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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CHRISTOPHER BARKER *v.* ALL ROOFS BY DOMINIC ET AL.
(SC 20196)

Robinson, C. J., and Palmer, McDonald, Kahn, Ecker, Vertefeuille and Elgo, Js.*

Syllabus

Pursuant to a provision of the Workers' Compensation Act (§ 31-291), "[w]hen any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation . . . to the same extent as if the work were done without the intervention of such contractor or subcontractor."

The defendants city of Bridgeport and its insurer, P Co., appealed from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner, who had found that the city was the plaintiff's principal employer and, therefore, liable for the plaintiff's workers' compensation benefits. The plaintiff had been employed by H Co., an uninsured subcontractor of the city, when he was injured while doing repair work to the roof of the city's transfer facility. The plaintiff sought workers' compensation benefits, and, following a hearing, the commissioner found that, because he was an employee of an uninsured subcontractor when he suffered his compensable injury, the Second Injury Fund was statutorily (§ 31-355) required to pay his workers' compensation benefits. The Second Injury Fund subsequently contested liability on the ground that, pursuant to § 31-291, the city was the plaintiff's principal employer when he suffered his injury and, therefore, was required to pay the workers' compensation benefits owed to him. Following additional hearings, the commissioner determined that, under *Massolini* v. *Driscoll* (114 Conn. 546), a municipality can be held liable as a principal employer under § 31-291, that the city had a statutory (§ 7-148) duty to manage, maintain, and repair its property, including the transfer facility, and that repairing the transfer facility's roof was a part or process in the city's trade or business within

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

This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, Kahn and Ecker. Thereafter, Justice Vertefeuille and Judge Elgo were added to the panel and have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

the meaning of § 31-291. Accordingly, the commissioner found that the city was the plaintiff's principal employer and ordered the city and P Co. to pay his workers' compensation benefits. The city and P Co. appealed to the board, which affirmed the commissioner's decision. Thereafter, the city and P Co. appealed to the Appellate Court, which upheld the board's decision. On the granting of certification, the city and P Co. appealed to this court. *Held* that the Appellate Court correctly concluded that, under § 31-291, the city was liable as the plaintiff's principal employer for workers' compensation benefits to which he was entitled as a result of the injuries he sustained repairing the roof of the city's transfer facility while employed by the city's uninsured subcontractor: whether an uninsured contractor's or subcontractor's work is a part or process in the trade or business of the principal employer under § 31-291 is a fact specific determination to be made in light of certain nondispositive factors, including the employer's legally defined powers and obligations, the complexity of the work being performed and the degree of specialization required, whether the employer supplied the tools or materials or oversaw the work, and whether the work was of such a character that it ordinarily would be performed by the employer's own employees or was an otherwise essential part in the maintenance or operation of the employer's business; considering the relevant factors in light of the record, as well as § 31-291's broader remedial purpose of preventing employers from denying workers full protection under the workers' compensation scheme by simply hiring uninsured contractors or subcontractors, this court concluded that the commissioner reasonably determined that the repair of the transfer facility's roof was a part or process in the city's trade or business, as it was undisputed that the city was responsible pursuant to § 7-148 to maintain and repair its public buildings, the roof repairs at issue were not especially complex and did not demand specialized skills, and, although the city did not employ its own roofers for financial reasons despite employing a variety of other tradespeople to maintain and repair city property, the roof repair fell within the nature and scope of the maintenance and repair work ordinarily performed by city employees; moreover, this court declined the city and P Co.'s invitation to overrule *Massolini* insofar as it applies principal employer liability to municipalities, as that case's holding has, over the past eighty years, become embedded in Connecticut worker's compensation law, and the city and P Co. did not identify any ambiguity in the statutory scheme or any legislative history suggesting that the legislature intended to abrogate this court's holding in *Massolini* or to change the standards of principal employer liability through the creation of the Second Injury Fund, a primary purpose of which is, instead, to act as a payer of last resort when an employer is unable to pay.

(*Three justices dissenting in one opinion*)

Argued October 22, 2019—officially released August 13, 2020**

** August 13, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District determining that the defendant city of Bridgeport was the plaintiff's principal employer, brought to the Compensation Review Board, which affirmed the commissioner's decision; thereafter, the defendant city of Bridgeport et al. appealed to the Appellate Court, *Sheldon*, *Bright* and *Harper*, *Js.*, which affirmed the board's decision, and the defendant city of Bridgeport et al., on the granting of certification, appealed to this court. *Affirmed.*

Joseph J. Passaretti, *Jr.*, with whom, on the brief, was *Amanda A. Hakala*, for the appellants (defendant city of Bridgeport et al.).

Lisa Guttenberg Weiss, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (Second Injury Fund).

Opinion

ECKER, J. The sole issue in this certified appeal is whether, under the Workers' Compensation Act, General Statutes § 31-291,[1] a municipality is the "principal employer" of an employee of an uninsured roofing subcontractor injured while repairing a municipal building. The defendants city of Bridgeport (city) and PMA Insur-

[1] General Statutes § 31-291 provides in relevant part: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. . . ."

ance Company[2] contend that the city is not a principal employer under the statute because it is not in the "trade or business" of roof repair. The Second Injury Fund (fund) responds that the city is in the "trade or business" of maintaining and repairing municipal buildings and facilities, and, therefore, the Appellate Court properly affirmed the judgment of the Compensation Review Board (board), which found that the city was liable for the payment of the workers' compensation benefits of the plaintiff, Christopher Barker, as his principal employer. We agree with the fund and affirm the judgment of the Appellate Court.

The relevant facts and procedural history are not in dispute. In March, 2000, the city hired the defendant All Roofs by Dominic (All Roofs) to do repair work on the roof of the city's transfer facility located at 475 Asylum Street. All Roofs hired the defendant Howard Adams d/b/a Howie's Roofing (Howie's Roofing) as a subcontractor. On June 29, 2000, the plaintiff, an employee of Howie's Roofing, was injured in the course and scope of his employment when he fell from the roof under

[2] The defendants in the matter before the Workers' Compensation Commission were (1) the city, (2) the city's insurer, PMA Insurance Company, (3) the city's contractor, All Roofs by Dominic, and (4) Howard Adams d/b/a Howie's Roofing, the city's subcontractor and the employer of the plaintiff, Christopher Barker. After the Workers' Compensation Commissioner determined that the plaintiff's claim was compensable under the Workers' Compensation Act and that the plaintiff's employer was uninsured, the Second Injury Fund (fund) became obligated to compensate the plaintiff for his injuries under General Statutes § 31-355 (h). See footnote 3 of this opinion.

The plaintiff did not participate in the proceedings before the Compensation Review Board or the Appellate Court, but the fund participated in those proceedings as the appellee to defend the decision of the Workers' Compensation Commissioner that the city, rather than the fund, was liable for the payment of the plaintiff's workers' compensation benefits. The plaintiff likewise is not a party to the present appeal, and the fund is the appellee. All Roofs by Dominic did not seek review of the decision of the Workers' Compensation Commissioner and is not a party to the present appeal. All references to the defendants hereinafter are to the city and its insurer, PMA Insurance Company.

repair. After his fall, the plaintiff sought workers' compensation benefits from Howie's Roofing, All Roofs, and the city. Neither Howie's Roofing nor All Roofs carried a valid workers' compensation insurance policy.

A formal hearing was held before the Workers' Compensation Commission. On January 5, 2005, the Workers' Compensation Commissioner for the Fourth District determined that the plaintiff was an employee of Howie's Roofing when he suffered his work-related injury. Because Howie's Roofing was uninsured, that finding required the fund to pay the workers' compensation benefits owed to the plaintiff pursuant to General Statutes § 31-355.[3] The fund subsequently contested liability on the ground that, under § 31-291, the city was the principal employer of the plaintiff and, therefore, was required to pay the workers' compensation benefits owed to him.

Additional hearings were conducted before the Workers' Compensation Commission on November 19, 2015, and February 23, 2016, to determine the city's principal employer liability. The city conceded that it had hired All Roofs to perform work on the transfer facility and that the plaintiff's injury took place on municipal property under the city's control. The city denied, however, that the roofing work performed by All Roofs was a part or process in the city's trade or business, which is a prerequisite to establish principal employer liability

[3] General Statutes § 31-355 provides in relevant part: "(b) When an award of compensation has been made under the provisions of this chapter against an employer who failed, neglected, refused or is unable to pay any type of benefit coming due as a consequence of such award or any adjustment in compensation required by this chapter, and whose insurer failed, neglected, refused or is unable to pay the compensation, such compensation shall be paid from the Second Injury Fund. . . .

* * *

"(h) When a finding and award of compensation [have] been made against an uninsured employer who fails to pay it, that compensation shall be paid from the Second Injury Fund . . . ."

under § 31-291. John F. Cottell, Jr., Deputy Director of Public Facilities for the city, testified that it was the responsibility of the public facilities department to maintain city-owned buildings, but he also testified that the city did not employ a roofer because the need was not extensive enough to justify the cost of employing one on a full-time basis.

In his written finding and orders, the Workers' Compensation Commissioner for the Third District (commissioner) determined that, under *Massolini* v. *Driscoll*, 114 Conn. 546, 551–52, 159 A. 480 (1932), a municipality can be liable as a principal employer under § 31-291. The commissioner also determined that, pursuant to General Statutes § 7-148,[4] the city has a statutory duty to manage, maintain, repair, and control its property, including its transfer facility. In addition, the commissioner concluded that the work of repairing the roof of the transfer facility was a part or process in the city's trade or business. The commissioner found that the city was the plaintiff's principal employer and ordered the defendants to pay the workers' compensation benefits to which the plaintiff was entitled. The defendants filed a motion to correct and a motion for articulation, both of which the commissioner denied.

The defendants appealed to the board, which affirmed the commissioner's decision. The defendants timely appealed from the board's decision to the Appellate Court. The Appellate Court affirmed the decision of the board. *Barker* v. *All Roofs by Dominic*, 183 Conn. App. 612, 623, 193 A.3d 693 (2018). We granted the defendants' petition for certification to appeal, limited to the following issue: "Did the Appellate Court [correctly]

[4] General Statutes § 7-148 (c) (6) (A) (i) provides in relevant part: "Any municipality shall have the power to do any of the following . . . [e]stablish, lay out, construct, reconstruct, alter, maintain, repair, control and operate . . . garbage and refuse disposal facilities . . . and any and all buildings or facilities necessary or convenient for carrying on the government of the municipality . . . ."

conclude that, under . . . § 31-291, as construed by *Massolini* v. *Driscoll*, [supra, 114 Conn. 546], the . . . city . . . was liable for workers' compensation benefits as the principal employer of a worker hired by an uninsured subcontractor to repair the roof of a building owned by the city?" *Barker* v. *All Roofs by Dominic*, 330 Conn. 925, 926, 194 A.3d 292 (2018).

The defendants contend that roof repair is not a part or process in the city's trade or business under § 31-291, as construed by *Massolini*. Alternatively, the defendants argue that *Massolini* is no longer good law because (1) it utilizes an outdated definition of "business" under the principal employer statute, and (2) the subsequent creation of the fund has "displaced" *Massolini* by providing a "logical alternative" to the holding in that case. Lastly, the defendants argue that the imposition of principal employer liability against a municipality violates General Statutes § 31-286a (c).[5] In response, the fund argues that (1) *Massolini* remains controlling law, notwithstanding the subsequent creation of the fund, (2) pursuant to § 31-291, as construed by *Massolini*, the city is liable for the payment of workers' compensation benefits to the plaintiff as his principal employer, and (3) § 31-286a (c) has no application on this record.

Our standard of review applicable to workers' compensation appeals is well-settled. "The conclusions

[5] General Statutes § 31-286a provides in relevant part: "(a) . . . [N]either the state, or its agents, nor any political subdivision of the state, or its agents, may enter into any contract on or after October 1, 1986, for the construction, remodeling, refinishing, refurbishing, rehabilitation, alteration or repair of any public works project before receiving from each of the other parties to such contract [inter alia] sufficient evidence of compliance with the workers' compensation insurance and self-insurance requirements of subsection (b) of section 31-284 . . . .

* * *

"(c) This section shall not be construed to create any liability on the part of the state or any political subdivision thereof to pay workers' compensation benefits or to indemnify the Second Injury Fund, any employer or any insurer who pays workers' compensation benefits. . . ."

drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board." (Internal quotation marks omitted.) *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 572, 986 A.2d 1023 (2010). "Our Workers' Compensation Act indisputably is a remedial statute that should be construed generously to accomplish its purpose." *Driscoll* v. *General Nutrition Corp.*, 252 Conn. 215, 220, 752 A.2d 1069 (2000).

The principal employer statute provides in relevant part: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. . . ." General Statutes § 31-291. The "underlying purpose" of the statute is to impose liability in "those situations [in which injurious] conditions might be assumed to be largely within the control or observation of the principal employer." *Wilson* v. *Largay Brewing Co.*, 125 Conn. 109, 112, 3 A.2d 668 (1939). Because "[m]ost compensable injuries are due to conditions of employment the danger from which could be prevented or minimized by sufficient oversight or control"; id.; the statute provides an incentive for the principal employer to provide a safe working environment for the contractors and subcontractors that carry out any part or process in its trade or business. See *Sgueglia* v. *Milne Construction Co.*, 212 Conn. 427,

433, 562 A.2d 505 (1989) ("[t]he purpose of § 31-291 is to protect employees of minor contractors against the possible irresponsibility of their immediate employers, by making the principal employer who has general control of the business in hand liable as if he had directly employed all who work [in] any part of the business [that] he has undertaken to carry on" (internal quotation marks omitted)); *Johnson* v. *Mortenson*, 110 Conn. 221, 225, 147 A. 705 (1929) (principal employer statute "afford[s] full protection to work[ers], by preventing the possibility of defeating the [Workers' Compensation Act] by hiring irresponsible contractors or subcontractors to carry on a part of the employer's work").

The relevant portion of the principal employer statute has remained unchanged since the enactment of our original Workers' Compensation Act in 1913. See Public Acts 1913, c. 138, pt. B, § 5. The controlling decisional law is similarly long-standing. Since 1927, we consistently have applied a three-part test to determine principal employer liability under the Workers' Compensation Act. "To render a principal employer liable, it is clear [that] this statute requires (1) that the relation of principal employer and contractor must exist in work wholly or in part for the former, (2) that the work must be in, on or about premises controlled by the principal employer, and (3) that the work be a part or process in the trade or business of the principal employer." *Crane* v. *Peach Bros.*, 106 Conn. 110, 113, 137 A. 15 (1927). The third prong of this test—the only one at issue in the present case—frequently is the most difficult to apply. See, e.g., *Fox* v. *Fafnir Bearing Co.*, 107 Conn. 189, 192–95, 139 A. 778 (1928). The question of whether the work at issue is included within an employer's trade or business largely is one "of degree and fact." *Grenier* v. *Grenier*, 138 Conn. 569, 571, 87 A.2d 148 (1952). Fortunately, however, our precedent supplies "a number of cases [in which] we have been called [on] to decide whether . . . [on] their particular facts they

fall within the provisions of the statute, and they afford a valuable basis for arriving at a general conception of its application." *King* v. *Palmer*, 129 Conn. 636, 639–40, 30 A.2d 549 (1943).

Massolini v. *Driscoll*, supra, 114 Conn. 546, is one such case, and it featured prominently in the present dispute to help guide the analysis of the commissioner, the board, and the Appellate Court, as well as in the parties' arguments before this court. In *Massolini*, the city of Hartford hired a contractor to provide a team of horses and a driver to collect ashes and rubbish left out by the public for removal. Id., 548. The driver employed by the contractor was fatally injured while tending to the horses' shoes, precipitating a workers' compensation claim. Id., 549. As in the present case, the issue in *Massolini* was whether the municipality was the employee's principal employer under the statute, and, as here, this question hinged on whether the work performed by the employee was a part or process in the city's trade or business. We held that, for a municipal corporation, the term "business" means "the conduct of the usual affairs of the corporation, and such as commonly engage the attention of its officers." Id., 552. We noted that Hartford was authorized to remove ashes and rubbish as part of its police powers; id., 551–52; and held that such work was a "business" of the city within the meaning of the Workers' Compensation Act. Id., 552. Because the driver's work on the horses' shoes was "incidental to and in furtherance of the operations involved in [that] business of [Hartford], a valid claim for compensation [had] been established against [Hartford]." Id., 553.[6]

[6] The dissent "find[s] most significant the fact that the driver in *Massolini* was working alongside Hartford's own employees at the time of his fatal injury." We respectfully disagree with this reading of *Massolini*. The factor identified by the dissent was not mentioned by the court in its application of the principal employer statute to the facts of that case. The primary factor determining the outcome in *Massolini* was that "Hartford was engaged in the removal of ashes and refuse in the exercise of its police powers";

We agree with the Appellate Court, the board, and the commissioner that *Massolini* provides useful guidance in the present case. The plaintiff in the present case was employed by one of the city's subcontractors to discharge an obligation imposed by law on the city itself, namely, the maintenance and repair of municipal buildings. As the commissioner found, and as no party disputes, the city had a responsibility to manage, maintain, and repair its public buildings, including its transfer facility, pursuant to § 7-148 (c) (6) (A) (i). See footnote 4 of this opinion. This conclusion is further supported by Cottell's testimony that it was the responsibility of the public facilities department to maintain city-owned buildings. The commissioner reasonably determined that maintenance of the transfer facility, including the repair of the facility's roof, was among "the usual affairs of the corporation, and such as commonly engage the attention of its officers" and, therefore, is a part or process in the city's business. *Massolini* v. *Driscoll*, 114 Conn. 552. Other states with similar "trade or business" language in their principal employer statutes have reached the same conclusion. See *Rodriquez* v. *John Russell Construction*, 16 Kan. App. 2d 269, 275, 826 P.2d 515 (1991) ("[r]oof repair was essential to protect the [public housing complex] and ensure that it remained habitable," and worker injured while doing so was statutory employee of municipality under workers' compensation statute); *Ford* v. *Richmond*, 239 Va. 664, 665, 669, 391 S.E.2d 270 (1990) (worker injured while repairing roof on city reservoir was statutory employee[7] of city under workers' compensation statute).[8]

Massolini v. *Driscoll*, supra, 114 Conn. 551–52; thus making "the disposal of ashes and rubbish . . . a 'business' in which . . . Hartford was engaged at the time of [the] accident . . . ." Id., 553.

[7] The terms "statutory employee" and "statutory employer" often are used in other states to refer to what our Workers' Compensation Act calls the "principal employer" relationship. See, e.g., Va. Code Ann. § 65.2-302 (2017).

[8] The dissent notes that the Virginia courts' approach, which looks only to the "duties, obligations, and responsibilities imposed [on governmental entities] by statute, regulation, or other means" for purposes of determining

We do not agree with the dissent's prediction that continuing[9] to give consideration to the legally defined powers and obligations of a city in determining its trade

principal employer status; (internal quotation marks omitted) footnote 6 of the dissenting opinion, quoting *Ford* v. *Richmond*, supra, 239 Va. 667; was criticized as "out of step" with other state courts in a two-sentence concurring opinion of the District of Columbia Circuit Court of Appeals. *Best* v. *Washington Metropolitan Area Transit Authority*, 822 F.2d 1198, 1202 (D.C. Cir.1987) (Mikva, J., concurring). Judge Mikva provided no analysis to accompany that criticism, but it appears that he would prefer an approach that determines principal employer status on the basis of whether the employer normally carries on a given activity through its own employees rather than through independent contractors. See id., 1200–1201 (describing "normal work" test rejected by Virginia Supreme Court in context of governmental entities (internal quotation marks omitted)). We, of course, agree with the dissent that an approach to determining principal employer status for governmental entities that looks *only* to their legal duties and obligations would be overly restrictive. But this court has long considered the powers and duties of public entities as a relevant factor in determining principal employer status. See footnote 9 of this opinion. The question of whether an employer ordinarily would perform certain work through its own employees rather than through contractors is likewise relevant to the principal employer inquiry; it simply is "not necessarily conclusive." *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 196, 355 A.2d 32 (1974); accord *Fox* v. *Fafnir Bearing Co.*, supra, 107 Conn. 195. Our approach is in accordance with the principle that " 'no one exclusive test can be set up' " for determining principal employer status. *Battistelli* v. *Connohio, Inc.*, 138 Conn. 646, 652, 88 A.2d 372 (1952) (*Inglis, J.*, concurring), quoting *Crisanti* v. *Cremo Brewing Co.*, 136 Conn. 529, 532, 72 A.2d 655 (1950).

[9] The dissent is correct that the legally defined powers and obligations of a municipality ordinarily should not be dispositive in determining its "trade or business," but the nature and scope of those legally prescribed duties are relevant to the inquiry, and looking to those legal prescriptions for guidance is consistent with our decisions regarding principal employer liability for municipal corporations. For example, in *Massolini*, it was significant that Hartford was collecting rubbish and ashes pursuant to its police powers. See *Massolini* v. *Driscoll*, supra, 114 Conn. 551–52; see also *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 196, 355 A.2d 32 (1974) (it was significant that public entity's charter authorized it to engage in work that plaintiffs had been performing when they were injured). Courts in states with similar "trade or business" language in their principal employer statutes have often looked to the powers, duties, and obligations of municipal corporations to determine the "business" of the corporation. See *Wright* v. *Honolulu*, 41 Haw. 603, 606 (1957) (tunnel construction was "properly a part of [the municipality's] business" under workers' compensation law when municipality was authorized by law to finance and fund project); *Klohn* v. *Louisiana Power & Light*, 406 So. 2d 577, 580–82 (La. 1981) (when city bond resolution required city to retain ownership of power plant system,

or business would "render a municipality the workers' compensation guarantor of virtually every employee of an independent contractor engaged by the city." As we explain elsewhere in this opinion, other factors, such as the complexity of the work in question; *Battistelli* v. *Connohio, Inc.*, 138 Conn. 646, 649, 88 A.2d 372 (1952); or the scale of the undertaking, as in *Grenier* v. *Grenier*, supra, 138 Conn. 569; see footnote 12 of this opinion; may place work outside of the trade or business of a municipality, even if that work falls generally within the city's legally defined powers and obligations. Importantly, a city may protect itself against the financial loss of a determination that it is the principal employer of an injured worker by taking the simple step of ensuring that any independent contractor it hires carries workers' compensation insurance, as the city is mandated to do by § 31-286a (a). See footnote 5 of this opinion. If a city takes that precaution, and if it is found liable to pay workers' compensation benefits as a principal employer, it may recover any sums that it pays as a result from the independent contractor. See *Sgueglia* v. *Milne Construction Co.*, supra, 212 Conn. 433–34 (between principal employer and subcontractor, latter is primarily liable); *Johnson* v. *Mortenson*, supra, 110 Conn. 228 (because liability of immediate employers is primary and liability of principal employers is secondary, principal employer may recover sums paid to injured worker from immediate employer).

city was in business of providing electric service, notwithstanding operating agreement that transferred all operations of plant to contractor); *Roberts* v. *Alexandria*, 246 Va. 17, 20, 431 S.E.2d 275 (1993) ("because the [c]ity is authorized and empowered [by state statute and the city charter] to operate the jail, and to provide medical services there, the delivery of those medical services are within the [c]ity's trade, business, or occupation"); see also *Leigh* v. *National Aeronautics & Space Administration*, 860 F.2d 652, 653 (5th Cir. 1988) (when federal statute authorized agency to develop, construct, test, and operate aeronautical and space vehicles, worker injured while performing test on external tank of space shuttle "was performing work that was part of the United States' business" for purposes of state workers' compensation law).

The defendants contend that roof repair is not a part or process in the city's business because the city did not employ any roofers. Although relevant to the determination of an employer's trade or business, this factor is not dispositive. We have held that, "[i]f the work is of such a character that it ordinarily or appropriately would be performed by the principal employer's own employees in the prosecution of its business, or as an essential part in the maintenance thereof, it is a part or process of his work." *King* v. *Palmer*, supra, 129 Conn. 641. We have made it clear that "no one exclusive test can be set up and that each case must be determined on its own facts . . . ." *Crisanti* v. *Cremo Brewing Co.*, 136 Conn. 529, 532, 72 A.2d 655 (1950). A finding that the work in question ordinarily or appropriately is performed by the principal employer's own employees is *sufficient* to establish principal employer liability; see, e.g., *Kasowitz* v. *Mutual Construction Co.*, 154 Conn. 607, 613–14, 228 A.2d 149 (1967); but it is not a prerequisite to that liability. See *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 196, 355 A.2d 32 (1974) (observing that "this test is not necessarily conclusive").

Pacileo v. *Morganti, Inc.*, 10 Conn. App. 261, 522 A.2d 841 (1987), is instructive on this point. In *Pacileo*, the Appellate Court considered whether the defendant, a general contractor hired to oversee the city of New Haven's city hall and library construction project, was the principal employer of the plaintiff, an ironworker injured on the work site. Id., 262. The Appellate Court noted that "the defendant's business, as the general contractor, was to oversee and implement the construction of the city hall library complex. . . . A necessary and expected part of that construction was the laying of steel rods for the pouring of concrete. Ironworkers generally lay steel rods. Since none of the individuals directly employed by [the defendant was] qualified to perform the job of ironworker . . . the utilization of

ironworkers such as the plaintiff was a part or process of the defendant's trade or business." (Internal quotation marks omitted.) Id., 264; see also *Adams* v. *Jodar Blasting, Inc.*, No. 1943, CRB 2-93-12 (January 17, 1996) (home construction business was principal employer of employee of contractor who was hired to blast rock at construction site, even though principal employer did not have any employees qualified to perform such work). Therefore, the defendant general contractor was the employee's principal employer under § 31-291, even though it "did not directly employ any [ironworkers]" or "any . . . employees qualified to perform the job of [ironworkers]." *Pacileo* v. *Morganti, Inc.*, supra, 263; see also *Kasowitz* v. *Mutual Construction Co.*, supra, 154 Conn. 608–609, 614 (The court held that the defendant general contractor was the primary employer of the plaintiff, who was an employee of a glass company hired to install windows, because the defendant was obligated by contract to "complete . . . construction . . . in all respects, including the glass work. All of this was part of its business. It chose to enter into subcontracts for certain phases of the work, including the glass work, instead of hiring glaziers to do the work at the appropriate time.").

The analogy to a general contractor is apt.[10] Just as the defendant's business in *Pacileo* was to "oversee and

[10] The dissent argues that *Pacileo* is distinguishable on the grounds that "[a] general construction contractor, who voluntarily undertakes the organization of a major construction project as a commercial venture, is situated differently from a municipality that has broad statutory powers in a variety of areas . . . ." Footnote 7 of the dissenting opinion. We agree that a municipality's business activity will generally be broader than that of a commercial enterprise focused on providing a particular product or service, but we do not see how this should be a *limiting* consideration when determining a municipality's trade or business. A municipality like Bridgeport has been conferred broad operational responsibilities. With those responsibilities come correspondingly broad obligations. In this regard, we repeat our observation that the legislature has seen fit to treat public and private employers without distinction or differentiation for purposes of determining principal employer status. We respectfully disagree that a consideration deemed rele-

implement" a construction project; *Pacileo* v. *Morganti, Inc.*, supra, 10 Conn. App. 264; in the present case, the city's business includes, among other things, the maintenance and repair of its buildings and facilities, including the transfer facility. See General Statutes § 7-148 (c) (6) (A) (i). We do not say that all such repairs, regardless of their complexity and the level of specialization required, automatically must be considered to be part of the business of a large municipality such as Bridgeport. Indeed, we have explained that the complexity of the work in question is a relevant factor for determining principal employer liability under § 31-291. See *Battistelli* v. *Connohio, Inc.*, supra, 138 Conn. 649 ("it is obvious that the intricate character of the job and the special skill required put it well outside of the capabilities of the defendants' ordinary employees"). On the present record, however, we have no reason to disagree with the conclusion of the commissioner that roof repair is a "necessary and expected part" of the routine building maintenance of the city's transfer facility. *Pacileo* v. *Morganti, Inc.*, supra, 264. It does not appear that the roof repairs at issue were so complex or demanded such specialized skills that they fell outside of the business of the city, which employs a variety of tradespeople—including electricians, carpenters, plumbers, painters, and masons—but which elected not to employ its own roofers for financial reasons.[11] Because the city chose not to employ roofers of its own, it was required to contract for roofing services, making the

vant to determining the principal employer status of a private business in *Pacileo* should be excluded from consideration as part of the same inquiry for a public employer.

[11] The range of skilled tradespeople employed by the city reveals the flaw in the city's argument that it cannot be the plaintiff's principal employer because it is not in the business of roofing. The city also is not "in the business" of masonry, plumbing, carpentry, painting, or electrical work, yet it employs individuals skilled in each of these trades because the business of the city requires it to manage, maintain, and repair a wide range of public facilities, including its transfer facility.

utilization of roofers, such as the plaintiff, a part or process in the city's business of maintaining and repairing the transfer facility.

Predicating principal employer liability on the actual employment of workers who perform the type of work at issue also would be inconsistent with the remedial purpose of § 31-291. As we previously have stated, "the purpose of the principal employer provision in § 31-291 is to afford full protection to work[ers], by preventing the possibility of defeating the [Workers' Compensation Act] by hiring irresponsible contractors or subcontractors to carry on a part of the [principal] employer's work." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 307, 140 A.3d 950 (2016). The statute "protect[s] employees of minor contractors against the possible irresponsibility of their immediate employers. . . . Otherwise, [§ 31-291], and, indeed, the whole policy of the [Workers'] Compensation Act, might be evaded by the device of the owner parceling out the work of construction among a number of separate [uninsured] contractors . . . ." (Internal quotation marks omitted.) *Johnson* v. *Mortenson*, supra, 110 Conn. 226. The defendants' interpretation of the statute would allow employers to do precisely what the statute was enacted to prohibit—avoid liability under the Workers' Compensation Act by choosing to hire contractors rather than employees to perform certain tasks.

The defendants contend that their position finds support in *Fox* v. *Fafnir Bearing Co.*, supra, 107 Conn. 189, the holding of which they say implies that the "repair or alteration" of a building is not a part or process in an employer's trade or business. The defendants construe our holding in *Fox* too broadly. In that case, the plaintiff, Richard Fox, was an employee of a window washing company that the defendant, Fafnir Bearing Company (Fafnir), had hired to wash the windows in its factory. Id., 190. Fafnir was "in the business of manu-

facturing ball bearings," but "it was necessary to have the windows washed, as a clean and attractive condition of the factory was an advertising asset of the corporation." Id., 191. On appeal, Fafnir claimed that it was not Fox' principal employer because "the washing of windows by [Fox] was not 'a part or process in [its] trade or business . . . .' " Id., 192. We disagreed, reasoning that "[a]ny work which was an essential part of the maintenance and operation of its factory was a part of its 'trade or business,' though not a process in the actual work of manufacturing ball bearings. . . . [Fox'] work of window-washing was work which had to do with the maintenance of the factory buildings in good condition for the manufacturing processes there conducted, and which could fairly be said to be essential for that purpose—work similar in character to that of scrubbing the floors, cleaning the offices and ordinary janitor work. Such work is customarily done by regular employees in the daily routine of their duties in the factory. It is clearly distinguishable from work done in connection with the repair or alteration of the factory buildings. It is a part of the work of keeping the employer's factory in running condition, and therefore a part of its 'trade or business' though not directly connected with any manufacturing process. To limit the application of [the principal employer statute] to work done in the actual process of manufacture would be to adopt a construction not required or permitted by the language of the [Workers' Compensation] Act, and entirely at variance with our settled policy of construing the [Workers'] Compensation Act broadly in order to effectuate its purpose." Id., 195–96.

Although the thrust of the analysis in *Fox* supports the conclusion we reach here, the defendants contend that the language distinguishing ordinary maintenance work, such as washing windows, from "work done in connection with the repair or alteration of the factory

buildings"; id., 195; requires a different outcome in the present case because it involves a roof repair. The defendants' position, however, overlooks the most fundamental observation made in *Fox*, which is that "[n]o general rule [for determining the scope of the employer's trade or business for purposes of principal employer liability] is deducible from the authorities, and it is often a matter of extreme difficulty to decide whether the work in a given case falls with the designation of the statute. It is in each case largely a question of degree and of fact . . . ." Id., 194. A categorical distinction between maintenance and repair is not helpful in this context, and we do not read *Fox* to establish such a distinction as a doctrinal matter. The determination in any particular case as to whether the nature and extent of the work being performed by the plaintiff should be deemed a part of the defendant's business operations or outside of those business operations will depend on the specific facts of the case viewed in light of the factors previously discussed in this opinion. In the present case, the commissioner reasonably concluded that the repair of the transfer facility's roof was a part or process in the city's business on the basis of the evidence concerning the city's business operations, its statutory responsibilities, and the nature and scope of the maintenance and repair work ordinarily performed by city employees.[12]

[12] The defendants also point to our decision in *Grenier* v. *Grenier*, supra, 138 Conn. 569, in support of their argument that roof repairs cannot be a part or process in the city's business. In *Grenier*, the plaintiff was injured while working for a contractor hired to install weatherproofing material on a new roof being constructed by another contractor as part of a major renovation of a three-story building owned by a car dealership. Id., 570. We upheld the commissioner's finding that the plaintiff's work was not a part or process in the trade or business of the dealership. Id., 572. We reject the defendants' contention that there is "no distinction" between *Grenier* and the present case. To the contrary, we believe that the commissioner in the present case was entitled to see a substantial difference between the major capital improvement undertaken by the automobile dealership in *Grenier* and the repair of an existing roof on the city's transfer station at issue here.

The defendants contend, in a similar vein, that roof repair is not a part or process in the city's trade or business because the city did not supply the plaintiff with tools or materials or oversee the plaintiff's work. This argument suffers from the same defect as the previous one. Like the hiring of employees, the source of the tools or materials used for the work, although relevant to the principal employer inquiry, is not a dispositive consideration. We have upheld findings of principal employer liability without making reference to which party supplied tools and materials or oversaw the work in question. See *Mancini* v. *Bureau of Public Works*, supra, 167 Conn. 193, 196–97 (finding no error in trial court's directions to jury on part or process element without making reference to whether defendant supplied tools or materials or directly oversaw work); *Fox* v. *Fafnir Bearing Co.*, supra, 107 Conn. 194–96 (upholding commissioner's conclusion that defendant was principal employer without making reference to whether defendant supplied tools or materials or directly oversaw work); see also *Hebert* v. *RWA, Inc.*, 48 Conn. App. 449, 454–55, 709 A.2d 1149 (upholding commissioner's finding that work was part or process in trade or business of principal employer without making reference to whether principal employer supplied tools and materials or directly oversaw work), cert. denied, 246 Conn. 901, 717 A.2d 239 (1998); *Pacileo* v. *Morganti, Inc.*, supra, 10 Conn. App. 264–65 (no genuine issue of material fact as to whether defendant was principal employer, although no reference was made to whether defendant supplied tools or materials or directly oversaw work).[13]

[13] In *Mancini* and *Hebert*, the court made reference to supervision of the work site by the principal employer when discussing control of the premises. See *Mancini* v. *Bureau of Public Works*, supra, 167 Conn. 200; *Hebert* v. *RWA, Inc.*, supra, 48 Conn. App. 454. Control of the premises is a separate element of the principal employer analysis, distinct from the trade or business inquiry. See *Crane* v. *Peach Bros.*, supra, 106 Conn. 113 ("[t]o render a principal employer liable, it is clear [that] this statute requires (1) that the relation of principal employer and contractor must exist in work wholly or in part for the former, (2) that the work must be in, on or about premises

In the alternative, the defendants ask us to overrule *Massolini* insofar as it applies principal employer liability to municipalities. The defendants argue that the definition of "business" in *Massolini* is outdated and cite a 2003 dictionary to support their claim that the term "business" means a "commercial or mercantile activity engaged in as a means of livelihood: trade, line," a "commercial or sometimes an industrial enterprise," or "dealings or transactions [especially] of an economic nature . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 167. We decline to overrule *Massolini* for two reasons. First, "[w]hen a term is not defined in a statute, we begin with the assumption that the legislature intended the word to carry its ordinary meaning, as evidenced in dictionaries in print *at the time the statute was enacted*." (Emphasis added.) *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 176, 162 A.3d 706 (2017); see also *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227, 134 S. Ct. 870, 187 L. Ed. 2d 729 (2014) ("[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning" (emphasis added; internal quotation marks omitted)).[14] We attribute no persuasive value to the defendants' preferred definition of business, taken from a dictionary published ninety years after the enactment of the principal employer statute.

Second, our adherence to this court's holding in *Massolini* gains additional force from the doctrine of stare decisis. "This court has repeatedly acknowledged the

controlled by the principal employer, and (3) that the work be a part or process in the trade or business of the principal employer").

[14] In doing so, we also acknowledge the wisdom found in Judge Learned Hand's cautionary note that a dictionary will not always provide the very best resource for determining the meaning of a word at any particular time. See *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) ("it is one of the surest [indices] of a mature and developed jurisprudence not to make a fortress out of the dictionary"), aff'd, 324 U.S. 404, 66 S. Ct. 193, 90 L. Ed. 2d (1945); see also *United States* v. *Costello*, 666 F.3d 1040, 1043–44 (7th Cir. 2012).

significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law. . . . The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Citation omitted; internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 519, 949 A.2d 1092 (2008). "Moreover, [i]n evaluating the force of stare decisis, our case law dictates that we should be especially wary of overturning a decision that involves the construction of a statute. . . . When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do." (Internal quotation marks omitted.) Id., 519–20. The Workers' Compensation Act includes municipalities within the definition of employer; General Statutes § 31-275 (10) (" '[e]mployer' means any person, corporation, limited liability company, firm, partnership, voluntary association, joint stock association, the state and *any public corporation within the state using the services of one or more employees for pay*" (emphasis added)); and the term "principal employer" has been construed to encompass municipalities for more than eighty years.[15] The holding and impli-

[15] "Public corporations have always been included within the scope of our [Workers' Compensation Act], no doubt because there is no substantial reason why their employees should be treated differently than employees in private industry. . . . [P]ublic corporation as used in § 31-275 (10) . . . signifies corporations organized for a public purpose such as municipalities and counties. . . . [T]his interpretation is consistent with the legislative history . . . . During the committee hearings on the bill that became chapter 138 of the 1913 Public Acts, [P]rofessor Willard C. Fisher, an economist at Wesleyan University who had been engaged by the standing committees on judiciary and labor to assist in drafting the act, remarked that the law ought to be as wide as possible in its scope; there ought to be no employment left out that can practicably be included. . . . Fisher stated further that there is no good reason for excluding employment of public corporations . . . truly public corporations, the state, the city and the like." (Citations omitted; internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 431–32, 994 A.2d 1265 (2010).

cations of *Massolini* and its progeny have by now become embedded as part of our workers' compensation law, and we are unwilling to overturn established doctrine and upset settled expectations under these circumstances.

The defendants seek to strengthen their argument in favor of doctrinal modification by asserting that the 1959 expansion of the fund has "displaced" *Massolini* because the availability of the fund has eliminated the need to hold municipalities liable as principal employers. The defendants point out that the fund did not exist when *Massolini* was decided and suggest that *Massolini* would have been decided differently if the fund had existed at the time. They hypothesize that, because the existence of the fund means that the injured worker is no longer left uncompensated in these circumstances—that is, the fund would be obligated to pay the plaintiff's compensation award if the city is not found to be the plaintiff's principal employer—it is no longer necessary to apply the principal employer statute to the city under *Massolini*. We are not persuaded.

To begin with, nothing in the language of the statute establishing the fund suggests a legislative intent to abrogate *Massolini* or to alter the standards of principal employer liability. The legislature created the fund in 1945 to encourage employers to hire employees with preexisting disabilities or injuries. See Public Acts 1945, No. 188; *Cece* v. *Felix Industries, Inc.*, 248 Conn. 457, 462–63, 728 A.2d 505 (1999). In 1959, the legislature expanded the role of the fund by requiring it to pay an award of comppensation whenever an injured employee's employer or the employer's insurer did not pay. See Public Acts 1959, No. 580, § 13. Today, this provision is codified at § 31-355.[16] Section 31-355 is silent on the matter of principal employer liability. The defendants

[16] See footnote 3 of this opinion.

have failed to identify any ambiguity in the relevant statutes or statutory scheme that would prompt us to consider their argument for modification; nor have they provided any evidence suggesting that the legislature contemplated making any change to the meaning or scope of principal employer liability or otherwise relieving municipalities of principal employer liability through the fund.

The defendants' argument also misapprehends the role of the fund in our workers' compensation scheme. A primary purpose of the fund is to act as a backstop, ensuring that injured workers receive compensation when the employer has "failed, neglected, refused, or is unable to pay . . . ." General Statutes § 31-155 (b). The fund is a payer of last resort; its existence does not relieve employers or principal employers of their obligations to pay under the Workers' Compensation Act. See General Statutes § 31-355 (c) ("[t]he employer and the insurer, if any, shall be liable to the state for any payments made out of the fund").

Finally, the defendants argue that the commissioner violated § 31-286a (c) by finding the city liable as the plaintiff's principal employer "solely because" it had not met its statutory obligation under § 31-286a (a) to ensure that its contractors were in compliance with the workers' compensation insurance requirements. We declined to grant certification on this issue and do not address the claim. See, e.g., *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 195 n.2, 931 A.2d 916 (2007).

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD and VERTEFEUILLE, Js., concurred.

ROBINSON, C. J., with whom KAHN and ELGO, Js., join, dissenting. I respectfully disagree with the majority's conclusion that, under General Statutes § 31-291,[1] the defendant city of Bridgeport (city)[2] was the "principal employer" liable to pay benefits under the Workers' Compensation Act (act), General Statutes § 31-275 et seq., to the plaintiff, Christopher Barker, an employee of an uninsured roofing subcontractor who was injured while repairing the roof of the city's municipal waste transfer facility. I agree with the majority's threshold conclusions that (1) this court's decision in *Massolini* v. *Driscoll*, 114 Conn. 546, 159 A. 480 (1932), remains good law for the proposition that a municipality can be a principal employer under the act, and (2) the vitality of *Massolini* has not been affected by subsequent developments in workers' compensation law, including the 1959 expansion of the coverage responsibilities of the Second Injury Fund (fund). See Public Acts 1959, No. 580, § 13. I nevertheless part company with the majori-

[1] General Statutes § 31-291 provides: "When any principal employer procures any work to be done wholly or in part for him by a contractor, or through him by a subcontractor, and the work so procured to be done is a part or process in the trade or business of such principal employer, and is performed in, on or about premises under his control, such principal employer shall be liable to pay all compensation under this chapter to the same extent as if the work were done without the intervention of such contractor or subcontractor. The provisions of this section shall not extend immunity to any principal employer from a civil action brought by an injured employee or his dependent under the provisions of section 31-293 to recover damages resulting from personal injury or wrongful death occurring on or after May 28, 1988, unless such principal employer has paid compensation benefits under this chapter to such injured employee or his dependent for the injury or death which is the subject of the action."

[2] The defendants in the matter are (1) the city, (2) the city's insurer, PMA Insurance Company (PMA), (3) the city's contractor, All Roofs by Dominic, and (4) the subcontractor and the plaintiff's employer, Howard Adams d/b/a Howie's Roofing. Once the Workers' Compensation Commissioner determined that the plaintiff's employer was uninsured, the Second Injury Fund (fund) became obligated to pay the plaintiff's compensable claim and participated in this case. See General Statutes § 31-355 (h). Only the fund, the city, and PMA are participating in this appeal. Like the majority, I refer to the fund by name and to the city and PMA collectively as the defendants.

ty's application of *Massolini* and its progeny to affirm the judgment of the Appellate Court affirming the decision of the Compensation Review Board (board). See *Barker* v. *All Roofs by Dominic*, 183 Conn. App. 612, 623, 193 A.3d 693 (2018). Specifically, I disagree with the majority's reliance on a municipality's statutory power to "[e]stablish, lay out, construct, reconstruct, alter, maintain, repair, control and operate . . . garbage and refuse disposal facilities . . . and any and all buildings or facilities necessary or convenient for carrying on the government of the municipality"; General Statutes § 7-148 (c) (6) (A) (i); to conclude that the city is in the "business" of repairing the roofs of municipal buildings. I believe that an unduly heavy focus on municipalities' broad statutory powers under § 7-148 (c) poses the risk of rendering them the guarantor of the workers' compensation obligations of any private contractor that they engage, even in cases in which the municipality has historically chosen not to engage in that contractor's business. Instead, I conclude that the city was not in the business of roofing because it had continuously outsourced that trade to the private sector, it did not have a roofer on its payroll, and there was no evidence that its employees had worked alongside the plaintiff on the transfer station roof project. Accordingly, I respectfully dissent.

I begin by noting my agreement with the majority's statement of the background facts, procedural history, and standard of review. See, e.g., *Graham* v. *Olson Wood Associates, Inc.*, 323 Conn. 720, 731–32, 150 A.3d 1123 (2016). I also agree with the majority's view of the law in this area generally, namely, that the "purpose of the act is to provide compensation for injuries arising out of and in the course of employment, regardless of fault. . . . Under the statute, the employee surrenders his right to bring a [common-law] action against the employer, thereby limiting the employer's liability to

the statutory amount. . . . In return, the employee is compensated for his or her losses without having to prove liability." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 304, 140 A.3d 950 (2016).

"The first sentence of § 31-291 embodies the 'principal employer doctrine,' under which an employer that hires a contractor or subcontractor, and meets the statutory definition of a 'principal employer,' is liable to pay workers' compensation benefits to the injured employees of those contractors or subcontractors. . . . Furthermore, if the principal employer actually pays those benefits, according to the second sentence of § 31-291, it enjoys immunity from further claims by the injured employees brought under [General Statutes] § 31-293." (Citation omitted; footnote omitted.) Id., 303–304. "The principal employer provision has been part of the act since its enactment in 1913."[3] Id., 307. "We have previously stated that the purpose of the principal employer provi-

[3] "Prior to 1988, however, § 31-291 did not require the contractor to actually pay workers' compensation benefits to the injured employees in order to obtain immunity. . . . So long as the employer was a principal employer—and, thus, was *liable* to pay the benefits—the employer enjoyed immunity from civil actions regardless of whether it *actually paid* those benefits." (Citation omitted; emphasis in original.) *Gonzalez* v. *O & G Industries, Inc.*, supra, 322 Conn. 307. The benefits provided by the fund and certificates of insurance provided by subcontractors created an "inequitable situation" because the principal employer received immunity, even though it was "rarely" required to pay workers' compensation benefits. (Internal quotation marks omitted.) Id. Accordingly, in 1988, "the legislature amended § 31-291 to require principal employers to actually pay workers' compensation benefits in order to obtain the statutory immunity from civil actions." Id., 307–308. "[T]he purpose and effect of this amendment was to limit the implied common-law immunity of the principal employer to the situation in which it had *in fact* paid the workers' compensation benefits that presumably were the basis of its immunity. Implicit in this amendment, moreover, was the notion that, except in the *isolated cases* of its application, there would be *no such immunity*." (Emphasis in original; internal quotation marks omitted.) Id., 308; see also *Sgueglia* v. *Milne Construction Co.*, 212 Conn. 427, 434–35, 562 A.2d 505 (1989) (discussing principal employer's obligation under General Statutes § 31-355 to reimburse fund for benefits paid).

sion in § 31-291 is to afford full protection to work[ers], by preventing the possibility of defeating the [act] by hiring irresponsible contractors or subcontractors to carry on a part of the [principal] employer's work." (Internal quotation marks omitted.) Id.

It is well settled that the "three conditions that must exist for [an entity] to qualify as a principal employer are: (1) the relation of principal employer and contractor must exist in work wholly or in part for the former; (2) the work must be on or about premises controlled by the principal employer; [and] (3) the work must be a part or process in the trade or business of the principal employer." (Internal quotation marks omitted.) Id., 303 n.13. I agree with the majority that this case turns on the third element of the test, namely, whether roof repair was "a part or process in the trade or business" of the city. "When applied to a public corporation, the term [business] signifies the conduct of the usual affairs of the corporation, and such as commonly engage the attention of its officers." *Massolini* v. *Driscoll*, supra, 114 Conn. 552; see *Mancini* v. *Bureau of Public Works*, 167 Conn. 189, 195–96, 355 A.2d 32 (1974).

The "leading case" from this court expounding on the third element of the principal employer test is *King* v. *Palmer*, 129 Conn. 636, 30 A.2d 549 (1943). *Gedeon* v. *First National Supermarkets, Inc.*, 21 Conn. App. 20, 26 n.2, 571 A.2d 123, cert. denied, 215 Conn. 804, 574 A.2d 220 (1990); see also R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (Supp. 2019–2020) § 2.32, pp. 89–90 (describing "the *King* test [as] ubiquitously applied" and "the classic statement and analysis of the law in Connecticut"). In *King*, a steamfitter, who was employed by an independent company that had been "engaged in replacing and reconstructing the entire heating and steam pressure system of [a railroad company's] enginehouse," brought a negligence action to recover for injuries he sustained when

he was struck by a truck operated by the railroad's employees. *King* v. *Palmer*, supra, 637. In considering whether the railroad was statutorily immune from liability because it was the steamfitter's principal employer, the court focused on the "determinative" third element of the three factor test, observing that it had "never attempted to define by a general statement the intent expressed by the legislature in its use of the words 'part or process in the trade or business' of the principal employer and [had] in fact in [its] opinions on one or two occasions suggested that it would be difficult to do so." Id., 639. Putting aside the "part" portion of the principal employer statute,[4] the court observed that its past cases had "in effect . . . held that the words 'process in the trade or business' included all those operations [that] entered directly into the successful performance of the commercial function of the principal employer," citing routine window washing of a factory in *Fox* v. *Fafnir Bearing Co.*, 107 Conn. 189, 193, 139 A. 778 (1928), "the placing of the calks in the shoes of horses by a driver engaged in collecting ashes for a city [that] had contracted out the performance of that function" in *Massolini* v. *Driscoll*, supra, 114 Conn. 546, "and the removal of rubbish in connection with the operation of a store" in *Hoard* v. *Sears Roebuck & Co.*, 122 Conn. 185, 189, 188 A. 269 (1936). *King* v. *Palmer*, supra, 640–41. The court observed that, "[o]n the other

[4] The court stated that it was not concerned with the "part" language of the statute, deeming it "intended to meet situations, for example, [in which] a manufacturer of a general line of hats contracts out the production and distribution of hats of a particular type or [when] a transportation company contracts out the maintenance and operation of one of its branches. We might conceivably have construed the words 'process in the trade or business' as restricted to those situations [in which] a part of the process [that] entered directly into the production of goods by a manufacturer or the performance of the business function of a commercial enterprise was contracted out, as, for example, [when] a manufacturer of optical goods contracted out the rough grinding of the lenses [that] went into the instruments it produced, itself doing the polishing and finishing of the lenses, or [when] a mercantile company contracted out the maintenance and operation of a system for delivery of its goods." *King* v. *Palmer*, supra, 129 Conn. 640.

hand, [when] the work in which the employee is engaged does not directly enter into the performance of the commercial function of the claimed principal employer but only affords facilities for the conduct of his trade or business, we have held that the work is not a 'process' in that trade or business," citing examples such as "the construction of a factory building . . . and the construction of a partition in a factory . . . ." (Citation omitted.) Id., 641. Distilling these two lines of cases, the court observed in *King* that, "[i]f the work is of such a character that it ordinarily or appropriately would be performed by the principal employer's own employees in the prosecution of its business, or as an essential part in the maintenance thereof, it is a part or process of his work." Id.

As the Appellate Court has observed, *King* "sets up the distinction between acts that constitute part or process and acts that do not, based on whether the acts constitute temporary maintenance or major replacement." *Gedeon* v. *First National Supermarkets, Inc.*, supra, 21 Conn. App. 26 n.2. "It has long been held that this condition is not limited to the main tasks performed in the principal employer's trade or business. Rather, those tasks [that] are necessary to the routine functioning of a business are also included within the scope of this element . . . ." *Alpha Crane Service, Inc.* v. *Capitol Crane Co.*, 6 Conn. App. 60, 75, 504 A.2d 1376, cert. denied sub nom. *Aparo* v. *United Technologies Corp.*, 199 Conn. 807, 508 A.2d 769 (1986), and cert. denied, 199 Conn. 808, 508 A.2d 769 (1986), and cert. denied sub nom. *Aparo* v. *United Technologies Corp.*, 199 Conn. 808, 508 A.2d 769 (1986). Leading commentators observe that "[t]he shades of gray . . . are numerous in this area," but, "with a surprising degree of harmony, the cases . . . agree [on] the general rule of thumb that the statute covers all situations in which work is accomplished [that] this employer, or employers in a similar business, would ordinarily do through employ-

ees." 19 R. Carter et al., supra, § 2.32, p. 89. "It is the actual practice of the principal employer on which the application of the statute turns." *Doyle* v. *Finitsis*, 42 Conn. Supp. 168, 171, 608 A.2d 1191 (1992). This determination ultimately "is a question of degree and fact." *Grenier* v. *Grenier*, 138 Conn. 569, 571, 87 A.2d 148 (1952); see *Crisanti* v. *Cremo Brewing Co.*, 136 Conn. 529, 532, 72 A.2d 655 (1950).

Applying this analysis, the court concluded in *King* that the steamfitter was "not engaged in [a] part or process" in the railroad's business, and, therefore, his negligence claims were not barred because the railroad was not his principal employer. *King* v. *Palmer*, supra, 129 Conn. 642. The court emphasized that the railroad "had two employees who were engaged in fixing leaks in the pipes and were continuously busy at that work. This was work that would ordinarily and appropriately be performed by the principal employers in the prosecution of their business and is essential to maintaining it. However, the work out of which the [steamfitter's] injury arose was a major job of replacement of pipes and *not one of their temporary maintenance*, so that the principal employers' business might proceed without interruption." (Emphasis added.) Id., 641–42; see id., 638 (noting that steamfitter's work was exclusively supervised by plumbing independent contractor, which had provided all tools he needed for reconstruction job); see also *Grenier* v. *Grenier*, supra, 138 Conn. 570–72 (automobile sales and repair business was not principal employer of roofer who was employed by uninsured roofing company and injured while installing weatherproofing material on wooden roof because roofing work "was not of such a character that it would ordinarily be performed by the [automobile company's] employees"); *Crisanti* v. *Cremo Brewing Co.*, supra, 136 Conn. 532–33 (beverage manufacturer was principal employer of independent trucking company employee who was injured while loading truck for New York deliveries

because he was "actually" working "in collaboration" with beverage manufacturer's employees during loading, and beverage manufacturer "maintained a fleet of trucks operated by its own employees to deliver to its [Connecticut and Massachusetts] customers 80 [percent] of its merchandise," rendering it "just as much a business function of the defendant to deliver its product by one method as by the other"); *Zimmerman* v. *MacDermid, Inc.*, 130 Conn. 385, 388–89, 34 A.2d 698 (1943) (moving "drums of chemicals from the unloading platform to the place in the factory designated by [the chemical plant's] employee was work [that] would ordinarily be performed by the employees of the [chemical plant]," rendering chemical plant principal employer of injured delivery company employee); *Alpha Crane Service, Inc.* v. *Capitol Crane Co.*, supra, 6 Conn. App. 76 (The crane operator was a statutory employee of the mechanical and electrical engineering company, which had been engaged to dismantle ductwork at a laboratory, because "[a] necessary and expected part of that business was that the dismantled ducts had to be lowered to the ground. Thus, the use of cranes such as those operated by [the independent contractors] was a part or process in [the engineering firm's] trade or business."); *Doyle* v. *Finitsis*, supra, 42 Conn. Supp. 171 ("[T]he actual practice of the bakery was to bake pastries and to sell them. The business of supplying the bakery with flour was . . . not that of its employees but of nonemployees, such as [the injured delivery employee]. The work that [the supplier and its employee] were performing was not [a] part or process of the [bakers'] trade or business.").

Turning to our principal employer cases involving municipalities, I note that the leading case is *Massolini* v. *Driscoll*, supra, 114 Conn. 546, in which this court held that the city of Hartford was the principal employer of a driver who was employed by an independent con-

tractor that supplied a team of horses to pull a wagon owned by the city and used by city employees to collect refuse. Id., 548–49, 553; see also 19 R. Carter et al., supra, § 2.32, p. 91 (describing *Massolini* as "[t]he seminal case" for principal employer liability for municipalities). The driver was killed while applying calks to the shoes of the horses to keep them from slipping, a horse care task that the court described as "not part of [Hartford's] business" and "solely in the interest of [the contractor] and of no benefit to" Hartford. *Massolini* v. *Driscoll*, supra, 549. Nevertheless, the court held that Hartford was liable to pay workers' compensation benefits as a principal employer because "the disposal of ashes and rubbish is a 'business,' in which . . . Hartford was engaged at the time of [the] accident" insofar as the driver had "been injured on the premises of [Hartford], while employed by a contractor hired by it, and while engaged in doing an act incidental to and in furtherance of the operations involved in the business of" Hartford. Id., 553. The court emphasized that picking up refuse was part of the exercise of Hartford's "police powers." Id., 552–53. I, however, find most significant the fact that the driver in *Massolini* was working alongside Hartford's own employees at the time of his fatal injury. Id., 548–49.

Similarly illustrative is this court's more recent decision in *Mancini* v. *Bureau of Public Works*, supra, 167 Conn. 189, which involved the Metropolitan District, a public corporation authorized by its statutory "charter . . . to build, create, maintain, alter or repair sewers throughout its district." Id., 191. In *Mancini*, the plaintiffs were employees of a construction company that the Metropolitan District had hired to install a sewer line in the town of Rocky Hill; they were injured in an explosion that occurred during the excavation process when one of the plaintiffs struck a dynamite blasting cap with his jackhammer. Id., 191–92. The court held that the Metropolitan District was the plaintiffs' princi-

pal employer, thus barring their negligence claims under § 31-291. Id., 192–93. Specifically, the court held that the trial court had properly instructed the jury with respect to the third element of the test because the fact that the Metropolitan District had used its own employees in addition to private contractors to dig sewers, along with the powers set forth in its charter, rendered the construction of sewers a part or process in its business. Id., 196. The court rejected the plaintiffs' reliance on the absence of evidence that the Metropolitan District "had engaged in blasting when laying sewer lines," rejecting this narrow construction of the act because, "under the terms of the statute, the actual cause of the injury is irrelevant to its applicability. Consequently, the absence of any showing that the [Metropolitan District] engaged in blasting is not fatal to the defense." Id., 195–96. Taking a broad approach to the *King* analysis, the court emphasized that "the 'work' to be performed by [the construction company] for the [Metropolitan District] can be characterized as laying sewer lines," especially "[g]iven that the [Metropolitan District's] charter authorized such construction, and that the plaintiffs' own claims of proof contain the statement that some of the sewers laid on behalf of the [Metropolitan District] were laid by [its own] employees . . . ." Id., 196.

Although I agree with the majority that the city's statutory authorization to engage in the construction and maintenance of municipal buildings is a *relevant* factor in determining whether roofing was a part or process in its business, the sheer breadth of municipal powers under § 7-148 (c), which encompasses nearly every conceivable aspect of running a city,[5] means that

[5] For example, subdivision (4) of § 7-148 (c) provides that a municipality may: "(A) Provide for police protection, regulate and prescribe the duties of the persons providing police protection with respect to criminal matters within the limits of the municipality and maintain and regulate a suitable place of detention within the limits of the municipality for the safekeeping of all persons arrested and awaiting trial and do all other things necessary or desirable for the policing of the municipality;

"(B) Provide for fire protection, organize, maintain and regulate the persons providing fire protection, provide the necessary apparatus for extinguishing fires and do all other things necessary or desirable for the protection of the municipality from fire;

"(C) Provide for entertainment, amusements, concerts, celebrations and cultural activities, including the direct or indirect purchase, ownership and operation of the assets of one or more sports franchises;

"(D) Provide for ambulance service by the municipality or any person, firm or corporation;

"(E) Provide for the employment of nurses;

"(F) Provide for lighting the streets, highways and other public places of the municipality and for the care and preservation of public lamps, lamp posts and fixtures;

"(G) Provide for the furnishing of water, by contract or otherwise;

"(H) Provide for or regulate the collection and disposal of garbage, trash, rubbish, waste material and ashes by contract or otherwise, including prohibiting the throwing or placing of such materials on the highways; [and]

"(I) Provide for the financing, construction, rehabilitation, repair, improvement or subsidization of housing for low and moderate income persons and families . . . ."

With respect to public works, sewers, and highways, subdivision (6) of § 7-148 (c) provides in relevant part that a municipality may: "(A) . . . (i) Establish, lay out, construct, reconstruct, alter, maintain, repair, control and operate cemeteries, public burial grounds, hospitals, clinics, institutions for children and aged, infirm and chronically ill persons, bus terminals and airports and their accessories, docks, wharves, school houses, libraries, parks, playgrounds, playfields, fieldhouses, baths, bathhouses, swimming pools, gymnasiums, comfort stations, recreation places, public beaches, beach facilities, public gardens, markets, garbage and refuse disposal facilities, parking lots and other off-street parking facilities, and any and all buildings or facilities necessary or convenient for carrying on the government of the municipality;

"(ii) Create, provide for, construct, regulate and maintain all things in the nature of public works and improvements;

"(iii) Enter into or upon any land for the purpose of making necessary surveys or mapping in connection with any public improvement, and take by eminent domain any lands, rights, easements, privileges, franchises or structures which are necessary for the purpose of establishing, constructing or maintaining any public work, or for any municipal purpose, in the manner prescribed by the general statutes;

"(iv) Regulate and protect from injury or defacement all public buildings, public monuments, trees and ornaments in public places and other public property in the municipality;

"(v) Provide for the planting, rearing and preserving of shade and ornamental trees on the streets and public grounds;

"(vi) Provide for improvement of waterfronts by a board, commission or otherwise;

"(B) . . . (i) Lay out, construct, reconstruct, repair, maintain, operate, alter, extend and discontinue sewer and drainage systems and sewage disposal plants . . . .

* * *

excessive reliance on that factor would render a municipality the workers' compensation guarantor of virtually every employee of an independent contractor engaged by the city.[6] Thus, I afford greater importance to the city's "actual practice"; *Doyle* v. *Finitsis*, supra, 42

"(C) . . . (i) Lay out, construct, reconstruct, alter, maintain, repair, control, operate, and assign numbers to streets, alleys, highways, boulevards, bridges, underpasses, sidewalks, curbs, gutters, public walks and parkways;

"(ii) Keep open and safe for public use and travel and free from encroachment or obstruction the streets, sidewalks and public places in the municipality . . . .

* * *

"(v) Require owners or occupants of land adjacent to any sidewalk or public work to remove snow, ice, sleet, debris or any other obstruction therefrom, provide penalties upon their failure to do so, and cause such snow, ice, sleet, debris or other obstruction to be removed and make the cost of such removal a lien on such property . . . ."

[6] My research reveals that Virginia case law, some of which is cited with approval by the majority, strictly distinguishes governmental entities and public utilities from private sector employers for purposes of the business aspect of its "statutory employer" test, which is akin to our principal employer status. In this context, the Virginia Supreme Court has rejected a test akin to that in *King* v. *Palmer*, supra, 129 Conn. 640–41, for private employers, which considered whether the work at issue would "normally [be] carried on through . . . employees rather than independent contractors," describing it as "not designed for every situation. It works best in cases involving private businesses because those entities often define their trade, business, or occupation by their conduct. With regard to such entities, what they do on a day-to-day basis provides a reasonably reliable indicator of their trade, business, or occupation.

"Yet, public utilities and governmental entities are of another class. It is not simply what they do that defines their trade, business, or occupation. What they are supposed to do is also a determinant. Whereas a private business entity is essentially self-defining in terms of its trade, business, or occupation, a public utility has duties, obligations, and responsibilities imposed [on] it by statute, regulation, or other means." (Emphasis omitted; internal quotation marks omitted.) *Ford* v. *Richmond*, 239 Va. 664, 666–67, 391 S.E.2d 270 (1990), quoting *Henderson* v. *Central Telephone Co. of Virginia*, 233 Va. 377, 383, 355 S.E.2d 596 (1987). The court went on to conclude in *Ford* that a contractor's employee who was injured while repairing a roof over a reservoir at a municipal waterworks was a statutory employee of the city of Richmond, which "was authorized and empowered by legislative mandate to perform certain public duties including . . . the maintenance of a public facility. Under the test applicable to governmental entities, the maintenance work delegated by contract to [the contractor] and performed by its employee, [Curtis E.] Ford, was part of the trade, business or occupation of [Richmond]. As an owner performing such work through an indepen-

Conn. Supp. 171; with respect to its execution of its statutory powers and responsibilities, which renders the present case distinguishable from *Mancini* and *Massolini*.[7]

Specifically, the city's broad menu of powers under § 7-148 (c) is distinct from the sewer line construction

dent contractor, [Richmond] was Ford's statutory employer," and workers' compensation benefits constituted "Ford's exclusive rights and remedies for the injury by accident . . . arising out of and in the course of the employment . . . ." (Citations omitted; internal quotation marks omitted.) *Ford* v. *Richmond*, supra, 669; see *Jones* v. *Commonwealth*, 267 Va. 218, 224–25, 591 S.E.2d 72 (2004) (concluding, without analysis of work of university's employees, that independent contractor injured while performing asbestos abatement at public university was statutory employee of university because of statute charging its "Board of Visitors . . . 'with the care and preservation of all property belonging to the [u]niversity' "); *Roberts* v. *Alexandria*, 246 Va. 17, 19–20, 431 S.E.2d 275 (1993) (holding that city of Alexandria was statutory employer of employee of medical services provider that sheriff had contracted with to provide medical services at city jail because Alexandria "clearly is authorized and empowered [by state statute] to provide medical services to the jail's inmates" and because Alexandria pays costs of operating jail from its general fund revenues).

I note that the Virginia analysis for determining a statutory employer in the governmental context has been criticized as "out of step" with other courts. *Best* v. *Washington Metropolitan Area Transit Authority*, 822 F.2d 1198, 1202 (D.C. Cir.1987) (Mikva, J., concurring); see id. (Mikva, J., concurring) (accepting *Henderson* as binding statement of state law in concluding that independent contractor's employee, who was injured when fixing escalator in subway station, was statutory employee of transit authority because "his employer contracted with a governmental entity [the] broad statutory mandate [of which] appears to embrace escalator repair"); see also *Hose* v. *United States*, 604 F. Supp. 2d 147, 151–52 (D.D.C. 2009) (citing federal cases showing broad application of Virginia law). I agree. With no consideration of a municipality's actual practices, the Virginia approach renders municipalities the guarantor of virtually every employee of any contractor that they engage, particularly given the broad statutory authority of municipalities to act in a variety of areas. I am concerned that the primacy that the majority places on the statutory mandate under § 7-148 (c)—with no evidence that the city ever used its own employees to engage in roofing tasks or to perform actual work alongside the contracted roofers—puts Connecticut on the same path.

[7] I respectfully disagree with the majority's reliance on *Pacileo* v. *Morganti, Inc.*, 10 Conn. App. 261, 522 A.2d 841 (1987). In *Pacileo*, the Appellate Court concluded that a general contractor was the principal employer of an ironworker because "the defendant's business, as the general contractor, was to oversee and implement the construction of the city hall library

and maintenance that were the raisons d'être of the Metropolitan District in *Mancini*, which the Metropolitan District accomplished in part with its own employees. *Mancini* v. *Bureau of Public Works*, supra, 167 Conn. 196. In contrast to the driver in *Massolini*, who drove a team of horses hitched to a city owned wagon that was staffed by city employees doing the routine task of refuse collection; *Massolini* v. *Driscoll*, supra, 114 Conn. 548–49; the record in the present case does not reveal any evidence that the plaintiff was working alongside any city employees on the transfer station roof construction project or that the city used its own employees for roofing tasks at any time. John F. Cottell, Jr., the city's Deputy Director of Public Facilities[8] who was the sole witness at the formal hearing before the Workers' Compensation Commissioner, testified that, although the city employed other tradespeople, such as carpenters, electricians, and plumbers, the Bridgeport Department of Public Facilities did not employ any roofers because the lack of regular roofing work rendered it more financially advantageous to hire an outside contractor when necessary.[9] To Cottell's knowl-

complex. . . . A necessary and expected part of that construction was the laying of steel rods for the pouring of concrete. Ironworkers generally lay steel rods. Since none of the individuals directly employed by [the defendant was] qualified to perform the job of ironworker . . . the utilization of ironworkers such as the plaintiff was a part or process of the defendant's trade or business." (Internal quotation marks omitted.) Id., 264. A general construction contractor, who voluntarily undertakes the organization of a major construction project as a commercial venture, is situated differently from a municipality that has broad statutory powers in a variety of areas and makes operational decisions as to the best way to implement those powers and responsibilities.

[8] As the city's Deputy Director of Public Facilities, Cottell supervised departmental divisions for roadway maintenance, recycling and sanitation, the city's municipal garage, and the city's Board of Education facilities, and also worked with other department heads for divisions such as maintenance and parks and recreation. He oversaw city employees, as well as the hiring of relevant contractors.

[9] Cottell testified that the city would hire outside contractors with respect to the other trades if necessary based on the size of the job, the amount of time that the job would require, and other working demands on his department.

edge, the city had never employed a roofer and lacked the funds to do so. Moreover, the record demonstrates that the city engaged in only the most fleeting supervision of the plaintiff's work on this project, with Cottell testifying that he stopped by the roofing project "at least once" but that he did not recall seeing the plaintiff personally.

Put differently, there is no evidence that roofing was a routine, nonspecialized maintenance task integral to the day-to-day operations of the Department of Public Facilities.[10] Thus, I view this case as more akin to *Gaspard* v. *Orleans Parish School Board*, 688 So. 2d 1298, 1302–1303 (La. App. 1997), in which the court held that a school board was not the principal employer of a plumber, an employee of an independent contractor who was injured while replacing a school's plumbing system. In that case, the court observed that the school board "contracts out specialized work such as a replumbing job," which "was not routine work for the [school board, which] did not customarily use [its] own employ-

[10] I note that the record is silent as to the city's construction and maintenance practices with respect to its public housing; see General Statutes § 7-148 (c) (4) (I); and Cottell testified that the Department of Public Facilities was not responsible for the construction and maintenance of public housing facilities. Given the importance of a roof to housing, I leave open the possibility that a city that owns and operates public housing facilities might be akin to a real estate developer, rendering roofing and related services part of the business of providing public housing. See *Rodriquez* v. *John Russell Construction*, 16 Kan. App. 2d 269, 274–75, 826 P.2d 515 (1991) (The court held that the municipality was the "statutory employer" of a privately employed roofer who was injured while repairing the roof of a public housing complex because, when a municipality "becomes involved as a local housing authority, its trade or business becomes everything inherent to the ownership and operation of an apartment complex with a large number of tenants. . . . Roof repair was essential to protect the building and ensure that it remained habitable."); see also *Mahaffey* v. *United States*, 785 F. Supp. 148, 149–51 (D. Kan. 1992) (United States Army was principal employer of independent construction contractor's laborer because, "through the Army Corps of Engineers and the Directorate of Engineering and Housing at Fort Riley, Kansas, [it was] responsible for designing, constructing, maintaining and supervising military facilities," rendering "the construction and maintenance of barracks . . . inherent in and an integral part of [the] United States Army's trade or business").

ees for such jobs." Id., 1303. But cf. *Sandhu* v. *State*, Docket No. 1 CA-CV16-0095, 2017 WL 1278982, *3 (Ariz. App. April 6, 2017) (state department of correction was principal employer of dentist employed by independent contractor because, inter alia, it retained control over independent contractor's employees by imposing departmental "policies and procedures while providing health and dental services," and medical care was "a 'part or process' " in department's business rather than "ancillary" function because "[t]he provision of medical and dental services to inmates is a routine part of [the department's] business, because Arizona law" imposes nondelegable duty on department to provide proper care); *Broward County* v. *Rodrigues*, 686 So. 2d 774, 775 (Fla. App.) (maintenance employee of independent contractor injured while cleaning tank at county owned and operated wastewater treatment plant was statutory employee of county because cleaning of tank was necessary to operation of plant, and county passed on all operating costs pursuant to contract with municipalities), cause dismissed, 690 So. 2d 1300 (Fla. 1997); *Joseph* v. *Parish of St. John the Baptist*, 772 So. 2d 737, 738–39 (La. App. 2000) (employee of independent contractor trash hauler was statutory employee of parish, which was legally required to provide garbage collection, nature of work was routine and nonspecialized, parish had personnel capable of performing work, although it did not have equipment at that time, and parish collected refuse removal fees from its residents"); *Clark* v. *Nevada Industrial Commission*, 99 Nev. 729, 730, 669 P.2d 730 (1983) (county was principal employer of temporary poll workers because "the employment of election workers is clearly within the scope of the county's business of providing governmental services").

Given these authorities and the record in this case, which indicated that the city had never employed its own roofers at any relevant time and contained no

evidence that city employees worked alongside the plaintiff or other employees of private contractors on the transfer station roof project, I conclude that the city was not in the business of roofing with respect to its public facilities.[11] Accordingly, the city was not the principal employer liable to pay workers' compensation benefits to the plaintiff under § 31-291.

Because I would reverse the judgment of the Appellate Court, I respectfully dissent.

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[11] Although this appeal turns on the third element, namely, whether the city was in the trade or business of roofing, I briefly address the second element of the principal employer test, which concerns whether "the work must be on or about premises controlled by the principal employer . . . ." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, supra, 322 Conn. 303 n.13. I suggest that the historical purpose of the principal employer doctrine is better accomplished when the focus is on authority over the conditions of the workplace at issue rather than on authority over the premises in general, such as that conferred by property ownership. See *Grenier* v. *Grenier*, supra, 138 Conn. 572 ("[t]he special purpose of [the act] is to protect employees of minor contractors against the possible irresponsibility of their immediate employers, by making the principal employer *who has general control of the business in hand* liable as if he had directly employed all who work [on] any part of the business [that] he has undertaken to carry on" (emphasis added; internal quotation marks omitted)); *Wilson* v. *Largay Brewing Co.*, 125 Conn. 109, 112, 3 A.2d 668 (1939) ("[t]he underlying purpose of the restriction as to the place of employment in the various acts was obviously *to limit liability to those situations* [*in which*] *such conditions might be assumed to be largely within the control or observation of the principal employer*" (emphasis added)). This distinction is most readily apparent in considering a general contractor relative to its subcontractors, with the other extreme represented by a homeowner who may, as a matter of law, own or control the premises but hires individuals for home improvement projects because they do not have the expertise or tools to engage in this work safely or competently. This consideration, however, would also likely be reflected in the third "trade or business" element, as well, given its consideration of whether the principal employer's own employees are working alongside the contractor's employees on the project at issue. See *Grenier* v. *Grenier*, supra, 571–72 (criticizing *Bello* v. *Notkins*, 101 Conn. 34, 36–38, 124 A. 831 (1924), which held that homeowner was principal employer of independent contractor employee who was building house for homeowner's own use, and suggesting that decision was driven by fact that homeowner's "business . . . was building houses").

ORDERS

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KATHLEEN JACQUES *v.* COMMISSIONER OF ENERGY AND ENVIRONMENTAL PROTECTION ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 203 Conn. App. 419 (AC 42609), is denied.

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

Richard S. Cody, in support of the petition.

Lori D. DiBella, assistant attorney general, in opposition.

Decided April 27, 2021

MARIA J. DERBLOM, EXECUTRIX (ESTATE OF FRED H. RETTICH), ET AL. *v.* ARCHDIOCESE OF HARTFORD

The plaintiffs' petition for certification to appeal from the Appellate Court, 203 Conn. App. 197 (AC 42630), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the plaintiffs, as putative beneficiaries of a testamentary bequest, did not have standing to enforce the terms of that bequest under the 'special interest' exception to

the rule giving the state's attorney general exclusive enforcement authority?"

D'AURIA, J., was not present for the vote on this petition.

Cody A. Layton, in support of the petition.

Lorinda S. Coon, in opposition.

Decided April 27, 2021

NEMIAH ALLAN *v.* COMMISSIONER OF CORRECTION

The petitioner Nemiah Allan's petition for certification to appeal from the Appellate Court, 203 Conn. App. 903 (AC 42781), is denied.

J. Patten Brown III, assigned counsel, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided April 27, 2021

STATE OF CONNECTICUT *v.* MARK STEVEN CAPASSO, JR.

The defendant's petition for certification to appeal from the Appellate Court, 203 Conn. App. 333 (AC 43051), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

Jennifer F. Miller and *Matthew A. Weiner*, assistant state's attorneys, and *Beth M. Kailey* and *Geoffrey B. Young*, certified legal interns, in opposition.

Decided April 27, 2021

ROBERT S. BUIE *v.* COMMISSIONER OF CORRECTION

The petitioner Robert S. Buie's petition for certification to appeal from the Appellate Court, 203 Conn. App. 232 (AC 43268), is denied.

J. Patten Brown III, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided April 27, 2021

ELIZABETH MECCA *v.* WILLIAM F. MECCA, JR.

The defendant's petition for certification to appeal from the Appellate Court, 203 Conn. App. 541 (AC 43293), is denied.

Sheila S. Charmoy, in support of the petition.

Jonathan E. Von Kohorn and *Tara L. Von Kohorn*, in opposition.

Decided April 27, 2021

JON ST. PIERRE *v.* COMMISSIONER OF CORRECTION

The petitioner Jon St. Pierre's petition for certification to appeal from the Appellate Court, 203 Conn. App. 901 (AC 43370), is denied.

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

James E. Mortimer, in support of the petition

Decided April 27, 2021

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

The named defendant's petition for certification to appeal from the Appellate Court (AC 44253) 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 named defendant, Timothy Brignole, pursuant to General Statutes § 52-196a?"

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

Mario Cerame, in support of the petition.

Decided April 27, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 204

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

JEROME RICE *v.* COMMISSIONER OF CORRECTION (AC 42970)

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

Syllabus

The petitioner, who had been convicted of the crime of murder, filed a third petition for a writ of habeas corpus. The habeas court, upon the request of the respondent Commissioner of Correction, issued an order, pursuant to statute (§ 52-470 (e)), to show cause why the petition should not be dismissed as untimely pursuant to § 52-470 (d) (1) on the ground that it was not filed within two years of the conclusion of appellate review of the judgment on the prior habeas petition. Following an evidentiary hearing, during which the petitioner testified, the habeas court dismissed the petition as untimely, concluding that the petitioner failed to establish good cause for the delay in filing his petition. In reaching its decision, the court determined that there was no evidence corroborating the petitioner's testimony that his prior habeas and appellate counsel did not advise him of the statutory time constraints or that he had taken substantial steps to pursue a federal habeas petition. The court also stated that it was not persuaded by that testimony nor the petitioner's testimony that he was unaware of the statutory time constraints. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner could not prevail on his claim that the habeas court erred in rejecting his claim that his ignorance of the time constraints in § 52-470 (d) constituted good cause for the delay in the filing of his habeas petition, which was based on his argument that his testimony that he was unaware of the statutory deadlines overcomes the rebuttable presumption of unreasonable delay: even if an assertion of ignorance of the statutory deadlines was sufficient to satisfy the burden of showing good cause, the habeas court found that the petitioner's testimony that he was unaware of the

deadlines was not credible, and it was not within the purview of this court to second-guess the habeas court's credibility determinations; accordingly, there was no basis for this court to conclude that the habeas court abused its discretion in denying the petition for certification to appeal.

Argued November 19, 2020—officially released May 11, 2021

Procedural History

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

Naomi T. Fetterman, for the appellant (petitioner).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Jerome Rice, appeals from the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely under General Statutes § 52-470 (d) and (e).[1] On appeal, the

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require. . . .

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior

petitioner claims that the habeas court improperly determined that, pursuant to § 52-470 (e), the petitioner had not established good cause to overcome the presumption of unreasonable delay for the filing of his untimely habeas petition. We disagree and accordingly dismiss the appeal.[2]

The following facts and procedural history, as set forth by the habeas court, are relevant to the petitioner's claim on appeal. "The petitioner was [found guilty] by a jury of murder in violation of General Statutes § 53a-54a . . . . On February 15, 2006, the [trial] court imposed a sentence of fifty-three years [of] incarceration. He appealed, and [this court] affirmed his convic-

petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

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

[2] This court recently issued an order asking the parties for their positions regarding whether consideration of this appeal should be stayed pending the final disposition in *Kelsey* v. *Commissioner of Correction*, Docket No. SC 20553 (appeal filed February 3, 2021), by our Supreme Court. The petitioner argued that the appeal should be stayed for clarification regarding the appropriate standard of review and whether a petitioner's ignorance of the filing deadline imposed by § 52-470 (d) (1) is good cause for delay. The respondent, the Commissioner of Correction, objected to a stay arguing that our Supreme Court's decision in *Kelsey* will not control the outcome of this appeal because the habeas court's decision in the present case is based on its finding that the petitioner's testimony was not credible, and, therefore, we are not required to address either the standard of review question or the legal meaning of good cause resolved by this court in *Kelsey*. Because we agree with the respondent that the resolution of the issues that the Supreme Court granted certification in *Kelsey* will have no bearing on the outcome of this appeal, we decline to stay this case.

tion and our Supreme Court denied certification to appeal on February 14, 2008. *State* v. *Rice*, 105 Conn. App. 103, 936 A.2d 694 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1101 (2008).

"[The petitioner] initiated his first petition for writ of habeas corpus . . . on July 6, 2007. This [petition] was withdrawn on July 20, 2010. A second habeas petition . . . was filed on August 6, 2010. The matter was tried to the [habeas] court, and the petition was denied on June 26, 2013. The petitioner appealed, and [this court] dismissed the appeal . . . [and] [o]ur Supreme Court denied certification to appeal on January 14, 2015. *Rice* v. *Commissioner of Correction*, 154 Conn. App. 901, 103 A.3d 1006 (2014), cert. denied, 315 Conn. 915, 106 A.3d 307 (2015). He then filed the instant petition on March 15, 2018."

On February 8, 2019, the habeas court, at the request of the respondent, the Commissioner of Correction, issued an order to show cause why the petition should not be dismissed as untimely pursuant to § 52-470 (d) (1) on the ground that it was not filed within two years of the conclusion of appellate review of the judgment on the prior petition, which became final on January 14, 2015. On March 27, 2019, the court held an evidentiary hearing at which the petitioner testified. The petitioner argued that "good cause exists because he was never informed by his prior attorneys of the existence of statutory time constraints that would prohibit him from getting review of his claims and, had he known of the expiration of the time period, he would have timely filed the petition. He testified that he was preparing to file a federal habeas corpus petition when he became aware that he might need to raise some claims in state court in order to exhaust his remedies before seeking relief in federal court."

In a memorandum of decision dated April 3, 2019, the habeas court, *Bhatt*, *J.*, dismissed the habeas petition as untimely under § 52-470 (d), concluding that the peti-

tioner failed to establish good cause for the delay. The court determined that there was no evidence corroborating the petitioner's testimony that prior habeas and appellate counsel did not advise him of the time constraints or that he had taken substantial steps to pursue a federal habeas petition. Because the court was "not persuaded by the testimony of the petitioner that he was unaware of the time constraints within which to refile his petition, was not informed of the same by prior habeas counsel and has acted with reasonable diligence in pursuing his legal rights," the court dismissed the petition. The court thereafter denied the petition for certification to appeal, and this appeal followed.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether

the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Haywood* v. *Commissioner of Correction*, 194 Conn. App. 757, 763–64, 222 A.3d 545 (2019), cert. denied, 335 Conn. 914, 229 A.3d 729 (2020).

"The conclusions reached by the [habeas] court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008). "To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 121 Conn. App. 295, 298, 995 A.2d 641, cert. denied, 297 Conn. 920, 996 A.2d 1192 (2010).

The petitioner asserts that the habeas court erred by rejecting his claim that his ignorance of the time constraints set forth in § 52-470 (d) constituted good cause for the delay in the filing of his habeas petition. In particular, he argues that his testimony that he was unaware of the statutory deadlines overcomes the rebuttable presumption of unreasonable delay.[3]

[3] This court recently addressed, and rejected, an identical claim in *Felder* v. *Commissioner of Correction*, 202 Conn. App. 503, 246 A.3d 63, cert. granted, 336 Conn. 924, A.3d (2021). In *Felder*, the petitioner alleged that he was unaware of the deadlines contained in § 52-470 and that his previous habeas counsel never informed him of the deadlines. Id., 516–17. The petitioner contended that this was sufficient evidence to demonstrate good cause for the delay in the filing of his petition. Id., 516. This court held: "[W]e are not persuaded that the petitioner's alleged lack of knowledge of the deadlines contained in § 52-470 is sufficient to compel a conclusion that he met his burden of demonstrating good cause for the delay. The only evidence the petitioner presented to support his contention that he was unaware of the filing deadline in § 52-470 was his own testimony that he lacked personal knowledge of the deadline and that he was never informed of it by his previous habeas counsel. Although it is unclear whether the

Even if an assertion of ignorance of the statutory deadlines was sufficient to satisfy the burden of showing good cause, the habeas court found that the petitioner's testimony that he was unaware of the deadlines was *not credible*. "[T]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . ." (Internal quotation marks omitted.) *Brenton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017). It is not within the purview of this court to second-guess the habeas court's credibility determinations. Accordingly, there is no basis for us to conclude that the habeas court abused its discretion when it denied the petition for certification to appeal.[4]

The appeal is dismissed.

In this opinion the other judges concurred.

habeas court credited the petitioner's assertion, the habeas court properly concluded that a mere assertion of ignorance of the law, without more, is insufficient to establish good cause. We conclude that the habeas court did not abuse its discretion in determining that the petitioner failed to establish good cause for the delay in filing his successive habeas petition." Id., 519. We are aware that our Supreme Court has granted certification in *Felder* on three issues, which include whether this court correctly determined that the habeas court did not abuse its discretion in rejecting the petitioner's claim that his ignorance of the statutory deadlines was good cause to overcome the rebuttable presumption of unreasonable delay. See *Felder* v. *Commissioner of Correction*, 336 Conn. 924, A.3d (2021). The issues before the Supreme Court in *Felder* have no bearing on the outcome of the present appeal because, unlike in *Felder*, the habeas court in the present case made clear that it did not credit the testimony of the petitioner.

[4] See *Langston* v. *Commissioner of Correction*, 185 Conn. App. 528, 533, 197 A.3d 1034 (2018) ("the petitioner's prior counsel did not testify and the habeas court concluded that there was insufficient evidence to ascertain whether counsel had failed to apprise the petitioner of the time constraints governing his subsequent petition"), appeal dismissed, 335 Conn. 1, 225 A.3d 282 (2020). The petitioner seemingly relies on our Supreme Court's grant of certification in *Langston* to argue that the resolution of the underlying claim in this case involves issues that are debatable among jurists of reason, resulting in an abuse of discretion in the habeas court's denial of his petition for certification to appeal. Because our Supreme Court subsequently dismissed the appeal after determining that certification was improvidently granted, this argument is unavailing.

PROPERTY TAX MANAGEMENT, LLC *v.* WORLDWIDE PROPERTIES, LLC, ET AL.

(AC 43682)

Moll, Cradle and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant property owners for breach of contract in connection with the defendants' failure to pay for services rendered. The plaintiff is a business that provides tax consultation services and specializes in real estate tax valuation and assisting property owners in contesting property assessments. The parties entered into a contract authorizing the plaintiff to represent the defendants at informal hearings, before the Board of Assessment Appeals of the City of Bridgeport and, if necessary, to hire an attorney to represent the defendants on appeal to the Superior Court. After the defendants refused to pay the plaintiff for the services it had rendered, the plaintiff commenced this action. The trial court rendered judgment in favor of the plaintiff on its complaint in part and the defendants appealed to this court, claiming that the court erred in not finding that the plaintiff had engaged in, or otherwise induced, the illegal practice of law by hiring an attorney to pursue the tax appeals and in maintaining exclusive control over the tax litigation. *Held* that the contract was consistent with public policy considerations and did not authorize the illegal or unauthorized practice of law: the trial court correctly observed that Connecticut courts have enforced agreements like the one at issue in the present case, and, according to our Supreme Court, contracts of this nature are consistent with the public policies against the unauthorized practice of law and in favor of fair and accurate taxation because they facilitate the correction of errors by municipal assessors; moreover, the contract provided the defendants with the right to discontinue the engagement at any time with proper notice, and the tax appeals to the Superior Court were validly brought by an attorney retained by the plaintiff on behalf of the defendants.

Argued March 8—officially released May 11, 2021

Procedural History

Action seeking damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendants filed a counterclaim; thereafter, the court, *Radcliffe, J.*, denied the defendants' motion for summary judgment;

subsequently, the case was tried to the court, *Hon. George N. Thim*, judge trial referee; judgment in part for the plaintiff on the complaint and judgment for the plaintiff on the counterclaim, from which the defendants appealed to this court. *Affirmed.*

Bill L. Gouveia, for the appellants (named defendant et al.).

Linda Pesce Laske, with whom, on the brief, was *Eric M. Gross*, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. In this breach of contract action, the defendants[1] appeal from the judgment, rendered after a trial to the court, in favor of the plaintiff, Property Tax Management, LLC, requiring that the defendants pay the plaintiff for services performed pursuant to a contract between the parties. On appeal, the defendants claim that the court erred in determining that a valid and enforceable contract existed between the parties that did not call for the illegal practice of law. We affirm the judgment of the trial court.

The trial court found the following facts. The defendants own real property located in the city of Bridgeport (city).[2] The plaintiff is a business that provides tax consultation services, specializes in real estate tax valuation and assists property owners in contesting property assessments.

[1] The defendants in this appeal are: Worldwide Properties, LLC; Englewood of Conn., Inc.; Main Sequoia, LLC, 4890 Main Street, LLC; J.G.V. Builders, Inc.; 4270 Main Street, LLC; 4348 Main Street Associates, Inc.; J.G.V. Barnum, LLC; 3768 Main Street, LLC; TVB, LLC; 3851 Main Street, Corp.; and Beechmont Group, LLC. In this opinion, we refer to these parties collectively as the defendants.

Antoinette Voll was also named as a defendant but is not involved in this appeal. The trial court rendered judgment in her favor, finding that no contract existed between her and the plaintiff.

[2] The defendants own twenty-six individual properties in the city.

In January, 2016, the defendants received a "Notice of Assessment Change" from the city. This assessment provided the assessed values of the defendants' properties for tax purposes and informed the defendants that they could review these updated assessments on an informal basis with an organization that was assisting the city in the reevaluation process, and then proceed to appeal to the Board of Assessment Appeals of the City of Bridgeport (board).

In January, 2016, a representative of the defendants was at Bridgeport City Hall to arrange a meeting for an informal review of the assessed values of the defendants' properties, when he met a representative of the plaintiff with whom he was acquainted. After the plaintiff's representative explained the tax consulting services that the plaintiff could provide, the defendants decided to retain the plaintiff to obtain tax assessment reductions on their properties. The parties entered into a written contract, which authorized the plaintiff to represent the defendants at informal hearings, before the board,[3] and then, if necessary, to hire an attorney to represent the defendants on appeal to the Superior Court. Under the terms of the contract, the defendants had the ultimate authority to accept or reject any reduction negotiated by the plaintiff or the attorney that it hired.

The plaintiff succeeded in obtaining reductions of some of the property assessments at the informal stage and before the board. With respect to the properties for which the plaintiff was unable to obtain reductions in the assessments, the plaintiff retained Attorney Steven Antignani[4] to pursue appeals in the Superior Court on behalf of the defendants. Antignani represented the

[3] General Statutes § 12-111 (a) allows a property owner to appeal to the board if the owner is aggrieved by the assessment of the value of the property, and expressly permits a "duly authorized agent of the property owner" to represent the owner in such an appeal.

[4] Antignani is not a party to this action.

defendants during pretrial proceedings and obtained reduced assessments pursuant to stipulated judgments. On or about June 13, 2017, having performed the services that it had agreed to provide under the contract, the plaintiff submitted an invoice to the defendants.

The defendants refused to pay the plaintiff for the services that it had rendered, and the plaintiff then commenced the present breach of contract action. The defendants filed a motion for summary judgment, claiming that the contract was "unenforceable because it [was] against public policy on the basis that . . . the plaintiff illegally practiced law . . . ." The court denied the defendants' motion, finding that the contract was "not unenforceable as a matter of law," and that there was "[n]o unauthorized practice of law demonstrated as a matter of law." After a trial, the court found that the "[p]laintiff performed the services that it agreed to provide" under the contract, because "[a]t each stage of the assessment proceedings, [the plaintiff] appeared and negotiated on behalf of the defendants." The court further found that "[t]he parties agreed that the plaintiff's fee shall be 33 percent of the tax savings. They agreed that if it became necessary for the plaintiff to hire an attorney to take an appeal, 'all fees incurred, including filing fees, legal fees and appraisal fees shall . . . be reimbursed by [the defendants] in the event of a tax saving.' . . . The total amount of the fees that the plaintiff is entitled to recover from the defendants is $81,458." On the basis of its findings, the trial court rendered judgment in favor of the plaintiff, requiring that the defendants pay for the services performed by the plaintiff. It is from that judgment that the defendants appeal.

On appeal, the defendants claim that the court erred in not finding that the plaintiff engaged in, or otherwise induced, the illegal practice of law by (1) hiring Antignani to pursue the tax appeals in the Superior Court

and (2) maintaining exclusive control over the tax litigation. Essentially, the defendants raise the question of whether a lay person authorized to negotiate on behalf of a client can legally retain an attorney on behalf of that client and bring an appeal before the Superior Court. In resolving the defendant's claim, we are guided by our Supreme Court's decision in *Robertson* v. *Stonington*, 253 Conn. 255, 750 A.2d 460 (2000).

Robertson involved an agreement similar to the one in the present case, whereby "[t]he plaintiff . . . hired [a property appraiser] to challenge the assess[ed] [value of his property] and, if necessary, to engage an attorney for the plaintiff to pursue the tax appeal to the trial court." Id., 258. On appeal, the defendant town claimed "that in order to effectuate the public policy of [General Statutes] § 51-86,[5] this court must bar the plaintiff's cause of action under [General Statutes] § 12-117a[6] because the plaintiff is a party to an illegal contract for the prosecution of the cause of action." (Footnotes added.) Id., 259. In resolving this claim, our Supreme Court noted that "the public policy concerns . . . implicated in the present case . . . [are] the public policy against the unauthorized practice of law, and the public policy in favor of fair and accurate taxation." Id., 260–61. The court

[5] General Statutes § 51-86 (a) provides in relevant part: "A person who has not been admitted as an attorney in this state . . . shall not solicit, advise, request or induce another person to cause an action for damages to be instituted, from which action or from which person the person soliciting, advising, requesting or inducing the action may, by agreement or otherwise, directly or indirectly, receive compensation from such other person or such person's attorney, or in which action the compensation of the attorney instituting or prosecuting the action, directly or indirectly, depends upon the amount of the recovery therein."

[6] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of the board of tax review or the board of assessment of appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom . . . to the superior court for the judicial district in which such town or city is situated . . . ."

held: "There is no public policy that discourages bringing valid tax appeals, and there is no evidence that [the property appraiser] promotes frivolous tax appeals. . . . If this tax appeal were barred on account of [the property assessor's] activities, the defendant would be allowed to withhold from the plaintiff an otherwise valid tax refund and to collect from the plaintiff excessive taxes each year until the next revaluation." Id., 261.

In the present case, the trial court correctly observed that "Connecticut courts have enforced agreements like the one at issue in this case." See, e.g., *Property Tax Management, LLC* v. *Karageorge*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6058816-S (April 19, 2017); *Plaza Realty & Management Corp.* v. *Sylvan Knoll Section II, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-95-0148938 (November 22, 1996). In fact, according to our Supreme Court, contracts of this nature are consistent with "the public polic[ies] against the unauthorized practice of law . . . and . . . in favor of fair and accurate taxation" because they "[promote] fair and accurate taxation by facilitating the correction of errors by municipal assessors." *Robertson* v. *Stonington*, supra, 253 Conn. 260–61. We note that such contracts are also consistent with § 12-111. Furthermore, the contract, which was before the court, clearly provided the defendants with the right to "discontinue the engagement, for all or any of the [p]roperties," at any time, provided that they gave thirty days of advance notice.

In light of *Robertson*, because the evidence in the record clearly shows that "[t]he . . . defendants [had] . . . ultimate control over the plaintiff and over any decision to bring or settle an appeal," and that the tax appeals to the Superior Court were validly brought by an attorney retained by the plaintiff on behalf of the defendants, we conclude that the contract in the present case is consistent with public policy considerations and

did not authorize the unauthorized or illegal practice of law.

The judgment is affirmed.

In this opinion the other judges concurred.

JEAN M. DISTURCO *v.* GATES IN NEW CANAAN, LLC
(AC 44115)

Elgo, Moll and DiPentima, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries allegedly sustained as a result of the defendant's negligence, arising out of an incident in which she became trapped in a restaurant restroom and one of the defendant's employees attempted to force the door open, causing a piece of wood to strike and injure her. The defendant's registered agent for service was served with the summons and complaint, but the defendant did not file an appearance until nine months later, after it had been defaulted for failure to appear and the trial court had rendered judgment on the default and awarded damages to the plaintiff. The defendant filed a motion to open the judgment, claiming that its failure to appear was the result of mistake in that it had notified its insurance broker of the underlying matter but that the broker did not notify the defendant's insurance company until after the judgment had been rendered. The court denied the defendant's motion to open the judgment, concluding that the defendant failed to meet the provisions of the applicable statute (§ 52-212) and, thereafter, granted the defendant's motion to reargue the motion to open but reaffirmed the denial of the motion to open, and the defendant appealed. *Held*:

1. The trial court did not abuse its discretion by denying the defendant's motion to open the judgment and finding that there was no reasonable cause for the defendant's failure to appear; the defendant did not file an appearance until nine months after it properly received notice of the action, and the court concluded that the defendant's action in sending the summons and complaint to its insurance broker under the assumption that the broker would inform its insurance company to hire an attorney constituted negligence on the part of the defendant rather than a mistake or other reasonable cause required by § 52-212.
2. The defendant could not prevail on its claim that it was entitled under the rules of practice (§ 11-12 (c)) to a hearing after the trial court granted its motion to reargue its motion to open; the court's denial of the motion

to open was an appealable final judgment and, as such, pursuant to Practice Book § 11-12 (d), § 11-12 (c) was inapplicable, the motion to reargue was instead governed by Practice Book § 11-11, pursuant to which the court was not required to schedule a hearing on granting the defendant's motion to reargue.

Argued February 10—officially released May 11, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant was defaulted for failure to appear; thereafter, the court, *Hon. Edward F. Stodolink,* judge trial referee, rendered judgment in favor of the plaintiff; subsequently, the court, *Stevens, J.*, denied the defendant's motion to open the judgment; thereafter, the court, *Stevens, J.*, granted the defendant's motion to reargue but denied the relief requested therein, and the defendant appealed to this court. *Affirmed.*

Andrew Ranks, with whom, on the brief, was *A. Jeffrey Somers*, for the appellant (defendant).

Eric G. Blomberg, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The defendant, Gates in New Canaan, LLC, appeals from the judgment of the trial court denying its motion to open the judgment rendered in favor of the plaintiff, Jean M. Disturco, after the defendant was defaulted for failure to appear. The defendant claims that the court improperly (1) determined that it had failed to satisfy General Statutes § 52-212 and (2) ruled on its motion to open without a hearing after the court had granted the defendant's motion to reargue. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the plaintiff's complaint,[1] or as undisputed in the record, and procedural history are relevant to this appeal. The plaintiff instituted the underlying action against the defendant on June 18, 2019. The return date for the complaint was July 23, 2019. The complaint alleged that on or about October 27, 2017, the plaintiff was "an invitee, customer, patron and/or guest" of Gates Restaurant, a restaurant owned by the defendant. The defendant is a limited liability company organized and existing under the laws of Connecticut. On the date in question, the plaintiff became locked in the restroom of the restaurant at which point "an agent, servant and/or employee attempted to forcefully open the door to the restroom causing a piece of wood to strike the plaintiff's head." The complaint further alleged that the incident was caused by the "negligence and/or carelessness of the defendant" and that the plaintiff suffered "painful, severe, and/or permanent" injuries and damages as a result of the employee's attempt to free her from the restroom. The complaint sought money damages and costs.

The defendant's registered agent for service, Heather M. Brown-Olsen, Esq., was served with the complaint and summons on June 18, 2019. On July 29, 2019, the plaintiff filed a motion for default for the defendant's failure to appear. The court clerk granted the plaintiff's motion on August 6, 2019, pursuant to Practice Book § 17-20 (d).[2] After an evidentiary hearing in damages, the court rendered a judgment on the default in favor of the plaintiff and awarded her $1,000,000 in damages on January 9, 2020.

[1] The allegations set forth in the plaintiff's complaint are deemed to be true as a result of the default. See *General Linen Service Co.* v. *Cedar Park Inn & Whirlpool Suites*, 179 Conn. App. 527, 529–30, 180 A.3d 966 (2018).

[2] Practice Book § 17-20 (d) provides in relevant part that "motions for default for failure to appear shall be acted on by the clerk not less than seven days from the filing of the motion . . . . The motion shall be granted by the clerk if the party who is the subject of the motion has not filed an appearance. . . ."

On March 20, 2020, the defendant filed an appearance and a motion to open the judgment pursuant to Practice Book § 17-43,[3] stating that its failure to appear was "the result of a mistake or inadvertence" and that it had a "good defense to the plaintiff's claim, which should be heard on its merits." Accompanying the defendant's motion to open was an affidavit from John W. Luther III, the defendant's managing member (Luther affidavit), in which Luther averred the following: "I first became aware of the subject lawsuit on August 26, 2019, when I received an August 21, 2019 letter from the company's then registered agent for service as to a default for failure to appear, which had been entered on August 6, 2019. The agent for service notified me in that same letter that she was resigning as agent for service . . . . Prior to August 26, 2019, [the defendant] had no knowledge of the claim or service of the lawsuit. . . . On August 26, 2019, I sent an e-mail to an individual at the Solomon Insurance Agency . . . whom I believed to be the agent handling our account, notifying them of the lawsuit and the default. . . . Subsequently, on September 23, 2019, I sent another e-mail to [the insurance agent] at Solomon when I received additional papers" regarding the underlying action. The affidavit also stated that the defendant believed that the "Solomon Insurance Agency would notify [its] insurance carrier

[3] Practice Book § 17-43 (a) provides in relevant part that "[a]ny judgment rendered or decree passed upon a default or nonsuit may be set aside within four months succeeding the date on which notice was sent, and the case reinstated on the docket on such terms in respect to costs as the judicial authority deems reasonable, upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of such judgment or the passage of such decree, and that the plaintiff or the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. Such written motion shall be verified by the oath of the complainant or the complainant's attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or the defendant failed to appear. . . ."

to arrange for an attorney to represent and defend [its] interests," and that, on January 24, 2020, after learning that judgment had been rendered, it reached out to the Solomon Insurance Agency at which point thereafter, on January 28, 2020, the agency reported the claim to Utica First Insurance Company, the defendant's insurance carrier. The plaintiff filed an objection to the defendant's motion on May 1, 2020. The motion appeared on the short calendar on May 4, 2020, which the defendant marked as "take papers."

The court sustained the plaintiff's objection to the defendant's motion and denied the defendant's motion to open on May 4, 2020, concluding that the defendant had failed to meet the provisions of § 52-212 because it "neither articulated a bona fide defense to the action, nor articulated facts indicating that the failure to assert a defense was prevented by mistake, accident or other reasonable cause as compared to mere neglect or negligence."[4]

Thereafter, the defendant filed a motion to reargue its motion to open the judgment on May 22, 2020, in which it asserted that it was filing the motion to reargue pursuant to "Practice Book [§§] 11-11 and/or 11-12." The plaintiff filed an objection to the defendant's motion to reargue on June 5, 2020. On June 5, 2020, the court granted the defendant's motion to reargue and considered the motion on the papers. The court reaffirmed its denial of the motion to open after considering the

[4] General Statutes § 52-212 (a) provides: "Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which it was rendered or passed, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense."

additional information that the defendant had provided. The additional information included an affidavit from Robert Gulla, a claims examiner with Utica First Insurance Company, averring that the insurance company did not have notice of the underlying action until after judgment had been rendered. The court determined that, even if the insurance company did not have notice, there was no dispute that the defendant had notice of the plaintiff's action before the default and subsequent judgment were rendered. Moreover, the court rejected the defendant's argument that its action of forwarding the summons and complaint to its insurance broker and "mak[ing] efforts to communicate with this broker" was "commercially reasonable" or satisfied the requirements of § 52-212.

The court concluded that the defendant failed to "[show] reasonable cause to open the judgment nor [did it] specifically [articulate] a bona fide defense that existed when judgment entered." Lastly, the court determined that the defendant's circumstances did not "support the conclusion that the defendant was prevented by mistake, accident or other reasonable cause" from making its defense because "the conduct at issue [did] not rise beyond mere negligence or neglect." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first contends that the court erred in denying its motion to open the judgment on the basis of its finding that the defendant had failed to meet the requirements under § 52-212. Specifically, the defendant argues that it is sufficient simply to show reasonable cause under § 52-212 and that, because the defendant established reasonable cause for its failure to appear, the court erred when it denied the defendant's motion to open the judgment. We are not persuaded.

We begin by setting forth the standard of review and governing legal principles. To the extent that we need to interpret a statute, our review is plenary. *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018) ("The interpretation and application of a statute . . . involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute, we] . . . first . . . consider the text of the statute . . . itself and its relationship to other statutes . . . ." (Internal quotation marks omitted.)).

"We review a trial court's ruling on motions to open under an abuse of discretion standard. . . . Under this standard, we give every reasonable presumption in favor of a decision's correctness and will disturb the decision only where the trial court acted unreasonably or in a clear abuse of discretion. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *General Linen Service Co.* v. *Cedar Park Inn & Whirlpool Suites*, 179 Conn. App. 527, 531, 180 A.3d 966 (2018). "[I]n order to determine whether the court abused its discretion [in ruling on a motion to open], we must look to the conclusions of fact upon which the trial court predicated its ruling. . . . Those factual findings are reviewed pursuant to the clearly erroneous standard . . . ." (Internal quotation marks omitted.) *Harris* v. *Neale*, 197 Conn. App. 147, 158–59 n.11, 231 A.3d 357 (2020).

"A motion to set aside a default judgment is governed by Practice Book § 17-43 and . . . § 52-212." *State* v. *Ritz Realty Corp.*, 63 Conn. App. 544, 548, 776 A.2d 1195 (2001). "To open a judgment pursuant to Practice Book § 17-43 (a) and . . . § 52-212 (a), the movant must make a two part showing that (1) a good defense existed at the time an adverse judgment was rendered;

and (2) the defense was not at that time raised by reason of mistake, accident or other reasonable cause. . . . The party moving to open a default judgment must not only allege, but also make a showing sufficient to satisfy the two-pronged test [governing the opening of default judgments]. . . . The negligence of a party or his counsel is insufficient for purposes of § 52-212 to set aside a default judgment. . . . Finally, because the movant must satisfy both prongs of this analysis, failure to meet either prong is fatal to its motion." (Footnotes omitted; internal quotation marks omitted.) *Multilingual Consultant Associates, LLC* v. *Ngoh*, 163 Conn. App. 725, 733, 137 A.3d 97 (2016).

On appeal, the defendant argues that the two-pronged test delineated in *Multilingual Consultant Associates, LLC* v. *Ngoh*, supra, 163 Conn. App. 733, applies only if a movant fails to show reasonable cause. Because the court clearly found that the defendant had failed to establish reasonable cause to open the judgment, this argument is meritless. Moreover, the court did not abuse its discretion in concluding that the defendant's action in sending the summons and complaint to its insurance broker, believing the insurance company would hire an attorney, and taking no additional action "[did] not rise beyond mere negligence or neglect."

During oral argument before this court, the defendant asserted that it was not contesting that its registered agent for service properly received service of process or that it properly was served the plaintiff's motion for default. Instead, the defendant's claim is that reasonable cause existed to open the judgment because it mistakenly believed that the insurance company was aware of the underlying action and would hire an attorney to protect its interests, when in fact the insurance company was not aware of the underlying action until after judgment was rendered. Because a defendant's negligence does not constitute reasonable cause for failing

to appear, its claim must fail. See *Postemski* v. *Landon*, 9 Conn. App. 320, 326, 518 A.2d 674 (1986) (discussing *Pelletier* v. *Paradis*, 4 Conn. Cir. 396, 399–400, 232 A.2d 925 (1966), cert. denied, 154 Conn. 745, 226 A.2d 520 (1967), in which negligence of defendant's counsel was attributed to defendant when defendant's counsel failed to file appearance after defendant received notice of lawsuit). The defendant properly was served with the summons and complaint in June, 2019, and did not file an appearance until March, 2020—nine months after it received service of process. "While mistake, accident or other reasonable cause may be a sufficient reason to open a default judgment, negligence is not. Our Supreme Court has consistently held that the denial of a motion to open a default judgment should not be held an abuse of discretion where the failure to assert a defense was the result of negligence." (Internal quotation marks omitted.) *Postemski* v. *Landon*, supra, 325.

The court completed a thorough analysis of the defendant's claims in light of § 52-212 and found that the defendant failed to articulate any facts in its motion to open supporting its conclusory statement that it had a good defense against the plaintiff's claims in the underlying action. The court also found that the mistake claimed by the defendant was rooted in its own negligence. The defendant received notice on June 18, 2019, when the writ of summons and complaint were served on its registered agent,[5] and failed to appear as a result

[5] General Statutes § 34-243r (a) provides in relevant part that "[a] limited liability company . . . may be served with any process, notice or demand required or permitted by law by any proper officer or other person lawfully empowered to make service leaving a true and attested copy with such company's registered agent, or at his or her usual place of abode in this state."

Moreover, "[n]otice to, or knowledge of, an agent, while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of the principal. . . . The fact that the knowledge or notice of the agent was not actually communicated will not prevent the operation of the general rule, since the knowledge or notice of the agent is imputed to the principal . . . ." (Citation omitted; internal quotation marks omitted.) *National Groups, LLC* v. *Nardi*, 145

of negligence or inattention. "[Section 52-212] is remedial, but it cannot be so construed as to authorize relief"; *Testa* v. *Carrolls Hamburger System, Inc.*, 154 Conn. 294, 299, 224 A.2d 739 (1966); where a defendant indeed has received proper notice of the underlying action and the plaintiff's motion for default yet failed to file an appearance. See *Postemski* v. *Landon*, supra, 9 Conn. App. 325; see also *Testa* v. *Carrolls Hamburger System, Inc.*, supra, 300 (defendant's motion to open was properly denied where defendant knew about lawsuit but failed to secure substitute counsel to enter appearance due to "confusion" regarding parent company's bankruptcy proceedings). We therefore conclude that the court did not abuse its discretion in denying the motion to open the judgment and finding that there was no reasonable cause for the defendant's failure to appear.

II

The defendant next claims that the court abused its discretion when, after granting the defendant's motion to reargue, it reaffirmed its denial of the motion to open without a hearing. Specifically, the defendant claims that, pursuant to Practice Book § 11-12 (c), the court was required to schedule a hearing after granting its motion to reargue. The plaintiff counters by positing that § 11-12 (c) does not apply to the present case because § 11-12 (d) states that § 11-12 is inapplicable "to motions to reargue decisions which are final judgments for purposes of appeal." We agree with the plaintiff.

To the extent that we deem it necessary to interpret the provisions of the rules of practice, our review is plenary. See *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 594. Practice Book § 11-12 governs

Conn. App. 189, 201, 75 A.3d 68 (2013). Therefore, the registered agent's notice or knowledge of the plaintiff's underlying action is imputed to the defendant due to the existence of an agency relationship between the defendant and its registered agent for service. See id.

motions to reargue. On appeal, the defendant grounds its argument that it had a right to be heard on its motion to reargue on Practice Book § 11-12 (c), which provides that a motion to reargue "shall be considered by the judge who rendered the decision or order. Such judge shall decide, without a hearing, whether the motion to reargue should be granted. If the judge grants the motion, the judge *shall schedule the matter for hearing* on the relief requested." (Emphasis added.) Practice Book § 11-12 (d), however, provides that "section [11-12] shall not apply to motions to reargue decisions which are final judgments for purposes of appeal. Such motions shall be filed pursuant to Section 11-11." Practice Book § 11-11 provides in relevant part that "[a]ny motions which would . . . delay the commencement of the appeal period, and any motions which . . . would toll the appeal period and cause it to begin again, shall be filed simultaneously . . . and shall be considered by the judge who rendered the underlying judgment or decision. . . . The foregoing applies to motions to reargue decisions that are final judgments for purposes of appeal . . . ."

Practice Book § 11-12 does not apply to the present matter because "[t]he denial of a motion to open is an appealable final judgment"; *Gibbs* v. *Spinner*, 103 Conn. App. 502, 506 n.4, 930 A.2d 53 (2007); and, as noted, Practice Book § 11-12 (d) plainly provides that Practice Book § 11-12 does not apply to motions to reargue decisions that are final judgments for purposes of appeal. Thus, Practice Book § 11-11 governs the defendant's motion to reargue. The provisions of Practice Book § 11-11 do not require the court to schedule a hearing upon granting a movant's motion to reargue. The defendant, therefore, was not entitled to a hearing on its motion to reargue. Accordingly, the defendant's second claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

JAN HLINKA *v.* MARIA K. MICHAELS
(AC 43759)

Bright, C. J., and Alexander and Suarez, Js.

Syllabus

The plaintiff, J, sought, by way of summary process, to regain possession of certain premises that he owned with B, his wife, that were occupied by the defendant. The defendant filed special defenses, a counterclaim and prayers for relief. The trial court granted the defendant's motion to cite in B as a counterclaim defendant. When J and B moved to strike the defendant's counterclaim and prayers for relief, the trial court, sua sponte, struck all but one of the defendant's special defenses. Following a trial, the court rendered judgment of possession of the premises in favor of J and B, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on her claim that the trial court lacked subject matter jurisdiction over the action, as the record clearly reflected that the joint owners of the premises were unanimous in their desire that the defendant be evicted from the premises: after B was added as a party to the action, she joined with J, a joint owner, in all efforts to secure a judgment of possession for them and against the defendant and there was no evidence that B objected to the summary process action; moreover, there was no language or provision in the applicable statute (§ 47a-23) providing that the trial court was deprived of subject matter jurisdiction over a summary process action unless all owners of a subject property agreed with the initiation of the action by a statement in the complaint or some sworn statement.
2. The trial court improperly struck, sua sponte, the defendant's special defense of laches; the defendant was not provided with reasonable notice that her special defense could be struck, as J and B filed a motion to strike the defendant's counterclaim and prayers for relief and did not move to strike the defendant's special defenses, yet, in granting the motion to strike, the court struck the special defense of laches.

Argued February 10—officially released May 11, 2021

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, where the defendant filed a counterclaim; thereafter, the court, *Spader*, *J.*, granted the defendant's motion to cite in Beata Hlinka as a counterclaim defendant; subsequently, the court granted the plaintiff's motion to strike; judgment for the plaintiff on

the complaint and for the plaintiff and the counterclaim defendant on the counterclaim, from which the defendant appealed to this court. *Reversed*; *further proceedings*.

John R. Williams, for the appellant (defendant).

Kevin J. Curseaden, for the appellees (plaintiff and counterclaim defendant).

Opinion

BRIGHT, C. J. In this summary process action, the defendant, Maria K. Michaels, appeals from the judgment of possession rendered by the trial court in favor of the plaintiff, Jan Hlinka, and Beata Hlinka.[1] The defendant claims that the court (1) lacked subject matter jurisdiction over the action and (2) erred in striking, sua sponte, the defendant's special defense of laches. We conclude that the court had subject matter jurisdiction over the action, but we agree with the defendant's claim that the court improperly struck, sua sponte, her special defense of laches. Accordingly, we reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. Jan Hlinka is the defendant's nephew and Beata Hlinka is Jan Hlinka's wife. The defendant has lived at 180 Rosebrook Drive in Stratford (premises) since 1965 and was the plaintiffs' sponsor when they immigrated to the United States. Since arriving in the United States, the plaintiffs have worked for the defendant. In May, 1999, the defendant entered into a purchase agreement for the sale of the premises to the plaintiffs. Pursuant to the purchase agreement, the defendant was granted the right to live on the premises

[1] Although the trial court granted the defendant's motion to cite in Beata Hlinka as a counterclaim defendant, Beata Hlinka was not added as a party plaintiff. For ease of reference, we refer to Jan Hlinka and Beata Hlinka collectively as the plaintiffs and individually by name.

pursuant to the following language: "The purchase price for [the premises] was established at One Hundred Sixty Five Thousand Dollars ($165,000) with the agreement that [the defendant] will continue to reside there as long as she does not become a burden to [the plaintiffs]." The purchase agreement was signed by the plaintiffs and the defendant. The transaction was evidenced by a warranty deed recorded in the Stratford land records on June 22, 1999, in volume 1508 at page 52.

Subsequent to the transaction, the relationship between the parties became acrimonious. On February 14, 2019, Jan Hlinka served a notice to quit possession on the defendant. The notice stated that the defendant must quit possession or occupancy of the premises on or before February 19, 2019, because the defendant's original right or privilege to occupy the premises had been terminated. A complaint seeking a judgment for immediate possession was filed on February 28, 2019, by Jan Hlinka, with a return date of March 8, 2019. On March 11, 2019, the defendant filed a motion to dismiss the complaint for lack of subject matter jurisdiction on the grounds that Jan Hlinka's notice to quit and summary process action failed to list both of the plaintiffs as coowners of the premises and failed to allege or demonstrate that good cause existed to evict the defendant pursuant to General Statutes § 47a-23c (b) (1). The court denied the defendant's motion to dismiss.

On May 13, 2019, the defendant filed an answer, special defenses, and a five count counterclaim. The defendant asserted special defenses of estoppel, laches, failure to include an indispensable party, and violation of General Statutes § 47a-23. The defendant also moved to cite in Beata Hlinka as an additional counterclaim defendant and the court granted the defendant's motion. In June, 2019, Jan Hlinka and Beata Hlinka, jointly as plaintiffs, filed a motion to strike the defendant's counterclaim and prayers for relief in their entirety. The

plaintiffs did not move to strike the defendant's special defenses. Nevertheless, the court, in addition to granting the plaintiffs' motion to strike the defendant's counterclaim, sua sponte, struck the defendant's special defenses, with the exception of her special defense of estoppel. After a trial to the court, the court issued a written decision on December 27, 2019, in which it rendered judgment of possession of the premises in favor of the plaintiffs with a stay of execution through April 27, 2020, and rejected the defendant's estoppel defense. This appeal followed. Additional facts will be set forth as necessary.

I

On appeal, the defendant concedes that the failure to name every owner of the subject property in a notice to quit does not deprive the court of subject matter jurisdiction in a summary process action. The defendant argues, nevertheless, that the court lacked jurisdiction because nothing in the summary process complaint or in an affidavit indicated to the court "that both of the joint owners of [the premises] joined or agreed in bringing the action to evict the defendant . . . ." In response, the plaintiffs contend that there is no requirement that all consenting owners must be joined in either the notice to quit or in the summary process action that follows.

We first set forth the standard of review and relevant legal principles. "We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits

of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . . [W]here the court rendering the judgment lacks jurisdiction of the subject matter the judgment itself is void. . . . Indeed, [i]t is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court." (Citations omitted; internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532–33, 911 A.2d 712 (2006).

"Before the [trial] court can entertain a summary process action and evict a tenant, the owner of the land must previously have served the tenant with notice to quit. . . . As a condition precedent to a summary process action, proper notice to quit [pursuant to § 47a-23] is a jurisdictional necessity. . . .

"We further observe that [s]ummary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Summary process statutes secure a prompt hearing and final determination. . . . Therefore, the statutes relating to summary process must be narrowly construed and strictly followed." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Karl*, 128 Conn. App. 805, 808–809, 18 A.3d 685, cert. denied, 302 Conn. 909, 23 A.3d 1249 (2011).

Section 47a-23 (a) (3) provides in relevant part: "When the owner or lessor, or the owner's or lessor's legal representative, or the owner's or lessor's attorney-at-law, or in-fact, desires to obtain possession or occupancy of any land or building . . . and . . . when one

originally had the right or privilege to occupy such premises but such right or privilege has terminated . . . such owner or lessor, or such owner's or lessor's legal representative, or such owner's or lessor's attorney-at-law, or in-fact, shall give notice to each . . . occupant to quit possession or occupancy of such land, building, apartment or dwelling unit, at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy." General Statutes § 47a-1 (e) defines "[o]wner" as "one or more persons, jointly or severally, in whom is vested (1) all or part of the legal title to property, or (2) all or part of the beneficial ownership and a right to present use and enjoyment of the premises and includes a mortgagee in possession." "[V]ested" is defined as "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." Black's Law Dictionary (9th Ed. 2009) p. 1699.

The defendant, citing to *T.D.B. International, LLC* v. *Parziale*, Superior Court, judicial district of Waterbury, Housing Session, Docket No. SPWA-95-1115883 (April 3, 1996) (16 Conn. L. Rptr. 607), argues that a summary process action may not be brought unless all of the owners agree with the initiation of the action. In *T.D.B. International, LLC*, the housing court addressed the issue of whether a person who has a two-thirds interest in real property fits the definition of the term "the owner" as used in § 47a-23, and therefore is authorized to bring a summary process action when the owner of the remaining interest *opposes* bringing such an action. See id., 607.

In interpreting the term "owner" in § 47a-23, the court concluded that "[w]hile in some situations, the term 'owner' may mean one of several vested parties, the court finds that under [§ 47a-23], 'owner' means unanimity of the interests of the owners of the property." Id.,

608. The court concluded further that the use of the word "the" to modify the term "owner" demonstrates the intended meaning of the phrase "the owner" in § 47a-23 as "an inclusive group which by definition connotes unanimity of interest." Id. In support of its conclusion, the court stated: "This finding is further supported by using a commonsense approach in construing the statute. Because the statute is aimed at providing possession of real property to those entitled to it, it follows that all owners have an interest in the disposition of the property. To effectuate the statutory intent, it is imperative that all of the owners act as one when bringing a summary process action. Only with a consensus can all the owners' unanimity of interest be represented. Therefore, the act of one owner against the wishes of the other owners, clearly goes against the statutory purpose of insuring that the owners decide how the property should be utilized." Id.[2]

We need not reach the question of whether § 47a-23 requires that all owners of a property be unanimous in their desire to pursue a summary process action because the record in this case clearly reflects that, unlike in *T.D.B. International, LLC*, the joint owners

[2] We note that there is a split in the Superior Court on the issue of whether the term "owner," as used in § 47a-23, connotes unanimity of the interests of the owners of a property. See *Greene* v. *Cabarrus*, Superior Court, judicial district of New Haven, Housing Session, Docket No. NHSP-08-098865 (September 8, 2009) (48 Conn. L. Rptr. 504, 504) (holding that entire ownership of premises must be represented as plaintiffs in order to maintain eviction action); *Sekeret* v. *Zdanis*, Docket No. DV-187692, 2001 WL 477433, *2 (April 19, 2001) ("[w]hile the notice to quit statute requires the owner to serve a notice to quit, the statute's language refers to an owner as being an inclusive group requiring unanimity of interest"). But see *Toler* v. *Grant*, Superior Court, judicial district of Hartford, Housing Session, Docket No. HDSP-144942 (April 2, 2008) (45 Conn. L. Rptr. 282, 284) (plaintiff, individually, can bring summary process action and unanimity of both owners is not required); *Chimblo* v. *Hutter*, Docket No. X01-CV-99-0162957, 2001 WL 357919, *9 (March 29, 2001) ("[§ 47a-23] does not require a plaintiff to be the sole owner, but specifically provides that summary process may be brought by 'the owner,' and the statutory definition includes those with a shared or partial interest").

of the premises are unanimous in their desire that the defendant be evicted from the premises. After Beata Hlinka was added as a counterclaim defendant in this action, she joined with her husband and joint owner in all efforts to secure a judgment of possession for the plaintiffs and against the defendant. There is no evidence that Beata Hlinka objected to the summary process action. The concerns expressed by the court in *T.D.B. International, LLC*, simply do not exist in this case.

We also disagree with the defendant that the unanimity of the owners must be set forth in the summary process complaint or in an affidavit. Section 47a-23 does not contain any language or provision providing that the trial court is deprived of subject matter jurisdiction over a summary process action unless all owners of the subject property agree with the initiation of the action by a statement in the complaint or some sworn statement. There is no question in this case that all owners of the premises were in agreement to pursue this summary process action. Thus, the defendant's jurisdictional argument is wholly without merit.

II

The defendant's second claim is that the court erred when it, sua sponte, struck her special defense of laches.[3] The plaintiffs contend that the court properly struck the special defense of laches because it was nonresponsive to the allegations of the complaint. We agree with the defendant.

We note the standard of review and legal principles that apply to the defendant's claim. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion

[3] On appeal, the defendant does not raise a claim with respect to the court's striking of her special defenses alleging failure to include an indispensable party and a violation of § 47a-23.

to strike] is plenary. . . . A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Fratarcangeli*, 192 Conn. App. 159, 164, 217 A.3d 649 (2019).

"Pleadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . Our rules of practice contain provisions for the framing of issues . . . . Our rules of practice include Practice Book § 10-39 et seq., which governs motions to strike; its proscriptions for its purpose and use are carefully set out. Given what may be the legal consequence to a party against whom such a motion is granted, the movants should be required to follow our rules of practice, especially as to the party or parties against whom it is directed. We cannot say that it is an unreasonable practice to condition the right to the remedy sought by a movant on a motion to strike on the requirement that the movant plead for that relief in a manner so that all parties directly concerned know that they are the object of such requested relief." (Citations omitted; internal quotation marks omitted.) *Heim* v. *California Federal Bank*, 78 Conn. App. 351, 363, 828 A.2d 129, cert. denied, 266 Conn. 911, 832 A.2d 70 (2003).

Furthermore, "[w]e are mindful that it is a fundamental tenet of due process that persons directly concerned with the result of an adjudication be given reasonable notice and the opportunity to present their claims or

defenses. . . . This case calls to mind the admonition that [e]ither we adhere to the rules [of practice] or we do not adhere to them." (Citation omitted; internal quotation marks omitted.) Id., 364.

In June, 2019, the plaintiffs filed a motion to strike the defendant's counterclaim and prayers for relief in their entirety on the ground that the counterclaim and prayers for relief did not implicate possession and, therefore, were not properly before the trial court in the summary process action. The plaintiffs, by way of their motion and memorandum of law in support of the motion to strike, did not move to strike the defendant's special defenses. Yet, in granting the plaintiffs' motion to strike, the court struck all counts of the defendant's counterclaim as well as all of the defendant's special defenses, with the exception of the special defense of estoppel. Because the defendant was not provided with reasonable notice that her special defense of laches could be struck, we conclude that the court acted improperly when it, sua sponte, struck that defense. See id., 363–64 (concluding that trial court improperly struck, sua sponte, count in absence of any motion to strike count); see also *Yale University School of Medicine* v. *McCarthy*, 26 Conn. App. 497, 502, 602 A.2d 1040 (1992) (concluding that it was improper for trial court to dismiss defendant's counterclaim in absence of motion to strike by opposing party).

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

ANDREW T. KOBZA *v.* COMMISSIONER OF CORRECTION (AC 43396)

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

Syllabus

The petitioner, who had been convicted on a plea of guilty to the crime of felony murder, sought a writ of habeas corpus, claiming that his sentence was illegal because the Department of Correction improperly failed to calculate certain job credits that amounted to a reduction of sixty-three days in his sentence. The petitioner alleged that he had had a seven day job that allowed him to earn one day off his sentence for every week he worked while he was incarcerated in Connecticut but that the sixty-three days in sentence reduction he claimed to have earned were taken away from him when he was transferred to a correctional facility in Virginia. The habeas court, without prior notice to the petitioner or a hearing, sua sponte rendered judgment dismissing his habeas petition pursuant to the applicable rule of practice (§ 23-29), concluding that the court lacked jurisdiction because there was no cognizable liberty interest in prison jobs or credits that have not yet been applied to a sentence. The court thereafter denied the petitioner certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petitioner certification to appeal from the dismissal of his habeas petition, the court having erred in concluding that it lacked jurisdiction over the petitioner's job credits claim as pleaded.
2. The habeas court erred as a matter of law when it dismissed the habeas petition for lack of jurisdiction: the court improperly concluded that it lacked jurisdiction because no cognizable liberty interest existed in prison employment or credits that have not been applied to a sentence, the petitioner's claim having been that his job credits were earned and credited but then removed without due process, and the court misconstrued the job credits claim as having asserted that the petitioner was denied the right to receive those credits while he was incarcerated in Virginia; moreover, contrary to the claim by the respondent Commissioner of Correction that dismissal of the habeas petition was proper because a certain timesheet constituted undisputed evidence that the petitioner never earned the job credits, at the time of the dismissal, the only information the court properly could have relied on was that contained in the allegations of the habeas petition, as it was not at all clear that the facts in the timesheet were undisputed; furthermore, Practice Book § 23-29 did not provide that the court may dismiss a habeas petition on its own motion without notice to the petitioner and an opportunity to be heard when a jurisdictional determination is dependent on the resolution of a critical factual dispute; accordingly,

the judgment was reversed and the case was remanded for further proceedings.

Argued February 9—officially released May, 11, 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, *Newson*, *J.*, dismissed the petition and rendered judgment thereon; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed*; *further proceedings*.

Deborah G. Stevenson, assigned counsel, for the appellant (petitioner).

James W. Donohue, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Andrew T. Kobza, appeals following the habeas court's denial of his petition for certification to appeal from the judgment of dismissal rendered by the court with respect to his petition for a writ of habeas corpus. The petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) erred by dismissing his habeas petition, sua sponte, pursuant to Practice Book § 23-29.[1] For the reasons set forth herein, we conclude that the habeas court abused its discretion in denying the petition for certification to appeal. We further conclude that the habeas court erred in its

[1] In his brief, the petitioner sets forth an assortment of claims challenging the propriety of the habeas court's sua sponte dismissal of the habeas petition pursuant to Practice Book § 23-29, and the denial of his motion for articulation. The petitioner also claims that the habeas court committed structural error. Because we conclude that the habeas court erred in dismissing the habeas petition, we need not reach the petitioner's additional claims.

sua sponte dismissal of the habeas petition. Accordingly, we reverse the judgment of the habeas court and remand the case for further proceedings according to law.

The following facts and procedural history are relevant to this appeal. On October 4, 1990, the petitioner was arrested and charged with numerous crimes, including felony murder in violation of General Statutes § 53a-54c. In January, 1992, following a guilty plea, the petitioner was sentenced by the court to a total effective term of forty-five years of imprisonment.[2]

On August 2, 2018, the petitioner filed a pro se petition for a writ of habeas corpus, claiming that his sentence is illegal because the Department of Correction (department) improperly failed to calculate "seven day job credits"[3] that were applicable to his sentence. The petitioner claims that he had earned seven day job credits amounting to a reduction of sixty-three days from his sentence prior to his transfer from MacDougall-Walker Correctional Institution to a correctional facility in Jarratt, Virginia, on August 30, 2001.

On July 12, 2019, without prior notice or a hearing, the habeas court, *Newson, J.*, sua sponte, dismissed the petitioner's habeas petition, pursuant to Practice Book § 23-29, on the ground that the court lacked jurisdiction. Specifically, the court stated that "[t]he petitioner asserts that [he] was denied and/or that the respondent [the Commissioner of Correction] inaccurately calculated his entitlement to receive '[seven] day job credits'

[2] Counsel for the respondent, the Commissioner of Correction, stated at oral argument before this court that the petitioner is presently on parole, but is not fully discharged from the respondent's custody.

[3] General Statutes § 18-98a provides: "Each person committed to the custody of the Commissioner of Correction who is employed within the institution to which he was sentenced, or outside as provided by section 18-100, for a period of seven consecutive days, except for temporary interruption of such period as excused by the commissioner for valid reasons, may have one day deducted from his sentence for such period, in addition to any other earned time, at the discretion of the Commissioner of Correction."

while the petitioner was incarcerated in another state pursuant to an interstate transfer." The court held that there is no cognizable liberty interest in prison jobs or to credits *that have not yet been applied to a sentence*. Following the habeas court's dismissal of his habeas petition, the petitioner filed a petition for certification to appeal from the dismissal, which the habeas court denied. On September 16, 2019, the petitioner filed the present appeal.[4] Additional facts will be set forth as necessary.

I

The petitioner claims that the court erred in denying his petition for certification to appeal from the court's dismissal of his habeas petition for lack of jurisdiction. We agree.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to

[4] On January 27, 2020, the petitioner filed a motion for articulation of the habeas court's dismissal of the petition for a writ of habeas corpus and the habeas court's denial of the petition for certification to appeal from the dismissal of the habeas petition. On January 28, 2020, the court, *Newson*, *J.*, denied the petitioner's motion for articulation. On February 3, 2020, the petitioner filed a motion for review with this court of the habeas court's denial of his motion for articulation. This court, on May 14, 2020, granted the motion for review but denied the relief requested therein.

deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed." (Citation omitted; internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 344–45, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021). On the basis of our review of the habeas petition, we agree that the habeas court erred in concluding that it lacked jurisdiction over the petitioner's job credits claim as pleaded and, therefore, we conclude that the habeas court abused its discretion in denying the petition for certification to appeal.

II

The petitioner argues that the habeas court misconstrued his seven day job credits claim and based its jurisdictional ruling on its misreading of the habeas petition as having asserted that the seven day job credits

had not yet been applied to his sentence. The petitioner argues that his petition, as pleaded, alleges that he had earned the seven day job credits and, after they were applied to his sentence, the respondent wrongfully removed them. The respondent contends, in response, that "[t]he facts of this case clearly indicate that the petitioner did not earn [sixty-three] [seven day] job credits while serving a portion of his sentence in Virginia," and he argues further that the habeas court properly dismissed the habeas petition because the petitioner has no cognizable liberty interest in unearned credits. In making this argument, the respondent relies not on the allegations of the habeas petition but on a document purportedly from the department. The document purports to show that sixty-three days of credit, to which the petitioner claims an entitlement, were credited to the petitioner's account in error and then removed. We disagree with the respondent that the court could rely on such a document in sua sponte dismissing the habeas petition, and we conclude that the habeas court misconstrued the petitioner's claim as it was pleaded in the habeas petition. Consequently, we further conclude that the court erred in holding that it lacked jurisdiction over the petitioner's claim.

We begin with our standard of review. "Whether a habeas court properly dismissed a petition for a writ of habeas corpus presents a question of law over which our review is plenary." *Gilchrist* v. *Commissioner of Correction*, 334 Conn. 548, 553, 223 A.3d 368 (2020).

Resolving the petitioner's claim requires us to review the allegations contained in his petition, which he filed as a self-represented party. Accordingly, we are mindful of the petitioner's self-represented status at the time he drafted the habeas petition. "This court has always been solicitous of the rights of [self-represented] litigants and, like the trial court, will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is

consistent with the just rights of any adverse party. . . . Although we will not entirely disregard our rules of practice, we do give great latitude to [self-represented] litigants in order that justice may both be done and be seen to be done. . . . For justice to be done, however, any latitude given to [self-represented] litigants cannot interfere with the rights of other parties, nor can we disregard completely our rules of practice." (Emphasis omitted; internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 107 Conn. App. 507, 512–13, 946 A.2d 252, cert. denied, 289 Conn. 902, 957 A.2d 870 (2008).

"It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . It is fundamental in our law that the right of [the petitioner] to recover is limited to the allegations of his complaint. . . . While the habeas court has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations . . . it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Citation omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 376–77, 233 A.3d 1106, cert. denied, 335 Conn. 948, 238 A.3d 18 (2020).

In his habeas petition, the petitioner claimed that his sentence is illegal because certain seven day job credits

were taken away from him after they were earned. Specifically, the petitioner alleged that, on August 30, 2001, the department transferred him to a correctional facility in Jarratt, Virginia, to continue serving his sentence at that facility. He claimed that, "[b]efore leaving [the MacDougall-Walker Correctional Institution], [the petitioner] had a [seven] day job earning a day off his sentence for every week he worked. Without any hearing or notice, [the petitioner] was sent to [Virginia] and on [February 1, 2002] [the petitioner's seven day job] credit of [sixty-three] days given to him was taken away."[5] Additionally, the petitioner alleged that he was unable to earn seven day job credits during his incarceration at the Virginia correctional facility because his prison employment at that facility was only a five day per week job. The petitioner alleged that "because it was only a [five day] job, [the petitioner] was not given a day off his sentence." (Emphasis omitted.) The petitioner stated further: "All issues like this should have been [dealt] with prior to inmates going to [the Virginia correctional facility]. But [the petitioner] should have never went. [The petitioner's sentence] has been extended by 106 days. Other inmates have been credited their [seven] day credit."[6]

The habeas court, in its notice of dismissal pursuant to Practice Book § 23-29, apparently focused on the allegations regarding the petitioner's not being able to earn additional credits in Virginia and stated that the court lacked jurisdiction on the following basis: "The petitioner asserts that [he] was denied and/or that the

[5] The habeas petition filed before the habeas court on August 2, 2018, states that his seven day job credits were taken away on February 1, 2002. On July 29, 2019, the petitioner filed an application for appointment of counsel and waiver of fees on appeal. Attached to the July 29, 2019 application is a copy of the addendum to the operative habeas petition, wherein the petitioner crossed out that his job credits were taken away on February 1, 2002, and replaced the date with August 1, 2001.

[6] The habeas petition does not state the reason for the alleged 106 day extension of his sentence.

respondent inaccurately calculated his entitlement to receive '[seven] day job credits' while the petitioner was incarcerated in another state pursuant to an interstate transfer. The habeas court lacks jurisdiction because there is no recognized liberty interest in prison jobs; *Santiago* v. *Commissioner of Correction*, 39 Conn. App. 674, 680, 667 A.2d 304 (1995); or to credits that have not yet been applied to a sentence. *Abed* v. *Commissioner of Correction*, 43 Conn. App. 176, 180, 682 A.2d 558, cert. denied, 239 Conn. 937, 684 A.2d 707 (1996)."

In the present case, a fair reading of the habeas petition indicates that the petitioner asserted that his seven day job credits were earned before he was transferred to the Virginia correctional facility, applied to his sentence, and then improperly removed. The habeas court, however, misconstrued the petitioner's claim as asserting that the petitioner was denied the right to receive the alleged seven day job credits while he was incarcerated in the Virginia correctional facility pursuant to an interstate transfer. On the basis of its misreading of the petitioner's claim, the court concluded that it lacked jurisdiction because the credits had not yet been applied to the sentence, and it sua sponte dismissed the habeas petition. The court dismissed the habeas petition without providing the petitioner with notice or an opportunity to be heard on the nature of his claim. Thus, in its dismissal of the habeas petition, the court deprived the petitioner of fair notice and an opportunity to be heard on a jurisdictional issue arising from the court's reading of the claim asserted in the habeas petition.

In his brief, the respondent argues that the habeas court properly dismissed the habeas petition because there were "undisputed" facts before the court demonstrating that the court lacked jurisdiction over the petitioner's claim. The respondent contends that "the facts clearly show that [the alleged seven day job credits] were not earned" by the petitioner on the ground that

the habeas court had evidence of a timesheet[7] when it dismissed the habeas petition, which indicated that the purported sixty-three days of credits claimed by the petitioner were never earned, were applied to the petitioner's account in error, and, subsequently, were properly removed. Citing to *Cuozzo* v. *Orange*, 315 Conn. 606, 109 A.3d 903 (2015), the respondent argues further that, "[i]n light of the undisputed evidence presented to the court," the habeas petition properly was dismissed for lack of jurisdiction. We find the respondent's argument unavailing.

"A habeas corpus action, as a variant of civil actions, is subject to the ordinary rules of civil procedure, unless superseded by the more specific rules pertaining to habeas actions." (Internal quotation marks omitted.) *Betancourt* v. *Commissioner of Correction*, 132 Conn. App. 806, 812, 35 A.3d 293, cert. denied, 303 Conn. 937, 36 A.3d 695 (2012).

Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . the

[7] In addition to the filing of his habeas petition, the petitioner requested a waiver of fees and appointment of counsel. After the waiver of fees was granted, the habeas petition was referred to the Office of the Chief Public Defender for investigation of indigence. In January, 2019, a notice was filed with the habeas court in which the Connecticut Innocence Project requested that the habeas court vacate its referral to the Office of the Chief Public Defender for counsel because the petitioner's claim was not a matter in which the Connecticut Innocence Project could be appointed. Attached to the notice is the purported timesheet. The document purports to show that the respondent erroneously applied sixty-three seven day job credits to the petitioner's sentence, while he was incarcerated at the Virginia correctional facility. The dates on the timesheet purporting to show the erroneous seven day job credits range from August 1, 2002, to November 1, 2002.

In February, 2019, the petitioner filed a motion to request a hearing regarding the denial of representation by the Office of the Chief Public Defender. In March, 2019, the Office of the Chief Public Defender, upon further review of the petitioner's self-represented petition, appointed counsel for the petitioner after making a finding of eligibility.

court lacks jurisdiction . . . .'' Section 23-29 ''serves, roughly speaking, as the analog to Practice Book §§ 10-30 and 10-39, which, respectively, govern motions to dismiss and motions to strike in civil actions.'' *Gilchrist* v. *Commissioner of Correction*, supra, 334 Conn. 561.

In *Cuozzo*, our Supreme Court recognized that ''[t]rial courts addressing motions to dismiss for lack of subject matter jurisdiction pursuant to [Practice Book § 10-30] may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'' (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, supra, 315 Conn. 615. Our Supreme Court has instructed further that, ''where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts.'' *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009).

Although Practice Book § 23-29 authorizes the habeas court to dismiss a habeas petition on its own motion, § 23-29 does not provide that the court may dismiss a habeas petition, on its own motion, in the absence of notice and an opportunity to be heard in circumstances in which a jurisdictional determination is dependent on the resolution of a critical factual dispute.

At oral argument before this court, the respondent's counsel acknowledged that there was a factual dispute as to whether the seven day job credits were earned and applied to the petitioner's sentence. Nevertheless, the respondent's counsel argued that the habeas court properly dismissed, sua sponte, the habeas petition because the petitioner failed to produce evidence to

support his claim and the habeas court was familiar with the timesheet that showed that the seven day job credits were not earned by the petitioner. We disagree.

It is not at all clear that, at the time the habeas court dismissed the habeas petition that the facts in the purported document were undisputed and that the court could have relied on the document in its determination that it lacked jurisdiction. First, the document was not admitted as an exhibit, and the petitioner never stipulated to its authenticity or contents. Second, the respondent fails to explain how the petitioner could have produced evidence to support his claim when the court dismissed the habeas petition without giving him an opportunity to present such evidence. Third, the petitioner's counsel argued before this court that the accuracy of the document is disputed. Consequently, the timesheet was not "undisputed evidence" as contemplated by the court in *Cuozzo* v. *Orange*, supra, 315 Conn. 606, and could not be the basis for the habeas court, sua sponte, to dismiss the habeas petition. Instead, when the habeas court dismissed the habeas petition the only information the court properly could have relied on was that contained in the allegations of the habeas petition.

Furthermore, on the basis of its misreading of the petitioner's claim, the habeas court relied on this court's holding in *Abed* v. *Commissioner of Correction*, supra, 43 Conn. App. 176, to conclude that it lacked jurisdiction on the ground that there is no cognizable liberty interest in credits that have not yet been applied to a sentence. *Abed* involved a petitioner's appeal from a habeas court's granting of the respondent's motion to quash and the court's dismissal of a habeas petition. Id., 177. In *Abed*, the petitioner claimed, inter alia, that the habeas court improperly concluded that the prospective denial of good time credits did not deprive him of a liberty interest in his monthly accrual of good time credits and that the denial of statutory good time credits did not constitute an improper prospective denial. Id. This court

affirmed the judgment of the habeas court and concluded that the petitioner did not have a liberty interest in unearned statutory good time credits. Id., 180–82.

The habeas court's reliance on *Abed*, here, was misdirected because the petitioner, in the present case, claimed that the job credits were actually earned and credited but then removed without due process.

Similarly, the habeas court's reliance on *Santiago* v. *Commissioner of Correction*, supra, 39 Conn. App. 674, on the basis of its reading of the petitioner's claim, also is misguided. In *Santiago*, five inmates appealed from the judgment of the habeas court dismissing their petitions for writs of habeas corpus. Id., 676. In their consolidated appeal, the inmates claimed, inter alia, that the court improperly granted a motion to quash their habeas petitions because it failed to find a legally cognizable liberty interest on the face of the petitions. Id. The inmates alleged that they had suffered a loss of recreation, school, and work privileges due to their designation as security risk group members. Id., 676–77. This court held that the inmates' allegations failed to implicate a protected liberty interest because a prisoner does not have a property or liberty interest in prison employment, increased recreation, educational courses, or access to visitors. Id., 680. This court, however, concluded that an inmate's allegation that he had suffered a loss of earned good time credits that would have reduced his term of confinement was legally sufficient to implicate a liberty interest to support a constitutional due process claim. Id., 682. We held that, "when a state creates a right to good time credits, it is required by the [d]ue [p]rocess [c]lause to insure that the state-created right is not arbitrarily abrogated." (Internal quotation marks omitted.) Id.

In the present case, the habeas court relied on *Santiago* in concluding that it lacked jurisdiction on the ground that there is no cognizable liberty interest in

prison employment. Unlike the inmates in *Santiago*, however, the petitioner, in the present case, did not claim in his habeas petition that his constitutional rights to due process were violated because he had suffered a loss of work privileges. Akin to the inmate in *Santiago*, who alleged that he had suffered a loss of earned good time credits that would have reduced his term of confinement, the petitioner here claims that he has suffered a loss of his seven day job credits that he had earned during his employment at the MacDougall-Walker Correctional Institution. Thus, the habeas court's reliance on *Santiago* also was misplaced.

Accordingly, we conclude that the habeas court erred as a matter of law when it sua sponte dismissed the habeas petition on jurisdictional grounds.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

TYRONE ROBINSON *v.* COMMISSIONER OF CORRECTION (AC 43041)

Alvord, Alexander and Vertefeuille, Js.

Syllabus

The petitioner, who had been convicted of murder and criminal possession of a firearm, sought a second writ of habeas corpus, claiming, inter alia, that the state violated his right to due process, pursuant to *Brady* v. *Maryland* (373 U.S. 83), when it failed to disclose to him at his criminal trial certain information concerning an alleged bank fraud scheme involving a third party, H, and the victim. H had given the police a sworn statement asserting that an individual he knew as Lenny had asked him to open a bank account and to provide him with an account number. H alleged that Lenny would then deposit money into the account after which H could withdraw a certain amount. H's statement to the police and certain bank records were admitted into evidence in the petitioner's second habeas trial, at which H invoked his fifth amendment privilege against self-incrimination and refused to testify. The petitioner, who had admitted to several individuals that he shot the victim, claimed that

H's statement and the bank records constituted exculpatory information and viable evidence that should have been provided to him to support a third-party culpability defense. The habeas court rendered judgment denying the habeas petition, concluding, inter alia, that there was no reasonable probability that H's statement or the bank records would have been relevant or admissible third-party culpability evidence at the criminal trial. On the granting of certification, the petitioner appealed to this court. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, as the proffered evidence, which did not establish a direct connection to the victim's murder, was not material and, thus, the state's failure to disclose it did not constitute a *Brady* violation: the possibility that H may have had a motive to kill the victim to withdraw the remaining funds from the bank account was insufficient to establish a direct connection to the crime, as the evidence, at best, created a mere suspicion of a connection between H and the victim, and, even if it were assumed that Lenny and the victim were the same person, the documents established only that H and the victim knew each other for a short time and were engaged in a fraud scheme, which did not rise to the level of a legitimate third-party culpability defense, particularly in light of the petitioner's multiple confessions; moreover, as a *Brady* claim is resolved by determining whether the suppressed evidence itself is material, the proffered evidence did not create a reasonable probability of a different result at the petitioner's criminal trial on the basis of a mere possibility that it could have led to the discovery of further evidence, and, contrary to the petitioner's assertion, the habeas court did not improperly decline to consider the effect of the proffered evidence in conjunction with an adverse inference from H's invocation of his privilege against self-incrimination, as the finder of fact would be prohibited from drawing any adverse inferences from H's decision to invoke the privilege, which could not have affected the petitioner's criminal trial without constituting error; furthermore, because the petitioner's claim of ineffective assistance on the part of his prior habeas counsel was premised on that counsel's failure to advance the *Brady* claim in the first habeas proceeding, the habeas court properly denied the petition as to that claim.

Argued March 2—officially released May 11, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Tyrone Robinson, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying both counts of his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly (1) determined that the state did not violate his rights to due process and a fair trial by failing to disclose material, exculpatory evidence at his criminal trial and (2) denied his claim of ineffective assistance by the habeas counsel who represented him with respect to a prior habeas petition. We affirm the judgment of the habeas court.

The following recitation of facts was set forth by this court in the petitioner's direct appeal from his conviction. "At the time that the victim, Leonard Lindsay, was shot, the [petitioner] was living with his girlfriend, Lashonda Barno. On occasion, the [petitioner] exhibited jealousy and controlling behavior toward Barno, particularly with regard to the victim.

"Sometime in the spring of 2001, the victim, who had known Barno for fifteen years because they had gone to school together, manhandled her at a dance club. When the [petitioner] learned about this incident, he became upset and confronted the victim. Following the incident at the dance club, rumors of a sexual relationship between Barno and the victim began to circulate in the neighborhood.

"In the early morning of October 6, 2002, the victim drove into a gasoline station on Albany Avenue in Hartford and parked his car so that the driver's side window

faced the street. Following a report of gunshots fired at the station, the police found the victim in his car with a gunshot wound to the head and a bullet hole in the driver's side window of the car. The victim was transported to a hospital, where he died later that day. The [petitioner] was not immediately identified as having committed the crime.

"At trial, the state presented evidence that the [petitioner] had admitted to four individuals that he had killed the victim. Immediately after having shot the victim, he confessed the killing to Barno and to her cousin. In September, 2004, he similarly confessed to Eric Smith, a longtime friend, who so informed the police in 2005, when Smith was incarcerated. In April, 2008, the [petitioner] confessed to Larry Raifsnider, a fellow inmate in a federal prison in Pennsylvania. Although the [petitioner's] earlier confessions were consistent with his claim, at trial, that he had intended only to frighten the victim, his confession to Raifsnider described a planned killing." *State* v. *Robinson*, 125 Conn. App. 484, 486–87, 8 A.3d 1120 (2010), cert. denied, 300 Conn. 911, 12 A.3d 1006 (2011).

The state charged the petitioner with murder in violation of General Statutes § 53a-54a and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). Id., 486. After a jury trial on the murder charge, the petitioner was found guilty. The weapons charge was thereafter tried to the court, which found him guilty and sentenced him on both counts to a total effective term of fifty years of incarceration. Id. This court affirmed the judgment of conviction on appeal. Id., 489.

The petitioner filed his first petition for a writ of habeas corpus on September 9, 2008, which subsequently was amended by his assigned counsel, Attorney Robert Rimmer, on May 8, 2012. The petitioner alleged three counts of ineffective assistance of trial counsel,

arguing that his trial counsel was ineffective during both the trial and the sentencing phase. The court denied the first habeas petition. This court subsequently dismissed the appeal. *Robinson* v. *Commissioner of Correction*, 167 Conn. App. 809, 144 A.3d 493, cert. denied, 323 Conn. 925, 149 A.3d 982 (2016).

The petitioner filed his second petition for a writ of habeas corpus, which is the subject of this appeal, on November 30, 2015, which was then amended on June 6, 2018. In the first count, the petitioner alleged a violation of his right to due process at his criminal trial, as guaranteed by *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963),[1] because the state had failed to disclose all relevant details surrounding an alleged bank fraud scheme between the victim and a third party, Robert L. Hudson, Jr. The second count alleged that Attorney Rimmer rendered ineffective assistance at the first habeas trial by failing to investigate and to present the *Brady* claim that the petitioner now advances.

A trial was held on the petitioner's second habeas petition in December, 2018. The petitioner entered into evidence a sworn statement that Hudson had provided to the Bloomfield Police Department in October, 2002, ten days after the victim was found dead. Hudson explained in the statement that he worked as a bouncer at a bar in Hartford and had become acquainted with a man named "Lenny," who drove a black BMW or Mercedes Benz. Lenny asked Hudson to open a bank account for him and to provide him with an account number. He explained that he would then deposit $23,000 into the account and Hudson could withdraw

[1] "In [*Brady* v. *Maryland*, supra, 373 U.S. 83], the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process [when] the evidence is material either [as] to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 262, 112 A.3d 1 (2015).

$10,000. Lenny also told Hudson that, if the plan worked, he could make more money in the future. A couple of days later, Hudson heard that a man in a black BMW or Mercedes Benz had been murdered at a gas station in Hartford and wondered if it was Lenny who had been shot. Later, while attempting to withdraw more money from the account, Hudson was apprehended by police officers. Along with Hudson's statement, the petitioner also entered into evidence bank records from Fleet National Bank, which had been acquired through a police investigation on October 18, 2002, showing the relevant deposits, withdrawals, and fraudulent checks. This information eventually was acquired by the Hartford Police Department.[2] Hudson was called to testify at the habeas trial, but after consultation with an attorney from the Office of the Public Defender, he invoked his fifth amendment privilege against self-incrimination in response to every question except to state his name and address.

The petitioner argued that Hudson's statement to the police and the bank records should have been provided to the petitioner's trial attorneys as exculpatory information and viable evidence to support a third-party culpability defense. The petitioner claimed that the failure to disclose this information violated his due process rights under *Brady*. The court denied the claim, finding no reasonable probability that this information would have been relevant or admissible third-party culpability evidence. The court denied the second count of the habeas petition because the ineffective assistance of habeas counsel claim was premised on Attorney Rimmer's failure to investigate and to present the *Brady*

[2] The habeas court explained that it was not contested that the "information, which was originally gathered by the Bloomfield Police Department, was turned over to the Hartford Police Department and was contained in the file related to the murder of the victim. What is not clear, nor established by any evidence before this court, is exactly when it was delivered to the Hartford police, or why."

claim. The court then granted the petitioner's petition for certification to appeal, and this appeal followed.

The petitioner claims that the court improperly determined that the evidence was not material, stressing that the documents could have led to the discovery of further evidence and that the court should have drawn an adverse inference from Hudson's invocation of his fifth amendment privilege. In response, the respondent, the Commissioner of Correction, argues that the habeas court properly determined that the petitioner failed to establish that the documents constituted material exculpatory evidence. We agree with the respondent.

We first set forth the applicable standard of review. "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). Moreover, "[w]hether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." *Walker* v. *Commissioner of Correction*, 103 Conn. App. 485, 491, 930 A.2d 65, cert. denied, 284 Conn. 940, 937 A.2d 698 (2007).

"In [*Brady* v. *Maryland*, supra, 373 U.S. 83] . . . the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. To establish a *Brady* violation, the [petitioner] must show that (1) the government suppressed evidence, (2) the suppressed evidence was favorable to the [petitioner], and

(3) it was material [either to guilt or to punishment]." (Internal quotation marks omitted.) *Floyd* v. *Commissioner of Correction*, 99 Conn. App. 526, 533–34, 914 A.2d 1049, cert. denied, 282 Conn. 905, 920 A.2d 308 (2007). All three components must be established in order to warrant a new trial. See *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 262, 112 A.3d 1 (2015).

The habeas court in the present case addressed only the third prong of the *Brady* test, finding that the proffered evidence was not material. "The test for materiality is well established. The United States Supreme Court . . . in *United States* v. *Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), [held] that undisclosed exculpatory evidence is material, and that constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." (Internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 157, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011). "[A] trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error." (Internal quotation marks omitted.) *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 264.

In order for evidence related to a third-party culpability defense to be material, it would first have to meet the relevancy requirements for such a defense. "The admissibility of evidence of [third-party] culpability is

governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly . . . the proffered evidence [must] establish a *direct connection* to a third party, rather than raise merely a bare suspicion regarding a third party . . . . Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of [third-party] culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a *direct connection* between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that [third-party] culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt." (Emphasis added; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 564–65, 198 A.3d 52 (2019).

The petitioner has failed to establish a direct connection between the proffered evidence and the victim's murder. As the respondent points out, the petitioner failed to establish that the individual known as Lenny, with whom Hudson had entered into the check-cashing scheme, was the murder victim, Leonard Lindsay. Even if we assume that the Lenny in the sworn statement and the murder victim are the same person, as the habeas court did, the documents establish only that Hudson and the victim knew each other for a short time and

were engaged in a fraud scheme together. This evidence does not rise to the level of a legitimate third-party culpability defense, particularly in light of the petitioner's multiple detailed confessions.[3] The possibility that Hudson may have had a motive to kill the victim to withdraw the remaining funds from the bank account, is insufficient to establish a direct connection to the crime. See *State* v. *Hedge*, 297 Conn. 621, 634–35, 1 A.3d 1051 (2010) (explaining that, without evidence that directly connects third party to crime, "[i]t is not enough to show that another had the motive to commit the crime" (internal quotation marks omitted)). The proffered evidence, at best, creates a mere suspicion of a connection between Hudson and the victim and is, therefore, not material.

As to the petitioner's argument that the documents could have led to the discovery of further evidence, a *Brady* claim is resolved by determining whether the suppressed evidence *itself* is material. *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 263 ("materiality is established if the *withheld evidence* is of suffi-

[3] "Whether a defendant has sufficiently established a direct connection between a third party and the crime with which the defendant has been charged is necessarily a fact intensive inquiry. In other cases, this court has found that proof of a third party's physical presence at a crime scene, combined with evidence indicating that the third party would have had the opportunity to commit the crime with which the defendant has been charged, can be a sufficiently direct connection for purposes of [third-party] culpability. . . . Similarly, this court has found the direct connection threshold satisfied for purposes of [third-party] culpability when physical evidence links a third party to a crime scene and there is a lack of similar physical evidence linking the charged defendant to the scene. . . . Finally, this court has found that statements by a victim that implicate the purported third party, combined with a lack of physical evidence linking the defendant to the crime with which he or she has been charged, can sufficiently establish a direct connection for [third-party] culpability purposes." (Citations omitted.) *State* v. *Baltas*, 311 Conn. 786, 811–12, 91 A.3d 384 (2014). For example, in *Baltas*, our Supreme Court found that the defendant was not entitled to a jury instruction on a third-party culpability defense even when it was undisputed that the third party was physically present at the crime scene and the third party's clothing was stained with a victim's blood. Id., 812.

cient import or significance in relation to the original trial evidence" (emphasis added)). We cannot conclude that these documents create a reasonable probability of a different result at trial on the basis of a mere possibility that they could have led to the discovery of further evidence.[4]

Last, the petitioner argues that the habeas court should have considered the effect of the evidence in conjunction with an adverse inference from Hudson's invocation of the privilege against self-incrimination. As the respondent correctly points out, however, in a criminal trial "a witness may not be called to the [witness] stand in the presence of the jury merely for the purpose of invoking his privilege against self-incrimination." *State* v. *Dennison*, 220 Conn. 652, 660, 600 A.2d 1343 (1991). Further, if Hudson did invoke the privilege, the finder of fact would be prohibited from drawing any adverse inferences from this decision. See id., 660–62; *State* v. *Bryant*, 202 Conn. 676, 683–84, 523 A.2d 451 (1987). Accordingly, if Hudson's invocation of the privilege could not have affected the petitioner's criminal trial without constituting error, it was not improper for the habeas court to decline to consider Hudson's invocation of the privilege.

In light of the applicable standard, and after a careful review of the record, we conclude that the habeas court properly determined that the state's failure to disclose evidence of the bank fraud scheme did not undermine confidence in the jury's verdict. This evidence, there-

[4] The petitioner argues that our Supreme Court has "explicitly rejected such a restrictive approach to *Brady* violations," citing to language from *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 262 n.34. The language cited, however, refers not to materiality but to the favorability prong of *Brady* and clarifies that evidence does not have to be admissible in its present form to be deemed *favorable* and subject to mandatory disclosure. Id. The state must *disclose* "material information potentially leading to admissible evidence favorable to the defense"; (internal quotation marks omitted) id.; but that does not necessarily mean that information that could potentially lead to favorable evidence is material under *Brady*.

fore, was not material, and the state's failure to disclose it did not constitute a *Brady* violation.

Because the petitioner's claim of ineffective assistance on the part of his prior habeas counsel is premised on Attorney Rimmer's failure to advance the *Brady* claim, we also conclude that the court properly denied the habeas petition with respect to this claim.[5]

The judgment is affirmed.

STATE OF CONNECTICUT *v.* MICHAEL J. MARSALA
(AC 41994)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court finding him in violation of his conditional discharge and revoking his conditional discharge. He claimed that the particular condition of his conditional discharge that prohibited him from soliciting on private property violated his rights to free speech, due process, and liberty guaranteed by the first, fifth, and fourteenth amendments to the United States constitution. *Held* that the defendant's appeal was dismissed as moot, the defendant having failed to challenge all the bases for the trial

[5] "In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 430, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011). Because the proffered evidence is not material, the habeas court correctly concluded that the petitioner did not suffer prejudice from his prior habeas counsel's failure to investigate and present the allegedly suppressed documents.

court's finding that he violated his conditional discharge; the court also found that the defendant violated a second condition of his conditional discharge, the condition that he stay away from the Connecticut Post Mall in Milford, and, as the defendant failed to challenge this independent basis for the court's finding that he violated his conditional discharge, this court could not afford him any practical relief.

Argued January 14—officially released May 11, 2021

Procedural History

Information charging the defendant with violation of conditional discharge, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and tried to the court, *Brown, J.*; judgment revoking conditional discharge, from which the defendant appealed to this court. *Appeal dismissed.*

Deren Manasevit, assigned counsel, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Matthew Kalthoff*, assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Michael J. Marsala, appeals from the judgment of the trial court finding him in violation of his conditional discharge under General Statutes § 53a-32. On appeal, the defendant claims that the particular condition of his conditional discharge that prohibited him from soliciting on private property impermissibly infringed upon his rights to free speech, due process, and liberty, as guaranteed by the first, fifth, and fourteenth amendments to the United States constitution, respectively. We dismiss the defendant's appeal as moot because he has not challenged a separate, independent condition of the conditional discharge that he also was found to have violated.

The following facts, as found by the trial court, *Brown*, *J.*, after an evidentiary hearing on the violation of conditional discharge, and procedural history are relevant to our resolution of this appeal. "After a jury trial for one count of criminal trespass [in the] first degree [of which the jury found the defendant guilty], the court, *Markle*, *J.*, on October 28, 2016, sentenced the defendant to one year [of incarceration], execution suspended after four months to serve, [followed by] two years conditional discharge. The conditions were placed on the record by the court. The defendant was present in court at sentencing and was made aware of all the conditions by the court. Those conditions were: (1) [s]tay away from the Connecticut Post Mall, Milford, Connecticut; (2) stay away from Milford Crossing, also known as Walmart; (3) stay away from Milford Marketplace, also known as Whole Foods; [and] (4) no soliciting on private property. . . .

"On September 28, 2017, the defendant was arrested by warrant and charged with violations of conditional discharge. The state's long form information allege[d] violations on July 6, 2017 and July 24, 2017. At the hearing with regard to the violations of conditional discharge, the court heard testimony from Sergeant Joseph Maida of the Stratford Police Department. He testified that on July 6, 2017, he was dispatched to the Stop and Shop parking lot to investigate a soliciting complaint. Upon arrival he encountered the defendant who was carrying a windshield washer, a fluid bottle, an opaque jug, and a funnel. Upon being approached by Sergeant Maida and the other officers, the defendant stated he was homeless, he had no job, and this was how he made his living. He stated [that] the defendant did not deny that he was on the premises for the purpose of asking people for money. Sergeant Maida testified that Stop and Shop was and is private property. The defendant was subsequently arrested for trespassing.

"The court also heard testimony from Mr. Wilford Castillo, employed by mall security for the Connecticut Post Mall in Milford. He testified that on July 24, 2017, he found the defendant in the Target department store parking lot which is on the grounds of the mall. He recognized the defendant as someone who had been banned from the mall property. He approached the defendant and reminded him of the ban.

"The court also heard testimony from Officer Michael Brennan of the Milford Police Department. He testified that he observed the defendant on Stop and Shop property, specifically East Town Road. He testified that the defendant admitted he had previously been on mall property and that he had been warned previously to stay off mall property. The defendant was subsequently arrested for criminal trespass.

"[T]he defendant testified at trial; he admitted to still asking people for money stating 'I get by by the generosity of people. I asked for money last night.' When asked whether he was asking for money at Stop and Shop on the evening of July 24, 2017, he stated 'no, never got the chance to.' The defendant testified that he could not recall a condition imposed by the court, *Markle*, *J.*, that he not solicit money. However, he then stated, '[e]verybody at the sentencing, including yourself, that the most important thing to everyone was that I was not to [solicit] at the Milford mall. . . .'

"The court finds that the defendant was well aware of the conditions of his release imposed by the court and his October 28, 2016 sentencing hearing, specifically, no soliciting on private property and stay away from the Connecticut Post Mall. . . .

"The court finds the testimony of Sergeant Maida, Officer Brennan, and Mr. Castillo credible and reliable."

On June 12, 2018, the court, *Brown*, *J.*, found that the state had proven by a preponderance of the evidence that the defendant violated two conditions of his two

year conditional discharge by (1) failing to stay away from the Connecticut Post Mall and (2) soliciting on private property, specifically, at the Stop and Shop. Thereafter, the court revoked the original sentence of conditional discharge and sentenced the defendant to eight months of incarceration. See General Statutes § 53a-32 (d). This appeal followed.

On appeal, the defendant claims that the condition of his conditional discharge that prohibited him from soliciting on private property improperly infringed upon his rights to free speech, due process, and liberty, as guaranteed by the first, fifth, and fourteenth amendments to the United States constitution, respectively.[1] Absent from the defendant's appellate brief, however, is a challenge to the second condition of the conditional discharge that he was found to have violated, namely, the condition that he stay away from the Connecticut Post Mall in Milford. The defendant's failure to challenge this independent basis for the court's finding that he violated his conditional discharge renders his appeal moot, as we cannot afford him any practical relief.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . The fundamental principles underpinning the mootness doctrine are well settled. We begin with the four part test

[1] In anticipation of an argument by the state that his appeal is moot because he has completed serving his sentence, the defendant also argued in his principal appellate brief that his appeal was not rendered moot by the completion of his sentence because his claim satisfies the "capable of repetition, yet evading review" exception to the mootness doctrine. See *Loisel* v. *Rowe*, 233 Conn. 370, 378, 660 A.2d 323 (1995). This exception, when satisfied, applies to an appeal that has been rendered moot because "*during the pendency of an appeal*, *events have occurred* that preclude an appellate court from granting any practical relief through its disposition of the merits . . . ." (Emphasis added; internal quotation marks omitted.) Id. We do not address the defendant's argument regarding the "capable of repetition, yet evading review" exception because we conclude that his appeal is moot for a different reason, as explained herein.

for justiciability . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by the judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . .

"[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . .

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017); see also *State* v. *Lanagan*, 119 Conn. App. 53, 60–62, 986 A.2d 1113 (2010) (affirming revocation of probation and imposition of new sentence upon concluding that there was sufficient evidence for trial court to find that defendant violated two conditions of probation and, in light thereof, declining to address defendant's claim directed to court's finding that she violated third condition).

Here, as a result of the defendant's failure to challenge all of the independent bases for the court's finding him

in violation of his conditional discharge, we cannot afford him any practical relief. Thus, we are compelled to conclude that the defendant's claim on appeal is moot.

The appeal is dismissed.

In this opinion the other judges concurred.

DAVID SMERNOFF *v.* STAR TIRE AND WHEEL (AC 43962)

Alvord, Elgo and Cradle, Js.

Syllabus

The plaintiffs, S and F Co., sought to recover damages from the defendant for breach of contract after the defendant allegedly breached its obligation to repair S's motor vehicle. The plaintiffs alleged that the defendant improperly drilled a hole in the engine block and damaged the vehicle and that, as a result of the defendant's breach, the plaintiffs incurred expenses for, inter alia, the repair of the vehicle, rental of a replacement vehicle, and lost business time and profits. The court rendered judgment, after a trial to the court, for the plaintiffs, awarding certain damages, and denying the plaintiffs' request for further claimed damages. On the defendant's appeal to this court, *held* that the trial court did not err in awarding certain direct and consequential damages to the plaintiffs: the plaintiffs presented sufficient evidence for the trial court to fairly and reasonably estimate their expenses, and the court subsequently awarded direct and consequential damages in amounts that were consistent with the plaintiffs' itemized expenses; with respect to direct damages, the plaintiffs presented invoices for work performed by the defendant, additional repair costs, and the cost of a replacement engine, and, with respect to consequential damages, the plaintiffs presented documentation of towing and rental expenses; accordingly, the damages award was not clearly erroneous, considering the evidentiary record before the court and affording the court the broad discretion that it is entitled to in calculating damages.

Argued January 12—officially released May 11, 2021

Procedural History

Action to recover damages for breach of contract, brought to the Superior Court in the judicial district of New Haven, where From Here to Antiquity, LLC, was added as a plaintiff; thereafter, the matter was tried to

the court, *Hon. Anthony V. Avallone*, judge trial referee; judgment for the plaintiffs, from which the defendant appealed to this court. *Affirmed.*

Andrea A. Dunn, for the appellant (defendant).

Patrick J. Aveni, with whom was *John A. Keyes*, for the appellees (plaintiffs).

Opinion

PER CURIAM. This appeal arises out of a breach of contract action by the plaintiff David Smernoff[1] against the defendant, Star Tire and Wheel d/b/a Star Tires Plus Wheels, LLC. On appeal, the defendant claims that the trial court erred in awarding damages to the plaintiff in the amount of $8918.98. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In April, 2018, the plaintiff initiated a breach of contract action against the defendant. In his one count amended complaint (operative complaint), the plaintiff alleged that, in January, 2018, the defendant breached a contractual obligation to repair his 2006 Dodge printer by improperly drilling a hole in the engine block and damaging the vehicle. The plaintiff further alleged that, as a result of the defendant's breach, he incurred expenses for, inter alia, the repair of his vehicle, rental of a replacement vehicle, and lost business time and profits.[2]

[1] By way of a September 14, 2018 "Motion to Intervene and Be Made a Co-Plaintiff," Smernoff moved to interplead From Here to Antiquity, LLC, as a plaintiff in the underlying action. On October 5, 2018, the court granted this motion. Thereafter, on November 1, 2018, an amended complaint (operative complaint) was filed that named both Smernoff and From Here to Antiquity, LLC, as plaintiffs. However, From Here to Antiquity, LLC, never filed an appearance in the underlying action or in this appeal. We therefore refer to Smernoff as the plaintiff in this appeal.

[2] In support of his operative complaint, the plaintiff testified that, in 2006 or 2007, he purchased a new 2006 Dodge Sprinter for use in his antique business. The plaintiff testified that, after he brought his vehicle to the defendant for repairs in January, 2018, his vehicle could not be started and had to be towed. The plaintiff further testified that, thereafter, he began

The case was tried before the court, *Hon. Anthony V. Avallone*, judge trial referee, on August 22, 2019. On October 1, 2019, the court rendered judgment for the plaintiff in the amount of $8918.98.[3] The damages award included the following expenses: $580.40 for the cost of work performed by the defendant; $895.62 for additional repair costs; $135 for towing costs; $3000 for the cost of a replacement engine; and $4307.96 for the cost of rental vehicles from February, 2018, through September, 2018.

The court denied the plaintiff's request for other damages. The court declined to award further damages pertaining to rental expenses that the plaintiff incurred after September 24, 2018. The court explained that, although the plaintiff is entitled to compensation for rental expenses that were incurred during a reasonable period of time, the plaintiff failed to mitigate his damages by incurring rental expenses beyond September 24, 2018. The court also declined to award damages in the requested amount of $6000 for replacing the engine of the vehicle. The court explained that "[t]he plaintiff is entitled to something toward solving the ultimate problem to this vehicle, but [is not] . . . entitled to 100 percent." The court commented on the mileage of the vehicle and took into consideration evidence pertaining to the plaintiff's temporary use of the vehicle subsequent to the work performed by the defendant.[4] Furthermore, the court declined to award damages for lost business profits, reasoning that it "did not receive sufficient evidence [from the plaintiff] to determine that [the

renting vehicles to continue his business operations while his vehicle was disabled.

[3] The trial court found that the plaintiff's damages were a result of the defendant's negligence. The defendant does not challenge the propriety of the court's determination as to liability.

[4] The defendant presented a Carfax report indicating that the plaintiff's vehicle incurred an additional 4286 miles subsequent to the work it had performed on the vehicle. The plaintiff testified that the additional 4286 miles were incurred while the vehicle was repaired temporarily.

lost business profits were the result] of the defendant's negligence."[5] This appeal followed.

On appeal, the defendant claims that the trial court erred in awarding damages to the plaintiff in the amount of $8918.98. The defendant contends that the amount of damages awarded creates "unreasonable economic waste." Specifically, the defendant maintains that "[a] proper measure of damages . . . should not have exceeded the difference between the value of the vehicle in its current condition and its value had the repair work been properly done." The defendant argues that, in light of a Kelley Blue Book document that it entered into evidence suggesting that a 2006 Dodge Sprinter in "[f]air [c]ondition" was worth up to $4320,[6] "the court put the [plaintiff] in a far superior position than he would have been in if the contract had been performed" because "the damages awarded . . . are more than double the fair market value of the [plaintiff's] motor vehicle." In response, the plaintiff contends that, "[h]aving reviewed the evidence in its totality, the trial court's findings were sound and not the product of mistake." The plaintiff argues that the "general damages" awarded by the court "may fairly and reasonably be considered as arising naturally from the [defendant's] breach." The plaintiff further argues that the "consequential damages" awarded by the court were "reasonably foreseeable at the time . . . the parties entered into the contract . . . ." We agree with the plaintiff.

[5] On September 10, 2019, the defendant filed a motion for reconsideration, contending that the award of damages put the plaintiff "in a much better position than he would have been had the contract been performed." The defendant argued that "[t]he plaintiff's rental costs were in excess of the vehicle's value and that coupled with the award of $3000 for a used engine, are, in effect, giving the plaintiff more than twice what the vehicle was worth at the time [that] it was repaired at the defendant's place of business." On February 10, 2020, the court denied the defendant's motion for reconsideration.

[6] The plaintiff testified that his vehicle was worth an estimated $15,000 and that it was in "great condition."

"The general rule of damages in a breach of contract action is that the award should place the injured party in the same position as he would have been in had the contract been performed. . . . Damages for breach of contract are to be determined as of the time of the occurrence of the breach." (Internal quotation marks omitted.) *Gazo* v. *Stamford*, 255 Conn. 245, 264–65, 765 A.2d 505 (2001). "The [injured party] has the burden of proving the extent of the damages suffered. . . . Although the [injured party] need not provide such proof with [m]athematical exactitude . . . the [injured party] must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate. . . . Our Supreme Court has held that [t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . In other words, we are constrained to accord substantial deference to the fact finder on the issue of damages. . . . Under the clearly erroneous standard, we will overturn a factual finding only if there is no evidence in the record to support it . . . or [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Northeast Builders Supply & Home Centers, LLC* v. *RMM Consulting, LLC*, 202 Conn. App. 315, 353, 245 A.3d 804 (2021).

"The Restatement (Second) of Contracts divides [an injured party's] recovery into two components: (1) direct damages, composed of the loss in value to him of

the other party's performance caused by its failure or deficiency; 3 Restatement (Second), Contracts § 347 (a) (1981); plus, (2) any other loss, including incidental or consequential loss, caused by the breach . . . . Id., § 347 (b). Traditionally, consequential damages include any loss that may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself." (Internal quotation marks omitted.) *Ambrogio* v. *Beaver Road Associates*, 267 Conn. 148, 155, 836 A.2d 1183 (2003).

With respect to direct damages, the plaintiff presented sufficient evidence for the court to fairly and reasonably estimate his expenses. In particular, the plaintiff presented an invoice showing that he paid $580.40 for the work performed by the defendant. The plaintiff presented invoices and documentation indicating that he incurred expenses for additional repairs in the amount of $200, $212.70 and $482.92. Furthermore, the plaintiff presented invoices indicating that he paid in excess of $3000 for a replacement engine. The court considered this evidence and awarded direct damages in an amount that is consistent with the plaintiff's itemized expenses.

With respect to consequential damages, the plaintiff also presented sufficient evidence for the court to fairly and reasonably estimate his expenses. In particular, the plaintiff presented documentation that the vehicle was towed on three separate occasions, incurring towing expenses of $135. Finally, the plaintiff presented invoices indicating that he incurred rental expenses from February, 2018, through September, 2018, in the total amount of $4307.96. The court considered this evidence and awarded consequential damages in an amount that is consistent with the plaintiff's itemized expenses.

Having reviewed the evidentiary record before the court and affording the trial court the broad discretion that it is entitled to in calculating damages, we are not

convinced that the damages award was clearly erroneous or that a mistake was made. Accordingly, we reject the defendant's claim that the trial court erred in awarding damages to the plaintiff in the amount of $8918.98.

The judgment is affirmed.

WILLIAM DOBIE *v.* CITY OF NEW HAVEN ET AL.
(AC 42877)

Elgo, Cradle and Alexander, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries that he sustained when his vehicle struck an open manhole while he was traveling on a roadway maintained by the defendant city. The plaintiff alleged that his injuries were the result of the city's negligence, as one of its snowplows had knocked off the manhole cover and its operator failed to stop and secure the roadway. The city filed a motion to dismiss the complaint, arguing that the facts alleged stated a claim of injury arising out of a highway defect for which the defective highway statute (§ 13a-149) provided the exclusive remedy and that the court lacked subject matter jurisdiction because the plaintiff failed to give notice of his injuries as required by the statute. The court sustained the plaintiff's objection to the motion, noting that the complaint alleged that the plaintiff's injuries were caused by the negligence of the snowplow driver rather than by a defect in the road. The matter proceeded to trial and a jury returned a verdict in favor of the plaintiff. The city filed a posttrial motion to dismiss, renewing its claim that the court lacked subject matter jurisdiction due to the plaintiff's failure to provide the requisite notice pursuant to § 13a-149. The court denied the motion, again stating that the plaintiff was asserting a negligence claim rather than a defective highway claim, and rendered judgment in favor the plaintiff, from which the city appealed to this court. *Held* that the trial court improperly denied the city's posttrial motion to dismiss the plaintiff's action for lack of subject matter jurisdiction because § 13a-149 provided the plaintiff's exclusive remedy against the city and the plaintiff failed to comply with its notice requirements: the plaintiff's injuries were caused by an open manhole, which constituted a highway defect within the meaning of § 13a-149 because it was an object in the traveled path that obstructed or hindered the use of the road for the purpose of traveling, and the city conceded that it was responsible for maintaining the road on which the manhole was located; moreover, although the plaintiff did not plead

§ 13a-149 as a means for recovery, his sole remedy was under the statute because the evidence invoked it, and the cause of the defect did not alter this analysis because the city's liability was based on the existence of and its failure to remedy the defect; furthermore, the plaintiff failed to provide notice to the city within ninety days of the accident, which was a condition precedent to an action under § 13a-149, thereby depriving the court of subject matter jurisdiction.

Argued November 16, 2020—officially released May 11, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of the named defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Ozalis*, *J.*; verdict for the plaintiff; thereafter, the court denied the named defendant's motions to set aside the verdict and to dismiss, and rendered judgment in accordance with the verdict, from which the named defendant appealed to this court. *Reversed*; *judgment directed*.

Thomas R. Gerarde, with whom, on the brief, was *Beatrice S. Jordan*, for the appellant (named defendant).

Brendan K. Nelligan, with whom were *Charles Riether* and *Leann Riether*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant city of New Haven[1] appeals from the judgment of the trial court, rendered following a jury trial, in favor of the plaintiff, William Dobie. On appeal, the defendant contends that the court improperly denied its posttrial motion to dismiss, which was predicated on the plaintiff's alleged failure to comply with the requirements of General Statutes § 13a-149,

[1] The plaintiff also named Geico General Insurance Company as a defendant in his complaint. At trial, the court rendered a directed verdict in favor of Geico General Insurance Company, the propriety of which the plaintiff does not contest in this appeal. We therefore refer to the city of New Haven as the defendant in this opinion.

commonly known as the defective highway statute.[2] See *Ferreira* v. *Pringle*, 255 Conn. 330, 331, 766 A.2d 400 (2001). We agree and, accordingly, reverse the judgment of the trial court.

The facts relevant to this appeal are largely undisputed. On the morning of January 21, 2011, the plaintiff was traveling to his workplace on a route he had taken for years. Snow had fallen the night before and there were patches of snow on the roadways. As he operated his motor vehicle on Canner Street, a municipal roadway in New Haven, the plaintiff followed a snowplow operated by the defendant for approximately three blocks.[3] The blade of the plow was engaged and sparks flew as it cleared the roadway.

The snowplow stopped at the intersection of Canner Street and Livingston Street, then proceeded through the intersection. The plaintiff's vehicle, which was approximately two to three car lengths behind, followed the snowplow through that intersection until the plaintiff heard a loud bang. The plaintiff continued through the intersection. Moments later, the plaintiff's vehicle struck an open manhole in the road, rendering it inoperable.[4] When the vehicle came to rest approximately ten feet away, the plaintiff observed a manhole cover in the roadway between the manhole and his vehicle.

At trial, the plaintiff testified that he did not observe the open manhole prior to colliding with it. He further testified that he did not witness the snowplow knock

[2] The defendant also claims that the court improperly denied its motion to set aside the verdict. In light of our conclusion that the court improperly denied its posttrial motion to dismiss, we do not address that claim.

[3] It is undisputed that the defendant is responsible for maintaining its municipal roadways, which includes snow removal.

[4] As the plaintiff testified, it was "a violent collision with [the vehicle's front tire and] the front of that manhole and then the front tire came up, [the] back tire went in and [then] came out. The [vehicle] traveled not too much longer and just died."

the cover off the manhole. There also was undisputed evidence that an orange cone was located on the side of Canner Street in the vicinity of the manhole in question, which the plaintiff had observed in that location for weeks.

The plaintiff thereafter commenced this civil action. In his original complaint, the plaintiff alleged one count of negligence on the part of the defendant's snowplow operator. In response, the defendant moved to strike that count, arguing in relevant part that it failed to state a claim upon which relief may be granted "because it fails to invoke a statute that abrogates governmental immunity." The court granted the defendant's motion and the plaintiff then filed the operative complaint, his first amended complaint. That complaint contained one count against the defendant sounding in negligence and brought pursuant to General Statutes § 52-557n (a). The defendant subsequently filed a motion to dismiss count one of the operative complaint for lack of subject matter jurisdiction, stating: "Count one of the complaint alleges facts that state a claim of injury arising out of a highway defect, for which . . . § 13a-149 provides the exclusive remedy. The court lacks subject matter jurisdiction because the plaintiff failed to give notice of his injuries pursuant to § 13a-149." By order dated December 21, 2015, the court sustained the plaintiff's objection to the motion to dismiss, concluding that "[t]he [operative] complaint alleges that the plaintiff's injuries were caused by the negligence of the snowplow driver rather than by a defect in the road." The defendant then filed an amended answer and special defenses in which it alleged, inter alia, that the defendant was entitled to governmental immunity pursuant to § 52-557n (a) (2) (B).[5]

[5] General Statutes § 52-557n (a) (2) (B) provides in relevant part that a municipality "shall not be liable for damages to person or property caused by . . . negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

The matter proceeded to trial before a jury, which heard testimony from the plaintiff; Jeffrey Pescosolido, Director of Public Works for the defendant; Dale Keep, an expert in snowplow operation and safety; and Robert Sorrentino, an oral and maxillofacial surgeon who treated the plaintiff. After the plaintiff presented his case-in-chief, the defendant filed a motion for a directed verdict on the basis of governmental immunity, which the court denied. The defendant then rested without presenting any evidence and the jury subsequently returned a verdict in favor of the plaintiff.

On October 30, 2018, the defendant filed two posttrial motions. In its motion to set aside the verdict, the defendant argued that the plaintiff had failed to prove that its snowplow driver was negligent or that the plaintiff was an identifiable victim subject to imminent harm. The court denied that motion in a memorandum of decision dated April 12, 2019.

In its posttrial motion to dismiss, the defendant renewed its claim that the court lacked subject matter jurisdiction due to the plaintiff's failure to provide the requisite notice pursuant to § 13a-149. By order dated January 2, 2019, the court denied that motion, stating in relevant part: "The evidence was clear and abundant at trial, that the plaintiff was asserting a negligence claim against [the defendant] and not a defective highway claim pursuant to § 13a-149. The jury interrogatories given to the jury specifically related to the negligence of the snowplow operator and whether such injury caused the plaintiff's injuries. As this court can find no legal or factual basis upon which to grant the defendant's current motion to dismiss, said motion to dismiss is denied." The court, therefore, rendered judgment in favor the plaintiff, and this appeal followed.

On appeal, the defendant contends that the uncontroverted evidence adduced by the plaintiff at trial established that the condition that caused his injuries was,

as a matter of law, a "highway defect" within the meaning of § 13a-149. Because the plaintiff did not comply with the notice requirements of that statute, the defendant claims that the court improperly denied its posttrial motion to dismiss for lack of subject matter jurisdiction.[6]

Before considering the merits of the defendant's claim, some additional context is necessary. As a general matter, "[a] town is not liable for highway defects unless made so by statute." *Hornyak* v. *Fairfield*, 135 Conn. 619, 621, 67 A.2d 562 (1949). That immunity "has been legislatively abrogated by § 13a-149, which allows a person to recover damages against a municipality for injuries caused by a defective highway." *Martin* v. *Plainville*, 240 Conn. 105, 109, 689 A.2d 1125 (1997); see also *Cuozzo* v. *Orange*, 315 Conn. 606, 609 n.1, 109 A.3d 903 (2015) (Supreme Court "has long recognized that § 13a-149 applies to publicly traversed roadways"); *Ferreira* v. *Pringle*, supra, 255 Conn. 356 ("[t]he term 'defect' and the adjective 'defective' have been used in statutes defining the right to recover damages for injuries due to public roads or bridges in Connecticut since 1672").

[6] At oral argument before this court, the defendant's counsel clarified that the defendant was not contesting the propriety of the denial of its pretrial motion to dismiss, as that decision necessarily was predicated on the pleadings set forth in the plaintiff's complaint.

In this regard, we note that "[t]rial courts addressing motions to dismiss for lack of subject matter jurisdiction . . . may encounter different situations, depending on the status of the record in the case." *Conboy* v. *State*, 292 Conn. 642, 650, 974 A.2d 669 (2009). When a court is presented with a pretrial motion to dismiss, it generally is obligated to "consider the allegations of the complaint in their most favorable light." (Internal quotation marks omitted.) *Tremont Public Advisors, LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 688, 217 A.3d 953 (2019). The court's decision on a posttrial motion to dismiss is different, as it no longer is confined to the operative pleadings and properly admitted evidence may be considered. See *D'Angelo* v. *McGoldrick*, 239 Conn. 356, 365–66 n.8, 685 A.2d 319 (1996). For that reason, there is "no inconsistency" when a trial court denies a pretrial motion to dismiss, but thereafter grants a posttrial one. Id.

Section 13a-149 provides in relevant part that "[a]ny person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . ." Our Supreme Court has "long defined a highway defect as [a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result . . . ." (Internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, 322 Conn. 344, 379, 141 A.3d 784 (2016) (*Espinosa*, *J.*, dissenting); see also *Kozlowski* v. *Commissioner of Transportation*, 274 Conn. 497, 502–503, 876 A.2d 1148 (2005); *Hewison* v. *New Haven*, 34 Conn. 136, 142 (1867). "[W]hether a highway is defective may involve issues of fact, but whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law"; (internal quotation marks omitted) *McIntosh* v. *Sullivan*, 274 Conn. 262, 268, 875 A.2d 459 (2005); over which we exercise plenary review.

The precedent of our Supreme Court further instructs that, "in an action against a municipality for damages resulting from a highway defect, [§ 13a-149] is the plaintiff's exclusive remedy." *Ferreira* v. *Pringle*, supra, 255 Conn. 341. That statute requires, "[a]s a condition precedent" to an action thereunder, the plaintiff to provide "a municipality with notice within ninety days of the accident."[7] Id., 354. The failure to comply with that requirement deprives the Superior Court of jurisdiction over a plaintiff's action. Id.; see also *Bagg* v. *Thompson*, 114 Conn. App. 30, 41, 968 A.2d 468 (2009) ("the failure to provide the notice required by [§ 13a-149] deprives

[7] General Statutes § 13a-149 obligates a plaintiff to provide "written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence . . . within ninety days thereafter . . . to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation. . . ."

the court of subject matter jurisdiction over the action"); *Bellman* v. *West Hartford*, 96 Conn. App. 387, 394, 900 A.2d 82 (2006) ("[i]f § 13a-149 applies, the plaintiff must comply with the notice provisions set forth therein in order for the trial court to have subject matter jurisdiction").

It is well established that a determination regarding a trial court's subject matter jurisdiction is a question of law over which our review is plenary. See *Khan* v. *Hillyer*, 306 Conn. 205, 209, 49 A.3d 996 (2012). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Reinke* v. *Sing*, 328 Conn. 376, 382, 179 A.3d 769 (2018).

Under our rules of practice, a motion to dismiss for lack of subject matter jurisdiction may be raised at any time. See Practice Book §§ 10-30 and 10-33; *Stroiney* v. *Crescent Lake Tax District*, 205 Conn. 290, 294, 533 A.2d 208 (1987). In the present case, the defendant's posttrial motion to dismiss was predicated on the plaintiff's failure to comply with the notice requirements of § 13a-149. The question, then, is whether the court properly determined, as a matter of law, that the condition that caused his injuries was not a highway defect within the ambit of § 13a-149.

At trial, the plaintiff offered uncontroverted testimony that his injuries were caused by a collision between his vehicle and an open manhole in a municipal roadway in New Haven.[8] That manhole plainly was an

[8] At trial, the following colloquy occurred:

"[The Plaintiff's Counsel]: When you got to the area of [the] manhole, what happened to your vehicle?

"[The Plaintiff]: The cover had gotten flipped off so I went down into the manhole, the front tire of the truck—a violent collision with the front of that manhole and then the front tire came up, back tire went in and that came out. The truck traveled not too much longer and just died.

object in the traveled path that necessarily obstructed or hindered the use of the road for the purpose of traveling. See *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 379 (*Espinosa*, *J.*, dissenting); see also *Machado* v. *Hartford*, 292 Conn. 364, 366, 972 A.2d 724 (2009) (defendant city liable under § 13a-149 for injuries sustained by plaintiff when vehicle "hit a large depression in the roadway" and then collided with exposed manhole cover); *Federman* v. *Stamford*, 118 Conn. 427, 429–30, 172 A. 853 (1934) (improperly installed manhole cover constituted highway defect); *Dudley* v. *Commissioner of Transportation*, 191 Conn. App. 628, 646, 216 A.3d 753 ("the allegedly defective manhole cover is within the definition of 'highway defect' "), cert. denied, 333 Conn. 930, 218 A.3d 69 (2019). Furthermore, the evidence at trial demonstrated, and the defendant concedes, that the roadway in question was one that the defendant was "bound to keep . . . in repair." General Statutes § 13a-149. Those undisputed facts conclusively establish, as a matter of law, that the condition that caused the plaintiff's injuries was a highway defect within the purview of § 13a-149.

As our precedent makes clear, it matters little that the plaintiff's complaint did not invoke § 13a-149 or that

* * *

"[The Plaintiff's Counsel]: [How] . . . violent was the impact when you fell into the manhole cover with your truck?

"[The Plaintiff]: Well, it was pretty violent. The truck that I was driving at the time was a small Ford Ranger so the tires were smaller so they went down quite deep into the manhole. The truck struck the other side, which is an immovable object. It hit it hard enough the back tire went through the same thing and the truck just died after it came out of the manhole.

"[The Plaintiff's Counsel]: And did your body strike any part of the interior of the [truck]?

"[The Plaintiff]: Yes, it did.

"[The Plaintiff's Counsel]: And . . . what part of your body struck what part of the interior of your truck please?

"[The Plaintiff]: The truck—my face and jaw hit the steering wheel. My body got thrown against . . . the driver side door of the truck and back against the rear windshield, the back window of the truck."

his action was predicated on § 52-557n (a). See, e.g., *Himmelstein* v. *Windsor*, 116 Conn. App. 28, 39, 974 A.2d 820 (2009) ("the absence of citation to § 13a-149 in [the plaintiff's nuisance allegation] is of no importance, as a complaint may still contain allegations sufficient to invoke that statute"), aff'd, 304 Conn. 298, 39 A.3d 1065 (2012). Like the plaintiffs in *Ferreira* v. *Pringle*, supra, 255 Conn. 335–36, and *Bellman* v. *West Hartford*, supra, 96 Conn. App. 393, the plaintiff in the present case claims that his cause of action was in negligence pursuant to § 52-557n. That statute provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . *provided, no cause of action shall be maintained for damages resulting from injury to any person or property by means of a defective road or bridge except pursuant to section 13a-149*. . . ." (Emphasis added.) General Statutes § 52-557n (a) (1). Our Supreme Court has construed § 52-557n "to provide that an action under [§ 13a-149] is a plaintiff's exclusive remedy against a municipality . . . for damages resulting from injury to any person or property by means of a defective road or bridge." (Internal quotation marks omitted.) *Wenc* v. *New London*, 235 Conn. 408, 412–13, 667 A.2d 61 (1995). For that reason, "[e]ven if a plaintiff does not plead § 13a-149 as a means for recovery, if the allegations in the complaint and any affidavits or other uncontroverted evidence necessarily invoke the defective highway statute, the plaintiff's exclusive remedy is § 13a-149." *Bellman* v. *West Hartford*, supra, 393–94.

We likewise disagree with the plaintiff that the cause of a particular highway defect, in this case an open manhole, alters the analysis of whether a municipality is liable under the highway defect statute. As our Supreme

Court has explained, "if two sources of negligence combine to *create* a defect, which defect is then the sole proximate cause of a plaintiff's injuries, the party bound to maintain the area wherein the defect is located can still be held liable under the relevant highway defect statute. . . . [I]t follows that the manner in which a defect is created in and of itself has no bearing on . . . liability under the statute. Rather, it is the *existence* of the defect and the . . . actual or constructive knowledge of and failure to remedy that defect that are of primary importance in making out a prima facie case of . . . liability . . . . Indeed, this court previously has concluded on several occasions that a municipality may be liable under the applicable highway defect statute despite the fact that the defect was *created* by the negligence of a third party. . . . Because there exists a statutory duty to maintain highways such that they are safe for ordinary use, liability under the highway defect statutes is premised on the existence of and the failure to remedy a defect, rather than on negligence in creating . . . a nuisance or other obstruction to present a danger to travelers."[9] (Citations omitted; emphasis in original; internal quotation marks omitted.) *Himmelstein* v. *Windsor*, 304 Conn. 298, 314–15, 39 A.3d 1065 (2012); see also *Machado* v. *Hartford*, supra, 292 Conn. 377–78.

The evidence presented at trial further demonstrated that the defendant had knowledge of the highway defect at issue. The plaintiff offered uncontroverted testimony that, soon after his vehicle collided with the open manhole, a snowplow approached with the defendant's name and insignia on it. After stopping at the scene, its driver informed the plaintiff that he had knocked the cover off the manhole. As our Supreme Court explained

[9] Moreover, this is not a case in which the plaintiff has alleged that the condition that caused his injuries was created by the negligence of a third party—his claim is that the defendant, in the course of maintaining its municipal roadways, negligently caused that condition.

in a case that also concerned a highway defect involving a manhole, the fact that "the defective condition which produced [the] plaintiff's injury was due to the act of [the defendant municipality's] own representatives . . . in itself would be sufficient to impute to it notice of that [defective] condition." *Federman* v. *Stamford*, supra, 118 Conn. 430. That logic applies equally to the present case.[10]

The plaintiff also contends that "the unique circumstances of this case would not have permitted [him] to pursue" a highway defect action. We disagree. At trial, the plaintiff offered the testimony of an expert in snowplow operation and safety, who testified that, as a matter of uniform operating procedure, "when a snowplow operator hits [an obstacle in the roadway] every safety bell that they have should go off. And they should stop, find out what it was they did and to protect the scene . . . for the traveling public and find out about the damage to the truck before they leave the scene." The plaintiff also presented the testimony of the defendant's Director of Public Works, who similarly testified that, when the defendant's snowplows "hit something abruptly," including manhole covers, the driver is supposed to stop the vehicle. That undisputed testimony undermines the plaintiff's contention that the circumstances of this case precluded him from pursuing a claim that the defendant failed to take reasonable measures to remedy the defective roadway condition that he encountered on the morning of January 21, 2011.

The plaintiff brought this action pursuant to § 52-557n (a), which provides in relevant part that "no cause of action shall be maintained for damages resulting from injury to any person or property by means of a

[10] For that reason, the plaintiff's reliance on *Prato* v. *New Haven*, 246 Conn. 638, 717 A.2d 1216 (1998), is unavailing. Unlike the present case, in *Prato* "[t]here [was] no evidence that the [defendant municipality] actually knew of this particular [defect] before the plaintiff had been injured." Id., 640.

defective road or bridge except pursuant to section 13a-149. . . .'' The evidence at trial unequivocally established that the plaintiff's injuries were caused by a collision between his vehicle and an object in the traveled path that necessarily obstructed or hindered the use of the road for the purpose of traveling—namely, an open manhole. For that reason, the plaintiff's exclusive remedy was pursuant to the highway defect statute. *Ferreira* v. *Pringle*, supra, 255 Conn. 341. The plaintiff, therefore, was obligated to comply with the notice provisions of § 13a-149 in order for the Superior Court to have jurisdiction over his action. See id., 340; *Bellman* v. *West Hartford*, supra, 96 Conn. App. 394. Because the plaintiff failed to do so, we conclude that the court improperly denied the defendant's posttrial motion to dismiss the plaintiff's action for lack of subject matter jurisdiction.

The judgment is reversed and the case is remanded with direction to grant the defendant's posttrial motion to dismiss and to render judgment accordingly.

In this opinion the other judges concurred.

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NOTICE

Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On May 17, 2021, at 2 p.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure, which are being considered by the Justices and Judges, and that were adopted by the Justices and Judges on an interim basis, as well as any proposed new rule or any change to an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the April 27, 2021 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Due to the ongoing pandemic, the public hearing will be conducted electronically using *Microsoft Teams* communication and collaboration platform. Individuals who would like to access the public hearing may do so by clicking here. The public hearing will also be broadcast on the Judicial Branch's YouTube channel. Individuals who wish to view the public hearing but who do not wish to speak, may do so by clicking here.

For every individual who wishes to access and speak at the public hearing, it is important that certain procedures be followed. All individuals who access the public hearing must at all times act in a professional and respectful manner. Any individual whose conduct is deemed by the co-chairs to be disruptive or inappropriate will be removed from the public hearing.

Individuals who would like to speak at the public hearing should access the hearing one-half hour before the hearing begins in order to be recognized and queued to speak. Each speaker will be allowed a maximum of five minutes to offer their remarks. Anyone who believes that they may need to exceed the five minute limit may e-mail Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov.

Hon. Gregory T. D'Auria

Hon. Eliot D. Prescott

Co-Chairs, Advisory Committee on Appellate Rules

NOTICE OF CONNECTICUT STATE AGENCIES

Notice of Ground Water Quality Reclassification Decision

The Commissioner of Energy and Environmental Protection hereby provides notice that pursuant to Section 22a-426 of the Connecticut General Statutes, she has approved changes to the state's Ground Water Quality Classifications. A request was made to lower the ground water quality classification from Class GA to Class GB at six sites in Greenwich, New Milford, Plainville, Plymouth (Terryville), Torrington and Wethersfield, respectively. The areas proposed for reclassification are as follows:

Greenwich: 54.46 acres encompassing the subject site at 10 Hillside Road and extending south to the existing GB area and Greenwich Creek; submitted by Amy Siebert, Commissioner of Public Works, on behalf of The Town of Greenwich.

New Milford: Approximately 7 acres encompassing the subject site at 41-47 Main Street and extending to Main St to the East, Bank St to the south, the property boundary to north and an existing GB area and Railroad tracks to the west; submitted by Edward Falkenberg on behalf of Acme 2 Realty LLC.

Plainville: Approximately 14.76 acres of property encompassing the subject site at 1 and 63 West Main St which is bounded to the north by the Pequabuck River, extending east to the Railroad line and connecting to the existing GB area to the northeast; submitted by Robert E. Lee on behalf of The Town of Plainville.

Plymouth (Terryville): 18 acres, encompassing the former O-Z Gedney Company, bordered on the north by Rt 72. The Class B Pequabuck River flows west to east through central part of property, then forms the east and southeastern border of the proposed GB area; submitted by Walter Galacki on behalf of the SPX Corporation.

Torrington: Approximately 8 acres encompassing the property at 293 New Litchfield St., extending south to Gulf Stream and east to the Railroad tracks and the adjacent existing GB area; submitted by Martin Marola on behalf of Belleview LLC.

Wethersfield: Approximately 2.02 acres encompassing the property at 214 Church St., and extending to the existing GB area to the north, west and south; submitted by Peter Kelly on behalf of Kell-Strom Tool Co., Inc.

The requests were made pursuant to Section 22a-426-7(k)(2) of the Regulations of Connecticut State Agencies and the requests met the applicable criteria. A public hearing was noticed and conducted in accordance with the statutory requirements on December 9, 2020. A copy of the Final Language and Statement of Reasons from the hearing, which includes the Commissioner's decision, is available on the Department's website on the ''Water Quality Reclassification'' link from www.ct.gov/deep/wqsc. https://portal.ct.gov/DEEP/Water/Water-Quality/Water-Quality-Reclassification. This approved change to the ground water quality classifications will be incorporated into the Water Quality Classification Maps as new editions are prepared. Any questions can be directed to Teresa Gagnon at teresa.gagnon@ct.gov or (860) 424-3724.

NOTICES

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of March 12, 2021:

Jessica Borowick	NBC Sports
Krysla Gregoriades	FCP Live-in, LLC

Certified as of April 5, 2021:

Beth Davis	Stamford Health System
Herschel S. Weinstein	Springworks Therapeutics, Inc.

Certified as of April 12, 2021:

Michael J. Crane	Ernst & Young LLP

Hon. Patrick L. Carroll III
Chief Court Administrator

Appointment of Trustee

Pursuant to Practice Book § 2-64, on April 5, 2021 in docket number HHD-CV20-6134091-S Attorney Lincoln Woodard (Juris No. 406693) of Hartford, Connecticut is appointed as trustee to take such steps are necessary to protect the interest of the Michael DeMarco's (Juris No. 432796) clients, inventory the client files, receive business mail, and take control of the Respondent's clients' funds, IOLTA, and all fiduciary accounts.

The Trustee shall not make any disbursements from said accounts without the prior authorization of the Court. The Trustee shall notify all active clients resident in Connecticut of the Respondent's suspension and the need to arrange for their self-representation or successor counsel, if necessary.

The Respondent shall comply with the Trustee in all respects.

David Sheridan
Presiding Judge