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COMMISSIONER OF PUBLIC HEALTH *v.*
ANTHONY COLANDREA

The defendant's petition for certification to appeal from the Appellate Court, 202 Conn. App. 815 (AC 42475), is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

A. Paul Spinella, in support of the petition.

Susan Castonguay, assistant attorney general, in opposition.

Decided April 6, 2021

ROGEAU R. COLLINS *v.* COMMISSIONER OF CORRECTION

The petitioner Rogeau R. Collins' petition for certification to appeal from the Appellate Court, 202 Conn. App. 789 (AC 42785), is denied.

D'AURIA and ECKER, Js., would grant the petition for certification.

Jennifer B. Smith, assigned counsel, in support of the petition.

Timothy F. Costello, senior assistant state's attorney, in opposition.

Decided April 6, 2021

ROBERT C. GODFREY *v.* COMMISSIONER OF CORRECTION

The petitioner Robert C. Godfrey's petition for certification to appeal from the Appellate Court, 202 Conn. App. 684 (AC 42890), is denied.

Vishal K. Garg, assigned counsel, in support of the petition.

Laurie N. Feldman, deputy assistant state's attorney, in opposition.

Decided April 6, 2021

CHRISTOPHER DWYER *v.* COMMISSIONER OF CORRECTION

The petitioner Christopher Dwyer's petition for certification to appeal from the Appellate Court, 202 Conn. App. 907 (AC 43456), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

Thadius L. Bochain, deputy assistant state's attorney, in opposition.

Decided April 6, 2021

RELIABLE MECHANICAL CONTRACTORS, LLC, ET AL. *v.* ROBERT RICKETTS ET AL.

The plaintiff Elijah El-Hajj-Bey's petition for certification to appeal from the Appellate Court, 202 Conn. App. 902 (AC 43556), is denied.

MULLINS, J., did not participate in the consideration of or the decision on this petition.

Elijah El-Hajj-Bey, self-represented, in support of the petition.

Jane S. Bietz, in opposition.

Decided April 6, 2021

IN RE PHOENIX A.

The petition by the respondent father for certification to appeal from the Appellate Court, 202 Conn. App. 827 (AC 44060), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Deanna S. Levine and *Evan O'Roark*, assistant attorneys general, in opposition.

Decided April 6, 2021

STATE OF CONNECTICUT *v.* DEYKEVIOUS RUSSAW

The defendant's petition for certification to appeal from the Appellate Court, 203 Conn. App. 123 (AC 43084), is denied.

Robert L. O'Brien, assigned counsel, in support of the petition.

Kathryn W. Bare, senior assistant state's attorney, in opposition.

Decided April 6, 2021

J. XAVIER PRYOR *v.* TIMOTHY BRIGNOLE ET AL.

The petition by the defendant Brignole, Bush & Lewis, LLC, for certification to appeal from the Appellate Court (AC 44254) is granted, limited to the following issue:

"Did the Appellate Court properly dismiss the appeal for lack of a final judgment after the trial court denied the special motion to dismiss filed by the defendant Brignole, Bush & Lewis, LLC, pursuant to General Statutes § 52-196a?"

KELLER, J., did not participate in the consideration of or decision on this petition.

Sarah F. D'Addabbo and *Matthew G. Conway*, in support of the petition.

Decided April 6, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 203

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

AARON M. ZWEIG *v.* THE MARVELWOOD SCHOOL (AC 42660)

Alvord, Elgo and Devlin, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, his allegedly wrongful discharge from employment. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. The plaintiff asserted that genuine issues of material fact existed as to whether the defendant's termination of his employment violated public policy for the protection of children. The plaintiff was employed by the defendant independent school as a history teacher and he also served as the defendant's Director of Food Studies, a role that required him to establish and maintain a garden on campus and use it to teach a class on food studies. In May, 2015, the plaintiff objected to the defendant's suggestion that telephone poles that had been treated with creosote, a pesticide and wood preservative, be used to make raised beds in the garden because he believed that the chemical posed a health risk to himself and his students. Following the dispute, the plaintiff was relieved of his duties relating to the garden but remained employed as a teacher at the school, entering into at-will employment agreements with the defendant in July, 2015, and April, 2016. In September, 2016, the plaintiff's employment was terminated. *Held* that the trial court properly granted the defendant's motion for summary judgment because no genuine issue of material fact existed as to whether the plaintiff set forth a valid wrongful discharge claim: the plaintiff failed to demonstrate that his dismissal occurred for a reason that violated public policy because it did not violate any explicit statutory or constitutional provision, as there were no state or federal regulations prohibiting the use of creosote-treated wood, and it did not violate any judicially conceived notion of public policy, as, although the courts may have recognized a public policy of protecting children in their prior interpretations of child protection statutes, they have not articulated any judicially conceived notion of public policy relating to the protection of children; moreover, the public policy exception to the at-will employment doctrine is narrow, requiring conduct that violates a clearly articulated public policy, as a broad interpretation would impair the exercise of managerial discretion and render the at-will employment doctrine meaningless; furthermore, even if this court assumed that the defendant's conduct violated public policy, the plaintiff could not have prevailed on his claim because he failed to satisfy his burden of demonstrating a causal connection between his allegedly protected activity and the discharge of his employment, as the defendant's decision to enter into employment contracts with the

plaintiff in July, 2015, and April, 2016, despite the May, 2015 dispute, broke the causal connection between the dispute and the plaintiff's September, 2016 termination of employment.

Argued March 5, 2020—officially released April 20, 2021

Procedural History

Action to recover damages for, inter alia, the allegedly wrongful termination of the plaintiff's employment, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Shaban*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Thomas W. Meiklejohn, with whom, on the brief, was *Henry F. Murray*, for the appellant (plaintiff).

Daniel A. Schwartz, with whom were *Christopher E. Engler* and, on the brief, *Gary S. Starr*, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, Aaron M. Zweig, appeals from the summary judgment rendered by the trial court in favor of the defendant, The Marvelwood School, in this action for wrongful discharge. On appeal, the plaintiff claims that the court improperly determined that no genuine issue of material fact existed as to whether he set forth a valid wrongful discharge claim. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant to this appeal. The defendant is an independent boarding school for grades nine through twelve, plus a postgraduate year. In June, 2012, the plaintiff executed an at-will employment contract with the defendant for the 2012–2013 school year as a history teacher, as well as a newly created position titled "Director of Food Studies." The latter position required the plaintiff to

establish a garden on campus and use it to teach a class on food studies.[1] The plaintiff also was responsible for maintaining the garden and, like other faculty at the school, he was responsible for supervising sports, community service activities and the dormitory. The plaintiff subsequently executed similar employment contracts for the 2013–2014 and 2014–2015 school years, which required him to teach three classes, coach sports for two seasons, continue as Director of Food Studies, serve as head of the community service program and continue with dormitory supervisory responsibilities.

In the spring and summer of 2014, the defendant's headmaster, Arthur Goodearl, expressed to the plaintiff his concern that the garden, which was located at the entrance to the campus, was not being maintained properly. The plaintiff responded that maintenance staff had not been helpful in his requests for assistance. Goodearl recommended that he engage students for this work, a suggestion that the plaintiff considered impractical because "teenagers . . . aren't necessarily interested in hard labor . . . ."

On May 22, 2014, Alicia Winter, a parent of students enrolled at the school who also had expressed concerns about the garden, sent an e-mail to Goodearl with suggestions for improving its appearance, which were then forwarded to the plaintiff. In an e-mail exchange on June 4, 2014, Winter sent photographs of telephone poles on her property, which she offered to donate for use in the garden, but advised that they would probably need to be lined because they were filled with creosote.[2] The

[1] The plaintiff previously was employed by the defendant as a teacher from 2005 until 2010. In the fall of 2010, the plaintiff left his position with the defendant to obtain a master's degree in food studies.

[2] Creosote is a pesticide used as a wood preservative. See United States Environmental Protection Agency, "Ingredients Used in Pesticide Products: Creosote," (last modified December 15, 2016), available at https://19january2-017snapshot.epa.gov/ingredients-used-pesticide-products/creosote_.html (last visited April 7, 2021).

plaintiff responded that "they seem a bit big and heavy. And with the creosote, maybe [it's] best not to use them. Not really sure how to even get them into the garden."

In an at-will employment agreement dated February 21, 2015 (February, 2015 contract), Goodearl offered the plaintiff employment for the 2015–2016 school year as Director of Food Studies at an annual salary of $45,900, which represented a 1.6 percent increase in salary. The plaintiff's responsibilities would have required him to teach four instead of three classes, as well as to continue to coach for two seasons and to serve as the head of the community service program. The agreement specified that "[r]esponses must be received on or before April 3, 2015. After which, those who have not signed & returned the agreement, may have their position made available to any other qualified applicants." The plaintiff never signed the February, 2015 contract.

On April 7, 2015, Goodearl advised the plaintiff of his intention to offer Winter the position of "Garden Manager." Winter accepted the offer to fill that role on April 19, 2015, thereby reducing the plaintiff's responsibilities as Director of Food Studies. As Garden Manager, Winter went forward with her plan to build raised beds for the garden using the donated telephone poles, which were delivered to the campus on or after May 7, 2015.

On May 15, 2015, the plaintiff e-mailed Goodearl and informed him that he objected to the use of the telephone poles to make raised beds "because they are made with carcinogenic chemicals that leech into the soil." The plaintiff further indicated his preference to make raised beds out of pine or cedar "because they do not put cancer in the soil." In response, Goodearl stated in relevant part: "Regarding the poles, [Winter] has used them for years, but [she] is researching to make sure that there is no adverse effect. Your comment about

putting cancer into the soil is gratuitous in the extreme, and frankly, unworthy of you." The plaintiff then sent a reply e-mail to Goodearl, in which he stated: "[Y]ou may feel that protecting our community from known sources of cancer is 'unworthy' of my efforts, but I feel as though preventing cancer and known poisons from our environment is a duty." Winter thereafter decided not to use the telephone poles for the garden and arranged for their removal.

In an e-mail dated June 15, 2015, Goodearl advised the plaintiff that he had not yet signed the February, 2015 contract, which at that point had expired. In his e-mail response on June 25, 2015, the plaintiff stated that he was aware that he had not signed his contract and that he had considered resigning his position. He asked Goodearl whether he would consider discussing a part-time position. Following negotiation with Goodearl and given assurances that he would maintain his health insurance, the plaintiff signed a new at-will employment agreement (2015–2016 Agreement) on July 14, 2015, for a full-time position that required him to teach four classes and administer the community service program. That agreement, which provided for an annual salary of $37,000, also eliminated his responsibilities for the Food Studies program and reduced his dormitory duties and coaching responsibilities.

Approximately nine months later, the plaintiff executed another at-will employment contract (2016–2017 Agreement)[3] with the defendant for the 2016–2017 school year. That agreement included the same terms as the 2015–2016 Agreement, with two exceptions: the plaintiff's community service obligation was eliminated and his annual salary was increased to $38,000.

Approximately five months later, on September 6, 2016, the defendant terminated the plaintiff from its employ,

[3] All of the plaintiff's prior annual employment contracts with the defendant were at will.

and this wrongful discharge action followed. The plaintiff filed a two count amended complaint against the defendant in September, 2017. In count one, the plaintiff alleged that the defendant had "reduced the plaintiff's pay because he opposed the use of carcinogens in the defendant's vegetable garden."[4] In count two, the plaintiff alleged that the defendant had terminated his employment for the same reason.[5] The plaintiff alleged that both adverse employment actions "violate[d] the public policy of the state of Connecticut."

On March 30, 2018, the defendant filed a motion for summary judgment as to both counts of the complaint on the ground that the plaintiff had failed to establish "an important public policy which supports his claim."[6] On September 4, 2018, the court heard oral arguments on the defendant's motion. In its subsequent memorandum of decision, the court granted the defendant's motion for summary judgment because "the plaintiff . . . failed to

[4] At oral argument on the motion for summary judgment, the defendant argued that count one does not allege any legally recognized tort because the common-law exception to at-will employment articulated in *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 476, 427 A.2d 385 (1980), only applies to wrongful discharge, not to reduction in pay. The trial court declined to address that argument because the defendant raised this issue for the first time at oral argument and not in its pleadings.

[5] The plaintiff also alleged that he was wrongfully terminated because he (1) "opposed policies that condoned failure to fulfill community service obligations" and (2) "called upon the defendant to take adequate steps to discourage drug and alcohol use by minors." The court granted the defendant's motion for summary judgment as to those alternative grounds, and the plaintiff does not challenge the propriety of that determination in this appeal.

[6] The defendant raised several other grounds in support of its motion for summary judgment, contending that (1) there was no evidence of a "causal connection between [the plaintiff's] May 15, 2015 e-mail in which he complained about the use of creosote treated telephone poles . . . and his 2015–2016 contract terms"; (2) the time gap between his 2015 e-mail objecting to creosote and later employment contracts "is too great a time gap to permit an inference of retaliation"; and (3) the defendant "had a legitimate, nonretaliatory reason for [the plaintiff's] termination." Because the court granted the defendant's motion for summary judgment for lack of an explicit public policy, it declined to address those alternative grounds.

identify any explicit public policy contained in an applicable statute, regulation, constitutional provision, or judicial decision that was violated by the defendant . . . .'' The plaintiff thereafter filed a motion to reargue the decision, which the court denied, and this appeal followed.

The issue presented in this appeal by the plaintiff is whether the court properly granted the defendant's motion for summary judgment on the ground that the plaintiff failed to demonstrate as a matter of law that his dismissal occurred for a reason violating public policy. ''The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. 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 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/her] 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. . . . A material fact . . . [is] a fact which will make a difference in the result of the case.'' (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 312–13, 77 A.3d 726 (2013). ''When a court renders summary judgment as a matter 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.) *Armshaw* v. *Greenwich Hospital*, 134 Conn. App. 134, 137, 38 A.3d 188 (2012).

"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). However, in *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 475, 427 A.2d 385 (1980), our Supreme Court recognized an exception to the at-will employment doctrine: a common-law cause of action for wrongful discharge exists "if the former employee can prove a demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy." (Emphasis omitted.) Id. As our Supreme Court subsequently explained, the "public policy exception . . . carved out in *Sheets* attempts to balance the competing interests of employer and employee. Under the exception, the employee has the burden of pleading and proving that his dismissal occurred for a reason violating public policy. The employer is allowed, in ordinary circumstances, to make personnel decisions without fear of incurring civil liability. Employee job security, however, is protected against employer actions that contravene public policy." *Morris* v. *Hartford Courant Co.*, 200 Conn. 676, 679, 513 A.2d 66 (1986). "The question of whether a challenged discharge violates public policy . . . is a question of law to be decided by the court . . . ." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 407, 142 A.3d 227 (2016).

"Given the inherent vagueness of the concept of public policy, it is often difficult to define precisely the contours of the exception." *Morris* v. *Hartford Courant*

Co., supra, 200 Conn. 680. Although *Sheets* and its progeny recognize a claim for wrongful termination in appropriate cases, our Supreme Court has "repeatedly . . . underscored . . . that the public policy exception to the general rule allowing unfettered termination of an at-will employment relationship *is a narrow one* . . . ." (Emphasis added; internal quotation marks omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 701. Indeed, the court in *Sheets* emphasized that "courts should not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation." *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 477. Consequently, our Supreme Court has "rejected claims of wrongful discharge that have not been predicated upon an employer's violation of an important and clearly articulated public policy." *Thibodeau* v. *Design Group One Architects, LLC*, supra, 701. Thus, in evaluating wrongful termination claims, a reviewing court must "look to see [1] whether the plaintiff has . . . alleged that his discharge violated any explicit statutory or constitutional provision . . . or [2] whether he alleged that his dismissal contravened any judicially conceived notion of public policy." (Internal quotation marks omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 581, 693 A.2d 293 (1997).

I

On appeal, the plaintiff concedes that the defendant's conduct does not violate any explicit statutory or constitutional provision.[7] The plaintiff also does not dispute

[7] In the absence of any state or federal statutory provisions that prohibit the defendant from reusing a creosote-treated telephone pole for gardens, the plaintiff submitted government studies on creosote in opposition to the defendant's motion for summary judgment. For example, the plaintiff relies on a 2002 brochure from the Agency for Toxic Substances and Disease Registry (ATSDR), an agency within the United States Department of Health and Human Services, which states that "exposure to coal tar creosote . . . may harm you . . . ." Agency for Toxic Substance and Disease Registry, "Public Health Statement: Creosote," (September 2002), p. 1, available at https://www.atsdr.cdc.gov/ToxProfiles/tp85-c1-b.pdf (last visited April 7,

the absence of state or federal regulations prohibiting the use of creosote-treated wood and concedes that discarded telephone poles are exempt from regulation as a hazardous waste. Instead, the plaintiff seeks to bring his claim within the narrow confines of *Sheets* and its progeny by asserting that Connecticut courts have "judicially recognized a public policy in the protection of children." The plaintiff relies on *Morris* v. *Hartford Courant Co.*, supra, 200 Conn. 680, which states in dicta an exception to the at-will employment doctrine where an employee alleges that his or her dismissal contravened a "judicially conceived notion of public policy." The plaintiff contends that judicial decisions that have "recognized the public policy of protecting children," as articulated in, for example, General Statutes § 17a-101,[8] constitute the basis for a judicially conceived notion of public policy, the violation of which

2021). The plaintiff also relies on an Environmental Protection Agency report, which classifies creosote as a "probable human carcinogen," and found a "well-documented carcinogenicity of other coal tar [creosote] products to humans." United States Environmental Protection Agency, "Chemical Assessment Summary: Creosote; CASRN 8001-58-9," (last modified December 3, 2002), p. 2, available at https://iris.epa.gov/static/pdfs/0360_summary.pdf (last visited April 7, 2021). The defendant counters that the Environmental Protection Agency study "do[es] not discuss the hundreds of other employees who were similarly exposed to creosote for whom there were apparently no reported incidents of cancer," and that the ATSDR brochure does not establish that limited creosote exposure poses a significant risk of cancer. We deem it unnecessary to rule on this dispute because, even if it were properly before this court, these studies do not bear on the issue before us, as they do not address whether the reuse of creosote-treated wood violates federal or state law. Although the sources for materials like an agency brochure and academic study might be influential to a legislative determination of public policy, these materials standing alone do not establish a violation of a statutorily based public policy.

[8] General Statutes § 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; 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 or neglect, investigation of such reports by a social agency, and provision of services, where needed, to such child and family."

can serve as an exception to the at-will employment doctrine.[9] We disagree.

In *Sheets*, our Supreme Court declined to address "whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy." *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 480. At the same time, the court observed that "when there is a relevant state statute we should not ignore the statement of public policy that it represents." Id. Relying on *Sheets* and its progeny, the defendant argues that "courts should not impute a statement of public policy beyond [the] express statutory language." See also *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 408–409.

Even if we were to accept the plaintiff's premise that the exemption of the reuse of creosote from state and federal environmental regulation is not fatal to his *Sheets* claim, we first note that the plaintiff misstates the standard articulated in *Morris*.[10] The court in *Morris*

[9] See, e.g., *Ward* v. *Greene*, 267 Conn. 539, 558, 839 A.2d 1259 (2004) ("[t]he 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"); *State* v. *AFSCME, Council 4, Local 2663, AFL-CIO*, 59 Conn. App. 793, 795, 798–99, 758 A.2d 387 (arbitration award reinstating Department of Children and Families bus driver convicted of drug offenses violated public policy to protect children in state custody), cert. denied, 255 Conn. 905, 762 A.2d 910 (2000); *Bridgeport* v. *National Assn. of Government Employees, Local R1-200*, Superior Court, judicial district of Fairfield, Docket No. CV-94-0311951 (August 2, 1994) (12 Conn. L. Rptr. 271) (rejecting claim that arbitration award reinstating school custodian violates public policy expressed in § 17a-101).

[10] The plaintiff's assertion that *Magnan* v. *Anaconda Industries, Inc.*, 193 Conn. 558, 479 A.2d 781 (1984),"is the only decision of the Connecticut Supreme Court to find wrongful termination based upon 'judicially conceived notions of public policy' in the absence of a specific statute" mischaracterizes the court's analysis and holding. In *Magnan*, the plaintiff was terminated for refusing to sign a statement that he claimed was an inaccurate account of his complicity in another employee's theft of company property. Id., 560–61. As an at-will employee, the plaintiff brought an action in two counts: (1) breach of the implied covenant of good faith and fair dealing and (2) wrongful discharge based on retaliation for his refusal to sign an untrue statement. Id., 573. With respect to the first count, which the jury found for

stated in dicta that an employer could be liable for wrongful termination if the discharge violated "any judicially *conceived* notion of public policy." (Emphasis added.) *Morris* v. *Hartford Courant Co.*, supra, 200 Conn. 680. In his brief, the plaintiff justifies his foray into invoking public policy language from case law that applies child protection statutes by repeatedly asserting that "[t]here is a judicially *recognized* public policy of protecting children" in a wide range of circumstances. (Emphasis added.)

the plaintiff, the court rejected the proposition that the requirement of good faith and fair dealing be transformed into "an implied condition that an employee may be dismissed only for good cause" in an at-will employment relationship. Id., 559, 571. In so doing, it observed that "[t]o hold otherwise would render the court a bargaining agent for every employee not protected by statute or collective bargaining agreement . . . ." Id., 571. Notably, it deferred to our legislature to determine what categories of employment should be given protection and what criteria should determine whether good cause exists for discharge, observing that "the General Assembly may deal . . . more comprehensively [with such questions] than the courts." Id., 572. In citing *Sheets*, it specifically declined "to enlarge the circumstances under which an at-will employee may successfully challenge his dismissal" beyond the violation of an important public policy. Id. Having set aside the verdict on the first count, the court addressed the second count, for which the jury returned a verdict for the defendant. Id., 573. In reviewing the jury instructions as to that count, the court observed that the underlying factual underpinnings for the first and second counts were essentially the same and remanded the case for a new trial on the second count on the basis of its conclusion that the jury verdicts were inconsistent. Id., 576–78. Although the second count was premised on the question of whether the defendant's conduct violated some important public policy, specifically whether the defendant terminated the plaintiff for his refusal to sign a statement that the defendant knew not to be true, the court did not specifically characterize this discharge as constituting a violation of a "judicially conceived notion of public policy." In fact, that language emerged for the first time two years later as dicta with no analysis or discussion in *Morris* v. *Hartford Courant Co.*, supra, 200 Conn. 680. Although our Supreme Court has recited the "judicially conceived notion of public policy" exception to the at-will employment doctrine in subsequent decisions; see *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 408; *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 699; *Faulkner* v. *United Technologies Corp.*, supra, 240 Conn. 581; it has not had occasion to be interpreted or applied by our appellate courts in the context of at-will employment wrongful discharge cases.

This distinction between a judicially conceived notion and a judicially recognized one is not mere semantics. Although we are not aware of any appellate court cases that have found an exception to the at-will employment doctrine based on a violation of a "judicially conceived notion of public policy," our courts routinely "recognize" public policy in interpreting statutes. See, e.g., *State* v. *Burns*, 236 Conn. 18, 22–23, 670 A.2d 851 (1996) (in discerning legislative intent, courts "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" (internal quotation marks omitted)). Nevertheless, although our courts may appropriately recognize and consider public policy, particularly as an aid to statutory construction, this function can in no way be construed as "conceived" by our courts.[11]

We emphasize this distinction because much of the authority on which the plaintiff relies for his contention that there is a judicially recognized policy of protecting children draws from child protection statutes. See *Ward* v. *Greene*, 267 Conn. 539, 560, 839 A.2d 1259 (2004) (in considering public policy underlying § 17a-101, court rejected claim that all children are encompassed in class of persons referenced therein); *State* v. *AFSCME, Council 4, Local 2663, AFL-CIO*, 59 Conn. App. 793, 798–99, 801–802, 758 A.2d 387 (court relied on public pol-

[11] See 2B N. Singer & J. Singer, Statutes and Statutory Construction (7th Ed. 2020) § 56:1 ("'Public policy' is a vague and indefinite concept not susceptible of application as a precise rule of decision, yet often serves as a shorthand reference for a wide variety of factors which may influence and condition the formation, validation, interpretation, and application of legislation. Precise identification, particularization, and definition of relevant policy considerations is helpful to clarify issues in particular cases. Courts locate public policy considerations by examining a statute's history, purpose, language and effect." (Footnotes omitted.)).

icy underlying General Statutes §§ 17a-90 (a), 17a-101 (a), 17a-114 (b), and 17a-115 in considering authority of commissioner to terminate Department of Children and Families employee convicted of drug offenses), cert. denied, 255 Conn. 905, 762 A.2d 910 (2000); *Bridgeport* v. *National Assn. of Government Employees, Local R1-200*, Superior Court, judicial district of Fairfield, Docket No. CV-94-0311951 (August 2, 1994) (12 Conn. L. Rptr. 271) (rejecting claim that arbitration award reinstating school custodian violated public policy expressed in § 17a-101). Our examination of these cases reveals that, although the court may have "recognized" the public policy expressed by child protection statutes, the court did not articulate *judicially* conceived notions of public policy. Rather, as is self-evident, the public policy in question emanated not from our courts, but from the statutes themselves and were thus conceived and promulgated by our legislature.

Numerous Supreme Court decisions since *Morris* demonstrate that, whatever the court suggested in dicta regarding judicially conceived notions of public policy, public policy exceptions to the at-will employment doctrine arising from statutes nonetheless must allege violations specific to those provisions. As our Supreme Court has explained, generalized statements of public policy contained in our statutes "should not be read to provide a broader public policy mandate than that which is represented." *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 408. Although we note that the plaintiff fails to mention the references to child protection statutes such as § 17a-101 (a) in his citation to cases in which courts have "recognized" the public policy to protect children, this does not obviate the fact that the legislature, and not the courts, determined the public policy articulated therein. The plaintiff's characterization of those cases as examples of

judicially conceived notions of public policy as contemplated by *Morris*, therefore, is untenable.

Moreover, in its admonition that a wrongful discharge action must allege a violation of an explicit statutory or constitutional provision, our Supreme Court has specifically rejected a more explicit attempt to invoke § 17a-101 (a) in a wrongful discharge action based on a violation of the public policy expressed therein. See *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 802, 734 A.2d 112 (1999). In *Daley*, an employee brought an action for wrongful discharge alleging, inter alia, that her employer terminated her because she advocated for flexible schedules for working parents. Id., 772–74. She alleged that the public policy contained in a variety of statutes—including § 17a-101 (a), the Connecticut Family and Medical Leave Act, General Statutes § 31-51kk et seq., and the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.—not only required employers to provide flexible work schedules, but also prohibited discrimination against employees pursuing these arrangements. Id., 799–801. Although our Supreme Court acknowledged that each of the statutes regulates workplace conduct to some degree, noting that § 17a-101 (a) includes the reporting and investigation obligations of certain professionals, the court nevertheless emphasized that "[n]one of these statutes requires that an employer accommodate employee requests for flexible work schedules." Id., 802.

In rejecting general public policy statements as a basis for wrongful discharge actions, the Supreme Court reiterated that courts "do not lightly intervene to impair the exercise of managerial discretion or to foment unwarranted litigation." (Internal quotation marks omitted.) Id., 802–803. "In declining to recognize an important public policy to that effect, we are mindful that we should not ignore the statement of public policy that is represented by a relevant statute. . . . Nor

should we impute a statement of public policy beyond that which is represented. To do so would subject the employer who maintains compliance with express statutory obligations to unwarranted litigation for failure to comply with a heretofore unrecognized public policy mandate." (Citation omitted.) Id., 804.

In *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 706, our Supreme Court similarly reaffirmed the principle that general statements of public policy in our statutes are an insufficient basis for a wrongful discharge action. The plaintiff in that case alleged that she was wrongfully discharged by her employer, the defendant, in violation of the public policy against pregnancy discrimination outlined in the Fair Employment Practices Act, General Statutes § 46a-51 et seq. *Thibodeau* v. *Design Group One Architects, LLC*, 64 Conn. App. 573, 574, 781 A.2d 363 (2001), rev'd, 260 Conn. 691, 802 A.2d 731 (2002). That statute, however, only applied to employers with three or more employees and the defendant admittedly employed only two individuals. Id., 575. The defendant successfully moved for summary judgment on the ground that the exemption was an expression of public policy against claims like that raised by the plaintiff. Id. On appeal, this court disagreed and reversed the judgment of the trial court in favor of the defendant, observing that the statute "announced a general public policy against sex discrimination in employment"; id., 584; and that "the language, history and public policy underlying the act . . . reflect a cognizable legislative and societal concern for eliminating discrimination on the basis of sex in Connecticut." Id., 586. Although it conceded that the statute exempted small employers like the defendant from pregnancy discrimination claims, this court concluded that the statute's statement of public policy, at most, was "simply to limit the statutory remedy, but [was] not an affirmative policy to exempt . . . small

employers from . . . discrimination suits." (Internal quotation marks omitted.) Id., 587.

The defendant then appealed to the Supreme Court, which reversed the judgment of the Appellate Court, concluding that "the exemption contained in the act for employers with fewer than three employees is, itself, an expression of public policy that cannot be separated from the policy reflected in the act's ban on discriminatory employment practices." *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 706. As the court rhetorically asked: "Why would the legislature have exempted small employers from the act unless it had concluded, as a policy matter, that such employers should not be required to defend against sex discrimination claims, notwithstanding this state's general public policy against sex discrimination?" Id., 718. The court thus concluded that it saw "no reason why the legislature would have excluded small employers from the act unless it had decided, as a matter of policy, that such employers should be shielded from liability for employment discrimination, including sex and pregnancy-related discrimination. . . . The legislature may wish to revisit its policy judgment regarding small employers. We, however, are not free to ignore the clear expression of public policy embodied in the statutory exemption currently afforded small employers under the act." Id.

We are also not persuaded that *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 107 A.3d 381 (2015), or *Hanford* v. *Connecticut Fair Assn.*, 92 Conn. 621, 103 A. 838 (1918), have any application to our jurisprudence in wrongful termination cases involving at-will employment. The primary issue in *Ruiz* involved "whether public policy [supported] the imposition of a [legal] duty" in the context of a negligence case involving

attractive nuisances on a landowner's property. (Internal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, supra, 323, 337. *Hanford* likewise is inapplicable because it merely stands for the proposition that a contract to hold a baby show during the 1916 "infantile paralysis" epidemic[12] was void because holding the event "would [have been] highly dangerous to the health of the community" and, thus, contrary to public policy. *Hanford* v. *Connecticut Fair Assn.*, supra, 622–23.

Although the plaintiff acknowledges that these cases do not involve exposure of children to creosote or any carcinogen, he argues that public policy "is not limited to narrowly defined circumstances." *Ruiz* and *Hanford*, however, did not address public policy in the context of the at-will employment doctrine, which presents countervailing public policy concerns that we are not free to ignore.

As our Supreme Court repeatedly has emphasized, *Sheets* is a narrow, not a broad, exception to the at-will employment doctrine. See, e.g., *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 700–701; *Parsons* v. *United Technologies Corp.*, 243 Conn. 66, 79, 700 A.2d 655 (1997). By circumscribing the parameters of the public policy exception, our Supreme Court has underscored the principle that, when its conduct violates some clearly articulated public policy, an employer forgoes its otherwise unfettered right to terminate an employee in an at-will employment relationship. The logic underlying this requirement is obvious. In those instances where the legislature has clearly spoken, the impropriety of the alleged conduct is, as a matter of law, not in dispute. See *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 407 ("[t]he question of whether a challenged discharge violates public policy . . . is a question of law to be

[12] The infantile paralysis was caused by polio. See 30 S. Williston, Contracts (4th Ed. 2004) § 77:72, p. 496.

decided by the court" (internal quotation marks omitted)). Thus, notwithstanding "the inherent vagueness of the concept of public policy," which renders the contours of exceptions, as the court in *Morris* v. *Hartford Courant Co.*, supra, 200 Conn. 680, observed, "often difficult to define precisely," the requirement that violations assert some "explicit statutory or constitutional provision"; *Faulkner* v. *United Technologies Corp.*, supra, 240 Conn. 581; ensures that an employer is effectively and constructively apprised of the improper conduct. As our Supreme Court noted in *Daley* v. *Aetna Life & Casualty Co.*, supra, 249 Conn. 804, "absent [a] clear breach of public policy, the employer must be allowed to make personnel decisions without fear of incurring civil liability." (Internal quotation marks omitted.) To do otherwise "would subject the employer who maintains compliance with express statutory obligations to unwarranted litigation for failure to comply with a heretofore unrecognized public policy mandate." Id.

Furthermore, actions that are premised on conduct that is alleged to violate public policy founded on general statements, rather than on clearly proscribed conduct, run the risk that our courts will be faced with arbitrating the merits of the alleged public policy itself. The present case, if it were permitted to advance to trial, illustrates precisely why our Supreme Court has foreclosed litigation of at-will employment cases that fall short of alleging violations of a clearly articulated public policy. Because the plaintiff concedes, as he must, the absence of state or federal statutes or regulations prohibiting the use of creosote in telephone poles used in garden beds, the plaintiff's proffer of the opinions of experts and statements in agency brochures effectively seeks to have the court litigate the merits of his public policy claim.[13] These sources, however,

[13] For example, the defendant contends that not only does the opinion of the plaintiff's expert, Jeffrey Cordulack, fail to establish that creosote use

are opinions subject to dispute, such that the defendant would be entitled to challenge with its own experts and evidence the degree to which creosote is unsafe and whether it was reasonable for the defendant to be dismissive of the plaintiff's concerns because it relied on Winter's belief that, if dry and/or lined, creosote telephone poles did not pose a risk to students.

Permitting a plaintiff to litigate conduct that is not clearly proscribed by statute would eviscerate the underlying premise of the at-will employment doctrine. "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." *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 697–98. The purpose of the at-will employment doctrine is to "preserve the autonomy of managerial discretion in the work place and the freedom of the parties to make their own contract." *Magnan* v. *Anaconda Industries*,

in garden beds is proscribed under state or federal law, but also that Cordulack's report should not be considered because "[Cordulack] has not been qualified as an expert. His undergraduate degree is in forestry, not a relevant field, and he has no advanced degrees." Moreover, in rendering his opinion that the use of creosote-treated telephone poles in organic gardens "is an unwise and unsafe decision," Cordulack relies on the United States Environmental Protection Agency statement that "[c]reosote is not approved to treat wood for residential use, including landscaping timbers or garden borders." United States Environmental Protection Agency, "Ingredients Used in Pesticide Products: Creosote," (last modified December 15, 2016), available at https://19january2017snapshot.epa.gov/ingredients-used-pesticide-products/creosote .html (last visited April 7, 2021). In response, the defendant claims that "the reuse of creosote-treated wood is not subject to federal regulation under pesticide laws." In its decision, the trial court noted that, under Connecticut law, discarded creosote-treated wood is specifically exempted from the definition of hazardous waste under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 et seq. (2018), "because of an existing exemption [codified] at 40 [C.F.R.] § 261.4 (b) (9) . . . ." (Internal quotation marks omitted.) See also General Statutes § 22a-115 (1) (A). These competing contentions illustrate not only that the use of creosote in garden beds is subject to dispute, but also that the very nature of the dispute is one that is quintessentially a matter to be resolved by the legislature and the executive branch.

Inc., 193 Conn. 558, 563, 479 A.2d 781 (1984). As our Supreme Court emphasized in *Sheets*, "courts should not lightly intervene" into the motivations behind an employer's termination of an at-will employee. *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 477. To adopt the plaintiff's argument in the present case would "impair the exercise of managerial discretion" and render the at-will employment doctrine meaningless. Id. For that reason, anything less than an express violation of a statutory or constitutional mandate would undermine the salutary purpose of balancing the right of an employee to have a remedy for clear violations of public policy and the right of the employer to managerial discretion as contemplated by *Sheets*.

"[J]ust as the primary responsibility for formulating public policy resides in the legislature . . . so, too, does the responsibility for determining, within constitutional limits, the methods to be employed in achieving those policy goals." (Citations omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 715. "In areas where the legislature has spoken . . . the primary responsibility for formulating public policy must remain with the legislature." *State* v. *Whiteman*, 204 Conn. 98, 103, 526 A.2d 869 (1987); see also *Sic* v. *Nunan*, 307 Conn. 399, 410, 54 A.3d 553 (2012) (declining to recognize duty of "drivers to keep their wheels pointed in a particular direction when stopped at an intersection waiting to turn" in part because "it is undisputed that the legislature, which has the primary responsibility for formulating public policy . . . has not seen fit to enact any statutes requiring [such conduct]" (citation omitted; internal quotation marks omitted)); *General Motors Corp.* v. *Mulquin*, 134 Conn. 118, 132, 55 A.2d 732 (1947) ("it is for the legislature, which is the arbiter of public policy, to determine what [public policy] shall be"); *New Haven Metal & Heating Supply Co.* v. *Danaher*, 128 Conn. 213, 222, 21 A.2d 383 (1941)

("the legislature determines the public policy of the state"); *State* v. *Gilletto*, 98 Conn. 702, 714, 120 A. 567 (1923) ("[t]he legislature is the arbiter of public policy"); *Nichols* v. *Salem Subway Restaurant*, 98 Conn. App. 837, 846, 912 A.2d 1037 (2006) ("[t]he legislature speaks on matters of public policy through legislative enactments and through the promulgation of regulations by state agencies as authorized by statute" (internal quotation marks omitted)).

Moreover, "[t]he wisdom of deferring questions of public policy to the legislature is exemplified by the problems that judicial intervention would create . . . ." *Burnham* v. *Administrator, Unemployment Compensation Act*, 184 Conn. 317, 325, 439 A.2d 1008 (1981). The plaintiff relies on an Environmental Protection Agency report, which classifies creosote as a "probable human carcinogen." United States Environmental Protection Agency, "Chemical Assessment Summary: Creosote; CASRN 8001-58-9," (last modified December 3, 2002), p. 2, available at https://iris.epa.gov/static/pdfs/0360_summary.pdf (last visited April 7, 2021). Although such a report might be influential to a legislative determination of public policy, it does not establish that the substance offends a clearly articulated public policy. We therefore decline the plaintiff's invitation to "[exceed] our constitutional limitations by infringing on the prerogative of the legislature to set public policy through its statutory enactments." *State* v. *Reynolds*, 264 Conn. 1, 79, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); see also *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 684 n.7, 189 A.3d 99 (2018) (noting distinction between court articulating public policy versus "*vindicating* our legislature's public policy, articulated in state statute" (emphasis in original)); *Schofield* v. *Loureiro Engineering Associates, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-14-6024702-S (March

9, 2017) (64 Conn. L. Rptr. 252) ("[i]n the absence of a clearly articulated judicially conceived notion of public policy on the issues presented . . . this court will not re-write existing statutes").

We agree with the plaintiff that, as a general matter, protecting the health and welfare of children is an important public policy. The plaintiff nonetheless bore the burden of demonstrating that his discharge was "predicated upon an employer's violation" of a "clearly articulated public policy." *Thibodeau* v. *Design Group One Architects, LLC*, supra, 260 Conn. 701. In advancing his claim that the defendant violated public policy, the plaintiff relies on case law premised on statutes promulgated by our legislature and, thus, not conceived by the court. As such, we are bound by *Sheets* and its progeny that public policy embodied in our statutes "should not be read to provide a broader public policy mandate than that which is represented." *Geysen* v. *Securitas Security Services USA, Inc.*, supra, 322 Conn. 408. We therefore conclude that the trial court properly determined that no genuine issue of material fact exists as to whether the plaintiff set forth a valid wrongful discharge claim because the defendant's conduct does not violate any statutory or constitutional provision or any judicially conceived notion of public policy.

II

Even if we were to conclude that the defendant's conduct constituted a violation of public policy, the plaintiff still could not prevail. The defendant argues, as an alternative ground for affirmance, that the plaintiff has failed to demonstrate a genuine issue of material fact as to whether his termination was caused by his May, 2015 objection to the defendant's attempted use of creosote.[14] We agree.

[14] The defendant properly preserved that alternative ground in its motion for summary judgment before the trial court.

Under the *Sheets* doctrine, one of the elements the plaintiff must prove for wrongful discharge is causation—"that is, that the discharge occurred for a reason violating public policy." *Sophia* v. *Danbury*, 116 Conn. App. 68, 74–75, 974 A.2d 804 (2009). This causation requirement is reflected in the text of *Sheets* itself, because the court required the plaintiffs to "prove a demonstrably improper reason for dismissal, a reason whose impropriety is derived from some important violation of public policy." (Emphasis omitted.) *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 475. If the employee is terminated for other reasons unrelated to the claimed public policy violation, then no wrongful discharge claim will lie against the employer. But see *Li Li* v. *Canberra Industries*, 134 Conn. App. 448, 457, 39 A.3d 789 (2012) (reversing grant of employer's motion for summary judgment on wrongful discharge claim because discharge occurred within months of protected activity).

A common-law cause of action for wrongful discharge "logically should be analyzed in the same framework as a statutory cause of action" for wrongful discharge. Id., 455. "Statutory actions for wrongful discharge typically follow the analytic route outlined in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this analysis, the plaintiff has a minimal burden of establishing a prima facie case by showing that he or she engaged in a protected activity or otherwise fell within the protection of the statute, that he or she was subsequently discharged, and that there was a causal connection between the two. If a prima facie showing is made, the burden of going forward shifts to the employer to demonstrate a permissible reason for the termination of employment. If the employer's burden of going forward is satisfied, the plaintiff has the ultimate burden of proving by the preponderance of the evidence that

the employer's reason is pretextual or, even if true, [that] the improper reason likely motivated the employer in the decision to terminate." *Li Li* v. *Canberra Industries*, supra, 134 Conn. App. 454.

The defendant argues that the plaintiff failed to establish the element of causation. More specifically, it contends that the plaintiff cannot establish that his reduction in pay and termination was causally related to the May, 2015 dispute over his objection to the use of creosote in light of the undisputed fact that the defendant thereafter renewed the plaintiff's employment contract for both the 2015–2016 and 2016–2017 school years. We agree.

In the present case, the facts are undisputed that the defendant's remarks evidencing hostility to the plaintiff's concerns regarding creosote occurred in e-mails exchanged in May, 2015. Prior to that exchange, the defendant offered to renew the plaintiff's employment for another year on February 15, 2015, with an annual salary of $45,900, representing a 1.6 percent increase in salary and a commensurate increase in responsibilities. The plaintiff does not dispute that he was aware of the contract offer and allowed it to lapse according to its terms on April 3, 2015, an event occurring prior to the May, 2015 e-mail exchange.[15] Instead, the plaintiff

[15] On June 15, 2015, Goodearl e-mailed the plaintiff about the fact that he had not signed the February, 2015 contract, indicating that he would be away from June 23, 2015, through the next weekend and that they should set a time to discuss the matter. On June 22, 2015, Goodearl contacted the plaintiff stating that the contract offer was "so far beyond the due date" that it was no longer valid. On June 25, 2015, the plaintiff replied by e-mail, "I am aware that I did not sign my contract, and have been discussing with Sunny what will be best for myself and my family. I was of the mind to resign from my position at Marvelwood, as I did not have an enjoyable year and thought it would be best. However, Bing and Sunny would both like me to stay, and suggested that perhaps a part-time contract might be more conducive to my situation. If you are interested in discussing a part-time position, I would be willing to meet either Monday or Tuesday of next week. Let me know what time works well, or if offering a revised contract is something that is not possible."

admitted that he had considered resigning his position and asked for the defendant to consider a part-time position. Following discussions with Goodearl and given assurances that he would maintain his health insurance, the plaintiff signed a new contract on July 14, 2015, for a full-time position, which included responsibility for teaching four classes and administering the community service program. The agreement also included the elimination of his responsibilities for the Food Studies program and a reduction of dormitory duty to one evening per week and coaching responsibility to one season instead of two for an annual salary of $37,000.

It is also undisputed that the defendant subsequently entered into yet another at-will employment contract[16] with the plaintiff for the 2016–2017 school year on April 8, 2016. That agreement included the same terms as the prior year with the exception of responsibility for community service, which was eliminated, and the increase of the plaintiff's annual salary to $38,000.

As the defendant correctly observes, the plaintiff chose to allow the February offer to lapse on April 3, 2015, and the defendant, as an at-will employer, was under no obligation to renew its offer. The defendant nevertheless did so and the plaintiff subsequently entered into a new at-will employment contract on July 14, 2015, for the 2015–2016 year, the terms of which were negotiated between him and the defendant. In the absence of duress, fraud or mutual mistake, which is not claimed here, the agreement between the plaintiff and the defendant under negotiated terms is the sine qua non of contract. Because both parties entered into the contract freely, any claim that the defendant

[16] As discussed in footnote 3 of this opinion, all of the plaintiff's prior annual employment contracts with the defendant were at will, each with a term beginning on July 1 and concluding on June 30 of the given contract year.

reduced the plaintiff's salary or terminated the plaintiff in September, 2016, because of the intervening May, 2015 dispute defies logic. If any inference can be reasonably made relative to the May, 2015 dispute, it is that the defendant rehired the plaintiff despite that dispute. That decision, and the renegotiation and renewal of the subsequent 2016–2017 employment agreement, operate to break the causation connection between the May, 2015 incident and the plaintiff's eventual termination in September, 2016.[17]

Accordingly, we agree that the plaintiff has failed to demonstrate a genuine issue of material fact as to whether his termination was caused by his objection to the defendant's attempted use of creosote. The court, therefore, properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

[17] We also note that the May, 2015 dispute between the parties occurred nearly sixteen months before his termination. As the United States Court of Appeals for the Second Circuit has explained, "[t]he causal connection needed for proof of a retaliation claim can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." (Internal quotation marks omitted.) *Lovejoy-Wilson* v. *NOCO Motor Fuel, Inc.*, 263 F.3d 208, 224 (2d Cir. 2001). Although the Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action"; *Gorman-Bakos* v. *Cornell Cooperative Extension of Schenectady County*, 252 F.3d 545, 554 (2d Cir. 2001); "[i]n the Second Circuit and district courts within the Second Circuit, time periods *greater than one year* have been found, in general, to be insufficient to establish this temporal relationship." (Emphasis added.) *Wilks* v. *Elizabeth Arden, Inc.*, 507 F. Supp. 2d 179, 196 (D. Conn. 2007). The uncontroverted fact that the dispute between the parties regarding creosote occurred sixteen months *prior* to the defendant's termination of the plaintiff's employment further undermines the plaintiff's claim that the September 6, 2016 termination of his employment was caused by that dispute.

SALVATORE GIBILISCO *v.* TILCON CONNECTICUT, INC.
(AC 43294)

Alvord, Prescott and Suarez, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for the alleged wrongful termination of his employment in violation of the statute (§ 31-290a) prohibiting discrimination against employees exercising their rights under the Workers' Compensation Act (§ 31-275 et seq.). The plaintiff had worked for the defendant since 2002, and, every year, received a seasonal layoff notice with recall. In October, 2016, the plaintiff sustained a work injury, received medical treatment, and filed a workers' compensation claim. Approximately one month after the plaintiff filed his claim, he received a seasonal layoff notice without recall, terminating his employment. The defendant filed a motion for summary judgment, which the trial court granted, concluding that there was no genuine issue of material fact as to whether the defendant discriminated against the plaintiff in violation of § 31-290a. On the plaintiff's appeal to this court, *held*:

1. The trial court erred in granting the defendant's motion for summary judgment on the ground that the plaintiff did not meet his initial burden of establishing a prima facie case of discrimination under the burden shifting framework set forth in *McDonnell Douglas Corp.* v. *Green* (411 U.S. 792), the plaintiff having presented evidence sufficient to raise a genuine issue of material fact regarding a causal connection between the protected activity and the adverse action: the plaintiff presented evidence that he sustained a work injury, reported his injury to the defendant, received medical treatment for his injury, filed a workers' compensation claim arising out of his work injury, and, thereafter, approximately two weeks before he received his seasonal layoff notice without recall, the defendant made the decision to terminate his employment, which showed a sufficiently close temporal connection between the exercise of his rights protected under the act and the defendant's adverse action against him; moreover, the plaintiff produced additional evidence sufficient to raise a disputed issue of fact as to whether the adverse action took place under circumstances permitting an inference of discrimination, including that, after he was examined at a medical treatment center and provided a first work status report that assigned him light duty work restrictions, the defendant's safety personnel had a conversation with the plaintiff's treating physician, without the plaintiff's knowledge, which resulted in a second work status report that eliminated the plaintiff's light duty work restrictions and attempted to minimize the plaintiff's workers' compensation claim, and an employee of

the defendant testified that the plaintiff had personal responsibility in sustaining his work injuries, despite also acknowledging that the plaintiff had not violated any company rule or policy when his injuries occurred.

2. The trial court erred in granting the defendant's motion for summary judgment on the ground that the plaintiff did not meet his ultimate burden under the *McDonnell Douglas Corp.* framework in proving the defendant's discriminatory motivation or demonstrating that the defendant's legitimate, nondiscriminatory reason was pretextual; the plaintiff presented evidence sufficient to raise a genuine issue of material fact that a discriminatory reason more likely motivated the defendant as well as evidence that the defendant's proffered explanation was unworthy of credence, including evidence of his disparate treatment relative to other coworkers involved in an October, 2016 safety incident in that only his employment was terminated, that the only other safety incidents referred to by the defendant were work injuries where it was determined that no rules or safety policies were violated, and evidence of direct statements made by representatives of the defendant that the plaintiff was held personally responsible for his work injuries, which factually supported his allegation that the defendant had a retaliatory animus directed against him for his work injuries.

Argued November 19, 2020—officially released April 20, 2021

Procedural History

Action to recover damages for the alleged wrongful termination of the plaintiff's employment, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Aurigemma, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings.*

Michael J. Reilly, with whom was *Emanuele R. Cicchiello*, for the appellant (plaintiff).

Daniel J. Krisch, with whom, on the brief, were *Carl R. Ficks, Jr.*, and *Laura Pascale Zaino*, for the appellee (defendant).

Opinion

ALVORD, J. This appeal arises out of an action by the plaintiff, Salvatore Gibilisco, in which he asserts that

his former employer, the defendant, Tilcon Connecticut, Inc., wrongfully terminated his employment in violation of General Statutes § 31-290a[1] because he had filed for workers' compensation benefits. On appeal, the plaintiff claims that the trial court erred in rendering summary judgment in favor of the defendant on the grounds that he had failed as a matter of law to raise a genuine issue of material fact with respect to his initial and ultimate burden of proving a discriminatory discharge under the *McDonnell Douglas* burden shifting framework.[2] We conclude that genuine issues of material fact exist that preclude the granting of summary judgment as a matter of law, and, accordingly, we reverse the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party,

[1] General Statutes § 31-290a provides in relevant part: "(a) No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter. . . ."

[2] "Ever since [the Connecticut Supreme Court's] holding in *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, [216 Conn. 40, 53, 578 A.2d 1054 (1990)], we have looked to federal employment retaliation law for guidance [i]n setting forth the burden of proof requirements in a § 31-290a action . . . . In *McDonnell Douglas* [*Corp.*] v. *Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the United States Supreme Court set forth the basic allocation of burdens and order of presentation of proof in cases involving claims of employment discrimination. The plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. . . . In order to meet this burden, the plaintiff must present evidence that gives rise to an inference of unlawful discrimination. . . . If the plaintiff meets this initial burden, the burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. . . . The plaintiff then must satisfy her burden of persuading the [fact finder] that she was the victim of discrimination either directly by persuading the [fact finder] . . . that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation

reveals the following facts and procedural history. The defendant supplies crushed stone, hot mix asphalt, and ready-mix concrete throughout Connecticut. The plaintiff was employed by the defendant as a "ground man" in the defendant's asphalt division from June 17, 2002, to December 9, 2016, and, at all relevant times, he was assigned to work at the defendant's asphalt plant in Manchester. As a ground man, the plaintiff was responsible for plant and rail yard maintenance, which includes, inter alia, heavy lifting, daily shoveling of sand, stone and wet materials, and greasing and oiling plant equipment.

At all relevant times, the plaintiff was a member of the International Union of Operating Engineers Local 478 (union) and the terms and conditions of the plaintiff's employment were subject to the collective bargaining agreement entered into by the union (collective bargaining agreement). Article 23, section 20 of the collective bargaining agreement that was in effect from April, 2014, to March, 2018, provides for a "seasonal layoff" of employees that is defined as "any layoff that takes place during the period from the day before Thanksgiving to April 30th." Pursuant to the collective bargaining agreement, the defendant typically provides each employee with an annual notice of seasonal layoff that is either with recall or without recall. Unless the defendant provides a union employee within the asphalt division, such as the plaintiff, a notice of seasonal layoff without recall, such employee is recalled the following spring. The collective bargaining agreement provides that except for Article 23, section 20, "there are no recall rights for employees . . . ." The collective bargaining agreement further provides that an employee who does not agree with a notice of seasonal layoff without recall

is unworthy of credence." (Internal quotation marks omitted.) *Mele* v. *Hartford*, 270 Conn. 751, 767–68, 855 A.2d 196 (2004).

may bring the matter before a four member mediation board for resolution.

The plaintiff received his first seasonal layoff notice on December 6, 2002. He received a seasonal layoff notice with recall every year thereafter until the defendant issued a final seasonal layoff notice without recall on December 9, 2016. Throughout that time, the defendant issued one seasonal layoff in November and the remaining seasonal layoffs in December. The plaintiff was recalled to work each year except for 2017, because he had received a seasonal layoff without recall on December 9, 2016.

When the plaintiff was hired by the defendant in 2002, he received a copy of the "Tilcon Safety Guide and General Company Rules," which specified the defendant's workplace safety policies and procedures. The plaintiff also received training on the safety rules and procedures after he was hired and every year when he returned for his seasonal recall. In the event that an employee is injured at work, the defendant investigates the cause of the injury and identifies actions to prevent the reoccurrence of injury. As part of the investigation, the defendant determines whether any company rules or policies were violated in causing the injury. The defendant makes this determination in reference to its general company rules and its specific safety guide. The defendant maintains an "Employee Counseling Record," which consists of written warnings that the defendant issues for, inter alia, avoidable accidents, safety rule violations, or unsafe conduct. The defendant's human resources policy is that an employee's injury is not held against the employee if the incident does not involve a violation of any company rules or policies.

On August 7, 2013, the plaintiff sustained a work injury to his left shoulder. In a "First Report of Injury,"

the plaintiff's supervisor, Gino Troiano, stated that the "root cause" of the plaintiff's injury was "dumping [a] wheelbarrow . . . ." The report suggested, as "corrective action" to eliminate the hazard, to "[i]ncrease [the] frequency of dumping to lessen [the] load." The defendant's Safety and Health Manager, Michael Woodin, also prepared a "Recordable Injury & Avoidable Vehicle Accident Report" (recordable injury report),[3] which stated that the "root cause" of the plaintiff's injury was that the "[w]heelbarrow load may have been too heavy . . . [in addition to an] [i]mproper lifting technique." The report suggested, as "corrective action," to stretch, to decrease load capacity and to increase frequency of dumping, to employ proper body mechanics, and to try using the pivoting wheelbarrow handles to see if they improve body mechanics. Woodin determined that the plaintiff had not violated any company rules or safety policies when the injury occurred. The defendant did not issue an "Employee Counseling Record" in connection with the plaintiff's injury. The plaintiff filed a workers' compensation claim arising out of the August 7, 2013 injury and received workers' compensation benefits in connection with his injury. After the 2013 injury, the plaintiff was recalled to work in March, 2014.

On December 9, 2015, the plaintiff sustained a work injury to his right elbow while scraping a dryer inlet chute. In a "First Report of Injury," the plaintiff's immediate supervisor, Michael Satagaj, stated that the "root

[3] The defendant's Asphalt Division Manager, Joseph Marrone, testified that recordable injury reports are completed by the defendant pursuant to requirements set forth by the federal Occupational Health and Safety Administration (OSHA). Any time that an employee is involved in a "recordable" work injury, the defendant is required to report that injury to OSHA. On the basis of the total number of injuries reported by the defendant, OSHA then calculates the defendant's recordable incident rate and compares that rate to other employers. If the defendant has a high recordable incident rate relative to comparable employers, OSHA can take remedial action against the defendant.

cause" of the plaintiff's injury was that "[t]he face of the chute developed a worn area that the blade of [a seven foot steel rod] scraper abruptly caught on . . . ." The worn area on the chute liner was a natural condition that develops over time with the running of the machine and requires periodic replacement. The report suggested, as "corrective action" to eliminate the hazard, to "[r]epair the worn chute liner." The defendant determined that the plaintiff had not violated any company rules or safety policies when the injury occurred. The defendant did not prepare a recordable injury report or issue an "Employee Counseling Record" in connection with the plaintiff's injury. The plaintiff did not file a workers' compensation claim in connection with this injury. The plaintiff returned to work the next day and the defendant provided him with light duty work. After the 2015 injury, the plaintiff was recalled to work in March, 2016.

On October 10, 2016, the plaintiff violated a safety rule promulgated by the defendant by "fail[ing] to return [a] machine [guard] to [its] proper place after repairs and running [the asphalt] plant without [the guard] in place." The plaintiff and two other employees of the defendant admitted responsibility for this safety violation. The defendant issued an "Employee Counseling Record" in connection with the plaintiff's safety violation. The October, 2016 employee counseling record was the plaintiff's first written counseling over the course of his employment with the defendant.[4] The

[4] The plaintiff submitted as part of his opposition to summary judgment the deposition testimony of Marrone, who testified as to the defendant's disciplinary policy. Marrone stated that "[t]here is a hierarchy [of counseling] where there's verbal counseling and then there's written counseling." Marrone further testified that the October, 2016 employee counseling record was the plaintiff's "first written counseling." In his deposition, the plaintiff testified that "[o]ther than [the October, 2016 employee counseling record] I've never had a verbal, never had a written, I have never had nothing."

plaintiff, as well as the two other employees responsible, received a three day unpaid suspension for the safety violation. The plaintiff signed the October, 2016 employee counseling record without contesting the disciplinary action against him. Although the safety violation was a terminable offense, the plaintiff, as well as the two other employees responsible, continued to work for the defendant after the safety violation and the resulting suspension. Neither of the two other employees responsible for the safety violation had been involved in any work accidents or work injuries in the last two seasons or were considered for layoff without recall at the end of the 2016 season. Both of the two other employees responsible for the safety violation were recalled to work in March, 2017.

On October 25, 2016, the plaintiff sustained a work injury to his right elbow while scraping a dryer inlet chute. In a "First Report of Injury," Satagaj provided neither a "root cause" of the plaintiff's injury nor suggested "corrective action" to eliminate the hazard. Woodin prepared a recordable injury report, which stated that the "root cause" of the plaintiff's injury was that "[u]sing the [scraper] at [the] location is ergonomically challenging . . . [i]t is awkward and lends itself to a measure of reaching and twisting," and "[t]he tool caught [on] a worn liner plate." The report indicated a risk tolerance factor on the basis of the plaintiff's familiarity with the task, stating that "[t]he repetitive task became routine and risk awareness decreased." The report also suggested, as "corrective action," to replace the worn liner of the dryer inlet chute, to commit to more frequent cleaning to alleviate buildup of material in the chute, to install chains to diffuse the aggregate, to change the liner composition, to improve access in the area, and to investigate increasing the size of the vibrator on the chute to improve the flow of material. The defendant determined that the plaintiff

had not violated any company rules or safety policies when the injury occurred. The defendant did not issue an "Employee Counseling Record" in connection with the plaintiff's injury. The plaintiff returned to work the same day "without restrictions" and "as tolerated."

After the plaintiff reported his October 25, 2016 work injury, the defendant sent the plaintiff to the Doctors Treatment Center in Plainville (treatment center) for medical treatment. In accordance with company policy, the plaintiff was accompanied to this appointment by one of the defendant's safety personnel, Mike Deluco, for the purpose of helping to "manage the claim" and to prevent it from being a recordable incident.[5] After the plaintiff was examined, the physician provided him with a "Work Status Report" (first work status report) that assigned the plaintiff with light duty work restrictions as follows: "Avoid using R. hand/arm." Deluco subsequently had a conversation with the plaintiff's physician, without the plaintiff's knowledge, which resulted in Deluco procuring a new "Work Status Report" from the physician (second work status report). Woodin testified that the purpose of this conversation with the physician was "to see if we can lift the significant restrictions to potentially avoid a recordable injury." The second work status report released the plaintiff to work "without restrictions."[6] The physician further

[5] See footnote 3 of this opinion.

Woodin testified that this policy exists to help "manage the treatment" by making sure employees receive "more or less immediate care . . . [and] to review after care, if there is any opportunity that we could not count it as a recordable injury or lost time event." Woodin further testified that such effort would not interfere with or "negatively impact any medical care . . . that the employee will receive." Marrone testified that "many times the claim can be minimized" but that "[u]ltimately the doctor has the decision."

[6] Despite the change to the plaintiff's work status to "without restrictions," the plaintiff's October 25, 2016 work injury nevertheless resulted in a recordable injury. Furthermore, the defendant provided the plaintiff with light duty work for the remainder of the 2016 season.

noted that the plaintiff could return to normal work "[a]s tolerated."

On November 8, 2016, the plaintiff filed a workers' compensation claim arising out of the October 25, 2016 injury and received workers' compensation benefits in connection with his injury. On November 18, 2016, the plaintiff was seen at the treatment center for a follow-up examination for his injury and was released to work with a light duty work restriction on lifting more than fifteen pounds until his next follow-up examination on November 28, 2016. As of the date of the submission of the parties' memoranda on the defendant's motion for summary judgment, the plaintiff was still receiving treatment and workers' compensation benefits for his October 25, 2016 injury.

On December 9, 2016, approximately one month after the plaintiff filed his workers' compensation claim, the plaintiff received a seasonal layoff notice without recall. Approximately two weeks before the plaintiff received that layoff notice without recall, the defendant made the decision to terminate the plaintiff's employment. Pursuant to the collective bargaining agreement, the plaintiff challenged his seasonal layoff notice without recall, and a hearing was held before a four member mediation board on January 24, 2017. At the hearing, the defendant presented evidence that the seasonal layoff without recall that was issued to the plaintiff on December 9, 2016, was based on several safety incidents that demonstrated the plaintiff's failure to adhere to the defendant's safety policies. The plaintiff's challenge of his notice of layoff without recall was ultimately unsuccessful before the board.

On January 23, 2018, the plaintiff filed this action against the defendant alleging wrongful termination in violation of § 31-290a, which prohibits retaliation or discrimination against an employee for exercising his

rights under the Workers' Compensation Act (act), General Statutes § 31-275 et seq. On April 1, 2019, the defendant moved for summary judgment on the grounds that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. In its memorandum of law in support of its motion for summary judgment, the defendant presented three arguments. First, the defendant argued that the plaintiff failed to establish a prima facie claim for discrimination under § 31-290a because the plaintiff "fail[ed] to establish any evidence of a causal connection between his exercise of any right under the act and being issued a seasonal layoff without recall." Second, the defendant argued that it fulfilled its burden of showing a legitimate, nondiscriminatory reason for issuing the plaintiff a seasonal layoff without recall on the basis of the plaintiff's "increasing instances of safety incidents."[7] Third, the defendant argued that the plaintiff failed to satisfy his ultimate burden of establishing that the defendant's legitimate, nondiscriminatory reason was pretextual.[8]

On June 3, 2019, the plaintiff filed an objection to the defendant's motion for summary judgment and a memorandum of law in support of his objection. In his memorandum, the plaintiff presented two arguments. First, the plaintiff argued that "[t]he close temporal proximity between the plaintiff reporting his [October

[7] The defendant's memorandum of law in support of its motion for summary judgment highlighted as the "plaintiff's safety issues" the October 10, 2016 violation of a safety rule involving the plaintiff's failure to return a machine guard to its proper place. The defendant separately listed the "plaintiff's injuries and workers' compensation claims" as follows: (1) the August 7, 2013 work injury to his left shoulder; (2) the December 9, 2015 work injury to his right elbow; and (3) the October 25, 2016 work injury to his right elbow. The defendant indicated that the "safety incidents" that served as a basis for the plaintiff's termination included all of these incidents.

[8] The defendant supported its motion with, inter alia, affidavits of Marrone, Regional Human Resources Manager Jackie Zimmer, and Woodin, and excerpts of deposition testimony of the plaintiff.

25, 2016] injury to the defendant [and] the termination of the plaintiff is plainly enough to suggest an inference of discrimination, thereby satisfying the plaintiff's de minimis prima facie burden."[9] Second, the plaintiff argued that he can overcome the defendant's proffered reason for his termination and carry his ultimate burden of proof for his claim of wrongful termination under § 31-290a. In support of his contention, the plaintiff presented the following evidence: "(1) The defendant contends that it terminated the plaintiff for his 'safety incidents' when he was injured in 2013, 2015, and 2016, when in fact, no such safety violations occurred, (2) the defendant's blatantly disparate treatment of the plaintiff and his other coworkers in Manchester who were involved in the [October 10, 2016] machine guard incident, [and] (3) the defendant's efforts to unilaterally override the plaintiff's light duty work restrictions . . . ."[10] On June 7, 2019, the defendant filed a reply to the plaintiff's objection to its motion for summary judgment, in which it reiterated its arguments that the plaintiff failed to meet his prima facie burden of establishing an inference of discrimination and his ultimate burden of demonstrating that the defendant's proffered legitimate, nondiscriminatory reason was pretextual.

On July 31, 2019, the trial court, *Aurigemma*, *J.*, issued a memorandum of decision granting the defendant's motion for summary judgment. In resolving the plaintiff's disparate treatment claim, the court applied

[9] In support of the plaintiff's argument that he was "terminated because of his work injuries and exercise of [his] rights under the [act]," the plaintiff also submitted the deposition testimony of Satagaj, who testified that he was involved in the decision to issue the plaintiff a seasonal layoff without recall. Satagaj testified that the plaintiff had "[p]ersonal responsibility" in the occurrence of his work injuries, despite acknowledging that the plaintiff had not violated any company rule or policy when the injuries occurred.

[10] The plaintiff supported his objection to the motion for summary judgment with, inter alia, excerpts of deposition testimony of the plaintiff, Marrone, Woodin, and Satagaj.

the *McDonnell Douglas* framework of allocating the burden of proof.[11] First, the court determined that "[t]he plaintiff has failed to establish a prima facie case of discrimination." Second, the court determined that, "even if the evidence is taken to establish such a prima facie case, [the defendant] has articulated a legitimate, nondiscriminatory reason for its actions toward the plaintiff . . . ." Finally, the court determined that "[t]he plaintiff has not pointed to any evidence . . . that would suggest that [the defendant's] reasons for issuing the plaintiff a 'no-recall' layoff were false or that [the defendant] intended to discriminate against the plaintiff in any way." Accordingly, the court concluded that there was no genuine issue of material fact as to whether the defendant discriminated against the plaintiff in violation of § 31-290a and rendered summary judgment in favor of the defendant with respect to the plaintiff's claim. This appeal followed.[12]

We first set forth the relevant standards that govern our review of a court's decision to grant a defendant's

[11] The plaintiff additionally claims on appeal that the court erred in applying the "motivating factor" standard of the third prong of the *McDonnell Douglas* burden shifting framework in analyzing his claim of retaliatory discharge under § 31-290a. The plaintiff argues that under the motivating factor standard, he was "required only to demonstrate that the [defendant's] decision to terminate him [was] motivated, at least in part, by his exercise of rights under the [act]." The plaintiff further contends that, "in its [memorandum of decision], the trial court held the plaintiff to a much stricter standard, effectively requiring him to demonstrate that the defendant's entire seasonal layoff was conducted for the purpose of retaliating against him due to his exercise of rights under the [act]." Because we reverse the decision of the trial court on other grounds, we need not address the plaintiff's additional claim.

[12] The plaintiff additionally claims on appeal that the court, in granting summary judgment for the defendant, failed to adhere to General Statutes § 31-51bb, *Genovese* v. *Gallo Wine Merchants, Inc.*, 226 Conn. 475, 628 A.2d 946 (1993), and *Spiotti* v. *Wolcott*, 326 Conn. 190, 163 A.3d 46 (2017), because it considered the claims and outcome of the plaintiff's union grievance. Because we reverse the decision of the trial court on other grounds, we need not address the plaintiff's additional claim.

motion for summary judgment. "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 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. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.). *Barbee* v. *Sysco Connecticut, LLC*, 156 Conn. App. 813, 817–18, 114 A.3d 944 (2015).

"It is frequently stated in Connecticut's case law that, pursuant to Practice Book §§ 17-45 and 17-46, a party opposing a summary judgment motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . .

"An important exception exists, however, to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition . . . .

On a motion by [the] defendant for summary judgment, the burden is on [the] defendant to negate each claim as framed by the complaint . . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial. . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Internal quotation marks omitted.) Id., 818–19.

On appeal, the plaintiff claims that the court improperly granted the defendant's motion for summary judgment because he had demonstrated that a genuine issue of material fact existed as to whether the defendant's termination of his employment was in retaliation for the exercise of his right to seek workers' compensation benefits, in violation of § 31-290a, and that the court failed to view the evidence in the light most favorable to the plaintiff as the nonmoving party. We agree with the plaintiff.

The burden of proof in actions alleging a violation of § 31-290a is well established. "The plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. . . . If the plaintiff meets this initial burden, the burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its actions. . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. . . . The plaintiff then must satisfy [the] burden of persuading the [fact finder] that [the plaintiff] was

the victim of discrimination either directly by persuading the court [or jury] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Citation omitted; internal quotation marks omitted.). Id., 819–20.

In the present case, the plaintiff does not challenge the court's determination that the defendant produced evidence of a legitimate, nondiscriminatory reason for its actions of terminating his employment. The plaintiff instead argues that the court erred in concluding as a matter of law that (1) he had failed to raise a genuine issue of material fact regarding his initial burden of establishing a prima facie case of discrimination, and (2) he had failed to raise a genuine issue of material fact regarding his ultimate burden of proving a discriminatory motivation or demonstrating that the defendant's proffered legitimate, nondiscriminatory reason was pretextual. We address each of the plaintiff's arguments in turn.

I

THE PLAINTIFF'S INITIAL BURDEN

The first step in analyzing a claim under § 31-290a is to determine whether the plaintiff raised a genuine issue of material fact with respect to a prima facie case of discrimination. "The plaintiff bears the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. . . . [T]o establish [a] prima facie case of discrimination, the plaintiff must first present sufficient evidence . . . that is, evidence sufficient to permit a rational trier of fact to find [1] that she engaged in protected [activity] . . . [2] that the employer was aware of this activity, [3] that the employer took adverse action against the plaintiff, and

[4] that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action . . . .'' (Citation omitted; internal quotation marks omitted.). Id., 819.

In the present case, the defendant did not dispute or present any evidence in support of its motion for summary judgment tending to negate the plaintiff's allegations that he had engaged in a protected activity by filing a claim for workers' compensation benefits, that the defendant was aware of that protected activity, or that the defendant had taken adverse action against the plaintiff by terminating his employment. Rather, the defendant argues that the plaintiff has produced ''no evidence from which to reasonably infer that a causal connection exists between the plaintiff's exercise of any right under the act and his being issued a seasonal layoff without recall and thus no evidence that gives rise to an inference of discrimination.'' (Internal quotation marks omitted.)

''The causation element can be proven (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant. . . . Alternatively, causation may be satisfied by showing a sufficiently close temporal connection between the protected activity and the adverse action . . . .'' (Internal quotation marks omitted.) *Jones* v. *Dept. of Children & Families*, 172 Conn. App. 14, 35, 158 A.3d 356 (2017)

The plaintiff argues that ''the close temporal proximity of approximately two weeks between the plaintiff's final work injury and the decision to terminate [his

employment], on its own, is enough to satisfy" his minimal burden of raising a genuine issue of material fact regarding setting forth a prima facie case. In support of his argument, the plaintiff presented the following evidence. On October 25, 2016, the plaintiff sustained a work injury, reported his injury to the defendant, and received medical treatment for his injury.[13] On November 8, 2016, the plaintiff filed a workers' compensation claim arising out of his work injury. On November 18, 2016, the plaintiff was seen at the treatment center for a follow-up examination for his injury and was released to work with a light duty work restriction.[14] Thereafter, approximately two weeks before the plaintiff received the 2016 seasonal layoff notice without recall, the defendant made the decision to terminate the plaintiff's employment. On December 9, 2016, the plaintiff received a seasonal layoff notice without recall. We agree that the plaintiff has produced evidence of a sufficiently close temporal connection between the exercise of his rights protected under the act and the defendant's adverse action against him.

The defendant contends that "temporal proximity does not, on its own, give rise to an inference of discrimination where no other evidence is offered to support

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

[14] The act affords employees the right to workplace accommodations of light duty work restrictions. General Statutes § 31-313 (a) (1) provides in relevant part: "Where an employee has suffered a compensable injury which disables him from performing his customary or most recent work, his employer at the time of such injury shall transfer him to full-time work suitable to his physical condition where such work is available, during the time that the employee is subjected to medical treatment or rehabilitation or both and until such treatment is discontinued on the advice of the physician conducting the same . . . ."

a claim of retaliation." In support of its argument, the defendant cites to *Andrade* v. *Lego Systems, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-14-6053523-S (January 26, 2018) (reprinted at 188 Conn. App. 652, 655, 205 A.3d 807, cert. denied, 331 Conn. 921, 205 A.3d 567 (2019)). In *Andrade*, this court adopted the memorandum of decision of the trial court, which stated that "the question is whether the evidence can reasonably and logically give rise to an inference of discrimination under all of the circumstances. As a jury would be entitled to review the evidence as a whole, courts must not view the evidence in piecemeal fashion in determining whether there is a trial-worthy issue." (Internal quotation marks omitted.) Id., 664–65. Ultimately, in *Andrade*, this court affirmed the trial court's granting of summary judgment on the grounds that the plaintiff had failed to present evidence that established that "the adverse action took place under circumstances permitting an inference of discrimination." (Internal quotation marks omitted.) Id., 664.

Our review of the record does not support the defendant's argument that the plaintiff has produced no other evidence to support a claim of retaliation. Rather, the plaintiff produced additional evidence sufficient to raise a disputed issue of fact as to whether the adverse action took place under circumstances permitting an inference of discrimination.[15] In his memorandum of law in support of his objection to the defendant's motion for summary judgment, the plaintiff argued that "[t]here is also

[15] Because the plaintiff produced evidence of a close temporal proximity between the exercise of his rights protected under the act and the defendant's adverse action against him as well as additional evidence sufficient to raise a disputed issue of fact as to whether the adverse action took place under circumstances permitting an inference of discrimination, we need not address the merits of the defendant's contention that "temporal proximity does not, on its own, give rise to an inference of discrimination where no other evidence is offered to support a claim of retaliation."

a multitude of evidence that the defendant was negatively disposed toward workers' compensation injuries in general, and the plaintiff's injuries and resultant work injuries more specifically." Specifically pertaining to the plaintiff's October 25, 2016 work injury, the plaintiff produced evidence that after he was examined at the treatment center and provided a first work status report that assigned him light duty work restrictions, the defendant's safety personnel, Deluco, had a conversation with the plaintiff's physician, without the plaintiff's knowledge, which resulted in Deluco procuring a second work status report that eliminated the plaintiff's light duty work restrictions. Woodin testified that the purpose of this conversation with the physician was "to see if we can lift the significant restrictions to potentially avoid a recordable injury." The plaintiff argued that the defendant's "specific actions to change the plaintiff's work status from light duty to full duty without the plaintiff's knowledge or consent" was "a deliberate effort to minimize the size or extent of the plaintiff's workers' compensation claim." Furthermore, in support of the plaintiff's argument pertaining to the defendant's negative disposition toward workers' compensation injuries, the plaintiff submitted the deposition testimony of Satagaj, who testified that the plaintiff had "[p]ersonal responsibility" in sustaining his work injuries, despite also acknowledging that the plaintiff had not violated any company rule or policy when his injuries occurred. Satagaj testified that he was involved in the decision to issue the plaintiff a seasonal layoff without recall. See footnote 10 of this opinion.

Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, we conclude that the plaintiff presented evidence sufficient to raise a genuine issue of material fact regarding a causal connection between the protected activity and the adverse action. Thus, we conclude that the plaintiff presented

evidence sufficient to raise a genuine issue of material fact with respect to his initial burden of setting forth a prima facie case of discrimination.

II

THE PLAINTIFF'S ULTIMATE BURDEN

We next turn to the plaintiff's argument that the court erred in determining as a matter of law that he had failed to raise a genuine issue of material fact regarding his ultimate burden of proving a discriminatory motivation or demonstrating that the defendant's proffered legitimate, nondiscriminatory reason was pretextual. Under the third prong of the *McDonnell Douglas* framework, the plaintiff "must satisfy [the] burden of persuading the [fact finder] that [the plaintiff] was the victim of discrimination either directly by persuading the court [or jury] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." (Internal quotation marks omitted.) *Barbee* v. *Sysco Connecticut, LLC*, supra, 156 Conn. App. 820.

"[E]vidence . . . that a retaliatory motive played a part in the adverse employment action . . . may be established either indirectly by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or directly through evidence of retaliatory animus directed against a plaintiff by a defendant." (Citation omitted; internal quotation marks omitted.). *Hammond* v. *Bridgeport*, 139 Conn. App. 687, 695–96, 58 A.3d 259 (2012), cert. denied, 308 Conn. 916, 62 A.3d 527 (2013). "Evidence establishing the falsity of the legitimate, nondiscriminatory reasons advanced by the employer may be, in and of itself, enough to support the trier of fact's ultimate finding of intentional discrimination." (Internal quotation marks omitted.) *Jacobs* v.

General Electric Co., 275 Conn. 395, 401, 880 A.2d 151 (2005); see also *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 79, 111 A.3d 453 (2015) ("disbelief of an employer's explanation for an adverse employment action, in combination with the plaintiff's prima facie case of discrimination, may, under some circumstances, be sufficient to meet the plaintiff's ultimate burden of proving intentional discrimination" (emphasis omitted)). "Of course, to defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Internal quotation marks omitted.) *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 28–29, 206 A.3d 194 (2019). "We bear in mind that it is the plaintiff's ultimate burden to prove that the defendant intentionally discriminated against her . . . ." (Internal quotation marks omitted.) *Dickman* v. *University of Connecticut Health Center*, 162 Conn. App. 441, 448, 132 A.3d 739 (2016).

In the present case, the defendant provided evidence of a legitimate, nondiscriminatory reason for issuing the plaintiff a seasonal layoff without recall on the basis of the plaintiff's several "safety incidents." The defendant's memorandum of law in support of its motion for summary judgment highlighted as "the plaintiff's safety issues" the October 10, 2016 violation of a safety rule involving the plaintiff's failure to return a machine guard to its proper place. The defendant separately listed "the plaintiff's injuries and workers' compensation claims" as follows: (1) the August 7, 2013 work injury to his left shoulder; (2) the December 9, 2015 work injury to his right elbow; and (3) the October 25, 2016 work injury to his right elbow. The defendant indicated that the "safety incidents" that served as a basis for the plaintiff's termination included all of these incidents. The

defendant contends that the plaintiff cannot satisfy his ultimate burden because "[t]here is simply no evidence that [the defendant's] decision not to recall the plaintiff because of four 'safety incidents' is pretextual."

On appeal, the plaintiff argues that "the trial court failed to consider evidence that [tended to demonstrate] that the reason for the plaintiff's termination was false, as well as direct and circumstantial evidence that [tended to show that] the defendant intended to discriminate against the plaintiff due to his exercise of rights under the [act]."

The plaintiff presented the following evidence in support of his contention that the defendant's proffered reason for the termination of his employment on the basis of several "safety incidents" was pretextual. First, the plaintiff presented evidence of his disparate treatment relative to his other coworkers in the Manchester asphalt plant who were involved in the October 10, 2016 machine guard safety incident. The plaintiff submitted the deposition testimony of the defendant's asphalt division manager, Marrone, who testified that the machine guard safety incident resulted in the plaintiff's "first written counseling." The plaintiff alleged that this "was the only formal discipline related to safety that [he] ever received." Furthermore, the plaintiff submitted the deposition testimony of Satagaj, who testified that the defendant never gave any consideration to laying off the other two employees involved in the machine guard safety incident, neither of whom had any history of work injuries. The plaintiff argues that this evidence implies "that the defendant was specifically motivated by the plaintiff['s] other 'safety incidents'—i.e., his work injuries—otherwise, if the safety guard incident was what motivated the defendant, it would have given some discipline, if not the same discipline, to the other employees involved in the incident." We agree with the

plaintiff that evidence that only the plaintiff's employment was terminated after the October 10, 2016 machine guard safety incident involving two other employees tends to demonstrate that something other than this safety incident motivated the defendant's decision to terminate the plaintiff, and that the only other "safety incidents" referred to by the defendant were the plaintiff's work injuries where it was determined that no rules or safety policies were violated. See *Hammond* v. *Bridgeport*, supra, 139 Conn. App. 695–96 ("evidence . . . that a retaliatory motive played a part in the adverse employment action . . . may be established . . . through . . . evidence such as disparate treatment of fellow employees who engaged in similar conduct" (citation omitted; internal quotation marks omitted)).

Second, the plaintiff presented evidence that he had not violated any rule or safety policy on the various occasions when he suffered work injuries. The defendant acknowledged in various depositions of its representatives that none of the plaintiff's work injuries was the result of any violation of a company rule or safety policy. The plaintiff argues that, "[i]n light of the contrary evidence that the plaintiff's 'safety incidents' were work injuries where the plaintiff did not violate any rule and should not have the incident held against him . . . the defendant's proffered reason for the plaintiff's termination was 'not worthy of belief' . . . ." We agree with the plaintiff that evidence that the plaintiff's work injuries motivated the defendant's decision to terminate the plaintiff, and that his work injuries were not the result of any violation of a company rule or safety policy, factually supports the plaintiff's allegation that the defendant's proffered reason for the plaintiff's termination on the basis of several "safety incidents" was false or that the prohibited factor was at least one of the motivating factors. See *Taing* v. *CAMRAC, LLC*, supra,

189 Conn. App. 28–29; see also *Jacobs* v. *General Electric Co.*, supra, 275 Conn. 401 ("[e]vidence establishing the falsity of the legitimate, nondiscriminatory reasons advanced by the employer may be, in and of itself, enough to support the trier of fact's ultimate finding of intentional discrimination" (internal quotation marks omitted)).

Next, the plaintiff presented the following evidence that tends to demonstrate that the defendant intended to discriminate against him. First, the plaintiff presented evidence with regard to the defendant's procurement of a second work status report subsequent to the plaintiff's October 25, 2016 work injury, without the plaintiff's knowledge, which eliminated the plaintiff's light duty work restrictions. The plaintiff presented the deposition testimony of Woodin who testified that the defendant's intention behind seeking to procure a second work status report was "to see if [the defendant could] lift the significant [work] restrictions to potentially avoid a recordable injury." The plaintiff argues that because the act affords employees the right to workplace accommodations of light duty work restrictions set forth in General Statutes § 31-313, this evidence demonstrates the defendant's "hostility to workers' compensation claims and the requirement to accommodate light duty restrictions . . . ." The defendant contends that, despite the change to the plaintiff's work status report, the plaintiff's October 25, 2016 work injury nevertheless resulted in a recordable injury and the defendant nevertheless provided the plaintiff light duty work. We agree with the plaintiff that, regardless of the success of the defendant's efforts, evidence of its attempts to procure a second work status report that could potentially impede the plaintiff's exercise of his rights afforded to him under the act factually supports his allegation that the defendant intended to discriminate against him. See *Hammond* v. *Bridgeport*, supra, 139 Conn. App. 695–96

("evidence . . . that a retaliatory motive played a part in the adverse employment action . . . may be established . . . directly through evidence of retaliatory animus directed against a plaintiff by a defendant" (citation omitted; internal quotation marks omitted)).

Second, the plaintiff presented evidence of direct statements made by representatives of the defendant that the plaintiff was held personally responsible for his work injuries. The plaintiff submitted the deposition testimony of Satagaj, who testified that the plaintiff had "[p]ersonal responsibility" in sustaining his work injuries. Satagaj testified that he held the plaintiff personally responsible for his work injuries despite also acknowledging that the plaintiff had not violated any company rule or policy when the injuries occurred. Satagaj also testified that he was involved in the decision to issue the plaintiff a seasonal layoff without recall. The plaintiff argues that this evidence "would support that the defendant had a retaliatory animus toward the plaintiff because of his work injuries." We agree with the plaintiff that these direct statements from the defendant's management factually support the plaintiff's allegation that defendant had a retaliatory animus directed against him for his work injuries. See *Hammond* v. *Bridgeport*, supra, 139 Conn. App. 695–96 ("evidence . . . that a retaliatory motive played a part in the adverse employment action . . . may be established . . . directly through evidence of retaliatory animus directed against a plaintiff by a defendant" (citation omitted; internal quotation marks omitted)).

Third, the plaintiff presented evidence of the close temporal proximity between his exercise of his rights protected under the act and the defendant's adverse action against him. The plaintiff established that, on October 25, 2016, he sustained a work injury; on November 8, 2016, the plaintiff filed a workers' compensation claim arising out of that work injury; and, on November

18, 2016, the plaintiff was released to work with a light duty work restriction. Furthermore, Satagaj testified that, approximately two weeks before the plaintiff received the 2016 seasonal layoff notice without recall, the defendant's representatives made the decision to terminate the plaintiff's employment; and, on December 9, 2016, the plaintiff received a seasonal layoff notice without recall. The plaintiff argues that "the close temporal proximity of approximately two weeks between [his] final work injury and the decision to [terminate his employment]" demonstrates that a retaliatory motive played a part in the adverse employment action. We agree with the plaintiff that evidence of a close temporal proximity between the protected activity and the adverse employment action factually supports his allegation that the defendant intended to discriminate against him. See *Hammond* v. *Bridgeport*, supra, 139 Conn. App. 695–96 ("evidence . . . that a retaliatory motive played a part in the adverse employment action . . . may be established . . . indirectly by showing that the protected activity was followed closely by discriminatory treatment" (citation omitted; internal quotation marks omitted)).

Our review of the record indicates that the plaintiff has presented evidence that a discriminatory reason motivated the defendant as well as evidence that the defendant's proffered explanation is unworthy of credence. See *Barbee* v. *Sysco Connecticut, LLC*, supra, 156 Conn. App. 820. Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, we conclude that the plaintiff presented evidence sufficient to raise a genuine issue of material fact that a discriminatory reason more likely motivated the defendant or that the defendant's proffered explanation is unworthy of credence. Thus, we conclude that the plaintiff presented evidence sufficient to raise a genuine issue of material fact with respect to his ultimate burden

of proving discrimination. Accordingly, we conclude that a genuine issue of material fact exists as to whether the plaintiff was the victim of discrimination in violation of § 31-290a and, therefore, the court erred in rendering summary judgment.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings according to law.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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TODD C. SCOFIELD ET AL. *v.* JANE A. SCOFIELD
(AC 43507)

Alvord, Prescott and Flynn, Js.

Argued April 6—officially released April 20, 2021

Named plaintiff's appeal from the Superior Court in the judicial district of Fairfield, *Welch*, *J.*

Per Curiam. The judgment is affirmed.

THOMAS STEELE *v.* COMMISSIONER
OF CORRECTION
(AC 43903)

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

Argued April 12—officially released April 20, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bhatt*, *J.*

Per Curiam. The appeal is dismissed.

JAN M. GAWLIK *v.* DANNELL P. MALLOY ET AL.
(AC 43870)

Alvord, Moll and Norcott, Js.

Argued April 13—officially released April 20, 2021

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *Abrams*, *J.*

Per Curiam. The judgment is affirmed.

SPENCER LAMPERT *v.* SHARI LAMPERT
(AC 43182)

Alvord, Moll and Norcott, Js.

Argued April 13—officially released April 20, 2021

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *M. Moore*, *J.*

Per Curiam. The judgment is affirmed.

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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

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STATE OF CONNECTICUT *v.* WAYNE A. KING
(AC 42764)

Bright, C. J., and Lavine and Alexander, Js.*

Syllabus

Convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and of previously having been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and sentenced pursuant to the statute (§ 14-227a (g)) that imposes enhanced penalties on a third time offender, the defendant appealed to this court. Specifically, he claimed that the trial court should not have sentenced him as a third time offender because the essential elements of the crime of driving while under the influence are not substantially the same in Connecticut and Florida, where he was convicted in 2000 and 2006. *Held:*

1. The defendant cannot prevail on his claim that prior convictions under Florida's statute for driving while under the influence did not qualify as prior convictions for the same offense under § 14-227a (a) and, therefore, he was entitled to be resentenced as a first time offender:

a. Contrary to the defendant's claim, the trial court's application of the current revision of § 14-227a to the defendant's conduct, rather than the revision that was in existence at the time of his Florida convictions, did not violate the ex post facto clause; the court's application of the current revision did not enhance the defendant's punishment for his prior Florida convictions and did not punish him for conduct that was not criminal in Connecticut at the time he committed the Florida offenses; instead,

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

the court, applying the statute as the legislature intended, merely enhanced his sentence for his current illegal conduct because it was considered more serious in light of his earlier offenses in Florida; moreover, on the basis of the statute's clear and unambiguous language, as well as precedent from this court, our Supreme Court, and the United States Supreme Court, the legislature intended that the applicable revision of § 14-227a was the one under which the defendant was charged in this case.

b. The "operation" element in § 14-227a was substantially the same as the "actual physical control" element in the Florida statute; the elements of each statute need not be identical to be substantially similar, and, in examining the manner in which Florida courts have applied the actual physical control element and the manner in which Connecticut courts have applied the operation element, it was clear that both statutes criminalize substantially the same conduct.

c. Contrary to the defendant's claim, neither § 14-227a (a) nor the Florida statute requires a vehicle to be motorized, and, accordingly, the statutes are substantially the same in their definitions of "vehicle" and "motor vehicle" for purposes of both statutes.

d. Contrary to the defendant's claim that the Florida statute and § 14-227a are dissimilar because at the time of his wrongful conduct in Florida, § 14-227a (a) required operation in specific proscribed areas, but the Florida statute did not, § 14-227a (g) directs a comparison of a prior conviction with the current revision of § 14a-227 (a) (1) or (2), and, pursuant to the revision of § 14-227a under which the defendant was charged for his 2016 conduct, there was no requirement that he operate his vehicle on a public highway or another similar road, as the public highway element of § 14-227a (a) was eliminated by the legislature in 2006.

e. The defendant's claim that the statutes are dissimilar because at the time of his 2000 conviction in Florida, § 14-227a (a) required a blood alcohol content of at least 0.10 percent, but the Florida statute required only a blood alcohol content of 0.08 percent, was without merit; as an enhancement penalty for a repeat offender penalizes only the last offense committed by a defendant, and, when the defendant was charged in the present case for his Connecticut conduct, § 14-227a (a) applied to a blood alcohol content of 0.08 percent or higher, the 0.10 percent element of § 14-227a (a) having been lowered to 0.08 percent by the legislature in 2002.

2. This court, as an intermediate court of appeal, was unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court and, accordingly, declined the defendant's request to overrule *State* v. *Burns* (236 Conn. 18) and *State* v. *Mattioli* (210 Conn. 573) on the basis that they contravene the plain language of § 14-227 (g).

Argued November 18, 2020—officially released April 20, 2021

Procedural History

Substitute two part information charging the defendant, in the first part, with the crimes of operating a motor vehicle under the influence of intoxicating liquor or drugs and operating a motor vehicle while having an elevated blood alcohol content, and, in the second part, with previously having been convicted of operating a motor vehicle while under the influence of intoxicating liquor or drugs, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the first part of the information was tried to the jury before *Crawford*, *J.*; verdict of guilty; thereafter, the defendant was tried to the court, *Crawford*, *J.*, on the second part of the information; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Joshua R. Goodbaum, for the appellant (defendant).

Tanya K. Gaul, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *LeeAnn S. Neal*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The defendant, Wayne A. King, appeals from the judgment of conviction, rendered by the trial court following a jury trial, of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a (a) (1) and (2).[1] The defendant claims that (1) the court should not have sentenced him as a third time offender because the essential elements of driving under the influence

[1] The defendant waived his right to a jury trial as to the part B information under which he also was charged, and the court enhanced the defendant's sentence as a third time offender on the basis of two prior convictions in the state of Florida.

are not substantially the same in Florida and Connecticut, and (2) *State* v. *Burns*, 236 Conn. 18, 670 A.2d 851 (1996), and *State* v. *Mattioli*, 210 Conn. 573, 556 A.2d 584 (1989), should be overruled because those cases contravene the plain language of § 14-227a (g), which requires that a defendant's prior convictions, on which the enhanced penalty relies, occur less than ten years before the current Connecticut conviction. We disagree with the defendant's first claim, and we, as an intermediary appellate court, are unable to overrule the decisions of our Supreme Court and, therefore, reject the defendant's second claim.[2] Accordingly, we affirm the judgment of the trial court.

The following facts, as reasonably found by the jury, and relevant procedural history inform our review of the defendant's claims. On April 1, 2016, the Naugatuck police pulled over the defendant's vehicle. The defendant smelled of alcohol, so the police transported him to the police station where the defendant agreed to take a Breathalyzer test. The defendant's blood alcohol content registered at 0.1801 percent and then at 0.1785 percent, both of which were above the legal limit. The defendant thereafter was charged with a violation of § 14-227a (a) (1) and (2). Following a guilty verdict returned by the jury, the state proceeded on a part B

[2] Although § 14-227a has been amended by the legislature since the events underlying the present case; see Public Acts 2016, No. 16-126, § 4; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

In his appellate brief, the defendant recognizes that we are "foreclosed by controlling authority." See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by [its] precedent"); *State* v. *Smith*, 107 Conn. App. 666, 684, 946 A.2d 319 ("[w]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them") (internal quotation marks omitted)), cert. denied, 288 Conn. 902, 952 A.2d 811 (2008). He raises his second claim only to preserve it for review by our Supreme Court. See part II of this opinion.

information, which the defendant elected to have tried to the court, charging the defendant with being a third time offender, pursuant to § 14-227a (g), on the basis of two prior convictions in the state of Florida.[3] Despite the defendant's objections on various grounds,[4] the court found that the state had established, beyond a reasonable doubt, that the defendant twice had been convicted of driving under the influence in Florida and that the essential elements of the Florida statute; see Fla. Stat. Ann. § 316.193 (West Supp. 2020);[5] were substantially the same as the essential elements of § 14-227a (a). Accordingly, the court sentenced the defendant to three years of imprisonment, execution suspended after eighteen months, twelve months of which is mandatory, followed by three years of probation. This appeal followed.

I

The defendant claims that his convictions under Fla. Stat. Ann. § 316.193, "upon which [his] conviction as a third time offender is predicated, [do] not satisfy" the requirements of § 14-227a (g) (3), which mandates that the out-of-state convictions of driving under the influence, on which the state relies in its part B information, contain "substantially the same" essential elements as § 14-227a (a). He argues that Fla. Stat. Ann. § 316.193 "criminalizes vast amounts of conduct that either are not illegal in Connecticut now or were not illegal in Connecticut at the time of [his] Florida arrests. Put

[3] General Statutes § 14-227a (g) provides in relevant part: "For purposes of the imposition of penalties for a second or third and subsequent offense . . . a conviction in any other state of any offense the essential elements of which are determined by the court to be substantially the same as subdivision (1) or (2) of subsection (a) of this section . . . shall constitute a prior conviction for the same offense."

[4] The defendant also filed a motion for a judgment of acquittal.

[5] The defendant and the state agree that Fla. Stat. Ann. § 316.193 has not undergone any significant changes since the time of the defendant's convictions. Accordingly, we employ the current revision of that statute.

another way, what qualifies as a crime in Florida often does not in Connecticut. On that basis, convictions under [Fla. Stat. Ann. § 316.193] do not qualify as prior convictions under [§ 14-227a (g)] because the essential elements of the respective crimes are not substantially the same."

More specifically, the defendant argues that the statutes are dissimilar in the following ways: (1) § 14-227a (a) requires operation, but Fla. Stat. Ann. § 316.193 does not require operation; (2) § 14-227a (a) requires the vehicle to be a "motor vehicle," but Fla. Stat. Ann. § 316.193 does not require the vehicle to be motorized; (3) at the time of the defendant's June 23, 1999, and May 16, 2005 "wrongful conduct" in Florida, which resulted in convictions on March 14, 2000, and October 25, 2006, respectively, § 14-227a (a) required operation in specified proscribed areas, but Fla. Stat. Ann. § 316.193 did not proscribe specific areas; and (4) at the time of the defendant's 2000 conviction in Florida, § 14-227a (a) required a blood alcohol content of at least 0.10 percent, but Fla. Stat. Ann. § 316.193 required a blood alcohol content of only 0.08 percent. See General Statutes (Rev. to 2005) § 14-227a (a); General Statutes (Rev. to 1999) § 14-227a (a). Accordingly, the defendant claims that "a conviction under [Fla. Stat. Ann.] § 316.193 . . . does not qualify as 'a prior conviction for the same offense' under § 14-227a (g) (3) . . . and [he] is therefore entitled to be resentenced as a first time offender."

"The issue of whether the elements of the [Florida] and Connecticut statutes under which the defendant was convicted were substantially the same calls for the comparison and interpretation of those statutes, which is a question of law." *State* v. *Commins*, 276 Conn. 503, 513, 886 A.2d 824 (2005), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

Therefore, our review is plenary. Id., 510. "When interpreting a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . To do so, we first consult 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." (Citation omitted; internal quotation marks omitted.) *State* v. *Haight*, 279 Conn. 546, 550, 903 A.2d 217 (2006).

A

Before we can compare the statutory language of the relevant Connecticut and Florida statutes, we must determine which revision of our General Statutes is applicable in this case.[6] Since the time of the defendant's conduct in Florida in 1999 and 2005, the essential elements of § 14-227a (a) have been revised in two relevant ways, namely, the legislature eliminated the requirement that the operation of a motor vehicle occur on a "public highway," and the legislature reduced the blood alcohol content level from 0.10 percent to 0.08 percent. See Public Acts 2006, No. 06-147, § 1; Public Acts, Spec. Sess., June, 2002, No. 02-1, § 108.

The defendant argues that the applicable revision of § 14-227a (a) is the revision that was in place before October 1, 2006, "when both of [his] Florida arrests occurred . . . ." He contends that the use of the current statute, rather than the one in existence at the time of his Florida arrests, would amount to an ex post facto application of the current statute. Specifically, he argues: "In order for the state to increase [his] punishment for his 2018 [Connecticut] conviction on the basis

[6] See footnote 5 of this opinion.

of his prior wrongful conduct in Florida, that prior conduct must have been illegal *in Connecticut* at the time it was committed." (Emphasis in original.) The state argues that the applicable revision of § 14-227a is the one that was in effect on the date of the defendant's Connecticut conduct, namely, April 1, 2016. We agree with the state.

Initially, we note that the defendant does not claim that the legislature intended that the revision of § 14-227a in existence at the time of the Florida offenses was to apply to the defendant's sentencing; nor could he, based on the plain language of the statute. The text of § 14-227a (g) provides in relevant part that "[f]or purposes of the imposition of penalties for a second or third and subsequent offense . . . a conviction in any other state of any offense the essential elements of which are determined by the court *to be substantially the same as subdivision (1) or (2) of subsection (a) of this section* . . . shall constitute a prior conviction for the same offense." (Emphasis added.) The legislature clearly has instructed that one must look to the current revision of § 14-227a (a) (1) or (2) to determine if the prior conviction in any other state is substantially the same. Thus, the only question is whether application of the current revision of § 14-227a (g) to the defendant's prior conduct in Florida violates the ex post facto clause.

"The ex post facto clause prohibits, inter alia, the enactment of any law [that] imposes a punishment for an act [that] was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." (Internal quotation marks omitted.) *State* v. *Hickey*, 80 Conn. App. 589, 593, 836 A.2d 457 (2003), cert. denied, 267 Conn. 917, 841 A.2d 1192 (2004). "Habitual criminal statutes increase the punishment for an offense because of previous convictions for other offenses. In *McDonald* v. *Massachusetts*, [180

U.S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901)], the Supreme Court held that the ex post facto law clause did not prevent the imposition of punishment under [a] habitual criminal statute even though the prior offenses had been committed prior to its passage. The [c]ourt explained that the accused was being punished only for the last offense, which occurred subsequent to the enactment of the habitual criminal statute. Similarly, a crime whose definition includes a predicate offense may be applied to an accused who commits the charged offense subsequent to the passage of the statute, even though the predicate offense was committed prior to the passage of the statute. This principle has also been applied to acts, as well as crimes, occurring prior to the passage of the habitual criminal statute. A different result is reached if the habitual criminal statute was enacted subsequent to commission of the offense [that] leads to the charge of habitual criminality.

"The reasoning in *McDonald* is also applicable to cases in which an element of the offense is the previous conviction for the same or different offense. That the prior offense was committed before the enactment of the offense for which the accused is prosecuted does not make the law ex post facto." (Footnotes omitted.) J. Cook, 1 Constitutional Rights of the Accused (3d Ed. December 2020) § 1:20.

In *Hickey*, this court addressed whether an amendment to § 14-227a that extended the " 'look back' " period for enhancing a defendant's sentence due to prior convictions from five years to ten years violated the ex post facto clause. *State* v. *Hickey*, supra, 80 Conn. App. 592–95. The defendant claimed that the court could not use convictions of driving under the influence in 1991 and 1994 to enhance his sentence arising from a conviction for driving under the influence in 2000 because at the time of the earlier convictions the " 'look back' " period for prior convictions was only five years.

Id. The defendant claimed that the court's reliance on a 1995 amendment to § 14-227a extending the look back period to ten years violated the ex post facto clause of the United States constitution because it increased his punishment for the earlier offenses. Id., 590–91. In rejecting the defendant's claim, we explained: "The United States Supreme Court has held that a statute enhancing a defendant's sentence because he is a repeat offender does not violate the ex post facto clause even if one of the convictions on which the sentence is based occurred before the enactment passage of the statute. See *Gryger* v. *Burke*, 334 U.S. 728, 732, 68 S. Ct. 1256, 92 L. Ed. 1683 (1948). Moreover, the United States Supreme Court has consistently sustained repeat offender laws as penalizing only the last offense committed by a defendant. See *Nichols* v. *United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994)." *State* v. *Hickey*, supra, 593.

We also are guided, as we were in *Hickey*, by our Supreme Court's decision in *State* v. *Holloway*, 144 Conn. 295, 300–301, 130 A.2d 562 (1957). In *Holloway*, our Supreme Court rejected the defendant's contention that his enhanced sentence as a third time offender, on the basis of convictions that had occurred in 1947 and 1950, under a statute that had been enacted in 1955, constituted a violation of the ex post facto clause. Id. The court explained: "[T]he crucial fact is that [the 1955 statute] does not undertake to provide punishment for any crime committed prior to the date when it went into effect. The punishment provided is for a violation of the . . . law [that] occurs subsequent to the effective date of the [1955 statute]. The only effect that a conviction antedating the statute has is to enhance the penalty to be imposed for a violation of the . . . [1955] law. The theory of [the 1955 statute] is not that a person shall be punished a second time for an earlier offense but that the principal offense for which the person is

being prosecuted under the statute is made more serious by reason of its being a repetition of an earlier offense or earlier offenses." Id., 301. Consequently, this court held in *Holloway*, "in no sense does the [1955] statute operate ex post facto. 16A C.J.S. 161, [Constitutional Law], § 450." *State* v. *Holloway*, supra, 301.

Similarly, in the present case, the court's application of the current revision of § 14-227a to the defendant did not enhance his punishment for his prior Florida convictions. It also did not punish him for conduct that was not criminal in Connecticut at the time he committed the Florida offenses. Instead, the court, in applying the statute as the legislature intended, merely enhanced his sentence for his current illegal conduct because it is considered more serious in light of his earlier offenses in Florida.

On the basis of our clear authority, including the plain and unambiguous language of § 14-227a (g), as well as precedent from this court, our Supreme Court, and the United States Supreme Court, we conclude that the legislature clearly intended that the applicable revision of the General Statutes is the one under which the defendant was charged in this case, namely, the current revision of § 14-227a, and that application of the current revision of the statute does not violate the ex post facto clause.

B

We next set forth the elements of Fla. Stat. Ann. § 316.193 and § 14-227a (a), followed by our consideration of each of the defendant's arguments related to his claim that the Connecticut and Florida statutes are not substantially the same.

Fla. Stat. Ann. § 316.193 (West Supp. 2020) provides in relevant part: "(1) A person is guilty of the offense

of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within this state and: (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired; (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or (c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath. . . ."

Section 14-227a provides in relevant part: "(a) No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. For the purposes of this section, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight, except that if such person is operating a commercial motor vehicle, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is four-hundredths of one per cent or more of alcohol, by weight, and 'motor vehicle' includes a snowmobile and all-terrain vehicle, as those terms are defined in section 14-379. . . ."

The defendant argues that the elements of the Florida and Connecticut statutes are not substantially the same, meaning "[they] are not 'the same' in their substance." The state argues that the statutes are substantially the same and that the defendant is comparing the statutes for exactness, rather than for substantial similarity.

"Black's Law Dictionary (6th Ed. 1990) defines 'substantially' as '[e]ssentially; without material qualification; in the main . . . in a substantial manner.' Likewise, 'substantial' is defined as, '[o]f real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. . . . Synonymous with material.' . . . Thus, the requirement of a 'substantial' association creates a threshold far below . . . exclusive or complete association . . . ." (Citation omitted.) *Hartford Electric Supply Co.* v. *Allen-Bradley Co.*, 250 Conn. 334, 359, 736 A.2d 824 (1999). We next consider whether certain elements of Fla. Stat. Ann. § 316.193 are substantially the same as the purported corresponding elements of § 14-227a (a).

1

The defendant argues that the statutes are dissimilar in that § 14-227a (a) requires "opera[tion]" of a motor vehicle, but Fla. Stat. Ann. § 316.193 does not require operation of a motor vehicle; it can be satisfied by proof of "actual physical control . . . ." He contends that being inside of a vehicle with keys in your hand is insufficient to support "operation" of a motor vehicle in Connecticut, but that such conduct is sufficient to support "control" of a vehicle in Florida. Therefore, he argues, "[b]ecause 'operating' a vehicle requires more than being 'in actual physical control of a vehicle,' the essential elements of [§ 14-227a (a)] and [Fla. Stat. Ann. § 316.193] are not substantially the same." The state argues that "the element of 'actual physical control' [in Fla. Stat. Ann. § 316.193] is substantially the same as the element of 'operation' [in § 14-227a]." We agree with the state.

A review of the case law in Florida reveals that "the reasonably capable of being rendered operable standard is applied when a person is charged with driving

under the influence and claims . . . that . . . he was not in actual physical control of the vehicle. For example, if a person is found passed out behind the steering wheel of a vehicle with the keys either in the ignition or on the floor of the vehicle, he may be found guilty of violating [Fla. Stat. Ann. § 316.193] because he is in actual physical control of a vehicle which can readily be made operational. See *State*, *Dept. of Highway Safety & Motor Vehicles* v. *Prue*, 701 So. 2d 637 (Fla. [App.] 1997) (conviction upheld for being in actual physical control while under the influence where a defendant was found passed out in a vehicle on the shoulder of a highway, with her face resting on the steering wheel and the keys either in the ignition or on the floor of the vehicle, because she could have used the keys to start the vehicle and drive away); *Baltrus* v. *State*, 571 So. 2d 75 (Fla. [App.] 1990) (upholding the reversal of a motion to dismiss where the defendant was found passed out and slumped over the steering wheel of his car, with the keys to the car in his hands); *Fieselman* v. *State*, 537 So. 2d 603 (Fla. [App.] 1988) (finding that the trial court erred by dismissing a charge of being in actual physical control of a vehicle while under the influence, where the defendant was found lying down, asleep in the front seat of his automobile, with the engine off but with the keys in the ignition, explaining that the presence of the keys in the ignition led to the inference that the defendant could have started the automobile and have driven away at any time); *Griffin* v. *State*, 457 So. 2d 1070, 1072 (Fla. [App.] 1984) (affirming a conviction based upon actual physical control where the defendant was in the driver's seat of a car that was stationary in the roadway with the keys in the ignition and the lights on, finding that, since the defendant had placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away, he was in actual physical control of the vehicle)." (Internal

quotation marks omitted.) *Hughes* v. *State*, 943 So. 2d 176, 194–95 (Fla. App. 2006), review denied, 959 So. 2d 716 (Fla. 2007); see *Cloyd* v. *State*, 943 So. 2d 149, 168 (Fla. App. 2006), review denied, 959 So. 2d 715 (Fla. 2007); see also *In re Standard Jury Instructions in Criminal Cases–Report No. 2016-08*, 211 So. 3d 995, 998 app. (Fla. 2017) (jury instruction set forth in appendix provides that " '[a]ctual physical control of a vehicle' means the defendant must be physically in [or on] the vehicle and have the capability to operate the vehicle, regardless of whether [he] [she] is actually operating the vehicle at the time").

In Connecticut, the definition of "operating" in § 14-227a (a) has been derived from our case law. Our case law has established that "the term operating encompasses a broader range of conduct than does [the term] driving." (Internal quotation marks omitted.) *State* v. *Cyr*, 291 Conn. 49, 57, 967 A.2d 32 (2009). "Neither § 14-227a nor any related statute defines operation of a motor vehicle. It is undisputed that the word 'operating' as used in [General Statutes] § 14-227b has the same meaning that it does in § 14-227a. The definition was formulated many years ago: Our Supreme Court . . . approved the following jury instruction in *State* v. *Swift*, 125 Conn. 399, 402–403, 6 A.2d 359 (1939): '[T]he statute [in question] refers to persons who shall operate a motor vehicle, and is not confined to persons who shall drive a motor vehicle. A person operates a motor vehicle within the meaning of this statute, when in the vehicle he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.'

"The definition [later] was refined in [*State* v. *Ducatt*, 22 Conn. App. 88, 90–91, 575 A.2d 708 (1990)] where the defendant was unconscious or sleeping in his parked,

running vehicle with his arm wrapped around the steering wheel and his fingers curled around the gear shift lever. '[T]he controls of a car capable of immediate powered movement are under the control of an intoxicated motorist, which is precisely the evil the legislature sought to avoid through [§] 14-227a (a). We conclude, therefore, that the statute does not require the state to prove that the defendant intended to move the vehicle in order to prove operation under [§] 14-227a (a).'

"The court [in *Ducatt*] concluded: 'An accused operates a motor vehicle within the meaning of . . . § 14-227a (a) when, while under the influence of alcohol or any drug and while in the vehicle and in a position to control its movements, he manipulates, for any purpose, the machinery of the motor or any other machinery manipulable from the driver's position that affects or could affect the vehicle's movement, whether the accused moves the vehicle or not.' [*State* v. *Ducatt*, supra, 22 Conn. App. 93]." (Footnotes omitted.) S. Tomeo & J. Sills, 21 Connecticut Practice Series: Connecticut [Driving Under the Influence] Law (2020 Ed.) § 8:3, pp. 215–16.

" 'Nothing in our definition of "operation" requires the vehicle to be in motion or its motor to be running.' *State* v. *Haight*, [supra, 279 Conn. 552]. 'It is well settled that operating encompasses a broader range of conduct than does driving. . . . [T]here is no requirement that the fact of operation be established by direct evidence.' . . . *State* v. *Sienkiewicz*, 162 Conn. App. 407, 410, 131 A.3d 1222, cert. denied, 320 Conn. 924, 134 A.3d 621 (2016). 'Operation occurs when a person in the vehicle intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle. . . . This court has clarified the meaning of operation by holding that an intent to drive is not an element of operation. . . . An accused operates a

motor vehicle within the meaning of . . . § 14-227a (a) when, while under the influence of alcohol or any drug and while in the vehicle and in a position to control its movements, he manipulates, for any purpose, the machinery of the motor or any other machinery manipulable from the driver's position that affects or could affect the vehicle's movement, whether the accused moves the vehicle or not.' " *State* v. *Smith*, 179 Conn. App. 734, 748–49, 181 A.3d 118, cert. denied, 328 Conn. 927, 182 A.3d 637 (2018).

Statutory prohibitions regarding driving while under the influence "are preventive measure[s] . . . [that] deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers . . . and which enable the drunken driver to be apprehended before he strikes . . . ." (Internal quotation marks omitted.) *State* v. *Cyr*, supra, 291 Conn. 61; id., 58 (defendant who remotely started vehicle and then sat in driver's seat met definition of "operation" even though he had not put key in ignition and car was not capable of moving without key). "When an obstacle or impediment [to driving the vehicle] is temporary . . . it remains possible that it can be surmounted, and that movement of the vehicle will ensue." Id., 60.

The defendant argues that these definitions show that the two statutes are not substantially the same because in Florida one can be convicted simply because he *was in a position to operate* the machinery of the vehicle, whereas in Connecticut one can be convicted only if he *actually operated* said machinery. We are not persuaded.

First, the defendant's argument requires that the elements of the offenses be identical. That is not the proper test. Second, in examining the manner in which Florida courts have applied the actual physical control element and the manner in which Connecticut courts have

applied the operation element, it is clear that both statutes criminalize substantially the same conduct. As noted previously in this opinion, Florida courts regularly have held that one who is sitting in the driver seat of his vehicle with the keys to the vehicle in his hand, or within reach, is in actual physical control of the vehicle because he is in a position to turn on the ignition immediately and drive the vehicle. At the same time, at least one case in the District Court of Appeal of Florida has held that "sleeping in a prone position in the front seat of a vehicle parked in a parking lot, the engine of which is not running, is not itself sufficient to establish actual physical control of the vehicle" if the key to the vehicle is not in the ignition. *Fieselman* v. *State*, supra, 537 So. 2d 606. The court concluded that such evidence was insufficient for "a legitimate inference to be drawn that [the] defendant had of his own choice placed himself behind the wheel [of the vehicle], and had either started the motor or permitted it to run." (Internal quotation marks omitted.) Id.

Thus, the manner in which Florida courts have interpreted actual physical control is substantially the same as the manner in which our Supreme Court has defined operation—a conviction can be based on the driver sitting in the driver seat and placing the key in the ignition, even though the vehicle is not yet operative, because the driver is in a position to turn on the ignition immediately and drive the vehicle. Both statutes are aimed at preventing the same conduct. As our Supreme Court has noted: "[T]he threat targeted by statutes disallowing not just driving, but also operating a motor vehicle while intoxicated—that is, 'the danger that a parked vehicle will be put in motion by an intoxicated occupant and thereby pose a risk to the safety of the occupant and others'—remains present when the condition rendering the vehicle inoperable is a temporary one that quickly can be remedied. *State* v. *Adams*, 142 Idaho 305, 308,

127 P.3d 208 (App. 2005), review denied, 2005 Idaho Lexis 206 (June 8, 2005)." *State* v. *Cyr*, supra, 291 Conn. 60. Significantly, our Supreme Court relied on *Adams* even though the statute the court had to apply in that case, like the Florida statute at issue in the present case, criminalized the actual physical control of a vehicle by a person under the influence of drugs or alcohol.

Similarly, in *State* v. *Haight*, supra, 279 Conn. 553–54, our Supreme Court, in comparing our driving under the influence statute with those of other states, treated the operation requirement of § 14-227a as the equivalent of the actual physical control element in other states' statutes. See id., 553 ("[n]umerous courts in other jurisdictions have concluded that a motorist who is found sleeping or unconscious in a stationary vehicle with the motor not running violates the applicable prohibition on operating or being in actual physical control of a motor vehicle while intoxicated or under the influence of intoxicating liquor or drugs"). Furthermore, our Supreme Court in *Cyr* found that the defendant's conduct met the operation requirement of § 14-227a even though, after the defendant started his vehicle remotely, the key still needed to be inserted into the ignition to make the vehicle operative. *State* v. *Cyr*, supra, 291 Conn. 61. As was the circumstance in the Florida cases we have cited, as well as in the *Adams* case, the focus of our Supreme Court has been on the fact that the defendant was in position to overcome a temporary obstacle to making the vehicle operative by taking an immediate step while he was in the driver's seat behind the steering wheel. See id.

Finally, we note that at least one other state appellate court has considered and rejected an almost identical argument to that made by the defendant in this case. In *State* v. *Slyter*, Docket No. 102,732, 2010 WL 4977154

(Kan. App. November 19, 2010) (unpublished opinion),[7] review denied (Kan. February 15, 2011), the defendant was convicted of operating his bicycle under the influence of drugs or alcohol. His sentence was enhanced due to three prior driving under the influence convictions, including one in Florida. Id., *1. The applicable part of the Kansas statute defined a prior conviction as " 'being convicted of a violation of a law of another state . . . which prohibits the acts that this section prohibits.' " Id. The defendant argued that the Florida conviction was not a prior conviction under the statute because "a person could be convicted under the Florida statute for merely being in 'actual physical control' of a vehicle while intoxicated, while [the Kansas statute] is limited to persons who 'operate or attempt to operate' a vehicle while intoxicated." Id., *2. Comparing a Kansas case, which found that having a key in the ignition and sitting in the driver's seat constituted attempting to operate under Kansas' statute, with the Florida cases cited previously in this opinion, the Court of Appeals of Kansas concluded that the defendant's Florida conviction could be used to enhance his sentence because both statutes criminalized substantially the same acts. Id., *2–4.

For all of the foregoing reasons, we conclude that the "operation" element in § 14-227a (a) is substantially the same as the "actual physical control" element in Fla. Stat. Ann. § 316.193.

2

The defendant next argues that the statutes are dissimilar because § 14-227a (a) requires the vehicle to be

[7] The decision in *Slyter* was an unpublished disposition. "Pursuant to Kansas Supreme Court Rule 7.04 (f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion." *State* v. *Slyter*, supra, 2010 WL 4977154, *1. Because we were unable to locate any published opinions of a Kansas appellate court on this issue, we cite *Slyter* as persuasive authority.

a "motor vehicle," but Fla. Stat. Ann. § 316.193 does not require the vehicle to be motorized. He contends that "Florida courts have straightforwardly concluded that 'vehicle' includes not just an automobile, but also a bicycle or a nonmotorized boat. See *State* v. *Howard*, 510 So. 2d 612, 612 (Fla. App. 1987) (affirming [driving under the influence] charge under [Fla. Stat. Ann.] § 316.193 for operation of bicycle while intoxicated, and reasoning that '[t]his section contemplates applicability to all "vehicles" since it is not limited to "motor vehicles," as are many of the other statutes dealing with driving while under the influence'); *State* v. *Davis*, 110 So. 3d 27, 32 n.9 (Fla. App. 2013) (holding that 'boating under the influence' under Florida law applies to operation of nonmotorized vessels, and citing with approval *Howard*'s holding that bicycles qualify as 'vehicles' under [Fla. Stat. Ann.] § 316.193)." The state argues that the definition of "vehicle" in Florida substantially is the same as the definition of "motor vehicle" in Connecticut in that "both statutes cover vehicles used on a highway" regardless of whether they are motorized. We agree with the state.

Pursuant to Fla. Stat. Ann. § 316.003 (75) (West 2005), a vehicle is defined as: "[e]very device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks."[8] Florida's driving under the influence statute, Fla. Stat. Ann. § 316.193, applies to nonmotorized vehicles as well as motorized vehicles. See *State* v. *Howard*, supra, 510 So. 2d 612–13.

General Statutes § 14-212 (5) defines "[m]otor vehicle" as "all vehicles used on the public highways . . . ."

[8] The definition of "vehicle," pursuant to Fla. Stat. Ann. § 316.003, has been revised slightly. The revised definition is: "Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except personal delivery devices, mobile carriers, and devices used exclusively upon stationary rails or tracks." Fla. Stat. Ann. § 316.003 (103) (West Supp. 2020).

Section 14-212 further provides that " '[v]ehicle' has the same meaning as 'motor vehicle.' " General Statutes § 14-212 (10).

In *State* v. *Fontaine*, 112 Conn. App. 190, 962 A.2d 197, cert. denied, 290 Conn. 921, 966 A.2d 238 (2009), this court, relying on our Supreme Court's decision in *State* v. *Knybel*, 281 Conn. 707, 916 A.2d 816 (2007), explained that the statutory definition contained in § 14-212 (5) is much broader than that contained in General Statutes § 14-1.[9] "[T]he definition of 'motor vehicle' in chapter 248, when read in the context of the General Statutes as a whole, not only suggests a broad definition of the term 'motor vehicle' for purposes of chapter 248 but also that all 'vehicles' in the various chapters of the General Statutes are included within that term. . . . Whether a vehicle is wholly self-propelled does not change whether it is a 'vehicle,' and thus a 'motor vehicle,' for the purposes of chapter 248; per § 14-212 (5), any vehicle that is driven on the public highways is a 'motor vehicle' under chapter 248." (Citations omitted.) *State* v. *Fontaine*, supra, 112 Conn. App. 201. As we noted in *Fontaine*, § 14-227a, under which the defendant in the present case was charged, is included in chapter 248 of our General Statutes.

Employing the broad definition set forth in § 14-212 (5), we conclude that neither § 14-227a (a) nor Fla. Stat. Ann. § 316.193 requires the vehicle to be motorized. Accordingly, these statutes are substantially the same

[9] Relying on this court's decision in *State* v. *Young*, 186 Conn. App. 770, 794, 201 A.3d 439, cert. denied, 330 Conn. 972, 200 A.3d 1151 (2019), the defendant argues in his principal brief that the statutory definition of "motor vehicle" found in § 14-1 is applicable in this case. In his reply brief, the defendant concedes that § 14-212 is, in fact, the applicable statutory section in this case. In *Young*, this court was not asked to decide whether the definition in § 14-212 or that in § 14-1 was applicable. Consequently, we attach no significance to the fact that the court referred only to § 14-1. See id. Instead, we agree with the parties that the definition of motor vehicle in § 14-212 controls the resolution of the defendant's claim.

in their definitions of "vehicle" and "motor vehicle" for purposes of Fla. Stat. Ann. § 316.193 and § 14-227a (a).

3

The defendant next argues that the statutes are dissimilar because, at the time of his June 23, 1999, and May 16, 2005 "wrongful conduct" in Florida, which resulted in convictions in Florida on March 14, 2000, and October 25, 2006, § 14-227a (a) required operation in specified proscribed areas, but Fla. Stat. Ann. § 316.193 did not proscribe specific areas. More specifically, the defendant argues that, "[i]n order for the state to increase [his] punishment for his 2018 conviction on the basis of his prior wrongful conduct in Florida, that prior conduct must have been illegal in Connecticut at the time it was committed. . . . To establish a violation of § 14-227a before 2006, the state had to prove that the defendant's operation of a motor vehicle under the influence occurred 'on a public highway' or another similar road." Under Florida law, he argues, there was no such requirement that his conduct occur on a public highway or another similar road. The defendant's argument is without merit because it rests on a flawed premise.

As we explained in part I A of this opinion, § 14-227a (g) directs a comparison of the prior conviction with the current revision of § 14-227a (a) (1) or (2). Furthermore, a conviction under a new or revised statute does not result in a second punishment merely because an enhancement is applied that was based on a prior conviction. See *State* v. *Hickey*, supra, 80 Conn. App. 589. "The United States Supreme Court has held that a statute enhancing a defendant's sentence because he is a repeat offender does not violate the ex post facto clause even if one of the convictions on which the sentence is based occurred before the enactment passage of the statute. See *Gryger* v. *Burke*, [supra, 334 U.S. 732]."

State v. *Hickey*, supra, 593. Repeat offender laws penalize only the *last offense* committed by a defendant. Id.; see *Nichols* v. *United States*, supra, 511 U.S. 747; see also *State* v. *Holloway*, supra, 144 Conn. 300–301.

Pursuant to the revision of § 14-227a (a), under which the defendant was charged for his April 1, 2016 conduct, there was no requirement that he operate his vehicle on a public highway or another similar road. The public highway element of § 14-227a was eliminated by the legislature in 2006. See Public Acts 2006, No. 06-147, § 1. Accordingly, the defendant's claim has no merit.

4

The defendant next argues that the statutes are dissimilar because, at the time of his 2000 conviction in Florida, § 14-227a (a) required a blood alcohol content of at least 0.10 percent, but Fla. Stat. Ann. § 316.193 required a blood alcohol content of only 0.08 percent. For the reasons previously stated, the premise of this claim also is flawed. See parts I A and I B 3 of this opinion.

An enhancement penalty for a repeat offender penalizes only the *last offense* committed by a defendant. See *Nichols* v. *United States*, supra, 511 U.S. 747; *State* v. *Hickey*, supra, 80 Conn. App. 593; see also *State* v. *Holloway*, supra, 144 Conn. 300–301. When the defendant was charged in the present case for his Connecticut conduct, § 14-227a (a) applied to a blood alcohol content of 0.08 percent or greater. The 0.10 percent element of § 14-227a was lowered to 0.08 percent by the legislature in 2002. See Public Acts, Spec. Sess., June, 2002, No. 02-1, § 108. Accordingly, this claim is without merit.

II

The defendant next claims that *State* v. *Burns*, supra, 236 Conn. 18, and *State* v. *Mattioli*, supra, 210 Conn. 573, should be overruled because the plain language of

§ 14-227a (g) requires that *all* of the defendant's previous convictions on which the enhanced penalty relies occur within ten years of the current Connecticut *conviction*. In *Burns*, our Supreme Court held that the prior convictions just had to be within five[10] years of the defendant's *conduct* that resulted in the conviction on which his sentence was enhanced. *State* v. *Burns*, supra, 236 Conn. 26. In *Mattioli*, the Supreme Court held that only the defendant's *last* conviction before the conviction at issue had to have occurred within the statutory look back period. *State* v. *Mattioli*, supra, 210 Conn. 576.

"[A]s an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court. . . . As our Supreme Court has stated: [O]nce this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an improper and fruitless endeavor." (Internal quotation marks omitted.) *State* v. *Edwards*, 202 Conn. App. 384, 410, A.3d , cert. denied, 336 Conn. 920, A.3d. (2021).

The judgment is affirmed.

In this opinion the other judges concurred.

USSBASY GARCIA *v.* ROBERT COHEN ET AL.
(AC 41079)

Lavine, Prescott and Bishop, Js.*

Syllabus

The plaintiff tenant sought to recover damages from the defendant landlords, R and D, for personal injuries that she suffered when she slipped on the rear exterior staircase of her apartment building. The plaintiff

[10] When *Burns* was decided, the statutory look back period was only five years. The defendant does not dispute that the holding in *Burns* applies to the current ten year look back period, and this court has so held. See *State* v. *Tenay*, 156 Conn. App. 792, 799, n.5, 114 A.3d 931 (2015).

* The listing of judges reflects their seniority status on this court as of the date the appeal was submitted on the briefs.

claimed that the defendants were negligent in failing to keep the steps of the staircase free from dirt and sand and by allowing the surface of the steps to become pitted, worn and uneven. At trial, R testified that other individuals helped him with snow removal at the property and that, together, they would remove snow and spread salt and sand on the staircase but that no one would return thereafter to clear the staircase after spreading salt and sand. After a jury trial, judgment was rendered in favor of the defendants. The plaintiff appealed to this court, claiming that the trial court improperly rejected her request to charge and failed to instruct the jury that the possessor of real property has a nondelegable duty to maintain the premises in a reasonably safe condition. This court affirmed the trial court's judgment, concluding that the general verdict rule precluded the plaintiff's claim on appeal. The plaintiff, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment and concluded that the general verdict rule did not preclude the plaintiff's claim on appeal, and remanded the case to this court with direction to consider the plaintiff's claim of instructional error. *Held*:

1. The trial court erred by failing to instruct the jury on the nondelegable duty doctrine; R's testimony that he employed contractors to remove snow and otherwise maintain the staircase implicated the nondelegable duty doctrine because that testimony implicitly raised the issue of whether he or the individuals who helped him remove snow was responsible for the condition of the staircase, and the plaintiff's proposed jury charge was relevant to the issues in the case, an accurate statement of the law and reasonably supported by the evidence adduced at trial.
2. The trial court's instructions to the jury and its refusal to instruct the jury on the defendants' nondelegable duty to maintain the premises constituted harmful error; the jury could have concluded that the snow removal team acted negligently, but the court did not instruct the jury that such a finding would have resulted in an allocation of liability to the defendants under the nondelegable duty doctrine; accordingly, this court concluded that there was a consequent likelihood of actual harm to the plaintiff significant to warrant a new trial.

(*One judge dissenting*)

Submitted on briefs October 5, 2020—officially released April 20, 2021

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn in part; thereafter, the matter was tried to the jury before *Dubay*, *J.*; verdict for the defendants; subsequently, the court denied the plaintiff's motions to set aside the verdict and for a new

trial, and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court, *Lavine*, *Prescott* and *Bishop*, *Js.*, which affirmed the trial court's judgment; thereafter, the plaintiff, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Reversed*; *new trial.*

John Serrano submitted a brief for the appellant (plaintiff).

Allison Reilly-Bombara submitted a brief for the appellees (defendants).

Opinion

BISHOP, J. This appeal returns to us on remand from our Supreme Court. At trial in this negligence action, a jury returned a verdict finding the defendants, Robert Cohen and Diane Cohen, not liable as landlords for injuries the plaintiff, Ussbasy Garcia, suffered when she slipped and fell on the staircase outside her apartment building on the defendants' premises. On appeal, the plaintiff claimed that the court erred by rejecting her request to charge and failing to instruct the jury that the owner of real property has a nondelegable duty to maintain the premises. We affirmed the judgment of the trial court on March 12, 2019, holding that the plaintiff's claims were not reviewable on the basis of the general verdict rule. See *Garcia* v. *Cohen*, 188 Conn. App. 380, 386–87, 204 A.3d 1245 (2019), rev'd, 335 Conn. 3, 225 A.3d 653 (2020). On certification, our Supreme Court reversed our holding with regard to the general verdict rule and remanded the case to this court with direction to consider the plaintiff's claim of instructional error. See *Garcia* v. *Cohen*, 335 Conn. 3, 28, 225 A.3d 653 (2020). On review of the merits, we agree with the plaintiff that the trial court should have issued a jury instruction on the defendants' nondelegable duty to

maintain the premises, and, accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are set forth in our Supreme Court's opinion. "In the middle of winter, the plaintiff exited her second floor rental apartment shortly before noon carrying a basket of laundry. She went out the rear exit and descended the exterior staircase. Before reaching the bottom of the staircase, she slipped and fell, fracturing her left ankle and tearing her left ankle deltoid ligament. She testified that she slipped because the fourth step had a lot of sand on the surface and was not safe. The plaintiff brought a premises liability action, alleging that her landlords, the defendants, negligently and carelessly (1) failed to maintain the steps clean, clear, and free of dirt and sand, (2) allowed the surface of the steps to become pitted, worn, and uneven, and (3) failed to post a notice or otherwise warn of the slippery condition of the steps. The defendants denied the allegations in the complaint and asserted a special defense alleging that the plaintiff's injuries resulted from 'her own negligence and carelessness . . . .'

"A jury trial ensued in which Robert Cohen testified about how he maintained the property during the winter months. He testified that three or four individuals helped him with snow removal at the property. Together, they would remove snow after a snowstorm and spread salt and sand on the stairs. Robert Cohen also testified that, after spreading salt and sand on the stairs, no one would return in the winter to clear off the stairs.

"In light of that testimony, the plaintiff submitted a proposed jury instruction regarding the defendants' nondelegable duty to maintain the safety of the premises. The plaintiff also proposed that the trial court submit three interrogatories to the jury. The proposed

interrogatories addressed three grounds on which the jury could have determined liability: (1) Were the plaintiff's fall and injuries caused by the defendants' negligence and carelessness in failing to maintain the steps clean, clear and free of dirt and sand? (2) Were the plaintiff's fall and injuries caused by the defendants' negligence in allowing the steps to become pitted, worn and uneven? And (3) were the plaintiff's fall and injuries caused by her own failure to exercise care under the circumstances and conditions then existing?

"The trial consisted of two days of evidence. The trial court began the second, and last, day of trial by asking if the attorneys had any preliminary matters to discuss. Because the court would instruct the jury and submit the case to it for deliberation after the conclusion of evidence later that day, the plaintiff's attorney responded: 'Just the fact that I had filed jury instructions—proposed jury instructions and jury interrogatories, and my understanding is, the court is going to disallow those.' The court replied by confirming the plaintiff's understanding and explaining: 'I don't think the interrogatories are necessary, and I don't think that the nondelegable duty charge is necessary because I'm specifically charging the jury—or I intend to specifically . . . charge the jury on the duties that are owed to an invitee.' The plaintiff's attorney answered: 'Very well. Thank [you].'

"As it indicated it would, the trial court, after the close of evidence, charged the jury on the applicable law. That charge included an explanation of the duty owed to an invitee but not an explanation of the nondelegable duty doctrine.[1] Following the instructions, the

[1] Additionally, in its explanation of proximate cause, the trial court charged: "Therefore, when a defendant's negligence combines together with one or more other causes to produce an injury, such negligence is a proximate cause of the injury if its contribution to the production of the injury, in comparison to all the other causes, is material and substantial—or substantial, I should say. When, however, some other cause contributes so powerfully to the production of an injury as to make the defendants' negligent

trial court asked the attorneys if there were any exceptions to the charge. The plaintiff's counsel answered: 'Other than what I had filed previously, no, Your Honor.' The jury proceeded to deliberate. During deliberations, the jury submitted the following question to the court: 'How do we indicate on the [verdict] form that we find neither party negligent?' The court instructed the jury that if it had found neither party negligent, it would have to return a defendants' verdict. The jury then returned a defendants' verdict." (Footnote added; footnotes omitted.) Id., 6–9.

After trial, the plaintiff filed motions to set aside the verdict and for a new trial. The trial court denied both motions. The plaintiff then appealed to this court, claiming that the trial court improperly had rejected her request to charge and improperly failed to instruct the jury on the defendants' nondelegable duty to maintain the premises. *Garcia* v. *Cohen*, supra, 188 Conn. App. 381–82. At oral argument, this court asked the parties whether the general verdict rule would apply to bar consideration of the plaintiff's instructional claim, and we later permitted the parties to submit supplemental briefs on that issue. Subsequently, this court concluded that the general verdict rule applied and held on that basis that the plaintiff's claims of instructional error were unreviewable. Id., 386–87.

The plaintiff filed a petition for certification to appeal from the judgment of this court, which was granted by our Supreme Court. Our Supreme Court held that "the Appellate Court incorrectly concluded that the plaintiff's instructional error claim was not reviewable." *Garcia* v. *Cohen*, supra, 335 Conn. 28. The court reasoned: "'The general verdict rule does not apply in the present

contribution to the injury merely trivial or inconsequential, the defendants' negligence must be rejected as a proximate cause of the injury, for it has not been a substantial factor in bringing that injury about."

case because the plaintiff had requested that the trial court submit her properly framed interrogatories to the jury and had objected when it denied her request. She properly framed her interrogatories by submitting questions addressing her claim of negligence and the defendants' denial of negligence and special defense of contributory negligence. The claims of negligence and contributory negligence are so intertwined with the plaintiff's nondelegable duty jury charge claim on appeal that the general verdict rule does not bar review. Additionally, the plaintiff was not required on appeal to assert an independent claim of error on the basis of the trial court's rejection of her request to submit the interrogatories to the jury. Rather, the plaintiff's submission of interrogatories and her objection upon the court's refusal to submit them to the jury is a defense to the application of the general verdict rule, not an independent claim of error." Id., 6. Accordingly, our Supreme Court remanded the case to this court with direction to review the trial court's denial of the plaintiff's request for a jury instruction on the nondelegable duty doctrine. Id., 28. Additional facts will be set forth as necessary.

I

First, the plaintiff claims that the trial court erred when it refused to give her requested jury instruction on the nondelegable duty doctrine. Specifically, she argues that "the ruling on the instruction rested on the incorrect assertion that the evidence showed that only the defendants were responsible for maintaining the stairway and the ruling violated the principle that a request to charge must be given if it accurately states the law and is founded, even weakly, on the evidence, and is relevant to the issues to be decided by the jury." We agree.

We begin by setting forth our standard of review. "In determining whether the trial court improperly refused

a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence." (Internal quotation marks omitted.) *Brown* v. *Robishaw*, 282 Conn. 628, 633, 922 A.2d 1086 (2007).

"The court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding. . . . The court should, however, submit to the jury all issues as outlined by the pleadings and as reasonably supported by the evidence." (Citations omitted; internal quotation marks omitted.) *Goodmaster* v. *Houser*, 225 Conn. 637, 648, 625 A.2d 1366 (1993).

Whether the evidence presented by a party reasonably supports a particular request to charge "is a question of law over which our review is plenary." *Brown* v. *Robishaw*, supra, 282 Conn. 633. Similarly, whether there is a legal basis for the requested charge is a question of law also entitled to plenary review. Id., 633–34.

The nondelegable duty doctrine is well established. "[T]he owner or occupier of premises owes invitees a nondelegable duty to exercise ordinary care for the safety of such persons." (Internal quotation marks omitted.) *Gazo* v. *Stamford*, 255 Conn. 245, 257, 765 A.2d 505 (2001). "[T]he nondelegable duty doctrine means that [the employer] may contract out the performance of [its] nondelegable duty, but may not contract out [its] ultimate legal responsibility." (Emphasis omitted;

internal quotation marks omitted.) *Machado* v. *Hartford*, 292 Conn. 364, 371–72, 972 A.2d 724 (2009). In *Smith* v. *Greenwich*, 278 Conn. 428, 460, 899 A.2d 563 (2006), our Supreme Court stated that "the owner or occupier of a premises owes a nondelegable duty to keep the premises safe by protecting third persons from foreseeable slip and fall injuries. Should the owner or occupier of the premises hire a contractor to maintain the property, the owner or occupier is vicariously liable for the consequences arising from that contractor's tortious conduct." In *Sola* v. *Wal-Mart Stores, Inc.*, 152 Conn. App. 732, 743, 100 A.3d 864, cert. denied, 314 Conn. 941, 103 A.3d 165 (2014), this court summarized that "the nondelegable duty doctrine creates a form of vicarious liability pursuant to which a property owner may be liable to an invitee for the negligence of its independent contractors or subcontractors in their performance of the employer's nondelegable duty, regardless of whether the property owner actually is at fault or the degree of fault." (Internal quotation marks omitted.)

In the present case, there is no dispute that the plaintiff's proposed jury charge was an accurate statement of the law regarding the nondelegable duty doctrine. At issue, however, is whether that proposed charge was reasonably supported by the evidence presented, viewing that evidence in the light most favorable to supporting the proposed charge. During trial, Robert Cohen testified that he hired individuals to assist him in removing snow from the plaintiff's steps and in spreading salt and sand on them. On its face, that testimony implicates the nondelegable duty doctrine because Robert Cohen testified that there were individuals performing maintenance work on the rear exterior staircase. Thus, he raised the issue, by implication, of whether he or the others may have been responsible for the claimed defect. It is well fixed in our decisional

law, however, that the defendants cannot shift legal responsibility to others when someone is injured due to the condition of property owned and controlled by the defendants.

Nevertheless, the defendants argue that the nondelegable duty doctrine does not apply to the facts of this case because (1) "there was no evidence, nor was it argued at trial, that anyone other than the [defendants] was responsible for maintaining the premises" and (2) the defendants never attempted to shift the burden of maintaining the premises onto a third party. That first argument is plainly incorrect. Viewed in the light most favorable to supporting the proposed charge, Robert Cohen's testimony that he employed contractors to remove snow and otherwise maintain the staircase establishes that those contractors, in addition to the defendants, were "responsible for maintaining the premises."

With respect to the defendants' second argument, the plaintiff relies on a series of cases to argue that, so long as a jury instruction is legally valid and is supported by admitted evidence, a court must give that instruction, even if the party requesting the instruction did not press an argument related thereto at trial. In other words, even though the plaintiff did not expressly argue at trial that the defendants were attempting to shift responsibility to their contractors, the plaintiff argues that the court improperly failed to give the nondelegable duty instruction because Robert Cohen's testimony at trial reasonably supported that charge. First, in *Wasko* v. *Farley*, 108 Conn. App. 156, 169–70, 947 A.2d 978, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008), and *Futterleib* v. *Mr. Happy's, Inc.*, 16 Conn. App. 497, 501–502, 548 A.2d 728 (1988), this court held that, because the evidence supported a jury charge on an injured party's duty to mitigate damages, it was not necessary for the defendants to have pleaded mitigation as a special

defense. Second, in *Al-Janet, LLC* v. *B & B Home Improvements, LLC*, 101 Conn. App. 836, 842, 925 A.2d 327, cert. denied, 284 Conn. 904, 931 A.2d 261 (2007), this court rejected a jury instruction as to agency, stating that "the plaintiffs have pointed to nothing in the record to demonstrate that they either requested an explicit instruction on the law of agency *or that the evidence supported such an instruction*." (Emphasis added.) Finally, in *Griffin* v. *Yankee Silversmith, Ltd.*, 109 Conn. App. 9, 15, 951 A.2d 1, cert. denied, 289 Conn. 925, 958 A.2d 151 (2008), a hostile workplace sexual harassment case, this court held that the trial court properly declined to instruct the jury on the definition of quid pro quo sexual harassment, because the quid pro quo theory "was neither alleged in her complaint *nor supported by the evidence*." (Emphasis added.)

In light of those cases and of Robert Cohen's trial testimony in the present case, it is immaterial to the plaintiff's claim that the defendants never explicitly attempted to shift blame to their contractors or employees. The proposed nondelegable duty charge was relevant to the issues in this case, was an accurate statement of the law, and was reasonably supported by the evidence adduced at trial. Accordingly, the trial court should have instructed the jury on the nondelegable duty doctrine.

II

Second, the plaintiff claims that the court's refusal to give her requested jury charge constituted harmful error that requires us to set aside the jury's verdict and remand the case for a new trial. Specifically, the plaintiff states that "the court's failure to charge on nondelegability, coupled with its instruction that the defendants could be relieved of liability if some other cause so powerfully caused the plaintiff's injury that it trivialized

the defendants' negligence, resulted in an unjust presentation of the plaintiff's case to the jury." We agree.

We begin by setting forth our standard of review. "[N]ot every improper jury instruction requires a new trial because not every improper instruction 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.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 656, 935 A.2d 1004 (2007).

"In determining whether an instructional impropriety was harmless, we consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Internal quotation marks omitted.) *Smith* v. *Greenwich*, supra, 278 Conn. 439.

In reversing this court's prior decision, our Supreme Court stated that, "[o]n the basis of Robert Cohen's testimony that he hired workers for snow removal and sanding, it is possible that the jury could have concluded that the snow removal team, rather than the defendants, acted negligently, and for that reason found that the defendants had *not* acted negligently or had acted less negligently than the plaintiff. The plaintiff argued before the Appellate Court that the jury did not have the benefit of being instructed by the trial court that, under the nondelegable duty doctrine, the defendants were liable for any negligence attributed to the snow removal team. . . . Although the trial court instructed the jury on the

duties that the defendants owed to the plaintiff as a tenant-invitee, the invitee instruction itself (the defendant has a duty to maintain and a duty to warn) is distinct from the nondelegable duty instruction (the defendant cannot avoid liability by hiring others to maintain the premises). If the jury found that the snow removal crew had been negligent, that negligence under the nondelegable duty doctrine would have resulted in some allocation of liability to the defendants. The jury's estimation and allocation of negligence are intertwined with the nondelegable duty instruction, and the jury had no untainted route to the verdict." (Citations omitted; emphasis in original; footnote omitted.) *Garcia* v. *Cohen*, supra, 335 Conn. 23–24.

We find instructive our Supreme Court's reasoning on this issue and conclude that the trial court's failure to instruct the jury on the defendants' nondelegable duty to maintain the premises was harmful. The jury's determination that neither *party* was negligent could have related only to the named plaintiff and defendants—no instruction was given that would inform the jury of its ability to attribute any potential negligence of the defendants' employees or contractors to the defendants themselves. The court's instruction to the jury that if "some other cause contributes so powerfully to the production of an injury as to make the defendants' negligent contribution to the injury merely trivial or inconsequential, the defendants' negligence must be rejected as a proximate cause of the injury," coupled with its refusal to instruct the jury on the nondelegable duty doctrine, compels our conclusion that the likelihood of actual prejudice to the plaintiff is significant enough to warrant a new trial in this case.

The judgment is reversed and the case is remanded for a new trial.

In this opinion, PRESCOTT, J., concurred.

LAVINE, J., dissenting. Because I believe a nondelegable duty charge was not required and indeed unwarranted, I agree with the trial court that the facts did not support the giving of such a charge and that to have given it simply would have confused the jury. Moreover, the plaintiff has failed to carry her burden of showing that the failure to give the requested charge affected the verdict. Therefore, for the following reasons, I respectfully dissent.

I agree with the facts as recited in the majority opinion.

Preliminarily, it should be noted that the purpose of a nondelegable duty charge is to prevent a defendant from arguing that she should be freed from liability because she had transferred to a third party the job of maintaining her premises in a safe condition. See, e.g., *Smith* v. *Greenwich*, 278 Conn. 428, 456–458, 899 A.2d 563 (2006). In other words, in simple English, it is to prevent a landowner from saying: "It's not my fault because Joe Doakes was supposed to do it." But, in the present case, the defendant landowner is in effect saying: "Don't blame Joe Doakes. *Blame me*. I'm the one who is fully responsible for the problem."

The majority states that, "[d]uring trial, Robert Cohen testified that he hired individuals to assist him in removing snow from the plaintiff's steps and in spreading salt and sand on them. *On its face, that testimony implicates the nondelegable duty doctrine because Robert Cohen testified that there were individuals performing maintenance work on the rear exterior staircase. Thus, he raised the issue, by implication, of whether he or others may have been responsible for the claimed defect. It is well fixed in our decisional law, however, that the defendants cannot shift legal responsibility to others when someone is injured due to the condition*

of property owned and controlled by the defendants." (Emphasis added.)

I disagree with the italicized portion of this assertion. In effect, the majority is asserting that a nondelegable duty charge must be given whenever a landowner hires individuals to maintain his property. Moreover, the unstated but erroneous premise of the majority's argument is that Robert Cohen may have been seeking to avoid legal responsibility by pointing the finger at a third party. The nondelegable duty doctrine stands for the proposition that an employer "may contract out the *performance* of [its] nondelegable duty, but may not contract out [its] ultimate legal responsibility." (Emphasis in original.) *Gazo* v. *Stamford*, 255 Conn. 245, 255, 765 A.2d 505 (2001). But, as noted, this case falls outside the purview of the nondelegable duty doctrine because, as the trial court pointed out in its response to the motion for articulation: "There was no evidence or argument that anyone other than the defendant was responsible for the maintenance of the stairway." At no time did Robert Cohen attempt to dodge or to deny responsibility for the condition of the stairway on which the plaintiff fell. In fact, he, in effect, claimed responsibility, as he testified in response to questioning on cross-examination from his counsel[1]:

"Q.: Thank you. As part of your process for taking care of this back staircase at 390 West Main Street if there was snow or ice, you would spread—or you or your workers would spread salt and sand on the stairs?

"A.: Yes, yes.

"Q.: And isn't it true, though, that after salt and sand was spread on the stairs you would not go back or you would not have your helpers go back and clear them off?

[1] It should be noted that Robert Cohen did not mention that he hired individuals to help him maintain his property until the plaintiff's counsel asked him on direct examination.

"A.: Not in January because there was anticipation of more snow and ice.

"Q.: So the salt and sand would go on, presumably, the snow and ice would melt, but neither you nor your workers would go and clear off the sand from the staircase? Is that—

"A.: Not in the—

"Q.: —correct?

"A.: —winter.

"Q.: I'm sorry?

"A.: Not in the winter."

Therefore, the plaintiff's proposed jury instruction that "[the defendant] cannot escape liability for any such injury by claiming he had contracted with someone else to maintain the premises in a reasonably safe condition," was unwarranted and unsupported by the facts of the case. Robert Cohen maintained control of the stairs, and those who helped him merely followed his instructions. The majority seems to be suggesting that notwithstanding Robert Cohen's decision-making authority, the helpers should have, on their own initiative and contrary to their employer's wishes, remedied the problem. I am unaware of any Connecticut case in which the defendant did *not* point at a third party in an effort to avoid legal responsibility, yet the failure to give a nondelegable duty charge was found to be reversible error.

Next, I agree with the trial court that to have given the instruction in this case would have confused the jury because the issue was neither presented nor argued by the defendants. While, as a general proposition, a trial court should give a requested charge if the law is relevant to the issues before the jury and there is a factual basis for it, the trial court must maintain some

reasonable degree of latitude based on pragmatic considerations. A trial court has "wide discretion" in the exercise of its jury charging function. *Ladd* v. *Burdge*, 132 Conn. 296, 298, 43 A.2d 752 (1945). The trial court, having sat in the court and observed the proceedings, counsels' arguments, and the jurors' reactions to the testimony, and generally gauged the jurors' understanding of the legal concepts presented, must be given discretion in a case where the giving of a requested charge might theoretically be permissible, but where, on balance, the trial court sees no need for it given the facts of the case and because of its capacity to confuse the jury. In other words, the fact that such a charge could theoretically have been given does not mean it was error to have failed to give it.[2] In ambiguous situations such as the present case, I believe the question to ask is whether the court abused its discretion in failing to give the nondelegable duty charge. In this case, I believe the answer to this question is "no."

"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 . . . 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

[2] This case is factually distinguishable from *Sola* v. *Wal-Mart Stores, Inc.*, 152 Conn. App. 732, 100 A.3d 864, cert. denied, 314 Conn. 941, 103 A.3d 165 (2014), in which this court concluded that the trial court had misconstrued and misapplied the nondelegable duty doctrine. In *Sola*, "[p]rior to the start of the trial, the court and the defendant had notice that one of the plaintiff's theories of recovery was that the nondelegable duty doctrine imposed liability on the defendant for the negligence of its independent contractor." Id., 749. Moreover, the theory was stated in a motion in limine filed prior to trial, and evidence was presented at trial that supported giving a nondelegable duty charge. Id., 749–50.

to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 656, 935 A.2d 1004 (2007). It must be remembered that the trial court in the present case included in its charge a discussion of the legal duty owed by a possessor of land to an invitee. Viewed as a whole, I believe the charge was adequate.

Under the circumstances of the present case, in which the defendants' responsibility for the condition of the stairs was unquestioned and Robert Cohen never argued that his helpers were legally responsible, it is hard to see why the requested charge was required, particularly when the trial court thought it would confuse the jury.

Finally, I do not agree with the majority that the failure to give the requested charge was harmful. Examination of excerpts from counsel's closing arguments confirms that the plaintiff's argument was directed solely at Robert Cohen. In his closing arguments, the plaintiff's counsel placed the blame for the accident squarely on Robert Cohen *himself*, and no one else. For example, counsel argued: "The steps were never swept. . . . In terms of responsibility for the accident, I almost don't have to say anything else. A storm would come, he would have his men come and clean up the ice and snow, put sand and salt on the steps, leave the sand there."

Later, in his rebuttal closing argument, the plaintiff's counsel stated: "The bottom line is . . . negligence, about neglecting to do something. He has his workers to help him maintain these sixty units and he can't be bothered to come by, have some—pay someone to come by and sweep the steps so that they're safe, and that's why . . . she has these lifelong effects . . . ." I disagree with the majority's assertion that there was

harmful error that requires the jury's verdict to be set aside and the case remanded for a new trial. It must be remembered that the jury sent the court a note asking how to mark the jury form if it found "neither party negligent." I see nothing whatever in the record to suggest that had a nondelegable duty charge been given, the result would have been different. The burden to prove the charge given by the court was harmful rests squarely on the plaintiff; see *Burke* v. *Mesniaeff*, 334 Conn. 100, 119, 220 A.3d 777 (2019); and she has failed entirely to carry that burden. Indeed, the majority has failed to identify any evidence from the record in support of its assertion that the failure to give the requested instruction "likely . . . affected the verdict." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 243, 828 A.2d 64 (2003). The majority relies on language in our Supreme Court's decision remanding this case in support of its conclusion that the failure to give the requested charge was harmful. See *Garcia* v. *Cohen*, 335 Conn. 3, 225 A.3d 653 (2020). I respectfully suggest this supposition is not sufficient. Under the particular facts and circumstances of this case, I do not believe the trial court abused its discretion by refusing to give the nondelegable duty charge.

In sum, I believe the majority is applying the nondelegable duty doctrine under attenuated and unclear circumstances, in which it was not factually justified, in which the trial court appropriately exercised its discretion not to give it because it concluded that the charge would unnecessarily confuse the jury, and in which the failure to give it did not affect the verdict. This is not a case in which the law clearly required that the charge be given. It is a case in which whether or not to give it was a matter upon which reasonable judges could disagree. I would defer to the instincts of the judge in the courtroom, who concluded first, that the charge

was not warranted under the facts, and second, that, in any event, it would confuse the jury.

For the foregoing reasons, I respectfully dissent.

LUIS LEBRON *v.* COMMISSIONER OF CORRECTION
(AC 43579)

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

Syllabus

The petitioner, who previously had been convicted, on a guilty plea, of the crimes of manslaughter in the first degree with a firearm and conspiracy to commit witness tampering, filed his third petition for a writ of habeas corpus, claiming, inter alia, that he had received ineffective assistance from D, his first habeas counsel. At the petitioner's criminal trial, the trial court permitted his defense counsel, S, to withdraw on the ground that he could be called as a witness at trial. The petitioner indicated to the court that he waived any conflict, and wanted to proceed to trial and was prepared to represent himself, which the court did not allow. The petitioner thereafter was charged with additional crimes in a separate docket, and C was appointed to represent him on all of the charges, after which the petitioner entered his plea. In the first habeas action, the petitioner alleged that S and C had rendered ineffective assistance. The habeas court denied the petition, and D failed to file a timely petition for certification to appeal. In the second habeas action, in which the petitioner alleged that S, C and D had provided ineffective assistance, the habeas court rendered judgment restoring the petitioner's appellate rights with respect to the issues raised in the first habeas petition. The petitioner thereafter appealed from the denial of his first habeas petition, but did not raise the merits of his claims in that first petition against S and C. This court affirmed the judgment of the first habeas court. The petitioner then filed his third habeas petition, and the habeas court rendered a judgment of dismissal, concluding that there was no good cause to proceed to trial. This court reversed in part the judgment of the habeas court and remanded the case for a trial on the merits of the petitioner's claim that his right to the effective assistance of habeas counsel had been violated. The petitioner claimed that D failed to pursue a claim that his right to the effective assistance of criminal trial counsel had been violated when C failed to advise him properly that his plea would operate as a waiver of his appellate rights, specifically, his right to challenge the trial court's granting of S's motion to withdraw. After a trial on the merits, the habeas court rendered judgment denying the

petitioner's claim on the ground that he had failed to prove prejudice because he failed to establish that he would not have pleaded guilty but for counsel's alleged deficient performance. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly denied the petitioner's ineffective assistance of habeas counsel claim because he failed to establish that he was prejudiced by the alleged deficient performance of C; the petitioner faced a possible sentence of 140 years of incarceration with no possibility of parole if convicted at trial, and C was able to negotiate a reduction in the charges and a state recommended sentence of thirty years of incarceration with the possibility of parole in exchange for the petitioner's plea, and the record supported the court's finding that the petitioner would not have declined that plea offer on the chance that he could convince a jury on a retrial, after he was convicted once and successfully appealed on the grounds he claimed he would have pursued if he had been counseled properly by C, that he was not guilty, as the state's case against the petitioner was strong, the petitioner's claim of self-defense had significant weaknesses, and the court was free to discredit the petitioner's testimony that he would have gone to trial had he been counseled by C that his issues regarding S's withdrawal and his right to self-representation could have been raised on appeal had he been convicted.

Argued February 4—officially released April 20, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland where the court *Sferrazza*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court, *Keller*, *Prescott* and *Kahn*, *Js.*, which reversed in part the judgment of the habeas court and remanded the case for a trial on the merits; subsequently, the matter was tried to the court before *Bhatt*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Leah Hawley*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Luis Lebron, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The habeas court granted his petition for certification to appeal. On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to the effective assistance of counsel was violated when his first habeas counsel, Attorney Sebastian DeSantis, failed to pursue a claim that the petitioner's criminal trial counsel, Attorney Thomas Conroy, had provided ineffective assistance when he failed to advise the petitioner that he would be waiving his appellate rights by pleading guilty. We affirm the judgment of the habeas court.

The following facts and somewhat complicated procedural history inform our review. The state, in 1997, originally charged the petitioner with murder in violation of General Statutes § 53a-54a (a) and criminal use of a firearm in violation of General Statutes § 53a-216 after he shot and killed another man. The petitioner claimed that he shot the victim in self-defense. Attorney Kenneth Simon represented the petitioner in connection with these charges. During jury selection, in January, 1999, it became apparent to Simon that the petitioner would be charged with conspiracy to commit additional crimes relating to two witnesses to the shooting, namely, two counts of conspiracy to commit witness tampering and two counts of conspiracy to commit murder. Simon then filed a motion to withdraw from representing the petitioner, stating that he believed that he likely would be called as a witness during the trial on the anticipated new charges. The petitioner opposed Simon's motion and argued, in the alternative, that he should be able to represent himself temporarily, until a special public defender could be appointed. On January 27, 1999, the court denied the petitioner's request to represent himself temporarily, granted Simon's

motion to withdraw, and declared a mistrial. In a separate information, the state additionally charged the petitioner with two counts of conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, and two counts of conspiracy to commit witness tampering in violation of General Statutes §§ 53a-48 and 53a-151. Attorney Conroy later was appointed to represent the petitioner on all of the charges

Conroy negotiated a plea agreement with the state that resolved all charges against the petitioner, pursuant to which the petitioner pleaded guilty under the *Alford* doctrine[1] to one count of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a and one count of conspiracy to commit witness tampering. The court sentenced the petitioner to a term of thirty years of incarceration on the manslaughter charge and to an unconditional discharge on the conspiracy charge. The state entered a nolle prosequi as to all of the other charges.

In June, 2000, the petitioner filed his first petition for a writ of habeas corpus. The petitioner's first habeas counsel, Attorney DeSantis, filed an amended petition, in which the petitioner alleged ineffective assistance of counsel as to Simon and Conroy. Specifically, the amended petition contained allegations that counsel had rendered ineffective assistance by failing to pursue discovery and to communicate with the petitioner about discovery, by failing to challenge the petitioner's arrest and the circumstances surrounding his arrest, by failing

[1] "Under *North Carolina* v. *Alford*, [400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)], a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Walker*, 187 Conn. App. 776, 778 n.2, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019).

to challenge the arrest warrant, and by failing to communicate with the petitioner regarding legal and evidentiary standards so that he could make an informed decision on whether to plead guilty or to proceed to trial. On February 20, 2003, the habeas court denied the amended habeas petition (first habeas court's decision). DeSantis did not file a timely petition for certification to appeal from the first habeas court's decision. The petitioner, however, filed a pro se petition for certification to appeal on February 26, 2003, which was denied. No appeal from that denial was timely taken.

On July 18, 2006, the petitioner, represented by Attorney Paul Kraus, filed a second petition for a writ of habeas corpus, alleging the ineffective assistance of counsel as to Simon, Conroy, and DeSantis. The habeas court and the petitioner entered a stipulated agreement to restore the petitioner's appellate rights in the first habeas case (second habeas case). The court also granted a petition for certification to appeal from the first habeas court's decision. On September 8, 2006, the petitioner filed an appeal from the first habeas court's decision limited only to whether the first habeas court improperly had denied his postjudgment motions for reconsideration and reargument. This court denied review of those claims because they fell outside the scope of the stipulated agreement in the second habeas case, and our Supreme Court denied the petition for certification to appeal from our decision. See *Lebron* v. *Commissioner of Correction*, 108 Conn. App. 245, 249, 947 A.2d 349, cert. denied, 289 Conn. 921, 958 A.2d 151 (2008).

Nearly ten years later, on January 8, 2016, the petitioner filed a six count amended petition for a writ of habeas corpus, his third such petition. On May 5, 2016, the habeas court rendered a judgment of dismissal on the amended petition, concluding that there was no good cause to proceed to trial. The habeas court granted

the petition for certification to appeal on May 18, 2016. On appeal, this court reversed in part the judgment of the habeas court and remanded the case for, inter alia, a trial on the merits of the petitioner's claim that his right to the effective assistance of habeas counsel had been violated because DeSantis had failed to pursue a claim that the petitioner's right to the effective assistance of criminal trial counsel had been violated when Conroy failed to advise the petitioner properly that his *Alford* plea would operate as a waiver of his appellate rights, specifically, his right to challenge the criminal trial court's granting of Simon's motion to withdraw. See *Lebron* v. *Commissioner of Correction*, 178 Conn. App. 299, 319–24, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018).

The habeas court proceeded to a hearing on the merits of the petitioner's remaining claim. On August 28, 2019, the habeas court issued a memorandum of decision denying the petition on the ground that the petitioner had failed to prove prejudice because he failed to establish that he would not have pleaded guilty but for counsel's alleged deficient performance. The court, thereafter, granted the petitioner's petition for certification to appeal. This appeal followed.

On appeal, the petitioner claims that the habeas court improperly rejected his claim that his right to the effective assistance of counsel was violated when his first habeas counsel, DeSantis, failed to pursue a claim that the petitioner's criminal trial counsel, Conroy, had failed to advise him that, by pleading guilty, he would be waiving his rights to challenge on appeal the decision of the criminal trial court allowing Simon to withdraw and denying the petitioner's alternative request to represent himself. He alleges that the actions of the criminal trial court violated his constitutional rights to his counsel of choice and to self-representation. The respondent, the Commissioner of Correction, maintains that the

petitioner failed to meet the prejudice prong of his ineffective assistance of counsel claim, and, therefore, the habeas court properly rejected the claim. We agree with the respondent.

We now turn to the merits of the petitioner's claim, recognizing that the claimed ineffective assistance regarding his first habeas counsel, DeSantis, must fail if the claims of ineffective assistance of his replacement trial counsel, Conroy, are without merit. See *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992).

In *Lozada*, our Supreme Court "established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing what is commonly known as a habeas on a habeas, namely, a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . Nevertheless, the court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . Any new habeas trial would go to the heart of the underlying conviction to no lesser extent than if it were a challenge predicated on ineffective assistance of trial or appellate counsel. The second habeas petition is inextricably interwoven with the merits of the original judgment by challenging the very fabric of the conviction that led to the confinement." (Citations omitted; internal quotation marks omitted.) *Lebron* v. *Commissioner of Correction*, supra, 178 Conn. App. 319–20.

"A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. . . . For ineffectiveness claims resulting from guilty pleas, we apply the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) . . . . To satisfy the performance prong, the petitioner must show that counsel's representation fell below an objective standard of reasonableness. . . . To satisfy the prejudice prong, the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Bigelow* v. *Commissioner of Correction*, 175 Conn. App. 206, 212–14, 167 A.3d 1054, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017).

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Godfrey* v. *Commissioner of Correction*, 202 Conn. App. 684, 693, A.3d (2021).

In evaluating the prejudice prong and the credibility of the petitioner's assertion that he would have insisted on going to trial but for Conroy's deficient performance, it is appropriate for the habeas court to consider whether a decision to reject a plea offer, under the circumstances presented, would have been rational. See *Padilla* v. *Kentucky*, 559 U.S. 356, 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). "Additionally, a petitioner's assertion after he has accepted a plea that he would have insisted on going to trial suffers from obvious

credibility problems . . . . In evaluating the credibility of such an assertion, the strength of the state's case is often the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial . . . . Likewise, the credibility of the petitioner's after the fact insistence that he would have gone to trial should be assessed in light of the likely risks that pursuing that course would have entailed." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36–37, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018).

In the present case, the petitioner argues that his underlying claims regarding the alleged violations of his rights to self-representation and to counsel of choice had considerable merit. The petitioner asserts that if Conroy had informed him of the merits of his constitutional claims and explained that, by pleading guilty, he would be giving up his right to assert those claims on appeal, he would not have entered an *Alford* plea but, instead, would have proceeded to trial. In its memorandum of decision, the habeas court concluded that the petitioner failed to demonstrate prejudice because he did not establish that, even if it assumed that the petitioner had been counseled by Conroy that his claims had merit and that, *following a conviction*, the petitioner could raise those claims in an appeal and, if successful on appeal, would be entitled to a retrial on the charges, the petitioner would not have accepted the plea offer but, instead, would have elected to proceed to trial.

In particular, the court credited the testimony of Simon and Conroy that the petitioner's self-defense claim had significant weaknesses and that there was a strong likelihood that the petitioner would be convicted of murder, or at least manslaughter in the first degree, on the original charges. In addition, the petitioner faced another eighty years of exposure arising out of the

additional charges of conspiracy to commit murder and conspiracy to tamper with witnesses. The court also noted that the petitioner's potential constitutional claims for appeal relating to Simon's withdrawal and to the petitioner's right of self-representation, at best, would have resulted only in another trial on the same charges with the same evidence available to the prosecution. On the basis of these underlying facts, the court clearly did not credit the petitioner's testimony that he would not have pleaded guilty had he been advised properly by Conroy. Specifically, the court stated that it "fail[ed] to see how the petitioner would want to risk exposing himself to a significantly longer sentence at a trial when the basis for a new trial would do nothing to make it more likely that he would be acquitted at the first or second trial. Put another way, pursuing the two claims he wished to [pursue] would only result in a second trial at which the state's evidence would be the same as that at the first. In light of that, it is not reasonable to conclude that the petitioner would have rejected the favorable offer and proceeded to trial." We conclude that the court's finding that the petitioner failed to establish that but for Conroy's alleged deficient performance, he would not have pleaded guilty but would have gone to trial was not clearly erroneous.

The petitioner faced a total possible sentence of 140 years of incarceration, with no possibility of parole if convicted at trial. Conroy was able to negotiate a reduction in the charges and a state recommended sentence of thirty years, with a right for the petitioner to argue for a lesser sentence, in exchange for the petitioner entering an *Alford* plea. At sentencing, Conroy argued for an unconditional discharge on the conspiracy charge, which the court granted and thereafter sentenced the petitioner to thirty years to serve on the manslaughter charge; the state nolled the remaining charges.

In addition, Conroy testified that he believed the state had a strong case against the petitioner and that he had urged the petitioner to take the plea bargain to avoid the risk of a murder conviction. In its memorandum of decision, the habeas court also discussed Conroy's testimony during the petitioner's first habeas trial that one of the benefits of the petitioner's plea of guilty to the manslaughter charge was that he would be eligible for parole, but if he had been convicted of the murder charge, he would have been ineligible for parole.

The record further demonstrates that the state's case against the petitioner was strong. In the petitioner's own statement to the police, he admitted that he drew his firearm first and pointed it at the victim. A witness identified the petitioner as the shooter, and the charges against the petitioner for conspiracy to commit murder were related to the petitioner's attempt to prevent that witness and another person from testifying at his criminal trial.

During the habeas trial, although the petitioner testified that he believed he had a strong case, and he wanted to continue to trial after Simon withdrew because he "felt that . . . the case would go in [his] favor," he also testified that Conroy told him that the state's case against him was "voluminous." Further, although the petitioner testified that he would have gone to trial if he had known that his issues regarding Simon's withdrawal and his right to self-representation could be raised on appeal if he were convicted, the court was free to discredit this testimony.

The record clearly supports the court's finding that the petitioner would not have declined a plea offer of thirty years of incarceration, with the possibility of parole, on a roll of the dice that he could convince a jury on a retrial, after he was convicted once and successfully appealed from that conviction, that he was

not guilty. A reversal of the judgment of conviction by this court on the grounds that the petitioner claims he would have raised on appeal, if successful, would not have resulted in an acquittal, but would have resulted in a retrial with the same evidence and with the petitioner again facing a possible sentence of 140 years in prison with no possibility of parole on the murder and conspiracy to commit murder charges. We conclude that the habeas court's finding that the petitioner failed to establish that there was a reasonable probability that he would not have pleaded guilty but for Conroy's alleged deficient performance was not clearly erroneous. Accordingly, we conclude, as a matter of law, that the habeas court properly determined that the petitioner failed to satisfy the prejudice prong of *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

STONE KEY GROUP, LLC *v.* REID TARADASH (AC 42524)

Lavine, Elgo and Alexander, Js.*

Syllabus

The plaintiff banking firm sought to recover damages from the defendant, a former employee of the plaintiff, for, inter alia, breach of contract in connection with bonus agreements between the parties. The plaintiff, which had paid annual discretionary bonuses to its employees, was unable to pay the plaintiff his 2014 bonus until 2016 because of financial difficulties. When the defendant shortly thereafter requested his bonus for 2015, U, the plaintiff's chief executive officer, told him that the plaintiff was not paying 2015 bonuses at that time because it had just paid 2014 bonuses. The defendant thereafter told U that, in exchange for the 2015 bonus, he would bring his family to the United States from the Philippines, buy a home in Connecticut and redouble his efforts at the plaintiff's firm. Pursuant to written agreements the parties executed, U agreed to pay the defendant an advance on the 2015 bonus and an

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

additional payment at a later date. Six days after receiving the advance on the 2015 bonus, the defendant informed U that he was resigning and moving to the Philippines. On his last day of employment, the defendant returned to the plaintiff a laptop computer that the plaintiff had provided to him. U thereafter discovered on the laptop e-mails from the defendant to friends and coworkers indicating that he had been preparing to start an information technology business in the Philippines upon receipt of the 2015 bonus. U concluded that the defendant had used the plaintiff's resources to develop that business. The plaintiff thereafter sought repayment of the 2014 bonus and the 2015 bonus advance. The trial court rendered judgment for the plaintiff on its complaint in part and thereafter granted in part the plaintiff's motion for attorney's fees. On the defendant's appeal and the plaintiff's cross appeal to this court, *held* that the trial court properly rendered judgment for the plaintiff and granted its motion for attorney's fees, and, because the court's memoranda of decision fully addressed the arguments raised in this appeal, this court adopted the trial court's memoranda of decision as proper statements of the facts and applicable law.

Argued September 17, 2020—officially released April 20, 2021

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 Stamford-Norwalk, where the defendant filed a counterclaim; thereafter, the court, *Lee*, *J.*, granted the defendant's motion to cite in Stone Key Securities, LLC, et al., as counterclaim defendants; subsequently, the matter was tried to the court; thereafter, the complaint was withdrawn in part; judgment for the plaintiff on the complaint in part and on the counterclaim, from which the named defendant appealed to this court; subsequently, the court, *Lee*, *J.*, granted in part the plaintiff's motion for attorney's fees, and the named defendant filed an amended appeal and the plaintiff cross appealed to this court. *Affirmed.*

James Nealon, for the appellant-cross appellee (defendant).

Daniel L. Schwartz, with whom, on the brief, was *Howard Fetner*, for the appellee-cross appellant (plaintiff).

Opinion

PER CURIAM. This case involves a dispute between the plaintiff employer, Stone Key Group, LLC, and the defendant employee, Reid Taradash, concerning the payment of two discretionary bonus agreements to the defendant. On appeal, the defendant claims that the trial court improperly (1) ruled in favor of the plaintiff on his wage claim pursuant to General Statutes § 31-72,[1] (2) concluded that he fraudulently induced the plaintiff into paying an advance on his 2015 bonus, (3) permitted the plaintiff to rescind that advance, (4) awarded the plaintiff punitive damages, and (5) assessed postjudgment interest. In its cross appeal, the plaintiff claims that the court improperly (1) rejected its claim that the defendant breached the terms of an agreement regarding his 2014 bonus, (2) denied its motion for prejudgment interest, and (3) failed to award the full amount of its requested attorney's fees and costs. We affirm the judgment of the trial court.

The plaintiff is a private merchant banking firm in Greenwich. At all relevant times, the defendant, who now resides in the Philippines, was an employee of the plaintiff. As part of its benefits package, the plaintiff paid large, annual discretionary bonuses to its employees. Beginning in 2010, the plaintiff required its employees to sign contracts in order to receive those annual bonuses. The amount of each bonus was left to the discretion of the plaintiff on the basis of (1) an individual employee's performance, (2) the plaintiff's performance overall, (3) macroeconomic conditions, (4) the

[1] General Statutes § 31-72 provides in relevant part: "When any employer fails to pay an employee wages . . . or fails to compensate an employee . . . such employee . . . shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

plaintiff's anticipated future revenues, and (5) bonuses paid by other competing investment banks.

From 2012 to 2014, the plaintiff suffered significant financial difficulties.[2] As a result, the defendant did not receive a bonus for the 2013 year until December 23, 2014, as memorialized in a contract titled "Revised 2013 Bonus Terms" (2013 bonus agreement). The 2013 bonus agreement contained a "clawback provision" that allowed the plaintiff to recover all or part of future annual bonuses for a specific year if an employee engaged in certain wrongful conduct specified therein.

The plaintiff did not pay any 2014 bonuses to its employees until the first quarter of 2016. On February 29, 2016, the defendant signed two documents. The first was titled "2014 Bonus Terms—Reid M. Taradash," and the second was titled "2014 Grant of Bonus Agreement" (2014 bonus agreement). The defendant subsequently received payment of his 2014 bonus in the amount of $524,999.92. The 2014 bonus agreement contained a clawback provision that allowed the plaintiff to recover 100 percent of the bonus it paid the defendant in the event that the defendant's employment was terminated "for cause."[3]

Shortly after receiving his 2014 bonus, the defendant asked the plaintiff's chief executive officer, Michael

[2] Specifically, in 2012, the plaintiff expected to earn $20 million but earned slightly more than $6 million. In 2013, the plaintiff's earnings were approximately $350,000, resulting in a loss of more than $11 million. In 2014, the plaintiff earned $3.5 million in revenue, resulting in a $3.3 million loss for the year.

[3] The 2014 bonus agreement defined "cause" as either (1) a "violation of a material policy of the [plaintiff]," (2) the "engagement in a dishonest or wrongful act involving fraud, misrepresentation or moral turpitude causing damage or potential damage [to the plaintiff]," (3) the "willful failure to perform a substantial part of [the defendant's] duties," (4) the engagement in "any conduct . . . which violates any federal or state securities law," or (5) "being materially deficient in . . . compliance or employment obligations to the [plaintiff]."

Urfirer, for a 2015 bonus. Urfirer replied that the plaintiff was not paying 2015 bonuses at that time because it had just paid 2014 bonuses. Urfirer and the defendant later had a second discussion about paying the defendant a 2015 bonus, during which the defendant told Urfirer that, in exchange for a 2015 bonus, he would bring his family to the United States from the Philippines, buy a home in Connecticut, and redouble his efforts at the firm.[4] The evidence presented at trial nonetheless revealed, as he stated in multiple e-mails to his friends and coworkers, that the defendant was preparing to move to the Philippines to start an information technology business with a coworker, Sumit Laddha, upon receipt of his 2015 bonus.

Urfirer ultimately agreed to pay the defendant a $250,000 advance on his 2015 bonus subject to the clawback provision, as well as an additional payment of at least $250,000 at a later date. As part of that transaction, the plaintiff and the defendant signed two documents on March 14, 2016: the "2015 Bonus Advance Terms—Reid M. Taradash" and the "2015 Grant of Bonus Advance Agreement" (2015 bonus advance agreement). The defendant was the only employee who received a 2015 bonus advance in March, 2016.

On March 21, 2016, six days after receiving the advance on his 2015 bonus, the defendant informed Urfirer that he was resigning and moving to the Philippines. In response, Urfirer told the defendant that he believed that the defendant had procured the bonuses under false pretenses and demanded that the defendant either return the bonuses or retract his resignation. The defendant did neither and relocated to the Philippines.

On his last day of employment, the defendant returned his employer provided laptop to the plaintiff.

[4] Although the defendant at trial denied making these promises to Urfirer, the court did not credit his denials and expressly credited Urfirer's contrary recollection of that conversation.

When Urfirer later used the laptop during a client presentation, the defendant's Google e-mail account appeared onscreen. At that time, Urfirer discovered many of the defendant's e-mails related to his new information technology business and concluded that the defendant had used the plaintiff's resources to develop that business. As a result, the plaintiff's legal counsel sent the defendant a letter notifying him that the plaintiff had reviewed his e-mails and demanding that he repay the 2014 bonus and 2015 bonus advance in full. When the defendant did not respond, Urfirer sent him a letter on September 12, 2016, in which he retroactively terminated the defendant's employment for cause.

On September 26, 2016, the plaintiff commenced the present action. The complaint alleged, inter alia, (1) breach of contract with respect to the 2014 bonus agreement and 2015 bonus advance agreement, (2) fraudulent inducement with respect to the 2015 bonus advance, (3) intentional misrepresentation, (4) negligent misrepresentation, (5) breach of fiduciary duty, (6) conversion, and (7) a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The defendant filed an answer denying the material allegations of the complaint, along with six special defenses and a thirteen count counterclaim.

An eight day court trial was held from December 12, 2017, to January 19, 2018. The court thereafter issued a comprehensive memorandum of decision on November 2, 2018, in which it set forth detailed findings of fact and a thorough analysis of the claims brought by the plaintiff and the defendant. On July 25, 2019, the court issued a second memorandum of decision in which it addressed the plaintiff's subsequent motion for attorney's fees, costs, and interest.[5] Our examination

[5] See *Stone Key Group, LLC* v. *Taradash*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6029872-S (July 25, 2019).

of the record on appeal, and the briefs and oral arguments of the parties, persuades us that the judgment of the trial court should be affirmed. Because the court's memoranda of decision fully address the arguments raised in the present appeal, we adopt the court's thorough and well reasoned decisions as proper statements of the facts and applicable law. See *Stone Key Group, LLC* v. *Taradash*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6029872-S (November 2, 2018) (reprinted at 203 Conn. App. 61, A.3d). It would serve no useful purpose for us to repeat the discussion contained therein. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Maselli* v. *Regional School District No. 10*, 198 Conn. App. 643, 647–48, 235 A.3d 599, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020).

The judgment is affirmed.

APPENDIX

STONE KEY GROUP, LLC *v.* REID TARADASH*

Superior Court, Judicial District of Stamford-Norwalk
File No. CV-16-6029872-S

Memorandum filed November 2, 2018

Proceedings

Memorandum of decision on plaintiff's action for breach of contract. *Judgment for the plaintiff on its complaint in part and on the named defendant's counterclaim.*

Daniel L. Schwartz and *Howard Fetner*, for the plaintiff.

James Nealon, for the named defendant.

* Affirmed. *Stone Key Group, LLC* v. *Taradash*, 203 Conn. App. 55, A.3d (2021).

Opinion

LEE, J. This litigation arises out of a dispute between the plaintiff, Stone Key Group, LLC (Stone Key), a private merchant banking firm located in Greenwich, Connecticut (Company), and the defendant Reid Taradash, a former employee and vice president, currently residing in the Philippines. Mr. Taradash resigned from Stone Key in April, 2016, shortly after receiving a bonus payment for the year 2014 and an advance against the 2015 bonus. A few months later, while examining Mr. Taradash's laptop computer provided for his use by the Company, Stone Key discovered that Mr. Taradash had devoted substantial efforts to establish a business in the Philippines with his wife and another Stone Key employee, while still employed by Stone Key, as well as apparently misleading Stone Key about his intention to leave the Company once he received his bonus and advance. On September 12, 2016, Stone Key retroactively terminated Mr. Taradash's employment for cause.

Stone Key commenced the present litigation by service of the summons and complaint on the defendant on about September 26, 2016. The complaint originally contained ten counts, but the ninth count, sounding in conversion, was withdrawn on June 22, 2017. The first count of the complaint asserts that Mr. Taradash's termination for cause was justified by his several breaches of corporate obligations, including breach of agreements relating to the 2014 bonus and, pursuant to a clawback provision, seeks a repayment of the 2014 bonus in the amount of $524,499.92. In posttrial briefing, Stone Key withdrew the second and fourth counts, which had alleged that Mr. Taradash had worked for competitors after leaving Stone Key. The third count alleges breach of the 2015 bonus advance terms and bonus advance agreement, and seeks repayment of $249,500 pursuant to a clawback provision in those agreements. The fifth count sounds in fraudulent inducement

and alleges that Mr. Taradash misled Stone Key as to his intention to remain with the Company in order to induce it to pay him the advance against the 2015 bonus. The sixth and seventh counts arise out of the same behavior and sound in intentional and negligent misrepresentation, respectively. The eighth count alleges breach of the fiduciary duty of loyalty arising out of Mr. Taradash's efforts to start a business in the Philippines while employed by the Company. The tenth count alleges a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b (a), based on Mr. Taradash's outside business activities. In summary, the complaint alleges two clusters of activities by Mr. Taradash, i.e., the effort to develop an outside business while employed by the Company and deception in connection with obtaining an advance against the 2015 bonus payment.

On July 11, 2017, the defendant filed the operative answer, six special defenses against all counts, and thirteen counterclaims against three Stone Key entities and its principal, Mr. Michael Urfirer. The special defenses allege that employment related claims are not regulated by CUTPA; that Mr. Taradash did not violate any rules relating to the disclosure of outside business interests; the plaintiff is equitably estopped from complaining of the defendant's use of office facilities for personal purposes; that the defendant's status as an at-will employee permitted him to seek outside employment or business opportunities while in the plaintiff's employ; that the plaintiff breached its promises to the defendant and related agreements as to compensation; and that the noncompete provisions contained in the bonus agreements are invalid.

Mr. Taradash's counterclaims are based on claims of (1) breach of 2013 bonus obligations by the Company and two related entities, Stone Key Securities and Stone Key Partners, (2) in relation to the 2013 bonus, violation

of General Statutes § 31-71a (3) (wage statute) by, inter alia, failing to timely pay what was owed and requiring agreement to additional conditions in order to receive the compensation, (3) and (4) similar conduct with respect to the 2014 bonus, (5) with respect to the 2015 bonus, failure to pay what was owed, indeed paying only 50 percent of the correct amount, and improper imposition of onerous terms on payments already owed, (6) such conduct constituted a violation of the wage statute, (7) discontinuance at the end of 2012 of the prior practice of a Company match of Mr. Taradash's 401 (k) contributions, (8) such discontinuance constituted a violation of the wage statute, (9), (10) and (11) Mr. Taradash's entitlement to the full 2015 bonus under the doctrines of unjust enrichment, quantum meruit and promissory estoppel, (12) as against the Stone Key entities and Mr. Urfirer personally, fraud as to promises made to Mr. Taradash about the payment of the 2013, 2014 and 2015 bonuses, and (13) as against the same four counterclaim defendants, civil theft under General Statutes § 52-564 for theft of services by reason of their dishonesty in connection with the aforementioned bonuses.

The plaintiff and the counterclaim defendants filed the operative reply to the special defenses and answer and special defenses to the counterclaims on November 29, 2017. The counterclaim plaintiff filed his reply on January 16, 2018. The matter was tried to the court over eight trial days commencing on December 12, 2017, and concluding on February 5, 2018. The parties filed proposed findings of fact, memoranda of law and replies. The court heard closing argument on May 16, 2018.

As more fully explained below, the court finds for the defendant, Mr. Taradash, on Count I (Breach of Contract as to the 2014 Bonus), Count III (Breach of the 2015 Bonus Advance Agreement), Count VIII (Breach

of Fiduciary Duty), and Count X (Violation of CUTPA). The court finds for the plaintiff, Stone Key, on Count V (Fraudulent Inducement of the 2015 Bonus Advance Agreement), Count VI (Intentional Misrepresentation), Count VII (Negligent Misrepresentation), and the defendant's Fifth Counterclaim (Breach of Contract re 2015 Bonus) and Sixth Counterclaim (Violation of General Statutes §§ 31-72 and 31-73 re 2015 Bonus). It awards damages in favor of the plaintiff and against the defendant in the amount of $250,000, plus appropriate interest and attorney's fees.

FINDINGS OF FACT

Upon a review of the pleadings, the trial testimony and exhibits received into evidence, the court makes the following findings of material facts:

A

Parties and Their Relationship

1. Stone Key is a boutique investment banking firm based in Greenwich, Connecticut, focused on providing strategic advisory services to government and commercial technology clients, including defense and aerospace companies such as General Dynamics and Lockheed Martin.

2. Stone Key Partners, LLC, is an entity through which Stone Key performs investment banking advisory and strategic advisory consulting services.

3. Stone Key Securities, LLC, is registered with the Financial Industry Regulatory Authority (FINRA) as a broker dealer to enable Stone Key to advise on transactions that require FINRA membership, such as the merger of two public companies.

4. Mr. Michael Urfirer is an experienced investment banker. He was a cofounder and eventual sole principal of the Stone Key entities.

5. Nearly all of Stone Key's work involves advising clients in connection with mergers and acquisitions, although it also does some short-term strategic consulting work. On a majority of Stone Key's engagements, Stone Key's fees are 100 percent success based, with no retainer up front: Stone Key gets paid only if and when the deal closes, if the transaction does not close, Stone Key gets nothing. As a result, Mr. Urfirer described Stone Key's revenues as "extremely lumpy," with no source of reoccurring revenues; "you get very big peaks and very, very big valleys."

6. The defendant-counterclaim plaintiff, Reid Taradash, is a former employee of Stone Key. Mr. Taradash and Mr. Urfirer had worked together at Bear Stearns. When Mr. Urfirer started Stone Key, he invited Mr. Taradash to join him, and Mr. Taradash accepted. Mr. Taradash did not have a written employment agreement with Stone Key.

7. Mr. Taradash contends that Mr. Urfirer promised him that he would be paid "Street pay," meaning that his total compensation would consist of a salary and a bonus, the total of which would be within a range of compensation received by employees at comparable levels at Wall Street financial firms.

8. Mr. Taradash began working for Stone Key in 2008 as an Associate. In 2009 or 2010, he was promoted to vice president, and he received a raise in his base salary to $175,000. At the time, there were four or five other vice presidents at Stone Key.

9. Mr. Taradash's responsibilities as a vice president included working on transactions, as well as supervising the work of analysts and associates, helping other employees, and helping coordinate other vice presidents' work on transactions and new business presentations. Mr. Taradash was not responsible for bringing in business or generating revenues.

10. In performing his responsibilities at Stone Key, Mr. Taradash interacted with Stone Key's clients, including attending presentations to clients, coordinating due diligence requests, and obtaining financial information from clients.

11. Initially, the relationship between. Mr. Urfirer and Mr. Taradash was positive. In 2013, while waiting for their new residence to be ready, Mr. Taradash, his wife and their newborn son lived rent free for several weeks in the guest house on Mr. Urfirer's property. Mr. Taradash's mother-in-law visited from the Philippines and stayed there as well.

12. Mr. Taradash was registered with FINRA during employment with Stone Key.

B

Stone Key's Policies Regarding Outside Business Interests

13. Mr. Taradash's employment with Stone Key was governed by the Stone Key Compliance Manual and the TriNet Employee Handbook. Stone Key distributes copies of the Compliance Manual to employees annually and makes it available at all times on the firm's shared computer drive. Mr. Taradash received a copy each year when he worked for Stone Key.

14. TriNet is a professional employer organization that Stone Key uses for human resources related functions. Although Mr. Taradash claims he never received it, the TriNet Employee Handbook was available at all times to Mr. Taradash through the TriNet employee portal.

15. The Stone Key Compliance Manual requires employees to disclose all outside business interests to Stone Key and to refrain from engaging in any outside

business interests without the prior written approval of Stone Key's Chief Compliance Officer (CCO).

16. Section 4.2 of the Compliance Manual states:

"Employees must disclose all outside business interests ('Outside Business Interests') to the Firm on the Employee Interests Attestation. No Employee may be engaged in any other business, or be employed or compensated by any other person, or serve as an officer or director of any other business organization without the prior written approval of the CCO."

"Outside Business Interests include, but are not limited to, the following:

• working for another company, organization or person

• having a control relationship (acting as an officer, director, 10% or greater shareholder, partner or member of a group that has or seeks such a relationship (such as a creditors' committee)) in any publicly or privately held company or organization

• acting as sole proprietor or owner of a business

• accepting compensation from any other person as a result of any business activity other than a proportionate share of a passive investment

• receiving consulting fees."

17. Stone Key has revised the Compliance Manual from time to time, but Section 4.2, addressing Outside Business Interests, did not change materially during the term of Mr. Taradash's employment.

18. The Compliance Manual also states:

"If approved for an Outside Business Interest, an Employee may not represent himself or herself as an Employee or as acting on behalf of Stone Key while

working at the outside position. In general, the Employee may not use Stone Key facilities, equipment, stationery, or any other Stone Key assets to perform the outside position. In addition, Employees with approved Outside Business Interests are required to exercise their best efforts to avoid circumstances that give rise to an actual or potential conflict of interest, or the appearance of a conflict of interest between their Outside Business Interest and their responsibilities as an Employee of the Firm (and to disclose immediately any such actual or potential conflict or the appearance of such a conflict to a member of senior management)."

19. Mr. Taradash reviewed the Compliance Manual during his employment at Stone Key, and was aware that it prohibited employees from using Stone Key facilities, equipment, stationery, and other Stone Key assets to perform any outside business.

20. The Stone Key Compliance Manual states, "On an annual basis, Employees are required to attest . . . that all of their respective Employee and Employee-Related Investment Accounts, Outside Business Interests and Private Securities Transactions are properly disclosed in their respective Employee Interests Attestation and that all restrictions or conditions applicable are being complied with or have been satisfied."

21. The TriNet Employee Handbook prohibits Stone Key employees from "[c]onducting personal business, including outside employment, on company time or with company equipment, supplies, or other resources, unless allowed to do so by law."

22. The TriNet Employee Handbook states, "Your Company insists on the undivided loyalty of all employees, including management and non-management staff, except to the extent doing so would be inconsistent with applicable law."

23. Each year during Mr. Taradash's employment with Stone Key, he was asked to inform the company as to whether he was involved in any outside business interests. Each year during Mr. Taradash's employment with Stone Key, including on or about November 20, 2015, he signed an attestation that he had disclosed all of his Outside Business Interests and complied with all applicable restrictions or conditions. Mr. Taradash never identified any outside business interests on his annual attestations.

24. However, in 2013, Mr. Taradash requested and received Stone Key's approval to join the board of directors of a company called Premium Beverage Group, Inc. In a December 12, 2013 memorandum, Stone Key's General Counsel and Chief Compliance Officer, Allen Weingarten, informed Mr. Taradash that Stone Key had approved his joining the board of directors of Premium Beverage Group, Inc., subject to certain conditions, including the condition that Mr. Taradash not serve on the board's audit committee and the condition that Mr. Taradash's time commitment to Premium Beverage not interfere with his work for Stone Key. Mr. Taradash did not end up serving on Premium Beverage's board because the company did not go public and did not need a board.

C

Mr. Taradash's Bonuses

25. Stone Key paid bonuses to Mr. Taradash and other employees. As mentioned previously, Mr. Taradash testified that, when he began working at Stone Key, Mr. Urfirer guaranteed him that he would receive a bonus every year comparable to what was being paid by Wall Street firms, no matter what, regardless of the quality of his performance and regardless of Stone Key's finances.

26. Testimony at trial established that Wall Street bonuses to investment bankers and other participants

in the financial industry are based on multiple variables. Mr. Urfirer testified that he had received bonuses while working on Wall Street that had great variation in amount but that he always received an annual bonus of some sort.

27. At Stone Key, Mr. Urfirer determined its employees' bonuses based on a series of factors, including, but not limited to, the individual's performance, the performance of the firm overall; macroeconomic conditions, and the pipeline of anticipated future revenues. Stone Key asked its employees to gather information about what bonuses were being paid by other investment banks and present it to Mr. Urfirer. He considered that information, along with the factors discussed previously.

28. The course of dealing between Mr. Urfirer and Mr. Taradash demonstrates to the court's satisfaction that Mr. Urfirer did promise Mr. Taradash Wall Street compensation, but that Wall Street compensation is highly variable, and that Mr. Taradash accepted the method to determine his compensation as Mr. Urfirer described.

29. Mr. Taradash admitted that he ultimately received "Wall Street level" total compensation for each year that he worked at Stone Key through and including 2014.

30. Mr. Urfirer would discuss with Mr. Taradash the amount of the bonus that he was to receive a short time prior to the payment of Mr. Taradash's bonus. Before Mr. Urfirer told Mr. Taradash what his bonus was going to be for a given year, Mr. Taradash did not know the amount of bonus he would receive.

31. From 2010 through 2013, Stone Key typically paid each year's bonuses in the first quarter of the following year. Starting with the bonuses paid in connection with 2010, Stone Key began having employees sign written

agreements when they received their bonuses with clawback and noncompete provisions to encourage employee retention. As a result, beginning with 2010, Mr. Taradash's bonus agreements included provisions requiring him to repay a substantial portion of each discretionary bonus in the event his employment was terminated for cause.

D

Stone Key's Economic Difficulties

32. After several successful years, Stone Key had a very difficult business year in 2012. The company expected to earn more than $20 million in revenues in 2012, but it ended up earning only slightly more than $6 million. The results were even worse in 2013, when Stone Key's total revenues were approximately $350,000. Between 2012 and 2013, Stone Key lost more than $11 million.

33. Following the difficult economic years of 2012 and 2013, at the start of 2014, there were difficulties in the business relationship between Mr. Urfirer and his cofounder and partner, Denis Bovin. Mr. Urfirer and Mr. Bovin ultimately reached an agreement pursuant to which Mr. Bovin left Stone Key in April, 2014, and Mr. Urfirer remained with the firm. Mr. Urfirer bought Mr. Bovin's interest in Stone Key and injected a significant amount of his own money into the firm.

34. The agreement between Mr. Urfirer and Mr. Bovin included an agreement as to the total amount of money that Stone Key could use to pay employees' bonuses for 2013, although Mr. Urfirer had discretion as to how to allocate the bonus pool. The agreement between Mr. Urfirer and Mr. Bovin included a variety of conditions that were prerequisites for the payment of bonuses for 2013, including, but not limited to, the receipt of future revenues by Stone Key.

35. In 2014, Stone Key earned about $3.5 million in revenues, resulting in a $3.3 million loss for the year.

E

Mr. Taradash's 2013 Bonus

36. Mr. Taradash's bonus for 2013 was addressed in a series of written agreements. On April 22, 2014, Mr. Taradash and Mr. Urfirer signed documents titled 2013 Bonus Terms—Reid M. Taradash, and Retention Bonus Terms—Reid M. Taradash. In the 2013 Bonus Terms, Stone Key committed to pay Mr. Taradash a bonus in the amount of $328,124.92, subject to certain identified conditions, including a financial target, which was not met, and the bonus was not paid. In the Retention Bonus Terms, Stone Key committed to pay Mr. Taradash a bonus in the amount of $186,875 if the firm was able to raise $10 million of additional capital, but that target was also not met, and that bonus was not paid.

37. On December 23, 2014, Mr. Urfirer and Mr. Taradash signed a document titled Revised 2013 Bonus Terms—Reid M. Taradash. Pursuant to that agreement, Stone Key paid Mr. Taradash a bonus in the amount of $203,608.75, substantially less than the total 2013 bonus of $515,000, which had been discussed. The 2013 bonus payment was not subject to a clawback, but the agreement stated that future bonus payments would have such a provision. The Revised 2013 Bonus contained a seventy-five day notice provision in the event Mr. Taradash wished to resign from the Company. Mr. Taradash also released any claims that he might have against Stone Key through December 23, 2014.

38. On October 23, 2015, Mr. Urfirer and Mr. Taradash signed a document titled Final Revised 2013 Bonus Terms—Reid M. Taradash, pursuant to which Stone Key paid Mr. Taradash an additional 2013 bonus in the amount of $221,391.17.

39. The delay in paying the 2013 bonuses put significant financial pressure on Mr. Taradash. When ultimately paid in December, 2014, and October, 2015, the bonuses aggregated approximately two-thirds of Mr. Taradash's total compensation for 2013.

F

Mr. Taradash's Family Moves to the Philippines; Mr. Taradash Plans for a Business There

40. Mr. Taradash's wife, Alarice Lacanlale Taradash, is from a prominent family in the Philippines, and her mother is a successful entrepreneur there. In 2014, Mr. Taradash and his wife began planning to move to the Philippines, ideally in the summer of 2015, to start an information technology (IT) training business there with Mr. Taradash's friend and fellow Stone Key employee, Sumit Laddha.

41. Over the ensuing months, Mr. Taradash e-mailed various friends about his plans, which messages indicated his concern about violating the Company's policy about pursuing outside business interests.

42. On September 2, 2014, Mr. Taradash e-mailed his friend, Jackie Chan, about the IT training business and his plan to move to the Philippines to start the business. Mr. Taradash told Chan to keep quiet about the information he was providing because he and Mr. Laddha "would like to get our 2014 bonuses before we do anything."

43. In a September 30, 2014 e-mail, Mr. Taradash wrote to several other friends about his plan to move to the Philippines to start the IT training business and his plan to fund the business with some of his accumulated savings. Mr. Taradash wrote, "the amount of money that I've saved as a banker for 10 years is pathetic, but when taken to Manila, is a princely sum and can fund what I hope will be a successful business."

Similar to his e-mail to Chan, Mr. Taradash wrote, "please don't mention—I need to keep on the DL [i.e., down low] as I need my 1 bonus for this year before packing up."

44. On February 23, 2015, Mr. Taradash e-mailed another friend that he was "shipping my wife and son out to Manila the weekend of July 4th," and that he would "join them the following March." Mr. Taradash explained that he and his wife were moving to Manila because "we do want to start getting the business going." Mr. Taradash told his friend that, at that time, February, 2015, he had people in India identifying potential business partners, whom he was about to start interviewing. Mr. Taradash told his friend that he wanted to get another bonus payment before leaving for the Philippines.

45. On April 1, 2015, Mr. Taradash e-mailed his wife a series of questions to discuss with a lawyer in Manila about their move to the Philippines. In the e-mail, Mr. Taradash stated that he, his wife, and their son would be moving to the Philippines, and that they were "going to spread the move between July 2015 and April 2016." Mr. Taradash stated that they "plan on starting a Philippines-based business, or businesses, and we'd like to repatriate between US $500k—US $1M (from the US to the Philippines) as start-up capital for the businesses. We plan on deploying the majority of this capital over the next 3 years." Mr. Taradash also mentioned his "India-citizen partner," i.e., Mr. Laddha, "who will relocate from New York City to the Philippines and will repatriate the same amount of money."

46. At the end of June, 2015, Mr. Taradash told Mr. Urfirer about his wife's impending move to the Philippines. He said that she was moving because he could not break even on his "below market" base salary and, without payment of the bonuses, he was out of money.

As a result, there was no choice but to have his family move to the Philippines where they could live with Alarice's mother.

47. Mr. Urfirer offered to have them stay at his guest house again as they had in 2013, but Mr. Taradash declined because, he said, his wife wanted to "save face" by telling her friends that she "has some 'family business' that she has to attend to." Mr. Taradash said that he would have to go to the Philippines to visit his wife and son every two months, and that he hinted or hoped to bring them back to Connecticut in the first quarter of 2016, when bonuses were paid and they might be able to afford a house.

48. Mr. Taradash's wife and son moved to the Philippines in early July, 2015. After Mr. Taradash's wife and son moved to the Philippines, he traveled there multiple times, for one to two weeks at a time, over the rest of 2015. Mr. Taradash told Mr. Urfirer that he was traveling to the Philippines to visit his family. He did not tell him that he was going there to meet with third parties in order to develop the IT training business.

49. During the second half of 2015, even when Mr. Taradash was not in the Philippines, Mr. Urfirer testified that there was a change in his work habits. He would show up in the office in the middle of the day, sometimes wearing his tennis outfit. In a February 6, 2016 e-mail to Mr. Laddha, Mr. Taradash wrote, "There is actually a lot that I could be working on now for stone key [sic], but I can't bring myself to do much with this unresolved." However, Stone Key did not demonstrate any job responsibilities that Mr. Taradash did not fulfill during this period.

50. On December 8, 2015, Mr. Taradash and Mr. Laddha exchanged drafts of a "Company Overview" of their IT training business, which they had named "Edify." They also shared the company overview with a recruiter

they had engaged to help find an IT trainer for their business. In that document, Mr. Taradash and Mr. Laddha described Edify as "in the early implementation stage . . . after spending the last 15 months heavily diligencing the opportunity." They wrote, "By the end of Q1 2016, all three co-founders [i.e., Mr. Taradash, his wife, and Mr. Laddha] will have relocated to Manila."

51. On January 10, 2016, Mr. Taradash e-mailed a family friend and said, "I'm going to be making a similar move to you—leaving New York for Manila. I would love to hear about the transition and adjustment."

52. On January 26, 2016, Mr. Taradash e-mailed a friend that he would "be out there [i.e., Manila] q1 for sure."

53. As of February 1, 2016, Mr. Taradash gave his landlord notice that he would be moving out of his Connecticut apartment on April 1, 2016.

G

Stone Key Pays Mr. Taradash 2014 Bonus

54. Stone Key did not pay employee bonuses for 2014 in the first quarter of 2015 because it maintained it did not have the wherewithal to do so. The company ultimately paid bonuses for 2014 in the first quarter of 2016, after having received a significant fee in the fall of 2015.

55. On February 29, 2016, Mr. Urfirer and Mr. Taradash signed documents titled "2014 Bonus Terms—Reid M. Taradash" and "2014 Grant of Bonus Agreement," in which Stone Key committed to pay Mr. Taradash a 2014 bonus in the amount of $524,999.92, subject to certain conditions. Stone Key paid Mr. Taradash the $524,999.92 bonus on or about March 10, 2016.

56. The 2014 Grant of Bonus Agreement contains a seventy-five day notice period and a 100 percent claw-back provision in the event Stone Key terminates Mr. Taradash for cause, as follows:

"In consideration of my receipt of a 2014 bonus from Stone Key Group LLC (Firm), the undersigned hereby agrees that if, prior to December 31, 2016, (i) I voluntarily terminate my employment with the Firm in order to work for a Competitor (as defined below) or (ii) the Firm terminates my employment for Cause (as defined below), assuming in either case that the Firm continues as a going concern as of the date of such termination, I will pay to the Firm, promptly following my receipt of the Firm's request, an amount in cash equal to 100% of the gross amount of such bonus, less $500."

57. The 2014 Grant of Bonus Agreement defines "Cause" as follows:

" 'Cause' means . . . (v) my violation of a material policy of the Firm, (vi) my engagement in a dishonest or wrongful act involving fraud, misrepresentation or moral turpitude causing damage or potential damage to the Firm or any subsidiary or affiliate, (vii) my willful failure to perform a substantial part of my duties, (viii) any conduct by me which violates any federal or state securities law or other applicable regulation governing my conduct and of the business of the Firm or any subsidiary or affiliate . . . or (xi) my being materially deficient in my compliance or employment obligations to the Firm."

58. On February 29, 2016, the same day that Mr. Taradash signed the 2014 Bonus Terms and 2014 Grant of Bonus Agreement, he wrote a friend that his move to the Philippines had been pushed back to May 1, 2016.

59. Before Mr. Urfirer signed the 2014 Bonus Terms and the 2014 Grant of Bonus Agreement on behalf of

Stone Key, Mr. Taradash did not tell him that he was planning to move to the Philippines to join his wife, and he did not tell him that he had been developing a business in the Philippines. Mr. Urfirer testified that if Mr. Taradash had told him about his efforts to develop a business in the Philippines or about his plan to move to the Philippines, Mr. Urfirer would not have provided him the $524,999.92 discretionary bonus payment dated February 29, 2016.

60. Mr. Urfirer determined the amount of Mr. Taradash's 2014 bonus based on the various factors involved in the computation of prior years' bonuses, as discussed previously. He arrived at the amount of discretionary bonuses for the Stone Key employees by deciding the amount of total compensation to award a given employee for the year, then deducting the individual's salary. Mr. Urfirer decided to award Mr. Taradash total compensation of $700,000. He therefore deducted Mr. Taradash's salary of $175,000 from that total to arrive at a bonus of $524,999.92. At the time, Mr. Taradash was the sole vice president remaining with Stone Key.

H

Stone Key Pays Mr. Taradash Advance Against 2015 Bonus

61. Shortly after Mr. Taradash received his 2014 bonus, he approached Mr. Urfirer and requested a 2015 bonus. Mr. Urfirer replied that he was not paying any 2015 bonuses at that time because he had just paid 2014 bonuses, Stone Key had many other expenses, he was concerned about future revenue, and "he didn't have the money to pay 2015 bonuses." In response, Mr. Taradash again talked about the hardship he was facing with his family in the Philippines, and Mr. Urfirer said he would think about it.

62. Mr. Urfirer and Mr. Taradash had a subsequent discussion in March, 2016, during which Mr. Urfirer

reiterated that he wasn't paying other employees their 2015 bonuses at that time. Mr. Taradash said that, if Stone Key paid him a 2015 bonus, he would bring his family back from the Philippines, buy a house in Connecticut, and redouble his efforts to do his job. Mr. Urfirer ultimately told Mr. Taradash that he would pay him a $250,000 advance on his 2015 bonus, based on the conditions that they had discussed, and that he would pay Mr. Taradash an additional payment of at least $250,000 at a later date.

63. Mr. Taradash denies making the statements attributed to him about bringing his family back to Connecticut in the event he received the compensation under discussion. However, the court does not credit this testimony in light of the numerous e-mails to the contrary, which Mr. Taradash sent to his friends and colleagues, as well as the court's observation of the parties' demeanor during several days of testimony.

64. On the basis of clear and satisfactory evidence, the court finds that Mr. Taradash's statements to Mr. Urfirer were false and misleading, known to be false by Mr. Taradash, and made with the intent to deceive Mr. Urfirer because, at that time (March, 2016), Mr. Taradash had already decided to leave Stone Key and relocate to the Philippines, where his wife and son lived and where he, his wife and Mr. Laddha were planning to open an IT training business. In March, 2016, Mr. Taradash did not intend to bring his family back to Connecticut, buy a house here, or remain at Stone Key for any extended period of time.

65. Mr. Urfirer credibly testified that his understanding was that, if he paid Mr. Taradash a $250,000 bonus advance in March, 2016, Mr. Taradash would be diligent in performing his work duties going forward, he would move his family back to Connecticut, and he would stop his frequent trips to the Philippines—and that, if

Mr. Taradash had said that he wasn't planning to bring his family back, and that he would continue to conduct himself the way he had been doing, Mr. Urfirer would not have paid Mr. Taradash the $250,000 bonus advance.

66. On March 14, 2016, Mr. Urfirer and Mr. Taradash signed documents titled 2015 Bonus Advance Terms—Reid M. Taradash, and 2015 Grant of Bonus Advance Agreement, in which Stone Key committed to pay Mr. Taradash a 2015 bonus advance in the amount of $250,000, subject to certain conditions. Stone Key also committed to pay a second bonus installment in the amount of $250,000, subject to certain conditions, including, but not limited to, Stone Key's receiving an additional $10 million in revenues.

67. Stone Key paid Mr. Taradash the $250,000 bonus advance on March 15, 2016. The 2015 Grant of Bonus Advance Agreement includes a clawback provision in the amount of 100 percent of the bonus amount, less $500. Mr. Taradash was the only Stone Key employee who received a 2015 bonus advance in March, 2016.

68. The 2015 Grant of Bonus Advance Agreement also contained a 100 percent clawback provision in the event of a termination for cause, as follows:

"In consideration of my receipt of the 2015 bonus advance from Stone Key Group, LLC (the 'Firm'), the undersigned hereby agrees that if, prior to March 31, 2016, (i) I voluntarily terminate my employment with the Firm in order to work for a Competitor (as defined below) or (ii) the Firm terminates my employment for Cause (as defined below), assuming in either case that the Firm continues as a going concern as of the date of such termination, I will pay to the Firm, promptly following my receipt of the Firm's request, an amount in cash equal to 100% of the gross amount of the total 2015 bonus (including the 2015 bonus advance) received by me prior to the termination date, less $500."

The parties agree that the clawback provision includes a typographical error, i.e., instead of March 31, 2016, it was intended to reference March 31, 2017. The 2015 Grant of Bonus Advance Agreement contains the same definition of "Cause" as does the 2014 Grant of Bonus Agreement.

69. At the same time that Mr. Taradash was telling Mr. Urfirer that he would bring his family back from the Philippines and redouble his efforts to Stone Key if he received a 2015 bonus, he confirmed to others that those representations were false. In a March 11, 2016 e-mail to Mr. Laddha, Mr. Taradash stated that a $300,000 advance on his 2015 bonus from Stone Key "would allow me to go two or three years without needing a job/source of income versus now, where I'll have to find a job 6-9 months after we launch" the IT training business.

70. On March 14, 2016—the same day that Mr. Taradash signed the 2015 Bonus Advance Terms and 2015 Grant of Bonus Advance Agreement—Mr. Taradash wrote in an e-mail to his sister, "I will quit next week. Then I have to do 75 days, per my contract. Then I move to the Philippines. . . ." (Plaintiff's exhibit 30.) That same day, Mr. Taradash also e-mailed his sister that he would be "in the Philippines 100% in June, now that I have my financial situation in the best spot that it can be in."

71. Mr. Taradash admits that he was paid at Wall Street level for every full year that he worked at Stone Key through 2014. Mr. Taradash also admits that, because he only worked at Stone Key for part of 2016, he is not entitled to any bonus for that year. However, Mr. Taradash contends that he is entitled to receipt of the second half of his 2015 bonus.

I

Mr. Taradash Resigns from Stone Key; Subsequent Events

72. On March 21, 2016, six days after Stone Key had paid Mr. Taradash the 2015 bonus advance of $250,000, Mr. Taradash called Mr. Urfirer at home and resigned. In that conversation, Mr. Taradash told Mr. Urfirer for the first time that he was moving to the Philippines. Mr. Urfirer immediately said that Mr. Taradash had lied to him and procured his bonus under false pretenses, and that he needed to either return the money or live up to what he had agreed to do. Mr. Taradash said he would talk to his wife and get back to him.

73. Shortly after his resignation, Mr. Taradash went to the Philippines, while still employed by Stone Key because of the seventy-five day notice period before his resignation became effective. When Mr. Taradash returned from the Philippines, he told Mr. Urfirer that he would be willing to continue working for Stone Key but only from the Philippines. Mr. Urfirer rejected that demand as "absurd on its face."

74. Mr. Taradash later proposed additional conditions under which he might continue to work for Stone Key, including payment of the remainder of the 2015 bonus in $300,000 cash up front, promotion to managing director, permission to spend one-third of each month in the Philippines, waiver of the 2014 clawback, and a guaranteed bonus each year going forward. Mr. Taradash said that he would not tell anyone about the promotion until he was living in Asia and that he wanted it so that he could better market himself to other employers. Mr. Urfirer told Mr. Taradash that his demands were absurd and that no one would agree to them. Mr. Taradash acknowledged that Mr. Urfirer was correct.

75. On April 7, 2016, a day after Mr. Taradash had e-mailed a moving and storage company that he would

be "moving to Asia for the next few years," Mr. Taradash submitted a written notice of resignation to Stone Key. Mr. Taradash's last day of employment at Stone Key was June 29, 2016.

76. Stone Key had issued Mr. Taradash a laptop computer to use in connection with his work for the firm. On Mr. Taradash's last day at Stone Key, he returned the laptop to the Company, without erasing its memory. Mr. Urfirer later turned on the computer to use it for a client presentation. When he opened the Internet browser, Mr. Taradash's Gmail account appeared, without requiring a password. In Mr. Taradash's Gmail account, Mr. Urfirer saw e-mail messages relating to Mr. Taradash's resignation from Stone Key and many others, going back to 2014, relating to the IT training business.

77. One of the e-mails that Mr. Urfirer saw in Mr. Taradash's Gmail account was an August 13, 2014 e-mail from Mr. Taradash to Mr. Laddha and Mr. Taradash's wife concerning Edify. Mr. Urfirer was surprised when he saw that e-mail because he had not known that Mr. Taradash, his wife, and Mr. Laddha had been working to develop an IT training business. The e-mail demonstrated that Mr. Taradash had used his Stone Key computer and a Stone Key template to prepare a presentation for his IT training business, without Stone Key's permission. In fact, Mr. Taradash stated in the e-mail, "[d]on't mind the SKP [Stone Key Partners] logos."

J

Mr. Taradash Attempts to Develop Edify, an IT Training Business in Philippines

78. While Mr. Taradash was employed by Stone Key, he spent approximately eighteen months conducting due diligence and other activities in connection with

his work for Edify, the IT training business in the Philippines. Mr. Taradash's computer contained over one thousand e-mails relating to his efforts to establish Edify.

79. Mr. Taradash, along with his wife, Alarice, and Mr. Laddha, had developed the idea of Edify in 2014 and held themselves out to third parties as the three "Co-Founders" of the business. The objective of the business was to "provide supplemental Information Technology ('IT') training." Beginning in 2014, Mr. Taradash performed a substantial amount of work on Edify during his employment with Stone Key, without disclosing this activity to Mr. Urfirer or the Chief Compliance Officer, Mr. Alan Weingarten.

80. In August, 2014, Mr. Taradash traveled to the Philippines for a week of meetings relating to Edify. Mr. Taradash and his partners met with representatives of IT services companies such as Convergys, Accenture, Genpact, and Cognizant, as well as with Philippine government and educational officials. Several of these meetings were with companies that were clients of Stone Key or had a business relationship with it.

81. As mentioned previously, in August, 2014, Mr. Taradash prepared a draft presentation for Edify, using his Stone Key issued computer and Stone Key's presentation template and logo. Mr. Taradash prepared the document to show to IT services firms in order to help recruit a potential partner or employee for Edify. He also used his Stone Key computer to prepare a similar document titled "Vision, Partner Requirements and Benefits," in order to recruit a potential partner or employee for Edify.

82. In March, 2015, Mr. Taradash used his Stone Key computer to prepare a script for a discussion with a potential employee whom he and his partners were attempting to recruit to Edify. Mr. Taradash e-mailed

the script to his partners, Mr. Laddha and his wife, during the Stone Key workday.

83. On April 24, 2015, Mr. Taradash e-mailed Anubhav Pradhan, an IT trainer for Wipro in India, to recruit him to join Edify. Stone Key was not aware of Mr. Taradash's and Edify's efforts to recruit Pradhan, while Stone Key was attempting to develop a business relationship with Wipro.

84. Mr. Taradash and his partners—his wife and Mr. Laddha—contacted various companies in the Philippines to find out if they would be interested in hiring employees with the skills that they planned to impart through Edify.

85. On July 13, 2015, Mr. Laddha e-mailed Jacob Dalevi Artelius, an employee of Accenture, to "pick his brain" about how to make IT talent in the Philippines more employable to companies like Accenture. At that time, Accenture was a client of Stone Key. Also in July, 2015, Mr. Taradash's wife sent similar e-mails to representatives of IBM and HP, also potential clients, in order to set up meetings with them for August, 2015.

86. In August, 2015, Mr. Taradash again traveled to the Philippines for meetings relating to Edify, including with IBM, HP, and Accenture, and did not disclose those meetings to Mr. Urfirer. Instead, Mr. Taradash told Mr. Urfirer that he was taking a vacation to visit his family.

87. In October, 2015, Mr. Taradash's wife e-mailed employees of Ernst & Young in the Philippines with a company overview of Edify. The overview identified three courses that Edify planned to offer, based on the due diligence that Mr. Taradash and his partners had conducted, including their discussions with IT companies. The overview stated that Edify initially planned to have one location in Metro Manila, and then to expand to four or five sites in Metro Manila within a

few years, and it described Edify as being "in the early execution stages."

88. Mr. Taradash and his wife committed to invest $500,000 of their own money in Edify, which they represented to third parties. Their plan was for Mr. Taradash, his wife, and Mr. Laddha collectively to invest $1 million of their own money to launch Edify, half from Mr. Taradash and his wife and half from Mr. Laddha.

89. Mr. Taradash prepared a financial model for Edify, which indicated that he and his partners planned to launch Edify in 2016. Mr. Taradash's plan was for Edify to generate profits.

90. Mr. Taradash interviewed a number of people who were being considered for the position of Edify's principal IT trainer. Mr. Taradash participated, along with his wife and Mr. Laddha, in the process of evaluating candidates, deciding whom to interview, and interviewing them. They interviewed candidates via Skype, with each interview lasting an hour or more.

91. Mr. Taradash and his partners engaged a recruiting firm, Ad Astra Consultants, to identify potential IT trainers for Edify. Mr. Laddha paid a $2000 retainer to the recruiting firm, and Mr. Taradash reimbursed him for half of that amount. The firm identified candidates, and Mr. Taradash and his partners interviewed them. Mr. Laddha conducted initial interviews of the candidates, then Mr. Taradash and his wife joined him in follow-up videoconference interviews of the candidates. Mr. Taradash conducted those interviews through his Stone Key computer or his Stone Key cell phone.

92. Mr. Taradash and his partners were interested in hiring one of the candidates whom the recruiting firm had identified, Sarvesh Shrivastava. On March 13, 2016, the day before Mr. Taradash signed the 2015 Bonus

Advance Terms and 2015 Grant of Bonus Advance Agreement, he e-mailed Mr. Shrivastava about a possible interview. In the e-mail to Mr. Shrivastava, Mr. Taradash stated that Edify had "current funding," a "business plan," and "a detailed financial model that includes an annual bottoms-up cost build, as well as a revenue forecast built upon student uptake and cost of offering assumptions."

93. In March, 2016, also during the same time period when he was seeking a 2015 bonus advance from Mr. Urfirer, Mr. Taradash discussed with Mr. Laddha a trip to India to interview Mr. Shrivastava in person. On March 16, 2016, two days after Mr. Taradash signed the 2015 Bonus Advance Terms and 2015 Grant of Bonus Agreement, and one day after Stone Key paid Mr. Taradash the 2015 bonus advance, Mr. Taradash wrote to Mr. Laddha, "If I go to India, MJU [i.e., Mr. Urfirer] will definitely sue us." Mr. Taradash nevertheless agreed to travel with Mr. Laddha to India to interview Mr. Shrivastava, but the trip was canceled in mid-April, 2016, when Mr. Shrivastava decided to stay with his existing employer.

94. Mr. Taradash and Mr. Laddha testified that Mr. Shrivastava's decision not to join Edify was a fatal blow to their plans and that they abandoned the project in approximately May, 2016.

95. Mr. Taradash never disclosed Edify to Stone Key.

96. Edify was never incorporated. The trade name was never registered. No licenses were obtained or bank accounts established. No employees were hired, although a search firm was retained with a $2000 retainer. No revenues were generated by the Edify project.

97. Stone Key was not in the information technology training business. It had no business presence in the Philippines.

K

Other Outside Activities by Mr. Taradash

98. On February 19, 2016, Mr. Taradash e-mailed an Asian company called Green Energy Storage as follows: "I am a Senior Vice President at Stone Key Partners, a merchant banking firm based in Greenwich, CT (a hedge fund and asset management hub near New York City). I am very interested in investing in Green Energy Storage, preferably personally, but potentially through my company."

99. Mr. Taradash explored an investment in Green Energy Storage, including a potential joint venture, on his own behalf. Upon review of the evidence, the court finds that Mr. Taradash did not disclose his discussions with Green Energy to Stone Key.

100. Between February 19, 2016, and June 29, 2016, Mr. Taradash sent and received 106 e-mails in connection with his work related to Green Energy Storage.

101. Also while Mr. Taradash was employed by Stone Key, he worked with a group interested in buying a failing insurance company in the Philippines, which they referred to as "Project Pac-Man." Mr. Taradash prepared a due diligence tracker and a preliminary plan, and drafted seventy-five questions as part of the diligence process.

102. Between April 3, 2016, and June 29, 2016, Mr. Taradash sent and received 535 e-mails in connection with his work on Project Pac-Man.

103. Based on a review of the evidence, the court concludes that Mr. Taradash did not disclose his work on Project Pac-Man to Stone Key.

104. Stone Key did not submit any evidence at trial that any of Mr. Taradash's extracorporate activities, such as Edify, caused Stone Key to suffer any damage.

No evidence of lost profits or loss of clients or any other negative impact on the Company was presented to the court.

L

Stone Key Terminates Mr. Taradash's Employment for Cause

105. On August 29, 2016, Stone Key's counsel, Attorney Daniel Schwartz at Day Pitney, sent Mr. Taradash a letter advising him that Stone Key had reviewed his e-mails, and demanded that he repay the 2014 bonus of $524,999.92 and the 2015 advance of $250,000. The letter claimed he had breached the agreements relating to the 2014 bonus and the 2015 bonus because of Mr. Taradash's participation in outside business activities, failure to disclose his outside business activities to Stone Key, using Stone Key's facilities and equipment in furtherance of his outside business activities, submitting false attestations to Stone Key, and making misrepresentations to Stone Key in order to fraudulently obtain bonus payments.

106. On September 12, 2016, Mr. Urfirer sent Mr. Taradash a letter terminating his employment with Stone Key for cause ("the Termination Letter"). The letter was based on the grounds set forth in the letter dated August 29, 2016, from counsel to Mr. Taradash based on information that Stone Key had acquired after Mr. Taradash's last day at Stone Key, when Mr. Urfirer discovered the e-mails in Mr. Taradash's Gmail account. Specifically, the Termination Letter claimed that (1) he had gone to work for a competitor, and (2) Stone Key was terminating his employment for cause because he (i) violated material policies of Stone Key, (ii) engaged in dishonest or wrongful acts involving fraud, misrepresentation or moral turpitude causing damage to Stone Key, (iii) wilfully failed to perform a substantial part of his duties for Stone Key, and (iv) had been materially

deficient in his compliance and/or employment obligations. The letter claimed that Stone Key would have terminated his employment for cause prior to his resignation if it had been aware of Mr. Taradash's wrongdoing.

107. On December 7, 2017, shortly before the commencement of trial, Stone Key issued Mr. Laddha a formal written warning as a result of his role in Edify and reserved the right to take further disciplinary action against him. Mr. Laddha testified that he had suggested the Edify concept to Mr. Taradash because of his wife's contacts in the Philippines and that he suggested the name of the venture. Stone Key did not report any violation of FINRA Rule 3270 by Mr. Laddha to FINRA. Mr. Weingarten explained why Stone Key did not report Mr. Laddha's alleged violation: "We looked at the requirements of the rule and we don't think that it is necessary. . . . [W]e're very confident that there's no widespread impact on our clients or the marketplace, et cetera, and, therefore, we are very comfortable that we don't have to make disclosure."

M

Expert Testimony Regarding Mr. Taradash's Compliance with FINRA Rule 3270

108. In its letter to Mr. Taradash dated August 29, 2016, Stone Key did not list as a cause any security or regulatory violations. Nevertheless, at trial, Stone Key claimed that FINRA Rule 3270 was comparable to Section 4.2 of the Company's Compliance Manual, the violation of which was listed as a cause for termination. As mentioned previously, Section 4.2 requires employees to disclose "all outside business interests" and includes various examples.

109. FINRA Rule 3270, as adopted in 2010, provides in pertinent part:

"Outside Business Activities of Registered Persons

"No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member."

110. With respect to Mr. Taradash's compliance with Rule 3270, Stone Key presented an expert witness, Attorney Miriam Lefkowitz, with extensive experience in the regulatory aspects of the securities industry. She opined that Mr. Taradash had violated Rule 3270 because (a) he "engaged in many activities of a business nature in connection with a business with . . . a reasonable expectation of compensation" and (b) he had served as a partner in an unrelated business endeavor.

111. Ms. Lefkowitz identified a number of steps that Mr. Taradash took that gave rise to an obligation under Rule 3270 to disclose Edify to Stone Key. In addition to holding himself out as a partner, and claiming that he was committing capital to the enterprise, he met with Accenture, which was a client of Stone Key. Ms. Lefkowitz also testified that it is "a compelling factor" that one presumably sets up a business in anticipation of making money, not as a hobby, and that Rule 3270 clearly applied to startups.

112. In discussing the drafting history of Rule 3270, Ms. Lefkowitz said Rule 3270 represented an intentional broadening by FINRA of the regulatory scope of its predecessor, Rule 3030. That rule provided: "No person associated with a member in any registered capacity shall be employed by, or accept compensation from, another person as a result of any business activity . . .

outside the scope of his relationship with his employer firm" without giving prior notice to his employer firm. Ms. Lefkowitz stated that, in her opinion, Mr. Taradash had not violated Rule 3030 because he was not "employed by" and had not "accepted compensation from" another person as a result of an outside business activity. Ms. Lefkowitz also observed that, in adopting Rule 3270, FINRA declined to define the terms "business activity" or "reasonable expectation of compensation" because clarification might facilitate evasion.

113. When asked to further specify what activities of Mr. Taradash with respect to Edify violated Rule 3270, Ms. Lefkowitz stated that one had to consider the totality of circumstances but that Mr. Taradash was obligated to disclose his activities with Edify to Stone Key, "[c]ertainly by the spring of 2015 and probably earlier. When he goes to a third party, the prospective IT trainer . . . there have been enough—you're going out trying to recruit someone presenting yourself as an entrepreneur who has partners whose [sic] in the midst of launching an IT training focused venture in the Philippines. Again, you have partners. You've spent a year and a half diligencing it. You've reached out to Accenture, IBM, et cetera . . . you've already gotten feedback from your likely sources of revenue, for potential sources of revenue. You know, if you're getting paid for placement, and they've already [committed] financing."[1]

114. Stone Key has not advised FINRA of Mr. Taradash's alleged violation of FINRA Rule 3270, claiming it might trigger an investigation by FINRA, and they did not want to ruin his career. Mr. Weingarten stated: "The

[1] Attorney Lefkowitz was not permitted to render an opinion as to whether Mr. Taradash violated Section 4.2 of the Compliance Manual because that topic was not contained in her expert disclosure, as required by Practice Book § 13-4 (b).

whole purpose behind the litigation was to recover some money. It wasn't to destroy his life."

DISCUSSION

This case turns, in the first instance, on the resolution of four questions:

(1) Is Mr. Taradash entitled to retain his 2014 bonus or must he repay it to Stone Key?

(2) Is Mr. Taradash entitled to retain the advance paid to him against his 2015 bonus?

(3) Is Mr. Taradash entitled to receive the balance of his 2015 bonus? And

(4) has Stone Key proven that Mr. Taradash's Edify activities while in Stone Key's employ constitute a breach of CUTPA?

To answer these questions, the court will evaluate the law, the facts and the defendant's special defenses relative to each remaining count of the complaint. The court will also evaluate any operative counterclaims as asserted by the defendant.

Count I

Breach of Contract as to 2014 Bonus

As found previously, on February 29, 2016, Mr. Taradash signed the 2014 Bonus Terms and 2014 Grant of Bonus Agreement (collectively, the 2014 Contract), pursuant to which he was paid $524,999.92 as his 2014 bonus. The 2014 Contract provides that this amount is subject to a clawback if Mr. Taradash (1) were to resign prior to December 31, 2016, to work for a competitor, or (2) be terminated for cause, as defined in the 2014 Contract, prior to December 31, 2016.

Stone Key no longer contends that Mr. Taradash worked for a competitor after his resignation and, in

posttrial briefing, it indicated the withdrawal of Counts II and IV, accordingly. As a result, Stone Key seeks the return of the 2014 bonus on the basis of its termination for cause of Mr. Taradash by the Termination Letter dated September 12, 2016. The Termination Letter articulated four grounds for termination, the validity of which the court must evaluate: (i) violation of material policies of Stone Key; (ii) dishonest or wrongful acts involving fraud, misrepresentation or moral turpitude causing damage to Stone Key; (iii) wilful failure to perform a substantial part of his duties for Stone Key; and (iv) material deficiency in compliance and/or employment obligations.

Before turning to the individual grounds, a discussion is helpful of the principles relating to the use of after-acquired evidence and to the nature of "cause" adequate to justify termination.

After-Acquired Evidence

In the leading case of *Preston* v. *Phelps Dodge Copper Products Co.*, 35 Conn. App. 850, 647 A.2d 364 (1994), the Appellate Court said: "The proper role of after acquired evidence as it affects damages for breach of a contract of employment raises an issue of first impression in Connecticut. Public policy would seem to disfavor compensating an employee for the loss of future wages, even though he was wrongfully discharged, when the employer proves by a fair preponderance of the evidence that it subsequently discovered evidence of employee misconduct that would have justified the termination of employment.

"In the federal system, as a general rule, after acquired evidence is relevant to the relief due a successful plaintiff in an employment discrimination discharge case. . . . If the after acquired evidence, in and of itself, would have caused the employer to discharge

the employee, it would be inappropriate to order reinstatement of employment or front pay. *Wallace* v. *Dunn Construction Co.*, 968 F.2d 1174, 1181 (11th Cir. 1992). '[I]f [an employer] has a legitimate motive that would cause [an employee's] discharge, then . . . front pay would go beyond making [the employee] whole and would unduly trammel [the employer's] freedom to lawfully discharge employees. Because [the employee] would no longer be employed at [the employer's place of business], [he] also would not be entitled to an injunction against further unlawful practices.' Id., 1182." (Citations omitted.) *Preston* v. *Phelps Dodge Copper Products Co.*, supra, 35 Conn. App. 858; see also *Torrington* v. *AFSCME, Council 4, Local 1579*, Superior Court, judicial district of Litchfield, Docket No. CV-00-0083909-S (July 11, 2002) (*Trombley, J.*) (32 Conn. L. Rptr. 681, 686) ("[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone [if] the employer [had] known of it at the time of the discharge" (emphasis omitted; internal quotation marks omitted)); *Chabot* v. *Waterbury*, Superior Court, judicial district of Waterbury, Docket No. 101562 (March 29, 1996) (*Vertefeuille, J.*) (court applied stated public policy to limit wrongfully terminated employee's recovery of back wages to date when after-discovered evidence would justify his termination).

Thus, the key to the proper use of after-acquired evidence, upon which so much of this case rests, is a finding that the subsequently discovered evidence of employee misconduct would have justified the termination of employment at the time of the misconduct.

Adequate Cause for Termination

In *Slifkin* v. *Condec Corp.*, 13 Conn. App. 538, 538 A.2d 231 (1988), the Appellate Court defined "cause"

in the employment context as follows: "Good cause, as distinguished from the subjective standard of unsatisfactory service, is defined as [s]ubstantial reason, one that affords a legal excuse . . . [l]egally sufficient ground or reason. Black's Law Dictionary (5th Ed. 1979). Good cause or [j]ust cause substantially limits employer discretion to terminate, by requiring the employer, in all instances, to proffer a proper reason for dismissal, by forbidding the employer to act arbitrarily or capriciously. . . . *Sheets* v. *Teddy's Frosted Foods*, *Inc.*, [179 Conn. 471, 475, 427 A.2d 385 (1980)]." (Citation omitted; internal quotation marks omitted.) *Slifkin* v. *Condec Corp.*, supra, 549.

In discussing *Slifkin*, the Appellate Court recently held in *Madigan* v. *Housing Authority*, 156 Conn. App. 339, 113 A.3d 1018 (2015): "[T]he reason or reasons for termination must be substantial. *Slifkin* v. *Condec Corp.*, supra, 13 Conn. App. 549. A reason that is less than substantial would be an improper reason for dismissal, i.e., arbitrary and capricious." (Emphasis omitted.) *Madigan* v. *Housing Authority*, supra, 356–57.

As a result of the foregoing authority, in order to constitute "cause," the reason for termination must be substantial. It is against these principles that the court will assess the validity of the grounds set forth in the Termination Letter with respect to the 2014 Bonus Agreement.

(i)

Violation of Material Policies of Stone Key

The Termination Letter explained the first ground for termination as follows:

"For instance, while you were employed by Stone Key, you wrongfully initiated and participated in outside business activities; you failed to disclose your outside

business activities to Stone Key . . . [and] you submitted false attestations to Stone Key."

Unlike FINRA Rule 3270, which does not define "outside business activities," Stone Key's Compliance Manual defines "Outside Business Interests." As set forth previously, Section 4.2 of the Compliance Manual states:

"Employees must disclose all outside business interests ('Outside Business Interests') to the Firm on the Employee Interests Attestation. No Employee may be engaged in any other business, or be employed or compensated by any other person, or serve as an officer or director of any other business organization without the prior written approval of the CCO."

The evidence at trial clearly showed that Mr. Taradash made no money on Edify or his other pursuits. Nor was he an officer or director of Edify. In his extracorporate activities, Mr. Taradash was not "employed or compensated by any other person," nor was he an officer or director of any other business organization. Whether he was "engaged in any other business" depends on the definition of "business interests," as discussed in the next paragraph of Section 4.2:

"Outside Business Interests include, but are not limited to, the following:

• working for another company, organization or person

• having a control relationship (acting as an officer, director, 10% or greater shareholder, partner or member of a group that has or seeks such a relationship (such as a creditors' committee)) in any publicly or privately held company or organization

• acting as sole proprietor or owner of a business

• accepting compensation from any other person as a result of any business activity other than a proportionate share of a passive investment

• receiving consulting fees."

None of these activities appears to apply to Mr. Taradash's activities. He was not working for another company, organization or person; he was trying to start one. He did not have a control relationship "in any publicly or privately held company or organization" because Edify did not exist. He was not acting as sole proprietor or owner of a business, because, again, Edify did not exist. He did not accept compensation from any other person or receive consulting fees.

The list of examples of prohibited business activities is not exclusive. They include, "but are not limited to," these examples. However, the termination is limited by the terms of the 2014 Bonus Agreement to breach of "material" policies of Stone Key. The listed examples all involve compensated or gainful positions or activities. Edify was neither. Significantly, Stone Key presented no evidence of harm to it arising from Edify or the other opportunities pursued by Mr. Taradash. Accordingly, the court concludes that these activities do not constitute a sufficient breach of a material policy to justify termination. Further, the fact that Stone Key did not report these activities by Mr. Taradash or Mr. Laddha to FINRA[2] strongly supports the conclusion that Stone

[2] FINRA Rule 4530.—Reporting Requirements—provides in pertinent part:

"(a) Each member shall promptly report to FINRA, but in any event not later than 30 calendar days, after the member knows or should have known of the existence of any of the following . . .

"(2) an associated person of the member is the subject of any disciplinary action taken by the member involving suspension, termination, the withholding of compensation or of any other remuneration in excess of $2,500.

"(b) Each member shall promptly report to FINRA, but in any event not later than 30 calendar days, after the member has concluded or reasonably should have concluded that an associated person of the member . . . has violated any securities-, insurance-, commodities-, financial-, or investment-related laws, rules, regulation or standards of conduct of any domestic or foreign regulatory body or self-regulatory organizations."

Key would not have terminated Mr. Taradash if it had found out about the activities while they were occurring in 2014, 2015 and early 2016.

It follows from this discussion that Mr. Taradash cannot be punished for failure to list these activities on the annual attestation form because the Stone Key policies did not require him to list them, as he believed to be the case.

(ii)

Dishonest or Wrongful Acts Involving Fraud, Misrepresentation or Moral Turpitude Causing Damage to Stone Key

This ground is asserted in connection with the receipt of the advance of the 2015 bonus, as pleaded in Count IV and clarified by the letter of counsel dated August 29, 2016, and will be discussed in the next section of this decision.

(iii)

Wilful Failure to Perform Substantial Part of His Duties for Stone Key

Mr. Taradash undoubtedly spent much time during business hours working on Edify. The plaintiff produced over a thousand e-mails on Mr. Taradash's company computer relating to that effort over a substantial period of time. However, no Stone Key witness could identify any deficiency in the performance of Mr. Taradash's duties. Indeed, Mr. Urfirer was profoundly displeased that Mr. Taradash was not staying with the company. Once again, the court concludes that Stone Key would not have terminated Mr. Taradash for dereliction of his duties if it had been aware of his Edify activities at the time they were occurring.

(iv)

Material Deficiency in His Compliance and/or Employment Obligations

The Termination Letter does not specify any deficiencies of this nature, other than with reference to the Compliance Manual. Neither the Termination Letter nor the complaint mentions noncompliance with FINRA Rule 3270. Indeed, Mr. Weingarten testified that he intentionally left out subparagraph (viii) from the definitions of cause in the 2015 Grant of Bonus Agreement, which lists "any conduct by me which violates any federal or state securities law or other applicable regulation governing my conduct and of the business of the firm or any subsidiary or affiliate."

However, even if it were determined that section (iv) would refer to a violation of FINRA Rule 3270, the court cannot conclude that a material violation occurred. Attorney Lefkowitz opined that Mr. Taradash's status as a partner in the Edify enterprise and his reasonable expectation of compensation from it might trigger the disclosure requirement. However, the cases upon which she relied involved a far greater engagement in the actual business of the other enterprise. Here, quite simply, nothing happened. As mentioned previously, no harm to the Company, its customers or to consumers was articulated. As with the purported violation of the Compliance Manual, Stone Key has failed to prove that it would have terminated Mr. Taradash for violating Rule 3270 if it had been aware of his activities. Again, the failure to report his activities or those of Mr. Laddha belie any such contention. In summary, the court concludes that Mr. Taradash's extracorporate activities did not constitute a material deficiency of his compliance obligations.

As a result, the court rules against the plaintiff on the first count of the complaint.

Count III

Breach of 2015 Bonus Advance Agreement

The August 29, 2016 letter from Stone Key's counsel to Mr. Taradash contended that termination of the 2015 Bonus Advance Agreement was justified by his previous breaches of the 2014 Bonus Agreement and because he "fraudulently induced Stone Key" to make the 2015 bonus advance payment. Count III of the complaint is pleaded somewhat differently. It also relies on Mr. Taradash's acts prior to March 31, 2016, which it alleges he fraudulently concealed, and adds as a ground the fact that he was terminated prior to March 31, 2017.

However, because the court concludes that the termination on the basis of alleged breaches of the 2014 Bonus Agreement was invalid, the concealment of those underlying activities and a termination based on them cannot, in themselves, justify termination of the 2015 Bonus Advance Agreement. Mr. Taradash's commission of fraud, discussed below, is a different matter.[3]

Count V

Fraudulent Inducement of 2015 Bonus Advance Agreement

Count V alleges that, in order to persuade Mr. Urfirer to give him an advance against his 2015 bonus, Mr. Taradash promised that he would remain with Stone Key for the rest of 2016, would relocate his family back to Connecticut, and would otherwise devote his time to advancing Stone Key's interests. The complaint alleges that all of these representations were false, were known by Mr. Taradash to be false, were made for the purpose

[3] Because the court determines that Stone Key has not adequately proven breaches of the 2014 and 2015 Contracts, it does not reach the defendant's special defenses relating to those agreements, including the contention that the contracts involved "wages" within the meaning of § 31-71a, except as specifically discussed below.

of inducing the advance, and that Mr. Urfirer believed them and agreed to the advance to the plaintiff's detriment.

The law with respect to fraudulent inducement is well established. As stated by the Appellate Court: "Fraud and misrepresentation cannot be easily defined because they can be accomplished in so many different ways. They present, however, issues of fact. . . . The trier of facts is the judge of the credibility of the testimony and of the weight to be accorded it." (Citation omitted; internal quotation marks omitted.) *Maturo* v. *Gerard*, 196 Conn. 584, 587–88, 494 A.2d 1199 (1985). "The essential elements of a cause of action in fraud are: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . All of these ingredients must be found to exist; and the absence of any one of them is fatal to a recovery. . . . Additionally, [t]he party asserting such a cause of action must prove the existence of the first three of [the] elements by a standard higher than the usual fair preponderance of the evidence, which higher standard we have described as clear and satisfactory or clear, precise and unequivocal. . . . *Citino* v. *Redevelopment Agency*, 51 Conn. App. 262, 275–76, 721 A.2d 1197 (1998)." (Internal quotation marks omitted.) *Harold Cohn & Co.* v. *Harco International, LLC*, 72 Conn. App. 43, 51, 804 A.2d 218, cert. denied, 262 Conn. 903, 810 A.2d 269 (2002).

As set forth in the findings of fact, the court finds that Stone Key proved by clear and satisfactory evidence the first three elements of fraudulent inducement, i.e.:

1. Mr. Taradash stated his intention to move his family back to Connecticut, to buy a house and to devote

himself to the best interests of the Company if he received an advance on his 2015 bonus;

2. These representations were untrue and known to Mr. Taradash to be untrue when he stated them; and

3. Mr. Taradash made these statements to induce Stone Key to give him an advance against his 2016 bonus.

Additionally, the court finds that Stone Key relied on these statements to its detriment by paying Mr. Taradash a bonus in advance of when it would otherwise have paid it.

The defendant contends that he could not have fraudulently induced payment of the advance (or engaged in any kind of misrepresentation) because Stone Key was obligated to pay him his 2015 bonus. However, this argument fails because the course of dealing between the parties demonstrates that the timing of payment of these bonuses was highly variable and was at the discretion of Mr. Urfirer. The court finds no obligation on the part of Stone Key to pay Mr. Taradash an advance prior to payment of the full 2015 bonus.

Having demonstrated fraudulent inducement as to the 2015 bonus advance, Stone Key has the option of voiding the 2015 Advance Agreement or affirming it and suing for damages for noncompliance. As our Supreme Court stated in *Texaco, Inc.* v. *Golan*, 206 Conn. 454, 538 A.2d 1017 (1988): "We have stated that 'fraud in the inducement of a contract ordinarily renders the contract merely voidable at the option of the defrauded party, who also has the choice of affirming the contract and suing for damages. If he pursues the latter alternative, the contract remains in [force. *A. Sangivanni & Sons* v. *F. M. Floryan & Co.*, 158 Conn. 467, 472, 262 A.2d 159 (1969)].' " *Texaco, Inc.* v. *Golan*, supra, 459 n.5.

Stone Key has chosen to rescind the 2015 Bonus Advance Terms. That agreement, as executed by the parties, states that the 2015 bonus would be paid in two installments: the advance of $250,000 would be paid as soon as "reasonably practicable" after March 15, 2016; the second installment of at least $250,000 was to be paid after receipt of transaction fees of at least $10,000,000 unless Stone Key terminates Mr. Taradash's employment for cause.

Because the court finds that Stone Key has proven by clear and satisfactory evidence that Mr. Taradash obtained his bonus through fraudulent inducement, the court finds that the 2015 Bonus Advance Agreement is void and ineffective. Stone Key is entitled to the return of the $250,000 advance and is not obligated to make the second installment payment of the 2015 bonus to Mr. Taradash, as specified in the 2015 Bonus Advance Terms.

Count VI

Intentional Misrepresentation

Stone Key has also pleaded Count VI, sounding in intentional misrepresentation or fraud arising out of Mr. Taradash's representations in connection with his efforts to convince Mr. Urfirer to pay him an advance against the 2015 bonus.

As indicated in the citation to *Harold Cohn & Co.* previously, the elements of fraudulent inducement and intentional misrepresentation are the same. *Peterson* v. *McAndrew*, 160 Conn. App. 180, 204, 125 A.3d 241 (2015) (claim for intentional misrepresentation or fraudulent inducement requires proof of same elements). Because the court has found that Stone Key has demonstrated the elements of fraud in the inducement by clear and satisfactory evidence, the court makes the same finding

as to a showing of the elements of intentional misrepresentation.

However, these claims differ in legal basis. Fraud in the inducement is a defense to a contract claim. Intentional misrepresentation is a tort. Accordingly, the measure of allowable damages differs in at least one major respect: an award of punitive damages in the amount of attorney's fees may be granted for intentional misrepresentation in appropriate circumstances. In *Whitaker* v. *Taylor*, 99 Conn. App. 719, 916 A.2d 834 (2007), the Appellate Court held: "In an action for fraud, the plaintiffs are entitled to punitive damages, in addition to general and special damages. . . . The [purpose] of awarding punitive damages is not to punish the defendant for his offense, but to compensate the plaintiff for his injuries. . . . The rule in this state as to torts is that punitive damages are awarded when the evidence shows a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . *DeSantis* v. *Piccadilly Land Corp.*, 3 Conn. App. 310, 315, 487 A.2d 1110 (1985)." (Internal quotation marks omitted.) *Whitaker* v. *Taylor*, supra, 730. "Common-law punitive damages, however, are limited . . . to litigation expenses, such as attorney's fees, less taxable costs." (Internal quotation marks omitted.) *McLeod* v. *A Better Way Wholesale Autos, Inc.*, 177 Conn. App. 423, 453, 172 A.3d 802 (2017); see also *O'Leary* v. *Industrial Park Corp.*, 211 Conn. 648, 651, 560 A.2d 968 (1989).

Part of the plaintiff's damage has been the cost of bringing this case, as requested in the complaint's ad damnum clause. An award of these costs is justified by a showing of intentional and wanton violation of the plaintiff's rights. The court finds that Stone Key has proven that the defendant's misrepresentations were intentional and wanton. The plethora of e-mails contemporaneous with his representations to Mr. Urfirer in connection with his efforts to induce him to pay an

advance against the 2015 bonus demonstrate in a remarkably clear way the deceit of Mr. Taradash's remarks. These messages include ones sent to his sister and to his colleague, Mr. Laddha, with whom Mr. Taradash would presumably be truthful. It is also corroborated by Mr. Taradash's termination of his lease.

The court finds for the plaintiff on Count VI sounding in intentional misrepresentation. As a result, the court orders the return of the $250,000 bonus and will render an award of reasonable attorney's fees incurred in connection with the prosecution of Count VI of this action, upon submission of a proper affidavit attesting to the hours and rates involved, and following a hearing thereon.

Count VII

Negligent Misrepresentation

Stone Key also alleges a claim for negligent misrepresentation with respect to Mr. Taradash's statements made in connection with the bonus advance. The elements of this tort are somewhat different from those for fraudulent inducement and intentional misrepresentation.

"To establish liability for negligent misrepresentation, a plaintiff must be able to demonstrate by a preponderance of the evidence: '(1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result.' *Nazami* v. *Patrons Mutual Ins. Co.*, [280 Conn. 619, 626, 910 A.2d 209 (2006)] . . . *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 443, 449 n.8, 27 A.3d 1 [standard of proof for claim of negligent misrepresentation is preponderance of evidence], cert. denied, 303 Conn. [915], 33 A.3d 739 (2011)

. . . .'' (Citation omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821–22, 116 A.3d 1195 (2015).

In addition to requiring a lower showing of scienter and a lower burden of proof, negligent misrepresentation differs from fraud in that it requires that the reliance be ''reasonable'' or ''justifiable.'' *National Groups*, *LLC* v. *Nardi*, 145 Conn. App. 189, 192 n.4, 75 A.3d 68 (2013) (''Our case law uses the term 'reasonably' interchangeably with 'justifiably' when considering whether a plaintiff's reliance is sufficient for purposes of negligent misrepresentation. See, e.g., *Glazer* v. *Dress Barn*, *Inc.*, 274 Conn. 33, 73, 873 A.2d 929 (2005).'').

''Reliance on a statement may become reasonable based on context, the statement's formal nature, the relationship between the parties; see *Williams Ford*, *Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 580, 657 A.2d 212 (1995); or when the statement is made by an individual with specialized knowledge; *Richard* v. *A. Waldman & Sons*, *Inc.*, 155 Conn. 343, 346–47, 232 A.2d 307 (1967). We have consistently held that reasonableness is . . . determine[d] based on all of the circumstances. *Williams Ford*, *Inc.* v. *Hartford Courant Co.*, supra, 580.'' (Internal quotation marks omitted.) *National Groups*, *LLC* v. *Nardi*, supra, 145 Conn. App. 194.

In this case, the court finds that the plaintiff has proved the elements of negligent misrepresentation by a preponderance of the evidence. As discussed previously, Mr. Taradash misrepresented his intentions about continuing to work for the Company and relocating his family to Connecticut, and he plainly knew what the truth of his intentions was. Mr. Urfirer's reliance on his remarks was reasonable under the circumstances because he had no reason to disbelieve them. Mr. Taradash's e-mails show that he took precautions to assure that his true plans were kept secret from the Company.

Finally, Stone Key suffered pecuniary loss because it paid the advance prior to when it was planning to pay the bonuses.

As a result, the court finds for the plaintiff on Count VII of the complaint but awards no damages thereunder because Stone Key has not articulated any damages that would not be duplicative of damages awarded under other counts.

Count VIII

Breach of Fiduciary Duty

In its complaint, Stone Key alleges that Mr. Taradash owed it a fiduciary duty of loyalty because he was an employee and a vice president. It claims he breached that duty because he pursued outside business interests (as defined by the Compliance Manual), used Stone Key resources in that pursuit, and did not disclose those interests. As a result, Stone Key claims it is entitled to damages, including the return of all compensation received by Mr. Taradash from Stone Key during the period of his Edify efforts from August, 2014, to the termination of his employment in 2016, which it claims aggregated $1,534,753.75.

The employment relationship regularly gives rise to a fiduciary relationship without regard to at-will status. In the leading case of *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 154 A.3d 989 (2017), our Supreme Court stated: "This court previously has recognized the viability of a claim by an employer against its employee for a breach of the duty of loyalty, which is grounded in agency principles. See *Town & Country House & Homes Service, Inc.* v. *Evans*, 150 Conn. 314, 317–18, 189 A.2d 390 (1963) (employee breached duty of loyalty by soliciting employer's customers for his own competing business while still working for employer); *Breen* v. *Larson College*, 137 Conn. 152, 153–55, 157, 75 A.2d

39 (1950) (academic dean breached duty of loyalty to college by secretly undermining administration's position as to potential legal claim, defaming college in process); *Phoenix Mutual Life Ins. Co.* v. *Holloway*, 51 Conn. 310, 314–15 (1884) (insurance agent breached duty of loyalty to insurer by failing to remit premium payments as previously agreed). . . .

" 'The general principle for the agent's duty of loyalty according to the Restatement is that the agent must act solely for the benefit of the principal in matters connected with the agency.' . . . *News America Marketing In-Store, Inc.* v. *Marquis*, 86 Conn. App. 527, 535, 862 A.2d 837 (2004), aff'd, 276 Conn. 310, 885 A.2d 758 (2005); see also 2 Restatement (Third), Agency § 8.01, comment (b), p. 250 (2006) ('the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship')." (Footnote omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 730–31.

Here, an agency relationship existed between Stone Key and Mr. Taradash. His position as vice president, his training of the Company's analysts and associates, and his participation in business pitches and other important activities of the Company attest to the trust reposed in him by the management of the Company. Accordingly, the court holds that Mr. Taradash owed Stone Key a fiduciary duty of loyalty.

However, as expressed in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 731, the duty pertains to " 'matters connected with the agency relationship' " of the employee. See *Town & Country House & Homes Service, Inc.* v. *Evans*, supra, 150 Conn. 317 ("[t]he defendant, as an agent of the plaintiff, was a fiduciary with respect to matters within the scope of his agency"). The investigation of a potential IT training business in

the Philippines had no connection with Mr. Taradash's employment with Stone Key. Stone Key has shown no diversion of corporate opportunity or competition with its business while Mr. Taradash was employed by Stone Key. As a result, Stone Key has not proven a breach of Mr. Taradash's fiduciary duty of loyalty.

Even if the court were to find a breach of the defendant's duty of loyalty, which it does not, the remedy of forfeiture of Mr. Taradash's compensation for an eighteen month period would be inappropriate. In *Wall Systems, Inc.*, the court held that such a remedy is within the trial court's discretion and set forth the factors to be considered in deciding whether to order the forfeiture: "For the foregoing reasons, we conclude that discretionary application of the remedies of forfeiture and disgorgement is both proper and desirable. In determining whether to invoke these remedies, a trial court should consider all of the facts and circumstances of the case before it. The following list of factors, which we have gleaned from existing jurisprudence, is not intended to be exhaustive, nor will every factor necessarily be applicable in all cases: the employee's position, duties and degree of responsibility with the employer; the level of compensation that the employee receives from the employer; the frequency, timing and egregiousness of the employee's disloyal acts; the wilfulness of the disloyal acts; the extent or degree of the employer's knowledge of the employee's disloyal acts; the effect of the disloyal acts on the value of the employee's properly performed services to the employer; the potential for harm, or actual harm, to the employer's business as a result of the disloyal acts; the degree of planning taken by the employee to undermine the employer; and the adequacy of other available remedies, as herein discussed." *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 737.

In that case, our Supreme Court upheld the decision of the trial court not to order forfeiture of the defendant's compensation from the plaintiff employer even though the defendant worked for a competitor while employed by the plaintiff and accepted three kickbacks from a subcontractor in connection with work for the plaintiff. Id., 718. The court found that the plaintiff had failed to prove that its business had been harmed and, in connection with the kickbacks, found that the "plaintiff's proven damages were negligible when compared to the large amount the plaintiff was seeking to recover." Id., 740. Additionally, the court below found that other damages awarded were adequate, including the denial of the defendant's counterclaim for lost wages. Id.

Applying the *Wall Systems*, *Inc.*, factors to this case, the court finds that the defendant was privy to the Company's analytical methods, but there is no evidence that he disclosed them to others. Mr. Taradash was well compensated, albeit irregularly. His Edify activities varied in intensity over the eighteen month period at issue. They were wilful and carefully planned, partly to avoid conflict with, or discovery by, Stone Key. There is no evidence of any impact on the value of Mr. Taradash's services performed for Stone Key or that such activities undermined Stone Key. There are alternative remedies available, which are awarded by this decision.

In conclusion, the court determines that it would be inequitable to order the forfeiture of Mr. Taradash's compensation under these circumstances. As noted by our Supreme Court in *Wall Systems*, *Inc.*: "The remedy is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned." (Internal quotation marks omitted.) Id., 734. Stone Key has not contended that Mr. Taradash did not earn his compensation despite exploring the possibility of establishing Edify in the Philippines. As

a result, forfeiture of his substantial compensation, especially in light of the plaintiff's negligible or nonexistent damages, would be unjust.

Count X

Violation of CUTPA

Finally, the complaint alleges that the defendant violated CUTPA because he engaged in outside business activities, breached his duty of loyalty, used the Company's facilities without authorization, and failed to disclose his outside activities to Stone Key. Although the plaintiff has largely proven the facts alleged in the complaint, the court does not agree that they constitute a violation of CUTPA.

In the first place, CUTPA does not apply to the employer-employee relationship. As found in *Quimby* v. *Kimberly Clark Corp.*, 28 Conn. App. 660, 613 A.2d 838 (1992): "The relationship in this case is not between a consumer and a commercial vendor, but rather between an employer and an employee. There is no allegation in the complaint that the defendant advertised, sold, leased or distributed any services or property to the plaintiff." Id., 670. As a result, the court held that CUTPA would not apply to the facts of the case. The same result is appropriate here. The actions claimed to violate CUTPA all relate to the employer-employee relationship, e.g., violation of the Compliance Manual by engaging in outside business activities and failing to disclose them, and violating the TriNet Handbook by using company materials for personal purposes. See *United Components, Inc.* v. *Wdowiak*, 239 Conn. 259, 264, 684 A.2d 693 (1996) (CUTPA does not apply to conduct in employment relationship because such conduct is not in trade or commerce); see also R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2017–

2018 Ed.) § 3.3, pp. 131–47 (employment, partnership, intracorporate, and association relationships).

Here, the conduct of which Stone Key complains occurred while Mr. Taradash was employed by Stone Key, and said conduct was regulated by the plaintiff's Compliance Manual and employee handbook. As a result, these events occurred in the context of the employer-employee relationship, and CUTPA does not apply to them.

Second, General Statutes § 42-110g (a) provides in relevant part: "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. . . ." Thus, ascertainable loss is a prerequisite to the prosecution of a CUTPA claim. In *National Waste Associates, LLC* v. *Scharf*, 183 Conn. App. 734, 194 A.3d 1 (2018), the Appellate Court held that a waste management broker failed to establish that it suffered an ascertainable loss as a result of a former employee's alleged actions, specifically, using the broker's trade secrets and confidential information to solicit its customers and prospective customers to do business with a competitor, where the former employee's misconduct did not cost the broker any specific customer. Similarly, because Stone Key was unable to prove any loss suffered by it as a result of the activities alleged in its CUTPA count, i.e., the defendant's exploration of the Edify matter without disclosure and the use of company equipment in that endeavor, it has not proved that it suffered an ascertainable loss and so has not established its case under CUTPA.

DEFENDANT'S COUNTERCLAIMS

The defendant pleaded thirteen counterclaims in his answer. Although the defendant has not indicated which counterclaims he contends are still at issue, several have been explicitly dropped or many not pursued, either through failure to present evidence at trial or absence of discussion of them in posttrial briefing. As a result, under the recent holding of the Appellate Court in *Seven Oaks Enterprises, L.P.* v. *DeVito*, 185 Conn. App. 534, 558, 198 A.3d 88 (2018), the court finds that the following counterclaims have been abandoned: claims relating to the 2013 bonus (Nos. 1 and 2); breach and conduct relating to the 2014 bonus (Nos. 3 and 4);[4] discontinuance of 401 (k) contributions (Nos. 7 and 8); unjust enrichment, quantum meruit, and promissory estoppel relating to the 2015 bonus (Nos. 9, 10 and 11); and fraud and civil theft occurring during the employment relationship (Nos. 12 and 13). Counterclaims remaining at issue are those relating to nonpayment of the full amount of the 2015 bonus (Nos. 5 and 6).

Fifth Counterclaim

Breach of Contract re 2015 Bonus

The Fifth Counterclaim claims that the plaintiff broke its promise to pay the defendant "Street level" compensation for 2015 because to date he has received only his salary of $175,000 and the bonus of $250,000, which he contends is $325,000 to $375,000 below "Street level."[5] The defendant also asserts that Stone Key

[4] If the defendant contends that he has not abandoned Counterclaims 1, 2, 3 and 4, regarding payment of the 2013 and 2014 bonuses, the court finds them without merit because the defendant admitted at trial that he had received "Street level" compensation for those years, and because those bonuses did not constitute "wages" as discussed in connection with the Sixth Counterclaim.

[5] The defendant also asserted that the imposition of the seventy-five day notice period prior to his resignation being effective deprived him of the ability to earn wages during that period. However, he submitted no proof of losses of this kind at trial and received salary from Stone Key during this period. Accordingly, the court does not consider this claim.

breached its contractual promise to pay him a "minimum" bonus of $500,000, depending on the receipt of $10,000,000 in advisory fees. The defendant claims that Stone Key has in fact received that fee income (without submission of proof), and so owes him the second installment of $250,000.

Neither of these theories has merit. As to the first one, Mr. Taradash executed the 2015 Bonus Agreements, which supplanted any oral contracts he claimed existed. Although he has claimed that the terms of the agreement are invalid because they lack additional compensation, the promise of an advanced payment disposes of that argument. Additionally, Mr. Taradash admitted that no Wall Street compensation survey was prepared for 2015, so his claim relating to the promised amount of his 2015 bonus is without evidentiary support.

As to the second argument, which is that Mr. Taradash is entitled to the second 2015 bonus payment under the 2015 Bonus Agreements, his fraudulent inducement of that agreement and intentional misrepresentation with respect to that agreement have deprived him of any right to enforce it because it is void by reason of his fraudulent conduct.

Sixth Counterclaim

Claims under §§ 31-72 and 31-73 re 2015 Bonus

The Sixth Counterclaim contends in part that the bonus Stone Key promised to pay the defendant for services rendered during 2015 constitutes "wages" as defined by § 31-71a (3). As a result, the defendant claims that any alteration of employment terms that Stone Key required prior to making payment was invalid under public policy and General Statutes § 31-71d. Further, Stone Key's failure to pay the entire bonus in March, 2016, constituted an improper withholding of wages in

violation of General Statutes § 31-71e. Accordingly, the defendant claims that he is entitled to an award of double the promised wages, plus fees and costs, and a declaration that none of the written agreements entered into in 2016 relating to the 2015 bonus may be asserted in defense to his claims. The defendant also claims that Stone Key's demand for the refund of the advance against the 2015 bonus constituted an unlawful demand for a " 'refund of wages' " in violation of § 31-73 (a) through (d).

A

2015 Bonus Did Not Constitute "Wage"

The court initially finds for the plaintiff on the Sixth Counterclaim because the evidence submitted at trial demonstrated that the 2015 bonus was not a "wage" within the meaning of § 31-71a (3). Our Supreme Court has addressed the circumstances under which a bonus award constitutes a "wage" within the meaning of § 31-71a (3). See *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 2 A.3d 873 (2010); *Ziotas* v. *Reardon Law Firm, P.C.*, 296 Conn. 579, 997 A.2d 453 (2010); *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 961 A.2d 349 (2008).

In *Assn. Resources, Inc.* v. *Wall*, supra, 298 Conn. 173, our Supreme Court determined that the bonuses at issue were wages because they were nondiscretionary and calculated in accordance with a formula set forth in the employment agreement. The plaintiff was "a senior level, executive manager of one of the defendant's divisions, with the bonus tied directly to the success of that specific division, rather than the performance of the defendant as a whole." (Emphasis omitted.) Id., 177–78.

In *Weems* v. *Citigroup, Inc.*, supra, 289 Conn. 769, our Supreme Court held "that bonuses that are awarded solely on a discretionary basis, and are not linked solely

to the ascertainable efforts of the particular employee, are not wages under § 31-71a (3)." Id., 782. "Our superior courts interpreting *Weems* have concluded that 'an employee who seeks to recover a bonus under the wage statutes must prove that the bonus meets two criteria. First, the bonus cannot be a wage if its award is solely within the employer's discretion. . . . Second, the bonus must be linked *solely* to the employee's performance or efforts and not linked to other factors unrelated to the particular employee's performance.' . . . *Commissioner of Labor* v. *Fireman's Fund Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-08-4039312-S (February 18, 2010) (*Prescott*, *J.*) (49 Conn. L. Rptr. 303, 306); see also *Hayes* v. *Pfizer*, *Inc.*, Superior Court, [judicial district of Middlesex] Docket No. CV-15-6014614-S (March 16, 2017) (*Domnarski*, *J.*)]." (Emphasis in original.) *Anderson* v. *Hartford Financial Services Group*, *Inc.*, Superior Court, judicial district of Harford, Docket No. CV-14-6052974-S (December 18, 2017) (*Bright*, *J.*) (65 Conn. L. Rptr. 652, 662). However, a bonus is not a "wage" even "when an employee is contractually entitled to a [bonus when] the amount is indeterminate and discretionary." *Ziotas* v. *Reardon Law Firm*, *P.C.*, supra, 296 Conn. 589.

As a result, the court must examine the 2015 Bonus in a two step process. First, to determine whether the defendant's bonus was awarded solely on a discretionary basis and, second, whether the amount was linked solely to the efforts of the individual employee or was indeterminate and discretionary. The plaintiff claimed that the payment of any bonus and the amount of any such bonus was entirely in its discretion. The defendant claimed that he had an enforceable oral contract that he would receive a bonus equivalent to "Street pay" levels without consideration of any discretionary factors.

The court finds that the evidence demonstrates a reality between these two extremes. Because of Mr. Urfirer's testimony that he always received a bonus of some sort while working on Wall Street, and because the magnitude of the bonus as a percentage of Mr. Taradash's compensation, generally in excess of 66 percent, was so large, the court finds that Mr. Taradash was contractually entitled to receive an annual bonus. However, the amount of the bonus was within Stone Key's discretion, within the boundaries of "Street pay." The calculation of the bonus was dependent upon the determination of several factors by Mr. Urfirer, including the employee's performance, the performance of the Company, general economic conditions, and anticipated future revenues. See Finding of Fact No. 27. Further, the course of dealing of the parties shows that the timing of payment was entirely within Mr. Urfirer's discretion.

As a result of the foregoing, the court finds that the 2015 Bonus did not constitute a "wage" within the meaning of § 31-71a because its amount and time of payment were within the discretion of Stone Key.

B

Defendant's Claim for Improper Refund of Wages is Moot

Finally, the defendant appears to claim that the 2015 Bonus Advance Agreement created an unlawful refund of wages under § 31-73. (Refund of wages for furnishing employment.) However, the court has not ordered the refund of the $250,000 advance under the "cause" provisions of the Bonus Advance Agreement but as a result of the defendant's fraudulent behavior. Accordingly, the defendant's contention that the return of the bonus would constitute an unlawful return of wages is not at

issue in the case and is moot.[6] As a result, the court finds against the defendant with respect to his second contention, relating to a violation of § 31-73, and the court finds for the plaintiff with respect to the Sixth Counterclaim.

CONCLUSION

By reason of the foregoing, the court finds for the defendant on Count I (Breach of Contract as to the 2014 Bonus), Count III (Breach of the 2015 Bonus Advance Agreement), Count VIII (Breach of Fiduciary Duty), and Count X (Violation of CUTPA). The court finds for the plaintiff on Count V (Fraudulent Inducement of the 2015 Bonus Advance Agreement), Count VI (Intentional Misrepresentation), Count VII (Negligent Misrepresentation), and the defendant's Fifth Counterclaim (Breach of Contract re 2015 Bonus) and Sixth Counterclaim (Violation of §§ 31-72 and 31-73 re 2015 Bonus), and directs the dismissal of all other claims against the counterclaim defendants.

Accordingly, judgment shall enter against the defendant consistent with the above, with damages in favor of the plaintiff, Stone Key Group, LLC, against the defendant, Reid Taradash, in the amount of $250,000, plus appropriate interest and attorney's fees

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GABRIEL COULOUTE ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF GLASTONBURY ET AL.
(AC 43375)

Elgo, Alexander and Sheldon, Js.

Syllabus

The plaintiffs, G, a high school student, and his mother, sought damages from the defendants, the Board of Education of the Town of Glastonbury and several school administrators and educators as a result of injuries

[6] In any event, the statute would not apply to the facts here because it prohibits the demand of return of paid compensation "to secure employment or continue in employment." General Statutes § 31-73 (b). The 2015 Bonus

G sustained while playing football at the high school. The plaintiffs had brought a previous action in connection with G's injuries in which the trial court granted the defendants' motion to strike and thereafter rendered judgment for the defendants after the plaintiffs failed to replead. The plaintiffs then appealed to this court but thereafter withdrew the appeal. The defendants in both actions were the same with the exception of a football coach who was named as a defendant in each case. The defendants in the present action filed a motion for summary judgment, claiming that the doctrine of res judicata barred the present action regardless of any additional facts or different theories of liability that the plaintiffs alleged. The trial court granted the defendants' motion for summary judgment, concluding that the plaintiffs' claims were barred by the doctrine of res judicata. The plaintiffs thereafter appealed to this court. *Held* that the judgment of the trial court was affirmed, as the issues were properly resolved in that court's thorough and well reasoned memorandum of decision, which this court adopted as a proper statement of the facts, issues and applicable law.

Argued March 10—officially released April 20, 2021

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Hartford, where the court, *Hon. Robert B. Shapiro*, judge trial referee, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Mark S. Kliger, with whom, on the brief, was *Irving J. Pinsky*, for the plaintiffs (appellants).

Keith R. Rudzik, for the defendants (appellees).

Opinion

PER CURIAM. The plaintiffs, Gabriel Couloute and his mother, April Couloute,[1] appeal from the summary judgment rendered by the trial court in favor of the

Advance Agreement required return of the Advance in the event of termination for cause.

[1] For clarity, we refer to Gabriel Couloute and April Couloute individually by their first names and collectively as the plaintiffs.

defendants, the Board of Education of the Town of Glastonbury; Alan Bookman, Superintendent of Schools; Nancy E. Bean, Principal of Glastonbury High School (high school); Trish Witkin, athletic director at the high school; and Mark Alexander, junior varsity football coach at the high school. On appeal, the plaintiffs claim that the court improperly concluded that the doctrine of res judicata barred the present action. We affirm the judgment of the trial court.

In 2016, the plaintiffs commenced a civil action (2016 action) regarding injuries that Gabriel allegedly sustained while engaging in interscholastic football activities at the high school during the 2016–2017 school year. The defendants in that action were identical to those in the present case, with one exception—Varsity Football Coach Scott Daniels was named as a defendant instead of Alexander. In their complaint, the plaintiffs set forth twenty-four counts alleging battery, fraud, negligence, due process violations, and violations of the Racketeer Influenced and Corrupt Organizations Act. See 18 U.S.C. § 1961 et seq. (2012). The defendants filed a motion to strike the complaint in its entirety, which the court granted by memorandum of decision dated January 5, 2018. When the plaintiffs failed to replead, the court rendered judgment in favor of the defendants. Although the plaintiffs filed an appeal of that judgment with this court, they subsequently withdrew that appeal.

Approximately two months after they withdrew the appeal, the plaintiffs initiated the present action. They alleged twenty counts in their complaint sounding in negligence and recklessness, all related to a concussion that Gabriel allegedly sustained while playing football at the high school on October 20, 2016. The defendants thereafter moved for summary judgment, claiming that the judgment in the 2016 action "was rendered on the merits, and the doctrine of res judicata is an absolute bar to this second action on the same matters/causes

of actions and any others that could have been raised in the [2016 action] regardless of what additional facts or different theories of liability are raised in this second action." The plaintiffs filed an opposition to that motion, and the court heard argument from the parties on July 8, 2019. On August 29, 2019, the court issued a memorandum of decision rendering summary judgment in favor of the defendants, concluding that the doctrine of res judicata barred the plaintiffs' claims. The plaintiffs now challenge the propriety of that determination.

Our examination of the pleadings, affidavits, and other proof submitted, as well as the briefs and arguments of the parties, persuades us that the judgment should be affirmed. The issues properly were resolved in the court's thorough and well reasoned memorandum of decision. See *Couloute* v. *Board of Education*, Superior Court, judicial district of Hartford, Docket No. CV-18-6106959-S (August 29, 2019) (reprinted at 203 Conn. App. 124, A.3d). We therefore adopt that memorandum of decision as a proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed.

APPENDIX

GABRIEL COULOUTE ET AL. *v.* BOARD OF EDUCATION OF THE TOWN OF GLASTONBURY ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-18-6106959-S

Memorandum filed August 29, 2019

Proceedings

Memorandum of decision on defendants' motion for summary judgment. *Motion granted.*

Irving J. Pinsky, for the plaintiffs.

Keith R. Rudzik, for the defendants.

Opinion

HON. ROBERT B. SHAPIRO, JUDGE TRIAL REFEREE. Before the court is the defendants' motion for summary judgment (#104). The issue presented is whether the court should grant the defendants' motion on the ground that the action is barred by the doctrine of res judicata. The court heard oral argument at short calendar on July 8, 2019.

I

BACKGROUND

Gabriel Couloute alleges that he suffered a football related concussion from playing football at Glastonbury High School during the 2016–2017 school year. During this time, Gabriel Couloute was a minor. His mother, April Couloute, the coplaintiff in this action, alleges that she incurred damages and losses as a result of her

* Affirmed. *Couloute* v. *Board of Education*, 203 Conn. App. 120, A.3d (2021).

son's medical care. In the plaintiffs'[1] complaint, they allege twenty counts against the defendants, the Board of Education of the Town of Glastonbury; Alan Bookman, Superintendent of Schools for the Glastonbury School District; Nancy E. Bean, Principal of Glastonbury High School; Trish Witkin, athletic director; and Mark Alexander, junior varsity football coach.

Each of the plaintiffs have alleged claims of negligence and recklessness against each of the defendants. The first, fifth, ninth, thirteenth, and seventeenth counts are negligence based claims against each of the defendants for their multitude of various failures arising out of Gabriel Couloute's participation in an October 20, 2016 football practice where he sustained a concussion. In the second, sixth, tenth, fourteenth, and eighteenth counts, Gabriel Couloute brought a recklessness claim against each of the defendants on similar grounds. In the third, seventh, eleventh, fifteenth, and nineteenth counts of the complaint, April Couloute brought a negligence claim against each of the named defendants for damages she incurred for paying for treatment and medical care for Gabriel Couloute. And in the fourth, eighth, twelfth, sixteenth, and twentieth counts of the complaint, April Couloute asserted a claim of recklessness against the defendants.

The defendants moved for summary judgment (#104) on the ground that the doctrine of res judicata bars this action. The defendants claim that the plaintiffs already brought these claims and/or had the opportunity to bring these claims against each of the defendants. The defendants further provide that all the defendants in the first action are the same in the second action with the exception of Mark Alexander, who has been substituted for Scott Daniels in the prior action.[2] In the prior

[1] Gabriel Couloute and April Couloute are identified collectively as the plaintiffs and individually by name where appropriate.

[2] In the first action, Scott Daniels, varsity football coach, was a defendant in the action instead of Mark Alexander.

action, April Couloute filed a twenty-four count complaint, on behalf of Gabriel Couloute, against the Glastonbury Board of Education, Bookman, Bean, Witkin, and Daniels. In that first action, counts twenty through twenty-four were negligence based claims against each of the aforementioned defendants. Ultimately, the prior action was disposed of by a motion to strike in *Couloute* v. *Board of Education*, Superior Court, judicial district of Hartford, Docket No. CV-17-6074140-S (January 5, 2018) (*Shapiro*, *J.*). The plaintiffs took no further action to replead the complaint. In the present case, the plaintiffs filed papers in opposition (#106). The defendants filed a reply (#107).

II

STANDARD OF REVIEW

"Summary judgment is a method of resolving litigation when 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. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried. . . . However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "[S]ummary judgment is an appropriate vehicle for raising a claim of res judicata . . . ." (Citations omitted.) *Joe's Pizza*, *Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 867 n.8, 675 A.2d 441 (1996). "Because res judicata or collateral estoppel, if raised, may be dispositive of a claim, summary judgment [is] the appropriate method for resolving

a claim of res judicata." *Jackson* v. *R. G. Whipple, Inc.*, 225 Conn. 705, 712, 627 A.2d 374 (1993).

III

DISCUSSION

The defendants argued that the motion for summary judgment should be granted on the ground of res judicata. The plaintiffs countered that summary judgment is inappropriate because, when the first action and the motion to strike were filed, the information they now have was not available to them. The plaintiffs claimed that this lack of information hindered their ability to fairly litigate the matter. Further, the plaintiffs argued that, pursuant to public policy, the court should not apply res judicata to this case.

A

Res Judicata

"[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to *any other admissible matter which might have been offered for that purpose*. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue."

(Emphasis in original; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019).

1

Element One

With respect to the first element, a judgment rendered on the merits, it is well established "[t]hat a judgment rendered pursuant to a motion to strike is a judgment on the merits . . . ." *Santorso* v. *Bristol Hospital*, 127 Conn. App. 606, 617, 15 A.3d 1131 (2011), aff'd, 308 Conn. 338, 63 A.3d 940 (2013). In the first action, the court granted the motion to strike the complaint in its entirety. See *Couloute* v. *Board of Education*, supra, Superior Court, Docket No. CV-17-6074140-S. The plaintiffs do not argue that the motion to strike was not a judgment on the merits. The first element is satisfied because the ruling on the motion to strike was a judgment on the merits.

2

Element Two

"The following principles govern the second element of res judicata, privity . . . . Privity is a difficult concept to define precisely. . . . There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather it is, in essence, a shorthand statement for the principle that [preclusion] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to

justify preclusion. . . . While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented . . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Citation omitted; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 75–76.

"Consistent with these principles, this court and other courts have found a variety of factors to be relevant to the privity question. These factors include the functional relationships between the parties, how closely their interests are aligned, whether they share the same legal rights, equitable considerations, the parties' reasonable expectations, and whether the policies and rationales that underlie res judicata—achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments—would be served. . . . [T]he crowning consideration, [however, is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." (Citations omitted; internal quotation marks omitted.) Id., 76–77.

The first action was against the Glastonbury Board of Education, Bookman, Bean, Witkin, and Daniels. In the current action, the defendants are all the same with the exception of Daniels, who has been replaced with another Glastonbury High School football coach, Alexander. The plaintiffs argued that Daniels and Alexander are not in privity because the facts alleged against Daniels are factually different from the facts alleged against Alexander. The defendants counter that Alexander was an agent of the same municipal board of education as was Daniels, and, therefore, Alexander was in privity

for purposes of the first action. "It is well settled law that an action against a government official in his or her official capacity is not an action against the official, but, instead is one against the official's office and, thus, is treated as an action against the entity itself. . . . [In general] an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is not a suit against the official personally, for the real party in interest is the entity. . . . Since [officials] represent not their own rights but the rights of the municipality the agents of the same municipal corporation are in privity with each other and with the municipality." (Internal quotation marks omitted.) *C & H Management, LLC* v. *Shelton*, 140 Conn. App. 608, 614, 59 A.3d 851 (2013). Similarly, Daniels and Alexander were in privity because both individuals were agents for Glastonbury High School on behalf of the town of Glastonbury. It is clear that all the defendants in the current case were all of the defendants in the first action with the exception of the aforementioned substitution of coaches. The second element of privity is satisfied.

3

Element Three

The third element requires an adequate opportunity to litigate the matter fully. The defendants argued that this third element is satisfied because, during the first case, the plaintiffs took all the steps and opportunities to fully litigate the matter. The plaintiffs counter that they did not have a fair opportunity to litigate the claims due to the unavailability of facts at the time of the prior action since Gabriel Couloute would not speak in any details as to the events that occurred during the football practice on October 20, 2016.

In *Tirozzi* v. *Shelby Ins. Co.*, 50 Conn. App. 680, 719 A.2d 62, cert. denied, 247 Conn. 945, 723 A.2d 323 (1998), the plaintiff brought the same claims against the same

parties in two separate causes of actions. The first action was disposed of by a motion to strike. The Appellate Court concluded that the second action was barred by the doctrine of res judicata. The court reasoned that "[t]he motion to strike required the trial court to decide the merits of the plaintiff's claim. The parties had the opportunity to fully litigate the matter. The motion to strike was contested, and both parties participated in oral argument. . . . After the trial court granted the motion to strike, the plaintiff neither repleaded pursuant to Practice Book § 10-44 nor took an appeal. The plaintiff, therefore, had an adequate opportunity to litigate the matter in the first action and to seek appellate review." Id., 686–87.

In the first action, the plaintiffs brought a twenty-four count complaint against the defendants. The court granted the motion to strike the entire complaint, which included a negligence claim. The plaintiffs filed a motion in opposition and supporting memorandum of law. After the ruling, the plaintiffs filed a request for reconsideration on the motion to strike. The plaintiffs further filed an appeal. Similar to *Tirozzi*, in the present action, the defendants contend that the plaintiffs had the opportunity to fully litigate the matter because the plaintiffs prepared a memorandum of law in opposition to the motion to strike, attended oral argument on the motion, filed a motion for reconsideration, and had the opportunity to replead the causes of action. The defendants further point out that the plaintiffs subsequently filed an appeal in the first action, regardless of the fact that it was later withdrawn.

As for the recklessness claims, our Supreme Court has emphasized that it is a "well settled rule that [a] judgment is final not only as to every matter which was offered to sustain the claim, *but also as to any other admissible matter which might have been offered for*

that purpose . . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 607–608, 922 A.2d 1073 (2007). More recently, our Supreme Court, again, reiterated this proposition, stating that, "[u]nder claim preclusion analysis, a claim—that is, a cause of action—includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. . . . Moreover, claim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or *might have been made*." (Emphasis in original; internal quotation marks omitted.) *Ventres* v. *Goodspeed Airport, LLC*, 301 Conn. 194, 205–206, 21 A.3d 709 (2011).

Accordingly, the plaintiffs had an adequate opportunity to fully litigate the claims in the first action and to seek appellate review. The recklessness claims are identical to the negligence claims, except for the language providing that the actions were done "consciously" or "knowingly." Although the plaintiffs did not make a claim for recklessness in the first action, it could have been asserted in the first action; thus, it is also extinguished under the doctrine of res judicata. As such, the third element is satisfied.

4

Element Four

"To determine whether claims are the same for res judicata purposes, this court has adopted the transactional test. . . . Under the transactional test, res judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out

of which the action arose. . . . What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. . . . [E]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action. . . . In applying the transactional test, we compare the complaint in the [present] action with the pleadings and the judgment in the earlier action." (Citations omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 159–60, 129 A.3d 677 (2016).

The defendants argued in support of their motion that these are the same claims. They argued that "[t]he central transactions to all of the claims in the first action was the purported inadequacy of and lack of establishing/following rules and procedures concerning head injuries, the failure to provide information concerning the dangers of concussions caused by repeated or severe head blows in the sport of high school football, and the mishandling of young Gabriel Couloute's football related injuries by school administrators and the coaches." See Defendants' Memorandum of Law (#105) p. 17. The plaintiffs countered that "[t]he first action [was] predicated on repeated physical contact generally occurring at unspecified and undetermined times during the 2016–2017 football season, and cumulatively leading to injury. There was no specific factual event or events identified as to place, date or time as causing a specific injury." See Plaintiffs' Memorandum of Law (#106) p. 5. They contend that the second action is based on a very specific set of facts detailing the date, time, place, manner and precise injury causing event.

Applying the transactional test, the actions are clearly related in time. Specifically, the first action alleged negligence that occurred in the time frame of the 2016–2017 school year. In the present action, the plaintiffs alleged negligence and recklessness claims for injuries that occurred on October 20, 2016. Further, these head injuries in the current action have the same origin as in the first action, to wit, the participation in playing high school football. Additionally, the defendants argued that the plaintiffs have the same motivation, which is the recovery of damages from head trauma resulting in brain injuries in 2016, and the rectification of inadequate protocols and procedures related to concussions.

Although the plaintiffs argued that the current action alleged narrower claims that are factually different from the claims in the first action, due to new information provided by Gabriel Couloute, and facts regarding exacerbation of his injury and/or impediment to his recovery resulting from the failure and/or delay in implementing educational accommodations, these arguments, nevertheless, fail. "The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Internal quotation marks omitted.) *New England Estates, LLC* v. *Branford*, 294 Conn. 817, 842, 988 A.2d 229 (2010). Similarly, the Appellate Court has stated that "[t]he plaintiffs cannot reassert their claim by proffering additional or new evidence." *Honan* v. *Dimyan*, 63 Conn. App. 702, 709, 778 A.2d 989, cert. denied, 258 Conn. 942, 786 A.2d 430 (2001).

Viewing the complaint in the light most favorable to the plaintiffs and assuming that the plaintiffs truthfully did not have certain factual information surrounding a specific incident within that 2016–2017 football year time frame available to them, Connecticut law does not allow for the plaintiffs to circumvent the doctrine of

res judicata by the reassertion of the same claims even after new information or evidence has been discovered.

B

Recognized Exceptions to Res Judicata

"In establishing exceptions to the general application of the preclusion doctrines, we have identified several factors to consider, including: (1) whether another public policy interest outweighs the interest of finality served by the preclusion doctrines . . . (2) whether the incentive to litigate a claim or issue differs as between the two forums . . . (3) whether the opportunity to litigate the claim or issue differs as between the two forums . . . and (4) whether the legislature has evinced an intent that the doctrine should not apply." (Citations omitted.) *Powell* v. *Infinity Ins. Co.*, supra, 282 Conn. 603. As discussed previously, the plaintiffs' motivation to litigate the claim was the same in the first action, the plaintiffs had an opportunity to litigate the claims in the prior action, and there has been no argument that the legislature has evinced an intent that the doctrine should not apply. Therefore, the only arguably applicable exception concerns whether another public policy interest outweighs the interest of finality.

"Because [the] doctrines [of res judicata and collateral estoppel] are judicially created rules of reason that are enforced on public policy grounds . . . whether to apply either doctrine in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide

repose by preventing a person from being harassed by vexatious litigation. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest . . . . [T]he application of either doctrine has dramatic consequences for the party against whom it is applied, and . . . we should be careful that the effect of the doctrine does not work an injustice. . . . Thus, [t]he doctrines of preclusion . . . should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Citations omitted; internal quotation marks omitted.) Id., 601–602.

Balancing the public policy considerations of the interests of the defendants and the judicial system in bringing litigation to a close, and the plaintiffs in vindication of a just claim, the evidence of these repetitive claims provides support for bringing litigation to an end. Granting the motion for summary judgment in this case is in conformity with the exact purpose for which the doctrine of res judicata exists. This case does not present itself as one that would frustrate social policies that are based on values equally or more important than that which is afforded by finality in legal controversies.

CONCLUSION

For the reasons stated previously, there is no genuine issue as to any material fact. The defendants have demonstrated that they are entitled to judgment as a matter of law. The defendants' motion for summary judgment is granted on the ground of res judicata.[3]

[3] During argument at short calendar on July 8, 2019, on the record, the defendants stated their intention to go forward on the theory of res judicata and stated that the court could consider the previously raised issue of collateral estoppel waived. As such, the collateral estoppel issue has not been addressed in this memorandum.

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NOTICE OF CONNECTICUT STATE AGENCIES

PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

NOTICE OF INTENT TO REVISE ITS PLAN OF OPERATIONS

In accordance with sections 1-121 and 31-49o of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority (''hereinafter the CT Paid Leave Authority'') intend to revise its Plan of Operations to correct typographical errors; revise the timeline for adopting a budget; establish a procedure in the event the Board of Directors does not adopt a budget in a timely fashion; and enable the CT Paid Leave Authority to utilize contracts competitively procured by any department, division or branch of the State of Connecticut.

All written comments regarding these procedures must be submitted by May 20, 2021 to the CT Paid Leave Authority via email at PFMLIAComments@ct.gov.

MISSION

The Paid Family and Medical Leave Insurance Authority (PFMLIA) helps Connecticut's workforce navigate health challenges and life changes with greater financial security.

VISION

Connecticut's workforce has access to reliable income replacement to take care of themselves and their families during the most important times in their lives.

OPERATIONS

ADMINISTRATION OF POLICY

The CEO has overall responsibility for directing the implementation and administration of policies and procedures. On a day-to-day basis it is the responsibility of each supervisor to administer all policies and procedures in a manner consistent with this policy.

GOVERNANCE

PFMLIA, a quasi-public agency of the State of Connecticut, shall be governed by a Board of Directors (Board) comprised of a number, and appointed in a manner, as prescribed in Section [41]**31**-49e *et seq* of the Connecticut General Statutes. The affairs of the Board shall be conducted in accordance with applicable law.

ADMINISTRATION

The affairs of the Authority shall be administered in accordance with applicable law, the Bylaws, this Plan of Operations and other administrative policies as may be adopted by the Board from time to time. The Board shall appoint a Chief Executive Officer in accordance with Section 31-49f of the Connecticut General Statutes, who shall have the duties and responsibilities set forth therein. References in this Plan of Operations to approval by the Board shall mean and include approval by the Board. To the extent there is any inconsistency between this Plan of Operations

and the enabling statutes or the Authority's by-laws, and the enabling statutes, the statutes shall control.

ANNUAL OPERATING BUDGET

The fiscal year of the PFMLIA runs from July 1st through June 30th. The Chief Executive Officer shall present an Annual Operating Budget not later than **[**4**]3** months prior to the close of the fiscal year for the forthcoming fiscal to the Finance and Audit Committee. The Finance and Audit Committee will have **[**45**]31** calendar days to review and comment on the Annual Operating Budget prior to submittal to the Board. **[**In the event the Finance and Audit Committee have no comments**]** **After the end of the Finance & Audit Committee comment period**, the **proposed** Annual Operating Budget will **[**immediately move on**]** **be presented** to the Board for discussion and consideration **at the meeting immediately following the review and comment period. The Finance & Audit Committee may reduce the comment period pursuant to a majority vote by the Committee if it determines that it does not need the full 31 calendar days for review and comment.**

[Three] **No later than one** month prior to the close of the current year, the Board shall take up for consideration, modify if necessary and adopt the proposed budget to be effective beginning the first day of the forthcoming fiscal year July 1st through June 30th. **If the Board is unable to comply with these deadlines, the previous Board-approved budget shall remain in place until the Board has voted to adopt a new budget.**

The Chief Executive Officer may present modifications to the annual operating budget during the fiscal year to which it relates as fiscal outcomes become available. The Board may consider and adopt the proposed modified changes during the current fiscal year as it relates.

Any non-budgeted expenditure greater than five thousand dollars ($5,000) for the purchase, lease or acquisition of real or personal property or personal services shall require the approval of the Board.

TIMELINE

The Authority shall comply with statutory timelines as defined in section 31-49e *et seq* of the Connecticut General Statutes, to collect contributions, distribute benefits, and carry out all other functions and responsibilities of the Authority.

PERSONNEL POLICIES

The Authority shall promulgate personnel policies that are compliant with all state and federals laws and regulations concerning workplace conduct and rights under all applicable state and federal statutes. The policies shall include but are not limited to policies concerning compensation, job classifications and postings, performance evaluation, dismissal, fringe benefits, business travel and reimbursement, paid time off, Workers' Compensation, overtime, hours of work, pay periods, conflicts of interest and workplace conduct including harassment and sexual harassment. Such policies shall be created by the Authority and approved by the Board of Directors.

PURCHASE AND LEASE OF REAL AND PERSONAL PROPERTY

The Authority, acting through the Chief Executive Officer or another duly authorized officer, shall have the authority to invest in, acquire, lease, purchase, own, manage, hold and dispose of real and personal property, and to lease, convey or

deal in or enter into agreements with respect to such real and personal property, on any terms necessary or incidental to the carrying out of the purposes of the Authority.

PROCUREMENT PROCEDURES

The Authority may purchase, lease or acquire real and personal property on a bid, negotiated or open-market basis, including through a sole source procurement or in such other manner as the Chief Executive Officer determines to be appropriate and in the best interests of the Authority under the circumstances.

CERTAIN REAL ESTATE TRANSACTIONS

The Authority may purchase, lease or acquire real property for its use with amounts appropriated by the state to the Authority or with the proceeds of bonds supported by the full faith and credit of the state.

PROCUREMENT PROCEDURES

The Authority, acting through the Chief Executive Officer or another duly authorized officer, shall have the authority to acquire, lease, purchase, own, manage, hold and dispose of real and personal property, to lease, convey or deal in or enter into agreements with respect to such real and personal property, and acquire or contract for personal services and professional services on any terms necessary or incidental to carrying out the purposes of the Authority.

Any non-budgeted expenditure greater than five thousand dollars ($5,000) for the purchase, lease or acquisition of real or personal property or personal services shall require the approval of the Board.

The Authority may purchase, lease or acquire **real and personal propert**y on a bid, negotiated or open-market basis, including through a sole source procurement or in such other manner as the Chief Executive Officer determines to be appropriate and in the best interests of the Authority in the circumstances, in accordance with the following:

- Minor nonrecurring purchases of any type of goods up to $5,000 (annually, per item), also known as direct or open market purchases, may be made without obtaining quotations or bids.
- Purchases or contracts over $5,000 and up to $100,000 (annually, per item) must be based upon, when possible, at least three written quotations or bids from responsible and qualified sources of supply.
- Purchases or contracts over $100,000 (annually, per item) must be based upon when possible, on a competitive procurement process resulting in at least three written quotations or bids**,** from responsible and qualified sources of supply.

Contracts for ***personal services*** and professional services shall be awarded by the Authority in such manner, including on the basis of a sole source procurement, as the Chief Executive Officer determines to be appropriate and in the best interests of the Authority in the circumstances, in accordance with the following:

- Minor nonrecurring purchases of any type of services up to $5,000 (annually, per item), may be made without obtaining quotations or bids.
- Contracts requiring an expenditure by the Authority in excess of $5,000 and not less than $100,000 over the period of one fiscal year must be based upon, when possible, at least three written quotations or bids**,** from responsible and qualified sources of supply.

- Contracts requiring an expenditure by the Authority in excess of one hundred thousand dollars ($100,000) over a period of one fiscal year, wherever possible, such contract shall be awarded pursuant to a process of competitive negotiation where proposals are solicited from at least three (3) qualified parties.

If the Chief Executive Officer determines that a competitive procurement process is not possible, including but not limited to the following situations, the Chief Executive Officer shall provide a written justification of that determination to the Board:

- When the Chief Executive Officer determines that a sole source procurement is appropriate and in the best interests of the Authority.
- When the Chief Executive Officer determines that it is necessary to engage in emergency repairs and emergency purchases (excluding real property) costing up to $200,000. An ''emergency'' exists where the normal operation of the Authority, the health or safety of any person, or the preservation of property would be seriously impaired, threatened or jeopardized if immediate action were not taken to correct the situation.

The above-referenced requirement for a written justification shall not be required in connection with the following transactions:

- Purchase transactions between or among the Authority and State agencies;
- The purchase of goods or contractual services from the United States Government, a federal agency, and any state government or any of their political subdivisions;
- The purchase of goods or contractual services utilizing [an existing DAS]contract **that has been competitively procured by a department, division or branch of the State of Connecticut** instead of independently engaging in a competitive solicitation;

The purchase of the following types of goods or services the nature of which preclude competition:

- Seminar or Certification Fees for Employees (i.e., Skill Path, Fred Pryor (or other local) seminars and/or professional designation/certification type trainings or workshops)
- Rental of conference and/or hotel facilities
- Publications
- Subscriptions (including electronic subscriptions)
- Advertising (including online and/or social media advertising fees)
- Dues, Fees, Tuitions, [Honariums]**Honoraria**, Sponsorships, Mentorships
- Certain public utility services (electric generation services, electric distribution services; water services, and natural gas distribution services)
- Cable and satellite television equipment and services (excluding internet services and excluding telephone services)
- Renewal of software licenses and Renewal of software maintenance
- Postage
- Licenses (excluding software licenses)
- Transportation of persons and freight
- Donations to charitable organizations and scholarship funds
- Gift cards
- Exhibit space and booths at trade-shows/conventions or other events

- Hiring of guest speakers (i.e., notable persons or personalities) for conferences and/or other events
- Catering services
- Car wash services
- Florist services
- Payments of parking fees (including validations)
- Products or services from professional associations to which the agency is a member
- Expert Witnesses

Solicitation of Proposals for Certain Services: The Authority shall solicit proposals at least once every three (3) years for financial, legal, bond, underwriting and other professional services required by the Authority on a regular and ongoing basis. The Authority shall not contract with the same person, firm or Authority to conduct financial audits of the Authority for more than six (6) consecutive fiscal years.

Nothing in this section shall prohibit the Authority from utilizing accountants, attorneys, financial advisers, and other professional services approved or provided by such state agency or quasi-public authority as a part of its normal contracting process, provided such use does not create any conflict of interest.

Any solicitation of bids or proposals by the Authority shall be published on the State Contracting Portal.

STATE CONTRACTING REQUIREMENTS

Any solicitation of bids or proposals by the Authority, and any award of a contract by the Authority, shall be subject to all state procurement and contracting requirements applicable to quasi-public agencies of the state, including without limitation the following to the extent applicable in the circumstances:

- Section 9-612(g) of the General Statutes, as amended, relating to campaign contributions by state contractors and their principals and related notices to state contractors and prospective state contractors;
- Section 4-252 of the General Statutes relating to affidavits as to gifts from contractors under certain large state contracts;
- Section 4a-81 of the General Statutes relating to affidavits with respect to consulting fees;
- Section 3-13*l* of the General Statutes relating to the prohibition of finder's fees in connection with investment transactions;
- Section 3-13j of the General Statutes relating to the disclosure of third-party fees attributable to investment services contracts;
- Section 4-61dd of the General Statutes relating to whistleblower protections; and
- Section 4a-60 and 4a-60a of the General Statutes relating to non-discrimination in state contracting and documentation of contractor adoption of a corporate policy supporting the non-discrimination agreements and warranties required by Sections 4a-60 and 40a-60a.

PFMLIA TRUST FUND SOLVENCY

The Authority shall make every effort to assure the solvency of the PFMLIA Trust Fund by regularly monitoring contributions and benefits payments and making regular reports to the Board of Directors regarding the Trust Fund's use and solvency. In the event that the Fund's solvency is in question, the Authority shall immediately take corrective actions to assure the solvency of the PFMLIA trust fund, including

adjusting benefit payments to covered employees by the minimum amount necessary to assure the program's solvency, pursuant to its authority to do so under Public Act 19-25 of the Connecticut General Statutes.

PFMLIA OPERATIONAL REVIEW AND AUDIT

The Authority shall assure the integrity of the Trust Fund and the Authority's operations by performing regular reviews and audits of contributions, claims payments and the general operations of the Authority and its Trust Fund. Findings of the reviews and audits shall be reported regularly to the Board of Directors, and the Authority shall take all reasonable corrective actions to address issues and concerns raised by the findings. The CEO or his or her designee shall immediately report to the Executive Committee of the Board of Directors and to the Board any contribution, payment, or operational concerns, and **shall** consult with the Board of Directors regarding actions taken to resolve the concerns and address the findings.

AMENDMENT OF POLICIES

This Plan of Operations may be amended in accordance with Section 1-121 of the Connecticut General Statues.

NOTICES

Notice to the Members of the Bar and the Public

Division of Criminal Justice

On June 30, 2021, the terms of the following will expire:

Richard J. Colangelo, Jr., Chief State's Attorney

Kevin D. Lawlor
Deputy Chief State's Attorney for Operations
Office of the Chief State's Attorney

The Criminal Justice Commission invites any comments you may have with respect to the performance of these individuals. You may forward one (1) copy of such information in writing no later than April 30, 2021, to: Criminal Justice Commission, c/o Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: HR; or via email: DCJ.HR.@ct.gov (preferred method).

The Honorable Andrew J. McDonald, Chair
Criminal Justice Commission

Notice of Suspension of Attorney

Pursuant to Practice Book Section § 2-54, notice is hereby given that on March 18, 2021, in Docket Number HHD-CV21-6137845-S, David V. Chomick, Juris No. 428595 of East Hartford, CT was suspended from the practice of law in Connecticut as follows:

As to the **First Count** the Respondent is suspended from the practice of law for a period of nine (9) months commencing on March 18, 2021.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

The Respondent shall apply for reinstatement pursuant to the provisions of § 2-53 of the Connecticut Practice Book.

As to the **Second Count** the Respondent is suspended from the practice of law for a period of eighteen (18) months, commencing upon the expiration of the period of suspension imposed in the First Count herein.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

The Respondent shall apply for reinstatement pursuant to the provisions of § 2-53 of the Connecticut Practice Book. However, the Respondent shall not be eligible to apply for reinstatement unless he has made restitution or has reimbursed the Client Security Fund.

As to the **Third Count** the Respondent is suspended from the practice of law for a period of eighteen (18) months, commencing upon the expiration of the period of suspension imposed in the Second Count herein.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

The Respondent shall apply for reinstatement pursuant to the provisions of § 2-53 of the Connecticut Practice Book. However, the Respondent shall not be eligible to apply for reinstatement unless he has made restitution or has reimbursed the Client Security Fund.

As to the **Fourth Count** the Respondent is suspended from the practice of law for a period of eighteen (18) months, commencing upon the expiration of the period of suspension imposed in the Third Count herein.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

The Respondent shall apply for reinstatement pursuant to the provisions of § 2-53 of the Connecticut Practice Book. However, the Respondent shall not be eligible to apply for reinstatement unless he has made restitution or has reimbursed the Client Security Fund.

It is the intent that the suspensions imposed result in a total suspension of forty-five (45) months commencing on March 18, 2021.

David Sheridan
Presiding Judge