STEPHEN HARRIS *v.* BRADLEY MEMORIAL HOSPITAL AND HEALTH CENTER, INC.
(SC 18944)

Palmer, Zarella, McLachlan, Harper and Gruendel, Js.*

Argued May 16—officially released September 4, 2012

Michael G. Rigg, with whom was *Steven V. Manning*, for the appellant (defendant).

P. Jo Anne Burgh, with whom was *Mary Alice Moore Leonhardt*, for the appellee (plaintiff).

Opinion

HARPER, J. This case, involving the summary suspension of the medical privileges of the plaintiff, Stephen Harris, by the defendant, Bradley Memorial Hospital and Health Center, Inc., comes to this court for the second time. In the plaintiff's appeal; *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 319–20, 994 A.2d 153 (2010); this court determined that the trial court improperly had granted the defendant's motion for judgment notwithstanding the verdict on claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with business expectancies[1] due to the plaintiff's failure to prove that the underlying administrative proceedings ultimately had terminated in his favor and improperly had denied the plaintiff's motion for punitive damages. Accordingly, we reversed the judgment as to the grant of the motion for judgment notwithstanding the verdict and as to the denial of the motion for punitive damages and remanded the case for further proceedings. Id., 351–52.

The present appeal arises from the proceedings on remand that resulted in the plaintiff being awarded punitive damages and offer of judgment interest pursuant to General Statutes § 52-192a. The defendant now appeals from the trial court's judgment,[2] claiming that: (1) it was entitled to immunity as a matter of law under the federal Health Care Quality Improvement Act of 1986 (federal act), 42 U.S.C. § 11101 et seq., from damages arising from its summary suspension of the plaintiff's privileges; (2) the trial court improperly instructed the jury regarding the standard for determining immunity under the federal act; (3) the award of common-law punitive damages violated the defendant's constitutional right to due process; (4) the award of common-law punitive damages violated the defendant's right to immunity under the federal act and the common law; and (5) the offer of judgment interest violated the defendant's right to due process. The plaintiff contends that the defendant is precluded from raising the first two claims due to its failure to properly raise them in the previous appeal in which the jury verdict was at issue and that we should reject the remaining claims relating to punitive damages and offer of judgment interest on the merits. We conclude that the defendant is not precluded from raising its immunity claims and that it is entitled to immunity from money damages under the federal act as a matter of law. Accordingly, we reverse the judgment.

In the first appeal, we set forth in substantial detail the underlying facts that the jury reasonably could have found. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 320–25. We summarize those facts, and the pertinent procedural history reflected in the record, that are necessary to an under-

standing of the issues presently before us. In 1993, the plaintiff, a general surgeon, was admitted to the defendant's medical staff and granted privileges, which the defendant periodically renewed. In 1999, following the renewal of the plaintiff's privileges earlier that year, a patient sustained an injury during a surgical procedure performed by the plaintiff. After a review of that procedure at the department of surgery's monthly morbidity and mortality meeting, the plaintiff agreed to a six month period of observation, after which time the plaintiff's privileges were fully restored.

In late 2000, members of the defendant's administration informed the plaintiff that, because of concerns about his clinical capabilities, an outside entity would be contacted to perform a review and analyze his cases. In fact, the proposed external review already had been conducted, based on a nonrandom sample of only those surgical cases of the plaintiff that previously had been subject to review at the morbidity and mortality meetings due to some complication or error that had occurred. Shortly thereafter, the plaintiff was informed that the external review had been completed and that, because the report was unfavorable, the defendant's medical executive committee had decided to form a peer review panel for the purpose of conducting further review of the plaintiff's cases. An additional nonrandom sample of the plaintiff's cases in which issues had arisen was submitted to the peer review panel.

In early 2001, the plaintiff was summoned to appear before the peer review panel, with no prior notice of the meeting date or the cases on which he would be questioned. Following that meeting, the peer review panel prepared a report in which it questioned the plaintiff's ability to safely function independently as a general surgeon in light of the panel's conclusions that the surgical care provided by the plaintiff during the period of time reviewed evidenced global deficits and did not meet the standard of care expected of a board certified general surgeon. Shortly thereafter, the reports of both the peer review panel and the external review were presented at the monthly meeting of the medical executive committee. The committee summarily suspended the plaintiff's surgical privileges effective immediately and limited his privileges to assisting in the operating room.

Pursuant to the defendant's medical staff bylaws, the plaintiff then sought review of the medical executive committee's action. On review, the hearing panel found that the plaintiff had not met his burden of proving that the decision suspending his privileges was not sustained by the evidence, unreasonable or otherwise unfounded. On the basis of its findings, the hearing panel recommended that the summary suspension be continued. The defendant's board of directors subsequently rejected the plaintiff's appeal from the decision of the

hearing panel, in which the plaintiff had claimed that the suspension was unwarranted, motivated by the bad faith of a competing surgeon who had assumed the position of chairman of the department of surgery in September, 2000, and impeded by the lack of due process.

Thereafter, the plaintiff commenced the present action, alleging in a four count complaint: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) tortious interference with business expectancies; and (4) a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff sought damages and a permanent injunction requiring the defendant to cease and desist from terminating the plaintiff's privileges and interfering with his patient relationships. In response, the defendant asserted a special defense that it was immune from liability under the federal act, which covers professional peer review actions by health care providers such as hospitals.[3]

Prior to trial, the defendant filed a motion for summary judgment, claiming that the plaintiff was unable to rebut the statutory presumption of immunity under the federal act. The trial court, *Burke, J.*, granted the motion in part and denied it in part. The court first determined that the federal act applies an objectively reasonable standard for examining a "professional review action"; see footnote 14 of this opinion; to which the presumption of immunity applies under the federal act, and thus, the plaintiff's allegations of bad faith were irrelevant. The court further determined that there had been more than one professional review action and that the plaintiff had demonstrated the existence of a material question of fact as to whether at least one of them, the proceedings culminating in the summary suspension of the plaintiff's privileges by the medical executive committee, satisfied the statutory criteria for immunity. Specifically, the court determined that the plaintiff had presented sufficient evidence to raise a question as to whether he had rebutted the presumption that the defendant had met two of the conditions for immunity to apply—that the defendant had made reasonable efforts to obtain the facts and had provided the plaintiff with adequate notice and the opportunity to be heard. 42 U.S.C. § 11112 (a) (2) and (3); see footnote 13 of this opinion for the text of that statute. The court rejected the defendant's claim that, even if it had not complied with those requirements, it nonetheless was immune from liability for its summary suspension of the plaintiff's privileges under the federal act's emergency provision, which applies where the failure to act "may result in an imminent danger to the health of any individual." 42 U.S.C. § 11112 (c) (2). The court concluded that the rebuttable presumption of immunity did not apply to this exception, and, therefore, the burden was on the defendant to produce evidence of immi-

nent danger, which it had not done. With respect to the professional review actions following the summary suspension and culminating in the sustained suspension, however, the court concluded that the defendant was entitled to summary judgment as to any claim of damages arising from the sustained suspension because the plaintiff had produced no evidence to rebut the statutory presumption of immunity. Finally, the court concluded that the federal act provides immunity only with respect to damages. Therefore, the court denied the defendant's motion as to the plaintiff's claims for injunctive relief, denied the motion as to the claim for damages resulting from the summary suspension of the plaintiff's privileges by the defendant's medical executive committee, and granted the motion as to the plaintiff's claim for damages for the defendant's actions subsequent to the summary suspension.

Thereafter, the case proceeded to trial, with the jury to decide the claims for damages arising from the summary suspension, followed by a trial to the court on the request for injunctive relief. Following the presentation of the plaintiff's case, the defendant filed a motion for a directed verdict. The trial court, *Schuman*, *J.*, granted the motion with respect to the fourth count of the complaint, the alleged CUTPA violation, and reserved decision on the three remaining claims. The jury subsequently returned a verdict in favor of the plaintiff on those claims, awarding $250,000 in economic and noneconomic damages plus punitive damages in an amount to be determined by the court. Thereafter, the trial court denied the plaintiff's request for injunctive relief.

The court then turned to the parties' postverdict motions. The court denied the plaintiff's motion for punitive damages and granted the defendant's motion for judgment notwithstanding the verdict. In granting that motion, the trial court determined that the plaintiff could not prevail without demonstrating that the underlying proceedings ultimately had terminated in his favor and expressly declined to reach the issue of immunity under the federal act. Although the court's decision rendered it unnecessary to consider the defendant's motion for remittitur, the court nonetheless granted the motion and ordered remittitur of $100,000. Accordingly, the trial court rendered judgment in favor of the defendant with respect to counts one, two and three of the complaint.

The plaintiff appealed from the judgment to the Appellate Court, and we transferred the appeal to this court. We first concluded that the trial court improperly had granted the defendant's motion for judgment notwithstanding the verdict because the favorable termination element required to prevail in certain other actions does not apply to an action for damages in connection with a hospital's decision to suspend or terminate a

physician's privileges. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 336. We rejected on the merits one alternate ground for affirming the judgment advanced by the defendant—that the defendant substantially had complied with its bylaws—and declined to consider another due to lack of preservation—that the plaintiff had failed to rebut the statutory presumption that the defendant was immune from liability under the federal act. Id., 345–46. We then turned to the plaintiff's challenge to the denial of his motion for punitive damages, concluding that the trial court's decision was improper in light of evidence in the record supporting the jury's finding that the defendant tortiously had interfered with the plaintiff's business expectancies with reckless indifference as to whether that conduct would injure him. Id., 348. We rejected, however, the plaintiff's claims that the trial court improperly had reached and granted the defendant's motion for remittitur; id., 349; and that the trial court improperly had directed a verdict in favor of the defendant on the CUPTA claim. Id., 350. Accordingly, we reversed the judgment as to the grant of the motion for judgment notwithstanding the verdict and as to the denial of the motion for punitive damages, and remanded the case for further proceedings according to law. We affirmed the judgment in all other respects. Id., 351–52.

On remand, the trial court, *Pittman, J.*, held an evidentiary hearing on the issue of punitive damages. Following those proceedings, the court entered judgment on the first, second and third counts of the plaintiff's complaint in the amount of $150,000 plus taxable costs, "[a]s directed by the Supreme Court . . . ." With respect to punitive damages relating to the third count, tortious interference with business expectancies, the court awarded the plaintiff punitive damages in the amount of $612,919.20, which included fees and costs relating to proceedings before the department of health, the defendant's internal review bodies, the Superior Court and the Supreme Court, as well as fees for the plaintiff's expert witness. Following the entry of judgment in his favor, the plaintiff filed a motion for offer of judgment interest, pursuant to § 52-192a, which the court granted over the defendant's objection in the amount of $266,373.94. This appeal followed.

On appeal, the defendant contends that: (1) it was entitled to immunity from liability as a matter of law under the federal act for damages arising out of the summary suspension of the plaintiff's privileges; (2) the jury charge improperly failed to state that the defendant is entitled to a rebuttable presumption that its summary suspension of the plaintiff's privileges was objectively reasonable and that to overcome this presumption, the plaintiff was required to establish that substantial evidence did not exist in the record to support the defendant's decision; (3) the award of common-law punitive

damages violated the due process clause of the federal constitution; (4) the award of common-law punitive damages violated the defendant's right to immunity under the federal act and the common law; and (5) the offer of judgment interest violated the defendant's right to due process.

In response, the plaintiff contests the first two claims on procedural grounds only and contests the remaining claims on the merits. Specifically, the plaintiff points to the fact that the defendant's first and second claims, which are predicated on its immunity from liability under the federal act, would, if successful, effectively reverse the effect of this court's decision in the first appeal reinstating the jury's verdict in favor of the plaintiff. As such, the plaintiff contends that the defendant was required to properly raise them as alternate grounds for affirmance in the previous appeal and is precluded from raising them in this appeal. We conclude that the defendant is not precluded from asserting these claims in the present appeal and that the defendant is entitled to prevail on its first claim. Because the defendant is entitled to immunity from all money damages awards, we need not reach its remaining claims.

I

As a threshold matter, we begin with the plaintiff's contention that the defendant should be precluded from bringing its immunity claims because it was required to properly raise them as alternate grounds for affirmance in the previous appeal. In support of his position, the plaintiff cites the rules of practice, principles of waiver and the scope of this court's remand in the previous appeal. The defendant responds that, because it was the appellee in the previous appeal, any deficiency on its part with regard to raising claims on appeal did not result in any forfeiture, and neither the rules of practice nor the scope of our previous remand preclude it from raising these claims here. We agree with the defendant.

The record reveals the following additional facts and procedural history that form the backdrop to this issue. In the plaintiff's appeal seeking to reverse the trial court's grant of the defendant's motion for judgment notwithstanding the verdict, the defendant had claimed, inter alia, "that the judgment of the trial court may be affirmed on the alternate ground that the plaintiff failed to rebut the statutory presumption that the defendant was immune from monetary liability under the [federal act] . . . ." Id., 342–43. We noted that the defendant consistently had claimed before the trial court that it was entitled to immunity under the federal act. Id., 344. Nonetheless, we held that, "[b]ecause the defendant has not challenged on appeal either the court's instructions to the jury regarding the defendant's special defense of immunity or the submission of the interrogatory to the jury on the defendant's special defense, we

conclude that the defendant has failed to preserve its claim that the jury's finding that it was not entitled to immunity was not supported by the evidence." Id., 343. In explaining this conclusion, we reasoned: "The defendant's failure to challenge the jury charge and the submission of the interrogatory in this appeal, despite its claim that it was entitled to immunity under 42 U.S.C. § 11112 (c) (2) and that this court, in considering the defendant's claim, should assume that the defendant was entitled to the presumption in 42 U.S.C. § 11112 (a), is problematic. The defendant asks us to conclude that the trial court properly could have granted the motion for judgment notwithstanding the jury's verdict on this basis, yet does not claim that the jury was misled by an improper charge or interrogatory. The defendant asks us to decide the issue, therefore, under a standard that was never submitted to the jury for its consideration. Put another way, the defendant's argument appears to ask us to assume that, if the jury had been instructed in accordance with the defendant's interpretation of the [federal] act, placing the burden on the plaintiff to rebut the presumption that the defendant was entitled to immunity under 42 U.S.C. § 11112 (c) (2), the jury could not reasonably have concluded that the defendant was not entitled to immunity. That we cannot do—we cannot usurp the plaintiff's right to have the issues decided by the jury. The defendant cannot circumvent that right by asking us to decide a question that was never presented to the jury, in the absence of a claim that the jury was misled by an improper instruction or interrogatory. The defendant's claim is unpreserved and we do not review it." Id., 345–46.

It is undisputed that, in the previous appeal in which the defendant was the appellee, the defendant failed to properly raise its immunity claim as an alternate ground for affirmance and that this court consequently declined to address the merits of the claim. In the present appeal, the defendant, as the appellant, both renews its previous assertion that it is entitled to judgment as a matter of law on immunity grounds and raises a new claim of instructional impropriety relating to that immunity defense. Thus, by advancing a claim of instructional impropriety, the defendant seeks to rectify the defect we had identified as precluding a decision on the merits on the alternate ground for affirmance asserted in the plaintiff's appeal.[4] Accordingly, there are two issues for us to consider: first, as a general matter, whether appellees are required to raise all available claims to avoid forfeiture; and second, even if appellees generally are not so bound, whether the fact that the defendant attempted to raise one of these claims previously but failed to obtain a decision on the merits precludes it from raising its claims in this appeal. We conclude that the defendant is not precluded from advancing these claims.

We begin our analysis with the general rule that "[a]n

appellant who fails to brief a claim abandons it . . . ." (Citations omitted; emphasis added.) *State* v. *Zarick*, 227 Conn. 207, 221, 630 A.2d 565, cert. denied, 510 U.S. 1025, 114 S. Ct. 637, 126 L. Ed. 2d 595 (1993). As the Third Circuit Court of Appeals has explained, "[a]dherence to the rule that a party waives a contention that could have been but was not raised on [a] prior appeal . . . is, of course, necessary to the orderly conduct of litigation. Failure to follow this rule would lead to the bizarre result, as stated admirably by Judge Friendly [in *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied sub nom. *Currier* v. *Fogel*, 459 U.S. 828, 103 S. Ct. 65, 74 L. Ed. 2d 66 (1982)], that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." (Citation omitted; internal quotation marks omitted.) *Cowgill* v. *Raymark Industries, Inc.*, 832 F.2d 798, 802–803 n.2 (3d Cir. 1987). In keeping with this reasoning, this court previously has refused to consider claims on subsequent appeals by the same party in which "[n]o valid reason has been alleged as to why the [appellant] could not have brought the present claim when the prior one was brought." *State* v. *Aillon*, 189 Conn. 416, 427, 456 A.2d 279, cert. denied, 464 U.S. 837, 104 S. Ct. 124, 78 L. Ed. 2d 122 (1983); *State* v. *Long*, 301 Conn. 216, 242, 19 A.3d 1242, cert. denied, U.S. , 132 S. Ct. 827, 181 L. Ed. 2d 535 (2011).

Although this forfeiture rule is well and widely established with respect to the failure of an appellant to raise a claim, the applicability of the rule to an appellee is the subject of considerable doctrinal uncertainty. See 18B A. Wright et al., Federal Practice and Procedure: Jurisdiction and Related Matters (2d Ed. 2002) § 4478.6, p. 831 ("[f]ailure to advance arguments as [an] appellee, whether by brief or by cross-appeal, has not generated anything like the consistent responses that have met an appellant's omission of arguments on an appeal actually taken"). The reason for courts' hesitation to apply the forfeiture rule equally to appellants and appellees has been articulated aptly by the District of Columbia Circuit Court of Appeals: "While there are clear adjudicative efficiencies created by requiring appellants to bring all of their objections to a judgment in a single appeal rather than seriatim . . . forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation. While an appellant must persuade the court to overturn a district court ruling, it enjoys the offsetting procedural benefit of filing both the opening and reply briefs. On the other hand, an appellee presenting alternative grounds for affirmance and facing a potential application of the waiver doctrine must also attack an adverse district court ruling, but without the offsetting advantage of being able to file a reply brief."[5] *Crocker*

v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 740–41 (D.C. Cir. 1995).

In some cases, an appellee may surmount this procedural disadvantage by filing a cross appeal pursuant to Practice Book § 61-8. The procedural posture of the prior appeal in this case, however, foreclosed such a solution. The defendant could not have properly filed a cross appeal challenging the underlying jury verdict on the basis of immunity under the federal act because the trial court's judgment notwithstanding the verdict, albeit on a different ground, already had provided the defendant with complete relief. See *Seymour* v. *Seymour*, 262 Conn. 107, 109–11, 809 A.2d 1114 (2002) (concluding that court lacked subject matter jurisdiction over appeal because party not aggrieved and citing supporting cases). Unlike some other jurisdictions, Connecticut courts have not recognized so-called "protective" or "conditional" cross appeals. Under such a procedure, a party that is not aggrieved "will cross-appeal to [e]nsure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well. . . . The theory for allowing a conditional cross-appeal is that as soon as the appellate court decides to modify the trial court's judgment, that judgment may become 'adverse' to the cross-appellant's interests and thus qualify as fair game for an appeal . . . ."[6] *Hartman* v. *Duffey*, 19 F.3d 1459, 1465 (D.C. Cir. 1994).

In Connecticut, this court has wrestled with the competing considerations of policy and judicial economy at issue, ultimately concluding that "[i]t would have served the interest of judicial economy for [the appellee] to have apprised this court of his constitutional claim on the first appeal, rather than to remain silent at that time and to reassert his objection on remand. Our rules of practice, however, which permit an appellee to suggest alternate bases for affirmance not ruled upon by the trial court, do not require the appellee to pursue such a course. . . . Failure to present alternate grounds on appeal does not result in the forfeiture of otherwise valid claims." (Citations omitted.) *Beccia* v. *Waterbury*, 192 Conn. 127, 132, 470 A.2d 1202 (1984);[7] see also *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 842 n.24, 860 A.2d 715 (2004) ("There is no rule . . . that an appellee's failure to reply in its brief to an issue raised by the appellant is an implicit concession that the appellant's claim is meritorious and that the claim should be decided in the appellant's favor. Abandonment of a claim for failure of a party to brief that claim typically occurs when the *appellant* fails to brief properly the claim that is raised on appeal." [Emphasis in original.]).

Although this court's decision in *Beccia* would seem to dispose of the plaintiff's forfeiture argument at least

as to the defendant's claim of instructional error, he contends that the court's conclusion in *Beccia* was dependent on a rule of practice that since has been amended to require appellees to assert any alternate ground for affirmance. Although the plaintiff is correct that the rule of practice cited in *Beccia* v. *Waterbury*, supra, 192 Conn. 132 and n.4, has since been slightly revised, both versions of the rule plainly set forth a set of procedures governing the manner in which an alternate ground is to be raised provided a party "wishes" to do so. Compare Practice Book (1979) § 3012 (a) with Practice Book § 63-4 (a) (1).[8] Contrary to the plaintiff's interpretation, the operative language of the provision therefore remains, for purposes of this appeal, discretionary with respect to whether an appellant chooses to submit any or all alternate grounds for affirmance. See *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 841–42 n.24. Therefore, we see no reason to depart at this time from the previously announced general principle that an appellee will not be deemed to have forfeited a claim that could have been, but was not, brought in the context of the appellant's appeal.

This general principle does not, however, definitively answer the question of whether the jury verdict reinstated in the plaintiff's prior appeal should be treated as final and unappealable given the particular procedural posture of this case. Unlike the appellant considered in *Beccia*, who chose merely to "remain silent" regarding its claims in a prior appeal; *Beccia* v. *Waterbury*, supra, 192 Conn. 132; the defendant in the present case previously attempted to raise an alternate ground for affirmance on the basis of its immunity special defense, but this court declined to address the merits of that claim. The defendant has thus already caused this court to expend judicial resources considering its claim and has compelled the plaintiff to devote resources attempting to rebut that claim. It now seeks a second chance to make the same general arguments it previously failed properly to raise, having taken advantage of this court's prior opinion to remedy that failure.

We conclude that, on balance, considerations of judicial economy do not justify a departure in the present case from the rule announced in *Beccia*, which this court crafted expressly notwithstanding the countervailing value of judicial economy.[9] The defendant's immunity claim has never been considered by this court on the merits,[10] and the court did not expend considerable judicial resources in ascertaining whether we could review the claim. We decline, however, to hold categorically that the nonforfeiture rule announced in *Beccia* will always apply to save improperly raised claims by an appellee in a previous appeal. We recognize that there may be unusual instances in which addressing an improperly presented claim requires such an expenditure of judicial resources that further consideration of

that claim will properly be deemed forfeited.

The final jurisprudential consideration advanced by the plaintiff in support of his preclusion argument is that the defendant's claim of immunity falls outside the confines of this court's remand in the previous appeal. Specifically, the plaintiff contends that, because this court in the previous appeal concluded that the jury verdict in his favor should be reinstated and ordered further substantive proceedings only on the issue of punitive damages, the question of immunity may not now be raised because it is beyond the scope of that remand. We conclude that the plaintiff has misconstrued our case law as to this issue.

In addressing the effect of a remand order, this court has noted that "[d]etermining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. See, e.g., *Higgins* v. *Karp*, 243 Conn. 495, 502–503, 706 A.2d 1 (1998) (duty of trial court to comply with Supreme Court mandate according to its true intent and meaning . . .). Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 791, 43 A.3d 567 (2012). As this statement makes clear, although our limited remand in the previous appeal certainly would have precluded the *trial court* from considering the defendant's renewed immunity claim; *Higgins* v. *Karp*, supra, 502; the same limitation does not apply to this court. See 5 Am. Jur. 2d 453, Appellate Review § 784 (1995) (lower court powerless to undertake any proceedings beyond those specified by *higher court's* opinion and mandate). This court's remand, intended to direct the scope of the trial court's action, would not operate as a constraint on this court's authority, and the plaintiff has pointed to no authority holding as such.[11]

In the absence of any other articulated jurisprudential basis for deeming the defendant as being precluded from advancing its immunity claims in the present case, we reject the plaintiff's preclusion claim. The defendant did not obtain a decision on the merits of its immunity defense as the appellee in the previous appeal and as the appellant in the present appeal, it has remedied the procedural defect that we had identified previously.[12]

II

We turn now to the merits of the defendant's claim that it is entitled to immunity from money damages as a matter of law under the federal act because it satisfied the standards provided in 42 U.S.C. § 11112[13] that qualify a professional review action[14] for immunity. Specifically, the defendant contends that, although professional review actions generally must be preceded by

certain notice and hearing procedures to be entitled to a presumption of immunity, procedures that the defendant did not afford the plaintiff in the present case, a summary suspension followed by notice and a hearing nonetheless is entitled to that presumption when necessary to prevent imminent danger to patients. The defendant asserts that the plaintiff's failure to rebut that presumption entitles the defendant to judgment as a matter of law. We agree with the defendant.

Before turning to the standard of review and the particular legal question raised, it is useful to provide a brief description of the statutory landscape in which this question arises. The federal act was crafted in response to, inter alia, the increased occurrence of medical malpractice; 42 U.S.C. § 11101 (1); and seeks to address the "overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." 42 U.S.C. § 11101 (5). The federal act accordingly provides, with a limited exception not applicable in the present case, immunity from liability in damages under any federal or state law "[i]f a professional review action . . . of a professional review body meets all the standards specified in section 11112(a) of this title . . . ." 42 U.S.C. § 11111 (a).

Section 11112 (a) sets forth four standards, one of which is that the professional review action must take place "after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances . . . ." 42 U.S.C § 11112 (a) (3). Subsection (a) further provides that "[a] professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence." 42 U.S.C. § 11112 (a). The defendant concedes that the summary suspension of the plaintiff's privileges was not preceded by any notice and hearing procedures as directed by § 11112 (a).

The defendant instead relies on subsection (c) of § 11112, which permits summary suspension of physicians in certain circumstances where there has not yet been a notice and hearing process. Section 11112 (c), entitled "Adequate procedures in investigations or health emergencies," provides in relevant part: "[N]othing in this section shall be construed as . . . precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." 42 U.S.C. § 11112 (c) (2). With this background in mind, we turn to the defendant's claim.

A

The threshold legal question we must consider is

whether the presumption of immunity in 42 U.S.C. § 11112 (a) applies when a professional review body properly acts under § 11112 (c). The defendant contends that the endorsement by § 11112 (c) (2) of summary suspension followed by notice and hearing provides an example of "such other procedures as are fair to the physician under the circumstances" for purposes of § 11112 (a) (3). The trial court concluded, in rejecting the defendant's motion for summary judgment, that § 11112 (c) (2) describes an alternate ground for immunity that stands entirely apart from § 11112 (a) and does not fall within the scope of the presumption under that provision. The plaintiff has not briefed this question, apparently resting on the trial court's summary rejection of the defendant's view of the federal act when denying in relevant part the defendant's motion for a directed verdict.

Generally, "[a] directed verdict is justified if on the evidence the jury could not reasonably and legally have reached any other conclusion. . . . [W]e must consider the evidence in the light most favorable to the [nonmoving party]." (Internal quotation marks omitted.) *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 634, 850 A.2d 145 (2004). Unlike a typical special defense, under which the question on a defendant's motion for a directed verdict would be whether the defendant has met its burden of persuasion as a matter of law, because the federal act provides a presumption of immunity, courts have recognized that immunity claims based on the federal act call for an "unusual" inquiry, namely: "[m]ight a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that [*the plaintiff*] has shown, by a preponderance of the evidence, that the defendant['s] actions are outside the scope of § 11112 (a)?" (Emphasis added.) *Austin* v. *McNamara*, 979 F.2d 728, 734 (9th Cir. 1992). To determine which of these analytic postures applies, we therefore must consider whether the presumption of immunity provided in 42 U.S.C. § 11112 (a), and the resulting unusual review, also covers summary suspensions contemplated in the emergency provision under § 11112 (c) (2). This issue solely concerns the proper construction of § 11112, and we therefore exercise plenary review over the trial court's decision in this respect. *Stewart* v. *Watertown*, 303 Conn. 699, 710, 38 A.3d 72 (2012).

Consideration of the statutory text reveals no clear answer to this question. On the one hand, § 11112 (c) (2) stands structurally apart from § 11112 (a), the subsection containing the presumption of immunity. Although both subsections require some form of notice and hearing procedures, § 11112 (c) (2) permits summary process subject to "subsequent notice and hearing or other adequate procedures," whereas § 11112 (a) (3) expressly requires that qualifying professional review actions be taken only "after" the requisite notice and hearing procedures. Therefore, it is difficult to imagine

how a summary suspension that takes place *before* such procedures could constitute literal compliance with § 11112 (a).

On the other hand, § 11112 (c) is entitled "[a]dequate procedures in investigations or health emergencies," thus suggesting that the summary suspension followed by process is in fact "adequate," a term used elsewhere in § 11112 exclusively to describe the notice and hearing requirement of § 11112 (a) (3). See *House* v. *Commissioner of Internal Revenue*, 453 F.2d 982, 987 (5th Cir. 1972) ("Subheadings on the respective sections of a statute will not be read as destroying the clear meaning of the body of the [federal act]. Where, however, there is no collision involved, it is proper to consult both the section heading and the section's content to come up with the statute's clear and total meaning."). Similarly, the text of § 11112 (c) strongly suggests that the subsection was intended not to provide an additional, free-standing ground for immunity, but, rather, to refer back to the immunity standards in § 11112 (a). Specifically, § 11112 (c) provides that "nothing in this *section* shall be construed as," inter alia, precluding summary suspension followed by further process. (Emphasis added.) Section 11112 (c) thus plausibly may be characterized as legislatively dictating an exceptional circumstance that satisfies § 11112 (a), even though a literal reading of the text of § 11112 (a) could not otherwise support such a construction.

In the absence of clear textual guidance, we turn to the legislative history of the federal act. Federal courts reviewing this history have recognized that "Congress clearly intended [the federal act] to permit defendants in suits arising out of peer review disciplinary decisions to file motions to resolve the issues concerning immunity from monetary liability as early as possible in the litigation process. As the House Committee [on Energy and Commerce] explained, 'these provisions allow defendants to file motions to resolve the issue of immunity in as expeditious a manner as possible.' H.R. Rep. No. 903, [p. 12], reprinted in 1986 U.S.C.C.A.N. [6394]." *Bryan* v. *James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1332 (11th Cir. 1994); accord *Austin* v. *McNamara*, supra, 979 F.2d 734 n.5. Similarly, federal courts have recognized that "the intent of [the federal act] was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise." (Internal quotation marks omitted.) *Poliner* v. *Texas Health Systems*, 537 F.3d 368, 385 (5th Cir. 2008), quoting *Lee* v. *Trinity Lutheran Hospital*, 408 F.3d 1064, 1073 (8th Cir. 2005).

In light of the purposes of the federal act, we conclude that § 11112 (c) is most appropriately read as an exception to literal compliance with § 11112 (a) (3), rather

than a freestanding ground for immunity, and therefore it is covered by the presumption of immunity that applies to § 11112 (a). To hold otherwise would not only require us to disregard the title of § 11112 (c) and the clear indication that this subsection is not intended to be interpreted in a manner to undermine the purpose of the section as a whole, but it would also conflict with Congress' intent to resolve the question of immunity under the federal act as early as possible and to reinforce judicial deference to hospital decision-making. To subject the portions of immunity claims relating to summary suspension to a different allocation of proof than all other aspects of immunity claims under the federal act would invite courts to resolve only partially the issue of immunity at summary judgment, permitting issues relating to summary suspension to proceed to trial while ordering summary judgment with respect to the ensuing review process. Such an outcome would eliminate much of the value of the immunity presumption as a means of avoiding drawn out litigation while also foreclosing jury consideration of the underlying conflict as a whole. The present case serves a prime example of the unproductive compromise resulting from application of differing standards on summary judgment.

Our conclusion that a presumption of immunity applies to summary suspensions finds further support in the fact that a review of federal case law shows that every federal court dealing with this issue thus far has applied a presumption of immunity to actions undertaken under § 11112 (c) (2), although not always expressly. The United States District Court for the Central District of California, in an opinion later affirmed by the Ninth Circuit Court of Appeals, has addressed this question most directly in a decision concluding that a summary action "satisfies the subsection (a) (3) [of 42 U.S.C. § 11112] due process requirement by virtue of § 11112 (c) (2) . . . ." *Austin* v. *McNamara*, 731 F. Sup. 934, 941 (C.D. Cal. 1990), aff'd, 979 F.2d 728 (9th Cir. 1992). Other circuits have impliedly afforded § 11112 (c) the same presumption of immunity as provided in § 11112 (a). For example, the Eighth Circuit Court of Appeals, in holding, inter alia, that a summary suspension satisfied § 11112 (c), stated categorically that "we hold that [the plaintiff physician] has failed to satisfy his burden of producing sufficient relevant evidence that would allow a reasonable jury to conclude by a preponderance of the evidence that [the defendant hospital] is not entitled to statutory immunity under the [federal act]." *Sugarbaker* v. *SSM Health Care*, 190 F.3d 905, 918 (8th Cir. 1999). Similarly, the Third Circuit Court of Appeals concluded generally that a plaintiff had failed to rebut the presumption of immunity, notwithstanding the fact that one of the defendant hospital's actions qualified for immunity only under § 11112 (c). *Brader* v. *Allegheny General Hospital*, 167 F.3d

832, 842–43 (3d Cir. 1999); see also *Straznicky* v. *Desert Springs Hospital*, 642 F. Sup. 2d 1238, 1247 (D. Nev. 2009) ("[b]y its own terms, § 11112 [c] expressly establishes that, for purposes of § 11111 [a] nothing in the section is to be construed to preclude an immediate suspension of privileges 'where the failure to take such an action may result in an imminent danger to the health of any individual' "); but see *Wahi* v. *Charleston Area Medical Center, Inc.*, 562 F.3d 599, 608 (4th Cir. 2009) (The court noted, in a discussion not related to whether § 11112 [c] warrants a presumption of immunity, that § 11112 [c] "sets out distinct ways in which a health care entity can be immune under the [federal act] without having complied with the usual requirements for claiming immunity. . . . [S]ubsection [c] presents additional routes to [the federal act] immunity beyond that set forth in subsection [a] [3].").

B

Having concluded that summary suspensions undertaken in accordance with 42 U.S.C. § 11112 (c) (2) are entitled to the presumption of immunity under § 11112 (a), we next turn to the question of whether the defendant is entitled to judgment as a matter of law in the present case.[15] In so doing, we reiterate that the plaintiff has not advanced any substantive argument in opposition to the defendant's immunity claim. Generally, "[t]here is no rule . . . that an appellee's failure to reply in its brief to an issue raised by the appellant is an implicit concession that the appellant's claim is meritorious and that the claim should be decided in the appellant's favor." *Harris* v. *Commissioner of Correction*, supra, 271 Conn. 842 n.24. In the unusual situation in which an appellee bears the burden of persuasion, however, it is not clear that this general rule applies. In *State* v. *Oquendo*, 223 Conn. 635, 660–61, 613 A.2d 1300 (1992), for example, this court reasoned, after concluding that the trial court improperly had admitted evidence in contravention of the defendant's constitutional rights, that "[t]he state has the burden of proving that the admission of evidence in violation of our state constitution was harmless beyond a reasonable doubt. . . . The state has advanced no argument that the admission of the cocaine and the identification of the defendant were harmless error and, therefore, has failed to meet its burden. We conclude that the admission of this evidence was harmful to the defendant." (Citations omitted.) Although *Oquendo* may be distinguished partially by virtue of the fact that the burden of demonstrating harmless error is borne by a party on appeal, while the burden at issue in the present case concerns adjudication at the trial level, it is at the very least clear that this court will not make arguments on behalf of parties that have declined to make any.

Looking to the record before us, we further observe that the plaintiff has not directed the court to any aspect

of the record that could support a conclusion that the presumption of immunity was rebutted in the trial court. Conducting our own limited review of the record, the sole source of reasoning we readily observe that would cast doubt on the defendant's immunity claim appears in the trial court's memorandum of decision denying in part the defendant's motion for summary judgment. In reaching its conclusion, the trial court reasoned that the plaintiff had presented sufficient information to demonstrate material issues of fact concerning whether the defendant's actions culminating in the summary suspension had satisfied § 11112 (a) (2) and (3), and that the defendant had failed to present evidence establishing immunity under § 11112 (c). These determinations, however, were made without the benefit of the evidence subsequently presented at trial and therefore offer little insight into the question of whether the defendant was entitled to judgment as a matter of law on the basis of all the evidence presented in the case. Moreover, because the trial court failed to apply the presumption of immunity under § 11112 (c) not only when denying in part the defendant's motion for summary judgment, but also when instructing the jury regarding the defendant's immunity defense,[16] we can draw no reasonable inference from the conclusions reached by the improperly instructed jury. Although we recognize that the complete trial record may contain evidence affirmatively suggesting that the plaintiff rebutted the presumption of immunity, we will not conduct any such searching inquiry on behalf of a party who has not made any effort to satisfy its burden of persuasion.[17]

We therefore must conclude that, under the proper legal standard, no reasonable jury could have found that the plaintiff rebutted the presumption that the defendant is entitled to immunity from money damages under the federal act. The judgment as to ordinary damages, punitive damages and offer of judgment interest therefore cannot stand.

The judgment is reversed and the case is remanded with direction to render judgment in favor of the defendant.

In this opinion the other justices concurred.

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

[1] As we explain later in this opinion, in the plaintiff's appeal, we affirmed the trial court's judgment in part insofar as it directed a verdict in the defendant's favor on the plaintiff's claim for a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and granted the defendant's motion for remittitur. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 349–50.

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

[3] As we explained in *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 343, "Congress enacted the [federal] act in light of its findings that improving the quality of medical care is a national problem and that effective peer review, which is an important tool in ensuring

quality medical care, is unreasonably discouraged by the threat of private money damage liability. Therefore, '[t]here is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.' 42 U.S.C. § 11101 (5)."

[4] We note that, although we characterized the defendant's immunity claim as "unpreserved"; *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 346; we were not referring to preservation in the usual sense of that concept, in which a party has failed to raise a claim in the trial court and, thus, has failed to preserve it for appeal. See, e.g., *State* v. *Bowman*, 289 Conn. 809, 821, 960 A.2d 1027 (2008); *State* v. *Kulmac*, 230 Conn. 43, 74, 644 A.2d 887 (1994). Indeed, we expressly noted that the defendant consistently had advanced this claim before the trial court. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 344. Nor was it the case that we declined to review the defendant's alternate ground due to an inadequate record. Cf. *Deutsche Bank National Trust Co.* v. *Angle*, 284 Conn. 322, 328, 933 A.2d 1143 (2007). If either of those circumstances had been present, the defendant would have been unable to obtain review in the present appeal because such defects could not have been remedied during the proceedings on remand and thus the defendant would be in the same position in terms of entitlement to review as it was in the plaintiff's previous appeal.

[5] We recognize that an appellee may also seek permission to file a responsive brief of greater length than that prescribed under the rules of practice and that such requests routinely are granted when sufficient justification is advanced. Practice Book § 67-3. Nonetheless, this relief is discretionary and it does not fully offset the advantages afforded by an appellant's original brief and reply brief.

[6] We note that neither party has expressed a view on the merits of protective cross appeals. We therefore have no occasion here to express an opinion as to whether protective cross appeals could or should be recognized in Connecticut, other than to note that the value of the device as a means of promoting finality and preventing piecemeal appellate adjudication; see, e.g., *Sanchez-Corea* v. *Bank of America*, 38 Cal. 3d 892, 910, 701 P.2d 826, 215 Cal. Rptr. 679 (1985) ("[b]ecause [the] defendant has failed to file a protective cross-appeal, reinstatement of the judgment will automatically be final"); must be weighed against competing considerations of judicial economy. See also *Crocker* v. *Piedmont Aviation, Inc.*, supra, 49 F.3d 741 ("These unnecessary cross-appeals . . . generate additional complexity that has elicited sharp judicial rebuke: Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer." [Internal quotation marks omitted.]).

[7] We recognize that the forfeiture question in *Beccia* v. *Waterbury*, supra, 192 Conn. 127, arose in a different procedural posture than in the present case. In the first appeal in *Beccia*, this court had considered the plaintiff's appeal from the trial court's judgment denying, inter alia, the plaintiff's request for a declaratory judgment that the procedure employed by the defendant city to select its fire marshal violated the requirements of a statute. *Beccia* v. *Waterbury*, 185 Conn. 445, 447–48, 441 A.2d 131 (1981) *(Beccia I)*. This court concluded that the trial court improperly had concluded that the statute was inapplicable; id., 457–60; and set aside the judgment and remanded the case for further proceedings. Id., 463. Following our decision in *Beccia I*, the plaintiff commenced an independent quo warranto action seeking to oust the defendant from the position of fire marshal and to declare the position vacant. *Beccia* v. *Waterbury*, supra, 192 Conn. 129 (*Beccia II*). In *Beccia II*, the defendant appealed from the trial court's judgment in favor of the plaintiff in the quo warranto action, claiming that the statute at issue is unconstitutional. Id., 129–31. Despite the fact that *Beccia II* was an appeal from an independent action, not a second appeal within the same case as in the present case, we see no basis to distinguish the jurisprudential considerations weighed in *Beccia II* on the basis of the different procedural postures, and the plaintiff has identified none.

[8] Practice Book (1979) § 3012 (a), the revision cited in *Beccia*, provided in relevant part: "If the appellee wishes to present for review alternate grounds upon which the judgment may be affirmed, or if he wishes to present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial, he may file a preliminary statement of issues within fourteen days from the

filing of the appeal." That rule's successor, Practice Book § 63-4 (a) (1), provides in relevant part: "If any appellee wishes to (A) present for review alternate grounds upon which the judgment may be affirmed, (B) present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial, or (C) claim that a new trial rather than a directed judgment should be ordered if the appellant is successful on the appeal, that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues. . . ."

[9] As the court recognized in *Beccia* v. *Waterbury*, supra, 192 Conn. 132, "[i]t would have served the interest of judicial economy for [the appellant] to have apprised this court of his constitutional claim on the first appeal, rather than to remain silent at that time and to reassert his objection on remand." We also note that the forfeiture principle more generally reflects the intuition, first expressed by Judge Friendly, that "[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Fogel* v. *Chestnutt*, supra, 668 F.2d 109. This assertion, as a disparagement of the strategic choice not to argue a point, applies with somewhat less force to the appellee who made no such strategic choice, but, rather, stumbled in the execution of a claim such that the court could not review it.

[10] But cf. *Schering Corp.* v. *Illinois Antibiotics Co.*, 89 F.3d 357, 358–59 (7th Cir. 1996) (Posner, C. J.) (The Seventh Circuit Court of Appeals held that the law of the case barred an appellant's claim when the claim is identical to the issue addressed on a previous appeal in which the appellant had been the appellee, reasoning: "We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the [D]istrict [C]ourt's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver. The urging of alternative grounds for affirmance is a privilege rather than a duty. But the present case does not involve a mere failure to have presented an alternative ground in a previous appeal. The defendants did not have an alternative ground for affirmance in the previous round. They had, rather, additional evidence, which the [D]istrict [C]ourt had excluded, bearing directly on the only ground for affirmance that was argued—the meaning of the injunction. By holding back their challenge to that exclusion, they set the stage for bringing back to us the identical issue, the meaning of the injunction, on a second appeal should they lose the first. To put this differently, by reserving their challenge to the [D]istrict [C]ourt's evidentiary ruling they have put themselves in the position of asking us to reexamine our previous ruling on the basis of newly discovered evidence. Only, of course, it is not newly discovered. It was there all along. If they thought it material to the meaning of the injunction they should have challenged its exclusion in the first round.").

[11] We note that, although we have characterized the scope of a remand as akin to prescribing subject matter jurisdiction, the rule that this court lacks jurisdiction to determine the merits of an appeal when the trial court lacked subject matter jurisdiction in the first instance; see *State* v. *Das*, 291 Conn. 356, 366 n.6, 968 A.2d 367 (2009); *Broadnax* v. *New Haven*, 270 Conn. 133, 160, 851 A.2d 1113 (2004); is inapplicable under these circumstances, as there is no question that the trial court did have subject matter jurisdiction at the time that it made, or declined to make, the legal determinations at issue in the defendant's immunity claims.

[12] Although the procedural posture of the present case invites consideration of the preclusive doctrines of res judicata and the law of the case, the plaintiff has not invoked these principles before this court. Nor, for that matter, does the present case appear to fall squarely within the framework of either of these doctrines.

[13] Title 42 of the United States Code, § 11112, provides: "Standards for professional review actions

"(a) In general

"For purposes of the [immunity] protection set forth in section 11111(a) of this title, a professional review action must be taken—

"(1) in the reasonable belief that the action was in the furtherance of quality health care,

"(2) after a reasonable effort to obtain the facts of the matter,

"(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

"(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

"A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

"(b) Adequate notice and hearing

"A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

"(1) Notice of proposed action

"The physician has been given notice stating—

"(A)(i) that a professional review action has been proposed to be taken against the physician,

"(ii) reasons for the proposed action,

"(B)(i) that the physician has the right to request a hearing on the proposed action,

"(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

"(C) a summary of the rights in the hearing under paragraph (3).

"(2) Notice of hearing

"If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

"(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

"(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

"(3) Conduct of hearing and notice

"If a hearing is requested on a timely basis under paragraph (1)(B)—

"(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

"(i) before an arbitrator mutually acceptable to the physician and the health care entity,

"(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

"(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

"(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

"(C) in the hearing the physician involved has the right—

"(i) to representation by an attorney or other person of the physician's choice,

"(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

"(iii) to call, examine, and cross-examine witnesses,

"(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

"(v) to submit a written statement at the close of the hearing; and

"(D) upon completion of the hearing, the physician involved has the right—

"(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

"(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

"A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

"(c) Adequate procedures in investigations or health emergencies

"For purposes of section 11111(a) of this title, nothing in this section shall be construed as—

"(1) requiring the procedures referred to in subsection (a)(3) of this section—

"(A) where there is no adverse professional review action taken, or

"(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

"(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual."

The defendant has not briefed any claim for immunity solely under 42 U.S.C. § 11112 (a) in the present appeal, nor does it contest this court's observation in the previous appeal that any such argument had been waived. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 344 n.17.

[14] Under 42 U.S.C. § 11151 (9), "[t]he term 'professional review action' means an action or recommendation of a professional review body which

is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. . . .'' That provision of the federal act further provides: ''The term 'professional review body' means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.'' 42 U.S.C. § 11151 (11).

[15] We do not address the defendant's more general suggestion that we adopt the rule stated by some courts that ''[u]nder no circumstances should the ultimate question of whether the defendant is immune from monetary liability under [the federal act] be submitted to the jury.'' *Bryan* v. *James E. Holmes Regional Medical Center*, supra, 33 F.3d 1333. In light of the apparent division among federal circuit courts; see *Singh* v. *Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25, 34 n.7 (1st Cir. 2002) (''[g]iven *Bryan*'s internal inconsistency, and its contradiction of the other circuits' holding that a jury may in principle make a [federal act] immunity determination, we decline to adopt its designation of [federal act] immunity determinations as pure questions of law off limits to a jury''); we decline to express an opinion on this issue.

[16] The trial court provided the following instruction to the jury: ''The defendant must prove that a professional review body took a professional review action resulting in an immediate suspension or restriction of clinical privileges because a failure to take such an action may have resulted in an imminent danger to the health of any individual.'' It is clear from this language that the trial court's instruction improperly placed the burden of persuasion with respect to immunity on the defendant. Given the outcome of this case, we need not determine whether this instructional impropriety would entitle the defendant to a new trial.

[17] We note that, when asked at oral argument before this court on what basis he could prevail if we disagreed with his procedural claim, the plaintiff contended that, in addition to the lack of notice required under 42 U.S.C. § 11112 (a) (3), the defendant had failed to make ''a reasonable effort to obtain the facts of the matter'' as required under § 11112 (a) (3) or to produce evidence of the immediate risk necessary for immunity under § 11112 (c) (2). Even if this court were to disregard the general rule that we will not consider claims raised at oral argument for the first time; *State* v. *Butler*, 296 Conn. 62, 70 n.10, 993 A.2d 970 (2010); these assertions would not be a sufficient basis on which to overcome the presumption of immunity.

With respect to § 11112 (a) (2), although the plaintiff asserts that evidence recounted in this court's opinion in *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 315, showed that the summary suspension was based on a nonrandom sample of cases chosen by an economic competitor, the plaintiff has made no showing in this appeal of what reasonable efforts were required before summary suspension could properly be imposed on the plaintiff or how the defendant fell short of that standard. The federal act's reasonableness requirements ''were intended to create an objective standard, rather than a subjective good faith standard''; *Austin* v. *McNamara*, supra, 979 F.2d 734; the existence of bias on the part of one participant in the review process therefore does not directly establish its objective inadequacy.

With respect to the imminent danger requirement of the emergency provision, the defendant's brief to this court cites federal case law that consistently has determined that the phrase ''may result in an imminent danger to the health of any individual'' under § 11112 (c) (2) does not require an existing or imminent danger or an identifiable patient at such a risk. See *Poliner* v. *Texas Health Systems*, supra, 537 F.3d 382; *Sugarbaker* v. *SSM Health Care*, supra, 190 F.3d 917; *Fobbs* v. *Holy Cross Health System Corp.*, 29 F.3d 1439, 1443 (9th Cir. 1994), cert. denied, 513 U.S. 1127, 115 S. Ct. 936, 130 L. Ed. 2d 881 (1995), overruled in part on other grounds by *Daviton* v. *Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1133 (9th Cir. 2001). The plaintiff has offered no authority in rebuttal. Moreover, although the defendant does not bear the burden of proof, in its brief to this court it has pointed to evidence in the record to demonstrate that it acted properly pursuant to § 11112 (c) (2): the plaintiff was a practicing surgeon with an active patient load; and

prior to the summary suspension of the plaintiff's privileges, a peer review panel had uncovered "global deficits" in the plaintiff's performance that caused the panel to "[question] the ability of [the plaintiff] to safely function independently as a general surgeon . . . at this time."