CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* THOMAS STEELE
(AC 37956)

Alvord, Sheldon and Norcott, Js.

Syllabus

Convicted of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree and conspiracy to commit larceny in the third degree in connection with his conduct in robbing a bank, the defendant appealed to this court. He challenged the sufficiency of the evidence to support his robbery conviction and also claimed, inter alia, that the trial court improperly admitted lay testimony from a detective, D, concerning historic cell site analysis, a certain process that utilizes cell phone records and cell site locations to identify the location of cell phones at a particular time. Specifically, he claimed that the court should have qualified D as an expert witness before permitting him to testify about how he used the defendant's cell phone records to determine his whereabouts before, during and after the bank robbery. *Held*:

1. There was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree as a principal: the jury reasonably could have credited the testimony of M, the defendant's friend, that the defendant had told M that he robbed a bank but discredited M's testimony that she understood him to be joking, and the state presented a variety of direct and circumstantial evidence that created a connection between the physical attributes and possessions of the robber and the defendant, including, inter alia, surveillance footage of the robbery, eyewitness testimony describing what the robber was wearing, which matched other surveillance footage that depicted the defendant wearing similar clothing, and evidence of the defendant's purchase of a BB gun like the one used in the robbery; moreover, although the evidence was not inconsistent with the defendant being

the getaway driver instead of the robber, a reasonable view of the evidence supported a finding that the defendant acted as a principal during the robbery, which was the only theory of liability the state pursued at trial and on which the court instructed the jury.

2. The trial court abused its discretion by not requiring D to be qualified as an expert witness before allowing him to testify regarding historic cell site analysis: although that analysis is not extremely difficult to understand, the analytical process involved therein is beyond the ken of the average juror, as call detail records can be used to determine the approximate location of a cell phone at the time of a particular communication by determining the geographical coverage area of the cell sector used to facilitate that communication, and that process of determining the coverage area requires scientific and technical knowledge, which would require a trial court, prior to admitting such testimony, to conduct a hearing to ensure that the testimony was based on a reliable scientific methodology, and contrary to the state's claim, D did not merely read from a document that was already in evidence, he explained how cell phones and cell sites operate and, thus, broached the realm of expert testimony; nevertheless, the admission of D's testimony was harmless beyond a reasonable doubt, as the state presented substantial evidence of the defendant's involvement in the bank robbery, including his admission to M that he robbed a bank, and D's testimony was largely cumulative of other direct and circumstantial evidence establishing the defendant's locations before, during and after the robbery.

3. The defendant's conviction of and sentences on the charges of conspiracy to commit robbery and conspiracy to commit larceny, having arisen out of a single agreement to rob the bank, violated his right against double jeopardy; accordingly, his conviction of both conspiracy charges could not stand.

Argued April 18—officially released August 29, 2017

Procedural History

Substitute information charging the defendant with of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree and conspiracy to commit larceny in the third degree, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the jury before *Markle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed in part; judgment directed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Maria V. Morse*, certified legal intern, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, state's attorney, and *Amy L. Bepko*, assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Thomas Steele, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4), and conspiracy to commit larceny in the third degree in violation of General Statutes §§ 53a-48 (a) and 53a-124 (a) (2). On appeal, the defendant claims that (1) there was insufficient evidence presented at trial to convict him of robbery in the first degree; (2) the trial court abused its discretion and violated his rights under the confrontation clause of the sixth and fourteenth amendments to the United States constitution when it permitted a detective to testify about historic cell site analysis without being qualified as an expert witness; and (3) his cumulative conviction and sentences for conspiracy to commit robbery and conspiracy to commit larceny violate the double jeopardy clause of the fifth and fourteenth amendments to the United States constitution. We agree with the defendant that his cumulative convictions and sentences for conspiracy to commit robbery and conspiracy to commit larceny violate the double jeopardy, but we reject the defendant's other claims. Accordingly, we reverse the judgment in part and affirm the judgment in part.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In the early morning hours of Saturday, February 16, 2013, the defendant checked into a Comfort Inn in Naugatuck and paid the required $100 deposit in cash. Later

that morning, at approximately 9:30 a.m., the defendant purchased a Beretta Airsoft BB gun (facsimile firearm), which looked like a Beretta style handgun, at a Walmart in Derby. Thereafter, the defendant returned to the Comfort Inn to check out. Caitlin Mitchell and an unidentified black male accompanied the defendant during the checkout process. When he was informed that he had to wait for housekeeping to check his room before his cash deposit would be refunded, the defendant became irate, insisting that he had to be somewhere and threatening to call the police if his deposit was not returned. Eventually, the hotel manager calmed the defendant down while the checkout process was completed. At approximately 11:30 a.m., after the hotel manager was informed that the defendant's room was in order, she placed the defendant's deposit on the counter beside her while she printed a receipt for the defendant. The defendant reached over the counter, grabbed the money, and left with Mitchell and the unidentified black male before the hotel manager could complete the checkout process. After exiting the hotel, all three individuals entered the defendant's green Cadillac Deville and left.[1]

At 11:54 a.m., the defendant ran into the Webster Bank in Seymour while wearing dark blue jeans, a black ski mask, and grey gloves. He pointed his facsimile firearm at Tara Weiss, the assistant bank manager, and ordered everybody "[to] get to the fucking floor." After the bank employees and customers complied with his order, the defendant jumped onto and then over the teller counter and aimed his facsimile firearm at Danielle George, a bank teller. He ordered her to open her

[1] At trial, the defendant disputed possessing or operating the Cadillac, which was registered to and insured by Wardell Eaddy. The state presented substantial evidence, however, that although Eaddy registered the Cadillac in his own name as a favor to the defendant, the defendant possessed and operated the Cadillac at the time of the robbery.

cash drawer and place the money in the bag he provided. As George complied with his order, another teller behind the counter began to move. The defendant aimed his facsimile firearm at the other teller and told her "not to be a hero . . . ." The defendant returned his attention to George. George continued to put money in the defendant's bag and managed to place a dye pack in the bag as well.[2] When George finished, the defendant took the bag and exited the bank.

On June 4, 2013, the defendant was arrested for his role in the bank robbery. In the operative information, the defendant was charged with robbery in the first degree, conspiracy to commit robbery in the first degree, and conspiracy to commit larceny in the third degree. After a trial, a jury found the defendant guilty of all counts. The defendant was sentenced to a total effective sentence of ten years of incarceration followed by four years of special parole.[3] This appeal followed. Additional facts will be set forth as necessary.

I

We begin with the defendant's claim that there was insufficient evidence presented at trial to convict him of robbery in the first degree as a principal, which was the only theory of liability the state pursued at trial

[2] A "dye pack" is a bank security feature that is made up of a stack of actual currency with its center removed and a dye pack put in its place. The dye pack is designed to release red dye, tear gas, and smoke at a designated period of time after the device has been removed from the bank. When the dye pack explodes, it becomes very hot and can burn currency it comes in contact with it. The serial numbers of the devices and the bills used on the top and bottom of the stack are recorded to pair specific packets with specific teller stations inside a bank.

[3] For both his conviction of robbery in the first degree and his conviction of conspiracy to commit robbery, the defendant was sentenced to ten years of incarceration followed by four years of special parole. For his conviction of conspiracy to commit larceny, the defendant was sentenced to five years of incarceration. The court further ordered that the defendant's three sentences were to be served concurrently.

and on which the court instructed the jury. The state responds that, when viewing the evidence in the light most favorable to sustaining the verdict, there was sufficient circumstantial evidence for a jury to reasonably conclude that the defendant acted as a principal during the robbery. We agree with the state.

The following additional facts are relevant to this claim. As the robber exited the bank, he ordered Weiss to count to 100. Weiss initially complied and began counting. Once the robber left the bank, however, she jumped up, ran to the doors, and locked them. Weiss then returned to her station, pressed the bank's panic alarm, and called 911. After speaking with a 911 operator, Weiss reported the robbery to Webster Bank's emergency hotline and to the branch manager, Jason Rodriguez, who was in New York. Rodriguez immediately began driving back to Connecticut from New York. State and federal law enforcement personnel arrived at the bank shortly thereafter and obtained, inter alia, surveillance footage of the robbery. Surveillance footage from inside the bank revealed that the robber wore dark blue jeans, grey gloves, and a black ski mask. Surveillance footage from outside the bank revealed that a green vehicle, which was similar in appearance to the defendant's Cadillac, entered the bank parking lot shortly before the robbery and picked up an individual on Spruce Street shortly after the robbery.[4]

After leaving the bank, the robber and his companion(s) initially drove north on Route 8, stopping in Beacon Falls to dispose of the discharged dye pack and the cash that was burned when the dye pack discharged. Shortly thereafter, members of law enforcement, with

[4] Raider, a canine trained and certified in tracking humans, tracked a scent from the front door of the Webster Bank where the robber was last seen to the corner of Garden Street and Spruce Street where he lost the trail. Raider's handler testified that he observed fresh tire tracks in the area where Raider lost the scent trail.

the assistance of a pedestrian, recovered the dye pack and some of the burned and stained cash from an area near the Beacon Falls Police Department.

Later that day, at approximately 2 p.m., the defendant and an unidentified black male were traveling northbound on Route 8 when they stopped to dispose of a facsimile firearm by throwing it onto the embankment along the side of the highway. Unbeknownst to the defendant and his companion, Rodriguez, who was also traveling northbound on Route 8 on his way to the bank, observed this conduct. When he neared the defendant's Cadillac, he immediately noticed that it was being driven erratically. In response, he slowed down and watched as the Cadillac swerved into the breakdown lane, where he saw the driver throw an object over the roof of the Cadillac and onto the embankment. Because of the suspicious nature of this conduct and his knowledge of the recent robbery at his bank branch, Rodriguez used his cell phone to record his observations, including the vehicle's make, color, and license plate number and a brief physical description of the men in the driver's and front passenger's seats.[5] He then reported the incident to the police. Shortly thereafter, officers recovered a black Beretta style facsimile firearm from the Route 8 embankment near the Bridgeport-Trumbull line. Notably, the tip of the recovered facsimile firearm was covered with black electrical tape.

Shortly after the incident along Route 8, the defendant purchased professional strength Goo Off and rubber cleaning gloves with cash at the Home Depot in Derby. He then proceeded to the Post Motor Inn in Milford where he rented a cabin in his own name and

[5] Rodriguez testified that the driver, who threw the object, had a thin mustache and that the passenger, whom he did not get a good look at, was wearing a hat. In surveillance footage from Walmart and a hotel the defendant stayed at the day after the robbery, the defendant is seen with a thin black mustache and a light grey beard.

paid for it in cash. The following morning, February 17, 2013, the defendant checked into the Super 8 Motel in Milford with Mitchell, paying for the room with cash.

That evening, a patrol officer reported that she had located the Cadillac involved in the Webster Bank robbery in the Super 8 Motel parking lot. Shortly thereafter, officers investigating the bank robbery arrived. After speaking to the employees at the front desk of the motel and reviewing its surveillance footage, the officers determined that the defendant was associated with the Cadillac and that he was staying in room 206. After about fifteen minutes of knocking on the defendant's door, the defendant came to the window of his room but refused to open the door. He denied ever being in Seymour or knowing anything about the Cadillac in the parking lot, claiming that a friend had dropped him off at the motel. When the detectives asked him whether he knew anything about a bank robbery, he stated that he did not, but added that "if [the officers] had enough information on him, [they] would be arresting him right now." Members of the Milford Police Department then detained the defendant and Mitchell in the lobby of the Super 8 Motel. When special agent Lisa C. McNamara of the Federal Bureau of Investigation arrived, she attempted to talk to Mitchell, but the defendant kept yelling at her: "Don't talk to them, you don't have to talk to them, your parents have to be present, you don't have to talk to them." As a result, McNamara brought Mitchell outside of the lobby and they sat in an unmarked police cruiser so that they could talk without the defendant hearing.

Officers subsequently seized several items from the Super 8 Motel. From the defendant and Mitchell's vacated room, they seized a hotel room key for the room that the defendant had rented at the Comfort Inn. From the hotel staff, they obtained surveillance footage, which showed the defendant arriving at the motel in

his Cadillac and checking into his room. Notably, during the course of check-in, the defendant could be seen removing several folded bundles of cash from his pants pockets and using that cash to pay for his room. Because the defendant paid in cash, officers further seized from the Super 8 Motel seventy dollars that was stained with red dye, which they believed that the defendant used to pay for the room. Subsequent forensic tests confirmed the presence of chemicals used in bank dye packs on the stained cash.

In addition to retrieving several items from the Super 8 Motel staff, officers seized and searched the defendant's Cadillac. In the Cadillac, officers found five pairs of grey latex gloves, receipts from Walmart and Home Depot, and a roll of black electrical tape. The latex gloves that were recovered from the Cadillac's glove box were similar in appearance to the ones worn by the individual who had robbed the Webster Bank. The Walmart receipt helped the officers obtain surveillance footage from Walmart, which confirmed that on the morning of the robbery the defendant, who was wearing dark blue jeans, arrived at Walmart in his Cadillac and purchased a facsimile firearm of the same make and model as the one recovered from the embankment along Route 8. Subsequent forensic tests revealed that the electrical tape found in the defendant's Cadillac was indistinguishable from the electrical tape found on the facsimile firearm recovered from the embankment along Route 8.

Because the defendant appeared to lead a transient lifestyle in which he frequently moved from motel to motel, officers checked with hotels and motels in the area to determine whether he had stayed in them after the robbery. When they arrived at the Post Motor Inn, they learned that the defendant had checked into a cabin at 2:51 p.m. on the day of the robbery. On his registration card, the defendant had listed two people

in his party and had noted his vehicle's make and license plate number. The officers noticed that the sink in the defendant's cabin was tinted red and that the snow behind the cabin was stained red. They took samples of the stained snow. In the tree line near the cabin, the officers found a garbage bag, which contained, inter alia, rubber gloves similar to those the defendant had purchased at Home Depot, towels with red stains on them, and an empty bottle of soap. A Post Motor Inn employee also gave them a black ski mask that he had found in the snowbank approximately thirty feet from the defendant's cabin. Subsequent forensic tests confirmed that the gloves and towels retrieved from the garbage bag and the seized samples of stained snow contained traces of the chemicals used in bank dye packs.

Finally, at trial, Mitchell testified that on the weekend of the robbery she had seen the defendant in possession of "a substantial amount of money" and cleaning "red stuff" off his Cadillac. Mitchell also testified that the defendant had told her that he "robbed a bank . . . ." Mitchell maintained that when the defendant stated that he robbed a bank, he did so "jokingly" and, as a result, she did not take him seriously. She admitted, however, that the defendant was her friend and that "I don't want to be here with this," i.e., "to testify against someone that was close to me . . . ." After the parties rested and presented closing arguments, the court instructed the jury. With respect to the charge of robbery in the first degree, the court instructed the jury only on principal liability.

"The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict.

Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether

there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015).

We conclude that there was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree. First, Mitchell testified that the defendant told her that he "robbed a bank . . . ." On the basis of this testimony, the jury could have concluded that when the defendant said that he "robbed a bank," he meant that he personally had robbed a bank. The defendant, relying on the corpus delicti doctrine, argues that Mitchell's testimony cannot support his conviction because his purported confession is uncorroborated. The purpose of the corpus delicti doctrine, however, is to protect against convictions for offenses that have not in fact occurred. *State* v. *Farnum*, 275 Conn. 26, 33–34, 878 A.2d 1095 (2005). The corpus delicti doctrine has no bearing on the present case because it is undisputed that the Webster Bank in Seymour was robbed on February 16, 2013; indeed, it is undisputed on appeal that the defendant was one of the individuals who conspired to rob the bank.

The defendant further suggests that Mitchell's testimony cannot support his conviction because Mitchell testified that she did not take the defendant seriously when he said that he "robbed a bank . . . ." A jury may properly decide, however, "what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Victor C.*, 145 Conn. App. 54, 61, 75 A.3d 48, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013). The jury in this case very well could have credited Mitchell's testimony that the defendant told her that he robbed a bank but discredited her testimony that she understood him to be

joking. Mitchell admitted that the defendant was her friend and that she did not want "to testify against someone that was close to [her]." The jury reasonably could have concluded, therefore, that Mitchell characterized the defendant's statement as a joke because of her desire to protect him.

The defendant's robbery conviction, however, is not supported solely by Mitchell's testimony. At trial, the state presented a variety of direct and circumstantial evidence creating a connection between the physical attributes and possessions of the robber and the defendant. The jury had before it surveillance footage of the robbery. When determining if the defendant was the robber, the jurors could have compared surveillance footage of the robber with other surveillance footage of the defendant and their own observations of the defendant in court to determine if there was a physical resemblance between the robber and the defendant. Additionally, the bank surveillance footage and eyewitness testimony established that the robber possessed a black firearm and was wearing dark blue jeans, grey gloves, and a black ski mask. Walmart surveillance footage depicted the defendant wearing dark blue jeans on the morning of the robbery. The receipt and surveillance footage from Walmart further established that while at Walmart the defendant personally purchased a black facsimile firearm, which was the same make and model as the facsimile firearm an individual driving a Cadillac disposed of later that afternoon by throwing it onto an embankment alongside of Route 8. Five pairs of grey latex gloves similar to those worn by the robber were recovered from the Cadillac's glove compartment, and a black ski mask similar to the one worn by the robber was recovered from a snowbank approximately thirty feet from the defendant's cabin at the Post Motor Inn.

Although it can be argued that this evidence is not inconsistent with the defendant being the getaway

driver instead of the robber, "[i]n reviewing a sufficiency of the evidence claim . . . we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Silva*, 285 Conn. 447, 459, 939 A.2d 581 (2008). Mindful that in determining the sufficiency of the evidence we consider its cumulative effect and construe the evidence in the light most favorable to sustaining the verdict, we determine that there was sufficient evidence presented at trial to support the defendant's conviction of robbery in the first degree.

II

The defendant next claims that the court improperly admitted lay testimony concerning historic cell site analysis.[6] Specifically, the defendant argues that the court should have qualified Detective Steven Ditria as an expert witness before permitting him to testify about how he used the defendant's cell phone records to determine his whereabouts before, during, and after the bank robbery. The defendant further contends that this evidentiary error obstructed his rights under the confrontation clause because Ditria's lack of training, education, or experience with cell phones, cellular networks, and cell site analysis prevented him from being meaningfully cross-examined on this evidence.[7] The defendant seeks

[6] Historic cell site analysis involves the use of cell phone records and cell site locations to determine, within some range of error, a cell phone's approximate location at a particular time. *United States* v. *Natal*, 849 F.3d 530, 534 (2d Cir. 2017).

[7] It is unclear whether the defendant also claims that Ditria's testimony concerning what he learned from a Sprint representative about how cell phones and cellular networks operate was improper and constituted a confrontation violation under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In the "legal standard" section of his opening appellate brief, the defendant briefly reviewed the principles of *Crawford* and, in one paragraph, argues why "the 'interpretations of the data' offered through Detective Ditria constituted testimonial hearsay" in violation of

review of this unpreserved constitutional claim pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third condition of *Golding*).[8] The state responds that Ditria merely read from a document that was already in evidence, i.e., the defendant's cell phone records and instructions from the cellular carrier on interpreting those records, and, thus, his testimony was factual, not opinion.[9] Alternatively,

Crawford. The defendant did not thereafter advance, in his briefs or at oral argument before this court, a claim that a *Crawford* violation occurred. Indeed, the defendant's briefs and oral argument focused principally on his claim that Ditria should have been qualified as an expert witness and that the court's failure to do so obstructed his confrontation rights. As a result, we conclude that, to the extent the defendant alleges a *Crawford* violation, this claim is inadequately briefed. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

[8] "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015). "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Britton*, 283 Conn. 598, 615, 929 A.2d 312 (2007). "The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Dixon*, supra, 511.

[9] The state further argues that the defendant has abandoned or, alternatively, inadequately briefed any evidentiary claim because he "appears to limit his appellate claims to his assertion that his constitutional right to confrontation was violated." The state is correct that the defendant framed this issue in his statement of the issues as "whether the defendant's sixth amendment right to confrontation was violated when Detective Ditria testified without specialized knowledge regarding the whereabouts of the defendant based upon his interpretation of cell phone records." In advancing this claim, however, the defendant has consistently argued that the violation of his confrontation rights stems from the court's evidentiary error in permitting Ditria to interpret his cell phone records without qualifying him as an expert

the state argues that any error in the admission of this testimony was harmless beyond a reasonable doubt. We agree with the defendant that the court abused its discretion by not requiring Ditria to be qualified as an expert witness, but we agree with the state that this error was harmless beyond a reasonable doubt. Accordingly, the defendant's constitutional claim fails under the fourth prong of *Golding*. See *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015).

A

To understand the significance of the trial court's decision to permit a lay witness to testify about historic cell site analysis, it is first necessary to understand the manner in which cell phones and cellular networks operate. Although the trial court did not have the benefit of such information when it made its evidentiary ruling, we share the view of our sister courts that such information is essential to understanding how historic cell site data is generated and what inferences that data supports concerning the locations of a cell phone, and by inference its user, during a communication. E.g., *State* v. *Payne*, 440 Md. 680, 690–98, 104 A.3d 142 (2014); *Collins* v. *State*, 172 So. 3d 724, 740–41 (Miss. 2015); *State* v. *Patton*, 419 S.W.3d 125, 130–31 (Mo. App. 2013); *State* v. *Johnson*, 797 S.E.2d 557, 561–62 (W. Va. 2017); see, e.g., *Commonwealth* v. *Augustine*, 467 Mass. 230, 236–39, 4 N.E.3d 846 (2014) (reviewing cell phone technology prior to determining whether police were required to obtain search warrant to obtain information from defendant's cell phone service provider); *State* v. *Earls*, 214 N.J. 564, 574–78, 70 A.3d 630 (2013) (same). We will rely in this overview on information and materials relied on by our sister courts when discussing cellular network technology or cell site analysis.

witness. The defendant has thoroughly briefed why testimony concerning cell site analysis should be admitted only through an expert witness. Accordingly, we conclude that the defendant has not abandoned or inadequately briefed this threshold evidentiary claim.

Cell phones are essentially sophisticated two way radios that use cellular networks comprised of cell sites[10] and radio frequency (RF) antennae to communicate with one another. *State* v. *Payne*, supra, 440 Md. 692; J. Beck et al., "The Use of Global Positioning (GPS) and Cell Tower Evidence to Establish a Person's Location—Part II," 49 Crim. L. Bull. Art. 8, 2 (2013). A cell site is the fixed location that provides cellular coverage using RF antennae, a base station, and other network equipment. J. Beck et al., supra, 3. The geographical coverage area of a cell site is called a cell sector.[11] See *United States* v. *Bohannon*, 824 F.3d 242, 256 (2d Cir. 2016), cert. denied, U.S. , 137 S. Ct. 628, 196 L. Ed. 2d 517 (2017). The shape and size of a cell sector is variable and depends on several external and internal factors. External factors include the surrounding environment and geography, e.g., the location of buildings, vehicles, vegetation, and land masses, which might prevent the RF signal from propagating in a uniform and uninterrupted manner. *State* v. *Payne*, supra, 693–94; A. Blank, "The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone," 18 Rich. J.L. & Tech. 3, 6–7 (2011);

[10] "Cell sites" are often referred to as "cell towers." We believe that the term cell site is more precise. The primary purpose of a cell site "is to elevate antennas that transmit and receive radio-frequency (RF) signals from" cell phones. M. Harris, Unison, How Cell Towers Work (2011), available at www.unisonsite.com/pdf/resource-center/How%20Towers%20Work.pdf (last visited August 23, 2017). This purpose can be accomplished by building an independent tower or by placing the cell site in common structures such as buildings, water towers, bridges, tunnels, streetlights, traffic lights, stadium lights, and billboards. Id.

[11] This geographical coverage area is also known as a "cell," "sector," and "footprint." See *T-Mobile USA, Inc.* v. *City of Anacortes*, 572 F.3d 987, 997 n.11 (9th Cir. 2009) (" 'coverage footprint' "); *State* v. *Payne*, supra, 440 Md. 692 ("cell"); *United States* v. *Mack*, Docket No. 3:13-cr-00054 (MPS), 2014 WL 6474329, *3 (D. Conn. November 19, 2014) ("sector"); *United States* v. *Davis*, Docket No. 11-60285-CR, 2013 WL 2156659, *5 (S.D. Fla. May 17, 2013) ("footprints of the sectors"); T. Singal, Wireless Communications 99 (2011) ("cell" or "footprint").

see generally T. Singal, Wireless Communications 35–65, 100 (2011) (discussing propagation patterns of radio frequency signals). Internal factors include the technical characteristics of the cell site and the RF antennae. *State* v. *Payne*, supra, 693; A. Blank, supra, 4–6.

There are four types of cell sites generally used by cellular companies: macrocells, microcells, picocells, and femtocells. M. Harris, Unison, How Cell Towers Work 2–3 (2011), available at www.unisonsite.com/pdf/resource-center/How%20Towers%20Work.pdf (last visited August 23, 2017) (hereinafter M. Harris, How Cell Towers Work); Geolocation Privacy and Surveillance (GPS) Act: Hearing on H.R. 2168 before the Subcommittee on Crime, Terrorism, Homeland Security and Investigations of the House Committee on the Judiciary, 113th Cong. 45, 54–55 (2013) (written testimony of Matthew Blaze, associate professor of computer and information science, University of Pennsylvania), available at https://judiciary.house.gov/wp-content/uploads/2016/02/113-34-80542.pdf (last visited August 23, 2017) (hereinafter Blaze testimony); see also *United States* v. *Davis*, 785 F.3d 498, 542 (11th Cir.), cert. denied, U.S. , 136 S. Ct. 479, 193 L. Ed. 2d 349 (2015). Macrocells are prototypical "cell towers," although they can be attached to a structure, and can cover an area often miles in diameter or more in rural areas where there is less signal interference. M. Harris, How Cell Towers Work, supra, 3; Blaze testimony, supra, 54; see also *Sprint Spectrum L.P.* v. *Zoning Board of Adjustment*, 21 F. Supp. 3d 381, 391 (D.N.J. 2014), aff'd, 606 Fed. Appx. 669 (3d Cir. 2015). Microcells typically are used in urban or suburban settings to cover an area that is less than one mile in diameter. M. Harris, How Cell Towers Work, supra, 3. A picocell is a small base station that acts like an extension cord, extending the macrocell's or microcell's signal through high traffic or obstructed areas and covering an area of less than 250

yards in diameter. Id.; M. Harris, Unison, Think Small: Micro, Pico and Femto Cell Sites 2 (2011), available at http://www.unisonsite.com/pdf/resource-center/Think-%20Small%20Unison-whitepaper-7D.pdf (last visited August 23, 2017) (hereinafter M. Harris, Think Small). Finally, a femtocell is like a booster pack; it uses a broadband Internet connection to "backhaul" mobile calls and data traffic into a wireless carrier's existing cellular network. M. Harris, Think Small, supra, 2; see also *EON Corp IP Holdings LLC* v. *Cisco Systems*, *Inc.*, 36 F. Supp. 3d 912, 923 (N.D. Cal. 2014), aff'd, 595 Fed. Appx. 991 (Fed. Cir. 2015). The coverage range of these devices is similar to that of a cordless phone base. M. Harris, How Cell Towers Work, supra, 3; M. Harris, Think Small, supra, 2; Blaze testimony, supra, 55; see also *United States* v. *Davis*, supra, 503–504 n.7.

Each of the four types of cell sites contains, inter alia, a base station and at least one RF antenna. M. Harris, How Cell Towers Work, supra, 2, 6. An RF antenna can be omnidirectional or multidirectional. An omnidirectional antenna is intended to service the entire, 360 degree area around a cell site. T. Singal, supra, p. 100; M. Harris, How Cell Towers Work, supra, 5–6; see also *Ruckus Wireless*, *Inc.* v. *Netgear*, *Inc.*, Docket No. C 08-2310 PJH, 2013 WL 6627737, *1, *4 (N.D. Cal. December 16, 2013). The idealized cell sector of a cell site with an omnidirectional antenna is a hexagon with the cell site at the center.[12] E.g., T. Singal, supra, pp. 99–100; M. Harris, How Cell Towers Work, supra, 5. In contrast, directional antennae are intended to service only small portions of the area around a cell site. For example, a cellular carrier might use three directional antennae with beam widths set at 120

[12] "Cells [or cell sectors] are always drawn as hexagons because it makes it simpler and easier to show adjacent cells without any overlap. In reality, the cell shape is closer to a circle but it may be affected by surrounding buildings and other geographic features." T. Singal, supra, p. 101.

degrees in order to achieve 360 degrees of coverage around a cell site. *Collins* v. *State*, supra, 172 So. 3d 740; J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 3; see also T. O'Connor, "Provider Side Cell Phone Forensics," 3 Small Scale Digital Device Forensics J. 1 (2009) (discussing and depicting typical cell site and antenna configurations), available at http://ctfdatapro.com/pdf/celltower.pdf (last visited August 23, 2017). With this configuration, the idealized cell sector is a wedge, with a center angle of 120 degrees, emanating out from the cell site. E.g., *State* v. *Payne*, supra, 440 Md. 724 (appendix C); T. O'Malley, "Using Historical Cell Site Analysis Evidence in Criminal Trials," 59 U.S. Atty. Bull. 16, 19 (2011), available at https://www.hsdl.org/?view&did=701377 (last visited August 23, 2017). The directional orientation of a directional antenna is called its "azimuth."[13] T. O'Connor, supra, 1; *United States* v. *Mack*, Docket No. 3:13-cr-00054 (MPS), 2014 WL 6474329, *2 (D. Conn. November 19, 2014).

Every seven seconds, regardless of whether it is being used, a cell phone will "register" with in-range cell sites.[14] J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 3; A. Blank, supra, 18 Rich. J.L. & Tech. 5. When an individual

[13] "Commonly a cell [site] will have the first of the three antennas centered on due North or 0 degrees. This antenna has a nominal area 120 degrees wide which [covers] 60 degrees each side of due north. This antenna's nominal field [extends] from 300 degrees (-60 degrees) to 60 degrees and is called either the north facing antenna or the Alpha antenna. The second antenna is centered at 120 degrees and has a nominal coverage area [that extends] from 60 degrees to 180 degrees, this antenna is referred to as the southeast facing antenna or the Beta antenna. The third antenna nominally covers the remaining area of the field; it is centered on 240 degrees and nominally [extends] from 180 degrees to 300 degrees, this antenna is called either the southwest facing antenna or the gamma antenna." T. O'Connor, supra, 3 Small Scale Digital Device Forensics J. 1; see also id., 1, 3 (depicting different antenna orientation models).

[14] The only way to prevent registration is by turning the cell phone off, by putting it in "Airplane Mode," or by placing it in a shielded container, such as a Faraday bag. J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 3.

places a call or sends a message, the cell phone communicates with the base station at the cell site with which it has the strongest, best quality signal. J. Beck et al., supra, 3–4; A. Blank, supra, 5; see also *United States* v. *Mack*, supra, 2014 WL 6474329, *3. Through various processes, the base station of that cell site helps the transmitting cell phone connect to the receiving cell phone, which will also use the cell site with the strongest, best quality signal to receive the call or message. See generally T. O'Malley, supra, 59 U.S. Atty. Bull. 20–21. Importantly, the cell site in closest proximity to these cell phones might not be the one producing the strongest, best quality signal for them. J. Beck et al., supra, 3; see A. Blank, supra, 5. The characteristics of the cell site, the RF antenna, and the cell phone as well as a variety of environmental and geographic factors influence which cell site has the strongest, best quality signal for a cell phone.[15]

In addition, it is possible that during a communication the cell site being used by either the transmitting or the receiving cell phone will cease to be the one with the strongest, best quality signal for that cell phone. In this circumstance, a "handoff," or "handover," will occur to ensure that the communication is not disrupted. A. Blank, supra, 18 Rich. J.L. & Tech. 5–6. Handoffs are broadly classified as being "hard" or "soft"

[15] Cell site characteristics include whether maintenance or repairs are being performed on a given cell site, the range of coverage, the wattage output, the call capacity of a cell site, and the number and closeness of neighboring cell sites that will be competing with the cell site in question to produce the strongest, best quality signal in the area. A. Blank, supra, 18 Rich. J.L. & Tech. 6; J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 5–6. Antenna characteristics include the number of antenna on the cell site, the antenna's height, the direction and angle of the antenna, and the call volume of the antenna at any given time. A. Blank, supra, 4. Cell phone specific characteristics include the wattage output and the generation of the cell phone's broadband capability. Id. Last, environmental and geographical factors include the weather, topography (e.g., height above sea level), and density of physical structures in the area. Id., 6–7; J. Beck et al., supra, 5–6.

depending on the cell phone system the cellular carrier uses. A hard, or "break before make," handoff involves a definite decision by the cell phone to break its connection with its current cell site before, or as, it makes a connection with a new cell site. D. Wong & T. Lim, "Soft Handoffs in CDMA Mobile Systems," IEEE Personal Communications, 6 (1997), available at http://wireless.stanford.edu/papers/DWongsoftHandoff.pdf (last visited August 23, 2017); L. Paul, "Handoff/Handover Mechanism for Mobility Improvement in Wireless Communication," 13 Glob. J. Res. Engineering Elec. & Elecs. Engineering 6, 7 (2013), available at https://globaljournals.org/GJRE Volume13/2-Handoff-Handover-Mechanism.pdf (last visited August 23, 2017).

Conversely, during a soft, or "make before break," handoff a cell phone will simultaneously connect to multiple base stations until it determines which of the in-range cell sites is producing the strongest, best quality signal. D. Wong & T. Lim, supra, 6; L. Paul, supra, 8–9.

Every time a cell phone sends or receives a communication the base station at the cell site automatically generates a call detail record. *State* v. *Payne*, supra, 440 Md. 695–96 and 696 n.24; *In re United States for Historical Cell Site Data*, 724 F.3d 600, 611–12 (5th Cir. 2013); J. Beck et al., supra, 49 Crim. L. Bull. Art. 8, 4. The purpose of call detail records is to enable the cellular provider to bill a subscriber accurately for his or her cell phone usage and to help the carrier understand the calling patterns of their subscribers. J. Beck et al., supra, 4; see also *State* v. *Payne*, supra, 695; *In re United States for Historical Cell Site Data*, supra, 611–12. Call detail records can contain a variety of information depending on the cellular carrier, but these records ordinarily include some information about the cell site(s) used to make or receive the communication.[16]

[16] The information contained in call detail records is sometimes referred to as cellular site location information, or CSLI. E.g., *State* v. *Smith*, 156 Conn. App. 537, 540, 554 n.4, 113 A.3d 103, cert. denied, 317 Conn. 910, 115

State v. *Payne*, supra, 696; J. Beck et al., supra, 4; T. O'Malley, supra, 59 U.S. Atty. Bull. 23; Blaze testimony, supra, 57. The call detail records in the present case contain information about the cell sites in use when the cell phone initiated and terminated a communication.

One form of historic cell site analysis uses the cell site and antenna information contained in a call detail record to determine which cell sector a cell phone was using at the time of a certain communication and, thereby, the geographical area the cell phone, and by inference its user, was in at that time. The geographical coverage area of a specific cell sector can be determined by conducting a drive test or by estimating the cell sector.[17] Drive testing involves the use of RF mapping equipment and software to map the actual cell sector generated by a particular cell site and antenna. E.g., T. O'Malley, supra, 59 U.S. Atty. Bull. 28; see also id., 29 (depicting cell sector based on drive testing). This method was developed by cellular carriers to help them monitor and maintain the quality of their cellular networks, but it has also been used by law enforcement agencies to track suspects and fugitives and by attorneys at trial to establish a cell phone's, and by inference its user's, approximate locations at particular dates and times. See *T-Mobile Central, LLC* v. *Unified Government of Wyandotte Country/Kansas City, Kan.*, 528 F. Supp. 2d 1128, 1140, 1150–52, 1166–67 (D. Kan. 2007), aff'd in part, 546 F.3d 1299 (10th Cir. 2008); T. O'Malley, supra, 28–29.

Although the precision of drive testing makes it the preferred method for determining the shape and size

A.3d 1106 (2015); see also *Commonwealth* v. *Estabrook*, 472 Mass. 852, 853 n.2, 38 N.E.3d 231 (2015).

[17] The methodology of estimating the shape and size of a cell sector is sometimes referred to as "cell identification"; *Collins* v. *State*, supra, 172 So. 3d 740; or "mapping"; e.g., *State* v. *Edwards*, 325 Conn. 97, 121, 156 A.3d 506 (2017); *United States* v. *Mack*, supra, 2014 WL 6474329, *3; *United States* v. *Machado-Erazo*, 950 F. Supp. 2d 49, 55–56 (D.D.C. 2013).

of a cell sector, performing a drive test is not always possible. *United States* v. *Mack*, supra, 2014 WL 6474329, *3. For example, the cell site might have been removed or its characteristics altered by the cellular carrier since the crime was committed. E.g., id. (federal agent testified that drive testing was not possible because cell site in question was no longer present at time of his investigation). In this circumstance, the approximate size and shape of a cell sector can be determined by drawing a pie-wedge diagram on a map. Id. The center angle of the pie-wedge corresponds to the antenna's beam width setting, e.g., 120 degrees, and the outward boundary of the pie-wedge will extend 50 to 70 percent of the way into the opposing cell sector. Id.; *United States* v. *Machado-Erazo*, 950 F. Supp. 2d 49, 55–56 (D.D.C. 2013); *United States* v. *Davis*, Docket No. 11-60285-CR, 2013 WL 2156659, *5–6 (S.D. Fla. May 17, 2013); e.g., T. O'Malley, supra, 59 U.S. Atty. Bull. 28 (depicting estimated cell sector superimposed on map). Critically, the boundaries of an estimated cell sector are not fixed. Depending on a variety of factors, the actual cell sector can be smaller or larger than the estimated cell sector. T. Singal, supra, p. 100; A. Blank, supra, 18 Rich. J.L. & Tech. 5; see also T. O'Malley, supra, 28–29 (depicting idealized cell sector and actual cell sector).

B

Against the foregoing scientific and technical background, we turn to the defendant's claims on appeal. As we previously stated, the threshold issue is whether the court improperly permitted lay testimony concerning historic cell site analysis. The following additional facts are relevant to our resolution of this claim. At the time of the robbery, the defendant owned a cell phone serviced by Sprint-Nextel (Sprint). During the course of his investigation, Ditria subpoenaed the defendant's subscription information and call detail records from

Sprint, and, at trial, the state entered the materials Sprint provided into evidence as exhibit 77.

Exhibit 77 includes, inter alia, the defendant's call detail records, instructions on how to interpret those records, and a list of cell site locations. The call detail records are in the form of a ten column chart, which, in relevant part, has columns titled, "First Cell," and, "Last Cell." The "key" to the call detail records explains that "First Cell" and "Last Cell" refer to the specific cell site and "sector" through which the communication was initiated and terminated. "The first digit [of the cell site identification number] reflects the sector. The last 3-4 digits represent the [cell] site number. . . . For example, if the number in the [First Cell or Last Cell] column reads 2083, the cell site is 083 and the sector is 2." (Emphasis omitted.) A separate, eighteen column chart provided by Sprint contains a variety of information about Sprint's cell sites, including the address and azimuth of each cell site. Exhibit 77 does not define what a "sector" or "azimuth" is.[18] Nor does it contain any general or specific information on cellular networks, the geographical coverage areas of Sprint's cell sites, or the operation of cell phones and cell sites.

At trial, Ditria explained that learning the defendant's cell phone number was "crucial" because he "wanted to learn the whereabouts of [the defendant] based on

[18] It appears that "sector" in these instructions refers to the RF antenna, and thereby the cell sector, used. The instructional page titled "Sector Layout" explains that "Sprint . . . cell sites can be set-up in a variety of ways. . . . [N]ot every cell site has three sectors. Some may have two sectors or may be omni sites. . . . The direction that the sector faces depends on the need for coverage in a particular area." The instructions further explain Sprint's labeling schemes for determining the directional orientation of the azimuth's face, which are designated as being an alpha sector, beta sector, or gamma sector. None of the information provided by Sprint explains the nautical directions associated with a particular sector type (e.g., north, south, east, or west). Cf. T. O'Connor, supra, 3 Small Scale Digital Device Forensics J. 1; footnote 14 of this opinion.

his phone records." Once he knew the defendant's cell phone number, Ditria testified, he subpoenaed the defendant's cell phone records from Sprint. Ditria identified the documents provided by Sprint, which were entered into evidence as exhibit 77 without objection. Ditria explained that although he understood the "[b]asic incoming and outgoing phone calls" when he received the call detail records, he needed help to understand the cell site information within them. He contacted a Sprint representative, whose job it was to assist law enforcement, "to learn about the communication of the cell phone and the cell tower . . . ."

When Ditria began to explain his current understanding of "the significance of a cell tower," defense counsel objected on foundational grounds, stating: "I think he is giving opinion testimony here regarding, I think that's where we're going here." The court asked the prosecutor for a response, to which she replied: "What he understands about cell phone records now after being educated." The court overruled the objection. Thereafter, the following colloquy occurred:

"[The Prosecutor]: Okay. You were explaining what a cell phone tower is for.

"[Ditria]: In order for a phone call to be made, incoming or outgoing, you have to have a cell tower, and it dedicates the subscriber information, checking if it's a legitimate phone number, and with that carrier.

"[The Prosecutor]: Can you make a phone call without a cell tower?

"[Ditria]: Absolutely not.

"[The Prosecutor]: And did you also learn how close a cell phone has to be to a tower in order to receive information from it?

"[Ditria]: Yes.

"[The Prosecutor]: And how far away can a phone be to bounce off the tower?

"[Ditria]: Anywhere from zero to thirty miles.

"[The Prosecutor]: A big radius?

"[Ditria]: Right.

"[The Prosecutor]: So, cell phone—at thirty miles or right next to the tower?

"[Ditria]: Correct.

"[The Prosecutor]: That's the tower that's it's going to bounce off of?

"[Ditria]: Correct.

"[The Prosecutor]: And so, did he also teach you how to read these?

"[Ditria]: Yes.

"[The Prosecutor]: Okay. And so, I'm going to pick a random page, page number two of thirty. How can you determine from this page what cell tower you are looking for? What column are we looking at?"

Defense counsel objected, explaining: "I think we're getting into the realm of expert testimony here, and I don't think that the officer has been qualified as an expert. What we're trying to do here is to educate the jury, and I think that's wholly in the purview of an expert." The prosecutor replied: "The officer has indicated that he did not know how to read the records, but now he does know how to read the records and has demonstrated to the jury that he has the information in front of him." The court overruled the defendant's objection, stating that it found that proper foundation had been laid for the admission of exhibit 77 into evidence and that "[i]t's part of his investigation, he learned

how to interpret the data. I'll allow him now to testify from the document entered into evidence.

Direct examination of Ditria continued. The prosecutor asked Ditria, "[h]ow is this information helpful to your understanding of the case," and Ditria explained that it "[b]asically, pinned down the whereabouts of [the defendant] before, during, and after the robbery of Webster Bank." Thereafter, Ditria explained in detail how the defendant's call detail records helped him to confirm the defendant's presence near eight areas of interest: Walmart, the Comfort Inn, the Webster Bank, Beacon Falls, Bridgeport, Home Depot, the Post Motor Inn, and the Super 8 Motel. In particular, Ditria testified as to when the defendant or the bank robbery suspect was believed to be in the area of interest, when the communication in question was made, the address of one of the cell sites used by the defendant's cell phone,[19] and the distance from that cell site to the area of interest.[20] After reviewing these details, the prosecutor asked

[19] We observe that of the eight phone calls analyzed by Ditria, five had different cell sites listed for the initiation and termination of the call. For four of these calls, Ditria provided the address of only the first cell site, and for one of these calls Ditria provided the address of only the last cell site. Ditria did not explain to the jury that a cell phone might use multiple cell sites or antennae during the course of a call or that he was, in some instances, providing them with the address of only one of the cell sites used.

[20] First, Ditria testified that around the time indicated on the Walmart receipt the defendant's cell phone "was hitting off the South Cliff Street tower approximately one mile from the Walmart in Derby located in Ansonia." Second, Ditria testified that around the time that the defendant checked into the Comfort Inn, the defendant's cell phone used a cell site located "on 280 Elm Street in Naugatuck, approximately point six miles from the Comfort Inn motel." Third, Ditria testified that around the time of the robbery, the defendant's cell phone used a cell site located on "Rimmon Street in Seymour . . . approximately point eight miles from the Webster Bank." Fourth, Ditria testified that at 12:20 p.m. on the day of the robbery, the defendant's cell phone used a cell site at "236 Pent Road in Beacon Falls," which was "[a]pproximately 1000 feet, under a quarter of a mile" from the Beacon Falls Police Department. Fifth, Ditria testified that at approximately 1 p.m. on the day of the robbery, the defendant's cell phone used a cell site at "1875 Noble Avenue in Bridgeport," which was "[a]pproximately a quarter mile." Ditria did not explain what this cell site was a quarter mile from, but

Ditria: "So, after learning the proximity of the cell tower locations to the places that you believe that [the defendant] was at, what does that do for your investigation?" Ditria responded: "It gives us a better understanding about the whereabouts of [the defendant] during those dates and times."

On cross-examination, defense counsel attempted to explore Ditria's understanding of cell site analysis through the following colloquy:

"[Defense Counsel]: And now, Sprint only operates a digital cell phone system; isn't that right?

"[Ditria]: I'm not sure.

"[Defense Counsel]: All right. Do you know if they operate an analog system?

"[Ditria]: I'm not sure.

"[Defense Counsel]: And the phones that we use now are all digital, right?

"[Ditria]: (Indicating yes.)

"[Defense Counsel]: And I think you were testifying that the cell phones connect to a particular tower, right?

"[Ditria]: Yes.

"[Defense Counsel]: And didn't they tell you that they actually connect to more than one tower simultaneously; isn't that right?

---

it appears he was alluding to the area where the facsimile firearm was recovered. Sixth, Ditria testified that around the time indicated on the Home Depot receipt, the defendant's cell phone used a cell site at "134 Roosevelt Drive in Derby . . . approximately point six miles from the Home Depot in Derby." Seventh, Ditria testified that around the time that the defendant checked into the Post Motor Inn, the defendant's cell phone used a cell site at "28 Orange Road in Orange," which was "[a]pproximately point eight miles from the Post Motor Inn." Finally, Ditria testified that around the time the defendant checked into the Super 8 Motel the defendant's cell phone was using a cell site located at "160 Wampus Lane in Milford," which was "[a]pproximately one mile" from the Super 8 Motel.

"[Ditria]: They did not say that.

"[Defense Counsel]: They didn't say that?

"[Ditria]: No. . . .

"[Defense Counsel]: Do you know that the cell phone is always looking for the strongest signal?

"[Ditria]: I don't know if it's looking for the strongest, no.

"[Defense Counsel]: Now, do you know that on a digital cell phone, they can connect to multiple cell sites; did you know that?

"[Ditria]: I did not know that.

"[Defense Counsel]: They didn't tell you that?

"[Ditria]: (Indicating no.)

"[Defense Counsel]: And the representative at Sprint, did he tell you that there's things that can get in the way of a signal from a cell tower?

"[Ditria]: He did not say that.

"[Defense Counsel]: Things like leaves, weather; did he say that?

"[Ditria]: He did not say that.

"[Defense Counsel]: That the wind could impact the coverage of a cell site; did he say that?

"[Ditria]: He did not.

"[Defense Counsel]: And that digital cell phones have this thing called a soft handoff; did he tell you what that is?

"[Ditria]: No.

"[Defense Counsel]: Have you ever heard of the term triangulation?

"[Ditria]: I have not.

"[Defense Counsel]: They didn't tell you or explain that to you over the phone?

"[Ditria]: No."

The defendant requested to make a motion outside the presence of the jury. After the jury was excused, the defendant moved to strike Ditria's testimony regarding "the cell phone coverage" because he was not competent to testify on that topic. The court disagreed, explaining: "There was never any offer that he is an expert, and he did not offer any opinions. He is simply interpreting or translating the data that was given to him." The state agreed, adding: "[I]t just goes to the weight of his testimony." The court overruled defense counsel's objection, but it stated, in response to a question from defense counsel, that it was "perfectly fine" for defense counsel to explore the defendant's education, or lack thereof, with respect to cell phones and cellular networks on cross-examination. Thereafter, defense counsel continued his cross-examination, during which he explored Ditria's lack of education and training concerning cell phones and cellular networks.

After Ditria's testimony, both parties rested and presented closing arguments. During her opening argument, the prosecutor referred to Ditria's testimony concerning the location of the defendant's cell phone, highlighting in particular the short distance between cell sites used by the defendant's cell phone and the areas of interest. In response, defense counsel during his closing argument emphasized that Ditria "didn't have any expertise as to how these things actually work." During her rebuttal argument, the prosecutor made the following relevant remarks: "Ditria said that he had no formal education in cell phone tower mechanics, but he did have the wherewithal to call somebody who did, right? And we found out that a cell tower is

in a fixed location and that cell phones are mobile, mobile phones, right? So, if you know where the cell tower is, and that's in a fixed location, and a cell phone is mobile, but you know that there are these other things that are fixed locations, like Walmart; Walmart is not mobile, right? Walmart is where it is. Home Depot is where it is. The Super 8 is not moving without some significant effort, okay? So, if you have [the defendant] pinned down in those places, then you could also coordinate the fact that his cell phone is pinging off cell towers in a fixed location all within a mile. Does Ditria really need all that technological expertise to explain it to you, okay?"

"We review a trial court's decision [regarding the admission of] expert testimony for an abuse of discretion. . . . If we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 123, 124, 156 A.3d 506 (2017). A lay witness may not provide opinion testimony "unless the opinion is rationally based on the perception of the witness . . . ." Conn. Code Evid. § 7-1. In order for a witness to testify concerning "scientific, technical or other specialized knowledge," the witness must be "qualified as an expert by knowledge, skill, experience, training, [or] education . . . ." Conn. Code Evid. § 7-2. "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation

marks omitted.) *State* v. *Williams*, 317 Conn. 691, 702, 119 A.3d 1194 (2015).

Our analysis of the evidentiary issue presented by the defendant is informed by our Supreme Court's recent decision in *State* v. *Edwards*, supra, 325 Conn. 97. In *Edwards*, the state sought to elicit testimony from Detective Christopher Morris concerning how he used the defendant's call detail records to determine his location at certain points in time and to offer into evidence maps that Morris created showing the estimated cell sectors of the cell sites in question. Id., 119–22. As part of the state's offer of proof, Morris testified as to his training and experience conducting historic cell site analysis. Id., 121. "The trial court then ruled that the state had met its burden of establishing the reliability of the proffered evidence and that Morris was qualified by his expertise to analyze cell phone data provided in Verizon records." Id., 122.

On appeal, our Supreme Court agreed with the defendant that "the trial court improperly admitted testimony and documentary evidence through Morris without qualifying him as an expert and conducting a *Porter* hearing[21] in order to ensure that his testimony was based on [a] reliable scientific methodology." (Footnote added.) Id., 133. In reaching this conclusion, the court observed that it "has not had the opportunity to address

[21] See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

"A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 325 Conn. 124.

whether a police officer needed to be qualified as an expert witness before he could be allowed to testify regarding cell phone data . . . .'' Id., 127. Relying on *State* v. *Payne*, supra, 440 Md. 680, the court concluded that Morris' testimony concerning historic cell site analysis constituted expert testimony and, therefore, Morris should have been qualified as an expert witness. *State* v. *Edwards*, supra, 325 Conn. 128, 133. The court observed that ''although Morris relied on data he obtained from Verizon to conduct his analysis [of the defendant's call detail records], the process he used to arrive at his conclusions [concerning the approximate coverage areas of the cell sites in question] was beyond the ken of [an] average [person].'' Id., 128.

We conclude that *Edwards* is controlling as to this issue on appeal.[22] Although historic cell site analysis is not extremely difficult to understand, we agree with the court in *Edwards* that this analytical process is beyond the ken of the average juror. As we discussed

[22] We recognize that in *Edwards* ''the state [did] not assert that Morris did not provide expert testimony''; *State* v. *Edwards*, supra, 325 Conn. 118; and the court elsewhere concluded that ''the trial court admitted Morris' testimony as an expert witness . . . .'' Id., 128. Indeed, the court initially framed the issue presented on appeal only as whether the trial court improperly admitted Morris' testimony and maps ''without determining that the evidence was based on reliable scientific principles under *State* v. *Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).'' *State* v. *Edwards*, supra, 118.

Nevertheless, our Supreme Court's holding does not appear to be dicta because this discussion was not ''merely [a] passing commentary'' that went ''beyond the facts at issue'' and was ''unnecessary to the holding in the case.'' (Internal quotation marks omitted.) *Voris* v. *Molinaro*, 302 Conn. 791, 797 n.6, 31 A.3d 363 (2011). Instead, the court was intentionally taking up, discussing, and deciding a question germane to, though not necessarily decisive of the controversy before it, i.e., whether historic cell site analysis is the kind of scientific evidence that requires expert testimony and a *Porter* hearing to ensure the reliability of the scientific principles underlying it. See id. Moreover, even if our Supreme Court's statements concerning the need to qualify a witness as an expert before permitting him to testify about historic cell site analysis was dicta, we conclude that it is persuasive precedent. See id.

in part II A of this opinion, call detail records can be used to determine the approximate location of a cell phone at the time of a particular communication by determining the geographical coverage area of the cell sector used to facilitate that communication. This process of determining the actual or approximate geographical coverage area of a cell sector requires scientific and technical knowledge. Specifically, it requires an understanding of how cell sites and RF antennae operate, and knowledge of all of the internal and external factors that influence the size and shape of a cell sector. Indeed, in recognition of the scientific underpinnings of historic cell site analysis, our Supreme Court in *Edwards* held that a court must conduct a *Porter* hearing prior to admitting testimonial or documentary evidence of historic cell site analysis. Id., 132–33. For these reasons, we conclude that the court abused its discretion by not requiring Ditria to be qualified as an expert witness.

The state nonetheless urges that "when Ditria's testimony is reviewed in relation to the cell phone records themselves, a document that was admitted as a full exhibit without objection, it is clear that the substance of his testimony, i.e., the particular cell tower that the defendant's cell phone connected with at particular times, did not constitute 'expert' testimony at all, but was the equivalent of Ditria merely reading from a document that was already in evidence." We disagree; Ditria did not merely read from exhibit 77. Ditria testified that in order to make a phone call, a cell phone must use a cell site. Ditria then explained that in order to use a cell site, a cell phone must be within thirty miles of it. Ditria further agreed with the prosecutor that, because of these principles, if a cell phone is "at thirty miles or right next to" a cell site, then that is the cell site that the cell phone is going to use to make or receive a call. None of this information is contained in Exhibit 77. By

explaining to the jury how cell phones and cellular sites operate and the geographical coverage area of Sprint's cell sites, Ditria broached the realm of expert testimony.

Having concluded that the court abused its discretion by not requiring Ditria to be qualified as an expert witness, we turn to the defendant's confrontation clause claim. Because the defendant seeks *Golding* review of this unpreserved constitutional claim, we do not need to determine whether the court's failure to qualify Ditria as an expert witness obstructed the defendant's confrontation rights if this error was harmless beyond a reasonable doubt. See *State* v. *Dixon*, supra, 318 Conn. 511.

"[W]hether [an improper evidentiary ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 325 Conn. 133; accord *State* v. *Santos*, 318 Conn. 412, 425, 121 A.3d 697 (2015). For the purposes of our analysis, we assume that this evidentiary error was of constitutional magnitude and, therefore, the burden is on the state to prove that this error was harmless beyond a reasonable doubt. See *State* v. *Santos*, supra, 425.

We conclude that the admission of Ditria's testimony was harmless beyond a reasonable doubt. As we discussed in part II of this opinion, the state presented

substantial and varied evidence of the defendant's involvement in the bank robbery, including the defendant's admission to Mitchell that he robbed a bank. Moreover, Ditria's testimony was largely cumulative evidence of the defendant's location before, during, and after the robbery. Specifically, Ditria's testimony was used to corroborate the defendant's presence near eight areas of interest: Walmart, the Comfort Inn, the Webster Bank, Beacon Falls, Bridgeport, Home Depot, the Post Motor Inn, and the Super 8 Motel. The state established the defendant's presence at all of these locations through other direct and circumstantial evidence. For example, surveillance footage established the defendant's presence at Walmart and the Super 8 Motel as well as the presence of a vehicle similar in appearance to the defendant's Cadillac at the Webster Bank during the robbery. The Walmart and Home Depot receipts recovered from the defendant's Cadillac corroborated the defendant's presence at those stores. Rodriguez' testimony and the recovered facsimile firearm, which was the same make and model as the one the defendant purchased from Walmart, established the defendant's and his Cadillac's presence on Route 8 near the Bridgeport-Trumbull line. To establish the defendant's presence at various hotels, the state admitted into evidence registration forms, in the defendant's own name, for the Comfort Inn, the Post Motor Inn, and the Super 8 Motel and presented the testimony of employees from those hotels who confirmed that guests must present a driver's license when checking into those establishments. Finally, all of the direct and circumstantial evidence of the defendant's participation in the robbery corroborates his presence in Beacon Falls, where the dye pack associated with George's cash drawer was recovered shortly after the robbery.

As a result, even though we conclude that the court abused its discretion by not requiring Ditria to be qualified as an expert witness, we also conclude that this

error was harmless beyond a reasonable doubt. Therefore, the defendant's constitutional claim fails under the fourth prong of *Golding*.

III

The defendant's final claim is that his cumulative convictions and sentences for conspiracy to commit robbery and conspiracy to commit larceny violated his right against double jeopardy. The defendant seeks *Golding* review of this unpreserved constitutional claim. The defendant's claim is reviewable under *Golding* because the record is adequate to review the alleged claim of error and the claim is of constitutional magnitude alleging the violation of a fundamental right. See *State* v. *Dixon*, supra, 318 Conn. 511. As the state concedes, the defendant is further entitled to reversal of one of his conspiracy convictions under *Golding* because both convictions arose out of a single agreement to rob the Webster Bank in Seymour. See *State* v. *Wright*, 320 Conn. 781, 829, 135 A.3d 1 (2016) ("it is a double jeopardy violation to impose cumulative punishments for conspiracy offenses if they arise from a single agreement with multiple criminal objectives").

The appropriate remedy for this due process violation is to reverse the judgment of conviction as to both counts of conspiracy and to remand the case to the trial court with direction to vacate the defendant's conviction of conspiracy to commit larceny and to render judgment on the defendant's remaining conviction of conspiracy to commit robbery. See id., 829–30; see also *State* v. *Lee*, 325 Conn. 339, 345, 157 A.3d 651 (2017); *State* v. *Padua*, 273 Conn. 138, 171–73, 869 A.2d 192 (2005). The defendant further requests that we direct the trial court to resentence him with respect to his remaining conviction of conspiracy to commit robbery. Cf. *State* v. *Wright*, supra, 320 Conn. 830. We cannot

order the trial court to resentence the defendant, however, because vacatur of the defendant's conviction and sentence for conspiracy to commit larceny will not alter his total effective sentence. See *State* v. *Johnson*, 316 Conn. 34, 42–43, 111 A.3d 447 (2015); see footnote 3 of this opinion.

The judgment is reversed only with respect to the conviction of conspiracy to commit larceny in the third degree and the case is remanded with direction to vacate the judgment as to that conviction. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ANNA ROCKHILL *v.* DANBURY HOSPITAL
(AC 37864)

DiPentima, C. J., and Beach and Sheridan, Js.*

Syllabus

The plaintiff, a business invitee of the defendant hospital, sought to recover damages for negligence in connection with personal injuries she sustained when she struck her toe against an obstacle while walking in a crosswalk to the parking lot of the hospital, which caused her to fall and break one of her toes and to sustain other injuries. The case was tried to the court, which rendered judgment for the plaintiff, from which the defendant appealed to this court. *Held*:

1. The defendant could not prevail on its claim that the trial court erroneously found that the defect in the walkway that caused the plaintiff's injuries was a reasonably foreseeable hazard; that court, which reviewed reports prepared by members of the defendant's security and medical staff, and photographs depicting the alleged defect and the surrounding area, and which heard the testimony of the plaintiff and her daughter describing the fall and the defect, had before it adequate evidence of a broken slab of pavement that contained a chip in a well traveled walkway that had existed for a sufficient period of time, and, thus, its findings relating to this claim were not clearly erroneous and its conclusions were not unreasonable.

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

2. The trial court reasonably found, on the basis of the evidence presented, that the defect in the crosswalk was the actual cause of the plaintiff's fall; that court's finding that the plaintiff struck her toe on some obstacle while walking in or next to the crosswalk was reasonably supported by the evidence and the inferences drawn therefrom, namely, that there was broken pavement at the corner where the plaintiff's foot had hit, that when a security officer examined the area of the fall, he identified only the defect in question, that the sensation the plaintiff felt when striking her foot was the inside of the broken pavement, and that the defect caused the fall based on the proximity of the plaintiff's location after the fall to the location of the defect.
3. The trial court's finding that all of the plaintiff's medical costs were substantially caused by the fall was supported by the record and was not clearly erroneous; that court's findings that the plaintiff's fall was a substantial factor in bringing about her injuries and exacerbating her preexisting spinal stenosis were supported by the record, there having been expert testimony that the plaintiff's fall was a significant factor in her accelerated need for surgery, the relevant medical records admitted into evidence having indicated that the plaintiff began significantly complaining to her physician of chronic back pain shortly after the incident and prior to seeking surgical treatment, and the testimony and medical records having demonstrated that, prior to the fall, despite the radiological presence of the plaintiff's preexisting condition, the plaintiff led an active and independent lifestyle.
4. The trial court did not abuse its discretion in denying the defendant's motion to preclude the expert testimony of K, one of the plaintiff's treating physicians: K's reliance on the plaintiff's statements to him pertaining to her medical history did not render his opinion factually baseless, and the plaintiff's recitation of her medical history to K was reinforced by other medical records admitted into evidence, on which K relied, describing her complaints regarding back pain shortly after the fall and the extensive treatment she received thereafter; moreover, although K testified that his apportionment between the plaintiff's preexisting condition and the fall was admittedly arbitrary, he nonetheless opined that the plaintiff's fall was a significant factor in causing her accelerated need for surgery, his opinion was supported by the plaintiff's medical history and had a reasonable foundation in the evidence, and it was within the province of the court, as the trier of fact, to credit some, all or none of K's testimony regarding his conclusion that the plaintiff's fall exacerbated her preexisting condition.

Argued April 24—officially released August 29, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's negligence, brought

to the Superior Court in the judicial district of Danbury and tried to the court, *Doherty, J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; judgment for the plaintiff, from which the defendant appealed to this court; subsequently, the court, *Doherty, J.*, issued an articulation of its decision. *Affirmed.*

Michael G. Rigg, for the appellant (defendant).

James P. Sexton, with whom were *Michael S. Taylor* and, on the brief, *Marina L. Green*, for the appellee (plaintiff).

Opinion

BEACH, J. The defendant, Danbury Hospital, appeals from the judgment of the trial court rendered in favor of the plaintiff, Anna Rockhill, following a trial to the court. On appeal, the defendant claims that the court erroneously found that (1) a defect on the defendant's property that allegedly caused the plaintiff to fall was a reasonably foreseeable defect; (2) the defect caused the plaintiff to fall; and (3) all of the plaintiff's medical expenses were caused by the fall rather than by her preexisting spinal stenosis. The defendant also claims that the court abused its discretion in admitting the testimony of the plaintiff's expert witness pertaining to the causation element of her negligence claim. We affirm the judgment of the trial court.

The trial court's memorandum of decision sets forth the following relevant facts. On June 16, 2010, the plaintiff and her daughter, Cynthia Fusco, were visiting the plaintiff's husband, who was receiving medical care at Danbury Hospital. After their visit, the plaintiff and Fusco exited the hospital's main building and walked onto a walkway leading toward the parking lot. The plaintiff and Fusco were familiar with this walkway, as they had made this same trip several times in the past.

While the plaintiff and Fusco were walking along the pathway, the plaintiff hit something with her foot and fell to the ground. As a result of the fall, she sustained injuries to her right foot and ankle. It later was determined that she had broken her big toe and damaged the fifth metatarsal of her right foot. Within minutes of the fall, the plaintiff was taken to the defendant's emergency department by hospital staff where she was examined and treated for her injuries. As a result of her fall, the plaintiff experienced chronic lower back pain from a protruded disk that required several epidural steroid injections and, eventually, a surgical decompression procedure.

A trial to the court was held on August 26, 2014. On February 2, 2015, the court issued a memorandum of decision and rendered judgment in favor of the plaintiff. The court made detailed findings pertaining to both liability and damages. With respect to liability, the court noted that "the evidence [presented at trial] permits the court to find that the plaintiff struck her right toe against some obstacle while walking in or next to the crosswalk, which caused the fracture for which she was treated minutes later in the emergency department." The court further noted that the "area where the defect exists is contiguous with the crosswalk, a heavily traveled area used daily by patients and other invitees of the hospital." As to damages, the court found that the plaintiff's total damages were $181,076.45. The court further found that the plaintiff was contributorily negligent in each way alleged in the defendant's special defenses.[1] The court found the plaintiff 40 percent at

[1] In its memorandum of decision, the court noted that the defendant raised several special defenses alleging that the plaintiff "[1] failed to keep and maintain a reasonable and proper lookout; [2] failed to make reasonable and proper use of her senses and of her faculties; [3] failed to take the necessary and proper precautions to observe the conditions then and there existing; [4] failed to be watchful of her surroundings; [5] failed to use reasonable care for her own safety commensurate with the existing circumstances and conditions; and/or [6] failed to take into account a condition

fault for the injuries she sustained. As a result, the court awarded judgment to the plaintiff in the amount of $108,645.87, plus taxable costs. This appeal followed.[2] Additional facts will be set forth as necessary.

I

The defendant sets forth three claims challenging the factual findings of the trial court. Specifically, the defendant argues that the court erroneously found that (1) the divot[3] that caused the plaintiff's injuries was a reasonably foreseeable hazard; (2) the divot actually caused the plaintiff to fall; and (3) the plaintiff's fall caused all of her medical expenses. We disagree.

Before we address the defendant's individual claims, we set forth the guiding legal principles and our standard of review. "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . If a plaintiff cannot prove all of those elements, the cause of action fails. . . . [I]n a negligence action . . . [a] causal relation between the defendant's wrongful conduct and the plaintiff's injuries is a fundamental element without which a plaintiff has no case . . . ." (Citations

that was open and obvious; [7] failed to observe and avoid whatever dangers or conditions of dangers she alleges to have been presented at said time and place; [8] failed to be watchful of where she was walking and stepping; and/or [9] [f]ailed to use reasonable care for her own well-being/safety under the conditions and circumstances then and there existing."

[2] During the pendency of this appeal, the defendant filed a motion for articulation, which the court denied. The defendant then filed a motion for review of the trial court's decision denying the relief requested therein, which this court granted. The trial court then issued an articulation in compliance with this court's order. The court's articulation is discussed in more detail in this opinion.

[3] The parties erroneously used the word "divot" to refer to a shallow hole or decompression in the surface. From the photographs introduced into evidence, one can see, perhaps, some similarity to the disturbance of turf caused by a golf club. A "divot", however, is the turf dislodged by the swing, not the resulting hole. Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). With this reservation, we will use the same terminology as the parties.

omitted; internal quotation marks omitted.) *Right* v. *Breen*, 88 Conn. App. 583, 586–87, 870 A.2d 1131 (2005), rev'd on other grounds, 277 Conn. 364, 890 A.2d 1287 (2006).

Notably, the present case was tried to the court. When the court is the finder of fact, "inferenc[es] of fact [are] not reversible unless the inferenc[es] [were] arrived at unreasonably. . . . We note as well that [t]riers of fact must often rely on circumstantial evidence and draw inferences from it. . . . Proof of a material fact by inference need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Moreover, it is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed." (Emphasis omitted; internal quotation marks omitted.) *Palkimas* v. *Fernandez*, 159 Conn. App. 129, 133–34, 122 A.3d 704 (2015).

A

The defendant first claims that the court erroneously found that the divot causing the plaintiff's injuries was a reasonably foreseeable trip hazard. In support of this claim, the defendant raises two arguments. First, the defendant argues that this finding was improper as a matter of law because the divot is insufficient in size to constitute a reasonably foreseeable hazard; that is, the divot is "trivial" as a matter of law. Second, it argues that the court's finding was speculative and unsupported by the record because the plaintiff failed to satisfy her burden of establishing that the divot was a reasonably foreseeable hazard. In response, the plaintiff

argues that the size of the divot is presumptively a question for the finder of fact and that the trial court's finding that the divot was a reasonably foreseeable trip hazard is sufficiently supported by evidence in the record. We agree with the plaintiff.

In its memorandum of decision, the court concluded that "[t]he evidence elicited at trial permits the court to find that in or near the crosswalk where the plaintiff alleges to have fallen, there did exist a portion of uneven surface where the blocks of cement or other materials meet to form the crosswalk and the adjacent walkway. In addition, a small edge of raised surface appeared to have been chipped or otherwise broken off." The court further noted that the area in question was "well worn" and that the defect "is a specific condition which existed for a sufficient length of time as to give the defendant constructive notice of its existence." The court also found that the divot "is easily visible when looked upon directly and . . . there [were] no express signs or paint or other warnings located in its proximity to point it out."

After this court acted on the defendant's motion for review of the trial court's denial of the defendant's motion for articulation, the trial court articulated its ruling as to the "trivial defect" rule. The court stated that the divot, "which was the subject of extensive testimony and which was illustrated in the photographs comprising . . . [the] plaintiff's exhibit 1, was found by this court of sufficient size and orientation to permit the court to find that the plaintiff, Anna Rockhill, had proved, by a fair preponderance of the evidence, her allegation that it was the proximate cause of her fall on June 16, 2010, on the premises of the defendant . . . and that it was of sufficient size and duration so as to put the defendant on notice of its existence."

We necessarily begin with the defendant's argument that the divot causing the plaintiff's injury was insufficient in size as a matter of law. In support of this argument, the defendant contends that our Supreme Court's decision in *Older* v. *Old Lyme*, 124 Conn. 283, 199 A. 434 (1938), demonstrates that Connecticut adheres to a trivial defect rule,[4] as adopted by other jurisdictions. In essence, the defendant invites this court to examine the evidence and make its own factual finding to determine whether the divot was a reasonably foreseeable hazard or otherwise to conclude that the divot was too small to support liability as a matter of law. Neither approach is supported by our precedent.

In *Older*, the plaintiff sustained injuries while she was walking on public property and sought to hold the municipality liable. The area in which she was walking was described by the court to be the outer edge of a sidewalk that extended "to the edge of the traveled portion of the adjoining highway." Id., 285. While the plaintiff was walking in that area, "she caught the heel of one of her shoes, fell, and sprained her ankle." Id. The hole that the plaintiff caught her heel in was "about [two] inches in width and about [one] inch in depth." (Internal quotation marks omitted.) Id. Judgment was rendered in her favor. Id., 284.

Our Supreme Court reversed. It discussed liability pursuant to a statutory predecessor of General Statutes

[4] Other jurisdictions have adopted a *de minimis* or trivial defect rule in which an alleged defect can be held to be insignificant or trivial as a matter of law. See, e.g., *Czochanski* v. *Tishman Speyer Properties, Ltd.*, 45 Fed. Appx. 45, 47 (2d Cir. 2002) ("New York courts often rely on the judge's examination of photographs to determine whether a defect is trivial as a matter of law"); *Ursino* v. *Big Boy Restaurants of America*, 192 Cal. App. 3d 394, 399, 237 Cal. Rptr. 413 (1987) (identifying trivial defect rule as procedural "check valve" to avoid imposing absolute liability upon property owner); *Gleason* v. *Chicago*, 190 Ill. App. 3d 1068, 1069–70, 547 N.E.2d 518 (1989) (affirming court's grant of summary judgment because alleged defect too slight to be actionable).

§ 13a-149, the highway defect statute. Liability was determined by standards somewhat different from the more general considerations underlying common-law premises liability. The court defined a highway defect to be "such an object or condition in, upon or near the traveled path as would necessarily obstruct or hinder one in its use for the purpose of traveling, or which from its nature and position would be likely to produce that result or injury to one so traveling upon it." Id. The only obligation of the municipality was to keep streets and sideways in a reasonably safe condition for travel. Id. The court noted that the question of whether a condition constituted a highway defect depended on "a great variety of circumstances"; it "is in general [a question] of fact," but whether the facts found warrant the conclusion of liability could be a question of law. Id., 285. The court concluded that the "subordinate facts as to its size and shape and especially its location at the extreme outer edge of the walk, comparable to the curb in usual forms of construction, and where persons would not ordinarily be expected to travel," did not support the conclusion of liability. Id.

In *Older*, then, the factor that a person was not likely to walk in the location of the defect was a significant, perhaps controlling, factor. See id.; see also *Ferreira* v. *Pringle*, 255 Conn. 330, 341–42, 766 A.2d 400 (2001) (seeking to hold municipality liable for defective highway, "may involve issues of [fact; however, whether] the facts alleged would, if true, amount to a highway defect according to the statute is a question of law" [internal quotation marks omitted]). There is in *Older* no mention of a "trivial defect rule," nor need there be. There simply was a recognition that in any particular case, evidence may be insufficient to support an essential element of the cause of action. The court did not establish a minimum "depth" requirement for liability.

In addition to its reliance on *Older*, the defendant also directs this court to authority in other jurisdictions that have adopted a less deferential standard of appellate review in determining whether a defect is "trivial" as a matter of law. In *Alston* v. *New Haven*, 134 Conn. 686, 60 A.2d 502 (1948), however, our Supreme Court declined to adopt such an approach. It stated that the defendants "cited numerous cases from other jurisdictions claimed by them to establish that in other states courts are much more inclined to rule on the character of the defect as a matter of law. A detailed analysis of those cases would serve no useful purpose. In many states the appellate court has more power than this court over questions of fact." Id., 688.

Our Supreme Court in *Alston* further stated that while "courts and juries have refused to hold municipalities liable for slight defects . . . in only one case [*Older* v. *Old Lyme*, supra, 124 Conn. 283] has such a defect been held too slight as a matter of law to form the basis of a judgment for the plaintiff." *Alston* v. *New Haven*, supra, 134 Conn. 688. Furthermore, it noted that the alleged defect in *Older* "was not only slight but was in a place where pedestrians were not apt to walk." Id., 689. Our Supreme Court ultimately reiterated our long-standing approach to questions of fact in negligence claims, which is that "[u]nless only one conclusion can reasonably be reached, the question is one of fact for the trier." Id., 688. We are thus required by binding authority to reject the invitation to impose a firm "trivial defect" rule.

Our resolution of this claim, then, is guided by the following traditional legal principles. It is undisputed that the plaintiff in the present case was a business invitee of the defendant. The fact finder is the exclusive arbiter in determining whether the elements of negligence are satisfied, including whether the defect causing injury is reasonably foreseeable. See *Ruiz* v. *Victory*

Properties, *LLC*, 315 Conn. 320, 330, 107 A.3d 381 (2015). In order "to prevail on a negligence claim as a business invitee in a premises liability case, it [is] incumbent upon [the plaintiff] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice of it. . . . [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it. . . . In the absence of allegations and proof of any facts that would give rise to an enhanced duty . . . [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers." (Internal quotation marks omitted.) *Porto* v. *Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573, 578–79, 145 A.3d 283 (2016).

Furthermore, "whether the injury is reasonably foreseeable ordinarily gives rise to a question of fact for the finder of fact, and this issue may be decided by the court only if no reasonable fact finder could conclude that the injury was within the foreseeable scope of the risk such that the defendant should have recognized the risk and taken precautions to prevent it. . . . In other words, foreseeability becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Citation omitted; internal quotation marks omitted.) *Ruiz* v. *Victory Properties*, *LLC*, supra, 315 Conn. 330; see also *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 188, 72 A.3d 929 (2013) (question for fact finder to determine whether plaintiff's injuries were foreseeable). With these principles in mind, we turn to the question of whether the court's factual findings are sufficiently supported by the record.

Two reports were introduced into evidence. While the plaintiff received medical attention at the scene, a Danbury Hospital security officer spoke to Fusco and prepared an incident report. That report provided in relevant part: "[The plaintiff] exited the hospital via the main lobby after visiting her husband . . . . While crossing the main drive crosswalk she tripped and fell to the ground. She was assisted to the [emergency department] for examination." The security officer also transcribed Fusco's description of the incident in the report, which stated: "[The plaintiff] fell while walking across the main drive crosswalk. The witness believes that the right foot of her mother slipped into the crack causing her to fall." The report also noted the officer's personal observation and assessment of the location in question, and stated that the "[c]rosswalk path is slightly unlevel [and] at the end of the crosswalk near the elevator there is a crack where the slab's corner has been chipped." The report ended with a notation that photographs were taken of the incident location. The photographs were admitted into evidence.

Second, the emergency department's medical staff prepared a report at the time of the plaintiff's admission to the emergency room on June 16, 2010, following her fall. That report provided in relevant part: "[T]his pleasant [seventy-nine] year old female fell out in the parking [area], and then had right foot pain for which she was brought in. Advanced triage [led to] two x-rays of the right foot and ankle . . . . She is accompanied by her daughter who said that she is in pretty good health despite all of the medical problems she has, and there is no history of her feeling dizzy or having . . . neurologic symptoms which would cause her to have tripped and fallen. She has pain in her right foot in the front some pain in the ankle on any kind of movement but the worse pain is in the right foot frontal with the pain being fairly sharp worse with movement." The

report also noted that the plaintiff's chief complaint was that she "fell in the hospital parking lot by the elevators where there is a bump in the walkway."

In addition, both Fusco and the plaintiff testified at trial. Fusco was called first to testify and stated that when the plaintiff fell, she reached down to assist the plaintiff. While aiding the plaintiff, Fusco noticed "[t]hat there was this broken pavement at the corner where she—her right foot had hit." Fusco also testified that the plaintiff told her shortly after the fall that her "foot hit the pavement right there" and that she immediately complained of foot pain. Fusco also positively identified the gap in the concrete depicted in the plaintiff's exhibit 1 as the concrete gap that she referred to in her testimony.

The plaintiff's recollection of the events was not as detailed as Fusco's. She testified that it felt like she had "hit a block with [her] big toe." The plaintiff further testified that she was walking "to the elevator and just hit that spot." It was the plaintiff's belief that the "spot" caused the fall, but she admitted that she did not actually see what caused her fall.

The court reviewed the reports written by members of the defendant's security staff and medical staff, the photographs depicting the alleged defect and the surrounding area, and the testimony of the plaintiff and Fusco describing the fall and the divot. We conclude that there is adequate evidence in the record reasonably supporting the court's factual findings and conclusions. More specifically, the evidence presented at trial reasonably described a broken slab of pavement that contained a chip in a well traveled walkway that had existed for a sufficient period of time.[5] This evidence sufficiently supports the court's findings. Accordingly, the

[5] The court found that the walkway where the plaintiff fell was "a convergence of large, well-worn slabs of stone or some concrete material. The paint on the slabs is worn and flaked." On appeal, the defendant has not specifically contested the length of time that the defect existed.

court's findings relating to this claim were not clearly erroneous, and its conclusions were not unreasonable.[6]

B

The defendant next claims that the plaintiff did not satisfy her burden of proving that the defect actually caused her injuries. Specifically, the defendant contends that, other than the evidence that the plaintiff's toe struck "something," nothing in the record supports the court's finding that the divot was the actual cause of her injuries. In response, the plaintiff argues that there is more than sufficient evidence supporting the court's findings pertaining to this claim. We agree.

In its memorandum of decision, the trial court found that "the plaintiff struck her right toe against some obstacle while walking in or next to the crosswalk, which caused the fracture for which she was treated minutes later in the emergency department." The court further found that "where the plaintiff alleges to have fallen, there did exist a portion of uneven surface where the blocks of cement or other materials meet to form the crosswalk and the adjacent walkway. In addition, a small edge of raised surface appeared to have been chipped or otherwise broken off." The court identified that uneven surface as the area depicted in the photographs admitted into evidence.

Before we address the defendant's claim, we set forth the following relevant legal principles. "To prevail on a negligence claim, a plaintiff must establish that the

[6] The defendant also argues that this court should review the photographs depicting the divot de novo. We disagree. We are cognizant that the trial court remains in a superior position to credit and weigh the evidence as it did in this case, including the photographs. As noted previously, the proper inquiry regarding the court's factual findings is whether the trial court could reasonably have drawn the inferences it did from the evidence presented. See *Cagianello* v. *Hartford*, 135 Conn. 473, 476, 66 A.2d 83 (1948). In light of our conclusion that the court's findings were not clearly erroneous, we need not further address this claim.

defendant's conduct legally caused the injuries. . . . The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct." (Citations omitted; internal quotation marks omitted.) *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 24–25, 734 A.2d 85 (1999).

The defendant takes issue with the court's conclusion that the plaintiff struck her toe on "some obstacle" by arguing that this conclusion is too imprecise or speculative. The defendant further argues that this imprecise conclusion is based on the plaintiff's similarly imprecise testimony that she "felt her right toe strike something as she was walking . . . ." Although these statements in a vacuum may perhaps be imprecise, there is significantly more evidence in the record supporting the court's finding that the divot was the actual cause of the plaintiff's injuries than the defendant sets forth. The opinion read as a whole shows that the court concluded that the plaintiff tripped on the defect identified by the witnesses.

As noted in part I A of this opinion, Fusco testified at trial and described the plaintiff's fall and what she noticed thereafter. When Fusco was asked what she observed in the area immediately next to where the plaintiff fell, she testified that "there was this broken pavement at the corner where she—[the plaintiff's] right foot had hit." Fusco also was shown the photographs taken by the security officer to whom she indicated that the "gap in the concrete" was the cause of her mother's fall. The plaintiff corroborated Fusco's testimony through her own testimony and described the sensation of striking what felt like a "block" with her right foot during the incident in question. Additionally, the report prepared by the security officer stated that

"at the end of the crosswalk near the elevator there is a crack where the slab's corner has been chipped."

In our view, the court made several reasonable inferences from facts. We have found in the record evidence that (1) when the security officer examined the area, he identified only the defect in question; (2) the sensation that the plaintiff felt when striking her foot was the inside of the divot; and (3) the defect caused the fall based on the proximity of the plaintiff's location after the fall to the divot's location. We thus conclude that the court reasonably found that the divot was the actual cause of the plaintiff's fall. Accordingly, the court's findings with respect to this claim were not clearly erroneous.

C

Finally, the defendant claims that the court erroneously found that all of the plaintiff's medical bills were the result of her fall. Specifically, the defendant argues that "[d]espite the fact that [a medical expert] testified that only half of the 10 percent impairment he assigned to [the] plaintiff's back was related to the fall, the trial court concluded that 100 percent of the medical treatment was caused solely by the fall." In response, the plaintiff contends that the evidence at trial supports the court's conclusion that all of her medical bills were substantially caused by the fall. We agree with the plaintiff.

In its memorandum of decision, the court found that "the plaintiff . . . has proven by a fair preponderance of the evidence that she did sustain the injuries and losses which she alleged in her complaint, including the injuries which exacerbated prior conditions of spinal stenosis and low back pain, and that those injuries and losses were caused by the negligence of the defendant . . . ." Following this court's granting of the defendant's motion for review of the trial court's denial of

its motion for articulation, the trial court articulated its decision in relevant part: "The evidence and testimony gave the court a factual basis for its finding that subsequent to her fall, the plaintiff underwent surgery, which required her to undergo rehabilitative care and treatment and which required her to purchase or otherwise acquire various items of rehabilitative equipment, drugs and miscellaneous items to promote her rehabilitation. As a proximate result of her fall, she incurred medical costs and expenses in a total amount of $131,076.45. The defendant offered no evidence or testimony which would permit the court to find that any of those expenses were incurred for anything other than the fractures which she sustained as a result of her fall on the defendant's premises on June 6, 2010, and the exacerbation of her preexisting back injuries."

Our inquiry is guided by the following legal principles. As noted previously in this opinion, one of the elements that a plaintiff must prove in order to prevail on a claim of negligence is legal cause. Legal cause comprises two components: (1) cause in fact and (2) proximate cause. See *Winn* v. *Posades*, 281 Conn. 50, 56–57, 913 A.2d 407 (2007). We noted previously that "[t]he test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct." (Internal quotation marks omitted.) *Gurguis* v. *Frankel*, 93 Conn. App. 162, 167, 888 A.2d 1083, cert. denied, 277 Conn. 916, 895 A.2d 789 (2006). "The second component of legal cause is proximate cause . . . . [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendants' conduct]. . . . The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for

the necessary causal connection. . . . This causal connection must be based upon more than conjecture and surmise." (Internal quotation marks omitted.) Id., 167–68. We review challenges to the finding of causation under the clearly erroneous standard because the conclusion of negligence is factual. See *Twin Oaks Condominium Assn., Inc.* v. *Jones*, 132 Conn. App. 8, 11, 30 A.3d 7 (2011) ("[t]he conclusion of negligence is necessarily one of fact"), cert. denied, 305 Conn. 901, 43 A.3d 663 (2012); see also *Gurguis* v. *Frankel*, supra, 168 (reviewing challenge to finding of causation under clearly erroneous standard).

Because the court concluded that the plaintiff's injuries were caused, at least in part, by an exacerbation of a prior condition, a discussion of the eggshell plaintiff doctrine is relevant to our inquiry. "The eggshell plaintiff doctrine states that [w]here a tort is committed, and injury may reasonably be anticipated, the wrongdoer is liable for the proximate results of that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health. . . . The eggshell plaintiff doctrine is not a mechanism to shift the burden of proof to the defendant; rather, it makes the defendant responsible for all damages that the defendant legally caused even if the plaintiff was more susceptible to injury because of a preexisting condition or injury. Under this doctrine, the eggshell plaintiff still has to prove the nature and probable duration of the injuries sustained." (Internal quotation marks omitted.) *Iazzetta* v. *Nevas*, 105 Conn. App. 591, 593 n.4, 939 A.2d 617 (2008); see also W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 43, p. 292.

At trial, one of the plaintiff's treating physicians, David L. Kramer, testified as an expert witness with respect to her treatment and the cause of her accelerated need for surgery. Kramer testified that although

he "did come up with an admittedly arbitrary apportionment, [he] still assigned 5 percent, or half of her accelerated need for surgery, to an underlying and natural degenerative condition." The defendant argues that Kramer's opinion was arbitrary, and that this statement indicates that the cause of her accelerated need for surgery was her degenerative condition. The defendant's argument misses the point and takes Kramer's testimony out of context.

Kramer testified that it was his medical opinion that "at the end of the day a lot of this is degenerative in nature, but to some extent, as far as [he] understood it, [the plaintiff's] clinical picture deteriorated after the fall, and there may have been some acceleration in the need for surgery subsequent to that fall, and so to the extent that [he] had already minimized her impairment rating, [he] still apportioned a significant percentage of that to an underlying degenerative condition." Specifically, Kramer testified that in his opinion, the plaintiff's fall "may have contributed to some accelerated deterioration" leading to her subsequent medical treatment. Moreover, Kramer testified that spinal stenosis, like other advanced conditions, may show significant damage when viewed through a radiological image, but an individual with such a condition may feel no effects or be only slightly affected by the condition in her daily life and not require extensive medical treatment.[7]

[7] Kramer testified in relevant part during his deposition: "[N]ot surprisingly, eighty year old people have the ugliest looking X-rays and [magnetic resonance imaging] scans, and yet, as a group, they tend to have one of the lower incidents of neck and lower back pain. So, tempting as it is to look at that time and X-ray that shows severe arthritis, it does not necessarily require treatment.

***

"[The plaintiff] was functioning apparently at a reasonably high level with radiographically severe spinal stenosis and may have been more vulnerable to even an innocuous physical insult like the fall she described. We see that all the time in the emergency room where elderly people have been living their lives and experiencing their subclinical degenerative changes with ongoing narrowing of the spinal canal and then they have a little slip and

A plaintiff with a "dormant" condition, such as the plaintiff's preexisting spinal stenosis here, is entitled to recover full compensation for a resulting disability. See *Tuite* v. *Stop & Shop Cos.*, 45 Conn. App. 305, 310–11, 696 A.2d 363 (1997). Contrary to the defendant's argument, the court was not required to find that the plaintiff's medical treatment and costs were "solely the result of the plaintiff's fall" in order to recover full compensation from the defendant. Instead, the proper inquiry to determine whether the defendant was liable for all the medical costs resulting from the plaintiff's fall is whether the fall was a "substantial factor in bringing about the plaintiff's injuries." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 433, 820 A.2d 258 (2003). In the present case, the court found that the plaintiff's fall was a substantial factor in bringing about her injuries and that finding is supported by the record. It was not illogical to conclude that all of the medical costs were substantially caused by the fall, even if the plaintiff had a preexisting condition.

In addition to Kramer's testimony that the plaintiff's fall was a significant factor in her accelerated need for surgery, the relevant medical records admitted into evidence indicate that the plaintiff began significantly complaining of chronic back pain to Dr. Sanjay Gupta shortly after the incident and prior to seeking surgical treatment from Kramer. The record also includes Fusco's testimony and the plaintiff's medical records, which indicate that prior to the fall, despite the radiological presence of her preexisting condition, the plaintiff led an active and independent lifestyle. Parenthetically, there is nothing in the record to suggest that an intervening event broke the chain of causation.

fall or a little car accident, and they become catastrophically [a]ffected if it's in the neck, for instance."

In short, the court's conclusion that the plaintiff's fall was a substantial factor in exacerbating her preexisting condition of spinal stenosis and, therefore, that the defendant was liable for all of the medical costs resulting therefrom is supported by the record. Accordingly, the court's findings relating to this claim are not clearly erroneous, nor are the conclusions unreasonable.[8]

II

The defendant also claims that the court abused its discretion in denying its motion in limine seeking to exclude an expert witness' testimony. Prior to the introduction of Kramer's deposition testimony, the defendant made a motion in limine to exclude his testimony on the ground that he "lacked a factual basis upon which to predicate an opinion that claimed damages were related to the alleged occurrence." The court reserved decision on the motion pending evidence at trial. Later, in its memorandum of decision, the court denied the defendant's motion in limine. On appeal, the

[8] In a related claim, the defendant contends that the trial court's articulation shifted the burden of proof to the defendant to prove that the plaintiff's expenses were not caused by her fall. Specifically, the defendant challenges the following portion of the court's articulation: "The defendant offered no evidence or testimony which would permit the court to find that any of those expenses were incurred for anything other than the fractures which she sustained as a result of her fall on the defendant's premises on June 6, 2010, and the exacerbation of her preexisting back injuries."

For the following reasons we disagree with this claim. When a party claims that the trial court applied an incorrect burden of proof, an appellate court does not presume error in the absence of a clear expression of what burden the court actually employed. See *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 131, 981 A.2d 1068 (2009). It appears to this court that the challenged language simply reiterated that the plaintiff had satisfied her burden and noted that there was no evidence introduced to the contrary. The language was a comment on the state of the evidence, not on the burden of proof. In any event, we do not presume error on the part of the trial court. *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014).

defendant claims that the court abused its discretion in admitting Kramer's testimony. We disagree.

As an initial matter we note our standard of review. "[T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 365, 926 A.2d 1024 (2007).

In its memorandum of decision, the court noted the defendant's prior motion in limine to exclude Kramer's testimony on the grounds that he "lacked a factual basis upon which to predicate an opinion that claimed damages were related to the alleged occurrence." The court denied the motion and stated in relevant part: "Having taken into consideration the totality of the evidence offered at trial, the court has denied the defendant's motion in limine, which seeks the preclusion of Dr. Kramer's testimony, and has reviewed that deposition testimony and has given it the weight which the court finds it deserves."

In the court's later articulation regarding its denial of the defendant's motion in limine pertaining to this claim, the court stated in relevant part: "In the instant case, the court found that the facts upon which Dr. Kramer's opinions are predicated are not without substantial value. His report states that based on the patient's history, as she reported it to him, and as set forth in the records of Dr. [S. Javed Shalid, a neurologist] and Dr. [David S. Kloth, a pain management specialist], which he reviewed, there was a factual basis on which to form his opinions that the fall was a significant

factor in the need for her subsequent lumbar decompression, her increase in back pain and her lack of tolerance for standing and walking. The court found that Dr. Kramer's opinions were based on reasonable probabilities rather than mere speculation and, for that reason, they were admissible in establishing causation."

Our standard regarding the admissibility of expert testimony is well settled. "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Citations omitted; internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 158, 971 A.2d 676 (2009); see also Conn. Code Evid. § 7-2.[9]

We begin with the defendant's argument that Kramer lacked a sufficient factual basis for his opinion that the plaintiff's fall caused her accelerated need for surgery. The record indicates that the plaintiff advised Kramer of her medical history when she initially met with him on June 21, 2012. During this time, the plaintiff "complained of symptoms consistent with lumbar spinal stenosis, namely an inability to stand and walk for any length of time. She described a spinal history which was significant for three prior surgical procedures performed in the distant past." The plaintiff also informed

[9] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

Kramer that "she was involved in a slip and fall, subsequent to which her symptoms of spinal stenosis seemed to have progressed." Furthermore, in Kramer's narrative summary regarding the diagnosis and treatment of the plaintiff, Kramer concluded, inter alia, that "[w]ithin a reasonable degree of medical probability, the fall of June 16, 2010 seems to have intensified this patient's symptoms of spinal stenosis. Based upon this patient's history, the fall was a significant factor in the need for her subsequent lumbar decompression." This narrative was introduced into evidence at trial.

"[O]ur case law is clear that a physician's medical opinion is not inadmissible because it is formed, in whole or in part, on the basis of hearsay statements made by a patient. See *George* v. *Ericson*, 250 Conn. 312, 320, 736 A.2d 889 (1999) (although "[i]t is the general rule that an expert's opinion is inadmissible if it is based on hearsay evidence . . . [o]ne exception to this rule . . . is the exception which allows a physician to testify to his opinion even though it is based, in whole or in part, on statements made to him by a patient for the purpose of obtaining from him professional medical treatment or advice incidental thereto" [citation omitted; internal quotation marks omitted]). The rationale for this exception is that "the patient's desire to recover his health . . . will restrain him from giving inaccurate statements to a physician employed to advise or treat him." (Internal quotation marks omitted.) *Millıun* v. *New Milford Hospital*, 129 Conn. App. 81, 96, 20 A.3d 36 (2011), aff'd, 310 Conn. 711, 80 A.3d 887 (2013).

Kramer's reliance on the plaintiff's statements to him pertaining to her medical history did not, then, render his opinion factually baseless. Moreover, the plaintiff's recitation of her medical history to Kramer was reinforced by other medical records admitted into evidence, which were also relied on by Kramer, describing her complaints regarding back pain shortly after the fall

and the extensive treatment she received thereafter. We thus find no merit to the defendant's argument that Kramer lacked a sufficient evidentiary basis on which to base his opinion.

Finally, the defendant challenges the admission of Kramer's opinion by again taking issue with Kramer's division of the cause of the plaintiff's 10 percent spinal stenosis injury equally between her preexisting condition and the fall, and his statement that it was "an admittedly arbitrary apportionment . . . ." We addressed this issue in part I C of this opinion. There, we noted that the defendant took the challenged statement out of context. Although the precise calculation of the apportionment was characterized by Kramer as somewhat arbitrary, it was nonetheless his medical opinion that the plaintiff's fall was a significant factor in causing her accelerated need for surgery. Kramer's opinion was supported by the plaintiff's medical history, as evidenced by the plaintiff's conversations with Kramer and her medical records.

Furthermore, as noted previously in this opinion, Kramer opined that the plaintiff's fall was a factor contributing to her accelerated need for surgery and that her symptoms appeared to progress significantly after the fall. Kramer also testified that his apportionment was "admittedly arbitrary . . . ." This statement is not necessarily inconsistent with a finding that the fall was a substantial factor; in any event, it is "the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Emphasis omitted; internal quotation marks omitted.) *Palkimas* v. *Fernandez*, supra, 159 Conn. App. 133. In the present case, the court, as the arbiter of credibility, was free to credit some, all or none of Kramer's testimony regarding his conclusion

that the plaintiff's fall exacerbated her preexisting condition.

We thus conclude that, in light of the sufficient evidentiary foundation supporting Kramer's testimony and his conclusion that the plaintiff's fall was a substantial contributing factor with respect to the plaintiff's accelerated need for surgery, his opinions had reasonable foundation.[10] Accordingly, the court did not abuse its discretion in admitting Kramer's testimony.

The judgment is affirmed.

In this opinion the other judges concurred.

KATHLEEN FREESE *v.* DEPARTMENT OF SOCIAL SERVICES
(AC 38045)

GUSTAV CARIGLIO *v.* DEPARTMENT OF SOCIAL SERVICES
(AC 38083)

DiPentima, C. J., and Mullins and Flynn, Js.

Syllabus

Pursuant to statute (§ 52-109), "[w]hen any action is commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff."

The plaintiffs in both actions appealed to the trial court, pursuant to statute (§ 4-183 [a]), from the decisions of the defendant Department of Social Services denying the plaintiffs' applications for certain Medicaid benefits, which they had filed on behalf of their mothers, both of whom died before the defendant rendered final decisions in the underlying administrative proceedings. The trial court thereafter granted the defendant's motions to dismiss for lack of subject matter jurisdiction and

[10] At the conclusion of its brief, the defendant, without any further analysis, claims that Kramer's opinions were not expressed to a reasonable degree of medical certainty. We will not review claims not supported by analysis. See *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 164–65, 20 A.3d 702 (2011).

rendered judgments dismissing both appeals. Thereafter, the plaintiffs filed separate appeals to this court, which consolidated the appeals. The trial court had determined that because the plaintiffs' decedents died before they brought the appeals and because the plaintiffs did not bring the appeals as executors or administrators of their decedents' estates, the plaintiffs lacked standing. Moreover, although the plaintiffs had been appointed as fiduciaries of their decedents' estates after they instituted the appeals and before the trial court ruled on the defendant's motions to dismiss, the trial court denied the plaintiffs' requests to cure the jurisdictional defects pursuant to the remedial statute, § 52-109, by substituting themselves, in their capacities as estate fiduciaries, as plaintiffs in the administrative appeals. *Held*:

1. The trial court properly concluded that the plaintiffs lacked standing to appeal:

   a. The plaintiffs' claim that they had standing, pursuant to certain state regulations (§ 17b-10-1), to assert their decedents' rights in representative capacities lacked merit, as the plaintiffs' standing to appeal derived from § 4-183 (a), and the state regulations could not diminish the standing requirements set forth in § 4-183 or a similar enabling statute (§ 17b-61 [b]), which do not confer standing to appeal to any party eligible to request a fair hearing, as claimed by the plaintiffs; moreover, although the plaintiffs cited § 17b-61 (b) as support for their claim that the person who applied for the fair hearing may appeal from the decision to the Superior Court, that statute provides that an individual who applies for a fair hearing may appeal from that decision provided that he or she also is aggrieved, and it does not diminish the standing requirements set forth in § 4-183 (a) for filing administrative appeals.

   b. The plaintiffs failed to plead facts establishing aggrievement, as the operative complaints alleged that the defendant prejudiced the rights of the plaintiffs' decedents by improperly denying the applications, and the plaintiffs thus failed to allege that they have any specific personal and legal interests in the decisions to establish their aggrievement and standing; moreover, the plaintiffs failed to allege facts establishing their standing to appeal under the right of survival statute (§ 52-599), which abrogates the common-law rule that causes of action do not survive the death of a plaintiff, as neither plaintiff commenced their appeal as an executor or administrator of their decedent's estate, and § 52-599 (b) is limited to executors or administrators and does not authorize actions by parties such as next friends, putative administrators, or estate examiners, and, therefore, the plaintiffs failed to plead sufficient facts to establish aggrievement.

2. The trial court improperly granted the defendants' motions to dismiss instead of giving the plaintiffs an opportunity to cure the jurisdictional defect by substituting themselves, as fiduciaries of their decedents' respective estates, as plaintiffs in the appeals: that court improperly denied substitution and concluded that the plaintiffs' administrative

appeals were not legally cognizable actions capable of being cured by § 52-109 or the right to survival statute (§ 52-599) because they were commenced by parties without authorization to sue and, consequently, were nullities, as the plaintiffs here lacked authority to bring the appeal but did not lack the capacity to sue so as to render their administrative appeals nullities, the mere fact that their action failed to confer jurisdiction on the court did not preclude that jurisdictional defect from being cured through substitution, and adding the plaintiffs here to correct a mistake in ascertaining the real plaintiff in interest did not prejudice the defendant because it was fully apprised of the claims against it and was prepared to defend against them, and the alternative grounds asserted by the defendant regarding why substitution was unavailable were without merit; nevertheless, because the court did not determine whether the failure of the plaintiffs to bring the actions in their capacities as fiduciaries of their decedents' estates was due to an error, misunderstanding or misconception, which is a prerequisite for substitution under § 52-109, the cases were remanded for further proceedings to make such findings and to determine whether substitution is necessary to determine the real matter in dispute.

Argued January 30—officially released August 29, 2017

Procedural History

Appeals from the decisions by the defendant denying the plaintiffs' applications for certain benefits, brought to the Superior Court in the judicial district of Middlesex and transferred to the judicial district of New Britain; thereafter, the matters were transferred to the judicial district of Fairfield; subsequently, the court, *Hon. Howard T. Owens, Jr.*, judge trial referee, granted the defendant's motions to dismiss and rendered judgments thereon, from which the plaintiffs filed separate appeals to this court; thereafter, this court consolidated the appeals. *Reversed; further proceedings.*

Andrew S. Knott, with whom was *Elizabeth A. Holman*, for the appellants (plaintiff in each case).

Patrick B. Kwanashie, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant in both cases).

Opinion

FLYNN, J. Our Supreme Court has construed remedial statutes liberally to give effect to their purpose. See *Dorry* v. *Garden*, 313 Conn. 516, 533, 98 A.3d 55 (2014). The plaintiffs, Kathleen Freese and Gustav Cariglio,[1] appeal from judgments of the trial court dismissing their administrative appeals. The principal issue in these cases is whether General Statutes § 52-109,[2] a remedial savings statute, could be utilized by the plaintiffs to save from dismissal their administrative appeals commenced in the names of the wrong persons as plaintiffs.

In these consolidated administrative appeals, the defendant, the Department of Social Services, denied applications for Medicaid benefits that the plaintiffs filed on behalf of their respective mothers, Noreen McCusker and Arlene Cariglio (Arlene), both of whom died before the defendant rendered final decisions in the underlying administrative proceedings. The plaintiffs appealed those denials to the trial court, but because their decedents died before they brought the appeals, and because they did not bring the appeals as executors or administrators of their decedents' estates, the court determined that the plaintiffs lacked standing and dismissed their appeals for lack of subject matter jurisdiction. Furthermore, although the plaintiffs had been appointed as fiduciaries of their decedents' estates after they instituted the appeals and before the court ruled on the defendant's motions to dismiss, the court

[1] We refer to Freese and Cariglio collectively as the plaintiffs throughout this opinion, distinguishing between them only where necessary to avoid confusion.

[2] General Statutes § 52-109 provides: "When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff."

denied the plaintiffs' requests to cure the jurisdictional defect by substituting themselves, in their capacities as estate fiduciaries, as plaintiffs in the administrative appeals pursuant to the remedial savings statute § 52-109 and the similarly worded rule of practice. See Practice Book § 9-20.

On appeal to this court, the plaintiffs claim that the trial court (1) improperly concluded that they did not have standing to bring their administrative appeals because, despite the fact that they did not bring the appeals as fiduciaries of their decedents' estates, they nonetheless had standing, pursuant to the regulations set forth in the Uniform Policy Manual (UPM); Regs., Conn. State Agencies § 17b-10-1; to assert their decedents' rights in representative capacities, and (2) improperly denied their requests for substitution because, even if they did not have standing initially, they were subsequently appointed as estate fiduciaries and, thus, were entitled to cure the standing problem pursuant to § 52-109 as applied by our Supreme Court in *Kortner* v. *Martise*, 312 Conn. 1, 91 A.3d 412 (2014). Although we agree with the court that the plaintiffs initially lacked standing to commence their appeals in representative capacities, we conclude that the court's stated justifications for denying the plaintiffs' requests for substitution of the fiduciaries of their decedents' estates were legally incorrect. Because, however, the court did not issue any findings as to whether the plaintiffs' failure to name the proper parties in their administrative appeals was due to a mistake, as is required for substitution to be available under § 52-109, we reverse the court's judgment and remand the case for further proceedings not inconsistent with this opinion.

The facts and procedural history relevant to these appeals are undisputed. Freese applied for Medicaid benefits on behalf of her mother, Noreen McCusker, in October, 2013. On April 27, 2014, before the defendant

ruled on the application, McCusker died. Thereafter, the defendant denied Freese's application because McCusker's assets exceeded the limit for eligibility for Medicaid. Acting on her mother's behalf, Freese requested a fair hearing with the defendant's Office of Legal Counsel, Regulations and Administrative Hearings. On September 26, 2014, after conducting the hearing, the Office of Legal Counsel concurred that McCusker's assets rendered her ineligible for Medicaid and denied Freese's appeal. Contesting the merits of that decision, Freese commenced an administrative appeal to the trial court on October 29, 2014. In her complaint, Freese alleged that McCusker's rights were prejudiced because the defendant improperly deprived McCusker of her entitlement to Medicaid benefits. Freese further alleged that she was aggrieved "by virtue of being next friend and putative administrator for [McCusker]." More than one month later, on December 11, 2014, Freese was appointed administratrix of McCusker's estate.

Cariglio's action followed a similar procedural path. Cariglio's mother, Arlene, died on November 4, 2013. Just over one week later, Cariglio applied for Medicaid benefits on Arlene's behalf. The defendant denied Cariglio's application because Arlene had died and because Arlene's assets exceeded the eligibility limit. Cariglio requested a fair hearing and, following the hearing, the Office of Legal Counsel denied Cariglio's appeal on August 12, 2014. Cariglio commenced an administrative appeal in the trial court on September 16, 2014, alleging, in his operative complaint, that Arlene's rights were prejudiced by the defendant's erroneous finding that Arlene was ineligible for benefits. Cariglio further alleged that he brought the appeal in his capacity as Arlene's "co-attorney-in-fact, next friend, and putative

coexecutor of [Arlene's] will."[3] With regard to aggrievement, Cariglio alleged that he was aggrieved as Arlene's "estate examiner."[4] Over a month later, on December 3, 2014, Cariglio was appointed as a coexecutor of Arlene's estate.

Around the time when the plaintiffs were appointed as fiduciaries of their decedents' estates, the defendant moved to dismiss the plaintiffs' administrative appeals for lack of subject matter jurisdiction. In both motions, the defendant argued that the plaintiffs lacked standing to appeal from the denials of their Medicaid applications because they were not personally aggrieved by the denials and, furthermore, did not institute the appeals as administrators or executors of their decedents' estates. In response, the plaintiffs filed motions to substitute

[3] Cariglio alleged that Arlene left a will that designated him and his brother Pasquale Cariglio "as coexecutors," and that the will was "in the process" of being admitted into probate.

[4] Cariglio's reference to his status as "estate examiner" appears to be a reference to General Statutes § 45a-317a, which provides in relevant part: "Any person interested in the estate of a deceased person and having a need to obtain financial information concerning the deceased person for the limited purpose of determining whether the estate may be settled as a small estate under section 45a-273, or having a need to obtain financial or medical information concerning the deceased person for the limited purpose of investigating a potential cause of action of the estate, surviving spouse, children, heirs or other dependents of the deceased person, or a potential claim for benefits under a workers' compensation act, an insurance policy or other benefits in favor of the estate, surviving spouse, children, heirs or other dependents of the deceased person, may apply to the Probate Court having jurisdiction of the estate of the deceased person for the appointment of an estate examiner. . . . If the court appoints an estate examiner under this section, the court may require a probate bond or may waive such bond requirement. The court shall limit the authority of the estate examiner to disclose the information obtained by the estate examiner, as appropriate, and may issue an appropriate order for the disclosure of such information. Any order appointing an estate examiner under this section, and any certificate of the appointment of a fiduciary issued by the clerk of the court, shall indicate (1) the duration of the estate examiner's appointment, and (2) that such estate examiner has no authority over the assets of the deceased person."

themselves, in their newly-obtained capacities as fiduciaries of their respective decedents' estates, as party plaintiffs in order to cure any jurisdictional defects. The plaintiffs both asserted that they commenced their appeals "based on a good-faith belief, not being the result of negligence," that they were the proper parties to appeal. The plaintiffs also requested leave to amend their complaints to that effect.[5] In their objections to the defendant's motions to dismiss, the plaintiffs argued that, on the basis of *Kortner* v. *Martise*, supra, 312 Conn. 1, substitution of an estate fiduciary as a plaintiff to cure a defect in standing is warranted under § 52-109 where, as in their cases, the original action was mistakenly brought in the name of an unauthorized party. Alternatively, the plaintiffs argued that, pursuant to the regulations set forth in the UPM, they had representative standing to appeal on their decedents' behalves despite the fact that, when they commenced their appeals, they had not yet been appointed as fiduciaries of their decedents' estates.

After hearing argument on May 12, 2015, and ordering supplemental briefing, the court issued memoranda of decision dismissing the plaintiffs' appeals. With regard to Freese, the court began by distinguishing her case from our Supreme Court's decision in *Kortner* v. *Martise*, supra, 312 Conn. 14, reasoning that, under *Kortner*, "substitution is permissible . . . only if the decedent had a colorable claim of injury during his life that is a real matter in dispute . . . such that the decedent had standing to bring the action himself," whereas McCusker died before Freese commenced her administrative appeal and, therefore, "ha[d] neither a vindicable right nor a colorable claim of injury that the action

[5] Freese's proposed amended complaint alleged that she was aggrieved "by virtue of being administratrix of estate for [McCusker]." Cariglio's proposed second amended complaint alleged that he and Pasquale Cariglio were aggrieved "by virtue of being the coexecutors of estate for [Arlene]."

implicates." The court further observed that, because Freese's appeal was not commenced by an executor or administrator of McCusker's estate, it was incapable of being cured by substitution: "Being a nullity and incapable of vesting the court with subject matter jurisdiction over any controversy, a suit initiated by a decedent or his heir, or by another on their behalf, cannot be an action within the meaning of § 52-109, that section contemplating a legally cognizable right of action. Further, substitution under § 52-109 cannot retroactively validate such a suit."[6] Accordingly, the court determined that *Kortner* was inapposite, declined to permit substitution, and dismissed Freese's appeal for lack of subject matter jurisdiction. In denying substitution, the court did not determine whether Freese's failure to appeal in her capacity as administratrix of McCusker's estate was the result of a mistake. See General Statutes § 52-109 (substitution appropriate only if trial court is satisfied that original action was commenced in name of improper party through mistake).

In its memorandum of decision dismissing Cariglio's appeal, the court reasoned that, to have standing to appeal, Cariglio was required to commence the appeal in his capacity as a fiduciary of Arlene's estate, and that Cariglio's operative complaint failed to allege that he brought his appeal in such a capacity. The court also rejected Cariglio's argument that his appeal could be saved by § 52-109 or General Statutes § 52-599,[7] reasoning that, because the appeal failed to invoke the court's

[6] The court further reasoned that permitting substitution in Freese's action would prejudice the defendant because it would permit Freese to avoid the forty-five day limitation period for filing administrative appeals. See General Statutes § 4-183 (c).

[7] General Statutes § 52-599 provides in relevant part: "(a) A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person.

"(b) A civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. If a party plaintiff dies, his executor or

jurisdiction in the first place, "there [was] no cause or right of action to save." Furthermore, the court concluded that Cariglio failed to plead aggrievement, as is required to have standing to appeal from an administrative decision. See General Statutes § 4-183 (a). Thus, the court declined to permit substitution and dismissed Cariglio's administrative appeal for lack of subject matter jurisdiction.[8] As in Freese's case, the court did not determine whether Cariglio failed to appeal as coexecutor of Arlene's estate due to a mistake. These consolidated appeals followed.

The plaintiffs claim that court improperly granted the defendant's motions to dismiss for lack of subject matter jurisdiction. First, they argue that the court erroneously concluded that they lacked standing to appeal because, pursuant to the regulations set forth in the UPM, they had standing to appeal in representative capacities. Second, the plaintiffs contend that, on the basis of § 52-109 and *Kortner* v. *Martise*, supra, 312 Conn. 1, the court erred in refusing to permit substitution in lieu of dismissing the cases.[9] As set forth subsequently in this opinion, we disagree with the plaintiffs'

administrator may enter within six months of the plaintiff's death or at any time prior to the action commencing trial and prosecute the action in the same manner as his testator or intestate might have done if he had lived. If a party defendant dies, the plaintiff, within one year after receiving written notification of the defendant's death, may apply to the court in which the action is pending for an order to substitute the decedent's executor or administrator in the place of the decedent, and, upon due service and return of the order, the action may proceed. . . ."

[8] In both memoranda of decision, the court did not address the plaintiffs' alternative arguments that they had representative standing to appeal pursuant to the UPM.

[9] The plaintiffs also argue that, by failing to raise the issue of standing at any point during the underlying administrative proceedings before the agency, the defendant is estopped from raising it now. Because, however, subject matter jurisdiction "addresses the basic competency of the court, [it] can be raised by any of the parties, or by the court sua sponte, at any time." (Internal quotation marks omitted.) *ABC, LLC* v. *State Ethics Commission*, 264 Conn. 812, 823, 826 A.2d 1077 (2003). Moreover, "subject matter jurisdiction cannot be conferred by waiver or consent . . . ." *Man-*

claim that they had standing to appeal in capacities other than as fiduciaries of their respective decedents' estates. However, we reverse the judgments of dismissal and remand the cases for the court to determine whether the plaintiffs' failure to name the proper parties as plaintiffs in their appeals was due to a mistake and for such further proceedings as are not inconsistent with this opinion.

We begin by setting forth our standard of review. "A determination regarding a trial court's subject matter jurisdiction is a question of law. . . . When the trial court draws conclusions of law, appellate review is plenary, and the reviewing court must decide whether the trial court's conclusions are legally and logically correct." (Internal quotation marks omitted.) *Youngman* v. *Schiavone*, 157 Conn. App. 55, 63, 115 A.3d 516 (2015). Furthermore, "[t]he decision whether to grant a motion for the addition or substitution of a party to legal proceedings rests in the sound discretion of the trial court." (Internal quotation marks omitted.) Id. "[When] a motion to dismiss is filed on the ground that the plaintiff lacks standing, and the plaintiff quickly follows by filing a motion to substitute the correct party, the motion to substitute may be heard while the motion to dismiss is pending, notwithstanding the general rule that the subject matter jurisdictional issues raised by a motion to dismiss must be dealt with prior to other motions." (Internal quotation marks omitted.) Id.

I

The plaintiffs first argue that the court erroneously concluded that they lacked standing to appeal from the defendant's denials of their Medicaid applications

ning v. *Feltman*, 149 Conn. App. 224, 236, 91 A.3d 466 (2014). Therefore, assuming, arguendo, that the defendant could have raised the standing issue during the administrative proceedings, the doctrine of estoppel does not apply.

because the UPM conferred them with standing to assert their decedents' rights in representative capacities. We disagree.

"It is well established that the right to appeal an administrative action is created only by statute and a party must exercise that right in accordance with the statute in order for the court to have jurisdiction." *New England Rehabilitation Hospital of Hartford, Inc.* v. *Commission on Hospitals & Health Care*, 226 Conn. 105, 120, 627 A.2d 1257 (1993). In the present cases, the plaintiffs appealed pursuant to § 4-183 (a), which provides in relevant part that "[a] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section." See also General Statutes § 17b-61 (b) (providing that "[t]he applicant for [a fair] hearing, if aggrieved, may appeal therefrom in accordance with section 4-183").

Therefore, "in order to have standing to bring an administrative appeal, a person or entity must be aggrieved. . . . Aggrievement is a question of fact for the trial court and the plaintiff has the burden of proving that fact. . . . Pleading and proof of facts that constitute aggrievement are essential prerequisites to the trial court's subject matter jurisdiction over an administrative appeal. . . . In the absence of aggrievement, an administrative appeal must be dismissed for lack of subject matter jurisdiction." (Citations omitted.) *New England Rehabilitation Hospital of Hartford, Inc.* v. *Commission on Hospitals & Health Care*, supra, 226 Conn. 120–21.

"[T]he fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and

legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision . . . .'' (Internal quotation marks omitted.) *New England Cable Television Assn., Inc.* v. *Dept. of Public Utility Control*, 247 Conn. 95, 103, 717 A.2d 1276 (1998).

Before reaching the question of aggrievement under § 4-183 (a), we reject the plaintiffs' central contention that the UPM conferred them with standing to commence their administrative appeals in representative capacities. In essence, the plaintiffs' argument is that they need not establish aggrievement under § 4-183 (a) provided that they had standing under the UPM. It is well settled, however, that ''[a]ppeals to the courts from administrative [agencies] exist only under statutory authority . . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created . . . and can be acquired and exercised only in the manner prescribed. . . . In the absence of statutory authority, therefore, there is no right of appeal from [an agency's] decision . . . .'' (Internal quotation marks omitted.) *Cales* v. *Office of Victim Services*, 319 Conn. 697, 700–701, 127 A.3d 154 (2015). Therefore, the plaintiffs' standing to appeal from the defendant's denials of their Medicaid applications is derived solely from §§ 4-183 (a) and 17b-61 (b), and unless the plaintiffs established the prerequisites to standing as required by those sections, namely, aggrievement, their appeals are subject to dismissal. The regulations set forth in the UPM, promulgated by the defendant pursuant to General Statutes § 17b-10 (a), cannot diminish the standing requirements set forth in the enabling statutes. Indeed, the plaintiffs' contention is that, under the UPM,

any party eligible to request a fair hearing also has standing to appeal to the trial court. The enabling statutes, however, do not confer standing under such circumstances. "[M]ere status . . . as a party or a participant in a hearing before an administrative agency does not in and of itself constitute aggrievement for the purposes of appellate review." (Internal quotation marks omitted.) *Med-Trans of Connecticut, Inc.* v. *Dept. of Public Health & Addiction Services*, 242 Conn. 152, 169, 699 A.2d 142 (1997). Because the plaintiffs' claim that the UPM conferred them with standing would require us to depart from the enabling statutes, their reliance on the UPM is without merit.

The plaintiffs do, however, cite one of the enabling statutes—§ 17b-61 (b)—as support for their argument that "the person who applied for the [f]air [h]earing may appeal the decision to the Superior Court." Section 17b-61 (b), which governs standing to appeal from decisions rendered after administrative hearings, provides in relevant part: "The applicant for such a hearing, *if aggrieved*, may appeal therefrom in accordance with section 4-183. . . ." (Emphasis added.) Contrary to the plaintiffs' interpretation, the plain text of that statute provides that an individual who applies for a fair hearing may appeal from that decision *provided that he or she also is aggrieved*. The plaintiffs' construction ignores the phrase "if aggrieved," in violation of the principle that statutes "must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 615, 72 A.3d 394 (2013). Therefore, § 17b-61 (b) does not diminish the standing requirements set forth in § 4-183 (a) for filing administrative appeals, and does not help the plaintiffs' cause.

Having rejected the plaintiffs' primary argument on appeal, namely, that the UPM could confer them with

authority to appeal to the Superior Court, we next conclude that the plaintiffs failed to plead facts establishing aggrievement.[10] In their operative complaints, the plaintiffs allege that they applied for Medicaid benefits on behalf of their decedents, and that the defendant prejudiced their decedents' rights by improperly denying the applications. Therefore, despite the plaintiffs' alleged participation in the underlying proceedings and disagreement with the merits of the administrative decisions, they have failed to allege that they have any specific personal and legal interests in the decisions. See *New England Cable Television Assn., Inc.* v. *Dept. of Public Utility Control*, supra, 247 Conn. 103. On that basis, the plaintiffs were not aggrieved and, thus, lacked standing to commence these appeals.

Nor did the plaintiffs allege facts establishing their standing to appeal under our right of survival statute, § 52-599, which abrogates the common law rule that causes of action do not survive the death of a plaintiff. See *Burton* v. *Browd*, 258 Conn. 566, 570–71, 783 A.2d 457 (2001). Under § 52-599, causes of action survive the death of a plaintiff, but only in favor of the plaintiff's "executor or administrator . . . ." See General Statutes § 52-599 (b).[11] "It is a well established principle

[10] We note that the trial court did not conclude that Freese failed to plead facts establishing aggrievement in its memorandum of decision. That omission does not preclude us from doing so on appeal, however, because defects in subject matter jurisdiction "may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 533, 911 A.2d 712 (2006).

[11] We note that the plaintiffs in the present cases could have availed themselves of § 52-599 during the underlying administrative proceedings. Our Supreme Court has held that § 52-599 (b) applies to situations in which "an executor has entered the administrative proceeding by filing an amended complaint seeking any remedy to which the deceased complainant may have been entitled . . . ." (Emphasis omitted; internal quotation marks omitted.) *Hillcroft Partners* v. *Commission on Human Rights & Opportunities*, 205 Conn. 324, 331, 533 A.2d 852 (1987); see also *Commission on Human Rights & Opportunities* v. *Greenwich Catholic Elementary School System, Inc.*, 202 Conn. 609, 613–14, 522 A.2d 785 (1987).

. . . that [d]uring the interval . . . between the death and the revival of the action [pursuant to § 52-599] by the appearance of the executor or administrator, the cause has no vitality. The surviving party and the court alike are powerless to proceed with it." (Internal quotation marks omitted.) *Burton* v. *Browd*, supra, 571. Limiting § 52-599 to suits brought by the decedent's executor or administrator accords with the established principle that "[t]he proper suit, upon a cause of action arising in favor of . . . the decedent during [his or her] lifetime, is in the name of the fiduciary [of the estate] rather than of the heirs or other beneficiaries of the estate." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 781, 125 A.3d 549 (2015); see also 31 Am. Jur. 2d 746, Executors and Administrators § 1093 (2012) ("the exclusive right to bring action in behalf of an estate . . . is the legal representative of the estate; the heirs have no standing to maintain such an action" [footnote omitted]).

In the present case, neither plaintiff commenced their appeal as an executor or administrator of their decedent's estate; indeed, it is undisputed that they were not appointed into those capacities until December, 2014, after they instituted the appeals. Instead, Freese alleged that she was aggrieved as McCusker's "next friend and putative administrator," and Cariglio alleged that he was aggrieved as Arlene's "estate examiner." Because § 52-599 limits its ambit to executors or administrators, it does not authorize suits by parties such as next friends, putative administrators, or estate examiners. Accordingly, the plaintiffs failed to plead sufficient facts to establish aggrievement, and the court properly concluded that they lacked standing to appeal.[12]

[12] The plaintiffs assert in their main brief that an administrative appeal pursuant to § 4-183 "is not a new proceeding, but the continuation of an extant proceeding." Regardless of whether that is true, however, the plaintiffs needed to establish their aggrievement in order to have standing to commence their appeals, which they failed to do.

We nonetheless find it appropriate to note that, in terms of whether a party authorized to participate in the administrative proceedings also is authorized to bring an administrative appeal, certain regulations in the UPM leave some room for confusion. For instance, § 1505.15 (A) (1) of the UPM permits applicants to be "represented by other qualified individuals who act responsibly for them," and § 1570.05 (D) (2) (b) provides that, in the case of a deceased applicant, their child may request a fair hearing on their behalf. Finally, § 1570.30 (A) of the UPM provides that "[t]he requester has the right to appeal a [f]air [h]earing decision to the court of jurisdiction." Taken together, we can see how litigants might be misled into thinking that they are authorized to file administrative appeals from fair hearing decisions simply because they were the person to request the fair hearing. Fair hearing applicants who mistakenly rely on these provisions of the UPM as conferring them with standing may be induced into failing to take the necessary measures to establish aggrievement under § 4-183, such as obtaining appointment as fiduciary of their decedent's estate, which could harm their ability to assert the rights of their decedents in administrative appeals. It would be prudent for the defendant to amend the relevant regulations of the UPM to provide a clear indication that none of them diminishes the aggrievement requirements set forth in § 4-183.

Regardless of their lack of clarity, however, the UPM regulations cannot, as we have stated, enlarge the class of persons eligible to file an administrative appeal beyond those qualifying as aggrieved persons under § 4-183 (a). See *Cales* v. *Office of Victim Services*, supra, 319 Conn. 700–701. Because the plaintiffs failed to allege that they were aggrieved, they lacked standing to appeal.

II

Having determined that the plaintiffs failed to plead sufficient facts to establish that they had standing to

commence their administrative appeals, we must next determine whether the court erred by granting the defendant's motions to dismiss instead of giving the plaintiffs an opportunity to cure the jurisdictional defect by substituting themselves, as fiduciaries of their decedents' respective estates, as plaintiffs in the appeals. We conclude that the court's stated justifications for denying substitution are legally incorrect, and that the alternative grounds asserted by the defendant regarding why substitution was unavailable are without merit. Because, however, the court did not determine whether the plaintiffs' failure to sue in their capacities as fiduciaries of their decedents' estates was due to a mistake, which is a prerequisite for substitution under § 52-109, we remand the case for a further finding and for further proceedings not inconsistent with this opinion.

"The decision whether to grant a motion for the addition or substitution of a party to legal proceedings rests in the sound discretion of the trial court. . . . In reviewing the trial court's exercise of that discretion, every reasonable presumption should be indulged in favor of its correctness . . . and only if its action discloses a clear abuse of discretion is our interference warranted." (Internal quotation marks omitted.) *Youngman* v. *Schiavone*, supra, 157 Conn. App. 65.

Section 52-109 provides: "When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." Section 52-109 "allow[s] a substituted plaintiff to enter a case [w]hen any action has been commenced in the name of the wrong person as [the] plaintiff, and that such a substitution will relate back to and correct, retroactively, any defect in a prior pleading concerning the

identity of the real party in interest. . . . Thus, a substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff . . . and, further, is permissible even after the statute of limitations has run. . . . An addition or substitution is discretionary, but generally should be allowed when, due to an error, misunderstanding or misconception,[13] an action was commenced in the name of the wrong party, instead of the real party in interest, whose presence is required for a determination of the matter in dispute." (Citations omitted; footnotes altered; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 552–53, 133 A.3d 140 (2016).

Once the trial court determines that the action was commenced in the name of the wrong party due to an error, misunderstanding or misconception, "the substituted party is let in to carry on a pending suit, and is not regarded as commencing a new one. After he is substituted he is . . . treated and regarded for most purposes just as if he had commenced the suit originally. The writ, the complaint, the service of process, attachment made, bonds given, the entry of the case in court, the pleadings if need be, in short all things done in the case by or in favor of the original plaintiff . . .

[13] Our Supreme Court held in *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 133 A.3d 140 (2016), that the term "mistake" as used in § 52-109 should be interpreted according to its ordinary meaning, namely, "error, misunderstanding or misconception." Id., 553 and n.21. In adopting that definition, the court disavowed its previous interpretation of "mistake" as "an honest conviction, entertained in good faith and not resulting from the plaintiff's own negligence," reasoning that such a definition was "too limiting and, practically, too difficult to apply, especially given the ameliorative purpose of § 52-109." Id., 553–54 n.21. We note that the trial court did not have the benefit of our Supreme Court's decision in *Fairfield Merrittview Ltd. Partnership* at the time it issued its memoranda of decision dismissing the plaintiffs' appeals. In any event, the change in the definition of "mistake" does not bear on our analysis of whether the court properly denied the plaintiffs' requests for substitution.

remain for the benefit of the plaintiff who succeeds him, as if done by and for him originally and just as if no change of parties had been made. So far as the defendant is concerned, the same suit upon the same cause of action, under the same complaint and pleadings substantially in most cases, goes forward to its final and legitimate conclusion as if no change had been made." (Internal quotation marks omitted.) *Kortner* v. *Martise*, supra, 312 Conn. 12–13. "[W]hen a plaintiff is added to the case to correct a mistake in ascertaining the real plaintiff in interest, the defendant rarely, if ever, will be prejudiced, as long as he was fully apprised of the claims against him and was prepared to defend against them." *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 158, 998 A.2d 730 (2010).

Finally, we must bear in mind that "remedial statutes must be afforded a liberal construction in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) *Dorry* v. *Garden*, supra, 313 Conn. 533. Our rules with respect to substitution are no different—they "permit the substitution of parties as the interest of justice require"; (internal quotation marks omitted) *Kortner* v. *Martise*, supra, 312 Conn. 11; and "are to be construed so as to alter the harsh and inefficient result that attached to the mispleading of parties at common law." (Internal quotation marks omitted.) Id.

In the present cases, the trial court did not determine whether the plaintiffs' failure to name the proper parties in their appeals was due to a mistake. Instead, the trial court's principal reason for denying substitution appears to have been that the plaintiffs' administrative appeals were not legally cognizable actions capable of being cured by § 52-109 or our right of survival statute, § 52-599 (b), because they were commenced by parties without authorization to sue and, consequently, were nullities. In its memorandum of decision dismissing

Freese's case, the court stated that, "[b]eing a nullity and incapable of vesting the court with subject matter jurisdiction over any controversy, a suit initiated by a decedent or his heir, or by another on their behalf, cannot be an action within the meaning of § 52-109, that section contemplating a legally cognizable right of action. Further, substitution under § 52-109 cannot retroactively validate such a suit." Likewise, with regard to Cariglio, the court observed that, although "§ 52-109 permit[s] substitution of a proper party for the plaintiff in any action mistakenly commenced in the name of the wrong person and § 52-599 (b) permits a civil action or proceeding by or against any party who dies during the pendency of the action to be continued by or against the decedent's executor or administrator, neither statute can save an unauthorized suit, there being no cause or right of action to save."

This reasoning is flawed on two levels. First, although the plaintiffs lacked authority to bring these appeals on their decedents' behalves, they did not, as the trial court suggested, lack the capacity to sue so as to render their administrative appeals nullities. "It is elemental that in order to confer jurisdiction on the court the plaintiff must have an actual legal existence, that is he or it must be a person in law or a legal entity with legal capacity to sue." (Internal quotation marks omitted.) *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, 136 Conn. App. 683, 687, 47 A.3d 294 (2012). For instance, "[t]he quintessential example of someone who lacks capacity to sue . . . is a deceased person, as capacity only exists in living persons." *In re Estate of Sauers*, 613 Pa. 186, 198, 32 A.3d 1241 (2011); see also *Noble* v. *Corkin*, 45 Conn. Supp. 330, 333, 717 A.2d 301 (1998) ("[a] dead person is a nonexistent entity and cannot be a party to a suit" [internal quotation marks omitted]). Likewise, "[a]n estate is not a legal entity. It is neither a natural nor

artificial person, but is merely a name to indicate the sum total of the assets and liability of the decedent or incompetent. . . . Not having a legal existence, it can neither sue nor be sued." (Citation omitted; internal quotation marks omitted.) *Isaac* v. *Mount Sinai Hospital*, 3 Conn. App. 598, 600, 490 A.2d 1024, cert. denied, 196 Conn. 807, 494 A.2d 904 (1985). In the present cases, however, the plaintiffs did not commence their appeals in the names of their decedents or their decedents' estates; rather, they sued in their own names. Although the plaintiffs were not authorized, and thus lacked standing, to appeal in their own names, they were nonetheless living persons with capacity to sue. See 67A C.J.S. 524–25, Parties § 10 (2013) ("[i]n general, every natural person of lawful age has legal capacity to sue"). Accordingly, the trial court was incorrect to posit that the plaintiffs' appeals were nullities.

Second, even if the plaintiffs' appeals were nullities, the mere fact that an action fails to confer jurisdiction on the court does not preclude that jurisdictional defect from being cured through substitution. "[I]f § 52-109 is to have the ameliorative purpose for which it was intended, then even assuming that the specter of subject matter jurisdiction rears its head, the statute is meant to give the trial courts jurisdiction for the limited purpose of determining if the action should be saved from dismissal by the substitution of plaintiffs. . . . The legislature's provision of this statutory remedy would be completely undermined by any rule requiring the immediate dismissal for lack of subject-matter jurisdiction of any action commenced in the name of the wrong person as plaintiff. The statute, as an exercise of the legislature's constitutional authority to determine [our court's] jurisdiction . . . must be seen as an extension of that jurisdiction for the limited purpose of deciding a proper motion to substitute." (Citations omitted; internal quotation marks omitted.) *Youngman* v. *Schiavone*, supra, 157 Conn. App. 64.

Put simply, substitution is available to cure lawsuits that, like the present cases, were commenced by unauthorized parties. Our Supreme Court recognized this in *Kortner* v. *Martise*, supra, 312 Conn. 1, in which the plaintiff, in her capacity as conservator of Caroline Kortner's person, commenced a tort action against the defendant, asserting that the defendant committed a variety of torts against Kortner. Id., 8. Kortner died after the action was commenced, the plaintiff was appointed administratrix of her estate, and the trial court granted the plaintiff's motion to substitute herself as administratrix as the plaintiff in the action. Id., 11. On appeal, the Supreme Court sua sponte ordered the parties to brief the issue of whether the plaintiff lacked standing to sue as conservator of Kortner's person. Id., 9 and n.7. The court concluded that, "even assuming, arguendo, that the plaintiff did not have standing to bring the claim when she commenced the action . . . any defect was cured when she, as administratrix of [Kortner's] estate, was substituted as the plaintiff . . . and that substitution related back to the commencement of the action." Id., 14. By permitting substitution to cure the alleged jurisdictional defect, the court implicitly recognized in *Kortner* that substitution under § 52-109 is not categorically unavailable to cure lawsuits commenced by unauthorized parties.

We also do not agree with the trial court's reasoning in its memorandum of decision dismissing Freese's appeal that substitution would prejudice the defendant because it would permit Freese to avoid the forty-five day limitation period for filing administrative appeals. Our case law recognizes that "[w]hen a plaintiff is added to the case to correct a mistake in ascertaining the real plaintiff in interest, the defendant rarely, if ever, will be prejudiced, as long as he was fully apprised of the claims against him and was prepared to defend against them." *DiLieto* v. *County Obstetrics & Gynecology*

Group, P.C., supra, 297 Conn. 158. Additionally, "substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff . . . and, further, is permissible even after the statute of limitations has run." (Citation omitted; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 553. Here, Freese brought her administrative appeal on October 29, 2014, within the forty-five day limitation period, and her pleadings fully apprised the defendant of the claims she was raising. Thus, it is difficult to discern the way in which the defendant would be prejudiced by substitution.

The defendant advances additional arguments as to why substitution was unavailable. The defendant argues that administrative appeals are not "actions" eligible to be cured under the provisions of § 52-109, and that there was not a sufficient identity of interest between the originally named plaintiffs and the plaintiffs in their capacities as estate fiduciaries. Moreover, the defendant argues that, in light of *Kortner* v. *Martise*, supra, 312 Conn. 14, substitution was unavailable in the plaintiffs' cases because the plaintiffs' decedents were deceased by the time the defendant issued appealable administrative decisions and, therefore, did not have standing in their own right to bring the appeals.

We turn first to the defendant's argument that the plaintiffs' administrative appeals are not "actions" for purposes of § 52-109. That section provides: "When any *action* has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." (Emphasis added.) Section 52-109 thus requires that, in order to fall within the statute's saving grace, a case must be an "action." As support for

its argument, the defendant cites to *Carbone* v. *Zoning Board of Appeals*, 126 Conn. 602, 13 A.2d 462 (1940), *Bank Building & Equipment Corp. of America* v. *Architectural Examining Board*, 153 Conn. 121, 214 A.2d 377 (1965), and *Chieppo* v. *Robert E. McMichael, Inc.*, 169 Conn. 646, 363 A.2d 1085 (1975), none of which deal with § 52-109 at issue here.

In *Carbone* v. *Zoning Board of Appeals*, supra, 126 Conn. 602, writing for our Supreme Court, Justice Maltbie, with logic and brevity worthy of Tacitus, observed that, as used in our General Statutes, "the word 'action' has no precise meaning and the scope of proceedings which will be included within the term as used in the statutes depends upon the nature and purpose of the particular statute in question." Id., 605. In deciding that an appeal from a zoning board was not an "action" for purposes of the accidental failure of suit statute, General Statutes § 52-592 (then codified as General Statutes [1930 Rev.] § 6024), the court held that statutory actions and special laws that fix a rather brief time in which appeals may be taken to the courts from the order and decisions of administrative boards, and that make it possible to proceed in the matter as soon as the time to take an appeal has passed if one has not been filed, were unsuited to be considered "actions" that could be saved under the one year recommencement provision of the accidental failure of suit statute. Id., 607. The court stated that "[t]o hold that an appeal in such a proceeding as the one before us is an 'action' within the meaning of [the accidental failure of suit statute] would have the practical effect of eliminating the time factor in taking such appeals." Id.

We see important distinctions between the present cases and *Carbone*. The *Carbone* court wisely ruled that a fifteen day appeal period could not be extended to one year under the accidental failure of suit statute because the short fifteen day appeal period had been

established by the legislature, rather than rule of the court, so that persons who might have received an approval of a zoning application could proceed with a project and so that public officials charged with issuing permits could issue them knowing that no appeal had been taken in the fifteen day period permitted. We see no such imperative here. Under § 4-183, the appeal statute in the present cases, the appeal period is forty-five days, three times longer than the time within which zoning appeals must be taken.[14] Unlike *Carbone*, there is no similar need to "proceed in the matter as soon as the time to take an appeal has passed if one has not been filed." *Carbone* v. *Zoning Board of Appeals*, supra, 126 Conn. 607. Moreover, unlike *Carbone*, the remedial statute involved here is § 52-109.

In *Bank Building & Equipment Corp. of America* v. *Architectural Examining Board*, supra, 153 Conn. 121, also relied upon by the defendant, the statute involved was General Statutes (Cum. Supp. 1965) § 20-289, which governed appeals from orders of the Architectural Examining Board and provided that such appeals must be taken within thirty days of the date of an order. Id., 123. Rejecting the plaintiffs' request to overrule *Carbone*, the court determined that an appeal under § 20-289 was not an "action" for purposes of the accidental failure of suit statute, § 52-592, or a "civil action" under General Statutes § 52-593, which provides that a plaintiff in "any civil action" who fails to obtain a judgment by reason of failure to name the right person as defendant may bring a new action even if the statute of limitations had expired. Id., 124. In reaching this conclusion, the court found it "significant that § 20-289, in authorizing appeals from the defendant board,

[14] Unless specifically regulated by statute, the time frame for taking appeals in Connecticut is governed by the rules of practice. See Practice Book § 63-1 (a).

requires that the citation be 'signed by the same authority' and that the appeal be 'returnable at the same time and served and returned in the same manner as is required in the case of a summons in a civil action.' . . . The steps prescribed in § 20-289 are easily understood. It is apparent from the language used that the General Assembly intended to set forth a procedure distinct from the ordinary concept of a civil action."[15] (Citation omitted.) Id., 125. By contrast, § 4-183 does not set forth any procedure distinct from the procedure used to bring an ordinary civil action.[16]

The defendant also argues that *Chieppo* v. *Robert E. McMichael, Inc.*, supra, 169 Conn. 646, supports the proposition that the present administrative appeals are not actions under § 52-109. *Chieppo*, however, also has factual distinctions from the present cases. *Chieppo* dealt with a workers' compensation appeal pursuant to General Statutes (Rev. to 1975) § 31-301 (a), which, at that time, provided for a very limited ten day appeal

[15] General Statutes (Cum. Supp. 1965) § 20-289 required the use of a citation commanding a party to appear rather than a summons, and provided in relevant part: "Any person aggrieved by an order made under this chapter may, within thirty days after the entry of such order, appeal to the superior court for the county in which he resides from such order, which appeal shall be accompanied by a citation to said board to appear before said court. Such citation shall be signed by the same authority and such appeal shall be returnable at the same time and served and returned in the same manner as is required in the case of a summons in a civil action. The authority issuing the citation shall take from the applicant a bond or recognizance to the state, with sufficient surety, to prosecute the application to effect and to comply with the orders and decrees of the court in the premises. Such application shall operate as a stay of such order pending the ultimate determination of the appeal, including an appeal to the supreme court, if any, unless otherwise ordered by the court. . . ."

[16] Moreover, we note that, subsequent to our Supreme Court's decision in *Bank Building & Equipment Corp. of America* v. *Architectural Examining Board*, supra, 153 Conn. 121, the legislature amended § 20-289 to eliminate the thirty day appeal period. Under the current version of § 20-289, "[a]ny person aggrieved by an order made under this chapter may appeal from such an order as provided in section 4-183."

period within which it might be brought. An employer whose appeal had been dismissed because it had been brought in the wrong court sought to transfer the matter to the proper court pursuant to General Statutes (Rev. to 1975) § 52-32. Id., 648–49. Because the purpose of the workers' compensation act was to provide a prompt, effective means of compensating injured workers for related expenses, it was not deemed a "civil action" for purposes of § 52-32. Id., 653–54. Given the much shorter ten day window for filing an appeal in *Chieppo*, and the obvious legislative purpose of the workers' compensation statutes to ensure that injured workers were provided with a prompt remedy in lieu of their right to sue their employer or negligent fellow worker, the ruling that such appeals are not ordinary civil actions was consistent with the framework that Chief Justice Maltbie's opinion in *Carbone* v. *Zoning Board of Appeals*, supra, 126 Conn. 602, used to decide whether a particular case was a civil action eligible to be saved by a remedial statute, namely, analysis of the nature and purpose of the particular statute in question.

For these reasons, we do not find *Carbone*, *Bank Building & Equipment Corp. of America* or *Chieppo* persuasive for purposes of determining whether administrative appeals under § 4-183 are "actions" that are salvageable under § 52-109. We conclude that substitution is available under § 52-109 to cure an administrative appeal commenced in the name of an improper party due to a mistake.[17]

[17] It bears noting that our rules of practice explicitly contemplate that the term "action" for purposes of substitution encompasses administrative appeals brought under § 4-183. Practice Book § 9-20, which is identical to § 52-109 in all material respects, provides: "When any *action* has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." (Emphasis added.) Practice Book § 14-6, which is entitled "administrative appeals are civil actions," provides: "For purposes of these rules, administrative appeals are civil actions subject to the provisions and exclusions of General Statutes § 4-183

The defendant also claims that substitution was unavailable because there is an insufficient identity of interest between the plaintiffs in their purported capacities as next of friend, putative administrator, and estate examiner, and the plaintiffs in their capacities as fiduciaries of their decedents' estates. The defendant grounds this argument in the assertion that, "whereas the plaintiffs claim to represent the decedents' interest, the estate fiduciaries represent the decedents' creditors' interest, and, though related, the two sets of interests do not coincide." We disagree. The pleadings in the present cases do not reflect that the plaintiffs, as estate fiduciaries, represent the interests of the decedents' creditors rather than the decedents' interests. To the contrary, the plaintiffs filed proposed amended complaints in conjunction with their requests for substitution in which they both alleged that the rights *of their decedents* were prejudiced by the defendant's erroneous denials of their Medicaid applications. Thus, whether suing in the unauthorized capacities of next of friend, putative administrator or estate examiner, or in their proper capacities as estate fiduciaries, the plaintiffs sought the very same thing—to vindicate their decedents' rights to Medicaid benefits. Accordingly, there is no identity of interest impediment to substitution.

Finally, we do not agree with the defendant's reading of *Kortner* as holding that, for substitution to be appropriate, the decedent must have been alive at the time the original action was commenced. The defendant relies on the specific language from *Kortner* in which our Supreme Court cautioned that its decision that substitution was available was "not meant to suggest that

et seq. and the Practice Book. Whenever these rules refer to civil actions, *actions*, civil causes, causes or cases, the reference shall include administrative appeals except that an administrative appeal shall not be deemed an action for purposes of section 10-8 of these rules or for General Statutes §§ 52-48, 52-591, 52-592 or 52-593." (Emphasis added.)

any person who is appointed an administrator of an estate becomes a proper party to any claim. As § 52-109 requires, the substitution of an administrator of an estate 'is necessary for the determination of the real matter in dispute . . . .' *In the present case, it is clear that* [*Kortner*] *herself had a colorable claim of injury, therefore, the substitution of the plaintiff, as administratrix of the estate, cured any possible jurisdictional defect.*" (Emphasis added.) *Kortner* v. *Martise*, supra, 312 Conn. 14. We do not read this portion of *Kortner* as categorically barring substitution under § 52-109 in every situation in which the decedent predeceases the commencement of the original action. Rather, the court merely was observing that the decedent in *Kortner* had standing by virtue of the fact that she suffered a personal, particularized injury. Similarly, the decedents in the present cases suffered personal legal injuries as a result of the defendant's denials of their Medicaid applications. The defendant's reading of *Kortner* would effectively undermine the remedial purpose of § 52-109.

Because the trial court did not issue findings as to the prerequisites for substitution under § 52-109, we conclude, consistent with *Allied Associates* v. *Q-Tran, Inc.*, 165 Conn. App. 239, 245, 138 A.3d 1104 (2016), that the judgment of dismissal must be reversed and the case remanded to the trial court for further findings. Specifically, the court must determine, in each plaintiff's case, whether (1) the plaintiff's failure to name the estate fiduciaries as plaintiffs was the result of a mistake, that is, an error, misunderstanding or misconception, and (2) whether substitution is necessary to determine the real matter in dispute. See General Statutes § 52-109.

The judgments are reversed and the cases are remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.