KATZ, J., with whom ROGERS, C. J., and PALMER, J., join, dissenting. The majority concludes that the arbitrator's decision refusing to award attorney's fees to the named plaintiff, Comprehensive Orthopaedics and Musculoskeletal Care, LLC,[1] is unreviewable because, as long as the arbitrator rendered one of two possible awards—either awarding attorney's fees or not awarding attorney's fees—the award conformed to the submission. The majority reasons that the arbitrator implicitly decided that the named plaintiff had not prevailed, despite being awarded $75,000 in damages on the claim at issue, and that such a decision was within the arbitrator's sole discretion as a matter of contract interpretation. I respectfully disagree. When parties to an arbitration agreement use terms that have a well settled, universally understood, unambiguous meaning, they have not intended to open up those terms to interpretation by the arbitrator. Thus, when an arbitrator ignores the settled meaning of a term, the arbitrator has not engaged in a plausible interpretation of the contract and, in such a case, has exceeded his authority. In the present case, by ignoring the settled meaning of the term "prevail," the arbitrator disregarded mandatory language in the arbitration agreement clearly stating that he must award attorney's fees to a prevailing party and, as such, exceeded his authority. Accordingly, I respectfully dissent.

The resolution of the issue in this appeal is informed by our analysis in *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 881 A.2d 139 (2005). The arbitration agreement in *Harty* expressly precluded the arbitrator from awarding "punitive damages or amounts in the nature of . . . punitive damages . . . ." (Internal quotation marks omitted.) Id., 76. The relevant issues in *Harty*, for purposes of this appeal, were whether the arbitrator had exceeded his authority by awarding: (1) double damages under the wage collection statute, General Statutes § 31-72; and (2) attorney's fees. *Harty* v. *Cantor Fitzgerald & Co.*, supra, 88. In that case, as in the present case, there was no dispute that the submission was unrestricted, in the sense that it did not condition the award on court review.[2] Id., 83. We therefore explained that, "[i]In light of that posture . . . the arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. . . . *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 110, 779 A.2d 737 (2001).

"Even with an unrestricted submission, however, it is well settled that the award may be reviewed to deter-

mine if the arbitrators exceeded their authority, one of the statutory grounds under [General Statutes] § 52-418 for vacating an award. *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, [273 Conn. 86, 94, 868 A.2d 47 (2005)]. We have explained that, [i]n our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers. . . . Id. The standard for reviewing a claim that the award does not conform to the submission requires what we have termed in effect, de novo judicial review. *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 265 Conn. 771, 789, 830 A.2d 729 (2003). . . . Our inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred. With respect to the latter, we have explained that, as long as the arbitrator's remedies were consistent with the agreement they were within the scope of the submission. [Id., 790]; see also *In re Matter of Granite Worsted Mills, Inc.*, 25 N.Y.2d 451, 456, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969) (where it is clear from face of award itself . . . that the arbitrator has included an element of damages specifically excluded by the contract pursuant to which he obtained his very authority to act, he exceeds his powers under the contract and the award thus made must be vacated upon proper application). In making this determination, the court may not engage in fact-finding by providing an independent interpretation of the contract, but simply is charged with determining if the arbitrators have ignored their obligation to interpret and to apply the contract as written. See *Metropolitan District Commission* v. *AFSCME, Council 4, Local 3713*, 35 Conn. App. 804, 811, 647 A.2d 755 (1994) (concluding that trial court improperly granted plaintiff's application to vacate arbitration award because, in determining whether award conformed to submission, it provided an independent interpretation of contract and thus engaged in fact-finding beyond scope of trial court's powers of review); *Board of Education* v. *Local 818, Council 4, AFSCME, AFL-CIO*, 5 Conn. App. 636, 640, 502 A.2d 426 (1985) ([w]here one party claims that the award, as issued, is inherently inconsistent with the underlying collective bargaining agreement, the court will compare the agreement with the award to determine whether the arbitrator has ignored his obligation to interpret and apply that agreement as written), citing *Hudson Wire Co.* v. *Winsted Brass Workers Union*, 150 Conn. 546, 553, 191 A.2d 557 (1963)." (Citations omitted; internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 83–87.

In *Harty*, in deciding whether the arbitrator had exceeded his authority, we applied the following analytical framework. We first compared the award to the

submission and noted the absence of any express reference in the award to "punitive" damages. Id., 91. We therefore considered whether either double damages under § 31-72 or attorney's fees were, *as a matter of law*, punitive damages or in the nature of punitive damages, and, therefore, were outside the scope of the submission. Id., 92. We noted that, "[t]o justify vacating an award . . . we must determine that the award *necessarily* falls outside the scope of the submission." (Emphasis in original.) Id., 98. To make that determination, we examined, inter alia, case law from this and other jurisdictions addressing the meaning of the term punitive damages generally and the specific question of whether statutory multiple damages are punitive. Id., 92–97.

That examination yielded different results. With respect to the award of double damages under § 31-72, because the case law was ambiguous as to whether such damages are punitive, we concluded that the arbitrator was acting within the scope of his authority by interpreting the contract to permit an award of such damages. Id., 98. By contrast, the case law demonstrated that "attorney's fees and costs provide the same relief and serve the same function as would be afforded by common-law punitive damages. See *Berry* v. *Loiseau*, [223 Conn. 786, 827, 614 A.2d 414 (1992)] (attorney's fees are element of punitive damages); *Tedesco* v. *Maryland Casualty Co.*, [127 Conn. 533, 538, 18 A.2d 357 (1941)] (same)." *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 99–100. Therefore, we concluded that the law clearly demonstrated that the fees were punitive in nature, and, accordingly, the arbitrator had exceeded his authority by including those in the award. Id., 100.

The present case is the converse of *Harty*. Rather than *precluding* the arbitrator from including certain compensation in the award, the agreement *mandates* that the arbitrator include certain compensation in the award if a factual predicate is met, namely, that the named plaintiff has prevailed on a specific claim. Applying the same analytical framework that we did in *Harty* to the present case yields the conclusion that the arbitrator exceeded his authority by declining to award attorney's fees.

I begin by comparing the arbitration agreement and the submission to the award. See *Administrative & Residual Employees Union* v. *State*, 200 Conn. 345, 348, 510 A.2d 989 (1986) ("[t]he arbitration agreement and the submission constitute the charter of the entire arbitration proceedings . . . and define the powers of the arbitrator and the issues to be decided" [citation omitted; internal quotation marks omitted]). In the arbitration agreement, the parties agreed to submit to binding arbitration "any and all issues or claims that they have against each other" and that "[t]he [a]rbitrator shall

apply the laws of the [s]tate of Connecticut wherever applicable and relevant." In the section of the agreement titled "Expenses," the parties agreed as follows: "As to [§] 11 of the [e]mployment [a]greement [titled 'Restrictive Covenant'] . . . the [a]rbitrator shall award attorney's fees and costs only to [the named plaintiff] and only if [the named plaintiff] *prevails* in its claims under [§] 11 of the [e]mployment [a]greement." (Emphasis added.) The parties submitted the following issues to be decided by the arbitrator. The plaintiffs asked the arbitrator to decide: "Did [the named defendant, Alfredo L. Axtmayer[3]] violate [§] 11 of his '[e]mployment [a]greement'?" If the arbitrator decided that issue in the affirmative, the plaintiffs requested enforcement of the $150,000 liquidated damages clause in that section, as well as attorney's fees and costs. The named defendant asserted in his submission: "The [plaintiffs] are not entitled to payment under the restrictive covenant." The arbitration award provides: "[The named defendant] is indebted to the [plaintiffs] for the following: [r]estrictive [c]ovenant and [l]iquidated [d]amages: $75,000. . . . No additional interest, costs or attorney's fees are awarded."

A comparison between the award and the submission reflects that, as in *Harty*, the arbitrator did not use the precise term at issue. In other words, the arbitrator did not state expressly that the named plaintiff had "prevailed" or "not prevailed" on its claims under § 11 of the employment agreement. As in *Harty*, therefore, we turn to our case law to determine whether a party that is awarded damages on a claim, even in an amount less than requested, has "prevailed" on that claim.

The Appellate Court aptly has summarized the law on this question in the context of discretionary awards of attorney's fees to prevailing parties: "Our Supreme Court and this court, in construing various statutory fee shifting provisions, *repeatedly* have cited favorably the following definition of a prevailing party: [A] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . . *Frillici* v. *Westport*, 264 Conn. 266, 285, 823 A.2d 1172 (2003); *Wallerstein* v. *Stew Leonard's Dairy*, [258 Conn. 299, 303, 780 A.2d 916 (2001)]; *Right* v. *Breen*, 88 Conn. App. 583, 591, 870 A.2d 1131 [(2005), rev'd on other grounds, 277 Conn. 364, 890 A.2d 1287 (2006)]; see also *Wallerstein* v. *Stew Leonard's Dairy*, supra, 304 (prevailing party is a legal term of art . . . [referring to] one who has been awarded some relief by the court . . .). Generally, costs may be awarded to a successful party-plaintiff as the prevailing party where there is success on the merits of the case although not to the extent of the plaintiff's original contention, or where the plaintiff is not awarded the entire claim. A party need not prevail on all issues to justify a full award of costs, and it has been held that if the prevailing party obtains judgment on even a fraction of the claims advanced, or is awarded

only nominal damages, the party may nevertheless be regarded as the prevailing party and thus entitled to an award of costs. 20 Am. Jur. 2d, Costs § 14 (1995)." (Emphasis added; internal quotation marks omitted.) *Russell* v. *Russell*, 91 Conn. App. 619, 630–31, 882 A.2d 98, certs. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005). This case law is wholly in accord both with the common meaning of the term "prevail"; see Webster's Third New International Dictionary (defining "prevail" as "to gain victory by virtue of strength or superiority" and "to urge one successfully: succeed in persuading or inducing one"); and with the legal definition; see Black's Law Dictionary (7th Ed. 1999) (defining "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . [a]lso termed 'successful party' "); Ballentine's Law Dictionary (3d Ed. 1969) (defining prevailing party as "[t]he party who is successful or partially successful in an action, so as to be entitled to costs"). As this foregoing discussion clearly demonstrates, whether one looks to the common meaning of a prevailing party to an action, or to the legal definition, treatises or case law, an award of damages to a party on a claim, even if only nominal, means that he has prevailed on that claim.[4]

The parties in this case undoubtedly vested the arbitrator with authority to decide whether the named defendant had violated the restrictive covenant and, if so, the amount of damages the plaintiffs were entitled to recover for that breach. Indeed, the defendants had asked the arbitrator to conclude that the plaintiffs were entitled to *no* payment. Accordingly, the arbitrator's legal and interpretive functions, consistent with the parties' submissions, were completed upon reaching those conclusions. The parties had set forth the conditions for payment of attorney's fees by using terms they undoubtedly understood consistently with their common, well established meaning. Thus, in this case, the arbitrator, a fortiori, by virtue of its order for the defendants to pay damages to the plaintiffs, determined that the named plaintiff had prevailed on its claim that the named defendant had violated the restrictive covenant included in § 11 of the employment agreement.

Although the trial court concluded that the arbitrator could have viewed the term prevail as ambiguous because, by virtue of receiving only 50 percent of the liquidated damages sought, the plaintiffs' proverbial glass was either "half full" or "half empty," neither the defendants nor the trial court has cited a single source to support that interpretation. In light of the clearly contrary meaning of prevailing party, that interpretation is not merely an incorrect one; it is implausible that the parties intended such an interpretation. See *Kashner Davidson Securities Corp.* v. *Mscisz*, 531 F.3d 68, 78 (1st Cir. 2008) ("With respect to the authority to interpret, the [arbitration] [p]anel's disregard of the unambiguous text of a [National Association of Securities

Dealers] [c]ode provision cannot be deemed a mere interpretation. To find otherwise and expand the concept of 'interpretation' to include the [p]anel's dismissal decision in this case would be tantamount to giving . . . arbitration panels a blank check to [act] in contravention of an explicit provision of the [c]ode. Our deference to the decisions of arbitrators does not extend that far."). It is a well settled principle of arbitration law that, "[a]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *United Steelworkers* v. *Enterprise Wheel & Car Corporation*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 [1960]." (Internal quotation marks omitted.) *Board of Education* v. *AFSCME, Council 4, Local 287*, 195 Conn. 266, 273, 487 A.2d 553 (1985). An award must be reversed when it is "inherently inconsistent with the underlying collective bargaining agreement"; *Board of Education* v. *Local 818, Council 4, AFSCME, AFL-CIO*, supra, 5 Conn. App. 640; "contrary to the plain language of the [contract]"; [internal quotation marks omitted] *Eastern Seaboard Construction Co.* v. *Gray Construction, Inc.*, 553 F.3d 1, 4 (1st Cir. 2008); "not on its face . . . a plausible interpretation of the contract"; (internal quotation marks omitted) *Virginia Mason Hospital* v. *Washington State Nurses Assn.*, 511 F.3d 908, 914 (9th Cir. 2007); or the decision is "so ignorant of the contract's plain language as to make implausible any contention that the arbitrator was construing the contract." (Internal quotation marks omitted.) *Totes Isotoner Corp.* v. *International Chemical Workers Union Council/UFCW Local 664C*, 532 F.3d 405, 412 (6th Cir. 2008). This is such a case given the well established meaning of the term at issue.

As another jurisdiction has noted: "Here, the parties' agreement mandates the arbitrator to award attorney fees and expenses to the prevailing party. It leaves no discretion to the arbitrator to deny attorney fees to the prevailing party. In ruling on [the plaintiff's] motion to modify, the arbitrator ignored the parties' agreement and fashioned his own rule that no prevailing party attorney fees will be awarded if any fault is attributable to each of the parties. The arbitrator's ruling is contrary to the parties agreement, it exceeds the arbitrator's power, and the award may be properly vacated . . . ." *Sooner Builders & Investments, Inc.* v. *Nolan Hatcher Construction Services, LLC*, 164 P.3d 1063, 1071–1072 (Okla. 2007);[5] accord *Bernard* v. *Kuhn*, 65 Md. App. 557, 565–66, 501 A.2d 480 (1985) (Agreeing with the following reasoning of the Washington Court of

Appeals: "The attorney's fees clause stated that if either party undertook arbitration then the prevailing party shall be entitled to reasonable attorney's fees. We do not believe that this language, agreed to by both parties *prior* to arbitration, gave the arbitrators discretion with regard to attorney's fees except for the amount of the award . . . . The question of whether or not attorney's fees should be awarded to the prevailing party was not an issue submitted to the tribunal for arbitration with the other claims and disputes; having already been decided by the parties by agreement, it was not arbitrable. To hold otherwise would require us to ignore the express language of a contract, something that courts may not do."[6] [Emphasis in original; internal quotation marks omitted.]); *In re Matter of Application of Shapiro*, 197 Misc. 241, 245, 97 N.Y.S.2d 644 (1949) ("Under the provisions of the agreement, the fees and expenses of the arbitrators were required to be imposed on the unsuccessful party. The arbitrators had no power under the agreement to apportion the amount of those fees among the parties as they have undertaken to do.");[7] but see *DiMarco* v. *Chaney*, 31 Cal. App. 4th 1809, 1815, 37 Cal. Rptr. 2d 558 (1995) ("Had the arbitrator found neither [the plaintiff] nor [the defendant] was the prevailing party, the arbitrator properly could have declined to make any award of [attorney's] fees. But having made a finding [the defendant] was the prevailing party, the arbitrator was compelled by the terms of the agreement to award her reasonable [attorney's] fees and costs."); *Morrell* v. *Wedbush Morgan Securities, Inc.*, 143 Wash. App. 473, 487, 178 P.3d 387 (2008) ("[T]he award of [attorney's] fees was included as a contract issue. Thus, the arbitrators had the power to decide the [attorney's] fees issue, even if they did so wrongly.").

The arbitrator in the present case had complete discretion to decide whether, under the facts and the terms of the contract, the named defendant had violated the restrictive covenant. Once the arbitrator determined, however, that the named defendant had violated the covenant and thus the plaintiffs were entitled to recover damages for that breach, the right to attorney's fees was not a matter of discretion or contract interpretation.

Accordingly, I respectfully dissent.

[1] See footnote 1 of the majority opinion for the listing of the individual plaintiffs involved in this appeal. References herein to those individuals and Comprehensive Orthopaedics and Musculoskeletal Care, LLC, jointly, are to the plaintiffs.

[2] We have used the term "unrestricted submission" in several ways, each of which has different legal implications. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 89 n.3, 868 A.2d 47 (2005) ("[a] submission is unrestricted when, as in the present case, the parties' arbitration agreement contains no language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review" [internal quotation marks omitted]).

[3] Alfredo L. Axtmeyer, M.D., P.C., also was named as a defendant in the present case. We refer to Axtmayer individually as the named defendant, and to him and his professional corporation jointly as the defendants.

[4] It is wholly irrelevant that the arbitrator reformed the agreement to

reduce the liquidated damages provision. The arbitrator did not strike either the restrictive covenant or the liquidated damages clause as unenforceable.

[5] The agreement at issue in *Sooner Builders & Investments, Inc.* v. *Nolan Hatcher Construction Services, LLC*, supra, 164 P.3d 1068, provided: "Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof . . . the prevailing party shall be entitled to recover reasonable attorney's fees, costs, charges and expenses expended or incurred therein." (Internal quotation marks omitted.)

[6] The agreement at issue in *Bernard* v. *Kuhn*, supra, 65 Md. App. 560, provided: "The cost of said arbitration, including all reasonable attorney's fees and other proper expenses incident thereto incurred by the winning party, will be borne by the losing party relative to said arbitration, and this fact will be reflected in the arbitrator's decision." (Internal quotation marks omitted.) In that case, the Maryland Court of Special Appeals relied on the reasoning of the Washington Court of Appeals decision in *Agnew* v. *Lacey Co-Ply*, 33 Wash. App. 283, 654 P.2d 712 (1982), cert. denied, 99 Wash. 2d 1006 (1983). See *Bernard* v. *Kuhn*, supra, 565. Although, the Washington Court of Appeals recently has questioned the reasoning in *Agnew*; see *Morrell* v. *Wedbush Morgan Securities, Inc.*, 143 Wash. App. 473, 178 P.3d 387 (2008); the Maryland courts have reiterated their view that an arbitrator acts outside the scope of his authority by failing to comply with a mandatory provision for attorney's fees to a prevailing party. See *Marsh* v. *Loffler Housing Corp.*, 102 Md. App. 116, 132, 648 A.2d 1081 (1994) (stating that "[t]he issue of [attorney's] fees . . . was not disputed, and therefore not arbitrable" and citing in support thereof *Bernard* and *Agnew*).

[7] *In re Matter of Application of Shapiro* does not indicate the language of the attorney's fees clause at issue.