense and to confront witnesses. *State* v. *Francis*, supra, 70 Conn. App. 582. Specifically, the Appellate Court held that the trial court's ruling deprived the defendant of his right to present a defense because it prevented his acquisition of evidence that he could have used to establish third party culpability. Id., 579. The Appellate Court also determined that, because the treatment records contained information about Uhlman's alcohol consumption during certain relevant periods, the trial court should have disclosed the records for impeachment purposes. Id., 580. Thus, the failure to disclose the records also violated the defendant's right to confrontation because it limited his right to impeach Uhlman's testimony and to attack his credibility. Id., 581. Finally, the Appellate Court concluded that the trial court's error in refusing to disclose the records was not harmless. Id., 582. This appeal followed.

[10] Because the Appellate Court's resolution of this issue in the defendant's favor resulted in the ordering of a new trial, that court did not reach the defendant's other claims, namely, "that (1) the trial court's charge to the jury on circumstantial evidence improperly lowered the state's burden of proof on the element of intent, and (2) the state's repeated reference to his invocation of his right to remain silent and his request for a lawyer violated his fifth amendment right and his right to due process under the fourteenth amendment." *State* v. *Francis*, supra, 70 Conn. App. 573 n.1. Having reversed the judgment of the Appellate Court on the limited certified issue, we leave these remaining claims to be considered by the Appellate Court on remand.

We conclude that the Appellate Court incorrectly held that the trial court abused its discretion by not disclosing Uhlman's treatment records pursuant to the defendant's third party culpability defense, but that the Appellate Court correctly held that the trial court abused its discretion by not disclosing the records for impeachment purposes. We, nonetheless, reverse the judgment of the Appellate Court based on our conclusion that any error was harmless.

As a threshold matter, we set forth the standard by which we review the trial court's determination concerning the disclosure of confidential records. "We recently have reiterated that [a]ccess to confidential records should be left to the discretion of the trial court which is better able to assess the probative value of such evidence as it relates to the particular case before it . . . and to weigh that value against the interest in confidentiality of the records. . . . *State* v. *Slimskey*, 257 Conn. 842, 856, 779 A.2d 723 (2001). . . . Once the trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused. . . . [Id.] On appeal, the appellate tribunal reviews the confidential records to determine whether the trial court abused its discretion in concluding that no information contained therein is especially probative of the victim's ability to know and correctly relate the truth so as to justify breaching their confidentiality in disclosing them to the defendant. *State* v. *Storlazzi*, 191 Conn. 453, 460, 464 A.2d 829 (1983). We are mindful that the restriction of a defendant's access to a witness' confidential records implicates the defendant's constitutional right to impeach and discredit state witnesses. . . . *State* v. *Bruno*, 236 Conn. 514, 532, 673 A.2d 1117 (1996)." (Citation omitted; internal quotation marks omitted.) *State* v. *Delgado*, 261 Conn. 708, 718–19, 805 A.2d 705 (2002).

I

We first address whether the trial court should have afforded the defendant access to Thomas Uhlman's treatment records for the purpose of establishing his third party culpability defense. The defendant claims that the trial court abused its discretion by refusing to disclose Uhlman's treatment records that, he asserts, contained information supporting the defense's theory that Uhlman committed the murder. Specifically, the defendant argues that the records revealed that Uhlman experienced a lot of guilt following the victim's murder and, that, had the defendant been provided access to this information, he could have explored this fact as it related to his third party culpability defense. Further, the defendant argues that the records revealed the extent of Uhlman's history of alcohol abuse. According to the defendant, this was a tremendous source of friction between Uhlman and the victim, and, thus, any information demonstrating the level of Uhlman's alcohol abuse would have added weight to his defense theory. The Appellate Court concluded that the trial court's decision denying the defendant access to the treatment records constituted an abuse of discretion because they contained information about Uhlman's state of mind that was favorable and material to the third party culpability defense. *State* v. *Francis*, supra, 70 Conn. App. 578. On the basis of our independent review of the records, we disagree with the Appellate Court with respect to the defendant's third party culpability theory, and we conclude that, because these records contain no relevant information pertaining to the defense theory, the trial court did not abuse its discretion by refusing to disclose the records.

"It is well established that a defendant has a right to introduce evidence that another person committed the offense with which the defendant is charged. *State* v. *Hernandez*, 224 Conn. 196, 202, 618 A.2d 494 (1992).

Third party suspect evidence is admissible if it *directly* connects the third party to the crime. *State* v. *Echols*, 203 Conn. 385, 392, 524 A.2d 1143 (1987). It is not enough [however] to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . . *State* v. *Hernandez*, supra [202]." (Internal quotation marks omitted.) *State* v. *Sauris*, 227 Conn. 389, 401, 631 A.2d 238 (1993).

"[I]t is within the sound discretion of the trial court to refuse to admit such evidence when it simply affords a possible ground of possible suspicion against another person. *State* v. *Giguere*, [184 Conn. 400, 405, 439 A.2d 1040 (1981)]; see also *State* v. *John*, 210 Conn. 652, 670, 557 A.2d 93 (1989). *State* v. *Delossantos*, 211 Conn. 258, 270, 559 A.2d 164, cert. denied, 493 U.S. 866, 110 S. Ct. 188, 107 L. Ed. 2d 142 (1989). The trial court's ruling on the relevancy of third party inculpatory evidence will be reversed on appeal only if the court has abused its discretion or an injustice appears to have been done. Id., 271." (Internal quotation marks omitted.) *State* v. *Payne*, 219 Conn. 93, 117, 591 A.2d 1246 (1991).

With this legal background in mind, we believe that the trial court acted well within its discretion by refusing to disclose Thomas Uhlman's treatment records based on the defendant's third party culpability defense. The defendant informed the trial court that he needed access to the records as a means of establishing the level of discontent that existed between Uhlman and the victim. In support of his third party culpability defense, the defendant elicited testimony that, approximately two months prior to the murder, Uhlman and the victim had engaged in an argument concerning Uhlman's drinking habits and his use of her car. Testimony was also presented that Uhlman was experiencing financial difficulties prior to the murder. According to

the defendant, these difficulties, combined with the defendant's drinking, created a constant source of conflict between Uhlman and the victim. Further, the defendant highlighted the fact that Wierenga, one of the state's witnesses, had testified on cross-examination that Uhlman appeared emotionally flat after realizing the victim had not escaped the fire.[11]

We are mindful that the present situation involves not only whether Thomas Uhlman's treatment records sufficiently connect him to the victim's murder, but also whether the evidence is so probative as to outweigh his right to maintain the confidentiality of these records. As we previously indicated, evidence of third party culpability must *directly* connect the third party to the crime. In our view, feelings of guilt and reported alcohol abuse do not satisfy this high standard. In fact, Uhlman's records arguably do not even raise a bare suspicion that he may have murdered the victim, given the multitude of other explanations that existed for why he was feeling guilty and began drinking heavily subsequent to her death. Indeed, the treatment records reveal that Uhlman was "very close" to the victim and had "worked hard in treatment to build a better relationship with her." The records do not contain any information directly connecting Uhlman with the victim's murder, nor do they establish that Uhlman ever maintained a violent disposition or demonstrated violent tendencies toward her at any time in the past. Thus, we reverse the judgment of the Appellate Court concluding that the trial court abused its discretion by refusing to disclose Uhlman's treatment records based on the defendant's third party culpability defense.

[11] The state counters this by pointing out that Wierenga, as well as several other witnesses, including Harmon, William Lewis, a fire investigator for the state police, and Sharon Wheeler, the owner of the property, subsequently testified that Uhlman appeared distraught at the crime scene.

II

We next address whether the trial court should have disclosed Thomas Uhlman's treatment records for impeachment purposes. The defendant claims that the trial court abused its discretion by refusing to disclose Uhlman's treatment records, which would have enabled the defendant to impeach Uhlman's testimony concerning the statement the defendant allegedly made to Uhlman in July or August, 1995, that "if he ever did [commit] another crime . . . he would burn the place to the ground," and Uhlman's subsequent recollection of this statement in February, 1996. Furthermore, the defendant contends that the records reveal the extent of Uhlman's alcohol abuse and that the jury could have inferred from this information that Uhlman's ability to perceive and recollect certain relevant events was highly questionable.

Prior to ruling on whether to disclose Thomas Uhlman's records, the trial court informed the defendant that it would allow any evidence pertaining to Uhlman's alcohol consumption on the days in question, but that evidence concerning Uhlman's status as an "alcoholic" would not be admissible for impeachment purposes. Thereafter, the trial court refused to disclose Uhlman's records after that court had conducted an in camera review of the evidence. The Appellate Court held that the trial court abused its discretion with regard to the defendant's ability to impeach Uhlman because the records contained material about Uhlman's alcohol consumption during certain relevant time periods, which was "probative of [Uhlman's] ability to observe, recollect and narrate the events about which he testified." *State* v. *Francis*, supra, 70 Conn. App. 580–81. On the basis of our independent review of the treatment records, we agree with the Appellate Court that, because the records contain information pertaining to

Uhlman's sensory capacity, the trial court abused its discretion by refusing to disclose the evidence.

"A criminal defendant has a constitutional right to cross-examine the state's witnesses, which may include impeaching or discrediting them by attempting to reveal to the jury the witnesses' biases, prejudices or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception. *Delaware* v. *Fensterer*, 474 U.S. 15, 19, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985); *Davis* v. *Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State* v. *Storlazzi*, [supra, 191 Conn. 457]. Thus, in some instances, otherwise privileged records, like the ones in this case, must give way to a criminal defendant's constitutional right to reveal to the jury facts about a witness' mental condition that may reasonably affect that witness' credibility. *State* v. *Hufford*, 205 Conn. 386, 401–402, 533 A.2d 866 (1987); *State* v. *Pierson*, 201 Conn. 211, 227, 514 A.2d 724 (1986), on appeal after remand, 208 Conn. 683, 546 A.2d 286 (1988), cert. denied, 489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989)." *State* v. *Slimskey*, supra, 257 Conn. 853–54. "[T]he linchpin of the determination of the defendant's access to [confidential] records is whether they sufficiently disclose material especially probative of the ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality and disclos[ure] . . . in order to protect [the defendant's] right of confrontation." (Internal quotation marks omitted.) Id., 856–57.

We acknowledge that "[w]e have never held that a history of alcohol or drug abuse or treatment automatically makes a witness fair game for disclosure of psychiatric records to a criminal defendant." *State* v. *Joyner*, 225 Conn. 450, 479, 626 A.2d 791 (1993); *State* v. *D'Ambrosio*, 212 Conn. 50, 60, 561 A.2d 422 (1989), cert. denied, 493 U.S. 1063, 110 S. Ct. 880, 107 L. Ed. 2d 963 (1990). Where, as in the present case, however, the

trial court does examine the records and those records indicate a long, persistent and serious history of alcohol and drug abuse and blackouts, and evidence was presented that the witness was drinking at the relevant times in question, common sense dictates that a jury should have that information before it in order properly to gauge the witness' general credibility. Furthermore, other courts have held that, "[w]here . . . the proffered evidence is that the condition of alcoholism causes the witness to suffer blackouts when he drinks, and evidence has been presented that the witness was drinking near the time of the events of which he testifies, then the evidence is admissible as probative of the witness' sensory capacity." *People* v. *Di Maso*, 100 Ill. App. 3d 338, 343, 426 N.E.2d 972 (1981); see *State* v. *Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977). Each case must be gauged on its own facts.

Our review of Thomas Uhlman's treatment records, viewed in conjunction with the testimony presented at trial, convinces us that portions of these records directly relate to his credibility and, therefore, should have been disclosed by the trial court. At trial, as a result of the trial court's ruling, Uhlman was presented to the jury as someone who did not start drinking heavily until after the victim's murder. Without quoting the records chapter and verse, suffice it to say that the records disclose the following. Uhlman began abusing both alcohol and marijuana at age twelve or thirteen, and had been doing so almost daily and consistently since that time. In addition, he had attempted suicide three times, and was subject to blackouts. He had been repeatedly diagnosed as both an alcohol and drug abuser, and had been in and out of several voluntary detoxification programs.

Thomas Uhlman's records further indicate that following the victim's murder on January 2, 1996, up until the time he was discharged from the Connecticut Valley

Hospital on February 21, 1996, he had abused alcohol and drugs typically to the point of passing out. Further, the records revealed that Uhlman had experienced "blackouts" specifically as a result of this recent drug and alcohol binge. Additionally, the records indicated that he had been unable to sleep as a result of the victim's murder, that he had been drinking continuously since the day of her death, and that whenever he stopped drinking he experienced the "shakes," which caused him to start drinking again. Further, the records revealed that Uhlman had been smoking marijuana several times a day since the victim's death and also had abused the drug Xanax. The records also indicated, however, that Uhlman claimed to have been sober for the eight months prior to the victim's murder.

As previously noted, the defendant sought these records for the purpose of revealing to the jury the extent of Thomas Uhlman's substance dependency from which the jury could have inferred that he had an impaired ability to perceive and recollect relevant events and, more specifically, to impeach Uhlman's testimony concerning his sensory capacity on the day the defendant allegedly made the inculpatory statement in July or August, 1995, and the day on which Uhlman subsequently recalled this event in February, 1996. Uhlman testified at trial that he had split a six-pack of beer with the defendant on the day the defendant made the statement, and that his memory on this day was unaffected by this alcohol consumption. Uhlman also testified that, in late February, 1996, at the time he recalled the defendant having made the statement, his consumption of alcohol on that day would have affected his ability to recall past events.

On the basis of the foregoing, we conclude that Thomas Uhlman's records contained information demonstrating that he suffered from a condition that may have "substantially affected [his] ability to . . . recall

or narrate events at issue in the trial." *State* v. *Cardinal*, 194 Conn. 114, 119, 478 A.2d 610 (1984). Specifically, Uhlman's records reveal an extreme state of substance dependency during relevant time periods, and that he was prone to "blackouts" as a result of his drinking and drug usage. Furthermore, the testimony presented at trial indicated that Uhlman had been drinking both at the time the statement was made and on the day he recalled the statement. Thus, the records disclose a history that (1) seriously undermines how Uhlman was presented as a witness to the jury, and (2) shows a long, persistent and serious history of both alcohol abuse and drug usage, which, on the facts of the present case, the jury should have been given in order to evaluate his overall credibility. Accordingly, the records were probative of Uhlman's capacity to relate the truth or recollect relevant occurrences, which, as previously noted, is the linchpin in determining whether disclosure is warranted. See *State* v. *Slimskey*, supra, 257 Conn. 856. Therefore, we agree with the Appellate Court that the trial court should have disclosed the treatment records for impeachment purposes and that its failure to do so constituted an abuse of discretion.

III

In light of our conclusion, we next must consider whether the trial court's improper refusal to disclose Thomas Uhlman's treatment records violated the defendant's constitutional rights, or whether the error was merely evidentiary in nature. See *State* v. *Kirsch*, 263 Conn. 390, 412, 820 A.2d 236 (2003).[12] "Our law in this regard is well settled. The right of an accused to effec-

[12] "If the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt. . . . Otherwise, in order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Citations omitted.) *State* v. *Kirsch*, supra, 263 Conn. 412.

tively cross-examine an adverse witness is embodied in the confrontation clause of the sixth amendment. . . . The general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial judge . . . but this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . *State* v. *Asherman*, 193 Conn. 695, 718, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. *State* v. *Gaynor*, 182 Conn. 501, 509, 438 A.2d 749 (1980), quoting *Davis* v. *Alaska*, [supra, 415 U.S. 318]. Indeed, if testimony of a witness is to remain in the case as a basis for conviction, the defendant must be afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony. *State* v. *Morant*, 242 Conn. 666, 682, 701 A.2d 1 (1997). The defendant's right to cross-examine a witness, however, is not absolute. *State* v. *Vitale*, 197 Conn. 396, 403, 497 A.2d 956 (1985) ([e]very evidentiary ruling which denies a defendant a line of inquiry to which he thinks he is entitled is not constitutional error). Therefore, a claim that the trial court unduly restricted cross-examination generally involves a two-pronged analysis: whether the aforementioned constitutional standard has been met, and, if so, whether the court nonetheless abused its discretion . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Clark*, 260 Conn. 813, 826–27, 801 A.2d 718 (2002).

In *State* v. *Slimskey*, supra, 257 Conn. 858, we stated that "there is . . . a minimum level of cross-examination that must be afforded to the defendant into matters affecting the reliability and credibility of the state's

witnesses." Accordingly, in that case, we held that, because the trial court's failure to disclose treatment records was an abuse of discretion that deprived the defendant of an opportunity to pursue a relevant line of inquiry, such error amounted to a constitutional violation. Id., 859.

In the present case, the trial court refused to disclose Thomas Uhlman's records, which would have allowed the jury to evaluate the life altering effects that drugs and alcohol may have had on his life. Moreover, although the trial court allowed the defendant to ask Uhlman questions on cross-examination regarding his alcohol consumption on particular days, the court completely denied the defendant any opportunity to inquire into Uhlman's extensive history of substance abuse, which, as we have already determined, was relevant to his credibility as a witness. Therefore, the trial court's refusal to disclose Uhlman's records is a constitutional violation, which requires the state to establish its harmlessness beyond a reasonable doubt. In our view, the state has met that burden in this case.

In addition to Thomas Uhlman's testimony, the state supported its case with several incriminating statements made by the defendant to the police following his arrest, testimony that the defendant had confessed to his cellmates, on three separate occasions, that he had committed the crime, and testimony of numerous disinterested witnesses, all of which was fully consistent with the defendant's guilt. As we just noted, following his arrest by Middletown police on a warrant for an unrelated crime, the defendant made a number of inconsistent and incriminating statements to various police personnel. The defendant stated to Detective Charles Jacobucci, " 'I did something real bad. I'm going to jail for the rest of my life.' " He told Officer David Visconti that, if he knew he would be facing a murder charge, he would starve himself to death. He stated to

state police Detective Richard Bedard, that he had been fishing with a prostitute on the night of the murder, and he did not respond when he was asked if he carried pepper spray. The defendant stated to Middletown police Sergeant Louis Tosto that he'd "probably get life," that he "wanted to get it over with," and that he likely would "get twenty for the burglaries and fifty for this." The defendant told Bedard and Detective Martin Graham that the Middletown police had planted the victim's ignition key on him.

Furthermore, three of the defendant's former cellmates, Patrick Weeman, Robert Swabski and Richard Harrison, testified that while each was incarcerated with the defendant, he had confessed to them that he had committed the murder. First, Weeman testified that he was a cellmate of the defendant for approximately one and one-half weeks sometime in February, 1996. Weeman testified that during his period of incarceration with the defendant, the defendant told him that around New Year's Eve of 1996, he had set fire to the home of an elderly woman after forcibly gaining entrance, tying her to a chair and strangling her. Weeman further testified that the defendant claimed that he stole the woman's car after setting the fire.

Swabski testified that he had overheard the defendant admit to committing the murder while they were being transferred back to prison from the Middletown courthouse on April, 15, 1997. Swabski testified that, although the defendant was not talking directly to him on this occasion, he knew what murder the defendant was referring to because Swabski was friends with Glen Uhlman. Swabski further testified that, once they had arrived at the Hartford correctional center, he and the defendant were placed in a holding cell together and the defendant once again admitted committing the murder. This time, however, the defendant also told Swabski that when he was arrested, he was in possession of a

key, which he was going to claim that the Middletown police planted on him, and also that he intended to blame the murder on someone named Tom.

Harrison testified that he was a cellmate of the defendant for two months in 1997. Harrison testified that, although the defendant eventually confessed to committing the murder, he at first denied having any involvement, and he claimed that he would succeed at trial. Harrison further testified that, after this initial denial, the defendant gradually began revealing facts about the incident, such as that he had run out of money and went to the victim's house to burglarize it. According to Harrison, the defendant admitted that during the course of the burglary, he either "whacked" or strangled the victim, and then he set fire to the place in order to hide the evidence. The defendant also told Harrison that he took the key to the victim's car and left the scene after setting the place on fire. Harrison testified that the defendant informed him that the police had found the victim's car key in the defendant's pocket when they arrested him, and that he planned on claiming that the police had planted this evidence on him. According to Harrison, the defendant claimed to have had problems in the past with the victim's son. Harrison also testified that he sought favorable treatment in return for his testimony concerning the murder, but that this request was denied. Harrison further testified that the state offered to send a letter to the parole board for him in exchange for his testimony, but that this occurred subsequent to the statement he had given to police.

Finally, the testimony of numerous other witnesses, such as Glen Uhlman, Wierenga, Raicik, Levesque and Garneau, supported the defendant's guilt. Specifically, Wierenga and Raicik testified that around the time of the murder, they were awakened by the sounds of a noisy car speeding away from the area. Furthermore,

the testimony of Levesque and Garneau established that the defendant was in the area of the victim's home on the night of the murder, that he had arrived there on foot, and that, subsequent to the murder, the defendant was seen in the vicinity of where the victim's car was discovered later that day. The testimony of other witnesses confirmed that, at the time of his arrest, the defendant was in possession of a car key that was capable of starting the victim's car. Additionally, Glen Uhlman testified that he witnessed the defendant in possession of a can of pepper spray approximately one month prior to the murder, which was identical to the can found near the crime scene.

The defendant's defense was that he had not committed the murder, arson and car theft, and that, in fact, Thomas Uhlman had probably done so. He testified that, shortly after the incident in which he threw the bucket of sand through the windshield of Uhlman's car, they had reconciled. The defendant testified further that, on the night of the crime, he and Uhlman drank beer and smoked marijuana and crack cocaine in Uhlman's apartment, that they then drove in Uhlman's car to Middletown to buy more drugs, with the defendant driving because Uhlman's license was suspended, that he parked the car in the Pearl Street lot while Uhlman bought the drugs, that he drove Uhlman back to his apartment at 1 a.m., and that Uhlman told him to drive himself back to Middletown in the victim's car and leave it in the same parking lot. The defendant further testified that following his arrest, he repeatedly has denied committing the murder and that he never made the alleged confessions that the state introduced at trial.

The defendant attempted to impeach Thomas Uhlman's credibility on cross-examination with evidence of his drinking. Uhlman denied drinking any alcohol on the night in question. With regard to the conversation in the summer of 1995, when, according to Uhlman's testimony, the defendant told Uhlman that he would

cover up any future crimes by arson, Uhlman admitted that they had split a six-pack of beer at that time, and that he only recalled that conversation in February, 1996, after being arrested for driving under the influence. Uhlman also admitted that his consumption of alcohol at the time he recalled the defendant's statement affected his memory and ability to recall.

The defendant raises two issues in support of his claim that the state has failed to prove that the trial court's error was harmless. First, the defendant claims that any argument that such error was harmless assumes that "jail-house informants are reliable witnesses." Further, the defendant points to the fact that Uhlman was characterized by the Appellate Court as a "key" state witness and that, had the jury discredited his testimony as a result of the information contained within the treatment records, "the state's case would have been very significantly weakened."

On the basis of the foregoing information, including the defendant's arguments on appeal, we are persuaded that the state has satisfied its burden. First, this court views the defendant's third party culpability defense as weak and implausible, and wholly uncorroborated. Moreover, it required the jury to believe, not only that Thomas Uhlman murdered the victim for some unstated financial reasons, but that he did so in a particularly brutal way, and that he covered up the murder by an arson that not only highly endangered both the upstairs tenants but himself as well.

Second, the state's case was very strong, irrespective of Thomas Uhlman's testimony, including his testimony of the 1995 conversation with the defendant. As the detailed rendition of the evidence discloses, the state's case, supported by physical evidence and the testimony of numerous disinterested witnesses, and on the testimony of witnesses who corroborated most of Thomas Uhlman's other testimony, was fully consistent with the

defendant's guilt, and inconsistent with his uncorroborated version of his reconciliation with Thomas Uhlman on the fatal New Year's Eve. The testimony of Wierenga, Raicik, Garneau and Levesque was particularly telling in this regard. In addition, the defendant's conduct after the crime was filled with evidence and statements of consciousness of guilt, such as his burglary of his sister's house and the note he left. Additionally, he made numerous incriminating statements to five different police officers, and made three separate, detailed confessions to three separate cellmates at three different times. Furthermore, his possession of the victim's car key was highly incriminating, and he gave several inconsistent explanations for it, none of which was consistent with his testimony at trial. Finally, there was Glen Uhlman's testimony about the defendant's possession of the can of pepper spray, which was never contradicted or explained. Thus, in our view, the evidence, irrespective of any uncorroborated testimony of Thomas Uhlman, pointed unerringly to the defendant's guilt, and to no one else's. Further, the defendant has not presented this court with any support for his contention that the jury found the jailhouse witnesses to be less reliable than the other witnesses, nor is there any support in the law for such a proposition. See *United States* v. *Westmoreland*, 240 F.3d 618, 627–28 (7th Cir. 2001) (confessions to cellmates meet "requirement that 'particularized guarantees of trustworthiness' be present").

As we have discussed, the trial court abused its discretion in refusing to disclose Thomas Uhlman's treatment records for the purposes of impeaching his testimony. Nevertheless, the defendant was able to attack the reliability of this testimony by eliciting through cross-examination that Uhlman's drinking had affected his capacity to recollect this event. Therefore, viewing the trial court's error in the context of the entire trial, we are persuaded beyond a reasonable doubt that the verdict would have been the same, even if Uhlman's

credibility had been impeached by his confidential records.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to consider the defendant's remaining claims on appeal.

In this opinion the other justices concurred.

RENAISSANCE MANAGEMENT COMPANY, INC. *v.* COMMISSIONER OF REVENUE SERVICES (SC 16984)

Sullivan, C. J., and Borden, Katz, Palmer and Zarella, Js.

Argued October 23—officially released December 30, 2003

Procedural History

Appeal from the defendant's assessment of sales and use tax deficiencies against the plaintiff in connection with certain payroll reimbursements the plaintiff had received for property management services provided to certain limited partnerships, brought to the Superior Court in the judicial district of New Britain, Tax Session, and tried to the court, *Hon. Arnold W. Aronson*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dismissing the plaintiff's appeal, from which the plaintiff appealed. *Affirmed.*

Robert J. Percy, for the appellant (plaintiff).

Philip Miller, assistant attorney general, with whom were *Louis P. Bucari, Jr.*, and, on the brief, *Richard Blumenthal*, attorney general, and *Jonathon L. Ensign*, assistant attorney general, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Renaissance Management Company, Inc., appeals,[1] pursuant to General Stat-

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

utes § 12-422,[2] from the judgment of the trial court, which dismissed its appeal from the determination by the defendant, the commissioner of revenue services, that during the audit period of October 1, 1993, through September 30, 1996, the plaintiff was not exempt from sales and use taxes on gross receipts derived from the furnishing of property management services. The plaintiff claims that the trial court improperly determined that it had failed to satisfy its burden of proving that the exemption described in General Statutes (Rev. to 1993) § 12-407 (8)[3]

[2] General Statutes § 12-422 provides: "Any taxpayer aggrieved because of any order, decision, determination or disallowance of the Commissioner of Revenue Services under section 12-418, 12-421 or 12-425 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom to the superior court for the judicial district of New Britain, which shall be accompanied by a citation to the Commissioner of Revenue Services to appear before said court. Such citation shall be signed by the same authority, and such appeal shall be returnable at the same time and served and returned in the same manner, as is required in case of a summons in a civil action. The authority issuing the citation shall take from the appellant a bond or recognizance to the state of Connecticut, with surety to prosecute the appeal to effect and to comply with the orders and decrees of the court in the premises. Such appeals shall be preferred cases, to be heard, unless cause appears to the contrary, at the first session, by the court or by a committee appointed by it. Said court may grant such relief as may be equitable and, if such tax has been paid prior to the granting of such relief, may order the Treasurer to pay the amount of such relief, with interest at the rate of two-thirds of one per cent per month or fraction thereof, to the aggrieved taxpayer. If the appeal has been taken without probable cause, the court may tax double or triple costs, as the case demands; and, upon all such appeals which are denied, costs may be taxed against the appellant at the discretion of the court, but no costs shall be taxed against the state."

[3] General Statutes (Rev. to 1993) § 12-407 (8) provides in relevant part: " 'Sales price' means the total amount for which tangible personal property is sold, the total amount of rent received for occupancy or the total amount received for any service rendered on or after July 1, 1975, or the total amount of payment or periodic payments received for leasing or rental of tangible personal property for the term of any such lease or rental occurring on or after July 1, 1975, valued in money, whether paid in money or otherwise, without any deduction on account of any of the following: (a) The cost of the property sold; (b) the cost of materials used, labor or service cost, interest charged, losses or any other expenses; (c) the cost of transportation

and (9)[4] includes the separately stated expenses of

of the property prior to its purchase. Such total amounts include all of the following: (a) Any services that are a part of the sale; (b) any amount for which credit is given to the purchaser by the seller; (c) all compensation and all employment related expenses, whether or not separately stated, paid to or on behalf of employees of a retailer of any service described in subdivision (i) of subsection (2) of this section. 'Sales price' does not include any of the following . . . (f) the amount charged for separately stated compensation, fringe benefits, workers' compensation and payroll taxes or assessments paid to or on behalf of employees of a retailer who has contracted to manage a service recipient's property or business premises and renders management services described in subdivision (i) of subsection (2) of this section, provided (A) the employees perform such services solely for the service recipient at its property or business premises and (B) 'sales price' shall include the separately stated compensation, fringe benefits, workers' compensation and payroll taxes or assessments paid to or on behalf of any employee of the retailer who is an officer, director or owner of more than five per cent of the outstanding capital stock of the retailer. Determination whether an employee performs services solely for a service recipient at its property or business premises for purposes of this subdivision shall be made by reference to such employee's activities during the time period beginning on the later of the commencement of the management contract, the date of the employee's first employment by the retailer or the date which is six months immediately preceding the date of such determination."

General Statutes (Rev. to 1993) § 12-407 (2) provides in relevant part: " 'Sale' and 'Selling' mean and include . . . (i) the rendering of certain services for a consideration . . . as follows . . . (I) services to industrial, commercial or income-producing real property, including but not limited to, such services as management . . . provided income-producing property shall not include property used exclusively for residential purposes in which the owner resides and which contains no more than three dwelling units, or a housing facility for low and moderate income families and persons owned by an organization which has as one of its purposes the ownership of housing for low and moderate income families, and which organization has been granted exemption from federal income taxation . . . ."

[4] General Statutes (Rev. to 1993) § 12-407 (9) provides in relevant part: " 'Gross receipts' means the total amount of the sales price, of the retail sales of retailers, or the total amount of the rent received for occupancy or the total amount received for any service rendered on or after July 1, 1975, or the total amount of payment or periodic payments received for leasing or rental of tangible personal property for the term of any such lease or rental occurring on or after July 1, 1975, valued in money, whether received in money or otherwise, without any deduction on account of any of the following: (a) The cost of the property sold; however, in accordance with such regulations as the commissioner of revenue services may pre-

employees who are not located at, and who do not solely devote their time to, a single housing project.

Our examination of the record and briefs and our consideration of the arguments of the parties persuade us that the judgment of the trial court should be affirmed. The issues were resolved properly in the trial court's concise and well reasoned memorandum of decision. *Renaissance Management Co.* v. *Commissioner of Revenue Services*, 48 Conn. Sup. 221, 838 A.2d

scribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration or display while holding it for sale in the regular course of business. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property; (b) the cost of the materials used, labor or service cost, interest paid, losses or any other expense; (c) the cost of transportation of the property prior to its sale to the purchaser. The total amount of the sales price includes all of the following: (a) Any services that are a part of the sale; (b) all receipts, cash, credits and property of any kind; (c) any amount for which credit is allowed by the seller to the purchaser; (d) all compensation and all employment related expenses, whether or not separately stated, paid to or on behalf of employees of a retailer of any service described in subdivision (i) of subsection (2) of this section. 'Gross receipts' do not include any of the following . . . (f) the amount charged for separately stated compensation, fringe benefits, workers' compensation and payroll taxes or assessments paid to or on behalf of employees of a retailer who has contracted to manage a service recipient's property or business premises and renders management services described in subdivision (i) of subsection (2) of this section, provided (A) the employees perform such services solely for the service recipient at its property or business premises and (B) 'gross receipts' shall include the separately stated compensation, fringe benefits, workers' compensation and payroll taxes or assessments paid to or on behalf of any employee of the retailer who is an officer, director or owner of more than five per cent of the outstanding capital stock of the retailer. Determination whether an employee performs services solely for a service recipient at its property or business premises for purposes of this subdivision shall be made by reference to such employee's activities during the time period beginning on the later of the commencement of the management contract, the date of the employee's first employment by the retailer or the date which is six months immediately preceding the date of such determination."

260 (2002). Because that memorandum of decision fully addresses all arguments raised in this appeal, we adopt it as a proper statement of the issues and the applicable law concerning those issues. It would serve no useful purpose for us to repeat the discussion contained therein. See *Davis* v. *Freedom of Information Commission*, 259 Conn. 45, 55–56, 787 A.2d 530 (2002).

The judgment is affirmed.

A. AIUDI AND SONS, LLC *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF PLAINVILLE
(SC 16879)

Borden, Norcott, Katz, Palmer and Zarella, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant planning and zoning commission denying its application for the removal of sand and gravel from its property, which is located in a residential zone. The trial court dismissed the plaintiff's appeal, concluding that the plaintiff's application constituted an application for site plan approval, that a zoning commission may consider public health, safety and welfare in denying a site plan application as long as the applicable regulations so permit, and that, because the applicable town zoning regulations authorized the defendant to consider the foregoing factors, it properly did so in denying the plaintiff's application. On the granting of certification, the plaintiff appealed to the Appellate Court. The Appellate Court determined, inter alia, that the plaintiff's application was, in substance, an application for a special exception and, thus, concluded that the trial court improperly treated the plaintiff's application as one for site plan approval. The Appellate Court nevertheless affirmed the judgment of the trial court, concluding, inter alia, that the applicable regulations authorized the commission to deny the plaintiff's application on the basis of considerations of public health, safety and welfare. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court properly concluded that the plaintiff's application was, in substance, an application for a special exception, and, because the town zoning regulation applicable to special exceptions expressly required, inter alia, that a proposed use not impair the public health,

safety or general welfare, the commission properly could consider those factors in denying the plaintiff's application.

Argued September 12, 2003—officially released January 6, 2004

Procedural History

Appeal from the decision of the defendant denying the plaintiff's application to remove sand and gravel from certain of its real property, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cohn, J.*; judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to the Appellate Court, *Lavery, C. J.*, and *Schaller* and *West, Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Peter J. Zagorsky, for the appellant (plaintiff).

Edward T. Lynch, Jr., with whom was *Jared Cohane*, for the appellee (defendant).

Opinion

ZARELLA, J. In this certified appeal, we must determine whether the Appellate Court properly affirmed the trial court's dismissal of the plaintiff's appeal from the decision of the defendant, the planning and zoning commission of the town of Plainville (commission), to deny the plaintiff's application for the removal of sand and gravel from its property. We conclude that it did and, accordingly, affirm the judgment of the Appellate Court.

The following facts and procedural history are relevant to this appeal. On October 1, 1996, the plaintiff, A. Aiudi and Sons, LLC, filed an application with the commission for the removal of approximately 95,000 cubic yards of sand and gravel from its property in Plainville. The plaintiff's property is located in a residential zone and is situated between a residential neighbor-

hood and a concrete plant utilized by the plaintiff. The commission held two public hearings in connection with the plaintiff's application during which it received testimony regarding the potential impact of the plaintiff's proposed activity from experts and owners of property abutting the plaintiff's property.

At the November, 1996 hearing, the plaintiff offered a brief overview of the area it sought to excavate but presented no other evidence in support of its application. At the December, 1996 hearing, Gregory Granger, an attorney appearing on behalf of the abutting property owners, objected to the plaintiff's application pursuant to General Statutes § 22a-19.[1] Granger presented four expert witnesses, all of whom testified about the negative impact that the plaintiff's proposed excavation posed to neighboring properties.

Thereafter, the commission denied the plaintiff's application,[2] and the plaintiff appealed to the trial court. Construing the plaintiff's application as an application for site plan approval, the trial court upheld the commission's decision to deny the plaintiff's application and dismissed the plaintiff's appeal. The trial court con-

[1] General Statutes § 22a-19 provides in relevant part: "(a) In any administrative . . . proceeding . . . any person, partnership, corporation, association, organization or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding . . . involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.

"(b) In any administrative . . . proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect so long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."

[2] Although three of the six commission members voted to approve the plaintiff's application, one member voted to deny the application, thereby preventing approval due to the lack of necessary majority votes.

cluded that the rule announced in *Friedman* v. *Planning & Zoning Commission*, 222 Conn. 262, 265–66, 608 A.2d 1178 (1992), authorizes a zoning commission to take into account general considerations of health, safety and welfare of the community in denying a site plan application when the applicable regulations so permit. The trial court further concluded that, because the applicable town zoning regulations expressly authorize the commission to deny an application on the basis of these "general considerations," the commission properly considered, inter alia, the health and safety of the community in denying the plaintiff's application.[3]

On the granting of certification, the plaintiff appealed from the judgment of the trial court to the Appellate Court. The Appellate Court affirmed the trial court's judgment, concluding that, even though the plaintiff had filed its application as an application for site plan approval, the application, "in substance," qualified as one for a special exception rather than site plan approval.[4] *A. Aiudi & Sons, LLC* v. *Planning & Zoning Commission*, 72 Conn. App. 502, 505, 516, 806 A.2d 77 (2002). The Appellate Court noted that, even if it were to accept the plaintiff's characterization of its application as one for site plan approval, General Statutes § 8-3 (g)[5] and the applicable regulations authorized the

[3] The trial court also rejected the plaintiff's other claim, namely, that the commission's decision to deny the plaintiff's application should have been reversed on the basis of the alleged absence in the record of any explanation by the commission for its decision. The court reviewed the record and determined that a sufficient basis had existed to uphold the commission's decision to deny the plaintiff's application.

[4] The Appellate Court noted, and we have recognized, that courts use the terms "special exception" and "special permit" interchangeably. *A. Aiudi & Sons, LLC* v. *Planning & Zoning Commission*, supra, 72 Conn. App. 508; see also *A.P. & W. Holding Corp.* v. *Planning & Zoning Board*, 167 Conn. 182, 185, 355 A.2d 91 (1974).

[5] General Statutes § 8-3 (g) provides in relevant part: "The zoning regulations may require that a site plan be filed with the commission . . . to aid in determining the conformity of a proposed . . . use . . . with specific provisions of such regulations. . . . A site plan may be modified or denied

commission to deny the plaintiff's application on the basis of considerations of public health, safety and welfare. Id., 515. This appeal followed.

We granted the plaintiff's petition for certification to appeal limited to the following issues: First, "[d]id the Appellate Court properly hold that the plaintiff's site plan application was actually an application for [a] special exception?" *A. Aiudi & Sons, LLC* v. *Planning & Zoning Commission*, 262 Conn. 919, 812 A.2d 861 (2002). Second, "[d]id the Appellate Court properly determine that if the application was seeking site plan approval, general criteria in the zoning regulations could serve as a basis for denial?" Id. We conclude that the Appellate Court properly determined that the plaintiff's application was, "in substance," one for a special exception and, therefore, need not reach the second certified issue.

The plaintiff claims that the Appellate Court improperly concluded that its application qualified as an application for a special exception. The plaintiff submits that the language of § 910 (2) of the regulations of the town of Plainville requires the issuance of a permit for the plaintiff's proposed activity and not a special permit or special exception. The plaintiff contends, therefore, that its application does not qualify as an application for a special exception but, rather, as an application for site plan approval. According to the plaintiff, the classification of its application as one for site plan approval rather than one for a special exception means that § 8-3 (g), rather than General Statutes § 8-2 (a),[6]

only if it fails to comply with requirements already set forth in the zoning . . . regulations. . . ."

[6] General Statutes § 8-2 (a) provides in relevant part: "The zoning commission of each . . . town . . . is authorized to regulate, within the limits of such municipality, the . . . use of buildings, structures and land for trade, industry, residence or other purposes . . . . Such zoning commission may divide the municipality into districts . . . and . . . may regulate the . . . use of buildings or structures and the use of land. All such regulations . . . may provide that certain . . . uses of land are permitted only after obtaining

applies. In support of its claim that the commission improperly denied its application on the basis of general considerations of public health, safety and welfare, the plaintiff relies on *Kosinski* v. *Lawlor*, 177 Conn. 420, 423, 418 A.2d 66 (1979). We disagree with the plaintiff that its application was merely one for site plan approval and conclude that the application qualifies as an application for a special exception, thereby implicating the provisions of § 8-2 (a) rather than § 8-3 (g).

We begin by noting our standard of review when interpreting statutes as well as regulations. "Statutory construction . . . presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Morrison* v. *Parker*, 261 Conn. 545, 548, 804 A.2d 777 (2002), quoting *Tighe* v. *Berlin*, 259 Conn. 83, 89, 788 A.2d 40 (2002). Such plenary review also applies to questions of law relating to the interpretation of regulations. *Wood* v. *Zoning Board of Appeals*, 258 Conn. 691, 698, 784 A.2d 354 (2001).

When the provisions of a zoning regulation contain requirements or procedures mirroring those found in special exceptions, we have held that an application qualifies as an application for a special exception in substance even though the regulation does not identify or label the application as one for a "special exception."

a special permit or special exception from a zoning commission, planning commission . . . [or] combined planning and zoning commission . . . subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. . . . Such regulations shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. . . ."

Etzel v. *Zoning Board of Appeals*, 155 Conn. 539, 540–41, 235 A.2d 647 (1967); *Powers* v. *Common Council*, 154 Conn. 156, 159–60, 222 A.2d 337 (1966); see also *Huhta* v. *Zoning Board of Appeals*, 151 Conn. 694, 696, 202 A.2d 139 (1964) ("[w]hether or not . . . [the] term [special exception] is used in the particular zoning regulations is not material"). In *Etzel* v. *Zoning Board of Appeals*, supra, 155 Conn. 539, the trial court dismissed the appeal of the plaintiff, Johanna Etzel, who owned land in a "light industrial" zone in North Haven, from the decision of the defendant zoning board of appeals denying her application for a certificate of approval for the erection of an automotive service station. Id., 540. Etzel thereafter appealed to this court. Id. We noted that, pursuant to the applicable zoning regulations, "automobile service stations are a permitted use in . . . a [light industrial] zone, but no permit for the construction of an automobile service station may be issued until the proposed location has been approved as suitable by the zoning board of appeals and, following such approval, certain designated physical aspects of the layout have been approved by the planning and zoning commission." Id. Accordingly, we held that "[t]he zoning regulations . . . place an automobile service station in the category of a special exception." Id. We discounted the fact that the applicable regulation did not employ the term "special exception" and noted that the absence of that term from the regulations was "of no consequence"; id., 541; because "[t]he language of the section ma[de] clear that no permit for the construction of an automobile service station [was] to be issued until the special conditions pertaining to that use of the land ha[d] been satisfied." Id.

We reached a similar conclusion in *Powers* v. *Common Council*, supra, 154 Conn. 156, in which the plaintiff, Seymour R. Powers, appealed from the trial court's dismissal of his appeal from the defendant common

council's denial of his application for the designation of land as a multiple housing project area. Id., 158. The city of Danbury had enacted a zoning ordinance that provided that "subject to the provisions of [Danbury Zoning Ordinance] § 3.17, a multiple housing project is a permitted use in a professional office and apartment district. The effect of § 3.17, however, is that no property within the district may be put to that use unless the property is first recommended by the planning commission and designated by the council for that use." Id., 159. In *Powers*, we noted, as we did in *Etzel*, that the applicable ordinance did not use the term "special exception" or the term "special permit." Id. Nonetheless, we concluded that "[t]he nomenclature is immaterial so long as the effect is the same"; id.; and held that "this area designation process [was] in effect a procedure for the granting of a special permit." Id., 160; see also *Heithaus* v. *Planning & Zoning Commission*, 258 Conn. 205, 220, 779 A.2d 750 (2001).

Similarly, in the present case, we are not constrained by the use or lack of use of the term "special exception" or the term "special permit" in determining the effect of the particular regulations at issue. Rather, we examine these regulations, focusing on their requirements and procedures. With this principle in mind, we next turn to the applicable regulatory scheme and the plaintiff's claim.

Article 9 of the zoning regulations of the town of Plainville governs the removal of, inter alia, sand and gravel. Section 900 of the regulations provides in relevant part: "*Except as otherwise provided for in . . . Article* [*9*], *there shall be no removal from the premises, in any district*, of earth, sand, gravel or clay except as surplus material, resulting from bona fide construction. A bona fide construction site shall retain upon completion, a minimum of four . . . inches of topsoil in areas to be either seeded, planted with trees, shrubbery or

cultivated." (Emphasis added.) Plainville Zoning Regs., art. 9, § 900 (1989). Accordingly, the removal of sand and gravel in any district in the town is expressly prohibited unless such removal occurs in conjunction with bona fide construction or falls within an exception otherwise provided in article 9 of the regulations.

Section 910 outlines the only exceptions to the prohibition enunciated in § 900. See generally id., § 910. Subsection (2) of § 910[7] authorizes the commission, in its discretion,[8] to "grant a permit for the removal of sand,

[7] Subsection (2) of § 910 provides in relevant part: "The Planning and Zoning Commission may, after a public hearing, subject to the provisions of Article 6, grant a permit for the removal of sand, gravel or clay in any zone, under the following conditions:

"a. The applicant shall submit a plan showing existing grades in the area from which the above material is to be removed, together with finishing grades at the conclusion of the operation.

"b. The plan shall provide for proper drainage of the area of the operation after completion and no bank shall exceed a slope of one . . . foot of vertical rise in two . . . feet of horizontal distance, except in the case of ledge rock. No removal shall take place within 20 feet of a property line.

"c. At the conclusion of the operation, or of any substantial portion thereof, the whole area where removal takes place shall be covered with not less than four . . . inches of top soil and either seeded, planted with trees, shrubbery or cultivated. This requirement may be modified or waived, in part or in full, when, in the judgment of the Planning and Zoning Commission, no practicable purpose is accomplished by adherence thereto where land is beyond redemption or cultivation.

"d. Except in a General Industrial or Quarry Industrial Zone, no stone crushers or other machinery not required for actual removal of the material shall be used.

"e. Before a permit is granted under this section, the applicant shall post a bond with the Planning and Zoning Commission, or its designated agent, in an amount approved by the Planning and Zoning Commission as sufficient to guarantee conformity with the provisions of the permit issued hereunder.

"f. Such permits shall be issued for a period not to exceed 2 years." Plainville Zoning Regs., art. 9, § 910 (2) (1989).

[8] The regulations provide that the commission "*may*, after a public hearing, subject to the provisions of Article 6, grant a permit for the removal of sand, gravel or clay in any zone . . . [provided certain conditions are met]." (Emphasis added.) Plainville Zoning Regs., art. 9, § 910 (2) (1989). Because the regulations define "may" as "permissive"; id., art. 1, § 130 (3); the granting of such a permit falls within the commission's discretion.

gravel or clay in any zone . . . .'' Id., § 910 (2). Section 910 (2) nevertheless contains numerous conditions to the granting of such a permit, including a public hearing on the proposed removal, the applicant's satisfaction of the requirements contained in article 6 of the regulations, and the fulfillment of certain conditions enumerated in § 910 (2).[9] Id. Thus, § 910 (2) serves as the lone gateway to the approval of an application for the removal of sand and gravel from a property located within the town when such removal will not be performed in conjunction with bona fide construction. See id.

As § 910 (2) instructs that an applicant must satisfy the requirements and conditions enumerated in article 6,[10] we examine that article and find that it reveals a host of submission requirements and other standards and considerations. Id., art. 6, §§ 600 through 603. Section 603,[11] in particular, details the general considera-

[9] The six conditions enumerated in § 910 (2) are not relevant to this appeal. See footnote 7 of this opinion for the full text of § 910 (2).

[10] Article 6 of the regulations, which is entitled, ''SITE PLAN REQUIREMENTS,'' contains four sections, although only § 603 is relevant to this appeal. See generally Plainville Zoning Regs., art. 6, §§ 600 through 603 (1989).

[11] Section 603 of the zoning regulations provides in relevant part: ''The Commission may approve, approve with conditions, modify or deny a Site Plan Application or Site Plan Modification. In approving such an application or approving it with conditions or approving it subject to modification, the Commission shall make a finding [that] the proposed use and proposed buildings and structures conform to the following considerations and standards in addition to any additional requirements for specific uses included in these Regulations. The Commission may modify the Site Plan Application or any revision thereto and/or attach conditions to an approval for such an application if such modification or conditions are necessary to achieve the objectives of this Regulation.

''1. Traffic Access. All proposed access to the site accommodates two way traffic entering and exiting the site, except as modified by Section 504, Drive Through Windows for Banks, Financial Institutions, Retail Stores and Restaurants, of the Regulations. The number of site access drives is adequate to accommodate the traffic generated by the proposed development. Site access drives are designed to safely accommodate existing traffic and traffic generated by the proposed development. Site access drives are properly

tions and standards for site plans. Id., art. 6, § 603. That section provides in relevant part: "The Commission may approve, approve with conditions, modify *or deny* a Site Plan Application or Site Plan Modification. In approving such an application or approving it with conditions or approving it subject to modification, the Commission *shall* make a finding [that] the proposed use . . . *conform*[*s*] *to the following considerations and standards* in addition to any additional requirements for specific uses included in these Regulations. . . ." (Emphasis added.) Id. The considerations and standards listed thereafter describe criteria relating to traffic access, circulation and parking, landscaping and screening, illumination, and the character and appearance of, inter

aligned and provide adequate site distance for the motorists and pedestrians. All of the proposed curb cuts are not located too near intersections, street corners, places of public assembly and other similar safety considerations.

"2. Circulation and Parking. Adequate off-street parking and loading areas are provided to prevent patrons, visitors and/or employees of a particular use from parking in public streets. Adequate, safe and accessible pedestrian circulation is provided to and within the site. Interior pedestrian and vehicular traffic circulation systems are designed to minimize conflicts between these two types of traffic and to provide safe access to and from buildings, structures and off-street parking areas. Loading areas are designed and located to prevent conflicts with pedestrian traffic.

"3. Landscaping and Screening. All parking areas, service delivery areas, outside storage of goods and materials associated with the primary use of the property shall be properly and reasonably screened with a combination of trees, indigenous to the region, shrubs, earthen berms, fences and/or other plant materials throughout the yea[r]. The view shall be screened from adjacent lots and streets and the visual screen shall be in character with the surrounding neighborhood. The preservation of existing trees over five inches in diameter . . . shall be encouraged by the Commission.

"4. Illumination. Outdoor illumination of a building, structure, parking area or any other portion of a lot must be properly shielded and directed in such a manner as not to adversely affect abutting properties or public or private streets.

"5. Character and Appearance. The character and appearance of the proposed use, building, parking and loading areas, outside storage areas, signs, landscaping and external illumination shall be in general harmony with the character and appearance of the surrounding neighborhood and will not adversely affect the general health, safety or welfare of the inhabitants of the [t]own of Plainville." Plainville Zoning Regs., art. 6, § 603 (1989).

alia, the proposed use. Id., § 603 (1) through (5). In particular, subsection (5) of § 603 provides in relevant part that "[t]he character and appearance of the proposed use . . . shall be in general harmony with the character and appearance of the surrounding neighborhood and will not adversely affect the general health, safety or welfare of the inhabitants of the [t]own . . . ." Id., § 603 (5).

Even though the plaintiff had submitted its application as one for site plan approval pursuant to § 910 (2) and, by incorporation, § 603 of the regulations, the Appellate Court concluded that, "[b]ecause the plaintiff was applying for a permit that is not allowed as of right in th[e] zone [in which the property was situated]," the plaintiff's application qualified as one for a special exception. *A. Aiudi & Sons, LLC* v. *Planning & Zoning Commission*, supra, 72 Conn. App. 508. In support of its conclusion, the Appellate Court noted that "the posture of the application process [in the present case]"; id.; resembled that of the process followed by the commission in considering applications for special exceptions. See id., 508–509.

We note, as did the Appellate Court, that the regulations governing the plaintiff's application parallel those that generally govern applications for special exceptions. See id. We previously have observed that "[a] special [exception] allows a property owner to use his property in a manner *expressly permitted* by the local zoning regulations." (Emphasis added; internal quotation marks omitted.) *Heithaus* v. *Planning & Zoning Commission*, supra, 258 Conn. 215. Nevertheless, special exceptions, although "expressly permitted" by local regulations, "must satisfy [certain conditions and] standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values [as required by § 8-2]." (Internal quotation marks omitted.)

Id., 215–16. Moreover, we have noted that the "nature [of special exceptions] is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site." (Internal quotation marks omitted.) *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission*, 222 Conn. 607, 612, 610 A.2d 1205 (1992). We also have recognized that, "if not properly planned for, [such uses] might undermine the residential character of the neighborhood." (Internal quotation marks omitted.) Id., 612–13. Thus, we have explained that the goal of an application for a special exception is to seek "permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular zoning district." *Heithaus* v. *Planning & Zoning Commission*, supra, 216.

In the present case, § 910 (2) of the regulations explicitly allows the plaintiff's proposed use, namely, the removal of sand and gravel from its property, but subjects such removal to numerous conditions and standards. See Plainville Zoning Regs., art. 9, § 910 (2) (1989). Accordingly, this regulatory scheme bears resemblance to those regulatory schemes that define and govern special exceptions. See *Heithaus* v. *Planning & Zoning Commission*, supra, 258 Conn. 215–16. Moreover, as with the regulation of other special exceptions, § 910 (2) serves to minimize the adverse impact that the removal of sand and gravel might have on the surrounding neighborhood and to safeguard permitted uses in that neighborhood.

The cumulative effect of these overlapping qualities, coupled with our holdings in *Etzel* and *Powers*, leads us to conclude that the plaintiff's application qualifies as an application for a special exception even though § 910 (2) uses the term "permit" rather than "special

exception" or "special permit."[12] Plainville Zoning Regs., art. 9, § 910 (2) (1989). Because we conclude that the plaintiff applied for a special exception, we now turn to the relevant statutory and regulatory provisions that govern special exceptions.

General Statutes § 8-2 (a)[13] authorizes municipal zoning commissions to enact regulations providing that "certain . . . uses of land are permitted only after obtaining a special permit or special exception from a zoning commission . . . ." General Statutes § 8-2 (a) further provides that the "obtaining [of] a special permit or special exception . . . [is] subject to standards set

[12] We note that the plaintiff's application does not qualify as a site plan application, as the trial court determined, and as the plaintiff maintains, inasmuch as § 910 (2) requires an applicant seeking to excavate, inter alia, sand or gravel to obtain *both* a permit and site plan approval. See Plainville Zoning Regs., art. 9, § 910 (2) (1989). If we were to accept the plaintiff's interpretation, we effectively would read the "permit" requirement out of the regulation. This we decline to do. See *Planning & Zoning Commission* v. *Gilbert*, 208 Conn. 696, 705, 546 A.2d 823 (1988) ("[w]henever possible, the language of zoning regulations will be construed so that no clause is deemed superfluous, void or insignificant").

Similarly, the plaintiff's application does not qualify as an application for a variance because § 900 does not completely bar the removal of sand and gravel when such removal is unrelated to bona fide construction. E.g., *Burlington* v. *Jencik*, 168 Conn. 506, 508, 362 A.2d 1338 (1975) ("[a] variance is authority extended to the owner to use his property in a manner forbidden by the zoning enactment"); see Plainville Zoning Regs., art. 9, § 900 (1989). Rather, § 900, in using the phrase, "[e]xcept as otherwise provided for in this Article," permits such removal subject to the conditions set forth in § 910 (2). Plainville Zoning Regs., art. 9, § 900 (1989); see also id., § 910 (2) (enumerating conditions that must be satisfied to obtain permit for removal of, inter alia, sand and gravel). We noted the distinction between special exceptions and variances in *Parish of St. Andrew's Church* v. *Zoning Board of Appeals*, 155 Conn. 350, 232 A.2d 916 (1967), in which we stated: "A special exception . . . allows an owner to put his property to a use which is expressly permitted under the regulations, in contradistinction to the grant of a variance, for instance, wherein the zoning board has the power to extend to the owner a right to use his property in a manner forbidden by the zoning enactment and need not depend upon express authorization in the zoning enactment." Id., 353.

[13] See footnote 6 of this opinion for the relevant text of § 8-2 (a).

forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values." Thus, in accordance with § 8-2 (a), an applicant's "obtaining" of a special exception pursuant to a zoning regulation is subject to a zoning commission's consideration of these general factors. Cf. *Willimantic Car Wash, Inc.* v. *Zoning Board of Appeals*, 247 Conn. 732, 738–39, 724 A.2d 1108 (1999) ("the gist of [§ 8-2] . . . is that zoning regulations must promote the public welfare").

Pursuant to its authority under § 8-2 (a), the commission adopted § 502 of article 5 of the regulations,[14] enti-

[14] Section 502 of the regulations provides in relevant part: " Special Exception Uses are declared to possess such special characteristics that each Special Exception shall be considered on an individual basis. In approving a Special Exception or approving it with conditions or approving it subject to modification, the Commission shall make a finding [that] the proposed use and proposed buildings and structures conform to the following considerations and standards in addition to any additional requirements for specific uses included in these Regulations. The Commission may modify the Special Exception and/or attach conditions to an approval for a Special Exception if such modification or conditions are necessary to achieve the objectives of this Regulation.

"A. The nature of the proposed use and its location does [sic] not impair public health, safety or the general welfare to the public. The proposed use and its location is [sic] consistent with orderly development of the [t]own and conforms to the requirements of these Regulations.

"B. The proposed use and proposed buildings and structures are in harmony and character with the surrounding properties and area and do not hinder or discourage the development and use of adjacent properties.

"C. The proposed use and proposed buildings and structures do not impair the value of adjacent properties.

"D. The nature and location of any proposed buildings and structures shall not impede access to the site and/or access for emergency response vehicles including but not limited to ambulances and fire apparatus.

"E. Local streets serving the proposed use are of adequate condition to carry traffic generated by the proposed use. Provisions shall be made for vehicular traffic to enter and exit the site which do not create an undue traffic hazard and/or cause undue traffic congestion. All access points shall accommodate two way traffic entering and exiting the site.

"F. The lot, on which the proposed use is located and the proposed buildings, structures and parking area are situated, is of sufficient size and adequate dimension to permit the normal operation of the use in [a] manner

tled, "GENERAL CONSIDERATIONS AND STANDARDS FOR SPECIAL EXCEPTIONS." Plainville Zoning Regs., art. 5, § 502 (1995). Section 502 mandates, for any type of approval, that the commission find that the proposed use complies with twelve standards enumerated therein. Id. Subsections (A) and (B) of § 502 require that: (1) "[t]he nature of the proposed use and its location [*do*] *not impair public health, safety or the general welfare* [*of*] *the public* . . . [and that they are] consistent with [the] orderly development of the [t]own and [conform] to the requirements of [the] Regulations"; (emphasis added) id., § 502 (A); and (2) "[t]he proposed use and proposed buildings and structures

which is not detrimental to the surrounding area and/or adjacent properties and consistent with the zoning district.

"G. The property and proposed parking areas shall be suitably landscaped with a combination of trees, shrubs and other plant materials to filter and screen the view of the proposed development from the surrounding area and adjacent properties and enhance the appearance of the proposed development. The Commission may require as a condition of approval a Performance Bond to assure the completion of any public improvements.

"H. Any proposed public improvements shall comply to [sic] the applicable [t]own, [s]tate or [f]ederal Regulations, Requirements, Standards or Guidelines. The Commission may require as a condition of approval a Performance Bond to assure the completion of any public improvements.

"I. The proposed buildings, structures and signs shall be sized, designed and situated to be in character and harmony with the surrounding area and adjacent properties.

"J. The proposed use and proposed buildings and structures are consistent with the policies, goals and objectives of the [t]own Plan of Development.

"K. The Commission shall find that the location and size of any use located in or adjacent to a residential zone, the nature and intensity of the operations of such use, the site layout and design of the proposed buildings and structures associated with the proposed use, vehicular access to and from the site and any proposed exterior illumination are compatible and consistent with the development and use of the neighborhood and adjacent properties, do not create a conflict with or impede the normal traffic on local roads or within the neighborhood and do not hinder or discourage the orderly and appropriate development and/or use of adjacent property and buildings.

"L. The proposed use, proposed buildings and structures and other site features are designed and maintained in such a manner as not to impose an unacceptable risk to aquifers and public water supplies." Plainville Zoning Regs., art. 5, § 502 (1995).

are in harmony and character with the surrounding properties and area and do not hinder or discourage the development and use of adjacent properties." (Emphasis added.) Id., § 502 (B). It follows, therefore, that when the commission determines that a use proposed in connection with an application for a special exception fails to satisfy one of the foregoing standards or other standards enumerated in § 502, it may deny the application. See id., § 502; see also *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 627, 711 A.2d 675 (1998) ("general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit"); *Whisper Wind Development Corp.* v. *Planning & Zoning Commission*, 229 Conn. 176, 177, 640 A.2d 100 (1994) ("in the case of a special permit, zoning regulations may authorize a planning and zoning commission to deny an application on the basis of enumerated general considerations such as public health, safety and welfare").

Therefore, because we have determined that the plaintiff's application qualifies as one for a special exception, and because § 502 of the regulations, which sets forth the standards for special exceptions, expressly requires that a proposed use not impair the public health, safety or the general welfare, and that it be in harmony with the surrounding properties, the commission properly could have considered those factors in denying the plaintiff's application.

Finally, the plaintiff claims that the list of special exceptions outlined in § 500[15] of the regulations, which

[15] Section 500 of the regulations provides: "The following uses are declared to possess such special characteristics that each must be considered as a special exception. They are permitted in any zone by the Plainville Town Planning and Zoning Commission, provided a public hearing is held and subject to the site plan provisions and guides to the Commission set forth in Article 6.

"1. Church

"2. Public or private school

enumerates eleven uses but does not include the removal of sand and gravel among those uses, constitutes an exclusive catalog of all special exceptions. The plaintiff contends that, if the commission had sought to include the removal of sand and gravel as a special exception, it easily could have done so by characterizing it as such in § 500 of the regulations. We disagree.

The Appellate Court concluded that § 500 is not an exhaustive list of special exceptions. *A. Aiudi & Sons, LLC* v. *Planning & Zoning Commission*, supra, 72 Conn. App. 510. The court reasoned that "[a]lthough § 500 lists certain uses that 'must' be considered to be special exceptions permitted in any zone, [it] does not state that this list is exclusive." Id. Accordingly, the Appellate Court determined that the plaintiff's application, which was submitted pursuant to § 910 (2), could constitute an application for a special exception. See id., 510–11.

We previously have noted that "[z]oning regulations, as they are in derogation of common law property rights, cannot be construed to *include or exclude by implication what is not clearly within their express terms*." (Emphasis added.) *Planning & Zoning Commission* v. *Gilbert*, 208 Conn. 696, 705, 546 A.2d 823 (1988). We also have noted that, "[w]henever possible, the language of zoning regulations will be construed so

"3. Library

"4. Public museum

"5. Public or private convalescent home

"6. Hospital or clinic

"7. Park or playground operated by a community association or nonprofit corporation located in the Town of Plainville, or by an employing corporation for the benefit of its employees or by a governmental unit.

"8. Public or private cemetery

"9. Town Hall, Police Station or Firehouse

"10. Public utility, building or facility

"11. Any other similar educational, religious, philanthropic, fraternal or governmental use." Plainville Zoning Regs., art. 5, § 500 (1989).

that no clause is deemed superfluous, void or insignificant." Id.

The plaintiff asks us to read into § 500 language designating the list of special exceptions contained therein as exhaustive. The language of § 500 does not indicate, however, that the list of special exceptions contained therein is exhaustive; see Plainville Zoning Regs., art. 5, § 500 (1989); and, consequently, we cannot interpret § 500 as an exhaustive list of special exceptions as the plaintiff urges. In addition, § 500 provides that the enumerated eleven uses "are declared to possess such special characteristics that each *must be* considered as a special exception." (Emphasis added.) Id. Section 500 does not state, however, that the uses enumerated therein possess such special characteristics that those, and *only those*, uses are considered as special exceptions. Accordingly, we conclude that § 500 outlines uses that unequivocally qualify as special exceptions, but does not operate to exclude other potential uses from this category that are set forth elsewhere in the regulations.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

VICTOR CWEKLINSKY *v.* MOBIL CHEMICAL COMPANY
(SC 16846)

Sullivan, C. J., and Borden, Katz, Palmer and Vertefeuille, Js.

Syllabus

As a general rule, no action for defamation exists if a defendant publishes defamatory statements to only the plaintiff and the plaintiff subsequently disseminates the statements to a third party.

The plaintiff brought an action in the United States District Court asserting various claims, including defamation, arising out of the termination of his employment by the defendant. The plaintiff, who had been employed

by the defendant for twenty-five years, had been given six weeks of paid medical leave to undergo carpal tunnel syndrome surgery on his wrist in November, 1998. The plaintiff's treating physician subsequently gave him a letter clearing him to return to work as of December 11, 1998. Rather than returning on that date, however, the plaintiff instead went to his physician's office to request that his return-to-work date be extended to December 14. To accommodate the plaintiff, the physician's office manager altered the plaintiff's copy of the return-to-work letter to reflect the December 14 date. When the plaintiff returned to work on December 14, he gave the altered return-to-work letter to his supervisor. The defendant decided to terminate the plaintiff's employment, concluding that the plaintiff himself had altered the physician's letter. After determining that the physician's office manager had altered the letter, the defendant nevertheless terminated the plaintiff's employment because he had taken paid leave from work without a medical basis. At trial, the plaintiff presented to the jury evidence that the statements by the defendant regarding the reasons for the plaintiff's termination were defamatory and that the plaintiff had felt compelled to publish the statements "over and over" to prospective employers when they asked him why he had been terminated. The jury found for the plaintiff on, inter alia, his defamation claim, and the District Court rendered judgment in his favor. From that judgment, the defendant appealed to the United States Court of Appeals for the Second Circuit, which certified to this court certain questions of law concerning the viability and scope of an employee's action against an employer for compelled self-publication defamation. *Held* that Connecticut does not recognize a cause of action for defamation based on a former employee's compelled self-publication of a former employer's defamatory statements made by the employer to only the employee; the public policy considerations that favor rejection of the doctrine of compelled self-publication defamation, i.e., the chilling effect on communication in the workplace, outweigh the considerations supporting its recognition, and an action for defamation based on compelled self-publication counters several well established principles of law, including the duty to mitigate damages, compliance with applicable statutes of limitations and the doctrine of employment at will.

Argued September 11, 2003—officially released January 6, 2004

Procedural History

Action to recover damages for, inter alia, the defendant's alleged violation of the Fair Labor Standards Act, wrongful termination of the plaintiff's employment and defamation, and for other relief, brought to the United States District Court for the District of Connecticut, and tried to the jury before *Squatrito*, *J.*; verdict and

judgment in part for the plaintiff; thereafter, the court granted the plaintiff's motion to set the amount of punitive damages and prejudgment and postjudgment interest and rendered a supplemental judgment for the plaintiff, from which the defendant appealed and the plaintiff cross appealed to the United States Court of Appeals for the Second Circuit, *McLaughlin*, *Jacobs* and *Sack*, *Js.*, which certified to this court three questions of law concerning the viability and scope of an employee's action against an employer for compelled self-publication defamation.

Jeffrey J. Tinley, with whom was *Robert Nastri, Jr.*, for the appellant (defendant).

Victoria de Toledo, with whom, on the brief, was *Rhonna W. Rogol*, for the appellee (plaintiff).

Allison M. Bogosian and *Robert B. Mitchell* filed a brief for the Connecticut Business and Industry Association, Inc., as amicus curiae.

Opinion

VERTEFEUILLE, J. The dispositive issue in this case, which comes to us upon acceptance of three certified questions from the United States Court of Appeals for the Second Circuit pursuant to General Statutes § 51-199b (d),[1] is whether Connecticut recognizes a cause of action for defamation based on a former employee's compelled self-publication of a former employer's defamatory statements made by the employer to only

[1] General Statutes § 51-199b, the Uniform Certification of Questions of Law Act, provides in relevant part: "(d) The Supreme Court may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state. . . ."

the employee.[2] We conclude that Connecticut does not recognize such a cause of action.

The plaintiff, Victor Cweklinsky, brought a multicount complaint against the defendant, Mobil Chemical Company, in the United States District Court for the District of Connecticut, asserting various claims arising out of the termination of his employment by the defendant.[3] The plaintiff's common-law claims for defamation and breach of implied contract, and statutory claims for state and federal retaliatory discharge were tried to a jury, which found for the plaintiff and awarded damages on his defamation and breach of contract claims, but found for the defendant on both of the retaliation claims.[4] The defendant subsequently appealed from the judgment of the District Court to the United States Court of Appeals for the Second Circuit.[5] The Court of Appeals then certified to this court three questions of law, which we accepted. See footnote 2 of this opinion.

[2] The Court of Appeals for the Second Circuit asked this court to answer the following three questions: "(1) Does Connecticut recognize a cause of action for defamation based on a plaintiff employee's or former employee's compelled self-publication of a defendant employer's or former employer's defamatory statements made by the employer or former employer only to the employee or former employee? (2) If so, does the assertion that [the plaintiff Victor] Cweklinsky was forced to repeat [the defendant Mobil Chemical Company's] defamatory statements 'over and over' present a triable jury issue as to whether any self-publications have occurred? (3) If no self-publications have occurred as a matter of law, may [the plaintiff Victor] Cweklinsky recover for self-publications that may occur in the future?" *Cweklinsky* v. *Mobil Chemical Co.*, 297 F.3d 154, 161 (2d Cir. 2002). Because we answer the first question in the negative, we need not reach the second and third certified questions.

[3] The plaintiff's third amended complaint alleged ten counts against the defendant, four of which ultimately were tried to the jury.

[4] See *Cweklinsky* v. *Mobil Chemical Co.*, United States District Court, Docket No. 399CV0698 (DJS) (D. Conn. February 16, 2001).

[5] The plaintiff filed a cross appeal that is not implicated in the questions certified to us.

The following facts, certified by the Court of Appeals, are relevant to our resolution of the certified questions.[6] "This case arises out of [the plaintiff's] termination from [the defendant]. [The plaintiff], who had worked as a machinist at [the defendant] for twenty-five years, was given approximately six weeks of paid medical leave in November [of] 1998 to undergo carpal tunnel syndrome surgery on his wrist. In December [of 1998], [the plaintiff's] treating physician, Dr. Gerald F. Cambria, gave [the plaintiff] a return-to-work letter that cleared him to return to full-time, full-duty work on Friday, December 11. On December 11, however, [the plaintiff] did not report to work. Instead, he went back to Dr. Cambria's office, and met with Carol Giacondino, Dr. Cambria's office manager. [The plaintiff] requested that Giacondino extend his return-to-work [date] from December 11 to December 14. [He] did not tell Giacondino that he already had been scheduled to work on Saturday, December 12 and Sunday, December 13.

"To accommodate [the plaintiff], Giacondino altered [the plaintiff's] copy of Dr. Cambria's December 8 return-to-work letter to reflect that [the plaintiff] could resume working on December 14. Significantly, Giacondino did not amend the office copy of Dr. Cambria's December 8 letter, nor indicate the change in [the plaintiff's] file.

"When [the plaintiff] reported to work on December 14, he gave his (amended) copy of Dr. Cambria's December 8 return-to-work letter to his supervisor, Gerry Smerka. Smerka then consulted with [the defendant's] human resources manager, Therese Haberman, about the discrepancy in [the plaintiff's] return-to-work date. As part of her investigation of the issue, Haberman

[6] General Statutes § 51-199b (f) provides in relevant part: "A certification order must contain . . . (2) The facts relevant to the question, showing fully the nature of the controversy out of which the question arose . . . ."

called Dr. Cambria's office and got access to Dr. Cambria's December 8 return-to-work letter from [the plaintiff's] medical file. The letters were identical with one salient exception: the return-to-work date on [the plaintiff's] copy was December 14, while Dr. Cambria's office copy had a December 11 return-to-work date.

"Confused by this discrepancy, Haberman made two more phone calls to Dr. Cambria's office, speaking with a different person each time. On both occasions, Dr. Cambria's people assured Haberman that [the plaintiff's] return-to-work date was December 11. Haberman also contacted . . . the administrator of [the defendant's] short-term disability plan, [which] confirmed that [it] was not aware of any change in [the plaintiff's] return-to-work date from December 11 to December 14. Concluding that [the plaintiff] himself must have altered Dr. Cambria's December 8 letter, [the defendant decided] to fire [the plaintiff].

"On January 5, 1999, Smerka and Haberman met with [the plaintiff]. They told him that he was being terminated because of the obvious discrepancy between Dr. Cambria's office copy and the altered letter that [the plaintiff] gave [the defendant]. [The plaintiff] denied altering Dr. Cambria's letter, but did not inform Smerka or Haberman that it was actually Giacondino who had changed the note at [the plaintiff's] request." *Cweklinsky* v. *Mobil Chemical Co.*, 297 F.3d 154, 156–57 (2d Cir. 2002).

After the plaintiff's denial, the defendant investigated further and determined that it was Giacondino, and not the plaintiff, who had altered the letter. Despite this finding, however, the defendant issued a final termination letter, concluding that although the plaintiff had not falsified his return-to-work letter, his employment should nonetheless be terminated because he had taken paid medical leave without a medical basis. Id., 157–58.

During the trial, the plaintiff provided evidence that the statements made by the defendant were defamatory. With regard to publication, counsel for the plaintiff asked him whether he had published the defamatory statements to prospective employers, and if so, whether he had felt "compelled" to do so. The plaintiff responded: "Over and over. And they asked why I was terminated. I told them. That's what they asked."

The question that we must answer is whether Connecticut recognizes a cause of action for defamation based on a former employee's compelled self-publication of a former employer's defamatory statement made only to the employee.[7] We are mindful that the issue of whether to recognize a common-law cause of action in defamation "is a matter of policy for the court to determine" based upon competing concerns in society. *Craig* v. *Driscoll*, 262 Conn. 312, 339, 813 A.2d 1003 (2003). In making such a determination, we acknowledge that the law of torts generally, and the tort of defamation especially, involves competing public policy considerations that must be thoroughly evaluated. After completing our evaluation as set forth herein, we conclude that the public policy considerations that favor the rejection of the doctrine of compelled self-publication defamation outweigh the considerations supporting its recognition. Accordingly, we decline to recognize the doctrine of compelled self-publication defamation.

[7] The plaintiff contends that this question does not present an issue of first impression, claiming that this court, in *Gaudio* v. *Griffin Health Services Corp.*, 249 Conn. 523, 544–45 n.23, 733 A.2d 197 (1999), recognized the doctrine of compelled self-publication defamation when it characterized the doctrine as "emerging." We disagree with the plaintiff's characterization of our statement. We did not recognize such a cause of action but merely referred to an article in which the *author* described the doctrine as emerging. Id., 544 n.23; see J. Acevedo, "The Emerging Cause of Action for Compelled Self-Publication Defamation in the Employment Context: Should Connecticut Follow Suit?," 72 Conn. B.J. 297 (1998).

We begin our analysis with a brief review of the common-law tort of defamation. A defamatory statement is defined as a communication that tends to "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . ." (Internal quotation marks omitted.) *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, 256 Conn. 343, 356, 773 A.2d 906 (2001), quoting 3 Restatement (Second), Torts § 559, p. 156 (1977). To establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. See *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 356; 3 Restatement (Second), supra, §§ 558, 580B, pp. 155, 221–22; W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 113, p. 802. With each publication by the defendant, a new cause of action arises. See W. Prosser & W. Keeton, supra, § 113, pp. 799–800. As a general rule, however, no action for defamation exists if the defendant publishes the defamatory statements to only the plaintiff, and the plaintiff subsequently disseminates the statements to a third person. See 3 Restatement (Second), supra, § 577, comment (m), p. 206; W. Prosser & W. Keeton, supra, § 113, p. 802.

Several courts in other states, however, have carved out an exception to that rule in the context of employment.[8] These courts have concluded that publication to

[8] See *McKinney* v. *County of Santa Clara*, 110 Cal. App. 3d 787, 795–97, 168 Cal. Rptr. 89 (1980); *Churchey* v. *Adolph Coors Co.*, 759 P.2d 1336, 1344–45 (Colo. 1988); *Munsell* v. *Ideal Food Stores*, 208 Kan. 909, 919–20, 494 P.2d 1063 (1972); *Grist* v. *Upjohn Co.*, 16 Mich. App. 452, 484, 168 N.W.2d 389 (1969); *Lewis* v. *Equitable Life Assurance Society of the United States*, 389 N.W.2d 876, 886–87 (Minn. 1986); *Neighbors* v. *Kirksville College of Osteopathic Medicine*, 694 S.W.2d 822, 824 (Mo. App. 1985); *Downs* v. *Waremart, Inc.*, 137 Or. App. 119, 130–31, 903 P.2d 888 (1995).

the third party by the defamed former employee, or "self-publication," may satisfy the publication requirement because the person effectively is "compelled" to publish the defamatory statement to prospective employers when the person is asked why he or she left his or her former employment. See, e.g., *Lewis* v. *Equitable Life Assurance Society of the United States*, 389 N.W.2d 876, 886–87 (Minn. 1986). These courts reason that it is fair to hold an employer liable for compelled self-publication because it is reasonably foreseeable that the employee, in seeking new employment, will inevitably be asked why he or she left his or her former employment. See id.

The parties in the present case disagree on whether a majority of jurisdictions recognize the doctrine of compelled self-publication defamation. Our own jurisdictional survey leads us to agree with the Court of Appeals' assessment that "most jurisdictions have yet to recognize compelled self-publication defamation or have expressly rejected it."[9] *Cweklinsky* v. *Mobil Chem-*

[9] A cause of action for compelled self-publication defamation expressly was rejected in the following cases: *Gore* v. *Health-Tex, Inc.*, 567 So. 2d 1307, 1308 (Ala. 1990); *Atkins* v. *Industrial Telecommunications Assn., Inc.*, 660 A.2d 885, 894–95 (D.C. App. 1995); *Brantley* v. *Heller*, 101 Ga. App. 16, 18–19, 112 S.E.2d 685 (1960); *Gonsalves* v. *Nissan Motor Corp. in Hawaii, Ltd.*, 100 Haw. 149, 170–72, 58 P.3d 1196 (2002); *Layne* v. *Builders Plumbing Supply Co.*, 210 Ill. App. 3d 966, 975–76, 569 N.E.2d 1104 (1991); *Wieder* v. *Chemical Bank*, 202 App. Div. 2d 168, 170, 608 N.Y.S.2d 195 (1994); *Yetter* v. *Ward Trucking Corp.*, 401 Pa. Super. 467, 472, 585 A.2d 1022 (1991); *Sullivan* v. *Baptist Memorial Hospital*, 995 S.W.2d 569, 574 (Tenn. 1999).

Many federal courts, applying state law, also have rejected a cause of action for compelled self-publication defamation. See, e.g., *Oliveri* v. *Rodriguez*, 122 F.3d 406, 408–409 (7th Cir. 1997) (stating that doctrine of self-publication has been "largely discredited"); *De Leon* v. *St. Joseph Hospital, Inc.*, 871 F.2d 1229, 1237 (4th Cir.) (applying Maryland law not recognizing self-publication), cert. denied, 493 U.S. 825, 110 S. Ct. 87, 107 L. Ed. 2d 52 (1989); *Spratt* v. *Northern Automotive Corp.*, 958 F. Sup. 456, 465 (D. Ariz. 1996) (stating that Arizona courts do not recognize compelled self-publication); *Hensley* v. *Armstrong World Industries, Inc.*, 798 F. Sup. 653, 657 (W.D. Okla. 1992) (asserting that Oklahoma would follow "vast majority of states" rejecting theory of compelled self-publication). In other federal jurisdictions, the issue has not been decided. See, e.g., *Golem* v. *Village of*

ical Co., supra, 297 F.3d 159. Furthermore, although as many as seven state appellate courts have adopted the doctrine; see footnote 8 of this opinion; the highest appellate courts of only two states, Colorado and Minnesota, have adopted it.[10] Moreover, in both those states, the legislatures responded by eliminating or restricting the doctrine's application.[11] After a thorough review of all of the applicable case law, we are persuaded by the majority of other states, which have concluded that public policy concerns favor the rejection of the doctrine of compelled self-publication defamation. See, e.g., *Sullivan* v. *Baptist Memorial Hospital*, 995 S.W.2d 569, 574 (Tenn. 1999).

The most compelling public policy consideration against recognition of the doctrine is that acceptance of the doctrine would have a chilling effect on communication in the workplace, thereby contradicting society's fundamental interest in encouraging the free flow of information. See, e.g., *Layne* v. *Builders Plumbing Supply Co.*, 210 Ill. App. 3d 966, 976, 569 N.E.2d 1104 (1991). Open and honest communication in the workplace is a laudable public policy, in that "an employer who com-

Put-in-Bay, 222 F. Sup. 2d 924, 934 (N.D. Ohio 2002) (stating that Ohio has not yet recognized doctrine of self-publication); *Monroe* v. *Host Marriot Service Corp.*, 999 F. Sup. 599, 604 (D.N.J. 1998) (asserting that cause of action for defamation could not be maintained when plaintiff publishes defamatory statement, but decided case upon statute of limitations grounds); *Bickling* v. *Kent General Hospital, Inc.*, 872 F. Sup. 1299, 1310–11 (D. Del. 1994) (asserting that Delaware was undecided on issue of self-publication); *Sarratore* v. *Longview Van Corp.*, 666 F. Sup. 1257, 1263 (N.D. Ind. 1987) (finding that compelled self-publication was not yet law of Indiana). For an overview of cases considering the self-publication doctrine, see generally annot., D. Chapus, "Publication of Allegedly Defamatory Matter by Plaintiff ('Self-Publication') as Sufficient to Support Defamation Action," 62 A.L.R.4th 616 (1988 & Sup. 2003).

[10] See *Churchey* v. *Adolph Coors Co.*, 759 P.2d 1336, 1347 (Colo. 1988); *Lewis* v. *Equitable Life Assurance Society of the United States*, supra, 389 N.W.2d 876.

[11] See Colo. Rev. Stat. Ann. § 13-25-125.5 (Lexis Nexis 2003); Minn. Stat. Ann. § 181.933 (2) (West 1993).

municates specific feedback, gives reasons for actions, and communicates those reasons to other employees will [foster] a happier . . . and [more] efficient [working environment]." R. Prentice & B. Winslett, "Employee References: Will a 'No Comment' Policy Protect Employers Against Liability for Defamation?," 25 Am. Bus. L.J. 207, 234 (1987). Recognition of compelled self-publication defamation, however, would encourage employers to curtail communications with employees, and the employees' prospective employers, for fear of liability. As one commentator noted, recognition of the doctrine could create a perpetual "culture of silence," negatively affecting not only employers, but employees in numerous ways. See J. Acevedo, "The Emerging Cause of Action for Compelled Self-Publication Defamation in the Employment Context: Should Connecticut Follow Suit?," 72 Conn. B.J. 297, 316 (1998) (stating that "adoption of self-publication defamation might deter employers from communicating [with] the employee . . . thereby fostering an unhealthy 'culture of silence' in the workplace").

Many states that have rejected the doctrine of compelled self-publication defamation have concluded that this "culture of silence" may actually harm employees by depriving them of the benefit of constructive criticism because of an employer's fear that the comments may be used against it in the future. See, e.g., *Gonsalves* v. *Nissan Motor Corp. in Hawaii, Ltd.*, 100 Haw. 149, 172, 58 P.3d 1196 (2002); *Sullivan* v. *Baptist Memorial Hospital*, supra, 995 S.W.2d 574. As the Supreme Court of Hawaii noted, "[e]mployees who may be able to improve substandard job performances may fail to do so because needed feedback is withheld." (Internal quotation marks omitted.) *Gonsalves* v. *Nissan Motor Corp. in Hawaii, Ltd.*, supra, 172. These states have reasoned further that a working environment fueled by "no comment" could result in the elimination of formal termina-

tion procedures, causing employees to be discharged prematurely without the opportunity to rebut an employer's accusations. See id.; *Sullivan* v. *Baptist Memorial Hospital*, supra, 573.

The majority of the states rejecting the doctrine also have determined that employer silence could frustrate an employee's right to redress a wrongful termination in violation of state and federal antidiscrimination statutes.[12] In a discrimination case, the plaintiff carries the initial burden of establishing a prima facie case of discrimination. See, e.g., *Wroblewski* v. *Lexington Gardens, Inc.*, 188 Conn. 44, 55–56, 448 A.2d 801 (1982). The burden then shifts to the employer to show that the employee was discharged for nondiscriminatory reasons. Id. "Normally, a factfinder would be justifiably suspicious if an employer fired an employee in a protected group and refused to explain the reason for the termination at the time of discharge." (Internal quotation marks omitted.) *Sullivan* v. *Baptist Memorial Hospital*, supra, 995 S.W.2d 574. As the Tennessee Supreme Court noted, however, in a case wherein there is potential liability for compelled self-publication defamation "an employer's silence could justifiably be viewed as savvy rather than suspicious," thereby providing an extra obstacle that a plaintiff claiming discriminatory discharge must overcome. Id.

Moreover, as several commentators have observed, this fear of chilling communications is not simply hypo-

[12] See, e.g., General Statutes § 46a-60 (a), which provides in relevant part: "It shall be a discriminatory practice . . .

"(1) For an employer . . . except in the case of a bona fide occupational qualification or need, to . . . discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including, but not limited to, blindness . . . ." See also 42 U.S.C. § 2000e-2 (a) (1).

thetical. In states where courts have recognized a cause of action for compelled self-publication defamation, "human resources, legal and other employment advisors admonish employers to provide limited or no information when terminating employees" in order to prevent potential liability. M. Cooper, "Between A Rock And A Hard Case: Time For A New Doctrine Of Compelled Self-Publication," 72 Notre Dame L. Rev. 373, 432 (1997). In response, many employers have adopted a policy of releasing only nominal information to terminated employees. See id.; see also A. Langvardt, "Defamation in the Business Setting: Basics and Practical Perspectives," 33 Bus. Horizons 66, 73 (September–October 1990) (estimating that, as of 1990, 40 percent of employers adhere to silence policy to avoid liability); M. Middleton, "Employers Face Upsurge in Suits Over Defamation," National L.J. 1, 30–31 (May 4, 1987) (stating that statistics show that employers are giving out less information about employees). We are persuaded that undermining open and honest communication in the workplace, to the detriment of both employers and employees, is a substantial public policy reason that weighs heavily against recognizing a cause of action for compelled self-publication defamation.

We further agree with those states that have refused to adopt the doctrine of compelled self-publication defamation because it counters several well established principles of law, including the duty to mitigate damages, compliance with applicable statutes of limitations, and the doctrine of employment at will. See, e.g., *Gonsalves* v. *Nissan Motor Corp. in Hawaii, Ltd.*, supra, 100 Haw. 172; *Layne* v. *Builders Plumbing Supply Co.*, supra, 210 Ill. App. 3d 976; *Sullivan* v. *Baptist Memorial Hospital*, supra, 995 S.W.2d 574. We address each of these principles individually.

First, the recognition of compelled self-publication defamation can discourage plaintiffs from mitigating

damages by providing them with too much control over the cause of action. See, e.g., *Layne* v. *Builders Plumbing Supply Co.*, supra, 210 Ill. App. 3d 976. It is axiomatic that the plaintiff has a duty to mitigate damages. See, e.g., *Ann Howard's Apricots Restaurant, Inc.* v. *Commission on Human Rights & Opportunities*, 237 Conn. 209, 229, 676 A.2d 844 (1996) ("[this court has] often said in the contracts and torts contexts that the party receiving a damage award has a duty to make reasonable efforts to mitigate damages"). As the United States Supreme Court noted in the context of defamation claims by public officials, "[t]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

In the case of compelled self-publication defamation, however, the duty to mitigate potentially is corrupted because publication occurs as a result of the *plaintiff's* repetition of the defamatory statement. The plaintiff, as the party repeating the publication, therefore, essentially controls the cause of action, having the ability to increase damages by continually repeating the defamatory statement to different prospective employers. As the Illinois Appellate Court observed, such control would then "encourage [repeated] publication of [the] defamatory statement by a plaintiff who reasonably could have avoided such republication or could have tried to explain to a prospective employer the true nature of the situation and to contradict the defamatory statement." *Layne* v. *Builders Plumbing Supply Co.*, supra, 210 Ill. App. 3d 976. Consequently, the unbridled control that the doctrine of compelled self-publication allows is inconsistent with the "fundamental principle of mitigation of damages." *Olivieri* v. *Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997).

Second, a cause of action for compelled self-publication defamation permits a former employee potentially to circumvent or manipulate the applicable statute of limitations. See, e.g., *Sullivan* v. *Baptist Memorial Hospital*, supra, 995 S.W.2d 574. The statute of limitations for a defamation claim begins on the date of publication; see 3 Restatement (Second), supra, §§ 577, 577A; and because a new cause of action arises with each publication; see W. Prosser & W. Keeton, supra, § 113, pp. 799–800; an employee relying on the doctrine of compelled self-publication has the ability to circumvent the statute of limitations by continually repeating the publication of the defamatory statement. After the statute of limitations expires with regard to one publication, an employee need only fill out a new job application, or go to another interview, in order to give rise to a new cause of action with a new publication. This capability would obviate the public policy underlying the statute of limitations itself, i.e., "to promote finality in the litigation process"; *Skibeck* v. *Avon*, 24 Conn. App. 239, 243, 587 A.2d 166, cert. denied, 219 Conn. 912, 593 A.2d 138 (1991); and give a defendant the peace of mind that comes with knowing that its potential liability has been extinguished. *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 582, 512 A.2d 893 (1986).

We reject the plaintiff's contention that a former employee's control over the duty to mitigate damages and the relevant statute of limitations are tempered, if not eliminated, by the requirement that the self-publication be "compelled." "Compulsion," as used by the proponents of self-publication, refers to the obligation to respond truthfully to questions in any job interview. See, e.g., *Lewis* v. *Equitable Life Assurance Society of the United States*, supra, 389 N.W.2d 886–87. Advocates of compelled self-publication defamation liability argue that a plaintiff is compelled to publish the defamatory statement when asked why he or she left his or her

former employment because "[f]abrication . . . is an unacceptable alternative." Id., 888. While it cannot be disputed seriously that encouraging truthful discourse during job interviews is desirable, it does not necessarily follow that the need for honesty negates the concerns entrenched in the plaintiff's control over a self-publication claim. In fact, compulsion, as defined by the need to be truthful in a job interview, exists in every case in which a terminated employee has a job interview, and therefore provides little temperance at all. Even if a plaintiff must prove, as some courts require, that a prospective employer *actually* inquired about the reason that the employee had left his or her former employment, the frequency of this line of questioning during a job interview essentially neutralizes its tempering effect. Consequently, the fact that the self-publication needs to be compelled does little to lessen the plaintiff's control over the cause of action.

Lastly, recognizing a cause of action for compelled self-defamation would significantly undermine the well established doctrine of employment at will. See *Gonsalves* v. *Nissan Motor Corp. in Hawaii, Ltd.*, supra, 100 Haw. 172; *Sullivan* v. *Baptist Memorial Hospital*, supra, 995 S.W.2d 574. "In Connecticut, an employer and employee have an at-will employment relationship in the absence of a contract to the contrary. Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability." (Internal quotation marks omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 697–98, 802 A.2d 731 (2002); see also *Boucher* v. *Godfrey*, 119 Conn. 622, 627, 178 A. 655 (1935) (Connecticut expressly adopts doctrine of employment at will). Consequently, in the absence of an employment contract, or an illegal discriminatory motive, an employer has the right to terminate an

employee at any time without liability.[13] Adoption of a cause of action in defamation based on compelled self-publication, however, could impose an obligation on an employer to conduct a sometimes costly and time-consuming investigation for *every* termination, no matter how irrefutable the evidence against the employee may be, so as to avoid potential liability for stating false grounds for termination. As the Supreme Court of Hawaii concluded, such an obligation "would significantly compromise [the] well-settled principles encompassed by the at-will employment doctrine." (Internal quotation marks omitted.) *Gonsalves* v. *Nissan Motor Corp. in Hawaii, Ltd.*, supra, 172.

Our rejection of the doctrine of compelled self-publication defamation is reinforced by the Restatement (Second) of Torts. Although the Restatement (Second) recognizes a cause of action for self-publication defamation, it does not recognize the doctrine of *compelled* self-publication in factual circumstances such as those in the present case. See 3 Restatement (Second), supra, § 577 (1). Section 577 (1) of the Restatement (Second) defines publication as a "communication intentionally or by a negligent act to one other than the person defamed." Id. A commentary to § 577 specifically addresses self-publication, providing that recovery for self-publication is allowed if a defamed person repeats the defamatory statement *without awareness of its defamatory nature*, and circumstances indicate repeti-

[13] This court has recognized an exception to the at-will employment doctrine. See, e.g., *Thibodeau* v. *Design Group One Architects, Inc.*, supra, 260 Conn. 694 ("[a]t common law, an employer may terminate an at-will employee for any reason unless that reason violates some important public policy"); *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 476–77, 427 A.2d 385 (1980) (recognizing public policy exception to doctrine of employment at will). Employment at will, however, remains the general rule.

tion is likely. Id., comment (m).[14] The illustrations to comment (m) confirm that ignorance of the defamatory nature of the published statement is crucial to the exception permitting recovery.[15] Thus, according to the Restatement (Second), because the plaintiff in the present case necessarily was aware of the defamatory nature of the defendant's statement, a cause of action in compelled self-publication defamation would be unavailable.

The plaintiff in the present case contends that adoption of the doctrine of compelled self-publication defamation would further the policies of equity and fairness. Specifically, the plaintiff argues that the doctrine should be adopted because "[it] . . . justly holds defendants accountable for the foreseeable consequences of their actions . . . [and] protects an employee from an injury for which his employer is responsible and the employee is powerless to prevent." (Internal quotation marks omitted.) We disagree.

We have set forth herein the significant public policy concerns that lead us to conclude that we should reject a cause of action for compelled self-publication defama-

[14] The Restatement (Second), supra, § 577, comment (m), provides: "One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person if there are no other circumstances. If the defamed person's transmission of the communication to the third person was made, however, without an awareness of the defamatory nature of the matter and if the circumstances indicated that communication to a third party would be likely, a publication may properly be held to have occurred."

[15] One illustration to § 577 of the Restatement (Second) provides: "A writes a defamatory letter about B and sends it to him through the mail in a sealed envelope. B indignantly shows the letter to his son. B, not A, has published a libel." 3 Restatement (Second), supra, § 577, illustration (9). In contrast, another illustration to the same section of the Restatement (Second) provides: "A writes a defamatory letter about B and sends it to him through the mail in a sealed envelope. A knows that B is blind and that a member of his family will probably read the letter to him. B receives the letter and his wife reads it to him. A has published a libel." Id., illustration (10).

tion. These considerations, in our view, outweigh those concerns that favor recognition of the doctrine, such as the one cited by the plaintiff. Furthermore, merely because a potential harm may be foreseeable does not require that a defendant should be held liable. In *Perodeau* v. *Hartford*, 259 Conn. 729, 756, 792 A.2d 752 (2002), we determined that "[a] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed." (Internal quotation marks omitted.)

The plaintiff further argues that equity compels the recognition of the doctrine of compelled self-publication defamation because employers are sufficiently protected from the aforementioned concerns by the traditional defamation defense of "truth." The plaintiff maintains that, "when faced with an employee suspected of having engaged in misconduct, an employer can always adequately protect itself by conducting a thorough investigation and making an informed and factually supported decision." The plaintiff seems to suggest that conducting a thorough investigation would allow the employer to feel confident in the truth of its assertion, thereby relieving it of liability for communicating a defamatory statement. In other words, the plaintiff argues that since "truth [is] an absolute defense" to compelled self-publication defamation, there is no reason for an employer to be apprehensive about honest communications with its employees. We disagree.

Although it is true that for a claim of defamation to be actionable, the statement must be false; see *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 112, 448 A.2d 1317 (1982); and under the common law, truth is an affirmative defense to defamation; see *Holbrook* v. *Casazza*, 204 Conn. 336, 361, 528 A.2d 774

(1987), cert. denied, 484 U.S. 1006, 108 S. Ct. 699, 98 L. Ed. 2d 651 (1988); the determination of the truthfulness of a statement is a question of fact for the jury. As a defense, truth provides protection against liability, but not against the expense and inconvenience of being sued. A successful defense is small comfort to an employer that must pay attorney's fees to defend a defamation claim and have the employer's attention diverted from its business to the defense of the suit. We are persuaded that most employers will likely choose a "culture of silence"; see J. Acevedo, supra, 72 Conn. B.J. 316; rather than rely on truth as a defense to a defamation claim.

The answer to the first certified question is: No. Because the answer to the first certified question is in the negative, we do not reach the remaining two questions that were certified.

No costs shall be taxed in this court to either party.

In this opinion the other justices concurred.

FLEET NATIONAL BANK'S APPEAL FROM PROBATE (SC 16905)

Sullivan, C. J., and Norcott, Katz, Palmer and Zarella, Js.

Syllabus

The plaintiff bank, which had been named as a corporate fiduciary under an irrevocable trust created for the benefit of the defendant beneficiaries, was removed as trustee by an order of the Probate Court pursuant to the statute ([Rev. to 2001] § 45a-242 [a], as amended by P.A. 01-114) providing for the removal of a fiduciary upon the request of the beneficiaries. The Probate Court determined that the plaintiff's removal was permissible under subdivision (4) of § 45a-242 (a), which had been created by P.A. 01-114, because the defendants' decision to remove the plaintiff was unanimous, removal was in the defendants' best interests since a successor trustee was already administering other trusts for them, and removal did not conflict with a material purpose of the trust. The plaintiff appealed to the Superior Court from the Probate Court's order pursuant to the statute (§ 45a-243) granting a right of appeal to

a fiduciary that has been removed "for cause" under § 45a-242. The defendants moved to dismiss the appeal arguing that the plaintiff had no right of appeal from the Probate Court's order because the plaintiff's removal was based on the grounds set forth in § 45a-242 (a) (4), and not "for cause" as required under § 45a-243. The Superior Court concluded that the plaintiff's removal as trustee was not "for cause" because it was not based on any conduct or an inability to perform the duties of a fiduciary, and, therefore, the plaintiff lacked standing to appeal under § 45a-243. That court granted the defendants' motion to dismiss and rendered judgment for the defendants, from which the plaintiff appealed. *Held* that the trial court properly concluded that a fiduciary that has been removed involuntarily by an order of the Probate Court pursuant to § 45a-242 (a) (4) has not been removed "for cause," and, therefore, lacks standing to appeal that removal under § 45a-243; the legislative history and purpose of §§ 45a-242 and 45a-243 support the interpretation that the inclusion of the phrase removed "for cause" in § 45a-243 provides a fiduciary removed from its position for a reason that is related to its fitness or ability to perform its duties, as enumerated in subdivisions (1), (2) and (3) of § 45a-242 (a), with a right of appeal to defend itself from such allegations, but does not provide such right of appeal where, as here, a fiduciary is removed pursuant to subdivision (4) by a request of all the beneficiaries that their best interests would be served by a successor fiduciary.

Argued September 22, 2003—officially released January 6, 2004

Procedural History

Appeal from an order of the Probate Court for the district of Hartford granting the application for removal of the plaintiff as trustee of a certain irrevocable trust, brought to the Superior Court in the judicial district of Hartford, where the court, *Koletsky, J.*, granted the defendants motion to dismiss and rendered judgment for the defendants, from which the plaintiff appealed. *Affirmed.*

William J. Wenzel, with whom was *Brian C. Roche*, for the appellant (plaintiff).

Kerry M. Wisser, with whom were *Nathan Schatz* and *Paul Mersereau*, for the appellees (defendants).

Richard Blumenthal, attorney general, and *Eliot D. Prescott* and *Maureen Regula*, assistant attorneys gen-

eral, filed a brief for the office of the attorney general as amicus curiae.

Opinion

NORCOTT, J. The dispositive issue in this appeal is whether a fiduciary, which has been involuntarily removed from its position by an order of the Probate Court under the authority of General Statutes (Rev. to 2001) § 45a-242 (a), as amended by Public Acts 2001, No. 01-114 (P.A. 01-114),[1] has been removed "for cause"

[1] Public Act 01-114, which was entitled "An Act Concerning the Removal of a Fiduciary," took effect on October 1, 2001, and substantially revised § 45a-242 (a). Prior to P.A. 01-114, General Statutes (Rev. to 2001) § 45a-242 (a) provided: "If any fiduciary becomes incapable of executing his trust, neglects to perform the duties of his trust, wastes the estate in his charge, or fails to furnish any additional or substitute probate bond ordered by the court, the court of probate having jurisdiction may, upon its own motion, or upon the application and complaint of any person interested or of the surety upon the fiduciary's probate bond, after notice and a hearing, remove such fiduciary."

Following the enactment of P.A. 01-114, General Statutes § 45a-242 (a) now provides: "The court of probate having jurisdiction may, upon its own motion or upon the application and complaint of any person interested or of the surety upon the fiduciary's probate bond, after notice and hearing, remove any fiduciary if: (1) The fiduciary becomes incapable of executing such fiduciary's trust, neglects to perform the duties of such fiduciary's trust, wastes the estate in such fiduciary's charge, or fails to furnish any additional or substitute probate bond ordered by the court, (2) lack of cooperation among cofiduciaries substantially impairs the administration of the estate, (3) because of unfitness, unwillingness or persistent failure of the fiduciary to administer the estate effectively, the court determines that removal of the fiduciary best serves the interests of the beneficiaries, or (4) there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, the court finds that removal of the fiduciary best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the governing instrument and a suitable cofiduciary or successor fiduciary is available. A successor corporate fiduciary shall not be removed in such a manner as to discriminate against state banks or national banking associations, nor shall any consolidated state bank or national banking association or any receiving state bank or national banking association be removed solely because it is a successor fiduciary, as defined in section 45a-245a."

Summarizing this amendment, P.A. 01-114 placed the previously existing grounds for the removal of a fiduciary within subdivision (1) of § 45a-242

and, therefore, has standing to challenge such removal by way of an appeal to the Superior Court pursuant to General Statutes § 45a-243.[2] The plaintiff, Fleet National Bank, appeals[3] from the judgment of the Superior Court dismissing the plaintiff's appeal from the order of the Probate Court that had removed the plaintiff as fiduciary. We conclude that a fiduciary removed from its position pursuant to § 45a-242 (a) (4) has not been removed "for cause" for the purposes of § 45a-243 and, therefore, does not have standing to appeal its displacement. Accordingly, we affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. In 1966, the John B. Faile Irrevocable Trust (trust) was created for the benefit of the defendants, certain individuals named as beneficiaries of the trust.[4] The instrument creating this trust named an individual fiduciary, James J. Preble, and a corporate fiduciary, the United Bank and Trust Company (United), as cotrustees while making no provision for the involuntary removal of either fiduciary. Thereafter, Preble passed away and United was left as the sole administrator of the trust. Following a corporate merger, the plain-

(a), and also added several new grounds for removal, which are listed in subdivisions (2), (3) and (4) of § 45a-242 (a).

[2] General Statutes § 45a-243 (a) provides in relevant part: "When any fiduciary has been removed for cause by a court of probate, as provided in section 45a-242, the fiduciary may appeal from such order of removal in the manner provided in sections 45a-186 to 45a-193, inclusive. . . ."

General Statutes § 45a-186 (a) provides in relevant part: "Any person aggrieved by any order, denial or decree of a court of probate in any matter, unless otherwise specially provided by law, may appeal therefrom to the Superior Court . . . ."

[3] The plaintiff appealed from the judgment of the trial court to the Appellate Court. We then granted the defendants' motion to transfer the case to this court pursuant to Practice Book § 65-2 and General Statutes § 51-199 (c).

[4] The defendants are the living beneficiaries of the trust and include Patsy B. Underwood, Danica Zupic, Toni Faile Lyerly, Alicia Zupic, Marilyn Faile and Jennifer Faile.

tiff became the successor in interest to United and assumed its role as the sole fiduciary.

On December 10, 2001, the defendants filed a petition in the Probate Court for the district of Hartford asking that the plaintiff be removed, pursuant to § 45a-242 (a) (4), as fiduciary for the trust, and that Putnam Trust (Putnam) be installed as the successor fiduciary. Thereafter, the Probate Court, *Killian, J.*, issued a written memorandum of decision granting the defendants' petition to remove the plaintiff as fiduciary. As a threshold matter, the Probate Court indicated that "[p]rior to October 1, 2001, the removal of a fiduciary [under § 45a-242 (a)] was permitted only in those circumstances where it was demonstrated that a fiduciary either lacked the capacity to perform the duties of the [t]rustee or [was] neglectful of those duties," and that the plaintiff's performance as fiduciary was such that the court "would be incapable" of finding such inadequacy in this matter. The Probate Court, however, went on to recognize that General Statutes (Rev. to 2001) § 45a-242 (a), as amended by P.A. 01-114, now supplied "significant new grounds for removal of [a] [t]rustee . . . ." In particular, P.A. 01-114 added subdivision (4) to § 45a-242 (a), which provides for the removal of a fiduciary when "there has been a substantial change in circumstances or removal is requested by all of the beneficiaries, the court finds that removal of the fiduciary best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the governing instrument and a suitable cofiduciary or successor fiduciary is available." The Probate Court concluded that, "[i]n contrast to the other sub[divisions] of § 45a-242 (a), all of which require some blamable acts on the part of the fiduciary in order to justify removal, [§ 45a-242 (a) (4) authorizes] removal by a unanimous request of the beneficiaries . . . and requires no blamable act on the part of the [t]rustee . . . ."

The Probate Court went on to determine that the removal of the plaintiff was permissible under § 45a-242 (a) (4) because: (1) the defendants were unanimous in their desire to remove the plaintiff; (2) removal was in the best interests of the defendants as it was undisputed that (a) Putnam already administered other trusts for the benefit of the defendants and to centralize management in one fiduciary would increase convenience and efficiency, (b) the services offered by Putnam were more personalized than those of the plaintiff, and (c) the fees charged by Putnam were lower than those imposed by the plaintiff; and (3) removal did not conflict with a material purpose of the trust because (a) the plaintiff was not the entity chosen by the settlor to administer the trust, and (b) the trust did not vest any special discretion in the trustee and did not require unique skills such that the plaintiff was the sole entity capable of effective administration of the trust. Accordingly, the Probate Court issued an order removing the plaintiff as fiduciary and turned administration of the trust over to Putnam.

Thereafter, the plaintiff appealed from this order of removal to the Superior Court. On appeal to the Superior Court, the plaintiff claimed that the Probate Court had abused its discretion by improperly concluding that: (1) the defendants to the trust unanimously had requested the plaintiff's removal; (2) § 45a-242 (a) (4) permits the removal of a fiduciary without a demonstration that the current administration of the trust was detrimental to the interests of the beneficiaries in some manner; (3) the removal of the plaintiff as fiduciary best served the interests of the defendants; and (4) the removal of the plaintiff did not conflict with a material purpose of the trust.

Subsequently, the defendants moved to dismiss the plaintiff's appeal. Specifically, the defendants claimed that while § 45a-243 confers standing to appeal "when

the fiduciary has been removed 'for cause' by a court of probate," § 45a-242 (a) (4), the provision under which the plaintiff had been removed, authorizes the removal of a fiduciary without a showing of "cause" and, therefore, is outside the scope of § 45a-243. Put differently, the defendants claimed that "[w]hen there has been removal of a fiduciary because of the fiduciary's unfitness, an appeal of the removal is authorized; however, where the removal of a fiduciary is not based on any reasons attributable to the fiduciary . . . that is, the removal was not 'for cause' but for the reason[s] set forth in § 45a-242 (a) (4) . . . no appeal of the removal is authorized."

On October 11, 2002, the Superior Court, *Koletsky*, *J.*, issued a written memorandum of decision granting the defendants' motion to dismiss. In dismissing the plaintiff's appeal, the Superior Court reviewed the text and legislative purposes of §§ 45a-242 and 45a-243, and determined that the standing to appeal conferred by § 45a-243 is implicated only when a fiduciary has been removed "for cause" and that a removal effected pursuant to § 45a-242 (a) (4) is not such a removal. Therefore, the Superior Court concluded that the plaintiff was without standing to pursue an appeal of its removal. This appeal followed.

On appeal, the plaintiff claims that the removal of a fiduciary from its position pursuant to § 45a-242 (a) (4) is a removal "for cause" within the meaning of § 45a-243 and, therefore, a fiduciary has standing to appeal such removal.[5] Specifically, the plaintiff relies upon our

[5] In its brief to this court, the plaintiff makes three claims in support of its contention that the trial court improperly dismissed the appeal. The plaintiff first claims that the common and ordinary meaning of " 'for cause' " is " 'for a good or adequate reason.' " As such, the plaintiff asserts that satisfaction of the various factors enunciated in § 45a-242 (a) (4)—unanimity among the beneficiaries, the furtherance of the best interests of the beneficiaries, the lack of frustration as to any material purpose of the instrument, and the availability of a suitable successor fiduciary—is such a removal "for cause" within the meaning of § 45a-243 and, therefore, a fiduciary has

interpretation of the phrase " 'for cause' " in *Robinson* v. *Unemployment Security Board*, 181 Conn. 1, 7, 434 A.2d 293 (1980), citing Webster's Third New International Dictionary, which expressed that "[t]he ordinary and customary meaning of the phrase 'for cause' is '[for] a good or adequate reason' . . . ." Under this interpretation, the plaintiff claims, the removal of a fiduciary based upon the factors articulated in § 45a-

standing to appeal its removal. The second claim of the plaintiff is that even if "for cause" as used in § 45a-243 is interpreted, as the defendants suggest, as removal for a reason related to the ability or fitness of a fiduciary to perform, removal effected pursuant to § 45a-242 (a) (4) constitutes such a determination as the subdivision authorizes removal only "where the terms of the trust are not being effectively carried out in some manner," and that conclusion is necessarily a finding that the fiduciary has been performing inadequately.

We note the considerable relatedness between the plaintiff's first and second claims. In both claims, the assertion of the plaintiff is that removal pursuant to § 45a-242 (a) (4) is a removal "for cause" within the scope of § 45a-243. As the two claims both require an interpretation of the phrase "for cause" in § 45a-243 and an inquiry into the interplay between §§ 45a-242 (a) (4) and 45a-243, we see no reason to differentiate analytically between the two claims and, therefore, we will focus on the claims as presenting one issue for our review.

The plaintiff also advances a third claim—that the trial court improperly relied upon the factual findings of the Probate Court and engaged in a premature review of the merits of the plaintiff's claim in its determination that the plaintiff lacked standing to appeal its removal as fiduciary. Specifically, the plaintiff claims that the trial court, in concluding that the plaintiff's removal was not "for cause" and therefore did not fall within the ambit of § 45a-243, improperly relied upon the Probate Court's factual finding that the plaintiff had not been removed by reason of its conduct or an inability to perform its duties. It is undisputed, however, that the Probate Court removed the plaintiff as fiduciary pursuant to § 45a-242 (a) (4) and that the trial court's dismissal of the plaintiff's appeal was based upon its interpretation of § 45a-243 so as to exclude appeals challenging removals pursuant to § 45a-242 (a) (4). Accordingly, we find no merit in the plaintiff's contention that the trial court impermissibly relied upon the factual findings of the Probate Court in dismissing the plaintiff's appeal. The conclusion of the trial court was based upon its threshold determination of standing and did not include a review of the merits of the plaintiff's claim or the findings of the Probate Court. As such, the sole issue for resolution in this appeal is whether a removal effected pursuant to § 45a-242 (a) (4) is appealable under § 45a-243.

242 (a) (4); see footnote 1 of this opinion; is a removal "for cause" and, therefore, the fiduciary may appeal such removal pursuant to § 45a-243. Moreover, the plaintiff claims that the relevant legislative histories and underlying legislative purposes of these statutes support the conclusion that a fiduciary removed pursuant to § 45a-242 (a) (4) may appeal the removal by means of § 45a-243.

In response, the defendants claim that the phrase "for cause" in § 45a-243 has a more narrow meaning than that advanced by the plaintiff. In the defendants' view, the phrase "for cause" is to be interpreted, in accordance with the definition provided in West's Legal Dictionary (1986), as "a reason that is relevant to ability and fitness to perform one's duty." Under this interpretation, the defendants assert, a removal pursuant to § 45a-242 (a) (4) is a removal based upon factors entirely unrelated to the plaintiff's ability or fitness as a fiduciary and, therefore, is not a removal "for cause" within the ambit of § 45a-243. Furthermore, in direct contrast to the position of the plaintiff, the defendants claim that the relevant legislative histories and motivating purposes of these statutory provisions buttress the conclusion that a fiduciary removed pursuant to § 45a-242 (a) (4) may not challenge such removal by an appeal taken under § 45a-243. We agree with the defendants that a fiduciary that has been removed pursuant to § 45a-242 (a) (4) has not been removed "for cause" and, therefore, lacks standing to appeal that removal under § 45a-243.

As a threshold matter, we set forth the applicable standard of review. The plaintiff is challenging the conclusion of the trial court with regard to the interpretation of §§ 45a-242 (a) (4) and 45a-243. Issues of statutory construction raise questions of law, over which we exercise plenary review. *Commissioner of Transportation* v. *Kahn*, 262 Conn. 257, 272, 811 A.2d 693 (2003). "[T]he

process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter."[6] (Internal quotation marks omitted.) *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 734, 830 A.2d 228 (2003).

Thus, our interpretive task begins with the relevant statutory language. Section 45a-242 (a) provides that "[t]he court of probate having jurisdiction may, upon its own motion or upon the application and complaint of any person interested or of the surety upon the fiduciary's probate bond, after notice and hearing, remove any fiduciary if: (1) The fiduciary becomes incapable of executing such fiduciary's trust, neglects to perform the duties of such fiduciary's trust, wastes the estate in such fiduciary's charge, or fails to furnish any additional or substitute probate bond ordered by the court, (2) lack of cooperation among cofiduciaries substan-

[6] We are, of course, aware that our legislature recently has enacted Public Acts 2003, No. 03-154, § 1 (P.A. 03-154), which provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." This case does not implicate P.A. 03-154. We note that, in the present case, the relevant statutory text and the relationship of that text to other statutes is not "plain and unambiguous . . . ." P.A. 03-154. Accordingly, our analysis is not circumscribed to an examination of text alone, but rather properly may consider the various other sources helpful in the ascertainment of statutory meaning.

tially impairs the administration of the estate, (3) because of unfitness, unwillingness or persistent failure of the fiduciary to administer the estate effectively, the court determines that removal of the fiduciary best serves the interests of the beneficiaries, or (4) there has been a substantial change of circumstances or removal is requested by all of the beneficiaries, the court finds that removal of the fiduciary best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the governing instrument and a suitable cofiduciary or successor fiduciary is available. A successor corporate fiduciary shall not be removed in such a manner as to discriminate against state banks or national banking associations, nor shall any consolidated state bank or national banking association or any receiving state bank or national banking association be removed solely because it is a successor fiduciary, as defined in section 45a-245a."

Section 45a-243 (a) provides in relevant part: "When any fiduciary has been removed for cause by a court of probate, as provided in section 45a-242, the fiduciary may appeal from such order of removal in the manner provided in sections 45a-186 to 45a-193, inclusive. . . ." By its plain terms, therefore, the right of a removed fiduciary to appeal its removal pursuant to § 45a-243 is limited to those instances in which the "fiduciary has been removed *for cause . . . as provided in section 45a-242* . . . ." (Emphasis added.)

The phrase "for cause" is not defined statutorily in §§ 45a-242, 45a-243, or in any other provision within chapter 802 of the General Statutes.[7] Following a comprehensive review of various other sources for the

[7] In addition, title 45a of the Regulations of Connecticut State Agencies, the set of administrative regulations effectuating title 45a of the General Statutes, contains no provisions either implementing chapter 802 of the General Statutes or otherwise providing content to the phrase "for cause" as used in § 45a-243.

meaning of the phrase, including dictionaries and sundry other provisions of the General Statutes and the Regulations of Connecticut State Agencies that also employ the wording, we conclude that the phrase "for cause" is ambiguous and, depending upon the context, can be used in either the manner advanced by the plaintiff or as advanced by the defendants.[8] We further con-

[8] Without a definition provided by the legislature, "[t]o ascertain the commonly approved usage of a word, it is appropriate to look to the dictionary definition of the term . . . ." (Internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 539, 791 A.2d 489 (2002). In this instance, the phrase "for cause" has been defined in various sources as supportive of both the plaintiff's somewhat capacious interpretation—that of a "good or adequate reason," and the defendants' interpretation—that of "a reason that is relevant to ability and fitness to perform one's duty" and which connotes either misfeasance or nonfeasance. Etymologically, the word "cause" is derived from the Latin term "causa," which has been defined, in harmony with the plaintiff's interpretation, as a "ground [or] justificatory principle," and also, in a manner supportive of the defendants' interpretation, as a reason relating to one's "[r]esponsibility [or] blame . . . ." Oxford Latin Dictionary (1984). Moreover, the same dictionary source relied upon by the plaintiff; Webster's Third New International Dictionary (1986); to support the definition of "cause" as "for good or adequate reason," also goes on to define the term as "a charge or accusation brought against one," a meaning similar to the interpretation suggested by the defendants. Furthermore, while Black's Law Dictionary (7th Ed. 1999) now defines "for cause" as "[f]or a legal reason or ground," earlier versions also defined the phrase as "affecting and concerning ability and fitness of [an] official to perform [the] duty imposed on him"; Black's Law Dictionary (5th Ed. 1979); and "[c]onduct indicating unworthy or illegal motives or improper administration of power [and] . . . misfeasance or nonfeasance . . . ." Black's Law Dictionary (4th Ed. 1968).

In addition, we are mindful that our legislature has used the phrase "for cause" in myriad instances within our General Statutes and that various state entities also have employed the phrase numerous times within the administrative regulations implementing these statutory enactments. Our review of these authorities indicates that the phrase "for cause" has been used interchangeably as meaning either "a good or adequate reason" or "a reason related to the fitness of an individual to perform assigned duties."

For instance, General Statutes § 17a-11 (h), as amended by Public Acts 2003, No. 03-278, § 52, provides in relevant part: "Upon motion of any interested party in a Probate Court proceeding under this section, the probate court of record may transfer the file *for cause* shown to a probate court for a district other than the district in which the initial or permanency hearing was held. . . ." (Emphasis added.) In this section, the most reasonable interpretation of the phrase "for cause shown" is that a file may be transferred to another district for "a good or adequate reason."

clude, however, that the legislative histories surrounding §§ 45a-242 and 45a-243, as well as the legislative purposes underlying these enactments, are consonant with the interpretation of the phrase "for cause" in § 45a-243 as a reason that is related to one's fitness or ability to perform its duties.

Prior to beginning our analysis of the legislative histories and statutory purposes of §§ 45a-242 and 45a-243, we place our inquiry into the proper context with a brief review of the historical backdrop for these statutory provisions. Since their creation, "[p]robate courts [have been] strictly statutory tribunals and, as such, they have only such powers as are expressly or implicitly conferred upon them by statute." (Internal quotation marks omitted.) *Gaynor* v. *Payne*, 261 Conn. 585, 596, 804 A.2d 170 (2002). In 1800, as the legislature began to define more precisely the scope of jurisdiction for courts of probate, a statutory provision was enacted that allowed a probate court, in certain instances, to remove a fiduciary from its position. See General Statutes (1902 Rev.) § 371. Specifically, the legislature authorized the removal of a fiduciary following a deter-

In contrast, the same phrase "for cause" is used elsewhere in our statutory and regulatory landscape in a manner in harmony with the interpretation of the phrase advocated by the defendants. Section 31-3s-3 (c) of the Regulations of Connecticut State Agencies provides in relevant part: "Whenever a Job Center obtains information which could lead to a determination that a program participant . . . (3) has been discharged *for cause* as set forth in [General Statutes § 31-236 (a) (2) (B)], the Job Center shall notify the referring local General Assistance office of such information. . . ." (Emphasis added.) In turn, General Statutes § 31-236 (a) provides in relevant part: "An individual shall be ineligible for benefits . . . (2) . . . (B) if . . . the individual has been discharged or suspended for felonious conduct, conduct constituting larceny of property or service . . . larceny of currency . . . wilful misconduct in the course of the individual's employment, or participation in an illegal strike . . . ." The intersection between these provisions of the General Statutes and the Regulations of Connecticut State Agencies therefore demonstrates that the meaning of "for cause" in the context of § 31-236 (a) (2) (B) is most reasonably understood as "a reason that is relevant to ability and fitness to perform one's duty."

mination that such fiduciary was incapable of administering its trust, had neglected its duties, or had committed waste. General Statutes (1902 Rev.) § 371. The current version of this statutory provision is now codified at § 45a-242 (a) (1).[9] See footnote 1 of this opinion.

Furthermore, in Connecticut there has long existed a right for a party to appeal the decision or order of a court having jurisdiction over probate matters. See General Statutes (1808 Rev.) tit. XLII, c. 1, § 95 n.79. This right of appeal, however, always has been contingent upon a threshold showing of aggrievement. General Statutes (1808 Rev.) tit. XLII, c. 1, § 95 n.79. Without such a demonstration of aggrievement, the appealing party may not maintain an appeal.[10] That broad right of appeal for an aggrieved party currently is codified

[9] Although now included within § 45a-242 (a) (1), prior to 1980, the ground for displacement authorizing the removal of a fiduciary that had failed to furnish a court-ordered probate bond was not a part of the original statutory scheme. This particular ground for removal was added to the scheme with the enactment of Public Acts 1980, No. 80-227.

[10] "Aggrievement" is a concept similar, but not identical, to the requirement that a party must have standing in order to raise a particular claim or maintain a particular cause of action. See *Gladysz* v. *Planning & Zoning Commission*, 256 Conn. 249, 255, 773 A.2d 300 (2001). "Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) Id.

Aggrievement exists in two forms: statutory and classical aggrievement. "Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Fort Trumbull Conservancy* v. *New London*, 265 Conn. 423, 430–31, 829 A.2d 801 (2003). Classical aggrievement, in contrast, requires an analysis of the particular facts of the case in order to ascertain whether a party has been aggrieved and, therefore, has standing to appeal. "We traditionally have applied the following two part test to determine whether [classical] aggrievement exists: (1) does the allegedly aggrieved party have a specific, personal and legal interest in the subject matter of a decision; and (2) has this interest been specially and injuriously affected by the decision." *Gladysz* v. *Planning & Zoning Commission*, supra, 256 Conn. 256.

at General Statutes § 45a-186. See footnote 2 of this opinion.

In a number of early cases, this court had the opportunity to analyze the intersection between these two statutory provisions, one allowing a party aggrieved in a probate matter the right of appeal, and the other conferring upon courts of probate the power to remove fiduciaries. See, e.g., *Hartford National Bank & Trust Co.* v. *Malcolm-Smith*, 129 Conn. 67, 69, 26 A.2d 234 (1942); *Avery's Appeal*, 117 Conn. 201, 205–206, 167 A. 544 (1933). "These cases held that a fiduciary was not aggrieved, in the absence of some demonstrated pecuniary loss, by impairment of potential future compensation or injury to his status in the community as a professional fiduciary." *Weill* v. *Lieberman*, 195 Conn. 123, 126, 486 A.2d 634 (1985).[11] As mere removal from its position did not confer aggrievement upon a fiduciary, displaced fiduciaries generally were unable to bring appeals challenging their removals.

Following these decisions, in 1955, spurred on by the banking lobby, the legislature undertook consideration of House Bill No. 1591, which was entitled "An Act Concerning the Removal for Cause of Executors, Administrators and Other Persons Acting in a Fiduciary Capacity and Providing Such Fiduciary so Removed the Right of Appeal from the Order of Removal."[12] In the

[11] We note that the requirement that, in order to be aggrieved, a party must demonstrate a personal pecuniary interest has since been abandoned. *Stanley* v. *Stanley*, 175 Conn. 200, 202, 397 A.2d 101 (1978). We also are mindful that the principles of aggrievement applied in these early cases since have been questioned as possibly having "taken too narrow a view of the common law of aggrievement." *Weill* v. *Lieberman*, supra, 195 Conn. 126.

[12] During the committee hearings regarding the proposed legislation, Horace E. Rockwell of the Connecticut Bankers Association explained: "At present a fiduciary who is removed by order of a Probate Court is not entitled to appeal such order for the reason that a fiduciary has been held by the Connecticut Supreme Court not to be aggrieved . . . . This means that an individual or a bank can be removed as a fiduciary when no legal grounds for such removal exists and . . . such fiduciary has absolutely no right of redress whatsoever in this situation. . . . It is completely . . .

House of Representatives, Representative Francis C. Cady introduced this bill as an enactment "giving the right of appeal to an executor, administrator or other fiduciary which [has been] removed for cause by order of [a] probate court." 6 H.R. Proc., Pt. 5, 1955 Sess., p. 2299.[13] House Bill No. 1591 subsequently was enacted as General Statutes (1955 Rev.) § 2942d, now codified at § 45a-243 (a). Since its adoption, § 45a-243 (a) has provided fiduciaries "removed for cause by a court of probate, as provided in section 45a-242" with a right of appeal from the removal decree.

Thereafter, this court indicated that the stated purpose of this provision was to "enlarge the rights of appeal of removed fiduciaries." *Weill* v. *Lieberman*, supra, 195 Conn. 126. In essence, this statutory provision was "designed to put the aggrievement issue to rest"; id., 126–27; and to confer statutory aggrievement

unfair that a fiduciary . . . should be subjected to the disgrace of removal without having any means of clearing . . . its name. The removal of an individual . . . could ruin him professionally, and every other way. The removal of a bank . . . could have a disastrous effect upon its standing and reputation and its future business . . . . [F]iduciaries should have the opportunity to have a removal order . . . reviewed by . . . the Superior Court." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1955 Sess., p. 442.

[13] We are also aware that Representative Cady went on to indicate: "This is a right which our committee felt *any fiduciary* should have . . . ." (Emphasis added.) 6 H.R. Proc., supra, p. 2299. Moreover, in the introduction of the bill before the Senate, Senator Arthur H. Healey stated: "[T]his bill concerns itself with a situation where *any fiduciary* appointed . . . has been ordered removed [and] allows him to appeal . . . such removal." (Emphasis added.) 6 S. Proc., Pt. 7, 1955 Sess., p. 2469. With regard to the choice of the phrase "any fiduciary" by these legislators, we note that, at the time this bill was under consideration, the only grounds for removal of a fiduciary were an inability to administer the trust, neglect and waste. General Statutes (1958 Rev.) § 45-263. As such, it would be intellectually disingenuous to extrapolate out from these legislators' use of the capacious term "any" in order to rely upon these statements to support the proposition that § 45a-243 applies to any fiduciary removed for any reason, including those removed pursuant to § 45a-242 (a) (4).

upon fiduciaries removed for cause. See footnote 10 of this opinion.

Until 2001, this statutory scheme remained materially unchanged. In that year, however, the legislature considered a substantial revision to § 45a-242 (a) through Senate Bill No. 419, which was entitled, "An Act Concerning a Petition for Change in Trustee." With its genesis in the bank acquisition and merger phenomenon of the 1990s,[14] and in the failure of many older trust instruments to provide a means by which a fiduciary could be removed involuntarily,[15] the express purpose of the bill was to "widen the circumstances under which [a] Probate Court can relieve a fiduciary . . . of [its] duties under a trust." 44 H.R. Proc., Pt. 14, 2001 Sess., p. 4720, remarks of Representative Arthur J. Feltman. Accordingly, P.A. 01-114 placed the previously existing grounds for the removal of a fiduciary within § 45a-242 (a) (1), and added subdivisions (2), (3) and (4) as new

[14] Linda Dow, counsel to the Probate Court administrator's office, appearing in support of the proposed legislation, stated: "[O]ver the last ten years, a series of Connecticut banks were either declared insolvent or for other reasons, were acquired by larger banks. There are many . . . estates in Connecticut in which the testator . . . had selected a small hometown bank as Trustee, recognizing both the local personnel and reasonable fees. But at the time of the death of the testator, that local bank no longer existed. The law clearly provides that in [the] event of an acquisition, the acquiring bank will succeed to the fiduciary appointments of the failed or merged bank. This leaves many beneficiaries of trust[s] . . . in the untenable position of having large out-of-state corporate trustee[s] handling their family trust, while paying fees that the . . . beneficiaries feel are very unreasonable." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 9, 2001 Sess., pp. 3073–74. According to Dow, the problem created by these corporate mergers was "substantial." Id., p. 3075.

[15] Anthony B. Ludovico, a Connecticut trusts and estates attorney, appeared before the judiciary committee and stated: "In most well drafted inter-vivos trusts today, there is generally some provision governing procedures for changes of trustee . . . [h]owever, there are still in existence many older [instruments] which [do] not include a provision for [a] change [in] trustee." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 10, 2001 Sess., p. 3188.

grounds for the removal of a fiduciary. See footnote 1 of this opinion.

In response to concerns that the bill as proposed would open the door to discrimination against state or national banks or banking associations simply because of their status as a successor fiduciary, Senate Bill No. 419 later was amended to include a provision barring discrimination against such an entity "solely because it is a successor fiduciary . . . ." General Statutes § 45a-242 (a). As Senator Eric Coleman explained, "the whole purpose of the amendment is to make clear that mergers and acquisitions would not constitute . . . the substantial change of circumstances [that is] referred to in the bill." 44 S. Proc., Pt. 7, 2001 Sess., pp. 2015–16.

Notably, P.A. 01-114, although substantially revising § 45a-242 (a), did not alter the statutory text of § 45a-243. Furthermore, the legislative history surrounding P.A. 01-114 reveals no discussion of the proposed bill's impact upon § 45a-243, and indeed discloses no reference at all to § 45a-243 in the discussions surrounding the modification of § 45a-242 (a). Instead, following the enactment of P.A. 01-114, § 45a-243 (a) continues to provide, as it previously had provided: "When any fiduciary has been removed *for cause* by a court of probate, *as provided in section 45a-242*, the fiduciary may appeal from such order of removal in the manner provided in sections 45a-186 to 45a-193, inclusive. . . ." (Emphasis added.)

Having reviewed the legislative genealogy of §§ 45a-242 and 45a-243, we now turn to the interpretive issue presented in this appeal. Although, as previously mentioned, the phrase "for cause" in the text of § 45a-243 is ambiguous, the legislative purpose underlying § 45a-243, as well as the subsequent statutory development of § 45a-242, lead to the conclusion that the most reasonable interpretation of § 45a-243 is the reading that

excludes from its ambit the removal of a fiduciary pursuant to § 45a-242 (a) (4). Accordingly, a fiduciary removed pursuant to § 45a-242 (a) (4) has not been conferred with statutory aggrievement pursuant to § 45a-243 and may not maintain an appeal pursuant to that statutory provision.

As demonstrated, the statutory precursor to § 45a-243 was born in response to several decisions of this court that had concluded that the mere removal of a fiduciary from its position did not aggrieve it in the classical sense and, therefore, such a removed fiduciary could not sustain an appeal under the general right of appeal statute, now codified at § 45a-186. At the time this right of appeal provision was enacted in 1955, a fiduciary was subject to removal only if it had become incapable of administering the trust, neglected its duties, or committed waste. General Statutes (1958 Rev.) § 45-263. As classical aggrievement was lacking, the purpose of the appeal provision was to confer statutory aggrievement upon fiduciaries removed for those performance related reasons. Put differently, the spirit and import of the precursor to § 45a-243 was to allow a fiduciary, charged with ignominious wrongs bearing directly upon its fitness or ability to perform in its role as fiduciary, the opportunity to defend itself from such allegations.

Over time, § 45a-242 and its statutory ancestors have been amended to incorporate several additional grounds for the removal of a fiduciary, including the failure to furnish a court-ordered probate bond, now codified in § 45a-242 (a) (1), and the various justifications articulated in subdivisions (2), (3) and (4) of § 45a-242 (a). Although the grounds for removal have been supplemented, the language of the appeal provision has not been modified and, perhaps more importantly, the spirit of the provision has never been altered. All that is left, therefore, is to apply § 45a-243 to the modified

§ 45a-242 in a manner that is both in harmony with the purpose behind the appeal provision and in keeping with the language of § 45a-243.

In this inquiry, it is critical to recognize that while the grounds for removal articulated in § 45a-242 (a) (1), and those qualitatively similar grounds as listed in § 45a-242 (a) (2) and (3), consist of factors inextricably intertwined with the fitness or ability of a fiduciary to perform its duties adequately, the grounds for removal as set forth in § 45a-242 (a) (4) are different in kind. In each of the grounds listed in § 45a-242 (a) (1), (2) and (3), the basis for the removal of a fiduciary is something the fiduciary has done, or has failed to do, which adversely has impacted the administration of the trust that has been committed to its charge. The focus of the inquiry under § 45a-242 (a) (4), however, is not so bound up with a showing as to the current fiduciary's insufficient performance. Rather, § 45a-242 (a) (4) indicates that a fiduciary can be removed, even if it adequately is performing its function as administrator, if removal: is requested by each beneficiary; would best serve the interests of the beneficiaries, as for example in an instance in which an alternative entity could *better* function as fiduciary, and is not inconsistent with a material purpose of the trust; and an alternative entity is available to serve as successor fiduciary.[16] Under this provi-

[16] In its brief to this court, the plaintiff claims that a finding that removal "best serves the interests of all the beneficiaries" under § 45a-242 (a) (4) is, in essence, a finding of inadequate or deficient conduct by the fiduciary. We are not persuaded. While it may be true that removal under subdivision (4) of § 45a-242 (a) may be warranted because of inadequate administration, such a claim is more likely to be brought pursuant to subdivision (1), a provision that allows removal for incapacity or neglect, or subdivision (3), a provision that allows removal for unfitness, unwillingness, or persistent failure effectively to administer the corpus. If inadequate performance is the basis for the removal petition, such a claim is more likely to be brought under one of these provisions as they do not require unanimity among the beneficiaries, a showing that removal does not conflict with a material purpose of the trust, or a showing that a successor fiduciary is available—all of which are required in a petition brought pursuant to § 45a-242 (a) (4).

sion, there need not be an allegation that a fiduciary is or has been performing inadequately. Rather, the focus of subdivision (4) is upon whether there is another entity that, for some reason, may perform better or provide different and more desirable benefits as administrator, or is otherwise better suited to serve as fiduciary for a particular trust.[17]

Accordingly, the motivating purpose behind § 45a-243, that a fiduciary be afforded a right of appeal in order to defend itself from scurrilous allegations of misfeasance, nonfeasance, or inadequate performance, is absent from a removal that has been effected pursuant to § 45a-242 (a) (4). Given what we view as this unmistakable legislative purpose in affording removed fiduciaries a right of appeal, we conclude that the most reasonable interpretation of the phrase "for cause" in § 45a-243 is to provide a fiduciary, removed from its position for a reason that is related to its fitness or ability to perform its duties, with a right of appeal to defend itself from such allegations. As removal pursuant to § 45a-242 (a) (4) is not predicated upon reasons related to fitness or ability to perform, such a removal is not within the scope of § 45a-243.

The plaintiff contends, however, that to interpret the phrase "for cause" in § 45a-243 as a reason related to the fitness or ability of a fiduciary to discharge its duties would be to render that phrase superfluous to the statute, as it had existed prior to the enactment of P.A. 01-114. Put differently, the plaintiff notes that, prior to P.A. 01-114, all of the grounds for removal listed in General Statutes (Rev. to 2001) § 45a-242 (a) were related to

[17] For instance, as the defendants here claimed, while the plaintiff was not an ill-performing fiduciary, the choice to remove it as fiduciary was beneficial to the trust and the defendants as there was a successor fiduciary that provided more personalized fiduciary services and charged lower fees, and whose appointment served the goals of increased convenience and efficiency.

the fitness or ability of a fiduciary to perform its duties. See footnote 1 of this opinion. As such, the plaintiff claims that if all of the grounds for removal under § 45a-242 (a) were "for cause," the use of the phrase "for cause" within § 45a-243 would have been mere surplusage.

Although we agree with this proposition to the extent that it asserts that, without legislative modification to § 45a-243, "for cause" under § 45a-243 must mean the same after P.A. 01-114 as it did prior to the amendment, we do not agree that our reading of the phrase as related to the fitness or ability of a fiduciary to perform its duties renders the phrase "for cause" superfluous in the scheme as existing prior to P.A. 01-114. "[I]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Internal quotation marks omitted.) *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, 265 Conn. 525, 536–37, 829 A.2d 818 (2003). In this regard, it is important to note that § 45a-243 provides a right of appeal to a fiduciary removed "for cause . . . as provided in *section 45a-242* . . . ." (Emphasis added.) Both before and after the enactment of P.A. 01-114, § 45a-243 referenced the preceding provision *in whole*, without a more pointed reference to any particular subsection or subdivision of § 45a-242. We also note that § 45a-242, and its statutory precursors dating back to the original passage of the provision in 1955, not only always has provided the particular grounds by which a fiduciary may be removed involuntarily from its position, in subsection (a) of the statute, but also, in subsection (b) of § 45a-242 and its earlier variations, has provided for the removal of a fiduciary by means of resignation.[18]

[18] General Statutes § 45a-242 (b) provides: "The court of probate, after notice and hearing, may accept or reject the written resignation of any

Our reading of the phrase "for cause" as a reason related to the fitness or ability of a fiduciary to perform its duties not only renders no portion of § 45a-243 superfluous following enactment of P.A. 01-114, but is also in keeping with a proper interpretation of the statute prior to P.A. 01-114. The phrase "for cause," as used in § 45a-243, means, as it always has, that a fiduciary removed for reasons related to its fitness or ability to perform has a right of appeal to clear its name from scurrilous or ignominious allegations. Prior to P.A. 01-114, the phrase "for cause" had distinguished removals pursuant to subsection (a) of § 45a-242, for which a right of appeal was afforded, from a resignation pursuant to § 45a-242 (b), for which no right of appeal was afforded. Essentially, the distinction precluded a fiduciary that had resigned its position from later changing its mind and seeking reinstatement by way of an appeal. Following the enactment of P.A. 01-114, the phrase "for cause" in § 45a-243 differentiates between removals pursuant to § 45a-242 (a) (1), (2) and (3), which are all related to the fitness or ability of a fiduciary to perform and for which a right of appeal is afforded, from removals pursuant to § 45a-242 (a) (4) or resignations pursuant to § 45a-242 (b), which are unrelated to a fiduciary's fitness or ability to perform and for which no right of appeal is afforded.[19]

fiduciary, but such resignation shall not be accepted until such fiduciary has fully and finally accounted for the administration of such fiduciary's trust to the acceptance of such court."

[19] Furthermore, we disagree with the concession made by the defendants' counsel at oral argument before this court that, as the removal of a fiduciary can be accomplished only pursuant to § 45a-242, the use of the phrase "as provided in section 45a-242" in § 45a-243 is superfluous. Again, in accordance with the tenet of statutory construction that no word or phrase in a statute be read as superfluous, we read this clause in § 45a-243 as a reference to the procedural means of removal enunciated in § 45a-242 that a removal may be initiated by the court's "own motion or upon the application and complaint of any person interested or of the surety upon the fiduciary's probate bond, [and may be effectuated] after notice and hearing . . . ." General Statutes § 45a-242 (a).

While we conclude that a fiduciary removed pursuant to § 45a-242 (a) (4) has not been conferred with statutory aggrievement to pursue an appeal under § 45a-243, our inquiry is not at an end. As previously noted, the early cases concluding that a fiduciary has not been classically aggrieved by its removal and may not maintain an appeal pursuant to the broad right of appeal from a probate decree now codified at § 45a-186 have since been questioned as having looked too narrowly upon the common law of aggrievement. See footnote 11 of this opinion and the accompanying text. Given this erosion, our conclusion that a fiduciary removed pursuant to § 45a-242 (a) (4) has not been conferred with statutory aggrievement under § 45a-243 does not foreclose the possibility that such fiduciaries, under our current principles of classical aggrievement, may now maintain an appeal pursuant to § 45a-186.

We conclude, however, that a fiduciary removed pursuant to § 45a-242 (a) (4) is not, under our well settled standard with regard to classical aggrievement, an "aggrieved" person pursuant to § 45a-186. See footnote 10 of this opinion. As previously mentioned, our early cases concerning "aggrievement" within the context of an appeal from a probate decree required that, in order to be aggrieved, a party must demonstrate injurious impact upon a pecuniary interest. *Spencer's Appeal*, 122 Conn. 327, 331–32, 188 A. 881 (1937); *Avery's Appeal*, supra, 117 Conn. 205–206. This requirement could be satisfied either by a showing of a direct pecuniary interest in the decree, such as a creditor, legatee or heir-at-law would possess; *Hartford National Bank & Trust Co.* v. *Malcolm-Smith*, supra, 129 Conn. 69; or a showing that an entity was acting in a representative capacity for one whose interest was so affected. *Spencer's Appeal*, supra, 331.

While we have abandoned the requirement of a pecuniary interest, either directly or in a representative

capacity; *Stanley* v. *Stanley*, supra, 175 Conn. 202; it has remained well settled that "[a] grievance to one's feelings of propriety or sense of justice is not a grievance which gives a right of appeal." Id. Under our current formulation of classical aggrievement, an allegedly aggrieved party must have a "specific, personal and legal interest in the subject matter of a decision . . . and . . . this interest [must have] been specially and injuriously affected by the decision." *Gladysz* v. *Planning & Zoning Commission*, supra, 256 Conn. 256.

We have concluded that "[o]ne serving in a fiduciary capacity has standing to appeal from any decree which adversely affects the interests of those for whom he is acting, if it is a part of his duty to protect those interests." (Internal quotation marks omitted.) *Stanley* v. *Stanley*, supra, 175 Conn. 202–203. Moreover, with regard to the nature of the interest implicated, we also have concluded that "[a]s long as there is some direct injury for which the plaintiff seeks redress, the injury that is alleged need not be great." *Maloney* v. *Pac*, 183 Conn. 313, 321, 439 A.2d 349 (1981). Accordingly, a party sufficiently has demonstrated classical aggrievement upon a showing of direct injury to a legally protected interest, either in the sense of personal harm or harm to the interests of one for whom the party stands in a representative capacity, regardless of the extent of the harm.

Turning to the plaintiff's asserted interest in this matter, we conclude that the plaintiff has not established a protected interest, either in a representative or personal capacity, such that it has been aggrieved by the order of the Probate Court removing it as fiduciary. In the representative sense, the order of the Probate Court, terminating the plaintiff's tenure as fiduciary, was an adjudication that the plaintiff was no longer to represent the interests of the defendants with regard to the trust. Therefore, following removal as fiduciary, the plaintiff

may no longer seek to assert claims on behalf of the defendants. Rather, the interests of the defendants are now represented by their current fiduciary, Putnam, and standing to appeal decrees impacting those interests is now vested solely in Putnam.

With no aggrievement in a representative capacity, the only means by which the plaintiff may be determined to have been aggrieved by the order of the Probate Court is by direct injury to a personal interest. We conclude that a fiduciary removed from its position pursuant to § 45a-242 (a) (4) has no such direct harm to a personal and legally protected interest.[20] Unlike removals pursuant to § 45a-242 (a) (1), (2) and (3), no harm to a fiduciary's reputation or standing in the community has been visited upon the fiduciary as a result of its removal pursuant to § 45a-242 (a) (4). The interest asserted by the plaintiff in a personal capacity is, in essence, nothing more than a claim that, in the absence of inadequate administration of a trust committed to its charge, the plaintiff is entitled to the continuation of its tenure as fiduciary ad infinitum.[21] In the absence of inadequate performance, the plaintiff claims that it may not be removed from its position regardless of whether there exists another fiduciary who could better administer the trust.

In the context of zoning and licensing appeals, we have concluded that "[o]rdinarily, an allegation that a governmental action will result in competition harmful to the complainant's business would not be sufficient

[20] As it is not implicated by this appeal, we express no opinion as to whether a fiduciary that has been removed from its position in violation of the antidiscrimination provision of § 45a-242 (a) possesses statutory aggrievement to maintain an appeal pursuant to § 45a-243, or satisfies the standard for classical aggrievement and may maintain an appeal pursuant to § 45a-186.

[21] In these circumstances, we do not view the plaintiff's expectation as to future compensation for continued service as fiduciary as an adequate basis upon which classical aggrievement may be conferred.

to qualify the complainant as an aggrieved person." *State Medical Society* v. *Board of Examiners in Podiatry*, 203 Conn. 295, 301, 524 A.2d 636 (1987). We see no functional difference in the plaintiff's implicit claim in this appeal that, if it is performing adequately as a fiduciary, it should be left free from the rigors of competition in the marketplace. The plaintiff's asserted personal interest is simply an insufficient basis upon which classical aggrievement may be claimed. Accordingly, the plaintiff has not been classically aggrieved by its removal as fiduciary and may not maintain an appeal pursuant to § 45a-186.

The judgment is affirmed.

In this opinion the other justices concurred.

SECRETARY OF THE OFFICE OF POLICY AND MANAGEMENT *v.* EMPLOYEES' REVIEW BOARD ET AL.
(SC 16806)

Borden, Katz, Palmer, Vertefeuille and Zarella, Js.

Syllabus

The plaintiff, the secretary of the office of policy and management, appealed to the trial court from a decision of the named defendant, the employees' review board, in favor of the defendant O, an employee of the department of correction who worked a nonstandard ten hour workday and averaged forty hours per week over a six or eight week period. O had challenged the practice of the department of correction treating each of the personal leave days and holidays to which she was entitled by statute (§§ 5-250 [c] and 5-254 [a], respectively) as representing eight hours of leave time and deducting from her accrued vacation account the difference between the number of hours in her nonstandard workday and the eight hours of credit to which the department claimed she was entitled for each personal leave day that she took and each holiday. The trial court determined that the terms "day" and "holiday" as used in §§ 5-250 (c) and 5-254 (a), respectively, represent an entire calendar day rather than eight hours. That court concluded that the department was required to apply each of O's personal leave days and holidays against her nonstandard workday on a day-for-day basis without deducting any time from

her accrued vacation account. That court also ordered restoration of any vacation time that already had been deducted from O's accrued vacation account in connection with her use of personal and holiday leave. On the plaintiff's appeal from the judgment of the trial court, *held* that, as determined by the trial court, §§ 5-250 (c) and 5-254 (a) require that O's personal leave days and holidays be applied on the basis of her nonstandard workday, without any deduction from her accrued vacation account to make up for the difference in hours between her workday and the standard eight hour workday: this court was persuaded that the legislature's use of the terms "day" and "holiday" in §§ 5-250 (c) and 5-254 (a), respectively, without any limiting language and read in light of their ordinary meanings, indicated that the legislature intended that employees be compensated for personal and holiday leave commensurate with their scheduled hours during the calendar day, there being no suggestion in either the purpose or the legislative history of those statutes that the legislature intended the terms "day" and "holiday" to represent an eight hour workday; accordingly, the trial court properly concluded that the practice of deducting vacation time from O's accrued account for her use of personal and holiday leave violated the mandate of § 5-250 (c), that the practice had to be discontinued and that O was entitled to restoration of any time that had been deducted from her accrued vacation account therefor.

(*One justice concurring separately*)

Argued April 16, 2003—officially released January 6, 2004

Procedural History

Appeal from a decision by the named defendant granting the appeal of a grievance filed against the state department of correction by the defendant Catherine Osten claiming that her paid personal and holiday leave time had been improperly calculated, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cohn, J.*; judgment dismissing the plaintiff's appeal, from which the plaintiff appealed. *Affirmed.*

Richard T. Sponzo, assistant attorney general, with whom, on the brief, were *Richard Blumenthal*, attorney general, and *Thomas P. Clifford III*, assistant attorney general, for the appellant (plaintiff).

Robert J. Krzys, for the appellee (defendant Catherine Osten).

PALMER, J. The defendant Catherine Osten[1] is a permanent full-time state employee working a nonstandard ten hour workday[2] but a standard forty hour work week.[3] The sole issue raised by this appeal is whether, pursuant to General Statutes §§ 5-250 (c)[4] and 5-254 (a),[5] the trial court properly concluded that the defendant is entitled to have each of her fixed number of personal leave days and holidays credited, on a day-for-day basis, against her entire nonstandard ten hour workday, or whether, under those statutory provisions, each such personal leave day and holiday represents only eight hours of leave time in accordance with the standard

[1] The named defendant, the employees' review board (board), also is a party to this action. Beyond certifying the administrative record, however, the board has declined to take an active role in the case. Therefore, for convenience, all subsequent references to the defendant are to Catherine Osten.

[2] As we explain more fully hereinafter, when this action first was initiated by the defendant, she was working a nonstandard eight and one-half hour workday. She since has been assigned to work a ten hour day.

[3] Section 5-238-1 of the Regulations of Connecticut State Agencies sets the standard hours of work at seven hours. In 1995, however, by directive of the department of administrative services, the standard workday gradually was increased to eight hours. *Nagy* v. *Employees' Review Board*, 249 Conn. 693, 696 n.3, 697, 735 A.2d 297 (1999). The standard work week currently is forty hours.

[4] General Statutes § 5-250 (c) provides: "In addition to annual vacation, each appointing authority shall grant to each full-time permanent employee in the state service three days of personal leave of absence with pay in each calendar year. Personal leave of absence shall be for the purpose of conducting private affairs, including observance of religious holidays, and shall not be deducted from vacation or sick leave credits. Personal leave of absence days not taken in a calendar year shall not be accumulated."

[5] General Statutes § 5-254 (a) provides: "Each full-time permanent employee in the state service shall be granted time off with pay for any legal holiday. If a legal holiday falls on a Saturday, employees shall be granted equivalent time off on the Friday immediately preceding such Saturday or given another day off in lieu thereof. The Commissioner of Administrative Services may issue regulations governing the granting of holiday time to other employees in the state service, which regulations shall be approved by the Secretary of the Office of Policy and Management."

eight hour workday for state employees. On appeal, the plaintiff, the secretary of the office of policy and management, contends that, contrary to the conclusion of the trial court, §§ 5-250 (c) and 5-254 (a) require him to: (1) treat each personal leave day and holiday as representing eight hours of leave time in accordance with the standard workday; (2) award the defendant eight hours of credit toward her ten hour workday for each such personal leave day and holiday; and (3) deduct two hours from the defendant's vacation account to make up for the difference in hours between her workday and the eight hours of leave time to which the plaintiff claims the defendant statutorily is limited for each personal leave day and holiday. We reject the plaintiff's claim and, therefore, affirm the judgment of the trial court.

The record reflects the following undisputed facts and procedural history. The defendant has been employed by the department of correction (department) since August, 1988. Since May, 1994, she has held the position of lieutenant. When the defendant first was appointed a lieutenant, the department assigned her to work an eight and one-half hour day, with four days on and two days off, repeating every six weeks. In October, 2000, the department changed her schedule to a ten hour workday.[6] Throughout her employment as a lieutenant, the defendant's weekly schedule has averaged forty hours per week over a six or eight week period.

On March 13, 2000, the defendant filed a grievance with the personnel division of the department of administrative services (administrative services) claiming, inter alia, that, relying on the standard eight hour workday for state employees, the department improperly

[6] The record indicates that the defendant did not elect to work a nonstandard workday but, rather, was required to do so by the department.

was treating each of her personal leave days and holidays as representing eight hours of leave time and then deducting from the defendant's vacation account the difference between the number of hours in her nonstandard workday and the eight hours of credit to which the department claimed she was entitled for each such personal leave day and holiday.[7] The defendant contended that this practice violated § 5-250 (c) and that she was entitled to have each personal leave day and holiday credited against her nonstandard workday on a day-for-day basis. She therefore sought restoration to her vacation account of all the time that the department had deducted from that account in connection with her use of personal leave and holiday time.[8] On April 19, 2000, administrative services denied the defendant's grievance.

Thereafter, the defendant appealed from the denial of her grievance to the employees' review board (board). After a hearing, the board concluded that the depart-

[7] Thus, when the defendant was working a nonstandard eight and one-half hour workday and elected to take a personal leave day, the department treated the personal leave day as representing eight hours of leave time and, accordingly, awarded the defendant eight hours of credit toward her eight and one-half hour workday. The department then deducted one-half hour from the defendant's vacation leave account to make up for the difference between her eight and one-half hour workday and the eight hours of leave time to which the department deemed she was entitled, under § 5-250 (c), for each personal day. The department also employed this practice with respect to holiday leave time. Therefore, on a state holiday when the defendant otherwise would have been working, the department awarded the defendant eight hours of credit toward her eight and one-half hour workday, and then deducted one-half hour from her bank of vacation time to account for the difference between her workday and the eight hours of holiday leave for which she had been credited in accordance with the department's interpretation of § 5-254 (a).

[8] Although the defendant did not cite to § 5-254 (a) in her grievance complaint, she also sought restoration of any vacation time that had been deducted in connection with her use of holiday leave. The parties do not dispute that, for purposes of the issue presented by this appeal, §§ 5-250 (c) and 5-254 (a) should be construed in the same manner.

ment's practice violated § 5-250 (c). Specifically, the board determined that the practice deprived the defendant of vacation time to which she was entitled because § 5-250 (c) does not reflect an intent by the legislature to penalize in such a manner employees whose workdays exceed the standard eight hours. Accordingly, the board ordered the department to: (1) grant the defendant three full calendar days of personal leave annually and credit her vacation account for any time that had been deducted from that account because of her use of personal leave days; and (2) make similar adjustments to the defendant's vacation account for any hours debited from that account in connection with her use of holiday leave.

The plaintiff then appealed from the board's decision to the Superior Court pursuant to General Statutes § 4-183.[9] The trial court issued its decision dismissing the plaintiff's administrative appeal, concluding that the terms " 'day' " and " 'holiday' " as used in §§ 5-250 (c) and 5-254 (a), respectively, represent an entire " 'calendar day,' " rather than eight hours. Thus, the trial court determined that the department statutorily is required to apply each of the defendant's personal days and holidays against her nonstandard workday *on a day-for-day basis*, thereby barring any deduction from the defendant's vacation account because of her use of personal and holiday leave. The court also ordered the plaintiff to restore any time that had been deducted from her vacation account in connection with her use of leave pursuant to §§ 5-250 (c) and 5-254 (a). This appeal by the plaintiff followed.[10]

[9] General Statutes § 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

[10] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

The plaintiff claims that the trial court improperly concluded that the defendant is entitled to personal leave days and holidays on the basis of her nonstandard workday, rather than the standard eight hour day. Specifically, the plaintiff contends that construing §§ 5-250 (c) and 5-254 (a) to award leave on the basis of the standard eight hour workday is consistent with other statutory provisions addressing irregular work schedules. The plaintiff further contends that the trial court's construction of §§ 5-250 (c) and 5-254 (a) gives rise to inequitable and irrational results, in particular, bestowing on employees working a nonstandard workday a windfall of additional leave time as compared to similarly situated employees working a standard eight hour day. Therefore, according to the plaintiff, the only reasonable interpretation of the terms "day" and "holiday" is an eight hour day.

The defendant, on the other hand, contends that equating personal leave days and holidays with the standard eight hour workday is incompatible with the legislature's intent as expressed in the pertinent statutory language and history. She further contends that employees working nonstandard workdays would receive disparate treatment under the interpretation urged by the plaintiff because they would have less vacation time available to them than employees who work a standard eight hour day. Therefore, the defendant contends, the trial court properly construed "day" and "holiday" to mean a "calendar day." We agree with the trial court that §§ 5-250 (c) and 5-254 (a) require the plaintiff to apply the defendant's personal days and holidays on the basis of her nonstandard workday, without any deduction from the defendant's bank of vacation leave to account for the difference in hours between her workday and the standard eight hour workday.

We begin by setting forth the well established standard that governs our review of an administrative

agency's decision. "[A]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Southern New England Telephone Co.* v. *Dept. of Public Utility Control*, 261 Conn. 1, 13, 803 A.2d 879 (2002). In the present case, there is no claim that the relevant statutory provisions previously have been subjected to judicial scrutiny or to a time-tested interpretation by the board. We, therefore, accord no deference to the board's interpretation of those provisions. As a result, our review is plenary because the plaintiff's claim involves a question of statutory construction. See, e.g., *Segal* v. *Segal*, 264 Conn. 498, 506, 823 A.2d 1208 (2003).

"The process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Citation omitted; internal quotation marks omitted.) *State* v. *Courchesne*, 262 Conn. 537, 577, 816 A.2d 562 (2003).

With these principles in mind, we turn to the merits of the plaintiff's claim.

As with all issues of statutory construction, we begin with the pertinent statutory language. General Statutes § 5-250 (c) provides in relevant part: "In addition to annual vacation, each appointing authority shall grant to each full-time permanent employee in the state service *three days of personal leave of absence with pay* in each calendar year. Personal leave of absence shall be for the purpose of conducting private affairs, including observance of religious holidays, and shall not be deducted from vacation or sick leave credits. . . ." (Emphasis added.) General Statutes § 5-254 (a) provides in relevant part that "[e]ach full-time permanent employee in the state service shall be granted *time off with pay for any legal holiday.* . . ." (Emphasis added.)

As a preliminary matter, we reiterate that neither party contends that our construction of §§ 5-250 (c) and 5-254 (a) should differ on the basis of any purported distinction between a "day" of personal leave and a "holiday."[11] Indeed, as we discuss at greater length later in this opinion, the language of the two provisions and their legislative history reflect an interrelated purpose of providing time for the observance of certain holidays, including religious holidays.[12] See General Statutes § 5-250 (c) ("[p]ersonal leave of absence *shall be for the purpose of* conducting private affairs, including *obser-*

[11] See footnote 8 of this opinion.

[12] Sections §§ 5-250 and 5-254 were enacted pursuant to the State Personnel Act, Public Acts 1967, No. 657, in accordance with recommendations made to the legislature in a report by J. L. Jacobs and Company (Jacobs report). 12 S. Proc., Pt. 5, 1967 Sess., p. 2306, remarks of Senator John P. Janovic ("bill is the culmination of the Jacobs report"). The Jacobs report directly associates personal leave days and holidays, stating that "a personal leave allowance . . . is provided to all employees to cover religious holidays not observed officially by the state . . . ." J. L. Jacobs & Company, A Modern Personnel Management System for Connecticut (January, 1967) p. 25.

vance of religious holidays" [emphasis added]); General Statutes § 5-254 (a) (providing for time off with pay for legal holidays, including certain religious holidays).[13] Accordingly, for purposes of this appeal, we construe §§ 5-250 (c) and 5-254 (a) similarly with respect to the leave time granted therein. See *Nizzardo* v. *State Traffic Commission*, 259 Conn. 131, 157, 788 A.2d 1158 (2002) (courts under duty, when reasonably possible, to construe related statutes harmoniously).

When one considers the statutory language, of particular significance is the phrase in § 5-250 (c) providing that, "[p]ersonal leave of absence . . . *shall not be deducted from vacation or sick leave credits*. . . ." (Emphasis added.) If the legislature intended that a "day" of personal leave means a calendar day, then the practice of deducting two hours of vacation time for every personal day the defendant takes—solely because her ten hour workday exceeds the standard eight hour workday—directly contravenes that statutory mandate. If, on the other hand, as the plaintiff contends, the legislature intended that a "day" of personal leave

[13] General Statutes § 1-4, which sets forth the designated state holidays, provides in relevant part: "In each year the first day of January (known as New Year's Day), the fifteenth day of January of each year prior to 1986, and commencing on the twentieth day of January in 1986, the first Monday occurring on or after January fifteenth (known as Martin Luther King Day), the twelfth day of February (known as Lincoln Day), the third Monday in February (known as Washington's Birthday), the last Monday in May (known as Memorial Day or Decoration Day), the fourth day of July (known as Independence Day), the first Monday in September (known as Labor Day), the second Monday in October (known as Columbus Day), the eleventh day of November (known as Veterans' Day) and the twenty-fifth day of December (known as Christmas) and any day appointed or recommended by the Governor of this state or the President of the United States as a day of thanksgiving, fasting or religious observance, shall each be a legal holiday, except that whenever any of such days which are not designated to occur on Monday, occurs upon a Sunday, the Monday next following such day shall be a legal holiday and whenever any of such days occurs upon a Saturday, the Friday immediately preceding such day shall be a legal holiday. . . ." The governor also has declared Good Friday and Thanksgiving day as legal holidays.

means a standard eight hour day, then the challenged practice does not violate § 5-250 (c). We turn, therefore, to the meaning of the terms "day" and "holiday" for purposes of §§ 5-250 (c) and 5-254 (a), respectively.

We first note that those terms are not defined in either § 5-250, § 5-254 or elsewhere in the State Personnel Act, General Statutes § 5-193 et seq. In the absence of a statutory definition, words and phrases in a statute are to be construed according to their common usage. General Statutes § 1-1 (a);[14] *State* v. *Sandoval*, 263 Conn. 524, 552, 821 A.2d 247 (2003). The dictionary defines "holiday" as: "a *day* on which one is exempt from one's usual labor or vocational activity . . . ." (Emphasis added.) Webster's Third New International Dictionary. A "day" is defined as: "the time of light or interval between one night and the next [or] . . . the period of the earth's rotation on its axis ordinarily divided into 24 hours . . . ." Id.

Consistent with these definitions, courts generally have construed the word "day," when left unqualified, to mean a calendar day. See, e.g., *The Pocket Veto Case*, 279 U.S. 655, 679, 49 S. Ct. 463, 73 L. Ed. 894 (1929) ("[t]he word 'days' when not qualified, means in ordinary and common usage calendar days"); *Booker* v. *Chief Engineer of the Fire Dept. of Woburn*, 324 Mass. 264, 266, 85 N.E.2d 766 (1949) ("the word 'day' means a calendar day"); *Kuznitsky* v. *Murphy*, 381 Ill. 182, 186, 44 N.E.2d 893 (1942) ("if the legislature had contemplated or intended any other or different day than the ordinary calendar day when they speak of 'portion of a day' they would have said so by appropriate lan-

[14] General Statutes § 1-1 (a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

guage").[15] "[A] calendar day is the space of time that elapses between two successive midnights." *Booker* v. *Chief Engineer of the Fire Dept. of Woburn*, supra, 266; accord *Avis Rent-A-Car System, Inc.* v. *Crown High Corp.*, 165 Conn. 608, 611–12, 345 A.2d 1 (1973) (noting that, "[b]y statute, New York has provided that '[a] calendar day includes the time from midnight to midnight' "). Indeed, administrative services defines the "customary work day" as lasting "from 12:01 a.m. to 12:01 a.m. the following day . . . ." Regs., Conn. State Agencies § 5-238-4. Therefore, the fact that the legislature did not qualify the term "day" for purposes of § 5-250 (c) suggests that a "day" of personal leave represents an entire twenty-four hour period for which a state employee elects not to work but, nonetheless, is paid.

When seeking to ascertain the proper construction of the words "day" and "holiday" as those terms are used in §§ 5-250 (c) and 5-254 (a), respectively, we also look to the legislative purpose underlying those statutory subsections. As noted previously, § 5-250 (c) expressly provides that "[p]ersonal leave of absence shall be *for the purpose of* conducting private affairs, including *observance of religious holidays* . . . ." (Emphasis added.) The grant of a day of leave for such a purpose suggests a full calendar day off from work because, as a general matter, the observance of a religious holiday requires the entire day, not just a portion of that day. Similarly, it is reasonable to conclude that the legislature, in granting paid leave for legal holidays, intended to exempt state employees from their usual duties for a full calendar day. See *Brennan* v. *Fairfield*, 255 Conn. 693, 700, 768 A.2d 433 (2001) ("[c]ertainly when the legislature declares a day to be a holiday, it means at least to free public officers from the obligation

[15] Cf. The Dorsey Brothers Orchestra, "What a Difference a Day Made," (1934) ("[w]hat a difference a day made, twenty-four little hours").

of keeping open their offices or attending to their duties on that day" [internal quotation marks omitted]).

Thus, on the basis of the language and purpose of §§ 5-250 (c) and 5-254 (a), we are persuaded that the legislature's use of the terms "day" and "holiday" in those provisions reflects its intent that employees shall be compensated for leave commensurate with their scheduled hours during the calendar day. Indeed, there is nothing in the related statutory scheme or legislative history of §§ 5-250 (c) or 5-254 (a) to suggest a contrary intent.[16]

The plaintiff's reliance on other statutory provisions related to irregular work schedules and average work weeks as indicating the legislature's intent that "day" and "holiday" mean a standard eight hour day is misplaced. The plaintiff first cites to General Statutes § 5-238,[17]

[16] We note that the plaintiff challenges the trial court's reliance on our decision in *Nagy* v. *Employees' Review Board*, 249 Conn. 693, 735 A.2d 297 (1999), and suggests that, to the extent that *Nagy* is relevant, it supports the plaintiff's interpretation of §§ 5-250 (c) and 5-254 (a). Although *Nagy* does not bear directly on the issue presented by this appeal, it is consistent with our conclusion that a "day" means a calendar day.

In *Nagy*, the issue was whether, under General Statutes §§ 5-247 and 5-250, the plaintiff state employees, who gradually had increased the length of their workday from seven to eight hours, were entitled to a full eight hour "day" of sick or vacation leave based on the then-standard workday of eight hours, or whether those statutory provisions entitled them only to seven hours of leave for each day they had earned at the time the standard workday was seven hours. Id., 695–96. The dispute arose because the statutes at issue in that case, in contrast to those at issue in the present case, permitted hourly computation of leave time. Id., 700. Nonetheless, we held in *Nagy* that the plaintiffs were entitled to a full "day" of leave, in accordance with the current eight hour workday. Id., 704–705. In so concluding, we rejected the contention of the defendant board that the relevant statutes granted leave in terms of *hours* rather than *days*. Id., 703–704. Thus, to the extent that *Nagy* is relevant to the issue presented by this appeal, it supports the trial court's conclusion that a "day" is a calendar day, that is, a full day, irrespective of the number of hours that an employee may have been scheduled to work on that day.

[17] General Statutes § 5-238 provides in relevant part: "The Commissioner of Administrative Services shall issue regulations for establishing and maintaining uniform and equitable hours of work required of all employees

which permits the commissioner of administrative services to designate a position as "unscheduled" when its work requirements cannot be met by a standard schedule, provided that, "over a period of not more than eight weeks, no employee serving in a position designated as unscheduled shall *average* more than five workdays and [forty] hours per week per period." (Emphasis added.) The plaintiff contends that, because § 5-238 permits the averaging of such irregular schedules based on the standard *work week*, which in turn translates to five standard eight hour *workdays*, § 5-238 evinces a legislative intent that employees working irregular hours and standard hours be treated the same.

Along a similar vein, the plaintiff cites to General Statutes §§ 5-245 and 5-246,[18] which address overtime and

in the Executive Department, which regulations shall be approved by the Secretary of the Office of Policy and Management. The number of hours any employee shall be required to be on duty each day or in any week or month shall be uniform for all whose positions are allocated to the same class . . . . Where work requirements cannot be met by the establishment of regular work schedules, the commissioner may designate positions or classes as unscheduled, provided, over a period of not more than eight weeks, no employee serving in a position designated as unscheduled shall average more than five workdays and thirty-five hours per week per period." The statutory reference to a thirty-five hour work week has been altered in the quotation in the preceding text of this opinion to be in accord with an administrative services directive to increase the standard workweek to forty hours. See footnote 3 of this opinion.

[18] General Statutes § 5-245 provides in relevant part: "(a) Any state employee who performs work authorized by his appointing authority for a period in addition to the hours of the employee's regular, established workweek shall receive compensation as follows: (1) For that portion of such additional time worked which when added to the employee's regular, established workweek does not exceed forty hours, the employee shall be compensated at an hourly rate based on his annual salary; (2) for that portion of such additional time worked which when added to the employee's regular, established workweek exceeds forty hours, the employee shall be compensated at a rate equal to one and one-half times an hourly rate based on his annual salary.

"(b) The provisions of this section shall not be applied with respect to any employee employed in (1) an executive, administrative or professional capacity as such terms may be defined and delimited from time to time by the Commissioner of Administrative Services, or (2) a position or class which

equivalent time off with pay for hours worked in addition to the "average" forty hour work week for certain state employees. The crux of the plaintiff's argument is that, because both of these provisions require that employees working irregular schedules be compensated on the basis of an "average" work week, the legislature similarly intended that, for purposes of §§ 5-250 and 5-254, employees working irregular, or nonstandard, daily schedules be treated the same as employees working a standard eight hour day.

We fail to see the correlation that the plaintiff seeks to draw between §§ 5-238, 5-245 and 5-246 and the issue

has been designated as unscheduled by the Commissioner of Administrative Services, or (3) a position the regular work schedule of which requires rotating shifts as approved by the Commissioner of Administrative Services and recorded in his office, which schedule shall not *average* more than five work days per week over a period of not more than eight weeks.

"(c) Any person serving in a position referred to in subdivision (2) or (3) of subsection (b) of this section who performs work authorized by his appointing authority for a period in addition to his *average* workweek shall receive compensation as follows: (1) For those hours worked in any one workweek which are additional to his regularly scheduled hours for such week and which, when added to the employee's *average* workweek, do not exceed forty hours, the employee shall be compensated at an hourly rate based on his annual salary; (2) for those hours worked in any one workweek which are additional to his regularly scheduled hours for such week and which, when added to the employee's *average* workweek, exceed forty hours, the employee shall be compensated at a rate equal to one and one-half times an hourly rate based on his annual salary, provided nothing in this section in conflict with section 5-246 shall be construed to apply to any member of the state police. . . ." (Emphasis added.)

General Statutes § 5-246 (a) (1) provides in relevant part: "Notwithstanding the provisions of any regulation issued under this chapter, no state policeman shall be required to be on active duty as such more than five days in any consecutive seven-day period except in case of emergency as determined by the Commissioner of Public Safety. Subject to the provisions of subsection (b) of section 5-245, compensation at a rate equal to one and one-half times an hourly rate based on his annual salary shall be made in the case of any member or officer of the state police force who performs work authorized by the Commissioner of Public Safety in addition to the hours of his regular workweek as established by said commissioner, provided the Commissioner of Public Safety shall establish no workweek which, including home-to-duty station and duty station-to-home time, exceeds an eight-week *average* of forty hours per week. . . ." (Emphasis added.)

presented by this case. The focus of each of those statutory sections is a standard forty hour *work week*; there is no indication that a standard workday has any particular significance insofar as those statutory provisions are concerned. Moreover, there is nothing in those provisions that suggests any relationship to the use and calculation of personal leave days and holidays under §§ 5-250 (c) and 5-254 (a). We are not persuaded, therefore, that §§ 5-238, 5-245 and 5-246 have any bearing on whether the legislature intended personal leave days and holidays to be credited on the basis of a calendar day or an eight hour day.

As the plaintiff contends, the State Personnel Act does evince the legislature's intent that similarly situated employees be treated equally, whenever reasonably possible. See General Statutes § 5-194 ("[t]his chapter shall be so construed and administered as to provide a uniform and equitable system of personnel administration of employees in the state service"); General Statutes § 5-238 ("The Commissioner of Administrative Services shall issue regulations for establishing and maintaining uniform and equitable hours of work required of all employees in the Executive Department . . . . The number of hours any employee shall be required to be on duty each day or in any week or month shall be uniform for all whose positions are allocated to the same class . . . ."). The plaintiff maintains that the trial court's construction of §§ 5-250 (c) and 5-254 (a) is contrary to this legislative goal. In particular, the plaintiff underscores the fact that, whenever the defendant uses a personal leave day or takes holiday leave, she is relieved of *ten hours of work* as a result of her nonstandard workday, whereas her similarly situated colleague working a standard day is relieved only of *eight hours of work*. Consequently, by the end of the year, the defendant will have worked as many as thirty fewer

hours than her colleague,[19] without any commensurate reduction in the defendant's pay.[20] The plaintiff claims that this is a "bizarre" and inequitable result that counsels against our adoption of the trial court's construction.[21]

We are mindful, however, that inequities also would result if we were to adopt the plaintiff's construction of §§ 5-250 (c) and 5-254 (a). For example, pursuant to § 5-250 (a),[22] a full-time permanent employee who has

[19] It is true, of course, that, under the construction of §§ 5-250 (c) and 5-254 (a) adopted by the trial court, the defendant will work fewer total hours per year than her similarly situated colleague who works a standard eight hour day. Because, however, we do not know how many state holidays fall on days when the defendant otherwise would have been scheduled to work, we also do not know precisely how many fewer hours she would be required to work, on an annual basis, than her colleague with an eight hour workday. Hypothetically, though, if the defendant were to use all three of her personal leave days, *and* if every state holiday fell on a day when she otherwise was scheduled to work, the defendant would work an annual total of thirty fewer hours than her colleague, if, of course, her colleague also used all of her personal leave days and if each of the twelve state holidays fell on one of her colleague's regularly scheduled workdays, as well.

[20] The plaintiff also contends that, had the legislature intended to grant greater leave time to employees working nonstandard schedules, it knew how to express such an intent. Specifically, the plaintiff points to regulations governing holiday, vacation and sick leave time for part-time state employees. See Regs., Conn. State Agencies §§ 5-254-2 (c) (2), 5-247-2 (a) (2) and 5-250-2 (b). Without more, we do not see how the language of these *administrative regulations* supports the plaintiff's claim regarding the language used by the *legislature*. Moreover, although the commissioner of administrative services has established regulations that govern the award of leave to part-time state employees, the legislature has not conferred such authority upon the commissioner with respect to permanent full-time state employees. The regulations relied on by the plaintiff, therefore, are inapposite.

[21] The plaintiff also asserts that, under the trial court's construction, the result becomes that much more inequitable when considering its effect on vacation and sick leave. As the plaintiff concedes, however, neither of those benefits is implicated in this appeal.

[22] General Statutes § 5-250 (a) provides in relevant part: "Each appointing authority shall grant to each full-time employee in a permanent position in the state service, who has worked at least one full calendar year, an annual vacation with pay of twenty-one consecutive calendar days or its equivalent. . . ."

worked a full calendar year is entitled to "an annual vacation with pay of twenty-one consecutive calendar days or its equivalent. . . ." For a person working a standard forty hour week, these twenty-one consecutive calendar days represent three work weeks, or 120 hours, of paid vacation time. Under the current practice, and applying the construction advocated by the plaintiff, two hours are deducted from the defendant's vacation account for each personal leave day that she takes and for each state holiday on which she otherwise would have been assigned to work. The sum total of this reduction in vacation leave is not insignificant. Because the defendant is entitled to three days of personal leave, and the state has designated twelve days as state holidays; see footnote 13 of this opinion; the defendant could have as many as thirty hours deducted from her vacation account each year.[23] Thus, although § 5-250 (a) entitles the defendant to the same 120 hours of vacation time as similarly situated employees who work a standard eight hour day, the construction of §§ 5-250 (c) and 5-254 (a) advocated by the plaintiff would result in the defendant having as many as thirty fewer hours of disposable vacation time than employees working an eight hour day.[24]

The construction urged by the plaintiff gives rise to another, albeit related, inequity with respect to the defendant's use of holiday leave. Under that construction, the defendant would be entitled to eight hours of holiday leave time for each holiday that falls on a day when she otherwise would have been working. Because

[23] See footnote 19 of this opinion.

[24] Indeed, because vacation time, unlike personal leave time, may be accrued; see General Statutes § 5-250 (b); and has a monetary value; General Statutes § 5-252 ("[a]ny state employee leaving state service shall receive a lump sum payment for accrued vacation time"); an employee who works a standard eight hour day not only has greater choice in *when* to take leave, she also has the opportunity to convert her greater number of vacation leave hours into a greater monetary payout upon her departure from state service.

the defendant works a ten hour day, however, two hours would be deducted from her vacation account to make up for the difference between her ten hour workday and the eight hours of holiday leave to which the plaintiff claims the defendant statutorily is limited. Those two hours would be deducted from the defendant's vacation account, however, even though she *cannot* work that day *because* it has been deemed a state holiday.[25] To deduct two hours from the defendant's vacation account under those circumstances is neither equitable nor consistent with the purpose of holiday leave, namely, to compensate state employees fully for holidays on which our state offices and facilities, with but a few exceptions, are closed.

Although we recognize that the inequity that flows from the trial court's construction of §§ 5-250 (c) and 5-254 (a) is not insignificant, neither is the unfairness that would result if we were to adopt the plaintiff's interpretation of those provisions. Thus, we must choose from two competing interpretations, each of which gives rise to inequities of similar magnitude. In such circumstances, the parties' equitable arguments cannot serve as the basis for our resolution of the question presented.

We are persuaded that the legislature's use of the words "day" and "holiday" in §§ 5-250 (c) and 5-254 (a), respectively, without any limiting language and read in light of those terms' ordinary meanings, indicates that the legislature intended for employees to receive personal and holiday leave credit on the basis of a calendar

[25] We do not mean to suggest, of course, that the defendant may not work on state holidays if she is assigned to do so in accordance with the terms of her employment. Indeed, as a correctional supervisor, it may be that the defendant does, in fact, work on one or more such holidays each year. Generally, however, state employees do not, and cannot, work on state holidays, unless authorized to do so, because the vast majority of state offices and facilities are closed to them, as well as to the public, on such days.

day.[26] Moreover, neither the purpose nor the legislative history of §§ 5-250 (c) and 5-254 (a) suggests that the legislature intended the terms "day" and "holiday" to represent an eight hour workday. "We will not impute to the legislature an intent to limit [a] term where such intent does not otherwise appear in the language of the statute." (Internal quotation marks omitted.) *State* v. *Love*, 246 Conn. 402, 412, 717 A.2d 670 (1998). Despite our recognition that the construction we adopt today will result in disparate treatment of employees working a standard eight hour day and those working a nonstandard day in excess of eight hours, "[i]t is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *State* v. *Luurtsema*, 262 Conn. 179, 202, 811 A.2d 223 (2002). Of course, the legislature is free to decide that, for purposes of such leave benefits, a day equates to an eight hour day. Indeed, Congress has done so. See 5 U.S.C. § 6129 ("[f]or purposes of administering sections 6303(a), 6304, 6307(a) and (d), 6323, 6326, 6327, and 8339(m) of this title, in the case of an employee who is in any program under this subchapter, references to a day or workday

[26] The plaintiff contends that an interpretation of "day" as a calendar day has "no meaning in measuring" these benefits and that this same interpretation of "holiday" is "wholly divorced from the context of calculating benefit entitlement . . . ." This claim lacks merit. Although "[i]t is not our practice to construe a statute . . . in a way that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve"; (internal quotation marks omitted) *State* v. *Reynolds*, 264 Conn. 1, 33, 836 A.2d 224 (2003); the plaintiff has failed to explain, and we cannot ascertain, how this interpretation renders impractical the computation of personal and holiday leave benefits.

The plaintiff also suggests that, if we construe a "day" to mean a calendar day, other absurd results would follow under various scenarios in which employees worked odd schedules, such as different numbers of irregular hours each day. Although we acknowledge the theoretical possibility of such anomalous results, we decline to construe §§ 5-250 (c) and 5-254 (a), which apply to large numbers of state employees, on the basis of a few hypothetical, and seemingly remote, fact patterns.

[or to multiples or parts thereof] contained in such sections shall be considered to be references to 8 hours [or to the respective multiples or parts thereof]"). We, however, cannot do so by judicial fiat.

In summary, the grant of personal leave days and holidays under §§ 5-250 (c) and 5-254 (a), respectively, is intended to compensate state employees on the basis of a calendar day. Section 5-250 (c) explicitly provides that personal days are "[i]n addition to annual vacation" and "shall not be deducted from vacation or sick leave credits." Accordingly, the practice of deducting time from the defendant's accrued vacation credits on account of her use of personal and holiday leave, solely because she works in excess of an eight hour day, violates that mandate of § 5-250 (c). Therefore, the trial court properly concluded that the practice must be discontinued and that the defendant is entitled to restoration of any time deducted from her vacation account, because of her nonstandard workday, for her use of personal leave days and holidays pursuant to §§ 5-250 (c) and 5-254 (a).

The judgment is affirmed.

In this opinion BORDEN, KATZ and VERTEFEUILLE, Js., concurred.

ZARELLA, J., concurring. I concur in the result reached by the majority but disagree with the majority's analysis. Following the approach to statutory interpretation adopted in *State* v. *Courchesne*, 262 Conn. 537, 577, 816 A.2d 562 (2003), the majority begins by examining the statutes and case law of other jurisdictions to determine the meaning of the terms "day" and "legal holiday" contained in General Statutes §§ 5-250 (c) and 5-254 (a), respectively. The majority then seeks to divine the legislative purpose underlying the statutory language by examining the related statutory scheme and legislative history. I would adopt a simpler approach.

As I have stated elsewhere, if the language of a statute is plain and unambiguous, as in the present case, we need look no farther for its meaning than the words of the statute itself, unless such an interpretation produces an absurd result. Id., 634 (*Zarella*, *J.*, dissenting). Only when the meaning of statutory language cannot be determined in this fashion should we consider the statutory scheme, the common-law principles governing the same subject matter and the statute's legislative history. Id. (*Zarella*, *J.*, dissenting). I therefore disagree with the majority's conclusion that §§ 5-250 (c) and 5-254 (a) should be construed similarly because the language and legislative history of the two provisions "reflect an interrelated purpose of providing time for the observance of certain holidays, including religious holidays." I also disagree with the majority's emphasis on the subjective intent of the legislature in addition to the pertinent statutory language.

I initially disagree that personal and holiday leave under §§ 5-250 (c) and 5-254 (a) should be interpreted similarly on the ground that both provisions "reflect an interrelated purpose of providing time for the observance of certain holidays, including religious holidays." General Statutes § 5-250 (c) expressly provides that personal leave "shall be for the purpose of conducting private affairs, including [but not limited to the] observance of religious holidays . . . ." General Statutes § 5-254 (a) provides "time off with pay for any legal holiday" without referring to the religious or secular character of the holiday. Accordingly, because the language of each statute is different, I would conduct a separate analysis of each provision under the applicable canons of statutory construction.

General Statutes § 5-254 (a) provides in relevant part: "Each full-time permanent employee in the state service shall be granted time off with pay for any legal holiday. . . ." As the majority correctly notes, there are no provi-

sions in the State Personnel Act[1] that define the term "legal holiday." The majority observes, therefore, that, in the absence of a statutory definition, we must construe the words and phrases of a statute according to their common usage. See General Statutes § 1-1 (a). The majority nevertheless proceeds directly to the statutes and case law of other jurisdictions in construing the meaning of the term.

I find such an analysis superfluous because the term "legal holiday" is generally understood to mean a full calendar day. In other words, a reasonable person simply would not interpret the statute to mean that state employees working a nonstandard ten hour day must report for two hours of work on Thanksgiving, Independence Day or any other day designated as a legal holiday if the employee's nonstandard workday happens to fall on the holiday. Indeed, such an interpretation would produce absurd results. Because most state offices are closed on legal holidays, employees reporting to work on a legal holiday might not be able to perform their usual duties, much less enter the building, in the absence of other employees. Accordingly, a construction of the term "legal holiday" to mean a full calendar day is both reasonable and consistent with the term's common usage.

General Statutes § 5-250 (c) provides in relevant part: "In addition to annual vacation, each appointing authority shall grant to each full-time permanent employee in the state service three days of personal leave of absence with pay in each calendar year. Personal leave of absence shall be for the purpose of conducting private affairs, including observance of religious holidays, and shall not be deducted from vacation or sick leave credits. . . ." Neither the statute nor the State Personnel

[1] General Statutes § 5-193 et seq.

Act contains a definition of the term "day" for purposes of calculating personal leave.

The majority observes that neither party has argued that this court's construction of the term "day" in § 5-250 (c) and the term "holiday" in § 5-254 (a) should differ on the basis of any purported distinction between a "day" of personal leave and a "holiday." Furthermore, it is a well settled canon of statutory construction that "the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . In applying these principles, we are mindful that the legislature is presumed to have intended a just and rational result." (Citations omitted; internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310–11, 819 A.2d 260 (2003).

Sections 5-250 (c) and 5-254 (a) are part of a single statutory scheme, namely, the State Personnel Act. In order to achieve a harmonious result, the two statutes must be construed so that both personal leave days and paid legal holidays refer to calendar days rather than standard eight hour workdays. Such an interpretation is reasonable and there is nothing in either statutory provision to suggest that a distinction should be made between them on that basis. Such an interpretation also is consistent with other provisions in the statutory scheme. See General Statutes § 5-250 (a) (each full-time employee shall be granted "an annual vacation with pay of twenty-one consecutive calendar days or its equivalent"). I believe that this is a more logical and legally defensible approach than that which the majority takes in construing the two provisions in a similar manner.

Finally, General Statutes § 5-250 (c) expressly provides that personal leave days shall be "[i]n addition to annual vacation" and that personal leave "shall not be deducted from vacation or sick leave credits." Consequently, under the plain language of the statute, hours taken for personal leave may not be deducted from an employee's vacation account. I thus reach the same result as the majority but via a more direct path.

PSE CONSULTING, INC. *v.* FRANK MERCEDE AND SONS, INC., ET AL.
(SC 16839)

Borden, Norcott, Katz, Palmer and Vertefeuille, Js.

Syllabus

The plaintiff, a sub-subcontractor on a certain construction project, sought damages from the named defendant, M Co., the general contractor on the project, and the defendant N Co., which, pursuant to an indemnity agreement it had with M Co., had issued a labor and materials payment bond for the project. The plaintiff sought payment for certain amounts it claimed were outstanding after the subcontractor that had hired it filed for bankruptcy. The plaintiff claimed breach of contract on the part of M Co. and bad faith and violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) on the part of N Co. N Co. filed a cross complaint against M Co. seeking indemnification for certain amounts that N Co., in fact, had paid the plaintiff, and M Co. filed a counter cross complaint seeking damages from N Co. for breach of contract and breach of the implied covenant of good faith and fair dealing. After the plaintiff released its claim against N Co. and reached a settlement with M Co., the jury returned a verdict in favor of M Co. on the cross complaint and a verdict in part in favor of M Co. on the counter cross complaint. From the trial court's judgment in accordance with the verdicts, N Co. appealed. *Held*:

1. Although the trial court improperly instructed the jury, in disregard of the express terms of the indemnity agreement, that N Co. had the burden of proving the propriety of its payments to the plaintiff under the payment bond, any error caused by the instruction was harmless, M Co. having proved its special defense that N Co. had breached the implied covenant of good faith and fair dealing and that N Co., therefore, had performed in bad faith; it was not likely that the jury's verdict would have been different had the trial court instructed the jury that the prima facie evidence clause of the indemnity agreement, which provided that any

evidence of a payment by N Co. upon a bond was prima facie evidence of the propriety of that payment, shifted the burden to M Co. to prove bad faith.

2. The trial court did not act improperly in denying N Co.'s motion for a directed verdict on its claim against M Co. for indemnification: a surety is entitled to indemnification only for payments that are made in good faith, the parties recognized that the implied covenant of good faith and fair dealing applies to sureties even though the indemnity agreement did not contain language expressly requiring N Co. to act in good faith, and the jury reasonably could have concluded that N Co. had breached that covenant in light of the evidence supporting M Co.'s claims that N Co., inconsistent with justified expectations and unfaithful to its duty under that implied covenant, both had failed to investigate adequately the plaintiff's claims and improperly had settled those claims out of self-interest; bad faith requires an improper motive or a dishonest purpose on the part of a surety, and a deficient investigation and a self-interested settlement, when accompanied by other evidence of improper motive, can constitute bad faith.

3. The jury reasonably could have concluded that N Co. was not entitled to attorney's fees and costs associated with its investigation and defense of the plaintiff's claims; subsumed in the jury's finding that M Co. had proven by a preponderance of the evidence that N Co. had breached the implied covenant of good faith and fair dealing was the jury's implicit finding that N Co.'s payments to the plaintiff were not the result of the plaintiff's claims under the bond.

4. N Co. could not prevail on its claim that the trial court improperly instructed the jury concerning the implied covenant of good faith and fair dealing; the charge, as a whole, adequately conveyed to the jury the law regarding good faith.

5. The trial court did not abuse its discretion by admitting into evidence an e-mail message sent to a surety analyst for N Co.'s parent company by N Co.'s counsel regarding a meeting he had had with the plaintiff's counsel to discuss the possibility of settling the plaintiff's claims against N Co.: the e-mail message, which merely paraphrased the discussion that transpired between counsel for N Co. and for the plaintiff, was not protected by the attorney-client privilege because the communication was not confidential, the statements therein by N Co.'s counsel having been made to a third party, the plaintiff's counsel; the e-mail was relevant in that it was probative of N Co.'s motives in making the payments to the plaintiff; and the e-mail was not inadmissible as evidence of an offer of settlement under the Connecticut Code of Evidence (§ 4-8), which precludes the admission of offers of settlement between the opposing parties at the trial in which the evidence is sought to be introduced, the e-mail here having pertained solely to the settlement discussions between N Co. and the plaintiff, and not to the possibility of settlement between N Co. and M Co.

6. N Co. could not prevail on its claim that the admission of testimony concerning an unrelated settlement agreement on a bond dispute between an affiliate of N Co. and a company that had been represented by M Co.'s current counsel was so prejudicial as to require a new trial because that testimony might have imputed bad faith by implying that N Co.'s motives to settle the plaintiff's claims were improper; as N Co. had requested, the trial court gave an unambiguous limiting instruction to the jury that was sufficient to negate any potentially adverse effect of that testimony, and there was no specific claim, nor any evidence with which to support a claim, that the jury ignored the trial court's instruction.

7. This court declined to review N Co.'s claim that the trial court improperly denied its motion to set aside the verdict because the jury's finding that N Co. had breached the implied covenant of good faith and fair dealing was inconsistent with the jury's finding that N Co. had not breached the indemnity agreement, that issue not having been raised before the trial court either in N Co.'s motion or in oral argument on that motion.

Argued September 9, 2003—officially released January 13, 2004

Procedural History

Action to recover damages under a payment bond issued to the named defendant in connection with a certain municipal construction project, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant filed a counterclaim, and where the defendant National Fire Insurance Company of Hartford filed a cross claim for indemnity against the named defendant and the named defendant filed a counter cross claim against the defendant National Fire Insurance Company of Hartford alleging breach of its duty of good faith and fair dealing; thereafter, the complaint and the counterclaim were withdrawn and the case was tried to the jury before *Tierney*, *J.*, on the cross claim and the counter cross claim only; verdict for the named defendant on the cross claim and verdict in part for the defendant National Fire Insurance Company of Hartford on the counter cross claim; subsequently, the court rendered judgment in accordance with the verdicts and awarded nominal damages to the named defendant, and the defendant National Fire Insurance Company of Hartford appealed. *Affirmed.*

R. Bradley Wolfe, with whom were *Mary Anne A. Charron* and, on the brief, *Durwin P. Jones*, for the appellant (defendant National Fire Insurance Company of Hartford).

Raymond A. Garcia, with whom were *Frederick E. Hedberg* and, on the brief, *Jane I. Milas*, for the appellee (named defendant).

Matthew M. Horowitz filed a brief for the Surety Association of America as amicus curiae.

Opinion

KATZ, J. This appeal concerns the rights of a surety, pursuant to an indemnity agreement, to indemnification for payments made in settling a claim against a surety bond. The sole parties in this appeal are National Fire Insurance Company of Hartford (National) and Frank Mercede and Sons, Inc. (Mercede), the two defendants in the underlying action.[1] National, a commercial surety company, appeals[2] from the judgment of the trial court, rendered after a jury trial, in favor of Mercede on National's cross complaint seeking indemnification and on Mercede's counter cross complaint seeking damages arising from a breach of the implied covenant of good faith and fair dealing.

On appeal, National claims that the trial court improperly: (1) disregarded the terms of an indemnity agreement executed by National and Mercede by instructing the jury that National had the burden of proving, as an element of its claim for indemnification, that its payments to the plaintiff, PSE Consulting, Inc. (PSE); see footnote 1 of this opinion; pursuant to a

[1] The plaintiff in the underlying action, PSE Consulting, Inc., settled with both National and Mercede before trial, and is not a party to this appeal.

[2] National appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

payment bond were proper; (2) failed to direct a verdict for National when the jury improperly found that National's payments to PSE had not been made in satisfaction of PSE's claim under the payment bond; (3) instructed the jury concerning the implied covenant of good faith and fair dealing; (4) admitted into evidence an e-mail message protected by the attorney-client privilege, as well as testimony pertaining to a settlement agreement between National and a third party unrelated to this action; (5) submitted Mercede's special defenses of waiver and estoppel to the jury, and refused to direct a verdict for National as to those special defenses, when the jury reasonably could not have found for Mercede; and (6) refused to set aside the verdict when the jury inconsistently had found that National had breached the implied covenant of good faith and fair dealing but not the indemnity agreement. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In October, 1996, National and Mercede executed a general agreement of indemnity (indemnity agreement), whereby National agreed to issue surety bonds on Mercede's behalf, and Mercede agreed to indemnify National for any expenses that National might incur as a result of issuing those bonds. In May, 1997, Mercede was hired as a general contractor to construct an assisted living facility in Stamford (project). As security for the contract, Mercede furnished the owner of the project with a labor and materials payment bond (payment bond). The payment bond was issued by National, on behalf of Mercede as the principal and in favor of the owner as obligee, whereby National and Mercede agreed to be jointly and severally responsible for the payment of all labor, materials and equipment furnished for use in the construction of the project.

Mercede executed a written subcontract with Dominion Bridge, Inc. (Dominion), for the manufacture and erection of structural steel. Dominion, in turn, entered into an oral sub-subcontract with PSE, whereby PSE agreed to erect steel structures for $1.5 million. This sub-subcontract between Dominion and PSE was never reduced to writing, however, and PSE never executed a formal subcontract with Mercede.

PSE began work on the project in November, 1997. Soon thereafter, PSE became concerned about the volume of work that it was performing on the project, and sought further assurance that it would be paid for that work. Consequently, PSE, Dominion and Mercede executed a joint check agreement, whereby Mercede agreed to issue checks made payable jointly to Dominion and PSE in satisfaction of their sub-subcontract. The joint check agreement provided that Mercede would pay for amounts "up to the contract amount [of $1.5 million], plus any extra charges determined and agreed upon subsequent to the date hereof." This joint check agreement also provided for a retainage of 10 percent.[3]

Between January and August, 1998, PSE continued to work on the project and to submit invoices to Dominion. Dominion then forwarded the invoices to Mercede, and Mercede issued joint checks pursuant to the joint check agreement. A representative of PSE signed a release form upon receipt of each joint check, whereby PSE waived any potential claims it may have had against Mercede. At the time of Mercede's final payment under

[3] In construction parlance, the term "retainage" ordinarily refers to the percentage of the contract price that a project owner may withhold from a contractor pending completion and acceptance of the contractor's performance under the terms of a construction contract. See *F & W Welding Service, Inc.* v. *ADL Contracting Corp.*, 217 Conn. 507, 508, 587 A.2d 92 (1991). The joint check agreement in this case provided for retainage of 10 percent of the $1.5 million contract price, or $150,000.

the joint check agreement on July 20, 1998, Mercede had made six joint payments totaling $1,323,000.

Dominion filed for bankruptcy in September, 1998. Shortly thereafter, PSE sent a letter to Mercede, stating that Dominion still owed PSE more than $600,000, and demanding that Mercede immediately pay this "undisputed" amount, "plus interest, and excluding other claims for delays, etc. that will be coming shortly." Mercede refused to make any further payments without confirmation from Dominion as to the validity of PSE's claim.

On October 13, 1998, PSE formally notified National of its claim for $1,123,551 against the payment bond. National thereafter assigned the claim to Laurence P. Jortner, surety claims analyst for National's parent corporation, CNA Surety. On November 2, 1998, Jortner sent a letter to PSE, in response to the claim, communicating National's position that "a number of bona fide or otherwise unresolved disputes exist between your company and either [Mercede] or Dominion," and that much of PSE's claim was "likely to be subject to reasonable defenses by [Mercede] or [National]." Jortner also requested that PSE submit further documentation in support of its claim. PSE complied with this request shortly thereafter.

National took no further action until February, 1999, when Jortner met with several representatives of Mercede to discuss defenses to the claim. At this meeting, Mercede's representatives told Jortner that they were disputing the claim in its entirety, including PSE's claims for payment for extra work and for the $150,000 retainage.

Additionally, in February, 1999, Jortner was contacted by Robert Dunn, counsel for PSE. On February 13, Dunn sent a letter to Jortner, and a copy of that letter to the insurance commissioner, claiming that

National had breached its obligations under paragraph six of the payment bond to pay undisputed amounts and to explain the basis for any disputed amounts within forty-five days of the receipt of a claim.[4] Jortner immediately responded that National was conducting a detailed investigation, and that, "[a]s of now, [PSE's] claim is fully disputed by [Mercede] and [National] believes that [Mercede] has provided it with, at [a] minimum, bona fide legal defenses regarding [PSE's] claim." PSE subsequently filed a formal complaint with the insurance commissioner.

Soon thereafter, National shifted its position on the PSE claim. In May, 1999, Jortner again met with representatives of Mercede. This time, Jortner suggested that either National or Mercede make a payment to PSE in the amount of $177,000—representing the $150,000 retainage plus a $27,000 balance remaining on the original contract. Mercede agreed to pay the $27,000 remaining balance, but maintained that it would not pay the $150,000 retainage because the project owner had not yet paid that amount to Mercede. Mercede continued to dispute PSE's claims for payment for extra work.

In August, 1999, PSE filed the original complaint in the underlying action against Mercede and National, seeking damages from Mercede for breach of contract, and claiming that National had acted in bad faith and had committed violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-

[4] The payment bond sets forth the procedures by which a claimant may make a claim against the bond. Once a claimant has complied with those procedures, paragraph six of the payment bond provides that "the Surety shall promptly and at the Surety's expense take the following actions:

"6.1 Send an answer to the Claimant, with a copy to the Owner, within 45 days after receipt of the claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed.

"6.2 Pay or arrange for payment of any undisputed amounts."

110a et seq. Unbeknownst to Mercede, National's counsel contacted PSE's counsel to discuss the possibility of a settlement of PSE's bad faith and CUTPA claims against National. National and PSE, however, did not reach an agreement at that time.

In September, 2000, almost two years after PSE initially had filed its formal notice of a claim against the payment bond, National conducted its independent investigation of the claim. At that time, Jortner enlisted Raymond Lemming, National's in-house chief engineer, to evaluate the fair market value of PSE's work on the project. Lemming concluded that PSE's work had a fair market value of approximately $927,913. That value was based, however, on PSE's work under the base contract and did not include PSE's claimed extra work.

Thereafter, National persistently attempted to settle PSE's claims. In April, 2001, Jortner attended a settlement meeting with counsel for National and counsel for PSE. No representatives of Mercede were present at this meeting. In October, 2001, National made a payment to PSE in the amount of $200,000. According to Jortner, this payment represented the $150,000 retainage plus an additional $50,000, constituting three years of interest at 10 percent. The payment was made at the time of Jortner's deposition, and Mercede, who had no prior knowledge of the settlement negotiations, objected to the payment.

On October 31, 2001, Jortner wrote a letter to Mercede, demanding that Mercede reimburse National for the $200,000 payment and either comply with the settlement of the remainder of PSE's claims, or deposit collateral of $500,000 with National, in accordance with National's rights under the indemnity agreement. Mercede refused to comply with either of these demands.

On November 30, 2001, National made a payment of $500,000 to PSE. On December 6, 2001, PSE released

its claims against National, leaving Mercede as the lone defendant to the action brought by PSE. Mercede and PSE reached a settlement on the first day of trial. As a result, the trial was limited to resolution of National's cross complaint, which sought indemnification from Mercede, and Mercede's counter cross complaint, which sought damages arising from a breach of contract and breach of the implied covenant of good faith and fair dealing. After a trial that lasted approximately two weeks, the jury returned a verdict for Mercede on both National's cross complaint and Mercede's counter cross complaint. Specifically, in the interrogatories submitted to the jury by the trial court, the jury stated its finding that National had not proven, by a preponderance of the evidence, "all five elements" of its claim for indemnification. Additionally, the jury found that Mercede had proven its special defense that National had breached the implied covenant of good faith and fair dealing, as well as the special defenses of estoppel and waiver.[5] Concerning Mercede's counter cross complaint, the jury found that National had not breached the indemnity agreement. Nonetheless, the jury also found that National had breached the implied covenant of good faith and fair dealing, and it awarded Mercede nominal damages. The trial court rendered judgment for Mercede in accordance with the jury's verdicts. This appeal followed. Additional facts will be set forth as necessary.

I

We first address National's claim that the trial court improperly instructed the jury that National had the burden of proving the propriety of its payments to PSE. Specifically, National contends that, in so instructing the jury, the trial court disregarded the express terms

[5] The jury also found that Mercede had not proven its special defenses that National had breached the indemnity agreement and had failed to mitigate its damages.

of the indemnity agreement, which provided that any evidence of a payment by National to a claimant upon the bond is "prima facie evidence" of the propriety of that payment. According to National, the trial court should have instructed the jury that, upon a finding that National, as the surety, had made a payment to PSE, the claimant, upon the payment bond, the prima facie evidence provision of the indemnity agreement shifted the burden of proof to Mercede, the principal, and its indemnitors[6] to prove that National's payment was improper. We agree. We also conclude, however, that this instructional impropriety constituted harmless error.

National takes issue with the following portion of the trial court's jury instruction: "The five elements of National's indemnity claim are: (1) Was the [indemnity agreement] in existence and signed by Mercede and National? (2) Did PSE submit a claim under the payment bond . . . ? (3) Was the . . . payment bond in existence and signed by the proper parties? (4) Did National pay to PSE $700,000? (5) Was the $700,000 payment to PSE as a result of PSE's claim and lawsuit against the payment bond . . . ?" The trial court further charged the jury "that elements one, two, three and four have been proven either by the evidence or the admissions of the parties. National has the burden by the preponderance of the evidence to prove element five."

"Our analysis begins with a well established standard of review. When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test

[6] The indemnity agreement refers to Mercede and its individual indemnitors, respectively, as "the Principal" and "the Indemnitors." For simplicity's sake, in our quoting of the indemnity agreement, we shall refer collectively to Mercede and its indemnitors as "Mercede."

of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . We do not critically dissect a jury instruction." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 238–39, 828 A.2d 64 (2003).

National contends that this jury instruction was improper because it disregarded the express terms of the indemnity agreement. Because the indemnity agreement is a written contract, our analysis of this issue must be guided by our well established principles of contract interpretation. Under these principles, "[a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Citations omitted; internal quotation marks omitted.) *Poole* v. *Waterbury*, 266 Conn. 68, 87–88, 831 A.2d 211 (2003). Neither National nor Mercede contends that the terms of the indemnity

agreement are ambiguous. Accordingly, our review of this issue is plenary.

National, relying on paragraphs two and five of the indemnity agreement, asserts that Mercede had agreed "to waive certain rights and benefits in exchange for National's issuance of . . . bonds on [Mercede's] behalf." Paragraph two of the indemnity agreement provided in relevant part: "[Mercede] will indemnify and save [National] harmless from and against every claim, demand, liability, cost, charge, suit, judgment and expense which [National] may pay or incur in consequence of having executed, or procured the execution of such bonds, or any renewals or continuations thereof or substitutes therefor, including, but not limited, to fees of attorneys, whether on salary, retainer or otherwise, and the expense of procuring, or attempting to procure, release from liability, or in bringing suit to enforce the obligation of . . . [Mercede] under this Agreement." In addition, paragraph two contained the following "prima facie evidence" provision: "In the event of payments by [National], [Mercede] agree[s] to accept the voucher or other evidence of such payments as *prima facie evidence of the propriety thereof, and of [Mercede's] liability therefor to [National]*." (Emphasis added.) Paragraph five of the indemnity agreement is a "right-to-settle" provision: "[National] shall have the exclusive right to determine for itself and [Mercede] whether any claim or suit brought against [National] or [Mercede] upon any such bond shall be settled or defended and its decision shall be binding and conclusive upon [Mercede]."

The terms set forth by paragraphs two and five are typical of indemnity agreements utilized throughout the surety industry, and courts routinely have upheld the validity of similar or identical provisions. See, e.g., *Transamerica Ins. Co.* v. *Bloomfield*, 401 F.2d 357, 362 (6th Cir. 1968) ("[p]rovisions in indemnity agreements

granting to the indemnitor the right to compromise and settle claims, and providing that vouchers and other evidence of payment shall be prima facie evidence of the propriety thereof, have been upheld as not against public policy and enforced by the courts"); *Engbrock* v. *Federal Ins. Co.*, 370 F.2d 784, 786 (5th Cir. 1967) (provisions wherein "voucher or other evidence of payment by said [surety] . . . shall be prima facie evidence . . . of each [i]ndemnitor's liability to said [surety]" and decisions of surety were "final and *conclusive and unconditionally* binding upon each [i]ndemnitor" upheld as not against public policy [emphasis in original]); *United States Fidelity & Guaranty Co.* v. *Napier Electric & Construction Co.*, 571 S.W.2d 644, 645–46 (Ky. App. 1978) (same); *Associated Indemnity Corp.* v. *CAT Contracting, Inc.*, 964 S.W.2d 276, 281, 283 and n.5 (Tex. 1998) (principal terms of indemnity agreement, vesting surety with "exclusive right" to settle claims in good faith and providing that "vouchers for . . . payments, shall be prima facie evidence" of indemnitors' liability to surety, are "standard throughout the industry, and have been widely upheld by courts"); see also J. Hinchey, "Surety's Performance Over Protest of Principal: Considerations and Risks," 22 Tort & Ins. L.J. 133, 146–47 (1986) (discussing enforceability of right-to-settle and prima facie evidence clauses).

Right-to-settle clauses, such as paragraph five of the indemnity agreement in this case, generally are enforced according to their terms. In other words, in the face of such a provision, a surety typically has wide discretion in settling claims made upon a bond, even where the principal is not liable for the underlying claim. See, e.g., *United States Fidelity & Guaranty Co.* v. *Napier Electric & Construction Co.*, supra, 571 S.W.2d 646; *Fidelity & Deposit Co. of Maryland* v. *Fleischer*, 772 S.W.2d 809, 816 (Mo. App. 1989); *Hess*

v. *American States Ins. Co.*, 589 S.W.2d 548, 551 (Tex. App. 1979); see also J. Hinchey, supra, 22 Tort & Ins. L.J. 146. The surety's discretion to make settlement payments is not unfettered, however, and most jurisdictions have held that the surety is entitled to indemnification only for payments that were made in good faith. See part II of this opinion.

The prima facie evidence provision in paragraph two of the indemnity agreement at issue here brings that limitation into focus. Courts interpreting similar or identical provisions routinely have concluded that, upon a finding that a surety has made a payment to a claimant upon a bond, the burden of proof shifts to the indemnitor to prove that the surety had not made the payment in good faith. See, e.g., *Transamerica Ins. Co.* v. *Bloomfield*, supra, 401 F.2d 362–63; *Engbrock* v. *Federal Ins. Co.*, supra, 370 F.2d 786 (where indemnity agreement has prima facie evidence provision, indemnitor may avoid liability "only by pleading and proving fraud or lack of good faith by [s]urety"); *United States Fidelity & Guaranty Co.* v. *Napier Electric & Construction Co.*, supra, 571 S.W.2d 646 (same). "The purpose of [prima facie evidence] clauses . . . is to facilitate the handling of settlements by sureties and obviate unnecessary and costly litigation." *Transamerica Ins. Co.* v. *Bloomfield*, supra, 363.

Although the prima facie evidence provision frequently is invoked to enable a surety to prevail on a motion for summary judgment; see, e.g., *United States Fidelity & Guaranty Co.* v. *Feibus*, 15 F. Sup. 2d 579, 582–83 (M.D. Pa. 1998); courts explicitly and implicitly have construed these provisions as shifting the burden of proof at trial. See, e.g., *Ideal Electronic Security Co.* v. *International Fidelity Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) (at trial in which surety sought indemnification for attorney's fees, prima facie evidence provision shifted burden to indemnitor to prove fees were

excessive); *Transamerica Ins. Co.* v. *Bloomfield*, supra, 401 F.2d 362–63 (uncontroverted evidence at trial demonstrated that surety had performed in good faith; therefore, prima facie evidence provision required verdict for surety); *Engbrock* v. *Federal Ins. Co.*, supra, 370 F.2d 786 (under prima facie evidence provision, indemnitor must plead *and prove* bad faith on part of surety); *United States Fidelity & Guaranty Co.* v. *Napier Electric & Construction Co.*, supra, 571 S.W.2d 646 (same); *Hess* v. *American States Ins. Co.*, supra, 589 S.W.2d 551 (same); *Fidelity & Deposit Co. of Maryland* v. *Wu*, 150 Vt. 225, 228–29, 552 A.2d 1196 (1988) (indemnitor had burden of producing evidence concerning surety's bad faith, regardless of whether prima facie evidence provision gave rise to presumption of good faith); see also *Hawaiian Ins. & Guaranty Co., Ltd.* v. *Higashi*, 67 Haw. 12, 14, 675 P.2d 767 (1984) ("[o]bviously, where such a provision is in the agreement, the burden of proof on those issues shifts").

We note that there is an apparent disagreement as to whether such provisions shift to the party who is contesting the surety's claim for indemnification both the burdens of production and persuasion, or merely the burden of production. Compare *Engbrock* v. *Federal Ins. Co.*, supra, 370 F.2d 786 (stating that indemnitor must plead *and prove* surety's bad faith) and *United States Fidelity & Guaranty Co.* v. *Napier Electric & Construction Co.*, supra, 571 S.W.2d 646 (same) with *Associated Indemnity Corp.* v. *CAT Contracting, Inc.*, supra, 964 S.W.2d 283 n.5 (prima facie evidence provision shifts burden of production only) and *Fidelity & Deposit Co. of Maryland* v. *Wu*, supra, 150 Vt. 229 n.3 (same); see generally *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 235–36 n.26, 694 A.2d 1319 (1997). We need not determine, in the present case, the scale of the prima facie evidence provision in paragraph two

of the indemnity agreement because any impropriety caused by the trial court's instruction was harmless.

"An improper instruction on the burden of proof may so mislead the jury as to be potentially harmful to one of the parties and therefore may amount to reversible error." (Internal quotation marks omitted.) *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 241 Conn. 241. Nonetheless, "[i]t is axiomatic . . . that not every error is harmful. . . . [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 243; *Scanlon* v. *Connecticut Light & Power Co.*, 258 Conn. 436, 448, 782 A.2d 87 (2001); accord *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 145, 757 A.2d 516 (2000); *Remington* v. *Aetna Casualty & Surety Co.*, 240 Conn. 309, 316, 692 A.2d 399 (1997).

At trial, Mercede asserted, as a special defense, that National had breached the implied covenant of good faith and fair dealing. The trial court properly instructed the jury that Mercede bore the burden of proving this special defense; see part III of this opinion; and the jury subsequently found that Mercede had met that burden. Therefore, because Mercede proved to the jury that National had breached the covenant of good faith and fair dealing, and had therefore performed in bad faith, it is not likely that the jury's verdict would have been different had the trial court properly instructed the jury that the prima facie evidence clause shifted the burden to Mercede to prove bad faith. Accordingly, we conclude that any error caused by this instruction was harmless.

II

We turn next to National's claim that the trial court improperly denied its motion for a directed verdict on its claim for indemnification. Specifically, National contends that the jury improperly concluded that the $200,000 and $500,000 payments to PSE had not been made in satisfaction of PSE's claim under the payment bond. As we previously have discussed, under the terms of the indemnity agreement in this case, National's payments to PSE presumptively were proper unless Mercede could prove its special defense—that National had made those payments in bad faith.[7] See part I of this opinion. Because the jury, having been instructed properly; see part III of this opinion; reasonably could have concluded, on the basis of the evidence and the logical inferences drawn therefrom, that National had acted in bad faith, we determine that the trial court did not improperly deny National's motion for a directed verdict.

At the close of trial, National moved for a directed verdict.[8] National claimed that Mercede's counterclaim and numerous special defenses had not been proven. At the heart of National's various arguments before the trial court in support of its motion for a directed verdict was its contention that the indemnity agreement gave National full discretion to make the payments to PSE, and that its exercise of that discretion did not constitute bad faith. Mercede responded in detail identifying those actions and omissions by National that supported a finding of bad faith—principally, National's failure to

[7] This court has tended to use the terms "bad faith," "lack of good faith" and "breach of the covenant of good faith and fair dealing" interchangeably. See, e.g., *Gaudio* v. *Griffin Health Services Corp.*, 249 Conn. 523, 564, 733 A.2d 197 (1999); *Multi-Service Contractors, Inc.* v. *Vernon*, 193 Conn. 446, 452, 477 A.2d 653 (1984). We maintain that practice in this opinion.

[8] At the close of National's case, Mercede had moved for a directed verdict, and the trial court reserved its decision on that motion.

conduct an investigation concerning the validity of PSE's claim against the payment bond and its self-interested settlement of the issue. The trial court reserved its decision on the motion.

Thereafter, on April 3, 2002, after the jury returned its verdict, National simultaneously filed a motion to set aside the verdict, a motion for a new trial and a renewed motion for a directed verdict.[9] National argued, inter alia, that the jury's finding that the $700,000 paid to PSE was not a result of the payment bond was contrary to the law and the evidence, and that National's exercise of its contractual rights did not constitute bad faith. In its response to the motions, Mercede argued, inter alia, that the issue regarding National's payment to PSE was essentially a question of whether National had acted in good faith and that there was sufficient evidence before the jury from which it could find bad faith. The trial court denied National's motions, in part, because, on the basis of the evidence presented, the jury reasonably could have found that National had made payments to PSE to settle PSE's bad faith and CUTPA claims rather than its claims against the payment bond. On appeal, National revives its arguments on this issue[10] and

[9] Concurrently, Mercede filed a motion to set aside part of the verdict and a motion for additional relief to enforce the settlement agreement. The trial court's resolution of these matters is not at issue in this appeal.

[10] Although National presents this issue as one concerning allocation, that is, that the jury failed to allocate properly how much of the $700,000 in payments to PSE had been made in response to a proper claim on the payment bond and how much had been to settle PSE's bad faith and CUTPA claims, we view this claim in a broader context. The dispositive issue on appeal is whether the jury reasonably could have found that National had made the payments in bad faith. This approach is not inconsistent with the interrogatories that presented the issue to the jury, and we note that, during argument before the trial court concerning the motions, the parties recognized that this issue potentially involved an "all or nothing" approach. The jury could have found that the payments were proper in their entirety, or that neither of the payments was proper, or they could have chosen to allocate the payments and find that *some* of the payments were proper. As

maintains that the trial court improperly failed to direct a verdict in its favor.[11]

Specifically, National claims that, under the indemnity agreement, it had the exclusive right to settle and defend claims, and that its determination to settle with PSE was conclusive as to Mercede. National argues that, because it offered evidence at trial that it had determined that some of PSE's claims on the payment bond were valid, and that it had valued those claims at $500,000, the jury failed to allocate properly by failing to find that *any* of the money paid to PSE constituted proper payment. Therefore, National contends, the jury reasonably could not have concluded from the evidence presented that it had performed in bad faith when it merely was exercising its contractual rights under the indemnity agreement. National further contends that its business judgment in this matter should not be questioned or second-guessed by a jury.

Mercede, in response, argues that the jury, properly instructed that Mercede had the burden of proof as to its special defense of bad faith, reasonably could have determined from the evidence that National had made the payments to PSE because of National's failure to

stated earlier, on the basis of its determination of bad faith, the jury concluded that neither of the payments was proper.

[11] On appeal, National also argues that, "as a matter of justice and equity," the verdict must be set aside because Mercede has kept the $150,000 retainage paid by the owner. In addition to being inadequately briefed; see *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 732–33 n.11, 830 A.2d 228 (2003) (court not required to review issues inadequately briefed); our review of the record indicates that this argument was not raised in either National's motion for a directed verdict, motion to set aside the verdict, motion for a new trial, or renewed motion for a directed verdict. "Proper preservation of claims for appellate review requires that the trial court [be] effectively . . . alerted to a claim of potential error while there [is] still time for the court to act." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 31, 807 A.2d 955 (2002). Because the plaintiff failed properly to preserve this claim, we decline to review it.

perform under the payment bond, and not because PSE legitimately was owed any money. Mercede claims that the evidence supports the jury's finding that National had acted in bad faith in its settlement of PSE's claim for the purpose of releasing itself from PSE's bad faith and CUTPA claims, as well as avoiding an investigation by the insurance commissioner, and in its failure to conduct a proper investigation of the claim upon the payment bond. We agree with Mercede that, on the basis of the evidence presented to the jury, the trial court's decision to deny National's motion for a directed verdict was not improper.

We begin with a brief discussion of the standard by which we review this claim. It is well established that "[o]ur review of a trial court's refusal to direct a verdict or to render judgment notwithstanding the verdict takes place within carefully defined parameters. We must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial; *Bleich* v. *Ortiz*, 196 Conn. 498, 501, 493 A.2d 236 (1985); giving particular weight to the concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony . . . . The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion." (Internal quotation marks omitted.) *Cohen* v. *Yale-New Haven Hospital*, 260 Conn. 747, 761, 800 A.2d 499 (2002).

Under paragraph two of the indemnity agreement in this case, Mercede expressly agreed to indemnify National for every "cost . . . and expense which [National] may pay or incur in consequence of having executed . . . bonds . . . ." Moreover, Mercede agreed, pursuant to paragraph five of the indemnity agreement, that "[National] shall have the exclusive right to determine for itself and [Mercede] whether any

claim or suit brought against [National] or [Mercede] upon any such bond shall be settled or defended and its decision shall be binding and conclusive upon [Mercede]." On the basis of the indemnity agreement, National argues that it had broad discretion to settle claims upon the payment bond, even over the objection of the principal, Mercede. We agree that indemnity agreements, such as the one here, typically guarantee the surety wide discretion in settling claims made upon a payment bond. This discretion is, however, not unfettered.

Other jurisdictions faced with this issue uniformly have held that the surety is entitled to indemnification only for payments that were made in good faith. See, e.g., *Gundle Lining Construction Corp.* v. *Adams County Asphalt, Inc.*, 85 F.3d 201, 210–11 (5th Cir. 1996); *Fidelity & Deposit Co. of Maryland* v. *Bristol Steel & Iron Works, Inc.*, 722 F.2d 1160, 1162–63 (4th Cir. 1983); *Transamerica Ins. Co.* v. *Bloomfield*, supra, 401 F.2d 362; *Engbrock* v. *Federal Ins. Co.*, supra, 370 F.2d 786; *Carroll* v. *National Surety Co.*, 24 F.2d 268, 270–71 (D.C. Cir. 1928); *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 15 F. Sup. 2d 583–85; *National Surety Corp.* v. *Peoples Milling Co.*, 57 F. Sup. 281, 282–83 (W.D. Ky. 1944); *Martin* v. *Lyons*, 98 Idaho 102, 105–106, 558 P.2d 1063 (1977); *United States Fidelity & Guaranty Co.* v. *Klein Corp.*, 190 Ill. App. 3d 250, 255, 558 N.E.2d 1047 (1989); *The Hartford* v. *Tanner*, 22 Kan. App. 2d 64, 70, 910 P.2d 872, review denied, 259 Kan. 927 (1996); *United States Fidelity & Guaranty Co.* v. *Napier Electric & Construction Co.*, supra, 571 S.W.2d 646; *International Fidelity Ins. Co.* v. *Spadafina*, 192 App. Div. 2d 637, 639, 596 N.Y.S.2d 453 (1993); *Portland* v. *George D. Ward & Associates, Inc.*, 89 Or. App. 452, 456–57, 750 P.2d 171, review denied, 305 Or. 672, 757 P.2d 422 (1988); *Hess* v. *American States Ins. Co.*, supra, 589 S.W.2d 550; *Fidelity & Deposit Co. of*

Maryland v. *Wu*, supra, 150 Vt. 230; but see *Fireman's Ins. Co. of Newark, New Jersey* v. *Todesca Equipment Co.*, 310 F.3d 32, 37 (1st Cir. 2002) (common-law covenant inapplicable given stringent language of indemnity agreement). Although some jurisdictions have limited the surety's duty of good faith to cases wherein the indemnity agreement has expressly imposed that duty upon the surety; see *Associated Indemnity Corp.* v. *CAT Contracting, Inc.*, supra, 964 S.W.2d 278 (surety has no common-law duty of good faith under Texas law, but there was evidence to support finding that surety failed to satisfy contractual condition of good faith in indemnity agreement); courts in jurisdictions that recognize the existence of an implied covenant of good faith and fair dealing in every contract have concluded that a surety owes a duty of good faith to its principal irrespective of whether the indemnity agreement expressly imposes that duty. See, e.g., *The Hartford* v. *Tanner*, supra, 71 ("obligation of good faith and fair dealing on the part of the surety is implied and in a sense superimposed on the entire surety contract"); *Portland* v. *George D. Ward & Associates, Inc.*, supra, 456–57 (applying "implied obligation of good faith in . . . every contract" to indemnity agreement); see also *Associated Indemnity Corp.* v. *CAT Contracting, Inc.*, supra, 282 ("[t]hose jurisdictions recognizing an affirmative duty of good faith in surety contracts have generally done so . . . because they impose such duty in all contracts").

Although the indemnity agreement at issue in the present case did not require, expressly, that National act in good faith, the parties recognized, both at trial and at oral argument before this court, that the implied covenant of good faith is an overlay that applies to sureties. *Arntz Contracting Co.* v. *St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 482, 54 Cal. Rptr. 2d 888 (1996) (standard of good faith implied in every

contract to surety conduct; doctrine has "particular application in situations where one party is invested with a discretionary power affecting the rights of another"); see also *Portland* v. *George D. Ward & Associates, Inc.*, supra, 89 Or. App. 457–58 (applying reasonableness standard to bad faith where indemnity agreement subjects right to compromise claim to surety's sole discretion). This application of the implied covenant of good faith and fair dealing to surety indemnity agreements is consistent with our good faith jurisprudence. See *Home Ins. Co.* v. *Aetna Life & Casualty Co.*, 235 Conn. 185, 200, 663 A.2d 1001 (1995) ("[e]very contract carries an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement" [internal quotation marks omitted]); *Habetz* v. *Condon*, 224 Conn. 231, 238, 618 A.2d 501 (1992) (same); *Verrastro* v. *Middlesex Ins. Co.*, 207 Conn. 179, 190, 540 A.2d 693 (1988) ("[t]he concept of good faith and fair dealing is [e]ssentially . . . a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended" [internal quotation marks omitted]). To decide the present issue, we find it necessary, however, to look outside our jurisdiction to seek guidance on how the covenant of good faith applies specifically in the surety context.

A

We note that the approach taken by our sister states is not uniform. "Though the weight of authority seems to be on the side of recognizing a duty of good faith, there is no consensus about what that duty requires." T. Harris, "Good Faith, Suretyship, and the Ius Commune," 53 Mercer L. Rev. 581, 587 (2002). The majority

of courts agree[12] that the principal must establish something more than mere negligence to prove bad faith. See, e.g., *Engbrock* v. *Federal Ins. Co.*, supra, 370 F.2d 787 ("neither lack of diligence nor negligence is the equivalent of bad faith"); *Frontier Ins. Co.* v. *International, Inc.*, 124 F. Sup. 2d 1211, 1214 (N.D. Ala. 2000) (same); *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 15 F. Sup. 2d 587 ("[g]ross negligence or bad judgment is insufficient to amount to bad faith"); *Employers Ins. Of Wausau* v. *Able Green, Inc.*, 749 F. Sup. 1100, 1103 (S.D. Fla. 1990) (surety's actions may have been negligent but did not rise to level of deliberate malfeasance required to establish bad faith); *American Employers' Ins. Co.* v. *Horton*, 35 Mass. App. 921, 924, 622 N.E.2d 283 (1993) ("bad judgment, negligence or insufficient zeal" not evidence of bad faith); *Fidelity & Deposit Co. of Maryland* v. *Wu*, supra, 150 Vt. 231 ("[a]t best, the jury could draw the conclusion that [the] plaintiff was negligent . . . there was no evidence of lack of good faith for the jury").[13] Unfortunately, many of

[12] We note that a minority of jurisdictions have appraised surety conduct under a less forgiving standard, namely, one that defines bad faith as conduct that was unreasonable or negligent. See, e.g., *Rush Presbyterian St. Luke's Medical Center* v. *Safeco Ins. Co. of America*, 712 F. Sup. 1344, 1346 (N.D. Ill. 1989) ("negligence and bad faith are synonymous" in context of determining good faith); *Arntz Contracting Co.* v. *St. Paul Fire & Marine Ins. Co.*, supra, 47 Cal. App. 4th 483 (surety's bad faith can be demonstrated by proof of "objectively unreasonable conduct, regardless of the actor's motive" [internal quotation marks omitted]); *Hawaiian Ins. & Guaranty Co., Ltd.* v. *Higashi*, supra, 67 Haw. 14 ("burden of establishing that the amount paid in the settlement . . . was reasonable and in good faith [is] upon the indemnitee"); *The Hartford* v. *Tanner*, supra, 22 Kan. App. 2d 76 ("good faith requires a surety seeking indemnification to show that its conduct was reasonable"); *Portland* v. *George D. Ward & Associates, Inc.*, supra, 89 Or. App. 458 (to prove bad faith in settling claim, indemnitors "needed only to prove that [the surety] failed to make a reasonable investigation of the validity of the claims against them or to consider reasonably the viability of their counterclaims and defenses, not that [the surety] acted for dishonest purposes or improper motives"); see also E. Gallagher, The Law of Suretyship (2d Ed. 2000) pp. 492–95 (discussing cases).

[13] Some courts appear to go so far as to require actual fraud in order for the surety's actions to rise to the level of bad faith. See, e.g., *Fireman's*

these jurisdictions do not go past this label to define the term "bad faith." In those jurisdictions that do further define the term, one common characterization used frequently, is that bad faith, in essence, means that the surety acted with an "improper motive" or "dishonest purpose." See, e.g., *Engbrock* v. *Federal Ins. Co.*, supra, 787 (improper motive); *Travelers Casualty & Surety Co. of America, Inc.* v. *Jadum Construction Co.*, United States District Court, 2003 U.S. Dist. LEXIS 11861, *5 (July 11, 2003) (dishonest purpose); *Fidelity & Guaranty Ins. Co.* v. *Keystone Contractors, Inc.*, United States District Court, Docket No. 02CV1328, 2002 U.S. Dist. LEXIS 15403, *13 (E.D. Pa. August 14, 2002) (dishonest purpose); *Frontier Ins. Co.* v. *International, Inc.*, supra, 1214 (improper motive; dishonest purpose); *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 587 (improper motive; dishonest purpose); *Safeco Ins. Co. of America* v. *Criterion Investment Corp.*, 732 F. Sup. 834, 841 (E.D. Tenn. 1989) (improper motive); *Associated Indemnity Corp.* v. *CAT Contracting, Inc.*, supra, 964 S.W.2d 285, 289 (improper motive; dishonest purpose); *Ford* v. *Aetna Ins. Co.*, 394 S.W.2d 693, 698 (Tex. App. 1965) (improper motive).

After full consideration of the issue before us, we join those jurisdictions that define bad faith as requiring an "improper motive" or "dishonest purpose" on the

Ins. Co. of Newark, New Jersey v. *Todesca Equipment Co.*, supra, 310 F.3d 37 (bad faith requires fraud or collusion under Rhode Island law); *General Accident Ins. Co. of America* v. *Merritt-Meridian Construction Corp.*, 975 F. Sup. 511, 516 (S.D.N.Y. 1997) (indemnity agreement's right-to-settle clause is invoked "[i]n the absence of an indication of fraud or collusion"); *Banque Nationale de Paris S.A.* v. *Ins. Co. of North America*, 896 F. Sup. 163, 165 (S.D.N.Y. 1995) (analogizing to business judgment rule and ruling that absent self-interest or fraud, surety's decision should be regarded as presumptively correct); *Reliance Ins. Co.* v. *Romine*, 707 F. Sup. 550, 552 (S.D. Ga. 1989) (bad faith equated with arbitrary or capricious standard for proving abuse of discretion), aff'd, 888 F.2d 1344 (11th Cir. 1989); *Hess* v. *American States Ins. Co.*, supra, 589 S.W.2d 551 (indemnity agreement "lodged in the indemnitee a discretion limited only by the bounds of fraud").

part of the surety. This standard is in substantial accord with our definition of bad faith in other contexts. See *Buckman* v. *People Express, Inc.*, 205 Conn. 166, 171, 530 A.2d 596 (1987) (jury instruction that "bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity . . . it contemplates a state of mind affirmatively operating with furtive design or ill will" [internal quotation marks omitted]). Additionally, this standard preserves a proper balance between affording the surety the wide discretion to settle that it requires, while ensuring that the principal is protected against serious and wilful transgression.

We are careful to note, however, that we do not interpret this standard as requiring the improper motive to rise to the level of fraud. See footnote 13 of this opinion. To do so would virtually obliterate the prophylactic effect of the covenant of good faith and fair dealing. See *The Hartford* v. *Tanner*, supra, 22 Kan. App. 2d 77 ("[a]llowing the surety's indemnification contract to be enforced, absent fraud, leaves the principal and indemnitor at the mercy of the surety's unreasonable conduct"). We further note, that, although we are not interpreting good faith to mean reasonableness; see footnote 12 of this opinion; whether a surety's actions were reasonable properly may be considered when analyzing bad faith. Unreasonable conduct can be evidence of improper motive and is a proper consideration where parties are bound by a contract that gives unmitigated discretion to one party. Applying these principles, we evaluate the evidence from which the jury reasonably could have concluded that Mercede was not bound to indemnify National's payments to PSE because they had been made in bad faith.

1

The evidence from which the jury reasonably could have concluded that National had acted in bad faith includes National's failure to conduct a sufficient investigation. Paragraph 6.1 of the payment bond directed National to send an answer to PSE within forty-five days after receiving formal notice of PSE's claim against the bond. In its response, National was obligated to identify what part of the claim it had determined to be undisputed, as well as to provide the basis for challenging any disputed amounts. Mercede presented evidence that National improperly had failed to put into writing, as required by the payment bond, its opinion as to whether all or any part of PSE's claim was disputed. Therefore, the parties involved, including Mercede, were not notified as to what portion of PSE's claims National considered to be undisputed and what evidence it had in support of that assessment. Moreover, paragraph 6.2 of the payment bond directed National to pay only claims upon the payment bond that were undisputed. From these facts, the jury reasonably could have found that National was obligated to investigate PSE's claims in a manner sufficient to determine whether the amount claimed by PSE was in dispute.

Additionally, Mercede presented evidence from which the jury could have concluded that Jortner had engaged in only a superficial review of PSE's claim; in particular, he personally never had reviewed Mercede's project records. Mercede presented evidence that Jortner was not himself capable of making an adequate assessment of the claim because he lacked the knowledge and experience necessary to do so. Mercede further presented evidence that, in September, 2000, almost two years after National was obligated under the payment bond to respond to PSE's claims, Jortner requested that Lemming, National's in-house engineer, evaluate the claims. Lemming advised Jortner that the

reasonable value of all work performed by PSE was $927,913, but by that point, Mercede already had paid PSE more than $1.3 million. Despite Lemming's valuation, Jortner made payments to PSE in October and November, 2001, in the amounts of $200,000 and $500,000, respectively.

First, National argues that there is no legal standard by which it had to investigate PSE's claim. Next, National claims that, from the evidence presented, the jury should have found that National ultimately had fulfilled its notification obligations under the payment bond, as evidenced by Jortner's letters of November 2, 1998, and February 15, 1999. National further claims that it presented evidence that Jortner adequately had considered the information regarding the claim, and that it was reasonable for him to have believed that PSE would have a significant recovery against the payment bond at a trial of the case. It argues that Mercede's attack on Jortner's competency in evaluating whether the claim under the payment bond should have been paid is disparaging and, ultimately irrelevant, as the proper legal issue is whether Jortner acted with malice toward Mercede. National also points out that Lemming's estimate, valuing PSE's work at just below $1 million, did not take into account PSE's claims for extra work, and other costs. Therefore, National argues, because Mercede did not present evidence to the jury that Lemming actually had considered PSE's additional claims as part of his estimate, the jury could not have concluded that the value of PSE's claims did not exceed $1 million.

"Central to the factfinding process is the process of drawing inferences, and central to the process of drawing inferences is the notion that the factfinder is not required to draw only those inferences consistent with one view of the evidence, but may draw whatever inferences from the evidence or facts established by

the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *In re Keijam T.*, 221 Conn. 109, 123, 602 A.2d 967 (1992). Therefore, even if we were to assume, as we must, that the jury rejected National's account, finding these issues of fact entirely in Mercede's favor, we conclude that the jury reasonably and legally could have concluded that, despite its obligation to conduct a proper investigation, National failed to do so.

Whether that finding leads inexorably to the ultimate determination of bad faith is an issue that has been addressed in other jurisdictions. Our reading of this authority informs us that the surety is under an obligation to conduct a proper investigation. See, e.g., *Continental Casualty Co.* v. *American Security Corp.*, 443 F.2d 649, 650 (D.C. Cir. 1970) (upholding summary judgment for surety where uncontradicted affidavits stated that all claims had been paid by surety "in good faith after investigation"), cert. denied, 402 U.S. 907, 91 S. Ct. 1378, 28 L. Ed. 2d 647 (1971); *Banque Nationale de Paris S.A.* v. *Ins. Co. of North America*, 896 F. Sup. 163, 165 (S.D.N.Y. 1995) (summary judgment for surety where it was undisputed that surety "investigated and evaluated [the principal's] alleged defenses before settling"); *United States* v. *D Bar D Enterprises, Inc.*, 772 F. Sup. 1167, 1170 (D. Nev. 1991) (parties may expect surety to settle only after investigation of claims, counterclaims, and possible defenses); *Portland* v. *George D. Ward & Associates, Inc.*, supra, 89 Or. App. 457–58 (parties to indemnity agreement subjecting right to compromise claim against principal to sole discretion of surety must reasonably expect compromise and payment to be made only after investigation of claims, counterclaims and defenses asserted in underlying action). This authority from other jurisdictions further informs us, however, that a deficient investigation is not, *by itself*, sufficient to support a finding of bad faith.

See, e.g., *Frontier Ins. Co.* v. *International, Inc.*, supra, 124 F. Sup. 2d 1214 (negligent investigation of claims does not constitute bad faith in suretyship context where undisputed evidence showed good faith); *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 15 F. Sup. 2d 587 (rejecting principals' argument that surety had acted in bad faith where principals failed to submit evidence of dishonest purpose or improper motive in surety's failure to investigate claims); M. Klinger, G. Judd & G. Bachrach, The Surety's Indemnity Agreement: Law and Practice (2002) pp. 174–75 ("Cases addressing whether the surety exercised its settlement discretion in good faith . . . usually focus on the surety's claim handling activities. Factors courts consider *include* . . . whether the surety reasonably investigated the claim . . . ." [Emphasis added.]); E. Gallagher, Suretyship (2d Ed. 2000) p. 497 (same); J. Hinchey, supra, 22 Tort & Ins. L.J. 149, citing *Maryland Casualty Co.* v. *R & L Construction Co.*, 368 S.W.2d 134, 135 (Tex. App. 1963) ("the thoroughness of the investigation performed by the surety" is *one* factor to be considering in determining whether surety has settled in good faith).

Therefore, the failure to investigate, standing alone and not accompanied by other evidence of an improper motive, is not enough to constitute bad faith, and because as we previously have stated, our standard of bad faith requires more than mere negligence or unreasonable conduct, we agree that evidence indicating that National had failed to investigate PSE's claim properly is not, *by itself*, sufficient evidence of bad faith. Nevertheless, "[a]lthough mere negligence or failure to make the inquiries which a reasonably prudent person would make does not of itself amount to bad faith, if a party fails to make an inquiry for the purpose of remaining ignorant of facts which he believes or fears would disclose a defect in the transaction, he may be

found to have acted in bad faith." (Internal quotation marks omitted.) *Funding Consultants, Inc.* v. *Aetna Casualty & Surety Co.*, 187 Conn. 637, 644, 447 A.2d 1163 (1982). Accordingly, a surety's failure to conduct an adequate investigation of a claim upon a payment bond, when accompanied by other evidence, reflecting an improper motive, properly *may* be considered as evidence of the surety's bad faith.

2

The jury also reasonably could have found that National settled the claim upon the payment bond solely to protect its own self-interest. First, Mercede presented evidence from which the jury could have concluded that National had paid PSE because it was fearful of possible action by the insurance commissioner based upon National's failure to process the claim properly as required by the payment bond. Specifically, Mercede presented two witnesses who testified that Jortner had expressed concern about PSE's complaint with the insurance commissioner.[14]

Additionally, Mercede presented evidence from which the jury could have concluded that National's sole motivation to settle PSE's claim upon the payment bond had been to release itself from PSE's claims that National had acted in bad faith and had violated CUTPA

[14] John Nettis, an insurance agent who had negotiated the surety relationship between National and Mercede, testified that Jortner had told him that "[h]e was concerned that . . . due to the fact that the attorney for PSE had gone to the insurance department that this would put CNA [Surety] in a bad light with the insurance department. And in the event they were called upon to pay, the insurance department could assess them treble damages." In addition, Mercede presented the testimony of Peter Mazza, a claims consultant who had assisted Mercede with the PSE claim. Mazza testified that "Jortner was extremely nervous and upset" that a complaint had been sent to the insurance commissioner. Mazza further testified that, at the May, 1999 meeting in which Jortner had urged Mercede to pay $177,000 to PSE, Jortner had indicated that "he was crazed about the insurance commissioner."

by failing to perform in accordance with the terms of the bond. Specifically, Mercede submitted evidence that in August, 1999, shortly after PSE had filed its original complaint against National and Mercede, counsel for National met with counsel for PSE, without Mercede's knowledge, in an attempt to settle PSE's bad faith and CUTPA claims against National. Moreover, the e-mail that National unsuccessfully sought to exclude from evidence; see part IV A of this opinion; also allowed the jury to find that National had settled with PSE in order to avoid the bad faith counts in PSE's complaint against National. That e-mail expressly revealed that National was interested in knowing how much PSE wanted in exchange for dropping its bad faith and CUTPA claims against National.

Furthermore, Mercede submitted to the jury evidence suggesting that the timing and circumstances surrounding National's settlement on the eve of trial was suspect. On the day jury selection was to begin, National made a $500,000 payment to PSE in exchange for a release of all claims against National; National, however, did not obtain a release of the claims PSE was asserting against Mercede. Rather, National became the beneficiary of PSE's claims against Mercede when PSE expressly assigned its claims against Mercede to National. On the basis of this evidence, the jury could have inferred that, if the $700,000 in payments made to PSE truly had been in settlement of PSE's claims against the payment bond, as opposed to settling PSE's claims for bad faith and CUTPA violations against National, National would have obtained a release that released both it and Mercede.

National argues that, from the evidence presented, the jury should have found that its settlement with PSE was proper, both as to motivation and execution. National claims that the testimony of Peter Mazza and John Nettis; see footnote 14 of this opinion; regarding

Jortner's concern about the insurance commissioner was self-serving, and that Mercede presented no evidence that the insurance commissioner had ever acted on the PSE complaint. National further argues that the jury should have found that at least $500,000 of the $700,000 had been paid to PSE to settle PSE's legitimate claims on the payment bond for retainage, extra work, change order work, and delay costs. Specifically, National claims that it presented overwhelming evidence supporting Jortner's decision that PSE actually was owed money under the payment bond for base work and extra work performed. Additionally, National argues that, at trial, Mercede's evidence never addressed the merits of PSE's claim, but challenged only the details surrounding National's settlement with PSE. National claims that it had made it clear to Mercede, in a timely manner, that National believed that PSE was a proper claimant under the payment bond, and that Jortner repeatedly advised Mercede that he believed there was no defense to the claim regarding the $150,000 retainage. Lastly, National points out that neither the indemnity agreement, nor the law, requires that a surety enter into a joint defense agreement with a principal.

The issue of whether National settled with PSE solely in its self-interest required the jury to evaluate the credibility of several key witnesses, many of whom contradicted one another. Issues of credibility are uniquely within the province of the jury and therefore we will not endorse the testimony of one witness over another. Moreover, as we have stated earlier, "the factfinder is not required to draw only those inferences consistent with one view of the evidence, but may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *In re Keijam T.*, supra, 221 Conn. 123. Even if we were to assume there-

fore, as we must, that the jury found these issues of fact entirely in Mercede's favor, we cannot say that the jury could not reasonably and legally have concluded that National acted solely out of self-interest.

Again, whether a self-interested settlement, like the failure to investigate properly, constitutes bad faith is an issue we have not had to consider, and the case law purporting to answer this question is sparse.[15] It is particularly noteworthy, however, that those cases upholding self-interested settlements have qualified the settlement, either explicitly or implicitly, by the terms "good faith." See, e.g., *Gundle Lining Construction*

[15] We recognize the authority holding that a surety is not acting in bad faith in seeking indemnification from a principal simply because the principal objected to and raised colorable defenses to payments made by the surety to the claimant. See, e.g., *Transamerica Ins. Co.* v. *Avenell*, 66 F.3d 715, 718, 721 (5th Cir. 1995) (surety's settlement of litigation over principal's objections not bad faith); *General Accident Ins. Co. of America* v. *Merritt-Meridian Construction Corp.*, 975 F. Sup. 511, 518 (S.D.N.Y. 1997) (no bad faith wherein surety settled claims despite possible defenses by principal). This is true because, under an indemnity agreement, it is not essential that a principal be liable for the claims upon which the surety seeks to be indemnified. See, e.g., *Frontier Ins. Co.* v. *International, Inc.*, supra, 124 F. Sup. 2d 1215 (liability of principal not prerequisite to surety's right to reimbursement); *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 15 F. Sup. 2d 583 (same); *Employers Ins. of Wausau* v. *Able Green, Inc.*, supra, 749 F. Sup. 1103 ("courts have consistently held that the surety is entitled to reimbursement pursuant to an indemnity contract for any payments made by it in a *good faith belief that it was required to pay*, regardless of whether any liability actually existed" [emphasis in original]); *Fireman's Fund Ins. Co.* v. *Nizdil*, 709 F. Sup. 975, 976–77 (D. Or. 1989) ("[a]ny claim asserted against the surety, regardless if it is valid or outside the scope of the bond triggers the obligation to indemnify the surety"); *Fidelity & Deposit Co. of Maryland* v. *Fleischer*, supra, 772 S.W.2d 816 (surety "had the right to settle any claim in good faith whether or not liability, necessity or expediency existed"); *International Fidelity Ins. Co.* v. *Spadafina*, supra, 192 App. Div. 2d 639 (surety entitled to indemnification, regardless of whether principal liable on underlying debt); *Hess* v. *American States Ins. Co.*, supra, 589 S.W.2d 551 (liability of principal not condition precedent to surety's right of recovery on indemnity agreement). We note that Mercede raised defenses to National against recovery under the bond by PSE. This case, however, does not turn on that mere assertion, but involves additional specific claims of bad faith and evidence in support thereof.

Corp. v. *Adams County Asphalt, Inc.*, supra, 85 F.3d 210 (surety did not act in bad faith by settling claim when principal refused to cooperate); *Transamerica Ins. Co.* v. *Bloomfield*, supra, 401 F.2d 362 ("[t]he surety had the right to settle and compromise the claims which were asserted against it but in so doing it was required to act in good faith"); *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 15 F. Sup. 2d 586 (upholding surety's right to indemnification "for claims paid to protect its own interests, as long as the payments were made in good faith"); *Employers Ins. of Wausau* v. *Able Green, Inc.*, supra, 749 F. Sup. 1103 (surety did not act in bad faith by settling claims where principal failed to request that surety litigate claims or post collateral to cover legal expenses as required under indemnity agreement); *Windowmaster Corp.* v. *Morse/Diesel, Inc.*, 722 F. Sup. 1532, 1534 (N.D. Ill. 1988) (surety had exclusive right "to determine in good faith how to handle suits upon validly issued bonds"); *Arntz Contracting Co.* v. *St. Paul Fire & Marine Ins. Co.*, supra, 47 Cal. App. 4th 486 ("[i]t is certainly true that indemnification is not precluded *just because* a surety is motivated to settle a case 'for its own benefit' " [emphasis added]); *Safeco Ins. Co. of America* v. *Gaubert*, 829 S.W.2d 274, 282 (Tex. App. 1992) ("as long as [the surety] acted in 'good faith,' its determination [to settle] would have been 'final and conclusive' ").

The case that is most often cited in regard to the issue of self-interested settlement is instructive. In *Fidelity & Deposit Co. of Maryland* v. *Bristol Steel & Iron Works, Inc.*, supra, 722 F.2d 1165–66, the United States Court of Appeals for the Fourth Circuit concluded that sureties were entitled to indemnification, pursuant to an indemnity agreement, for a settlement that the sureties had made for the sole purpose of protecting their own self-interest. The sureties initially had disputed a claim on a performance bond and had asserted the principal's

defenses. Id., 1164. Consequently, the Pennsylvania department of transportation, which had executed the construction contract with the principal, declared the principal and its sureties in default on the construction contract, and as a result of that default, disqualified the sureties from issuing bonds on any subsequent department of transportation construction projects. Id. Faced with the threat of being blacklisted, the sureties settled. The District Court, after a trial without a jury, had awarded the sureties indemnification, and the Fourth Circuit affirmed that decision, stating that there was "no justification for a finding of bad faith or fraud simply because [the sureties] made the payment to secure their removal from [the Pennsylvania department of transportation's] blacklist as a surety on road work in Pennsylvania." Id., 1165, citing *United States Fidelity & Guaranty Co.* v. *Sandoval*, 223 U.S. 227, 32 S. Ct. 298, 56 L. Ed. 415 (1912).

The court began its analysis by stating the basic rule: sureties must be indemnified for payments made in good faith. It is clear, however, from the facts noted by the court in *Fidelity & Deposit Co. of Maryland*, that there was no evidence that could have supported a finding of bad faith other than the self-interested settlement. First, the principal, with full knowledge of the sureties' payment and the purpose for it, never objected to the payment. *Fidelity & Deposit Co. of Maryland* v. *Bristol Steel & Iron Workers, Inc.*, supra, 722 F.2d 1164–65. In fact, the principal sent a letter to the sureties stating that the sureties' actions were reasonable under the circumstances; it was only after receipt of this letter that the sureties made payment to the claimant. Id., 1165. The court also noted how the sureties "sought in making their payment to protect fully the interests of the [principal]." Id. We note further that under the applicable law in Pennsylvania, the principal was bound "not simply to indemnify the surety but to keep it unmolested

. . . ." (Internal quotation marks omitted.) Id. Therefore, the court in that case faced only with a claim of a self-interested settlement, unblemished by any other evidence of bad faith, determined that the surety was not barred from seeking its right of indemnification.

Those facts are distinguishable from the present case wherein the jury reasonably could have found that the principal, Mercede, at various times, either was unaware of the fact that National was making payments to PSE, or had objected to those payments once it was made aware of them. In fact, Mercede presented evidence showing that, initially, National actually had supported Mercede's defenses against PSE's claims against the payment bond. Mercede also presented evidence that, only after PSE had filed a complaint with the insurance commissioner and had threatened litigation against National based upon bad faith and CUTPA claims, did National abandon this approach. Moreover, we observe that Pennsylvania law required the principal in *Fidelity & Deposit Co. of Maryland* " 'not simply to indemnify the surety but to keep it unmolested' "; id.; a standard not at play in the present case. Therefore, unlike in *Fidelity & Deposit Co. of Maryland*, the self-interested settlement in the present case was not cloaked in good faith garb, but, rather, was tainted by a confluence of circumstances from which a jury could properly have inferred improper motive.

We recognize, due to the unique nature of the tripartite relationship among surety, principal and claimant, that a surety may subject itself to bad faith claims from the claimant simply by defending the principal and refusing to settle the claimant's demand upon the payment bond. Similarly, a surety may face claims, such as in this case, by its principal, when it settles with a claimant. Consequently, sureties, by the nature of their business, may find themselves caught between Scylla

and Charybdis.[16] As a result, even though motives of self-interest *may* constitute bad faith under some circumstances, it does not follow that the self-interested exercise of rights under a contract *necessarily* constitutes a per se violation of the implied covenant of good faith and fair dealing. See *Arntz Contracting Co.* v. *St. Paul Fire & Marine Ins. Co.*, supra, 47 Cal. App. 4th 485–86 ("[a] surety's exposure to . . . [a] bad faith claim *may be* a reasonable ground for settling bond litigation that will not preclude indemnification" [emphasis added]).

Inherent in this determination is our appreciation of the public policy supporting the discretion afforded a surety under an indemnity agreement, in that, such agreements make it possible for a surety to compensate unpaid subcontractors and vendors or to complete a project in response to a performance bond claim without having to await the adjudication of every possible defense by the principal. See, e.g., *Transamerica Ins. Co.* v. *Bloomfield*, supra, 401 F.2d 363 (purpose of indemnity agreement is to facilitate handling of settlements and protect sureties from unnecessary litigation); *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 15 F. Sup. 2d 585 (same). Additionally, we are cognizant of how obligees or claimants can hold sureties hostage by merely alleging bad faith against them. See *Arntz Contracting Co.* v. *St. Paul Fire & Marine Ins. Co.*, supra, 47 Cal. App. 4th 485 ("[s]uch allegations are easily made, and may be based on nothing more tha[n] an obligee's [or claimant's] interest in frightening a surety into settling").

Although we acknowledge the policy behind a surety's discretionary authority, we also question, however,

[16] This situation has also been dubbed the surety's " 'classic dilemma.' " *Associated Indemnity Corp.* v. *CAT Contracting, Inc.*, supra, 964 S.W.2d 282, citing J. Hinchey, supra, 22 Tort & Ins. L.J. 133.

the wisdom of allowing potentially suspect claims to control or interfere with the contract obligations between a principal and its surety.[17] Where a self-interested settlement is accompanied by an improper motive, courts have held that bad faith can preclude indemnification. Id., 485–86 (holding indemnification of settlement costs properly denied where costs were attributable to obligee's action against surety for bad faith claims *and* claims involving wilful malfeasance in managing project); see also *United States Fidelity & Guaranty Co.* v. *Feibus*, supra, 15 F. Sup. 2d 586–87 (no evidence submitted that surety made payments because of "improper motive or purpose"). We agree. Therefore, consistent with the aforementioned cases, and recognizing the difficulties associated with the surety business, we conclude that a self-interested settlement, when accompanied by other evidence of improper motive, can constitute bad faith.

Obviously, what constitutes good faith or lack thereof depends on the facts of each case. In this instance, we conclude that the jury reasonably could have determined that National had breached the implied covenant of good faith and fair dealing based upon all the evidence supporting Mercede's claims that National, inconsistent with justified expectations and unfaithful to its duty under the implied covenant, both failed to investigate adequately *and* improperly settled PSE's claims solely out of self-interest.[18] Thus, the trial court's

[17] This is particularly problematic when the indemnity agreement, as in the present case, did not give the principal the option of posting collateral and determining for itself whether suspect claims should be litigated. See *Fidelity & Deposit Co. of Maryland* v. *Fleischer*, supra, 772 S.W.2d 816 (noting significance of indemnitor's failure to take advantage of such option).

[18] We note that the overwhelming majority of cases deciding in favor of sureties in their claims for indemnification were decided by summary judgment, without the development of the factual record present in the this case. See, e.g., *Transamerica Ins. Co.* v. *Avenell*, 66 F.3d 715, 721 (5th Cir. 1995) (affirming summary judgment where there was no factual support for allegations of surety's bad faith); *Continental Casualty Co.* v. *American Security Corp.*, supra, 443 F.2d 652 (affirming summary judgment for surety

failure to direct a verdict in favor of National on its indemnification claim was not improper.

B

Lastly, National argues that the jury's conclusion that National was not entitled to recover its attorney's fees and costs associated with its investigation and defense of PSE's payment bond claims contradicted the express language of the indemnity agreement. Therefore, according to National, the verdict should be set aside and the issue tried to the court to determine the amounts of recoverable fees and costs.[19] Our law regard-

where uncontradicted affidavit provided that all claims had been paid by surety " 'in good faith after investigation' "); *Elm Haven Construction Ltd. Partnership* v. *Neri Construction*, United States District Court, Docket No. 3:01CV1307 (D. Conn. September 11, 2003) (principal's claim that surety breached implied covenant of good faith and fair dealing presented no genuine issue of material fact); *Frontier Ins. Co.* v. *International, Inc.*, supra, 124 F. Sup. 2d 1214 (granting summary judgment for surety where there was "no evidence" that surety made payments based on improper motive or purpose); *General Accident Ins. Co. of America* v. *Merritt-Meridian Construction Corp.*, 975 F. Sup. 511, 518 (S.D.N.Y. 1997) ("[c]onclusory allegations of bad faith are insufficient to defeat a motion for summary judgment in favor of a surety seeking to enforce an indemnification agreement"); *Banque Nationale de Paris S.A.* v. *Ins. Co. of North America*, supra, 896 F. Sup. 165 (granting summary judgment for surety where "[t]here is not a scintilla of evidence, as distinct from conclusory assertions, that [the surety] acted inappropriately"); *Transamerica Ins. Co.* v. *H.V.A.C. Contractors, Inc.*, 857 F. Sup. 969, 974 (N.D. Ga. 1994) (granting summary judgment where defendants' only allegation of bad faith was "unsupported accusation" regarding inflated payments); *Reliance Ins. Co.* v. *Romine*, 707 F. Sup. 550, 552 (S.D. Ga. 1989) (granting summary judgment for surety where record "devoid" of evidence of bad faith); *Fireman's Fund Ins. Co.* v. *Nizdil*, 709 F. Sup. 975, 977 (Or. 1989) (granting summary judgment where defendant did not contend that sureties settled claims against bond in bad faith); *United States Fidelity & Guaranty Co.* v. *Klein Corp.*, supra, 190 Ill. App. 3d 256 (affirming summary judgment for surety where principals "failed to introduce any evidence of fraud or bad faith"); *United States Fidelity & Guaranty Co.* v. *Napier Electric & Construction Co.*, supra, 571 S.W.2d 646 (remanding case with direction to render judgment for surety where no proof of bad faith or fraud and sufficient evidence that payments made in good faith).

[19] Paragraph two of the indemnity agreement provided in relevant part: "[Mercede] will indemnify and save [National] harmless from and against

ing contract interpretation is well settled. "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Poole* v. *Waterbury*, supra, 266 Conn. 88. In the present case, however, National stipulated,[20] and conceded several times at the charging conference, that the issue of *whether* it was entitled to fees pursuant to paragraph two of the indemnity agreement should be decided by the jury, and that if the jury decided that National *were* entitled to those fees, the court would determine the amount of those costs and fees. By agreeing to submit the entitlement issue to the jury, National effectively waived any right it might have had to an automatic award of attorney's fees under the indemnity agreement. See *Lanna* v. *Greene*, 175 Conn. 453, 458, 399 A.2d 837 (1978) ("The general rule is that a party for whose benefit a provision in a contract is intended may waive his rights under such provision. 3A Corbin, Contracts 761."). Therefore, we review this matter to determine only whether the jury reasonably could have concluded that National was not entitled to attorney's fees and costs associated with

every . . . cost . . . and expense which [National] may pay or incur in consequence of having executed . . . such bonds . . . including, but not limited, to fees of attorneys . . . and the expense of procuring, or attempting to procure, release from liability, or in bringing suit to enforce the obligation of [Mercede] under this Agreement. In the event [National] deems it necessary to make an independent investigation of a claim, demand or suit, [Mercede] acknowledge[s] and agree[s] that all expense attendant to such investigation is included as an indemnified expense."

[20] The trial court referenced this stipulation in its instructions to the jury on this issue: "The parties have stipulated that the amount of any award of fees of attorneys, costs and expenses claimed by National pursuant to the [indemnity agreement] will be handled by [the trial court] at a later date. So, you are only to determine *if* such fees should be awarded. . . . National is claiming it is entitled to [an] award of attorney's fees by . . . reason of paragraph two of the [indemnity agreement]." (Emphasis added.)

its investigation and defense of PSE's complaint. See *Cohen* v. *Yale-New Haven Hospital*, supra, 260 Conn. 761.

The jury found that Mercede had proven by a preponderance of the evidence that National had breached its implied covenant of good faith and fair dealing. Subsumed in this finding is the jury's implicit finding that National's payments to PSE were not the result of PSE's claims under the payment bond. Therefore, the evidence in support of the jury's finding that National was not entitled to receive attorney's fees and costs is entangled with the other issues we have resolved in this opinion.

III

We next address National's broad contention that the trial court improperly instructed the jury concerning the implied covenant of good faith and fair dealing. National's arguments can be divided into three separate categories. First, National claims that the jury instruction was improper and harmful because it disregarded the express terms of the indemnity agreement. Second, National argues that when the trial court read a list of fourteen factors that the jury might consider in determining whether National had acted in bad faith, the effect of the overall charge was that any one of the items on the list would constitute a per se violation of the implied covenant of good faith and fair dealing. Third, National contends that the trial court improperly excluded particular language from the instruction. We disagree and address each contention in turn.

We reiterate the appropriate standard of review. "When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a

court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . We do not critically dissect a jury instruction." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 238–39.

National's first claim, namely, that the jury instruction was improper because it disregarded the express terms of the indemnity agreement, is inextricably intertwined with National's incorrect belief that, as a matter of law, it did not owe Mercede an implied duty of good faith. Accordingly, in resolving this issue, we simply refer to part II of this opinion. To the extent that National argues that the implied covenant of good faith cannot be applied, in and of itself, to achieve a result contrary to the express terms of the indemnity agreement, we agree. See *Verrastro* v. *Middlesex Ins. Co.*, supra, 207 Conn. 190. We conclude, however, that the trial court's instruction to the jury on good faith, when "considered in its entirety . . . and judged by its total effect rather than by its individual component parts," was consistent with this proposition. *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 238–39. In fact, on two separate occasions, the court reminded the jury that "National [had] the exclusive right to settle any and all construction bond claims, including those arising under the payment bond in this case."

We similarly reject National's second claim, that the jury instructions were improper because a list of four-

teen factors,[21] which the trial court presented to the jury to use in determining whether National had acted in bad faith, improperly led the jury to believe that any one of the items on the list would constitute a per se violation of the implied covenant of good faith and fair dealing.

Our review of the record reveals that, although National objected at the charging conference to six of the fourteen items on the list,[22] it did not object

[21] The trial court charged the jury concerning these factors as follows: "In determining whether National performed in good faith, you should consider the following: Whether National considered and paid amounts that Mercede was disputing that were due under the payment bond. Whether National conducted a reasonable investigation. Whether National acted in its own self-interest. Whether [National] was settling claims PSE asserted against it for which Mercede was not responsible for the amounts claimed under bad faith and CUTPA. Whether [National] responded promptly to PSE under the terms of the payment bond. Whether it responded within forty-five days as required by the payment bond. Whether National considered colorable defenses asserted by Mercede. Whether National acted as a volunteer in making the payments to PSE for which it had no legal responsibility under the payment bond. Whether National acted as a volunteer in making the payments to PSE to settle National's exposure for bad faith and/or CUTPA damages to PSE. Whether PSE had asserted sufficient claim as state[d] in PSE's October 10, 2000 revised and amended complaint. Whether National made an unreasonable demand for collateral. Whether National settled due to fear of actions by the Connecticut insurance commissioner. Whether conduct of National in refusing to issue consent of surety include[d] sending a letter to Turner [Construction] Company. And whether the amount paid in settlement to PSE was reasonable. *You need not find all of these allegations have been proven by the evidence for you to find a violation of the implied covenant of good faith and fair dealing. You must decide whether National fulfilled its obligation to exercise good faith.*" (Emphasis added.)

[22] Briefly stated, National specifically objected to the following: (1) the absence of the clause "furtive design or ill will," from the definition of bad faith; (2) the failure to use the language "whether National had an obligation to conduct an investigation" instead of "whether National conducted a reasonable investigation"; (3) the omission of the word "solely" from the phrase "whether [National] acted in its own self-interest"; (4) the omission of the word "solely" from "whether [National] was settling claims PSE asserted against it for which [Mercede] was not responsible"; (5) the instruction regarding "whether [National] acted as a volunteer in making payments" to PSE "for which it had no legal responsibility" under the payment bond;

specifically to either the inclusion of a list within the jury charge or the overarching effect of such a list. In fact, during the charging conference, National's counsel played an active role in negotiating the phrasing of several of the items that were on the list. More importantly, however, we note that after setting forth the fourteen specific factors the jury could consider in making its finding, the trial court explicitly instructed the jury as follows: "You need not find *all* of these allegations have been proven by the evidence for you to find a violation of the implied covenant of good faith and fair dealing." (Emphasis added.) Therefore, National's contention that the jury was led to believe that *any one* of the items on the list would constitute a per se violation of the implied covenant of good faith and fair dealing fails.

Finally, National argues that the trial court improperly excluded particular language from the jury instructions. According to National, the court improperly failed to recite the entire instruction on the covenant of good faith and fair dealing set forth in *Buckman* v. *People Express, Inc.*, supra, 205 Conn. 171. Specifically, the court omitted the following language from its instructions: "[Bad faith] contemplates a state of mind affirmatively operating with furtive design or ill will." (Internal quotation marks omitted.) Id. National's proposed jury instruction regarding the good faith issue included the "furtive design or ill will" language, and when the trial court decided not to include it during the charging conference, National objected; therefore, its claim concerning this instruction is preserved.

After the trial court enumerated the fourteen factors that the jury could consider in determining whether National had performed in good faith; see footnote 21

and (6) the instruction regarding "[w]hether PSE ha[d] asserted sufficient claim as stated in PSE's October 10, 2000 revised and amended complaint."

of this opinion; the trial court stated the following: "You must decide whether National fulfilled its obligation to exercise good faith. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with justified expectations of the other party. Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose and freedom from intention to defraud. It means being faithful to one's duty and obligation under the contract. Good faith is defined as the opposite of bad faith. If National engaged in bad faith, you must find that it did not fulfill the implied covenant. Bad faith generally implies a design to mislead or to deceive another or neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's right or duties. Bad faith is simply not bad judgment or negligence, but it implies the conscious doing of a wrong because of dishonest purpose."

National argues that the trial court's failure to include the "furtive design or ill will" language from *Buckman* was improper because that phrase is a required element in a good faith jury instruction under Connecticut law. Specifically, National argues that such language is necessary because bad faith requires "proof that goes beyond the potential ill feelings between parties when one exercises a contractual right to the detriment of the other" and that the court's omission kept the jury from understanding that "unhappiness" was "not the equivalent of bad faith." We conclude, however, after reading the jury charge as a whole, that the charge adequately conveyed to the jury the law regarding good faith, and therefore was proper.[23]

[23] We note that, when we adopted the "improper motive" standard of bad faith in part II of this opinion, we based that decision, in part, on the fact that the standard was consistent with our definition of bad faith in *Buckman*, including the "furtive design or ill will" language. See *Buckman* v. *People Express, Inc.*, supra, 205 Conn. 171. Although that express language is helpful in relaying the definition of bad faith to a jury, as we conclude herein, the jury instructions here adequately expressed the law.

IV

A

We next turn to National's claim that the trial court abused its discretion[24] by admitting into evidence an e-mail message that Bradley Wolfe, National's counsel, had sent to Jortner. Specifically, National claims that the trial court should have precluded this e-mail from evidence because it is protected by the attorney-client privilege. We disagree.

The following additional facts are relevant to our resolution of this issue. In August, 1999, shortly before PSE had filed its original complaint in this action, Wolfe met with David Rosengren, counsel for PSE, to discuss the possibility of a settlement of PSE's claims against National. On August 6, 1999, Wolfe sent an e-mail message to Jortner, reporting on his meeting with PSE's counsel. The message provided in relevant part: "I again asked what it would take to avoid the bad faith counts, in exchange for payment of totally uncontested funds. Rosengren again had no number in mind, but understood the concept of the question and will be getting

[24] In its brief to this court concerning this issue, National sets forth the proper abuse of discretion standard for review, but invokes plain error review on this issue as well. The plain error doctrine, however, is inapplicable to this situation, as it provides appellate review of claims unpreserved at trial. Practice Book § 60-5 provides in relevant part: "The court may in the interests of justice notice plain error *not brought to the attention of the trial court*. . . ." (Emphasis added.) See *State* v. *Ramos*, 261 Conn. 156, 171, 801 A.2d 788 (2002). Moreover, "[p]lain error review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Andresen*, 256 Conn. 313, 336, 773 A.2d 328 (2001). At trial, National properly objected to the disclosure of this e-mail. Accordingly, we will not engage in a plain error analysis regarding this issue.

back to me. The entire [conversation] was 'off the record.' "[25]

During discovery, National inadvertently disclosed the contents of this e-mail message, along with the contents of two other e-mail messages sent between National and its counsel. National thereafter filed a motion in limine seeking to preclude Mercede from using the contents of the messages at trial. At the beginning of trial, the trial court issued a preliminary ruling that the August 6, 1999 e-mail message was admissible. Specifically, the trial court ruled that this e-mail was not protected by the attorney-client privilege because it merely transmitted information concerning a meeting between counsel for National and counsel for PSE.[26] Thereafter, Mercede referred to this e-mail in its opening statement.

National renewed its objection to the admissibility of the August 6, 1999 e-mail message at trial, during Mercede's cross-examination of Jortner. National argued that the message was inadmissible because it was: (1) protected by the attorney-client privilege; (2) irrelevant; and (3) prejudicial. The trial court overruled National's objection and admitted the e-mail into evidence as a full exhibit. Mercede used the e-mail in its cross-examination of Jortner and relied on it during closing arguments as circumstantial evidence that National had made its payments to PSE in bad faith because National was trying to avoid liability on PSE's claims of bad faith and CUTPA violations.

[25] The e-mail also revealed that, as a result of his meeting with PSE's counsel, Wolfe would be able to give Jortner "a pretty good idea of the exposure [National would] have," and also that PSE planned to file suit in the near future to avoid any statute of limitations issue.

[26] Concurrently, the trial court ruled that the two other e-mails that were disclosed, dated August 5 and August 18, 1999, were protected by the attorney-client privilege and that National's inadvertent disclosure of them did not waive the privilege. The trial court's ruling regarding these other two e-mails is not at issue in this appeal.

On appeal, National contends that the attorney-client privilege protected the e-mail from disclosure since the e-mail was "inextricably linked" to National's legal strategy concerning PSE's claims against them. National also claims, in the alternative, that the trial court should have ruled that the e-mail message was inadmissible as irrelevant evidence. Finally, National claims that the trial court should have precluded the introduction of the e-mail message pursuant to § 4-8 of the Connecticut Code of Evidence,[27] because the message reflected an off-the-record settlement discussion between counsel for National and counsel for PSE.

Before addressing the merits of National's claims, we set forth the standard by which we review them. "The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Dehaney*, 261 Conn. 336, 354–55, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). "When reviewing claims under an abuse of discretion standard, the

[27] Section 4-8 of the Connecticut Code of Evidence provides: "(a) General rule. Evidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim.

"(b) Exceptions. This rule does not require the exclusion of:

"(1) Evidence that is offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution, or

"(2) statements of fact or admissions of liability made by a party."

unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . ." (Internal quotation marks omitted.) *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 274, 819 A.2d 773 (2003). "In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Simmons* v. *Simmons*, 244 Conn. 158, 175, 708 A.2d 949 (1998).

In the present case, however, the specific issue before us is whether the attorney-client privilege protected this e-mail from disclosure. "Therefore, [t]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 7, 826 A.2d 1088 (2003). Our limited task is to decide whether, based on the facts, the trial court's conclusions of law are legally and logically correct.

"On numerous occasions we have reaffirmed the importance of the attorney-client privilege and have recognized the long-standing, strong public policy of protecting attorney-client communications. . . . In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank com-

munications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice." (Internal quotation marks omitted.) Id., 9–10. We note further that "[a]lthough the existence of the privilege encourages the candor that is necessary for effective legal advice . . . the exercise of the privilege tends to prevent a full disclosure of the truth in court." (Citations omitted.) *State* v. *Cascone*, 195 Conn. 183, 188, 487 A.2d 186 (1985). Therefore, the privilege is strictly construed. *Ullmann* v. *State*, 230 Conn. 698, 710, 647 A.2d 324 (1994); *Turner's Appeal*, 72 Conn. 305, 318, 44 A. 310 (1899).

Not every communication between client and attorney, however, is protected by the attorney-client privilege. "As a general rule, [c]ommunications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice." (Internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, supra, 265 Conn. 10. "A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice." (Internal quotation marks omitted.) *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 157, 757 A.2d 14 (2000). The burden of proving each element of the privilege, by a fair preponderance of the evidence, rests with National, as it is the party seeking to assert the privilege. *State* v. *Hanna*, 150 Conn. 457, 466, 191 A.2d 124 (1963).

The August 6, 1999 e-mail resembles a progress report from Wolfe to his client, and it merely paraphrases the discussion that had transpired between Wolfe and counsel for PSE. "One of the essential elements of the claim of privilege between attorney and client is that the communication be confidential." *Rienzo* v. *Santangelo*, 160 Conn. 391, 395, 279 A.2d 565 (1971). "Statements

made in the presence of a third party, on the other hand, are usually not privileged because there is then no reasonable expectation of confidentiality."[28] (Internal quotation marks omitted.) *Ullmann* v. *State*, supra, 230 Conn. 711; *State* v. *Cascone*, supra, 195 Conn. 186. In the e-mail, Wolfe merely reported back to his client what he had said to a third party and how that third party had responded. As the trial court described it, "[i]t is a reconstitution of an event that occurred with third parties involved." Such a communication is not confidential. Moreover, "statements that are meant to be transmitted to another are not confidential." C. Tait, Connecticut Evidence (3d Ed. 2001) § 5.23.2, p. 320, citing *State* v. *Yates*, 174 Conn. 16, 20, 381 A.2d 536 (1977); see *State* v. *Burak*, 201 Conn. 517, 526, 518 A.2d 639 (1986) (holding statements by client's attorney to opposing attorney concerning plea arrangement not privileged). National's claim that the e-mail was privileged because its contents were "inextricably linked" to the giving of legal advice overlooks the fundamental requirement that the communication be confidential in order to qualify for the privilege in the first instance.[29]

[28] We have recognized, however, that "[t]he presence of certain third parties . . . *who are agents or employees* of an attorney or client, *and who are necessary to the consultation*, will not destroy the confidential nature of the communications." (Emphasis added; internal quotation marks omitted.) *Olson* v. *Accessory Controls & Equipment Corp.*, supra, 254 Conn. 157 (citing supporting cases). National does not claim that PSE's counsel should be considered a member of this unique class of persons whose communications are also protected by the attorney-client privilege, nor would the facts support such an argument.

[29] National also claims that this e-mail is privileged because it is "related to" an e-mail sent one day prior that the trial judge determined to be protected by the privilege and thus inadmissible. This court is unaware of any doctrine that transfers the privilege from one confidential document to another document that, while it may be related to the initial document in time or general subject matter, is not confidential, nor does National cite to any case law in support of such a "relatedness" doctrine. The e-mail in question failed to qualify as a confidential communication, and therefore, was not protected from disclosure or admissibility by the attorney-client privilege.

National claims, in the alternative, that the trial court should have determined that the e-mail was not relevant, specifically because Wolfe had sent the e-mail more than two years prior to making settlement payments to PSE. The law defining the relevance of evidence is well settled. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue." (Internal quotation marks omitted.) *State* v. *Andresen*, 256 Conn. 313, 336, 773 A.2d 328 (2001). "The trial court has wide discretion to determine the relevancy of evidence . . . . Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Rizzo*, 266 Conn. 171, 285, 833 A.2d 363 (2003). Wolfe sent the e-mail on August 6, 1999, more than two years before National made the first of its two payments to PSE. National claims that this temporal gap negated the probative value of the e-mail. We disagree. The e-mail in issue was probative of National's motives in making the payments to PSE. Accordingly, we conclude that the trial court properly determined that the e-mail was relevant.

Finally, National claims that the trial court should have excluded this e-mail because it was evidence of an offer of settlement, which is inadmissible under § 4-8 of the Connecticut Code of Evidence. The purpose of § 4-8, however, is to preclude the admission of settlement offers between parties who are opposing parties at the trial in which the evidence of the settlement is sought to be introduced. See generally *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 221 Conn. 194, 198, 602 A.2d 1011 (1992) (explaining that policy behind exclusion of such evidence is to promote settlement of disputes between parties). Section 4-8 does not apply here because the e-mail pertains solely to settlement discussions between National and PSE, and not to the

possibility of settlement between National and Mercede. Indeed, National and Mercede were codefendants in the underlying action. Accordingly, § 4-8 does not preclude the admission of the e-mail into evidence.

B

We next address National's claim that the trial court abused its discretion by overruling National's objections to testimony concerning an unrelated settlement agreement between an affiliate of National and the principal of one of its bonds, a company that had been represented in the unrelated matter by Mercede's present counsel. National claims that, although the trial court gave a curative charge instructing the jury to disregard this testimony, the testimony itself was so prejudicial as to necessitate a new trial. We disagree.

The following additional facts are relevant to our resolution of this issue. In October, 1999, Jortner received an e-mail message from Robert Campbell, an underwriter for one of National's affiliates. In the e-mail, Campbell referred to his prior dealings with Raymond Garcia, Mercede's present counsel. The e-mail provided in relevant part: "Having some experience with Garcia, I'm particularly interested in your reaction to whatever defenses he put forward. Some of them have got to be beauties."

At trial, Garcia conducted a direct examination of Campbell, in which he asked Campbell to explain the meaning of the e-mail message. Campbell testified that he had dealt with Garcia's office in an earlier bond dispute, which had proceeded to trial and resulted in a jury verdict against Campbell's company. One of the issues in that dispute involved a bad faith claim. Campbell further testified that he had "been in this business for thirty-two years and found a lot of outrageous claims from a lot of attorneys. . . . You're part of that." In addition to admitting that he was predisposed to believe

that some attorneys filed "outrageous claims," Campbell stated that he may have conveyed this belief to Jortner. At the conclusion of the evidence, National requested that the trial court give a curative charge instructing the jury to disregard the entire line of questioning regarding the settlement of this unrelated dispute. The trial court complied with this request.[30]

On appeal, National claims that the testimony concerning the settlement and the testimony revealing how that event had engendered negative feelings between National's employees and counsel for Mercede imputed bad faith to National by implying that National's motives to settle PSE's claims were improper. National contends that, despite the curative instruction, the testimony was so prejudicial as to require a new trial. We disagree. Even if we were to assume, arguendo, that the testimony was admitted improperly, we nevertheless conclude that the curative instruction sufficiently negated any potential prejudice.

National requested a curative charge regarding Campbell's testimony, and the trial court obliged in this request. The trial court's instructions to the jury, in relevant part, provided: "You are instructed to disregard any of the questions, comments or answers relating to [the settlement agreement] and you are further

[30] The trial court's curative charge instructed the jury as follows: "Now, in connection with the examination of [Campbell], attorney . . . Garcia, counsel of record for Mercede, made reference to another lawsuit in which [Garcia] and [Campbell] both participated. [Garcia] was obligated by a confidentiality clause and a written agreement in that other lawsuit not to disclose any of the details relating to the settlement of that litigation. The settlement agreement that is executed by both parties and counsel further states that nothing therein shall be construed to be a concession or admission of fault by either party. You are instructed to disregard any of the questions, comments or answers relating to this line of inquiry and you are further instructed not to draw any negative inferences or conclusion[s] as to CNA [Surety] or National as a result of that litigation or [Garcia's] line of inquiry as to his examination of [Campbell]."

instructed not to draw any negative inferences or conclusion as to CNA [Surety] or National as a result of that litigation or [Garcia's] line of inquiry as to his examination of [Campbell]." National does not claim that the curative charge itself was inadequate; rather, citing *John T. Brady & Co.* v. *Stamford*, 220 Conn. 432, 443, 599 A.2d 370 (1991), it claims only that the " 'bell of prejudice' could not be unrung here." Our jurisprudence is clear, however, that unless there is a clear indication to the contrary, a jury is presumed to follow the court's instructions. *State* v. *Negron*, 221 Conn. 315, 331, 603 A.2d 1138 (1992); accord *State* v. *Fields*, 265 Conn. 184, 207, 827 A.2d 690 (2003); *State* v. *McIntyre*, 250 Conn. 526, 533, 737 A.2d 392 (1999). There is no specific claim, nor any evidence with which to support a claim, that the jury ignored the trial court's instructions. We conclude that the court's unambiguous limiting instruction to the jury was sufficient to negate any potentially adverse effect of the admission of the testimony concerning the settlement agreement.

V

National next claims that the trial court improperly denied its motion to set aside the verdict because the jury's finding that National had breached the implied covenant of good faith and fair dealing was inconsistent with its finding that National had not breached the indemnity agreement. Our review of the record reveals, however, that National did not raise this issue before the trial court either in its motion to set aside the verdict or at oral argument on that motion. Because our review is limited to matters in the record, we will not address issues not decided by the trial court. Practice Book § 60-5 (court on appeal shall not be bound to consider claim unless distinctly raised at trial); *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 589–90 n.9, 830 A.2d 164 (2003) (claims neither addressed nor decided

by trial court are not properly before appellate tribunal). Therefore, we decline to review this claim.

VI

Finally, National claims that the trial court improperly submitted to the jury the special defenses of estoppel and waiver, and failed to direct a verdict in National's favor on those defenses, when according to National, Mercede could not prove the necessary elements of each defense. In light of our decision that the jury properly found that Mercede had proven its special defense that National had breached its implied covenant of good faith and fair dealing, thereby affirming the judgment in favor of Mercede on National's cross claim for indemnity, we need not address National's remaining claim.

The judgment is affirmed.

In this opinion the other justices concurred.

GENE S. JONES *v.* ALEX C. KRAMER
(SC 16872)

Sullivan, C. J., and Norcott, Katz, Palmer and Vertefeuille, Js.

Syllabus

The plaintiff, who had sought damages for injuries he sustained in a motor vehicle accident, appealed to the Appellate Court, challenging the trial court's reduction of a jury's award of $15,000 in economic damages. The plaintiff had claimed more than $40,000 in economic damages, including medical expenses and lost wages, and the jury, in returning its verdict, had not delineated the amount awarded for each specific item of damages claimed. The plaintiff claimed that the trial court improperly had concluded that the verdict was subject to a statutory (§ 52-225a) collateral source reduction. The plaintiff maintained that § 52-225a authorizes a trial court to deduct only those collateral source payments received for damages that actually were included in a jury's verdict and that the defendant had not sustained his burden of proving that the verdict here included damages for which the plaintiff had received collateral source benefits. The Appellate Court affirmed the

trial court's judgment, concluding that the express language of § 52-225a authorized a reduction of the jury's award by a single amount representing the sum of all collateral source payments received by the plaintiff, less any amounts paid by or on behalf of the plaintiff to secure those collateral source payments. On the plaintiff's appeal to this court, *held* that, when viewed in the context of the purposes of tort reform, to prevent double recoveries without infringing upon the right of an injured party to be restored to his or her original position, § 52-225a must be construed to allow only collateral source payments specifically corresponding with items of damages included in the jury's verdict to be deducted from the economic damages award; the jury not having delineated the amounts awarded for the specific items of economic damages claimed by the plaintiff, it was not possible to know whether the economic damages awarded included any amounts for which the plaintiff had received collateral source benefits, with the result that judgment should have been rendered in accordance with the verdict.

Where, as here, a party seeks to reduce the amount of economic damages awarded by the fact finder, that party bears the burden of proving that the verdict includes items for which the plaintiff has received a collateral source benefit and, therefore, must submit to the jury, at the conclusion of the evidence, interrogatories concerning the specific items of damages included within the jury's verdict.

Argued October 20, 2003—officially released January 13, 2004

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff in a motor vehicle accident allegedly caused by the defendant's negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where Alex Davis, executor of the estate of Alex C. Kramer, was substituted as the defendant, and tried to the jury before *Hon. Edward F. Stodolink*, judge trial referee; verdict for the plaintiff; thereafter, *Hon. Edward F. Stodolink*, judge trial referee, granted the substitute defendant's motion in arrest of judgment pending the determination of collateral sources and subsequently, exercising the powers of the Superior Court, rendered judgment for the plaintiff reducing the jury's award, from which the plaintiff appealed to the Appellate Court, *Schaller* and *Mihalakos*, *Js.*, with *Bishop*, *J.*, dissenting, which affirmed the trial court's judgment, and the plaintiff, on the grant-

ing of certification, appealed to this court. *Reversed; judgment directed.*

Robert C. Mirto, with whom was *Wesley R. Mead*, for the appellant (plaintiff).

J. Kevin Golger, for the appellee (substitute defendant).

William F. Gallagher and *Hugh D. Hughes* filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

KATZ, J. In a personal injury action, General Statutes § 52-225a[1] authorizes the trial court to reduce the plain-

[1] General Statutes § 52-225a provides: "(a) In any civil action, whether in tort or in contract, wherein the claimant seeks to recover damages resulting from (1) personal injury or wrongful death occurring on or after October 1, 1987, or (2) personal injury or wrongful death, arising out of the rendition of professional services by a health care provider, occurring on or after October 1, 1985, and prior to October 1, 1986, if the action was filed on or after October 1, 1987, and wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, the court shall reduce the amount of such award which represents economic damages, as defined in subdivision (1) of subsection (a) of section 52-572h, by an amount equal to the total of amounts determined to have been paid under subsection (b) of this section less the total of amounts determined to have been paid under subsection (c) of this section, except that there shall be no reduction for (1) a collateral source for which a right of subrogation exists and (2) that amount of collateral sources equal to the reduction in the claimant's economic damages attributable to his percentage of negligence pursuant to section 52-572h.

"(b) Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment.

"(c) The court shall receive evidence from the claimant and any other appropriate person concerning any amount which has been paid, contributed, or forfeited, as of the date the court enters judgment, by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he has received as a result of such injury or death."

tiff's economic damages award by an amount equal to the sum of collateral source payments received by the plaintiff, less any amount paid by or on behalf of the plaintiff to secure those payments. This certified appeal[2] requires that we determine whether § 52-225a requires the trial court to deduct all collateral source payments from the plaintiff's economic damages award, or only those payments that were allocated to the specific items of damages actually included within the fact finder's verdict. Specifically, the plaintiff, Gene S. Jones, claims that the Appellate Court improperly concluded that the trial court properly had reduced his economic damages award by all collateral source payments received by him, irrespective of whether those payments corresponded with items of damages that actually had been included in the jury's verdict. See *Jones* v. *Kramer*, 72 Conn. App. 789, 796, 806 A.2d 606 (2002). We agree with the plaintiff and, accordingly, reverse the judgment of the Appellate Court.

The Appellate Court opinion sets forth the following relevant facts and procedural history: "By way of an amended complaint, the plaintiff brought this action against the defendant, Alex Davis, executor of the estate of Alex C. Kramer.[3] In the amended complaint, the plaintiff alleged that he sustained injuries in an automobile collision with Kramer and that the collision was caused by Kramer's negligence. At trial, the plaintiff claimed more than $40,000 in economic damages, including

[2] We granted the plaintiff's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the trial court applied General Statutes § 52-225a appropriately to reduce the jury's award of economic damages by the amount of collateral source payments received by the plaintiff?" *Jones* v. *Kramer*, 262 Conn. 914, 915, 811 A.2d 1291 (2002).

[3] "The plaintiff originally commenced the action against Alex C. Kramer. Kramer died prior to trial, and the court, *Nadeau*, *J.*, granted Davis' motion to be substituted as the defendant. In this opinion, we refer to Davis as the defendant." *Jones* v. *Kramer*, supra, 72 Conn. App. 791 n.2.

more than $30,000 in medical expenses and $10,000 in lost wages. The jury returned a verdict for the plaintiff, awarding him $15,000 in economic damages and $35,000 in noneconomic damages.

"At the subsequent collateral source hearing, the parties stipulated that $13,031 of the plaintiff's medical bills had been paid by his insurance carrier. The parties also stipulated that after the deduction of insurance premiums paid by the plaintiff, the net amount received from the insurer was $12,000 and that the plaintiff was entitled to costs in the amount of $4361.21. In addition, the [trial] court found, on the basis of the testimony of the plaintiff, that the plaintiff's unreimbursed, out-of-pocket medical expenses totaled $16,008.61." Id., 791–92.

On the basis of these facts, the defendant sought a collateral source credit of $12,000, claiming that, because the plaintiff's insurance carrier had paid in excess of that amount toward the plaintiff's medical bills, the defendant was entitled to that credit. The plaintiff argued in response that the jury had awarded only $15,000 when he had claimed in excess of $30,000 in medical expenses and $10,000 in lost wages. The jury had not delineated the amount awarded for each specific item of damages, and the defendant had not proven whether the economic damages awarded by the jury included any of the medical bills or other benefits paid by the plaintiff's insurance carrier. Therefore, the plaintiff claimed, the defendant had not sustained his burden of proof as to whether he was entitled to any collateral source credit. Pursuant to the defendant's request, the trial court reduced the $50,000 verdict by the full amount of $12,000 and thereafter rendered judgment for the plaintiff in the amount of $42,361.21, which included the plaintiff's costs.

On appeal to the Appellate Court, the plaintiff claimed that the trial court improperly had concluded that the

verdict was subject to a collateral source reduction pursuant to § 52-225a. Specifically, the plaintiff contended that § 52-225a authorizes the trial court to deduct only those collateral source payments received for damages that actually were included in the jury's verdict. The plaintiff further argued that the defendant should bear the burden of requesting jury interrogatories to establish whether the verdict includes damages for which the plaintiff had received collateral source benefits. Id., 792. Because the defendant had not sustained his burden of proof, the plaintiff claimed that the defendant was not entitled to any collateral source credit. A majority of the Appellate Court rejected the plaintiff's claim, concluding that the express language of the statute, as written, "authorizes a reduction of the jury's award of economic damages by a single amount representing the sum of *all* collateral sources received by the plaintiff, less any payments made to secure the collateral sources." (Emphasis added.) Id., 794. In so concluding, the Appellate Court noted that, contrary to the plaintiff's argument, the express language of § 52-225a requires the court to deduct from the jury's award of economic damages "*an amount* equal to *the total* of amounts determined to have been paid under subsection (b) of this section less *the total* of amounts determined to have been paid under subsection (c) of this section"; (emphasis added) General Statutes § 52-225a (a); and likewise requires the court to determine "the *total amount* of collateral sources . . . ." (Emphasis added.) General Statutes § 52-225a (b). The Appellate Court, therefore, determined that "[t]he legislature's use of the word 'total' in both subsections (a) and (b) of the statute is inconsistent with the piecemeal approach to collateral source reductions advocated by the plaintiff." *Jones* v. *Kramer*, supra, 72 Conn. App. 794. Additionally, the Appellate Court stated that its conclusion was consistent with the legislative policy underlying

§ 52-225a "to prevent plaintiffs from obtaining double recoveries, i.e., collecting economic damages from a defendant and also receiving collateral source payments." (Internal quotation marks omitted.) Id., 795.

In a dissent to the majority opinion, Judge Bishop determined that § 52-225a authorizes the trial court to reduce the jury's award of economic damages "only by collateral source payments for the damages actually awarded." Id., 797. Specifically, Judge Bishop disagreed with "the majority's conclusion that the repeated use of the word 'total' in two portions of the statute makes it clear that the legislature intended for any award of economic damages to be reduced by the amount of payments of any other economic damages, regardless of whether the damages for which collateral payments made were, in fact, part of the jury's award." Id., 798 (*Bishop*, *J.*, dissenting). Rather, he reasoned that the language of § 52-225a must be understood in the context of its underlying legislative policy, as a function of tort reform, "to change the common law so as to prevent a plaintiff from receiving a double recovery for the same damages." Id. Therefore, Judge Bishop concluded in his dissent that "[t]o give meaning to the stated intent of tort reform, a more reasonable understanding of the term 'damages' in § 52-225a requires that the court, at a collateral source hearing, should deduct collateral source payments for the *specific* economic damages that were, in fact, awarded by the jury." (Emphasis in original.) Id., 800. Additionally, he stated that § 52-225a should be construed narrowly because it had been enacted in derogation of the common-law collateral source rule. Id., 802–803. Finally, Judge Bishop concluded that the defendant should bear the burden of proving collateral source payments of damages awarded by the jury, because such an allocation of the burden of proof is consistent with both the statutory

purpose of § 52-225a and the traditional treatment of statutes in derogation of the common law. Id., 803–804.

On appeal to this court, the plaintiff urges us to adopt the reasoning of Judge Bishop's dissent as the proper resolution of this issue. Specifically, the plaintiff contends in his brief that the statutory terms "damages" and "award," when understood within the context of the statute, were intended by the legislature to mean " 'damages actually awarded by the trier of fact.' " The plaintiff also contends that § 52-225a must be construed narrowly because it is a statute in derogation of the common-law collateral source rule. The defendant argues that, to the contrary, § 52-225a requires the reduction of any economic damages award by the sum of any collateral sources paid for the benefit of the plaintiff. The defendant also claims that the judgment of the Appellate Court is supported by the statute's "legislative purpose of preventing double recoveries by limiting plaintiffs to the amount of economic damages as determined by the jury." We agree with the plaintiff.

The plaintiff's claim turns on our construction of § 52-225a. "Issues of statutory construction raise questions of law, over which we exercise plenary review." *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 588, 830 A.2d 164 (2003). "The process of statutory interpretation involves a reasoned search for the intention of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. In seeking to determine that meaning, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Citation omitted; internal quotation marks

omitted.) *Bender* v. *Bender*, 258 Conn. 733, 741, 785 A.2d 197 (2001).[4]

With these principles in mind, we turn to the plaintiff's claim. "As with all issues of statutory interpretation, we look first to the language of the statute." (Internal quotation marks omitted.) *Spears* v. *Garcia*, 263 Conn. 22, 28–29, 818 A.2d 37 (2003). General Statutes § 52-225a (a) provides in relevant part: "In any civil action, whether in tort or in contract, wherein the claimant seeks to recover damages resulting from . . . personal injury . . . and wherein liability is admitted or is determined by the trier of fact and damages are awarded to compensate the claimant, the court shall reduce the amount of such award which represents economic damages . . . by an amount equal to the total of amounts determined to have been paid under subsection (b) of this section less the total amounts determined to have been paid under subsection (c) of this section . . . ." The statute further provides: "Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment." General Statutes § 52-225a (b). Lastly, General Statutes § 52-225a (c) provides: "The court shall receive

[4] We are, of course, aware that our legislature recently has enacted the method of interpretation by which this court is to interpret statutes when the text is plain and unambiguous. Specifically, the legislature enacted Public Acts 2003, No. 03-154, § 1, which provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." We note that, in the present case, the relevant statutory text and the relationship of that text to other statutes is not plain and unambiguous. Accordingly, our analysis does not involve this new legislation.

evidence from the claimant and any other appropriate person concerning any amount which has been paid, contributed, or forfeited, as of the date the court enters judgment, by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he has received as a result of such injury or death." Succinctly put, § 52-225a provides that the trial court shall reduce an award for economic damages by an amount equal to the total amount of collateral sources that have been paid for the benefit of the claimant, less any premium paid by or on behalf of the claimant to secure the benefit of such collateral source payments.

Section 52-225a is silent, however, on the issue of whether economic damages awarded by the trier of fact shall be reduced by the amount of *any* collateral source benefits received by a plaintiff, or whether those damages shall be reduced only by the *specific* collateral source benefits received for items of damages that actually were included in the fact finder's award. We agree with the conclusion of Judge Bishop, as stated in his dissent, that "the repeated use of the word 'total' in two portions of the statute" does not clearly establish that the legislature had intended for a plaintiff's award of *some* economic damages to be reduced by collateral source payments received for *other* economic damages not included in the award. *Jones* v. *Kramer*, supra, 72 Conn. App. 798. We therefore turn to other methods of statutory construction to divine the intent.

At the outset, we note that § 52-225a was enacted as part of tort reform. "Prior to the enactment of § 52-225a in 1985, Connecticut adhered to the common-law collateral source rule, which provides that a defendant is not entitled to be relieved from paying any part of the compensation due for injuries proximately resulting from his act where payment [for such injuries or damages] comes from a collateral source, wholly indepen-

dent of him. . . . The basis for [such a] rule is that a wrongdoer shall not benefit from a windfall from an outside source. . . . In 1985, however, the legislature by enacting Public Acts 1985, No. 85-574 . . . abolished the common-law collateral source rule in medical malpractice actions. Public Act 85-574 . . . was codified as § 52-225a . . . . In 1986 . . . § 52-225a was extended by No. 86-338, § 4, of the 1986 Public Acts to abolish the common-law collateral source rule in all personal injury actions. . . . [The purpose behind the enactment of the statute] was . . . to prevent plaintiffs from obtaining double recoveries, i.e., collecting economic damages from a defendant and also receiving collateral source payments. See 28 H.R. Proc., Pt. 27, 1985 Sess., p. 9820, remarks of Representative Morag L. Vance; id., p. 9834, remarks of Representative Joseph D. Nardini; Conn. Joint Standing Committee Hearings, Judiciary, Pt. 6, 1985 Sess., p. 1909, remarks of Senator Richard B. Johnston; 29 S. Proc., Pt. 10, 1986 Sess., p. 3442, remarks of Senator Johnston; 29 H.R. Proc., Pt. 22, 1986 Sess., pp. 8074–76, remarks of Representative Robert G. Jaekle." (Internal quotation marks omitted.) *Jones* v. *Riley*, 263 Conn. 93, 102–103, 818 A.2d 749 (2003). Nothing in the history of tort reform, however, would indicate that the legislature had intended to negate the basic principle that "[t]he purpose of damages in a tort action is to restore the injured party to his original position." D. Wright, J. Fitzgerald & W. Ankerman, Connecticut Law of Torts (3d Ed. 1991) § 169, p. 449. Therefore, in enacting § 52-225a, the legislature sought to strike an "equitable balance . . . between preventing defendants from benefiting from reduced judgments due to collateral source payments, on the one hand, and barring plaintiffs from recovering twice for the same loss, on the other." *Jones* v. *Riley*, supra, 104. It is within this context that we must construe § 52-225a.

We reiterate that § 52-225a (a) provides in relevant part that "[i]n any civil action . . . wherein . . . *damages* are awarded to compensate the claimant, the court shall reduce the amount of such award which represents *economic damages* . . . by an amount equal to the total of amounts determined to have been paid under subsection (b) of this section . . . ." (Emphasis added.) Subsection (b) of § 52-225a provides in relevant part that "[u]pon a finding of liability and an awarding of *damages* by the trier of fact . . . the court shall receive evidence . . . concerning the total amount of collateral sources which have been paid for the benefit of the claimant . . . ." (Emphasis added.)

We agree with Judge Bishop's assessment that, "[i]n this instance the term 'damages' in § 52-225a has to be understood in the context of the purposes of tort reform." *Jones* v. *Kramer*, supra, 72 Conn. App. 799 (*Bishop*, *J.*, dissenting). Put another way, our construction of the term "damages" must be consistent with the legislative policy underlying § 52-225a to prevent plaintiffs from obtaining double recoveries, without infringing upon the right of the injured party to be restored to his or her original position. We believe that the Appellate Court's view, that § 52-225a requires the wholesale reduction of an economic damages award by the sum of all collateral source benefits received by the plaintiff, irrespective of whether those benefits had been for items of damages that actually were included in the fact finder's award; see id., 794; is overly expansive and, consequently, inconsistent with the purposes of tort reform. As Judge Bishop correctly noted in his dissent: "[I]f the [Appellate Court] majority is correct in its understanding of the statute, then tort reform serves not only to deny plaintiffs double payments, but also to deny them payments for economic losses *not* covered by the jury's award of damages. It also has the potential of negating a jury's economic damages award

when that award was not the subject of a collateral source payment." (Emphasis in original.) Id., 799–800. We previously have stated that "[i]t is not our practice to construe a statute in a way to thwart its purpose or lead to absurd results . . . or in a way that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve." (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 33, 836 A.2d 224 (2003). Accordingly, we conclude that § 52-225a, when viewed in the context of the purposes of tort reform, must be construed to allow only payments specifically corresponding with items of damages included in the jury's verdict to be deducted as collateral sources from the economic damages award.

Our conclusion is consistent with our prior treatment of statutes enacted in derogation of the common law. "[W]hen a statute is in derogation of common law or creates a liability where formerly none existed, it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope by the mechanics of [statutory] construction. . . . We recognize only those alterations of the common law that are clearly expressed in the language of the statute because the traditional principles of justice upon which the common law is founded should be perpetuated. The rule that statutes in derogation of the common law are strictly construed can be seen to serve the same policy of continuity and stability in the legal system as the doctrine of stare decisis in relation to case law." (Citations omitted; internal quotation marks omitted.) *Vitanza* v. *Upjohn Co.*, 257 Conn. 365, 381–82, 778 A.2d 829 (2001). The legislature clearly enacted § 52-225a in derogation of the common-law collateral source rule. See *Jones* v. *Riley*, supra, 263 Conn. 103 (noting § 52-225a abolished common-law collateral source rule in all personal injury actions); *Alvarado* v. *Black*, 248 Conn. 409, 417, 728 A.2d 500 (1999) (same). Accordingly, our construction

of § 52-225a is confined to that statute's scope as an abrogation of the common-law collateral source rule. We therefore decline to extend the statute to require collateral source reduction of all economic damages awards, irrespective of whether items of damages corresponding with the payments specifically had been included in the jury's verdict.[5]

We next address the procedure by which trial courts may ascertain which items of damages are subject to a collateral source reduction, and which items are not. In the present case, for example, the plaintiff claimed more than $30,000 in medical expenses, which were covered only partially by collateral sources, and more than $10,000 in lost wages, which were not covered by collateral sources. The jury awarded the plaintiff a total of $15,000 in economic damages, without delineating the amount awarded for each specific item of damages. Therefore, to apply a collateral source reduction pursuant to § 52-225a, in a manner that is faithful to the purposes of tort reform, the trial court must know the specific types of damages that were awarded by the jury. That information was missing in this case.

We conclude that the defendant, as the party seeking to reduce the amount of economic damages awarded

[5] The defendant also contends that, because one of the goals of tort reform was to reduce insurance premiums; see 29 S. Proc., supra, p. 3517, remarks of Senator Thomas F. Upson; the statute should be construed in furtherance of that goal as allowing a reduction of the plaintiff's economic damages award because, "notwithstanding whether the jury accepted all of the plaintiff's claims of injuries and damages, he has been reimbursed for at least some of his claims." Although we acknowledge that reduced insurance premiums was a desired goal of the legislature in enacting § 52-225a, we do not believe that the legislature intended to effectuate that goal at the expense of injured parties by negating a jury's award of economic damages irrespective of whether the items of damages corresponding with the collateral source benefit had been included in the jury's award. Moreover, our conclusion in the present case has no bearing upon the effect of § 52-225a to reduce economic damages awards, and thus potentially reduce insurance premiums, in cases wherein the fact finder's verdict includes items of damages for which the plaintiff has received a collateral source benefit.

by the fact finder, bears the burden of proving that the verdict includes items of damages for which the plaintiff has received a collateral source benefit. Specifically, the defendant who is seeking a collateral source reduction must, at the conclusion of the evidence, submit interrogatories to the jury concerning the specific items of damages included within the verdict.[6] Although we acknowledge that § 52-225a is silent concerning burdens of proof; see *Jones* v. *Kramer*, supra, 72 Conn. App. 796 n.4; we believe that placing the burden on the defendant to submit jury interrogatories is most consistent with the equitable balance that the statute seeks to strike between barring plaintiffs from recovering twice for the same loss, on the one hand, and preventing defendants from benefiting from reduced judgments due to collateral source payments, on the other. Moreover, because it is the defendant who is seeking to reduce the award, the defendant should bear the burden of proving that the items of damages corresponding with the desired collateral source reduction actually are included in the award.[7]

[6] The Connecticut Trial Lawyers Association proposes, in its amicus brief, that we require juries "to break down their economic damages on the verdict form into past medical, future medical, and all lost earnings." The argument for such a rule is that a rule "requiring specific interrogatories for every medical bill [as proposed by Judge Bishop in his dissent in *Jones* v. *Kramer*, supra, 72 Conn. App. 801, 803] is unfortunately cumbersome and unworkable." We do not believe, however, that requiring juries to break down their economic damages awards on the verdict form will be significantly more efficient than requiring them to perform the same function in response to jury interrogatories submitted by the defendant.

[7] The defendant asserts that requiring defendants to submit interrogatories to the jury in every case would be "unwieldy and contrary to the clear mandate of [§ 52-225a]." It is axiomatic, however, that in every tort action, the fact finder may award economic damages only if the plaintiff has proven those damages to a reasonable certainty and has shown that the defendant had proximately caused the damages. See *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 59, 717 A.2d 724 (1998); *Preston* v. *Keith*, 217 Conn. 12, 20, 584 A.2d 439 (1991). Therefore, in the present case, the jury presumably determined, for each item of damages awarded, that the plaintiff had proven these dual requirements of reasonable certainty and proximate cause. Specifically, the plaintiff submitted multiple

As we previously have stated, the jury in this case awarded the plaintiff a total of $15,000 in economic damages, without delineating the amount awarded for each specific item of damages. Therefore, it is not possible to know whether the economic damages awarded by the jury included any of the medical bills or other benefits paid by collateral sources.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court, and to remand the case to that court with direction to render judgment for the plaintiff in the amount of $50,000 in accordance with the jury's verdict.

In this opinion the other justices concurred.

YALE DIAGNOSTIC RADIOLOGY *v.* ESTATE OF HARUN FOUNTAIN ET AL.
(SC 16922)

Sullivan, C. J., and Borden, Katz, Palmer and Zarella, Js.

Syllabus

The plaintiff sought to recover for certain emergency medical services it had provided to F, the minor child of the defendant T, after F had been

items of economic damages, consisting of two categories: claimed medical expenses and lost wages. In awarding the plaintiff some, but not all, of his claimed economic damages, the jury necessarily made the determination that the plaintiff was entitled to some items of damages but not others, or was entitled to partial recovery for all items of damages. Accordingly, we cannot say that requiring the defendant to request, through interrogatories, that the jury break down its award of economic damages, would be particularly unwieldy. Moreover, this requirement would not be contrary to the legislative intent underlying § 52-225a. General Statutes § 52-572h (a) (1) defines the term "economic damages," as it applies in § 52-225a, as "compensation determined by the trier of fact for pecuniary losses including, but not limited to, the cost of reasonable and necessary medical care, rehabilitative services, custodial care and loss of earnings or earning capacity excluding any noneconomic damages . . . ." Therefore, the statutory scheme recognizes that an economic damages award may consist of several different types of pecuniary loss.

accidentally shot by a friend. When T failed to pay the medical bill, the plaintiff brought a collection action against her and obtained a judgment in its favor. Thereafter, T filed for bankruptcy and was granted a discharge of the plaintiff's debt. Subsequently, T brought an action against the tortfeasor for damages sustained by F, including sums expended on medical care and treatment, and the funds resulting from a settlement agreement were placed in the defendant estate of F. The plaintiff's claim to recover its costs from the estate was denied by the Probate Court on the ground that pursuant to the statutory (§ 46b-37 [b]) liability of parents for the support of their children, T was liable for the medical services rendered to F, and T's refusal to pay for the services did not render F or his estate liable. That court also ruled that, as an unemancipated minor, F was incapable of entering into a binding contract or consenting to medical treatment. Thereafter, the plaintiff appealed to the Superior Court, claiming that, although parents are primarily liable under § 46b-37 (b) for their child's "necessaries," the parents' failure to pay renders the child secondarily liable. That court agreed with the plaintiff and, additionally, relied on the fact that F had received a settlement, based in part on his medical expenses. That court rendered judgment for the plaintiff, from which the defendants appealed. *Held* that because this state has long recognized and codified the common-law doctrine of necessaries, which provides that a minor may not avoid a contract for goods or services necessary for his health and sustenance, and is based on the equitable principles of an implied in law contract, the defendants here were liable to the plaintiff for the medical services rendered to F; the purpose behind the statutory rule of § 46b-37 (b) (2) that parents are primarily liable—to reinforce parents' obligations to support their children—and the purpose behind the common-law doctrine of necessaries that a minor is secondarily liable—to provide a mechanism for collection by creditors when the parents refuse or are unable to discharge that obligation—when read together, serve to encourage payment for contracts for necessaries.

Argued September 22, 2003—officially released January 13, 2004

Procedural History

Appeal from an order of the Probate Court for the district of Milford disallowing the plaintiff's claim for payment for certain medical services rendered to the minor child of the defendant Vernetta Turner-Tucker, brought to the Superior Court in the judicial district of Ansonia-Milford at Derby and tried to the court, *Ripley, J.*, pursuant to the parties' stipulation of facts; judgment for the plaintiff, from which the defendants appealed. *Affirmed.*

Marc L. Glenn, for the appellants (defendants).

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

Opinion

BORDEN, J. The sole issue in this appeal[1] is whether a medical service provider that has provided emergency medical services to a minor may collect for those services from the minor when the minor's parents refuse or are unable to make payment. The defendants, the estate of Harun Fountain, an unemancipated minor, and Vernetta Turner-Tucker (Tucker), the fiduciary of Fountain's estate, appeal from the judgment of the Superior Court following an appeal from an order of the Probate Court for the district of Milford. The Probate Court had denied the motion of the plaintiff, Yale Diagnostic Radiology, for distribution of funds from the estate. The trial court ordered recovery of the funds sought by the plaintiff. The defendants claim that the trial court improperly determined that they are liable to the plaintiff for payment of Fountain's medical expenses. We affirm the judgment of the trial court.

The plaintiff filed a proof of claim against the defendants and a motion for distribution of funds in the Probate Court. The Probate Court denied the motion for distribution of funds. The plaintiff appealed to the trial court, which sustained the appeal and rendered judgment in favor of the plaintiff.

The following facts and procedural history are undisputed. In March, 1996, Fountain was shot in the back of the head at point-blank range by a playmate. As a result of his injuries, including the loss of his right eye, Fountain required extensive lifesaving medical services from a variety of medical services providers, including

[1] The defendants appealed from the judgment of the Superior Court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

the plaintiff. The expense of the services rendered by the plaintiff to Fountain totaled $17,694. The plaintiff billed Tucker, who was Fountain's mother,[2] but the bill went unpaid and, in 1999, the plaintiff obtained a collection judgment against her. In January, 2001, however, all of Tucker's debts were discharged pursuant to an order of the Bankruptcy Court for the District of Connecticut. Among the discharged debts was the judgment in favor of the plaintiff against Tucker.

During the time between the rendering of medical services and the bankruptcy filing, Tucker, as Fountain's next friend, initiated a tort action against the boy who had shot him. Among the damages claimed were "substantial sums of money [expended] on medical care and treatment . . . ." A settlement was reached, and funds were placed in the estate established on Fountain's behalf under the supervision of the Probate Court. Tucker was designated the fiduciary of that estate. Neither Fountain nor his estate was involved in Tucker's subsequent bankruptcy proceeding.

Following the discharge of Tucker's debts, the plaintiff moved the Probate Court for payment of the $17,694 from the estate. The Probate Court denied the motion, reasoning that, pursuant to General Statutes § 46b-37 (b),[3] parents are liable for medical services rendered

[2] There is no reference to Fountain's father in the record or briefs of either party. We therefore assume that he is not available as a viable source of payment of the plaintiff's bill for services rendered to Fountain.

[3] General Statutes § 46b-37 (b) provides: "Notwithstanding the provisions of subsection (a) of this section, it shall be the joint duty of each spouse to support his or her family, and both shall be liable for: (1) The reasonable and necessary services of a physician or dentist; (2) hospital expenses rendered the husband or wife or minor child while residing in the family of his or her parents; (3) the rental of any dwelling unit actually occupied by the husband and wife as a residence and reasonably necessary to them for that purpose; and (4) any article purchased by either which has in fact gone to the support of the family, or for the joint benefit of both."

Although § 46b-37 (b) was amended by No. 01-195 of the 2001 Public Acts to include a technical change for purposes of gender neutrality, that change is not relevant to this appeal. References herein are to the current revision of § 46b-37 (b).

to their minor children, and that a parent's refusal or inability to pay for those services does not render the minor child liable. The Probate Court further ruled that minor children are incapable of entering into a legally binding contract or consenting, in the absence of parental consent, to medical treatment. The Probate Court held, therefore, that the plaintiff was barred from seeking payment from the estate.

The plaintiff appealed from the decision of the Probate Court to the trial court. The trial court sustained the appeal and rendered judgment for the plaintiff, holding that, under Connecticut law, minors are liable for payment for their "necessaries," even though the provider of those necessaries "relies on the parents' credit for payment when [the] injured child lives with his parents . . . ." The trial court reasoned that, although parents are primarily liable, pursuant to § 46b-37 (b) (2), for their child's medical bills, the parents' failure to pay renders the minor secondarily liable. Additionally, the trial court relied on the fact that Fountain had obtained money damages, based in part on the medical services rendered to him by the plaintiff. This appeal followed.

The defendants claim that the trial court improperly determined that a minor may be liable for payment for emergency medical services rendered to him. They further claim that the trial court, in reaching its decision, improperly considered the fact that Fountain had received a settlement, based in part on his medical expenses. We disagree with both of the defendants' claims.

Connecticut has long recognized the common-law rule that a minor child's contracts are voidable. See *Shutter* v. *Fudge*, 108 Conn. 528, 530, 143 A. 896 (1928); *Strong* v. *Foote*, 42 Conn. 203, 205 (1875). Under this rule, a minor may, upon reaching majority, choose

either to ratify or to avoid contractual obligations entered into during his minority. See 4 S. Williston, Contracts (4th Ed. 1992) § 8:14, pp. 271–72. The traditional reasoning behind this rule is based on the well established common-law principles that the law should protect children from the detrimental consequences of their youthful and improvident acts, and that children should be able to emerge into adulthood unencumbered by financial obligations incurred during the course of their minority. See *Shutter* v. *Fudge*, supra, 530. The rule is further supported by a policy of protecting children from unscrupulous individuals seeking to profit from their youth and inexperience.

The rule that a minor's contracts are voidable, however, is not absolute. An exception to this rule, eponymously known as the doctrine of necessaries, is that a minor may not avoid a contract for goods or services necessary for his health and sustenance. See 5 S. Williston, Contracts (4th Ed. 1993) § 9:18, pp. 149–57. Such contracts are binding even if entered into during minority, and a minor, upon reaching majority, may not, as a matter of law, disaffirm them. Id.

The parties do not dispute the fact that the medical services rendered to Fountain were necessaries; rather, their dispute centers on whether Connecticut recognizes the doctrine of necessaries. As evidenced by the following history, the doctrine of necessaries has long been a part of Connecticut jurisprudence.

In *Strong* v. *Foote*, supra, 42 Conn. 205, this court affirmed a judgment in favor of a dentist against a minor for services rendered to the minor, who had an estate and who was an orphan for whom a guardian had been appointed. This court stated: "In suits against minors, instituted by persons who have rendered services or supplied articles to them, the term 'necessaries' is not invariably used in its strictest sense, nor is it limited

to that which is requisite to sustain life, but includes whatever is proper and suitable in the case of each individual, having reference to his circumstances and condition in life." Id. The court further noted that the services were "within the legal limitations of the word 'necessaries,' " and that the plaintiff was not required to inquire as to the minor's guardianship before rendering the services because the services were "necessary to meet an unsupplied want." Id.

Furthermore, from 1907 to 1959, statutory law regarding minors and the doctrine of necessaries remained unchanged. General Statutes (1958 Rev.) § 42-2 provided: "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. When necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery." Therefore, insofar as it referred to minors, this statute codified the common-law doctrine of necessaries. See *Shutter* v. *Fudge*, supra, 108 Conn. 533. We recognize that § 42-2 was repealed in 1959; see Public Acts 1959, No. 133, § 1-103; when Connecticut adopted the Uniform Commercial Code. That repeal was not intended, however, to eliminate the doctrine because the statute was replaced by General Statutes § 42a-1-103, which contemplated that the Uniform Commercial Code would continue to be supplemented by the general principles of contract law regarding minors.[4]

[4] General Statutes § 42a-1-103 provides: "Unless displaced by the particular provisions of this title, *the principles of law and equity*, including the law merchant *and the law relative to capacity to contract*, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." (Emphasis added.)

In light of these precedents, we conclude that Connecticut recognizes the doctrine of necessaries. We further conclude that, pursuant to the doctrine, the defendants are liable for payment to the plaintiff for the services rendered to Fountain.

We have not heretofore articulated the particular legal theory underlying the doctrine of necessaries.[5] We therefore take this occasion to do so, and we conclude

[5] Courts in other jurisdictions that have held that minors may be liable pursuant to the doctrine of necessaries for medical services have done so by applying varying legal theories. See annot., Infant's Liability for Medical, Dental, or Hospital Services, 53 A.L.R.4th 1249 (1987). For example, some courts have held minors liable only if the creditor can show that the minor was not living with or being supported by his or her parents at the time the contract arose or the services were rendered, or, put another way, only if it is shown that the services were furnished on the minor's credit and not that of his or her parents. See *North Carolina Baptist Hospitals, Inc.* v. *Franklin*, 103 N.C. App. 446, 450, 405 S.E.2d 814 (1991) (minor not liable when parents provided all necessaries but were found not to be willing or able to pay one bill); see also *Kennedy* v. *Kiss*, 89 Ill. App. 3d 890, 894–95, 412 N.E.2d 624 (1980); *Gaspard* v. *Breaux*, 413 So. 2d 288, 290–91 (La. App. 1982); *Hoyt* v. *Casey*, 114 Mass. 397, 399 (1874); *Westrate* v. *Schipper*, 284 Mich. 383, 386, 279 N.W. 870 (1938); *Gardner* v. *Flowers*, 529 S.W.2d 708, 711 (Tenn. 1975). Some courts have held that liability is only established where an express or implied in fact contract arose between the minor and the creditor. See *North Carolina Baptist Hospitals, Inc.* v. *Franklin*, supra, 450; *Madison General Hospital* v. *Haack*, 124 Wis. 2d 398, 404, 369 N.W.2d 663 (1985). Still other courts have held minors liable after determining that the goods or services rendered were necessaries, and the minor's parent or guardian was unwilling or unable to pay for them. See *Schmidt* v. *Prince George's Hospital*, 366 Md. 535, 555, 784 A.2d 1112 (2001) (minor's father's use of insurance proceeds to buy minor car sufficient for finding that father was unwilling to pay minor's medical expenses); see also *In re Dzwonkiewicz's Estate*, 231 Mich. 165, 167, 203 N.W. 671 (1925); *Greenville Hospital System* v. *Smith*, 269 S.C. 653, 655, 239 S.E.2d 657 (1977); *Gardner* v. *Flowers*, supra, 711. Some courts, however, have held minors liable under the doctrine of necessaries primarily due to the fact that the minor had recovered from a tortfeasor. See, e.g., *Cole* v. *Wagner*, 197 N.C. 692, 698–99, 150 S.E. 339 (1929). Still other courts have reasoned that the minor's ever present secondary liability for payment for medical services rendered to him gives rise to an implied in law contract. See *In re Dzwonkiewicz's Estate*, supra, 167; *In the Matter of Peacock*, 261 N.C. 749, 753, 136 S.E.2d 91 (1964); *McAllister* v. *Saginaw Timber Co.*, 171 Wash. 448, 451, 18 P.2d 41 (1933). As we explain in the text of this opinion, we agree with this latter approach.

that the most apt theory is that of an implied in law contract, also sometimes referred to as a quasi-contract. We further conclude that based on this theory, the defendants are liable.

"In distinction to an implied [in fact] contract, a quasi [or implied in law] contract is not a contract, but an obligation which the law creates out of the circumstances present, even though a party did not assume the obligation . . . . *It is based on equitable principles* to operate whenever justice requires compensation to be made. . . . *Brighenti* v. *New Britain Shirt Corporation*, 167 Conn. 403, 407, 356 A.2d 181 (1974). With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary . . . to examine the circumstances and the conduct of the parties and apply this standard. *Cecio Bros., Inc.* v. *Greenwich*, 156 Conn. 561, 564–65, 244 A.2d 404 (1968)." (Emphasis in original; internal quotation marks omitted.) *Bershtein, Bershtein & Bershtein, P.C.* v. *Nemeth*, 221 Conn. 236, 242, 603 A.2d 389 (1992).

Thus, when a medical service provider renders necessary medical care to an injured minor, two contracts arise: the primary contract between the provider and the minor's parents; and an implied in law contract between the provider and the minor himself. The primary contract between the provider and the parents is based on the parents' duty to pay for their children's necessary expenses, under both common law[6] and statute.[7] Such contracts, where not express, may be implied in fact and generally arise both from the parties' conduct and their reasonable expectations. The primacy of this

[6] Our common law has long recognized the parents' obligation to provide for their minor child. See, e.g., *Finch* v. *Finch*, 22 Conn. 411, 415 (1853) ("[t]here is a law of our universal humanity . . . which impels parents, whether fathers or mothers, to protect and support their helpless children").

[7] For the text of § 46b-37 (b), see footnote 3 of this opinion.

contract means that the provider of necessaries must make all reasonable efforts to collect from the parents before resorting to the secondary, implied in law contract with the minor.

The secondary implied in law contract between the medical services provider and the minor arises from equitable considerations, including the law's disfavor of unjust enrichment. Therefore, where necessary medical services are rendered to a minor whose parents do not pay for them, equity and justice demand that a secondary implied in law contract arise between the medical services provider and the minor who has received the benefits of those services. These principles compel the conclusion that, in the circumstances of the present case, the defendants are liable to the plaintiff, under the common-law doctrine of necessaries, for the services rendered by the plaintiff to Fountain.

The present case illustrates the inequity that would arise if no implied in law contract arose between Fountain and the plaintiff. Fountain was shot in the head at close range and required emergency medical care. Under such circumstances, a medical services provider cannot stop to consider how the bills will be paid or by whom. Although the plaintiff undoubtedly presumed that Fountain's parent would pay for his care and was obligated to make reasonable efforts to collect from Tucker before seeking payment from Fountain, the direct benefit of the services, nonetheless, was conferred upon Fountain. Having received the benefit of necessary services, Fountain should be liable for payment for those necessaries in the event that his parents do not pay.

Furthermore, in the present case, we note, as did the trial court, that Fountain received, through a settlement with the boy who caused his injuries, funds that were calculated, at least in part, on the costs of the medical

services provided to him by the plaintiff in the wake of those injuries. Fountain, through Tucker, brought an action against the tortfeasor and, in his complaint, cited "substantial sums of money [expended] on medical care and treatment . . . ." This fact further supports a determination of an implied in law contract under the circumstances of the case.

The defendants claim, however, that the doctrine of necessaries has been legislatively abrogated by § 46b-37 (b) (2). See footnote 3 of this opinion. We disagree. Section 46b-37 (b) (2) governs the joint liability of parents for the support and maintenance of their family, and, in doing so, merely codifies the common-law principle, long recognized in Connecticut, that both parents are *primarily* responsible for providing necessary goods and services to their children. See *Finch* v. *Finch*, 22 Conn. 411, 415 (1853); see also footnote 6 of this opinion. Section 46b-37 (b) (2), however, is silent as to a child's *secondary* liability. That statute neither promotes nor prohibits a determination of secondary liability on the part of a minor when the minor has received emergency medical services and the parents are either unwilling or unable to pay for those services. We, therefore, decline the defendants' invitation to read into § 46b-37 (b) (2), which governs the relationship of parents to one another and to their creditors, any rule regarding the relationship of their minor children to those same creditors. Nothing in either the language or the purpose of § 46b-37 (b) (2) indicates an intent on the part of the legislature to absolve minors of their secondary common-law liability for necessaries.

To the contrary, the purposes behind the statutory rule that parents are primarily liable and the common-law rule, pursuant to the doctrine of necessaries, that a minor is secondarily liable, when read together, serve to encourage payment on contracts for necessaries. Those purposes are (1) to reinforce parents' obligation

to support their children, and (2) to provide a mechanism for collection by creditors when, nonetheless, the parents either refuse or are unable to discharge that obligation.

The defendants further contended, at oral argument before this court, that, even if we were to conclude that the doctrine of necessaries is applicable, the defendants are not liable to the plaintiff because there has been no showing that Tucker was unwilling or unable to provide necessaries to Fountain. Specifically, the defendants argue that, because Fountain lived in Tucker's home, it cannot be shown that, as a matter of law, Tucker was unwilling or unable to provide Fountain with necessary medical care. We disagree.

The undisputed facts show that Tucker had four years to pay the plaintiff's bill for the services rendered to Fountain. She did not pay that bill even when the plaintiff pursued a collection action against her. These facts are sufficient to show that Tucker was unwilling or unable to pay for Fountain's necessary medical services.

Furthermore, the premise underlying the legal structure placing primary liability in the parent and secondary liability in the minor, and requiring that the creditor first exhaust reasonable efforts to collect from the parent, is that the creditor has the legal capability, beyond moral suasion, to require the parent to pay. That premise simply disappears when the parent's primary obligation has been erased by an intervening bankruptcy.

This reasoning applies, moreover, whether the minor is living in the parent's home, as was the case here, or elsewhere. The place of the minor's residence is simply irrelevant to the question of whether the creditor has an enforceable claim against the parent. That is because the fact that Tucker may be supplying other necessaries, such as food and shelter, does not undermine the claim

that she has not made payment for this necessary medical service, which was already provided by the plaintiff to Fountain.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* RANDALL SAUNDERS (SC 16816)

Sullivan, C. J., and Borden, Katz, Palmer and Vertefeuille, Js.

Syllabus

Convicted on retrial of the crime of manslaughter in the first degree with a firearm in connection with the defendant's shooting of the victim in a restaurant in which the victim and the defendant had an altercation immediately prior to the shooting, the defendant appealed. *Held*:

1. Contrary to the claim of the defendant, the jury reasonably could have concluded that the state disproved his claim of self-defense beyond a reasonable doubt.

   a. Evidence adduced by the state undermined the defendant's claim that deadly physical force was necessary because he believed that the victim was reaching behind his back for a gun immediately before the defendant shot the victim; furthermore, even if the jury found that the defendant did believe that the victim had reached behind his back for a gun before the defendant shot him, that fact alone was not so compelling as to require the conclusion that the defendant's belief that the victim possessed a gun was objectively reasonable in light of the dearth of evidence to suggest that the victim was armed or that he routinely carried a gun and that the defendant was aware of that fact.

   b. Forensic evidence established that three of the four bullets that struck the victim entered through his back and the testimony of certain witnesses established that the defendant fired one shot, paused briefly, and then fired four more shots in succession; that evidence supported a finding that the defendant safely could have stopped firing but elected not to do so, even though the victim no longer posed a threat, and, therefore, the jury reasonably could have found that the defendant's actions were excessive and beyond those reasonably necessary to repel any attack.

   c. In the absence of any indication that the victim intended to inflict great bodily harm upon the defendant, the jury reasonably could have found that any subjective belief that the defendant may have had regarding the victim's intent to inflict such harm was not reasonable.

d. The jury reasonably could have concluded that, because the defendant knew that he could have exited the restaurant in complete safety after his physical altercation with the victim that occurred prior to the shooting, his use of deadly physical force against the victim was not justified.

2. The defendant could not prevail on his claim that the trial court improperly excluded expert testimony in violation of his constitutional right to present a defense; even if the trial court improperly precluded defense counsel from eliciting the testimony of an expert to rationalize certain false statements that the defendant had made soon after the shooting as post-traumatic confabulation, the subject of those statements, namely, the extent of the defendant's involvement in the military, was not central to his claim of self-defense, and, therefore, the trial court's ruling, even if improper, did not rise to the level of a constitutional violation.

3. The defendant could not prevail on his claim that because the trial court declared a mistrial in his first trial on the charge of murder without his consent, his retrial on the charge of manslaughter in the first degree with a firearm was barred by principles of double jeopardy, the defendant having consented to the declaration of the mistrial by virtue of his failure to object to that declaration in the face of an invitation to do so by the court immediately before the declaration was made and by virtue of the defendant's repeated prior requests for a mistrial without any indication that he had retreated from that position; furthermore, although the trial court denied defense counsel's request to poll the jurors in the first trial as to whether they had reached a verdict on the murder charge, that request and subsequent denial by the court was not accompanied by any objection to the declaration of the mistrial, and the state elected not to retry the defendant on the murder charge, thereby rendering moot any double jeopardy challenge to his retrial on that charge.

Argued January 15, 2003—officially released January 13, 2004

Procedural History

Substitute information charging the defendant with the crime of manslaughter in the first degree with a firearm, brought to the Superior Court in the judicial district of Danbury and tried to the jury before *Holden*, *J.*; verdict of guilty; thereafter, the court denied the defendant's motion for a new trial and his motion in arrest of judgment, and rendered judgment of guilty in accordance with the verdict, and the defendant appealed. *Affirmed*.

Lisa J. Steele, special public defender, for the appellant (defendant).

Timothy J. Sugrue, senior assistant state's attorney, with whom, on the brief, were *Walter D. Flanagan*, state's attorney, and *Warren C. Murray*, supervisory assistant state's attorney, for the appellee (state).

Vicki H. Hutchinson filed a brief for AWARE as amicus curiae.

William H. Peterken filed a brief for Defense Associates as amicus curiae.

Opinion

PALMER, J. Following a mistrial, a second jury found the defendant, Randall Saunders, guilty of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a).[1] The trial court, *Holden*, *J.*, rendered judgment in accordance with the jury verdict,[2] and the defendant appealed.[3] On appeal, the defendant claims that: (1) the state failed to disprove his claim of self-defense beyond a reasonable doubt; (2) the trial court improperly excluded certain expert testimony in violation of his constitutional right to present a defense; and (3) he was retried in violation of his constitutional

[1] General Statutes § 53a-55a provides in relevant part: "(a) A person is guilty of manslaughter in the first degree with a firearm when he commits manslaughter in the first degree as provided in section 53a-55, and in the commission of such offense he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses a pistol, revolver, shotgun, machine gun, rifle or other firearm. . . ."

General Statutes § 53a-55 provides in relevant part: "(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person . . . or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person. . . ."

[2] The trial court sentenced the defendant to a term of twenty-seven years imprisonment.

[3] The defendant initially appealed to the Appellate Court. Because the defendant should have taken his appeal directly to this court; see General Statutes § 51-199 (b) (3); his case was transferred to this court pursuant to Practice Book § 65-4.

right not to be placed in jeopardy twice for the same offense. We reject the defendant's claims and, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On January 26, 1997, the defendant and his girlfriend, Susan Bruemmer, went to Tortilla Flat, a restaurant and bar in Danbury, after having spent the previous several hours drinking at another bar. The two remained at Tortilla Flat during the Super Bowl and continued to drink. As the defendant and Bruemmer were getting ready to leave after the end of the game, Bruemmer approached the victim, Dominic Badaracco, Jr., who was seated at the bar, and struck up a conversation with him. Bruemmer was acquainted with the victim because she previously had dated his brother. The conversation soon escalated into an argument, which culminated in Bruemmer's throwing a drink in the victim's face.

The victim then called out to the defendant that he had "better contain [his] bitch." The defendant drew a handgun, approached the victim, and placed the barrel of the gun against the victim's head or neck. A fight ensued between the defendant, who is approximately six feet, five inches tall and 220 pounds, and the victim, who was approximately six feet, two inches tall and 230 pounds. The two men proceeded to fight. During the fight, which lasted only a short time, the victim punched the defendant in the face. As a result, the defendant suffered minor injuries including a bloody nose and some cuts and abrasions on his face. The victim's shirt was torn, and a gold chain that he had been wearing around his neck was broken.

As the fight broke out, Bethany McKnight, a bartender, heard someone in the bar yell "there's a gun . . . ." McKnight went into the kitchen to call 911 but discovered that Paula Keeler, the sister-in-law of Dennis

Keeler, one of the owners of Tortilla Flat, already had made the call. Dennis Keeler also entered the kitchen to confirm that the police had been called. By this time, the defendant had entered the kitchen from the bar area. Dennis Keeler noticed that the defendant was holstering his weapon. McKnight and Paula Keeler asked the defendant whether he had been shot and if he wanted them to call for an ambulance. The defendant smiled and said no. Paula Keeler thereafter left the kitchen and went upstairs. At this time, the defendant was located within fifteen feet of a door leading to the outside of the restaurant.

The victim, who had remained in the bar area, headed toward the kitchen. As the victim approached the kitchen doorway, he kicked a garbage can, stopped near the doorway and, according to Dennis Keeler, shouted to the defendant that "if he [the defendant] ever pulled a gun on him again he'd kill him."[4] The victim then continued to move toward the defendant. Dennis Keeler asked the victim "to stop, to let it go . . . ." The victim did not heed Keeler's request, however, and continued to advance in the direction of the defendant.

By this time, the defendant was leaning against a stove, wiping blood from his face. McKnight, who had remained in the kitchen, testified that the defendant pulled out his handgun and "just calm [sic] as a cucumber . . . started firing." The defendant discharged all five of the bullets from his gun. The victim was struck by four of the five bullets, three of which entered through his back.[5] The other bullet struck the victim in

[4] Other witnesses testified that they heard the victim make a somewhat different threat. One such witness testified that he heard the victim say, "Nobody puts a gun to my head and lives [un]til tomorrow." A second witness testified that the victim said, "Nobody pulls a gun on me and lives . . . ."

[5] The testimony varied as to the exact sequence of the shots. Three witnesses testified that they heard a single shot followed by a short pause and then several shots in succession. Two other witnesses testified, however, that the shots were fired in succession.

the left arm, near the armpit. The police soon arrived and arrested the defendant. The victim subsequently died as a result of one or more gunshot wounds. Additional facts will be set forth as necessary.

I

The defendant first contends that the state failed to disprove his claim of self-defense; see General Statutes § 53a-19;[6] beyond a reasonable doubt as required by General Statutes § 53a-12 (a).[7] We disagree.

[6] General Statutes § 53a-19 provides in relevant part: "(a) Except as provided in subsections (b) and (c) of this section, a person is justified in using reasonable physical force upon another person to defend himself . . . from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm.

"(b) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using deadly physical force upon another person if he knows that he can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he is in his dwelling, as defined in section 53a-100, or place of work and was not the initial aggressor . . . or (2) by surrendering possession of property to a person asserting a claim of right thereto, or (3) by complying with a demand that he abstain from performing an act which he is not obliged to perform.

"(c) Notwithstanding the provisions of subsection (a) of this section, a person is not justified in using physical force when (1) with intent to cause physical injury or death to another person, he provokes the use of physical force by such other person, or (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force . . . ."

[7] General Statutes § 53a-12 (a) provides: "When a defense other than an affirmative defense, is raised at a trial, the state shall have the burden of disproving such defense beyond a reasonable doubt."

Our Penal Code characterizes self-defense as a nonaffirmative defense that the state must disprove beyond a reasonable doubt. See General Statutes § 53a-16 ("[i]n any prosecution for an offense, justification, as defined in sections 53a-17 to 53a-23, inclusive, shall be a *defense*" [emphasis added]).

The following additional facts are necessary to our resolution of this issue. At trial, the defendant did not dispute that he had shot and killed the victim but claimed that he had done so in self-defense. The defendant presented two related theories in justification of his use of deadly force against the victim.[8] First, the defendant contended that he shot the victim because he reasonably believed that the victim was going to shoot him. The defendant's second theory of self-defense was founded on his claim that he reasonably feared that the victim was going to beat him to death.

Both of these theories were based, in large part, on a written statement that the defendant had given to the police upon being taken into custody shortly after the shooting.[9] That statement, which contains a version of

[8] The self-defense claim raised by the defendant, who did not testify, was predicated on the testimony of the state's witnesses, several witnesses who testified in the defendant's case-in-chief and certain documentary evidence.

[9] The defendant's written statement, which was introduced as a full exhibit, provides in relevant part: "On Sunday Jan[uary] 26, 1997 I went to Uncle Al's [Cafe in Danbury] with my girlfriend Susan Bruemmer. We went [to Uncle Al's] at around [6 p.m.] to watch the [Super Bowl]. While at Uncle Al's I had approximately four (4) beers. At half-time Susan wanted to leave and go to Tortilla Flat. When we arrived at Tortilla [Flat] Susan got involved in a card game, and I was watching the [Super Bowl] on the TV. While I was watching the game I had two (2) beers. Approximately forty five minutes to an hour after the game myself [sic] and Susan were getting ready to leave and go home. As we started walking out of the bar area Susan saw [the victim] sitting at the bar [and] she went up to him to say hello, [and] [h]e then got ugly with her. [The victim] turned and said to me is that your bitch you better contain your bitch. I then told Susan lets [sic] go. We then started to walk out the door and [the victim] pushed me and then punched me in the nose, [and] I fell to the floor and [the victim] was on top of me hitting me. I then pulled my gun out and pointed it at him and told him that it was over and to stop or I'll shoot, [the victim] then grabbed my gun. We struggled a while but I didn't let go of the gun, when [the victim] got off of me, I put my gun back in the holster and I ran into the kitchen, I was going to run out the door, but I was concerned where Su[san] was. When I was in the kitchen the next thing I know is that [the victim] was in the kitchen and coming after me, I then pulled my weapon again and pointed it at [the victim] and told him to stop or that I'll shoot. [The victim] then reached around to his back with his hand and I thought that he was reaching for a gun. I then fired my gun, I kept pulling the trigger until the gun was empty.

the events that differs from much of the other evidence adduced at trial, may be summarized as follows. After arguing with Bruemmer, the victim initiated the fight with the defendant by pushing him and then punching him in the face as the defendant was trying to leave the restaurant. The defendant fell to the floor, and the victim jumped on him and continued to punch him. While the two men were struggling, the defendant pulled out his handgun, pointed it at the victim and stated, "[S]top or I'll shoot . . . ." The victim then grabbed the defendant's gun but was unable to wrest it away from him. The victim then disengaged from the defendant, who holstered his gun and ran into the kitchen. The defendant initially thought that he would flee the restaurant but decided not to do so because he was concerned about Bruemmer's whereabouts and safety.

Immediately thereafter, the defendant observed that the victim had entered the kitchen and was "coming after" him. The defendant again pulled out his handgun, aimed it at the victim and told him to stop or he would shoot. The victim continued, however, to move toward the defendant, who observed the victim reaching for something behind his back. Believing that the victim was reaching for a gun, the defendant repeatedly shot the victim from a distance of approximately fifteen to twenty feet. After firing all five of the bullets in his gun, the defendant holstered his gun and stepped away.

The state adduced evidence tending to contradict the factual foundation of the defendant's claim of self-

[The victim] then fell to the floor. When the gun was empty I holstered it and stepped away. Then I saw that some of his friends [were] coming into the kitchen. I was approximately 15 to 20 feet away from [the victim] when I fired the shots."

The defendant also had repeated the substance of this statement in several letters that he sent to Bruemmer. Those letters also were introduced into evidence.

defense. In particular, the state's evidence undermined the veracity of the defendant's version of the incident as reflected in his written statement. First, testimony of certain state's witnesses that the defendant walked over to the bar and placed a gun to the victim's head or neck contradicted the defendant's assertion that the victim had initiated the altercation. Indeed, the defendant did not acknowledge that he had pulled out his gun when he first approached the victim; according to the defendant, he unholstered his gun only after the victim physically had assaulted him. Second, the evidence adduced by the state established that, contrary to the defendant's statement, he did not holster his gun until after he had left the bar area and proceeded into the kitchen. Third, several witnesses testified that they had heard the victim make a statement as he entered the kitchen and approached the defendant, but there was no evidence to corroborate the defendant's assertion that he had warned the victim that he would shoot him if the victim continued to move toward him. Four, the state presented forensic evidence that the defendant was approximately two to three feet from the victim when he fired at him, rather than fifteen to twenty feet away as the defendant had asserted in his statement.

The state also adduced evidence that the defendant was approximately fifteen feet from a door leading to the outside of the restaurant when the victim confronted him in the kitchen. McKnight, who was in the kitchen when the defendant fired at the victim, testified that the defendant could have "gotten out of the kitchen if he wanted. He was right over by the door." Officer Brian Bishop of the Danbury police department, who arrived at the scene soon after the shooting, noted that the door was open.[10]

[10] Officer Bishop testified that "[t]here was a screen door and . . . an interior door which was open. The screen door was closed, but the interior door was open."

Moreover, no witness ever observed the victim in possession of a gun, and no such gun was found, either on the victim's person or elsewhere. In addition, Dennis Keeler, who returned to the kitchen moments after the shooting, testified that he did not see anyone remove anything from the victim's person. Bishop, who transported the defendant to the police station and who was present during the booking process, testified that the defendant never inquired about whether the victim's weapon had been recovered. Furthermore, McKnight's testimony regarding the defendant's calm demeanor when he shot the victim cast doubt on the defendant's assertion that he feared that the victim was reaching for a gun as he approached the defendant. Finally, the testimony that the defendant fired one shot, paused briefly, and then fired four more shots; see footnote 5 of this opinion; three of which struck the victim in the back, also undermined the defendant's claim that he used only the amount of force necessary to repel an imminent and potentially deadly attack by the victim.

With this evidentiary background in mind, we turn to the well established legal principles that guide our analysis of the defendant's claim. With respect to the standard of review, "we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence [disproved the defendant's claim of self-defense] beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Murphy*, 254 Conn. 561, 575, 757 A.2d 1125 (2000).

The law of self-defense is equally well settled.[11] "Pursuant to § 53a-19 (a)[12] . . . a person may justifiably use

[11] We note that the defendant does not challenge the propriety of any aspect of the trial court's instructions on self-defense.

[12] See footnote 6 of this opinion for the relevant text of § 53a-19.

deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack. . . . We repeatedly have indicated that the test a jury must apply in analyzing the second requirement, i.e., that the defendant reasonably believed that deadly force, as opposed to some lesser degree of force, was necessary to repel the victim's alleged attack, is a subjective-objective one. . . .

"The subjective-objective inquiry into the defendant's belief regarding the necessary degree of force requires that the jury make two separate affirmative determinations in order for the defendant's claim of self-defense to succeed. First, the jury must determine whether, on the basis of all of the evidence presented, the defendant in fact had believed that he had needed to use deadly physical force, as opposed to some lesser degree of force, in order to repel the victim's alleged attack. . . . The jury's initial determination, therefore, requires the jury to assess the veracity of witnesses, often including the defendant, and to determine whether the defendant's account of his belief in the necessity to use deadly force at the time of the confrontation is in fact credible. . . .

"If the jury determines that the defendant [did] not [believe] that he . . . needed to employ deadly physical force to repel the victim's attack, the jury's inquiry ends, and the defendant's self-defense claim must fail. If, however, the jury determines that the defendant in fact had believed that the use of deadly force was necessary, the jury must make a further determination as to whether that belief was reasonable, from the perspective of a reasonable person in the defendant's circumstances. . . . Thus, if a jury determines that the defendant's honest belief that he had needed to use

deadly force, instead of some lesser degree of force, was not a reasonable belief, the defendant is not entitled to the protection of § 53a-19." (Citations omitted; internal quotation marks omitted.) *State* v. *Prioleau*, 235 Conn. 274, 285–87, 664 A.2d 743 (1995).

Furthermore, under General Statutes § 53a-19 (b), a person is not justified in using deadly physical force "if he knows that he can avoid the necessity of using such force with complete safety (1) by retreating . . . ." Thus, a defendant who raises a claim of self-defense is required to retreat in lieu of using deadly physical force if the state establishes beyond a reasonable doubt that a completely safe retreat was available and that the defendant actually was aware of it. See, e.g., *State* v. *Ash*, 231 Conn. 484, 492, 651 A.2d 247 (1994).

The defendant essentially contends that, because his claim of self-defense was reasonable, the jury could not have concluded that the state disproved his claim beyond a reasonable doubt. Contrary to the defendant's contention, the relevant inquiry is not whether the jury reasonably could have found that the defendant acted in self-defense, but, rather, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. See, e.g., *State* v. *Murphy*, supra, 254 Conn. 576. Applying this standard, we conclude that the evidence was sufficient to support the jury's finding, implicit in its verdict, that the state had disproved the defendant's claim of self-defense beyond a reasonable doubt.

First, evidence adduced by the state undermined the credibility of the defendant's assertion that he believed that the use of deadly physical force against the victim was necessary because he feared that the victim was going to shoot him. The defendant claimed that he had fired at the victim because he thought that the victim was reaching behind his back for a gun. The victim never brandished or displayed a gun on the evening of

the shooting, however, nor did he otherwise indicate that he was in possession of a gun. Indeed, no such gun was recovered. Furthermore, the defendant did not ask the police if the victim had a gun or if one had been recovered. In addition, the defendant's calm demeanor when he fired the shots that killed the victim suggests that he was not afraid that the victim was reaching for a gun. Finally, no other witness corroborated the defendant's assertion, contained in his written statement, that he saw the victim reach behind his back as he moved toward the defendant. In light of the foregoing, the jury reasonably could have rejected the defendant's contention that he believed that the victim was reaching for a gun and that he was in imminent danger of being shot.

Even if the jury found that the defendant did believe that the victim was about to use deadly force and that such force was necessary to repel the victim's attack, the evidence adduced by the state was sufficient to permit the jury to find that the defendant's subjective belief nevertheless was not objectively reasonable. Even if it is assumed that the jury credited the defendant's assertion that the victim was reaching behind his back as he approached the defendant, that fact alone is not so compelling as to require the conclusion that the defendant's belief that the victim possessed a gun was objectively reasonable. As we have explained, there was no evidence to suggest that the victim was armed. Nor was there any evidence to indicate that the victim routinely carried a weapon and, if so, that the defendant knew that. Indeed, the jury reasonably could have concluded that it was not reasonable for the defendant to have believed that the victim was reaching for a gun because it is highly likely that the victim, if armed, would have been holding the gun when he entered the kitchen to confront the defendant who, as the victim well knew, was armed.

The evidence adduced at trial also established that three of the four bullets that struck the victim entered through his back. Because the victim could not have been shot in the back while he was advancing *toward* the defendant, the jury reasonably could have inferred that the defendant should have held his fire rather than have shot all five bullets at the victim. Indeed, several witnesses testified that the first shot was followed by a slight delay and then a volley of four more shots. This evidence supported a finding that the defendant safely could have stopped firing, but elected not to do so, even though the victim no longer posed a threat because, with his back facing the defendant, he was not in a position to shoot at or otherwise injure the defendant. Consequently, the jury reasonably could have found that the defendant's actions were excessive and beyond those reasonably necessary to repel any attack. See *State* v. *Maselli*, 182 Conn. 66, 73, 437 A.2d 836 (1980) (even though defendant believed that victim was armed and aiming gun at him, jury nevertheless reasonably could have found that defendant's act of shooting victim eight times at point blank range constituted gross deviation from standard of conduct of reasonable person in same circumstances), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981).

In addition to his contention that he shot the victim because he believed that the victim was going to shoot him, the defendant also predicated his claim of self-defense on his purported fear of being beaten to death by the victim. There is nothing in the defendant's statement, however, to substantiate his claim that he was afraid of another *physical* altercation with the victim,[13] and the record otherwise is devoid of any such proof. Moreover, although the victim was approximately six

[13] The letters that the defendant sent to Bruemmer; see footnote 9 of this opinion; also contained no mention of the defendant's purported fear of being beaten by the victim.

feet, two inches tall and 230 pounds, the defendant himself is approximately six feet, five inches tall and weighed about as much as the victim. Thus, the defendant was not at a physical disadvantage vis-á-vis the victim. In light of the absence of any persuasive evidence to support the defendant's contention that he was fearful that the victim was about to inflict great bodily harm, the jury was free to reject that claim of self-defense.

Furthermore, even if the jury found that the defendant actually believed that the victim was about to inflict great bodily harm upon him, the jury also could have found, in view of the dearth of evidence to support such a belief, that the defendant's concern about an imminent and severe physical beating was not objectively reasonable. Although the two men had fought moments earlier, the altercation did not last long, and it did not result in any serious injuries either to the defendant or to the victim. In fact, when the defendant had been asked if he wanted immediate medical attention after the fight, he smiled and indicated that he did not need any assistance. In the absence of any indication that the victim intended to inflict great bodily harm on the defendant, the jury reasonably could have found that any subjective belief that the defendant may have harbored regarding the victim's intent to inflict such great bodily harm was not also reasonable.

Finally, the jury reasonably could have concluded that the defendant was not entitled to prevail on his claim of self-defense because he knew that he could have retreated without jeopardizing his "complete safety . . . ." General Statutes § 53a-19 (b). McKnight testified that the defendant was standing near a door when the victim entered the kitchen. Indeed, the defendant acknowledged in his written statement that he "was going to run out the door," but decided not to out of concern for Bruemmer. The

jury was not obligated, however, to accept the defendant's justification for deciding not to leave in order to avoid any further conflict with the victim because, among other reasons, there was nothing to suggest to the defendant that Bruemmer was in any danger. Therefore, the jury reasonably could have concluded that, because the defendant knew that he could have exited the restaurant in complete safety after his physical altercation with the victim, his use of deadly physical force against the victim was not justified.[14]

For all of the foregoing reasons, the jury was not bound to accept the defendant's claim of self-defense. Contrary to his contention, therefore, the defendant was not entitled to an acquittal under § 53a-19 as a matter of law.

II

The defendant next contends that the trial court improperly excluded expert testimony in violation of his sixth amendment right to present a defense. We disagree.

The following additional facts and procedural history are relevant to this claim. At trial, the state sought to undermine the defendant's claim of self-defense by attacking the veracity of certain key assertions that the defendant had made in his written statement to police, including his assertion that, contrary to the forensic evidence, he had shot the victim from a distance of

[14] The state also claims that the jury reasonably could have rejected the defendant's claim of self-defense because the evidence supported a finding that the defendant was the initial aggressor and that he did not withdraw from his encounter with the victim upon effectively communicating to the victim his intent to do so. See General Statutes § 53a-19 (c). We do not reach this contention in light of the other reasons, which we set forth in the text of this opinion, why the jury properly could have rejected the defendant's claim of self-defense.

fifteen to twenty feet.[15] The state also relied on a videotape of the defendant that had been taken at the police station subsequent to his arrest. On that videotape, the defendant asserted, among other things, that he had spent four years in the United States Marine Corps during which he achieved the rank of lieutenant and was an instructor in marksmanship. At trial, however, the state introduced evidence establishing that the defendant, in fact, had spent only two months in the Marine Corps before being discharged from boot camp.

The defendant thereafter sought to introduce the testimony of Arthur Taub, a neurologist and neuroscientist,[16] to explain, inter alia, that the inaccuracies in the defendant's assertions regarding the extent of his service in the Marine Corps and his distance from the victim immediately before he shot him likely were due to certain head injuries that the defendant had sustained during his altercation with the victim. Outside the presence of the jury, Taub testified that he had reviewed photographs of the defendant taken after the shooting, as well as the videotape of the defendant taken at the police station.[17] Taub further testified that, on the basis of the defendant's head and facial injuries as depicted in the photographs and on the basis of the defendant's behavior as depicted in the videotape, the defendant

[15] As we previously have indicated; see part I of this opinion; forensic evidence introduced by the state established that the defendant was only two to three feet from the victim when the defendant shot him.

[16] A neurologist is a physician who specializes in the diagnosis and treatment of diseases of the nervous system, including the brain. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 833. A neuroscientist is a scientist who studies the function of the nervous system. See id., p. 834. In addition to a doctorate degree in medicine, Taub also has a PhD in neuroscience.

[17] In preparing his testimony, Taub also reviewed the defendant's statement to police, police reports, the testimony of various police officers, the statements and testimony of a number of eyewitnesses, a "criminalistics" report, the autopsy report and the forensic pathologist's testimony. Taub never interviewed or personally examined the defendant, however.

likely had suffered a concussion as a result of his altercation with the victim.

Taub also testified that a concussion can result in memory loss. Taub explained that a person who suffers a concussion and concomitant memory loss may "confabulate" or create a story to replace the missing memory. According to Taub, a person who engages in such post-traumatic confabulation is not lying; rather, he actually believes that his recollection of the events is accurate.[18]

On the basis of Taub's review of the videotape, Taub testified that the defendant had exhibited signs of confabulation, hyperemotionality and volubility following his arrest. According to Taub, these manifestations were suggestive of an injury consistent with a concussion. In particular, Taub testified that the defendant's claims regarding the extent of his involvement in the Marine Corps constituted a "striking" example of post-traumatic confabulation. Taub also testified that the concussion that the defendant purportedly sustained

[18] Taub explained the defendant's statements about his Marine Corps experience as follows: "[T]hat sort of statement, which can be checked [for accuracy] almost instantaneously, and being grossly incorrect, is, to me, an example of confabulation. And what happens is that individuals who have been injured, not understanding . . . precise[ly] . . . what has [transpired] before[hand], try to make sense of it, and use various kinds of schemes or programs that they already have which may be unrelated entirely to what is going on, and simply say it. And you see this in the hospital all the time. I mean, you will interview people and you will ask them, Did I see you in the bar last night? And, at first, they will not be clear. And then they will develop an entire story and build that story around a little kernel of some sort of memory or scheme that they have. And, to me, [the defendant's exaggeration of the nature of his involvement in the Marine Corps] was a striking example . . . of post-traumatic confabulation." Another expert witness in an unrelated case described confabulation as "a mental defect where[by] someone who has a poor or missing memory thinks that they have a memory and will tell you what happened when it didn't. . . . It is a false memory. It is not a lie. It is a belief the patient has which simply has no basis in fact." (Internal quotation marks omitted.) *State* v. *Kaddah*, 250 Conn. 563, 571–72, 736 A.2d 902 (1999).

likely caused the defendant's misperception regarding the actual distance between him and the victim when he shot the victim.

At the conclusion of Taub's voir dire testimony, defense counsel stated that she also intended to elicit testimony from Taub regarding the cognitive difficulties that the defendant had experienced following the altercation with the victim. Defense counsel further stated that Taub "would also testify to some of the discrepancies in the case that arise from the allegations by the state with respect to the [defendant's written] statement . . . [a]s well as [to] remarks that [were] made [by the defendant] on the videotape . . . [including those with respect to] distance, timing, that type of thing." Finally, defense counsel reiterated that the state had "opened the door [to such testimony] by putting in issue the question of whether . . . the remarks on the tape and the remarks [contained in] the statement are truthful or are false."

After hearing Taub's voir dire testimony and defense counsel's proposed supplemental proffer, the court concluded that Taub indeed was qualified as an expert in the fields of neurology and head injuries and that his knowledge in those areas was beyond that of the average juror. The court nevertheless initially denied defense counsel's request for permission to call Taub as a witness.[19] The court noted that Taub's testimony likely would mislead and confuse the jury.

Thereafter, the court reconsidered its ruling and permitted Taub to testify about the effect of the defendant's

[19] We note that the assistant state's attorney did not object to defense counsel's use of Taub's testimony insofar at it related to the defendant's memory and to his ability to perceive and recall distances. The state did object, however, to testimony by Taub concerning the effect of the defendant's injuries on his general cognitive abilities. In particular, the state claimed that such testimony necessarily would be speculative in view of the fact that Taub never had examined or interviewed the victim personally, either immediately following the shooting or at any time thereafter.

purported concussion on his ability to perceive distances accurately. The court nevertheless limited the substance of Taub's testimony to the foregoing issue and, thus, prohibited Taub from testifying about the effect of the concussion on the defendant's memory and cognitive abilities in general. Accordingly, Taub thereafter testified in the presence of the jury that the defendant had "suffered, at the least, a mild concussion," and that such an injury "would [have] significantly interfere[d] with" the defendant's ability to determine distances accurately and with his "ability to recall whether or not [he] had made such a distinction earlier."

Before addressing the merits of the defendant's claim, we review the legal principles that govern our review. "The federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies."[20] (Citation omitted; internal quotation marks omitted.) *State* v. *Cerreta*, 260 Conn. 251, 260–61, 796 A.2d 1176 (2002).

"A defendant is, however, bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he

[20] "The right to compulsory process is fundamental to due process of law and is applied to state prosecutions through the due process clause of the fourteenth amendment. *Washington* v. *Texas*, 388 U.S. 14, 18–19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)." *State* v. *Cerreta*, 260 Conn. 251, 261 n.8, 796 A.2d 1176 (2002).

wishes." (Internal quotation marks omitted.) *State* v. *Dehaney*, 261 Conn. 336, 366, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003). Thus, a defendant's right to present a defense is not violated when a trial court properly excludes expert testimony pursuant to the applicable rules of evidence. See, e.g., *State* v. *Billie*, 250 Conn. 172, 181–82, 738 A.2d 586 (1999). "Expert testimony should be admitted [however] when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 392, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002); see also Conn. Code Evid. § 7-2.

"[Of course, a predicate to the admissibility of such testimony is its relevance to some issue in the case.] Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter." (Internal quotation marks omitted.) *State* v. *Wargo*, 255 Conn. 113, 123–24, 763 A.2d 1 (2000); see also Conn. Code Evid. § 4-1. We now turn to the defendant's claim.

The defendant contends that the testimony that he was barred from eliciting from Taub was crucial to the jury's assessment of the credibility of his claim of self-defense and, therefore, the court's exclusion of that evidence violated his constitutional right to present a defense. In particular, the defendant contends that,

although the trial court permitted Taub to testify both that the defendant had suffered a concussion and that that concussion had affected his ability to perceive distances, the court improperly prohibited Taub from testifying about the "effects of the concussion on [the defendant's] other perceptions" and "on his ability to accurately recall what [had] happened in the kitchen . . . ." The defendant also claims that he was entitled to have Taub explain to the jury that the defendant's false statements about his service in the Marine Corps were the product of post-traumatic confabulation stemming from the head injuries that he had sustained during his fight with the victim.[21] We reject the defendant's claims.

With respect to the defendant's first contention, we conclude that it was not adequately preserved at trial and that it has not been briefed adequately on appeal. With the exception of two statements by the defendant, namely, the assertion contained in his written statement regarding his distance from the victim when he shot him, and his assertion, as depicted on the videotape,

[21] On appeal, the defendant also claims that Taub would have testified regarding the "neurological effects of life-threatening stress, separate from the effects of the concussion . . . ." The state contends that the defendant failed to raise this claim in the trial court and, therefore, we should not consider it. See Practice Book § 60-5. The defendant counters that the claim adequately was preserved by virtue of defense counsel's statement, made in connection with her offer of proof relating to Taub's testimony, that Taub would testify about "some of the physiological changes in the body, the things that actually happen in the body [following a blow to the head], the [endocrinological] changes, [the defendant's] physiological changes. [Taub] would also testify as to the repetitive body functions and its association and relationship to head injur[ies]." We agree with the state that defense counsel's statements in this regard were not sufficiently clear and specific to alert the court that defense counsel intended to elicit testimony from Taub regarding the likely effect of stress on the defendant. Because the defendant failed to identify the purpose of the proffered evidence adequately so that the court could determine its admissibility, we decline to review the defendant's claim. See, e.g., *Burns* v. *Hanson*, 249 Conn. 809, 824, 734 A.2d 964 (1999).

regarding the extent of his service in the Marine Corps, the defendant failed to inform the trial court how Taub's testimony related to any other of his postarrest assertions or to his conduct after his fight with the victim. On appeal, the defendant likewise has failed to identify any such statement or conduct that resulted from or was affected by his purported cognitive impairment and loss of memory. Indeed, other than the defendant's assertions regarding the distance from which he shot the victim and his service in the Marine Corps, most, if not all, of the defendant's postarrest statements were consistent with his self-defense claim, and defense counsel relied on those statements in advocating that claim during her closing argument to the jury.

With respect to the trial court's ruling barring Taub's testimony rationalizing the defendant's grandiose statements about his Marine Corps service as a product of post-traumatic confabulation, we are not persuaded that the exclusion of that evidence violated the defendant's constitutional right to present a defense. Even if we assume, arguendo, that the court improperly excluded that testimony, we still must determine whether the impropriety rises to the level of a constitutional violation. E.g., *State* v. *Sandoval*, 263 Conn. 524, 546, 821 A.2d 247 (2003). "Whether a trial court's erroneous restriction of a defendant's or defense [witness'] testimony in a criminal trial deprives a defendant of his [constitutional] right to present a defense is a question that must be resolved on a case by case basis. . . . The primary consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial." (Citation omitted; internal quotation marks omitted.) Id.

In the present case, the defendant's theory of defense was justification. Thus, defense counsel sought to elicit Taub's testimony about confabulation to rebut the

state's claim that the defendant's false statements regarding his military experience undermined the credibility of his claim of self-defense. We conclude that the defendant's postarrest exaggeration of his Marine Corps experience was not central to his defense. The defendant's military service was wholly unrelated to the only disputed issue in the case, namely, whether the defendant had shot the victim in self-defense. It is true, of course, that the jury's resolution of that issue depended, to some extent, on its assessment of the credibility of the defendant's written statement. The primary measuring stick for the jury, however, was not whether the defendant had exaggerated the nature and extent of his military service, but, rather, whether the defendant's version of the facts as set forth in his written statement was believable in light of the contradictory evidence adduced by the state. Moreover, although Taub's testimony was limited to the defendant's perception and short-term memory of distances, the jury was apprised that, in Taub's view, the defendant had suffered a concussion that significantly had impaired his cognitive ability and his ability to recall. Consequently, we are not persuaded that the trial court's ruling barring Taub's testimony regarding the defendant's purported confabulation, even if improper, rises to the level of a constitutional violation.

In light of our conclusion that any impropriety in the exclusion of such testimony was not of constitutional dimension, the defendant nevertheless is entitled to reversal of his conviction if he can establish that the exclusion was both improper and harmful. See, e.g., *State* v. *Young*, 258 Conn. 79, 94–95, 779 A.2d 112 (2001). "As we recently have noted, we have not been fully consistent in our articulation of the standard for establishing harm. . . . One line of cases states that the defendant must establish that it is more probable than not that the erroneous action of the court affected the

result. . . . A second line of cases indicates that the defendant must show that the prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict." (Citations omitted; internal quotation marks omitted.) Id., 95. For purposes of the present case, we need not choose between the two formulations because, even if we assume that the trial court improperly limited Taub's testimony, we conclude that the defendant has not satisfied his burden of proving harm under either formulation.

As we have explained, the defendant's false statements about his military service related only to the defendant's overall credibility and, consequently, those statements bore only tangentially on the defendant's claim of self-defense. In addition, the jury had considerable evidence before it that related directly to the issue of whether the defendant had shot and killed the victim in self-defense, or whether, as the state maintained, the use of deadly force was unnecessary. Finally, the excluded testimony would have had little or no impact on the strength and credibility of the state's case, which included forensic evidence that the defendant had shot the victim three times in the back. We conclude, therefore, that the defendant has failed to demonstrate that the exclusion of Taub's testimony regarding the defendant's purported confabulation of the extent of his service in the Marine Corps was harmful.[22]

[22] The defendant also contends that Taub would have testified about the defendant's allegedly hyperemotional behavior and volubility as depicted on the videotape. The defendant has failed to explain, however, why such testimony was relevant or how its exclusion, if improper, harmed him. In the absence of any such explanation, the defendant cannot prevail on his claim.

III

The defendant finally contends that constitutional principles of double jeopardy[23] barred his retrial. We disagree.

Certain additional facts and procedural history are relevant to this issue. The defendant initially was tried for murder in 1999 (first trial). Following the presentation of evidence in the first trial, the court, *Moraghan, J.*, instructed the jury on the law. In the course of its charge, the court instructed the jury on the lesser included offenses of manslaughter in the first degree with a firearm and criminally negligent homicide. In accordance with our decision in *State* v. *Sawyer*, 227 Conn. 566, 630 A.2d 1064 (1993),[24] the trial court also informed the jury that it could consider a lesser included offense only after first finding the defendant not guilty of the greater offense.[25] On February 15, 2000, the case was submitted to the jury.

[23] The fifth amendment to the United States constitution provides in relevant part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The double jeopardy clause of the fifth amendment is applicable to the states through the due process clause of the fourteenth amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

[24] In *State* v. *Sawyer*, supra, 227 Conn. 579, we held that, to ensure that the greater offense has been determined by unanimous agreement, the court is required to instruct the jury to reach a unanimous decision on the issue of guilt or innocence with respect to that greater offense before considering any lesser included offense.

[25] In elaborating on the proper sequence in which the jury was to consider the defendant's culpability for murder and the lesser included offenses, the court, *Moraghan, J.*, instructed the jury in relevant part: "So, there are three possible charges that you can consider. The first is murder. And if you find the defendant guilty of murder, you'll go no farther . . . . If you find he is not guilty of murder, then you will consider manslaughter in the first degree with a firearm. . . . If you find him not guilty of that, then you go under criminally negligent homicide. But if you find murder, you'll stop there. . . . If you don't find it, you'll consider manslaughter in the first degree and if you find manslaughter in the first degree, you'll stop there. If you don't find manslaughter in the first degree with a firearm, obviously, it has to be with a firearm in this case, then you go to criminally negligent homicide."

On February 16, 2000, the court received a note from the jury inquiring as to whether it would be permissible to consider a lesser included offense even though there was no unanimous agreement on the greater charge, namely, murder.[26] The trial court responded that the jury could not consider a lesser included offense unless and until all of the jurors have reached a verdict of not guilty on the greater offense. Thereafter, the jury requested that the court repeat its instructions on manslaughter.

On February 18, 2000, the jury asked for clarification regarding the element of intent.[27] Later that same day, the jury sent out two more "questions":[28] (1) "The jurors are not following instructions, we're deadlocked"; and (2) "We're deadlocked." The trial court apprised the jury that it was required to follow the court's instructions and indicated that the jury would be excused for the day. Before leaving for the day, however, the jury sent out yet another note stating that a "a final vote" had been taken and that the jurors were "hopelessly deadlocked." The court then excused the jury until February 22, 2000. Immediately thereafter, defense counsel requested, in accordance with a written motion filed with the court, that, if the jurors remained deadlocked, the court poll the jurors on whether any partial verdict had been reached.

On February 22, 2000, the court admonished the jury that it was bound to follow the court's instructions on the law. The trial court also gave the jury a "Chip Smith"

[26] In the first trial, the court received a total of twenty-seven notes from the jury during the course of jury deliberations. We refer only to those notes that are relevant to the defendant's double jeopardy claim, however.

[27] The jury also asked whether there is a distinction between intent and premeditation.

[28] The court characterized them as questions even though they were of an assertive nature.

charge.[29] That same day, the jurors informed the court by note: "The majority of the jurors believe one way on the charge of murder [and] a minority of the jurors believe otherwise. We understand your instructions. We . . . agree that unanimity is not going to be achieved." The trial court instructed the jurors to return to their deliberations and to attempt to "reach some other result rather than an impasse." A juror subsequently requested to be excused from service. After consulting with counsel, and without objection, the trial court denied the juror's request.

On February 23, 2000, defense counsel moved for a mistrial, claiming that the various notes from the jury indicated that the jurors were deadlocked and that they would not be able to reach a unanimous verdict. The defendant also noted that the deliberations apparently were taking a toll on at least one juror. The state objected to the defendant's motion, noting that the jury actually had been deliberating for only a relatively short period of time. The trial court denied defense counsel's motion.

On February 25, 2000, the court received a note from a single, unidentified juror stating, "We're still not reaching agreement. I and several others feel we will not reach a unanimous decision. I am asking to be released [from] this task." The trial court denied the request and reminded the jurors of their "oath to reach a verdict or a result, whichever the case may be," adding, apparently for emphasis, that "that will happen." The trial court further stated that "[n]o one is going to be released from this jury. Don't ask again. Don't mention it again

[29] "A Chip Smith instruction reminds the jurors that they must act unanimously, while also encouraging a deadlocked jury to reach unanimity. See *State* v. *Smith*, 49 Conn. 376 (1881); see also 5 Connecticut Practice, D. Borden & L. Orland, Connecticut Criminal Jury Instructions (1986) § 4.8." (Internal quotation marks omitted.) *State* v. *Pare*, 253 Conn. 611, 616 n.4, 755 A.2d 180 (2000).

because it is not going to happen." Defense counsel renewed his motion for a mistrial on the ground that the jury was deadlocked. Although the trial court did not expressly address the defendant's renewed motion for a mistrial, the court instructed the jury to resume its deliberations, thereby effectively denying defense counsel's renewed motion.

On February 28, 2000, the defendant filed a written motion for a mistrial. In his motion, the defendant claimed that the court's admonition to the jury that it was "to reach a verdict or a result," along with the court's comment that "[n]o one is going to be released from this jury," was coercive and created an unreasonable risk of depriving him of a fair trial. Additionally, the defendant stressed that the jury was deadlocked. The next day, February 29, 2000, the trial court entertained argument on the defendant's motion. Defense counsel contended that an "immediate mistrial" should be declared because the jury was deadlocked and because the court's remarks to the jury on the previous day were unduly coercive. The trial court denied the defendant's motion.

Later that day, the jury had yet another note delivered to the court. The note stated: "Your Honor, we've deliberated in earnest. We cannot come up with a unanimous verdict." Upon receipt of this note, the following colloquy occurred between counsel and the court:

"The Court: . . . At this point, it appears as though [the jury has] gone as far as [it] can go. We're not going to get a verdict. Do you want to be heard?

"[Defense Counsel]: I would just ask that if [the jurors] are unanimous on any count, such as the greater count of murder—

"[Assistant State's Attorney]: I would ask that they be given the Chip Smith charge, which the state submitted to the court, the second one.

"[Defense Counsel]: I would object to that, they've been—

"The Court: Well, as far as they can't agree [as] to any decision in any particular verdict, they can't. If they can't agree on murder, they don't go any further. If they can't agree on manslaughter, they don't go any further. It's not up to me to probe [as] to where they are. They can't agree. That's all there is to it. Bring them out please.

"It appears as though we have no choice but to declare a mistrial, unfortunately. Do you want to be heard on that, either one of you?

"[Defense Counsel]: No, Your Honor.

* * *

"[Assistant State's Attorney]: [I've already] spoken my piece on that, Your Honor."

The trial court then declared a mistrial and dismissed the jurors.

On March 2, 2000, the defendant filed a motion for judgment of acquittal on the murder charge. In support of the motion, the defendant claimed, inter alia, that he had become aware that the jury unanimously had agreed that he was not guilty of murder and merely had deadlocked on the charge of manslaughter in the first degree with a firearm. According to the defendant, therefore, constitutional principles of double jeopardy barred his subsequent retrial for murder. Defense counsel also averred at the hearing on the defendant's motion that the jury foreperson was prepared to testify that the jury had "taken a vote on the murder count and had found the defendant not guilty of murder." The trial court declined to receive testimony from the foreperson and denied the defendant's motion.

On August 1, 2000, the defendant filed an amended motion to dismiss the charge of murder.[30] The defendant claimed that the trial court had declared a mistrial without the requisite " 'manifest necessity' . . . ."[31] The defendant asserted that the trial court had neglected to consider all reasonable alternatives to a mistrial by virtue of its failure to poll the jury as requested. The defendant further claimed that the jury had acquitted him of the murder charge and, therefore, any subsequent retrial on that charge would violate his rights under the double jeopardy clause of the fifth amendment. The defendant also alleged that the jury had deadlocked on the charge of manslaughter with a firearm. The trial court, *Moraghan*, *J.*, concluded that the defendant had "acquiesced in the declaration of a mistrial" and, consequently, a finding of manifest necessity for the declaration of a mistrial was not necessary. Accordingly, on October 11, 2000, the trial court denied the defendant's amended motion to dismiss.

The next day, October 12, 2000, the state filed a substitute information charging the defendant only with the crime of manslaughter in the first degree with a firearm. The defendant filed no further motions to dismiss. The defendant subsequently was tried (second trial) and found guilty of that charge. Prior to sentencing, the defendant filed a motion in arrest of judgment, claiming, inter alia, that he was tried a second time in violation of his rights under the double jeopardy clause of the

[30] The defendant had filed an earlier motion to dismiss the murder charge, on grounds of double jeopardy, on March 10, 2000. On March 28, 2000, the court reserved decision on that motion until immediately prior to the defendant's retrial. The defendant appealed the court's refusal to entertain his motion to dismiss until that later date. This court granted the state's motion to dismiss that appeal on July 13, 2000.

[31] "[A] judge may declare a mistrial without the defendant's consent only if there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." (Internal quotation marks omitted.) *State* v. *Tate*, 256 Conn. 262, 286, 773 A.2d 308 (2001).

fifth amendment because the court, *Moraghan*, *J.*, had declared a mistrial in the first trial without a finding of manifest necessity. The trial court, *Holden*, *J.*, denied the motion, effectively concluding that the defendant had waived his double jeopardy claim by failing to challenge the substitute information prior to the conclusion of the second trial. The court, *Holden*, *J.*, thereafter rendered judgment in accordance with the jury verdict. With this background in mind, we turn to the relevant legal principles.

"The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. . . . As a part of this protection against multiple prosecutions, the Double Jeopardy Clause affords a criminal defendant a valued right to have his trial completed by a particular tribunal." (Internal quotation marks omitted.) *State* v. *Butler*, 262 Conn. 167, 174, 810 A.2d 791 (2002). Thus, when a defendant objects to the declaration of a mistrial and is unwilling to forgo his right to have the charges against him resolved by that particular tribunal, it is well settled that the court may declare a mistrial "only if there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." (Internal quotation marks omitted.) *State* v. *Tate*, 256 Conn. 262, 286, 773 A.2d 308 (2001). The requirement of manifest necessity ensures that a defendant's deprivation of his right to have the charges against him decided by that tribunal is subject to "the exercise of scrupulous judicial discretion." *State* v. *Aillon*, 182 Conn. 124, 129, 438 A.2d 30 (1980), cert. denied, 449 U.S. 1090, 101 S. Ct. 883, 66 L. Ed. 2d 817 (1981).

When the defendant consents to the declaration of a mistrial, however, there generally is no double jeopardy

bar to a retrial;[32] see *State* v. *Butler*, supra, 262 Conn. 174–75 ("[o]rdinarily, the prohibition against double jeopardy does not apply whe[n] a defendant has requested that a mistrial be declared"); *State* v. *Kasprzyk*, 255 Conn. 186, 205 n.19, 763 A.2d 655 (2001) ("[i]t is well established that whe[n] the defendant moves for, or consents to a mistrial, the defendant is prevented from raising a double jeopardy claim"); because a defendant, having consented to a mistrial, "is deemed to have deliberately elected to for[go] his valued right to have his guilt or innocence determined before the first trier of fact." (Internal quotation marks omitted.) *Aillon* v. *Manson*, 201 Conn. 675, 681, 519 A.2d 35 (1986). Consequently, because a defendant who consents to a mistrial is deemed to have waived that right, "no finding of manifest necessity for the declaration need be made." *State* v. *Aillon*, supra, 182 Conn. 129.

Relying primarily on this court's holding in *State* v. *Tate*, supra, 256 Conn. 262, the defendant claims that the second trial violated the double jeopardy clause because the trial court, *Moraghan*, *J.*, declared a mistrial without the requisite manifest necessity. In *Tate*, we held that a manifest necessity did not exist for the trial court's declaration of a mistrial without the consent of the defendant, James Tate. Id., 286–87. We concluded that because the trial court declined to poll the jury in accordance with Tate's request, it failed to explore all reasonable alternatives to the declaration of a mistrial. Id., 287. In the present case, we conclude that, because the defendant consented to the declaration of a mistrial,

[32] We note that there is an exception to this general rule when "prosecutorial or judicial overreaching is designed to provoke the defendant into asking for a mistrial, thereby avoiding an acquittal or affording the state another, perhaps more favorable, opportunity to convict . . . ." (Internal quotation marks omitted.) *State* v. *Butler*, supra, 262 Conn. 176. In the present case, the defendant does not claim that either the trial court or the assistant state's attorney improperly goaded him into seeking a mistrial. Accordingly, this exception to the general rule is inapplicable.

he cannot prevail on his claim that his second trial was barred by the double jeopardy clause.[33]

It is clear from the record that the defendant did not expressly object to the trial court's declaration of the mistrial. Therefore, the determinative issue is whether the defendant may be deemed to have consented to the trial court's declaration of the mistrial. Consent is to be determined from the totality of circumstances surrounding the declaration of the mistrial. See *State* v. *Kasprzyk*, supra, 255 Conn. 205 n.19 ("[c]ourts examine the totality of the circumstances surrounding the trial court's [declaration] of a mistrial to determine whether a defendant either expressly or impliedly consented to the mistrial"). On the basis of the totality of the circumstances, we conclude that the defendant consented to the trial court's declaration of the mistrial.

Although the defendant did not consent explicitly to the mistrial, he expressed no disagreement when the trial court indicated that the jury appeared to be unable to reach a verdict. In addition, after the trial court had made its intention to declare a mistrial clear and invited comment from both defense counsel and the assistant state's attorney, defense counsel raised no objection, indicating that he had nothing more to say on the matter. E.g., *United States* v. *Gantley*, 172 F.3d 422, 429 (6th Cir. 1999) (fact that defendant was "essentially invited" to offer objection and failed to do so weighs in favor of finding of consent); *United States* v. *Buljubasic*, 808 F.2d 1260, 1265–66 (7th Cir.) (invitation to object and

[33] The state contends that the defendant waived any double jeopardy claim he may have had regarding the manslaughter charge by failing to seek dismissal of that charge prior to the commencement of the second trial. The defendant contends that he did not waive his claim because he sought dismissal of the charge before the court had rendered judgment in accordance with the jury verdict of guilty. We need not reach this claim in light of our conclusion that the defendant consented to the trial court's declaration of the mistrial.

subsequent failure to do so weigh in favor of finding of assent to declaration of mistrial), cert. denied, 484 U.S. 815, 108 S. Ct. 67, 98 L. Ed. 2d 31 (1987). Furthermore, the record is devoid of any suggestion that defense counsel had failed to object because he was surprised by the trial court's ruling. See *United States* v. *DiPietro*, 936 F.2d 6, 11 (1st Cir. 1991) (in determining whether defendant consented to mistrial, court should consider whether defendant could have anticipated mistrial or, instead, was surprised by ruling). Indeed, in light of the defendant's own requests for a mistrial, it is clear that he was aware that a mistrial might be declared. Moreover, defense counsel had adequate time to reflect on the trial court's intention to declare a mistrial and to formulate an appropriate objection if he wished to do so. See *United States* v. *Palmer*, 122 F.3d 215, 219 (5th Cir. 1997) (factor to be considered in determining whether defendant consented to mistrial is whether defendant was afforded meaningful opportunity to respond to trial court's ruling); *United States* v. *Goldstein*, 479 F.2d 1061, 1066 (2d Cir.) (same), cert. denied, 414 U.S. 873, 94 S. Ct. 151, 38 L. Ed. 2d 113 (1973).

Furthermore, the defendant himself repeatedly had moved for a mistrial. Each such occasion constituted an acknowledgment by the defendant that he believed that a mistrial was warranted and that he was prepared to relinquish his right to have the charges against him resolved in the first trial. In fact, on the very same day that the mistrial was declared, the defendant himself had sought an "immediate mistrial" on the ground that any verdict would be the product of judicial coercion, and there is no indication in the record that the defendant had retreated from this position.[34] See *United*

[34] Contrary to the defendant's claim, the fact that his motion for a mistrial was predicated on a claim of judicial coercion rather than juror deadlock does not militate against the conclusion that his motion was indicative of his consent to a mistrial. See *State* v. *Knight*, 616 S.W.2d 593, 596–97 (Tenn.) (fact that defendant's motion for mistrial was based on different ground

States v. *Goldstein*, supra, 479 F.2d 1067 (that defendant previously moved for mistrial weighed in favor of finding of consent even though defendant's motion had been denied and record contained indication that defendant had changed his mind); cf. *United States* v. *Buljubasic*, supra, 808 F.2d 1265 (factor to consider is whether defendant indicates that he or she no longer sought mistrial).

The only fact that weighs in the defendant's favor is defense counsel's request that the jurors be polled to determine whether they had reached a partial verdict. This request was not accompanied by an objection to the declaration of a mistrial, however. Furthermore, once the trial court denied the defendant's request to poll the jurors and clearly indicated that it intended to declare a mistrial, the defendant did not object even though the trial court invited defense counsel to register any objection he may have had to the declaration of a mistrial. Thus, the record does not substantiate the defendant's claim that the court's failure to poll the jury necessarily vitiated his consent to the mistrial.

Finally, and importantly, the defendant himself had sought a mistrial on the ground that the jury had reached a verdict of not guilty *on the murder charge*. At no time did the defendant claim that the jury had reached such a verdict on the charge of manslaughter in the first degree with a firearm. In fact, the defendant represented, in connection with his amended motion to dismiss, which he filed after the declaration of the mistrial but before the second trial had commenced, that he had learned that the jury unanimously had found him not guilty of murder *and had deadlocked on the lesser charge of manslaughter in the first degree with a fire-*

than that relied on by court in declaring mistrial was irrelevant to issue of whether defendant consented to mistrial inasmuch as defendant's motion reflected willingness to give up right to have case decided by jury already impaneled), cert. denied, 454 U.S. 1097, 102 S. Ct. 670, 70 L. Ed. 2d 638 (1981).

arm. The defendant's acknowledgment that the jury had deadlocked on the manslaughter charge necessarily constituted a concession that the jury had not reached a verdict on that charge. In such circumstances, the court's failure to poll the jury on the charge of manslaughter in the first degree with a firearm could not have harmed the defendant and, in view of his own requests for a mistrial, there is no reason to believe that the defendant did not consent to the trial court's declaration of the mistrial.

In light of the foregoing, the defendant's only viable double jeopardy claim arises out of the court's failure to poll the jury in regard to the murder charge. The state, however, in the exercise of its discretion, elected not to retry the defendant for murder, thereby rendering moot any double jeopardy challenge to his retrial on that charge. Consequently, in light of this fact and the fact that the defendant consented to the trial court's declaration of the mistrial, he has no legitimate claim that he was prejudiced by the court's failure to poll the jury before declaring the mistrial.

The judgment is affirmed.

In this opinion the other justices concurred.

KEVIN DALEY *v.* WILLIAM MCCLINTOCK ET AL.
(SC 16979)

Borden, Norcott, Palmer, Vertefeuille and Zarella, Js.

Syllabus

The plaintiff, an employee of a telephone company, sought to recover damages for personal injuries he sustained when he was struck by a utility pole on which he was working as part of a road crew that was assigned to repair the pole following an accident. The defendant police officer, G, who had been assigned to control traffic at the accident scene, had left the worksite while the road crew was still doing the repair work. After G had left the site, a truck driven by M passed through the work area and snagged utility wires still attached to the pole, causing it to

strike the plaintiff. At trial, G called as a witness M, who testified that immediately prior to the accident he had observed that the road crew was not working but, rather, that they were standing on the side of the road drinking coffee. On cross-examination, the plaintiff impeached M with a written statement that he had given to an insurance investigator shortly after the accident, indicating that he had not seen any workers as he approached the worksite. Additionally, the plaintiff suggested that M had contrived his trial testimony after conferring with the G's attorney on the morning he took the witness stand. On redirect examination, over the plaintiff's objection, G was allowed to introduce M's deposition testimony that was taken four years after the accident had occurred and was consistent with his trial testimony. The jury returned a verdict for G, and the trial court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict. The plaintiff appealed claiming that the trial court abused its discretion in admitting M's deposition testimony as a prior consistent statement. *Held*:

1. G could not prevail on his claim that the plaintiff failed to articulate properly at trial the basis for his objection to the trial court's admission of the prior consistent statement, which precluded appellate review of the plaintiff's claim; a review of the record revealed that the plaintiff's objection to the admission of the evidence both at a sidebar and when the matter later was raised before the jury sufficiently alerted the trial court and G to the precise nature of the objection.
2. The trial court did not abuse its discretion in allowing G to introduce M's deposition testimony as a prior consistent statement to rehabilitate his credibility under § 6-11 (b) (3) of the Connecticut Code of Evidence, the plaintiff having impeached M's credibility on cross-examination with a prior inconsistent statement and having suggested that M had contrived his trial testimony after conferring with G's attorney that morning; the deposition testimony was not admitted for the truth of the matter asserted but, rather, for the limited purpose of rehabilitating M's credibility by establishing that he had given similar testimony before the alleged conversation with G's attorney had occurred.

Argued October 21, 2003—officially released January 20, 2004

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Ansonia-Milford, where the action was withdrawn as against the named defendant et al.; thereafter, the matter was transferred to the judicial district of Waterbury, Complex Litigation Docket, and tried to the jury before *McWeeny*, *J.*, against the defendant George Geane only;

verdict for the defendant George Geane; subsequently, the court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, and the plaintiff appealed. *Affirmed.*

Joel T. Faxon, with whom, on the brief, were *Michael A. Stratton* and *Michael R. Denison*, for the appellant (plaintiff).

James V. Somers, with whom were *Robert A. Rhodes* and, on the brief, *Stephen P. Fogerty*, for the appellee (defendant George Geane).

Opinion

NORCOTT, J. The sole issue in this appeal is whether the trial court abused its discretion by permitting the defendant George Geane[1] to use a prior consistent statement to rehabilitate a witness who had been impeached on cross-examination by a suggestion of recent contrivance and by a prior inconsistent statement. The case was tried before a jury, which returned a verdict in favor of the defendant. The plaintiff, Kevin Daley, appeals from the trial court's judgment rendered in accordance with the verdict,[2] claiming that: (1) the trial court abused its discretion in admitting the prior consistent statement; and (2) this abuse of discretion constituted harmful error. In response, the defendant contends that the trial court properly exercised its discretion in admitting the prior consistent statement. We agree with the defendant, and we affirm the judgment of the trial court.

[1] The plaintiff originally brought a negligence action for personal injuries against the following defendants: George Geane, William McClintock, Anthony Cuzzo, Eagle Leasing Company, the town of Orange, Sorenson Trucking Company, Michael Okrent and Elliot Okrent. Prior to trial, the plaintiff settled his claims against every defendant with the exception of Geane and, therefore, he is the only defendant in this appeal.

[2] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

The record reveals that the jury reasonably could have found the following facts. On May 15, 1993, a one car accident caused extensive damage to a utility pole in Orange, and left the attached utility lines hanging low over the roadway. The plaintiff, along with several other Southern New England Telephone Company (telephone company) employees, was dispatched by the telephone company to reset the pole and fix the wires. The defendant, a police officer for the town of Orange, was assigned to monitor traffic at the worksite. Prior to the completion of the road crew's work, the defendant left the worksite. After the defendant had departed, a tractor trailer driven by William McClintock passed by the worksite and snagged the overhanging utility wires. The resulting tension caused a utility pole to come crashing down on the plaintiff, causing him severe physical injury.

At trial, the defendant introduced testimony from McClintock as to the location of the telephone company road crew at the time of the accident. On cross-examination, the plaintiff impeached McClintock's testimony through a prior inconsistent statement and through a suggestion of recent contrivance. See footnote 6 of this opinion. On redirect examination, the defendant, over the objection of the plaintiff, was allowed to introduce a prior consistent statement given by McClintock in order to rehabilitate his credibility. The prior consistent statement was McClintock's testimony in a deposition that had been taken four years after the accident had occurred, while he was named as a defendant in the present case. See footnote 1 of this opinion. At the conclusion of the trial, the jury returned a verdict for the defendant. The trial court accepted the jury's verdict, denied the plaintiff's motion to set aside the verdict, and rendered judgment in accordance with the verdict. This appeal followed.

We begin by setting forth the applicable standard of review. "It is well settled that the trial court's evidentiary rulings are entitled to great deference. . . . The trial court is given broad latitude in ruling on the admissibility of evidence, and we will not disturb such a ruling unless it is shown that the ruling amounted to an abuse of discretion." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 28–29, 807 A.2d 955 (2002); *Pestey* v. *Cushman*, 259 Conn. 345, 368–69, 788 A.2d 496 (2002); *State* v. *Copas*, 252 Conn. 318, 326, 746 A.2d 761 (2000). "Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Finally, the standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely] would [have] affect[ed] the result." (Citations omitted; internal quotation marks omitted.) *Ryan Transportation, Inc.* v. *M & G Associates*, 266 Conn. 520, 530, 832 A.2d 1180 (2003).

Concerning the admissibility of a prior consistent statement, the "general rule is that a party cannot strengthen the testimony of his own witness by showing that he has made previous statements to the same effect as his testimony . . . . *Palmer* v. *Hartford Dredging Co.*, 73 Conn. 182, 188, 47 A. 125 (1900). [This court] recognized in *Thomas* v. *Ganezer*, 137 Conn. 415, 78 A.2d 539 [1951], that prior consistent statements may be admitted in certain limited situations and that the determination of this issue is left to the discretion of the trial court. *State* v. *Mitchell*, 169 Conn. 161, 168, 362 A.2d 808 (1975)." (Internal quotation marks omitted.) *State* v. *McCarthy*, 179 Conn. 1, 18, 425 A.2d 924 (1979).

Section 6-11 (b) of the Connecticut Code of Evidence sets forth three limited situations in which the prior

consistent statement of a witness is admissible: "If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment." See also *State* v. *Pollitt*, 205 Conn. 61, 77, 530 A.2d 155 (1987) (recognizing same three exceptions at common law prior to adoption of Code of Evidence). In the present case, the plaintiff claims that the trial court abused its discretion because McClintock's prior consistent statement does not fall within any of the three exceptions set forth in § 6-11 (b). We disagree, and we conclude that McClintock's statement properly was admitted under subdivision (3) of § 6-11 (b).

I

Before turning to the specific claims raised by the plaintiff, we first must address the defendant's claim that the plaintiff failed to articulate properly at trial the basis for his objection and, therefore, he failed to preserve the record properly for appellate review. We reject this contention.

"The standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of his objection, any appeal

will be limited to the ground asserted." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 30; see Practice Book § 5-5.

Our review of the record indicates that the plaintiff made an objection that, while not the most artful, sufficiently alerted both the trial court and the defendant to the precise nature of the objection. When the defendant began to ask questions about McClintock's prior deposition, the plaintiff indicated that he would like to object at sidebar.[3] After the sidebar had concluded, and the

[3] The transcript indicates the following discussion occurred during the redirect examination of McClintock by Stephen Fogerty, the defendant's attorney:

"[Fogerty]: And then, between 1993 and when your deposition was taken—you have a copy of it there, right?

"[McClintock]: Yes, I do.

"[Fogerty]: And that was taken—

"[McClintock]: February 26 of 1997.

"[Fogerty]: Four years after the accident, right?

"[Michael Stratton, Plaintiff's Attorney]: Your Honor, if I could object on a sidebar, please?

"The Court: All right."

Following an off the record discussion between both counsel and the court, the redirect examination of McClintock continued as follows:

"[Fogerty]: You gave that testimony in 1997, is that right?

"[McClintock]: As far as I recall. I know it was winter because it was cold and I was freezing and it was wind and everything in New Haven.

"[Fogerty]: You had a lawyer representing you at that time, correct, there was a lawyer there with you?

"[McClintock]: Yes, there was.

"[Fogerty]: It wasn't me, was it?

"[McClintock]: No. As far as I know, I've never met you.

"[Fogerty]: And in 1997 you testified that you saw people with coffee cups, is that right?

"[McClintock]: Yes.

"[Fogerty]: I want to turn to page 40.

"[Stratton]: Your Honor, for the record, I object.

"The Court: All right. Overruled.

"[Fogerty]: Page 41. Excuse me. Question: As you were approaching the scene, at any time prior to stopping, did you see any people on or near the highway? That was the question that [the plaintiff's] asked you, right? Read your response.

"[McClintock]: It says, not on or near the highway, they were behind the truck with coffee cups in their hands.

questioning of the witness once again reached the point where the deposition was being explored, the plaintiff stated, "Your Honor, for the record, I object."[4] We conclude, therefore, that the plaintiff properly preserved the record for appeal, and we will review his claims on appeal.

II

The plaintiff claims that the trial court abused its discretion by admitting McClintock's prior consistent statement under § 6-11 (b) (3) of the Connecticut Code of Evidence.[5] We disagree.

During his cross-examination of McClintock, the plaintiff highlighted the fact that McClintock's testimony was inconsistent with the initial statement that he gave to an insurance investigator shortly after the accident had occurred. In addition, the plaintiff suggested that McClintock had contrived his testimony after conferring with the defendant's attorney that

"[Fogerty]: I have nothing further, Your Honor.

"The Court: Mr. Stratton?

"[Stratton]: Your Honor, nothing further."

[4] Further, we note that Practice Book § 60-5 provides in relevant part: "In jury trials, where there is a motion, argument, or offer of proof or evidence in the absence of the jury, whether during trial or before, pertaining to an issue that later arises in the presence of the jury, and counsel has fully complied with the requirements for preserving any objection or exception to the judge's adverse ruling thereon in the absence of the jury, the matter shall be deemed to be distinctly raised at the trial for purposes of this rule without a further objection or exception provided that the grounds for such objection or exception, and the ruling thereon as previously articulated, remain the same. . . ."

In the present case, the plaintiff made his objection at a sidebar, in the absence of the jury. When the matter was later raised before the jury, the objection the plaintiff made before the jury incorporated sufficiently the specific grounds that he set forth at sidebar.

[5] In his brief, the plaintiff also claimed that McClintock's prior consistent statement was not admissible under § 6-11 (b) (1) and (2) of the Connecticut Code of Evidence. Because we conclude that the statement properly was admitted under § 6-11 (b) (3), we need not address these claims.

morning, prior to his taking the witness stand.[6] In order to rebut this suggestion of recent contrivance, the defendant introduced, over the plaintiff's objection, testimony that McClintock had given in a pretrial deposi-

[6] On direct examination of McClintock, the following exchange occurred between Stephen Fogerty, the defendant's attorney, and the witness:

"[Fogerty]: Did you see—Did you see any [telephone company] employees as you approached the intersection?

"[McClintock]: Yes. They were either behind the left first truck or the left second truck, I'm not even sure, and they all had coffee cups in their hands, or at least the first two that I noticed. I believe there was a group of four of them back there. . . ."

Subsequently, on cross-examination, the following colloquy occurred between Michael Stratton, the plaintiff's attorney, and McClintock:

"[Stratton]: Sir, in your [prior inconsistent] statement you actually—There's no mention in here about [telephone company] guys eating donuts by the side of the road, are there?

"[McClintock]: No.

"[Stratton]: There isn't, is there? In fact, there's no mention that you had even seen the [telephone company] workers at all until after you hit the wires, until after you came to a stop, isn't that true, in the statement?

"[McClintock]: In the statement I said a lot of things to him, what he wrote down, he wrote down.

"[Stratton]: Sir, let's go through it and see what you agree with now and what you don't agree."

After asking McClintock about other parts of his statement, Stratton asked the following questions related to McClintock's testimony that day on the location of the telephone company workers:

"[Stratton]: [Reading from the prior inconsistent statement] 'I could see work trucks facing me in the northbound lane, their lights were on, and saw no pedestrians or workmen.' Is that true, sir?

"[McClintock]: No pedestrians or workmen?

"[Stratton]: Or workmen. Is that what you wrote in your statement?

"[McClintock]: I didn't write the statement, he did.

"[Stratton]: Is this the statement that you signed off on as being accurate and fair and truthful on May 19, 1993?

"[McClintock]: I—That is my signature.

"[Stratton]: *But you disagree with that assessment today, now you've got workmen drinking coffee over on the side of the road?*

"[McClintock]: *That's what they were doing.*

"[Stratton]: *After talking with Mr. Fogerty this morning, is that correct*?

"[McClintock]: *No. I talked to the insurance investigator, I told them that. I told the—*

"[Stratton]: There's no question pending, sir.

"[Fogerty]: *Objection, Your Honor, I'd like an answer because my integrity's being impugned here, improperly, I might add. I'd like this witness to answer . . . .*" (Emphasis added.)

tion. In that deposition, while under oath, McClintock testified just as he had at trial—that he saw workers drinking coffee at the scene immediately prior to the accident.

Before we address the defendant's claim, we first reemphasize that the Connecticut Code of Evidence, as adopted by the judges of the Superior Court in 1999, was intended to restate, in codified form, "Connecticut case law regarding rules of evidence as rules of court . . . ." Conn. Code Evid. § 1-2 (a). As Justice Borden has explained, the Code of Evidence is a " 'code' in the sense of a set of general statements of rules embodied in the prior case law, without, however, being an attempt to restate every nuance, exception and different application of the rules of evidence expressed in that case law. That is why the Commentary accompanies each section, because that Commentary points to the general case law that the Code attempted to codify." D. Borden, "The New Code of Evidence: A (Very) Brief Introduction and Overview," 73 Conn. B.J. 210, 212 (1999). Furthermore, unlike in other situations, "in adopting the Code the Judges formally adopted the Commentary as well. . . . Thus, the Code must be read together with its Commentary in order for it to be fully and properly understood." Id., 213.

The plaintiff claims that *State* v. *Ouellette*, 190 Conn. 84, 98, 459 A.2d 1005 (1983), requires that a trial court, before it may admit a prior consistent statement to rebut a suggestion of recent contrivance, must find: "(1) that the prior statement was made at a time when it would have been natural to make it, independent of its potential use in court; and (2) that the witness has been impeached by a suggestion of recent fabrication." We disagree with the plaintiff's characterization of the precedential value of *Ouellette*.

In *Ouellette*, after a trial to a jury, the defendant was found guilty of risk of injury to a child. Id., 85. On

appeal, the defendant claimed, among other things, that the trial court improperly admitted prior consistent statements as constancy of accusation evidence.[7] Id., 86. Although *Ouellette* did not involve a suggestion of recent contrivance, this court noted that "[b]ecause the rationale of the constancy of accusation exception so clearly suggests the recent contrivance or fabrication exception, there is no analytical reason to approach them differently." Id., 99.

Turning to its analysis of the defendant's claim, this court set forth a new two part test governing the admissibility of prior consistent statements offered either to rebut a charge of recent contrivance or as constancy of accusation evidence. That test, supported by citations to two Pennsylvania Supreme Court decisions, stated that a prior consistent statement is admissible to rebut a charge of recent contrivance or as constancy of accusation evidence when the trial court finds: "first that the statement was made at a time when it was natural to make it; [and] second that the witness has been impeached by a suggestion of recent contrivance." Id.[8] Because that test had not been applied to the constancy of accusation evidence, the court held that it

[7] The constancy of accusation evidence in *Ouellette* consisted of statements given by the victim to a police officer, the victim's mother and the hospital staff. *State* v. *Ouellette*, supra, 190 Conn. 96–97.

[8] This test is different from the version cited by the plaintiff, which is also from *Ouellette*, in that it omits the qualifying phrase "independent of its potential use in court" from the first prong. *State* v. *Ouellette*, supra, 190 Conn. 98. Therefore, within *Ouellette*, there are two different versions of the test set forth: one linking admissibility to a statement's potential use in court, and one not. Compare id., 98 (with qualifying phrase) with id., 99 (without qualifying phrase). For two reasons, we conclude that the second formulation, without the qualifying phrase, is the operative test. First, the test with the qualifying phrase is not supported by citations to any legal authority, while the test without the qualifying phrase is supported by citations to two Pennsylvania Supreme Court cases. Second, the test without the qualifying phrase is the version that has been cited subsequently by this court. See *State* v. *Parris*, 219 Conn. 283, 288–89, 592 A.2d 943 (1991) (citing, yet declining to apply, version without qualifying phrase).

was error to admit it, and the case was remanded for a new trial. Id., 100.

Thus, after *Ouellette*, it appeared that the two part test was applicable to the analysis of prior consistent statements offered as constancy of accusation evidence or to rebut a suggestion of recent fabrication. Since *Ouellette* was decided, however, this court has modified the application of that test. In *State* v. *Parris*, 219 Conn. 283, 289, 592 A.2d 943 (1991), this court reviewed *Ouellette* and concluded: "While phrased in terms of a rule to be applied in future cases involving constancy of accusation evidence . . . the [test] announced in *Ouellette* was not essential to the outcome of that case. . . . Consequently, the [test] was merely dictum, without the force of precedent insofar as proper constancy evidence is concerned." (Citation omitted; internal quotation marks omitted.)

After concluding that *Ouellette* was not binding precedent, this court then declined formally to adopt the two part test. This conclusion was supported by three reasons. First, its adoption "effectively would overrule a long line of precedent in the constancy of accusation context with which that dictum directly conflicts." Id. Second, "contrary to the dictum in *Ouellette*, the term 'natural' as employed in our prior caselaw was not connected to any preliminary issue of admissibility for the trial court's resolution." Id., 290. Finally, "again conflicting with the dictum in *Ouellette*, the significance of the timing of a victim's report of the incident traditionally was a matter to be considered by the jury, exclusively, in evaluating the victim's credibility." Id., 291. For all of those reasons, this court "discard[ed] the dictum in *Ouellette* to the extent that it pertains to constancy of accusation evidence . . . ." Id., 292.

At the present time, therefore, the two part test set forth in dictum in *Ouellette* has been rejected for con-

stancy of accusation evidence, but, as the plaintiff in the present case suggests, it may be applicable to prior consistent statements offered to rebut a suggestion of recent fabrication. In order to resolve this confusion, we take this opportunity expressly to "discard the dictum in *Ouellette* to the extent that it pertains to [prior consistent statements offered to rebut a suggestion of recent contrivance], and we reaffirm our precedents prior to *Ouellette* that leave the evaluation of the timing of a [witness' prior consistent] statements and any 'naturalness' thereof in the hands of the jury." Id. In reaching this conclusion, we are persuaded that all of the rationales set forth in *Parris* are equally as applicable to the recent contrivance exception as to the constancy of accusation exception.

In addition, we note that the two Pennsylvania cases cited by *Ouellette* lend no support to the first prong of the two part test: that a prior consistent statement offered to rebut a charge of recent contrivance must be "made at a time when it was natural to make it . . . ." *State* v. *Ouellette*, supra, 190 Conn. 99. In *Commonwealth* v. *Byrd*, 490 Pa. 544, 558, 417 A.2d 173 (1980), the Pennsylvania court merely stated that "[i]t is settled that prior consistent statements are admissible if relevant to rebut a suggestion of recent fabrication." The second case cited by *Ouellette*, as well as by *Byrd*, is *Commonwealth* v. *Wilson*, 394 Pa. 588, 603, 148 A.2d 234, cert. denied, 361 U.S. 844, 80 S. Ct. 97, 4 L. Ed. 2d 82 (1959), in which the only relevant statement is that "[e]vidence of consonant statements, if admissible, are admissible only in rebuttal and then only for the purpose of showing that that which the witness now testifies to has not been recently fabricated and not for the purpose of proving the truth of the present testimony."

Having concluded that the dictum in *Ouellette* is not applicable to our analysis, we once again state that

when a suggestion of recent contrivance has arisen,[9] the determination of whether to allow the introduction of a prior consistent statement for rebuttal purposes is left to the sound discretion of the trial court. Conn. Code Evid. § 6-11 (b) (3); *State* v. *McCarthy*, 179 Conn. 1, 18, 425 A.2d 924 (1979). Furthermore, "[i]n stating that evidence of a witness' prior consistent statement is admissible 'in the discretion of the court,' Section 6-11 stresses the broad discretion afforded the trial judge in admitting this type of evidence." Conn. Code Evid. § 6-11, commentary.

In the present case, the trial court acted well within its discretion in allowing the defendant to introduce prior deposition testimony to rebut a suggestion that McClintock contrived his testimony after talking to the defendant's attorney on the morning of his testimony. This testimony was not admitted for the truth of the matter asserted but, rather, for the limited purpose of rehabilitating McClintock's credibility,[10] which had been impeached by virtue of the plaintiff's suggestion that he had contrived his testimony after a conversation with the defendant's attorney that morning. By introducing McClintock's prior consistent statement, the defendant sought to establish that McClintock had given similar testimony before the alleged conversation with the defendant's attorney had occurred. McClintock's deposition testimony was made prior to the time of suggested contrivance, was consistent with his testimony at trial and, therefore, was, within the trial court's discretion, an appropriate source of rehabilitation.

[9] Although the suggestion of recent contrivance was explicit in the present case, we note that it may also arise by implication. *State* v. *Hines*, 243 Conn. 796, 804–805, 709 A.2d 522 (1998).

[10] It is well settled that "[w]here the prior consistent statement becomes admissible, it may not be used as substantive evidence of the facts contained therein, but only to rehabilitate the credibility of the witness which has been attacked." *State* v. *Anonymous (83-FG)*, 190 Conn. 715, 728, 463 A.2d 533 (1983); *State* v. *Dolphin*, 178 Conn. 564, 569, 424 A.2d 266 (1979); see also Conn. Code Evid. § 6-11, commentary.

The plaintiff claims, however, that since McClintock was named as a defendant at the time of the deposition, he was biased against the plaintiff, and, therefore, his deposition testimony was an inappropriate source of rehabilitation. See Conn. Code Evid. § 6-11 (b) (2) (allowing use of prior consistent statement to rebut "a suggestion of bias, interest or improper motive *that was not present at the time the witness made the prior consistent statement*" [emphasis added]). This claim improperly conflates the requirements of subdivisions (2) and (3) of § 6-11 (b) of the Connecticut Code of Evidence.

Under subdivision (2) of § 6-11 (b) of the Connecticut Code of Evidence, a prior consistent statement must have been made before the bias, interest or improper motive arose in the witness. *State* v. *Dolphin*, 178 Conn. 564, 570–71, 424 A.2d 266 (1979). Subdivision (2), however, is not applicable to a prior consistent statement offered to rebut a suggestion of recent contrivance. In the present case, the plaintiff clearly suggested that McClintock had contrived his testimony after talking with the defendant's attorney on the morning he took the witness stand; see footnote 6 of this opinion; thereby implicating subdivision (3) of § 6-11 (b). Any consistent statement given by McClintock prior to that morning, namely, the time of suggested contrivance, became an appropriate source of rehabilitation, regardless of whether McClintock may have been biased or had an interest at the time of that prior statement due to his status as a defendant. Any bias that McClintock harbored at the time of the deposition, which was taken four years prior to the trial, is irrelevant to the determination of whether he contrived his testimony after talking with the defendant's attorney that morning, prior to his taking the witness stand.[11]

[11] The fact that the prior consistent statement was made four years after the accident had occurred, when McClintock was named as a defendant in the present action, however, may be utilized properly by the trier of fact in evaluating McClintock's credibility.

"As Justice Story explained: '[W]here the testimony is assailed as a fabrication of a recent date . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted.' *Ellicott* v. *Pearl*, [35 U.S. (10 Peters) 412, 439, 9 L. Ed. 475 (1836)]." (Emphasis in original.) *Tome* v. *United States*, 513 U.S. 150, 156, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). The rationale behind this statement is that " '[a] consistent statement, [made] at a time prior to [the suggested time of contrivance] will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence.' 4 J. Wigmore, Evidence (Chadbourn Rev. 1972) § 1128, p. 268." *State* v. *Vines*, 71 Conn. App. 359, 371, 801 A.2d 918, cert. denied, 261 Conn. 939, 808 A.2d 1134 (2002). In the present case, McClintock's prior consistent statement dispels the plaintiff's charge that he had contrived his testimony after talking with the defendant's attorney that morning, prior to his taking the witness stand. Accordingly, we conclude that the trial court did not abuse the discretion afforded to it by § 6-11 (b) (3) of the Connecticut Code of Evidence in admitting McClintock's prior consistent statement.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* GARRICK TURNER (SC 16711)

Sullivan, C. J., and Borden, Katz, Palmer and Vertefeuille, Js.

Syllabus

Convicted of the crimes of sexual assault in the second degree and risk of injury to a child, the defendant appealed to the Appellate Court claiming that the trial court improperly had denied his motion to withdraw his guilty plea. The defendant claimed that his plea was not knowingly or

voluntarily made because his trial counsel had failed to inform him that his guilty plea, unlike a conditional plea of nolo contendere, waived his right to challenge on appeal the denial of his motion to suppress an incriminating statement that he had given to the police in the absence of *Miranda* warnings. The Appellate Court concluded that the defendant had nonfrivolous grounds to challenge the denial of his motion to suppress on appeal and that defense counsel's failure to inform him of his statutory (§ 54-94a) right to plead nolo contendere in order to preserve his right to appeal constituted ineffective assistance of counsel. That court reversed the trial court's judgment and remanded the case with direction to vacate the guilty plea, to accept the defendant's plea of nolo contendere, and to render judgment thereon, and the state, on the granting of certification, appealed to this court. *Held* that the defendant's claim of ineffective assistance of counsel was without merit: a review of the record having revealed that the defendant's interview with the police could not, as a matter of law, be construed as a custodial interrogation for *Miranda* purposes, the defendant failed to establish that he had nonfrivolous grounds to appeal from the trial court's denial of his motion to suppress, and, accordingly, defense counsel was not required to consult with him regarding a conditional plea of nolo contendere under § 54-94a; the issue of whether the defendant was in custody at the time of his interrogation was not debatable among jurists of reason, could not reasonably have been resolved differently, and did not raise questions deserving further appellate scrutiny, the defendant having testified that he voluntarily had gone to the police station with his father, that he had been told several times that he was not under arrest and that he was free to leave, and that he had not been threatened in any way.

(*One justice dissenting*)

Argued September 11, 2003—officially released January 20, 2004

Procedural History

Amended information charging the defendant with one count each of the crimes of sexual assault in the second degree and risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Turner*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *B. Kaplan*, *J.*, on a plea of guilty; subsequently, the court denied the defendant's motion to withdraw the plea and rendered judgment of guilty in accordance with the plea, from which the defendant appealed to the Appellate Court, *Lavery*, *C. J.*, and

Dranginis and *Dupont*, *Js.*, which reversed the trial court's judgment and remanded the case with direction to grant the defendant's motion to withdraw the guilty plea and to accept the defendant's plea of nolo contendere and to render judgment thereon, and the state, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Michele C. Lukban, assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Joseph Harry*, senior assistant state's attorney, for the appellant (state).

Carlton L. Hume, with whom were *Tony Jorgensen* and, on the brief, *Tina J. Georgiades*, for the appellee (defendant).

Opinion

BORDEN, J. The state appeals, following our grant of certification, from the judgment of the Appellate Court reversing the defendant's conviction, rendered following a guilty plea, of sexual assault in the second degree and risk of injury to a child. The state claims that the Appellate Court improperly concluded that the defendant's guilty plea resulted from ineffective assistance of counsel. We reverse the judgment of the Appellate Court.

The defendant, Garrick Turner, was charged with sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), and risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21 (1).[1] Prior to trial, the defendant filed a motion

[1] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person . . . ."

General Statutes (Rev. to 1997) § 53-21 provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered . . . or the morals of such child are likely to

to suppress a statement that he had made to the police, claiming that he had not been informed of his *Miranda*[2] rights. Following an evidentiary hearing, the trial court, *Turner*, *J.*, denied the defendant's motion, and the defendant subsequently pleaded guilty to all charges. Thereafter, the defendant filed a motion to withdraw and vacate his guilty plea, claiming that he had received ineffective assistance of counsel. The trial court, *B. Kaplan*, *J.*, denied the defendant's motion to withdraw his plea and rendered a judgment of conviction in accordance with the guilty plea.

On appeal to the Appellate Court, the defendant claimed that he had been denied due process of law due to ineffective assistance of counsel because his attorney had not informed him of the possibility of entering a conditional plea of nolo contendere pursuant to General Statutes (Rev. to 1999) § 54-94a[3] and Practice Book § 61-6,[4] thereby preserving the right to appeal

be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony."

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] General Statutes (Rev. to 1999) § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress evidence based on an unreasonable search or seizure, motion to suppress statements and evidence based on the involuntariness of a statement or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[4] Practice Book § 61-6 (a) (2) (i) provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's (a) motion to suppress evidence based on an unreasonable search or seizure, (b) motion to suppress statements and evidence based on the involuntariness of a statement, (c) or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such appeal shall be limited to whether it was proper

from the denial of his motion to suppress. The Appellate Court reversed the judgment of the trial court, concluding that, due to ineffective assistance of counsel, the defendant's guilty plea had not been entered knowingly and voluntarily because he had not understood "that a guilty plea, unlike a nolo plea, would waive his right to appeal" from the denial of his motion to suppress. *State* v. *Turner*, 67 Conn. App. 708, 715, 789 A.2d 1058 (2002). Accordingly, the Appellate Court held that the "[trial] court abused its discretion in denying the defendant's motion to vacate his guilty plea." Id., 715–16. This certified appeal followed.[5]

The underlying facts and procedural history were set forth in the opinion of the Appellate Court. "On March 8, 1998, the defendant went to the Bridgeport police station. His father had received a telephone call the day before from Mark McDaniel, a sergeant, requesting to speak to the defendant. The defendant was eighteen years old, had no prior criminal history and had been living in the United States for only two years. The defendant resided with his father, who, along with the defendant's aunt, accompanied him to the police station.

"At the station, McDaniel questioned the defendant alone. The interrogation lasted about thirty to forty

for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this subsection shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution. The court shall not accept a nolo contendere plea pursuant to this subsection where the denial of the motion to suppress would not have a significant impact upon the disposition of the case in the trial court. The court shall also decline to accept such a nolo contendere plea where the record available for review of the denial of the motion to suppress or motion to dismiss is inadequate for appellate review of the court's determination thereof."

[5] We granted the state's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the defendant's guilty plea resulted from ineffective assistance of counsel?" *State* v. *Turner*, 260 Conn. 905, 795 A.2d 546 (2002).

minutes, three to four minutes of which were recorded.[6]

[6] The transcript of the defendant's recorded police interview provides as follows: "Today's date is December 12, 1998. The time is 3:03 P.M. This is Detective McDaniel.

"Q. Can you please state you name?

"A. Garrick Turner.

"Q. How old are you Garrick?

"A. I'm eighteen.

"Q. What's your date of birth?

"A. January 2, 19[80].

"Q. Do you know why you're here today Garrick?

"A. Yeah.

"Q. You know that you're free to leave and you're not under arrest, right?

"A. Yeah.

"Q. And you haven't been coerced or forced to come down here to speak to me at all, have you?

"A. No.

"Q. You want to tell me what your relationship [is] with [the victim]?

"A. Uh, we've been girlfriend and boyfriend.

"Q. For how long?

"A. For a year, almost a year.

"Q. And have you had a relationship with [the victim]?

"A. Yes.

"Q. What exactly do you mean by a relationship? Did you have sex with her?

"A. Yeah.

"Q. When did you have sex with her?

"A. Uh, March.

"Q. March. What year? This year? March of [19]98?

"A. Yeah.

"Q. Where did this occur?

"A. Uh, at my house.

"Q. At your house, where's your house?

"A. Uh, 303 Garfield Avenue.

"Q. Where in the house, in your room, in the living room?

"A. In the bathroom.

"Q. In the bathroom? And, how many times did this happen?

"A. Twice.

"Q. Twice? In the month of March?

"A. Yes.

"Q. Okay. And, have you talked to her since then?

"A. Yeah, I've talked to her since then.

"Q. Did you know how old she was at the time?

"A. Yeah.

"Q. How old was she?

"A. She was fifteen.

McDaniel asked the defendant if he had engaged in sexual intercourse with the victim and [if so] when that had occurred. The defendant responded that he had engaged in sexual intercourse with the victim two times in March, 1998, when the victim was fifteen years old.[7] The defendant was subsequently charged with sexual assault in the second degree and risk of injury to a child.

"Before entering his guilty plea, the defendant filed a motion to suppress his statement to the police, and an evidentiary hearing followed. The defendant's counsel called the defendant as his only witness. The defendant claimed that his statement to the police was inadmissible because he had been interrogated at the police station, under circumstances from which it could be inferred that he was in custody, without having been notified of his rights under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"Q. Fifteen. And, what's your relationship with her now?

"A. Uh, we still talk you know, so, we're still girlfriend and boyfriend.

"Q. When's the last time she called you?

"A. Last night.

"Q. Last night, what time?

"A. Around eight or nine.

"Q. Eight or nine? And what did she say?

"A. She said she was checking up on me, seeing what I was doing.

"Q. Who was home? Was there anyone home when this happened at your house?

"A. I was downstairs on the first floor with my cousin. We were watching tv.

"Q. No, when you had sex with her in March.

"A. Uh, yeah, my cousins were home and my aunts. One of my aunt's [was] home.

"Q. Did they know that you were in the bathroom. How did you get in there without them seeing you?

"A. I just sneaked in.

"Q. Okay. Do you have anything else you'd like to add to this statement?

"A. No, that's it.

"Q. You swear that what you've told me in this statement is the truth?

"A. Yes.

"This statement ends on December 8, 1998. Time is 3:06 P.M."

[7] It is undisputed that, at the time of the sexual intercourse, the victim was less than sixteen years of age and the defendant was more than eighteen years of age.

"At the hearing, McDaniel admitted that he did not read the defendant *Miranda* warnings because the defendant was neither under arrest nor in custody. He testified that he told the defendant several times during the interrogation that he was free to leave and that he was not under arrest.[8] McDaniel further testified that he did not threaten the defendant or pressure him into making his statement. The [trial] court concluded that the defendant failed to sustain his burden of proving that he was in custody at the time of the interview and therefore denied the motion to suppress. Thereafter, the defendant pleaded guilty to the charges of sexual assault in the second degree and risk of injury to a child.[9]

"On June 14, 2000, prior to sentencing, the defendant filed a motion to vacate and to withdraw his guilty plea on the ground that his trial counsel was ineffective in failing to inform him that by pleading guilty, he was waiving his right to appeal from the court's denial of his motion to suppress. See Practice Book § 39-27 (4). The defendant requested the withdrawal of his plea so that he could enter a new plea of nolo contendere in accordance with General Statutes [Rev. to 1999] § 54-94a and thereby preserve his right to appeal from the denial of his motion to suppress. The [trial] court denied the motion to withdraw on the ground that the defen-

[8] Although the Appellate Court opinion does not refer to it, the record also discloses that the defendant testified that McDaniel had told him several times that he was free to leave.

[9] The record discloses that the defendant's trial was scheduled to begin shortly because jury selection had already begun at the time of the defendant's plea hearing. In exchange for the defendant's plea of guilty, for which the maximum sentence could have been twenty years imprisonment, the state recommended an effective sentence of ten years imprisonment, execution of which would be suspended after the nine month mandatory minimum, including ten years probation, registration as a sex offender, no contact with the victim, and sexual offender treatment. After the court canvassed the defendant, defense counsel stated that the defendant understood that his plea put him in severe jeopardy, and that he was pleading guilty because of the risk of being sentenced to a longer term of incarceration.

dant had not demonstrated ineffective assistance of counsel.[10] The court sentenced the defendant to a total term of incarceration of ten years, execution suspended after nine months, and ten years conditional probation in accordance with the state's recommended sentence offered pursuant to its [guilty] plea agreement with the defendant. The defendant's appeal [to the Appellate Court] followed." *State* v. *Turner*, supra, 67 Conn. App. 709–11.

On appeal to the Appellate Court, the defendant claimed that his guilty plea had been the result of ineffective assistance of counsel because he had not been informed of his "statutory right" to plead nolo contendere, thereby preserving his right to appeal from the trial court's denial of his motion to suppress. Id., 711.

[10] The record also discloses that, in the time between his guilty plea and his sentencing hearing, the defendant retained new counsel. At the sentencing hearing, in support of the defendant's motion to withdraw his plea, the defendant's new counsel represented that he had spoken with the defendant's prior counsel and had learned that the prior counsel had not discussed with the defendant the prospect of entering a plea under § 54-94a because prior counsel believed that appealing the ruling on the motion to suppress would have been frivolous. For that reason, the defendant's counsel argued, the prior counsel's performance had been ineffective because he should have consulted with the defendant regarding the ability to appeal his motion to suppress. In response, the state argued that, even if the defendant had prevailed on his motion to suppress, the state was nonetheless ready to proceed to trial with the victim as its central witness. Thus, in the state's view, § 54-94a was inapplicable to this case because the defendant's appeal would not have been "dispositive" of the case. In reply, the defendant's counsel opined that "we don't know whether or not [the victim] would actually come in and testify." Thus, the defendant's counsel asserted, without the victim's testimony, and without the defendant's statement made to the police, the state's case would have been weak and, therefore, a successful appeal on his motion to suppress would have been dispositive. The trial court denied the defendant's motion, stating that it was familiar with the case and found the prior counsel to have been competent at all times. The court concluded, moreover, that a conditional plea of nolo contendere was inappropriate in this case because the trial was scheduled to begin shortly and the victim was expected to testify, meaning that the defendant's appeal would not have been "dispositive" of the case as required by § 54-94a.

In response, the state claimed that his counsel's failure to inform the defendant of his right to appeal did not amount to ineffective assistance counsel because any appeal from the trial court's motion to suppress would have been frivolous. Id., 714. The Appellate Court concluded that it was "possible that [the defendant] might have prevailed on his claim that his *Miranda* rights were violated because he believed he was in custody due to his inexperience with the criminal system." Id. Accordingly, the Appellate Court held that, because "the defendant had nonfrivolous grounds for an appeal," defense counsel's failure to inform the defendant "of his statutory right to plead nolo contendere" constituted ineffective assistance of counsel in accord with this court's holding in *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 9, 761 A.2d 740 (2000). *State* v. *Turner*, supra, 67 Conn. App. 714. The Appellate Court remanded the case to the trial court "with direction to vacate the guilty plea, to accept the defendant's plea of nolo contendere pursuant to § 54-94a and to render judgment thereon." Id., 716. Additional facts will be presented as necessary.

On appeal to this court, the state claims that the Appellate Court improperly concluded that defense counsel had been ineffective for failing to consult with the defendant about the prospect of entering a conditional plea of nolo contendere under § 54-94a. Specifically, the state argues that, because the defendant was not in custody for *Miranda* purposes, any appeal from the trial court's denial of his motion to suppress would have been frivolous. Thus, the state contends, because the defendant had no nonfrivolous grounds for an appeal, defense counsel was not ineffective for failing to consult with the defendant regarding whatever appellate rights § 54-94a would have preserved. We agree.[11]

[11] This conclusion makes it unnecessary to reach the merits of the state's other arguments, namely, that: (1) the defendant has not met his burden of establishing an adequate factual basis to prevail on a claim of ineffective

We first turn to a brief review of the law governing pleas of nolo contendere conditional on the right to appeal as set forth in § 54-94a and Practice Book § 61-6. Central to that review is the notion that, at the time of the trial court proceedings in the present case, a plea of nolo contendere conditioned on the defendant's right to take an appeal was, unlike a guilty plea, subject to the determination of the trial court that its ruling on the motion at issue would "have a significant impact upon the disposition of the case in the trial court. . . ." Practice Book § 61-6 (a) (2) (i); see footnote 4 of this opinion. In this connection, we note that § 54-94a was enacted in 1982 by No. 82-17 of the 1982 Public Acts and has been amended twice; once in 1988 by No. 88-19 of the 1988 Public Acts, and again in 2001 by No. 01-13 of the 2001 Public Acts. Practice Book § 61-6 was originally adopted in 1986 as § 4003, and although the rule was designed to implement the statute, it contains language slightly different from that used in § 54-94a.[12] See footnotes 3 and 4 of this opinion. Because the defendant attempted to withdraw his guilty plea on June 14, 2000, we evaluate his claim in light of the statute and rule of practice as they existed as of that date.

By enacting § 54-94a, the "legislature in 1982 *altered* the broad waiver of constitutional rights implicit in a plea of guilty or nolo contendere . . . . Section 54-94a

assistance of counsel; (2) the defendant did not have a "statutory right" to plead nolo contendere in this case because his appeal from the trial court's denial of his motion to suppress would not have been dispositive of the case and, therefore, trial counsel was not required to inform the defendant of the possibility of entering such a plea; and (3) the Appellate Court improperly concluded that the defendant's guilty plea was neither knowing nor intelligent because the trial court's plea canvass was sufficient as a matter of law.

[12] Of particular relevance to this appeal is the fact that Practice Book § 61-6 (a) (2) (i) added the following additional language, which is not contained in § 54-94a: "The court shall not accept a nolo contendere plea pursuant to this subsection where the denial of the motion to suppress *would not have a significant impact upon the disposition of the case in the trial court.*" (Emphasis added.)

is intended to promote judicial economy by allowing the parties to litigate a suppression or dismissal issue fully in the trial court, and thereafter allowing the defendant to obtain review of an adverse ruling without the parties' or the court's expending additional resources." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Piorkowski*, 236 Conn. 388, 402, 672 A.2d 921 (1996). In 1985, this court interpreted § 54-94a strictly and directed trial courts "not [to] employ this procedural innovation except in situations plainly within [its] provisions . . . ." *State* v. *Madera*, 198 Conn. 92, 102, 503 A.2d 136 (1985). We noted, moreover, that "[t]he conditional plea is susceptible to abuse . . . unless its use is carefully limited to significant issues the determination of which on appeal is *likely to be dispositive of the case*." (Emphasis added.) Id., 101.

For those policy reasons, Practice Book § 61-6, then § 4003, was adopted in 1986 and limited the scope of § 54-94a by stating, among other things, that a court should not accept the conditional nolo plea if the issue on appeal "would not have a *significant impact upon the disposition of the case* in the trial court." (Emphasis added.) See *State* v. *Piorkowski*, supra, 236 Conn. 416 ("[t]he rule, designed to implement the statute, is more limited than the statute, and cannot be read to expand it"). In *Piorkowski*, however, we rejected the state's contention that " 'significant impact' " was synonymous with "fully dispositive." Id., 414–15. The state had argued in *Piorkowski* that, because Practice Book § 4003, now § 61-6, is patterned after rule 11 of the Federal Rules of Criminal Procedure, conditional pleas are available only "when the decision of the [reviewing] court . . . will dispose of the case either by allowing the [conviction] to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence." (Internal quotation marks omitted.) *State* v. *Piorkowski*, supra, 414. We disagreed, and held that

Practice Book § 4003, now § 61-6, imposed a less stringent standard than does rule 11, although we did not go on to define precisely that standard; rather, we merely stated that "the standard is looser than the state suggests." Id., 420. Thus, at the time the defendant attempted to withdraw his guilty plea in the present case, after *Piorkowski* had been decided in 1996, but before § 54-94a was amended in 2001, a trial court could accept a conditional plea of nolo contendere so long as the issue on appeal would have a significant impact on the outcome of the case.[13]

We next turn to a brief review of the law governing claims of ineffective assistance of counsel. "Almost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim." (Internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 385, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002). "*Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.* The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency." (Emphasis in original; internal quotation marks omitted.) *State* v. *Colton*, 234 Conn. 683, 697, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996).

Practice Book § 39-27 (4) provides an explicit exception to this general rule, however, and allows a defendant to withdraw a guilty plea after its acceptance if

[13] Section 54-94a was amended in 2001, and explicitly added language requiring that the motion to suppress "be dispositive of the case." Public Acts 2001, No. 01-13. Thus, the standard in place today is stricter than the standard set forth in *Piorkowski*.

the "plea resulted from the denial of effective assistance of counsel . . . ."[14] We recognize, therefore, that the defendant's claim of ineffective assistance of counsel is procedurally correct. Nevertheless, we are mindful that "on the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal . . . we have limited our review" to situations in which "the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development." *State* v. *Crespo*, 246 Conn. 665, 688, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999). We point out, finally, that irrespective of whether a defendant proceeds by way of habeas corpus or direct appeal, our review is the same, and the burden remains on the defendant to produce an adequate record so that an appellate court may ascertain whether counsel's performance was ineffective.

As the foregoing discussion indicates, in order to establish that the defendant's prior counsel's assistance was ineffective for failing to advise him of the availability of a conditional plea under § 54-94a, the defendant was required to establish, as a threshold factual matter, that the trial court would have accepted such a plea. This, in turn, would have required the defendant to establish that: (1) the victim would not have testified against him; and (2) the denial of his motion to suppress would have had a significant impact on the case. See footnote 10 of this opinion. Although we have doubts about those matters, we assume without deciding that the defendant, in fact, made those requisite showings

[14] Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows . . .

"(4) The plea resulted from the denial of effective assistance of counsel . . . ."

to the trial court.[15] We conclude, nonetheless, that the defendant has failed to establish ineffective assistance of counsel in this case, because the defendant has failed to establish that he had nonfrivolous grounds to appeal from the trial court's denial of his motion to suppress.

It is well settled that claims of ineffective assistance of counsel are governed by the United States Supreme Court's two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a "defendant must show: (1) that counsel's representation fell below an objective standard of reasonableness . . . and (2) that defense counsel's deficient performance prejudiced the defense." (Citation omitted.) *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 154, 662 A.2d 718 (1995). In the realm of plea negotiations, in order to satisfy the second prong of *Strickland*, namely, proving actual harm, a defendant must show that, but for the counsel's "defi-

[15] The dissent acknowledges that the record does not establish that the trial court would have accepted a conditional plea of nolo contendere, yet concludes that such an oversight "does not prevent me from considering whether the failure of the defendant's prior counsel at least to notify the defendant of the possibility of pleading nolo contendere constituted ineffective assistance of counsel." See footnote 2 of the dissenting opinion. As the following discussion makes clear, however, this conclusion ignores a basic maxim regarding claims of ineffective assistance of counsel, namely, that a defendant must establish that counsel's "deficient performance prejudiced the defense." *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Put another way, in order to prevail on a claim of ineffective assistance of counsel, a defendant must show actual harm. In the present case, the defendant is claiming that counsel's performance prevented him from entering a plea under § 54-94a; he has not claimed, as the dissent suggests; see footnote 2 of the dissenting opinion; that he would have pleaded not guilty and gone to trial if a nolo plea had not been available to him. In order to show actual harm, therefore, the defendant must show that, but for counsel's deficient performance, he would have entered a plea under § 54-94a, which, in turn, requires him to show that the court would have accepted such a plea. Without such a showing, the defendant cannot prevail on a claim of ineffective assistance of counsel. Because the dissent fails to undertake that issue, it lacks a fundamental predicate.

cient performance, the outcome of the plea process would have been different." Id., 156.

In the context of whether counsel has a duty to advise a defendant of his right to take an appeal, we are guided by *Ghant* v. *Commissioner of Correction*, supra, 255 Conn. 9, in which we held that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."[16] (Internal quotation marks omitted.) The crux of the defendant's claim is that, because of his counsel's failure to advise him about the possibility of entering a conditional plea of nolo contendere, he was deprived of an opportunity to appeal from the trial court's denial of his motion to suppress. By analogy then, because *Ghant* establishes when counsel has a duty to advise a defendant of his right to appeal, and because § 54-94a preserves, albeit in limited circumstances, a defendant's right to appeal, *Ghant* similarly establishes when counsel has a duty to advise a defendant of the prospect of entering a plea under § 54-94a. In the context of the present case, therefore, the defendant must establish that there were nonfrivolous grounds for an appeal. This requires, moreover, that we define the standard for evaluating the frivolousness of an appeal in this procedural context.

We previously have defined the frivolousness of an appeal in two contexts. First, in the context of whether to impose sanctions on an attorney for filing a frivolous appeal, we adopted the standard set forth in the official

[16] This prong of *Ghant* is inapposite to the present case because the defendant has not claimed that he told his counsel that he was interested in appealing.

commentary to rule 3.1 of the Rules of Professional Conduct, which states that an "action is frivolous . . . if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." (Internal quotation marks omitted.) *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464, 538 A.2d 1017 (1988).

Second, in the context of evaluating whether a court has abused its discretion in denying requests for certification or permission to appeal, we repeatedly have applied the criteria set forth in *Lozada* v. *Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991). See, e.g., *State* v. *James*, 261 Conn. 395, 405–10, 802 A.2d 820 (2002) (denial of state's request for permission to appeal from court's ruling that police lacked probable cause to arrest); *Seebeck* v. *State*, 246 Conn. 514, 534, 717 A.2d 1161 (1998) (denial of request for certification to appeal from denial of petition for new trial); *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994) (denial of petition for certification to appeal from denial of writ of habeas corpus). "The *Lozada* inquiry was established in order to determine whether a petitioner has made the requisite 'substantial showing of the denial of a federal right' for the issuance of the required certificate of probable cause to appeal the denial of federal habeas relief . . . . In *Lozada*, the United States Supreme Court held that the required 'substantial showing' was made if the petitioner 'demonstrate[s] *that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.*' . . . In the federal courts, the probable cause certificate serves the same policy goal as the granting of permission or certification to

appeal does in Connecticut, namely, to screen out frivolous appeals while still protecting the litigants' statutory right to appellate review of adverse determinations." (Citations omitted; emphasis added.) *State* v. *James*, supra, 404.

We first applied the *Lozada* criteria in evaluating the frivolousness of an appeal in *Simms* v. *Warden*, supra, 230 Conn. 616, in which we held that, in an appeal under General Statutes § 52-470 (b), which governs denials of requests for certification to appeal an adverse habeas corpus ruling, "a petitioner will establish a clear abuse of discretion . . . if he can demonstrate the existence of one of the *Lozada* criteria . . . ." We reasoned that, because the legislature had intended to discourage frivolous appeals when it enacted § 52-470, a "habeas appeal that satisfies one of the *Lozada* criteria is not frivolous." Id.

Following our reasoning in *Simms*, we subsequently held that the *Lozada* criteria was the proper standard with which to evaluate an abuse of discretion under General Statutes § 54-95, which governs requests for certification to appeal a denial of a petition for a new trial or writ of error. *Seebeck* v. *State*, supra, 246 Conn. 533–34. In a similar fashion, we held that the *Lozada* criteria was appropriate in evaluating an abuse of discretion in which the state sought permission to appeal under General Statutes § 54-96. *State* v. *James*, supra, 261 Conn. 405–10. Thus, *Simms*, *Seebeck* and *James* make clear that when a petitioner presents an issue on appeal that satisfies any one of the *Lozada* criteria, that petitioner ought to have that issue considered on appeal.

We see no reason why the *Lozada* criteria similarly should not be used for evaluating the frivolousness of an appeal on a defendant's claim, whether by way of habeas corpus or direct appeal via Practice Book § 39-

27 (4), that counsel was ineffective for failing to consult with him regarding an appeal. First, this situation is legally analogous to those in which we already have applied the *Lozada* criteria. If a court has not abused its discretion in denying a petition for certification to appeal because the appeal is frivolous under *Lozada*, then it logically follows that counsel would not be ineffective for failing to inform a defendant of his right to appeal if that appeal would be frivolous. Second, the *Lozada* criteria, as previously discussed, is consistent with our policy of discouraging frivolous appeals, which is equally applicable in this context in which a defendant is seeking relief for counsel's failure to consult about appellate rights. Finally, the standard of frivolousness that was adopted in *Texaco, Inc.*, which deals with attorney misconduct, is inapplicable to the present case because its purpose is to evaluate whether an attorney should be sanctioned, not whether a convicted criminal defendant has been denied an otherwise valid avenue to a judicial appellate remedy.

Bolstering our conclusion is the fashion in which we rejected the petitioner's claims as frivolous in *Ghant*. Indeed, for each of the petitioner's five claims in *Ghant*, we stated the claim, followed by the applicable well settled law, and upon an application of the law to the facts of the case, we concluded that each claim did "not constitute a nonfrivolous ground for appeal." *Ghant* v. *Commissioner of Correction*, supra, 255 Conn. 11–17. In other words, we merely concluded that counsel's performance could not have been ineffective as a matter of law because the petitioner failed to present any claims that established even a remote likelihood of success under those well settled rules of law. Thus, the standard used in *Ghant* very much resembled the *Lozada* criteria, although we did not explicitly say so at the time.

We are mindful that this standard allows counsel some discretion in whether to consult with a defendant about an appeal. Indeed, it presumes that counsel is aware of well settled law and may, in his or her best judgment, decide in which circumstances it is appropriate to pursue an appeal on behalf of his or her client. The opposite conclusion, however, would oblige attorneys to ignore well settled law and common sense in an effort to exhaust a defendant's appellate remedies—all for the singular purpose of avoiding a later claim of ineffectiveness. The *Lozada* set of criteria sets forth a desirable standard in this context, because it balances those situations in which a defendant has been unconstitutionally deprived of a right to present a colorable claim on appeal with those situations in which it is in a defendant's ultimate best interest to end the proceedings sooner rather than later.

Thus, if a defendant can demonstrate either that: (1) the issue is debatable among jurists of reason; (2) a court could resolve the issue in a different manner; or (3) the question is adequate to proceed further, then the defendant's appeal is not frivolous as a matter of law and, therefore, "counsel has a constitutionally imposed duty to consult with the defendant about an appeal" under *Ghant*. (Internal quotation marks omitted.) Id., 9. A defendant, therefore, may prevail on a claim of ineffective assistance of counsel under *Ghant* if he can satisfy any one of the *Lozada* criteria. Once he has done so, he "must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, *he would have timely appealed*." (Emphasis added; internal quotation marks omitted.) Id., 10.

We now turn, therefore, to the question of whether the defendant's claim that his statements should have been suppressed because the police had failed to give him *Miranda* warnings was frivolous. The applicable

law is well settled. "Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody; and (2) the defendant must have been subjected to police interrogation. . . . [A]lthough the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (Citations omitted; internal quotation marks omitted.) *State* v. *Atkinson*, 235 Conn. 748, 757, 670 A.2d 276 (1996); see also *New York* v. *Quarles*, 467 U.S. 649, 665, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); *Oregon* v. *Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 711 (1977); *State* v. *Pinder*, 250 Conn. 385, 409, 736 A.2d 857 (1999). "A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed [that] he was not free to leave." (Internal quotation marks omitted.) *State* v. *Pinder*, supra, 409, citing *United States* v. *Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). "Further, the United States Supreme Court has adopted an objective, reasonable person test for determining whether a defendant is in custody. . . . Thus, in determining whether *Miranda* rights are required, *the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest*." (Citations omitted; emphasis added.) *State* v. *DesLaurier*, 230 Conn. 572, 577, 646 A.2d 108 (1994); *State* v. *Atkinson*, supra, 758; see also *Stansbury* v. *California*, 511 U.S. 318, 321, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994).

The defendant bears the burden of proving that he was in custody for *Miranda* purposes. *State* v. *Pinder*, supra, 250 Conn. 409. Two discrete inquiries are essen-

tial to determine custody: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." (Internal quotation marks omitted.) Id., 410. The first inquiry is factual, and we will not overturn the trial court's determination of the historical circumstances surrounding the defendant's interrogation unless it is clearly erroneous. Id., 410–11. "The second inquiry, however, calls for application of the controlling legal standard to the historical facts." (Internal quotation marks omitted.) Id., 410. The ultimate determination of whether a defendant was subjected to a custodial interrogation, therefore, "presents a mixed question of law and fact," over which our review is de novo. (Internal quotation marks omitted.) Id.; see also *State* v. *Johnson*, 241 Conn. 702, 719, 699 A.2d 57 (1997) ("historical facts surrounding custody reviewed for clear error; ultimate determination of custody reviewed de novo").

With those well settled principles in mind, we have reviewed the transcript of the defendant's recorded police interview, as well as the transcripts of the suppression hearing and the trial court's ruling thereon. We conclude that, contrary to the defendant's assertion, the defendant's interview with the police cannot, as a matter of law, be construed as a custodial interrogation for *Miranda* purposes.

The following additional facts, as revealed through the case file and transcripts, are necessary to resolve this appeal. At the defendant's suppression hearing, the defendant testified in support of his motion, and McDaniel testified on behalf of the state. The defendant testified that, on the day after his father had received a telephone call from McDaniel, he voluntarily went to the police station accompanied by his father and aunt. He further testified that, upon his arrival at the police

station, McDaniel said that he needed to ask him a few questions concerning the "whole incident," and thereafter, McDaniel accompanied the defendant to a room with a recording device. The defendant testified further that he had been told several times that he was free to leave and that he was not under arrest. The defendant testified, moreover, that McDaniel had not threatened him in any way. McDaniel testified that, while the defendant had been at the police station, he never had been in custody, and he never was placed under arrest. McDaniel further testified that after he had finished asking the defendant questions, the defendant left the police station with his father. An examination of the transcript of the defendant's recorded interview corroborates the testimony of both the defendant and McDaniel. See footnote 6 of this opinion.

We note that neither party disputes the underlying facts surrounding the defendant's interview. The parties' sole disagreement regarding the defendant's interrogation is whether he was "in custody" when he made his statements to police.

The defendant's contention that he was entitled to *Miranda* warnings in the present case is foreclosed by such cases as *Oregon* v. *Mathiason*, supra, 429 U.S. 494–96, *State* v. *Pinder*, supra, 250 Conn. 412–13, and *State* v. *Atkinson*, supra, 235 Conn. 759–61. In those cases, each of the defendants' claims that they were in custody failed because each voluntarily had gone to the police station and each had been free to leave at any time. In other words, because there had not been "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," the defendants in those cases, like the defendant in the present case, were not entitled to *Miranda* warnings. (Internal quotation marks omitted.) *State* v. *Atkinson*, supra, 757.

In *Mathiason*, for example, the defendant was the only suspect in a burglary investigation and he agreed

to meet the investigating officer at the state patrol office to answer some questions. *Oregon* v. *Mathiason*, supra, 429 U.S. 493. The defendant was told that he was not under arrest and he was led to a closed office. Id. After being advised that he was believed to have been involved in the burglary, the defendant admitted that he had taken the property. Id. The officer then gave the defendant *Miranda* warnings and took a taped confession. Id., 493–94. At the end of the taped conversation, the defendant was told he was not yet under arrest, and he then left the police station. Id., 494. Noting that the defendant voluntarily had gone to the police station, that he had been told that he was not under arrest, and that he left the station after the interview, the United States Supreme Court held that *Miranda* warnings had not been required because the defendant had not been in custody "or otherwise deprived of his freedom of action in any significant way." (Internal quotation marks omitted.) Id.

In *Pinder*, the defendant had agreed to take a polygraph test after police had become suspicious about inconsistencies in his previous interview. *State* v. *Pinder*, supra, 250 Conn. 392. The defendant had been told that he was not required to take the polygraph test and that he could leave at any time. Id., 394. We held that the defendant had not been in custody at any time during his questioning because he took the test of his own volition and he repeatedly was told that he was free to leave at any time. Id., 412–13.

Finally, in *Atkinson*, detectives investigating a murder questioned the defendant at the police station in a closed room about an unrelated robbery. *State* v. *Atkinson*, supra, 235 Conn. 753–54. When the questioning turned to the murder, however, the defendant was given *Miranda* warnings and later he implicated himself in the murder. Id., 754. The defendant moved to suppress his entire statement—the portions given

both before and after he had been given *Miranda* warnings—claiming that he had been in custody throughout the interrogation. Id., 755–56. We held that the defendant was *never* in custody. Id., 760–61. Noting that the defendant voluntarily had gone to the police station, that he had not been handcuffed or arrested, and that he had been free to leave at any time, we stated that "the concerns of *Miranda* are not implicated in this case." Id., 760. Accordingly, we held "that a reasonable person in the defendant's situation would not have believed that his movement was restricted to a degree that is associated with a formal arrest . . . ." Id., 760–61.

This court has stated several times, moreover, that it is realistic to assume "that a reasonable person would feel free to leave when that person was told repeatedly that he could do so." *State* v. *Pinder*, supra, 250 Conn. 413; see, e.g., *State* v. *Greenfield*, 228 Conn. 62, 71 n.10, 634 A.2d 879 (1993) ("an important factor distinguishing a consensual encounter from a seizure is whether the police expressly informed the defendant that he was free to leave at the outset of the interview"); *State* v. *Northrop*, 213 Conn. 405, 415, 568 A.2d 439 (1990) ("[i]t is difficult to conceive of a 'reasonable man' who would not feel free to leave after having been told so many times and in so many different ways that he could"); see also *State* v. *Lapointe*, 237 Conn. 694, 726, 678 A.2d 942 ("[g]iven the defendant's freedom of movement about the police station and the fact that he had been repeatedly told that he was free to leave, we conclude that the defendant was not in custody"), cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996).

In the present case, the defendant voluntarily went to the police station. He was told several times that he was not under arrest. He was told several times that he was free to leave at any time, and, in fact, he did leave as soon as McDaniel had finished questioning him.

The defendant was not threatened in any way. Given that the present case is legally indistinguishable from those previously discussed, coupled with the clear state of the law in this area, we conclude that, as a matter of law, the defendant has failed to establish that he had nonfrivolous grounds for an appeal. The issue presented by the defendant is not debatable among jurists of reason, it could not reasonably have been resolved differently, and it does not raise questions deserving further appellate scrutiny. Accordingly, the defendant's claim on appeal is frivolous because it does not satisfy any of the *Lozada* criteria. Because we have concluded that the defendant's claim on appeal is frivolous, counsel was not required to consult with the defendant regarding a conditional plea of nolo contendere under § 54-94a. Thus, the defendant's claim of ineffective assistance of counsel fails under *Ghant*.

The defendant argues, nonetheless, that, as the Appellate Court noted; *State* v. *Turner*, supra, 67 Conn. App. 714; when taking into account his youth and unfamiliarity with the legal system, a court could have inferred that the defendant was "in custody" because he had felt that he was not free to leave. We disagree.

As previously discussed, when determining whether a *reasonable person* would have felt that he or she was free to leave, courts are to apply an *objective*, rather than a subjective, standard. See *State* v. *DesLaurier*, supra, 230 Conn. 577. "[T]he initial determination of custody depends on the objective circumstances of the interrogation, *not on the subjective views harbored by either the interrogating officers or the person being questioned*." (Emphasis added.) *Stansbury* v. *California*, supra, 511 U.S. 323. Thus, in the present case, it is irrelevant that the defendant may have been a novice to police questioning. His subjective beliefs about whether he was in fact free to leave have no bearing on whether he was in custody for *Miranda* purposes.

It is also irrelevant that the defendant was questioned under McDaniel's assumption, based on the victim's sworn statement, that he had committed the crime. "*[T]he only relevant inquiry* is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest." (Emphasis added.) *State* v. *DesLaurier*, supra, 577.

The defendant argues that an appellate court could determine that he was in custody based on the "confinement and the restrictive setting in which [the defendant] was interrogated." We disagree.

The mere fact that the defendant's interview took place behind closed doors at the police station does not entitle the defendant to *Miranda* warnings. Indeed, the interrogations in both *Mathiason* and *Atkinson*, both of which fell short of "custodial interrogations," took place in almost factually identical conditions to those in the present case. As the United States Supreme Court noted in *Mathiason*, "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that . . . the questioning took place in a 'coercive environment.' Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system [that] may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and

to which it is limited." (Emphasis in original.) *Oregon* v. *Mathiason*, supra, 429 U.S. 495.

It is important to note that our use of the *Lozada* criteria in this context does not imply that an appeal that is merely likely to be unsuccessful on the merits is necessary frivolous. On the contrary, we simply hold that, when the law is clear and well settled in a particular area, as it is in the present case, and the case would require only the application of that well settled law to undisputed or virtually undisputable facts, an appeal would be frivolous within the meaning of *Ghant*.

Finally, we are aware that it may seem paradoxical that we have concluded that the issue presented by the defendant was neither debatable among jurists of reason, nor reasonably could have been resolved differently; yet the Appellate Court came to a different conclusion. This is explainable, however, because the Appellate Court apparently applied a less stringent standard of frivolousness than that required by the *Lozada* criteria, which we had yet to apply in this context. The Appellate Court, moreover, improperly applied a subjective, rather than an objective, test for determining whether the defendant was in custody.[17] We are confi-

[17] Much the same may be said of the dissent in the present case. The dissent focuses on a combination of factors to conclude that jurists of reason could disagree about whether the defendant was in custody. Specifically, these factors are: his age; his unfamiliarity with our criminal justice system; his presence in this country for two years; the fact that he was being asked questions about a crime; and the fact that his having voluntarily gone to the police station was prompted by his choice to avoid embarrassment in front of his peers and teachers at school. Suffice it to say that this constellation of factors turns what both the United States Supreme Court and this court repeatedly have stated is an objective test into a subjective test. Under the dissent's approach, the question is not whether a reasonable person in the defendant's position would believe that he was in police custody to the degree associated with a formal arrest; *State* v. *DesLaurier*, supra, 230 Conn. 577; but whether *this defendant* was likely to have believed that he was in custody to such a degree.

Furthermore, each of the cases on which the dissent relies for the proposition that the age of the defendant ought to be taken into account for determin-

dent that, had the Appellate Court properly applied the

ing custody, involved a defendant who was a juvenile under the laws of the applicable jurisdiction. See *Alvarado* v. *Hickman*, 316 F.3d 841, 843 (9th Cir. 2002), cert. granted sub nom. *Yarborough* v. *Alvarado*, 539 U.S. 986, 124 S. Ct. 45, 156 L. Ed. 2d 703 (2003) (seventeen year old defendant was juvenile under California law); *State* v. *Savory*, 105 Ill. App. 3d 1023, 1029, 435 N.E.2d 226 (1982) (fourteen year old defendant was juvenile under Illinois law); *State* v. *Smith*, 546 N.W.2d 916, 926 (Iowa 1996) (fifteen year old defendants were juveniles under Iowa law); *In re L.M.*, 993 S.W.2d 276, 278 (Tex. App. 1999) (eleven year old defendant was juvenile under Texas law). By contrast, the defendant in the present case was for legal purposes an adult, over the age of eighteen; see General Statutes § 1-1d (defining age eighteen as age of majority); and, therefore, more than two years beyond juvenile status. Compare General Statutes § 46b-120 (1) (defining " 'child' " as under age sixteen for purposes of delinquency prosecution). Indeed, had the defendant been a juvenile in the present case, his confession would have been inadmissible unless: (1) a parent was present during the interview; and (2) he and his parent had been advised of his right to counsel and his right to remain silent. General Statutes § 46b-137 (a).

The only cases relied on by the dissent that did not involve juvenile defendants are *People* v. *Horn*, 790 P.2d 816, 818 (Colo. 1990) (describing test for custody as "whether a reasonable person in the suspect's position would believe that he is deprived of his freedom of action in any significant way"), and *State* v. *Zancauske*, 804 S.W.2d 851, 859 (Mo. App.) (defendant was in custody because police already had enough evidence to make arrest, thereby making defendant focus of their suspicion), cert. denied, 502 U.S. 817, 112 S. Ct. 73, 116 L. Ed. 2d 47 (1991). Both cases, however, are simply out of step with the overwhelmingly prevailing jurisprudence that the United States Supreme Court, and this court, have adopted regarding the proper test for custody. We note, moreover, that *Horn* and *Zancauske* were decided three and four years, respectively, before the Supreme Court decided *Stansbury* v. *California*, supra, 511 U.S. 318, in which it reiterated that the requisite degree of restraint must be " 'of the degree associated with a formal arrest' "; id., 322; and that "whether interrogating officers have focused their suspicions upon the individual being questioned . . . is not relevant for purposes of *Miranda*." Id., 326.

In addition, all of the cases relied on by the dissent are factually dissimilar. Without belaboring the point, a careful examination of all of those cases discloses significant factual differences from the facts found in the present case.

In sum, application of the "jurists of reason" test must be applied with some level of discrimination. Simply because there may be a few cases from other jurisdictions, however legally or factually dissimilar, that have reached different results, does not mean that we must ignore our own, and the United States Supreme Court's, repeated statements of the applicable law to the contrary.

Lozada criteria and applicable *Miranda* principles to the present case, it likewise would have concluded that an appeal in the present case would have been frivolous.

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

In this opinion KATZ, PALMER and VERTEFEUILLE, Js., concurred.

SULLIVAN, C. J., dissenting. The majority in the case presently before us concludes that, because reasonable jurists could not conclude that the defendant was in custody at the time of his interrogation, the failure of his attorney to apprise him of the opportunity to appeal if he entered a conditional plea of nolo contendere does not give rise to a claim of ineffective assistance of counsel. I first conclude that the majority adopts an inappropriate standard for the evaluation of frivolous appeals. In addition, I believe that, even utilizing the standard that the majority adopts, reasonable jurists could disagree about the outcome of the forgone appeal. Accordingly, I respectfully dissent.

In the present case, the defendant, Garrick Turner, was an eighteen year old high school student who had been living in the United States for only two years and had never been arrested before his arrest in connection with this case. While investigating a complaint of sexual assault, a police detective called the father of the defendant and asked to speak with the defendant. The defendant testified that the police detective told him that he should come to the police station in order to avoid the embarrassment of the police coming to his school. The next day, the defendant, along with his father and his aunt, went to the police station. At the station, the defendant was taken to an interrogation room. There, he was interrogated by a single police officer. Although

the defendant was told that he was free to leave, he was also asked questions implicating him in a crime and was told that the police were gathering evidence with respect to the crime. It is undisputed that the defendant was never told that he had a right to remain silent and a right to counsel and that his statements could be used against him.

The majority first sets forth a review of the law governing pleas of nolo contendere conditional on the right to appeal that applied at the time the defendant attempted to withdraw his appeal. The majority correctly notes that, at the time of the trial court proceedings in the present case, in order for the trial court to accept the defendant's plea of nolo contendere conditional on the right to appeal, that court would have had to find that its ruling on the defendant's motion to suppress would have had a significant impact on the disposition of the case at trial. See footnote 4 of the majority opinion. The rules of practice also required the trial court to find, before accepting the plea, that the record was adequate for appellate review. Practice Book § 61-6 (a) (2) (i). Although the majority acknowledges that the trial court's ruling denying the defendant's motion to suppress need not be fully dispositive of the case, but only have a significant impact on the outcome, the majority also concludes that in order to find that the trial court would have accepted a plea of nolo contendere conditional on the right to appeal, it would have required the defendant "to establish that: (1) the victim would not have testified against him; and (2) the denial of his motion to suppress would have had a significant impact on the case."[1]

[1] It is unclear to me why the majority would conclude that the defendant would need to establish that the victim would not have testified against him. As the majority acknowledges, the trial court's denial of the motion to suppress need not be dispositive of the case, but only have a significant impact on the outcome. Thus, in my opinion, even if the victim testified, in the absence of a confession from the defendant, and any medical or scientific evidence, the trial would become a much weaker case from the standpoint

Subsequently, assuming without deciding that the defendant made the requisite showings to the trial court so that it would have accepted the plea, the majority properly sets forth our review of claims of ineffective assistance of counsel.[2] Specifically, the majority notes

of the state. Accordingly, even if the victim testified in this case, the denial of the defendant's motion to suppress would still have had a substantial impact on the case.

[2] The majority concludes that my analysis is incomplete because the record leaves doubt as to whether the trial court even would have accepted a nolo contendere plea. Although the trial court indicated that such a plea was inappropriate in this case; see footnote 10 of the majority opinion; in fact the trial court apparently utilized an improper standard. As the majority opinion states: "The [trial] court concluded, moreover, that a conditional plea of nolo contendere was inappropriate in this case because the trial was scheduled to begin shortly and the victim was expected to testify, meaning that the defendant's appeal would not have been '*dispositive*' of the case . . . ." (Emphasis added.) Footnote 10 of the majority opinion. As noted previously in this dissent, pursuant to the rules in effect at the time of the trial court's statement, the denial of the defendant's motion to suppress must have had only a substantial impact on the outcome of the proceedings at the trial court.

More fundamentally, the very reason that we do not know whether the trial court would have accepted a conditional plea of nolo contendere if it had been proffered prior to the defendant's pleading guilty is that the court was never asked to do so. Put differently, the failure of the defendant's prior counsel to notify the defendant of the possibility of the plea and to inquire of the trial court whether a conditional nolo contendere plea would be accepted is exactly what is being claimed as ineffective assistance of counsel. I cannot conceive how any fact finder could determine at this point whether the trial court would have accepted the plea if it had been offered at the appropriate time and the trial court had been apprised of the appropriate standard for accepting it. Thus, although the record does not establish conclusively that the trial court would have accepted a nolo contendere plea, it does not prevent me from considering whether the failure of the defendant's prior counsel at least to notify the defendant of the possibility of pleading nolo contendere constituted ineffective assistance of counsel.

Moreover, the majority misapplies the prejudice requirement as set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As the Appellate Court has recognized, "[f]or ineffectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), which modified *Strickland*'s prejudice prong." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 80 Conn. App. 96, 99, 832 A.2d 1210 (2003). In *Hill*, the United States Supreme Court stated that, in such cases,

this court's decision in *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 9, 761 A.2d 740 (2000), in which we concluded that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." (Internal quotation marks omitted.) From this, the majority concludes that, in order to prevail on appeal on his claim of ineffective assistance of counsel, the defendant must establish that there were nonfrivolous grounds for an appeal from the trial court's denial of his motion to suppress.

As a result of this conclusion, the majority sets forth two tests that this court has utilized to define the frivo-

the focus is "on whether counsel's constitutionally ineffective performance affected the outcome of the *plea process*. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Emphasis added.) *Hill* v. *Lockhart*, supra, 59. Therefore, the defendant's required showing of actual harm is satisfied by evidence of a reasonable probability that, but for the ineffective assistance of counsel, the defendant would not have pleaded guilty.

Thus, in my view, the defendant should not be required to show that, "but for counsel's deficient performance, he would have entered a plea under [General Statutes] § 54-94a, which, in turn, requires him to show that the court would have accepted such a plea." See footnote 15 of the majority opinion. It is clear to me that there was at least a reasonable probability that the defendant in the present case would not have pleaded guilty but for his prior counsel's failure to notify him of the possibility of pleading nolo contendere. I also believe that there is at least a reasonable probability that, if the court had refused to accept the defendant's nolo contendere plea, the defendant would have insisted on going to trial in order to preserve his right to appeal. Specifically, the defendant subsequently attempted to withdraw that guilty plea after he acquired new counsel. Accordingly, I would conclude that the defendant has satisfied the second prong of *Strickland*, as modified by *Hill*. Consequently, contrary to the majority's assertion, a fundamental predicate indeed exists for the review of the defendant's ineffective assistance of counsel claim.

lousness of an appeal. The first, taken from the commentary to rule 3.1 of the Rules of Professional Conduct, states that an action is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." See *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988). The second definition of frivolousness, and the one the majority ultimately adopts, requires the person moving for an appeal to demonstrate that "the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) This language is taken from the United States Supreme Court's per curiam decision in *Lozada* v. *Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), which concluded that the United States Court of Appeals for the Ninth Circuit improperly denied the issuance of a certificate of probable cause required for an appeal from the denial of federal habeas corpus relief.

As the majority explains, this court has utilized the *Lozada* test in prior cases involving the frivolousness of appeals. For example, in *State* v. *James*, 261 Conn. 395, 409, 802 A.2d 820 (2002), this court adopted the *Lozada* test in order to provide a framework within which to determine whether a trial court abused its discretion when it denied the state's request to appeal pursuant to General Statutes § 54-96. In *James*, we noted that "[t]he *Lozada* inquiry already provides us with well marked guideposts for the exercise of trial court discretion in two other *areas of appeals requiring permission or certification to appeal*." (Emphasis added.) Id., 404. In those prior cases, the *Lozada* test

again provided a framework within which to review a claim that was subject to an abuse of discretion standard. For instance, in *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994), we concluded that the *Lozada* test applied to the denial of a request for certification to appeal from an adverse habeas corpus determination pursuant to General Statutes § 52-470 (b). In addition, we have concluded that the *Lozada* test applied to the review of the denial of petitions for certification to appeal the denial of a request for a new trial. *Seebeck* v. *State*, 246 Conn. 514, 534, 717 A.2d 1161 (1998).

In all of those cases, however, the right to appeal was subject to the permission of the trial court. Thus, our review centered around whether the trial court abused its discretion when it denied the party the right to appeal. In the present case, however, once the trial court has accepted a plea of nolo contendere, the trial court's permission was not required in order to appeal. Instead, the defendant who pleads nolo contendere conditional on the right to appeal may appeal to challenge the denial of a motion to suppress *as a matter of statutory right*. See General Statutes (Rev. to 1999) § 54-94a ("[w]hen a defendant . . . enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress . . . the *defendant after the imposition of sentence may file an appeal within the time prescribed by law*" [emphasis added]). Put differently, although the decision whether to *accept the plea* is subject to the trial court's discretion, the actual appeal that results from that decision is a matter of statutory right. Accordingly, it is simply not appropriate to utilize the *Lozada* test when evaluating the frivolousness of an appeal that the defendant would be entitled to file as a result of the acceptance of a plea of nolo contendere conditioned on a right to appeal.

Instead, I would adopt the standard this court adopted in *Texaco, Inc.* v. *Golart*, supra, 206 Conn. 464. Thus, the appeal in the present case would have been frivolous if "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer [was] unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." (Internal quotation marks omitted.) Id., 463–64 n.7.[3] Indeed, this court reaffirmed the use of this standard recently in *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 254–55, 828 A.2d 64 (2003), in which we concluded that the standard explicated in *Texaco, Inc,.* was the standard by which this court reviews a claim that a prevailing party was entitled to attorney's fees as a result of another party's bringing a frivolous action.

My conclusion that the less stringent standard of frivolousness should apply also finds support within the context of the defendant's claim. The definition employed by the Rules of Professional Conduct exists in order to evaluate attorney conduct and to provide a basis for sanctions for bringing a frivolous appeal. Consequently, it is entirely reasonable that the question of whether attorneys have engaged in ineffective assistance of counsel because they failed to notify their clients of nonfrivolous grounds for appeal should be answered by resort to the rules detailing the attorneys' conduct. Put another way, because in this case we are looking to the attorney's conduct, namely, whether the

[3] Good faith is defined by Black's Law Dictionary as: "[h]onesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transaction unconscientious. . . ." Black's Law Dictionary (6th Ed. 1990).

attorney engaged in ineffective assistance of counsel, the standards governing our review should be the rules prescribing that conduct. Additionally, the rules prescribing the attorney's conduct define what constitutes a frivolous appeal, specifically, as it applies to this case, one that is not grounded in a good faith argument. The standard of frivolousness, then, should originate within the context of the attorney's conduct and what they could be sanctioned for, rather than within the context of a review of the trial court's discretion in allowing an appeal to go forward.

Because I would have concluded that good faith grounds for an appeal existed in the present case, I believe that counsel for the defendant engaged in ineffective assistance of counsel by failing to inform the defendant of his right to appeal if he had pleaded nolo contendere subject to a right to appeal. Specifically, the defendant's challenge to the trial court's finding of no custody with respect to his *Miranda* claim constituted a good faith basis for an appeal, and, therefore, the defendant's prior counsel should have informed him of that ground for appeal before the defendant pleaded guilty to the crimes with which he was charged.

Even under the standard that the majority adopts, however—namely, whether the issues are debatable among jurists of reason, or a court could resolve the issues in a different manner, or the questions deserve encouragement to proceed further—I would conclude that the determination of whether the defendant was in custody for *Miranda* purposes would not have constituted a frivolous appeal. The majority properly sets forth the standard that we utilize when determining whether a person is in custody for *Miranda* purposes. Specially, as the majority states: " 'A person is in custody only if, in view of all the surrounding circumstances, a reasonable person would have believed [that] he was not free to leave.' (Internal quotation marks

omitted.) *State* v. *Pinder*, [250 Conn. 385, 409, 736 A.2d 857 (1999)] . . . ." (Citation omitted.) The majority also properly explains that " 'the only relevant inquiry is whether a reasonable person in the defendant's position would believe that he or she was in police custody of the degree associated with a formal arrest.' " I, however, disagree that the reasonable and objective test cannot take into account the defendant's status as an eighteen year old high school student who had recently immigrated to this country and had no prior experience with our legal system.[4]

Numerous cases conclude that the age of the defendant should be taken into account when determining whether a juvenile would reasonably believe he was not free to leave a police interrogation. Specifically, the United States Court of Appeals for the Ninth Circuit recently concluded that the determination of "custody" for *Miranda* purposes can take into account the defendant's status as a juvenile. In *Alvarado* v. *Hickman*, 316 F.3d 841, 844 (9th Cir. 2002), cert. granted sub nom. *Yarborough* v. *Alvarado*, 539 U.S. 986, 124 S. Ct. 45, 156 L. Ed. 2d 703 (2003), the habeas petitioner, who was seventeen years old at the time of the crime, had been convicted of second degree murder and attempt to commit robbery. The conviction was based primarily on a statement the petitioner gave to the police while being interviewed with respect to the crime. Id.

[4] I find curious the majority's characterization of this dissent as applying a subjective rather than objective test. See footnote 17 of the majority opinion. Specifically, I do not question the majority's conclusion that courts are to apply an objective test rather than a subjective standard when determining whether a suspect was in custody for *Miranda* purposes. My belief, however, is that anyone in the defendant's position similarly would feel as though he was not free to leave, *because of* such factors as his age and his inexperience with the legal system. Thus, I am not declaring that, because the *defendant* felt he could not leave he was in custody for *Miranda* purposes, which would indeed be applying a subjective test. Rather, in my opinion, a reasonable person, *when in the defendant's position*, would not have felt that he was free to leave the police station.

In *Alvarado*, while investigating a murder, the police contacted the petitioner's mother at work and informed her that they needed to speak with her son. Id. The petitioner's mother told the police that she and the petitioner's father would bring the petitioner to the police station. Id. While at the police station, the petitioner's parents were denied permission to be present during the interview. Id. The court also pointed out that the petitioner had never been questioned by the police before and had no prior criminal history. Id. The interview with the petitioner lasted approximately two hours, during which the petitioner was never given and did not waive his *Miranda* rights. Id. The petitioner first denied involvement in the murder. The detective then informed him that she did not believe his statements and that she had witnesses who said " 'quite the opposite.' " Id. The petitioner thereafter began to divulge details of the murder and his role in hiding the murder weapon. Id. During the interview, the detective hinted to the petitioner that he would be going home after the interview. Id. The petitioner's statement to the police was introduced as evidence at his trial. Id.

The District Court denied the habeas petition, and on appeal, the state relied on *Oregon* v. *Mathiason*, 429 U.S. 492, 493–95, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), to claim that, because the petitioner was not under arrest, voluntarily went to the police station and was allowed to leave after the interview, he was not in custody and, therefore, his *Miranda* rights did not attach. *Alvarado* v. *Hickman*, supra, 316 F.3d 846–47. The Circuit Court distinguished *Mathiason* on several grounds. First, the court noted, the defendant in *Mathiason* went to the police station voluntarily and was told immediately that he was not under arrest. Id., 847. In *Alvarado*, the court determined, arrangements for the police interview were made by the petitioner's parents, and the petitioner was never told that he was not under arrest.

Id. Second, while the interview in *Mathiason* lasted only thirty minutes, the interview in *Alvarado* lasted two hours, and the petitioner repeatedly had denied his involvement. Id. Third, the suspect in *Mathiason*, as a parolee, had experience in the criminal justice system. As the Ninth Circuit pointed out, in *Alvarado*, "[the petitioner] had no prior experience with the police." Id.

The Ninth Circuit acknowledged that both the petitioner and the state had constructed their arguments regarding the custody status of the petitioner under an objective standard. Id., 848. The court explained, however, that the petitioner's "status as a minor is an important subsidiary issue that potentially alters the constitutional analysis." Id. The court noted that under the United States Supreme Court's due process jurisprudence, a criminal defendant's age "has long been a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary." Id.

The court in *Alvarado* additionally relied on *In re Gault*, 387 U.S. 1, 42–43, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), to conclude that the petitioner's juvenile status could be taken into account when determining custody. *Alvarado* v. *Hickman*, supra, 316 F.3d 849. In *In re Gault*, supra, 55, the United States Supreme Court stated: "If counsel was not present for some permissible reason when an admission was obtained, *the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or adolescent fantasy, fright or despair.*" (Emphasis added.) The court in *Alvarado* relied on that language to explain that "if a juvenile is more susceptible to police coercion during a custodial interrogation than would be a similarly situated adult, there is no reason why the same juvenile would not similarly be less capable of determining whether he was, in fact, in custody in the first place." *Alvarado* v.

Hickman, supra, 849–50. Considering other factors[5] as well as the age of the petitioner in the objective determination of custodial status, the court concluded that they did not believe a reasonable seventeen year old in the petitioner's position would have felt "at liberty to terminate the interrogation and leave." (Internal quotation marks omitted.) Id., 851; see also *People* v. *Savory*, 105 Ill. App. 3d 1023, 1028, 435 N.E.2d 226 (1982) (factors involved in determination regarding custodial status include: location, time, length, mood and mode of interrogation; number of police officers present; presence or absence of friends or family of accused; any indicia of formal arrest; manner in which person questioned got to place of interrogation; whether suspect voluntarily assists police in their investigation; whether subject is allowed to walk within and from location of interrogation unaccompanied by police; and "*the age, intelligence and mental makeup of the accused*" [emphasis added]); *State* v. *Smith*, 546 N.W.2d 916, 923 (Iowa 1996) (holding that "it is appropriate to consider the age of the defendants as an additional factor in making a determination as to custody status").[6]

Additionally, although the majority relies in part on the fact that the defendant was told that he was free to leave the interrogation, that fact is not dispositive

[5] The other factors considered by the court included "[1] the language used by the officer to summon the individual, [2] the extent to which he or she is confronted with evidence of guilt, [3] the physical surroundings of the interrogation, [4] the duration of the detention and [5] the degree of pressure applied to detain the individual." (Internal quotation marks omitted.) *Alvarado* v. *Hickman*, supra, 316 F.3d 846.

[6] See also *In re L.M.*, 993 S.W.2d 276, 289 (Tex. App. 1999) ([S]tandard for determining whether juvenile is in custody is "whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted. Our holding does not conflict with the standard applied in earlier Texas cases, but expressly provides for consideration of age under the reasonable-person standard established in *Stansbury* [v. *California*, 511 U.S. 318, 322–24, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)].).

of the question of custodial status. See *People* v. *Horn*, 790 P.2d 816, 818–19 (Colo. 1990) (custody found where interrogation was "accusative from the outset" and stating that "[a]lthough the defendant was repeatedly told that he was free to leave and that he would not be arrested that day, he was also confronted with the evidence against him and informed that charges would be filed against him regardless of his interview responses").

Although I acknowledge that the defendant in this case was eighteen years old at the time of the interrogation, I see no difference in kind between a seventeen year old murder suspect and an eighteen year old high school student who has no experience with the criminal justice system and has lived in this country for only two years. In the present case, while the defendant was told that he was free to leave, he contemporaneously was being asked questions that implicated him in a crime and was told he was there for the police to "gather evidence" about a crime. Moreover, although this court previously has found that there is no custody when a defendant voluntarily goes to the police station,[7] here, the defendant was told he would be "better off" if he went to the station. Consequently, although technically the defendant voluntarily traveled to the station, it was a result of the threat of embarrassment in front of his peers and teachers at school. Under these circumstances, I believe that reasonable jurists could disagree over whether a reasonable person in the defendant's position would have believed that he was free to leave the interrogation.

Accordingly, I respectfully dissent.

[7] But see *State* v. *Zancauske*, 804 S.W.2d 851 (Mo. App.) (although defendant voluntarily traveled to police station, he was in custody for *Miranda* purposes), cert. denied, 502 U.S. 817, 112 S. Ct. 73, 116 L. Ed. 2d 47 (1991).

PATRICIA SMITH ET AL. *v.* CHARLES SNYDER ET AL. (SC 16801)

Sullivan, C. J., and Borden, Norcott, Palmer and Zarella, Js.

Syllabus

The plaintiffs, L Co., and two of its shareholders, brought an action against the defendants alleging, inter alia, that the named defendant, S, had breached his fiduciary duties while serving as an officer and director of L Co. The plaintiffs further alleged that the other defendants had conspired with S. The trial court granted the plaintiffs' motion for a default judgment after the defendants had failed to comply with certain discovery orders. Thereafter, the trial court rendered judgment awarding the plaintiffs compensatory damages, punitive damages and attorney's fees. The defendants appealed from the judgment of the trial court, claiming, inter alia, that there was insufficient evidence to support the award of damages. *Held*:

1. The plaintiff shareholders, having failed to demonstrate that they sustained an injury separate and distinct from that suffered by any other shareholder or by L Co., lacked standing to bring an action against the defendants in their individual capacities; therefore, the judgment of the trial court was reversed in part and the case was remanded to that court with direction to render judgment dismissing the action as to those plaintiff shareholders.
2. The trial court properly awarded L Co. compensatory damages under the Uniform Trade Secrets Act (§ 35-50 et seq.) and the common law; there was sufficient evidence to establish that L Co. treated certain information about its customers, pricing schemes and processes as proprietary information and that the defendants misappropriated that information by soliciting L Co.'s customers and diverting them to the defendants' new business venture, and, furthermore, there was sufficient evidence to establish that the defendants had violated the common-law theory of misappropriation of nontrade secret property by arranging for the removal of certain equipment from the premises of L Co. and the installation of that equipment at the premises of the defendants' new business venture.
3. The defendants could not prevail on their claim that the trial court improperly calculated compensatory damages by failing to deduct the proper amount of the proceeds from the sale of certain equipment; the testimony regarding the value of that equipment was vague, and it was within the trial court's discretion to weigh that testimony and to decide whether to rely on it in calculating compensatory damages.
4. The defendants could not prevail on their claim that the trial court improperly awarded punitive damages under CUTPA because S, the only defendant that was alleged to have breached a fiduciary duty, was no longer

a party to the action when damages were awarded, and, therefore, there was no evidence to establish that the remaining defendants had demonstrated a reckless indifference to the plaintiffs' rights; the plaintiffs having alleged in their complaint that the remaining defendants conspired with S in the breach of his fiduciary duties, and the defendants' liability having been established conclusively by virtue of the entry of a default judgment, the remaining defendants were jointly and severally liable for S's breach of his fiduciary duties.

5. The trial court did not abuse its discretion in awarding punitive damages under the Uniform Trade Secrets Act, it having been undisputed that the defendants' conduct was wilful and malicious.

6. The defendants could not prevail on their claim that the trial court's award of $20,000 in attorney's fees was improper because no evidence was presented to establish the reasonableness, nature and extent of attorney's fees incurred by the plaintiffs during the course of the litigation; although a party seeking attorney's fees ordinarily must present a clearly stated and described factual predicate for the fees sought, the plaintiffs' failure to do so in the present case did not render the trial court's award improper because the defendants did not oppose or otherwise take any action in response to the plaintiffs' request for $25,000 in attorney's fees in their brief submitted after the hearing in damages.

(*One justice concurring and dissenting*)

Argued April 22, 2003—officially released January 27, 2004

Procedural History

Action to recover damages for, inter alia, the named defendant's breach of fiduciary duties and interference with business relations, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the named defendant filed a counterclaim; thereafter, the court, *Moran, J.*, granted the plaintiffs' motion for a default judgment with respect to liability as against the named defendant et al. on the basis of the repeated failure of those defendants to comply with certain discovery orders; subsequently, the case was tried to the court, *Skolnick, J.*, on the issue of damages against the defendant CS Industries, LLC, et al.; judgment in favor of the plaintiffs, from which the defendant CS Industries, LLC, et al., appealed. *Reversed in part*; *judgment directed.*

Steven D. Ecker, with whom, on the brief, were *Susan E. Zak* and *Mark H. Bluver*, pro hac vice, for the appellants (defendant CS Industries, LLC, et al.).

Timothy A. Bishop, for the appellees (plaintiffs).

Opinion

ZARELLA, J. The defendants, Bettina Snyder, Donald Snyder and CS Industries, LLC (CS Industries),[1] appeal from the judgment of the trial court[2] awarding damages to the plaintiffs, Patricia Smith,[3] Carol Tartagni and Lectron Labs, Inc. (Lectron). The defendants claim that there was insufficient evidence to support the trial court's award of damages. The defendants alternatively claim that, even if the evidence supported the award of damages, the trial court improperly determined the amount of damages and attorney's fees. We conclude that the trial court properly determined that Lectron was entitled to damages and affirm the trial court's award of attorney's fees.

The following facts and procedural history are relevant to this appeal. In October, 1999, the plaintiffs brought an action against the defendants alleging, inter alia, that the named defendant, Charles Snyder,[4] while serving as a director and officer of Lectron, breached a fiduciary duty that he owed to Lectron by engaging

[1] We note that the operative complaint in the present action also named Charles Snyder, Advanced Vacuum Resources, Inc., and Gary LaChapelle as defendants. At the damages hearing, however, the plaintiffs proceeded against only Bettina Snyder, Donald Snyder and CS Industries.. We refer to Bettina Snyder, Donald Snyder and CS Industries as the defendants throughout this opinion.

[2] The defendants appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] We note that the operative complaint and certain other court documents refer to Patricia Smith as Patricia Moore. For ease of reference, we refer to her as Patricia Smith.

[4] See footnote 1 of this opinion.

in a pattern of self-dealing and other abuses of his position that were designed to destroy or devalue Lectron. The plaintiffs further alleged that certain other defendants conspired with Charles Snyder in his alleged improprieties. Among other things, the plaintiffs claimed that the defendants misappropriated corporate property and that their conduct violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

Thereafter, the plaintiffs moved for a default judgment on the basis of the defendants' repeated failure to comply with discovery orders. The trial court granted the plaintiffs' motion and rendered judgment in their favor on the issue of liability. Subsequently, the trial court held a hearing on damages at which three witnesses testified. Vincent Sorrentino, Smith's agent and husband, testified on behalf of the plaintiffs. David Veilleux, a certified public accountant, testified on behalf of the plaintiffs with respect to the common stock value of Lectron as of December, 1998. And Bettina Snyder, a former employee of Lectron and current employee of CS Industries, testified on behalf of the defendants.

The trial court set forth the following findings of fact in its memorandum of decision. "The plaintiffs protected their suppliers, customers, pricing schemes and processes, and treated them as proprietary information. The defendants kept [a] competing venture secret from the plaintiffs. Specifically, the defendants, while in the plaintiffs' employ: (1) started a competing business, (2) utilized fraudulent means to misappropriate the plaintiffs' most productive and efficient machine, (3) [discouraged] the plaintiffs' existing customers by overquoting jobs, (4) disrupted the plaintiffs' cash flow by not sending out bills, (5) altered the plaintiffs' company records to prevent the plaintiffs from being able to rehire employees who had been laid off, and (6) solic-

ited the plaintiffs' customers and diverted them to the defendants' new business venture."

The trial court concluded that the plaintiffs were entitled to damages under common law, the Uniform Trade Secrets Act, General Statutes § 35-50 et seq., and CUTPA. The trial court awarded the plaintiffs the following: (1) $235,000 in compensatory damages on the basis of the defendants' violation of the common law, CUTPA and the Uniform Trade Secrets Act; (2) $40,000 in punitive damages under the Uniform Trade Secrets Act; (3) $40,000 in punitive damages under CUTPA; and (4) $20,000 in attorney's fees.

I

Prior to addressing the defendants' claims on appeal, we address the issue of whether the individual shareholder plaintiffs, Smith and Tartagni, have standing.[5] "The issue of standing implicates this court's subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for

[5] We raise this issue of standing sua sponte as it implicates our subject matter jurisdiction. See, e.g., *Ardmare Construction Co.* v. *Freedman*, 191 Conn. 497, 498 n.4, 467 A.2d 674 (1983).

determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Citations omitted; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Orange*, 256 Conn. 557, 567–68, 775 A.2d 284 (2001).

"Since at least the middle of the [nineteenth] century, it has been accepted in this country that the law should permit shareholders to sue derivatively on their corporation's behalf under appropriate conditions. . . . [I]t is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding secondarily, deriving his rights from the corporation which is alleged to have been wronged." (Citation omitted; internal quotation marks omitted.) *Fink* v. *Golenbock*, 238 Conn. 183, 200, 680 A.2d 1243 (1996).

"[I]n order for a shareholder to bring a direct or personal action against the corporation or other shareholders, that shareholder must show an injury that is separate and distinct from that suffered by any other shareholder or by the corporation." Id., 201. It is commonly understood that "[a] shareholder—even the sole shareholder—does not have standing to assert claims alleging wrongs to the corporation." *Jones* v. *Niagara Frontier Transportation Authority*, 836 F.2d 731, 736

(2d Cir. 1987), cert. denied, 488 U.S. 825, 109 S. Ct. 74, 102 L. Ed. 2d 50 (1988).

We conclude, therefore, that Smith and Tartagni lacked standing to bring this action in their individual capacities because the allegations in the plaintiffs' complaint, if true, demonstrate that Lectron was harmed, but that no specific shareholder sustained an injury separate and distinct from that suffered by any other shareholder or by the corporation. Accordingly, the individual claims of Smith and Tartagni must be dismissed.

II

The defendants' first claim on appeal involves the trial court's determination that the plaintiffs were entitled to compensatory damages. The trial court's award of compensatory damages was based on its conclusion that the defendants had violated the common-law theory of misappropriation of trade secrets, which is codified in Connecticut's Uniform Trade Secrets Act, the common-law theory of misappropriation of property, and CUTPA.[6] As a threshold matter, we note that a trial court's findings of fact will be reversed only if they are clearly erroneous. E.g., *Tarullo* v. *Inland Wetlands & Watercourses Commission*, 263 Conn. 572, 581, 821 A.2d 734 (2003).

The defendants claim that, to the extent that the trial court's award of damages was based on its conclusion that the defendants had violated the Uniform Trade Secrets Act, it was improper because there was insuffi-

[6] We note that "[t]he entry of a default constitutes an admission by the defendant of the truth of the facts alleged in the complaint." *DeBlasio* v. *Aetna Life & Casualty Co.*, 186 Conn. 398, 400, 441 A.2d 838 (1982). Thus, the defendants cannot challenge the determination of liability in the present case because liability was deemed to be established conclusively. Accordingly, our review of the defendants' claims is limited to whether the trial court properly awarded damages and whether the amount of damages awarded was proper.

cient evidence to establish that Lectron possessed protected information about customers, pricing schemes and processes and treated it as proprietary information.[7] Thus, the defendants contend that the information at issue did not constitute trade secrets. We disagree.

General Statutes § 35-51 (d) defines a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, process, drawing, cost data or *customer list* that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Emphasis added.)

The trial court found that Lectron protected information about its suppliers, customers, pricing schemes and processes, and treated it as proprietary information. The court concluded that the defendants improperly had appropriated this information. Our review of the transcript from the damages hearing reveals that there was sufficient evidence to support the trial court's factual findings. At the damages hearing, for example, Sorrentino specifically was asked, "[D]id you keep your customers—who your customers were and your pricing scheme, and things of that nature—did Lectron . . . treat that information as confidential?" Sorrentino responded, "Yes, we did." Sorrentino also testified that Bettina Snyder and Donald Snyder, among others, were aware that such information was confidential. Thus,

[7] We note that the plaintiffs did not allege in their complaint that the defendants had violated the Uniform Trade Secrets Act. The defendants do not claim on appeal, however, that the trial court's award of damages was improper inasmuch as the plaintiffs failed to allege a violation of the Uniform Trade Secrets Act in their complaint. See Practice Book § 10-3.

there was sufficient evidence to permit the trial court to award damages under the Uniform Trade Secrets Act.

The defendants claim, however, that there was no evidence to support a finding that the defendants actually misappropriated trade secrets or nontrade secret property. We disagree. General Statutes § 35-51 (b) defines misappropriation as: "(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (2) disclosure or use of a trade secret of another without express or implied consent by a person who (A) used improper means to acquire knowledge of the trade secret; or (B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (i) derived from or through a person who had utilized improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, including but not limited to disclosures made under section 1-210, sections 31-40j to 31-40p, inclusive, or subsection (c) of section 12-62; or (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake."

The trial court's determination that the defendants misappropriated trade secrets was based on its finding that the defendants had "solicited [Lectron's] customers and diverted them to the defendants' new business venture [namely, CS Industries]." First, the allegations of the plaintiffs' complaint support the trial court's factual determination, and it is well settled that "[t]he entry of a default constitutes an admission by the defendant of the truth of the facts alleged in the complaint." *DeBlasio* v. *Aetna Life & Casualty Co.*, 186 Conn. 398, 400, 441 A.2d 838 (1982). The plaintiffs alleged in their com-

plaint, for example, that the defendants usurped Lectron's customers. Second, a review of the transcript from the hearing in damages further demonstrates that there was sufficient evidence to support the trial court's factual findings. There was testimony that the defendants had solicited Lectron's customers and diverted them to the defendants' new business venture.

The trial court also determined that the defendants had violated the common-law theory of misappropriation of nontrade secret property by using fraudulent means to misappropriate Lectron's most productive and efficient machine. Similarly, the trial court's determination is supported by the pleadings and by evidence adduced at the hearing in damages. The plaintiffs alleged in their complaint that several of the defendants arranged to remove an electron beam welder from the premises of Lectron so that it could be reinstalled at the premises of CS Industries. There was also testimony at the damages hearing that the defendants started a competing business, namely, CS Industries, and utilized fraudulent means to misappropriate the plaintiffs' most productive and efficient machine.

The allegations contained in the plaintiffs' complaint, which are deemed to be established conclusively, and the evidence adduced at the damages hearing, therefore, demonstrate that there was ample support for the trial court's determination that Lectron was entitled to damages under the common law and the Uniform Trade Secrets Act.[8]

III

The defendants also claim on appeal that, even if the trial court properly determined that the plaintiffs were entitled to damages, the amount of compensatory dam-

[8] We note that the defendants' only challenge in connection with the trial court's award of damages under CUTPA is to its award of punitive damages, which we discuss in part III of this opinion.

ages, punitive damages and attorney's fees that the trial court actually awarded was improper. We first note that a trial court is vested with "broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed . . . absent a clear abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, 251 Conn. 59, 90, 752 A.2d 1037 (1999).

A

First, the defendants claim that the trial court's award of compensatory damages was improper. The defendants claim that the trial court improperly calculated compensatory damages because it: (1) failed to consider that the individual shareholder plaintiffs did not have a 100 percent interest in Lectron, a fact that should have served to reduce the compensatory damages award; and (2) failed to deduct the proper amount of the proceeds from the sale of various pieces of Lectron's equipment.

On the basis of our earlier conclusion that the individual shareholder plaintiffs lack standing in the present matter; see part I of this opinion; we need not address the first part of the defendants' claim. This issue is moot in light of our decision to direct the trial court to render judgment dismissing the action as to Smith and Tartagni.

In support of the second part of their claim regarding compensatory damages, the defendants assert that the trial court improperly reduced the compensatory damages award by $15,000 instead of $127,000 to reflect the proceeds of the sale of Lectron's equipment. The defendants contend that the trial court failed to consider evidence adduced at the damages hearing that Lectron received $127,000 for the sale of the equipment.

Although the defendants correctly note that Sorrentino testified at the damages hearing regarding the pro-

ceeds from the sale of Lectron's equipment, Sorrentino's testimony was vague at best. For example, when Sorrentino was questioned about the sale proceeds, he was unable to recall how much money Lectron had received with any degree of precision or certainty. Moreover, our review of the record reveals no supporting documentation regarding the sale proceeds. It was within the trial court's discretion, therefore, to weigh Sorrentino's testimony and to decide whether to rely on it in its calculation of compensatory damages. See *Bieluch* v. *Bieluch*, 199 Conn. 550, 555–56, 509 A.2d 8 (1986).

Moreover, because the defendants elected not to file a motion for articulation to illuminate further the basis for the compensatory damages award, this court can only speculate as to how and why the trial court arrived at that sum. We repeatedly have stated that it is the appellant's responsibility to provide an adequate record for review. E.g., *Walton* v. *New Hartford*, 223 Conn. 155, 164–65, 612 A.2d 1153 (1992). Thus, in light of the discretion afforded the trial court in determining the amount of damages to be awarded and in crediting or discrediting the testimony of witnesses, we conclude that the trial court's award of compensatory damages was proper. See *Bieluch* v. *Bieluch*, supra, 199 Conn. 555–56.

B

The defendants next contend that the trial court improperly awarded punitive damages under CUTPA because an award of such damages under CUTPA requires evidence that the defendants demonstrated a reckless indifference to the rights of the plaintiffs. In the present case, the trial court's finding of reckless indifference was premised on the defendants' breach

of fiduciary duties.[9] The defendants claim that the only defendant that was alleged to have breached a fiduciary duty was Charles Snyder, who is no longer a party to this action. Thus, the defendants claim that the trial court improperly awarded punitive damages under CUTPA against the remaining defendants in this action because there was no direct or circumstantial evidence to establish that they demonstrated a reckless indifference to the plaintiffs' rights. We disagree.

We have stated that when "two or more persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or in doing it under circumstances which fairly charge them with intending the consequences which follow, they incur a joint and several liability for the acts of each and all of the joint participants. . . . Whe[n] . . . the evidence supports the conclusion that there was concerted action, each participant is . . . liable for the entire injury caused by the concerted action." (Citation omitted; internal quotation marks omitted.) *Lamb* v. *Peck*, 183 Conn. 470, 472–73, 441 A.2d 14 (1981).

In their complaint, the plaintiffs alleged that Charles Snyder breached his fiduciary duties to Lectron as an officer and director. The plaintiffs further alleged in their complaint that the remaining defendants conspired with Charles Snyder in the breach of his fiduciary duties. As we have discussed previously in this opinion, the entry of the default judgment conclusively established the facts alleged in the plaintiffs' complaint. Our decision in *Lamb* and the allegations in the plaintiffs' complaint, therefore, inform our conclusion that the remaining defendants in the present case are jointly and severally liable for Charles Snyder's breach of his

[9] The trial court cited *Blum, Shapiro & Co.* v. *Searles & Houser, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-99-0586283-S (August 11, 1999), for the proposition that a breach of fiduciary duties may constitute reckless indifference.

fiduciary duties. We conclude, therefore, that the trial court did not abuse its discretion in awarding $40,000 in punitive damages under CUTPA.

C

The defendants next claim that the trial court improperly awarded $40,000 in punitive damages under the common law because the plaintiffs had failed to plead punitive damages, which the defendants contend is required under Connecticut law. See *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, 230 Conn. 148, 161 n.16, 645 A.2d 505 (1994). The defendants claim alternatively that, even if it is assumed that an award of common-law punitive damages is merited, the award was improper because common-law punitive damages are limited to the plaintiffs' litigation expenses, and there was no evidence in the present case concerning the plaintiffs' litigation expenses. See *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, 193 Conn. 208, 236, 238, 477 A.2d 988 (1984) (common-law punitive damages limited to expense of litigation less taxable costs).

Our review of the trial court's memorandum of decision reveals, however, that the trial court awarded punitive damages under the Uniform Trade Secrets Act rather than under common law. The punitive damages provision of that act, namely, General Statutes § 35-53 (b), provides: "In any action brought pursuant to subsection (a) of this section,[10] if the court finds *wilful and malicious misappropriation*, the court may award punitive damages in an amount not exceeding twice any award made under subsection (a) and may award reasonable attorney's fees to the prevailing party." (Emphasis added.) The trial court specifically quoted § 35-53 (b) in awarding punitive damages on the basis

[10] Subsection (a) of § 35-53 authorizes an award of damages for the "misappropriation" of trade secrets as described in subsection (b) of § 35-51.

of its finding that the defendants' conduct was wilful and malicious. The only logical interpretation of the trial court's decision, therefore, is that it awarded punitive damages under § 35-53 (b). The defendants do not dispute the trial court's finding that their conduct was wilful and malicious. We conclude, therefore, that the trial court did not abuse its discretion in awarding $40,000 in punitive damages under § 35-53 (b) inasmuch as the award did not exceed twice the amount of the award of compensatory damages. See General Statutes § 35-53 (b).

D

Finally, the defendants claim that the trial court abused its discretion in awarding $20,000 in attorney's fees. Specifically, the defendants claim that the award of attorney's fees was improper because no evidence was presented to establish the reasonableness, nature and extent of the attorney's fees incurred by the plaintiffs during the course of the litigation. We reject the defendants' claim under the particular circumstances of this case.

The trial court was vested with discretion to award reasonable attorney's fees under both CUTPA and the Uniform Trade Secrets Act. General Statutes § 42-110g (d) provides in relevant part that, in any action in which a person alleges damages resulting from an unfair trade practice prohibited by § 42-110b of CUTPA, "the court may award, to the plaintiff, in addition to the relief provided in this section, *costs and reasonable attorneys' fees* based on the work reasonably performed by an attorney and not on the amount of recovery. . . ." (Emphasis added.) Additionally, General Statutes § 35-53 (b), one of the provisions comprising Connecticut's Uniform Trade Secrets Act, provides in relevant part: "[I]f the court finds wilful and malicious misappropriation, the court may award punitive damages in an

amount not exceeding twice any award [of compensatory damages] *and may award reasonable attorney's fees* to the prevailing party." (Emphasis added.)

Notwithstanding the conclusive establishment of liability occasioned by the default of the defendants in the present case, "the plaintiff must still prove . . . how much of the judgment prayed for in the complaint he is entitled to receive."[11] (Internal quotation marks omitted.) *DeBlasio* v. *Aetna Life & Casualty Co.*, supra, 186 Conn. 401. Thus, although Lectron was entitled to a discretionary award of reasonable attorney's fees in light of the defendants' liability, it was incumbent upon Lectron to prove the amount of fees to which it was entitled upon the entry of the default judgment.

We long have held that there is an "undisputed requirement that the reasonableness of attorney's fees and costs must be proven by an *appropriate evidentiary showing*." (Emphasis added.) *Hartford Electric Light Co.* v. *Tucker*, 183 Conn. 85, 91, 438 A.2d 828, cert. denied, 454 U.S. 837, 102 S. Ct. 143, 70 L. Ed. 2d 118 (1981); accord *Barco Auto Leasing Corp.* v. *House*, 202 Conn. 106, 121, 520 A.2d 162 (1987); see also *Appliances, Inc.* v. *Yost*, 186 Conn. 673, 680–81, 443 A.2d 486 (1982); *Stelco Industries, Inc.* v. *Cohen*, 182 Conn. 561, 567–68, 438 A.2d 759 (1980). We also have noted that "courts have a general knowledge of what would be reasonable compensation for services which are *fairly stated and described*"; (emphasis added; internal quotation marks omitted) *Shapero* v. *Mercede*, 262 Conn. 1, 9, 808 A.2d 666 (2002); and that "[c]ourts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees." (Internal quotation marks omitted.) *Andrews* v. *Gorby*, 237 Conn. 12, 24,

[11] At the very least, a default judgment entitles the plaintiff to nominal damages. *DeBlasio* v. *Aetna Life & Casualty Co.*, supra, 186 Conn. 401.

675 A.2d 449 (1996). Even though a court may employ its own general knowledge in assessing the reasonableness of a claim for attorney's fees, we also have emphasized that "no award for an attorney's fee may be made when the evidence is insufficient." (Internal quotation marks omitted.) *Appliances, Inc.* v. *Yost*, supra, 680.

The weight of authority indicates that more than the trial court's mere general knowledge is required for an award of attorney's fees. See, e.g., *Miller* v. *Kirshner*, 225 Conn. 185, 201, 621 A.2d 1326 (1993); *Barco Auto Leasing Corp.* v. *House*, supra, 202 Conn. 120–21; *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 681; *Stelco Industries, Inc.* v. *Cohen*, supra, 182 Conn. 567–68; *Lebowitz* v. *McPike*, 151 Conn. 566, 568, 201 A.2d 469 (1964); but see *Bizzoco* v. *Chinitz*, 193 Conn. 304, 310–11, 476 A.2d 572 (1984).

For example, in *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 679, the terms of a promissory note provided for an award of reasonable attorney's fees. The trial court nevertheless determined that the parties had failed to provide sufficient evidence for an award of attorney's fees. Id. We disagreed, concluding that "some evidentiary material did exist for the court to consider on that issue"; id., 681; including a supplemental brief filed by the plaintiff in which the plaintiff itemized the attorney's services. Id. We noted that "[t]hese materials, *combined with* the court's own general knowledge, could serve to provide a basis for the court to decide the right to and amount of reasonable attorney's fees." (Emphasis added; internal quotation marks omitted.) Id.

In *Piantedosi* v. *Floridia*, 186 Conn. 275, 440 A.2d 977 (1982), the defendant claimed that the trial court improperly awarded attorney's fees because it did not base its award on "factual evidence in the transcript, such as expert witness testimony." Id., 279. We rejected the defendant's contention, concluding that the trial

court properly considered evidence that "twenty-five hours, at $60 per hour, had been expended on the case before trial." Id. We noted that a party need not present expert testimony regarding attorney's fees and reaffirmed our previous holdings that "courts have a general knowledge of what would be reasonable compensation for services which are *fairly stated and described*." (Emphasis added; internal quotation marks omitted.) Id.

Moreover, in *Hartford Electric Light Co.* v. *Tucker*, supra, 183 Conn. 86–87, the defendant appealed from the judgment of the trial court awarding, inter alia, attorney's fees to the plaintiff. The defendant challenged the constitutionality of a statute that allowed for the plaintiff's recovery of "reasonable attorney's fees and costs . . . ." (Internal quotation marks omitted.) Id., 91. We rejected the defendant's contention that the statute authorizing the plaintiff's recovery of attorney's fees was "devoid of standards," concluding that "[t]he defendant's constitutional protection from excessive awards [was] to be found in the *undisputed requirement that the reasonableness of attorney's fees and costs must be proven by an appropriate evidentiary showing*." (Emphasis added.) Id.

In *Miller* v. *Kirshner*, supra, 225 Conn. 199, the defendant, Hal Kirshner, claimed that there was insufficient evidence to support an award of attorney's fees. "During the trial on financial issues, the plaintiff [Mary Miller] submitted a sworn affidavit indicating that she owed counsel $20,000 at the time of trial and attached a supporting itemization. [Kirshner] argued that [Miller] was barred from seeking attorney's fees because she had failed to produce expert testimony that the fees were reasonable. In its memorandum of decision on financial issues, the trial court awarded [Miller] $7000 in attorney's fees. The court stated that . . . [it had] a general knowledge of what would be a reasonable fee under

the facts, circumstances and workload of th[e] case. It [found that] amount to be fair and reasonable.

"[On appeal, Kirshner] claim[ed] that the trial court improperly [had] awarded attorney's fees without conducting a hearing to consider evidence from an expert witness with respect to the reasonableness of the hours and monetary amount of the fees requested. [Kirshner did] not claim that he was not permitted to introduce evidence regarding the unreasonableness of the fees requested, but that [Miller had] failed to produce evidence, through an expert witness, of their reasonableness. [Kirshner] argue[d], therefore, that without a proper evidentiary foundation, an award of attorney's fees could not be made." (Internal quotation marks omitted.) Id., 199–200.

We disagreed with Kirshner and concluded that "[t]he trial court properly relied on the financial affidavit before it *and* on its general knowledge and involvement with the entire trial to ascertain a reasonable attorney's fee." (Emphasis added.) Id., 201. Thus, the trial court possessed documentary evidence regarding attorney's fees and based its award on that evidence in addition to its own general knowledge of what constituted a reasonable attorney's fee. See id.

In *Shapero* v. *Mercede*, 262 Conn. 1, 808 A.2d 666 (2002), we reviewed the Appellate Court's conclusion that there was insufficient evidence upon which to base a finding of attorney's fees because the plaintiff attorney, Paul D. Shapero, had produced no evidence to establish either his rate of compensation or the prevailing rates in the legal community. We stated that "[t]he Appellate Court did not consider, however, whether there was other evidence that could have supported the fee award." Id., 6.

Shapero testified that he had worked 100 hours on the matter. Id., 3. "[T]he referee based her finding that

the appropriate hourly rate was $275, rather than $500 as requested by [Shapero], upon other subordinate findings relevant to the value of [Shapero's] services. With regard to [Shapero's] experience and reputation, the referee noted that [t]he fact finder recognizes that the value added choice of [having Shapero] . . . handle the [client's] tax matters involved the recognition of [Shapero's] notable service as probate judge and as corporation counsel with the city of Stamford and other public boards and agencies and his lifelong service to the community and to the legal profession. [The referee] also found that [t]he arguments were complicated by the fact that a claim of environmental contamination was involved that could [have] trigger[ed] a broader base for application of tax relief, and that [t]here [was] an element of novelty to [Shapero's] presentation to the tax assessor regarding the assessment method and the list year in question . . . .

"The referee's evidentiary findings with regard to [Shapero's] experience and reputation, and the novelty and complexity of the legal issues addressed in the course of his work on behalf of [his client], ha[d] not been challenged and [were] therefore binding on this court." (Internal quotation marks omitted.) Id., 8–9.

In *Shapero*, we concluded the court's "general knowledge [of what constitutes a reasonable attorney's fee] and the referee's unchallenged findings relevant to the value of the plaintiff's services provided sufficient support for the challenged finding that $275 per hour was an appropriate measure of the value of those services." Id., 10. Thus, as in numerous other cases, there was additional evidence in *Shapero* to support the trial court's award of attorney's fees.

In *Shapero*, we distinguished cases that the Appellate Court had relied on in reversing the trial court's award of attorney's fees. See id., 6–7 n.3. We noted that "[t]he

Appellate Court cite[d] several cases in support of its conclusion that [n]o award of attorney's fees . . . may be made when the evidence on which to base the award is insufficient. . . . *Although this is a correct statement of the law*, the cases cited are distinguishable . . . . Specifically, in none of the cases cited has this court or the Appellate Court ruled that competent evidence regarding the value of legal services was introduced but that it did not suffice to support a finding regarding that value. Indeed, in the first case cited by the Appellate Court [namely, *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 673], we reversed the ruling of the trial court and held that *a brief in which counsel's services were itemized, when taken with the court's own general knowledge, constituted sufficient evidence from which to determine the amount of reasonable attorney's fees.* [Id., 681]. Therefore, in *Appliances, Inc.*, we required neither evidence regarding the rate ordinarily charged by the plaintiff in that case nor evidence of prevailing rates in the community. In one of the other cases cited by the Appellate Court . . . *no evidence of the value of the services whatsoever had been introduced. Lebowitz* v. *Pike*, [151 Conn. 566, 568, 201 A.2d 469 (1964)]. In another [namely, *City Savings Bank of Bridgeport* v. *Miko*, 1 Conn. App. 30, 467 A.2d 929 (1983)], the Appellate Court determined that the awarding of attorney's fees would be improper because the post-deficiency-judgment services for which the fees were sought had not yet been performed, unlike those in question in [Shapero], and might never be performed in the future. [Id., 38]. That court ruled that [p]ermitting an award of legal fees depends upon a factual finding concerning work already performed. Id. In the remaining case cited by the Appellate Court [namely, *Gruskay* v. *Simenauskas*, 107 Conn. 380, 140 A. 724 (1928)], the only evidence of the value of the attorney's services was in the form of opinion testimony

provided by three witnesses in response to a hypothetical question regarding the attorney's prior experience. [Id., 384–85]. An objection to the question was made on the grounds that it did not accurately reflect the actual level of experience of the attorney seeking compensation. Id., 384. This court concluded that the trial court improperly had overruled this objection . . . and held that [w]ith the hypothetical question excluded, there was *no sufficient evidence before the court upon which to predicate a conclusion regarding the value of the services*. Id., 387. [In *Shapero*] . . . there [was] such evidence." (Citations omitted; emphasis added; internal quotation marks omitted.) *Shapero* v. *Mercede*, supra, 262 Conn. 6–7 n.3.

Thus, as our case law demonstrates, to support an award of attorney's fees, there must be a clearly stated and described factual predicate for the fees sought, apart from the trial court's general knowledge of what constitutes a reasonable fee. Although we have been careful not to limit the contours of what particular factual showing may suffice, our case law demonstrates that a threshold evidentiary showing is a prerequisite to an award of attorney's fees.[12]

Notwithstanding the existence of numerous cases establishing this evidentiary burden, some confusion exists in our case law regarding the nature and extent of this evidentiary burden. See *Resurreccion* v. *Normandy Heights, LLC*, 76 Conn. App. 642, 650, 820 A.2d 1116 (acknowledging confusion relating to evidentiary burdens associated with awards of attorney's fees), cert. denied, 264 Conn. 917, 826 A.2d 1159 (2003).

[12] In *Lebowitz* v. *McPike*, supra, 151 Conn. 567–68, we held that the plaintiff, who had brought an action to collect on a note executed by the defendants, was not entitled to attorney's fees, after a trial on the issues, despite a term in the note providing for such fees. We concluded that "[t]he judgment did not include any allowance for attorneys' fees, *since no evidence was introduced concerning them*." (Emphasis added.) Id., 568.

The dissent relies on our holding in *Bizzoco* v. *Chintz*, supra, 193 Conn. 304, to support its conclusion that the trial court's general knowledge of the file, per se, is sufficient for an award of attorney's fees. In *Bizzoco*, the defendant, Leon Chinitz, appealed from the judgment of the trial court awarding the plaintiff, Elizabeth Bizzoco, attorney's fees. See id., 306–307. The trial court awarded Bizzoco attorney's fees pursuant to the explicit provisions of a promissory note authorizing an award of reasonable fees. Id., 310. Inasmuch as Bizzoco had offered no additional evidence regarding attorney's fees at trial apart from the terms of the promissory note, Chinitz claimed that the evidence was insufficient to sustain an award of attorney's fees. See id. We disagreed with Chinitz and held that "courts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees." Id. We noted that "the trial court knew that [Bizzoco's] counsel had taken a lengthy deposition, had engaged in a two-day trial, and had prepared a post-trial brief." Id., 310–11. We thus concluded that "[t]he [trial] court was in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues. Th[e] record was sufficient to support the award made by the court." Id., 311.

We acknowledge that the dissent's interpretation of our holding in *Bizzoco*, namely, that the trial court's general knowledge of the reasonableness of the attorney's fees as well as the court's access to the file and knowledge of the proceedings before it was alone sufficient to warrant an award of attorney's fees, is a reasonable interpretation of that case. Nevertheless, we believe, on the basis of the weight and persuasiveness of our case law on this issue, decided both before and after *Bizzoco*, that the trial court's general knowledge of the file in a particular case, by itself, is an insufficient

foundation on which to base an award of attorney's fees. Our adherence to the principle set forth in *Bizzoco* would require us to read the "fairly stated and described" language out of our long-standing precedent. (Internal quotation marks omitted.) *Shapero* v. *Mercede*, supra, 262 Conn. 9. We decline to do so. Furthermore, we note that, in support of our holding in *Bizzoco*, we cited to *Appliances, Inc.*, and *Piantedosi*; *Bizzoco* v. *Chintz*, supra, 193 Conn. 310; two cases that clearly emphasize the necessity of having an evidentiary foundation, independent of the trial court's general knowledge, upon which to base an award of attorney's fees. See *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 681; *Piantedosi* v. *Floridia*, supra, 186 Conn. 279.

Accordingly, when a court is presented with a claim for attorney's fees, the proponent must present to the court at the time of trial or, in the case of a default judgment, at the hearing in damages, a statement of the fees requested and a description of services rendered.[13] Such a rule leaves no doubt about the burden on the party claiming attorney's fees and affords the opposing party an opportunity to challenge the amount requested at the appropriate time.[14]

[13] Of course, courts must enforce statutory limits on attorney's fees; e.g., General Statutes § 42-150aa (b); and recognize self-executing terms of contractual provisions that call for an award of a set percentage of attorney's fees upon the occurrence of a certain event. Cf. *Stelco Industries, Inc.* v. *Cohen*, supra, 182 Conn. 567–68.

[14] We have recognized the right of parties, at trial, to litigate fully the reasonableness of the fees requested. See *Barco Auto Leasing Corp.* v. *House*, supra, 202 Conn. 121. In *Barco Auto Leasing Corp.*, the defendants sought to introduce into evidence affidavits in support of their request for attorney's fees. Id. The plaintiff objected to the admission of one affidavit and claimed that the defendants were required to offer expert testimony to establish the value of reasonable fees. Id. The trial court did not allow the admission of the affidavits in evidence but, instead, included them in the case file. Id. Thereafter, the court directed the parties to raise any claims or objections to the award of attorney's fees in their briefs. Id. Upon these facts, we held that the court "denied the [party against whom attorney's fees were sought] the undisputed right to litigate fully the reasonableness of the attorney's fees sought . . . ." Id.

Our holding today does not limit the trial court's ability to assess the reasonableness of the fees requested using any number of factors, including its general knowledge of the case, sworn affidavits or other testimony, itemized bills, and the like. As we recognized in *Piantedosi*, "[t]he value [of reasonable attorney's fees] is based upon many considerations." (Internal quotation marks omitted.) *Piantedosi* v. *Floridia*, supra, 186 Conn. 279, quoting *Hoenig* v. *Lubetkin*, 137 Conn. 516, 524, 79 A.2d 278 (1951).

In addition, as a matter of good policy, our holding today establishes a paradigm within which all parties must act when pursuing a claim for attorney's fees. Perhaps, even more importantly, our holding eliminates the undesirable burden imposed upon the courts when a party seeks an award of attorney's fees predicated solely upon a bare request for such fees. Parties must supply the court with a description of the nature and extent of the fees sought, to which the court may apply its knowledge and experience in determining the reasonableness of the fees requested.

Under the circumstances of this case, however, we affirm the trial court's award of $20,000. We reach this conclusion because the defendants did not oppose or otherwise take any action in response to the plaintiffs' request for $25,000 in fees in their post-damages hearing brief.[15] Although the proponent bears the burden of

We note that our conclusion in *Barco Auto Leasing Corp.*, namely, that the trial court improperly denied the party against whom attorney's fees were sought the opportunity to litigate fully the issue, was premised upon factual circumstances that differ from those in the present case. In *Barco Auto Leasing Corp.*, the party against whom attorney's fees were sought affirmatively objected to the submission of evidence in support of the request for attorney's fees. Id. In the present case, however, upon notice of the plaintiffs' request for attorney's fees, the defendants did not object or otherwise respond to that request. Accordingly, the trial court in the present case did not deny the defendants any opportunity to litigate fully the issue of attorney's fees.

[15] See footnote 14 of this opinion.

furnishing evidence of attorney's fees at the appropriate time, once the plaintiffs in this case did make such a request, the defendants should have objected or at least responded to that request. Had the defendants demonstrated any interest in objecting to the plaintiffs' request for attorney's fees, the trial court would have been obligated to grant the defendants an opportunity to be heard. See *Barco Auto Leasing Corp.* v. *House*, supra, 202 Conn. 121; footnote 14 of this opinion. Accordingly, although a bare request for attorney's fees, without more, ordinarily would not suffice under the clarifying rule we announce today, we conclude that a reversal of the award in the present case is not justified in light of the defendants' failure, prior to this appeal, to interpose *any objection whatsoever* to the plaintiffs' request for attorney's fees. In other words, the defendants, in failing to object to the plaintiffs' request for attorney's fees, effectively acquiesced in that request, and, consequently, they now will not be heard to complain about that request.[16]

The judgment is reversed with respect to the trial court's award of damages and attorney's fees to the plaintiffs Patricia Smith and Carol Tartagni and the case is remanded to the trial court with direction to render judgment dismissing the action as to those two plaintiffs. The judgment is otherwise affirmed.

In this opinion SULLIVAN, C. J., and NORCOTT and PALMER, Js., concurred.

BORDEN, J., concurring and dissenting. I agree with, and join, all of the majority opinion, except part III D. In that part, the majority (1) announces a new rule governing the awarding of attorney's fees, but (2) declines to apply that rule to the present case, and (3)

[16] We underscore the fact that the defendants do not challenge the reasonableness of the amount that the trial court awarded in attorney's fees.

therefore affirms an award that, by its own reasoning, was not adequately supported by the record. I would conclude that, in accord with our existing and well considered case law, no abuse of discretion occurred in the award of attorney's fees and that, furthermore, no new rule such as that articulated by the majority is necessary. Accordingly, I would affirm the award of attorney's fees to the plaintiff corporation and its shareholders, and I dissent from the majority's new procedural requirement for such awards.

I

I first address the award of attorney's fees, and explain why I think it was properly made, both procedurally and substantively, under our existing case law. Although the defendants, former employees of the plaintiff corporation, had been defaulted and the trial was limited to a hearing in damages, the record of this case, including the trial court's factual findings and the defendants' claims in both the trial court and this court, demonstrates that the hearing in damages involved claims going to liability as well as damages. As a result of that contested hearing in damages, over which the trial court presided, the court awarded the plaintiffs: (1) $235,000 in compensatory damages under both the Connecticut Unfair Trade Practices Act (CUTPA) and the Connecticut Uniform Trade Secrets Act (trade secrets act); (2) $40,000 in punitive damages under the trade secrets act; (3) $40,000 in punitive damages under CUTPA; and (4) $20,000 in attorney's fees.[1]

I agree with the general standard set forth by the majority for the award of attorney's fees. "[W]e have repeatedly held that courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described. . . . *Piantedosi* v. *Floridia*, 186 Conn. 275, 279, 440 A.2d 977 (1982).

[1] This award was a reduction from the $25,000 requested by the plaintiffs.

We have applied this principle with regard to attorney's fees. See, e.g., *Andrews* v. *Gorby*, [237 Conn. 12, 24, 675 A.2d 449 (1996)]; *Appliances, Inc.* v. *Yost*, [186 Conn. 673, 681, 443 A.2d 486 (1982)]." (Internal quotation marks omitted.) *Shapero* v. *Mercede*, 262 Conn. 1, 9–10, 808 A.2d 666 (2002). More specifically, we have stated: "Time spent is but one factor in determining the reasonableness of an attorney's fee.[2] Although the better practice is for an attorney . . . to maintain time records, the failure to do so does not preclude the court from determining and awarding an attorney's fee. . . . *[C]ourts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. . . . The court [is] in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues. Miller* v. *Kirshner*, 225 Conn. 185, 201, 621 A.2d 1326 (1993)." (Citation omitted; emphasis added; internal quotation marks omitted.) *Andrews* v. *Gorby*, supra, 24; see also *Miller* v. *Kirshner*, supra, 201 (trial court properly relied on plaintiff's itemized financial affidavit of what she owed counsel, "and on its general knowledge and involvement with the entire trial to ascertain a reasonable attorney's fee"); *Bizzoco* v. *Chinitz*, 193 Conn. 304,

[2] "Rule 1.5 of the Rules of Professional Conduct, entitled 'Fees,' provides in pertinent part: '(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

" '(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

" '(2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

" '(3) The fee customarily charged in the locality for similar legal services;

" '(4) The amount involved and the results obtained;

" '(5) The time limitations imposed by the client or by the circumstances;

" '(6) The nature and length of the professional relationship with the client;

" '(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

" '(8) Whether the fee is fixed or contingent. . . .' " *Andrews* v. *Gorby*, supra, 237 Conn. 24 n.19.

310–11, 476 A.2d 572 (1984) (award of attorney's fees sustained because "trial court knew that the plaintiff's counsel had taken a lengthy deposition, had engaged in a two-day trial, and had prepared a post-trial brief . . . [and] was in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with [the] issues"); *Piantedosi* v. *Floridia*, supra, 279 (court's discretion in award of attorney's fees need not "be based on factual evidence in the transcript"; trial court's "[awareness] of the activities of counsel during the course of . . . trial," supported its valuation of reasonable attorney's fees). In addition, we explicitly have held that, even when the trial court that awarded attorney's fees was not the same court that presided over the rest of the case, it can employ its general knowledge of the value of attorneys' services performed in the case, and can estimate the amount of work involved from an examination of the pleadings in the file. *Shapero* v. *Mercede*, supra, 9 n.6; *Appliances, Inc.* v. *Yost*, supra, 681 n.5 (trial court had "entire file before it from which it could estimate the approximate number of hours devoted to the pleadings"). Applying these standards to the record in the present case, I would conclude that the trial court did not abuse its discretion in its award of attorney's fees.

First, the trial court had presided over the entire contested hearing in damages, resulting in a successful award of a total of $235,000 in compensatory damages, and $80,000 in punitive damages based on the defendants' reckless, willful and malicious conduct toward the plaintiffs. Thus, it had firsthand knowledge of the length, difficulty and complexity of that proceeding, as well as the degree of its success. In addition, immediately prior to the commencement of the hearing in damages, the very same trial court entertained the defendants' motion to open the very default that had led to the hearing in damages. In opposing the motion,

the plaintiffs' attorney gave the following detailed description of the procedurally tortured path of the case up to that time.

Eighteen months prior to the hearing in damages, the plaintiffs' attorney had first sought discovery, and continued to seek discovery over the ensuing months. The defendants did not file any objection, yet they failed to comply with the discovery requests. Specifically, the defendants flagrantly had refused to comply.[3] Thus, the plaintiffs' attorney was forced to move for compliance, and he obtained a ruling that a default would enter if the defendants continued to fail to comply. Again, they failed to comply, and the plaintiffs' counsel was forced to move for a default. The defendants *then* filed an objection to discovery. The plaintiffs' counsel then took more depositions, coupled with further discovery requests, with which the defendants again failed to comply; this required a hearing, during which the plaintiffs' counsel was required to "spend a lot of time going over this." The trial court then agreed with the plaintiffs' counsel that the defendants' discovery objections had been untimely, *and ordered the defendants to pay the plaintiffs' attorney's fees.* Nonetheless, the court opened the default, based on the defendants' representations that they would now comply with the discovery requests. Thereafter, counsel for the plaintiffs met with counsel for the defendants in an attempt to reach an understanding about the defendants' compliance. The defendants' attorney agreed that they would comply. The plaintiffs' counsel then sent a letter to the defendants' counsel reaffirming their understanding that the defendants would produce the relevant materials within thirty days, and stating if he had "anything wrong . . .

[3] The plaintiffs' counsel represented to the court, without objection from the defendants, that he had "taken two depositions with [the defendants] where I sat across the table from them, and they told me how they've made no attempt [to obtain or disclose] the [requested] discovery materials."

[or had] misconstrued something" the defendants should "please tell [counsel] . . . so we can address it now, rather than later." The defendants neither responded to the letter nor complied with the outstanding discovery requests, forcing the plaintiffs' counsel again to move for a default for failure to comply with discovery. As a result, the court again entered a default against the defendants for failure to comply with discovery requests. The defendants *again* moved to set the default aside, based on their earlier objections to discovery, which already had been determined to have been untimely. The plaintiff's counsel, consequently, was *again* required to file an objection laying out the prior history.[4]

It was on this state of the record that the court considered the defendants' motion to open the default. The court denied the motion, and proceeded immediately to the hearing in damages. Thus, although the preceding representations were not offered to the court in *specific* connection with the plaintiffs' ultimate request for attorney's fees, the court certainly was entitled to take them into account in connection with that request.[5]

[4] The hearing in damages took place at the end of June, 2001. The plaintiffs' counsel's objection, dated December 26, 2000, provided the following: two depositions had been commenced, both with substantial production requests, which were "almost completely ignored," with no objections filed, and that the defendants "simply chose not to produce the requested documents"; the defendants had filed objections to the plaintiffs' interrogatories and production requests "long after the deadline for compliance," and used the late filed objections as a basis for opening a default; the trial court had opened the default, but imposed costs on the defendants, advising both counsel to work out the objections or place them on a calendar; thereafter both counsel reviewed all the discovery requests and the defendants' counsel agreed to comply with them, an agreement that was confirmed in writing by the plaintiffs' counsel's letter, which was attached; and because the original discovery requests had been filed on December 2, 2000, the plaintiffs had been unsuccessfully seeking discovery for one year.

[5] Curiously, the majority neglects to mention this entire proceeding in its discussion of the award of attorney's fees. Indeed, the majority does not even give any weight to the fact that the trial court had just completed hearing and deciding the hearing in damages, which covered both liability

Second, the trial court file, which the trial court that conducted the hearing in damages had available to it for use in connection with the claim for attorney's fees, confirms the history recounted by the plaintiffs' attorney, including the needless litigation costs associated with the defendants' repeated discovery abuses. That file includes the following, in addition to the normal cohort of pleadings.[6] The plaintiffs' filed a second motion for default "for repeated refusal and non-compliance with discovery." That motion also notes the court's prior order for the defendants to comply with numerous discovery requests, and the defendants' untimely objections thereto. In addition, in October, 2000, the trial court again ordered compliance, with a warning that a default would enter if the defendants again refused to comply, and with an award of attorney's fees at that time. The file further reflects the defendants' continued failure to comply, and their failure to pay the attorney's fee award. The plaintiffs' filing also discloses the depositions at which the defendants failed to produce the documents requested in connection therewith, and the court's granting of the plaintiffs' motion for default based on the defendants' repeated discovery violations, together with copies of various renewed notices of depositions and ignored production requests.

This entire record—the hearing before the court on the defendants' final motion to open the default, the hearing in damages, and the trial court file—is more than ample to surmount any reasonable requisite procedural or evidentiary threshold so as to justify the court's award of attorney's fees. Thus, the majority's suggestion that the only evidence to support an award of attorney's

and damages. Instead, the majority suggests that this is a case in which the award was "predicated solely upon a bare request for such fees."

[6] The prayer for relief in the original complaint included a request for attorney's fees. Thus, it was apparent from the very beginning that such an award was at least a possibility, and the defendants have never claimed surprise regarding the request.

fees was the plaintiffs' posttrial request for $25,000 is simply contrary to the record.

Indeed, *Bizzoco* v. *Chinitz*, supra, 193 Conn. 310–11, is directly on point. In that case, the promissory note signed by the defendant "expressly authorized the recovery of a reasonable attorney's fee." Id., 310.[7] The defendant challenged the trial court's award of such a fee in the amount of $5868, amounting to 15 percent of the judgment, claiming that "the evidence at trial was insufficient because there was nothing before the court about the services performed by the plaintiff's counsel or about the hours that counsel had spent on the case." Id. This court expressly rejected that challenge, stating that "*courts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. In this case, the trial court knew that the plaintiff's counsel had taken a lengthy deposition, had engaged in a two-day trial, and had prepared a post-trial brief. The court was in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues. This record was sufficient to support the award made by the court.*" (Emphasis added.) Id., 310–11. Similarly, in the present case, the trial court knew that the plaintiffs' counsel had gone through lengthy and contentious discovery proceedings, including several depositions and repeatedly reopened defaults, had engaged in a one day trial on both liability and damages issues, and had filed a posttrial brief. As in *Bizzoco*, "[t]his record was sufficient to support the award made by the court." Id., 311.

The majority's concession that my reading of *Bizzoco* is "reasonable," is, although generous, also disingenu-

[7] In evaluating whether a trial court's award of an attorney's fee is based on sufficient evidence in the record, I can perceive no legitimate basis for distinguishing between a note calling for a reasonable fee and a statute calling for a reasonable fee. Indeed, I do not read the majority opinion to suggest otherwise.

ous. In my view, that is not only a reasonable reading of *Bizzoco*, it is the only accurate reading of it. The majority, moreover, does not suggest an alternative reading. Therefore, the majority has, without explaining what is wrong with *Bizzoco*, implicitly overruled it. The doctrine of stare decisis requires more than that. *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003) ("[t]he doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it" [internal quotation marks omitted]); *State* v. *Ferguson*, 260 Conn. 339, 367 n.18, 796 A.2d 1118 (2002) (same).

In addition, I note that the defendants do *not* claim that the award of $20,000 in attorney's fees was unreasonable in amount. Indeed, given the total award of $335,000, including $80,000 in punitive damages for reckless, willful and malicious conduct by the defendants, the fee award amounts to slightly less than 6 percent of the total award of damages. That strikes me as eminently reasonable in amount, based on the factors set forth by this court in *Andrews* v. *Gorby*, supra, 237 Conn. 24 n.19. See footnote 2 of this opinion.

In this connection, furthermore, I also note that at no time did the defendants attempt in the trial court to challenge the award, either as to its evidentiary basis or as to the reasonableness of its amount. When the plaintiffs filed their posttrial brief requesting $25,000 in attorney's fees, the defendants did not ask the court to postpone any such award until they had an opportunity to challenge it, they did not suggest to the court that the plaintiffs should present documentation or evidence to support the award, and they did not ask for a hearing on the award. When the court made the award, they did not ask the court for an articulation of its evidentiary basis. Had the defendants done any of these things, it is clear to me from this record that both the plaintiffs and the court could have and would have made explicit

what is vividly implicit as to both the evidentiary basis of the award and its reasonableness in amount. Instead, the defendants remained silent on the entire issue until the filing of their brief in this court, in which they devoted a total of less than one page to it. Furthermore, the trial court did not perceive the necessity of further briefing, documentation or evidence, before rendering its award. Compare *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 681 (trial court sua sponte requested supplemental brief itemizing legal services rendered).

I agree that, as we have stated previously, it is the better practice for attorneys seeking fees to keep and produce time records, and I also agree that is the better practice for such attorneys, when they file a request for such fees, to enter into the record, in some appropriate form, a specific statement of the basis for the request. See *Miller* v. *Kirshner*, supra, 225 Conn. 201. That does not mean, however, as the majority now holds, that a failure to make such a specific entry deprives the trial court of an evidentiary basis to render an unchallenged award based on it's the court's own firsthand knowledge of the case before it and of the file available to it.

II

This brings me to the majority opinion and my reasons for disagreeing with it. As a predicate, it is necessary to summarize what I perceive to be its reasoning.

I begin by noting that the majority opinion is a paradigmatic example of the tail wagging the dog.[8] This is an appeal from a total judgment of $335,000, of which only $20,000 is the attorney's fee portion. In addition, as I have already indicated, the portion of the defendants' brief challenging the attorney's fee award constituted less than one page. Furthermore, the majority

[8] Lest I be accused, by virtue of the length of this opinion, of the same thing, I point out that, because I disagree with the majority's reasoning, I am compelled to add my tale to the story in order to explain that disagreement.

spends approximately one-half of its opinion affirming the other substantive aspects of the judgment, which constituted $315,000 in damages, and approximately the same amount of the opinion going to great lengths to articulate a new procedural wrinkle for the award of attorney's fees, but, at the same time, the majority declines to apply that rule to the facts of the present case.

The majority opinion rests on the following chain of reasoning: (1) the weight of our case law requires more than the trial court's general knowledge of the proceedings before it and of the reasonable value of legal services; (2) there must be a clearly stated and described factual predicate for the fees sought, *apart* from the court's general knowledge of what constitutes a reasonable fee, and that "a threshold *evidentiary* showing is a prerequisite for an award of attorney's fees" (emphasis added); (3) therefore, the party seeking the fees "must present to the court at the time of trial or, in the case of a default judgment, at the hearing in damages, a statement of the fees requested and a description of services rendered," thus leaving "no doubt about the burden on the party claiming attorney's fees," and giving the other party "an opportunity to challenge" that request; (4) this holding will eliminate "the undesirable burden imposed upon the courts when a party seeks an award of attorney's fees predicated solely upon a bare request for such fees"; (5) consequently, parties now "must supply the court with a description of the nature and extent of the fees sought, to which the court may apply its knowledge and experience in determining the reasonableness of the fees requested"; *but* (6) none of this applies *to the present case* because the defendants took no action to challenge the plaintiffs' request for fees and, therefore, the award must be upheld. This chain of reasoning is fundamentally flawed.

To take the last link in the chain first, it escapes me why, if this result is required by the weight of our preexisting case law, as the majority insists, it should not apply in the present case. If, as the majority concludes, and as I agree, an award of attorney's fees is part of the plaintiff's burden of establishing damages, and if, as the majority also concludes, and as I do *not* agree, that case law requires a *separate* statement "of the fees requested and a description of services rendered," then I simply fail to see why the majority deprives the defendants of their right to prevail in the present case simply because they remained silent. After all, a defendant who is faced with an absence of necessary proof by the plaintiff on an essential element of the plaintiff's damages has no obligation to do any more than remain silent. Such a defendant may rely on the fact that its adversary simply has failed to establish that part of his case and may, as the defendants did here, claim such a lack of evidentiary sufficiency on appeal. See, e.g., *Lipshie* v. *George M. Taylor & Son, Inc.*, 265 Conn. 173, 175, 828 A.2d 110 (2003).

I do not, of course, advocate such a result in the present case, because in my view the plaintiffs must prevail on the basis of our existing case law. I merely point this out as an example of the self-contradictory nature of the majority's reasoning.

Furthermore, the majority appears to divide the requisite showing for an award of attorney's fees into two parts, namely: (1) a sufficient *evidentiary* basis; and (2) a "*statement*"—presumably by the party's counsel—"of the fees requested and a description of services rendered." (Emphasis added.) Under the majority opinion, however, the second part apparently will satisfy the first part. But why? It is settled law that statements of counsel do not ordinarily constitute evidence. *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 153, 496 A.2d 476 (1985); *Celentano* v. *Zoning Board of*

Appeals, 135 Conn. 16, 18, 60 A.2d 510 (1948). I therefore fail to see why a formal statement of counsel satisfies any evidentiary requirement.

If, however, as seems more likely, the majority instead means that a "threshold *evidentiary* showing"; (emphasis added); does not really mean "evidence," but just the formal statement of counsel that the majority now requires, then the majority has elevated form over substance to Everestian heights, particularly as applied to this record. There can be little doubt that the trial court, as well as the defendants, knew full well the basis of the plaintiffs' request for attorney's fees, without a formal separate statement of that basis. To mix the metaphor even more, the tail that is wagging the dog is little more than a stump. Furthermore, on this understanding of the majority's meaning, it has rendered wholly superfluous our numerous statements that "[c]ourts may rely on their general knowledge of what has occurred in the proceedings before them *to supply evidence* in support of an award of attorney's fees." (Emphasis added; internal quotation marks omitted.) *Miller* v. *Kirshner*, supra, 225 Conn. 201; *Andrews* v. *Gorby*, supra, 237 Conn. 24.

The other links in the majority's chain of reasoning are similarly flawed. The majority elaborately describes the facts of the cases from which it draws the lesson that the weight of our case law requires more than the court's general knowledge of the proceedings and of the reasonable value of legal services, namely, that weight of authority requires a separate statement of the fees requested and services rendered. See *Shapero* v. *Mercede*, supra, 262 Conn. 1; *Miller* v. *Kirshner*, supra, 225 Conn. 185; *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 673; *Piantedosi* v. *Floridia*, supra, 186 Conn. 275; *Hartford Electric Light Co.* v. *Tucker*, 183 Conn. 85, 438 A.2d 828 (1981). It is true that in each of these cases, in which we affirmed the award of fees, there was in

fact more than the court's knowledge of the proceedings and of the value of services in general. Contrary to the majority's assertion, however, in none of those cases did we say or even intimate that the "more" was a *requisite* for such an award. More important, in the only case in which the court made its award *without* the "more," that is, on the basis of its knowledge of the proceedings before it and its general knowledge of the value of legal services; *Bizzoco* v. *Chinitz*, supra, 193 Conn. 304; we squarely affirmed the award, using the same analytical framework that we have employed in all of the cases on which the majority relies. I simply do not see why *Bizzoco* is deprived of its place on the scale measuring the weight of our authority. It is on point, it makes good sense, neither party has asked this court to overrule it, and the majority makes no attempt to justify doing so. Thus, the majority's characterization of the weight of our authority is more properly described as what the majority *wants* that weight to be.

Finally, the majority justifies its new rule on the basis that it will eliminate "the undesirable burden imposed upon the courts when a party seeks an award of attorney's fees predicated solely upon a bare request for such fees." This justification falls of its own weight. First, I am unaware of any such "burden," undesirable or desirable. Certainly, neither the majority nor the defendants in this case have presented any evidence thereof; indeed, the defendants have never even claimed that to be the case. Furthermore, the trial court in this case did not seem at all burdened by the plaintiffs' claim for fees, and had no apparent difficulty making an eminently reasonable award. Certainly this trial court was, as will be any of our trial courts, aware of the option of requesting supplemental briefing, itemizing the legal services rendered, if it determined that it needed more than it already had before it in order to make an intelligent award of attorney's fees. See

Appliances, Inc. v. *Yost*, supra, 186 Conn. 681. Finally, it borders on the facetious to suggest that the present case involves a request for attorney's fees "predicated solely upon a bare request . . . ." The record, as I have demonstrated in part I of this opinion, is wholly to the contrary. Thus, in my view, the majority has fashioned a remedy for a problem that has not been shown to exist.

I would, therefore, affirm the award of $20,000 in attorney's fees to the plaintiffs.

STATE OF CONNECTICUT *v.* PABLO E. SANTOS (SC 16924)

Sullivan, C. J., and Borden, Katz, Palmer and Vertefeuille, Js.

Syllabus

The defendant, who was convicted of the crime of possession of narcotics with intent to sell following his conditional plea of nolo contendere, appealed claiming that the trial court improperly denied his motion to suppress narcotics seized following a warrantless patdown search of his person. The narcotics were seized after the defendant and his three companions were detained by a state trooper who had noticed their vehicle parked at night in the parking lot of publicly owned athletic fields that were known for criminal activity. The defendant claimed, inter alia, that the trooper did not have a reasonable and articulable suspicion of criminal activity that is required to conduct a valid stop and search of an individual pursuant to *Terry* v. *Ohio* (392 U.S. 1), and therefore, that the trooper's actions violated the defendant's constitutional rights. *Held* that the trial court improperly denied the defendant's motion to suppress: the defendant's presence in a high crime area at night, without any other facts, could not form the basis for a reasonable and articulable suspicion that he had engaged in or was about to engage in criminal activity; the record here being devoid of any evidence of suspicious activity at the time the trooper detained the defendant and his companions, the *Terry* stop that led to the discovery of the narcotics seized from the defendant's possession was constitutionally infirm.

Argued September 26, 2003—officially released January 27, 2004

Procedural History

Information charging the defendant with the crimes of possession of narcotics and possession of narcotics

with intent to sell, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the court, *Kocay*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the state nolled the charge of possession of narcotics, and the defendant was presented to the court on a conditional plea of nolo contendere to the charge of possession of narcotics with intent to sell; judgment of guilty of possession of narcotics with intent to sell, from which the defendant appealed. *Reversed*; *further proceedings*.

Jeanne M. Zulick, special public defender, for the appellant (defendant).

Denise B. Smoker, assistant state's attorney, with whom, on the brief, were *Patricia M. Froehlich*, state's attorney, and *Roger Caridad*, senior assistant state's attorney, for the appellee (state).

Opinion

VERTEFEUILLE, J. The dispositive issue in this appeal is whether the trial court properly denied the defendant's motion to suppress narcotics seized following a warrantless patdown search for weapons. The defendant, Pablo E. Santos, appeals from the trial court's judgment of conviction, rendered following a conditional plea of nolo contendere, of possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a).[1] He claims that the actions of the police constituted a search and seizure violative of his

[1] General Statutes § 21a-277 (a) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance . . . for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned . . . ."

state constitutional rights under article first, §§ 7, 8 and 9,[2] of the Connecticut constitution and the first, fourth and fourteenth[3] amendments to the United States constitution.[4] We agree with the defendant that the police detained him without a reasonable and articulable basis to suspect that criminal activity had occurred or was

[2] The Connecticut constitution, article first, § 7, provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

The Connecticut constitution, article first, § 8, provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

The Connecticut constitution, article first, § 9, provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

[3] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."

The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourteenth amendment to the United States constitution, § 1, provides in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

[4] We resolve this issue under the state constitution because it is well established that the reasonable and articulable suspicion standard by which we review a warrantless patdown search is the same under both the federal and state constitutions. See, e.g., *State* v. *Torres*, 230 Conn. 372, 382–83, 645 A.2d 529 (1994) ("[t]he reasonable and articulable suspicion standard also defines the showing required for a prearrest detention under the fourth and fourteenth amendments to the federal constitution . . . and under our state constitution" [citation omitted]; *State* v. *Lamme*, 216 Conn. 172, 184, 579 A.2d 484 (1990) (federal reasonable and articulable suspicion standard defines when detentions are " 'clearly warranted by law' " under article first, § 9, of state constitution).

about to occur, and, accordingly, we reverse the judgment of the trial court.[5]

Prior to trial, the defendant filed a motion to suppress the seized narcotics, which he claimed were seized illegally during a warrantless patdown search of his person for weapons. The court held a suppression hearing on the motion during which the following facts were adduced. On September 7, 2001, at 10:23 p.m., Troopers Chick Bistany and Steven McManaway of the Connecticut state police, Troop K, conducted a routine patrol of the athletic fields on Plains Road (athletic fields) in the town of Windham. The athletic fields consist of a soccer field, softball field, tennis courts and basketball courts, all of which are accessible from a common parking lot. Although not equipped with lighting for nighttime use, the publicly owned athletic fields do not close at sunset, and there are no signs posted restricting public access or limiting the use of the fields to daylight hours.[6] The athletic fields are noted for a high instance of criminal activity, including drug transactions and prostitution,[7] and state police, at the request of the town, therefore patrolled the area nightly.

When the troopers entered the athletic fields' parking lot on the evening in question, they noted the presence

[5] Because we conclude that the initial investigatory detention of the defendant was not supported by a reasonable and articulable basis for suspicion of criminal activity, it necessarily follows that the patdown search was illegal. See, e.g., *State* v. *Trine*, 236 Conn. 216, 223–24, 673 A.2d 1098 (1996), citing *Terry* v. *Ohio*, 392 U.S. 1, 24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ("[i]f, during a *lawful* investigatory detention, the officer reasonably believes that the detained individual might be armed and dangerous, the officer may undertake a patdown search of the individual to discover weapons" [emphasis added]).

[6] Susan Johnson, a former selectman for the town of Windham and a former member of the zoning board of appeals, testified at the suppression hearing that she was familiar with the town ordinances and, to the best of her knowledge, there were no ordinances limiting the use of the athletic fields. Johnson pointed out that, although there are other town ordinances posted at the athletic fields, there are no postings limiting or restricting public access.

[7] Bistany testified at the suppression hearing that hypodermic needles and small bags of the type used to package narcotics have been found in the past at the athletic fields.

of two parked automobiles.[8] McManaway drove to the right of the parking lot toward one of the automobiles,[9] while Bistany drove to the left, toward the other, a white Chevrolet Lumina, in which the defendant was a passenger. Bistany turned on his vehicle's spotlight to illuminate the area around the Lumina. At this point, neither trooper witnessed any illegal activity.

As Bistany approached the Lumina, which was parked with its front end abutting the athletic fields, he observed three individuals standing outside the car, and a fourth, the defendant, exiting the right passenger side of the vehicle. Bistany stopped his cruiser behind the Lumina, at a slight angle, and trained the spotlight on the car and the individuals. Bistany then activated his cruiser's mobile video recorder and his body microphone, allowing him to record all visual and audio events transpiring in front of his cruiser.[10]

Bistany, who was in full uniform, including his state police badge, identifying state police patches, service revolver, and cap stun,[11] exited his cruiser and approached the four men. Bistany testified that, as he got closer to the men, he noted that they were "pacing back and forth . . . [and] appeared visibly nervous . . . ." Bistany stopped at the rear of the Lumina, approximately four feet from the men, and asked them what he characterized at the suppression hearing as routine questions, including what they had been doing at the athletic fields and where they had come from. One of the men responded that they were "not causing any trouble" and that they were "just driving around."

[8] Bistany entered the parking lot first, followed by McManaway. Both cruisers were outfitted with light bars on their roof and were identifiable as police cars. Neither trooper illuminated his cruiser's flashing lights.

[9] McManaway testified at the suppression hearing that the car he approached was occupied by two young persons who provided positive identification and said they were leaving shortly. After checking their identification, he allowed them to leave without further questioning.

[10] The videotape was entered into evidence at the defendant's suppression hearing before the trial court, and has been reviewed by this court.

[11] Cap-stun is an irritant designed to disable and distract a subject temporarily.

At this point, Bistany asked the men, who were standing on either side of the Lumina, to come to the rear of the Lumina, in front of his cruiser. When the four men complied and were standing in a line in front of him, Bistany asked who was driving the Lumina. One of the defendant's companions identified himself as the driver and Bistany requested to see his identification. When the individual who had identified himself as the driver began to move toward the driver's side of the vehicle,[12] Bistany instructed him to stop and return to where he had been standing. At this point, Bistany, out of concern for his safety, instructed all four men to remain still and submit to a patdown search.[13] Bistany proceeded to conduct a patdown search of each individual. As Bistany began searching the first man, McManaway returned from patrolling the opposite side of the parking lot and assisted Bistany by watching the three individuals not being searched. When Bistany searched the first individual, he noted that the individual felt wet and was covered in grass clippings. Bistany asked the individual why that was so, and the man responded that he and the other three men had been wrestling on the ground prior to Bistany's arrival.[14]

The defendant was the third person searched. Bistany testified that, when he called the defendant over to him, the defendant approached with his hands clenched. As he reached Bistany, the defendant turned around and placed his fists under his armpits. Bistany instructed the defendant to put his hands behind his back, and, after the defendant complied, he began to pat him down. Bistany told the defendant to relax and open his hands. Bistany then observed a clear plastic bag containing a

[12] The individual who identified himself as the driver of the automobile can be heard on the videotape stating that he thought his identification was in the car.

[13] Bistany later testified that he noticed "an odor of alcoholic beverage emanating from the males' breaths." He could not remember, however, at what point during his encounter with the men that he smelled the alcohol.

[14] Bistany testified that, at this point, his conversation with the four men was "quite light" and that he was "joking around with them."

white, powdery substance between the fingers of the defendant's right hand. The troopers subsequently arrested the defendant for possession of narcotics.[15]

The state charged the defendant with possession of narcotics in violation of General Statutes § 21a-279 (a)[16] and possession of narcotics with intent to sell in violation of § 21a-277 (a). The defendant thereafter moved to suppress the seized narcotics on the ground that the police did not have a reasonable and articulable suspicion of criminal activity that is required to conduct a valid *Terry* stop.[17] See *Terry* v. *Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Specifically, the defendant argued in his motion that: (1) his detention was unwarranted because the troopers did not possess a reasonable and articulable suspicion that a crime had been or was about to be committed; (2) the *Terry* pat-down of his person was unwarranted because the troopers did not have a reasonable suspicion or probable cause to suspect that the defendant was presently armed and dangerous; and (3) consequently, the exclusionary rule and the fruit of the poisonous tree doctrine required suppression of all evidence obtained during and subsequent to the stop and seizure. Following an evidentiary hearing, the trial court denied the defendant's motion to suppress, concluding that, when Bistany decided to detain and pat down the defendant, he had a reasonable and articulable suspicion for doing so.

[15] The troopers confiscated eight small plastic bags of the substance, which subsequently was determined to be cocaine.

[16] General Statutes § 21a-279 (a) provides in relevant part: "Any person who possesses or has under his control any quantity of any narcotic substance . . . for a first offense, may be imprisoned not more than seven years or be fined not more than fifty thousand dollars, or be both fined and imprisoned . . . ."

[17] "Under *Terry* . . . an officer may forcibly stop a suspect and engage in a 'stop and frisk' investigation if the officer has a reasonable and articulable suspicion that the suspect has committed or is about to commit a crime." (Citation omitted.) *State* v. *Czyzewski*, 70 Conn. App. 297, 303 n.7, 797 A.2d 643, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002).

Pursuant to General Statutes § 54-94a[18] and Practice Book § 61-6,[19] the defendant entered a conditional plea of nolo contendere to the second count, possession of narcotics with intent to sell, in order to appeal immediately the trial court's denial of the motion to suppress. The trial court accepted the defendant's conditional plea and, after the state nolled the first count, possession of narcotics, the trial court rendered judgment of guilty on the charge of possession of narcotics with intent to sell. The defendant subsequently appealed from the judgment to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the defendant claims that the trial court improperly denied his motion to suppress and challenges both the trial court's factual findings and its legal conclusion. First, the defendant contends that the trial

[18] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[19] Practice Book § 61-6 (a) (2) provides in relevant part: "(i) When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's (a) motion to suppress evidence based on an unreasonable search or seizure, (b) motion to suppress statements and evidence based on the involuntariness of a statement, (c) or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law. The issue to be considered in such appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this subsection shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution. The court shall not accept a nolo contendere plea pursuant to this subsection where the denial of the motion to suppress would not have a significant impact upon the disposition of the case in the trial court. The court shall also decline to accept such a nolo contendere plea where the record available for review of the denial of the motion to suppress or motion to dismiss is inadequate for appellate review of the court's determination thereof. . . ."

court improperly found that the defendant and his companions were "sweating" and "pacing back and forth" during the questioning by Bistany. The defendant further claims that, based on these erroneous factual findings, the trial court improperly concluded that there existed a reasonable and articulable basis for the *Terry* stop and that the subsequent patdown search was valid. We agree with the defendant.

We begin our analysis by setting forth the applicable standard of review. "Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Luurtsema*, 262 Conn. 179, 184, 811 A.2d 223 (2002).

When considering the validity of a *Terry* stop, our threshold inquiry is twofold. *State* v. *Oquendo*, 223 Conn. 635, 645, 613 A.2d 1300 (1992). First, we must determine "at what point, if any, did the encounter between [the police officer] and the defendant constitute an investigatory stop or seizure." Id. Next, "[i]f we conclude that there was such a seizure, we must then determine whether [the police officer] possessed a reasonable and articulable suspicion at the time the seizure occurred." Id., 645–46.

We must first determine, therefore, at what point, if at all, a seizure occurred. "We have . . . defined a person as seized under our state constitution when by means of physical force or a show of authority, his freedom of movement is restrained. . . . In determining the threshold question of whether there has been a seizure, we examine the effect of the police conduct at the time of the alleged seizure, applying an objective

standard. Under our state constitution, a person is seized only if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[20] (Citation omitted; internal quotation marks omitted.) *State* v. *James*, 237 Conn. 390, 404, 678 A.2d 1338 (1996). Therefore, "[w]hether there has been a seizure in an individual case is a question of fact." *State* v. *Ostroski*, 186 Conn. 287, 292, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S. Ct. 173, 74 L. Ed. 2d 142 (1982).

In the present case, the state concedes that a seizure occurred when Bistany instructed the defendant and his acquaintances to remain still and submit to a patdown search.[21] Specifically, this was the point in time after Bistany had assembled the men, including the defendant, at the rear of the Lumina and in front of the police cruiser, and after Bistany had instructed the driver of the automobile to return to where he had been standing after he had attempted to retrieve his identification from inside the automobile.

We next turn, therefore, to the pivotal issue in this case: whether the trial court properly concluded that the seizure was based on a reasonable and articulable suspicion of criminal activity. The determination of whether a reasonable and articulable suspicion exists rests on a two part analysis: "(1) whether the underlying factual findings of the trial court are clearly erroneous; and (2) whether the conclusion that those facts gave

[20] It is well established that article first, §§ 7 and 9, of the Connecticut constitution afford greater protection to the citizens of this state than does the federal constitution in the determination of what constitutes a seizure. *State* v. *Wilkins*, 240 Conn. 489, 506, 692 A.2d 1233 (1997); see also *State* v. *Miller*, 227 Conn. 363, 382, 630 A.2d 1315 (1993) (article first, § 7, of Connecticut constitution is broader than federal counterpart); *State* v. *White*, 229 Conn. 125, 148–49, 640 A.2d 572 (1994) (article first, § 9, provides greater protection than federal constitution).

[21] The defendant, in his brief, contends that a seizure actually occurred at numerous earlier points in time prior to the time Bistany told the four men that they would be searched. Because we conclude that Bistany did not have a reasonable and articulable suspicion of criminal activity as of the time he instructed the defendant and the others to wait to be searched,

rise to such a suspicion is legally correct." *State* v. *Wilkins*, 240 Conn. 489, 496, 692 A.2d 1233 (1997).

"Under the fourth amendment to the United States constitution and article first, §§ 7 and 9, of our state constitution, a police officer is permitted in appropriate circumstances and in an appropriate manner to detain an individual for investigative purposes if the officer believes, based on a reasonable and articulable suspicion that the individual is engaged in criminal activity, even if there is no probable cause to make an arrest." (Internal quotation marks omitted.) *State* v. *Lipscomb*, 258 Conn. 68, 75, 779 A.2d 88 (2001); see also *Alabama* v. *White*, 496 U.S. 325, 330–31, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990); *Terry* v. *Ohio*, supra, 392 U.S. 22.

"[I]n justifying [a] particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Internal quotation marks omitted.) *State* v. *Lipscomb*, supra, 258 Conn. 75; see also *Terry* v. *Ohio*, supra, 392 U.S. 21; *State* v. *Januszewski*, 182 Conn. 142, 148–49, 438 A.2d 679 (1980). "In determining whether a detention is justified in a given case, a court must consider if, relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity." *State* v. *Lipscomb*, supra, 76.

We begin this inquiry by reviewing the facts as found by the trial court in its memorandum of decision, which formed the basis for its conclusion that the investigatory detention of the defendant was justified. In denying the defendant's motion to suppress, the court found the following facts: "[M]embers of the Connecticut state police . . . were conducting a patrol check of the [athletic] fields of Plains Road in Windham . . . . [T]he area is noted for the high instance of criminal activity

the time at which the state concedes he was seized, we do not need to determine whether a seizure occurred at any earlier time.

and there have been numerous instances of used hypodermic needles . . . and empty narcotics baggies being found in the area. . . . When [Bistany] approached the . . . individuals, they appeared nervous, were sweating, and were pacing back and forth. The officer also noted an odor of alcohol emanating from the individual's breath." The defendant specifically challenges the trial court's findings that the defendant and his companions were sweating and pacing back and forth, claiming that these findings are clearly erroneous. We address each factual challenge separately.

After reviewing the videotape of the encounter, we cannot reasonably discern any indicia of perspiration on the defendant or his companions. The footage, shot from the police cruiser, at night, under the glare of the spotlight, is grainy and provides no support for a finding that the defendant or his companions were perspiring. Furthermore, neither Bistany nor McManaway testified at the suppression hearing that the defendant or his companions were sweating. In addition, the state conceded at oral argument in this matter that there was no testimony that they were perspiring. Thus, the court's finding that the defendant and his companions "were sweating" cannot stand.

We also find no support for the trial court's finding that the defendant and his companions were "pacing back and forth." Although Bistany testified that the four men were "pacing back and forth," our review of the videotape leads us to conclude otherwise. The videotape depicts the defendant and his friends standing at the rear of their car, occasionally shifting their weight from one foot to the other while standing in the glare of the spotlight, answering Bistany's questions. That movement cannot properly be characterized as "pacing back and forth."

Having concluded that these factual findings were clearly erroneous, we must determine whether the trial

court's legal conclusion—that a reasonable and articulable suspicion of criminal activity justified the intrusion—can be supported by the remaining facts found, namely, that Bistany noted the "odor of alcohol emanating from the individual's breath" and that "the area is noted for the high instance of criminal activity . . . ." We conclude that these remaining facts alone do not satisfy the requirement that there be a *reasonable and articulable* suspicion that the defendant had engaged or was about to engage in criminal activity.

First, the fact that Bistany smelled alcohol cannot reasonably support the investigatory detention of the defendant. Consumption of alcoholic beverages by persons over the age of twenty-one is not unlawful unless accompanied by other conduct, such as the operation of a motor vehicle while under the influence of alcohol or with a blood alcohol level above the legal limit.[22] There is no evidence in the record that the individual who smelled of alcohol was the defendant.[23] There is no evidence that the defendant was the driver of the vehicle.[24] Moreover, while Bistany testified that he noticed the odor of alcohol at "*some point*," (emphasis added) he conceded that he could not accurately recall at *which point* he smelled the alcohol. There is no evidence in the record indicating that Bistany detected the odor of alcohol *prior* to the seizure. Thus, the fact that the officer detected the odor of alcohol on *some* person at *some* point during the encounter cannot provide a reasonable and articulable basis for suspecting criminal activity.

Second, the mere presence of the defendant and his companions in a high crime area at night is not suffi-

[22] See, e.g., General Statutes § 14-227a, entitled, "Operation while under the influence of liquor or drug or while having an elevated blood alcohol content."

[23] At the time of his arrest, the defendant was twenty-two years old. The record does not reveal the ages of the defendant's companions.

[24] The state, for the first time at oral argument, impliedly suggested that the defendant and his companions were violating § 9-1 of the Windham town ordinance, which prohibits possession of open containers or consumption of alcoholic beverages in publicly owned parking areas. There is no evidence

ciently indicative of criminal activity to justify the investigatory detention. Although, "[t]he character of the neighborhood and the officer's knowledge of narcotics distributions in the area may properly be considered"; (internal quotation marks omitted) *State* v. *Turner*, 62 Conn. App. 376, 399, 771 A.2d 206 (2001); *State* v. *Moreland*, 23 Conn. App. 495, 497, 582 A.2d 212 (1990); a person's physical presence in an area where police anticipate criminal activity, alone, does not justify an arbitrary investigatory detention of that person. See *State* v. *Scully*, 195 Conn. 668, 678–79 n.15, 490 A.2d 984 (1985).

When considering the impact of a defendant's presence in a high crime area as a factor in a *Terry* stop analysis, this court previously has relied on the United States Supreme Court's decision in *Brown* v. *Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), the facts of which are similar to the present case. See, e.g., *State* v. *Mikolinski*, 256 Conn. 543, 549, 775 A.2d 274 (2001); *State* v. *Mitchell*, 204 Conn. 187, 195, 527 A.2d 1168, cert. denied, 484 U.S. 927, 108 S. Ct. 293, 98 L. Ed. 2d 252 (1987); *State* v. *Torres*, 197 Conn. 620, 626, 500 A.2d 1299 (1985); *State* v. *Scully*, supra, 195 Conn. 673. In *Brown*, two police officers conducted a *Terry* stop of a defendant whom they observed walking in the opposite direction of another man in an alley located in an area known for drug trafficking. *Brown* v. *Texas*, supra, 48. Although the men were a few feet apart when the police observed them, one officer testified that he believed that they previously had been together. Id., 49. He further testified that the police had stopped the defendant because he looked suspicious and they had never seen him in that area before. Id. The United States Supreme Court concluded that "[t]he fact that [the defendant] was in a neigh-

in the record, however, to indicate that the defendant and his companions possessed open containers or consumed alcoholic beverages in the parking lot.

borhood frequented by drug users, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct." Id., 52. "The lesson from *Brown* . . . is simply that physical presence in a geographical area where the police may have reason to anticipate possible violations of the law does not in and of itself justify arbitrary investigatory stops." *State* v. *Scully*, supra, 678–79 n.15.

In the present case, we conclude that the defendant's presence in a high crime area at night, without any other facts, cannot form the basis for a reasonable and articulable suspicion that the defendant had engaged or was about to engage in criminal activity. Simply put, the record in the present case is devoid of evidence of suspicious activity. The state, in its brief, fails to articulate with specificity any criminal activity reasonably indicated by the facts and circumstances set forth in the record. The defendant's mere physical presence at the athletic fields was neither suspicious nor criminal. Without more, we cannot conclude that the trooper had a reasonable and articulable basis for suspecting criminal activity.[25]

The state likens the present case to other cases in which the denial of a motion to suppress seized contraband based on a neighborhood's unsavory notoriety have been upheld.[26] The cases relied upon by the state in its brief are factually distinguishable. For instance, the state points to *State* v. *Januszewski*, supra, 182 Conn. 149–50, in which this court upheld the trial court's

[25] We note that, in their briefs, both parties relied heavily on *State* v. *Oquendo*, supra, 223 Conn. 635, and *State* v. *Donahue*, 251 Conn. 636, 742 A.2d 775 (1999), cert. denied, 531 U.S. 924, 121 S. Ct. 299, 148 L. Ed. 2d 240 (2002). Because we are not persuaded that either case is factually similar to the present one, we decline to address them here.

[26] The state further relies on numerous federal and extrajurisdictional cases. We decline to address the federal cases because the Connecticut constitution affords greater protection than the fourth amendment in this area. *State* v. *Wilkins*, supra, 240 Conn. 506. Additionally, because our own precedent is well established on this issue, we see no need to address the decisions of our sister states in this opinion.

conclusion that a reasonable and articulable basis for suspicion of criminal activity existed due to the defendant's presence in a commuter parking lot during customary work hours and his "plainly furtive conduct" upon the police officer's approach.[27] Likewise, the state relies on *State* v. *Watson*, 165 Conn. 577, 585–86, 345 A.2d 532 (1973), cert. denied, 416 U.S. 960, 94 S. Ct. 1977, 40 L. Ed. 2d 311 (1974), in which this court concluded that the investigatory detention of the defendant was justified when police officers had observed the defendant drive his vehicle into the parking lot of a motel late at night, and drop off four passengers who entered the motel and, shortly thereafter, emerged from the motel hurriedly and cautiously. Finally, the state relies on *State* v. *Moreland*, supra, 23 Conn. App. 498, in which the Appellate Court concluded that the defendant's presence in an area known for drug trafficking, along with the defendant's conversation with the occupant of an automobile and a third individual and the defendant's open display of money, supported the trial court's finding that a reasonable and articulable basis for suspicion existed to warrant the defendant's detention. These cases all involved conduct on the part of the defendant beyond mere physical presence in a high crime area. Unlike the present case, each involved plainly furtive, even bizarre, behavior, which, when coupled with a neighborhood's crime-ridden reputation, clearly supplied the basis for a reasonable and articulable suspicion that criminal activity was afoot.

Finally, the state argues that a reasonable and articulable suspicion of criminal activity can arise from noncriminal acts. Although we have stated that "[a]n investigative stop can be appropriate even where the police have not observed a violation because a reason-

[27] We note that the furtive conduct referred to in *Januszewski* consisted of the defendant crawling out of the passenger side of an automobile and under a nearby motorcycle to avoid the approaching police officer. *State* v. *Januszewski*, supra, 182 Conn. 144–45.

able and articulable suspicion can arise from conduct that alone is not criminal"; (internal quotation marks omitted) *State* v. *Lipscomb*, supra, 258 Conn. 76; the state's argument fails to recognize that, even if the acts prompting the stop are not criminal, the stop is justified only if the officer has a reasonable and articulable suspicion that *criminal activity is afoot*. "The issue is not whether the particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts." (Internal quotation marks omitted.) *State* v. *Hammond*, 257 Conn. 610, 625, 778 A.2d 108 (2001). In the present case, the noncriminal conduct that prompted the stop, i.e., the presence of four men in the parking lot of public athletic fields at night, without more, reasonably could not give rise to the belief that they were engaged in criminal activity. Accordingly, the detention and patdown search violated the defendant's constitutional rights.

Having concluded that the defendant's detention was not supported by a reasonable and articulable suspicion of criminal activity, we turn our attention to the defendant's claim that the seized narcotics must be suppressed pursuant to the exclusionary rule. It is axiomatic that "[u]nder the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality." (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 42, 836 A.2d 224 (2003); see also *Wong Sun* v. *United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Because we conclude that the *Terry* stop that led to the discovery of the narcotics seized from the defendant's possession was constitutionally infirm, the trial court improperly denied the motion to suppress that evidence.

The judgment is reversed and the case is remanded to the trial court with direction to grant the defendant's motion to suppress.

In this opinion the other justices concurred.

NICHOLAS D. GALGANO *v.* METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY ET AL.
(SC 17011)

Borden, Norcott, Katz, Vertefeuille and Zarella, Js.

Syllabus

The plaintiff, who, along with his son, was injured in a motorcycle accident involving an uninsured motor vehicle, sought to recover from the defendant insurer P Co. for his personal injuries and for bystander emotional distress he allegedly suffered as a result of having witnessed his son's injuries. At the time of the accident, the plaintiff was operating his motorcycle and his son was a passenger. The plaintiff made his claim pursuant to the uninsured motorist provision of the policy issued to him by P Co., which provided that the maximum amount of uninsured motorist coverage payable for each person was $20,000 "for all claims by all persons for damages for bodily injury to any one person." P Co. had paid $20,000 to the plaintiff's son in compensation for his bodily injuries, thus exhausting the "each person" coverage applicable to him, and the trial court rendered summary judgment for P Co. on the plaintiff's claim for bystander emotional distress. Thereafter, the parties filed a stipulation of facts and the trial court granted their joint motion to reserve for appellate advice the question whether the plaintiff was entitled to compensation for bystander emotional distress, as a result of having witnessed his son's injuries, under the separate uninsured motorist coverage available to the plaintiff for his own injuries. *Held* that the plaintiff could not recover uninsured motorist benefits from P Co. for his bystander emotional distress; under the express terms of the policy, the $20,000 limit applicable to the plaintiff's son, which limit had been exhausted, also applied to all claims by all persons for damages resulting from the son's bodily injury and, but for the bodily injury to his son, the plaintiff would not have suffered any emotional injuries.

Argued December 5, 2003—officially released January 27, 2004

Procedural History

Action to recover uninsured motorist benefits allegedly due pursuant to certain liability insurance policies issued by the defendants, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Hon. Walter M. Pickett*, judge trial referee, granted the motion for summary judgment filed

by the defendant Patriot General Insurance Company as to the plaintiff's claim for damages for bystander emotional distress arising from injuries sustained by the plaintiff's son in a motorcycle accident; thereafter, the court, *Kocay*, *J.*, granted the named defendant's motion for summary judgment as to the same claim against it and rendered judgment for the defendants, from which the plaintiff appealed to the Appellate Court, *Landau*, *Mihalakos* and *Daly*, *Js.*, which dismissed the appeal for lack of a final judgment; subsequently, the court, *DiPentima*, *J.*, pursuant to a stipulation by the plaintiff and the defendant Patriot General Insurance Company, reserved two questions of law for the advice of the Appellate Court concerning the plaintiff's entitlement to compensation for bystander emotional distress under the uninsured motorist coverage limit applicable for bodily injury in the policy issued by the defendant Patriot General Insurance Company, which already had paid that limit to the plaintiff's son; subsequently, the reservation was transferred to this court.

Robert J. Flanagan, *Jr.*, for the appellant (plaintiff).

Jack G. Steigelfest, for the appellee (defendant Patriot General Insurance Company).

Opinion

KATZ, J. The dispositive question in this reservation asks whether, under the underinsured motorist provision of the plaintiff's insurance policy, the plaintiff was entitled to compensation, for bystander emotional distress arising from his having witnessed bodily injury to his son, to the extent of the "each person" bodily injury coverage limit applicable to the plaintiff, when the defendant already had paid to the plaintiff's son the full amount of the "each person" bodily injury limit available to the son and the policy provided that the maximum amount that the defendant was required to

pay "for all claims by all persons for damages for bodily injury to any one person is the 'each person' Uninsured Motorist Coverage limit . . . ." We answer the question in the negative.

The following facts and procedural history are undisputed. On June 18, 1995, Nicholas A. Galgano was a passenger on a 1979 Honda motorcycle operated by his father, the plaintiff, Nicholas D. Galgano, when the motorcycle was struck by an uninsured motor vehicle. The plaintiff's son sustained severe bodily injuries, and the plaintiff sustained bodily injuries and experienced severe emotional distress as a result of his having witnessed the bodily injuries to his son.

The plaintiff was insured by the defendant Patriot General Insurance Company (Patriot General) pursuant to a policy that provided uninsured motorist coverage limits of $20,000 for "each person" and $40,000 for "each accident." The policy further provided a motorcycle endorsement with the following language regarding limits of uninsured motorist insurance: "The maximum amount we'll pay for any one *motorcycle accident* for all claims by all persons for damages for bodily injury to any one person is the 'each person' Uninsured Motorist Coverage limit shown in the declarations. Subject to the limit for 'each person' the maximum amount we'll pay in damages for bodily injury to two or more persons, is the 'each accident' Uninsured Motorist Coverage limits shown in the declarations." (Emphasis in original.) The plaintiff also had an insurance policy with the named defendant, Metropolitan Property and Casualty Insurance Company (Metropolitan), which provided $100,000 in uninsured motorist coverage. The plaintiff's son settled his claims with Metropolitan for the full amount of that policy. Additionally, Patriot General paid $20,000 to the plaintiff's son in compensation for his bodily injuries, thus exhausting the "each person" cov-

erage limit applicable to him under the Patriot General policy.

Thereafter, the plaintiff brought this action against Patriot General and Metropolitan seeking to recover for his physical injuries and for bystander emotional distress stemming from his having witnessed the accident that caused his son's injuries. Both Patriot General and Metropolitan moved for summary judgment as to the plaintiff's bystander emotional distress count claiming that, inter alia: (1) because the plaintiff's bystander emotional distress claim was derivative of his son's claim, it could not be asserted unless the plaintiff's son were a party to the action; and (2) the bystander emotional distress claim was barred because both insurers already had paid their respective "each person" uninsured motorist coverage limits applicable to the bodily injury to the plaintiff's son. In separate proceedings, the trial court, *Hon. Walter M. Pickett, Jr.*, and *Kocay, J.*, respectively, granted both motions, and the plaintiff appealed from the judgment rendered thereon in favor of Patriot General and Metropolitan on his bystander emotional distress claim. The Appellate Court subsequently granted both insurers' motions to dismiss the appeal on the ground that no final judgment had been rendered on the plaintiff's personal injury claim. *Galgano* v. *Metropolitan Property & Casualty Ins. Co.*, 64 Conn. App. 25, 30–31, 779 A.2d 229 (2001).

Thereafter, Patriot General and the plaintiff entered into a joint stipulation of facts and filed a motion requesting that the trial court reserve certain questions of law for the advice of the Appellate Court. In accordance with Practice Book § 73-1[1] and General Statutes

[1] Practice Book § 73-1 provides in relevant part: "(a) Any reservation shall be taken to the supreme court or to the appellate court from those cases in which an appeal could have been taken directly to the supreme court, or to the appellate court, respectively, had judgment been rendered. Reservations in cases where the proper court for the appeal cannot be determined prior to judgment shall be taken directly to the supreme court.

"(b) All questions presented for advice shall be specific and shall be

§ 52-235 (a),[2] the trial court granted the parties' joint motion for reservation of questions of law. We subsequently transferred the reserved questions to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199 (c).

The questions framed by the parties and reserved by the trial court for advice are: "(a) Where Patriot General . . . has paid the 'each person' Uninsured Motorist Coverage limit applicable for bodily injury to [the plaintiff's son] and the insurance policy provides that the maximum amount the insurer must pay 'for all claims by all persons for damages for bodily injury to any one person is the "each person" Uninsured Motorist Coverage

phrased so as to require a Yes or No answer.

"(c) Before any question shall be reserved by any court, counsel shall file in that court a stipulation which shall clearly and fully state the question or questions upon which advice is desired; that their present determination by the appellate court having jurisdiction would be in the interest of simplicity, directness and economy in judicial action, the grounds for such allegation being particularly stated; that the answers to the questions will determine, or are reasonably certain to enter into the final determination of the case; and that the parties request that the questions be reserved for the advice of the appellate court having jurisdiction. The stipulation shall also designate the specific pleadings in the trial court case file which are necessary for the presentation of the question or questions sought to be reserved and shall state the undisputed facts which are essential for determination of the question or questions sought to be reserved. With the stipulation the parties shall file a joint docketing statement in the format specified in Section 63-4 (a) (4) for regular appeals. . . .

"(e) The court will not entertain a reservation for its advice upon questions of law arising in any action unless the question or questions presented are such as are, in the opinion of the court, reasonably certain to enter into the decision of the case, and it appears that their present determination would be in the interest of simplicity, directness and economy of judicial action. . . ."

[2] General Statutes § 52-235 provides: "(a) The Superior Court, or any judge of the court, with the consent of all parties of record, may reserve questions of law for the advice of the Supreme Court or Appellate Court in all cases in which an appeal could lawfully have been taken to said court had judgment been rendered therein.

"(b) The court or judge making the reservation shall, in the judgment, decree or decision made or rendered in such cases, conform to the advice of the Supreme Court or the Appellate Court."

limit,' is [the plaintiff] entitled to compensation for bystander emotional distress arising from witnessing the bodily injury to his son . . . under the separate 'each person' Uninsured Motorist Coverage limit available to [the plaintiff]?"[3] and "(b) If the answer to [the first question] is in the affirmative, can [the plaintiff] have a legally viable claim for bystander emotional distress arising from the bodily injury to [his son] for uninsured motorist coverage against Patriot General . . . subsequent to the prior settlement of the uninsured motorist claim for bodily injury to [the plaintiff's son] and in the absence of [the son] as a party to this action?" Because we answer the first reserved question in the negative, we do not reach the second reserved question.

As part of the stipulated facts, Patriot General has agreed with the plaintiff to a value in an amount of less than $20,000 for the bodily injury that he had sustained. The parties further have agreed that, if the bystander emotional distress claim is recoverable through the "each person" uninsured motorist coverage limit of the plaintiff, the total value of his claim equals the limit of the $20,000 "each person" uninsured motorist coverage limit applicable to his claim for bodily injury.

Patriot General claims that damages for the plaintiff's bystander emotional distress are not recoverable under the $20,000 "each person" uninsured motorist coverage limit applicable to his own bodily injury, but, rather, that the exhaustion of the $20,000 "each person" uninsured motorist coverage limit by payment to the plaintiff's son bars any recovery in compensation for the plaintiff's

[3] We note that in *Polowitzer* v. *Uriano*, 263 Conn. 633, 638 and n.4, 821 A.2d 762 (2003), we expressly did not decide whether the language used in a virtually identical policy to the one in the present case would allow the plaintiff therein to recover under the separate "each person" uninsured motorist coverage limit available to him because of the stipulation in that case that " 'bodily injury' . . . includes emotional distress."

bystander emotional distress. In other words, Patriot General contends that the plaintiff's bystander emotional distress is a consequence of the bodily injury to his son and not a bodily injury in itself that would allow coverage under a separate "each person" limit. Additionally, Patriot General claims that because the claim for bystander emotional distress is a derivative claim, the prior settlement with the plaintiff's son and the son's absence from this litigation precludes the plaintiff from recovering for his bystander emotional distress.

The plaintiff argues that all of his injuries, both physical and emotional, from whatever source, should be covered by *his* "each person" limit and not that of his son. Specifically, he claims that, pursuant to *Clohessy* v. *Bachelor*, 237 Conn. 31, 675 A.2d 852 (1996), the emotional injuries suffered by family members who witness the severe injury or death of another family member are a separate and independent direct action entitling the emotionally injured bystander to liability coverage under his or her own coverage and not that of the physically injured family member.

Although we agree with the plaintiff that his bystander emotional distress, arising from his having witnessed the bodily injury to his son, is quite separate and distinct in nature from the injuries sustained by his son, the characterization of the plaintiff's injury is not dispositive of the first issue that we must decide, namely, whether the "each person" coverage limit applicable to the bodily injuries to the plaintiff's son also applies to the plaintiff's claim for bystander emotional distress. How the law defines particular claims does not control. Rather, we must look to the relevant policy language and apply the limits of liability as provided in the policy. In other words, whether we label the plaintiff's emotional injuries as discrete and independent or *derivative;* see *Hansen* v. *Ohio Casualty Ins. Co.*, 239

Conn. 537, 538 n.3, 687 A.2d 1262 (1996) (treating bystander emotional distress as derivative cause of action); see also *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 494, 408 A.2d 260 (1979) (treating loss of consortium as derivative cause of action); is not dispositive. At issue is how the Patriot General policy in effect treats those injuries.

"[C]onstruction of a contract of insurance presents a question of law for the court which this court reviews de novo." (Internal quotation marks omitted.) *Board of Education* v. *St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 40, 801 A.2d 752 (2002). "[T]he terms of an insurance policy are to be construed according to the general rules of contract construction. . . . The determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . However, [w]hen the words of an insurance contract are, without violence, susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses. . . . Our jurisprudence makes clear, however, that [a]lthough ambiguities are to be construed against the insurer, when the language is plain, no such construction is to be applied. . . . Indeed, courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." (Citation omitted; internal quotation marks omitted.) *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 267–68, 819 A.2d 773 (2003).

Therefore, we begin with the pertinent provision of the Patriot General policy, which provides: "The maximum amount we'll pay for any one *motorcycle accident* for all claims by all persons for damages for bodily injury to any one person is the 'each person' Uninsured Motorist Coverage limit shown in the declarations. Subject to the limit for 'each person' the maximum we'll pay in damages for bodily injury to two or more persons, is the 'each accident' Uninsured Motorist Coverage limits shown in the declarations." (Emphasis in original.) By the express terms of the policy, the bodily injury to the plaintiff's son includes *all* claims by all persons for damages for bodily injury resulting from the bodily injury to the plaintiff's son. It is beyond dispute that, but for the bodily injury to his son, the plaintiff would not have suffered any emotional injuries. In other words, the plaintiff's injuries are the natural and probable consequence of his having witnessed the accident that injured his son. Therefore, the measure of the plaintiff's recovery is not governed by the fact that his separate damages arose out of the same accident, but by the fact that they arose out of the same bodily injury to his son.

This treatment of the plaintiff's injuries is consistent with our approach to bystander emotional distress claims in other contexts. In *Clohessy* v. *Bachelor*, supra, 237 Conn. 49, wherein we recognized a claim for bystander emotional distress under certain limited circumstances, we concluded that the plaintiff there was entitled to recover damages for the emotional distress that occurred "as a result of harm done to a third party." Similarly, in *Mendillo* v. *Board of Education*, 246 Conn. 456, 488, 717 A.2d 1177 (1998), we noted that bystander emotional distress, like loss of consortium, is a third party cause of action. Therefore, as with loss of consortium, bystander emotional distress is "a form of third party liability of the defendants. That is, the . . . plain-

tiffs seek to recover from the defendants, not for tortious harms that the defendants inflicted directly on them, but for emotional harms they suffered as a result of the defendants' tortious conduct committed against another with whom they have a close relationship . . . ." Id., 480.

As further support for its claim that, because bystander emotional distress derives from bodily injury to another, it comes within the single "each person" coverage limit pertaining to "all claims by all persons for damages for bodily injury to . . . [that other] person," Patriot General directs our attention to a case in which the Wisconsin Supreme Court addressed an identical issue. In *Mullen* v. *Walczak*, 262 Wis. 2d 708, 718, 664 N.W.2d 76 (2003), the court determined that, although the plaintiff himself had been physically injured in a motor vehicle accident in which his wife was killed, his claim for emotional distress resulted from his wife's injuries. Therefore, under the terms of the plaintiff's insurance policy, any injuries sustained by all persons as a result of the wife's death, including the plaintiff's emotional distress, could be compensated only by the "per person" coverage limit applicable to the plaintiff's wife. Id. In other words, because the plaintiff's emotional injuries arose out of his wife's physical injuries, his claims were compensable only out of *her* "each person" limit. "[B]ut for the death of his wife, [the plaintiff] would not have an emotional distress claim based on witnessing her death. That he suffered his own injuries is irrelevant to the issue of how the policy covers claims that result from bodily injury to another person." (Internal quotation marks omitted.) Id., 715. In so concluding, the court recognized that a plaintiff's bodily injury could include emotional distress as a component, and noted the difficulty in separating damages for emotional distress that stem from different sources. Id. Because of the stipulation in *Mullen* between the

insurance company and the plaintiff, however, which stated that the plaintiff's claim for emotional distress resulted solely from witnessing his wife's death, that case did not present such a problem. Id., 718–19. Therefore, the policy provision that "[t]he limit for each person is the maximum for all damages sustained by all persons as the result of bodily injury to one person in any one accident" controlled and the "each person" limit applicable to the plaintiff's wife included "all damages sustained by all persons as the result of her bodily injury in the accident." (Internal quotation marks omitted.) Id., 716. Wisconsin is not alone in its reasoning. See, e.g., *Allstate Ins. Co.* v. *Clohessy*, 32 F. Sup. 2d 1333, 1336 (M.D. Fla. 1998) (noting that, in context of insurance coverage, majority of jurisdictions that have considered issue have held that bodily injury encompasses only physical harm), question certified for advice, 199 F.3d 1293, 1295 (11th Cir. 2000); *McNeill* v. *Metropolitan Property & Liability Ins. Co.*, 420 Mass. 587, 590, 650 N.E.2d 793 (1995) (concluding that physical ailments arising from emotional distress "do not warrant a separate 'per person' limit . . . because emotional distress is not a bodily injury"); *Farm Bureau Ins. Co. of Nebraska* v. *Martinsen*, 265 Neb. 770, 777, 659 N.W.2d 823 (2003) (concluding that bystander emotional distress "is a byproduct of and entirely dependent upon the bodily injury to [another person]," and is subject to the "per person" coverage limit applicable to that person); *Bowman* v. *Holcomb*, 83 Ohio App. 3d 216, 220, 614 N.E.2d 838 (1992) (concluding that "each person" coverage limit applied because emotional distress is not bodily injury); *United Pacific Ins. Co.* v. *Edgecomb*, 41 Wash. App. 741, 744, 706 P.2d 233 (1985) (concluding that insurance policy "limit[s] the obligation to pay [emotional distress] damages that are derivative or consequential from the injuries to one person to the limits of the policy for injury to that person").

We recognize that there are courts in other jurisdictions that have reached a contrary result. Those courts have done so, however, predicated upon their determination that bystander emotional distress is itself a bodily injury. See, e.g., *Pekin Ins. Co.* v. *Hugh*, 501 N.W.2d 508, 512 (Iowa 1993) (concluding that emotional distress is bodily injury, and therefore compensable to extent of remaining "per occurrence" coverage limits); *Crabtree* v. *State Farm Ins. Co.*, 632 So. 2d 736, 745 (La. 1994) (concluding that insurance policy definition of bodily injury "includes severe and debilitating mental pain and anguish"); *Treichel* v. *State Farm Mutual Automobile Ins. Co.*, 280 Mont. 443, 449, 930 P.2d 661 (1997) (concluding that "each person" coverage limit did not apply to emotional distress when insurance policy did not expressly define bodily injury but allowed recovery for other nonphysical injuries, such as loss of consortium). As Patriot General points out, however, this court previously has concluded, within the context of a liability insurance policy, that "bodily injury . . . *does not* include emotional distress unaccompanied by physical harm." (Emphasis added.) *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 411–12, 746 A.2d 1252 (2000). Therefore, because emotional distress, by itself, is not a bodily injury, it can be compensable only if it flows from the bodily injury of another person. In other words, in view of the fact that the plaintiff's bystander emotional distress claim arises because of the bodily injury to his son, under the language of the Patriot General insurance policy, which groups all claims by all persons because of bodily injury to another person under the limit applicable to that other person, the claim here for emotional injury must fall under that limit. Thus, as Patriot General points out, although any damages that flowed to the plaintiff from his son's bodily injury may be covered under the policy, in theory, those damages fall under the limit applicable to the plaintiff's son, the person who had sustained the bodily injury.

We conclude, therefore, that the plaintiff's claim for emotional distress comes within the "each person" coverage limit applicable to all claims by all persons for damages for bodily injury to the plaintiff's son. As we previously have stated, that particular "each person" coverage limit has been exhausted. Accordingly, the plaintiff cannot recover uninsured motorist benefits from Patriot General for his bystander emotional distress.

The answer to the first reserved question is: No.

No costs will be taxed in this court to any party.

In this opinion the other justices concurred.

ROXANN AMES *v.* COMMISSIONER OF MOTOR VEHICLES
(SC 16831)

Sullivan, C. J., and Borden, Katz, Palmer and Vertefeuille, Js.

Syllabus

The plaintiff appealed to the Superior Court from the decision of the defendant commissioner of motor vehicles ordering the intervening defendant surety company to make certain payments for the benefit of the plaintiff under a surety bond furnished pursuant to the statute (§ 14-52) requiring, inter alia, used automobile dealers to furnish a $20,000 surety bond as a condition to obtaining a license to sell used automobiles in order to indemnify "for any loss sustained by any person by reason of . . . such [dealer's] going out of business." The plaintiff had obtained a judgment against a used automobile dealer, which included an award of punitive damages and attorney's fees. Subsequently, the dealer went out of business and failed to satisfy the judgment. The commissioner invoked the surety bond that the dealer had furnished in accordance with § 14-52, but determined that the plaintiff could not recover that part of the judgment that consisted of punitive damages and attorney's fees. The trial court rendered judgment dismissing the plaintiff's appeal from the commissioner's decision, and the plaintiff appealed to the Appellate Court, which affirmed the trial court's judgment. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court properly concluded that the term "any loss" contained in § 14-52 did not encompass punitive damages or attorney's fees; in light of the

absence of any express language in § 14-52 authorizing the recovery of attorney's fees or punitive damages against the surety bond and the fact that the legislative history of § 14-52 supports the conclusion that the legislature did not intend to authorize such recovery, the plaintiff was not entitled to recover punitive damages or attorney's fees against the surety bond.

Argued September 23, 2003—officially released February 3, 2004

Procedural History

Appeal from the decision of the defendant ordering Western Surety Company to make certain payments for the benefit of the plaintiff under a motor vehicle dealer's surety bond, brought to the Superior Court in the judicial district of New Britain, where the court, *Hartmere*, *J.*, granted Western Surety Company's motion to intervene as a defendant; thereafter, the matter was tried to the court, *Cohn*, *J.;* judgment dismissing the plaintiff's administrative appeal, from which the plaintiff appealed to the Appellate Court, *Mihalakos* and *Dranginis*, *Js.*, with *Schaller*, *J.*, dissenting, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Joanne S. Faulkner, for the appellant (plaintiff).

Gary M. Case, for the appellee (intervening defendant).

Opinion

PALMER, J. Under General Statutes § 14-52,[1] an automobile dealer is required to furnish a surety bond in

[1] General Statutes § 14-52 provides in relevant part: "(a) No person, firm or corporation may engage in the business of the buying, selling, offering for sale or brokerage of any motor vehicle or the repairing of any motor vehicle without having been issued either a new car dealer's, a used car dealer's, a repairer's or a limited repairer's license. . . .

"(b) . . . (2) . . . [E]ach applicant for a new car dealer's or a used car dealer's license shall furnish a surety bond in the amount of twenty thousand dollars. . . .

"(4) Each such bond . . . shall be conditioned upon the applicant or licensee complying with the provisions of any state or federal law or regulation relating to the conduct of such business and provided as indemnity for any loss sustained by any person by reason of any acts of the licensee

the amount of $20,000 as indemnity for any loss sustained by any person as a result of any acts of the dealer constituting grounds for the suspension or revocation of the dealer's license to sell or repair automobiles or as a result of such dealer's going out of business. The sole issue raised by this certified appeal is whether the Appellate Court properly concluded that a surety bond furnished in accordance with § 14-52 does not provide indemnity for that portion of a civil judgment against the dealer incorporating an award of attorney's fees or an award of punitive damages. We agree with the Appellate Court that attorney's fees and punitive damages fall outside of the indemnification provisions of § 14-52 and, therefore, affirm the judgment of the Appellate Court.

The following relevant facts and procedural history are set forth in the opinion of the Appellate Court. "The underlying event in this case involved the plaintiff [Roxann Ames] and A.P.L. Auto Consulting, Inc., also known as Discount Auto Sales, a used automobile dealer (dealer). In 1995, the plaintiff purchased a motor vehicle from the dealer. Over protest by the plaintiff, in 1997, the dealer repossessed the vehicle. As a result of the repossession, the plaintiff filed an action [in 1997] against the dealer, alleging, [inter alia], breach of contract and unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff demanded statutory, actual, punitive and treble damages. [In 1998] [t]he

constituting grounds for suspension or revocation of the license or such licensee going out of business. Such bond shall be executed in the name of the state of Connecticut for the benefit of any aggrieved party, but the penalty of the bond shall not be invoked except upon order of the commissioner [of motor vehicles] after a hearing held before said commissioner in accordance with the provisions of chapter 54. . . ."

Although § 14-52 was amended in 2002; see Public Acts 2002, 02-70, § 22; those amendments are not relevant to the merits of this appeal. For ease of reference, we refer to the current revision of § 14-52 throughout this opinion.

court rendered a default judgment in favor of the plaintiff after the dealer failed to appear and awarded damages in the amount of $20,286.40 plus costs of $280.60. The award included [treble damages pursuant to General Statutes § 52-564[2] and $1000 in attorney's fees under CUTPA].[3]

"Subsequently, the dealer went out of business and failed to pay the judgment. Pursuant to § 14-52, however, the dealer had obtained a surety bond for $20,000, which was issued by Western Surety [Company (Western Surety)].[4] After the expiration of the 180 day waiting period of General Statutes § 52-400e,[5] [the defendant, the commissioner of motor vehicles (commissioner)] invoked the surety bond on the plaintiff's behalf. The commissioner noted the court's prior award of damages, but found that the plaintiff [had] suffered actual damages of $5650, an amount consisting of her down payment, financing payment[s] and costs. The commissioner then concluded that the balance of the court's award of attorney's fees and punitive damages was not 'recoverable under the subject bond,' as set forth in

[2] General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

[3] General Statutes § 42-110g (d) provides in relevant part that a party prevailing on a CUTPA claim may be awarded "costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ."

[4] Western Surety was granted permission to intervene as a party defendant in the present action.

[5] General Statutes § 52-400e provides: "Whenever a judgment in a civil action which relates to activities for which a license is required has been rendered against a business which is licensed by a state or local licensing authority and which remains unpaid for one hundred eighty days after receipt by the judgment debtor of notice of its entry and the judgment has not been stayed or appealed, the state or local licensing authority shall consider such failure to pay, if deliberate or part of a pattern of similar conduct indicating recklessness, as a basis for the revocation, suspension or conditioning of, or refusal to grant or renew such license. Nothing herein shall be construed to preempt an authority's existing policy if it is more restrictive."

§ 14-52, and thus ordered Western Surety to pay $5650 to the state of Connecticut for the benefit of the plaintiff.

"The plaintiff filed a petition for reconsideration, which the commissioner denied. The plaintiff then appealed to the Superior Court pursuant to General Statutes § 4-183.[6] In affirming the decision of the commissioner, the [trial] court concluded that § 14-52 . . . precludes an award of punitive damages and attorney's fees." *Ames* v. *Commissioner of Motor Vehicles*, 70 Conn. App. 790, 792–93, 802 A.2d 126 (2002).

The plaintiff appealed to the Appellate Court, which affirmed the judgment of the trial court. Id., 804. Specifically, the Appellate Court concluded that the term "any loss," as used in § 14-52 (b) (4), is "both generalized and ambiguous, and susceptible on its face to several different interpretations." Id., 798. The Appellate Court examined the legislative history and circumstances surrounding the enactment of the surety bond clause of § 14-52 (b), as well as its relationship to similar legislation, and concluded that the legislature did not intend for the term "any loss" to encompass attorney's fees and punitive damages. Id. In particular, the Appellate Court noted that the pertinent legislative history indicates an intent by the legislature to provide *some*, rather than complete, recourse for victims of fraudulent practices by motor vehicle dealers. Id., 798–99. The Appellate Court concluded that such recourse is limited to money that actually is *owed* to the consumer, and does not include any associated expenses or penalties. Id., 799–800. With regard to the plaintiff's claim for attorney's fees, the Appellate Court observed that, because Connecticut adheres to the "American rule," which precludes the recovery of attorney's fees in the absence

[6] General Statutes § 4-183 provides in relevant part: "(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

of express statutory or contractual language providing for such fees; e.g., *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 72–73, 689 A.2d 1097 (1997); the absence of such language in § 14-52 was a factor that weighed heavily against the plaintiff's interpretation of that statutory provision. *Ames* v. *Commissioner of Motor Vehicles*, supra, 70 Conn. App. 800. Finally, the Appellate Court relied on the fact that a similar statute, namely, General Statutes § 14-176,[7] which provides that a person seeking to obtain a certificate of title to a motor vehicle may be required to furnish a surety bond when title is in question, expressly authorizes the recovery of attorney's fees against the bond, thereby indicating that if the legislature also had intended for § 14-52 to encompass attorney's fees, the legislature would have said so explicitly as it did in § 14-176. Id., 800–801.

[7] General Statutes § 14-176 provides: "If the commissioner is not satisfied as to the ownership of the vehicle or that there are no undisclosed security interests in it, the commissioner may register the vehicle but shall either: (1) Withhold issuance of a certificate of title until the applicant presents documents reasonably sufficient to satisfy the commissioner as to the applicant's ownership of the vehicle and that there are no undisclosed security interests in it; or (2) as a condition of issuing a certificate of title, require the applicant to file with the commissioner a bond in the form prescribed by the commissioner and executed by the applicant, and either accompanied by the deposit of cash with the commissioner or also executed by a person authorized to conduct a surety business in this state. The bond shall be in an amount equal to twice the value of the vehicle as determined by the commissioner and conditioned to indemnify any prior owner and lienholder and any subsequent purchaser of the vehicle or person acquiring any security interest in it, and their respective successors in interest, against any expense, loss or damage, including reasonable attorney's fees, by reason of the issuance of the certificate of title of the vehicle or on account of any defect in or undisclosed security interest upon the right, title and interest of the applicant in and to the vehicle. Any such interested person has a right of action to recover on the bond for any breach of its conditions, but the aggregate liability of the surety to all persons shall not exceed the amount of the bond. The bond, and any deposit accompanying it, shall be returned at the end of five years or prior thereto if the vehicle is no longer registered in this state and the currently valid certificate of title is surrendered to the commissioner, unless the commissioner has been notified of the pendency of an action to recover on the bond."

We granted the plaintiff's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly conclude that, pursuant to General Statutes § 14-52, the plaintiff was not entitled to recover punitive damages and attorney's fees against the surety bond issued by . . . Western Surety . . . ?" *Ames* v. *Commissioner of Motor Vehicles*, 261 Conn. 923, 806 A.2d 1058 (2002). We answer the certified question in the affirmative.

We begin our review of the plaintiff's claim by noting that "the general purpose of a suretyship contract is to guard against loss in the event of the principal debtor's default. . . . [T]he obligation of a surety is an additional assurance to the one entitled to the performance of an act that the act will be performed. . . . [T]he liability of sureties is to be determined by the specified conditions of the bond . . . . [W]hen a bond is required by statute, a court will read the statute into the contract between the principal, surety and obligee." (Citations omitted; internal quotation marks omitted.) *Southington* v. *Commercial Union Ins. Co.*, 254 Conn. 348, 358–59, 757 A.2d 549 (2000).

Because this issue raises a question of statutory construction, our review is plenary. E.g., *Thames Talent, Ltd.* v. *Commission on Human Rights & Opportunities*, 265 Conn. 127, 135, 827 A.2d 659 (2003). As with all such questions, we look first to the language of the statute. Id. General Statutes § 14-52 (b) provides in relevant part that each applicant for a used car dealer's license shall furnish a surety bond in the amount of $20,000 "as indemnity for any loss sustained by any person by reason of . . . such licensee going out of business. . . ." The bond is to be executed in the name of the state for the benefit of any aggrieved party, and the commissioner shall determine, after a hearing, the amount to which that aggrieved party is entitled under the bond. See General Statutes § 14-52 (b) (4). The plain-

tiff asserts that she is entitled to recover not only actual damages but also punitive damages and attorney's fees under the bond. In support of her contention, she claims that the term "any loss" contained in § 14-52 (b) (4) "is an all encompassing term which contains no hint of an exception." We are not persuaded.

We agree with the Appellate Court that the term "any loss," as used in § 14-52 (b) (4), is facially susceptible to more than one interpretation. See *Ames* v. *Commissioner of Motor Vehicles*, supra, 70 Conn. App. 798. "In interpreting statutes that contain the word 'any,' we have recognized that 'any' can have a variety of meanings. . . . The word 'any' can be used to denote 'all,' 'every,' 'some' or 'one.' " (Citations omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 117, 779 A.2d 737 (2001). "Its meaning in a given statute depends upon the context and subject matter of the statute." *Stamford Ridgeway Associates* v. *Board of Representatives*, 214 Conn. 407, 428, 572 A.2d 951 (1990). Similarly, " '[l]oss' has been held synonymous with deprivation, detriment and injury. . . . It is a generic and relative term." (Citation omitted.) *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 613, 440 A.2d 810 (1981). We therefore must look to the particular statutory context in which the term "any loss" is used.

"A fundamental tenet of statutory construction is that statutes are to be considered to give effect to the apparent intention of the lawmaking body." (Internal quotation marks omitted.) *Winchester Woods Associates* v. *Planning & Zoning Commission*, 219 Conn. 303, 309, 592 A.2d 953 (1991). "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra-

textual evidence of the meaning of the statute shall not be considered." Public Acts 2003, No. 03-154, § 1. Inasmuch as § 14-52 is not "plain and unambiguous," we look to other factors relevant to our inquiry into its meaning, including the legislative history of the statute, the circumstances surrounding its enactment and its purpose. E.g., *Winchester Woods Associates* v. *Planning & Zoning Commission*, supra, 310. We are mindful, moreover, that, "[i]n determining whether . . . a statute abrogates or modifies a common law rule the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope." (Internal quotation marks omitted.) *Rumbin* v. *Utica Mutual Ins. Co.*, 254 Conn. 259, 265, 757 A.2d 526 (2000). Thus, "[n]o statute is to be construed as altering the common law, farther than its words import [and . . . a statute] is not to be construed as making any innovation upon the common law which it does not fairly express." (Internal quotation marks omitted.) *State* v. *Luzietti*, 230 Conn. 427, 433, 646 A.2d 85 (1994). "We recognize only those alterations of the common law that are clearly expressed in the language of the statute because the traditional principles of justice upon which the common law is founded should be perpetuated." (Internal quotation marks omitted.) *Rumbin* v. *Utica Mutual Ins. Co.*, supra, 265–66.

"The common law rule in Connecticut, also known as the American Rule, is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception." (Internal quotation marks omitted.) *Fleming* v. *Garnett*, 231 Conn. 77, 93–94, 646 A.2d 1308 (1994). "Because we must respect the legislative prerogative of choosing the special circumstances under which [attorney's fees] awards may be made . . . we require a clear expression of the legislature's intent to

create a statutory exception [to the rule]." (Citation omitted; internal quotation marks omitted.) Id., 94. Examples of such clearly articulated statutory exceptions to our common-law rule include General Statutes § 14-106b (d) (in action to recover damages for odometer tampering, defendant shall be liable for, inter alia, "reasonable attorney's fees"), General Statutes § 14-145c (allowing "reasonable attorney's fees" in action to recover damages for improper towing or removal of automobile by owner or lessee of private property), General Statutes § 52-240a (if court determines that claim or defense in product liability action is frivolous, it "may award reasonable attorney's fees" to prevailing party), General Statutes § 52-251b (a) (in action brought pursuant to General Statutes § 46a-58 to recover damages for deprivation of civil rights, court may award prevailing party, inter alia, "reasonable attorney's fee"), and General Statutes § 52-251d (a) (in civil actions to establish paternity or in certain actions to establish, modify or enforce child support orders, "the court may allow the state, when it is the prevailing party, a reasonable attorney's fee"). Thus, it is apparent that "when the General Assembly want[s] to authorize the award of attorney's fees it kn[ows] how to do it." (Internal quotation marks omitted.) *Fleming* v. *Garnett*, supra, 94. Section 14-52, however, is devoid of any express language authorizing an award of attorney's fees. In the absence of such language, we will not presume that the legislature intended for § 14-52 to operate in derogation of our long-standing common-law rule disfavoring the award of attorney's fees to the prevailing party.

The plaintiff asserts that § 14-176[8] provides support for her contention that attorney's fees fall within the purview of § 14-52. On the contrary, we agree with the Appellate Court that § 14-176 militates *against* the construction of § 14-52 advanced by the plaintiff. Under

[8] See footnote 7 of this opinion.

§ 14-176, a person applying for a certificate of title to a motor vehicle may be required to post bond as a condition of receipt of the certificate. General Statutes § 14-176 provides in relevant part: "The bond shall be in an amount equal to twice the value of the vehicle as determined by the commissioner and conditioned to indemnify any prior owner and lienholder and any subsequent purchaser of the vehicle . . . against any expense, loss or damage, *including reasonable attorney's fees*, by reason of the issuance of the certificate of title . . . ." (Emphasis added.) The plaintiff contends that because the legislature has deemed attorney's fees to be included within the phrase "*any* expense, *loss* or damage" contained in General Statutes § 14-176, the legislature also intended that attorney's fees shall constitute a component of the term "any loss" contained in § 14-52. (Emphasis added.) We disagree.

First, the plaintiff's contention is contrary to the principle that, "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them." (Internal quotation marks omitted.) *M. DeMatteo Construction Co.* v. *New London*, 236 Conn. 710, 717, 674 A.2d 845 (1996). Moreover, as we have explained, the construction of § 14-52 urged by the plaintiff contravenes the principle that, when an entitlement to attorney's fees is claimed, we require a clear expression of the legislature's intent to create an exception to our long-standing common-law rule barring the recovery of such fees. E.g., *Fleming* v. *Garnett*, supra, 231 Conn. 93–94. Finally, it is reasonable to presume that the legislature considered attorney's

fees to be an "expense" within the meaning of § 14-176, rather than a component of any "loss" or "damage," because attorney's fees are a cost, or expense, frequently associated with litigation. See, e.g., *Berry* v. *Loiseau*, 223 Conn. 786, 832, 614 A.2d 414 (1992) (noting that "[l]itigation expenses may include . . . [inter alia] attorney's fees").

The plaintiff also contends that the Appellate Court's interpretation of § 14-52 is inconsistent with our holding in *Chrysler Corp.* v. *Maiocco*, 209 Conn. 579, 596, 552 A.2d 1207 (1989), in which we concluded that arbitrators have authority to award attorney's fees under the provisions of Connecticut's Lemon Law. See generally General Statutes §§ 42-179 through 42-190. The plaintiff's reliance on *Maiocco* is misplaced. In *Maiocco*, the issue was not whether attorney's fees are permitted under the Lemon Law; they clearly are, and we cited to "the four separate statutory areas involved in the overall Lemon Law apparatus that [expressly] authorize payment of attorney's fees." *Chrysler Corp.* v. *Maiocco*, supra, 586. The sole issue we addressed, rather, was whether a Lemon Law arbitrator is authorized to award such fees in the absence of explicit provisions in the Lemon Law providing such authorization. See id., 580. After reviewing the relevant statutory language, history and purpose, we concluded that the legislature intended to authorize Lemon Law arbitrators to award attorney's fees. Id., 596. *Maiocco* is therefore inapposite inasmuch as it involved the question of *who* is authorized to award attorney's fees under the Lemon Law rather than *whether* such an award is authorized thereunder.[9]

[9] The plaintiff also relies on several cases of this court and the Appellate Court involving uninsured and underinsured motorist coverage to support her contention that attorney's fees and punitive damages are recoverable under § 14-52. The cases cited by the plaintiff are unavailing, however, because they involve statutory provisions that bear no material similarity to § 14-52.

We also reject the plaintiff's claim that she is entitled to recover punitive damages against a surety bond furnished in accordance with § 14-52. In particular, the plaintiff seeks indemnification under § 14-52 for the treble damages that she was awarded pursuant to § 52-564. An award of multiple damages, however, is an extraordinary remedy that is available only when the legislature expressly provides for such damages by statute. E.g., *DeMilo* v. *West Haven*, 189 Conn. 671, 675–76, 458 A.2d 362 (1983); *Alaimo* v. *Royer*, 188 Conn. 36, 43, 448 A.2d 207 (1982). Accordingly, as with attorney's fees, we require explicit statutory language to support an award of punitive damages. Put simply, just as the legislature knows how to authorize an award of attorney's fees when it wishes to do so; see *Fleming* v. *Garnett*, supra, 231 Conn. 94; it also knows how to authorize an award of punitive damages. E.g., General Statutes § 4d-39 (c) (in action by attorney general to prosecute violation under General Statutes §§ 4d-36, 4d-37 or 4d-38, court may "award [inter alia] punitive damages"); General Statutes § 16-8d (b) (in action by employee alleging retaliation for disclosure of substantial misfeasance, malfeasance or nonfeasance in management of, inter alia, public service company, court "may award punitive damages"); General Statutes § 19a-550 (e) ("punitive damages may be assessed" in civil action in which there is finding of wilful or reckless deprivation of rights under patients' bill of rights implemented in accordance with § 19a-550); General Statutes § 31-290a (b) (in action alleging retaliation against employee for filing workers' compensation claim, "court may . . . award punitive damages"). Because § 14-52 makes no mention of punitive damages, the plaintiff cannot prevail on her claim that she may recover such damages under § 14-52.

Finally, as the Appellate Court explained; see *Ames* v. *Commissioner of Motor Vehicles*, supra, 70 Conn.

App. 798–99; the legislative history of § 14-52 supports the conclusion that the legislature did not intend to authorize the recovery of either attorney's fees or punitive damages against a surety bond furnished pursuant to § 14-52. In 1984, the legislature amended § 14-52 to "require applicants for motor vehicle dealer or repair licenses to post surety bonds executed in the name of the state in order to provide security for those consumers who are provided services by those individuals." 27 H.R. Proc., Pt. 8, 1984 Sess., p. 2708, remarks of Representative Christine M. Niedermeier; see Public Acts 1984, No. 84-508. In explaining the purpose and need for the amendment, Representative Niedermeier explained: "[V]ery often motor vehicle repairers and others go out of business and they at that point owe money to various consumers, and there is no avenue for recovery. These bonds would provide *some* financial security to enable consumers to obtain *reimbursement* for *money owed* to them." (Emphasis added.) 27 H.R. Proc., supra, p. 2709. It is unlikely that a surety bond that was intended to provide "*some* financial security" to consumers in the form of "*reimbursement* for *money owed* to them"; (emphasis added) id.; also was intended to indemnify consumers for attorney's fees and punitive damages. Indeed, the fact that the bond amount was set at $5000 in 1984 and only raised to $20,000 in 1993 to adjust for inflation; see 36 S. Proc., Pt. 9, 1993 Sess., p. 3219, remarks of Senator Winthrop S. Smith, Jr.; underscores this point; had the legislature intended for the dealer's bond to indemnify consumers beyond their actual or compensatory damages, the legislature likely would have mandated a significantly larger bond, as it has done in other statutory contexts. See, e.g., General Statutes § 8-25 (a) (authorizing planning commission to accept surety bond in amount sufficient to secure "to the municipality the actual construction, maintenance and installation of . . . improvements and utilities"

approved by commission in accordance with plan to subdivide land); General Statutes § 49-41 (a) (certain state or municipal construction contracts shall include provision requiring person or entity performing contract to furnish surety bond for full amount of contract price "for the protection of persons supplying labor or materials in the prosecution of work provided for in the contract for the use of each such person").

The plaintiff finally argues that public policy considerations militate in favor of her proposed construction of § 14-52. The plaintiff's primary contention in this regard is that the statutory suretyship created under § 14-52 is intended to protect consumers and, therefore, should be construed broadly to accomplish its purpose. We agree with the plaintiff regarding the beneficent purpose of § 14-52. For the reasons that we already have articulated, however, we are not persuaded that it is susceptible to the interpretation urged by the plaintiff.[10] The determination of whether reasons of public policy exist to expand the reach of § 14-52 to encompass attorney's fees and punitive damages is for the legislature, not this court, to make.[11]

[10] We note that, at least with respect to her claim for attorney's fees, the plaintiff relies largely on *State ex rel. Webb* v. *Hartford Casualty Ins. Co.*, 956 S.W.2d 272 (Mo. App. 1997) (*Webb*). Unlike § 14-52, however, the Missouri automobile dealer bond statute at issue in *Webb* required an injured party to obtain a final judgment against the dealer from a court of competent jurisdiction before the bond could be invoked. Id., 275; see Mo. Rev. Stat. § 301.560.1 (4) (Cum. Sup. 1993). In holding that attorney's fees were recoverable under the Missouri statute, the Missouri Court of Appeals reasoned: "The statute which requires the bond, and specifies what the bond must cover, contemplates that the injured party will necessarily incur attorney fees in obtaining the required judgment against the dealer. . . . Consequently, it is clear that the parties intended that attorney fees be a 'loss' subject to the bond's indemnity." *State ex rel. Webb* v. *Hartford Casualty Ins. Co.*, supra, 275. Inasmuch as § 14-52 permits an aggrieved party to raise a claim directly with the commissioner, the plaintiff derives no support from the rationale underlying the court's conclusion in *Webb*.

[11] Our interpretation of § 14-52 also is supported by the Restatement (Third) of Suretyship and Guaranty, § 73, pp. 290–91 (1996) ("[w]hen the secondary obligation is a legally mandated bond, that obligation does not

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

PATRICE WARD *v.* KATHY GREENE ET AL. (SC 16883)

Sullivan, C. J., and Katz, Palmer, Vertefeuille and Zarella, Js.[1]

Syllabus

The plaintiff, acting both individually and in her capacity as administratrix of her decedent, M, sought to recover damages arising out of the death of M in 1997 after she had sustained a head injury while attending a licensed day care facility operated by G. The plaintiff claimed, inter alia, that the defendant V Co., a private, nonprofit organization that contracted with individuals to provide foster care and, prior to 1995, day care to children in need, was liable under the wrongful death statute (§ 52-555 [a]). G was one of the individuals with whom V Co. had contracted to provide foster care and, prior to 1995, day care. After eliminating its day care program in 1995 and terminating its contract with G for day care services, V Co. had no ownership interest in G's day care facility, did not refer or direct children to that facility, did not pay G for or supervise her in operating that facility, and did not investigate

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include any penalties imposed on the principal obligor for failure to fulfill the underlying obligation unless the secondary obligation so provides"), and by what appears to be the weight of authority on the issue. E.g., *Ferris* v. *Haymore*, 967 F.2d 946, 953 (4th Cir. 1992) (interpreting North Carolina law with respect to recovery of punitive damages); *Harper* v. *Home Ins. Co.*, 23 Ariz. App. 348, 350, 533 P.2d 559 (1975) (punitive damages); *Carter* v. *Agricultural Ins. Co.*, 266 Cal. App. 2d 805, 807, 72 Cal. Rptr. 462 (1968) (punitive damages); *Hubbel* v. *Aetna Casualty & Surety Co.*, 758 So. 2d 94, 97 (Fla. 2000) (attorney's fees); *Koch* v. *Merchants Mutual Bonding Co.*, 211 Kan. 397, 403, 507 P.2d 189 (1973) (punitive damages); *United States Fidelity & Guaranty Co.* v. *State ex rel. Stringfellow*, 254 Miss. 812, 818, 182 So. 2d 919 (1966) (punitive damages); *Stumpf* v. *Pederson*, 180 Okla. 408, 409–10, 70 P.2d 101 (1937) (punitive damages); *Butler* v. *United Pacific Ins. Co.*, 265 Or. 473, 478, 509 P.2d 1184 (1973) (punitive damages); *Dawson* v. *Reliance Ins. Co.*, 482 S.W.2d 882, 882 (Tex. Civ. App. 1972) (punitive damages).

[1] This case originally was heard by a panel consisting of Justices Borden, Katz, Palmer, Vertefeuille and Zarella. Subsequent to the oral argument, Justice Borden was recused and Chief Justice Sullivan was substituted for him. Chief Justice Sullivan read the briefs and listened to the tape of the oral argument.

to determine her qualifications to be a licensed a day care provider or to have her license renewed. The plaintiff, who had sought the services of a day care provider for M in 1996, learned independently that G provided day care services and contacted the state department of public health concerning G's qualifications. M's subsequent death while in G's care was ruled a homicide, and G was convicted of manslaughter in the first degree. V Co. moved for summary judgment on the plaintiff's wrongful death claim arguing that it did not owe a duty of care to M. The plaintiff opposed the motion, claiming that V Co.'s duty of care arose under the statute (§ 17a-101 [Rev. to 1997]) providing for mandatory reporting of suspected child abuse. The trial court granted the motion on the ground that V Co. did not owe a duty of care to M under § 17a-101 because M was not within the class of persons that § 17a-101 was intended to protect, there having been no relationship between V Co. and M and V Co. having had no knowledge that G was abusing M. On the plaintiff's appeal, *held* that the trial court properly granted V Co.'s motion for summary judgment, the plaintiff having failed to allege, as required by § 52-555, a viable theory of legal fault on the part of V Co. that was the proximate cause of M's injuries; as determined by the trial court, V Co. did not owe a duty of care to M under § 17a-101, she not having been within the class of persons protected by that statute, which is limited to those children who have been abused or neglected and are, or should have been, the subject of a mandated report.

(*Two justices concurring separately in one opinion; one justice dissenting*)

Argued March 20, 2003—officially released February 3, 2004

Procedural History

Action to recover damages for, inter alia, the alleged negligence of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Hartford, where the case was transferred to the judicial district of New London, Complex Litigation Docket at Norwich, and where certain counts of the plaintiff's complaint were stricken or withdrawn; thereafter, the court, *McLachlan*, *J.*, granted the motion for summary judgment filed by the defendant Village for Families and Children, Inc., and the motion for summary judgment filed by the defendant department of public health et al., and rendered judgment in favor of those defendants, from which the plaintiff appealed to the Appellate Court, which granted the motion of the defendant department of public health et al. to dismiss

the appeal as to the defendant department of public health et al.; subsequently, the case was transferred to this court. *Affirmed.*

Joseph A. Moniz, for the appellant (plaintiff).

Linda L. Morkan, with whom, on the brief, were *Theodore J. Tucci* and *Deirdre A. Devaney*, for the appellee (defendant Village for Families and Children, Inc.).

Opinion

ZARELLA, J. The plaintiff, Patrice Ward, individually and in her capacity as administratrix of the estate of Raegan McBride, brought an action against several defendants including the Village for Families and Children, Inc.,[2] to recover for, inter alia, the wrongful death of McBride, as authorized by General Statutes § 52-555 (a).[3] The plaintiff appeals from the judgment rendered by the trial court in favor of the defendant after it granted the defendant's motion for summary judgment on the plaintiff's wrongful death cause of action. The dispositive issue in this appeal is whether the defendant owed McBride a duty of care by virtue of General Statutes (Rev. to 1997) § 17a-101.[4] We conclude that the

[2] The Village for Families and Children, Inc., is the only defendant involved in this appeal. References to the defendant are to the Village for Families and Children, Inc.

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

[4] General Statutes (Rev. to 1997) § 17a-101, as in effect at the time of the events that gave rise to this action, provides in relevant part: "(a) The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and

trial court properly determined that the defendant did not owe a duty of care to McBride. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The defendant is a private, nonprofit organization that contracts with individuals to provide foster care and, prior to 1995, day care to children in need. The defendant contracted with Kathy Greene to provide day care and foster care. In August, 1995, the defendant ended its contract with Greene as a day care provider because it eliminated its day care program. The defendant did, however, continue its contract with Greene as a foster care provider.

Although the record does not indicate what, if any, interest the defendant had in Greene's day care operation prior to ending its day care contract with Greene in 1995, the record does indicate that after the defendant ended its contract with Greene as a day care provider, the defendant: (1) had no ownership interest in Greene's day care facility; (2) did not refer or direct children to Greene's day care operation; (3) did not pay Greene

safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.

"(b) The following persons shall be mandated reporters: Any physician or surgeon licensed under the provisions of chapter 370 or 371, any resident physician or intern in any hospital in this state, whether or not so licensed, and any registered nurse, licensed practical nurse, medical examiner, dentist, dental hygienist, psychologist, school teacher, school principal, school guidance counselor, school paraprofessional, social worker, police officer, clergyman, pharmacist, physical therapist, osteopath, optometrist, chiropractor, podiatrist, mental health professional or physician assistant, any person who is a licensed substance abuse counselor, any person who is a licensed marital and family therapist, any person who is a sexual assault counselor or a battered women's counselor as defined in section 52-146k or any person paid to care for a child in any public or private facility, day care center or family day care home which is licensed by the state. . . ." Unless otherwise indicated, all references and citations in this opinion to § 17a-101 are to that statute as revised to 1997.

for the operation of her day care program; (4) did not supervise Greene in the operation of her day care program; and (5) did not investigate to determine Greene's qualifications to be licensed as a day care provider, or to determine whether her license should be renewed. The state department of public health (public health) was responsible for licensing Greene as a day care provider.

In 1996, the plaintiff sought the services of a day care provider for McBride. The plaintiff learned from a friend that Greene provided day care services out of her home. The plaintiff contacted the public health hotline to determine whether Greene was a qualified day care provider and to see whether any complaints had been made against Greene as a day care provider. The plaintiff was informed by public health that there was nothing in the state's file other than a report that one child had fallen off a bicycle while in Greene's care. In January, 1997, Greene began providing full-time day care services to McBride. While McBride was attending Greene's day care program, Greene remained a licensed foster care provider for the defendant. Thereafter, on February 24, 1997, McBride suffered a head injury while in Greene's care. McBride was taken to a hospital by ambulance and pronounced dead upon her arrival. Edward McDonough, deputy medical examiner for the state, ruled that McBride's death was a homicide. On September 22, 1999, Greene was convicted of manslaughter in the first degree.

Thereafter, the plaintiff brought an action against several defendants for damages arising out of McBride's death. The plaintiff claims that the defendant is liable under the wrongful death statute, § 52-555, for damages arising out of McBride's death. The defendant moved for summary judgment on the ground that it was not liable under § 52-555 because it did not owe a duty of care to McBride. During the course of oral argument

on the defendant's motion for summary judgment, the plaintiff's counsel was asked repeatedly to provide a basis for any duty of care owed to McBride by the defendant. The plaintiff's counsel stated that the duty arose by virtue of § 17a-101, the statute providing for mandatory reporting of suspected child abuse. Acting on the premise that the plaintiff properly alleged a violation of § 17a-101, the trial court went on to determine whether the defendant owed McBride a duty of care under that statute.[5]

The trial court granted the defendant's motion for summary judgment on the plaintiff's wrongful death claim on the basis of its determination that the defendant did not owe a duty of care to McBride under § 17a-101. The trial court reasoned that the class of persons that § 17a-101 was intended to protect is limited to identifiable victims, which the court defined as children who have reported abuse or neglect or about whom reports of abuse or neglect have been made to mandated reporters. Thus, the trial court determined that, since there was no relationship between the defendant and McBride and the defendant had no knowledge that Greene was abusing McBride, McBride was not within the class of persons that § 17a-101 was intended to protect. The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

Prior to addressing the plaintiff's claim, we address our standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that sum-

[5] We note that neither party disputes the viability of the plaintiff's wrongful death claim on the ground that a violation of § 17a-101 was not alleged in the pleadings as providing the basis of the duty owed to McBride by the defendant. We will review the trial court's determination, therefore, under the assumption that a violation of § 17a-101 properly was alleged.

mary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Gould* v. *Mellick & Sexton*, 263 Conn. 140, 146, 819 A.2d 216 (2003).

The plaintiff claims on appeal that the trial court improperly failed to recognize that a public policy exists in this state creating a private cause of action for an aggrieved individual where a mandated reporter fails to report instances of suspected child abuse to designated officials or agencies. At oral argument before this court, the plaintiff clarified that her cause of action properly is characterized as a wrongful death cause of action under § 52-555, not a private cause of action under § 17a-101.[6] The plaintiff further clarified that § 17a-101 merely establishes the duty of care owed to McBride by the defendant. The plaintiff contends that the public policy statement set forth in § 17a-101 (a), "[t]o protect children whose health and welfare may be adversely affected through injury and neglect," together with the mandatory reporting provisions set forth in § 17a-101

[6] We note that in count fourteen of the amended complaint, the plaintiff alleged a private cause of action under § 17a-101. That count already had been stricken prior to the summary judgment that is the subject of this appeal. See *Ward* v. *Greene*, judicial district of New London at Norwich, Docket No. X04-CV-99-0120118 (February 21, 2002).

(b), creates a duty of care that extends to children situated similarly to McBride.[7]

As a preliminary matter, we address the defendant's claim that this court should decline to review the plaintiff's claim on the ground that it was inadequately briefed. We recognize that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 179, 763 A.2d 1011 (2001). Nevertheless, while the plaintiff has failed to analyze in depth the issues presented, she has directed our attention to the plain language of § 17a-101 as a source for the claimed duty. In the exercise of our discretion, therefore, we review the plaintiff's claim.

We now review the law regarding a wrongful death cause of action. "The elements of a cause of action . . . for a wrongful death are clear from the explicit language of the statute, which as a statute in derogation of the common law is limited to matters clearly within its scope. . . . The plaintiff must prove not only a violation of a standard of care as a wrongful act, but also a causal relationship between the injury and the resulting death. A causal relation between the defendant's wrongful conduct and the plaintiff's injuries is a fundamental element without which a plaintiff has no case. . . . If the chain of causation of the damage, when traced from the beginning to the end, includes an act or omission which, even if wrongful or negligent, is or becomes of no consequence in the results or so trivial as to be a

[7] We note that neither party disputes that the defendant is a mandated reporter pursuant to § 17a-101. Thus, we will not address the issue of whether the defendant is actually a mandated reporter.

mere incident of the operating cause, it is not such a factor as will impose liability for those results." (Citations omitted; internal quotation marks omitted.) *Grody* v. *Tulin*, 170 Conn. 443, 448–49, 365 A.2d 1076 (1976).

A wrongful death cause of action, therefore, requires that the party seeking relief allege an underlying theory of legal fault and that such fault is the proximate cause of the injury. Id. In the present case, the plaintiff alleged the following material allegations in support of her wrongful death cause of action. The plaintiff alleged that: (1) Greene had a contractual agreement with the defendant to provide foster care services; (2) the defendant had received numerous reports that Greene physically abused children in her care prior to the time that Greene provided day care to McBride; (3) the defendant had a duty to report allegations of abuse to the department of children and families (department); (4) the defendant failed to report allegations of Greene's abuse; (5) prior to placing McBride in Greene's care, the plaintiff contacted public health to see if any complaints had been made against Greene and was told that there was nothing in the state's file concerning abuse; (6) Greene subsequently abused McBride, causing her death; and (7) the defendant's actions were the proximate cause of McBride's death.

The allegations in the plaintiff's wrongful death count sound in negligence. "The existence of a duty of care is an essential element of negligence. . . . A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." (Internal quotation marks omitted.) *Calderwood* v. *Bender*, 189 Conn. 580, 584, 457 A.2d 313 (1983).

The plaintiff in the present case claims that the duty of care owed to McBride by the defendant arises by

virtue of § 17a-101. "Where the court adopts the requirements of a legislative enactment as the standard of conduct of a reasonable person, a violation of the enactment may constitute negligence per se, or create a presumption of negligence, or make out a prima facie case of negligence, or constitute evidence of negligence, depending on the legal doctrine followed in a particular jurisdiction . . . ." 57A Am. Jur. 2d 669–70, Negligence § 743 (1989).

It is unclear in the present case whether the plaintiff relies on § 17a-101 to establish negligence per se, a presumption of negligence, a prima facie case of negligence or evidence of negligence. This ambiguity is of no consequence in the present case, however, because in determining whether a duty of care is owed to a specific individual under a statute, the threshold inquiry for each legal doctrine is whether the individual is in the class of persons protected by the statute. Thus, we must determine the class of persons protected by § 17a-101.

There is no Connecticut appellate case law that discusses the scope of the class of persons protected by § 17a-101. This case, therefore, presents an issue of first impression. The plaintiff claims in her brief that the purpose of § 17a-101 is to protect *all* of the children of the state. At oral argument before this court, the plaintiff narrowed her view of the class of persons protected by § 17a-101 to include, as it applies to the present matter, all of the children in Greene's care during the course of the defendant's relationship with Greene regardless of whether: (1) the children were receiving day care or foster care services from Greene; (2) the children were placed in Greene's care by the defendant or by another individual; and (3) the defendant had actual knowledge of the abuse of the specific individual. The plaintiff contends that the public policy statement set forth in § 17a-101 (a) demonstrates that all such

children are within the class of persons protected by § 17a-101. We disagree.

The policy statement contained in § 17a-101 (a) lends little support for the plaintiff's interpretation of the protected class. The opening line of the statute, for example, provides in relevant part: "The public policy of this state is: To protect children whose health and welfare may be adversely affected *through injury and neglect* . . . ." (Emphasis added.) General Statutes (Rev. to 1997) § 17a-101 (a). The plaintiff implies that the use of the plural "children" must mean either "all children" or "all children in the care of the provider." This reading of the statute, however, ignores the ending phrase that provides "may be adversely affected through injury and neglect . . . *and for these purposes* to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to *such child and family*." (Emphasis added.) General Statutes (Rev. to 1997) § 17a-101 (a).

From this reading of the statutory language, we conclude that the policy statement appears to be directed at the child, or children in the case of multiple children placed at risk in a singular incident, who should be the subject of a report of abuse or neglect under the statute and are, accordingly, in need of services. The policy statement thus suggests that the legislature intended to focus on children who *already* have been exposed to conduct that amounts to a reportable event, and we do not find merit in the plaintiff's argument that the statute creates a duty of care to every child who has been in the care of the defendant.

The courts of several other states, with almost identical mandated reporter statutes and under facts analogous to the facts in the present case, also have considered this precise issue and determined that the

class of individuals protected by mandated reporter statutes is limited to the child who has been abused or neglected and is, or should have been, the subject of a mandated report.

The Court of Appeals of Ohio, for example, determined whether individuals other than the child who has been abused or neglected and is, or should have been, the subject of a mandated report could bring a negligence action under Ohio's mandated reporter statute, which is almost identical to Connecticut's statute. *Curran* v. *Walsh Jesuit High School*, 99 Ohio App. 3d 696, 651 N.E.2d 1028 (1995). The court stated: "[The plaintiff] is correct in asserting that failure to perform a statutory duty imposed by [the mandated reporter statute] is actionable. . . . Further, [the plaintiff] is correct that the duty imposed . . . is intended for the protection of individuals rather than for the public in general. . . . [T]he Supreme Court of Ohio addressed the issue stating, the statute is not directed at or designed to protect the public at large, but intended to protect a specific child who is reported as abused or neglected. However, because the statute is intended to protect the specific child who is reported abused or neglected, [the plaintiff] has failed to persuade this court that he has standing to bring a civil claim for [the] alleged breach of the statutory duty . . . .

"Generally, in order to maintain a claim of negligence per se based on the defendant's violation of a statute, the plaintiff must show that he is among the class of individuals that the statute is designed to protect: In an action for neglect of duty it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed, but to entitle him to recover, he must further show that such duty was imposed for his benefit, or was one which the defendant owed to him for his protection and security,

from the particular loss or injury of which he complains. . . .

"We believe that [Ohio's mandated reporter statute] imposes a duty which is owed solely to the minor child of whom reports[8] have been received concerning abuse or neglect. . . . In so holding, we find instructive the Supreme Court of Ohio's statement . . . that [Ohio's mandated reporter statute] is intended to protect a specific child who is reported as abused or neglected." (Citations omitted; internal quotation marks omitted.) Id., 699–700.

In determining the class of persons protected by a statute, we do not rely solely on the statute's broad policy statement. Rather, "we review the statutory scheme in its entirety, including the design of the scheme as enacted." *Gore* v. *People's Savings Bank*, 235 Conn. 360, 380–81, 665 A.2d 1341 (1995). Other states with similar policy statements also have determined that a reporting statute's broad policy statement does not, by itself, define the class of persons protected by the statute.

The purpose of the Utah reporting statute, for example, is "to protect the best interests of children, offer protective services to prevent harm to the children, stabilize the home environment, preserve family life whenever possible, and encourage cooperation among the states in dealing with the problem of child abuse." *Owens* v. *Garfield*, 784 P.2d 1187, 1191 (1989). Similarly, § 17a-101 (a) provides: "The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect . . .

[8] We note that the use of the phrase "minor child of whom reports have been received concerning abuse or neglect" in *Curran* refers not to the required statutory report itself but to reports made to the mandated reporter concerning abuse and neglect, which give rise to the duty to file a required report under the statute.

to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse . . . ."

The Utah Supreme Court, however, concluded that: "Although the statute is intended to address the problem of child abuse, we are not persuaded that it can be read to create a legally enforceable duty on the part of the [mandated reporter] to protect all children from child abuse in all circumstances. Such a duty would be impossible to perform. The statute sets up procedures to be followed by [mandated reporters] when they are alerted of suspected abuse of identified children, but it does not create a duty on the part of the [mandated reporter] to protect children who are never identified as being in need of protection." *Owens* v. *Garfield*, supra, 784 P.2d 1191.

We similarly look to the substantive provisions of Connecticut's mandated reporter statute, which are focused on individuals who already have been abused or neglected and should have been the subject of a mandated report. For example, the reporting requirements are triggered whenever a mandated reporter "has reasonable cause to suspect or believe that *any child* under the age of eighteen years is in danger of being abused or has had nonaccidental physical injury, or injury which is at variance with the history given of such injury, inflicted upon him by a person responsible for such child's health, welfare or care or by a person given access to such child by such responsible person, or has been neglected, as defined in section 46b-120 . . . ." (Emphasis added.) General Statutes (Rev. to 1997) § 17a-101a. Once the requirement to report is triggered, the mandated reporter must report: "(1) The names and addresses of *the child* and his parents or other person responsible for his care; (2) the age of *the child*; (3) the gender of *the child*; (4) the nature and

extent of *the child's injury or injuries*, maltreatment or neglect; (5) the approximate date and time the injury or injuries, maltreatment or neglect occurred; (6) information concerning any previous injury or injuries to, or maltreatment or neglect of, *the child* or his siblings; (7) the circumstances in which the injury or injuries, maltreatment or neglect came to be known to the reporter; (8) the name of the person or persons suspected to be responsible for causing such injury or injuries, maltreatment or neglect; and (9) whatever action, if any, was taken to treat, provide shelter or otherwise assist *the child*." (Emphasis added.) General Statutes § 17a-101d. These provisions, therefore, focus only on the abused child.

Even more compelling is the fact that, once a mandated reporter is aware of suspected abuse or neglect giving rise to a mandatory report, there is not one provision in the statutory scheme that requires the reporter to provide additional information about other children known to the reporter to be in the care of the suspected abuser. If the class of persons protected by § 17a-101 included such children, it would seem logical that the statute would require the reporter to disclose information about other children known to the reporter to be in the care of the suspected abuser.

The confidentiality requirements set forth in General Statutes (Rev. to 1997) § 17a-101k also demonstrate that the class of persons protected by § 17a-101 is limited to the children who have been abused or neglected and are, or should have been, the subject of a mandated report. For example, § 17a-101k provides in relevant part that "[t]he information contained in the reports and any other information relative to child abuse, wherever located, shall be confidential subject to such regulations governing their use and access as shall conform to the requirements of federal law or regulations. . . ." General Statutes (Rev. to 1997) § 17a-101k. Any information

that is gathered concerning the reports of suspected abuse, therefore, is prohibited from public disclosure. Section 17a-101-6 of the Regulations of Connecticut State Agencies[9] sets forth the persons and agencies having emergency and routine access to the information

[9] Section 17a-101-6 of the Regulations of Connecticut State Agencies provides: "(a) Persons and agencies having emergency access to the registry. ('Emergency access' means ability to query central registry by telephone and get immediate response by telephone after verifying caller is who he/she says he/she is). ('Routine access' means ability to query central registry and response given by appointment or in writing).

"(1) Only the following persons shall be eligible for both emergency access and routine access to the registry:

"(A) A legally-mandated public or private child protective agency investigating a report of known or suspected child abuse or neglect; or an agency treating a child or family which is the subject of a report of record; or a designated agency under contract to the department of children and families performing such investigation or treatment;

"(B) A police or other law enforcement agency investigating a report of known or suspected child abuse or neglect;

"(C) A physician who has before him a child who he reasonably suspects may be abused or neglected;

"(D) A person legally authorized to place a child in protective custody when such person has before him a child whom he reasonably suspects to be abused or neglected and such person requires the information in registry to determine whether to place the child in protective custody;

"(E) An agency having the legal responsibility or authorization either to care for, treat or supervise a child who is the subject of a report or record, or to care for, treat or supervise a parent, guardian or other person responsible for such child's welfare;

"(2) Additional persons eligible only for routine access to the registry include the following:

"(A) Any person named in the report or record who is alleged to be abused or neglected; if the person named in the report or record is a minor or is otherwise incompetent, his guardian ad litem or conservator;

"(B) A parent, guardian of other person responsible for the welfare of a child named in a report or record or their attorney except that the name or names of persons reporting the incidents of alleged abuse shall not be discharged;

"(C) Subject to the prior approval of the commissioner of the department of children and families or his designee, persons engaged in bona fide research provided, however, that no information identifying the subjects of the report shall be made available unless it is absolutely essential to the research purposes.

"(D) A court, upon its finding that access to such records may be necessary

contained in the abuse registry, and each person or agency authorized to access the information has an official investigative, medical or legal connection to the child who was abused or neglected and was the subject of a mandated report. Thus, children other than the child who is the subject of a mandated report do not directly benefit from the reporting requirements. Notwithstanding the fact that the confidentiality requirements are likely designed to protect the accused abuser, if the statutory scheme truly had been intended to protect children other than the child who is the subject of a mandated report, information relating to reports of abuse would be available to the public in general or, at a minimum, to the parents or guardians of children also in the care of the abuser.

The confidentiality requirements, taken together with the fact that the statute requires that only information relating to the abused or neglected child be reported and not information relating to other known children in the care of the suspected abuser, strongly suggests that the class of persons protected by the statute is limited to the children who have been abused or neglected and are, or should have been, the subject of a mandated report. The plaintiff points to no substantive provisions that are aimed at protecting children other than children who have been abused or neglected and are, or should have been, the subject of a mandated report. From our review of the statutory scheme, we can find only two provisions that arguably benefit children outside this defined and identifiable group.

The first provision is found in General Statutes (Rev. to 1997) § 17a-101j (b), which provides: "Whenever a

for determination of an issue before such court; but such access shall be limited to 'in-camera inspection' unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it;

"(E) Any appropriate state or local official responsible for carrying out his or her official functions with respect to child protective services."

report has been made pursuant to section 17a-101b and section 17a-103 alleging that abuse or neglect has occurred at an institution or facility that provides care for children which is subject to licensure by the state and the Commissioner of Children and Families, after investigation, has reasonable cause to believe abuse or neglect has occurred, the commissioner shall forthwith notify the state agency responsible for licensure of such institution or facility of such information."

The second provision is found in General Statutes (Rev. to 1997) § 17a-101g, which provides in relevant part: "(a) Upon receiving a report of child abuse as provided in section 17a-101b, the Commissioner of Children and Families, or his designee, shall cause the report to be classified and evaluated immediately. If the report contains sufficient information to warrant an investigation, the commissioner shall make his best efforts to commence an investigation of a report concerning an imminent risk of physical harm to a child or other emergency *within two hours of receipt* of the report. . . .

"(c) If the Commissioner of Children and Families, or his designee, has probable cause to believe that the child *or any other child in the household is in imminent risk of physical harm from his surroundings* and that immediate removal from such surroundings is necessary to ensure the child's safety, the commissioner, or his designee, shall authorize any employee of the department or any law enforcement officer to *remove the child and any other child similarly situated* from such surroundings . . . ." (Emphasis added.)

The potential protection afforded under these provisions to those other than the child who is the subject of a complaint of abuse depends on the intervening acts of administrative agencies and is, therefore, remote and speculative. For example, an abusive care provider

might lose his or her license at some indeterminate point in the future, but revocation of a state license to provide care would occur after a substantial investigation and lengthy administrative process, if at all. Thus, the class of children who are protected by the statute and, therefore, owed a duty are not readily identifiable. Similarly, the provision that allows the state agency to remove children similarly situated to a child who has been abused or neglected requires an investigation and a subsequent determination by the agency that there are, in fact, other children similarly situated, and that such children are at imminent risk of harm. Again, there is no way to determine the children, if any, who will benefit from this provision.

Thus, whether these provisions ultimately will benefit children other than the child who has been abused or neglected depends entirely on administrative processes outside the control of the mandated reporter. These provisions, therefore, do not establish a specific and identifiable class. On the basis of the foregoing, we cannot say that a mandated reporter owes a legally enforceable duty to children unknown to the reporter who might stand the remote chance of benefiting from a report of abuse or neglect, where the benefit would depend entirely on the intervening acts of administrative agencies.

Finally, we note that McBride's injuries were, in the abstract, a foreseeable consequence of the defendant's failure to report prior abuse of other children. We have stated, however, that "[t]he conclusion that a particular injury to a particular plaintiff or class of plaintiffs possibly is foreseeable does not, in itself, create a duty of care. . . . Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which

lead the law to say that the plaintiff is entitled to protection. . . . While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree." (Citations omitted; internal quotation marks omitted.) *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 576, 717 A.2d 215 (1998).

The public policy concerns inherent in the present case are of profound importance, namely, the protection of children's health and welfare, which may be affected adversely through injury and neglect. We are mindful, however, that extending liability to a mandated reporter for potential future abuse of children, unknown to the mandated reporter, may, in fact, undermine the salutary goals of the statutory scheme.

Specifically, extending the liability of a mandated reporter to such children undoubtedly will result in overburdening with nonmeritorious reports the agencies charged with investigating abuse and neglect claims, which have limited resources. For example, to shield themselves from liability, mandated reporters will feel compelled to report incidents that rightfully should not be reported, thereby diverting valuable resources from the claims that demand immediate attention. In 2003, for example, the department reported that it received 33,630 reports involving 95,214 individual allegations of suspected abuse or neglect. Of these allegations, 20,322 were substantiated after full investigations resulted in findings of reasonable cause to believe that neglect or abuse had occurred. These statistics aptly demonstrate that a vast amount of resources is required to investigate the tens of thousands of

allegations brought to the attention of the department each year.[10]

The legislature obviously was concerned about over-reporting, when in 1997 it amended Connecticut's mandated reporter statute.[11] Up until that time, General Statutes (Rev. to 1997) § 17a-101e (b) shielded reporters from liability when they, in good faith, reported suspected abuse or neglect.[12] With the enactment of Public Acts 1997, No. 97-319, § 12, the legislature opted also to shield reporters from liability when they, in good faith, do *not* report suspected abuse or neglect.[13]

The legislature, therefore, has expressed its desire that reporters use good judgment in reporting suspected

[10] See 2003 Department of Children and Families Town Page Report.

[11] During debate on the amendment before the House of Representatives, Representative Ellen Scalettar, in response to an inquiry from Representative Dominic Mazzoccoli, provided the following explanation for amending the statutory language: "[A]t this time there is immunity, this only applies to mandated reporters. A mandated reporter who in good faith makes a report of child abuse and it's proved to be false, that person is immune from liability. There are many cases now though that we have heard about where professional people in particular feel that they must err always on the side of reporting even when in their professional judgment they really don't believe there has been abuse. And so long as they're exercising their professional judgment as a mandated reporter and in good faith don't make a report, this lends some balance to that reporting requirement." 40 H. R. Proc., Pt. 18, 1997 Sess., p. 6594, remarks of Representative Ellen Schalettar.

[12] General Statutes (Rev. to 1997) § 17a-101e (b) provided in relevant part: "Any person, institution or agency which, *in good faith, makes the report . . . shall be immune from any liability, civil or criminal*, which might otherwise be incurred or imposed and shall have the same immunity with respect to any judicial proceeding which results from such report provided such person did not perpetrate or cause such abuse or neglect." (Emphasis added.)

[13] General Statutes § 17a-101e (b), as it incorporates Public Acts 1997, No. 97-319, § 12, provides in relevant part: "Any person, institution or agency which, in good faith, makes, *or in good faith does not make, the report . . .* shall be immune from any liability, civil or criminal, which might otherwise be incurred or imposed and shall have the same immunity with respect to any judicial proceeding which results from such report provided such person did not perpetrate or cause such abuse or neglect." (Emphasis added.)

abuse or neglect. Presumably, one of the legislature's goals in requiring that mandated reporters use good judgment is to ensure that the system does not become overburdened, thereby preventing the agencies charged with investigating suspected abuse or neglect from protecting the children of our state with the required level of efficacy. Essentially, the agencies rely on mandated reporters to filter allegations that cannot be substantiated, which enables the agencies to focus their limited resources on reports that demand immediate attention. Moreover, we have stated that there is a public policy in this state to ensure that limited governmental resources are used efficiently. See *Board of Education* v. *Freedom of Information Commission*, 217 Conn. 153, 161, 585 A.2d 82 (1991). Extending a mandated reporter's liability to children with whom the reporter has no relationship and about whom the reporter has no independent reason to suspect abuse or neglect invariably will result in making reporters less diligent. Mandated reporters will report all potential claims rather than exercising the requisite amount of discretion to determine the validity of such claims. This will further extend the department's resources and increase the risk of deficient action by the agency on claims that warrant attention and action.

On the basis of the foregoing, we conclude that the class of persons protected by § 17a-101 is limited to those children who have been abused or neglected and are, or should have been, the subject of a mandated report. We agree with the trial court, therefore, that the defendant did not owe a duty of care to McBride because she was not within the class of persons protected by § 17a-101.

We conclude that the trial court properly granted the defendant's motion for summary judgment on the plaintiff's wrongful death cause of action because the plaintiff failed to allege a viable theory of legal fault on

the part of the defendant that was the proximate cause of McBride's injuries as required by § 52-555.

The judgment is affirmed.

In this opinion SULLIVAN, C. J., and PALMER and VERTEFEUILLE, Js., concurred.

PALMER, J., with whom VERTEFEUILLE, J., joins, concurring. I join the majority opinion. I write separately merely to note that the 1997 amendment to the immunity provisions of General Statutes § 17a-101,[1] though concededly not applicable to the present case, casts serious doubt on whether § 17a-101 gives rise to a private cause of action for negligence in failing to report *irrespective* of whether the party seeking to invoke § 17a-101 falls within the class of persons that the legislature intended to protect. This doubt is predicated on the fact that the 1997 amendment affords immunity for any good faith failure to report under § 17a-101. Public Acts 1997, No. 97-319, § 12, codified at General Statutes § 17a-101e (b).[2] The legislature provided for such immunity because of the highly sensitive, and necessarily discretionary, nature of the reporting requirement. See, e.g., 40 H.R. Proc., Pt. 18, 1997 Sess., p. 6594, remarks of Representative Ellen Scalettar. The imposition of civil liability on a mandated reporter for his or her negligence in failing to report under § 17a-101 seems antithetical to the legislative policy expressed in § 17a-101e (b), as amended.

Although the 1997 amendment is not applicable to the present case, it nevertheless has serious implica-

[1] See Public Acts 1997, No. 97-319, § 12 (effective July 1, 1997), codified at General Statutes § 17a-101e (b).

[2] General Statutes § 17a-101e (b) provides in relevant part: "Any person, institution or agency which, in good faith, makes, *or in good faith does not make*, the report pursuant to sections 17a-101a to 17a-101d, inclusive . . . shall be immune from any liability, civil or criminal, which might otherwise be incurred or imposed . . . ." (Emphasis added.)

tions for any future case in which a victim alleges the breach of a duty that is predicated upon the reporting requirement of § 17a-101. I wish only to note those potential implications.

Accordingly, I concur.

KATZ, J., dissenting. I disagree with the majority's conclusion that the defendant, the Village for Families and Children, Inc., did not owe a duty of care to Raegan McBride, the deceased two year old daughter of the plaintiff, Patrice Ward.[1] Specifically, I would conclude that the defendant's failure to report allegations of abuse by Kathy Greene, the operator of a child day care with whom the defendant contracted, in violation of General Statutes (Rev. to 1997) §§ 17a-101[2] and 17a-

[1] The plaintiff, Patrice Ward, individually and in her capacity as administratrix of the estate of Raegan McBride, her two year old daughter, filed the underlying action against the Village for Families and Children, Inc., Kathy Greene, the department of public health and Stephen A. Harriman, in his capacity as commissioner of public health. Because the issue on appeal pertains only to the Village for Families and Children, Inc., we refer to the Village for Families and Children, Inc., as the defendant in this dissenting opinion. References herein to the plaintiff are to Ward in both her individual capacity and as administratrix of her daughter's estate.

[2] General Statutes (Rev. to 1997) § 17a-101 provides in relevant part: "(a) The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.

"(b) The following persons shall be mandated reporters . . . any person paid to care for a child in any public or private facility, day care center or family day care home which is licensed by the state. . . ."

Since 1997, the statute has been amended to add other persons as mandated reporters under § 17a-101 (b). See Public Acts 2002, No. 02-138, § 12; Public Acts 2002, No. 02-106, § 3; Public Acts 2000, No. 00-49, § 6.

101a,[3] constituted negligence per se.[4] In my view, a statutorily mandated reporter pursuant to § 17a-101 (b); see footnote 2 of this opinion; who unreasonably fails to report allegations of child abuse, owes a duty of care to both the abused child and to other children who come into the care of the alleged abuser at or near the time of the abuse. Accordingly, I respectfully dissent.

I begin by setting forth the facts that form the background to this issue, as alleged in the plaintiff's amended complaint.[5] The defendant is a private placement agency contracted by the state to provide day care and foster care services to children in the Hartford area. The defendant first placed a child with Greene in a day care capacity in September, 1983, and later that month received a report from that child's caretaker alleging

[3] General Statutes (Rev. to 1997) § 17a-101a provides: "Any mandated reporter, as defined in section 17a-101, who in his professional capacity has reasonable cause to suspect or believe that any child under the age of eighteen years is in danger of being abused or has had nonaccidental physical injury, or injury which is at variance with the history given of such injury, inflicted upon him by a person responsible for such child's health, welfare or care or by a person given access to such child by such responsible person, or has been neglected, as defined in section 46b-120, shall report or cause a report to be made in accordance with the provisions of sections 17a-101b to 17a-101d, inclusive. Any person required to report under the provisions of this section who fails to make such report shall be fined not more than five hundred dollars."

[4] Although the plaintiff never invoked explicitly the term *negligence per se* as the basis for liability in her amended complaint, the language of both her brief and her amended complaint indicate that she is relying on the defendant's failure to report the incidents of alleged abuse in violation of §§ 17a-101 and 17a-101a as a basis for liability. Moreover, it is clear that the trial court looked to these provisions to determine whether the defendant owed a duty of care to McBride. Indeed, despite footnote 10 of its opinion, the majority implicitly recognizes that §§ 17a-101 and 17a-101a may form the basis for negligence per se by concluding that "the class of persons protected by § 17a-101 is limited to those children who have been abused or neglected and are, or should have been, the subject of a mandated report."

[5] Because this appeal comes to us on a judgment rendered on the defendant's motion for summary judgment, we view the facts in the light most favorable to the plaintiff, the nonmoving party. *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 514, 825 A.2d 72 (2003).

that Greene had struck the child in the face. Greene closed her day care operation the following month. The defendant did not report the allegation to the department of children and families (department).

In 1988, the defendant again hired Greene as a day care provider. In April, 1990, Greene also contracted with the defendant to become a foster parent, and the defendant placed the first foster child in Greene's care in July, 1990. Soon after this placement, the foster child indicated to several persons that, on separate occasions, Greene had beaten her and had pulled her hair out of her scalp. In response, the defendant filled out a critical incident report[6] and sent a social worker to meet with the child. At this meeting, in the presence of Greene, however, the child recanted her story. After further reports of abuse, the child was removed from Greene's home. In 1994, a two year old child sustained a cut on his penis while in Greene's day care. Greene's explanation for the injury was that the child had been cut while on a slide; however, neither the child's pants nor his diaper were torn. The child's mother removed him from Greene's care and reported the incident to the defendant. The defendant did not report the incident to the department. The relationship between the defendant and Greene continued until 1995, when the defendant eliminated its entire day care program. During the course of this relationship, Greene applied for and renewed her day care license with the department of public health four times.

Until McBride's death in February, 1997, the defendant continued to place foster children with Greene, notwithstanding continued allegations of abuse. Specifically, the allegations included that: Greene's daughter

[6] From the context of the record, it appears that a critical incident report is a type of internal report used by the defendant when incidents of abuse are alleged.

had slapped and bitten a baby in Greene's care; Greene had bent a child's fingers backward; and Greene had thrown a child across the room by grabbing his neck. Many of these allegations were never reported to the department.

In December, 1996, the plaintiff began inquiring about day care facilities for McBride. In January, 1997, after contacting the department of public health's hotline and learning that no complaints had been made against Greene for abuse, the plaintiff placed McBride in Greene's care. In early February, 1997, the defendant placed an eleven year old foster child with Greene. Shortly thereafter, the foster child complained of being hit twice by Greene, once with a wooden spoon and once with Greene's hand. Although the defendant filled out a critical incident report, it did not report these incidents to the department. On February 24, 1997, after the plaintiff had dropped McBride off at Greene's house for the day, Greene fractured McBride's skull, resulting in her death. With these facts in mind, I turn to the issue of whether the trial court properly granted the defendant's motion for summary judgment on the ground that it did not owe a duty of care to McBride.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Maffucci* v. *Royal Park Ltd. Partnership*, 243 Conn. 552, 566, 707 A.2d 15 (1998). "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand." (Internal quotation marks omitted.) *Mendillo* v. *Board of Education*, 246 Conn. 456, 483, 717 A.2d 1177 (1998). "If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from

the defendant." *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 384–85, 650 A.2d 153 (1994).

It is well settled that, "under general principles of tort law, [that] a requirement imposed by statute may establish the applicable standard of care to be applied in a particular action. . . . [I]n order to establish liability as a result of a statutory violation, a plaintiff must satisfy two conditions. First, the plaintiff must be within the class of persons protected by the statute. . . . Second, the injury must be of the type which the statute was intended to prevent. . . .

"Negligence per se operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles, i.e., that standard of care to which an ordinarily prudent person would conform his conduct. To establish negligence, the jury in a negligence per se case need not decide whether the defendant acted as an ordinarily prudent person would have acted under the circumstances. [It] merely decide[s] whether the relevant statute or regulation has been violated. If it has, the defendant was negligent as a matter of law." (Citations omitted; internal quotation marks omitted.) *Gore* v. *People's Savings Bank*, 235 Conn. 360, 375–76, 665 A.2d 1341 (1995).

I begin with the second prong of the negligence per se test—whether the injury was of the type that the statute is designed to prevent—because that prong is not seriously in dispute. The statement of purpose of the child welfare statutory scheme, which is set forth in § 17a-101 (a) and discussed further herein, clearly reflects an intent to protect children from abuse. Indeed, this provision is contained in chapter 319a of the General Statutes, entitled "Child Welfare," under part I, which sets forth provisions addressing "Dependent and Neglected Children." The entire statutory scheme provides for both remedial and prophylactic

measures targeted toward ascertaining whether abuse has occurred and preventing future abuse. McBride, a two year old child who was fatally injured by Greene, her day care provider, clearly sustained the type of injury intended to be prevented by the statute. Indeed, rather than contest the fact that McBride's injury satisfied this prong of the negligence per se test, the defendant focuses solely on the issue of the scope of liability—whether McBride is in the class of persons the statute intended to protect—which is the first prong of the test. Similarly, the majority does not suggest that the harm inflicted on McBride—a fractured skull at the hands of her day care provider—is not the type of harm that § 17a-101 was enacted to prevent.

Therefore, I turn to the first prong of the negligence per se test, that is, whether McBride is within the class of persons that § 17a-101 is intended to protect. In making this determination, I look to that particular statute, as well as the statutory scheme as a whole, of which § 17a-101 is merely one of the many measures taken by the legislature to protect children from abuse. I would conclude that, as a child in Greene's care at or near the time of the alleged abuse that the defendant failed to report, some of which I previously have set forth herein, McBride was within that class of protected persons.

First, the public policy set forth in § 17a-101 indicates that the reporting statutes apply to all similarly situated children whose health and welfare may be affected, which, in the present case, would include McBride. The statute provides in relevant part: "The public policy of this state is: To protect *children* whose health and welfare *may be adversely affected* through injury and neglect . . . and for [this purpose] *to require the reporting of suspected child abuse*, investigation of such reports by a social agency, and provision of services, where needed, to such child and family." (Empha-

sis added.) General Statutes § 17a-101 (a). This language indicates that the reporting statute is not merely a remedial statute designed to isolate and punish child abusers, but it is also a prophylactic statute. Put another way, the policy articulated in § 17a-101 (a) is not to protect only children who are suspected of being abused or neglected, but *any* child who *may be* subjected to abuse or neglect. Interpreting the statute to include only those children who have already been injured or neglected would be incongruous with a policy to protect children whose health and welfare *may* be so adversely affected.

Indeed, other sections within the statutory scheme bolster the position that §§ 17a-101 and 17a-101a are intended to protect all children similarly situated who are at risk of being abused. After a statutorily mandated reporter generates an initial report of suspected abuse, pursuant to § 17a-101a, General Statutes § 17a-101g (c) provides in part that "[i]f the Commissioner of Children and Families, or his designee, has probable cause to believe that the child or any other child in the household is in imminent risk of physical harm from his surroundings and that immediate removal from such surroundings is necessary to ensure the child's safety, the commissioner, or his designee, shall authorize any employee of the department or any law enforcement officer to remove the child *and any other child similarly situated from such surroundings* . . . ." (Emphasis added.) This language indicates an intent to protect not just children on behalf of whom reports have been received, but also children similarly situated, that is, all children in the care of the suspected abuser. Accordingly, the protective measures set forth in § 17a-101g (c) are consistent with the policy articulated in § 17a-101 (a)—to protect *all* children from potential abuse, not just children who already have been subjected to suspected abuse.

Moreover, General Statutes § 17a-101i[7] requires the suspension, with pay, of an employee accused of child abuse, if after an investigation, the department has reasonable cause to believe that the child has been abused. Had the legislature been concerned *solely* with protecting the particular child who allegedly had been abused, it could have taken the less drastic measure of requiring that the accused employee not have contact with the child in question. Instead, the legislature required that the employee be suspended, thereby

[7] General Statutes § 17a-101i provides in relevant part: "(a) Notwithstanding any provision of the general statutes to the contrary, after an investigation has been completed and the Commissioner of Children and Families, based upon the results of the investigation, has reasonable cause to believe that a child has been abused by a school employee who holds a certificate, permit or authorization issued by the State Board of Education, the commissioner shall notify the employing superintendent of such finding and shall provide records, whether or not created by the department, concerning such investigation to the superintendent who shall suspend such school employee. Such suspension shall be with pay and shall not result in the diminution or termination of benefits to such employee. Within seventy-two hours after such suspension the superintendent shall notify the local or regional board of education and the Commissioner of Education, or the commissioner's representative, of the reasons for and conditions of the suspension. The superintendent shall disclose such records to the Commissioner of Education and the local or regional board of education or its attorney for purposes of review of employment status or the status of such employee's certificate, permit or authorization. . . .

"(b) After an investigation has been completed and the Commissioner of Children and Families, based upon the results of the investigation, has reasonable cause to believe that a child has been abused by a staff member of a public or private institution or facility providing care for children or private school, the commissioner shall notify the executive director of such institution, school or facility and shall provide records, whether or not created by the department concerning such investigation to such executive director. Such institution, school or facility may suspend such staff person. Such suspension shall be with pay and shall not result in diminution or termination of benefits to such employee. Such suspension shall remain in effect until the incident of abuse has been satisfactorily resolved by the employer of the staff person. If such staff member has a professional license or certification issued by the state, the commissioner shall forthwith notify the state agency responsible for such license or certification of the staff member and provide records, whether or not created by the department, concerning such investigation. . . ."

removing him or her from the presence of *all* the children at the place of employment. Similarly, the statutory scheme provides for the revocation of a child care license as a preventive measure against further abuse of children other than the child already suspected of having been abused. See General Statutes § 17a-151. I interpret these directives, therefore, as protecting not only the allegedly abused child, but also all children similarly situated to that child.

Second, an implicit goal of this statutory scheme is to encourage the reporting of alleged incidents of child abuse. Indeed, the child welfare system cannot work without such reporting, as the regulation and licensing of child care providers and the prevention of abuse require information that, in many cases, can be provided only by the persons statutorily designated as mandated reporters. See General Statutes § 17a-145 et seq. Therefore, to ensure that these mandated reporters fulfill this duty, the legislature insulated them from certain liabilities that might arise as a result of reporting instances of child abuse and neglect. Specifically, it limited liability for inaccurate reports made in good faith; General Statutes (Rev. to 1997) § 17a-101e (b);[8]

[8] General Statutes (Rev. to 1997) § 17a-101e (b) provides: "Any person, institution or agency which, in good faith, makes the report [of abuse or neglect] pursuant to sections 17a-101a to 17a-101d, inclusive, and section 17a-103 shall be immune from any liability, civil or criminal, which might otherwise be incurred or imposed and shall have the same immunity with respect to any judicial proceeding which results from such report provided such person did not perpetrate or cause such abuse or neglect."

In 1997, the legislature amended § 17a-101e (b) by adding a provision also to immunize a mandated reporter who in good faith *does not* make a report of abuse or neglect. Public Acts 1997, No. 97-319. § 12. Therefore, in cases involving negligence per se pursuant to § 17a-101, as in the present case, the defendant may avoid liability upon proof of a valid excuse or justification. See 2 Restatement (Second), Torts § 288A, pp. 32–33 (1965). A mandatory reporter who negligently has failed to act in accordance with the statute may assert good faith as an excuse and thereby avoid liability. See *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 150, 491 A.2d 389 (1985).

The majority relies upon the 1997 amendment as evidence that the legislature was concerned about overreporting and that recognizing a broader

and prevented employers from retaliating against an employee for making a report of child abuse. General Statutes § 17a-101e (a).[9] By providing such protections to statutorily mandated reporters, it is evident that the legislature sought to allay fears of adverse repercussions that might be associated with reporting. In other words, these protections are designed to encourage reporters to err on the side of caution, by making reports of abuse, even if they only *suspect* that abuse is occurring.

The majority points to two provisions in the child welfare statutory scheme that prescribe the nature of the event that triggers the reporting requirement; General Statutes (Rev. to 1997) § 17a-101a; see footnote 3 of this dissenting opinion; and the information that the reporter must provide in the report; General Statutes § 17a-101d; as support for its conclusion that a duty is owed solely to the child who is the subject of the report—the child of whom abuse already is suspected.

class to include victims like McBride would overburden the system contrary to legislative intent. The legislative history indicates, however, that the legislature merely was attempting at that time to add "some balance" in recognition of the many unsubstantiated claims that require investigation. See 40 H.R. Proc., Pt. 18, 1997 Sess., p. 6586, remarks of Representative Robert Farr; id., p. 6594, remarks of Representative Ellen Scalettar. Nothing in this history reflects a diminution in legislative concern about *underreporting*. Indeed, the provision ensuring confidentiality of abuse reports; see General Statutes § 17a-101k; further indicates that the legislature wanted to encourage even the reporting of abuse that ultimately might not be substantiated. Finally, I note that it is evident that the failure to report abuse when there is a reasonable basis to conclude it has occurred is far greater than the ramifications of overreporting such claims, even when some of those claims ultimately prove to be false.

[9] General Statutes § 17a-101e (a) provides: "No employer shall discharge, or in any manner discriminate or retaliate against, any employee who in good faith makes a report pursuant to sections 17a-101a to 17a-101d, inclusive, and 17a-103, testifies or is about to testify in any proceeding involving child abuse or neglect. The Attorney General may bring an action in Superior Court against an employer who violates this subsection. The court may assess a civil penalty of not more than two thousand five hundred dollars and may order such other equitable relief as the court deems appropriate."

Although these provisions address only the child who is the subject of the report, other provisions addressing the purpose and ramifications of reporting as I previously have discussed bear directly on the issue of duty.

Indeed, the majority recognizes that the statutory scheme prescribes further measures that could suggest a duty that extends beyond the child that is the subject of the report. See General Statutes § 17a-101j (b) (investigation by commissioner of children and families of allegations of abuse and, after finding reasonable cause to substantiate report, notification of state agency responsible for licensure of child care institution or facility); General Statutes § 17a-101g (authorizing department after investigating report of abuse to remove from household all children in imminent risk of harm). The majority dismisses these provisions, however, because they depend on actions by independent entities other than the mandated reporter and, therefore, the possibility of preventing abuse of children other than those who are the subject of the report is "remote and speculative" in that these other children are "not readily identifiable." This reasoning is circular. According to the majority, the class of other children likely to be at risk of abuse is not identifiable because no investigation took place, and no investigation leading to the disclosure of children at risk of abuse took place because no report was filed.

The majority also relies for support on General Statutes § 17a-101k and its supporting regulation, which impose confidentiality requirements on the disclosure of reports of abuse, limiting the persons to whom such information can be disclosed. The majority concludes that, because this information is not available to the public at large, parents of children who also are in the care of the alleged abuser do not have access, and therefore do not benefit from, this information. This

reasoning is equally flawed because it goes to the issue of causation, not duty. Although a parent may not receive the information and thereby *directly* benefit from the report, the actions by state agencies upon receipt of information in the mandated report otherwise may prevent future instances of abuse by revoking the abuser's child care license; see General Statutes § 17a-151; or by suspending or terminating the employment of the abuser. See General Statutes § 17a-101i.

Accordingly, I would conclude that children similarly situated to a child of whom abuse reasonably is suspected are within the class of persons that the statute is intended to protect. This construction is supported by analogy to an area of our common law wherein we have had to delineate the scope of a foreseeable class of victims. We have determined that, in order to impose liability on a municipal employee who presumptively enjoys immunity in the performance of discretionary governmental acts, a plaintiff must show the existence of circumstances that "make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . ." (Internal quotation marks omitted.) *Mulligan* v. *Rioux*, 229 Conn. 716, 728, 643 A.2d 1226 (1994), on appeal after remand, 38 Conn. App. 546, 662 A.2d 15 (1995); *Burns* v. *Board of Education*, 228 Conn. 640, 645, 638 A.2d 1 (1994); *Sestito* v. *Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979). "We have construed this exception to apply not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims." *Burns* v. *Board of Education*, supra, 646. "In delineating the scope of a foreseeable class of victims exception to governmental immunity, our courts have considered numerous criteria, including the imminency of any potential harm, the likelihood that harm will result from a failure to act with reasonable care, and the identifiability of the particular victim. E.g., *Evon* v.

Andrews, [211 Conn. 501, 507–508, 559 A.2d 1131 (1989)]. Other courts, in carving out similar exceptions to their respective doctrines of governmental immunity, have also considered whether the legislature specifically designated an identifiable subclass as the intended beneficiaries of certain acts; see, e.g., *Halvorson* v. *Dahl*, 89 Wash. 2d 673, 676, 574 P.2d 1190 (1978); whether the relationship was of a voluntary nature; *McLeod* v. *Grant County School District*, 42 Wash. 2d 316, 319, 255 P.2d 360 (1953); the seriousness of the injury threatened; *Irwin* v. *Ware*, [392 Mass. 745, 756, 467 N.E.2d 1292 (1984)]; the duration of the threat of injury; id.; and whether the persons at risk had the opportunity to protect themselves from harm. Id." *Burns* v. *Board of Education*, supra, 647–48.

Applying these factors to the circumstances of this case, I would conclude that " '[c]onsiderations of public policy [that] . . . undergird the judicial determination of the scope of duty in the law of negligence' "; *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 97, 735 A.2d 347 (1999); likewise suggest that children in the care of an abuser, *at or near the time* that another child's abuse went unreported by a mandatory reporter, are intended beneficiaries of §§ 17a-101 and 17a-101a. It should be apparent to any statutorily mandated reporter that his or her failure to act, when there is a reasonable basis on which to conclude that abuse has occurred, would be likely to subject other children then in the abuser's care to imminent harm.[10] These children are similarly situated to the child who has been abused and are equally deserving of protection.

Moreover, concluding that the defendant had a duty of care to children similarly situated to other children

[10] Indeed, under the majority's reasoning, the mandated reporter would owe no duty to a sibling of a child who had been abused unless the reporter knew that the abuser in fact had other children in his care.

allegedly abused by Greene, like McBride, is consistent with the goal of the statutory scheme—the protection of children. "An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer." (Internal quotation marks omitted.) *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 579, 717 A.2d 215 (1998). In my view, the use of a negative incentive—specifically, that the failure to report reasonable suspicions of abuse will result in potential liability—in the absence of good faith, is consistent with the statutory scheme and helps promote this state's public policy of protecting all children from abuse.

Finally, I recognize that there exists a legitimate concern of attenuation, that is, that the attenuation between a defendant's conduct and a plaintiff's harm is too remote, as a matter of public policy, to impose a duty. See *Gomes* v. *Commercial Union Ins. Co.*, 258 Conn. 603, 616–17, 783 A.2d 462 (2001). That is not the case here. Greene's conduct demonstrated a pattern of abuse, the last known incident occurring within a few weeks of McBride's death. In the present case, we need not decide to what extent *every* child who has in the past or will at some time in the future come into the care of a suspected abuser falls within the class of persons that the statutory child abuse scheme is intended to protect. In this particular case, McBride clearly was imminently at risk.

Accordingly, I respectfully dissent.

STATE OF CONNECTICUT *v.* MICHAEL BARILE (SC 17040)

Borden, Norcott, Katz, Vertefeuille and Zarella, Js.

Syllabus

The defendant, who was on probation in connection with his conviction of risk of injury to a child, appealed from the judgment of the trial court finding him in violation of his probation for having failed to participate fully and effectively in a sex offender treatment program by refusing to submit to a polygraph examination administered by the office of adult probation, and ordering his continued probation conditioned on his submitting to such examination. The defendant claimed, for the first time on appeal, that the trial court violated his constitutional rights against self-incrimination by ordering him to submit to a polygraph examination. *Held* that the defendant, not having raised in the trial court the constitutional claim presented on appeal, and having affirmatively acquiesced to the trial court's order, was deemed to have waived any such claim.

Argued December 4, 2003—officially released February 3, 2004

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the court, *Dyer*, *J.*; judgment of guilty with an order of continued probation subject to modified conditions, from which the defendant appealed. *Affirmed.*

Richard Cramer, with whom, on the brief, was *William T. Gerace*, for the appellant (defendant).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *James E. Thomas*, state's attorney, and *John H. Malone*, supervisory assistant state's attorney, for the appellee (state).

PER CURIAM. The defendant, Michael Barile, appeals[1] from the judgment of the trial court finding him in violation of probation for having failed to participate fully and effectively in a sex offender treatment program. The defendant claims that the trial court improperly ordered him to take a polygraph examination administered by a polygrapher selected by the office of adult probation (adult probation), in violation of his rights against self-incrimination under the fifth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. We affirm the judgment of the trial court.

Adult probation secured a warrant for the defendant's arrest, claiming that he had violated his probation by failing to participate in sex offender counseling and treatment. After a hearing, the trial court, *Dyer*, *J.*, found that the defendant had violated his probation. In the dispositional phase of the proceeding, the trial court continued the defendant on probation, and specifically ordered that he take a polygraph examination. This appeal followed.

We have carefully examined the trial court record in this matter. The facts are voluminous and complicated, and it would serve no useful purpose for us to state them in detail. They may be summarized, however, as follows. In 1998, the defendant was found guilty, in a court trial before *Swienton*, *J.*, of risk of injury to a child, based in part on his repeated sexual contact with his young stepdaughter. He was sentenced to ten years imprisonment, execution suspended after three years, followed by five years probation. One of the conditions of his probation was that he cooperate with sex offender

[1] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

treatment that was deemed necessary by adult probation. Thereafter, both before and after his release from custody, the defendant signed written conditions of probation, among which were that he would submit to polygraph examinations as required by adult probation. After more than one year of attending group therapy sex offender treatment sessions, the defendant continued to deny that he had engaged in the sexual conduct for which he had been convicted,[2] and he refused to submit to polygraph examinations, despite having been assured that, if he successfully passed the examination, the treatment program officials would recommend that the condition requiring participation in such a program be eliminated. Ultimately, the defendant was discharged from the treatment program, based both on his continued denial and his refusal to take the polygraph examination. The director of the treatment program stated that, although the defendant had faithfully attended the therapy sessions, he was in effect "just biding his time . . . ." Thereafter, his probation officer brought this violation of probation proceeding.[3]

In the adjudicative phase of the violation of probation proceeding, the trial court, *Dyer*, *J.*, found that the

[2] The trial court specifically noted the testimony of the program therapists that denial is common among sex offenders, and that acceptance of their responsibility is necessary for successful treatment and rehabilitation of sex offenders.

[3] A revocation of probation proceeding has two distinct components, an adjudicative phase and a dispositional phase. In the adjudicative phase, a "factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. If a violation is found, a court must next determine [in the dispositional phase] whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Hill*, 256 Conn. 412, 425, 773 A.2d 931 (2001); see General Statutes § 53a-32; Practice Book § 43-29. By statute, a court may: (1) continue the sentence of probation; (2) modify or enlarge the conditions of probation; (3) extend the period of probation; or (4) revoke the sentence of probation. General Statutes § 53a-32 (b).

defendant had been discharged from the sex offender treatment program without satisfactorily finishing it, despite having been accorded sufficient time to acknowledge his sexual misconduct, despite having been warned that failure to do so could result in termination of treatment, and despite having been given more than one year to resolve the issue of his denial. The court also found that the defendant had resisted taking a polygraph examination by a polygrapher approved by the sex offender treatment program, despite the fact that he repeatedly had agreed to take such an examination, and despite assurances by the program officials that a successful examination would prompt them to recommend the elimination of the sex offender treatment requirement of his probation. On the basis of these findings, the trial court further found that the defendant had violated the terms of his probation because he had failed to complete satisfactorily the court-ordered sex offender treatment. Accordingly, the court found the defendant in violation of his probation. Thereafter, in the dispositional phase of the violation of probation proceeding; see footnote 3 of this opinion; the court continued the defendant on probation, and specifically enlarged the court-ordered conditions of his probation by ordering him to take a polygraph examination by a polygrapher selected by adult probation or its designee.[4]

The defendant's appeal is limited to the sole question of whether the trial court violated his federal and state constitutional rights against self-incrimination by ordering him to undergo a polygraph examination. Our review of the record, however, discloses that, not only did the defendant never raise in the trial court the con-

[4] Prior to the transfer of this appeal from the Appellate Court to this court, the state moved to dismiss the defendant's appeal on the ground of mootness, asserting that, subsequent to the judgment of violation of probation from which the defendant appeals, he took a polygraph examination and was participating in good standing in sex offender treatment. The Appellate Court denied that motion, and the state has not renewed it in this court.

stitutional claim or claims that he now presents on appeal, but he affirmatively acquiesced to the trial court's order and, therefore, he waived any such claims.

The position of the state, which was presented through the testimony of the officials of the sex offender treatment program in which the defendant was enrolled, was that the defendant had continued both to deny the sexual misconduct for which he had been convicted, and to refuse to take a polygraph examination about that misconduct by an examiner selected by adult probation that would have, if completed successfully, resulted in a recommendation that he no longer be required to participate in the treatment program. Thus, according to the state, the defendant simply was not amenable to any useful treatment by the program. The defendant did not claim throughout the dispositional phase that he should not be required to take a polygraph examination; instead, he claimed that he should be permitted to take a polygraph examination by an examiner selected by him or, at a minimum, by an "independent" examiner selected by the court. Furthermore, it was only in passing that the court, rather than the defendant, raised the issue of the fifth amendment. In that regard, the defendant specifically agreed with the court that he did not have a fifth amendment right to silence about the crime of which he already had been convicted. In addition, the defendant specifically agreed that, although he did not want to take a polygraph examination, "he will if it's fair," presumably meaning that he would do so if he were able to select the examiner. Finally, the defendant specifically represented to the court that, if the court, as opposed to the state, were to order the polygraph examination, he would "follow [the court's order] to the letter of the law."

Against this background, the court entered the order. In doing so, moreover, the court specifically found that

the defendant's failure to take the polygraph examination was, contrary to his assertions that it was a matter of principle, due to his "attempt to engage in denial, delay, and manipulation of the probation function." Moreover, after the court entered its order, the defendant affirmatively stated that he had no objection to it, and he specifically thanked the court for its patience and fairness.

The judgment is affirmed.

LEONARD L. CRONE *v.* JAMES A. CONNELLY ET AL.
(SC 16965)

Borden, Norcott, Palmer, Vertefeuille and Zarella, Js.

Argued January 8—officially released February 3, 2004

Procedural History

Action to recover damages for, inter alia, the alleged violation of the plaintiff's civil rights, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the matter was tried to the jury before *Hon. Edward Stodolink*, judge trial referee, who granted the defendants' motion for a directed verdict and, exercising the powers of the Superior Court, rendered judgment for the defendants, from which the plaintiff appealed to the Appellate Court, *Foti*, *Mihalakos* and *Hennessy*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Leonard M. Crone, with whom, on the brief, was *Doreen M. Alegi*, for the appellant (plaintiff).

Barbara Brazzel-Massaro, associate city attorney, for the appellees (defendant Lester H. Garrett et al.).

Arthur C. Laske III, assistant city attorney, for the appellee (named defendant).

PER CURIAM. The plaintiff, Leonard L. Crone, a teacher in the Bridgeport public school system, brought an action for violation of his constitutional rights, false arrest, intentional infliction of emotional distress, and malicious prosecution, against the defendants, James A. Connelly, the superintendent of the Bridgeport school system, Lester H. Garrett, a detective in the Bridgeport police department, Richard Mancini, a sergeant in the Bridgeport police department, and Thomas Sweeney, the police chief for the city of Bridgeport. The trial court granted the defendants' motion for a directed verdict, and rendered judgment for the defendants accordingly. On the plaintiff's appeal to the Appellate Court, that court affirmed the trial court's judgment. *Crone* v. *Connelly*, 74 Conn. App. 788, 802, 813 A.2d 1084 (2003). We granted the plaintiff's petition for certification for appeal limited to the following issue: "Did the Appellate Court properly conclude that the trial court properly granted the defendants' motion for a directed verdict?" *Crone* v. *Connelly*, 263 Conn. 902, 819 A.2d 836 (2003). This certified appeal followed.

Our examination of the record and briefs, and our consideration of the arguments of the parties persuade us that the judgment of the Appellate Court should be affirmed. The issues were resolved properly in the Appellate Court's concise and well reasoned opinion. Because that opinion fully addresses the arguments raised in this appeal, we adopt it as a proper statement of the issues and the applicable law concerning those issues. It would serve no useful purpose for us to repeat the discussion contained therein. See *Miller's Pond Co.* v. *Rocque*, 263 Conn. 692, 697, 822 A.2d 238 (2003).

The judgment of the Appellate Court is affirmed.

MICHAEL DAUBERT *v.* BOROUGH OF NAUGATUCK ET AL.
(SC 16848)

Sullivan, C. J., and Borden, Katz, Vertefeuille and Zarella, Js.

Syllabus

The defendant employer and its worker's compensation insurance carrier appealed to this court, following our grant of certification, from the judgment of the Appellate Court reversing the decision by the workers' compensation review board affirming a commissioner's dismissal of the plaintiff police officer's claim for benefits. The plaintiff sought benefits in connection with injuries he had sustained when his police cruiser collided with a tree while he was on duty. The plaintiff alleged that the accident occurred when he failed to negotiate a curve in the road while he was searching for a reported reckless driver, and that the impact of the collision rendered him unconscious. The commissioner determined that the plaintiff had not established compensability because he did not meet his burden of proving that he was injured during the course of his employment. Specifically, the commissioner found that, although the plaintiff was on duty at the time of the accident, his testimony as to how the accident occurred, the speed at which he was traveling and his claim that he was rendered unconscious following the accident was not credible. The plaintiff then appealed to the board, which affirmed the commissioner's decision, concluding that the commissioner was not required to find the accident compensable merely because it had occurred while the plaintiff was on duty. Thereafter, the plaintiff appealed to the Appellate Court, which determined that the commissioner's finding that the plaintiff was on duty as a police officer while he was driving in his police cruiser and hit the tree mandated the additional finding that he was injured while he was reasonably fulfilling the duties of his employment. That court concluded that the commissioner's determination that the plaintiff had not met his burden of proving that the accident had occurred as he had alleged was not a reasonable inference to be drawn from the facts. *Held* that the commissioner's finding that the plaintiff did not prove that his injuries had occurred while he was acting in the course of his employment had to stand, the plaintiff having specifically claimed and introduced evidence in support of his claim that the injury occurred in a specific way, and the commissioner having specifically found that the evidence was not credible; the commissioner's finding that the collision arose out of the plaintiff's employment did not give rise to a mandatory inference that the collision occurred while the plaintiff was performing work-related duties in the course of his employment.

Argued October 22, 2003—officially released February 17, 2004

Procedural History

Appeal from the decision of the workers' compensation commissioner for the fifth district dismissing the plaintiff's claim for benefits, brought to the compensation review board, which affirmed the commissioner's decision, and the plaintiff appealed to the Appellate Court, *Lavery*, *C. J.*, and *Bishop* and *Peters*, *Js.*; judgment reversing the decision of the compensation review board and remanding the matter to the board with direction to reverse the decision of the workers' compensation commissioner, and for further proceedings, and the defendants, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Richard T. Stabnick, with whom was *Courtney C. Stabnick*, for the appellants (defendants).

D. Kirt Westfall, for the appellee (plaintiff).

Opinion

BORDEN, J. The sole issue in this certified appeal is whether there was a reasonable basis in the facts found for the workers' compensation commissioner to have determined that the plaintiff had not met his burden of proving that he was injured during the course of his employment. The defendants, the borough of Naugatuck and its insurer, the Hartford Insurance Group, appeal, following our grant of certification, from the judgment of the Appellate Court reversing the decision of the compensation review board (board) in their favor. The defendants claim that the Appellate Court improperly determined that the workers' compensation commissioner for the fifth district (commissioner) was compelled to draw the inference that the plaintiff police officer, Michael Daubert, was injured during the course of his employment, once the commissioner had determined that the plaintiff was on duty and driving his police vehicle in Naugatuck at the time he collided

with a tree, and that the board improperly affirmed the commissioner's decision. See *Daubert* v. *Naugatuck*, 71 Conn. App. 600, 601, 803 A.2d 343 (2002). We agree with the defendants and, accordingly, we reverse the judgment of the Appellate Court.

The plaintiff filed a claim for workers' compensation benefits and the defendants denied compensability. After an extended hearing, the commissioner dismissed the claim, finding that the plaintiff had not established compensability. The plaintiff appealed to the board, which affirmed the commissioner's decision. The plaintiff then appealed to the Appellate Court, which reversed the decision of the board and remanded the case to the board with direction to reverse the decision of the commissioner. Id., 613. This certified appeal followed.[1]

Certain facts, which are undisputed by the parties, are as follows. At approximately 1:46 a.m., on January 26, 1997, the plaintiff was an employee of the Naugatuck police department, and was on duty in his cruiser when he was involved in a motor vehicle accident in which his cruiser struck a tree. All of the other facts, however, were disputed by the parties. The plaintiff claimed before the commissioner that, while he was searching for a reported reckless driver, his cruiser had struck the tree when he failed to negotiate a sharp curve in the road. The plaintiff also claimed that, as a result of the impact, he had sustained various injuries, including loss of consciousness. The defendants denied that the

[1] We granted the defendants' petition for certification for appeal limited to the following questions: "1. Did the Appellate Court [im]properly substitute its own factual findings for those of the workers' compensation commissioner?" and "2. Did the Appellate Court [im]properly reverse the decision of the workers' compensation commissioner or should the Appellate Court have remanded the issues?" *Daubert* v. *Naugatuck*, 261 Conn. 942, 943, 808 A.2d 1135 (2002). Because we answer the first question in the affirmative, it is not necessary to reach the second question.

collision with the tree had occurred as the plaintiff claimed because his assertions were inconsistent with the evidence. Thus, the plaintiff sought a finding that his injuries arose out of and in the course of his employment and that his claim was compensable under the Workers' Compensation Act (act). General Statutes § 31-275 et seq. The defendants sought a finding that the plaintiff had not sustained his burden of proof that the collision occurred as he had alleged and that, therefore, his claim should be dismissed. From the commissioner's point of view, therefore, the issue was "[w]hether the [plaintiff's] accident occurred as alleged by the [plaintiff] thereby resulting in a compensable claim pursuant to the [act]."

The commissioner held fourteen hearings over the course of two years, received testimony from numerous witnesses for both sides, and viewed dozens of exhibits, including a videotaped narration by the plaintiff of the events that immediately preceded the collision. The plaintiff testified and introduced evidence and expert witness testimony in support of his claim that his injuries were compensable. The defendants presented their own witnesses and evidence, including expert witness testimony, which disputed the plaintiff's rendition of how the collision had occurred, what had happened in the collision's aftermath, and the nature of the plaintiff's alleged injuries.

The commissioner dismissed the plaintiff's claim for benefits on the ground that the plaintiff had not met his burden of proving that the collision occurred as he had alleged. This determination was based on the commissioner's specific findings of fact, which can be summarized as follows: (1) on January 26, 1997, at approximately 1:46 a.m., the plaintiff, while on duty as a sergeant for the Naugatuck police department, was involved in a motor vehicle accident wherein his police cruiser struck a tree; (2) the plaintiff's explanation that

he was traveling forty-five to fifty miles per hour and "spotlighting" streets prior to the accident was not credible; (3) the plaintiff's testimony that he was rendered unconscious by the collision was not persuasive; (4) the testimony of the defendants' witnesses regarding the skid marks left at the scene was credible, and the testimony of the paramedic attending the plaintiff following his collision that the plaintiff was in fact conscious was "very persuasive"; (5) the testimony of the defendants' medical expert that the plaintiff was not rendered unconscious by the impact was more credible than the testimony of the plaintiff's medical expert to the contrary; (6) the collision reconstruction testimony of the defendants' witness was more credible than the reconstruction testimony of the plaintiff's witness; and (7) based on the discrepancies in the plaintiff's testimony and the credibility of the other witnesses, the plaintiff "[was] found to be not credible." In sum, the commissioner found that, although the plaintiff was on duty in his cruiser when his cruiser struck a tree, he had not proven: (1) that the collision with the tree had occurred as a result of his failure to negotiate a curve while looking for a reported reckless driver; and (2) that he had been rendered unconscious as he had alleged.

The board affirmed the commissioner's determination, on the ground that the plaintiff had not proven, as he was required to do, that the collision giving rise to his injuries took place while he was reasonably fulfilling the duties of his employment or doing something incidental to it. Specifically, the board stated that "where a [plaintiff] contends that an accident occurred in a specific manner, and the trial commissioner finds the [plaintiff's] explanation to lack credibility, we cannot say that the trial commissioner *must* find the accident to be compensable merely because it occurred while the [plaintiff] was on duty. Certainly, in the instant case it is unclear whether the [plaintiff] met the third

requirement of [the] 'in the course of' the employment provision, specifically we do not know whether the accident occurred while he was reasonably fulfilling the duties of the employment or doing something incidental to it." (Emphasis in original.) Thus, the board noted that the commissioner "did not find the [plaintiff's] testimony to be credible regarding how the accident occurred. As the [plaintiff] did not sustain his burden of proving a compensable injury, it is neither incumbent upon the [defendants], nor upon the trial commissioner, to disprove the compensability of the accident."

The Appellate Court disagreed. That court reasoned that the commissioner's finding that the plaintiff was on duty as a police officer while he was driving in his police cruiser and hit the tree, mandated the additional finding that he was injured "while he was reasonably fulfilling the duties of his employment," and that the commissioner's determination "that the plaintiff had not met his burden of proving that the accident occurred as he had alleged was not a reasonable inference to be drawn from the subordinate facts." *Daubert* v. *Naugatuck*, supra, 71 Conn. App. 610.

On appeal to this court, the defendants claim that the Appellate Court improperly determined that the commissioner's finding that the plaintiff was on duty and in his police cruiser when the collision occurred mandated the additional finding that the injuries occurred while he was reasonably fulfilling the duties of his employment or doing something incidental to it. We agree with the defendants.

"It is well settled that, because the purpose of the act is to compensate employees for injuries without fault by imposing a form of strict liability on employers, to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the

employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment." (Internal quotation marks omitted.) *Spatafore* v. *Yale University*, 239 Conn. 408, 417–18, 684 A.2d 1155 (1996). "Proof that [an] injury arose out of the employment relates to the time, place and circumstances of the injury. . . . Proof that [an] injury occurred in the course of the employment means that the injury must occur (a) within the period of the employment; (b) at a place the employee may reasonably be; and (c) *while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 418.

It is useful to note what is not at issue in this case. Not at issue is that the plaintiff proved that his claimed injuries "arose out of [his] employment"; id., 417; and that he proved the first two of the three prongs of the requirement that the injuries occurred "in the course of [his] employment"; id.; because these elements relate to the time, place and circumstances of the injury, and to whether the injury occurred "within the period of the employment . . . [and] at a place the employee may reasonably be . . . ." (Internal quotation marks omitted.) Id., 418. The defendants do not dispute any of these elements, and the finding that the plaintiff was on duty in his cruiser when the collision occurred satisfies those elements. Also not at issue is whether the plaintiff intentionally drove his cruiser into the tree. The defendants did not claim that to be the case, and they specifically disavowed any such claim in oral argument before this court.[2]

[2] Thus, we are not persuaded by the Appellate Court's reliance on the commissioner's use of the word "accident" in his findings, for that court's conclusion that the facts found compelled the inference that the plaintiff was injured in the course of his employment. *Daubert* v. *Naugatuck*, supra, 71 Conn. App. 613. First, we read the commissioner's use of the word as merely a synonym for "collision." Second, that discussion took place in the

What is at issue in this case is whether the plaintiff failed to prove the third prong of the "in the course of the employment" inquiry; id., 417–18; namely, that he was reasonably fulfilling the duties of his employment or doing something incidental to his employment when he collided with the tree. "The determination of whether an injury arose . . . in the course of employment is a question of fact for the commissioner." Id., 418. "[I]n determining whether a particular injury arose out of and in the course of employment, the [commissioner] must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited . . . . If supported by evidence and not inconsistent with the law, the [commissioner'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 [commissioner] is factually questionable." (Internal quotation marks omitted.) *Fair* v. *People's Savings Bank*, 207 Conn. 535, 539–40, 542 A.2d 1118 (1988).

We conclude that the commissioner's finding, that the plaintiff did not prove that his injuries had occurred while he was reasonably fulfilling the duties of his employment or doing something incidental to it, must stand. As the board noted, there may be instances when, without specific evidence, a commissioner may infer from all of the circumstances that an injury occurred in the course of employment. When, however, as in the present case, the plaintiff specifically claims and

context of whether the defendants could rely on a claim that the plaintiff intentionally had caused the collision. As we have noted, the defendants specifically have disclaimed any such reliance.

introduces evidence in support of his burden of proof that an injury occurred in a specific way, and the commissioner specifically finds that evidence not credible, and when there is no other credible evidence to require a different compensable factual scenario, the commissioner's finding that the plaintiff failed to meet his burden of proof that the injuries had occurred during the course of his employment cannot be overturned. To conclude otherwise would, in such a situation, shift the burden of proof to the defendants. Thus, we simply disagree with the Appellate Court and the plaintiff that, under the circumstances of the present case, the commissioner's finding that the plaintiff was on duty in his cruiser when the cruiser hit the tree mandated the additional finding that he was acting in the course of his employment when he hit the tree.

The question of whether a plaintiff's injuries resulted from an incident that occurred in the course of his employment is a separate and distinct question from whether his alleged injuries arose out of his employment. *Kolomiets* v. *Syncor International Corp.*, 252 Conn. 261, 266, 746 A.2d 743 (2000). The commissioner's finding that the collision arose out of the plaintiff's employment did not, in the circumstances of the present case, give rise to a mandatory inference that the collision occurred while the plaintiff was performing work-related duties and, therefore, that the collision occurred in the course of his employment.

The plaintiff argues, however, that if we uphold the decisions of the commissioner and the board, we will have assigned to the plaintiff the burden of disproving the defendants' evidence that he deliberately collided with the tree and that this shifting of the burden of proof would be in derogation of his due process rights. We disagree. As we have noted, the defendants do not claim that the plaintiff intentionally caused the collision. In this connection, we agree with the board that

the plaintiff's failure to prove that the collision occurred as he claimed and testified simply left the issue of what he was doing when his cruiser collided with the tree unproven, or, as the board put it, "shrouded in mystery." Thus, our disposition of this appeal does not shift the burden of proof to the plaintiff. To the contrary, it leaves that burden precisely where the law puts it, on the plaintiff.

The plaintiff also claims that, if we were to reverse the Appellate Court's judgment, it would violate his right to procedural due process of law because it would, in effect, mandate a finding that he deliberately collided with the tree, and such a finding would be impermissible because the defendants did not plead wilful misconduct as an affirmative defense. We reject this claim for the same reasons that we rejected the plaintiff's claim regarding a purported shift in the burden of proof.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the decision of the compensation review board.

In this opinion the other justices concurred.

RUSSELL WENTLAND ET AL. *v.* AMERICAN EQUITY INSURANCE COMPANY

KIMBERLY BLEAU *v.* AMERICAN EQUITY INSURANCE COMPANY

AMANDA KISZKA *v.* AMERICAN EQUITY INSURANCE COMPANY
(SC 16802)

Sullivan, C. J., and Borden, Palmer, Vertefeuille and Zarella, Js.

Syllabus

The plaintiffs, B, a minor, W, the administrator of the estate of M, a minor, and K, the operator of a motor vehicle, each brought a separate action, which were later consolidated, against the insureds, a bar and its owner, for injuries and death sustained in a motor vehicle accident caused by R, a minor, who allegedly had been furnished alcohol at the bar. The

complaints alleged that the insureds were negligent because they had failed to prevent R from consuming alcohol, that the bar was negligently designed because adult patrons with alcoholic beverages were allowed access to common areas of the bar visited by minor patrons, and that the insureds negligently had failed to supervise the common areas by warning adult patrons not to provide alcoholic beverages to minor patrons and by warning minor patrons not to accept alcoholic beverages from adult patrons. The complaints further alleged that R had lost control of her vehicle as a result of her "consumption of alcohol" at the bar. The insureds notified the defendant insurer of the claim, requesting a defense under their commercial general liability insurance coverage, but the defendant refused to defend the action on the basis of a liquor liability exclusion contained in the policy. Subsection (1) of the exclusion precluded coverage for bodily injury or property damage by reason of the insureds' "causing or contributing to the intoxication of any person." The parties then stipulated to a judgment in favor of the plaintiffs, under which they agreed that satisfaction of the judgment would be sought against the defendant, and that the insureds would assign to the plaintiffs any tort and contract rights that they may have had against the defendant. Thereafter, the plaintiffs each commenced a separate action, which were later consolidated, against the defendant, alleging breach of the duty to defend and indemnify its insureds, and seeking a declaratory judgment that the defendant had breached those duties. The defendant moved for summary judgment claiming that it had no duty to defend the action because of the liquor liability exclusion, and the plaintiffs also moved for summary judgment claiming that the allegations of the complaint fell outside the exclusion. The trial court granted the defendant's motions, denied the plaintiffs' motions, and rendered judgments for the defendant, from which the plaintiffs appealed. *Held* that the trial court improperly granted the defendant's motions for summary judgment because the allegations in the plaintiffs' complaints fell outside of the liquor liability exclusion and, therefore, the defendant breached its duty to defend the insureds; the language in the exclusion "causing or contributing to the intoxication of any person" encompassed something more than merely being under the influence of alcohol and operated to preclude coverage only if the injuries resulted from a person's intoxication, not merely a person's "consumption of alcohol," and because the plaintiffs alleged that their injuries resulted from R's "consumption of alcohol" rather than from her "intoxication," the language of the exclusion did not operate to bar the duty to defend.

Argued October 28, 2003—officially released February 17, 2004

Procedural History

Three actions for, inter alia, a declaratory judgment to determine the defendant's obligations under a general liability insurance policy to defend and indemnify certain of its insureds in personal injury actions brought

against those insureds by the plaintiffs, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the cases were consolidated; thereafter, the court, *Berger*, *J.*, denied the plaintiffs' motions for summary judgment, granted the defendant's motions for summary judgment and rendered judgments thereon for the defendant, from which the plaintiffs filed a joint appeal. *Reversed; further proceedings*.

Michael S. Taylor, with whom were *Wesley W. Horton* and, on the brief, *Andrea Merkle*, certified legal intern, for the appellants (plaintiffs).

Daniel P. Scapellati, with whom was *James V. Somers*, for the appellee (defendant).

Opinion

BORDEN J. The dispositive issue in this appeal is whether the defendant insurer had a duty to defend certain actions brought against its insureds alleging injuries resulting from the insureds' service of alcohol, where the insurance policy contained a clause excluding claims for which the insureds may be liable by reason of "causing or contributing to the intoxication of any person . . . ." The plaintiffs appeal[1] from the judgments of the trial court, granting the defendant's motions for summary judgment and denying the plaintiffs' cross motions for summary judgment. The plaintiffs claim that the trial court improperly granted the defendant's motions for summary judgment because the underlying complaints did not allege that the injuries resulted from "intoxication," but merely from the "consumption of alcohol," thereby falling outside of the policy's liquor liability exclusion. We reverse the judgments of the trial court.

[1] The plaintiffs appealed from the judgments of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199 (c).

The plaintiffs, Kimberly Bleau, Amanda Kiszka, and Russell Wentland, the administrator of the estate of the decedent, Marci L. Wentland,[2] who are assignees of the insureds of the defendant, American Equity Insurance Company, brought these consolidated actions against the defendant for breach of its duty to defend and to indemnify its insureds, and accordingly, for declaratory judgments that the defendant had a duty to defend and to indemnify. The defendant moved for summary judgment, claiming that it had no duty to defend any of the actions. The plaintiffs also moved for summary judgment, claiming the contrary. The trial court granted the defendant's motions, denied the plaintiffs' motions, and rendered judgments for the defendant accordingly.

The procedural history of these cases is as follows. The plaintiffs each brought a separate action, which were later consolidated, against Seneco Corporation and Antonio Senese[3] (Seneco), for damages sustained as a result of an automobile accident. The complaints alleged, among other things, that Seneco negligently had furnished alcohol to the driver of an automobile, who was less than twenty-one years of age. Seneco notified its insurer, the defendant, of the claim, but the defendant refused to defend the action on the basis of a liquor liability exclusion in Seneco's policy. Subsequently, the parties stipulated to a judgment in favor of the plaintiffs, whereby it was agreed that satisfaction of that judgment would be sought against the defendant.

The plaintiffs then each commenced a separate action, which were also later consolidated, against the defendant, claiming that the defendant had breached its duties to defend and to indemnify Seneco. The par-

[2] For purposes of clarity, we refer to Russell Wentland by name as a plaintiff, and to Marci L. Wentland as the decedent.

[3] According to the plaintiffs' complaints, Senese is an officer and director of Seneco Corporation, which owns and operates The Stadium Sports Bar and Club (The Stadium).

ties filed cross motions for summary judgment; the plaintiffs claimed that the defendant had breached its duty to defend and, consequently, its duty to indemnify, and the defendant claimed, to the contrary, that it had no duty to defend the underlying actions. On the basis of the liquor liability exclusion in Seneco's policy, the trial court held that the defendant had no duty to defend. Accordingly, the trial court granted the defendant's motions, denied the plaintiffs' motions, and rendered judgments for the defendant.

For the purposes of this appeal, the following facts, as alleged in the plaintiffs' complaints, are undisputed. On March 15, 1997, Bleau, Darlene Rodriguez and the decedent, who were all less than twenty-one years of age, went to a bar called "The Stadium" in Bristol. The Stadium, which was owned by Seneco, consisted essentially of two areas: a regular bar area where adult patrons could purchase alcoholic beverages; and a "juice bar" for patrons less than twenty-one years of age. In addition, The Stadium contained several common areas, including a dance floor and a billiards room, which were used by both adult and minor patrons. Adults who intended to purchase alcoholic beverages were required to wear paper wristbands to distinguish them from minors.

While at The Stadium that evening, Rodriguez consumed alcoholic beverages that had been provided to her by adult patrons of the bar. Subsequently, as Rodriguez was driving home during the early morning hours of March 16, 1997, with Bleau and the decedent as passengers, she lost control of her vehicle and collided head-on with a vehicle operated by Kiszka. As a result of the collision, Bleau, Kiszka and the decedent were injured, with the decedent's injuries being fatal.

Bleau, Kiszka, and Wentland, as administrator of the decedent's estate, each brought a separate action

against Seneco, claiming, among other things, that Seneco was negligent because it had failed to prevent Rodriguez from consuming alcohol.[4] The complaints, which were alike in all material respects, alleged that Rodriquez had lost control of her vehicle as a result of her "consumption of alcohol" at The Stadium.[5]

Following the commencement of the underlying actions, Seneco forwarded copies of the complaints to the defendant, requesting a defense under its commercial general liability insurance coverage. Seneco's insurance policy provided that the defendant "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . [and] defend any 'suit' seeking those damages." The defendant, however, refused to defend Seneco because of a liquor liability exclusion in Seneco's policy. That exclusion provided in relevant part: "This insurance does not apply to . . . '[b]odily injury' or 'property damage' for which any insured may be held

[4] The complaints alleged, for instance, that The Stadium was negligently designed and constructed in that the bar's only dance floor, used by both adult and minor patrons, was located in the "juice bar" area. The complaints also alleged that Seneco: failed to supervise continuously the entrance between the "juice bar" and the common areas; failed to prevent adult patrons from carrying alcoholic beverages into the common areas and the "juice bar"; failed to provide distinct cups for alcoholic and nonalcoholic beverages; failed to warn adult patrons not to provide alcoholic beverages to minor patrons; and failed to warn minor patrons of the consequences of accepting alcoholic beverages from adult patrons.

[5] Bleau's complaint stated: "Said consumption of alcoholic beverages by Rodriguez at the . . . Stadium caused her driving ability to become impaired. . . . Due to Rodriguez' impairment, said vehicle . . . collided with a motor vehicle being operated by . . . Kiszka . . . ."

Kiszka's complaint stated: "Rodriguez' consumption of alcohol at The Stadium caused her to be unable to properly control her vehicle and she . . . collided head-on with . . . Kiszka's vehicle, causing the injuries and losses of which . . . Kiszka hereinafter complains."

Wentland's complaint stated: "Rodriguez' consumption of alcohol at The Stadium caused her to be unable to control her vehicle, which inability caused . . . [the decedent's] death."

liable by reason of: (1) Causing or contributing to the intoxication of any person; (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages."

Subsequently, the trial court, *Shortall*, *J.*, approved stipulated judgments in favor of the plaintiffs against Seneco.[6] The stipulations released all claims against Seneco, providing that satisfaction of the judgments would be sought only against the defendant. In addition, Seneco assigned to the plaintiffs all the tort and contract rights that it may have had against the defendant.

Following Seneco's declaration of bankruptcy, the plaintiffs each brought a separate action against the defendant, which subsequently were consolidated. The matter was subsequently heard on cross motions for summary judgment. The defendant argued that it had no duty to defend because the alleged negligent acts were not covered by Seneco's policy. According to the defendant, the "unambiguous language" of the policy's liquor liability exclusion barred "coverage for incidents related to Seneco's sale or service of alcohol." The plaintiffs argued, to the contrary, that the allegations in the complaints fell outside the exclusion, particularly their claim that Seneco had failed to warn the minors of the consequences of accepting alcohol. The trial court, *Berger*, *J.*, denied the plaintiffs' motions for summary judgment, granted the defendant's motion for summary judgment, and rendered judgments in favor of the defendant. Additional facts will be presented as necessary.

On appeal to this court, the plaintiffs claim that the trial court improperly granted the defendant's motion

[6] The plaintiffs and Seneco agreed that judgments of $50,000 would enter in favor of Bleau and Kiszka, and a judgment of $900,000 would enter in favor of Wentland.

for summary judgment because the allegations in the complaints fell outside of the liquor liability exclusion. Specifically, the plaintiffs argue that the language "[c]ausing or contributing to the intoxication of any person," which was contained in the exclusion, encompasses something more than merely being under the influence of alcohol, and operates to preclude coverage only if the injuries resulted from a person's "intoxication," not merely a person's "consumption of alcohol." In that regard, the plaintiffs contend, because the complaints alleged that the plaintiffs' injuries resulted from Rodriguez' "consumption of alcohol," as opposed to her "intoxication," the language of the exclusion did not operate to bar the duty to defend, and the defendant, therefore, breached its duty to defend the insureds in the present case.[7] The defendant argues for a broader reading of the exclusion, namely, that the exclusion operates to preclude the duty to defend for any claims related to the insureds' sale or service of alcohol. In that regard, the defendant claims that it did not have a

[7] The defendant claims that the plaintiffs have failed to preserve an adequate record for this claim. See Practice Book § 61-10 (appellant's responsibility to provide adequate record for review). Specifically, the defendant contends, because Practice Book § 64-1 (a) provides that the trial "court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor," and because the trial court did not articulate the precise ground for its decision, the plaintiffs were required to seek an articulation of the trial court's ruling. We disagree.

"The question of whether an insurer has a duty to defend its insured is purely a question of law, which is to be determined by comparing the allegations of [the] complaint with the terms of the insurance policy. . . . In such circumstances, the facts are not in dispute and, because the reviewing court's review is de novo, the precise legal analysis undertaken by the trial court is not essential to the reviewing court's consideration of the issue on appeal." (Citations omitted; internal quotation marks omitted.) *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 395–96, 757 A.2d 1074 (2000). As we note later in this opinion, we read the trial court's decision as resting on subsection (1) of the liquor liability exclusion. Thus, an articulation of the trial court's ruling would not have provided this court with any additional information that would aid our review of the applicability of subsection (1) of the exclusion.

duty to defend the insureds because all of the plaintiffs' underlying claims were dependent upon the insureds' sale or service of alcohol. We agree with the plaintiffs, but we remand the case for consideration of other issues discussed herein.

Construction of a policy of insurance presents a question of law, over which our review is de novo. *Security Ins. Co. of Hartford* v. *Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 700–701, 826 A.2d 107 (2003). "It is beyond dispute that an insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the complaint. . . . The obligation of the insurer to defend does not depend on whether the injured party will successfully maintain a cause of action against the insured but on whether he has, in his complaint, stated facts [that] bring the injury within the coverage." (Citation omitted; internal quotation marks omitted.) *Flint* v. *Universal Machine Co.*, 238 Conn. 637, 646, 679 A.2d 929 (1996). "If an allegation of the complaint falls even possibly within the coverage, then the [insurer] must defend the insured." (Internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, 252 Conn. 405, 409, 746 A.2d 1252 (2000). Accordingly, an insurer's duty to defend its insured is triggered without regard to the merits of its duty to indemnify. See, e.g., *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, 256 Conn. 343, 352, 773 A.2d 906 (2001) (insurer has duty to defend even if pleadings indicate that claim may be meritless).

"Although policy exclusions are strictly construed in favor of the insured . . . the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 409. The interpretation of an insur-

ance policy is based on the intent of the parties, that is, the coverage that the insured expected to receive coupled with the coverage that the insurer expected to provide, as expressed by the language of the entire policy. *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 256 Conn. 351–52; *Springdale Donuts, Inc.* v. *Aetna Casualty & Surety Co. of Illinois*, 247 Conn. 801, 805–806, 724 A.2d 1117 (1999). The words of the policy are given their natural and ordinary meaning, and any ambiguity is resolved in favor of the insured. *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 351–52; *Springdale Donuts, Inc.* v. *Aetna Casualty & Surety Co. of Illinois*, supra, 805–806.

Applying those principles to the facts of the present case, and to the policy language at issue, we conclude that: (1) the trial court determined that the part of the liquor liability exclusion that precluded the duty to defend was the language regarding the "intoxication of any person"; (2) that language was not unambiguously applicable to the pleadings of the injured parties in their underlying complaints; and (3) therefore, the defendant had a duty to defend against the injured parties' complaints against its insureds. In this regard, it is not necessary for us to decide definitively what the word "intoxication" means as used in the policy. It suffices to conclude, as we do, that the word is sufficiently ambiguous that, when read in light of the injured parties' complaints, the duty to defend was triggered.

We first turn to a brief discussion regarding the basis of the trial court's decision in the present case. Relying on cases that had interpreted similar liquor liability exclusions, the trial court held that, "because the 'allegations of alcohol' are integral to and inseparable from the allegations of negligence, the liquor liability exclusion applies as a matter of law." Although the trial court did not specifically state which provision formed the basis of its ruling, it reasoned that "the allegations of

negligence are inseparable from the fact that Seneco either caused or contributed *to the intoxication* of Rodriguez." (Emphasis added.) In addition, the trial court referenced the language "caus[ing] or contribut[-ing] *to the intoxication* of Rodriguez"; (emphasis added); four times in the concluding paragraph of its memorandum of decision, but did not reference the language from either subsections (2) or (3) of the liquor liability exclusion.[8] Thus, we read the trial court's decision as resting on subsection (1) of the exclusion. Put another way, because the trial court determined that subsection (1) was sufficient to trigger the liquor liability exclusion, it did not explicitly discuss the applicability of subsections (2) or (3) of the exclusion in its memorandum of decision. Moreover, that is primarily how the parties have briefed and approached this appeal. We ordinarily decide appeals on the basis in which it was decided in the trial court, and briefed and argued in this court. See, e.g., *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000). Thus, we confine our discussion herein to the applicability of subsection (1) of the liquor liability exclusion, and we express no opinion as to the applicability of subsections (2) or (3).

The language of the policy concerning coverage in the present case provided in relevant part that the defendant "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . [and] defend any 'suit' seeking those damages." The policy also contained a liquor liability exclusion, which provided in relevant part: "This insurance does not apply to . . . '[b]odily injury' or 'property damage' for which any insured may

[8] The only mention of subsection (2) of the liquor liability exclusion in the trial court's memorandum of decision was when the court quoted the exclusion to preface the discussion of its analysis. Subsection (3) was never mentioned.

be held liable by reason of: (1) Causing or contributing to the intoxication of any person; (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages."

The critical dispute between the parties is whether, under the facts alleged in the underlying complaints, the liquor liability exclusion precluded the defendant's duty to defend. In addition, the parties agree, at least as it relates to the defendant's duty to defend, that subsection (3) of the exclusion, which refers to "[a]ny statute, ordinance or regulation relating to" alcohol, is not relevant to this appeal.

Subsection (1) of the exclusion operates to bar coverage in circumstances in which an insured may be liable by reason of its "[c]ausing or contributing to the intoxication of any person . . . ." The applicability of that language to the present case rests on the meaning of the term "intoxication." As the ensuing discussion indicates, the word "intoxication" has various meanings in our law, depending on the context in which it is used. The common thread of these meanings, however, is that it does not necessarily mean being impaired by, or under the influence of, alcohol *to any degree*.

In defining "intoxication," the parties focus on *Sanders* v. *Officers Club of Connecticut, Inc.*, 196 Conn. 341, 349, 493 A.2d 184 (1985), but they come to different conclusions as to whether its definition triggers the liquor liability exclusion in the present case. In *Sanders*, we laid out the elements that a plaintiff was required to prove in order to prevail under our Dram Shop Act; General Statutes § 30-102; which permits a civil action against a person who sells alcoholic liquor to an intoxicated person. *Sanders* v. *Officers Club of Connecticut, Inc.*, supra, 349. In order to establish sufficiently that

a person was intoxicated under § 30-102, we stated: "To be intoxicated is something more than to be merely under the influence of, or affected to some extent by, liquor. Intoxication means an abnormal mental or physical condition due to the influence of intoxicating liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions and energies. When it is apparent that a person is under the influence of liquor, when his manner is unusual or abnormal and is reflected in his walk or conversation, when his ordinary judgment or common sense are disturbed or his usual will power temporarily suspended, when these or similar symptoms result from the use of liquor and are manifest, a person may be found to be intoxicated. He need not be 'dead-drunk.' It is enough if by the use of intoxicating liquor he is so affected in his acts or conduct that the public or parties coming in contact with him can readily see and know this is so." Id., 349–50. On the basis of this definition of intoxication, and keeping in mind that any ambiguity ought to be resolved in favor of the insured, we conclude that the complaints in the present case did not necessarily allege that the plaintiffs' injuries were the result of Seneco's "[c]ausing or contributing to *the intoxication* of any person . . . ." (Emphasis added.) Accordingly, subsection (1) of the liquor liability exclusion did not relieve the defendant of its duty to defend the insureds in the present case.

The first sentence of the definition in *Sanders* v. *Officers Club of Connecticut, Inc.*, supra, 196 Conn. 349, states that intoxication is "something more" than merely being affected by alcoholic liquor. This is a plain indication that there may be levels of inebriation that are less severe than intoxication. Indeed, common sense dictates that one's behavior will be influenced to differing degrees depending on what, and how much, alcoholic liquor one had consumed. Similarly, alcoholic

liquor may tend to affect some persons differently than it does others, depending on a number of factors, for instance, a person's body weight, a person's tolerance to alcohol, and what other food or beverages, if any, a person has consumed within the same time frame. Thus, under our definition in *Sanders*, it is possible to be "affected to some extent by" alcoholic liquor, without being "intoxicated." Id.

By the same token, in another context, we have interpreted the *Sanders* formulation to imply that being "under the influence of intoxicating alcohol" is something less than being "intoxicated." *State* v. *Lonergan*, 213 Conn. 74, 92 n.11, 566 A.2d 677 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2586, 110 L. Ed. 2d 267 (1990), overruled on other grounds, *State* v. *Alvarez*, 257 Conn. 782, 794, 778 A.2d 938 (2001). In *Lonergan*, the defendant was charged with driving under the influence of intoxicating liquor in violation of General Statutes § 14-227a, and manslaughter in the second degree with a motor vehicle in violation of General Statutes § 53a-56b. Id., 76. At the time of the incident in question, in order to convict a defendant under § 53a-56b, the state was required to prove that the victim's death was the result of the defendant's " 'intoxication' "; id., 76–77 n.2; whereas, under § 14-227a, the state was required to prove merely that the defendant was " 'under the influence of intoxicating liquor . . . .' " Id., 76 n.1. In differentiating between "under the influence of intoxicating liquor" and "intoxication," we reasoned that, although "it is possible to be under the influence of intoxicating alcohol while not being intoxicated, it is impossible to be intoxicated while not, at the same time, be[ing] under the influence of alcohol." (Internal quotation marks omitted.) Id., 92 n.11; *Sanders* v. *Officers Club of Connecticut, Inc.*, supra, 196 Conn. 349–50. Although § 53a-56b no longer requires the state to prove that the defendant had been "intoxicated," but only that he had been

"under the influence of intoxicating liquor";[9] see Public Acts 1985, No. 85-147, § 1; our reading of the *Sanders* formulation in *Lonergan* reinforces the notion that intoxication may be "something more" than merely being under the influence of alcoholic liquor. *Sanders* v. *Officers Club of Connecticut, Inc.*, supra, 349.

Also in the motor vehicle context, General Statutes (Rev. to 1997) § 14-227a, which was in effect at the time of the alleged negligent conduct in the present case, differentiated between driving "under the influence of intoxicating liquor"; General Statutes (Rev. to 1997) § 14-227a (a); and driving "while impaired."[10] General Statutes (Rev. to 1997) § 14-227a (b). The offense of driving "under the influence of intoxicating liquor" required, among other things, that the offender be fined not less than $500, be imprisoned not more than six months, and have his or her driving privileges suspended for one year; General Statutes (Rev. to 1997) § 14-227a (h) (1); whereas the offense of driving "while impaired" was only an infraction. General Statutes (Rev. to 1997) § 14-227a (i). The legislature's recognition of the offense of driving while impaired, which carried a lesser penalty than did driving under the influence of intoxicating liquor, further informs us that our law recognizes lesser degrees of inebriation, some of which may not properly be characterized as intoxication.

Having concluded that there may be lesser degrees of inebriation that do not necessarily constitute "intoxication," at least as this court and our legislature have

[9] The same change was made to General Statutes § 53a–60d, which describes assault in the second degree with a motor vehicle. See Public Acts 1985, No. 85-147, § 2.

[10] The offense "operation while impaired" defined "impaired" as having a blood alcohol content in excess of 0.007, but less than 0.01. This offense was eliminated by the amendment of § 14-227a, effective July 1, 2002. See Public Acts, Spec. Sess., May, 2002, No. 02-1. Before the change, a blood alcohol content greater than or equal to 0.01 qualified as "operation while under the influence of intoxicating liquor" pursuant to § 14-227a (a).

defined the term, we turn to the plaintiffs' allegations against Seneco in the present case. Bleau's complaint stated: "Said consumption of alcoholic beverages by Rodriguez at the . . . Stadium caused her driving ability to become impaired." Kiszka's complaint stated: "Rodriguez' consumption of alcohol at The Stadium caused her to be unable to properly control her vehicle . . . ." Finally, Wentland's complaint stated: "Rodriguez' consumption of alcohol at The Stadium caused her to be unable to control her vehicle . . . ." Thus, for all material purposes, the underlying complaints against Seneco alleged that Rodriguez' *consumption of alcohol* caused her to be unable to control her vehicle, or caused her driving ability to become impaired.

The complaints did not allege that Rodriguez was intoxicated, or that she displayed any behavior[11] that would establish, as a matter of law, that she was intoxicated. Because the "allegation[s] of the complaint[s] [fell] even possibly within the coverage"; (internal quotation marks omitted) *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 409; the defendant had a duty to defend the insureds, at least with regard to subsection (1) of the liquor liability exclusion. The plaintiffs also point out that the defendant had the means to insert a broader liquor liability exclusion known as an "absolute liquor" exclusion, which states that "the policy does

[11] For instance, we have stated that "one of the most common indications of intoxication . . . [is] staggering in walking or running." *State* v. *Katz*, 122 Conn. 439, 442, 189 A. 606 (1937). The defendant relied on *Katz* at oral argument before this court, and urged this court to infer that, because the complaints alleged that Rodriguez lost control of her vehicle as a result of her consumption of alcohol, common sense would indicate that she *must* have been intoxicated. See id., 442–43 (evidence that person was staggering sufficient to support finding of intoxication). To the contrary, common sense indicates that she *might* or *might not* have been intoxicated, at least as we have defined the term, which supplies enough ambiguity to trigger the defendant's duty to defend. See *Moore* v. *Continental Casualty Co.*, supra, 252 Conn. 409 (if allegation falls " 'even possibly' " within coverage, insurer must defend).

not provide coverage for bodily injuries arising out of or in connection with the manufacturing, selling, distributing, serving, or furnishing of any alcoholic beverages." *Bagley* v. *Monticello Ins. Co.*, Massachusetts Superior Court, Docket No. 95296D (October 16, 1998); see also *Holmes* v. *Edison*, Docket No. CIV 00-1707 LCS/KBM-ACE (D.N.M. 2001) (policy provided that "[t]his insurance does not apply to . . . [b]odily injury . . . for which any insured . . . may be held liable as a result of the consumption of any alcoholic beverages"); but see *Monticello Ins.* v. *Mike's Speedway Lounge, Inc.*, 949 F. Sup. 694, 702 (S.D. Ind. 1996) (policy with "absolute liquor" exclusion provided "only illusory coverage" under Indiana law).

The defendant argues that the plaintiffs' allegations fall within our definition of intoxication in *Sanders*. In that regard, the defendant points out that *Sanders* defines intoxication in a number of ways, for instance, "an abnormal mental or physical condition due to the influence of intoxicating liquors," or "a derangement or impairment of physical functions and energies." *Sanders* v. *Officers Club of Connecticut, Inc.*, supra, 196 Conn. 349. Accordingly, the defendant contends, the allegations in the underlying complaints, which alleged that Rodriguez' consumption of alcohol caused " 'her to be unable to control her vehicle,' " or " 'caused her driving ability to become impaired,' " are essentially synonymous with, say, an " 'impairment of physical functions and energies,' " and, therefore, fall squarely within the *Sanders* formulation. We disagree.

Although the definition of intoxication set forth in *Sanders* goes on to provide examples that would be sufficient to support a finding of intoxication, for instance, "a derangement or impairment of physical functions and energies"; id.; these differing examples cannot not relieve the defendant of its duty to defend. First, keeping in mind the context in which this court

decided *Sanders*, these examples do not inform what constitutes intoxication as a matter of law; rather, they merely provide illustrations of what will be sufficient to support the factual finding that a purchaser of alcohol was intoxicated for purposes of the Dram Shop Act. In that regard, merely because a trier of fact ultimately may conclude that the plaintiffs' injuries in the present case were the result of Rodriguez' "intoxication," it does not follow that the allegations in the complaint, for instance, that "Rodriguez' consumption of alcohol at The Stadium caused her to be unable to control her vehicle," compel the conclusion that Rodriguez must have been intoxicated as a matter of law. Because an insurer's duty to defend is triggered without regard to the likelihood that it ultimately may be required to indemnify the insured, the examples in *Sanders*, setting forth what may be sufficient to establish intoxication at trial, cannot relieve the defendant of its duty to defend.[12]

[12] Much the same can be said of the defendant's reliance on *State* v. *Katz*, 122 Conn. 439, 442, 189 A.2d 606 (1937), at oral argument before this court. *Katz*, like *Sanders*, did not define what constitutes intoxication as a matter of law; rather, it merely provided an example of what would be sufficient to support the factual finding that a person was intoxicated. The defendant in *Katz*, who was charged with selling liquor to an intoxicated person, challenged the statute on vagueness grounds, claiming that the term " 'intoxicated person' " was too indefinite to be enforceable. Id., 440, 442. Without defining the term "intoxicated person," this court affirmed the conviction because evidence that the purchaser was staggering was sufficient to support a finding of intoxication. Id., 441–43.

In the present case, the defendant places great emphasis on the court's statement in *Katz* that the "condition of intoxication . . . [is] a matter of general knowledge . . . ." Id., 442. To that end, the defendant argues that common sense shows that Rodriguez was intoxicated in this case. The defendant's reliance on *Katz*, however, is misplaced because, although this court opined that common sense may be used to ascertain the term "intoxicated person," that was in the context of reviewing a factual finding made by the trier of fact, not in the context of reviewing, on a de novo basis, whether allegations in a complaint may possibly trigger an insurer's duty to defend. The defendant's argument is better suited for review of a factual finding made in the context of an insurer's duty to indemnify, not to defend, its insured.

Second, the additional definitions of intoxication in *Sanders* reinforce the notion that intoxication is defined in a number of ways. As previously discussed, intoxication has been defined, in one way or another, in both our statutes and case law. See, e.g., General Statutes § 53a-7; *Sanders* v. *Officers Club of Connecticut, Inc.*, supra, 196 Conn. 349. In addition, "intoxication" had been defined as "the condition of being drunk," with "drunk" meaning "having the faculties impaired by alcohol . . . ." Merriam-Webster's Collegiate Dictionary (10th Ed. 1993). Intoxication also has been defined as a "diminished ability to act with full mental and physical capabilities because of alcohol or drug consumption; drunkenness." Black's Law Dictionary (7th Ed. 1997).

All of these varying definitions, however helpful to the defendant, merely show that intoxication is defined in a number of ways in a number of contexts. Given an insurer's broad duty to defend, and keeping in mind that any ambiguity in the terms ought to be resolved in favor of the insured; *QSP, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 256 Conn. 352; these competing definitions reinforce our conclusion that subsection (1) of the liquor liability exclusion did not relieve the defendant of its duty to defend the insureds in the present case.

The defendant claims, nevertheless, that the liquor liability exclusion bars all claims that are dependent upon the sale or service of alcohol. Relying on cases from other jurisdictions that have interpreted similar exclusions; see, e.g., *Frost* v. *David*, 673 So. 2d 340, 344 (La. App. 1996); *Kelly* v. *Painter*, 202 W. Va. 344, 348, 504 S.E.2d 171 (1998); the defendant argues that all of the plaintiffs' allegations are dependent upon the sale or service of alcohol, and, therefore, are not covered under the policy. We disagree.

Interpreting this exclusion to bar all claims dependent upon the sale or service of alcohol expands its

reach beyond that which its explicit terms provide, and would render superfluous the specific language of subsections (2) and (3) of the liquor liability exclusion. In addition, the cases from other jurisdictions on which the defendant relies did not undertake the task of interpreting the meaning of the term "intoxication." We therefore decline to adopt such a broad reading of the liquor liability exclusion in the present case.

Finally, the defendant argues, as an alternate ground for affirmance, that subsection (2) of the exclusion, which relates to "[t]he furnishing of alcoholic beverages to a person under the legal drinking age," barred coverage in the present case. Because the parties have not adequately briefed this issue in this court, we decline to consider this claim. We therefore express no opinion as to the merits of that question, but instead leave it for further exploration in the trial court should the defendant choose to raise it.

The judgments are reversed and the case is remanded with direction to deny the defendant's motions for summary judgment and for further proceedings according to law.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ADRIAN PEELER
(SC 16571)

Sullivan, C. J., and Norcott, Palmer, Vertefeuille and Zarella, Js.

Syllabus

Convicted of the crime of conspiracy to commit murder in connection with the shooting deaths of a mother and her son, both of whom were potential state witnesses in another pending criminal case in which the defendant's brother was charged with attempted murder, the defendant appealed. *Held*:

1. The trial court's determination that the reasons proffered by the state's attorney for exercising a peremptory challenge to exclude from the jury an African-American, female venireperson were race neutral, supported

by the record and not a pretext for impermissible racial discrimination was not clearly erroneous; the fact that the venireperson had a son who was approximately the same age as the defendant and who had been convicted for offenses involving conduct similar to that in which the defendant had engaged and regarding which the state intended to introduce evidence reasonably might have caused the state's attorney to be particularly concerned that the venireperson might identify with the defendant to the detriment of the state.

2. The trial court properly allowed the state to introduce, under the coconspirator exception to the hearsay rule (Conn. Code Evid. § 8-3 [1] [D]), certain inculpatory statements that the defendant's brother had made to third parties and, contrary to the defendant's claim, the admission of such evidence did not violate his sixth amendment right to confront the witnesses against him:

a. The defendant could not prevail on his claim that his brother's statement to a third party that the defendant was "doing something" for him and his subsequent statement to the same person that the defendant "did something" for him were not in furtherance of an ongoing conspiracy; both statements served to promote the conspirational objective of concealing the conspirators' criminal conduct, the first statement having been made for the purpose of inducing the listener to act in a manner that would assist the defendant's brother in establishing an alibi and the second statement having been made for the purpose of securing the listener's silence.

b. The defendant could not prevail on his claim that the question, "Did you file that down?" which the defendant's brother asked during a telephone conversation with an unknown caller, and his brother's use of the word "river" during the same conversation were inadmissible under the coconspirator exception to the hearsay rule because the state failed to establish the identity of the caller and because, in any event, the statements related to a conspiracy to conceal or destroy evidence that was separate and distinct from the conspiracy to murder the victims; the identification of the party to whom a statement is addressed, although helpful in establishing whether the statement was made in furtherance of a conspiracy, is not a prerequisite to admissibility under the coconspirator exception to the hearsay rule, and efforts to conceal a crime that already has been committed generally will be deemed to be in furtherance of the conspiracy to commit that crime.

3. The trial court did not abuse its discretion in permitting the state to introduce evidence regarding the defendant's brother's attempted murder and subsequent murder of a former drug trafficking partner; that evidence was relevant to explain why the defendant's brother had asked the defendant to kill the victims and, furthermore, the probative value of the evidence was not outweighed by its prejudicial effect in light of the fact that the evidence related to the prior misconduct of someone other than the defendant and the fact that the trial court's limiting

instructions mitigated any possible prejudice that could have resulted from the admission of the evidence.

4. The defendant could not prevail on his unpreserved claim that certain remarks that the state's attorney had made during closing arguments deprived him of a fair trial:

a. The state's attorney did not improperly comment, during closing arguments, on the defendant's postarrest silence; although the state's attorney noted that the defendant had waited several days after his arrest before asking to speak with an FBI agent to discuss certain cellular telephone calls that the defendant had made and received at or around the time of the murders, that reference contained no express or implied connection between the defendant's silence and his guilt.

b. The comments by the state's attorney, during closing arguments, with respect to a particular state witness' reason to fear the defendant did not warrant reversal of the defendant's conviction; there was extensive admissible evidence concerning the defendant's motive for committing the crimes charged, namely, to eliminate crucial state witnesses who were capable of linking the defendant's brother to extremely serious crimes, and the challenged remarks provided the jury with an alternate explanation for the inconsistencies between the witness' testimony and her written statements to the police and her former landlord, inconsistencies that defense counsel had highlighted during his closing argument.

c. Although the state's attorney improperly stated, during closing arguments, that the defendant would have killed an eyewitness to the murders who also served as a state witness if he had not run out of ammunition, the defendant was not deprived of a fair trial in the particular context of the present case, there having been ample evidence properly before the jury regarding the willingness of the defendant to resort to murder to silence prospective witnesses; furthermore, defense counsel, having failed to object contemporaneously to the remarks of the state's attorney, presumably did not view the impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial, and the trial court's instruction to the jury that the arguments of counsel are not evidence likely mitigated any harm caused by the impropriety.

Argued September 22, 2003—officially released February 24, 2004

Procedural History

Substitute information charging the defendant with one count of the crime of murder, two counts of the crime of capital felony, and one count each of conspiracy to commit murder and conspiracy to commit a violation of the Corrupt Organization and Racketeering Activity Act, brought to the Superior Court in the judicial district of Fairfield, where the case was transferred

to the judicial district of Waterbury; thereafter, the court, *O'Keefe*, *J.*, granted the defendant's motion to sever the charge of conspiracy to commit a violation of the Corrupt Organization and Racketeering Activity Act, and the remaining counts of the information were tried to the jury before *O'Keefe*, *J.*; verdict and judgment of guilty of one count of conspiracy to commit murder, from which the defendant appealed. *Affirmed*.

Felix Esposito, for the appellant (defendant).

Susann E. Gill, senior assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Joseph T. Corradino*, senior assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. A jury found the defendant, Adrian Peeler, guilty of conspiracy to commit murder in violation of General Statutes §§ 53a-54a[1] and 53a-48.[2] The trial court rendered judgment in accordance with the jury verdict,[3] and the defendant appealed,[4] claiming that the trial court improperly had: (1) rejected his claim that the state, during jury selection, exercised a peremptory challenge in a racially discriminatory manner; (2) per-

[1] General Statutes § 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

[2] General Statutes § 53a-48 provides in relevant part: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. . . ."

[3] The trial court sentenced the defendant to a term of twenty years imprisonment, to run consecutive to a previously imposed federal sentence of thirty-five years imprisonment for the commission of certain federal narcotics offenses.

[4] The defendant initially appealed to the Appellate Court. Because the defendant should have taken his appeal directly to this court; see General Statutes § 51-199 (b) (3); his appeal was transferred to this court pursuant to Practice Book § 65-4.

mitted the state to introduce certain hearsay statements under the coconspirator exception to the hearsay rule; and (3) permitted the state to introduce certain evidence relating to motive. The defendant also claims that certain remarks made by the state's attorney during closing arguments deprived him of a fair trial. We reject these claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts. In the 1990s, the defendant and his brother, Russell Peeler (Russell), ran a large-scale drug trafficking operation in the city of Bridgeport. The defendant and Russell divided the profits derived from the operation, which were estimated to be as much as $38,000 per week.

Sometime in 1997, Russell and a former drug trafficking partner, Rudolph Snead, Jr., had a dispute, apparently over drug money. As a result of this dispute, Russell attempted to kill Snead on September 2, 1997. Specifically, on that date, Russell was riding in a car with Ryan Peeler, Corey King and Shawn Kennedy when Russell noticed Snead's car in the parking lot of a barbershop located in Bridgeport. Snead subsequently left the barbershop and drove to a gas station. Two seven year old boys, one of whom was Leroy Brown, Jr., were passengers in Snead's car.

After Snead exited the gas station, Russell followed Snead to the Lindley Street entrance ramp to Route 25 in Bridgeport. Snead proceeded up the ramp but gradually slowed down and pulled off to the side of the road. The car in which Russell was riding pulled alongside Snead's car. Russell, who was armed with a .40 caliber, semiautomatic handgun and seated in the right front passenger seat, fired several shots at Snead.[5] Although Snead had been injured by the shots, he was able to drive himself to St. Vincent's Medical Center in

[5] We hereinafter refer to this incident as the Lindley Street shooting.

Bridgeport where he received treatment for his gunshot wounds.

Shortly thereafter, Officer Robert Shapiro of the Bridgeport police department interviewed Snead and his two young passengers. Shapiro's investigative report included the names of all three interviewees. On the basis of Snead's identification of Russell as the person who had shot him, Russell was arrested and charged with attempted murder.

Russell posted bond, however, and was released from custody. While free on bond, Russell shot and killed Snead in the same barbershop that Snead had patronized immediately prior to the Lindley Street shooting. After ballistics tests performed on shell casings retrieved from the murder scene and the scene of the Lindley Street shooting revealed that they had been fired from the same gun, Russell was arrested and charged with the murder of Snead.

Russell again secured his release by posting bond. As a condition of his release, Russell was required to be in his house on Chopsey Hill Road in Bridgeport by 9 p.m. each evening. He also was required to wear an electronic ankle bracelet so that his compliance with the court imposed curfew could be monitored.

In January, 1998, during the course of pretrial discovery in the criminal case involving the Lindley Street shooting, the state provided Russell with a police report identifying Brown as one of the two passengers in Snead's car when the Lindley Street shooting had occurred. Russell did not learn, however, until December 23, 1998, that Brown and his mother, Karen Clarke, had given the police sworn, written statements about the Lindley Street shooting. In addition, after Russell was arrested for Snead's murder, the state provided Russell with copies of certain ballistics reports connecting the shell casings found at the scene of the Lindley

Street shooting with the shell casings found at the scene of Snead's murder.

During the fall of 1998, Russell frequently speculated about the identity of the state's witnesses. Upon learning that Brown's testimony linked him to the Lindley Street shooting and that the ballistics evidence connected that shooting with the murder of Snead, Russell began to speak about killing Brown and Clarke. On one such occasion, Russell and the defendant had a heated discussion in which Russell repeatedly implored the defendant to kill Brown and Clarke. The defendant declined to do so, however.

At this time, Russell and his drug trafficking associates were using a house located at 200 Earl Avenue in Bridgeport to process crack cocaine. The residents of that house, including Josephine Lee, were crack cocaine users who obtained their drugs from Russell and the defendant's drug operation. Brown and Clarke lived across the street, at 207 Earl Avenue.

Lee testified that, on January 6, 1999, Russell and King were at her house, observing Clarke's house from a window in Lee's dining room. Lee further testified that the defendant and Gary Garner, one of Russell's associates, came by her house that day. King eventually left Lee's house and, thereafter, Lee observed Russell and the defendant having a discussion in her living room.

Russell and the defendant then entered Lee's kitchen and prepared some crack cocaine. At that time, Russell offered Lee "a couple hundred" dollars if she would kill Clarke. Lee, who testified that she never had handled a gun, declined to do so, however. Russell thereupon asked the defendant if he would kill Clarke. According to Lee, the defendant stated that he would "take care of it."

Russell then asked Lee to keep an eye on Clarke's house and to contact him when Clarke and Brown arrived home. Lee agreed to do so, and Russell wrote down his beeper number for Lee so that she could reach him when Clarke and Brown returned home. Russell gave Lee some crack cocaine, apparently in return for her willingness to act as a lookout for him.

Lee testified further that, the next day, in the late afternoon, she was at home "getting high" when she observed Clarke pull into her driveway. Both Clarke and Brown exited the car and entered Clarke's house. Lee then called Russell's beeper number. Upon receiving the beeper message, Russell called Lee back. Lee told Russell that "the little boy and lady [were] home." A few minutes later, Lee entered her living room and saw the defendant standing there. The defendant, who was dressed in black and had a gun in his hand, greeted Lee and then left Lee's house through the front door. Lee followed him.

The defendant crossed the street and walked toward Clarke's house. The defendant stopped, however, to speak to Garner, who was the lone occupant of a car that was parked in front of Clarke's house. Lee testified that she heard the defendant tell Garner that "he was going in." According to Lee, Garner then warned her that if she "said anything," she and the "whole house" were "going to get it, too."[6]

The defendant and Lee walked up to Clarke's front door. Lee rang the doorbell while the defendant hid behind her. Lee heard Clarke, from inside the house, ask, "Who is it?" Lee identified herself as "[t]he girl across the street." Clarke started to open the door when the defendant pushed past Lee and forced the door open.

[6] When Garner mentioned Lee's "whole house," he apparently was referring to all of the persons who lived in Lee's house.

Lee testified that she followed the defendant into Clarke's house where she observed him chase Brown and Clarke up a flight of stairs. While Brown was "hollering out for his mommy," the defendant pursued Clarke into an upstairs bedroom. According to Lee, she heard the defendant say something about Brown being a witness and then heard a gunshot from the bedroom. Lee testified that, immediately thereafter, the defendant emerged from that room and shot Brown in the head. The defendant then ran out of the house. Lee initially froze, but, thereafter, she, too, fled Clarke's house. By the time she had done so, however, both the defendant and the car in which Garner was sitting were gone.

After the shootings, the defendant drove to a Comfort Inn motel in Milford and checked in under a false name. He subsequently went with Kennedy and King to the mall in Stamford. The defendant eventually returned to the Comfort Inn where he remained until the next morning. The next day, the defendant purchased a round trip plane ticket to North Carolina under another false name. The defendant was to leave for North Carolina on January 10, 1999, and was to return to Connecticut on January 16, 1999. The defendant thereafter changed his departure date to January 17, 1999, and his return date to January 23, 1999. The defendant never used the ticket, however, and did not exchange it or seek a refund.

On January 14, 1999, Russell was arrested for the murders of Brown and Clarke. Soon thereafter, the Bridgeport Post ran a story about Russell's arrest that included a photograph of the defendant. That same day, at the defendant's request, Kennedy drove the defendant to New York City where the defendant boarded a train headed for North Carolina. On January 21, 1999, members of a Federal Bureau of Investigation (FBI) fugitive task force apprehended the defendant in North Carolina in connection with the murders of Brown and

Clarke. The defendant subsequently was charged with two counts of capital felony in violation of General Statutes (Rev. to 1997) § 53a-54b (8) and (9),[7] one count of murder and one count of conspiracy to commit murder.[8] After a jury trial, the defendant was convicted of conspiracy to commit murder and acquitted on the other charges. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court improperly overruled his objection to the state's use of a peremptory challenge against venireperson A.F.,[9] an African-American female. Specifically, the defendant contends that his equal protection rights were violated because the state's exercise of that challenge was the product of impermissible racial discrimination. We disagree.

Before addressing the merits of the defendant's claim, we set forth the well established legal principles that govern our review. "In *Batson* [v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)] the United States Supreme Court recognized that a claim of purposeful racial discrimination on the part of the prosecu-

[7] General Statutes (Rev. to 1997) § 53a-54b provides in relevant part: "A person is guilty of a capital felony who is convicted of . . . (8) murder of two or more persons at the same time or in the course of a single transaction; or (9) murder of a person under sixteen years of age."

Subsections (8) and (9) of General Statutes (Rev. to 1997) § 53a-54b currently are codified at subsections (7) and (8) of General Statutes § 53a-54b as a result of the legislature's redesignation of certain subsections of § 53a-54b in 2001. See Public Acts 2001, No. 01-151, § 3.

[8] The defendant also was charged with one count of conspiracy to participate in an enterprise operating through a pattern of racketeering activity in violation of General Statutes §§ 53-395 and 53a-48. The trial court subsequently granted the defendant's motion to sever this count from the other counts. See *State* v. *Peeler*, Superior Court, judicial district of Waterbury, Docket No. CR99-148397 (October 12, 2000).

[9] We use the initials of the venireperson to protect her legitimate privacy interests. E.g., *State* v. *Reynolds*, 264 Conn. 1, 116 n.109, 836 A.2d 224 (2003).

tion in selecting a jury raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . The court concluded that [a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his [or her] view concerning the outcome of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . .

"Under Connecticut law, [o]nce a [party] asserts a *Batson* claim, the [opposing party] must advance a neutral explanation for the venireperson's removal. . . . The [party asserting the *Batson* claim] is then afforded the opportunity to demonstrate that the [opposing party's] articulated reasons are insufficient or pretextual. . . . [T]he trial court then [has] the duty to determine if the [party asserting the *Batson* claim] has established purposeful discrimination. . . . The [party asserting the *Batson* claim] carries the ultimate burden of persuading the trial court, by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination. . . .

"We have identified several specific factors that may indicate that [a party's removal] of a venireperson through a peremptory challenge was . . . motivated [by race or gender]. These include, but are not limited to: (1) [t]he reasons given for the challenge were not related to the trial of the case . . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner . . . (3) prospective jurors of one race [or gender] were asked a question to elicit a particular response that was not asked of the other jurors . . . (4) persons with the same or similar characteris-

tics but not the same race [or gender] as the challenged juror were not struck . . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race [or gender]. . . .

"In assessing the reasons proffered in support of the use of a peremptory challenge . . . [a]n explanation . . . need not . . . be pigeon-holed as wholly acceptable or wholly unacceptable . . . and even where the acceptability of a particular explanation is doubtful, the inquiry is not at an end. In deciding the ultimate issue of discriminatory intent, the judicial officer is entitled to assess each explanation in light of all the other evidence relevant to prosecutorial intent. The officer may think a dubious explanation undermines the bona fides of other explanations or may think that the sound explanations dispel the doubt raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances. . . .

"Finally, the trial court's decision on the question of discriminatory intent represents a finding of fact that will necessarily turn on the court's evaluation of the demeanor and credibility of the attorney of the party exercising the peremptory challenge. . . . Accordingly, a trial court's determination that there has or has not been intentional discrimination is afforded great deference and will not be disturbed unless it is clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation

marks omitted.) *State* v. *Mukhtaar*, 253 Conn. 280, 283–86, 750 A.2d 1059 (2000). With these principles in mind, we now turn to the factual underpinnings of the defendant's claim.

After both parties had questioned A.F., the state's attorney exercised a peremptory challenge to strike her from the panel. The defendant objected, claiming that the state's exercise of a peremptory challenge against A.F. was predicated on the fact that she is African-American. The state's attorney sought to refute the defendant's claim by explaining that the primary reason for striking A.F. was that she had a son who was approximately the same age as the defendant and who had served one year in prison for drug and weapons offenses. According to the state's attorney, those offenses involved conduct that bore similarities to conduct in which the defendant engaged and regarding which the state intended to introduce evidence. The state's attorney further indicated that he also had considered the fact that A.F. herself previously had had a brush with the law.[10] Finally, the state's attorney noted that he expected the defendant to introduce, during the penalty phase of the case,[11] mitigating evidence relating to the death of the defendant's mother, a former police officer who was approximately the same age as A.F. when she died.

The defendant claimed that the reasons that the state's attorney proffered for striking A.F. from the

[10] When asked whether she previously had been in a courtroom, A.F. stated, inter alia: "[M]yself, in my earlier days, I've been before the judge."

[11] As we previously indicated, the defendant was found not guilty of two counts of capital felony. If the defendant had been found guilty of the crime of capital felony, however, the state indicated that it would have sought the death penalty. In such circumstances, the same panel of jurors that was responsible for deciding the guilt phase of the trial would have determined the defendant's sentence during the penalty phase, a fact that the parties necessarily were permitted to consider in formulating their questions to prospective jurors and in connection with the exercise of peremptory challenges.

panel were unsupported by the record and merely a pretext for racial discrimination. In support of his claim, the defendant referred to A.F.'s assertion that she held her son, and not the state, responsible for her son's legal difficulties. The defendant also maintained that it was improper for the state's attorney to exercise a peremptory challenge on the basis of evidence that the defendant *might* adduce at some stage of the proceedings. In addition, the defendant maintained that if A.F. were biased at all, it likely was in favor of the state in view of her employment as a correction officer. Finally, the defendant noted that the state's attorney had failed to question A.F. in more than a perfunctory manner.

The trial court concluded that the reasons offered by the state's attorney for striking A.F. were race neutral, supported by the record and not pretextual. The court thereupon overruled the defendant's objection to the state's use of a peremptory challenge to strike A.F. On appeal, the defendant renews his claim of a *Batson* violation. We agree with the state that the defendant has failed to demonstrate that the trial court's determination was clearly erroneous.

As we recently have observed, "[c]ourts consistently have upheld the use of peremptory challenges to excuse a venireperson with a close relative who has been prosecuted because of the real possibility that the venireperson may harbor resentment against prosecuting authorities generally." *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531 (1999). A.F. testified that her son had been convicted of drug and weapons offenses. "Although [A.F.] stated that she would not allow [that fact] to affect her impartiality as a juror, a prosecutor is not bound to accept the venireperson's reassurances, but, rather, is entitled to rely on his or her own experience, judgment and intuition in such matters." Id.; cf. *State* v. *Smith*, 222 Conn. 1, 14–15, 608 A.2d 63 (1992) ("[a] venireperson's assessment of his [or her] own

prejudices may be untrustworthy for a variety of reasons''). Moreover, the fact that the defendant and A.F.'s son were close in age and had committed several like offenses reasonably may have caused the state's attorney to be particularly concerned that A.F. might identify with the defendant to the detriment of the state. In the absence of any other indication of racially motivated conduct by the state's attorney during the jury selection process, A.F.'s son's criminal convictions alone constituted a sufficient basis for the trial court's finding that the decision of the state's attorney to strike A.F. was not racially motivated.

Although it is true that the state did not question A.F. at length and did not press her about her ability to be impartial, the trial court reasonably concluded that the state's attorney had obtained enough information about A.F., based upon the totality of the parties' questioning of A.F., to warrant a legitimate, race neutral concern in the mind of the state's attorney regarding A.F.'s suitability as a juror. Furthermore, it is entirely proper for a prosecutor to use a peremptory challenge to strike a venireperson on the basis or his or her reasonable belief that, in light of certain evidence that the defendant is likely to produce at trial, that venireperson may be favorably disposed toward the defendant for reasons unrelated to the merits of the case. Moreover, the state's attorney was not bound to conclude that, because A.F. was a correction officer, any bias she might have likely would favor the state rather than the defendant. No such conclusion is foregone merely because a venireperson works in law enforcement, especially when, as in the present case, countervailing considerations, such as a family member with a criminal history, reasonably may be perceived to outweigh any possible bias that a venireperson otherwise might have in favor of the state.

Finally, the defendant does not contend that the state's attorney engaged in any other racially discrimi-

natory conduct during the jury selection process. Although the fact that the defendant adduced no such evidence is not dispositive of his claim, that fact supports the trial court's finding that the state's attorney's exercise of a peremptory challenge against A.F. was unrelated to A.F.'s race. We conclude, therefore, that the trial court's determination with respect to the defendant's *Batson* claim was not clearly erroneous.

II

The defendant next claims that the trial court improperly permitted the state to introduce into evidence, under the coconspirator exception to the hearsay rule, certain inculpatory statements that Russell had made. According to the defendant, the admission of this evidence violated his right under the sixth amendment to the United States constitution to confront the witnesses against him.[12] We disagree.

The following additional facts are relevant this claim. The state called Ryan Peeler (Ryan), the defendant's cousin, as a witness in its case-in-chief. Before Ryan testified, the defendant sought to preclude the state from eliciting testimony from Ryan about certain statements that he had heard Russell make. The defendant claimed that Russell's statements were inadmissible hearsay and that their admission would violate his rights under the confrontation clause. The state claimed that Russell's statements, although hearsay, fell within the coconspirator exception to the hearsay rule. See Conn. Code Evid. § 8-3 (1) (D). The trial court agreed with the state and allowed the state's attorney to elicit Ryan's testimony regarding Russell's statements.[13]

[12] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

[13] We note that the trial court improperly instructed the jury that Ryan's testimony regarding Russell's statements could be considered only in regard to the conspiracy charge. When a hearsay statement is admissible under the coconspirator exception to the hearsay rule, its admissibility is not

Ryan then testified that, on the evening of the murders, he drove Russell's car, which he had borrowed earlier that day, to Russell's house on Chopsey Hill Road where the two men played video games. Russell told Ryan that he had been home all day and that the defendant was "doing something" for him. That same evening, Russell asked Ryan to take Russell's car when he left. The next morning, Ryan drove to Russell's house, picked him up and, at Russell's direction, took him to the Comfort Inn motel in Milford where they met the defendant. On their way to Milford, Russell told Ryan that the defendant "did something" for him and warned Ryan "not to say anything about it." Upon their arrival at the Comfort Inn, Russell went inside and Ryan waited outside. Russell eventually emerged from the motel with Garner.

A day or two after the murders, Ryan, Russell and Kennedy were together in an apartment on Lincoln Avenue in Bridgeport when Russell received a telephone call. Ryan heard Russell ask the unidentified caller, "Did you file that down?" Ryan also heard Russell use the word "river" during the telephone conversation.

On appeal, the defendant renews his claim that the trial court improperly concluded that Russell's hearsay statements were admissible under the coconspirator exception to the hearsay rule. The thrust of the defendant's contention is that the statements fall outside the exception because the evidence is insufficient to establish that they were made in furtherance of an ongoing conspiracy.[14] We disagree.

limited to proving the existence of the conspiracy or any other element of the conspiracy charge. As long as the statement at issue is relevant to the other charges, the jury may consider it for the truth of the matter asserted in connection with those other charges. See 2 C. McCormick, Evidence (5th Ed. 1999) § 259, p. 159 ("[a] conspiracy need not be formally charged for coconspirator statements to be admissible if a conspiracy in fact exists").

[14] The defendant does not contend that the evidence was insufficient to establish the existence of a conspiracy.

"It is well established that a coconspirator's [hearsay] statement, made while the conspiracy is ongoing and in furtherance of the conspiracy, is an exception to the hearsay rule and as such, does not violate the confrontation clause. . . . In order to invoke the coconspirator exception to the hearsay rule, [t]here must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made during the course and in furtherance of the conspiracy. . . . The court must make its preliminary determination[s] by a fair preponderance of the evidence . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Robertson*, 254 Conn. 739, 745, 760 A.2d 82 (2000); see also Conn. Code Evid. § 8-3 (1) (D). Moreover, "the evidence will be construed in a way most favorable to sustaining the preliminary determinations of the trial court; its conclusions will not be disturbed on appeal unless found to be clearly erroneous." *State* v. *Vessichio*, 197 Conn. 644, 656, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986).

"[T]he in furtherance term implies . . . [that] the statements must in some way have been designed to promote or facilitate achievement of the goals of the ongoing conspiracy, as by, for example, providing reassurance to a coconspirator, seeking to induce a coconspirator's assistance, serving to foster trust and cohesiveness, or informing coconspirators as to the progress or status of the conspiracy . . . or by prompting the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates the carrying out of a criminal activity . . . . Statements made by a co-conspirator to a third party who is not then a member of the conspiracy are considered to be in furtherance of the conspiracy if they are designed to induce that party either to join the conspiracy or to act in a way that will assist it in accomplishing its objectives

. . . .” (Citation omitted; internal quotation marks omitted.) *State* v. *Robertson*, supra, 254 Conn. 748–49. Of course, whether a particular statement is made in the course of and in furtherance of the conspiracy depends upon the nature of the statement and all of the relevant facts and circumstances under which it was made. See, e.g., *United States* v. *Lewis*, 759 F.2d 1316, 1340 (8th Cir.), cert. denied sub nom. *Milburn* v. *United States*, 474 U.S. 994, 106 S. Ct. 406, 88 L. Ed. 2d 357 (1985), and cert. denied sub nom. *Milburn* v. *United States*, 474 U.S. 994, 106 S. Ct. 407, 88 L. Ed. 2d 357 (1985).

Finally, “[a] conspiracy does not necessarily end with the commission of the target crime. Thus, a subsequent declaration of a conspirator may be admissible against any coconspirator . . . if the conspirators were still concerned with the concealment of their criminal conduct or their identity . . . .” (Internal quotation marks omitted.) *State* v. *Robertson*, supra, 254 Conn. 746.

The defendant first claims that Russell’s two statements to Ryan about the defendant “doing something” for him were not made in furtherance of the conspiracy to murder Brown and Clarke. The defendant contends that the statements, though perhaps an acknowledgment of a conspiracy, were not intended to promote any goal of the conspiracy. See, e.g., *Tuscaloosa* v. *Harcros Chemicals, Inc.*, 158 F.3d 548, 559 (11th Cir. 1998) (“[a] statement that merely discloses the existence of a conspiracy to a non-conspirator, that merely ‘spills the beans,’ with no intention of recruiting the [nonconspirator] into the conspiracy does not further the conspiracy”), cert. denied, 528 U.S. 812, 120 S. Ct. 309, 145 L. Ed. 2d 42 (1999). “The law [however] does not require a conspirator to ask a third party expressly to do something to further the conspiracy in order for the statement to be admissible under the coconspirator exception to the hearsay rule. . . . Instead, [t]he standard to be applied is whether some reasonable basis

exists for concluding that the statement furthered the conspiracy." (Citations omitted; internal quotation marks omitted.) *State* v. *Robertson*, supra, 254 Conn. 750.

We conclude that the trial court properly determined that this standard was satisfied with respect to both of Russell's statements that the defendant had agreed to "do something" for him. The first such statement, which was followed by Russell's request to Ryan that Ryan take Russell's car for the night, likely was intended to provide Ryan with the reason why Russell wanted Ryan to take his car, namely, to shore up his alibi that he was home, without transportation, when the murders occurred.[15] Thus, Russell's statement was intended to induce Ryan to act in a manner that would assist Russell in establishing an alibi. The concoction of an alibi is evidence of an effort to conceal a crime; *State* v. *Booth*, 250 Conn. 611, 661, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000); and statements relating to such efforts are admissible under the coconspirator exception to the hearsay rule. See id., 661–62.

We reach the same conclusion with respect to Russell's statement to Ryan on the day after the murders in which Russell declared that the defendant "did something" for him. Russell had reason to believe that Ryan knew about his involvement in those murders because Ryan witnessed the Lindley Street shooting, he was present when Russell asked the defendant to kill Brown and Clarke, and Russell had told Ryan the day before that the defendant was "doing something" for him. Thus, Ryan likely knew or, at the very least, suspected

[15] The state adduced evidence at trial that both Russell and the defendant sought to create alibis for the evening of the murders. For example, although the records pertaining to Russell's electronic ankle bracelet indicate that he generally was not at home until his 9 p.m. curfew, on the day of the murder, he did not leave his house after 3 p.m.

that Russell was involved in the murders of Brown and Clarke. Russell's statement to Ryan that the defendant "did something" for him, followed by the admonition that Ryan was "not to say anything about it," was an attempt to secure Ryan's silence and to discourage him from asking questions. See *United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir.) (statements to third party were made in furtherance of conspiracy when purpose of statements was to discourage third party from revealing incriminating information), cert. denied sub nom. *Lavery* v. *United States*, 493 U.S. 933, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989). Consequently, Russell's statements were made in furtherance of a conspiracy and, therefore, were admissible under the hearsay exception for statements by a coconspirator.

The defendant contends that Russell's references to the defendant's "doing something" for him did not further any conspiracy because the statements were ambiguous and subject to other interpretations. In support of this contention, the defendant relies on Ryan's testimony that he did not know what Russell was referring to when he heard the statements and, furthermore, that Ryan did nothing in response to the statements. The defendant also refers to testimony establishing that Russell was a braggart who spoke frequently of his interest in killing the victims, that Russell often lent Ryan and others his car, and that Russell did not need support for his alibi in light of the fact that his whereabouts were being monitored by his electronic ankle bracelet. We are not persuaded by the defendant's argument.

The fact that a coconspirator's statement does not *actually* further the conspiracy does not preclude the statement from being admissible under the coconspirator hearsay exception. See, e.g., *United States* v. *Reyes*, 798 F.2d 380, 384 (10th Cir. 1986); *United States* v.

Hamilton, 689 F.2d 1262, 1270 (6th Cir. 1982), cert. denied sub nom. *Wright* v. *United States*, 459 U.S. 1117, 103 S. Ct. 753, 74 L. Ed. 2d 971 (1983), and cert. denied sub nom. *Salisbury* v. *United States*, 459 U.S. 1117, 103 S. Ct. 754, 74 L. Ed. 2d 971 (1983). "It is enough that [the statement is] intended to promote the conspiratorial objectives." *United States* v. *Hamilton*, supra, 1270; accord *United States* v. *Reyes*, supra, 384. Similarly, the coconspirator's statement need not be perfectly clear or unambiguous. Indeed, because of the secretive nature of most conspiracies, statements that are made in furtherance of a conspiracy frequently are cryptic or guarded.[16] All that is required is a reasonable basis for concluding that the statements were made in furtherance of the conspiracy, and such a basis existed with respect to Russell's statements that the defendant was "doing something" and "did something" for him.

The defendant also claims that the trial court improperly permitted the state to elicit testimony from Ryan that he had overheard Russell, while on the telephone, ask an unknown caller, "Did you file that down?"[17] In addition, the defendant claims that the trial court improperly allowed the state to elicit testimony from Ryan that he had heard Russell say the word "river" during that same telephone conversation. In particular, the defendant contends that the statements were inadmissible under the coconspirator exception to the hearsay rule because the state never established the identity of the caller. The defendant further claims that, even if the state's failure to establish the caller's identity does not preclude the statements from being admitted under the coconspirator exception to the hearsay rule, the statements still were inadmissible inasmuch as they

[16] Of course, the defendant was entitled to cross-examine Ryan about the meaning of the statements, and he did so.

[17] Neither the state nor the defendant raised the issue of whether Russell's question actually constituted hearsay.

related to a conspiracy to conceal or destroy evidence that was separate and distinct from the conspiracy to murder Brown and Clarke.

With respect to the defendant's first claim, we never have held that the identity of the party to whom the statement is addressed is a prerequisite to the admissibility of a conspirator's statement under the coconspirator exception to the hearsay rule. Although the identity of that third party may be helpful in determining whether the statements were made in furtherance of a conspiracy, the third party's identity is not essential to such a determination. If, under all of the facts and circumstances, there is a reasonable basis to conclude that statements made by a coconspirator to an unidentified third party were made in furtherance of the conspiracy, those statements are otherwise admissible under the coconspirator exception to the hearsay rule. In light of the existence of evidence that Russell had solicited the murders, the proximity of the telephone call to those murders, and the fact that the murders were committed with a handgun, there was a reasonable basis for the trial court to conclude that Russell's statements related to the concealment or destruction of the murder weapon. As we have explained, efforts to conceal a crime that already has been committed generally will be deemed to be in furtherance of the conspiracy to commit that crime.

For that reason, we also reject the defendant's claim that the challenged statements were not made while the murder conspiracy was ongoing. The trial court reasonably concluded that the conspiracy was ongoing during the period shortly after the murders, when Russell was seeking to ensure the disposal of the murder weapon. Under the circumstances, therefore, it was not improper for the trial court to have allowed the state to introduce into evidence, under the coconspirator exception to the hearsay rule, Ryan's testimony about

the statements that he had overheard Russell make during the telephone call.

III

The defendant next claims that the trial court abused its discretion in permitting the state to introduce evidence regarding the Lindley Street shooting and the subsequent murder of Snead. We disagree.

The following additional facts and procedural history are relevant to this issue. Prior to trial, the defendant filed a motion in limine seeking the exclusion of all evidence related to the Lindley Street shooting and the Snead murder (Snead evidence). The defendant asserted that the Snead evidence was not relevant to the case against the defendant because the defendant was not implicated in any act of violence against Snead. The defendant further maintained that the prejudicial effect of the Snead evidence outweighed its probative value. The trial court overruled the defendant's objections and the state introduced the Snead evidence through the testimony of a number of witnesses, including several police officers. The trial court, however, repeatedly admonished the jury, both during the trial and in its final instructions, that the Snead evidence was admissible for the limited purpose of establishing motive, intent and identity and, therefore, the jury was not to consider the evidence for any other purpose.

On appeal, the defendant renews his claims that the Snead evidence was only marginally relevant and that its prejudicial effect outweighed its probative value. We reject both of these contentions.

Well established principles govern our resolution of the defendant's claim. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other

fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Citations omitted; internal quotation marks omitted.) *State* v. *Cerreta*, 260 Conn. 251, 261–62, 796 A.2d 1176 (2002); see also Conn. Code Evid. § 4-1 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence"). Furthermore, our role in reviewing evidentiary rulings of the trial court is limited. "This court has consistently held that trial courts are vested with broad discretion in rulings on relevancy and every reasonable presumption must be given in favor of the court's ruling. . . . Rulings on such matters will be disturbed on appeal only upon a showing of a clear abuse of discretion." (Internal quotation marks omitted.) *State* v. *Watson*, 251 Conn. 220, 235, 740 A.2d 832 (1999).

Contrary to the defendant's claim, there can be no doubt regarding the relevance of the Snead evidence. That evidence established that: (1) Brown was an eyewitness to the Lindley Street shooting; (2) ballistics tests suggested that the same gun that was used in the Lindley Street shooting was used to kill Snead; (3) Brown and Clarke gave statements to the police implicating Russell in the Lindley Street shooting, thereby linking him to the Snead murder; and (4) Russell had asked the defendant to kill Brown and Clarke to prevent them from testifying against him. Thus, the Snead evidence was critical to explain *why* Russell had asked the defendant to kill Brown and Clarke. Indeed, the state's case would have been grievously undermined without that evidence because the jury would have been left to wonder why the state had not demonstrated any

motive for the otherwise inexplicable, execution-style murders of an innocent mother and her young child.

Although motive is not an element of any of the crimes with which the defendant had been charged, "[w]e previously have recognized the significance that proof of motive may have in a criminal case. . . . [S]uch evidence is both desirable and important. . . . It strengthens the state's case when an adequate motive can be shown. . . . Evidence tending to show the existence or nonexistence of motive often forms an important factor in the inquiry as to the guilt or innocence of the defendant. . . . This factor is to be weighed by the jury along with the other evidence in the case." (Internal quotation marks omitted.) *State* v. *Wargo*, 255 Conn. 113, 140 n.24, 763 A.2d 1 (2000). The facts of the present case graphically illustrate the importance of motive testimony: although the direct evidence establishing the defendant's involvement in the murders was predicated largely on the testimony of Lee, a readily impeachable witness, the state's case against the defendant was buttressed immeasurably by the fact that only Russell and his trusted confederates, the defendant first among them, had a reason for wanting Brown and Clarke dead. See *State* v. *Harris*, 182 Conn. 220, 224, 438 A.2d 38 (1980) (without disclosed motive, state's evidence may be so weak that guilt of accused is clouded by reasonable doubt). We can think of few cases in which motive evidence is more important.[18]

[18] The defendant asserts that there was no need for the jury to have heard the Snead evidence because it would have been sufficient, for purposes of demonstrating the defendant's reason for killing the victims, for the jury simply to have learned that Russell had asked the defendant to kill them. This argument is specious. The reason why *Russell* wanted the victims killed was a critically important component of the state's case against the defendant, and the state was not required to truncate its proof to accommodate the defendant's interest in avoiding the introduction of such highly relevant, albeit damaging, evidence of motive.

The defendant nevertheless contends that the Snead evidence was unduly prejudicial, and, therefore, the trial court improperly permitted the state to introduce it at trial. We disagree.

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . The trial court . . . must determine whether the adverse impact of the challenged evidence outweighs its probative value. . . . Finally, [t]he trial court's discretionary determination that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Dehaney*, 261 Conn. 336, 357–58, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003); see also Conn. Code Evid. § 4-3.

We conclude that the trial court did not abuse its discretion in concluding that the probative value of the Snead evidence outweighed its prejudicial effect. As we have explained, the evidence was highly probative of the defendant's reason for murdering the victims, and proof of that motive was especially important in view of the nature of the crimes with which the defendant was charged and the identity of the victims. Further-

more, because the Snead evidence related to prior misconduct by Russell, not the defendant, that evidence, although graphic and undoubtedly upsetting, was not likely to inflame unduly the jurors' passions against the *defendant*. In addition, the trial court's limiting instructions sufficiently mitigated any possible prejudice that could have resulted from the admission of the evidence. In the absence of a clear indication to the contrary, we presume that the jury followed the court's instructions regarding the limited admissibility of the Snead evidence.[19] See, e.g., *State* v. *Fields*, 265 Conn. 184, 207, 827 A.2d 690 (2003).

The defendant nevertheless claims that the Snead evidence was unduly prejudicial because it was graphic[20] and consumed a substantial amount of time during the trial.[21] We disagree.

The Snead evidence involved an attempted murder, a murder and the results of forensic testing that linked the two incidents. It was not unreasonable, therefore, for the state to call several witnesses to establish the facts underlying these events. Moreover, while some of the testimony may have been graphic, "any murder involves violent and upsetting circumstances . . . ."

[19] The defendant contends that the Snead evidence unfairly prejudiced him because the jury likely concluded that he must be a murderer like his brother. We disagree that the jury was likely to have come to that conclusion simply because Russell was the defendant's brother. Moreover, the trial court repeatedly instructed the jury that the defendant was not being tried for the Snead shootings, that the Snead evidence was not probative of the defendant's character or propensity to commit crimes and that the evidence was offered for the limited purpose of establishing motive, intent and identity. As we have explained, we have no reason to believe that the jury disregarded those instructions.

[20] In particular, the defendant refers to the testimony of a police detective who arrived at the barbershop just after Snead was shot. The detective stated that when she tried to speak to Snead, "[h]e was kind of just moaning. He seemed like he was in a lot of pain."

[21] The state called a total of eight witnesses to testify about the Lindley Street shooting and the Snead murder.

State v. *Herring*, 210 Conn. 78, 97, 554 A.2d 686, cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989). Because the Snead evidence properly was before the jury, the jury necessarily was exposed to some such testimony. "[A]lthough irrelevant evidence of a gruesome character is inadmissible, [t]he prosecution, with its burden of establishing guilt beyond a reasonable doubt, is not to be denied the right to prove [its case] by the most convincing evidence it is able to produce." (Internal quotation marks omitted.) *State* v. *Satchwell*, 244 Conn. 547, 575, 710 A.2d 1348 (1998). As we have explained, the Snead evidence was extremely important—indeed, it was crucial—to the state's case, and the trial court's limiting instructions minimized any possible prejudice that otherwise might have flowed from the admission of that evidence. We therefore reject the defendant's claim that the trial court abused its discretion in permitting the state to present the Snead evidence.

IV

The defendant finally claims that certain remarks that the state's attorney had made during closing arguments deprived him of a fair trial. Specifically, the defendant maintains that the state's attorney improperly: (1) commented on the defendant's postarrest silence even though the defendant, at the time of his arrest, had been advised of his constitutional right to remain silent in accordance with *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); (2) suggested that the defendant posed a threat to Lee, the state's key witness; and (3) stated that the defendant would have killed Lee, in addition to the victims, if he had not run out of ammunition. Inasmuch as the defendant failed to object to the remarks that he now challenges on appeal, he seeks to prevail under *State*

v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989).[22] Although the record is adequate for our review of the defendant's claim, we nevertheless conclude that his claim must fail because the remarks of the state's attorney did not deprive him of a fair trial.[23]

We repeatedly have articulated the principles that govern our review of claims of prosecutorial impropriety during closing arguments. "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . [M]oreover . . . [a defendant is not entitled to prevail under *Golding*] whe[n] the claimed misconduct was not blatantly egregious and merely consisted of isolated and brief episodes that did not reveal a pattern of conduct repeated throughout the trial. . . . In determining whether the defendant was denied a fair trial [by virtue of prosecutorial misconduct] we must view the prosecutor's comments in the context of the entire trial. . . .

"As we previously have recognized, prosecutorial misconduct of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must

[22] In *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), we held that "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 clearly exists and clearly 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." (Emphasis in original.) Id., 239–40. "In the absence of any one of these conditions, the defendant's claim will fail." Id., 240.

[23] Thus, the defendant's claim fails under the third prong of *Golding*. See footnote 22 of this opinion.

be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from . . . facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Citations omitted; internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 161–63, 836 A.2d 224 (2003).

"In determining whether prosecutorial misconduct was so serious as to amount to a denial of due process, this court, in conformity with courts in other jurisdictions, has focused on several factors. . . . Included among those factors are the extent to which the misconduct was invited by defense conduct or argument . . . the severity of the misconduct . . . the frequency of the misconduct . . . the centrality of the misconduct to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case. . . .

"Just as the prosecutor's remarks must be gauged in the context of the entire trial, once a series of serious improprieties has been identified we must determine whether the totality of the improprieties leads to the conclusion that the defendant was deprived of a fair trial. . . . Thus, the question in the present case is whether the sum total of [the state's attorney's alleged] improprieties rendered the defendant's [trial] fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial misconduct, therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Citations omitted; internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 460, 832 A.2d 626 (2003).

Applying these principles, we conclude that the majority of the challenged remarks were proper. With respect to those remarks that were improper, we nevertheless are persuaded that there is no reasonable possibility that they harmed the defendant. Consequently, we reject the defendant's claim that the state's attorney's closing arguments deprived him of a fair trial.

A

The defendant first claims that the state's attorney improperly commented, during closing arguments, on

the defendant's postarrest silence. The defendant contends that the comments of the state's attorney were improper because the defendant's silence followed his receipt of *Miranda* warnings. We conclude that the challenged remarks were not improper.

The following additional facts are necessary to our resolution of this claim. On January 21, 1999, FBI agents arrested the defendant in North Carolina. On January 22, 1999, two police detectives from Connecticut interviewed the defendant while he was incarcerated. They commenced their interview of the defendant by advising him of his *Miranda* rights, including his right to remain silent. After answering some questions posed by the detectives, the defendant invoked his right to remain silent. The jury did not hear testimony concerning the defendant's meeting with the two detectives.

Several days later, FBI Special Agent Mark Rozzi, one of the arresting officers, was informed that the defendant wished to speak with him. When Rozzi arrived at the jail where the defendant was being held, the defendant expressly waived his *Miranda* rights. Rozzi then asked the defendant what he wanted to say. The defendant began the conversation by mentioning a cellular telephone that he had possessed from early December until the date of his arrest. Rozzi asked the defendant why he wanted to discuss his cellular telephone, and the defendant responded that he wanted to clear his name regarding the murders of a young boy and his mother.[24] In particular, the defendant indicated that he wanted to explain his whereabouts at the time

[24] Rozzi was not then, and never has been, involved in the investigation of the murders of Brown and Clarke. Moreover, unbeknownst to Rozzi, records for the defendant's cellular telephone revealed that there were both incoming and outgoing calls at or around the time of the murders. According to the state's version of the offenses, the defendant planned these incoming and outgoing calls to buttress his alibi that he was otherwise occupied at the time of the murders.

of those murders. Rozzi told the defendant to tell him where he had been on the day of the murders, from the beginning to the end of the day. The defendant, however, began by informing Rozzi that he was at the Comfort Inn between 5 and 7 p.m. that day, and that he went to the mall in Stamford later that evening. Thereafter, he returned to the Comfort Inn where Latosha McKnight, the defendant's girlfriend, joined him sometime between 9 and 10 p.m. According to the defendant, McKnight stayed with him in his motel room until 2 or 3 a.m. the next morning. The defendant further indicated that he could not recall his whereabouts prior to 5 p.m. on the day of the murders.

During his initial closing argument, the state's attorney stated: "Remember FBI agent . . . Rozzi? *The defendant wanted to talk to him after he had a couple of days to think about it.* Following his arrest, the defendant wanted to clear up something. So the defendant, professing his innocence to Rozzi—what are the very first words out of the defendant's mouth? Check my cell phone. How would somebody, if not actually at the crime scene, know what was in the media as far as the time the murders were committed? And you have all the exhibits here. Nowhere in any media article presented in this trial is the time of these murders published, neither on TV that you saw last week, and not newspaper articles that were [introduced] early in the trial. All any of them say is sometime Thursday night. And they include the obvious fact after the two had returned from the grocery store. That's all they said. So how would somebody who wasn't there, who had nothing to do with it, who didn't commit these crimes—at that point [he] had a couple of days to think about it—know to key an FBI investigator into his cell phone where amazingly—the rest of the cell phone record is before you—amazingly the busiest one quarter of an hour in the entire cell phone record—I don't mean

this day, I mean the days before and after—starts right around when [the victims] got home . . . .

* * *

[*A*]*fter the defendant was arrested* . . . [*he*] *had a chance to think things over for a couple of days*, *tried to alibi himself*." (Emphasis added.)

In his closing argument, defense counsel vigorously sought to discredit Lee. Among other inconsistencies in Lee's testimony, defense counsel noted that Lee had given one statement in which she claimed to have seen the defendant leave the victims' house after the murders and flee up the street on foot. Defense counsel noted further that, in a later statement, Lee indicated that the defendant had driven away from the murder scene. According to defense counsel, Lee's story changed because the state had received information that the defendant had preexisting leg injuries that would have made it impossible for him to run from the scene of the murders as Lee originally had reported.

During his rebuttal argument, the state's attorney stated: "McKnight backed up the defendant's claim [that] he indeed was at the Comfort Inn the night of January 7. Of course, as we know, that was way, way after the time the murders were committed. But that kind of highlights the point that the circumstances under which the defendant spoke to the FBI in North Carolina are so telling. He was arrested. *He waited—I can't remember how long—at least a couple days*, *thought about things* . . . [and] [p]ut in a request that Agent . . . Rozzi come talk to him. The defense completely slid by this whole thing, didn't even talk about it, [does not] want you to think about it. Remember, the defendant asked for the FBI, not vice versa. It wasn't the FBI's case. [The FBI agents] had done their job. They didn't know anything about the Connecticut murder case, at least in [any] detail whatsoever. Remark-

ably, the very first words out of the defendant's mouth were, 'check my cell phone.' The most active one [quarter] of an hour in this entire twenty-five day, $4200 bill." (Emphasis added.)

The state's attorney argued further: "Certainly, the defendant wasn't having any trouble traveling up and down the east coast back in the fall of 1998. He had no trouble going to New York City, shopping for drugs, escorting his girlfriends around. All of his associates . . . indicate [that] he was getting around fine. In fact, what did he himself have to say about his ability to get around? He did talk to Agent Rozzi. *He thought about things—what he was going to say to Rozzi before he talked to him.* Do you think if for a moment he actually had been physically impaired back in January of 1999 that he would have failed to point that fact out to Rozzi, [that he could not] even walk." (Emphasis added.)

With these facts in mind, we set forth the law applicable to the defendant's claim. "In *Doyle* [v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)] . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. The court based its holding [on] two considerations: First, it noted that silence in the wake of *Miranda* warnings is insolubly ambiguous and consequently of little probative value. Second and more important[ly], it observed that while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. . . . The court . . . reaffirmed *Doyle*'s reasoning in *Wainwright* v. *Greenfield*, 474 U.S. 284, 290, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986),

in which it held that the defendant's silence following his arrest and receipt of *Miranda* warnings could not be used at trial to rebut his defense of insanity. The court reasoned: The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. . . .

"[A]lthough *Doyle* prohibits impeachment of a defendant with evidence of his post-*Miranda* silence, we expressly stated in [*State* v. *Plourde*, 208 Conn. 455, 468, 545 A.2d 1071 (1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 847, 102 L. Ed. 2d 979 (1989)] that it also is fundamentally unfair . . . and, therefore, a deprivation of due process, for the state to use evidence of a defendant's post-*Miranda* silence as affirmative proof at trial . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Montgomery*, 254 Conn. 694, 712–14, 759 A.2d 995 (2000). It therefore is constitutionally impermissible for the state to use a defendant's post-*Miranda* silence either as affirmative proof of guilt or to impeach the defendant.

We conclude, however, that the references of the state's attorney to the defendant's post-*Miranda* silence were not prohibited by the holdings of *Doyle* and its progeny. With respect to the defendant's statements regarding his cellular telephone, the state's attorney did not ask the jury to infer that the defendant's silence after his arrest was suggestive of guilt. Rather, the state's attorney merely was underscoring the fact that, in his view, the defendant had contrived an alibi *before* committing the murders—namely, the record of incoming and outgoing cellular telephone calls at or around the time of the murders—and then, after his arrest and as part of an orchestrated, preconceived plan to exculpate

himself, he contacted Rozzi to inform him of that alibi. Moreover, the jury had no knowledge that the defendant had met with the two detectives from Connecticut several days earlier. Similarly, the state's attorney did not improperly impugn the defendant's silence when he suggested that, because the defendant had planned what he was going to say before requesting to speak with Rozzi, he would have told Rozzi about any injury that he purportedly had on the day of the murders if he indeed had sustained such an injury. Although the state's attorney adverted to the fact that the defendant had waited several days before asking to speak with Rozzi, that reference contained no express or implied connection between the defendant's silence and his guilt.

B

The defendant next claims that the state's attorney, in his rebuttal argument, improperly assailed the defendant's character by stating that he was capable of, and willing to commit, uncharged and unproven acts of violence against Lee, one of the state's witnesses. The state contends that the challenged statements were not improper because they were reasonable comments on the evidence and, even if they were improper, they nevertheless were not part of a pattern of egregious misconduct requiring reversal. We conclude that the challenged remarks do not warrant reversal of the defendant's conviction.

Certain additional facts are necessary to our disposition of this claim. During the state's rebuttal argument, the state's attorney alluded several times to Lee's reason to fear the defendant. Specifically, in referring to a nightmare that Lee claimed to have had about the defendant and Russell, the state's attorney commented: "[T]hat the Peelers would seek revenge on [Lee] for testifying is not an illogical concern at all, all things

considered here." Later, in positing why Lee had written letters to her former landlord disavowing any knowledge of the killings, the state's attorney argued: "Why is she writing letters? You know clearly from those surveillance recordings what [the landlord's] position on this whole thing was. He was vehement [that] she should keep her mouth shut. I don't blame him. This is all about murdering witnesses." Finally, the state's attorney argued that Lee's initial statement to the police was incomplete or inaccurate because Lee had "seen the night before what the Peelers do to witnesses."

We reject the defendant's claim that these comments were improper. First, there was extensive admissible evidence concerning the defendant's motive for committing the crimes charged, namely, to eliminate crucial state witnesses who were capable of linking Russell, the defendant's brother, to extremely serious crimes, including murder. Indeed, Lee herself testified that she had been threatened by Garner, an apparent coconspirator, who warned her that both she and her entire household would be killed if she told anyone about the murders of Brown and Clarke. Furthermore, the comments of the state's attorney followed defense counsel's closing argument in which he attacked Lee's credibility by referring to inconsistencies in her direct testimony, her prior statements to the police and a letter that she had written to her former landlord. The challenged remarks, therefore, provided the jury with an alternate explanation for the inconsistencies highlighted by defense counsel. See, e.g., *State* v. *Burton*, 258 Conn. 153, 169, 778 A.2d 955 (2001) (prosecutor may present jury with alternative explanation for inconsistencies in witness' statements when defendant has engaged in lengthy attack on witness' credibility). Consequently, it was not unreasonable for the state's attorney to argue that Lee had reason to fear the defendant

and that this fear had caused her to change her version of the facts.

C

The defendant's final claim of misconduct involves the following statement by the state's attorney during his rebuttal argument: "The incredible thing about . . . Lee is she's a survivor. I don't mean her [medical condition] and her crack. I mean she survived that night, January 7, 1999. If the defendant had his brother's Glock semi-automatic pistol, she wouldn't be alive, no question. The problem with using the six shooter is [that the defendant] didn't have a spare bullet for [Lee]. He had to shoot . . . Clarke twice because she made it up to the telephone. I don't think he had to shoot [Brown] four times, but he did. He didn't have another bullet. Who would have cared if [Lee] got killed?"

The defendant contends that the foregoing argument was improper inasmuch as the state adduced no evidence that the defendant either had attempted to kill or had planned to kill Lee. We agree. "A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument." (Citations omitted; internal quotation marks omitted.) *State* v. *Alexander*, 254 Conn. 290, 306, 755 A.2d 868 (2000). This argument was nothing more than rank speculation designed to inflame the passions of the jurors against the defendant.

Although the comments were highly improper, we are persuaded that, in the particular context of this case, they did not deprive the defendant of a fair trial. Although, in other circumstances, the argument might be so prejudicial as to require a new trial, in the present case, there was ample evidence properly before the jury regarding the willingness of the defendant and his

coconspirators to resort to murder to silence prospective witnesses. Indeed, the state's evidence established convincingly that Brown and Clarke were murdered for that very reason. We find it significant, also, that defense counsel made no contemporaneous objection to the challenged remarks, presumably because he did not "view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." *State* v. *Reynolds*, supra, 264 Conn. 165. Finally, the trial court's instruction to the jury that the arguments of counsel are not evidence likely mitigated any harm caused by the improper argument.[25] See id., 131 (presumption that jury follows court's instructions absent contrary indication). For all of the foregoing reasons, we conclude that the improper argument of the state's attorney does not mandate reversal of the defendant's conviction.

The judgment is affirmed.

In this opinion the other justices concurred.

JAMES R. LEVANDOSKI *v.* DOUGLAS CONE
(SC 16843)

Borden, Norcott, Palmer, Vertefeuille and Zarella, Js.

Syllabus

Pursuant to the common-law "firefighter's rule," a firefighter or police officer who enters private property in the exercise of his duties occupies the

[25] The trial court instructed the jury in relevant part: "You should keep in mind [that] the arguments and statements by the attorneys in final arguments or during the course of the case were not evidence. You should not consider as evidence their recollections of the evidence nor their personal beliefs as to any facts or as to the credibility of any witness or any facts which any attorney may have presented to you in argument from that attorney's knowledge which [were] not supported by the evidence during the course of the trial. Furthermore, I emphasize to you that if there was any difference between what any attorney recalls as the evidence or what I recall as the evidence and what you recall as the evidence, it is your recollection that controls. Follow your recollection, not anyone else's. . . ."

status of a licensee and, therefore, is owed a duty of care by the property owner that is less than that owed to an ordinary invitee. Under the rule, a property owner owes a firefighter or police officer injured on his property only the duty not to injure him wilfully or wantonly.

The plaintiff, a police officer for the town of East Lyme, brought a negligence action against the defendant to recover damages for personal injuries the plaintiff had sustained during a fall while pursuing the defendant on the property of a third party. While responding to a complaint of a noisy party at a private residence, the plaintiff had observed the defendant attempting to conceal what he suspected to be narcotics. The plaintiff approached the defendant, who ran into the woods behind the house to avoid being arrested, and the plaintiff, while pursuing the defendant, was injured when he fell down a steep embankment. The town intervened in the plaintiff's action seeking reimbursement of the workers' compensation benefits it had paid him. The defendant rejected the plaintiff's offer of judgment, and a jury ultimately returned a verdict for the plaintiff. The defendant moved to set aside the verdict and for judgment notwithstanding the verdict, claiming that the plaintiff's recovery was barred by the firefighter's rule. Thereafter, the town withdrew its intervening complaint because it had reached a settlement with the plaintiff regarding the amount of its workers' compensation lien reimbursement. The trial court denied the motions to set aside the verdict and for judgment notwithstanding the verdict, as well as the defendant's request for a reduction in the amount of the verdict by the amount of the lien. That court rendered judgment in accordance with the verdict and awarded the plaintiff prejudgment interest on the verdict, from which the defendant appealed. *Held:*

1. The firefighter's rule was not applicable here, this court having concluded that the rationales for the rule did not justify extending it beyond the scope of premises liability so as to bar a police officer from recovering in a negligence action from a tortfeasor who is neither an owner nor a person in control of the premises; the firefighter's rule is a rule of premises liability, and the defendant, not having been the owner of the property on which the plaintiff was injured, could not claim the benefit of the rule so as to bar the plaintiff's negligence action.

2. The defendant could not prevail on his claim that there was insufficient evidence on which the jury reasonably could have found that the plaintiff's injuries were caused by the defendant's negligence; contrary to the defendant's claim, it was reasonably foreseeable that a police officer could be injured in pursuing a fleeing suspect through the woods over unlit terrain.

3. The defendant could not prevail on his claim that, because the plaintiff's net recovery, after payment of the town's workers' compensation lien, would have been less than the offer of judgment, the trial court improperly awarded prejudgment interest on the jury's award pursuant to statute (§ 52-192a); offer of judgment interest awarded pursuant § 52-192a

is based on the amount of the jury verdict, not on the amount of the judgment after apportionment of the damages between the employee and the employer.

Argued October 21, 2003—officially released February 24, 2004

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, brought to the Superior Court in the judicial district of New London, where the court, *Handy*, *J.*, granted the motion filed by the town of East Lyme to intervene as a plaintiff and to file a complaint for reimbursement of workers' compensation benefits it had paid to the plaintiff; thereafter, the plaintiff filed an offer of judgment, which was not accepted by the defendant, and the matter was tried to the jury before *Corradino*, *J.*, who thereafter declared a mistrial; subsequently, the matter was tried to the jury before *Robaina*, *J.*; following the court's reservation of judgment on the defendant's motion for a directed verdict, the jury returned a verdict for the plaintiff; subsequently, the court, *Robaina*, *J.*, denied the defendant's motion to set aside the verdict and for judgment notwithstanding the verdict, and, after the intervening plaintiff withdrew its complaint, rendered judgment in accordance with the verdict awarding the plaintiff damages and prejudgment interest, and the defendant appealed. *Affirmed.*

William J. Melley III, for the appellant (defendant).

Kathryn Calibey, with whom were *Douglas W. Hammond* and, on the brief, *John J. Houlihan*, *Jr.*, for the appellee (plaintiff).

Opinion

BORDEN, J. The common-law "firefighter's rule" provides, in general terms, that a firefighter or police officer who enters private property in the exercise of his duties occupies the status of a licensee and, therefore, is owed

a duty of care by the property owner that is less than that owed to an ordinary invitee. *Furstein* v. *Hill*, 218 Conn. 610, 615, 590 A.2d 939 (1991). Thus, under the firefighter's rule, the landowner generally owes the firefighter or police officer injured on his property "only the duty not to injure him wilfully or wantonly . . . ." Id., 616. The principal issue in this appeal is whether the firefighter's rule should be extended beyond the scope of premises liability so as to bar a police officer from recovering, based on a claim of ordinary negligence, from a tortfeasor who is neither an owner nor a person in control of the premises. The defendant, who is not a landowner or person in control of land, appeals[1] from the judgment of the trial court, following a jury trial, in favor of the plaintiff, a police officer who was injured by the defendant's negligent conduct on the land of another person. We conclude that the firefighter's rule should not be so extended and, accordingly, we affirm the judgment of the trial court in favor of the plaintiff.

The plaintiff, James R. Levandoski, a member of the East Lyme police department, brought this action against the defendant, Douglas Cone, for injuries negligently caused by the defendant while the plaintiff was pursuing the defendant on private property. The plaintiff's employer, the town of East Lyme (town), filed a motion to intervene as a party plaintiff seeking reimbursement of workers' compensation benefits it had paid to the plaintiff, which the court granted. Thereafter, the plaintiff filed an offer of judgment, which the defendant did not accept. After a jury trial and a verdict for the plaintiff, the defendant moved to set aside the verdict and for judgment notwithstanding the verdict,

[1] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

which the court denied.[2] Thereafter, the town, with the court's permission, withdrew its intervening complaint because it had reached a settlement with the plaintiff regarding the amount of its workers' compensation lien reimbursement. The trial court denied the defendant's request for a reduction in the amount of the verdict by the amount of the lien, awarded prejudgment interest on the verdict, and rendered judgment for the plaintiff accordingly.

The defendant claims that the trial court improperly: (1) denied his motions for a directed verdict and for judgment notwithstanding the verdict because the plaintiff's action was barred by the firefighter's rule; (2) denied his motions because the plaintiff failed to prove proximate cause; and (3) awarded prejudgment interest to the plaintiff. We conclude that: (1) the firefighter's rule does not apply to this case;[3] (2) there was sufficient evidence to establish proximate cause; and (3) the court properly awarded prejudgment interest.

The jury reasonably could have found the following facts. On May 15, 1996, the plaintiff was a police officer of the town. At approximately 11 p.m., in response to a neighbor's complaint about a noisy party taking place at the home of David Baskin on Hillwood Drive, the plaintiff and another officer went to that residence, intending to end the party rather than to make arrests. When they arrived at the residence, they approached the house from different sides in order to observe the party. The plaintiff, watching from behind bushes and

[2] The defendant also moved for a directed verdict, and the court reserved judgment on that motion. The court's ruling on the postverdict motions in effect constituted a denial of that motion as well.

[3] The defendant also claims that, if the firefighter's rule applied to this case, the court should have instructed the jury that the plaintiff could recover only if he proved that there was independent negligence by the defendant subsequent to the plaintiff's arrival on the property. In view of our conclusion that the firefighter's rule does not apply to this case, we need not consider this claim.

a tree, saw a group of young persons playing basketball, and heard music and noise. He then heard someone announce the arrival of the police, and saw cans of what he assumed was beer being discarded.

The plaintiff then saw the defendant retrieve some items from a bag in the garage, walk down the driveway while peering over his shoulder, and then put some sandwich size plastic baggies in his pants. The plaintiff believed that the baggies contained marijuana. The plaintiff, who had changed his position to behind a car, then stepped out from behind the car, turned his flashlight on the defendant, and requested that he remove the baggies from his pants. The defendant, in order to avoid being arrested, then began to run away toward some woods, and the plaintiff ordered him to stop. The defendant continued to run, and the plaintiff pursued him into the woods. Just as the plaintiff was about to apprehend the defendant, the plaintiff fell off of a ledge onto some rocks. As a result of the fall, the plaintiff suffered severe injuries to his hip and knee, including lacerations, dislocation of the hip, and a 20 percent permanent disability of his lower right leg.

During the course of the litigation, the town intervened to recover the amount of its workers' compensation lien, and the plaintiff filed an offer of judgment in the amount of $100,000, which the defendant did not accept. The jury rendered a verdict in favor of the plaintiff in the total amount of $147,535, which consisted of $65,000 in noneconomic damages and $82,535 in economic damages. The trial court denied the defendant's postverdict motions, and granted the town's request for permission to withdraw its intervening complaint because it had reached a settlement with the plaintiff in the amount of $58,000 with respect thereto. Thereafter, the court denied the defendant's request to reduce the award by the amount of the town's lien, and awarded

the plaintiff prejudgment interest on the verdict pursuant to General Statutes § 52-192a.[4] This appeal followed.

I

We first address the defendant's claim that the trial court improperly denied his motions for a directed ver-

[4] General Statutes § 52-192a provides: "(a) After commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may, not later than thirty days before trial, file with the clerk of the court a written 'offer of judgment' signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action and to stipulate to a judgment for a sum certain. The plaintiff shall give notice of the offer of settlement to the defendant's attorney or, if the defendant is not represented by an attorney, to the defendant himself or herself. Within sixty days after being notified of the filing of the 'offer of judgment' and prior to the rendering of a verdict by the jury or an award by the court, the defendant or the defendant's attorney may file with the clerk of the court a written 'acceptance of offer of judgment' agreeing to a stipulation for judgment as contained in plaintiff's 'offer of judgment'. Upon such filing, the clerk shall enter judgment immediately on the stipulation. If the 'offer of judgment' is not accepted within sixty days and prior to the rendering of a verdict by the jury or an award by the court, the 'offer of judgment' shall be considered rejected and not subject to acceptance unless refiled. Any such 'offer of judgment' and any 'acceptance of offer of judgment' shall be included by the clerk in the record of the case.

"(b) After trial the court shall examine the record to determine whether the plaintiff made an 'offer of judgment' which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in the plaintiff's 'offer of judgment', the court shall add to the amount so recovered twelve per cent annual interest on said amount, computed from the date such offer was filed in actions commenced before October 1, 1981. In those actions commenced on or after October 1, 1981, the interest shall be computed from the date the complaint in the civil action was filed with the court if the 'offer of judgment' was filed not later than eighteen months from the filing of such complaint. If such offer was filed later than eighteen months from the date of filing of the complaint, the interest shall be computed from the date the 'offer of judgment' was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

dict and for judgment notwithstanding the verdict because of the firefighter's rule.[5] Although the defendant recognizes that the rule has its origins in claims based on premises liability, he argues, nonetheless, that it should be extended to nonpremises liability cases, such as the present case. We are not persuaded.

We begin our analysis with an overview of the history of and policies underlying the firefighter's rule. This court first applied the firefighter's rule in *Roberts* v. *Rosenblatt*, 146 Conn. 110, 148 A.2d 142 (1959). In that case, the plaintiff firefighter, who had responded to an alarm, sought to recover from the defendant landowners based upon the defendants' negligent maintenance of their property. Id., 113. The trial court declined the defendants' request "to charge the jury, as a matter of law, that the plaintiff was a licensee upon the defendant's property and that the duty which the defendants owed to the plaintiff was limited by that relationship." Id., 111. This court stated: "Upon these facts, the court should have instructed the jury as a matter of law that the plaintiff entered upon the premises in the perfor-

Although § 52-192a was amended subsequent to trial in this case by No. 01-71, § 1, of the 2001 Public Acts to include technical changes, those changes are not relevant to this appeal. References herein are to the current revision of § 52-192a.

[5] In denying the defendant's motions, the trial court reasoned that the firefighter's rule should be extended to nonpremises liability cases, but that the so-called "subsequent negligence" exception to the rule would also apply. Under that exception, a police officer is not treated as a licensee when the defendant engages in negligent acts after the police officer arrives at the scene. Therefore, the trial court denied the defendant's motions, not because of the inapplicability of the rule, but because in its view the facts of the case brought the case within the exception to the rule. We affirm the trial court's rulings on the motions on the alternate ground that the firefighter's rule simply does not apply. See, e.g., *State* v. *DeLoreto*, 265 Conn. 145, 153, 827 A.2d 671 (2003) ("[w]here the trial court reaches a correct decision but on [mistaken] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it" [internal quotation marks omitted]). Thus, we need not decide whether the "subsequent negligence" exception to the rule applies in this state.

mance of a public duty under a permission created by law and that his status was akin to that of a licensee and the defendants owed him no greater duty than that due a licensee." Id., 113.

In *Furstein* v. *Hill*, supra, 218 Conn. 610, we considered whether to extend the firefighter's rule to a police officer. We phrased the issue as "whether a police officer occupies the status of an invitee or of a licensee when, in the course of performing his official duties, he is injured by a defective condition on the property of a landowner." Id., 612. We read *Roberts* as "adopt[ing] the principle expressed in the Restatement (Second) of Torts, § 345 (1), that 'the liability of a possessor of land to one who enters the land only in the exercise of a privilege, for either a public or a private purpose, and irrespective of the possessor's consent, is the same as the liability to a licensee.' 2 Restatement (Second), Torts (1965) § 345 (1), pp. 226–27." *Furstein* v. *Hill*, supra, 615. We concluded that the rule applies to police officers as well as firefighters. Id., 616. In doing so, we gave three reasons for extending the rule to police officers. Id., 616–20. Of the three reasons, the first we characterized as "[t]he most compelling argument"; id., 616; and the second and third we described as having been adopted by other jurisdictions as rationales for the firefighter's rule. Id., 617–20.

The first reason was cast in terms of the similarity of the roles of firefighters and police officers, and the reasonable expectations of landowners regarding those two types of public officers. We stated: "[F]irefighters and police officers often enter property at unforeseeable times and may enter unusual parts of the premises under emergency circumstances. *Kreski* v. *Modern Wholesale Electric Supply Co.*, [429 Mich. 347, 368, 415 N.W.2d 178 (1987)]; *Nared* v. *School District of Omaha*, 191 Neb. 376, 379–80, 215 N.W.2d 115 (1974); 2 Restatement (Second), [supra, § 345 (1), p. 228, com-

ment (c)]. Such public officers enter the land regardless of the owner's consent; indeed, if the conditions for the exercise of their public duty exist, the owner would not be privileged to exclude them. *Shypulski* v. *Waldorf Paper Products Co.*, 232 Minn. 394, 396, 45 N.W.2d 549 (1951); *Scheurer* v. *Trustees of the Open Bible Church*, 175 Ohio St. 163, 168, 192 N.E.2d 38 (1963); 5 F. Harper, F. James & O. Gray, The Law of Torts (2d Ed. 1986) § 27.14, p. 260. Recognizing that only invitees may rely on an implied representation of safety, courts have considered it unreasonable to require landowners to undertake the same standard of care for public officers whose presence the landowners can neither predict nor interdict. 'There would be an obvious hardship in holding otherwise, because landowners would then be under compulsion to keep all parts of their premises in a condition perhaps uncalled for by the normal use to which the premises are devoted.' *Shypulski* v. *Waldorf Paper Products Co.*, supra, 397; see also 2 Restatement (Second), [supra, § 345 (1), p. 228, comment (c)]." *Furstein* v. *Hill*, supra, 218 Conn. 616–17.

The second reason was essentially a reiteration of the doctrine of assumption of the risk. We noted: "Several jurisdictions have explained their adoption of the firefighter's rule by recognizing the inherently hazardous nature of the public safety work performed by firefighters and police officers. Some courts have characterized this recognition as a variant of the doctrine of 'assumption of the risk'; see *Krauth* v. *Geller*, 31 N.J. 270, 273–74, 157 A.2d 129 (1960); while others have noted that firefighters and police officers voluntarily choose to enter their professions knowing that they will often confront physically perilous situations created by the negligence of the public they serve." *Furstein* v. *Hill*, supra, 218 Conn. 617–18.

The third reason rested upon the combination of the avoidance of double taxation upon landowners and the

availability of workers' compensation benefits to compensate the injured firefighter or police officer. In this regard, we stated: "[P]ermitting firefighters and police officers to recover in tort for occupational injuries caused by the negligence of particular members of the public whom the officer is called upon to aid would impose a double burden on the taxpayers, who already pay such officers to deal with the hazards that may result from the taxpayers' own future acts of negligence. 'Exposing the negligent taxpayer to liability for having summoned the police would impose upon him multiple burdens for that protection.' *Berko* v. *Freda*, [93 N.J. 81, 87–88, 459 A.2d 663 (1983)]. To avoid this potential for double liability, in taxes and in tort, most courts have concluded that the public as a whole, rather than individual landowners, should bear the burden of the foreseeable losses incurred when firefighters or police officers are injured in the performance of their duties. As more than one court has observed, the public should compensate its safety officers both in pay that reflects the hazard of their work and in workers' compensation benefits for injuries suffered when the risks inherent in the occupation materialize." *Furstein* v. *Hill*, supra, 218 Conn. 618–19.

This background persuades us that the rule should not be extended to a nonpremises liability case, such as the present appeal. Because the firefighter's rule is an exception to the general rule of tort liability that, as between an innocent party and a negligent party, any loss should be borne by the negligent party, the burden of persuasion is on the party who seeks to extend the exception beyond its traditional boundaries. The history of and rationales for the rule persuade us, however, that it should be confined to claims of premises liability.

First, the firefighter's rule is essentially a rule of premises liability. The distinction upon which it rests, namely, whether the plaintiff is an invitee or licensee,

is itself a distinction that exists in our law only with regard to claims based upon premises liability, and the differing duties of care that emanate from those distinctions are cast in terms of a landowner's duty to persons on his or her land. We have recognized that the rule is "directly applicable [to] an issue of landowner liability . . . ." *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 580 n.12, 717 A.2d 215 (1998). We have declined to extend the rule to a case in which the plaintiff firefighters sought to recover damages from the defendant alarm company for injuries and death sustained as a result of a collision caused by the negligent maintenance and failure of brakes on their fire engine while responding to a false alarm transmitted by the defendant. Id., 585–86. This essential link to a landowner's liability, as we explained in *Furstein*, is the most compelling argument for the rule, because of the reasonable expectations of landowners, and because of the ensuing hardship that would be visited upon a landowner in the absence of the rule. Indeed, we have reiterated that this is "[t]he most compelling argument for the continuing validity of the rule . . . ." (Internal quotation marks omitted.) *Morin* v. *Bell Court Condominium Assn.*, 223 Conn. 323, 328, 612 A.2d 1197 (1992). This argument simply does not apply if the defendant is not a landowner. Indeed, neither the differing status of the plaintiff nor the reasonable expectations of the defendant are relevant if the plaintiff is not engaged in entering the land of the defendant. It would be anomalous, therefore, to extend the rule to a case in which the most compelling argument for the rule is inapplicable.

Second, to the extent that the firefighter's rule rests on the doctrine of assumption of the risk, it would be inconsistent with the policy of our general tort law to extend the rule beyond its present confines. That policy is expressed in General Statutes § 52-572h,[6] pursuant

[6] General Statutes § 52-572h, which describes the doctrines applicable in negligence actions and the liability of multiple tortfeasors for damages,

to which the legislature has abolished the doctrine of assumption of the risk in negligence actions. Section 52-572h (*l*) provides: "The legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished." Subsection (b) of § 52-572h makes the statute applicable to "causes of action based on negligence . . . ." The present action is "[a cause] of action based on negligence . . . ." General Statutes § 52-572h (b).

Third, to the extent that the firefighter's rule rests on the avoidance of double taxation of the landowner and the presence of workers' compensation benefits for the injured firefighter or police officer, the rationale does not apply to the present case. The defendant is not a taxpayer, as is a landowner who pays taxes on his or her property. Of course, although in any given case a negligent tortfeasor who injures a firefighter or police officer may also pay taxes to the local municipality, that fact would be wholly fortuitous. The point of the rule, however, is that the landowner who owes a lesser degree of duty to the police officer who enters his or her land has that benefit because, as a landowner, he or she also indirectly pays the salary of the officer through property taxes. Furthermore, we are not persuaded that, simply because the firefighter or police officer has recourse to workers' compensation benefits, he or she should not also be able to recover from a

provides in relevant part: "(b) In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages resulting from personal injury, wrongful death or damage to property if the negligence was not greater than the combined negligence of the person or persons against whom recovery is sought including settled or released persons under subsection (n) of this section. The economic or noneconomic damages allowed shall be diminished in the proportion of the percentage of negligence attributable to the person recovering which percentage shall be determined pursuant to subsection (f) of this section. . . .

"(*l*) The legal doctrines of last clear chance and assumption of risk in actions to which this section is applicable are abolished. . . ."

third party based on negligence. We do not ordinarily put such an elevated burden on recovery where, for example, the third party is a product manufacturer, and we see no persuasive reason to do so in the context of the present case. In addition, as the present case indicates, permitting the plaintiff to recover for the defendant's negligence will tend to reduce workers' compensation costs by permitting the plaintiff's employer to recoup those benefits.

We disagree, therefore, with the contention of the defendant that the rationales for the firefighter's rule justify extending it to the present case. We also disagree with the defendant's reliance on *Kaminski* v. *Fairfield*, 216 Conn. 29, 38–39, 578 A.2d 1048 (1990). In that case, we held that homeowners, who had summoned mental health workers to their home to evaluate their mentally ill son, had no duty to warn a police officer, who accompanied the mental health workers, of the son's dangerous and violent propensities. Id., 36–37. First, that case did not present the applicability of the firefighter's rule to a nonlandowner. Second, although, in rejecting the claim of a duty to warn, we used language and cited some out-of-state cases that appear to apply beyond the confines of landowner's liability; see, e.g., id., 38–39; our principal rationale was consistent with the limitation of the rule to premises liability cases, namely, the risk of double taxation. Thus, we stated: "Exposing the negligent taxpayer to liability for having summoned the police would impose upon him multiple burdens for that protection." (Internal quotation marks omitted.) Id., 39. Similarly, we disagree with the defendant's suggestion that we ought to extend the firefighter's rule beyond situations in which the plaintiff is injured while on the defendant's land; instead, we agree with those jurisdictions that have framed the rule as one that relates specifically to premises liability and defines the duty owed by *an owner or occupier of land*. See, e.g.,

Syracuse Rural Fire District v. *Pletan*, 254 Neb. 393, 401, 577 N.W.2d 527 (1998) (" 'firemen . . . on the premises of an owner or occupant is a bare licensee' "); *Moreno* v. *Marrs*, 102 N.M. 373, 376, 695 P.2d 1322 (App. 1984) (rule states duty of owner or occupier of land owed to firemen); *Rogers* v. *Cato Oil & Grease Co.*, 396 P.2d 1000, 1004 (Okla. 1964) (rule concerns property owners' duty to fireman); *Allen* v. *Albright*, 43 S.W.3d 643, 647 (Tex. App. 2001) (fireman treated as licensee for premises liability purposes).

II

The defendant next claims that there was insufficient evidence on which the jury reasonably could have found that the plaintiff's injuries were caused by the defendant's negligence. Specifically, the defendant contends that he reasonably could not have foreseen that his conduct would cause the plaintiff to be harmed. We disagree.

We agree with the trial court, and the plaintiff, that it was reasonably foreseeable that the plaintiff could be injured in pursuing the fleeing defendant. The defendant does not contend that he had a right to disregard the plaintiff's order to stop, and to continue to flee. Thus, as the plaintiff aptly argues, "common sense suggests that one who takes off running into the dark to flee from a police officer, who had ordered him to stop, ought to know that the pursuing officer could be injured scrambling through obstacles and over unlit terrain."

III

Finally, the defendant claims that the trial court improperly awarded prejudgment interest on the jury's award pursuant to § 52-192a,[7] because the plaintiff's net recovery, after payment of the town's workers' compensation lien, would have been less than the offer of judg-

[7] See footnote 4 of this opinion for the text of § 52-192a.

ment. This claim is controlled by *Cardenas* v. *Mixcus*, 264 Conn. 314, 823 A.2d 321 (2003), which was decided while the appeal in the present case was pending. In that case, we held that offer of judgment interest awarded pursuant to § 52-192a must be based on the amount of the jury verdict, and not on the amount of the judgment after apportionment of the damages between the employee and the employer. Id., 323.

The judgment is affirmed.

In this opinion the other justices concurred.

RICHARD SZCZAPA *v.* UNITED PARCEL SERVICE, INC., ET AL.
(SC 16942)

Borden, Norcott, Katz, Vertefeuille and Zarella, Js.

Argued January 15—officially released February 24, 2004

Procedural History

Action to recover uninsured motorist benefits for personal injuries sustained by the plaintiff in a motor vehicle accident while in the course of his employment with the named defendant, brought to the Superior Court in the judicial district of Hartford, where the court, *Peck*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, which granted the named defendant's motion to dismiss the appeal and, thereafter, denied the plaintiff's motion for reconsideration of that decision, and the plaintiff, on the granting of certification, appealed to this court. *Appeal dismissed.*

Neil Johnson, for the appellant (plaintiff).

Karen K. Clark, with whom, on the brief, was *Richard J. Kenny*, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiff, Richard Szczapa, appeals, following our grant of certification, from the order of the Appellate Court granting the motion of the named defendant, United Parcel Service, Inc., to dismiss the appeal of the plaintiff from the judgment of the trial court rendered in favor of the named defendant. We granted the plaintiff's petition for certification for appeal limited to the following issue: "Did the Appellate Court properly dismiss this appeal?" *Szczapa* v. *United Parcel Service, Inc.*, 262 Conn. 952, 817 A.2d 111 (2003).

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

IN RE APPLICATION OF HARRY S. EBERHART
(SC 17003)

Borden, Katz, Palmer, Vertefeuille and Zarella, Js.

Argued December 4, 2003—officially released February 24, 2004

Procedural History

Application by the defendant for reinstatement to the state bar, brought to the Superior Court in the judicial district of New Haven, where the court, *Silbert, J.*, issued a memorandum of decision dismissing the application; thereafter, the court, *Thompson, J.*, granted the motion filed by the statewide grievance committee to substitute the Standing Committee on Recommendations for Admission to the Bar of New Haven County as the party plaintiff, and the defendant appealed from the dismissal of his application. *Affirmed.*

Jeffrey D. Brownstein, for the appellant (defendant).

Thomas J. Sansone, for the appellee (substitute plaintiff).

Opinion

PER CURIAM. The defendant, Harry S. Eberhart, appeals from the judgment of the trial court dismissing his application for reinstatement to the bar of this state.[1] This was the defendant's second application for reinstatement, following his 1991 resignation from the bar, which was accompanied by a waiver of his right to apply for reinstatement. The defendant claims that the trial court improperly: (1) ignored certain provisions of the rules of practice; (2) applied the doctrines of collateral estoppel and res judicata; and (3) denied him due process of law.

Based on our examination of the record and briefs and our consideration of the arguments of the parties, we are persuaded that the judgment of the trial court should be affirmed. The issues were resolved properly in the trial court's concise and well reasoned memorandum of decision. *In re Application of Eberhart*, 48 Conn. Sup. 267, 841 A.2d 749 (2004). The memorandum of decision fully addresses all issues raised by the defendant in this appeal. Therefore, we adopt it as a proper statement of the issues and the applicable law concerning those issues. It would serve no useful purpose for us to repeat the discussion contained therein. See *Davis* v. *Freedom of Information Commission*, 259 Conn. 45, 55, 787 A.2d 530 (2002).

The judgment is affirmed.

[1] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

CHRISTA M. PANE *v.* CITY OF DANBURY ET AL. (SC 17041)

Sullivan, C. J., and Norcott, Katz, Palmer and Zarella, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, the city of Danbury and its personnel director, alleging, inter alia, that the defendants' release of the plaintiff's personnel file to a newspaper reporter violated both the public policy and the express provisions of the Freedom of Information Act (FOIA) (§§ 1-210 [b] [2] and 1-214 [b]) and violated her constitutional right to privacy in violation of 42 U.S.C. § 1983. The trial court granted the defendants' motion for summary judgment and rendered judgment for the defendants, from which the plaintiff appealed claiming, inter alia, that the trial court improperly determined that the FOIA does not provide a private cause of action for civil damages. *Held*:

1. The trial court properly determined, as to the first count of the plaintiff's complaint, that she failed to allege a violation of the public policy against invasions of privacy embodied in § 1-210 (b) (2) and that, even if the plaintiff had alleged a violation of that public policy, she failed to allege that the disclosure was highly offensive to a reasonable person and did not involve matters of legitimate concern to the public, and, therefore, her allegations were insufficient to establish a cause of action for invasion of privacy; furthermore, the plaintiff did not cite any statute by which the city's governmental immunity had been abrogated.
2. The trial court properly determined, with respect to the plaintiff's second count, that the FOIA does not contain an implied right to a private cause of action; the civil penalty provided by the FOIA (§ 1-206 [b] [2]) is the exclusive remedy for the violation of rights conferred by that act.
3. The trial court properly determined that the city could not be held liable under 42 U.S.C. § 1983, the plaintiff not having alleged that the employee's decision to release the personnel file was a "final governmental policy," and not having provided evidence or legal argument to support her claim that the city's personnel director had "final policymaking authority," as is required to subject the city to liability for the actions of its officials.
4. The plaintiff's claim against the city for intentional infliction of emotional distress was barred by the doctrine of governmental immunity.

Argued November 26, 2003—officially released March 2, 2004

Procedural History

Action, in five counts, to recover damages for, inter alia, invasion of privacy and intentional and negligent infliction of emotional distress as a result of the defen-

dants' unauthorized release of the plaintiff's personnel records, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Rush*, *J.*, granted the defendants' motion for summary judgment as to the named defendant on all counts and as to the defendant Emanuel Merullo on counts one, two, four and five of the amended complaint, and rendered judgment thereon, and the plaintiff appealed; thereafter, the plaintiff withdrew count three of the amended complaint as against the defendant Emanuel Merullo. *Affirmed.*

Thomas W. Bucci, for the appellant (plaintiff).

Thomas R. Gerarde, with whom, on the brief, was *Jay T. DonFranciso*, for the appellees (defendants).

Victor R. Perpetua, appellate attorney, and *Mitchell W. Pearlman*, general counsel, filed a brief for the Freedom of Information Commission as amicus curiae.

Opinion

SULLIVAN, C. J. This appeal arises from a claim by the plaintiff, Christa M. Pane, an employee of the named defendant, the city of Danbury (city), that the defendant Emanuel Merullo, who was employed by the city as personnel director, improperly permitted a newspaper reporter to review her personnel file pursuant to the Freedom of Information Act (FOIA), General Statutes § 1-200 et seq. The plaintiff brought a five count complaint against the defendants alleging a violation of the public policy embodied in General Statutes § 1-210 (b) (2), formerly § 1-19 (b) (count one); violations of § 1-210 (b) (2) and General Statutes § 1-214 (b),[1] formerly

[1] General Statutes § 1-214 (b), formerly §1-20a (b), provides: "Whenever a public agency receives a request to inspect or copy records contained in any of its employees' personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned, provided such notice shall not be required to be in writing where impractical due to the large number of employees concerned and (2) the collective bargaining representative, if

§ 1-20a (b) (count two); deprivation of the plaintiff's state and federal constitutional right to privacy in violation of 42 U.S.C. § 1983[2] (count three); intentional infliction of emotional harm (count four); and negligent infliction of emotional harm (count five).[3] Thereafter, the trial court granted the defendants' motion for summary judgment as to counts one, two, four and five. With respect to count three, the court granted the defendants' motion for summary judgment as to the state constitutional claims against both defendants and the federal constitutional claim against the city. It denied the motion for summary judgment as to the federal constitutional claim against Merullo. The plaintiff then brought this appeal[4] claiming that the trial court improperly had rendered summary judgment in favor of the city on counts one, two, three and four.[5] We affirm the judgment of the trial court.

The record reveals the following facts and procedural history relevant to this appeal. In May, 1987, the city

any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy."

[2] Section 1983 of title 42 of the United States Code provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

[3] The claim of negligent infliction of emotional distress against the city ultimately was abandoned by the plaintiff.

[4] The plaintiff appealed to the Appellate Court and this court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[5] At the time that this appeal was filed, the plaintiff's claim against Merullo on count three was still pending. On March 20, 2003, the plaintiff withdrew her complaint against Merullo. This appeal does not involve any of the trial court's rulings with respect to that defendant.

hired the plaintiff as a public health inspector. In October, 1995, Merullo received a FOIA request from Elizabeth Hamilton, a newspaper reporter for the Danbury News-Times, to review the plaintiff's personnel file. Thereafter, Merullo informed the city's attorney that he had received the request and they discussed how he should handle it. Merullo then reviewed the plaintiff's personnel file to determine whether it contained any material that was unrelated to matters of legitimate public concern or contained information the disclosure of which would be highly offensive to a reasonable person. After determining to his own satisfaction that it contained no such materials, he made the file available to Hamilton. Merullo did not notify the plaintiff of Hamilton's request or of the release of the file. Subsequently, the Danbury News-Times published two articles written by Hamilton that were critical of the plaintiff. The articles contained information from the plaintiff's personnel file.

On October 7, 1997, the plaintiff filed this action against the defendants. She filed a substitute complaint on February 13, 1998. The defendants filed a motion for summary judgment on February 1, 1999, and on October 18, 2002, the trial court issued its memorandum of decision. The court granted the motion as to counts one and two on the ground that the FOIA does not provide a private cause of action for civil damages. The court granted the motion as to count three against the city on the grounds that: (1) the state constitution does not provide a private cause of action for invasion of privacy; and (2) liability under 42 U.S.C. § 1983 for violations of the federal constitution does not attach in the absence of a widespread discriminatory "custom and usage" by the local governmental body. Finally, it granted the motion as to count four on the ground that Merullo's conduct was not extreme and outrageous.

On appeal, the plaintiff claims that the trial court improperly granted the defendants' motion for summary judgment in favor of the city: (1) on count one of the substitute complaint because the court incorrectly determined that the claim was premised on the proposition that the FOIA provides a private cause of action, when in fact it was premised on the proposition that the city violated public policy; (2) on count two because the FOIA contains an implied private right of action and there is a genuine issue of fact as to whether the city violated the provisions of the act; (3) on count three alleging a violation of 42 U.S.C. § 1983 because Merullo had authority to establish policy with respect to the release of personnel records;[6] and (4) on count four because Merullo's conduct was extreme and outrageous. We conclude that the trial court properly rendered summary judgment in favor of the city on all four counts.

I

We first address the plaintiff's claim that the trial court improperly rendered summary judgment for the city on count one of the substitute complaint. The trial court granted the motion for summary judgment on counts one and two on the ground that the FOIA does not create a private cause of action. The plaintiff argues that count one was not premised on that proposition, but on the proposition that the plaintiff has a right of action for the violation of the public policy embodied in § 1-210 (b) (2). In other words, the plaintiff argues that count one did not allege statutory violations, but a violation of public policy. We conclude that: (1) the trial court properly determined that count one alleges FOIA violations and that the FOIA does not provide a private right of action; (2) even if the plaintiff attempted

[6] The plaintiff does not challenge the trial court's ruling that there is no private cause of action for invasion of privacy under the state constitution.

to allege a violation of public policy in count one, the allegations were legally insufficient; and (3) the plaintiff has not established that governmental immunity from claims of invasion of privacy has been legislatively abrogated. Accordingly, we affirm the ruling of the trial court.

Before addressing the plaintiff's arguments, we first set forth the applicable standard of review of a court's ruling on a motion for summary judgment.[7] "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must

[7] We note that, in the defendants' motion for summary judgment as to counts one and two of the substitute complaint, the defendants essentially claimed that the plaintiff had failed to state a cause of action. Such a claim generally should be raised before the pleadings are closed by way of a motion to strike pursuant to Practice Book § 10-39. See *Burke* v. *Avitabile*, 32 Conn. App. 765, 772, 630 A.2d 624 ("[t]he office of a motion for summary judgment is not to test the legal sufficiency of the complaint, but is to test the presence of contested factual issues"), cert. denied, 228 Conn. 908, 634 A.2d 297 (1993); cf. *Boucher Agency, Inc.* v. *Zimmer*, 160 Conn. 404, 408-409, 279 A.2d 540 (1971) (suggesting that motion for summary judgment may be used to test sufficiency of cause of action). "There is a substantial difference between a motion for summary judgment and a motion to strike. The granting of a defendant's motion for summary judgment puts the plaintiff out of court as it did in this case. See Practice Book § 17-49. The granting of a motion to strike allows the plaintiff to replead his or her case. See Practice Book § 10-44." *Rivera v. Double A Transportation, Inc.*, 248 Conn. 21, 38 n.3, 727 A.2d 204 (1999) (*Berdon, J.*, dissenting). Because the plaintiff did not challenge the propriety of the defendants' use of a motion for summary judgment to challenge the legal sufficiency of her complaint either in the trial court or before this court, we consider the merits of the defendants' legal sufficiency claim in the procedural context in which it was raised. Cf. *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 32 n.17, 699 A.2d 964 (1997) (treating motion for summary judgment as if it were motion to strike). We emphasize, however, that even if the plaintiff had been permitted to replead count one to clarify that she was alleging a violation of public policy and not a statutory violation, she would still have had to overcome the defense of governmental immunity.

view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. Practice Book [§ 17-46]." (Internal quotation marks omitted.) *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 397–98, 757 A.2d 1074 (2000). "A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Citation omitted; internal quotation marks omitted.) *H.O.R.S.E. of Connecticut, Inc.* v. *Washington*, 258 Conn. 553, 560, 783 A.2d 993 (2001).

In support of her claim, the plaintiff relies on *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 635 A.2d 783 (1993). In that case, we undertook to define the phrase "invasion of personal privacy" as used in § 1-210 (b) (2).[8] Id., 169. We concluded that, "[a]s a common-law matter, the privacy concerns embedded in the 'invasion of personal privacy' exemption from the FOIA mirror developing notions of protection for personal privacy that have emerged in a variety of legal contexts since the latter part of the nineteenth century." Id., 170. "Section 652D of the Restatement (Second) of Torts defines a tort action for the invasion of personal privacy as being triggered by public disclosure of any matter that '(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.' By its terms, therefore, the tort action provides a private remedy to implement a public policy that

[8] At the time, this statutory section was codified as § 1-19 (b) (2).

closely approximates the public policy embodied in § [1-210 (b) (2)] of the FOIA." *Perkins* v. *Freedom of Information Commission*, supra, 172.

Thus, in *Perkins*, we recognized that the common-law tort action for invasion of personal privacy is grounded in the same public policy interest that the legislature sought to advance by enacting § 1-210 (b) (2), namely, the interest in shielding "entirely private matters . . . [from] the public gaze . . . ." Id., 173. We also recognized that the proper remedy for a violation of that public policy is a tort action for invasion of privacy. See id., 172, 174 (tort standard would supply remedy only for, and § 1-210 (b) (2) of FOIA would bar disclosure only of, information that is highly offensive to ordinary, reasonable person).

Upon a careful reading of the plaintiff's substitute complaint, we conclude that count one is most reasonably read to allege that the defendants violated the provisions of the FOIA, rather than, as the plaintiff claimed, to allege a violation of the *public policy* embodied in § 1-210 (b) (2), in other words, an invasion of her personal privacy. For example, the complaint alleges that the plaintiff has a *statutory* right to privacy under various FOIA provisions, that the defendants violated that right by granting Hamilton access to her personnel file, and that the defendants failed to notify the plaintiff of Hamilton's request to inspect the file in violation of § 1-214 (b). As is more fully discussed in part II of this opinion, the FOIA does not provide a private right of action.

Even if we read the substitute complaint to assert that the alleged FOIA violations constituted an invasion of the plaintiff's privacy per se, the plaintiff could not prevail. As *Perkins* recognized, in order to establish a cause of action for invasion of privacy, a plaintiff must allege that the disclosure of the information " '(a) would

be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.' " Id., 172. The plaintiff's substitute complaint made no such allegations. We are mindful that, "[u]nder modern rules of pleading, slight linguistic ambiguity should not be fatal to a cause of action . . . and that pleadings should be read broadly and realistically, rather than narrowly and technically." (Citation omitted; internal quotation marks omitted.) *Sauerwein* v. *Bell*, 17 Conn. App. 697, 709, 556 A.2d 613, cert. denied, 211 Conn. 804, 559 A.2d 1158 (1989). That does not mean, however, that the trial court is obligated to read into pleadings factual allegations that simply are not there or to substitute a cognizable legal theory that the facts, as pleaded, might conceivably support for the noncognizable theory that was actually pleaded.

Finally, "[t]his court has previously stated that [a] municipality itself was generally immune from liability for its tortious acts at common law . . . . We have also recognized, however, that governmental immunity may be abrogated by statute . . . . Thus, the general rule developed in our case law is that a municipality is immune from liability for [its tortious acts] unless the legislature has enacted a statute abrogating that immunity." (Internal quotation marks omitted.) *Spears* v. *Garcia*, 263 Conn. 22, 28, 818 A.2d 37 (2003). The plaintiff has not cited any statute abrogating governmental immunity to the tort of invasion of privacy.[9]

[9] In *Spears* v. *Garcia*, supra, 263 Conn. 29, we concluded that General Statutes § 52-557n allows a plaintiff to bring a direct cause of action for negligence against a political subdivision of the state. Section 52-557n provides in relevant part that "a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ." The plaintiff makes no claim, however, that the tort of invasion of privacy belongs to the class of "negligent acts or omissions" covered by the statute.

We note that there is an exception to the doctrine of qualified immunity from liability as it applies to a municipal *employee*, as distinct from the municipality itself, "where the circumstances make it apparent to the public

We conclude that count one did not state a cause of action and, even if it did, the plaintiff has not cited any statute allowing her to sue the city for invasion of privacy. Accordingly, we conclude that the trial court properly rendered summary judgment in favor of the city.

II

We next address the plaintiff's claim that the trial court improperly granted the city's motion for summary judgment on count two of the plaintiff's substitute complaint which, unlike count one, expressly is premised on the proposition that the alleged FOIA violations, in and of themselves, gave rise to a private action for money damages. The plaintiff argues that the granting of the motion for summary judgment was improper because § 1-210 (b) (2) contains an implied right of action.[10] We affirm the ruling of the trial court.

The trial court's conclusion that the FOIA does not give rise to a private cause of action was based on its determination that *Perkins* v. *Freedom of Information Commission*, supra, 228 Conn. 175-76, merely gave substantive meaning to the phrase "invasion of personal privacy" as used in § 1-210 (b) (2), and did not recognize

officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . " (Citation omitted.) *Evon* v. *Andrews*, 211 Conn. 501, 505, 559 A.2d 1131 (1989). That exception does not apply in this case because the claims against Merullo have been withdrawn.

[10] The plaintiff raised this argument for the first time at oral argument before this court. In her brief to this court, the plaintiff did not address the trial court's conclusion that the FOIA does not create a private right of action. Instead, she sidestepped this dispositive issue and argued only that there is a material issue of fact as to whether there were "items in the plaintiff's personnel file that (1) do not pertain to legitimate matters of public concern and (2) are highly offensive to a reasonable person." Whether the facts as pleaded would support the allegation that the city violated the FOIA is irrelevant, however, to our determination of whether the FOIA creates a private cause of action. In any event, the plaintiff did not make those allegations in count two of her complaint.

a private cause of action under that statute. It also concluded that General Statutes § 1-206 (b) (2) provides the exclusive remedy for the denial of a right conferred upon an individual by the FOIA. Section 1-206 (b) (2) provides in relevant part that, "upon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars." The plaintiff now challenges these conclusions on the grounds that the purpose of § 1-210 (b) (2) is to protect the privacy of government employees and, in the absence of a statutory right of action, employees whose privacy rights are violated will be left without a remedy. For the following reasons, we reject this argument.

This court previously has recognized that, "[i]n determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" (Internal quotation marks omitted.) *Napoletano* v. *CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216, 249, 680 A.2d 127 (1996), cert. denied, 520 U.S. 1103, 117 S. Ct 1106, 137 L. Ed. 2d 308 (1997).

We repeatedly have stated that "[t]he overarching legislative policy of [FOIA] is one that favors the open conduct of government and free public access to government records. . . . The sponsors of the [act] under-

stood the legislation to express the people's sovereignty over the agencies which serve them . . . and this court consistently has interpreted that expression to require diligent protection of the public's right of access to agency proceedings. Our construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed." (Internal quotation marks omitted.) *Stamford* v. *Freedom of Information Commission*, 241 Conn. 310, 314, 696 A.2d 321 (1997). We also have stated that, "although the act was intended as a general matter to promote openness in government . . . the act itself recognizes competing interests, and the need for some governmental records to remain confidential, at least initially." (Citation omitted.) *Gifford* v. *Freedom of Information Commission*, 227 Conn. 641, 652, 631 A.2d 252 (1993).

Thus, "the class for whose . . . benefit [FOIA] was enacted"; (internal quotation marks omitted) *Napoletano* v. *Cigna Healthcare of Connecticut, Inc.*, supra, 238 Conn. 249; consists of members of the general public who desire information about the conduct of their government. Although the FOIA recognizes certain privacy interests that are in tension with the intended benefit to the public, it cannot be said that the act as a whole was intended to protect those interests. Moreover, the FOIA does not contain any explicit provisions suggesting the existence of a private right of action for the violation of such interests. As the trial court properly determined, nothing in our decision in *Perkins* suggests otherwise. Accordingly, we are persuaded that the legislature intended that the civil penalty provided by § 1-206 (b) (2) would be the exclusive remedy for the violation of a right conferred by the FOIA.

In any event, as we have already suggested, there is a more fundamental reason that the plaintiff may not bring this claim against the city. "[T]he general rule

developed in our case law is that a municipality is immune from liability . . . unless the legislature has enacted a statute abrogating that immunity." (Internal quotation marks omitted.) *Spears* v. *Garcia*, supra, 263 Conn. 22. The plaintiff has pointed to no statutory provision expressly abrogating governmental immunity from claims arising under the FOIA. Accordingly, even if we assume that § 1-210 (b) (2) was intended primarily to advance the privacy interests of government employees within the meaning of *Napoletano*, the plaintiff's claim would be barred by governmental immunity. The fact that this leaves municipal employees who have otherwise meritorious claims against their employers without any remedy at law is simply an unavoidable consequence of the doctrine. Accordingly, we see no reason to disturb the trial court's well reasoned decision.

III

We next address the plaintiff's claim that the trial court improperly granted summary judgment on count three. The plaintiff argues that the city may be held liable under 42 U.S.C. § 1983 because Merullo had final policy making authority with respect to the release of her personnel records pursuant to the FOIA request. We affirm the trial court's ruling.

"In *Monell* v. *Dept. of Social Services*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the United States Supreme Court . . . held that '[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.' '[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be

said to represent official policy, inflicts injury that the government as an entity is responsible under § 1983.' [Id.], 694.

"In *Pembaur* v. *Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), the United States Supreme Court further elaborated on the scope of municipal liability under § 1983. In *Pembaur*, the court considered the'official policy' requirement discussed in *Monell*, and concluded that 'it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.' Id., 480. 'If the decision to adopt [a] particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood.' Id., 481. Further defining the limits of this definition, the court held that 'municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the officials or officials responsible for establishing final policy with respect to the subject matter in question.' Id., 483.

"Noting that the courts of appeals had not applied these principles consistently, the United States Supreme Court, in *St. Louis* v. *Praprotnik*, 485 U.S. 112, 124, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988), 'set out again to clarify the issue that we last addressed in *Pembaur*.' The court stated: 'Two Terms ago, in *Pembaur* . . . we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. Although the [c]ourt was unable to settle on a general formulation, Justice Brennan's opinion articulated several guiding principles. First, a majority of the [c]ourt agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, that is, acts which the municipality has

officially sanctioned or ordered. . . . Second, only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability. . . . Third, whether a particular official has final policymaking authority is a question of state law. . . . Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business.' . . . Id., 123." *Thomas* v. *West Haven*, 249 Conn. 385, 410-12, 734 A.2d 535 (1999), cert. denied, 528 U.S. 1187, 120 S. Ct. 1239, 156 L. Ed. 2d 99 (2000).

The plaintiff in the present case alleged in count three of her substitute complaint that "[t]he violation of the [p]laintiff's right of privacy by the [d]efendants, [the city and Merullo], was done under color of state law." In her brief to the trial court on the motion for summary judgment, she argued that "Merullo is admitted to be the [city's] [p]ersonnel [d]irector, an official within the city government . . . . There is no dispute that . . . Merullo acting as an officer of the [city] released the [p]laintiff's entire personnel file to . . . Hamilton. A reasonable inference that can be drawn from these facts is that . . both Merullo and the [city], when making public her personnel file were engaged in conduct that is related to the public authority conferred on these individuals."

The trial court stated in its memorandum of decision that "[n]either party alleges that [the city] has an officially-adopted policy as to how to construe the personal privacy exemption under the FOIA, or that Merullo is responsible for establishing final municipal policy with respect to the exemption." The court concluded that the motion for summary judgment should be granted in favor of the city because Merullo's release of the plaintiff's personnel file "did not represent a final gov-

ernmental policy, or even a governmental 'custom,' with respect to individual privacy rights."

The plaintiff, in her brief to this court, now acknowledges for the first time that a municipality may be held liable under 42 U.S.C. § 1983 for the single action of a government employee *only* when the challenged action was taken by a government official with "final policymaking authority . . . . " (Internal quotation marks omitted.) *St. Louis* v. *Praprotnik*, supra, 485 U.S. 123. She also argues, again for the first time, that Merullo, as the city's personnel director, "possessed the final authority on releasing the plaintiff's personnel file." She provides no evidentiary foundation for this factual claim and no legal authority or argument for the proposition that the authority to make a final decision on releasing a personnel file amounts to "final policymaking authority" within the meaning of *St. Louis* v. *Praprotnik*, supra, 123. See *Jett* v. *Dallas Independent School District*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989) (identification of officials whose decisions represent official policy of local governmental unit is legal question to be resolved by trial judge before case is submitted to jury). Accordingly, we conclude that the trial court properly determined, on the basis of the record before it at the time of its ruling, that there was no genuine issue of material fact and that the city was entitled to judgment on count three as a matter of law.

IV

Finally, the plaintiff claims that the trial court improperly granted the motion for summary judgment for the city on count four of her complaint alleging intentional infliction of emotional distress. The trial court granted the motion on the ground that Merullo's conduct was not extreme and outrageous. The plaintiff argues that a reasonable fact finder could find that the failure of Merullo and the city to notify her of Hamilton's request

to review her personnel file to be extreme and outrageous conduct. We affirm the ruling of the trial court on the alternate ground that the claim is barred by governmental immunity.

In *Miner* v. *Cheshire*, 126 F. Sup. 2d 184, 186 (D. Conn. 2000), the plaintiff brought a complaint against the town of Cheshire and a town employee alleging, inter alia, intentional infliction of emotional distress. The District Court concluded that, "[t]o the extent that [the plaintiff] alleges that the [t]own is liable for any intentional infliction of emotional distress by [the town employee] . . . such a claim is precluded by [General Statutes] § 52-557n, which provides, that 'a political subdivision of the state shall not be liable for damages to person or property caused by . . . [a]cts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or *wilful* misconduct . . . .' [General Statutes] § 52-557n (a) (2) (A) . . . . Under Connecticut law, the term 'wilfulness' is synonymous with 'intentional.' *Bhinder* v. *Sun Co.*, 246 Conn. 223, 242 n.14, 717 A.2d 202 (1998) ('While [courts] have attempted to draw definitional [distinctions] between the terms wilful, wanton or reckless, in practice the three terms have been treated as meaning the same thing.'), quoting *Dubay* v. *Irish*, 207 Conn. 518, 533, 542 A.2d 711 (1988) ["wilful misconduct has been defined as intentional conduct"]; see also *Elliott* v. *City of Waterbury*, 245 Conn. 385, 415, 715 A.2d 27 (1998) (legal concepts of wanton, reckless, wilful, intentional and malicious conduct indistinguishable); *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 527, 686 A.2d 481 (1996) ('A wilful act is one done intentionally or with reckless disregard of the consequences of one's conduct.'). Thus, the [t]own may not be liable under [§] 52-557n (a) (2) (A) for [its employee's] alleged intentional infliction of emotional distress." (Emphasis in original.) *Miner* v. *Cheshire*, supra, 194.

We are persuaded by the court's analysis in *Miner*. Accordingly, we conclude that the plaintiff's claim against the city for intentional infliction of emotional distress is barred by governmental immunity.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* WILLIAM C.[1]
(SC 16864)

Norcott, Katz, Palmer, Vertefeuille and Zarella, Js.

Syllabus

The defendant, who had been convicted of the crimes of sexual assault in the fourth degree and risk of injury to a child in connection with certain incidents involving his adopted daughter, appealed to the Appellate Court claiming, inter alia, that the trial court improperly had excluded from evidence certain records regarding the victim that had been prepared by the department of children and families. The records consisted mainly of notes and entries made by department workers detailing conversations between the workers and the victim as well as between the workers and other individuals involved in the victim's life, including foster parents, therapists and physicians. The defendant sought to introduce those records that related to the victim's problems with veracity following her placement into foster care. He claimed that the victim had fabricated the allegations of sexual abuse so that she would be removed from her adoptive parents' home and returned to her biological mother. He argued that the records contained information regarding the victim's veracity, her pattern of misbehavior, her doubts as to the legitimacy of her accusations, and her inconsistent statements to various individuals regarding the allegations of abuse, all of which were critical to his theory of defense. The Appellate Court concluded that although the records were admissible pursuant to the statute (§ 52-180) pertaining to the business records exception to the hearsay rule, the trial court's exclusion of the records constituted harmless error because the records were cumulative of other evidence presented by the defendant concerning the credibility of the victim. The Appellate Court affirmed the judg-

[1] In accordance with General Statutes § 54-86e, as amended by Public Acts 2003, No. 03-202, § 15, and the court policy of protecting the privacy of victims in sexual abuse matters, we decline to use the names of individuals involved in this appeal.

ment of conviction and the defendant, on the granting of certification, appealed to this court. *Held* that the records maintained by the department qualified as business records for the purpose of § 52-180, the records having been made in the regular course of business, the department having been required to maintain the type of records at issue, and the records having been made at the time of the acts described in the reports, and because the records would have been a strong source of impeachment evidence as to the victim's credibility and were highly relevant to the theory of defense, the trial court abused its discretion by excluding the records in their entirety; accordingly, because the defendant met his burden of demonstrating harm from the court's exclusion of the records, he was entitled to a new trial.

Argued November 26, 2003—officially released March 9, 2004

Procedural History

Amended information charging the defendant with one count each of the crimes of sexual assault in the first degree and sexual assault in the third degree, and with two counts each of the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Tolland and tried to the jury before *J. Kaplan*, *J.*; verdict and judgment of guilty of one count each of the crimes of sexual assault in the fourth degree and risk of injury to a child, from which the defendant appealed to the Appellate Court, *Lavery*, *C. J.*, and *Landau* and *Dranginis*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed; new trial.*

Hubert J. Santos, with whom were *Hope C. Seeley* and *Patrick S. Bristol*, for the appellant (defendant).

Christopher T. Godialis, assistant state's attorney, with whom, on the brief, were *Christopher L. Morano*, chief state's attorney, and *Sandra L. Tullius*, assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The principal issue in this certified appeal is whether the Appellate Court, in affirming the

defendant's judgment of conviction of one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A),[2] and one count of risk of injury to a child in violation of General Statutes (Rev. to 1995) § 53-21, as amended by Public Acts 1995, No. 95-142, § 1,[3] properly determined that certain department of children and families (department) records regarding the victim were admissible pursuant to the business records exception to the hearsay rule, but that the trial court's exclusion of such records was a harmless impropriety. The defendant claims that the Appellate Court improperly concluded that the evidentiary exclusion was harmless because the department records were cumulative of other evidence presented by the defendant with regard to the credibility of the victim's testimony. We conclude that: (1) the department records satisfy the statutory criteria for admission pursuant to the business records exception to the hearsay rule, as set forth in General Statutes § 52-180;[4] and (2) the trial court's exclusion of such records was harmful to the defendant. Accordingly, we reverse the judgment of the Appellate Court.

[2] General Statutes § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . ."

[3] General Statutes (Rev. to 1995) § 53-21, as amended by Public Acts 1995, No. 95-142, § 1, provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony."

[4] General Statutes § 52-180 (a) provides: "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."

The defendant was charged with one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2),[5] one count of sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1) (A),[6] two counts of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A), and two counts of risk of injury to a child in violation of § 53-21. After a jury trial, the defendant was convicted of one count of fourth degree sexual assault[7] and one count of risk of injury to a child,[8] and was acquitted of the remaining four counts of the amended information. Thereafter, the trial court sentenced the defendant to a total of ten years imprisonment, execution suspended after six years, and five years probation. The defendant then appealed to the Appellate Court, which affirmed the judgment of conviction. *State* v. *William C.*, 71 Conn. App. 47, 50, 801 A.2d 823 (2002). We thereafter granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the defendant was not

[5] General Statutes § 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

[6] General Statutes § 53a-72a (a) provides in relevant part: "A person is guilty of sexual assault in the third degree when such person (1) compels another person to submit to sexual contact (A) by the use of force against such other person or a third person . . . ."

[7] The sexual assault in the fourth degree count of the amended information alleged that the defendant "did touch [the victim's] breasts with his hands while applying sunburn lotion and/or lotion for a rash for the purpose of said defendant's sexual gratification and/or for the purpose of degrading and/or humiliating such [victim] when said [victim] was less than fifteen years of age . . . ."

[8] The risk of injury to a child count of the amended information alleged that the defendant "did wilfully and/or unlawfully cause a child under the age of sixteen years to be placed in such a situation that her health is likely to be injured and/or her morals are likely to be impaired and/or did perform an act or acts, to wit: have sexual contact with the breasts of a female child . . . ."

harmed by the trial court's exclusion of the [department's] records?" *State* v. *William C.*, 262 Conn. 907, 810 A.2d 277 (2002). Subsequently, pursuant to Practice Book § 84-11,[9] the state presented for review the following alternate ground on which to affirm the judgment of the Appellate Court: "Whether the Appellate Court erred in concluding that the excluded [department] records are business records?"[10]

The jury reasonably could have found the following relevant facts, as set forth in the opinion of the Appellate Court. "When the victim was quite young, the [department] removed her from the home of her biological parents. She lived with her maternal grandmother for a period of time before the defendant and his wife began to care for her. The defendant and his wife [parents] subsequently adopted the victim when she was about seven years old. In the fall of 1995, the victim began to communicate with her biological mother, who is the sister of the defendant's wife. The victim did not get along well with her adoptive mother and expressed a desire to live with her biological mother. She thought this would be possible if she were removed from her parents' home.

"The victim developed behavioral problems that intensified when she was in the seventh grade. In partic-

[9] Practice Book § 84-11 (a) provides in relevant part: "Upon the granting of certification, the appellee may present for review alternative grounds upon which the judgment may be affirmed provided those grounds were raised and briefed in the appellate court. . . ."

[10] Although the question certified for our review is focused upon whether the trial court's exclusion of the records was harmless, we recognize that whether the department's records qualify as business records for the purposes of the hearsay exception codified in § 52-180, and therefore possess a degree of evidentiary reliability, appropriately factors into our analysis as to whether the exclusion of the records was harmful. Additionally, both parties have briefed and argued the state's alternate ground for affirmance and neither side would be prejudiced by our review of the issue. Consequently, we view the state's alternate ground for affirmance as inextricably intertwined with the certified issue and elect to review it.

ular, the victim had difficulty coping with her anger and with limits imposed on her, and she had difficulty telling the truth. She sometimes destroyed personal property belonging to others. On one occasion, she 'trashed' her parents' home and lied to a neighbor to obtain transportation to another part of town. She had difficulties with her classmates and refused to go to school. During the 1996 spring semester, her parents enrolled her in a special school in which she was able to receive psychological counseling in addition to academic instruction. In February, 1996, the victim became angry with her mother for not permitting her to have a party and assaulted her mother. The victim threatened suicide and, for a brief period of time, received inpatient treatment at the child and adolescent psychology department of Mount Sinai Hospital . . . . The special school provided the victim and her parents with family therapy [through] a clinical psychologist assigned to the victim. As part of the family therapy, the victim and her parents entered into a behavioral contract. Because the victim and her mother argued a great deal, the family agreed that the defendant should deal with the victim if she failed to comply with the behavioral contract.

"In March, 1996, the victim told her peers at her new school that the defendant had sexually abused her. According to the victim's psychologist, who learned of the reported abuse second hand, the victim first complained about the defendant's behavior when she was asked to confront her inappropriate behavior toward her peers. The psychologist held a family conference to discuss what she understood to be inappropriate boundaries in the family home, e.g., the defendant's touching himself and 'mooning' the victim. During the conference, the victim alleged that the defendant had inserted his finger into her vagina. The psychologist then made a sexual abuse report to the department and

to the police." *State* v. *William C.*, supra, 71 Conn. App. 51–53.

The defendant was thereafter convicted of two of the six counts alleged in the amended information: one count of fourth degree sexual assault and one count of risk of injury to a child. "With respect to the charges of which the defendant was convicted, the victim, who was then fifteen years old, testified that the defendant had fondled her breasts when he applied lotion to her sunburned back and again when he applied lotion to a rash on her torso. When he testified, the defendant admitted that on different occasions he had applied lotion to sunburn on the victim's back and to a rash on the victim's torso, including her chest and the sides of her breasts, but he denied that he had touched her nipples or touched the victim in a sexual manner. The theory of defense to the victim's allegations was that the victim had fabricated the allegations of sexual abuse so that she could move out of her parents' home and live with her biological mother." Id., 53.

On appeal to the Appellate Court, the defendant claimed that the trial court improperly had excluded from evidence certain records maintained by the department regarding the victim's veracity, her pattern of misbehavior following the disclosure of abuse and the legitimacy of the victim's accusations against the defendant.[11] Id., 74. The Appellate Court agreed with the

[11] In addition to the certified issue that we address in this opinion, the defendant also raised, in the Appellate Court, the following claims: (1) that the state and the trial court had failed to disclose material exculpatory to the defendant; *State* v. *William C.*, supra, 71 Conn. App. 54; (2) that the trial court improperly had excluded from evidence portions of a diary narrative allegedly written by the victim; id., 66–67; (3) that the trial court improperly had admitted hearsay evidence presented by several of the state's witnesses; id., 67–68; and (4) that the trial court improperly had charged the jury by failing (a) to instruct that there must be unanimity amongst the jurors as to the factual predicate for the jury's verdict; (b) to define what constitutes "sexual contact" for the purposes of a charge of sexual assault in the fourth degree; and (c) properly to instruct the jury regarding reasonable doubt and the presumption of innocence applicable in criminal trials. Id., 75. The

defendant that the department's records were admissible pursuant to § 52-180, and that the trial court improperly had excluded the records from evidence. Id., 74–75. Nevertheless, the Appellate Court concluded that the trial court's abuse of its evidentiary discretion was harmless error. Id., 75. In particular, the Appellate Court determined that it had reviewed the records in camera and that "[t]he [records] reveal that the victim's behavior had not changed since she was placed in foster care. She continued to lie and to misbehave. The victim's lying and misbehavior were the subject of much testimony, and putting the department's records into evidence would have been cumulative. The jury was well aware of the victim's penchant for failing to tell the truth when it suited her objectives." Id. This certified appeal followed.

Before this court, the defendant claims that the Appellate Court properly concluded that the records of the department were admissible pursuant to the business records exception, but improperly determined that the trial court's abuse of discretion in excluding the records was harmless. More specifically, the defendant asserts that the records of the department were critical to the defense theory at trial that the victim had concocted the allegations of abuse against the defendant. In particular, the defendant points to certain entries made by department workers that: relate to the victim's problems with veracity following her placement into foster care; indicate the victim herself had questioned whether the defendant actually had abused her or whether she had "dreamed" up the abuse; and the victim had conveyed her doubts as to the legitimacy of her accusations to various other individuals. The defendant, relying upon the various factors that we have articulated as relevant in the inquiry as to whether an evidentiary

Appellate Court rejected each of these claims made by the defendant; id., 54, 67, 68, 75; and the issues are not before us in this appeal.

impropriety is harmless,[12] further claims that: (1) the records were crucial evidence in that they impacted the credibility of the state's key witness at trial, the victim; (2) the records were not, as the Appellate Court concluded, cumulative of other evidence used to impeach the credibility of the victim because the department's records did not, as the other impeachment evidence did, focus upon the victim's credibility in general or in other unrelated instances, but rather specifically regarded the victim's veracity as to the charges of abuse against the defendant and the legitimacy of those allegations; (3) the trial court's exclusion of the records was harmful because, although the defendant did cross-examine the victim with regard to her credibility in general, the department's records were the only evidence through which the defendant could contradict the victim's trial testimony that the incidents of abuse actually had taken place; and (4) the state's case against the defendant was not particularly strong, emphasizing the critical nature of the victim's testimony and the harm visited upon the defendant by the trial court's exclusion of the records.

In response, the state raises, as an alternate ground on which to affirm the judgment of the Appellate Court, the claim that the records were not admissible pursuant to the business records exception to the hearsay rule because the records contain statements made by individuals without a business duty to make reports regarding the victim and contain statements of opinion made by individuals whose qualifications to render opinions

[12] "Whether . . . error [in connection with the exclusion of evidence at trial] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (Internal quotation marks omitted.) *State* v. *Casanova*, 255 Conn. 581, 595, 767 A.2d 1189 (2001).

regarding the victim have not been established. In sum, the state concedes that the records were made by the department in the regular course of its business, but contends that not everything found in the files of a business is admissible pursuant to the business records exception; rather, to the extent such files contain hearsay evidence or information transmitted by individuals without a business duty to report, such records independently must be determined to be admissible under our well settled principles of evidentiary admissibility. As to the certified issue, the state contends that the Appellate Court properly concluded that the trial court's exclusion of the records did not prejudice the defendant because the records were merely cumulative of other evidence adduced by the defendant as to the veracity of the victim. Furthermore, the state claims that the exclusion of the records was harmless because, in light of the defendant's testimony that he had rubbed lotion on the victim in order to treat a sunburn and a rash, but denied doing so for sexual gratification, the verdict of the jury likely turned upon the jury's critical assessment of the *defendant's* credibility. As such, the state contends that the exclusion of the records, evidence that was relevant to an assessment of the victim's credibility but irrelevant as to the defendant's credibility, was harmless. We agree with the defendant that the trial court abused its discretion by excluding the department's records in their entirety, and we further conclude that the evidentiary impropriety was harmful to the defendant.

The following additional facts guide our resolution of these issues. At trial, the victim testified as to two instances in which she claimed that the defendant inappropriately had touched her breasts.[13] As to the first,

[13] As the count of sexual assault in the fourth degree of which the defendant was convicted; see footnote 2 of this opinion; contains both of these allegations; see footnote 7 of this opinion; it is unclear from this record as to whether the jury convicted the defendant on the basis of both, or just

the victim testified that, while rubbing lotion on her back in order to treat a sunburn, the defendant had moved both of his hands to the front of the victim's body and had fondled her breasts for approximately ten minutes. With regard to the second incident of abuse, the victim testified that the defendant had noticed the victim scratching a rash that had developed on her upper chest because the victim had used too much detergent when washing her clothes. The defendant asked the victim to lift her shirt in order to see the rash and then told her to retrieve lotion from an upstairs bathroom. The victim testified that the defendant thereafter applied the lotion to her chest area and, despite the fact that the rash had not spread to her breast area, then proceeded to fondle her breasts for approximately five minutes.

The victim subsequently was subjected to cross-examination by the defendant over the course of three days. During this lengthy cross-examination, defense counsel questioned the victim as to her veracity, the inconsistent statements she had made to various individuals regarding the allegations of abuse, and her recollections of the details of the abuse.[14] On redirect

one, of these incidents. Consequently, we set forth relevant facts as to each allegation.

[14] Specifically, the defendant elicited from the victim that: (1) there was a temporal gap of significant duration from the cessation of the defendant's acts of abuse until the victim's initial disclosure of the abuse; (2) the victim owned a book on the subject of sexual abuse prior to her initial disclosure; (3) on a previous occasion the victim had constructed an elaborate lie to a neighbor in order to get a ride across town; (4) the victim had not disclosed her allegations of abuse to her physician or therapist during a hospitalization occurring prior to her initial disclosure; (5) following her disclosure of abuse, the victim had told a foster parent that she was going to say that the sexual abuse never took place in order that the victim could return home; (6) the victim had told a foster parent that perhaps she had dreamed up the sexual abuse but had made no such statement to any other individual; (7) a statement that the victim had signed for law enforcement detailing her allegations contained several inconsistencies with her trial testimony; (8) the victim had lied to a classmate about the abuse in order to avoid talking to the classmate about the abuse; (9) the victim had allowed a friend

examination, the state attempted to rehabilitate the victim's testimony by eliciting that the victim would often deny that the abuse had taken place or lie regarding the abuse in order to avoid talking about its details; that the victim had not read thoroughly the statement provided to law enforcement regarding the abuse; and that the victim had lied to her friend who had read her diary because she did not want to get into trouble. In summary, the gravamen of the victim's testimony was that the abuse indeed had taken place as described in her trial testimony and that prior statements to the contrary had been made only to avoid having to discuss the abuse or in an attempt to return home.

Thereafter, during the defendant's case-in-chief, Denise D'Auteuil, a social worker with the department, was called as a witness. During her testimony, D'Auteuil indicated that she was the social worker assigned to oversee the victim's placement in foster care, which had begun after the initial disclosure of abuse and the victim's subsequent removal from the defendant's home. D'Auteuil further testified that it was the policy and practice of the department, in instances in which a child would be involved in long-term supervision by the department, for the various department workers involved in the case to maintain a file on the matter. Included in this file would be a running narrative in which each worker involved in the case would create an entry as to their various activities with regard to

to read a portion of her diary detailing the allegations of abuse and had told the friend that she had made up the story so that the defendant's wife would read the diary and become angry with the defendant; (10) the victim lied to her parents "[w]henever I needed to get myself out of trouble" or to avoid the consequences of her actions; (11) the victim had told certain individuals that the allegations were untrue because she wanted to avoid talking about the abuse; (12) the victim had questioned, for a time, whether what the defendant was doing was sexual abuse and had consulted her sexual abuse book; and (13) the victim lied in correspondence to her grandmother asking for money to replace items stolen from the victim.

the child and the progress of the child based upon communications by individuals involved in the child's life, including the child's foster parents.

Pursuant to § 52-180, the defendant then attempted to question D'Auteuil about a portion of the department's records containing certain statements made by the victim's foster parents concerning the victim's propensity for veracity. The state objected, claiming that the defendant was attempting to use the records in an effort to avoid having to call a witness with actual knowledge of the incidents referenced in the records and, moreover, that the records were inadmissible as they "contain hearsay all over the place . . . ." In response to the state's objection, the defendant argued that the particular portion of the department's records met the requirements of the business records exception because the victim's foster parents had a duty to report to the department any information relevant to the care of the child, the department had an obligation to create a record of such reports and the department had made such a record contemporaneous with the report of the victim's foster parents. The defendant further asserted that particular evidence was relevant in order to demonstrate the "ongoing problem of [the victim's] truthfulness and her reputation for truth and veracity."

The trial court sustained the state's objection to the introduction of the evidence, concluding that the particular portion of the records sought to be admitted was irrelevant and, even if relevant, the defendant had failed to show that a witness with actual knowledge of the events contained in the record was unavailable and, therefore, the record did not qualify as a business record. Thereafter, outside the presence of the jury, the defendant identified certain other portions of the department's records claimed to be admissible pursuant to the business records exception; the trial court indicated that, as the defendant sought to admit these other

records on the same basis as the earlier proffer, the court's prior ruling as to the inadmissibility of the records would apply to all of the department's records offered by the defendant.[15]

In the appendices to their briefs before this court, the parties have reproduced for our review the pertinent portions of the department's records. At the outset, we note that the records consist of myriad entries made by department workers detailing conversations between the workers and the victim as well as between the workers and other individuals involved in the victim's life, including foster parents, therapists and physicians. The subject of these entries range from the victim's allegations of abuse against the defendant to her daily life and development in foster care. With specific regard to the allegations of abuse, our review of these records reveals the following: (1) several entries made by department workers were based upon conversations with the victim's foster mother in which the foster mother indicated that she believed that the victim had lied about the allegations of abuse, that the victim was constantly untruthful in her daily life, and that the victim believed people disliked her because she lied and that the victim had implied that she had fashioned her allegations of abuse against the defendant from a book on sexual abuse that she owned; (2) several entries, based upon conversations between department workers and the victim's physician, indicate that the victim's foster father had told the physician that the

[15] The trial court allowed the defendant to identify those portions of the department's records claimed as admissible pursuant to the business records exception and identified such materials as sealed exhibit 25 for appellate review. We are aware that the trial court expressly indicated on the record that it had not reviewed all of the documents contained within exhibit 25. Rather, the court stated that, because the defendant had conceded the basis for admission of these records was the same as the earlier proffer, its prior ruling as to the inadmissibility of the records applied with equal force to all such records.

victim had made up the allegations of abuse, that the victim has a " 'flair for drama' " and tends to " 'exaggerate things,' " that the victim had called herself a pathological liar, had questioned whether the abuse actually occurred or whether she had dreamed it, and had referred to a book on sexual abuse while in the defendant's home, and that the victim tends to distort reality and come to believe her distorted perceptions; (3) other entries concern conversations between department workers and the victim's therapists in which the therapists indicated that the victim had stated that she acted in ways that would get her attention, that the victim had questioned her memories of the abuse and, when pressed by her physician for details, indicated that she may have given inaccurate information, and that the victim had stated that she is very sneaky with her foster parents; (4) another entry details a conversation between a worker and a Connecticut state trooper in which the trooper relayed the substance of a conversation between the victim's biological mother and the victim's foster mother in which the foster mother indicated that she did not believe the victim's allegations of abuse; (5) an entry in the records mentions a statement made by the victim's foster father that the victim had told him that the abuse really did occur but that she planned on lying to her physician and denying the abuse in order to return home; and (6) an entry made by a department worker references the victim's inquiry of the worker as to whether her family knew of her allegations of abuse against the defendant and whether they believed her. In addition to these entries, the records also contain many other worker entries unrelated to the allegations of abuse and instead focused upon the victim's development and events in her life while in foster care.

It is axiomatic that "[t]he trial court's ruling on the admissibility of evidence is entitled to great deference.

. . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Hines*, 243 Conn. 796, 801, 709 A.2d 522 (1998).

Our inquiry begins with the issue of whether the records satisfied § 52-180. The defendant, relies primarily upon our decision in *In re Barbara J.*, 215 Conn. 31, 39–42, 574 A.2d 203 (1990), in which we concluded that correspondence from a foster mother to a department worker regarding a causal connection between a foster child's disruptive behavior and visits with her biological mother were admissible pursuant to the business records exception. He contends that the records of the department regarding the victim are admissible pursuant to § 52-180 and, to the extent that the records contain multiple levels of hearsay, either fall within separate hearsay exceptions covering each level, or are not hearsay evidence. In response, the state claims that the records are not admissible pursuant to the business records exception because they contain multiple levels of hearsay, include statements made by persons without a business duty to report information regarding the victim, and contain statements of opinion made by persons whose qualifications to render an opinion regarding the victim have not been established. We conclude that because the records maintained by the department qualify as business records for the purposes of § 52-180, the trial court acted improperly.[16]

[16] We recognize that the defendant has, on appeal, advanced various bases on which, the defendant contends, the multiple levels of hearsay contained within the department's records either are covered by hearsay exceptions or are nonhearsay evidence. As the trial court never reached these issues, deciding instead, as a threshold matter, that the records did not fall within § 52-180, and because we subsequently conclude in this opinion that the

Section 52-180 (a) recognizes "the inherent trustworthiness of records on which businesses rely to conduct their daily affairs." *State* v. *Kirsch*, 263 Conn. 390, 400, 820 A.2d 236 (2003). "To be admissible under the business record exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . In applying the business records exception, the statute [§ 52-180] should be liberally interpreted." (Internal quotation marks omitted.) *Calcano* v. *Calcano*, 257 Conn. 230, 240, 777 A.2d 633 (2001).

We conclude that the department's records satisfy the tripartite requirements of § 52-180. The records of the department were made in the regular course of business, it was within the regular course of the department's business to make such records, and the records were made at the time of the act described in the reports, or within a reasonable time thereafter. Indeed, beyond mere department practice, the department is statutorily *required* to maintain the type of records at issue in this matter. General Statutes § 17a-98 provides: "The [c]ommissioner of [the department], or any agent appointed by him, shall exercise careful supervision of each child under his guardianship or care and shall maintain such contact with the child and his foster family as is necessary to promote the child's safety and

trial court's evidentiary impropriety was harmful and that the defendant is entitled to a new trial, we will not now reach the defendant's proposed bases for admission of specific portions of the department's records, and instead leave it to the trial court, upon remand, to rule upon the admissibility of these records on a document-by-document basis in accordance with the principles articulated herein.

his physical, educational, moral and emotional development. The commissioner shall maintain such records and accounts as may be necessary for the proper supervision of all children under his guardianship or care." See also *In re Barbara J.*, supra, 215 Conn. 39–42 (concluding that foster parents are statutorily mandated to make reports to department with regard to supervision and care of foster children and department is statutorily required to maintain contact with such children and to create records necessary for proper supervision of children).

Moreover, the fact that the defendant's sole witness as to the creation of the records, D'Auteuil, personally did not create each entry in the victim's narrative and does not have personal knowledge of the particular events recorded in the entry does not impact the admissibility of the records under § 52-180. As § 52-180 (b)[17] expressly indicates, the failure of a party to produce a witness with personal knowledge of the creation of the record or the events contained within the record does not impact the admissibility of the record but, rather, properly impacts only the evidentiary weight to be afforded the record.[18]

[17] General Statutes § 52-180 (b) provides: "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."

[18] As the state concedes now on appeal, insofar as the trial court's exclusion of the department's records was based upon its conclusion that the defendant had failed to demonstrate the unavailability of a witness with personal knowledge of the creation of the record or the events contained within the record, the trial court was incorrect as a matter of law. For the purposes of the business records exception to the hearsay rule, the availability of a witness with such personal knowledge is immaterial. See General Statutes § 52-180 (b); see also Conn. Code Evid. § 8-4 (b).

Our conclusion that these records satisfy the requirements of § 52-180 does not, however, end the inquiry in which the trial court is to engage on remand. See footnote 16 of this opinion. "Once [the criteria of § 52-180] have been met by the party seeking to introduce the record . . . it does not necessarily follow that the record itself is generally admissible, nor does it mean that everything in it is required to be admitted into evidence. . . . For example, the information contained in the record must be relevant to the issues being tried. . . . In addition, the information contained in the report must be based on the entrant's own observation or on information of others whose business duty it is to transmit it to the entrant. . . . If the information does not have such a basis, it adds another level of hearsay to the report which necessitates a separate exception to the hearsay rule in order to justify its admission." (Citations omitted; internal quotation marks omitted.) *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 794, 595 A.2d 839 (1991). Furthermore, we also have recognized that information contained in business records is only admissible pursuant to § 52-180 if the information is related to the "business" of the record's entrant. Consequently, in the context of hospital reports, we have concluded that only the portions of a hospital report associated with the "business" of a hospital, that is the information relevant to the medical treatment of a patient, are admissible pursuant to the business records exception. *Kelly* v. *Sheehan*, 158 Conn. 281, 285, 259 A.2d 605 (1969) (concluding that portion of hospital report revealing identity of driver who struck patient is not admissible). We have reached a similar result with regard to a physician's report and have stated that "[o]nce the report is ruled admissible under the statute, any information that is not relevant to medical treatment is subject to redaction by the trial court." *Aspiazu* v. *Orgera*, 205 Conn. 623, 628, 535 A.2d 338

(1987). In this instance, the trial court, in determining the admissibility of the department's records, is to evaluate whether the information contained in the records has a demonstrable nexus to the "business" of the department, as articulated in § 17a-98.

Although the business records are subject to redaction by the trial court on the grounds of relevancy, insufficient connection to the "business" of the department, or status as inadmissible hearsay,[19] the burden is upon the opponent of the evidence properly to object to any challenged portions of the records. "[O]nce a report qualifies as a business record, its proponent is not required to show the source of information for each item contained in the record. The burden is on the objecting party to specify objections to the inadmissible parts of the report." Id.

In this matter, having concluded that the department's records qualify as business records and that it was improper for the trial court to exclude them under § 52-180, we now must determine whether the defendant is entitled to a new trial because the exclusion of the records prejudiced the defendant. In this inquiry, the party bearing the burden of demonstrating prejudice, or harmlessness, depends upon whether the improper evidentiary ruling was of constitutional magnitude. "When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense." (Internal quotation marks omitted.) *State*

[19] To the extent that the statements of the victim's foster parents are opinions of the victim's veracity, such statements are also subject to our well settled standards with regard to opinion evidence. "A witness' character for veracity may also be proved by opinion evidence of those who have formed an opinion as to the character of the witness with respect to truth and veracity. . . . Whether a witness has had sufficient contact with a person to be qualified to testify as to a particular character trait is a matter peculiarly within the discretion of the trial court . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Gould*, 241 Conn. 1, 19, 695 A.2d 1022 (1997).

v. *King*, 249 Conn. 645, 668, 735 A.2d 267 (1999). If such a constitutional right is implicated, "[t]he state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Conn*, 234 Conn. 97, 113, 662 A.2d 68 (1995). Conversely, if "the evidentiary impropriety is not constitutional in nature, the defendant bears the burden of demonstrating harm." *State* v. *Grenier*, 257 Conn. 797, 806–807, 778 A.2d 159 (2001).[20]

The defendant claims that the trial court's exclusion of the material adversely impacted his right to present a defense as protected by the federal and state constitutions.[21] In the alternative, the defendant contends that,

[20] "As we recently have noted, we have not been fully consistent in our articulation of the standard for establishing harm. . . . One line of cases states that the defendant must establish that it is more probable than not that the erroneous action of the court affected the result. . . . A second line of cases indicates that the defendant must show that the prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict." (Citations omitted; internal quotation marks omitted.) *State* v. *Grenier*, supra, 257 Conn. 807. Given that we conclude that the defendant has satisfied his burden of demonstrating harm under either of these standards, in the present context we need not resolve this split in authority.

[21] The sixth amendment to the United States constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

We have stated that "[t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." (Internal quotation marks omitted.) *State* v. *Sandoval*, 263 Conn. 524, 541–42, 821 A.2d 247 (2003).

Article first, § 8, of the constitution of Connecticut provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of

even if the exclusion of the evidence is not of constitutional magnitude, under our evidentiary standard of review in which the defendant bears the burden of demonstrating harmfulness, he can prevail. In response, the state, contending that the alleged impropriety does not rise to the level of a constitutional violation, asserts that the defendant has failed to demonstrate harm.

"Whether a trial court's erroneous restriction of [defense evidence] in a criminal trial deprives a defendant of his due process right to present a defense is a question that must be resolved on a case by case basis." *State* v. *Jones*, 205 Conn. 723, 731, 535 A.2d 808 (1988). Based upon the extensive cross-examination of the victim by the defendant,[22] we conclude that the trial court's exclusion of the department's records was not of constitutional magnitude and, accordingly, the defendant bears the burden of demonstrating harm.

On appeal, the defendant has shown harm flowing from the trial court's exclusion of the department's records and, accordingly, the defendant is entitled to a new trial. As our review of the trial transcript, in particular the testimony of the victim, and the records of the department that the defendant sought to admit into evidence demonstrates, much of the evidence contained within the department's files is qualitatively different from the other evidence used to impeach the victim at trial. Most glaringly, while much of the defendant's cross-examination of the victim centered upon the victim's misbehavior and propensity to lie in a gen-

the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf . . . and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. . . ."

Inasmuch as the defendant provides no independent analysis of his state constitutional claim, we limit our review to his federal constitutional claim. *State* v. *Sandoval*, supra, 263 Conn. 532 n.17.

[22] See footnote 14 of this opinion and accompanying text.

eral sense or in other instances, the information contained in the department's records evince, if believed by the trier of fact, a pattern of vacillations with regard to the very allegations of abuse for which the defendant was standing trial. Moreover, we are mindful that the records contain entries that indicate that the victim had remarked to several other individuals that she had begun to question whether her allegations of abuse were legitimate or whether she had imagined the incidents. At trial, the victim testified that she recalled making such a statement to her foster mother, but denied making such a statement to anyone else. When asked whether she had intimated such doubts to the individuals mentioned in the records, the victim responded in the negative. The records, therefore, would have been a particularly strong source of impeachment evidence as to the victim's credibility. Additionally, numerous entries in the records reference the victim's inconsistent statements with regard to the details of abuse, her statements that she would lie if she thought it necessary, and statements of the victim's physician as to the victim's capacity to distort reality and come to believe her distortions. These subjects are all highly relevant to the defendant's theory at trial: that the victim had concocted, intentionally or not, consciously or not, the allegations of abuse. This was not a case in which the state had numerous witnesses testify as to the allegations of abuse. The heart of the state's case against the defendant was the testimony of the victim and the testimony of witnesses to whom the victim had detailed her allegations of abuse.

Furthermore, our determination that the defendant was harmed by the trial court's exclusion of the department's records is guided by the various factors that we have articulated as relevant into the inquiry of evidentiary harmlessness. Whether an evidentiary error is harmless "depends upon a number of factors, such as

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) *State* v. *Rolon*, 257 Conn. 156, 174, 777 A.2d 604 (2001).

As to the first factor, the department's records contain material highly relevant to the accuracy of the testimony of the victim, the key witness for the state. Although the defendant did testify to the physical act of applying lotion to the victim's body on two occasions, the defendant denied fondling the victim's breasts or touching her for sexual gratification. The only evidence before the jury that the victim was fondled by the defendant, thereby meeting the element of "sexual contact" for the purposes of § 53a-73a (a) (1), came from the victim herself. With regard to the second factor, as indicated, we do not view the evidence contained in the department's records as cumulative because, the evidence is largely different in kind, and more focused upon the actual allegations of abuse, from the other credibility evidence that the defendant had used to impeach the victim. Moreover, the fact that there was a distinct dearth of evidence corroborating the testimony of the victim, and the fact that the department's records would serve to contradict her testimony, often through her own words, demonstrate that the state's case against the defendant was not particularly strong. Put simply, we believe the nature of the evidence contained in the department's records to be of a quality

such that the records may have a tendency to impact the determination of a jury as to the defendant's guilt or innocence and, therefore, their exclusion cannot be labeled as harmless.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court, and to remand the case to that court for a new trial.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* BRUCE R. CHRISTIAN, JR.
(SC 17010)

Sullivan, C. J., and Borden, Norcott, Katz and Vertefeuille, Js.

Syllabus

The defendant, who was convicted, after a jury trial, of manslaughter in the second degree, operating a motor vehicle while under the influence of intoxicating liquor and reckless driving in connection with a motor vehicle accident in which a female companion in the vehicle was killed, appealed. He claimed, inter alia, that the trial court improperly allowed the state to introduce certain evidence at trial. Prior to the accident, the defendant and the accident victim had been out drinking together and, at the time of the accident, they were riding in the victim's car. When the police arrived at the accident scene, the victim's car was resting under a railroad overpass, in a creek at the bottom of an embankment off the side of the road. The defendant was sitting in the creek with his back resting against the open driver's side door, and the victim, who was not wearing a seat belt, was located in the front passenger seat. At trial, the defendant did not contest the issue of his intoxication. He claimed, however, that the victim had been driving the vehicle at the time of the accident. The state sought to admit the testimony of J, the defendant's wife, regarding the defendant's statement to her, made while he was in the hospital on the night of the accident, that he had been driving the victim's car. The defendant filed a motion in limine to exclude J's testimony, claiming that his statement to J was a privileged marital communication. The trial court denied the defendant's motion and admitted J's testimony, concluding that the marital privilege did not apply because, by the time the statement was made and the time of trial, the defendant's marriage to J irretrievably had broken down. *Held:*

1. The trial court improperly allowed J to testify regarding the defendant's statement that he had been driving the victim's car at the time of the fatal accident: Connecticut recognizes the common-law marital communications privilege, which permits an individual to prevent a spouse or former spouse from testifying as to a confidential communication made by the individual to the spouse during their marriage, the defendant's statement here was made to J while the couple was living together as husband and wife, and the trial court did not conclude either that the state had overcome the presumption of confidentiality or that the communication was not confidential; the improper admission of the privileged testimony, however, constituted harmless error, this court not being able to say, in light of the volume of evidence presented by the state to establish that the defendant had been driving at the time of the accident, that the improperly admitted evidence affected the jury's verdict or that any prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict.
2. The trial court improperly excluded, as collateral and as violative of J's attorney-client privilege, certain proffered testimony by B regarding a conversation she had overheard between J and the attorney representing J in her divorce and custody action against the defendant, wherein they discussed the impact of the defendant's conviction in the present case on the divorce and custody proceedings, B's proffered testimony having related directly to the issue of J's motive, bias or interest in testifying that the defendant had admitted to being the driver at the time of the accident, and the overheard conversation, which was made in the presence of B, a third party, not having been protected by J's attorney-client privilege; nevertheless, the defendant having had the opportunity effectively to cross-examine J concerning her interest in the outcome of the litigation in the present case and having exposed numerous facts from which the jury could have concluded that J's testimony was tainted by motive, bias or interest, and J's testimony having been cumulative to a substantial amount of physical evidence, in addition to testimony by witnesses, indicating that the defendant had been the driver, the impropriety, which was evidentiary in nature rather than a violation of the defendant's constitutional rights, was harmless.
3. The defendant could not prevail on his claim that the trial court improperly had excluded from evidence the medical record forms filled out by the emergency personnel who treated him in the ambulance on his way to the hospital; the forms, which the defendant sought to introduce to support his claim that he was confused and disoriented when he made incriminating statements to the emergency personnel, were not admissible as prior inconsistent statements for the purpose of impeaching witnesses or as substantive evidence, the witnesses having testified at trial about their statements on the forms, and the information on the forms having been merely cumulative of their testimony.

Argued December 5, 2003—officially released March 9, 2004

Procedural History

Substitute information charging the defendant with the crimes of manslaughter in the second degree with a motor vehicle, operating a motor vehicle while under the influence of intoxicating liquor and reckless driving, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court, *Maloney, J.*, denied the defendant's motion to suppress and his motion in limine to exclude certain evidence; thereafter, the matter was tried to the jury before *Maloney, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Oliver B. Dickins, with whom, on the brief, was *Edward M. Henfey*, for the appellant (defendant).

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *James E. Thomas*, state's attorney, and *John H. Malone*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KATZ, J. The defendant, Bruce R. Christian, Jr., appeals[1] from the judgment of conviction, rendered after a jury trial, of manslaughter in the second degree with a motor vehicle in violation of General Statutes § 53a-56b (a),[2] operation of a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes (Rev. to 1999) § 14-227a (a) (2) (A), as

[1] The defendant appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] General Statutes § 53a-56b (a) provides: "A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug."

amended by No. 99-255, § 1, of the 1999 Public Acts,[3] and reckless driving in violation of General Statutes § 14-222 (a).[4] The defendant claims that the trial court improperly: (1) permitted the defendant's wife, Joan Christian, to testify, over the defendant's objection, regarding his confidential marital communications to her; (2) refused to admit the testimony of a certain witness to show that the defendant's wife had a motive for falsely testifying against the defendant; and (3) refused to admit emergency medical "run sheets," as either prior inconsistent statements, or under the business record exception to the hearsay rule, to impeach emergency personnel who testified for the state.

[3] General Statutes (Rev. to 1999) § 14-227a (a), as amended by No. 99-255, § 1, of the 1999 Public Acts, provides in relevant part: "No person shall operate a motor vehicle while under the influence of intoxicating liquor . . . . A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor . . . if such person operates a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property . . . (2) while such person has an elevated blood alcohol content. For the purposes of this section, 'elevated blood alcohol content' means (A) a ratio of alcohol in the blood of such person that is ten-hundredths of one per cent or more of alcohol, by weight . . . ."

References herein to § 14-227a (a) are to the 1999 revision, as amended by Public Act 99-255, § 1.

[4] General Statutes § 14-222 (a) provides in relevant part: "No person shall operate any motor vehicle upon any public highway of the state, or any road of any specially chartered municipal association or of any district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or in any parking area for ten cars or more or upon any private road on which a speed limit has been established in accordance with the provisions of section 14-218a or upon any school property recklessly, having regard to the width, traffic and use of such highway, road, school property or parking area, the intersection of streets and the weather conditions. The operation of a motor vehicle upon any such highway, road or parking area for ten cars or more at such a rate of speed as to endanger the life of any person other than the operator of such motor vehicle . . . shall constitute a violation of the provisions of this section."

Although we agree with the defendant's first two claims, we nevertheless conclude that the trial court's improprieties were harmless. We disagree with the defendant's third claim. Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the evening of March 17, 2000, the defendant went to a bar in Southwick, Massachusetts with the victim, Victoria Ryan, and the victim's roommate, Alexander Imperatrice. They arrived at the bar sometime between 9 and 9:30 p.m., whereupon the defendant, the victim and Imperatrice all consumed alcohol. At around 11 p.m., they left the bar and, with Imperatrice driving, proceeded to the victim's residence in Enfield, arriving there at approximately 11:30 p.m. Thereafter, the defendant and the victim told Imperatrice that they were "going back out," and at around 11:45 p.m., the two entered the victim's car, a 1996 Oldsmobile Cutlass Supreme, and drove off, with the victim driving.

Sometime after midnight, Debra Wilson was traveling on Suffield Street in Windsor Locks when she noticed that the car in front of her did not have its headlights illuminated. The headlights remained unlit for approximately one mile before becoming illuminated somewhere near the border between the towns of Windsor Locks and Suffield. As Wilson continued on Suffield Street into the town of Suffield, she noticed that the car in front of her had increased its speed and was "pulling away" from her, although she herself was traveling at a rate of ten or fifteen miles above the posted speed limit. Soon thereafter, Wilson lost sight of the other car's taillights.

As Wilson continued on Suffield Street in a northerly direction, the road curved sharply to the right and passed under a railroad overpass. As Wilson approached the overpass, she observed that the guard

posts along the left side of the road had been knocked down. She stopped her vehicle, whereupon she observed the victim's car resting under the railroad overpass, in a creek at the bottom of a six and one-half foot embankment off the side of the road, with steam rising from the front of the car. Wilson drove to her house, which was close to the scene of the accident, and called 911. She then returned to the accident scene and, standing at the edge of the embankment, pointed a flashlight at the victim's car. She yelled out that she had just called 911, and a male voice responded, "Thank you." According to Wilson, the voice sounded like it came from the male individual she observed sitting in the driver's seat, behind the steering wheel. Wilson asked the man if he was alright, and he responded, "We're okay." Wilson then asked how many people were in the car, and the man told her that there were two. Finally, Wilson asked him if they both were alright, and the man responded, "Yes, we're both okay." The police arrived at the scene shortly thereafter.

Officer Shawn Nelson of the Suffield police department arrived at the scene at approximately 12:50 a.m. on March 18, 2000. He identified himself as a police officer and, upon receiving no response from the occupants of the victim's car, made his way down the embankment to the vehicle. Sergeant David Bourque of the Suffield police department arrived shortly thereafter and joined Nelson at the bottom of the embankment. Nelson and Bourque both observed that the car's driver's side door was open, and that the defendant was sitting in the creek, unconscious, with his back against the open driver's side door and his body slumped forward into the driver's seat area. Through the window of the closed passenger's side door, Bourque observed that the victim "was in the passenger seat with her buttocks fully in the seat." Nelson forced open the passenger's side door, which was jammed shut, and he and

Bourque observed that the victim was seated in the passenger seat with her body slumped forward toward the vehicle's center console, which was completely destroyed. She was not wearing a seat belt. The victim did not make any movement, nor did she respond to Nelson's questions asking if she was alright.

Nelson and Bourque soon were joined by other emergency personnel, including several firefighters and Deidre Vorih, an emergency medical technician. Vorih observed that the defendant still was sitting in the creek, unconscious and leaning against the open driver's side door. She revived the defendant, who appeared confused. After ascertaining that the defendant was able to use his legs, Vorih instructed him to get out of the creek and wait in the driver's seat of the car while she tended to the victim.

Because the victim was not breathing and had no pulse, the emergency personnel had to remove her from the vehicle to perform cardiopulmonary resuscitation (CPR) on her. The victim was a relatively large woman, approximately five feet eight inches tall and weighing approximately 200 pounds, and it took the concerted efforts of Nelson, Vorih and two or three firefighters to remove her from the car and carry her up the embankment. CPR was performed on the victim, who never regained consciousness. She was transported by ambulance to Hartford Hospital.

Vorih then tended to the defendant while they waited for a second ambulance to arrive to transport him to the hospital. She observed that the defendant was "much more lucid" than he had been earlier, and that he was able to answer her questions regarding his medical history. After the second ambulance arrived at the scene, Vorih and another emergency medical technician, Nicole Ruggiero, accompanied the defendant to Hartford Hospital. On the way to the hospital the ambu-

lance stopped to pick up Tonya Ford, a paramedic, who also accompanied the defendant to the hospital. In the course of the ride to the hospital, the defendant told both Vorih and Ruggiero that, before the accident, he had been at a friend's house, and that he had been driving to a bar in Southwick, Massachusetts. He also told them that he had been in a previous car accident five weeks earlier, and was taking prescription pain medication for injuries sustained in that accident. With regard to the previous accident, Vorih asked the defendant, "Were you driving then too?" The defendant responded, "Yeah, I was driving then, too." In addition, the defendant repeatedly told Vorih, Ruggiero and Ford that he had been driving the victim's car at the time of the accident at issue in the present case, and that he had been wearing his seat belt.

When the ambulance arrived at Hartford Hospital, the defendant was examined by a trauma team headed by Orlando C. Kirton, a general surgeon, who determined that the defendant had sustained several injuries, including a broken left clavicle, or collarbone, with accompanying abrasions and bruising to the upper left side of his chest, a broken bone in his right hand, two broken toes in his right foot and a bruise on his right hip. The defendant's blood was drawn, revealing that he had a blood alcohol level of 0.20, twice the legal limit. See footnote 3 of this opinion. The defendant told Robert Beginsky, a junior resident physician and part of the trauma team on duty at Hartford Hospital when the defendant was admitted, that he did not remember the accident or whether he had been the driver or the passenger. Beginsky noted that the defendant initially had stated that he thought he had been the passenger.

The victim was pronounced dead at Hartford Hospital at 1:42 a.m. on March 18, 2000. The cause of death was "multiple blunt traumatic injuries," including "multiple

rib and sternal fractures . . . .”[5] The defendant subsequently was charged by substitute information with manslaughter in the second degree with a motor vehicle in violation of § 53a-56b (a), operation of a motor vehicle while under the influence of intoxicating liquor in violation of § 14-227a (a) (2) (A), and reckless driving in violation of § 14-222 (a). See footnotes 2 through 4 of this opinion.

At trial, the defendant did not contest that he was intoxicated on the evening of March 17, 2000. Rather, the defendant argued that the victim had been driving her car at the time of the accident and that he had been in the passenger seat. The state presented the testimony of Vorih, Ruggerio and Ford, all of whom testified that the defendant repeatedly had told them that he had been driving at the time of the accident. The state also presented the testimony of the defendant's estranged wife, Joan Christian, who testified, over the defendant's objection, that the defendant had told her that he had been driving at the time of the accident.

In addition, the state presented evidence concerning the circumstances of the accident. Specifically, Bourque testified that, on the basis of the “crush” damage to the vehicle and the location of paint chips from the victim's vehicle on the stone trestle wall of the railroad overpass, he determined that the vehicle had been moving at a speed of approximately fifty miles per hour when it hit the wall at a 73 degree angle, and that it then had rotated approximately 88 degrees before coming to rest at the bottom of the embankment. After comparing the circumstances of the accident to video recordings of professional crash tests, which were shown to the jury,

[5] A postmortem external examination by Ira Kanfer, a pathologist from the office of the chief medical examiner, indicated that the victim also had sustained multiple abrasions and lacerations to her face and right arm, some abrasions and lacerations to her left arm and abrasions and bruising to her lower legs.

Bourque characterized the collision as a frontal impact. On the basis of the crash test video recordings, the frontal impact collision, the weight of the victim, the victim's position in the passenger seat and Wilson's statement to the police that she had witnessed a male seated in the driver's seat, Bourque testified with a reasonable degree of certainty that the defendant had been driving at the time of the accident.

Bourque also testified, with the aid of a videotaped reenactment that was shown to the jury, that due to the intense damage to the vehicle, a woman of the victim's height and weight could not have moved from the driver's seat into the passenger's seat after the vehicle had come to rest. Finally, Bourque testified that the driver's side seat belt, which was shown to the jury, had suffered structural damage and was found in a retracted and "locked" position. In contrast, the passenger's side seat belt was not found in a locked position.

Ira Kanfer, a pathologist from the office of the chief medical examiner, testified that the injury to the victim's right arm was consistent with the type of injury that occurred to people located on the passenger side of motor vehicles. He also testified that the defendant's injury to his left clavicle and the bruising of his right hip were consistent with injuries that might be caused by a driver's side seat belt, "because the [driver's] seat belt comes over your left shoulder" and "[t]he buckle is put on the right hip."

John Kwasnoski, an accident reconstruction expert, testified that, once the car had hit the trestle wall, it took less then one second for the car to go down the embankment. Kwasnoski further testified that, under the circumstances of the accident, which he also characterized as a frontal impact, the "natural tendency" would be for the occupants of the car to move "very much forward and slightly to the right . . . ." There-

fore, it was Kwasnoski's opinion that, if the driver of the car had been wearing a seat belt, it would have been impossible for the driver to shift into the passenger seat. He further testified that, in the present case, there was no evidence that the driver had been unrestrained. Kwasnoski also testified that the occupants' slight movement to the right similarly would have been restricted by the frontal air bags, which had deployed during the accident. Finally, Kwasnoski testified that he did not believe that the victim could have hit the steering wheel—which was obstructed by an air bag—and "then somehow rebound[ed] from that and [gone] sideways and [gotten] both her upper body and her feet over on the other side of the console." Rather, he believed that the injuries to the victim's chest had been caused by her body moving forward, at a high rate of speed, into an air bag as it deployed at a rate of more than 100 miles per hour.

In the defendant's case-in-chief, Eugene Baron, an accident reconstruction expert, testified that, based on the severe damage to the interior of the vehicle and the injuries sustained by its occupants, it was "more probable" that the victim, and not the defendant, had been the driver. Specifically, Baron testified that the severe damage to the vehicle's steering column and steering wheel probably had been caused by "an occupant [who had] sustained very severe chest and facial trauma." He further stated that the steering wheel rim significantly had been bent toward the dashboard, indicating that the driver of the vehicle had not been wearing a seat belt. In addition, Baron stated that the driver's side seat belt had not sustained the type of deformation or other damage that customarily would be found after a high-speed collision. Baron testified that he had observed blood on the driver's side air bag, the center of the steering wheel rim, the dashboard and the passenger side door panel. He also testified that the damage to

the dashboard on the passenger's side of the vehicle was consistent with the injury to the defendant's right hand. Finally, Baron testified that the vehicle had rotated clockwise approximately 90 degrees after hitting the trestle wall, and that any "objects" in the car, including its occupants, would have been propelled toward the right side of the vehicle during the rotation.

The defendant also presented Robert Fisher, the defendant's treating physician, who testified that the injury to the defendant's left clavicle "could not have been caused by a seat belt with any reasonable medical probability." In addition, the defendant presented the expert testimony of Ricardo Sanchez, chairman and assistant director of emergency medicine at Saint Francis Hospital and Medical Center in Hartford, who testified that the victim's chest injury could not have been caused by an impact with a deploying air bag, but "may have" been caused by traumatic contact with "some blunt object, such as the steering wheel or some other part of the vehicle." Sanchez further testified that anxiety, intoxication or discomfort could cause a patient to make an incorrect statement to a treating paramedic.

The jury returned a verdict of guilty on all three counts. Thereafter, the trial court rendered judgment in accordance with the verdict and imposed on the defendant a total effective sentence of ten years and seven months imprisonment, suspended after eight years and seven months, five years probation and a $500 fine. This appeal followed. Additional facts will be set forth as necessary.

I

We first address the defendant's claim that the trial court improperly permitted the defendant's wife, Joan Christian, to testify, over his objection, regarding his confidential communications to her. The following facts and procedural history are relevant to our resolution of this claim. In the early hours of March 18, 2000,

Joan Christian was finishing her shift as a waitress at a restaurant in Avon when she received a telephone call informing her of the defendant's accident. She immediately went to Hartford Hospital, where she was greeted by Imperatrice, a chaplain and several physicians, who told her that the victim had died in the accident and that they believed that the defendant had been the driver of the vehicle involved. After consulting with the physicians, Joan Christian went, by herself, to the defendant's hospital room to inform him that the victim had died. When she arrived, the defendant quietly told her that he had been driving the vehicle, and he then made motions with his hands as though he were operating a steering wheel. Joan Christian quickly covered the defendant's hands with her own and "hushed" him, ostensibly to prevent him from making any further incriminating statements. Imperatrice and the physicians entered the room immediately thereafter. The defendant made no further incriminating remarks.

At trial, the state offered Joan Christian as a witness. She testified, upon voir dire, that at the time of trial, she and the defendant were separated and in the process of getting divorced. She further testified, however, that at the time of the accident in March, 2000, although she and the defendant still were living together, the marriage "was very rocky" and that it "went downhill" after the night of the accident. Finally, she testified that the marriage was over and that she did not feel that preserving the confidentiality of the defendant's statement would have any effect on repairing the marriage.

The defendant filed a motion in limine seeking to prevent Joan Christian from testifying about this communication on the ground that it was a privileged confidential marital communication. Specifically, the defendant argued that, although no Connecticut case expressly has recognized the existence of the marital communications privilege, the dictum of this court's

opinion in *State* v. *Littlejohn*, 199 Conn. 631, 649, 508 A.2d 1376 (1986), indicates that the privilege "has seemingly been accepted" by the courts of this state. The defendant further argued that the marital communications privilege was applicable to the present case because the communication had been "made during [the] marriage, out of the presence of third parties . . . ." In response, the state argued that, regardless of whether the privilege was available, the communication was not confidential, and thus, not privileged, because the defendant previously had made similar communications to Vorih, Ruggiero and Ford while riding in the ambulance to the hospital. The state further argued that application of the privilege would be inappropriate because the marriage between the defendant and his wife was "rocky" at the time of the communication, and that they were separated at the time of trial and in the process of getting divorced. The state argued, therefore, that any harm that disclosure might cause to the defendant's marital relationship was outweighed by the interest of the court and of society in "this judicial investigation of the truth."

The trial court denied the defendant's motion in limine. Although the court concluded that the marital communications privilege "may exist in certain circumstances," it determined that the privilege did not apply in the present case because the marriage irretrievably had broken down. Specifically, the court stated: "[B]ased on the dictum in *Littlejohn*, certainly this court will not say that no such privilege exists in Connecticut even though it is not set forth in a statute. I think our Supreme Court strongly indicates that the privilege does exist under some circumstances. Certainly there must be a marriage in effect; certainly the communication must be confidential, must have been made confidentially so that other people were not privy to it. And those circumstances seem to be present here. Although,

with respect to the confidential nature of the communication, I think that may be questioned in view of the evidence that we have heard, that the defendant essentially made the same inculpatory statement to other people before he made the statement to his wife. But I think the overriding factor in the circumstances of this case is that at the time the statement was made, but most importantly now, at the time of trial, the marriage relationship exists in name only, de jure, we might say, but not de facto. In my opinion, the marriage relationship has so broken down that at present the marital privilege, if it existed, has lost its purpose and must, therefore, give way to the competing strong interest of justice; namely, that relevant and material evidence be presented to a jury so that the jury can make a correct decision based on the facts." Consequently, Joan Christian testified concerning the communication.

On appeal, the defendant revives his argument to the trial court that the marital communications privilege is alive and well in Connecticut. Specifically, the defendant claims that, although neither the courts nor the legislature explicitly have recognized such a privilege, "the case law and the statutory history . . . show that this privilege is well recognized." The defendant therefore contends that the trial court improperly precluded the defendant from asserting the privilege concerning the communication, which had been made in confidence and while the couple was living together and in a legally valid marital relationship. In response, the state urges us not to recognize the marital communications privilege because "the cost of recognizing the common law . . . privilege exceeds its dubious benefits." Rather, the state contends, the legislature has enacted "a reasonable compromise" by codifying the separate and distinct adverse marital testimonial privilege in General Statutes § 54-84a.[6] The state further argues that,

[6] General Statutes § 54-84a provides: "If any person on trial for crime has a husband or wife, he or she shall be a competent witness but may elect

even if we recognize the marital communications privilege, it is inapplicable in the present case because the defendant's previous statements to Vorih, Ruggiero and Ford rendered his communication to his wife not confidential. We agree with the defendant.

We note at the outset that evidentiary privileges are governed by § 5-1 of the Connecticut Code of Evidence, which provides: "Except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book, privileges shall be governed by the principles of the common law." The adverse spousal testimony privilege, which is codified at § 54-84a, belongs to the "witness spouse." *State* v. *Saia*, 172 Conn. 37, 43, 372 A.2d 144 (1976). Under that privilege, the husband or wife of a criminal defendant has a privilege not to testify against his or her spouse in a criminal proceeding, provided that the couple is married at the time of trial. See id.; *State* v. *Volpe*, 113 Conn. 288, 290, 155 A. 223 (1931); see also C. Tait, Connecticut Evidence (3d Ed. 2001) § 5.34.1, pp. 325–26. The marital communications privilege, on the other hand, "permits an individual to refuse to testify, and to *prevent* a spouse or former spouse from testifying, as to any confidential communication made by the individual to the spouse during their marriage."[7] (Emphasis added.) *United States* v. *Rakes*, 136

or refuse to testify for or against the accused, except that either spouse who has received personal violence from the other or is the spouse of one who is charged with violation of any of sections 53-20, 53-21, 53-23, 53-304, 53a-70, 53a-70a, 53a-71 and 53a-83 to 53a-88, inclusive, may, upon his or her trial for offenses arising out of such personal violence or from violation of the provisions of any of said sections, be compelled to testify in the same manner as any other witness."

[7] "Although Connecticut has never ruled whether either spouse can invoke the privilege or only the communicating spouse can do so, the proper holder would seem to be the communicating spouse, since the privilege is based on the policy of encouraging free expression." C. Tait, supra, § 5.35.1, p. 329; see also 1 C. McCormick, Evidence (5th Ed. 1999) § 83, p. 336 (supporting argument that privilege belongs to communicating spouse). We are aware, however, that most state statutes confer the privilege upon *either* spouse

F.3d 1, 3 (1st Cir. 1998); see also *Trammel* v. *United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (marital communications privilege "protect[s] information privately disclosed between husband and wife in the confidence of the marital relationship"); 1 C. McCormick, Evidence (5th Ed. 1999) §§ 78 through 86, pp. 323–42; C. Tait, supra, §§ 5.35.1 through 5.35.5, pp. 328–31. Because the marital communications privilege is not addressed squarely by either the federal constitution, state constitution, General Statutes or Practice Book, it is governed by the principles of the common law. See Conn. Code Evid. § 5-1.

In *State* v. *Littlejohn*, supra, 199 Conn. 649, this court stated: "We have never explicitly held that confidential communications between husband and wife are privileged under the common law of this jurisdiction. Our early case of *State* v. *Hoyt*, 47 Conn. 518 (1880), strongly suggests that the *Hoyt* court felt that there was such a privilege. See [id.], 540.[8] The later case of *Spitz's Appeal*

to refuse to testify, prevent the other spouse from testifying, or both, concerning *any* confidential communication between them. Indeed, only five statutes expressly limit the privilege to the communicating spouse. See Ky. R. Evid. Ann. 504 (b) (Michie 2004) ("made by the individual to his or her spouse"); Me. R. Evid. 504 (b) (West 2003) ("from such person to the spouse"); N.M. R. Evid. Ann. 11-505 (B) (Michie 2003) ("by that person to that person's spouse"); R.I. Gen. Laws § 9-17-13 (1997) ("neither [spouse] shall be permitted . . . to disclose any communication made to him or her, by the other, during their marriage"); Tex. R. Evid. 504 (a) (2) (West 2003) ("made to the person's spouse"). In the present case, however, we need not decide whether the privilege is available to either spouse, or just to the communicating spouse, because the defendant was the communicating spouse and would be entitled to assert the privilege in either respect.

[8] "In *State* v. *Hoyt*, [supra, 47 Conn. 518], the defendant husband was charged with the murder of his father. At the trial, the state had possession of several letters written by the defendant to his wife, (how obtained or whether they were ever in the wife's possession did not appear), which were offered into evidence by the state as containing admissions inconsistent with the defendant's testimony in court with his insanity claim. Id., 540. The court admitted them over the defendant's objection that they were confidential communications between husband and wife.

"On appeal, this court found that doing so violated no rule of evidence and went on to say: The question was not whether the husband or wife

from Commissioners, 56 Conn. 184, 14 A. 776 (1887), clearly hypothesizes such a privilege." In *Littlejohn*, the defendant sought to assert the marital communications privilege to prevent his wife from testifying as to some twenty-five or thirty confidential communications. *State* v. *Littlejohn*, supra, 648–49. This court concluded that, "[a]lthough the confidential communications involved may have been admitted in error, any error was harmless." Id., 650. Accordingly, we did not answer the question of whether the marital communications privilege existed under our common law. We remarked, nonetheless, that the privilege for confidential marital communications "commends itself to judicial acceptance." Id., 649.

"[T]he rules of privilege, of which the most familiar are the rule protecting against self-incrimination and those shielding the confidentiality of communications between husband and wife, attorney and client, and physician and patient, are not designed or intended to facilitate the fact-finding process or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light." 1 C. McCormick, supra, § 72, p. 299. Privileges have "the effect of withholding relevant information from the factfinder . . . . Accordingly, although a . . . privilege must be applied so as to effectuate its purpose, it is to be applied cautiously and with circumspection because it impedes the truth-seeking function

could have been compelled to produce the evidence, but whether, when the letters fell into the hands of a third person, *the sacred shield of the privilege went with them.* We think not. 1 Greenl. Ev., § 284a. . . . [*State* v. *Hoyt*, supra, 47 Conn. 540].

"The citation to Professor Greenleaf's treatise by the *Hoyt* court is provocative in view of the fact that Greenleaf had earlier, in 1842, announced the existence of a distinct privilege [apart from marital status] for marital communications . . . . McCormick, Evidence (3d Ed. 1984) § 78, pp. 188–89." (Emphasis in original; internal quotation marks omitted.) *State* v. *Littlejohn*, supra, 199 Conn. 649 n.13.

of the adjudicative process." (Internal quotation marks omitted.) *State* v. *Montgomery*, 254 Conn. 694, 724, 759 A.2d 995 (2000). A privilege should be recognized, therefore, only if four essential conditions have been met: "(1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." 8 J. Wigmore, Evidence (1961) § 2285, p. 527.

The principles underlying the marital communications privilege are well recognized. "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails. . . . Hence it is that the privilege with respect to communications extends to the testimony of husband or wife even though the different privilege, excluding the testimony of one against the other, is not involved." (Citations omitted.) *Wolfle* v. *United States*, 291 U.S. 7, 14, 54 S. Ct. 279, 78 L. Ed. 617 (1934). The marital communications privilege protects "information privately disclosed between husband and wife in the confidence of the marital relationship—once described . . . as 'the best solace of human existence.' " *Trammel* v. *United States*, supra, 445 U.S. 51, quoting *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839). The privilege has been described as "almost sacrosanct . . . ." *Johnson* v. *United States*, 616 A.2d 1216, 1224 (D.C. App. 1992), cert. denied, 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172 (1993). "[T]he primary purpose of the

confidential marital communication privilege is to foster marital relationships by encouraging confidential communication between spouses . . . .'' *Curran* v. *Pasek*, 886 P.2d 272, 276 (Wyo. 1994). The privilege ''permit[s] a husband and wife to communicate freely with one another without fear that their communications will be used against them at some future date.'' G. Sodaro & P. Wilson, ''Spousal Privileges,'' in 2 Testimonial Privileges (S. Stone & R. Taylor eds., 2d Ed. 1995) § 5.07, p. 5-11. ''We encourage married people to confide in each other by protecting their statements from later scrutiny in court.'' *United States* v. *Lea*, 249 F.3d 632, 641 (7th Cir. 2001).

It therefore is apparent that the purposes underlying the marital communications privilege asserted by the defendant are quite different from those supporting the separate and distinct privilege against adverse spousal testimony relied upon by the state. ''The [adverse spousal testimony] privilege looks forward with reference to the particular marriage at hand: the privilege is meant to protect against the impact of the testimony on the marriage. The marital communications privilege in a sense, is broader and more abstract: it exists to insure that spouses generally, prior to any involvement in criminal activity or a trial, feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law.'' *United States* v. *Byrd*, 750 F.2d 585, 590 (7th Cir. 1984); see also *State* v. *Adamson*, 72 Ohio St. 3d 431, 433, 650 N.E.2d 875 (1995) (''[s]pousal privilege and spousal competency are distinct legal concepts which interrelate and provide two different levels of protection for communications between spouses''). We therefore are not persuaded by the state's assertion that the privilege against adverse spousal testimony, codified at § 54-84a, alone is sufficient to protect the interests of open communication in the marital relationship. Accordingly, we reaffirm our statement in *State*

v. *Littlejohn*, supra, 199 Conn. 649, that the marital communications privilege "commends itself to judicial acceptance," and we expressly accept that privilege as a fixture of our common law.

Our conclusion, recognizing the existence of a privilege for confidential marital communications, aligns us with every other jurisdiction in the country.[9] Connecticut is unique among its sister states, which each have a statute or a rule of evidence expressly providing for the privilege.[10] Even when the marital communications

[9] The legislature, moreover, implicitly has recognized the existence of a separate and distinct privilege for confidential marital communications. See General Statutes § 46b-129a (3) ("the privilege against the disclosure of communications between husband and wife shall be inapplicable [to proceedings concerning commitment of child or youth] and either may testify as to any relevant matter"); General Statutes (Rev. to 1997) § 46b-203 ("[l]aws attaching a privilege against the disclosure of communications between husband and wife" were inapplicable to proceedings for spousal support), repealed, effective January 1, 1998, by Public Acts, Spec. Sess., June, 1997, No. 97-1, §§ 74 and 75.

[10] See Ala. R. Evid. 504 (1996); Alaska R. Evid. 505 (b) (West 2003); Ariz. Rev. Stat. Ann. § 12-2232 (West 2003); Ark. Court Rules Ann., Evid. 504 (LexisNexis 2003); Cal. Evid. Code § 980 (Deering 1986); Colo. Rev. Stat. Ann. § 13-90-107 (LexisNexis 2003); Del. Rules Ann. 504 (Michie 2003); D.C. Code Ann. § 14-306 (b) (2001); Fla. Stat. c. 90.504 (2002); Ga. Code Ann. § 24-9-21 (1) (1995); Haw. R. Evid. 505 (b) (2003); Idaho Code § 9-203 (1) (Michie 1998); 725 Ill. Comp. Stat. Ann. § 5/115-16 (West 2002); Ind. Code Ann. § 34-46-3-1 (4) (Lexis 1998); Iowa Code § 622.9 (2001); Kan. Stat. Ann. § 60-423 (b) (1994); Ky. R. Evid. Ann. 504 (b) (Michie 2004); La. Code Evid. Ann. art. 504 (B) (West 1995); Me. R. Evid. 504 (West 2003); Md. Code Ann., Cts. & Jud. Proc. § 9-105 (2002); Mass. Gen. Laws Ann. c. 233, § 20 (LexisNexis 2000); Mich. Comp. Laws § 600.2162 (7) (2001); Minn. Stat. Ann. § 595.02 (1) (a) (West 2000); Miss. R. Evid. 504 (1999); Mo. Rev. Stat. § 546.260 (1) (2000); Mont. Code Ann. § 26-1-802 (2003); Neb. Rev. Stat. § 27-505 (1) (1995); Nev. Rev. Stat. 49.295 (1) (b) (2001); N.H. R. Evid. 504 (2003-2004); N.J. Stat. Ann. § 2A:84A-22 (West 1994); N.M. R. Evid. Ann. 11-505 (Michie 2003); N.Y. C.P.L.R. 4502 (b) (McKinney 1992); N.C. Gen. Stat. § 8-57 (c) (2003); N.D. Court Rules Ann., Evid. 504 (LexisNexis 2002-2003); Ohio Rev. Code Ann. §§ 2317.02 (D) and 2945.42 (West 1994); Okla. Stat. Ann. tit. 12, § 2504 (West 1993); Or. Rev. Stat. § 40.255 (2) (1988); 42 Pa. Cons. Stat. Ann. § 5914 (West 2000); R.I. Gen. Laws § 9-17-13 (1997); S.C. Code Ann. § 19-11-30 (Law. Co-op. 1985); S.D. Codified Laws § 19-13-13 (Michie 1995); Tenn. Code Ann. § 24-1-201 (c) (2000); Tex. R. Evid. 504 (a) (West 2003); Utah Code Ann. § 78-24-8 (1) (a) (2002); Vt. R. Evid. 504 (LexisNexis 2003); Va. Code Ann.

privilege is a product of legislative fiat, however, courts have continued to recognize the strong common-law roots of the privilege. See, e.g., *State* v. *Gianakos*, 644 N.W.2d 409, 415 (Minn. 2002) ("despite the statutory nature of Minnesota's marital privilege, its roots are in the common law"); *State* v. *Holmes*, 330 N.C. 826, 828, 412 S.E.2d 660 (1992) ("[t]he common law has long recognized a privilege protecting confidential marital communications, that is, information privately disclosed between a husband and wife in the confidence of the marital relationship"); see also 1 C. McCormick, supra, § 78, p. 325 ("statutes protecting marital communications from disclosure are declaratory of the common law"). The federal courts, moreover, continue to recognize and apply the privilege as a matter of federal common law. See *Trammel* v. *United States*, supra, 445 U.S. 45 n.5, 51 (recognizing marital communications privilege); *United States* v. *Westmoreland*, 312 F.3d 302, 306 (7th Cir. 2002) ("[t]he marital communications privilege is well-established in the federal courts"), cert. denied, 538 U.S. 1042, 123 S. Ct. 2094, 155 L. Ed. 2d 1077 (2003); see also Fed. R. Evid. 501 (providing that "privileges . . . shall be governed by the principles of the common law").

As we have stated, the marital communications privilege permits an individual to prevent his or her spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. In the present case, it is uncontroverted that the statement made by the defendant to his wife, along with the accompanying gesticulations, were "communications."[11] Accordingly, we must determine:

§ 8.01-398 (A) (Michie 2000); Wash. Rev. Code § 5.60.060 (1) (2002); W. Va. Code § 57-3-4 (Michie 1997); Wis. Stat. § 905.05 (2001-2002); Wyo. Stat. Ann. § 1-12-101 (a) (iii) (LexisNexis 2003).

[11] In general, for purposes of the marital communications privilege, the word "communications" includes "utterances or expressions intended to convey information between spouses." *In re Witness Before the Grand Jury*, 791 F.2d 234, 239 (2d Cir. 1986). "[A]lthough communication need not involve

(1) whether the defendant had made those communications to his wife during their marriage; and (2) whether those communications were confidential.

We begin our analysis by determining whether the defendant had made the communications to his wife while the couple were in a valid marital relationship. In the present case, the trial court determined that the marital communications privilege, if it existed, was inapplicable because "at the time the statement was made, but most importantly now, at the time of trial," the defendant's marriage irretrievably had broken down. The state contends that the trial court's decision was proper, because the defendant's marriage was "beyond repair" both at the time the statement was made and at the time of trial.[12] The defendant claims that the trial court improperly refused to apply the privilege. Specifically, he claims that the trial court's focus was imprecise because the privilege attaches at the time that the confidential statement was made, and if made during the marriage, the privilege survives the dissolution of the marriage. We agree with the defendant.

"[T]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When,

words, it must involve more than observation by one person of the conduct of another; it must involve the attribution of a message or meaning to that conduct. Whether particular sounds, gestures, or actions constitute 'communications' depends in large measure on the context in which they occur." *Commonwealth* v. *Chiappini*, 566 Pa. 507, 518, 782 A.2d 490 (2001); see also 1 C. McCormick, supra, § 79, pp. 327–29; C. Tait, supra, § 5.35.3, p. 330.

[12] At oral argument before this court, however, the state conceded that the application of the marital communications privilege focuses on the marital relationship at the time of the communication, and not at the time of trial.

however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 7, 826 A.2d 1088 (2003). In the present case, the trial court's determination that the marital communications privilege does not apply to existent marriages that irretrievably have broken down was a conclusion of law. Thus, our limited task, in connection with the first prong of the test, is to decide whether, based on the facts set forth in the record, the trial court's conclusion of law was legally and logically correct. See id.

For the marital communications privilege to apply, the communications must have been made in confidence *during the marriage*. Once the marital communications privilege has attached, moreover, it continues to survive even after the marriage has ended. See *Pereira* v. *United States*, 347 U.S. 1, 6, 74 S. Ct. 358, 98 L. Ed. 435 (1954) ("divorce . . . does not terminate the privilege for confidential marital communications"); see also 1 C. McCormick, supra, § 85, p. 339 ("about one-half of the statutes codifying the [marital communications] privilege explicitly provide that it continues after death or divorce");[13] C. Tait, supra, § 5.35.4, p.

[13] Almost one half of the marital communications privilege statutes codified by our sister states expressly provide that the privilege continues after the end of the marriage. See Alaska R. Evid. 505 (b) (1) (West 2003); Ariz. Rev. Stat. Ann. § 12-2232 (West 2003); Cal. Evid. Code § 980 (Deering 1986); Colo. Rev. Stat. Ann. § 13-90-107 (1) (a) (II) (LexisNexis 2003); Fla. Stat. c. 90.504 (1) (2002); Idaho Code § 9-203 (1) (Michie 1998); Iowa Code § 622.9 (2001); La. Code Evid. Ann. art. 504 (B) (West 1995); Mich. Comp. Laws § 600.2162 (7) (2001); Minn. Stat. Ann. § 595.02 (1) (a) (West 2000); Miss. R. Evid. 504 (b) (1999); Mont. Code Ann. § 26-1-802 (2003); Neb. Rev. Stat. § 27-505 (1) (1995); Nev. Rev. Stat. 49.295 (1) (b) (2001); N.J. Stat. Ann. § 2A:84A-22 (West 1994); Ohio Rev. Code Ann. § 2317.02 (D) (West 1994); Tex. R. Evid. 504 (a) (2) (West 2003); Utah Code Ann. § 78-24-8 (1) (a) (2002); Vt. R. Evid. 504 (b) (LexisNexis 2003); Va. Code Ann. § 8.01-398 (A) (Michie 2000); Wash. Rev. Code § 5.60.060 (1) (2002); W. Va. Code § 57-3-4

330 (marital communications privilege continues after divorce and death of spouse). In other words, the privilege focuses on the marital relationship between the spouses *at the time that the communication was made*, and not at the time of trial.

As we have noted, the marital communications privilege was founded upon the strong policy of preserving the marital relationship through the fostering of confidences between spouses. This policy applies with equal force to preserve *all* legally valid marriages, irrespective of marital difficulties.[14] "Indeed, the reasons justifying

(Michie 1997); Wis. Stat. § 905.05 (1) (2001-2002).

In the absence of such statutory language, many courts have recognized, under the common law, that the privilege attaches to confidential communications made during the marriage and continues to apply after the marriage has ended by reason of death or divorce. See, e.g., *Hall* v. *State*, 720 So. 2d 1043, 1048 (Ala. Crim. App. 1998) ("the [marital communications] privilege survives both divorce and death" [internal quotation marks omitted]); *Shepherd* v. *State*, 257 Ind. 229, 234, 277 N.E.2d 165 (1971) ("divorce does not remove the privilege as to confidences which were communicated between the parties during their coverture"); *State* v. *Glover*, 219 Kan. 54, 57, 547 P.2d 351 (1976) ("the privilege given to an accused against disclosure of confidential communications made during marriage survives dissolution of the marriage"); *Commonwealth* v. *May*, 540 Pa. 237, 249, 656 A.2d 1335 (1995) (marital communications privilege "remains in force even after death or divorce"); *Curran* v. *Pasek*, supra, 886 P.2d 276 ("[T]he confidential marital communications privilege survives the death of either spouse. To rule otherwise would thwart the very purpose of the . . . privilege.").

[14] Federal courts have held that the marital communications privilege does not apply to married couples who, at the time of the communication, were permanently separated; *United States* v. *Singleton*, 260 F.3d 1295, 1298–99 (11th Cir. 2001); *United States* v. *Porter*, 986 F.2d 1014, 1018–19 (6th Cir.), cert. denied, 510 U.S. 933, 114 S. Ct. 347, 126 L. Ed. 2d 312 (1993); *United States* v. *Frank*, 869 F.2d 1177, 1179 (8th Cir.), cert. denied, 493 U.S. 839, 110 S. Ct. 121, 107 L. Ed. 2d 82 (1989); *United States* v. *Byrd*, supra, 750 F.2d 593; or were permanently separated and had no hope of reconciling. *United States* v. *Roberson*, 859 F.2d 1376, 1381 (9th Cir. 1988); *In re Witness Before the Grand Jury*, 791 F.2d 234, 238 (2d Cir. 1986).

The state, relying on one such case, *United States* v. *Singleton*, supra, 260 F.3d 1300, contends in its brief that "[w]hen a marriage . . . is beyond repair, suppressing relevant evidence, when the spouse is willing to testify, does nothing to support the marriage." In *Singleton*, however, the court expressly held that "society's interest in protecting the confidentiality of

the marital communications privilege—encourag[ing] marital partners to share their most closely guarded secrets and thoughts, thus adding an additional measure of intimacy and mutual support to the marriage—apply with equal force to married couples who, despite the appearance to outsiders of an irretrievably broken marriage, may still share hopes of reconciliation." (Internal quotation marks omitted.) *Blazek* v. *Superior Court*, 177 Ariz. 535, 539–40, 869 P.2d 509 (App. 1994). We conclude, therefore, that the marital communications privilege applies to the present case.

Although the defendant's marriage may have been acrimonious at the time that he had made the communications to his wife, the marital communications privilege nonetheless was valid. Furthermore, because the focus is on the status of the marital relationship at the time of the communication, their marital status at the time of trial was immaterial. Accordingly, we conclude that the defendant's communications to his wife, made while the couple was living together as husband and wife, were subject to the marital communications privilege insofar as those communications were confidential.

We next focus our analysis on the question of whether the communications were confidential. The state contends that the trial court's denial of the defendant's

the relationships of *permanently separated* spouses is outweighed by the need to secure evidence in the search of truth that is the essence of a criminal trial, and that proof of *permanent separated* states at the time of the communication between the defendant and the defendant's spouse renders the communications privilege automatically inapplicable." (Emphasis added; internal quotation marks omitted.) *United States* v. *Singleton*, supra, 1299. *Singleton*, and cases like it, are not instructive in the present case, however, because it is uncontroverted that the defendant and his wife were living together and were not permanently separated at the time of the communications. We do not decide, therefore, whether a confidential communication made during a marriage but while the couple was permanently separated shall be protected by the privilege.

motion in limine can be affirmed, nevertheless, because the marital communications were not confidential. Specifically, the state relies on the defendant's previous, similar statements to Vorih, Ruggerio and Ford. We disagree.

We note, at the outset, that the determination of the second factor, that is, whether a communication was confidential, depends on the facts of the particular case. It is axiomatic that the marital communications privilege protects only those communications that are confidential.[15] *Wolfle* v. *United States*, supra, 291 U.S. 14.

[15] There is little controversy over the requirement of confidentiality. Most statutes expressly require that, to be privileged, the communication must be confidential or privately made. See Ala. R. Evid. 504 (1996); Alaska R. Evid. 505 (b) (West 2003); Ark. Court Rules Ann., Evid. 504 (LexisNexis 2003); Colo. Rev. Stat. Ann. § 13-90-107 (1) (a) (II) (LexisNexis 2003); Del. Uniform R. Evid. 504 (1991); D.C. Code Ann. § 14-306 (b) (2001); Fla. Stat. c. 90.504 (2002); Haw. R. Evid. 505 (b) (2003); Kan. Stat. Ann. § 60-423 (b) (1994); Ky. R. Evid. Ann. 504 (b) (Michie 2004); La. Code Evid. Ann. art. 504 (B) (West 1995); Me. R. Evid. 504 (b) (West 2003); Md. Code Ann., Cts. & Jud. Proc. § 9-105 (2002); Mass. Gen. Laws Ann. c. 233, § 20 (LexisNexis 2000); Miss. R. Evid. 504 (1999); Mo. Rev. Stat. § 546.260 (1) (2000); Neb. Rev. Stat. § 27-505 (1) (1995); N.J. Stat. Ann. § 2A:84A-22 (West 1994); N.M. R. Evid. Ann. 11-505 (Michie 2003); N.Y. C.P.L.R. 4502 (b) (McKinney 1992); N.C. Gen. Stat. § 8-57 (c) (2003); N.D. Court Rules Ann., Evid. 504 (LexisNexis 2002-2003); Ohio Rev. Code Ann. §§ 2317.02 (D) and 2945.42 (West 1994); Okla. Stat. Ann. tit. 12, § 2504 (West 1993); Or. Rev. Stat. § 40.255 (2) (1988); 42 Pa. Cons. Stat. Ann. § 5914 (West 2000); S.D. Codified Laws § 19-13-13 (Michie 1995); Tenn. Code Ann. § 24-1-201 (c) (2000); Tex. R. Evid. 504 (a) (West 2003); Vt. R. Evid. 504 (2003); Va. Code Ann. § 8.01-398 (A) (Michie 2000); W. Va. Code § 57-3-4 (Michie 1997); Wis. Stat. § 905.05 (2001-2002). "However, even where the words used are 'any communication' or simply 'communications,' the notion that the privilege is born of the 'common law' and the fact that the pre-statutory descriptions of the privilege had clearly based it upon the policy of protecting confidences, have actuated most courts to read into such statutes the requirement of confidentiality." 1 C. McCormick, supra, § 80, pp. 329–30.

The federal courts require, as a matter of federal common law, that the communication be confidential. *Wolfle* v. *United States*, supra, 291 U.S. 14 ("wherever a communication . . . was obviously not intended to be confidential it is not a privileged communication"); *Securities & Exchange Commission* v. *Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (for privilege to apply, "communication must have been made in confidence").

"Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private." *Pereira* v. *United States*, supra, 347 U.S. 6; see also *State* v. *Smith*, 384 A.2d 687, 691 (Me. 1978) (following "the near universal rule . . . that all marital communications are presumed to be confidential, and the party seeking to introduce the evidence must overcome the presumption" [citations omitted]). The state, therefore, as the party seeking to introduce the marital communication into evidence, bears the burden of overcoming the presumption of confidentiality by proving that the communication between the defendant and his wife was not confidential. See *Blau* v. *United States*, 340 U.S. 332, 333, 71 S. Ct. 301, 95 L. Ed. 170 (1951) ("[M]arital communications are presumptively confidential. . . . The Government made no effort to overcome the presumption." [Citations omitted.]); *Commonwealth* v. *Hancharik*, 534 Pa. 435, 442, 633 A.2d 1074 (1993) ("[c]ommunications between husbands and wives are presumed to be confidential, and the party opposing application of the rule disqualifying such testimony bears the burden of overcoming this presumption"); *State* v. *Witchey*, 388 N.W.2d 893, 895 (S.D. 1986) ("[w]ith the introduction of evidence of private communications between spouses goes the burden of showing that either the nature of the communication or the circumstances under which it occurred render the communication not privileged").

We recognize that there is a split of authority concerning the test to be applied in determining whether a communication was confidential. Under the traditional view, a communication is confidential if the communicator, at the time of the communication, subjectively *intended* that the content of the communication not be disclosed to third parties or the public. See, e.g., *Hall* v. *State*, 720 So. 2d 1043, 1047 (Ala. Crim. App. 1998);

State v. *Levi*, 67 Haw. 247, 250, 686 P.2d 9 (1984); see also "Developments in the Law—Privileged Communications," 98 Harv. L. Rev. 1450, 1573 (1985) (" '[c]onfidentiality' usually requires that the communicator subjectively intend that the communication not be disclosed"). Some jurisdictions, however, apply an objective test, wherein a communication is confidential if, at the time of the communication, the communicator could have had a *reasonable expectation of confidentiality*. See, e.g., *State* v. *Benner*, 284 A.2d 91, 109 (Me. 1971); *State* v. *McMorrow*, 314 N.W.2d 287, 289 (N.D. 1982); *Commonwealth* v. *May*, 540 Pa. 237, 250, 656 A.2d 1335 (1995). We think that the latter standard is the better approach, because it is consistent with our prior case law construing the distinct, but analogous, privilege for attorney-client communications. See *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 157, 757 A.2d 14 (2000) ("statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality" [internal quotation marks omitted]). Accordingly, a marital communication is considered confidential if, at the time of the communication, the holder of the privilege had a reasonable expectation of confidentiality.[16]

Under either test, however, the party offering the marital communication usually can overcome the pre-

[16] We note, however, that quite often "[i]n application . . . [the objective reasonable expectations] test differs little from the subjective [intentions] test." "Developments in the Law—Privileged Communications," supra, 98 Harv. L. Rev. 1573. Indeed, the concept of intention has appeared in our jurisprudence concerning the attorney-client privilege. See *Pagano* v. *Ippoliti*, 245 Conn. 640, 650, 716 A.2d 848 (1998) ("[I]f a client calls into [a] conference with [an] attorney one of the client's agents, and matters are discussed which bear on the agent's rights against the client, those communications would not be privileged. . . . The rationale in both instances is that the individuals involved did not *intend* to keep their communications secret from one another." [Citation omitted; emphasis added; internal quotation marks omitted.]).

sumption of confidentiality through evidence that the communication had been made in the presence of a third party. See, e.g., *United States* v. *Taylor*, 92 F.3d 1313, 1331–32 (2d Cir. 1996) (evidence that third person had been in room with defendant and spouse overcame presumption of confidentiality), cert. denied, 519 U.S. 1093, 117 S. Ct. 771, 136 L. Ed. 2d 717 (1997); *State* v. *Levi*, supra, 67 Haw. 250 (defendant's statements to wife in presence of third parties not confidential); *State* v. *McMorrow*, supra, 314 N.W.2d 288–89 (marital communications not confidential when made while couple in car with third person). Even when no third party actually was present, the presumption of confidentiality may be rebutted by evidence that the communication was intended or expected to be disclosed to a third party or to the public. See, e.g., *In re Witness Before the Grand Jury*, 791 F.2d 234, 239 (2d Cir. 1986) (communications concerning defendant's bank accounts, real estate transactions, credit cards, car registration, and payment of insurance premiums not confidential because defendant knew information was or would be disclosed to third parties or public); *United States* v. *McCown*, 711 F.2d 1441, 1452–53 (9th Cir. 1983) (check written by wife on husband's behalf overcame presumption that husband's instruction to wife to write check intended as confidential); *Grulkey* v. *United States*, 394 F.2d 244, 246 (8th Cir. 1968) (husband's letters to wife not confidential wherein husband knew wife would need help reading them); *Yoder* v. *United States*, 80 F.2d 665, 667–68 (10th Cir. 1935) (husband's note to wife not confidential when written on large cardboard and conspicuously posted); see also "Developments in the Law—Privileged Communications," supra, 98 Harv. L. Rev. 1573 ("even if the communications were made in private, the presumption of confidentiality may be rebutted by showing that the communicant intended the statements to be disclosed to specific third parties or to the public").

In the present case, the trial court made no determination as to whether the defendant's communications to his wife were confidential.[17] Rather than resolving the question of confidentiality, the trial court concluded that "the overriding factor" in its decision to admit the testimony was "that at the time the statement was made, but most importantly now, at the time of trial, the marriage relationship exists in name only, de jure, we might say, but not de facto." Thus, the trial court did not conclude that the state had overcome the presumption of confidentiality, nor did it conclude that the communication was not confidential. Similarly, the state has not presented any persuasive reason on appeal that would lead us to conclude that the communication was not confidential, that is, that the defendant did not have a reasonable expectation of confidentiality. Therefore, we do not agree with the state's contention that the trial court's decision to allow Joan Christian's testimony was proper.

Our determination that the trial court improperly allowed Joan Christian to testify, however, does not end our inquiry. We also must decide whether the impropriety was harmful. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. As we recently have noted, we have not been fully consistent in our articulation of the standard for establishing harm. . . . One line of cases states that the defendant must establish that it is more probable than not that the erroneous action of the court affected

[17] We reiterate that the trial court stated: "Certainly there must be a marriage in effect; certainly the communication must be confidential, must have been made confidentially so that other people were not privy to it. And those circumstances seem to be present here. Although, with respect to the confidential nature of the communication, I think that may be questioned in view of the evidence that we have heard, that the defendant essentially made the same inculpatory statement to other people before he made the statement to his wife."

the result. . . . A second line of cases indicates that the defendant must show that the prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict." (Internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 667, 835 A.2d 895 (2003). For purposes of the present case, we need not choose between the two formulations or decide whether there is any functional difference between them because we conclude that the defendant has not satisfied his burden of proving harm under either formulation of the standard.

The defendant claims that the admission of Joan Christian's testimony concerning the privileged communication was harmful because that testimony was "critical to the state's case." The defendant contends that it is more probable than not that the jury accorded greater weight to Joan Christian's testimony than to other testimony in the case. Specifically, the defendant points out that he had made his statements to Vorih, Ruggiero and Ford, indicating that he was the driver, when he was still "confused" and intoxicated, and that those statements later were clarified by the testimony of Kirton that the defendant, upon arriving at the hospital, initially believed that he had been the passenger. The defendant's communications to Joan Christian, on the other hand, were made after his intoxication and confusion had receded. In addition, the defendant argues that testimony concerning marital communications frequently is accorded greater weight than other types of testimony. See, e.g., *Hall* v. *State*, supra, 720 So. 2d 1049 ("a jury might reasonably be expected to accord substantial weight to . . . a confession, in part because of the very fact that it was made privately by a husband to his wife").

The state contends, in response, that the defendant cannot meet his burden. Specifically, the state argues that "it is unlikely that the jury placed much reliance"

upon the privileged testimony because Joan Christian admitted on cross-examination that she and the defendant were getting divorced, that they were involved in a contentious custody dispute and that their relationship was poor. In addition, the state points out that Joan Christian's testimony was cumulative to the testimony of Vorih, Ruggerio and Ford concerning the defendant's similar statements to them that he was the driver. Finally, the state points to the "overwhelming" physical evidence establishing that the defendant was the driver of the vehicle at the time of the accident.

We agree with the state that the admission of the privileged testimony constituted harmless error. As the state correctly points out, Joan Christian's testimony that the defendant had admitted to operating the vehicle is merely cumulative of the testimony of Vorih, Ruggiero and Ford regarding the defendant's similar admission. "It is well established that if erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not constitute reversible error." (Internal quotation marks omitted.) *State* v. *Booth*, 250 Conn. 611, 639, 737 A.2d 404 (1999), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000). Moreover, although the defendant presented some evidence that he was not the driver, the state presented an abundance of evidence to support a finding that the defendant had indeed been the driver. Specifically, Wilson testified that she heard a male voice coming from a person sitting in the driver's seat, behind the steering wheel. Bourque testified that, when he arrived at the scene of the accident, the victim "was in the passenger seat with her buttocks fully in the seat." Bourque also testified that, based upon his reenactment of the accident, he had determined that a woman of the victim's height and weight could not have moved from the driver's seat into the passenger's seat. The state also presented

Kwasnoski, who testified that, under the circumstances of the accident, the "natural tendency" would have been for the occupants of the car to move "very much forward and slightly to the right . . . ." Finally, the state presented evidence that the injuries to the defendant's left clavicle were consistent with those that might be caused to a driver by a restraining device, such as the driver's side seat belt. In light of the volume of evidence presented by the state indicating that the defendant had been driving at the time of the accident, we cannot say in the present case that it was more probable than not that the erroneously admitted privileged testimony affected the jury's verdict, nor can we say that any prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict. Accordingly, we conclude that the improper admission of the privileged testimony constituted harmless error.

II

The defendant next claims that the trial court improperly precluded Victoria Bobryk from testifying with regard to a conversation that she had overheard between Joan Christian and her attorney. Specifically, the defendant claims that Bobryk's testimony concerned the effect that the defendant's conviction would have had on Joan Christian's claim for custody of the couple's child, and was therefore relevant impeachment evidence.

The following additional facts are relevant to our resolution of this claim. As we previously have discussed, Joan Christian testified at trial that the defendant had told her that he had been driving the vehicle at the time of the accident. See part I of this opinion. On cross-examination, the defendant questioned her concerning her truthfulness in a prior, unrelated criminal proceeding in Connecticut Superior Court, wherein

Joan Christian herself had been charged with driving under the influence. Specifically, the defendant asked her if she had told the court in that proceeding that she had no prior convictions and never had participated in an alcohol education program, despite the fact that she had an earlier conviction for driving under the influence in Massachusetts and had participated in that state's alcohol education program. Joan Christian admitted that she had not been entirely truthful in that proceeding, but explained that she had thought that the court's questions in that proceeding pertained solely to convictions in Connecticut and the Connecticut alcohol education program.

In connection with questions regarding her marriage to the defendant, Joan Christian testified that the defendant had abandoned her and their young son in October, 2000, and that she thereafter had moved with the son to Massachusetts. Upon further cross-examination, she testified that she had initiated court proceedings in Massachusetts regarding the defendant's visitation rights with their son, and that in the court file for those proceedings she had enclosed newspaper articles concerning the charges against the defendant in the present case. Joan Christian further testified that the defendant had initiated divorce and child custody proceedings in Connecticut in February or March, 2001. She admitted that, in a discussion with the defendant concerning those proceedings, she had told him that she had been "keeping up" with the status of the present case. She further admitted that she had contacted the state's attorney and had given a statement to the Suffield police department concerning the present case. Joan Christian acknowledged that her divorce and child custody proceedings against the defendant were "hotly contested," and that her conflicts with him had escalated over time. She also admitted that she was not "too happy" with the fact that the defendant had left her without paying

their bills, although she had given him money for that purpose. Nonetheless, she stated that she was not angry with him, and that she was testifying against him in the present case because it was "the right thing to do."

Finally, the defendant questioned Joan Christian regarding a conversation she had with her attorney in the Enfield courthouse in May, 2001. Specifically, the defendant asked her if she recalled having had a conversation with her attorney, who had represented her in both the driving under the influence proceeding and the divorce and child custody proceedings, while they were in a small vestibule of the Enfield courthouse following the pretrial conference in the driving under the influence proceeding. Joan Christian testified that she did not remember that particular conversation. The defendant then asked her if she recalled discussing with her attorney the effect that the defendant's conviction in the present case might have on the divorce and child custody proceedings, and she testified that she did not.

After the close of the state's case-in-chief, the defendant attempted to have Bobryk testify. In making this proffer, he explained that Bobryk, a former legal intern for the defendant's attorney in the present case, had gone to the Enfield courthouse, at the attorney's direction, to observe Joan Christian in her driving under the influence proceeding. Specifically, the defendant's attorney had told Bobryk "to make a note of" whether Joan Christian was driving a car when she left the proceeding, because "these were things that were deemed to be relevant in the divorce litigation." After the proceeding, Bobryk waited in the small vestibule of the courthouse to attempt to see if Joan Christian left the courthouse driving a vehicle. At this point, Joan Christian purportedly entered the vestibule with her attorney and discussed with him the impact that the defendant's conviction in the present case would have on the divorce proceeding. In particular, it was acknowledged

that, if the defendant was convicted in the present case, "there would be no further question about him . . . getting custody of their child." Joan Christian's attorney purportedly asked her about the status of the defendant's criminal proceeding, and she told him that she did not know. She and her attorney then went to the clerk's office to check on the status.

The state objected to the admission of Bobryk's testimony on grounds that its admission would violate the evidentiary rule against impeaching a witness based on extrinsic evidence concerning a collateral matter, and because Joan Christian's communications with her attorney were protected by the attorney-client privilege. The defendant argued, in response, that Bobryk's testimony was not extrinsic evidence of a collateral matter, because Joan Christian's "efforts to use [the present case] to bolster her [child] custody and divorce litigation" were relevant to her credibility as a witness in the present case.[18]

The trial court sustained the state's objection and excluded the proffered testimony "for two essential reasons. One is I believe it is collateral. I don't think there's any way you could characterize the evidence that . . . Bobryk would offer here as material to, or even relevant, to any of the issues raised by this case. Secondly . . . I believe [that] . . . under the peculiar circumstances of this encounter as set forth in the defendant's offer of proof, it would appear to me to be a really egregious eavesdropping on the part of an agent of the defense attorney here. . . . And, I think it would be just absolutely violative of any kind of policy that

[18] The defendant did not argue, at this time, that Bobryk's testimony would not violate the attorney-client privilege. In a previous discussion regarding Joan Christian's conversation with her attorney at the Enfield courthouse, however, the defendant argued that the attorney-client privilege would not apply if "she knew that there was a third party present."

we can hope to have which keeps attorney-client privileges—attorney-client confidentiality sacrosanct."[19]

Before addressing the merits of the defendant's claim, we briefly set forth the standard of review. "The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. *State* v. *Barnes*, 232 Conn. 740, 746–47, 657 A.2d 611 (1995). Furthermore, [t]o establish an abuse of discretion, [the defendant] must show that the restrictions imposed upon [the] cross-examination were clearly prejudicial. . . . *State* v. *Castro*, 196 Conn. 421, 426, 493 A.2d 223 (1985). The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant. . . . *State* v. *Barnes*, supra, 747. When the trial court excludes defense evidence that provides the defendant with a basis for cross-examination of the state's witnesses, however, such exclusion may give rise to a claim of denial of the right to confrontation and to present a defense." (Internal quotation marks omitted.) *State* v. *Ferguson*, 260 Conn. 339, 350–51, 796 A.2d 1118 (2002). When defense counsel is permitted to expose to the jury the facts from which it appropriately can draw inferences relating to the reliability of the witness, those constitutional rights have been satisfied. *State* v. *Gaynor*, 182 Conn. 501, 509, 438 A.2d 749 (1980).

[19] The trial court also stated: "Now, I'm not suggesting in the slightest, not one iota, that [the defendant's attorney] suggested that . . . Bobryk go and try to overhear the conversation of an opposing party which was being held, they thought, in confidence with her attorney. But that, nevertheless, would be the result that we'd have. We'd essentially have an agent of . . . the attorney for one party surreptitiously positioning herself so that she could [overhear] a conversation between the opposing party and that person's attorney."

With these principles in mind, we turn to the defendant's contentions.

The defendant first claims that the trial court improperly ruled that the proffered testimony was inadmissible extrinsic evidence of a collateral matter. The defendant contends that Bobryk's testimony was relevant and material to the merits of the case, because "[Joan] Christian's bias or motive went to the very core of her testimony . . . ." The state asserts, in response, that the testimony properly was excluded because "the jury had sufficient evidence from which to assess Joan Christian's bias and motivation for testifying against the defendant. Permitting the additional testimony proffered by Bobryk would have unnecessarily complicated the case and unduly distracted the jury's attention from the principal issues before them." We agree with the defendant.

"[C]ross-examination is the principal means by which the credibility of witnesses and the truth of their testimony is tested. *State* v. *Lee*, 229 Conn. 60, 69, 640 A.2d 553 (1994). Although only relevant evidence may be elicited through cross-examination; *State* v. *Kelley*, 229 Conn. 557, 562, 643 A.2d 854 (1994); [e]vidence tending to show motive, bias or interest of an important witness is never collateral or irrelevant. [Indeed, it] may be . . . the very key to an intelligent appraisal of the testimony of the [witness]. . . . *State* v. *Colton*, 227 Conn. 231, 248, 630 A.2d 577 (1993) [on appeal after remand, 234 Conn. 683, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996)]. Accordingly, cross-examination to elicit facts tending to show that a witness' testimony was motivated by bias may not be unduly restricted. Id., 249; see also *State* v. *Francis*, 228 Conn. 118, 123, 635 A.2d 762 (1993). Bias may consist of a friendly feeling or of hostility. It may be shown in a variety of ways. *State* v. *Asherman*, 193 Conn. 695, 719, 478 A.2d 227 (1984), cert. denied, 470

U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985)." (Internal quotation marks omitted.) *State* v. *Chance*, 236 Conn. 31, 58, 671 A.2d 323 (1996); see also Conn. Code Evid. § 6-5 ("[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely").

In the present case, it is clear that Joan Christian was an important witness for the state. Consequently, evidence of any motive, bias or interest that may have impacted the credibility of her testimony cannot be characterized as collateral or irrelevant. The proffered testimony bore directly on the issue of her motive, bias or interest, in that, had it been heard and credited by the jury, the jury could have inferred that Joan Christian would benefit from the defendant's conviction by virtue of its effect on her civil proceedings against him for divorce and custody of their child. Therefore, the testimony improperly was excluded as collateral.

Furthermore, the trial court improperly determined that admission of Bobryk's testimony would have violated the attorney-client privilege held by Joan Christian. We previously have stated that, "[c]ommunications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice." (Internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, supra, 265 Conn. 10. "By contrast, statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality." *State* v. *Cascone*, 195 Conn. 183, 186, 487 A.2d 186 (1985). The only recognized exceptions to this rule are when the third party was an interpreter, clerk or agent of *the client's* attorney; see *Olson* v. *Accessory Controls & Equipment Corp.*, supra, 254 Conn. 158; which Bobryk clearly was not. At oral argument before this court, the state conceded that, because the communication had been made

in the presence of a third party, it was not protected by the attorney-client privilege. Therefore, because the communication at issue was made in her presence, Bobryk should have been allowed to testify.

In light of our conclusion that Bobryk's testimony improperly was excluded, we next must consider whether that impropriety violated the defendant's constitutional rights, or whether the error was merely evidentiary in nature.

We already have concluded that Bobyrk's testimony was relevant impeachment evidence and that the trial court's exclusion of that testimony improperly denied the defendant meaningful access into a legitimate area of inquiry. Whether that impropriety violated the constitutional protection of the confrontation clause depends, however, upon a variety of factors. "[W]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) *State* v. *Clark*, 260 Conn. 813, 828, 801 A.2d 718 (2002).

We begin by noting that the defendant effectively cross-examined Joan Christian, during which time he was able to extract several admissions concerning her interest in the outcome of the litigation in the present case. For example, the defendant questioned her regarding the pending divorce and child custody proceedings. Joan Christian acknowledged that those proceedings were "hotly contested . . . ." She admitted that, in a discussion with the defendant concerning those proceedings, she had told him that she had been "keeping up" with the status of the present case. She also admitted that she had contacted the state's attorney and had given a statement to the Suffield police department concerning the present case. In addition, the defendant

cross-examined Joan Christian regarding her bias against him. Specifically, she testified that the defendant had abandoned her and their young son, and admitted that she was not "too happy" with the fact that he had left her without paying their bills. Finally, she acknowledged that her conflicts with the defendant had "escalated over time." Accordingly, the defendant exposed numerous facts from which the jury could have concluded that Joan Christian's testimony was tainted by motive, bias or interest, and, therefore, was not credible.

Under all of the circumstances of this case, we conclude that the constitutional standard of confrontation had been met, and, therefore, that the trial court's improper exclusion of Bobryk's testimony was merely an evidentiary impropriety. "[I]n order to prevail on appeal, the defendant must show that the restrictions imposed by the trial court were harmful. . . . In order to do so, the defendant must establish that the impropriety was so prejudicial as to undermine confidence in the fairness of the verdict . . . ." (Internal quotation marks omitted.) *State* v. *Clark*, supra, 260 Conn. 830. We conclude that the defendant has not satisfied this burden.

The defendant, relying on *State* v. *Colton*, supra, 227 Conn. 253–54, contends that the impropriety was harmful because it had a tendency to influence the decision of the jury. In *Colton*, we concluded that the trial court improperly had excluded evidence that a chief witness for the state had abused illegal drugs and engaged in prostitution, because it was relevant to that witness' interest in receiving a monetary award for testifying against the defendant. Id., 251–52. We further concluded that the impropriety constituted reversible error. Specifically, we stated: "The importance of [the witness'] testimony to the state's case against the defendant cannot be underestimated. The state conceded in its closing

argument to the jury that it would have to credit [the witness'] testimony to convict the defendant. . . . The exclusion of evidence bearing on the motivation of a chief witness for the state, particularly when no other evidence corroborated material aspects of the witness' testimony, is harmful error." (Citation omitted.) Id., 254. In the present case, by contrast,[20] as we already have stated, Joan Christian's testimony concerning the material issue of whether the defendant had been driving at the time of the accident was cumulative of the testimony of three other witnesses. See part I of this opinion. Moreover, the state presented a substantial amount of physical evidence, in addition to the testimony of these witnesses, indicating that the defendant had been the driver. See id. Accordingly, we conclude that the evidentiary impropriety of the trial court was harmless.

III

Finally, the defendant claims that the trial court improperly excluded from evidence the emergency medical "run sheets"[21] prepared by Ruggiero and Ford. Specifically, the defendant claims that the trial court improperly failed to admit the run sheets either as prior inconsistent statements or under the business records exception to the hearsay rule and, therefore, denied him his constitutional right to present evidence that he was confused and disoriented when he made the incriminating statements to Ruggiero and Ford in the ambulance on the way to the hospital.

The following additional facts are relevant to our resolution of this claim. During the state's case-in-chief,

[20] We note, moreover, that the impropriety in *Colton* was constitutional in nature, and therefore, in that case *the state*, and not the defendant, had the burden of proving that the error was harmless beyond a reasonable doubt. *State* v. *Colton*, supra, 227 Conn. 254.

[21] The defendant, in his brief to this court, defines a "run sheet" as "the medical record of the injury, condition and treatment of the patient. It is completed by the [emergency medical technician] as part of the record of the ambulance company."

Ruggiero testified on direct examination that she had arrived at the accident scene at approximately 12:55 a.m. on March 18, 2000. At the scene, she made a physical assessment of the defendant, during which she asked him questions concerning the accident. Specifically, Ruggiero asked him if he had been driving and wearing his seat belt, and he answered both questions in the affirmative. The defendant appeared coherent when he answered these questions. During the ambulance ride to the hospital, however, the defendant wavered "between coherent and confused." Ruggiero marked the box labeled "confused" on her run sheet, but she explained that she had done so because "at times, he wasn't really cooperative with answering." Nonetheless, she asked the defendant several times whether he had been driving and wearing a seat belt, and each time the defendant responded in the affirmative.

On cross-examination, the defendant questioned Ruggiero about why she had marked the box labeled "confused" on the run sheet, and not the box labeled "oriented."[22] She explained: "He was oriented to person, place, and time, which is what we go by. He knew where he was, he knew his name, and he knew what time it was. The reason why I checked confused was because he did not remember the accident, the actual impact." Ruggiero further explained that, in her assessment, "he was confused at [the] time." On recross-examination, Ruggiero again acknowledged that the run sheet stated that the defendant had been "confused," and not "oriented," after the accident. Ford testified, on direct examination by the state, that the defendant "was con-

[22] The run sheets filled out by Ruggiero and Ford contained a section entitled, "Verbal Response," which included checkboxes for the following five options: (1) "None"; (2) "Incomplete Sounds" or "Incomplete Words"; (3) "Inappropriate Words"; (4) "Confused"; and (5) "Oriented." Ruggiero and Ford both placed a mark in the box labeled "Confused," and left the other boxes blank.

fused at times," but that he was able to answer most of her questions. She asked the defendant, several times, if he had been driving at the time of the accident. Each time, he responded affirmatively. Ford testified that the defendant did not appear to be confused when he told her that he had been driving. On cross-examination, Ford acknowledged that she had marked the box labeled "confused" on the run sheet, and had not marked the box labeled "oriented." She also acknowledged that "there was some confusion," and that the defendant "was not totally oriented . . . ."

After the close of the state's case-in-chief, the defendant offered Ruggiero's and Ford's run sheets into evidence, as either prior inconsistent statements or under the business records exception to the hearsay rule. Specifically, the defendant argued that, because the run sheets "state that the defendant was confused and that he was not oriented" and "the testimony contradicted that," they were admissible under § 6-10 of the Connecticut Code of Evidence[23] as prior inconsistent statements used to impeach the credibility of the witness. The defendant further argued that the run sheets were admissible for *substantive* purposes under *State* v.

[23] Section 6-10 of the Connecticut Code of Evidence provides: "(a) Prior inconsistent statements generally. The credibility of a witness may be impeached by evidence of a prior inconsistent statement made by the witness.

"(b) Examining witness concerning prior inconsistent statement. In examining a witness concerning a prior inconsistent statement, whether written or not, made by the witness, the statement should be shown to or the contents of the statement disclosed to the witness at that time.

"(c) Extrinsic evidence of prior inconsistent statement of witness. If a prior inconsistent statement made by a witness is shown to or if the contents of the statement are disclosed to the witness at the time the witness testifies, and if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court. If a prior inconsistent statement made by a witness is not shown to or if the contents of the statement are not disclosed to the witness at the time the witness testifies, extrinsic evidence of the statement is inadmissible, except in the discretion of the court."

Whelan, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Finally, the defendant argued that the run sheets were admissible as business records, because Ruggiero and Ford had reduced their prior statements into written reports on the date of the accident, as they had been obligated to do.

The trial court determined that the run sheets were inadmissible extrinsic evidence of a prior inconsistent statement. Specifically, the court determined that the statements on the run sheets were not inconsistent with the statements made at trial because Ruggiero and Ford had admitted making those statements on the run sheets. Therefore, the court concluded that the statements were inadmissible for both purposes of impeachment and as substantive evidence. The court did not make a determination concerning whether the run sheets were business records; during oral argument, however, in response to the defendant's assertion that the run sheets were admissible as "business record[s] of . . . prior statement[s]," the trial court stated that "[i]f the witness admits to making the statement, extrinsic evidence of the statement is inadmissible."

A

The defendant first claims that the trial court improperly precluded the run sheets as prior inconsistent statements for the purpose of impeaching witnesses and as substantive evidence.[24] Specifically, the defendant contends that the prior statements included in the run sheets, stating that the defendant had been confused and not oriented, were inconsistent with the in-court testimony of both Ruggerio and Ford stating that the defendant had been coherent. The state contends, in

[24] Although the defendant, in his brief to this court, addressed the usage of prior inconsistent statements for impeachment purposes and substantive evidence as separate issues, we analyze them together.

response, that there was no substantial inconsistency between the in-court testimony and the statements on the run sheets because Ruggerio and Ford both acknowledged having stated, on their run sheets, that the defendant was confused and not oriented. Therefore, the introduction of the run sheets would have been cumulative evidence. See Conn. Code Evid. § 6-10 (c) ("[i]f a prior inconsistent statement made by a witness is shown to or if the contents of the statement are disclosed to the witness at the time the witness testifies, and if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court").

"In deciding whether the statement is admissible, the trial court must review it in light of the witness' entire testimony to determine whether it is, in fact, inconsistent with that testimony; *State* v. *Richardson*, 214 Conn. 752, 764, 574 A.2d 182 (1990); *State* v. *Whelan*, [supra, 200 Conn. 748 n.4]; *State* v. *Piskorski*, 177 Conn. 677, 710, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979); and, if so, whether such inconsistency is substantial and relate[s] to a material matter. . . . *State* v. *Richardson*, supra, 763–64. Such a determination as to inconsistency lies within the discretionary authority of the trial court." (Internal quotation marks omitted.) *State* v. *Bova*, 240 Conn. 210, 227, 690 A.2d 1370 (1997). As the trial court correctly determined, both witnesses admitted, in their testimony, to their prior statements on the run sheets. Therefore, the run sheets were not inconsistent with the testimony elicited at trial. Accordingly, the trial court did not abuse its discretion in precluding the run sheets as prior inconsistent statements for the purpose of impeaching the witnesses and as substantive evidence.

B

The defendant next claims that the trial court improperly precluded the run sheets under the business record

exception to the hearsay rule. Specifically, the defendant claims that the run sheets are business records because they "are made in the regular course of the business of [ambulance] companies" and emergency medical technicians have "a duty to write the run sheets contemporaneously with the ambulance user." He further contends that the run sheets were admissible, as business records, under General Statutes § 52-180,[25] because they were relevant to the material issue of whether the defendant was coherent when he told Ruggiero and Ford that he had been driving at the time of the accident. The state contends, in response, that the defendant has not established that the run sheets were business records in accordance with the requirements of § 52-180 (a). The state also contends that any error in the trial court's evidentiary ruling was harmless because the proffered evidence would have been cumulative.

"Section 52-180 sets forth an exception to the evidentiary rule otherwise barring admission of hearsay evidence for business records that satisfy express criteria. *Calcano* v. *Calcano*, 257 Conn. 230, 240, 777 A.2d 633 (2001); *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 600, 717 A.2d 713 (1998); see also Conn. Code Evid. § 8-4 (incorporating § 52-180). Section 52-180 (a) provides that a record of an act, transaction, occurrence or event is admissible as evidence of that act, transaction, occurrence, or event, provided that the record was made in the regular course of business. *Pagano* v. *Ippoliti*, 245 Conn. 640, 650–51, 716 A.2d 848 (1998). The rationale for the exception derives from the inherent trustworthiness of records on which busi-

[25] General Statutes § 52-180 (a) provides: "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."

nesses rely to conduct their daily affairs. *Calcano* v. *Calcano*, supra, 240–41 (§ 52-180 recognizes the inherent trustworthiness of documents created for business rather than litigation purposes); *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 486, 586 A.2d 1157 (1991) (fact that the business relies on such records tends to establish their trustworthiness); see generally *New England Savings Bank* v. *Bedford Realty Corp.*, supra, 600–601 (setting forth development of rule)." (Internal quotation marks omitted.) *State* v. *Kirsch*, 263 Conn. 390, 400, 820 A.2d 236 (2003).

"To be admissible under the business record exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in . . . § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . In applying the business records exception, the statute [§ 52-180] should be liberally interpreted." (Internal quotation marks omitted.) *Calcano* v. *Calcano*, supra, 257 Conn. 240–41.

We need not decide whether the trial court's failure to admit the run sheets into evidence under § 52-180 was improper because, even if it was, the impropriety was harmless. As we previously have stated, Ruggiero and Ford both testified that their run sheets referenced the fact that the defendant was confused, rather than oriented. See part III A of this opinion. The run sheets would have been merely cumulative of this testimony and, therefore, any impropriety in disallowing the run sheets under § 52-180 was harmless. See *State* v. *DeJesus*, 260 Conn. 466, 486, 797 A.2d 1101 (2002) (exclusion of cumulative evidence harmless).

The judgment is affirmed.

In this opinion the other justices concurred.

Note

Supreme Court Orders begin at page 901. Page numbers 760 to 900 are intentionally omitted.

Reporter of Judicial Decisions

ORDERS

KEVIN L. STROBEL *v.* ROSE LI-HWA STROBEL

The appeal by the defendant (SC 16898) was ordered dismissed by the Supreme Court, sua sponte, on the ground that certification was improvidently granted.

Decided November 20, 2003

LEGA SICILIANA SOCIAL CLUB, INC. *v.* ROBERT ST. GERMAINE, SR.

The defendant's petition for certification for appeal from the Appellate Court, 77 Conn. App. 846 (AC 23071), is denied.

SULLIVAN, C. J., and VERTEFEUILLE, J., did not participate in the consideration or decision of this petition.

Eddi Z. Zyko, in support of the petition.

Alvin Rosenbaum, in opposition.

Decided December 8, 2003

STATE OF CONNECTICUT *v.* KERMIT ELLISON

The defendant's petition for certification for appeal from the Appellate Court, 79 Conn. App. 591 (AC 21823), is denied.

Darcy McGraw, special public defender, in support of the petition.

Michele C. Lukban, assistant state's attorney, in opposition.

Decided December 8, 2003

STATE OF CONNECTICUT *v.* JUAN FERNANDO RAMIREZ

The defendant's cross petition for certification for appeal from the Appellate Court, 79 Conn. App. 572 (AC 22582), is denied.

KATZ, J., did not participate in the consideration or decision of this cross petition.

John R. Gulash, Jr., in support of the cross petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided December 8, 2003

STATE OF CONNECTICUT *v.* JUAN FERNANDO RAMIREZ

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 79 Conn. App. 572 (AC 22582), is denied.

KATZ, J., did not participate in the consideration or decision of this petition.

James A. Killen, senior assistant state's attorney, in support of the petition.

John R. Gulash, Jr., in opposition.

Decided December 8, 2003

STATE OF CONNECTICUT *v.* DERRICK TROY SHIPP

The defendant's petition for certification for appeal from the Appellate Court, 79 Conn. App. 427 (AC 23007), is denied.

Derrick Troy Shipp, pro se, in support of the petition.

Michele C. Lukban, assistant state's attorney, in opposition.

Decided December 8, 2003

NANCY BURTON *v.* STATEWIDE GRIEVANCE COMMITTEE

The plaintiff's petition for certification for appeal from the Appellate Court, 79 Conn. App. 364 (AC 23132), is denied.

Nancy Burton, pro se, in support of the petition.

Michael P. Bowler, assistant bar counsel, in opposition.

Decided December 8, 2003

DEY, SMITH AND COLLIER, LLC *v.* ANITA F. STEENSON

The defendant's petition for certification for appeal from the Appellate Court, 79 Conn. App. 831 (AC 23732), is denied.

Barbara M. Schellenberg and *Vincent M. Marino*, in support of the petition.

John-Henry M. Steele, in opposition.

Decided December 8, 2003

STATE OF CONNECTICUT *v.* DAVID PALMER

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 70 (AC 22712), is denied.

Michael A. D'Onofrio, special public defender, in support of the petition.

Frederick W. Fawcett, supervisory assistant state's attorney, in opposition.

Decided December 8, 2003

HEYWARD SELLERS *v.* SELLERS GARAGE, INC., ET AL.

The plaintiff's petition for certification for appeal from the Appellate Court, 80 Conn. App. 15 (AC 23114), is denied.

SULLIVAN, C. J., did not participate in the consideration or decision of this petition.

Heyward Sellers, pro se, in support of the petition.

Charlene M. Russo, in opposition.

Decided December 8, 2003

MARCEL HUGUENIN *v.* COMMISSIONER OF CORRECTION

The petitioner Marcel Huguenin's petition for certification for appeal from the Appellate Court (AC 23247) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss the petitioner's appeal on the ground that the ex post facto issue raised by the petitioner was not debatable among jurists of reason?"

The Supreme Court docket number is SC 17103.

Sandra J. Crowell, assistant public defender, and *Temmy Ann Pieszak*, chief of habeas corpus services, in support of the petition.

Decided December 8, 2003

STATE OF CONNECTICUT *v.* STANLEY CHANCE

The defendant's petition for certification for appeal from the Appellate Court (AC 24014) is denied.

Stanley Chance, pro se, in support of the petition.

Decided December 8, 2003

GREGORY WILLIAMS *v.* COMMISSIONER OF CORRECTION

The petitioner Gregory Williams' petition for certification for appeal from the Appellate Court, 79 Conn. App. 837 (AC 23178), is denied.

David B. Rozwaski, special public defender, in support of the petition.

Gerard P. Eisenman, senior assistant state's attorney, in opposition.

Decided December 16, 2003

NYRON DUMAS *v.* COMMISSIONER OF CORRECTION

The petitioner Nyron Dumas' petition for certification for appeal from the Appellate Court, 80 Conn. App. 62 (AC 23264), is denied.

Michael A. D'Onofrio, special public defender, in support of the petition.

Decided December 16, 2003

STATE OF CONNECTICUT *v.* PAUL CURRY

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 902 (AC 23516), is denied.

Anthony J. Musto, special public defender, in support of the petition.

Eileen F. McCarthy, assistant state's attorney, in opposition.

Decided December 16, 2003

IN RE JANAYSHA B.

The respondent mother's petition for certification for appeal from the Appellate Court (AC 24355) is denied.

Trudy Condio, in support of the petition.

Paula D. Sullivan, assistant attorney general, in opposition.

Decided December 16, 2003

IN RE JANAYSHA B.

The respondent father's petition for certification for appeal from the Appellate Court (AC 24356) is denied.

William S. Bingham, in support of the petition.

Paula D. Sullivan, assistant attorney general, in opposition.

Decided December 16, 2003

STATE OF CONNECTICUT *v.* FLORIAN BANGULESCU

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 26 (AC 21881), is denied.

NORCOTT, J., did not participate in the consideration or decision of this petition.

Michael Stone, special public defender, in support of the petition.

Timothy J. Sugrue, senior assistant state's attorney, in opposition.

Decided December 30, 2003

STATE OF CONNECTICUT *v.* MICKEY MINOR

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 87 (AC 22709), is denied.

Gerald E. Bodell, special public defender, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided December 30, 2003

STATE OF CONNECTICUT *v.* DAVID BRIDGES

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 903 (AC 22875), is denied.

Richard C. Marquette, special public defender, in support of the petition.

Marjorie Allen Dauster, senior assistant state's attorney, in opposition.

Decided December 30, 2003

AFSCME, COUNCIL 4, LOCAL 704 *v.* DEPARTMENT OF PUBLIC HEALTH

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 1 (AC 23084), is granted, limited to the following issues:

"1. Did the Appellate Court properly reverse the judgment of the trial court, which found the parties to the arbitration jointly waived, by conduct or agreement, the deadline for rendering a decision by their conduct?

"2. Did the Appellate Court properly reverse the judgment of the trial court, which found that the plaintiff had waived its right to claim the award was untimely?"

The Supreme Court docket number is SC 17120.

Thomas P. Clifford III, assistant attorney general, in support of the petition.

J. William Gagne, Jr., and *P. Jo Anne Burgh*, in opposition.

Decided December 30, 2003

STATE OF CONNECTICUT *v.* SAMUEL HOOKS

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 75 (AC 23208), is denied.

Deborah G. Stevenson, special public defender, in support of the petition.

Christopher T. Godialis, assistant state's attorney, in opposition.

Decided December 30, 2003

STATE OF CONNECTICUT *v.* RAMON LOPEZ

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 902 (AC 23342), is denied.

Todd A. Bussert, special public defender, in support of the petition.

Melissa L. Streeto, deputy assistant state's attorney, in opposition.

Decided December 30, 2003

DAVID BURNS ET AL. *v.* GENERAL MOTORS CORPORATION ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court, 80 Conn. App. 146 (AC 23659), is denied.

William J. Ward, in support of the petition.

Decided December 30, 2003

ROBERT E. MARTIN, JR. *v.* TOWN OF WESTPORT

The plaintiff's petition for certification for appeal from the Appellate Court, 80 Conn. App. 901 (AC 23680), is denied.

Ikechukwu Umeugo, in support of the petition.

Michael J. Rose and *DeAnn K. Seymour*, in opposition.

Decided December 30, 2003

NATIONAL LOAN INVESTORS, L.P. *v.* WORLD PROPERTIES, LLC, ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 79 Conn. App. 725 (AC 23322), is denied.

Jeffrey D. Cedarfield, in support of the petition.

Frederic S. Ury, in opposition.

Decided January 7, 2004

MARK A. MASON *v.* COMMISSIONER OF CORRECTION

The petitioner Mark A. Mason's petition for certification for appeal from the Appellate Court, 80 Conn. App. 142 (AC 22943), is denied.

Alan E. Dillon, special public defender, in support of the petition.

Julia K. Conlin, deputy assistant state's attorney, in opposition.

Decided January 7, 2004

DONALD CHARETTE ET AL. *v.* CITY OF WATERBURY ET AL.

The defendants' petition for certification for appeal from the Appellate Court, 80 Conn. App. 232 (AC 23408), is denied.

SULLIVAN, C. J., did not participate in the consideration or decision of this petition.

Jeffrey R. Babbin, in support of the petition.

Dana B. Lee, in opposition.

Decided January 7, 2004

SHERI PAIGE *v.* STATEWIDE GRIEVANCE COMMITTEE

The plaintiff's petition for certification for appeal from the Appellate Court, 80 Conn. App. 905 (AC 23721), is denied.

Geoffrey S. Brandner, in support of the petition.

Christopher L. Slack, assistant bar counsel, in opposition.

Decided January 7, 2004

STATE OF CONNECTICUT *v.* TRAVIS L. WRIGHT

The defendant's petition for certification for appeal from the Appellate Court, 76 Conn. App. 91 (AC 21830), is denied.

NORCOTT, J., did not participate in the consideration or decision of this petition.

Joseph A. Moniz, in support of the petition.

Eileen F. McCarthy, senior assistant state's attorney, in opposition.

Decided January 13, 2004

STATE OF CONNECTICUT *v.* LUIS FERNANDO LOPEZ

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 80 Conn. App. 386 (AC 22637), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that the trial court's inquiry into a possible conflict of interest between the defendant and defense counsel was inadequate and, if so, did the Appellate Court properly conclude that the defendant was entitled to a reversal of his conviction in the absence of a specific showing of harm?"

The Supreme Court docket number is SC 17123.

John A. East III, senior assistant state's attorney, in support of the petition.

William M. Bloss, in opposition.

Decided January 13, 2004

STATE OF CONNECTICUT *v.* STEVEN CLARK

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 224 (AC 22677), is denied.

Auden Grogins, special public defender, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided January 13, 2004

JILL M. CARASSO *v.* STEPHEN S. CARASSO

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 299 (AC 22965), is denied.

PALMER, J., did not participate in the consideration or decision of this petition.

Campbell D. Barrett, in support of the petition.

Mark H. Swerdloff and *Ileen P. Swerdloff*, in opposition.

Decided January 13, 2004

STATE OF CONNECTICUT *v.* ALFREDO VARGAS

The petition by the state of Connecticut for certification for appeal from the Appellate Court, 80 Conn. App. 454 (AC 23158), is denied.

Frederick W. Fawcett, supervisory assistant state's attorney, in support of the petition.

George G. Kouros, special public defender, in opposition.

Decided January 13, 2004

REYNALDO RAMOS ET AL. *v.* BENITO RAMOS, JR., ET AL.

The petition by the plaintiff Wilson Ramirez for certification for appeal from the Appellate Court, 80 Conn. App. 276 (AC 23455), is denied.

Hugh D. Hughes, *William F. Gallagher*, *Brian M. Flood* and *Garrett Moore*, in support of the petition.

William J. Melley III, in opposition.

Decided January 13, 2004

LINDA BEHRNS *v.* RONALD BEHRNS

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 286 (AC 23611), is denied.

Veronica E. Reich, in support of the petition.

Decided January 13, 2004

JOSEPH R. KREVIS ET AL. *v.* CITY OF BRIDGEPORT

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 432 (AC 19438), is denied.

John R. Mitola, associate city attorney, in support of the petition.

Decided January 22, 2004

STATE OF CONNECTICUT *v.* JAMES SERVELLO

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 313 (AC 22759), is denied.

SULLIVAN, C. J., and NORCOTT and KATZ, Js., did not participate in the consideration or decision of this petition.

William B. Westcott, special public defender, in support of the petition.

Denise B. Smoker, assistant state's attorney, in opposition.

Decided January 22, 2004

STATE OF CONNECTICUT *v.* HOWARD GOMBERT, JR.

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 477 (AC 23012), is denied.

Kent Drager, senior assistant public defender, in support of the petition.

Rita M. Shair, senior assistant state's attorney, in opposition.

Decided January 22, 2004

TOWN OF EAST HAMPTON *v.* DEPARTMENT OF PUBLIC HEALTH

The plaintiff's petition for certification for appeal from the Appellate Court, 80 Conn. App. 248 (AC 23275), is denied.

Jean M. D'Aquila, in support of the petition.

Rosemary M. McGovern, assistant attorney general, in opposition.

Decided January 22, 2004

DOROTHY S. MITCHELL *v.* MORRIS SILVERSTEIN ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 903 (AC 23445), is denied.

PALMER, J., did not participate in the consideration or decision of this petition.

Morris Silverstein, pro se, in support of the petition.

Decided January 22, 2004

BRIAN NIBLACK *v.* COMMISSIONER OF CORRECTION

The petitioner Brian Niblack's petition for certification for appeal from the Appellate Court, 80 Conn. App. 292 (AC 23580), is denied.

Salvatore C. Adamo, special public defender, in support of the petition.

Nancy L. Chupak, assistant state's attorney, in opposition.

Decided January 22, 2004

STATE OF CONNECTICUT *v.* VINCENT FERRAIUOLO

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 521 (AC 23973), is denied.

Lisa J. Steele, special public defender, in support of the petition.

Julia K. Conlin, deputy assistant state's attorney, in opposition.

Decided January 22, 2004

JAMIE GOMEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Jamie Gomez' petition for certification for appeal from the Appellate Court, 80 Conn. App. 906 (AC 24078), is denied.

Robert J. McKay, special public defender, in support of the petition.

Decided January 22, 2004

STATE OF CONNECTICUT *v.* EMISAEL VAZQUEZ

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 907 (AC 23343), is denied.

Martin Zeldis, public defender, in support of the petition.

Michele C. Lukban, assistant state's attorney, in opposition.

Decided February 4, 2004

STATE OF CONNECTICUT *v.* MICHAEL HICKEY

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 589 (AC 22847), is denied.

Alice Osedach-Powers, assistant public defender, in support of the petition.

Decided February 11, 2004

ROBERT JOHNSON *v.* COMMISSIONER OF CORRECTION

The petitioner Robert Johnson's petition for certification for appeal from the Appellate Court, 80 Conn. App. 574 (AC 22990), is denied.

Kalisha R. Raphael, deputy assistant public defender, and *Temmy Ann Pieszak*, chief of habeas corpus services, in support of the petition.

Decided February 11, 2004

DANIEL HENDERSON *v.* COMMISSIONER OF CORRECTION

The petitioner Daniel Henderson's petition for certification for appeal from the Appellate Court, 80 Conn. App. 499 (AC 23253), is denied.

Daniel Henderson, pro se, in support of the petition.

Decided February 11, 2004

STATE OF CONNECTICUT *v.* KATHLEEN WYATT

The defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 703 (AC 23440), is denied.

Daniel J. Krisch, special public defender, and *Sarah J. Healy*, legal intern, in support of the petition.

Bruce R. Lockwood, assistant state's attorney, in opposition.

Decided February 11, 2004

DANIEL R. PEKERA, ADMINISTRATOR (ESTATE OF CHARLENE WALKER), ET AL. *v.* DAVID PURPORA ET AL.

The plaintiffs' petition for certification for appeal from the Appellate Court, 80 Conn. App. 685 (AC 23546), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that the trial court did not abuse its discretion in not permitting the plaintiffs to amend their complaint?"

The Supreme Court docket number is SC 17133.

John D. Jessep, in support of the petition.

Jeffrey R. Babbin, in opposition.

Decided February 11, 2004

DIANE S. BUSQUE *v.* OAKWOOD FARMS SPORTS CENTER, INC., ET AL.

The named defendant's petition for certification for appeal from the Appellate Court, 80 Conn. App. 603 (AC 23666), is denied.

Eric D. Eddy, in support of the petition.

Michelle D. Killion, in opposition.

Decided February 11, 2004

ERIC KING *v.* COMMISSIONER OF CORRECTION

The petitioner Eric King's petition for certification for appeal from the Appellate Court, 80 Conn. App. 580 (AC 23734), is denied.

Judith M. Wildfeuer, assistant public defender, in support of the petition.

Decided February 11, 2004

LEWIS M. RESS, TRUSTEE *v.* TOWN OF SUFFIELD

The plaintiff's petition for certification for appeal from the Appellate Court, 80 Conn. App. 630 (AC 23807), is denied.

Vincent M. Marino and *Barbara M. Schellenberg*, in support of the petition.

Edward G. McAnaney, in opposition.

Decided February 11, 2004

JEROME T. DUNBAR *v.* COMMISSIONER OF MOTOR VEHICLES

The plaintiff's petition for certification for appeal from the Appellate Court (AC 24204) is denied.

Jerome T. Dunbar, pro se, in support of the petition.

Decided February 11, 2004

APPENDIX

JUSTICE JOSEPH F. DANNEHY

The Honorable Joseph F. Dannehy, a longtime Willimantic resident who had a lengthy and distinguished career in the Connecticut judiciary, passed away on December 16, 2003, at the age of eighty-six. Justice Dannehy was born in Willimantic on May 28, 1917, and attended St. Thomas Seminary in Bloomfield. He received his B.A. from Boston College in 1940, and earned his L.L.B. from Cornell University Law School in 1943. Upon graduation, he was admitted to the Connecticut bar that same year. From 1943 to 1946, Justice Dannehy served in the United States Army during World War II with the Counter Intelligence Corps of the 17th Airborne Division in Germany.

Justice Dannehy was a member of the Windham County Bar Association and began his law career as an assistant prosecuting attorney in the Willimantic Police Court from 1946 to 1959. He also served as town counsel for Windham from 1946 to 1948, and as corporation counsel for Willimantic from 1947 to 1959.

During his forty-two years on the bench, Justice Dannehy had the unique distinction of being the only judge to have served on every court in the Connecticut judicial system. In 1961, he was nominated to the Circuit Court where he served until 1965, when he was appointed to the Court of Common Pleas. Justice Dannehy served as the chief judge of that court from 1967 to 1968. In 1968, he was appointed a judge of the Superior Court where he served for a period of fifteen years. Thereafter, in 1983, Justice Dannehy was appointed as one of the original five judges of the newly created Appellate Court, and he became its first chief presiding judge. After leading that court for more than one year, he was appointed an associate justice of the Connecticut Supreme Court in 1984. Justice Dannehy retired from the Supreme Court in 1987 upon reaching the mandatory retirement age of seventy. Thereafter, he continued his service to the judiciary by serving as a judge trial referee for sixteen years until his death in 2003.

During his tenure as a Supreme Court justice and an Appellate Court judge, Justice Dannehy resided on the judicial panel of 535 cases. He authored ninety majority opinions, seventy-six while serving as a member of the Supreme Court. At a ceremony marking his retirement from

the Connecticut Supreme Court, Chief Justice Ellen A. Peters acknowledged that Justice Dannehy "has been a valued friend and colleague whose contribution to the work of this court has been impressive." Additionally, in recognizing Justice Dannehy's significant contributions to the administrative agenda of the judicial department, Justice Peters commented: "With unflagging energy and profound understanding of the judicial process, he has steadfastly endeavored to strengthen judicial administration in this state."

During his so-called retirement years, Justice Dannehy worked relentlessly as a judge trial referee mediating or pretrying cases where he devoted many hours to the settlement of cases. As a result, he settled thousands of cases in his second career as a judge trial referee and many deserving litigants did not have to wait years to recover their losses.

Throughout his distinguished legal and judicial career, Justice Dannehy also served on the judicial council, the sentence review division of the Superior Court, the commission on adult probation, the state bar examining committee and the executive committee of the Superior Court. He also served as administrative judge of the Windham judicial district.

In addition to his judicial duties, Justice Dannehy was very active in politics and local community affairs. He served as assistant clerk of the state Senate, chairman of the Windham Democratic Town Committee and president of the Windham County Democratic Association. Additionally, Justice Dannehy served as governor of the Willimantic Country Club, director of the Willimantic YMCA, trustee of the Windham Community Memorial Hospital, president of the Windham Visiting Nurses Association, president of the Greater Willimantic Community Chest, first vice president of the Willimantic Chamber of Commerce and director of the Chronicle Printing Company and the Willimantic Savings Institute.

Justice Dannehy was predeceased by his wife of many years, Margaret Riordan Dannehy, who died in 1997, and was survived by their four children, Nora R. Dannehy, Mary Ellen Dannehy, Michael R. Dannehy and Patrick T. Dannehy, as well as two grandchildren.

On September 21, 2005, a memorial dedication for Justice Dannehy was held at the Willimantic Superior Court where

he was honored and recognized for his contributions to the law, the art of lawyering and the community. He was remembered by friends and colleagues as a judge who was well liked and respected, and who ran his courthouse in a firm but fair manner. He was also remembered as a very private person who helped many people and many causes but never wanted the spotlight. In receiving the ultimate compliment for a judge, Justice Dannehy was praised as a man of integrity and accomplishment who made his colleagues better lawyers.