ALVORD, J., dissenting. Although the majority acknowledges that the defendant, Connecticut Oil Recycling Services, LLC, is contractually entitled to recover attorney's fees in this action, it affirms the trial court's judgment that did not award any of the requested fees. Because I believe that *Heller* v. *D. W. Fish Realty Co.*, 93 Conn. App. 727, 890 A.2d 113 (2006), is applicable to the facts of this case, I respectfully dissent.

The majority opinion sets forth the facts and procedural history of this action. The following additional facts and procedural history, however, also are relevant to the issues on appeal. To simplify, the plaintiffs, Total Recycling Services of Connecticut, Inc. (Total Recycling) and Whitewing Environmental Corp. (Whitewing), alleged in their complaint: (1) breach of the asset purchase agreement with respect to equipment, (2) breach of the asset purchase agreement with respect to goodwill and (3) breach of the noncompetition agreement. Of the three contracts, only the asset purchase agreement with respect to equipment did not contain a provision for the recovery of attorney's fees. The three contracts all related to the sale of a recycling business by Total Recycling to the defendant. *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 114 Conn. App. 671, 673, 970 A.2d 807 (2009).

In the plaintiffs' complaint, they treated the first two contracts, only one of which provided for attorney's fees, as inseparable by combining the allegations of the defendant's breach of those contracts in one count. The complaint alleged that Total Recycling "performed its obligations under the two asset purchase agreements" and that the defendant "breached the asset purchase agreements . . . ." There is a separate count alleging that the defendant breached the noncompetition agreement with the parent company plaintiff, Whitewing, which agreement likewise had a clause providing for attorney's fees. The plaintiffs never amended their original complaint.

In addition to the plaintiffs treating the contracts as parts of a single transaction, the defendant consistently referred to the agreements as being related in its answer to the plaintiffs' complaint and in its five count counterclaim. In its counterclaim, the defendant alleged: "The three agreements referenced above (collectively the 'Agreements') in combination, constituted a single transaction pursuant to which [the defendant] purchased the used oil collection and delivery business from Total [Recycling] and Whitewing."

After this court reversed the trial court on the issue of attorney's fees; *Total Recycling Services of Connecti-*

cut, *Inc.* v. *Connecticut Oil Recycling Services*, *LLC*, supra, 114 Conn. App. 681; the defendant filed its motion for attorney's fees with the trial court. The court, *Jones*, *J.*, issued a memorandum of decision on November 30, 2009, in which it stated that "it is necessary for the defendant to identify which reasonable attorney's fees were incurred in prosecuting its breach of contract counterclaim with regard to the contracts that specifically provide for attorney's fees." A hearing eventually was scheduled for March 29, 2010. More than two months prior to the scheduled hearing, in direct response to Judge Jones' directive, the defendant filed a renewed motion for attorney's fees and a supporting memorandum.[1] In the supporting memorandum, the defendant claimed that *all* of the attorney's fees in the affidavit and itemized statement were incurred in prosecuting its breach of contract counterclaim with regard to the contracts that specifically provide for attorney's fees. It cited *Heller* v. *D. W. Fish Realty Co.*, supra, 93 Conn. App. 735–36, in support of its argument that all reasonable fees were recoverable because the legal services provided could not be allocated among the three contracts under the factual circumstances of this case. The plaintiffs filed a brief in opposition to the defendant's request for attorney's fees.

At the hearing on March 29, 2010, William Gallagher testified as an expert witness for the defendant. Gallagher, an attorney for forty-seven years with extensive experience in this state's trial and appellate courts, testified that he had reviewed the materials relating to this action, including the defendant's motion for attorney's fees and the time records attached to counsel's affidavit. According to Gallagher, who has been involved in similar commercial cases claiming breach of contract, there was no way to separate the fees relating to the plaintiffs' claimed breach of the agreements from those fees incurred in connection with the prosecution of the defendant's counterclaim involving the same breach.

Gallagher testified: "The fact is that where you're basically in the defense of the case proving your cause of action or claim for attorney's fees because all three contracts were breached and there only two of them had attorney's fees provisions, but to sort it out, I find it that you can't.

"Then I think there's authority for that supported in the *Heller* case, which was a CUTPA [Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.] case. This was a common problem and especially in CUTPA, but basically *Heller* held that where the services are intertwined in such a way that it's not possible to sort them out, that the court ought to allow all of them. In that case, the trial court didn't and the Appellate Court reversed. That's the case closest to this circumstance that I found." He also testified that it is not customary for attorneys to itemize their services in

the detail that would have been required to allocate the fees incurred among the three separate contracts, particularly when those contracts were tied to one transaction involving the sale of a business.

After Gallagher's testimony, counsel presented oral argument. Counsel for the defendant, who also was counsel during the trial proceedings, stated: "With respect to the issue about being able to keep time records or to allocate time in a case of this nature where we have a business transaction, one business transaction, that within that business transaction had three separate contracts, one for assets, one for goodwill, and then from the parent company, the customer list.

"It's impossible to try to quantify time spent between each part, it was all part of one transaction, it was all—there were parts to it, no question about it, there were certain witnesses that testified about parts of this and parts of that. But to somehow separate it all out is next to impossible.

"But more importantly, I think that given the language in *Heller*, which talks in terms of that . . . if the claim is personal, or essentially the same transaction or where facts are inextricably connected or intertwined, I mean, this is a classic case for that."

I agree that the holding in *Heller* v. *D. W. Fish Realty Co.*, supra, 93 Conn. App. 727, is applicable to the facts of this case. In *Heller*, the plaintiffs could not distinguish the amount of attorney's fees related to their CUTPA claim from the amounts related to their breach of contract and negligence claims. We concluded that the plaintiffs were not required to apportion their attorney's fees among their claims because "they depended on the same facts." Id., 735. In the present case, there was expert testimony that the claims were interrelated and the contracts were all part of one transaction. There was no expert testimony to the contrary.[2]

I also would conclude that the defendant is entitled to reasonable appellate attorney's fees.[3] There is no appellate case law addressing the award of appellate counsel fees when the entitlement to those fees is contractual rather than statutory. Nevertheless, the rationale in *Gagne* v. *Vaccaro*, 118 Conn. App. 367, 984 A.2d 1084 (2009), persuades me that the recovery of appellate attorney's fees would be permitted in the discretion of the court if the language in the contract provides for their recovery.

"The general rule of law known as the American rule is that attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a contractual or statutory exception. . . . This rule is generally followed throughout the country. . . . Connecticut adheres to the American rule. . . . There are few exceptions. For example, a specific con-

tractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights." (Internal quotation marks omitted.) *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, 282 Conn. 576, 582, 923 A.2d 697 (2007).

In the present case, the authority for an award of attorney's fees is found in the two contracts at issue. It is, therefore, necessary to interpret the language in the contracts. "The standard of review for the issue of contract interpretation is well established. When, as here, there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . Accordingly, our review is plenary." (Internal quotation marks omitted.) *Genua* v. *Logan*, 118 Conn. App. 270, 273, 982 A.2d 1125 (2009).

Paragraph 14.2 of the asset purchase agreement with respect to goodwill provides: "Seller agrees to indemnify and hold Buyer harmless from any costs or damages, including reasonable attorney fees, resulting from any breach of any representation, warranty or covenant contained in this Agreement." Paragraph 1.2 of the noncompetition agreement provides: "[Whitewing] agree[s] to indemnify and hold [the defendant] harmless for any costs or damages, including reasonable attorney fees, resulting from any breach of any representation, warranty or covenant contained in this Agreement." It is clear from the language in the contracts that the fees are not limited to trial proceedings.

In *Gagne* v. *Vaccaro*, supra, 118 Conn. App. 371, this court concluded that appellate attorney's fees were allowed by General Statutes § 52-249 even though the statute did not specifically provide for their recovery. The statutory language clearly provided for the recovery of attorney's fees in actions for the foreclosure of mortgages and liens, and we held that the provision extended to attorney's fees incurred on appeal as well as at the trial level. Id. I would conclude that the contractual language in the present case, which provides the basis for the recovery of attorney's fees and does not limit that recovery to proceedings at the trial level, extends to the recovery of reasonable attorney's fees incurred on appeal.

For those reasons, I conclude that the court abused its discretion in failing to award reasonable attorney's fees because it did not correctly apply the law; *Heller* v. *D. W. Fish Realty Co.*, supra, 93 Conn. App. 727; and could not reasonably have reached the conclusion that it did. See *Moasser* v. *Becker*, 121 Conn. App. 593, 595, 996 A.2d 1200 (2010). Accordingly, I would reverse the judgment and remand the case for a hearing regarding the appropriate amount of attorney's fees.

[1] Although the plaintiffs claimed that the defendant ignored Judge Jones' directive and simply waited until the hearing to challenge that directive, the record belies that argument. Months before the hearing, the defendant argued the applicability of *Heller* v. *D. W. Fish Realty Co.*, supra, 93 Conn.

App. 727, to its claim for attorney's fees in its memorandum. Judge Jones "invited" the defendant to identify which fees could be claimed with respect to the two contracts that provided for attorney's fees, and the defendant responded that all of the fees were incurred in the defense of the breach of contract claims relating to those two contracts. As the defendant's counsel stated at the hearing on March 29, 2010: "I thought Judge Jones' opinion pretty much left things wide open for me to put on whatever evidence I thought was appropriate in order to support this. So, please don't consider anything we've done here as an intention to disagree with the court in the sense of, I think it was left pretty wide open and I'm just putting on the evidence I think is appropriate."

[2] The majority notes that "the interrogatories to the jury enabled the jury to find in favor of the defendant on one or more of the breach of contract claims, but find in favor of the plaintiffs on one or more of the others." The fact is, however, that the jury found that the plaintiffs had breached all three contracts, lending further support to the claim that the three contracts were inextricably connected or intertwined.

[3] The majority did not need to reach this issue in light of its conclusion that the court properly denied the attorney's fees incurred in connection with the trial proceedings in this case.