GARY BIRKHAMSHAW, ADMINISTRATOR (ESTATE OF GEORGE M. UPTON, JR.) *v.* JOSEPH SOCHA ET AL.
(AC 36058)

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

Argued December 2, 2014—officially released April 14, 2015

(Appeal from Superior Court, judicial district of New London, Peck, J.)

Roman T. Galas, pro hac vice, with whom were *Stephen P. McLaughlin*, *Andrew S. Turret* and, on the brief, *James H. Gordon*, pro hac vice, for the appellants (defendants).

Kevin C. Ferry and *Stephen M. Reck*, for the appellees (plaintiffs).

Opinion

MULLINS, J. This wrongful death case involves a tragic motor vehicle accident in which George M. Upton, Jr. (decedent) lost his life. The defendants, Joseph Socha and United Parcel Service, Inc. (UPS), appeal from the judgment of the trial court, accepting the jury's verdict and awarding damages to the plaintiffs, Gary Birkhamshaw, the administrator of the estate of the decedent, and Julie Upton (Upton), the wife of the decedent. The defendants claim that the court: (1) erred in denying their motion to dismiss Upton's claims for lack of subject matter jurisdiction on the ground that Upton did not have standing in this case, having never been named in a summons properly served on the defendants; (2) abused its discretion by denying their motion to preclude evidence of the decedent's driving practices; (3) abused its discretion by permitting the plaintiffs' expert witness, Lew Grill, to offer an opinion on accident reconstruction and on Socha's cell phone usage; (4) abused its discretion by precluding the testimony of the defendants' expert witness, Stephen B. Chewning; (5) abused its discretion by striking the testimony of the defendants' expert witness, Stephen Fenton; (6) abused its discretion in barring any reference during closing argument to an expert witness, Michael Cei, who was not called by the plaintiffs; and (7) erred as a matter of law by awarding interest and attorney's fees to the plaintiffs pursuant to General Statutes § 52-192a (c). We affirm the judgment of the trial court.

The following facts reasonably could have been found by the jury. At approximately 2:57 a.m. on November 23, 2010, Socha was driving a UPS tractor trailer truck in the right lane of Interstate 395 in Norwich. He was nearing the end of a twelve hour workday for UPS. As he approached exit 82, he was traveling approximately sixty-seven miles per hour as he drove around a left-hand curve and then down a straight downgrade in the interstate.

The decedent, who was driving his pickup truck, was on his way to work at Trimac Transportation, Inc., where he was a tanker truck driver. The decedent also was traveling in the right lane approaching exit 82, but at a much lower rate of speed, approximately fifty miles per hour.

As Socha drove around the left-hand curve, he and the decedent were approximately one quarter of a mile apart and approximately fifty-two seconds from impact. Socha, who did not see the decedent's pickup truck until it was too late to avoid it, hit it from behind, causing it to veer off the road, over the guardrail, through a light pole, and down an embankment. The decedent was ejected from the pickup truck and was killed.

Birkhamshaw filed a wrongful death action against

the defendants sounding in negligence and recklessness. Before the statute of limitations ran on her loss of consortium claim, Upton was added as a plaintiff, and an amended complaint was filed that included loss of consortium claims also sounding in negligence and recklessness.

The jury found that Socha was 100 percent responsible for the accident and that he was both negligent and reckless. It awarded Birkhamshaw economic damages in the amount of $508,132, and noneconomic damages in the amount of $1,500,000. It also awarded Upton $1,875,000 on her loss of consortium claims. The jury declined, however, to award double or treble damages under General Statutes § 14-295.[1] This appeal followed. Additional facts will be set forth as necessary.

I

The defendants first claim that the court erred in denying their motion to dismiss Upton's claims for lack of subject matter jurisdiction. They argue that Upton did not have standing in this case because she was never named in a summons properly served on the defendants. They contend that, under our rules of practice, Upton was required to serve them with a new or amended summons in order to gain party status in the case. Additionally, they contend that the court also issued an order requiring that Upton be named in a summons and that the summons be issued to the defendants. They contend that the failure to do so deprived the court of subject matter jurisdiction over Upton's claim because, without the issuance of an amended summons, she never was made a party to the action.

The plaintiffs respond that "[t]he defendants were properly summoned to court, and they agreed to the form of the summons, and, even if they did not agree, it is clear that they waived any defect by not filing a motion to dismiss within [thirty] days." They also argue that, "[i]f the defendants had their way, then the thousands of cases where parties were added by agreement of counsel, without a formal summons and complaint, should all be overturned for lack of jurisdiction. The defendant[s] cannot be rewarded by [lying] in wait . . . . The court's ruling was proper, as Julie Upton was a known party to everyone, including the court." We agree that the court properly denied the defendants' motion to dismiss.

The following additional facts are relevant to this claim. On March 31, 2011, Birkhamshaw filed a motion to cite in Upton as a plaintiff and to amend his complaint to include claims for loss of consortium.[2] On April 19, 2011, the court granted the motion, which was unopposed, and the clerk's office issued the following order: "It appearing that the foregoing motion should be granted, it is hereby ordered that, on or before May 26, 2011, the plaintiff amend his complaint to state facts

showing the interest of Julie Upton in this action and summon Julie Upton to appear as a defendant in this action on or before the second day following June 7, 2011, by causing some proper officer to serve on him in the manner prescribed by law a true and attested copy of this order, a true and attested or certified copy of the complaint in this action as amended, and a summons civil for JD-CV-1 and due return make."[3]

On May 25, 2011, the defendants filed an answer with special defenses to the plaintiffs' amended complaint, including the new claims on behalf of Upton. On April 25, 2012, the plaintiff sought to file an amended complaint to add a cause of action for negligent supervision against UPS, and the defendants filed an objection to the amendment. The court overruled the objection, and, on June 29, 2012, the defendants filed a new answer with special defenses. On November 15, 2012, the plaintiffs again sought permission to file an amended complaint, this time removing the claim for negligent supervision against UPS, and, on January 13, 2013, the plaintiffs filed another request for leave to amend their complaint.

On January 22, 2013, after the jury was picked, the defendants filed a motion to dismiss Upton's loss of consortium claims. In their motion, the defendants claimed that the court lacked subject matter jurisdiction because (1) Birkhamshaw lacked standing to pursue Upton's claims, and (2) Upton was never properly made a party to the action because the defendants were never served with a summons that had Upton's name on it. The plaintiffs filed an objection on January 23, 2013, arguing that this was a matter of personal jurisdiction, not subject matter jurisdiction, and that the defendants had agreed to this procedure and had waived any objection by waiting years to raise the issue. That same day, the following order issued: "ORDER REGARDING: 01/22/2013 204.00 MOTION TO DISMISS. The foregoing, having been considered by the clerk, is hereby: ORDER[ED]: DENIED. Short Calendar Results Automated Mailing (SCRAM). Notice was sent on the underlying motion."

Despite the issuance of this order on January 23, 2013, our review of the transcripts in this case reveals that the court heard argument on the defendants' motion to dismiss on both January 23 and 24, 2013, before ruling. The court repeatedly asked the defendants' counsel to explain why this was not a matter of personal jurisdiction, rather than subject matter jurisdiction. He explained that the "sole issue" was whether Upton was named on a summons properly served on the defendants because that was the only way for her to gain standing in the case. The court asked the defendants' counsel if he was suggesting that in the "many, many, many" cases where "counsel accept[s] service on behalf of a client," that "those cases are somehow defective because the court lacks subject matter juris-

diction." The defendants' counsel stated that he was not making such a suggestion. He stated, however, that "a person named in a complaint and even in the caption of a case is not a party plaintiff if he or she is not named and listed as a plaintiff on the summons served on the defendant. Service is not an issue because the summons doesn't list Julie Upton in the first place." The court then questioned whether the defendants' counsel was arguing that "parties can't be added by consent." He stated that they must "institute their civil action by being named on a summons. Otherwise they're not plaintiffs before the court."

The plaintiffs' counsel responded that the letter he sent to the defendants' counsel with his motion to cite in Upton as a plaintiff and his amended complaint should be viewed as fulfilling any requirements of a summons, and that the defendants agreed to this procedure and waived any objection by not filing a timely objection or a timely motion to dismiss. He also asked the court to consider General Statutes § 52-123.[4] The court opined that the filing of a responsive pleading gives the court personal jurisdiction over the defendants, and that the defendants agreed to this procedure by not objecting to the plaintiffs' counsel's letter and method of service. The court stated that it did not agree with the defendants' counsel's premise that this was a matter of subject matter jurisdiction, and it denied the motion to dismiss.[5] The defendants claim this was error because Upton did not having standing in this case, having not been formally named on a summons that was properly served on the defendants. We disagree.

"It is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [W]hen standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the [party] has a legally protected interest [that may be remedied]. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather, it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury [that] he has

suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . .

"Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary. . . . [I]n determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *One Country, LLC* v. *Johnson*, 314 Conn. 288, 297–98, 101 A.3d 933 (2014).

The defendants argue: "Despite an express April 19, 2011 order from the court requiring that a new summons be issued after Julie Upton . . . was given leave to join the action as a plaintiff . . . only a single summons was ever filed, and that summons lists a single plaintiff . . . . No summons lists Julie Upton as a plaintiff." They contend that Upton is not a proper party to this case because she never was listed on a summons properly served on the defendants. We conclude, however, that the lack of a supplemental or amended summons naming the additional plaintiff, whom the court granted leave to be added to the case without objection from the defendants, implicated the court's personal jurisdiction over the defendants, rather than the subject matter jurisdiction of the court.

We find our Supreme Court's decision in, *Hillman* v. *Greenwich*, 217 Conn. 520, 587 A.2d 99 (1991), instructive. In *Hillman*, the plaintiff served the original complaint on the defendant without a writ of summons and without any of the information required to be in a writ of summons. Id., 524. The defendant then filed "a timely motion to dismiss for lack of personal jurisdiction, because there was no writ of summons attached to the complaint." Id. The plaintiff responded by serving an amended complaint and a writ of summons on the defendant. Id. The court, thereafter, denied the defendant's motion to dismiss. Id. The defendant later appealed from the court's judgment, claiming, inter alia, that the motion to dismiss should have been granted. Id.

On appeal, our Supreme Court explained: "Practice Book 49 [now Practice Book § 8-1] provides that [m]esne process in civil actions shall be a writ of summons . . . describing the parties, the court to which it is returnable and the time and place of appearance, and shall be accompanied by the plaintiff's complaint. Such writ . . . shall be signed by a commissioner of the superior court . . . . [T]he writ of summons shall be on a form substantially in compliance with . . . Form 103.1 (JD-CV-1) . . . . See also General Statutes § 52-45a. In ordinary usage of the term, [a summons is the] original process upon a proper service of which an action is commenced and the defendant therein named

brought within the jurisdiction of the court . . . . Ballentine's Law Dictionary (3d Ed.). A summons is part of a citation. The citation . . . is a command to a duly authorized officer to summon the [defendant] . . . to appear in court on a specific day to answer the [complaint]." (Footnote omitted; internal quotation marks omitted.) Id., 524–25.

Our Supreme Court then explained: "[A] writ of summons is a statutory prerequisite to the commencement of a civil action. General Statutes 52-45a. A writ of summons is . . . an essential element to the validity of the jurisdiction of the court. . . . Although the writ of summons need not be technically perfect, and need not conform exactly to the form set out in the Practice Book . . . the plaintiff's complaint must contain the basic information and direction normally included in a writ of summons. Because the plaintiff in this case failed to comply in any fashion with these basic requirements, we conclude that the trial court should have granted the defendant's motion to dismiss the complaint . . . for lack of personal jurisdiction over the defendant." (Citations omitted.) Id., 526; see also *Laudette* v. *Franklin*, Superior Court, Judicial District of Middlesex, Docket No. CV-00-103577-S (June 4, 2004) (37 Conn. L. Rptr. 192) (applying § 52-123, court concluded it was not deprived of subject matter jurisdiction when one plaintiff not named in summons but was properly listed in complaint because defect merely circumstantial as defendant had timely notice of claim); *Coburn* v. *Quaratella*, Superior Court, Judicial District of New London, Docket No. 563074 (January 27, 2003) (34 Conn. L. Rptr. 32) (conducting thorough analysis of *Hillman* and concluding that where one plaintiff not named in summons served by other plaintiff, but clearly designated in complaint, common-law purpose of mesne process accomplished, and defect is circumstantial not jurisdictional).

Our Supreme Court in *Hillman* clearly opined that the trial court should have granted the defendant's motion to dismiss for *lack of personal jurisdiction* in that case, the defendant having filed a *timely* motion to dismiss when he received no summons or the equivalent thereto from the plaintiff. See *Hillman* v. *Greenwich*, supra, 217 Conn. 526. In the present case, the defendants did not file a timely motion to dismiss for lack of personal jurisdiction. They had notice of Birkhamshaw's motion to cite in Upton as a plaintiff and to amend the complaint, they offered no objection thereto, and they then filed an answer to the amended complaint and to subsequently amended complaints. The defendants then waited nearly two years after the court granted the motion to cite in Upton as a plaintiff before filing a motion to dismiss, and, along the way, they filed responsive pleadings. "[T]he Superior Court . . . may exercise jurisdiction over a person . . . if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objec-

tion to the court's exercise of personal jurisdiction." (Internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 529–30, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014). We conclude that the defendants implicitly agreed to the procedure employed by Birkhamshaw in adding Upton as a plaintiff and, also, that they waived any objection thereto by their failure to file a timely motion to dismiss or other form of objection.

II

The defendants claim that the court abused its discretion by denying their motion in limine to preclude evidence of the decedent's driving practices and by permitting the introduction of this evidence during trial. They argue that this evidence amounted to improper character evidence and that its admission violated § 4-4 (a) of the Connecticut Code of Evidence. The plaintiffs contend that this evidence went to the decedent's habits, rather than his character, and that objections to some of the statements to which the defendants now cite were not preserved by a proper objection.

We conclude that the court did not deny the defendants' motion, but reserved its ruling pending the introduction of specific testimony, that the defendants failed to object to some of the testimony that they now complain should have been excluded, and that the court improperly overruled some objections. Nevertheless, after a thorough review of the record, we are left with a fair assurance that the court's improper evidentiary rulings on character evidence were harmless and likely did not affect the jury's verdict.

The following additional facts are relevant to this claim. Before the start of evidence, the defendants filed a motion in limine seeking to "preclude evidence regarding the *driving habits* of [the] decedent . . . ." (Emphasis added.) The defendants argued this evidence—"that [the decedent] was a safe and cautious driver"—was inadmissible under §§ 4-4 and 4-6 of the Connecticut Code of Evidence because, in reality, it was character evidence. They argued that the plaintiffs would be required to "show, at a minimum, that [the decedent] had *repeatedly* responded to a situation similar to the one that he was faced with *at the time of the subject accident* . . . [but that] these witnesses' testimonies entail a generalized description of [the decedent's] disposition as to a particular trait—i.e., that he was generally not careless. The evidence thus falls squarely within the meaning of character evidence, as opposed to evidence of habit." (Emphasis in original; internal quotation marks omitted.) The plaintiffs argued that there "were several witnesses who [would] meet the foundational requirements for habit evidence and [that] the evidence should be allowed." The court heard argument on the motion on January 24, 2013.

Although the defendants assert that the court denied their motion to preclude evidence regarding the decedent's driving habits, we disagree with this assertion. During argument on the motion, the court stated that it was being asked to rule on "something in a vacuum" and that it was not "inclined to order the plaintiff[s] to not ask questions that may involve the habit/custom of the plaintiffs' decedent." The court further stated that it was not "fair to enter a blanket prohibition of that type of evidence under all the circumstances and based on the representation of counsel that this . . . doesn't fall . . . within the definition of habit . . . ." The court then heard argument on other motions prior to the parties' opening statements. It appears from our review of the record and the court's discussion of this motion with counsel that the court did not deny the motion, but that it left the issue of habit evidence open for objection during trial as specific testimony was offered. The court explained that the defendants' motion was far too expansive and that it would not rule "in a vacuum," in light of the fact the habit evidence is admissible. Accordingly, we will examine the testimony that the defendants now assert was admitted improperly.

On appeal, the defendants cite to the following testimony as improper character evidence that the court should have precluded: "Kenneth Evans, a coworker [of the decedent], said he passed [the decedent] a 'couple dozen time[s],' and denied that [the decedent] was in the left lane at those times. Michael Brown said he rode with [the decedent] 'on occasion,' and [the decedent] 'had a habit of obeying all the laws,' 'a habit of driving slow . . . in his own personal vehicles,' and 'always did the things that you were supposed to do, using your turn signals and driving in the right-hand lane.' Maria Krecidlo said [the decedent] was 'constantly teaching us about what it takes for us, a truck driver and the importance of the safety [rules] and respecting them.' " The defendant also cites certain testimony of Birkhamshaw, stating that the decedent "drove like a grandma," made no "sudden accelerations," and had received "million mile safe driving awards" and "a gold watch . . . for three years of service without any incidents." A review of the trial transcripts reveals that the defendants failed to object to any of these statements. Accordingly, the issue of whether this testimony amounted to improper character evidence is not preserved for review.

Additionally, the defendants argue: "Unsatisfied with just those witnesses, the plaintiff[s] elicited hearsay testimony regarding [the decedent's] safe driving character from expert Lew Grill, who lacked any personal knowledge: 'He was a conservative driver that would—that would practice what I call economy driving; drive his vehicle like he's got an egg under his foot trying to

accomplish as much fuel mileage out of his car that he can which means not fast accelerations, not sudden stopping movements, and a smooth driver. I call it a conservative driver with economy driving. . . . Safe." A review of this testimony reveals that the defendants objected to portions of it solely on the ground of relevance, and that the court overruled their objection. The defendants made no objection on the ground of improper character evidence. Accordingly, the issue of whether this testimony amounted to improper character evidence is not preserved for our review.[6] See *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013) ("[o]nce counsel states the authority and ground of [the] objection [before the trial court], any appeal will be limited to the ground asserted" [internal quotation marks omitted]).

The defendants also cite the following testimony, which properly was preserved by objection, as improper character evidence that the court should have precluded: "Through Ron [Bradley] Coleman, a supervisor of [the decedent], the plaintiffs admitted a 'performance review' record in which Coleman noted that [the decedent] had 'a clean twelve month history,' and elicited testimony that [the decedent] had no 'accident or mishap at work,' and was 'a very safe' and 'very good' driver, with 'very good overall performance.' " Additionally, the defendants argue that Upton was permitted to testify that the decedent received "many safety awards," that he had not gotten into any accidents while driving, and that he always drove in the right-hand lane at a speed of fifty-five miles per hour.

The defendants argue that this testimony was character evidence, rather than habit evidence, and that the court improperly admitted this evidence. The plaintiffs argue that this evidence was habit evidence, designed to address the defendants' special defense that the decedent had been negligent or reckless. We conclude that some of this testimony should have been precluded as improper character evidence.

"To the extent [that] a trial court's admission of evidence is based on an interpretation of [our code of evidence], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] [on these bases] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably

[could have] conclude[d] as it did." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

To properly address the defendants claim, we must first examine the distinction between character evidence and habit evidence. With respect to character evidence, § 4-4 (a) of the Connecticut Code of Evidence provides in relevant part: "Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion . . . ."[7]

With respect to habit evidence, § 4-6 of the Connecticut Code of Evidence provides: "Evidence of the habit of a person or the routine practice of an organization is admissible to prove that the conduct of the person or the organization on a particular occasion was in conformity with the habit or routine practice."

"While [§] 4-4 [of the Connecticut Code of Evidence] generally precludes the use of evidence of a trait of character to prove conforming behavior, [§] 4-6 admits evidence of a person's habit or an organization's routine practice to prove conformity therewith on a particular occasion. . . . The distinction between habit or routine practice and 'trait of character' is, therefore, dispositive.

"Whereas, a 'trait of character' entails a generalized description of one's disposition as to a particular trait, such as honesty, peacefulness or carelessness, habit is a 'person's regular practice of responding to a particular kind of situation with a specific type of conduct.' " (Citations omitted.) Conn. Code Evid. § 4-6, commentary; see C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 4.21.2, pp. 177–78 ("Habit and custom should be distinguished from character and reputation. Habit and custom refer to a course of conduct that is fixed, invariable, and unthinking, and generally pertain to a very specific set of repetitive circumstances. On the other hand, character and reputation refer to broad traits of behavior such as violence, honesty, etc.").

"Testimony as to the habit or practice of doing a certain thing in a certain way is evidence of what actually occurred under similar circumstances or conditions. . . . Evidence of *a regular practice* permits an inference that the practice was followed on a given occasion." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Hubbard*, 32 Conn. App. 178, 185, 628 A.2d 626, cert. denied, 228 Conn. 902, 634 A.2d 296 (1993).

Here, as mentioned previously, the court properly admitted some habit evidence, but also improperly admitted some character evidence. As to habit evidence, Upton, the decedent's wife, testified that the decedent always drove in the right-hand lane at a speed of fifty-five miles per hour. We conclude that this testi-

mony is habit evidence of the decedent's regular practice of driving rather than character evidence, and that the court properly overruled the defendants' objection to this testimony.

Nonetheless, as to character evidence, the court also permitted Upton to testify that the decedent received "many safety awards," including a "million miles safety award," for driving one million miles without an accident. The court also admitted a copy of the decedent's performance review from work into evidence, over the defendants' objection, during Coleman's testimony, and the court permitted Coleman to testify that the decedent had a clean twelve month driving history, that he had no accidents or mishaps at work, and that he was a very safe and very good driver, with "very good overall performance." We agree with the defendants that the court improperly overruled their objections to this evidence on the ground that it was improper character evidence. See Conn. Code Evid. § 4-6, commentary (character evidence entails generalized description of person's disposition as to particular trait).

This conclusion does not end our inquiry, however. "[E]ven when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Finally, the standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely] would [have] affect[ed] the result. . . . Moreover, an evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not affect the jury's verdict. . . .

"A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial. . . . Thus, our analysis includes a review of: (1) the relationship of the improper evidence to the central issues in the case, particularly as highlighted by the parties' summations; (2) whether the trial court took any measures, such as corrective instructions, that might mitigate the effect of the evidentiary impropriety; and (3) whether the improperly admitted evidence is merely cumulative of other validly admitted testimony. . . . The overriding question is whether the trial court's improper ruling affected the jury's perception of the remaining evidence." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Hayes* v. *Camel*, 283 Conn. 475, 488–90, 927 A.2d 880 (2007).

After reviewing the entire record in this case, we have a fair assurance that this evidentiary impropriety likely did not affect the jury's verdict and, therefore, was harmless. This evidence vaguely was related to the central issue in the case, namely, whether Socha legally was responsible for the accident that killed the dece-

dent. Although the plaintiffs' counsel spoke of the decedent's safe driving practices during closing argument, counsel for the defendants also argued: "Both drivers here were good drivers. They were both good drivers. This doesn't mean that an accident didn't occur, does it? Of course not. An accident did occur. That's corroborated. If we were to believe the plaintiffs, good drivers don't get in accidents, we wouldn't have had an accident because we had two gentlemen with equally good driving history and habits. Equally good."

Nevertheless, counsel for both parties repeatedly argued that the *central issue* in the case was the credibility of Socha, and whether he was negligent and reckless, and a review of their closing arguments reveals that the arguments were much more focused on Socha's credibility than on the driving record of the decedent. At the beginning of his closing argument, counsel for the defendants stated that "[c]redibility has been the theme effectively of the plaintiffs' case." We agree with that statement. Additionally, a review of the trial court's charge to the jury reveals that it did not address the decedent's driving record or character evidence. As to whether the improperly admitted character evidence was merely cumulative of other validly admitted testimony, we conclude that the evidence for which there was a proper objection was merely cumulative of the following other evidence for which no objection was raised.

First, Evans, who had worked driving tanker trucks at Trimac Transportation, Inc., with the decendent for at least eight years before the fatal accident, testified, without objection, that the decedent had conducted an experiment to see at what speed he would save the most fuel during his commute to work, and that he had told Evans that fifty-five miles per hour saved the most fuel. Evans then stated that he had passed the decedent driving in the area where the accident occurred on a "few dozen" occasions and that the decedent never was going over the speed limit, and he always was in the right-hand lane.

Second, Brown, a longtime friend of the decedent, testified, without objection, that he occasionally accompanied the decedent when he was making deliveries to Maine or other places. He stated that the decedent was a "professional driver in all sense of the word," that he "had a habit of obeying all the laws," that he "had a habit of driving slow," and that he had a habit of "using [his] turn signals and driving in the right-hand lane."

Third, Coleman, who had been the decedent's supervisor for the five year period preceding his death, testified, without objection, that the decedent had no mishaps at work, had no incidents at work, never cut corners, and that he had never received a complaint about the decedent's driving. Coleman further testified that he asked the decedent to train the other drivers,

that the decedent took pride in his work, that the decedent was "very meticulous," except for sometimes being a little sloppy with his paperwork, and that the decedent was a "steady driver."

Fourth, Birkhamshaw testified, without objection, that the decedent "drove like a grandma." He stated that the decedent "wouldn't make any sudden accelerations," and that "he was just very, very conservative, trying to conserve gas, bragging about gas mileage, just one those kinds of people . . . ." He also testified that the decedent received "a teal jacket . . . an ATA jacket, [from] the American Trucking Association," that he had received "a bunch of pins and badges and things also from them, [and] that [the] jacket was a million mile jacket" that he received for driving one million miles without an accident. The defendants offered no objection to any of this testimony.

After a thorough review of the record, we are left with a fair assurance that the trial court's improper evidentiary rulings on character evidence were harmless and likely did not affect the jury's verdict.

III

The defendants next claim that "the court abused [its] discretion by allowing Lew Grill, [the plaintiffs' expert] to testify at trial." They argue that, despite being disclosed only as a truck driving expert, the "trial court, nonetheless, allowed Grill to offer accident reconstruction testimony,[8] which was based on nothing more than a review of the accident reconstruction reports and expert deposition . . . . Grill offered no reliable methodology to render reconstruction opinions, and the plaintiff[s] admitted he performed no accident reconstruction. . . . In short, the court erred in allowing Grill's accident reconstruction testimony, which was not derived from and based upon a scientifically reliable methodology." Additionally, the defendants contend that the court improperly permitted Grill to give character evidence for the decedent and against Socha.

Insofar as the defendants' statement of the claim and their initial argument seems to assert that the court should have precluded all of Grill's testimony in this case, we conclude that the defendants have waived such a claim. As to the defendants claim that the court should not have allowed Grill to offer any "accident reconstruction" testimony, we are not persuaded. Finally, as to the defendants' argument that the court improperly permitted Grill to offer character evidence for the decedent and against Socha, we conclude that the issue was not preserved.

The following additional facts are necessary for our review. The defendants filed a motion to preclude Grill's testimony on the basis that, inter alia, it lacked scientific and factual foundation. The court heard argument on the motion on January 24, 2013. At that time, the court

sought clarification as to whether the defendants were seeking to preclude certain aspects of Grill's testimony or to preclude the entirety of his testimony. The defendants clarified that they were seeking to preclude the entirety of Grill's testimony. The plaintiffs explained that, although Grill was an accident reconstructionist, they intended to use him primarily as a truck driving expert for this case to help establish the applicable standard of care. The court explained that it would "have to see what the foundation for [the testimony] is [before making a ruling on its admissibility]" and it told the defendants that they certainly could offer objections as they saw fit.

When the plaintiffs called Grill to testify at trial, he first discussed his many credentials, including, but not limited to, his extensive history as a truck driver, his history as an executive in the truck driving industry, his twenty-eight year history as an instructor for truck driving training schools, his work as a representative on various committees with the federal Department of Transportation, his work as an author of fourteen books and as many as twenty videotapes related to truck driving, his work as an author of approximately 400 articles for truck driving magazines, and his formation and twenty-three year ownership of a company that trains approximately 5000 truck drivers per year in sixteen states. He also stated that he is a consultant to the federal government, insurance companies, the fleet industry, and law firms.

Grill then explained how the rules of driving differ for passenger vehicles and commercial trucks, including the requirements for obtaining certain types of commercial driver's licenses. He also explained some of the ways in which driving a tractor trailer truck differs from driving an automobile. Following some additional questions by the plaintiffs, the defendants objected. The court then excused the jury, and the defendants asked the court to conduct "a little mini-*Porter* hearing." The defendants stated that they "had no objection" to Grill testifying "as a fleet safety expert," but that he should not be able to testify as an accident reconstructionist because he did not conduct an accident reconstruction for this case.[9]

The plaintiffs asserted that they planned on having "Grill testify to all the things in his disclosure, which include his review of the accident reconstruction reports, his review of all the deposition testimony, his review of the photographs of the scene and his opinion that Mr. Socha, even if he's accurate about a lane change, which Mr. Grill disagrees with and disagreed with in a four or five hour deposition that they took in Billings, Montana, that he didn't appreciate the vehicle in his zone of awareness. He'll talk about his improper steering . . . about the failure to properly observe, use the lookout, and he's also going to say, based upon his

review of the photographs, his review of the employment files of both of these gentlemen, that it made absolutely no common sense given the physical evidence, given the testimony, and given his knowledge of the truck drivers and what they would do, that [the decedent] was ever in the [left] lane." The defendants argued that Grill should not be permitted to testify about common sense, and the court agreed that an expert was not needed for matters of common sense.

The defendants then argued that Grill should be restricted to hypotheticals regarding the appropriateness of a truck driver's response to certain situations because he did not personally reconstruct the accident. The plaintiffs argued that Grill is a trained reconstructionist who reviewed two accident reconstruction reports in this case and that he was "trained and qualified to review [these reports] . . . ." The court, citing § 7-4 of the Connecticut Code of Evidence,[10] ruled that it would allow the testimony, but that the defendants could object where they felt it was necessary.

When testimony resumed, the plaintiffs asked Grill to explain what he reviewed in preparation for this case. Grill stated that he reviewed case documents, the police report, photographs, a videotape, Socha's deposition, the depositions of police officers, and the depositions of the accident reconstructionists; that he visited the scene of the accident; and that he spoke to Upton, Birkhamshaw, and a superintendent where the decedent had worked. Grill also stated that he reviewed the laws in Connecticut related to passing on the right, the Federal Motor Carrier Safety Regulations, and the commercial driver's license manual.

Showing Grill a photograph of the accident scene, the plaintiffs then asked Grill whether there was any reason that a professional truck driver should not have seen the tail lights of the decedent's pickup truck down the highway, and Grill responded that there was no reason, unless there were visibility or distraction problems. Grill then explained five keys of safe driving: "Aim high in steering, meaning looking twelve to fifteen seconds out ahead of you; get the big picture, meaning, you know, the juxtaposition, the position you are with your vehicle relative to all objects around and those that are stationary . . . keep your eyes moving [and] leave yourself an out by always having a plan." He also explained that professional truck drivers are trained to move away from the danger and to move to the right. He opined that, after reviewing photographs in the record and visiting the scene of the accident, Socha had room to move to the right in this case, "entirely on the shoulder of [the] road." Grill also testified that a professional truck driver who passes another vehicle on the right would be violating Connecticut commercial driving rules if he did not slow down, signal the vehicle he was attempting to pass to communicate his presence,

and verify that the other vehicle was not going to move over.

When the plaintiffs asked Grill whether he had reviewed the cell phone record of Socha for the night of the accident, the defendants objected on the ground of relevance, stating that this had "nothing to do with this accident . . . ." The court overruled the objection, and Grill opined that Socha had an incredible amount of cell phone usage for the night.

Grill then continued his testimony, and, after restating that professional drivers are trained to steer away from danger and to steer to the right, instinctively, the plaintiffs asked him whether the skid marks on the highway moving to the left support the defendants' claim that the decedent was moving into Socha's lane, to which the defendants' counsel objected, claiming a lack of foundation. The court overruled the objection. Grill answered that the skid marks did not support the defendants' claim because a driver is trained to move away from danger and, instinctively, to move to the right, especially when a vehicle allegedly is coming into his lane from the left. The plaintiffs also asked Grill whether the skid marks were consistent with a truck driver closing in on a slow moving vehicle that is established in the right lane, and Grill, without objection from the defendants, opined "that's what I think." He also stated that he thought that the skid marks were consistent with a driver who was not alert and who had panicked and slammed on his brakes.

Following some additional testimony, the plaintiffs asked Grill if he had discussed the decedent's habitual driving behaviors with anyone, and Grill stated that he had spoken to Upton, Birkhamshaw, and the superintendent at the decedent's workplace. The plaintiffs then asked Grill what he had learned about the decedent's habitual driving behaviors, and the defendants objected on the ground of relevance. The court overruled the objection, and Grill testified that the decedent was a conservative driver, who tried to conserve fuel by not driving fast, not engaging in sudden stops, and not engaging in quick acceleration.

Finally, the plaintiffs asked Grill, without objection, to "summarize, based only [on his] review of all the cases and [his] expertise, what truck driving rules were violated by Mr. Socha in this case," and Grill responded: "Sure. Failure to keep a good lookout, failure to identify a hazard that he had a duty to identify and to avoid, failure to properly manage speed, failure to properly manage space, driving too fast for conditions, failure to avoid, [and] failure to warn."

A

As to the defendants' claim that the court abused its discretion by allowing Grill to give "accident reconstruction" testimony, we are not persuaded. As

explained previously, the defendants initially sought to preclude Grill's entire testimony. They then asked the court to hold a mini-*Porter* hearing in which they stated that they had no objection to Grill's testifying as a truck driving expert, but that he was not qualified to give any accident reconstruction testimony because he personally had not performed an accident reconstruction in this case. The court overruled the objection and stated that the defendants could offer objections to Grill's testimony when they thought objections were necessary. We conclude that the court did not abuse its discretion in so ruling.

"It is well established that [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Concerning expert testimony specifically, the trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed." (Citation omitted; internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 342, 907 A.2d 1204 (2006), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007).

"The mere fact that a witness has been qualified as an expert in a particular field [however] does not itself give the expert information needed to state an opinion relevant to the case. There remain two additional elements before that opinion may be rendered . . . [a] knowledge of the facts of the case, to which the expert's training and experience may then be applied [and] . . . [t]he perceived reliability or trustworthiness of the principles and theories from the field of expertise which the expert employs to render the opinion . . . .

"The opinions of experts must be based upon facts which have been proved, assumed, or observed, and which are sufficient to form a basis for an intelligent opinion. . . . Opinion evidence should be accompanied by a statement of the facts on which it is based, and as a general rule, an expert must state facts from which the jury may draw [its] conclusions. Conversely, a witness qualified as an expert may not only testify as to the conclusions based upon his skill and knowledge, but also as to the facts from which such conclusions are drawn. . . . [W]here the factual foundation for an expert opinion is not fully disclosed, it cannot be assailed upon appeal if accepted by the jury as sufficient in weight and credibility to support the verdict. . . .

"The fact that an expert opinion is drawn from sources not in themselves admissible does not render the opinion inadmissible, provided the sources are fairly reliable and the witness has sufficient experience to evaluate the information. . . . An expert may base his or her opinion on facts or data not in evidence, provided they are of a type reasonably relied on by experts in

the particular field. . . . This is so because of the sanction given by the witness's experience and expertise. . . . An expert may give an opinion based on sources not in themselves admissible in evidence, provided (1) the facts or data not in evidence are of a type reasonably relied on by experts in the particular field, and (2) the expert is available for cross-examination concerning his or her opinion." (Internal quotation marks omitted.) *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, 149 Conn. App. 839, 848–49, 89 A.3d 993, cert. denied, 312 Conn. 920, 94 A.3d. 1200 (2014).

Here, the plaintiffs properly disclosed Grill as an expert in many fields related to truck driving and accident reconstruction. See footnote 8 of this opinion. During trial, he testified extensively about his credentials, and he explained what he had reviewed before forming an opinion about the accident in this case. He stated that he had reviewed documents from the case, the police report, photographs, a videotape, Socha's deposition, the depositions of police officers and accident reconstructionists, and the report and supplemental report of the defendants' accident reconstructionist, Stephen Fenton. He also testified that he personally had visited the scene of the accident. He further stated that he had reviewed the laws in Connecticut related to passing on the right, the Federal Motor Carrier Safety Regulations, and the commercial driver's license manual. It was on the basis of this information and his training and knowledge that Grill was able to form an opinion in this case.

The defendants do not challenge Grill's qualifications generally. Rather, they suggest that he was legally unqualified to give an opinion in this particular case because he did not personally reconstruct the accident but, instead, relied on the reports and information generated by others. Our review of relevant case law and our code of evidence leads us to the conclusion that there is no requirement that an expert personally perform his own study before rendering an opinion. As explained in *R.I. Pools, Inc.*: "[A]n expert witness need not personally study or observe conditions, but may apply his or her specialized knowledge to facts perceived or made known to him at or before the proceeding." Id., 852; see Conn. Code Evid. § 7-4 (b).

Furthermore, "an expert's opinion is not rendered inadmissible merely because the opinion is based on inadmissible hearsay, so long as the opinion is based on trustworthy information and the expert had sufficient experience to evaluate that information so as to come to a conclusion which the trial court might well hold worthy of consideration by the jury." (Internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 727, 80 A.3d 887 (2013). Here, Grill analyzed and formed an opinion after reviewing, among other things, the reports and depositions of accident

reconstructionists, including the defendants' reconstructionist, Fenton. Indeed, the defendants assert no claim that such reports and depositions did not provide trustworthy information.

Although Grill did not reconstruct the accident personally in this case, the record reflects that he formed his opinions about the accident after reviewing material information that he learned from reading the depositions and reports of accident reconstructionists and police officers, and from reviewing photographs, police reports, a videotape, and other case documents. We conclude that the reliance on such information to help one formulate an expert opinion does not necessarily undermine the reliability of the opinion. See id.; *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, supra, 149 Conn. App. 851–52 (expert's reliance on material information learned from others concerning physical condition of pools and nature of concrete used in construction did not necessarily undermine reliability of expert opinion). Accordingly, we conclude that the court did not abuse its discretion in allowing Grill's testimony about the accident.

B

The defendants also claim that the court improperly overruled their objections to Grill's improper character evidence. Specifically, they argue: "Over objection, the trial court also permitted the plaintiff[s] to use Grill as a conduit for inadmissible evidence of [the decedent's] character for safe driving . . . and permitted Grill to smear Socha with hyberbole concerning Socha's cell phone usage despite the undisputed fact that Socha's cell phone records . . . conclusively proved he was not on his cell phone near the time of the accident." (Emphasis omitted.) We conclude that this issue is not preserved for appellate review.

"The standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial." (Internal quotation marks omitted.) *Scandariato* v. *Borrelli*, 153 Conn. App. 819, 832, 105 A.3d 247 (2014). "In order to preserve an evidentiary ruling for review, trial counsel must . . . articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, supra, 308 Conn. 753.

As we explained in part II of this opinion, the few objections that the defendants made regarding Grill's testimony concerning the decedent's driving practices were made on the ground of relevance. Our review of the specific testimony claimed to be improper character

evidence regarding Socha's cell phone use the night of the accident also reveals an objection based solely on the ground of relevance. Specifically, the defendants objected: "I'm going to object, Your Honor, I'm sorry, as to relevance. The evidence has already shown [Socha] was not on his phone at the time of the accident. It has nothing to do with this accident, judge." The court overruled this objection. Accordingly, the issue of whether this testimony amounted to improper character evidence is not preserved for our review.

IV

The defendants also claim that the court abused its discretion by granting the plaintiffs' oral motion to preclude the testimony of the defendants' expert, Stephen Chewning. They argue: "Despite the fact that [Chewning] was timely disclosed long before trial, and despite the fact that each party listed him as a witness in a joint trial management report, the court granted [the plaintiffs'] oral motion to preclude [his testimony] based on the supposed insufficiency of the defendants' disclosure, which, according to the court, 'focused' on count six of the complaint (which was withdrawn)." (Emphasis omitted.)

The plaintiffs contend that the court made a proper ruling because Chewning was disclosed as an expert who would testify concerning the negligent supervision count of the plaintiffs' complaint, but the plaintiffs withdrew that count. Additionally, they argue that some of Chewning's testimony went to the proper operation of a passenger vehicle, which is within the common knowledge of the average juror, and that the attorney for UPS had agreed that there would be no need for Chewning to testify because count six, the negligent supervision count, of the plaintiffs' complaint had been withdrawn. We are not persuaded that the court abused its discretion in granting the plaintiffs' motion to preclude Chewning's testimony.

The following additional facts are necessary to inform our review. On January 31, 2013, the plaintiffs made an oral motion to preclude the testimony of Chewning. They explained that the defendants very recently had alerted them that Chewning, in fact, was going to be called to testify. The plaintiffs argued that the defendants' previous counsel had indicated to them that Chewning would not be called to testify because the plaintiffs had withdrawn the negligent supervision count of their complaint. They also argued that the defendants' disclosure specifically stated that the primary focus of Chewning's testimony would address the negligent supervision count of the complaint. Accordingly, they argued that they would be prejudiced if the court permitted him to testify because they would have deposed Chewning and had their expert review his deposition had they known that he would be called to testify on matters outside of the negligent supervi-

sion count.

The defendants argued that, although the disclosure focused on the negligent supervision count, it was more expansive than that, and Chewning's testimony was necessary to rebut Grill's testimony. They also argued that there never was an agreement that they would not call Chewning, and that Chewning had been listed as a witness for "months, and months, and months."

The court reviewed the defendants' disclosure of Chewning, which stated in part: "Chewning is expected to testify about commercial vehicle safety issues, proper commercial vehicle operating procedures, motor fleet safety programs and training, Federal Motor Carrier Safety Regulations . . . and accident analysis, including his investigation and analysis of the incident which occurred on November 23, 2010 which is the subject of the plaintiffs' complaint. Specifically, he will address the allegations contained in count six . . . of the plaintiffs' proposed amended complaint . . . . Chewning is expected to focus upon the allegations contained in count six of the plaintiffs' proposed amended complaint . . . ." The disclosure ended with the following: "The plaintiffs' motion to amend the amended complaint to add a cause of action against UPS for negligent hiring, supervision, training and retention has not been decided and the plaintiffs' purported evidence in support of this proposed new claim is unknown. Accordingly, the defendants reserve the right to supplement this response once the nature and extent of the claim (if it is allowed) becomes apparent."

The court noted that the disclosure focused on the fact that Chewning would be testifying to address the negligent supervision count of the plaintiffs' complaint, which had been withdrawn, that the defendants never had amended the disclosure, that Chewning was disclosed before the plaintiffs had disclosed Grill, and that the plaintiffs had not deposed Chewning because of the defendants' alleged representation that they would not be calling him and because of the limited nature of the disclosure. The court further stated that it credited the representation of the plaintiffs' counsel that he would have deposed Chewning and had Grill address Chewning's deposition during his testimony at trial if he had been aware that Chewning would testify to matters outside of the withdrawn negligent supervision count. Ultimately, the court determined that there would be undue prejudice to the plaintiffs if Chewning were permitted to testify in this case. The defendants then pointed out to the court that the disclosure specifically stated that "Chewning may also address other topics regarding safety and training in response to evidence introduced by the plaintiffs." The court responded that the plaintiffs "should not have to guess what those might be."[11]

On February 6, 2013, after the close of evidence, the

defendants made an oral motion to reconsider, asking the court, inter alia, to reconsider its ruling precluding Chewning's testimony, and they submitted to the court an affidavit from the defendants' previous counsel that averred that he had made no representation to the plaintiffs' counsel that Chewning would not be called to testify. The court explained that "it would be too prejudicial after the plaintiff[s] had rested their case to allow Mr. Chewning to then go off on another direction . . . which was . . . characterized . . . by the plaintiff [and] . . . the defendant as, essentially, a rebutal of Mr. Grill's testimony. So, my view of it [is] that it just simply [is not] fair . . . to allow that to happen. . . . If it was the intention to have Mr. Chewning testify more broadly in response to Mr. Grill then a revised or amended expert disclosure should have been made and then the plaintiff[s] would have had an adequate opportunity to determine whether . . . they . . . wished to take Mr. Chewning's deposition." The court also explained that it had reviewed the affidavit, the expert disclosure, and the transcripts of its prior ruling, and that it believed that the prior ruling was correct. Accordingly, the court granted to motion to reconsider, but denied the relief requested. On appeal, the defendants claim that the court abused its discretion by precluding Chewning's testimony. We are not persuaded.

"[T]he preclusion of expert testimony is a sanction, and . . . the decision to impose sanctions rests solely in the discretion of the court. . . . In reviewing the court's decision, every reasonable presumption will be made in favor of its correctness. The court is not required to preclude expert testimony when there is a discrepancy between the previously disclosed subject matter of an expert witness' testimony and the proffered testimony at trial. . . . It is only required to exercise its discretion in deciding whether to impose the sanction of preclusion, impose a lesser sanction, or impose no sanction at all. . . . That is a decision left to the trial court's best judgment, subject on appeal only to the test of abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Vitali* v. *Southern New England Ear, Nose, Throat & Facial Plastic Surgery Group, LLP*, 153 Conn. App. 753, 757–58, A.3d (2014). "In reviewing a trial court's exercise of discretion, the same 'clear abuse of discretion' standard is used for excluding evidence as is used for admitting evidence; the exclusion of evidence is not to be viewed more critically." C. Tait & E. Prescott, supra, §1.24.2, p. 62.

Reviewing the present case under this standard, we are not persuaded that the court abused its discretion when it precluded Chewning's testimony. Pursuant to Practice Book § 13-4, an expert disclosure must contain: "(1) the name of the expert witness; (2) the subject matter on which the expert is expected to testify; (3) the substance of the facts and opinions to which the

expert is expected to testify; and (4) a summary of the ground for each opinion." (Internal quotation marks omitted.) *Kosiorek* v. *Smigelski*, 138 Conn. App. 695, 720, 54 A.3d 564 (2012), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013). An expert disclosure satisfies the requirements of Practice Book § 13-4 when it alerts the opposing party as to the basic topics of the expert's testimony. *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 252–53, 9 A.3d 364 (2010); id., 252 ("[t]his court never has articulated a requirement that a disclosure include an exhaustive list of each specific topic or condition to which an expert might testify as the basis for his diagnosis; disclosing a categorical topic such as 'causation' generally is sufficient to indicate that testimony may encompass those issues").

In the present case, the record reveals that the trial court carefully and thoroughly reviewed the expert disclosure of Chewning in this case. It listened to repeated oral argument on whether to preclude Chewning's testimony, and it carefully considered the argument of counsel and the potential prejudice involved. The court concluded that it would be too prejudicial to the plaintiffs to allow Chewning to present testimony that went beyond the stated purpose for which he was disclosed. The court acknowledged that the defendants stated during argument that Chewning would testify, in part, in rebuttal of Grill's testimony, but the court recognized that Grill was disclosed after Chewning, and, therefore, that Chewning had not been disclosed as a rebuttal witness to Grill.

Additionally, the court concluded that the defendants clearly and repeatedly set forth in their disclosure that the focus of Chewning's testimony would concern the allegations of negligent supervision and that no amended disclosure had been filed. The court credited the plaintiffs' representation that they did not depose Chewning after deciding to withdraw their negligent supervision claim because that was the primary basis of Chewning's proposed testimony. Thus, the court concluded that to allow the defendants to expand upon their disclosure at such a late juncture would be too prejudicial to the plaintiffs. Despite the defendants' argument to the contrary, our thorough review of the record and the law in this case leads us to the conclusion that the court did not abuse its discretion in so ruling.

V

The defendants claim that "the court abused its discretion by striking . . . Fenton's opinions." They argue that "[n]otwithstanding its prior rulings [overruling the plaintiffs' objections and the denial of their motion to strike], the trial court decided to specifically instruct the jury to give *no weight* to Fenton's testimony that there was 'physical' or 'scientific' evidence of a lane change." (Emphasis in original.) We conclude, after fully considering the defendants' argument on appeal,

that they have not met their burden of demonstrating that the court abused its discretion.

The following additional facts are necessary to resolve this claim. On January 28, 2013, the plaintiffs filed a motion to, inter alia, preclude Fenton's opinion as to the preimpact position of the vehicles in this case. In the motion, the plaintiffs argued that Fenton's opinion that there was physical evidence that the decedent made an unsignaled lane change, from left to right, directly into Socha's lane of travel, was not supported by the physical evidence in the case and that it was insufficient under § 7-4 (a) of the Connecticut Code of Evidence because it was nothing more than speculation. The plaintiffs contended during argument on the motion that Fenton testified during his deposition that the physical evidence would be the same even if the decedent had been in the right lane for at least ten seconds. The plaintiffs also argued to the court that Fenton's testimony on this issue was on all fours with *Liskiewicz* v. *LeBlanc*, 5 Conn. App. 136, 497 A.2d 86 (1985), and that the court, therefore, should not permit it. The court, stating that it was a close call, ruled that there was foundation for Fenton's opinion, stemming from Socha's testimony, and it denied the motion.

Fenton went on to testify that he was an accident reconstruction engineer, and, when asked to explain what such a job entails, he stated: "Accident reconstructionists reconstruct car crashes, and, in most cases, we go out, evaluate the physical evidence, determine the exact, precise location of that evidence and then, using the laws of physics, determine how the accident happened." He stated that the evidence of the skid marks made by the UPS truck in this case demonstrated that Socha was centered in his lane at the time of the accident and that he reacted to an emergency by slamming on the brakes and steering to the left. Fenton also discussed the tire marks made by the decedent's pickup truck as it was forced off the interstate after being struck by the UPS truck, and that the pickup truck was only seven inches from the white fog line of the interstate on impact.

The defendants asked Fenton if he had reviewed Socha's statement and if the "cutoff" Socha described was consistent with the physical evidence, to which the plaintiffs objected on foundational grounds, and on the grounds of no physical evidence to support a cutoff and no qualification to render such an opinion. The defendants withdrew the question. The defendants also asked Fenton to explain what information the tachograph relayed concerning Socha's application of the tractor trailer's brakes, and Fenton explained that the braking occurred "just after the impact or just about at the same point of the impact." He also explained that there is an approximate two second perception reaction time for the truck driver. The defendants then

asked Fenton whether he had "done any research on the amount of time that it takes to perform a lane change," and Fenton responded, "Yes." Fenton then explained the research and the methodologies employed, to which the plaintiffs objected and moved to strike his answer. The court overruled the objection. Fenton continued by testifying that "to change from the center of one lane to the other is about three seconds. To get from a point where you're beginning to enter that adjacent lane to completing that lane change is about two seconds. So, it's about a second to get to the center line and then two seconds to complete that change and get centered in the opposing lane or the adjacent lane." The defendants then asked him if it was the "same two seconds as for perception reaction time," and Fenton responded, "Yes, it is." The defendants then asked Fenton what was his opinion on the accident, to which to plaintiffs objected. The court overruled the objection.

Fenton explained: "Based on all the physical evidence that I identified earlier and ruling out certain scenarios, I came to the conclusion that [the decedent] changed lanes at the last second or two seconds prior to the accident, cutting off Mr. Socha in the right lane." The plaintiffs again objected, arguing a lack of foundation and no physical evidence to support such a conclusion. The court excused the jury and entertained argument on the objection. After argument, the court recalled the jury and struck Fenton's answer.

The defendants then asked Fenton if he had an opinion about the accident and to explain that opinion, to which the plaintiffs objected. The court overruled the objection and allowed Fenton to answer. Fenton opined: "My opinion is that [the decedent] changed lanes in front of Mr. Socha . . . ." The plaintiffs moved to strike the answer, and the court denied the motion. Fenton then testified: "[T[here are two ways I can look at this. One is to look at the two scenarios; one with [the decedent] being in the right lane the entire time, or the alternative theory, which is the testimony of Mr. Socha that he was cut off or the [the decedent] changed lanes. So, there's two theories, and I looked at both of those theories. So, the basis for that opinion is to look at both those theories. One is whether the timing of the application of the brakes by Mr. Socha is consistent with a lane change. As I mentioned earlier, it takes a typical driver two seconds to perceive and react; [a] second and a half perception reaction, and then another half a second for the brake application—for the air brakes to lock up.

"So, we've got the total of two seconds. That total of two seconds is consistent with the lane change that would occur [if] a driver . . . changed lanes from the left lane into the right lane. So, what I call that . . . is that that two seconds of a lane change equals two sec-

onds for perception reaction time. So, the reaction of an emergency braking, the emergency steering of Mr. Socha is consistent with a lane change; the timing of two seconds for a lane change equals two seconds perception reaction time. That's one of the reasons why I come to that conclusion." The plaintiffs again objected, and the court overruled the objection. Fenton then explained that the evidence "tells me that as . . . Mr. Socha is approaching the [decedent's] vehicle—during the last one minute or fifty-two seconds, he's closing this quarter mile gap, and as he gets closer and closer, he's maintaining his speed, he's maintaining his position in the lane, he's going through a curve. He has to do that by being visually acute; by seeing and reacting and actually being aware of his surroundings. That maintaining speed and position, and going through the curve, is consistent with him being alert, and, at the last second, reacting to a driver adjacent to him, not with a vehicle that's been in front of him for the last fifty-two seconds." The plaintiffs again objected, arguing that Fenton's opinion was completely speculative and had no foundation, and that, because Fenton was not a truck driver, he was unqualified to render an opinion as to what a truck driver would have seen. The court ruled that it would allow the answer "at this point."

During cross-examination, Fenton agreed that the accident occurred in the right-hand lane, that both vehicles were in that lane at the point of impact, that Socha was traveling approximately sixty-seven miles per hour, and that the decedent was traveling approximately fifty miles per hour, with his tires approximately seven inches from the right fog line on the interstate. He also agreed that the physical evidence left on the roadway after the accident did not "allow [him] to determine anything beyond the location of the crash." He also stated, however, that on the basis of all the physical evidence, including the truck's tachograph, he was "able to conclude that it's more likely than not that [the decedent] changed lanes and cut off Mr. Socha." He then agreed that there was no physical evidence of a lane change at the location where the impact occurred. Additionally, Fenton acknowledged that he had agreed with the plaintiffs during his deposition that "the tire marks and the skid marks left by both vehicles [were] consistent with [the decedent] being in his right lane for ten seconds prior to impact, and Socha failed to recognize him until it was too late." Fenton then stated that "both scenarios are possible. Yes, I agree with both scenarios being possible based on those tires marks in the lane."

During recross-examination, Fenton explained that the science he used to arrive at his opinion that the decedent made a last second lane change was to look "at the damage to the vehicles and determin[e] what the closing speed was. [He] determined that closing speed was seventeen miles per hour or twenty-five feet per second. During the time when the Socha vehicle

[was] approaching the back end of the [decedent's] vehicle, during the last fifty-two seconds, [the decedent's] vehicle would be within a quarter mile the entire time with that closing distance continuing to get shorter all the way up to the point of impact. We know that he has to do several things—maintain his speed, maintain his position in the road, maintain his position going around the curve. All these things tell me, based on this evidence, that the scenario of Mr. Socha being inattentive and not knowing what's around him and missing a vehicle that was in front of the entire fifty-two seconds is not plausible. It makes no sense. The only thing that makes [sense] in this case is the testimony of Mr. Socha and everything that he said about the lane change, the braking, the steering to the left. All those things are actually true."

On February 6, 2013, the court heard argument on the plaintiffs renewed motion to strike Fenton's testimony. The court stated that it would not strike the testimony in its entirety, but that it, too, was concerned about Fenton's testimony insofar as it indicated that there was physical evidence of a lane change. The following colloquy occurred:

"The Court: . . . to the extent that Mr. Fenton testified that there was physical evidence of a lane change by [the decedent], there is no basis for that opinion, and I'm striking that. That's what I'm prepared to do.

"[The Defendants' Counsel]: Judge, I'd request that the court simply, rather than striking the testimony, define physical evidence for the jury, in which case, if the jury concludes . . . that Mr. Fenton is wrong or is being untruthful, that's a great remedy for them, and what [that] remedy avoids is the comment by the court, [whereas now] the jury has to listen to the court characterizing facts.

"The Court: Well, here is the thing. I could—instead of ruling on the motion to strike—I could simply make this instruction to include this in the jury instruction.

"[The Defendants' Counsel]: That's appropriate, Judge.

"The Court: I have no problem with that. I do think it makes the point, and I will include it in a—you know—wherever we decide to include it. I think it most appropriately goes in the expert testimony portion, and we can just—

"[The Defendants' Counsel]: Please do, Judge, and I would ask just out of—

"The Court: Well, I would actually prefer to do it because I think it makes it very difficult for the—in the event of a read back.

"[The Defendants' Counsel]: I don't think, Judge, that there's going—with my closing argument, I'm not going to jump up and down and say the physical evidence, the

physical evidence, the physical evidence, the physical evidence of a lane change. I'm going to put the story together the way Your Honor did. Just in fairness, Judge, on this issue, if you cure this issue with an instruction, then they get what they need and, you know, what doesn't appear—Mr. Fenton doesn't have to go through and read this discussion to try to figure out how to answer a question in the way that he—based on the occupation that he uses to feed his kids to determine, you know, has your testimony ever been stricken on this. Cure it with an instruction, Judge. That's the fair thing to do.

"The Court: Well, I mean, there may be unintended consequences, certainly.

"[The Defendants' Counsel]: I'm not suggesting that they're looking—

"The Court: The issue is whether . . . the problem is effectively cured, and I do think it's a real problem, that there's no basis in the evidence for that opinion and that really goes to the heart of this case and needs to be cleared up. It needs to be cleared up.

"[The Defendants' Counsel]: Don't strike his testimony.

"The Court: I think it can be cleared up with an instruction.

"[The Plaintiffs' Counsel]: Just very briefly we'd like to . . . maintain our position for all the reasons we've already stated. I'll be brief. All of the opinions [Fenton] gave didn't have a factual foundation. *Liskiewicz* [v. *LeBlanc*, supra, 5 Conn. App. 136,] keeps them out, and the reasons I've set forth in our motion I'd like to raise that as our grounds also. . . .

"The Court: You're welcome to argue whatever you . . . wish based on the evidence, but this—I think this cures the concern that I have.

"[The Defendants' Counsel]: Thank you, Judge."

The court and counsel then discussed the full jury charge, and both parties noted that they had reviewed it and that there was agreement on most everything. When the court began to discuss what might be included in the additional instruction regarding Fenton's testimony, additional argument ensued. The court then told counsel that it was going to call a short recess to finish the instruction, and the defendants' counsel asked: "Judge, what time would you like [us] to return? [The plaintiffs' counsel] has said that he would take thirty-five to forty-five minutes, I believe, in terms of his initial [closing]. If we do it now, we can get it done before lunch. I say we do it, Judge." The court then stated: "If you're willing to do it without the charge, but I'm going to tell you, without the specific language, it's up to you. This is where we started. I asked you if you wanted to see it. I am going to instruct this jury—let's take a

recess. We're going to take fifteen minutes."

Thereupon, the court took a recess. When the court returned, it stated: "Okay. Here's the instruction. With regard to the—comes right at the end of the expert testimony, the instruction with regard to the testimony of the defendants' accident reconstructionist Stephen Fenton. Unless stricken by the court, you may considered all the opinions [that have been] rendered except to the extent that Mr. Fenton offered an opinion that there was physical or other scientific evidence of a lane change by [the decedent]. I instruct you that there's no factual basis for that testimony. Therefore, you may not consider that opinion. Okay. So, that's the instruction."

The defendants' counsel then renewed his motion for a directed verdict, which the court denied, and the jury was summoned into the courtroom, without counsel offering any objection to the additional instruction drafted by the court. A luncheon recess was taken soon thereafter, and, upon returning from that recess, closing argument began. At the conclusion of closing and rebuttal arguments, the court adjourned for the day.

When court resumed the following morning, the defendants' counsel stated that he had an objection to the court's instruction regarding Fenton's testimony concerning a lane change. He argued: "We believe that that charge directly invades the province of the fact-finding of the jury. We have the court commenting on the court's impression of the evidence. It's totally improper and unnecessary. The jury is instructed they are to determine—make their decisions based on the facts. That's sufficient, judge, and what you're doing is highlighting Mr. Fenton, and really the defense evidence, and commenting on it improperly, and we object to that." The court indicated that the objection was too late because it was made immediately before the charge was to be given. The defendants' counsel then stated: "I'm objecting to the presence of that charge based on a lack of evidence, and, if the court is going to charge on it, I've made the suggestion as what the proper charge would be. I've done it on the record."

Soon thereafter, the court stated: "The charge on Mr. Fenton is to stand, as I indicated yesterday, and as has been argued by the plaintiff[s] in this case . . . based on *Liskiewicz* v. *LeBlanc*, [supra] 5 Conn. App. 136. The question of whether a sufficient foundation is laid for an expert opinion is a factual question for the court, and, certainly, the court is a gatekeeper with respect to expert testimony. I did read you the rule, § 7-4, of the [Connecticut] Code of Evidence, which indicates the circumstances, and I did articulate this yesterday, under which opinion testimony by expert is allowed. An expert may testify in the form of an opinion, give reasons provided sufficient facts are shown as a foundation for that expert's opinion, and, in this particular circumstance with regard to this, a very particular opin-

ion that Mr. Fenton rendered stating that there was scientific or physical evidence that [the decedent] was in the left lane. That's the opinion for which I find there was no foundation . . . . I stand by that decision." The plaintiffs' counsel then argued that the plaintiffs still thought that the court should strike Fenton's testimony rather than give the instruction, and that the court explained that it thought the instruction was "appropriate and [the] fairest way to do it . . . ." The court proceeded to summon the jury into the courtroom, and it gave the final instructions, including its instruction to disregard the testimony of Fenton insofar as he stated that there was physical or scientific evidence that the decedent made a lane change.

Following the court's instructions, the plaintiffs' counsel again stated, inter alia, that the plaintiffs believed that Fenton's testimony should have been stricken. The defendants' counsel then argued: "We also object, as we have previously, to the instruction singling out Mr. Fenton. It came specifically in the expert testimony portion of the court's charge. As noted previously, we believe that this is an unfair singling out of Mr. Fenton and that is a court comment, unnecessarily, upon the weight or value of his individual testimony. We pointed out that the court specifically instructed the jury on page one of their charge that they are not to draw any inference from any question, the answer to which was stricken. The court also instructed the jury that they are not to consider testimony that was stricken of Mr. Fenton. To the extent that there were objections made regarding him at the time of his testimony, and the court might have sustained that objection or stricken a portion of his answer, that all happened in front of the jury. The jury was properly instructed up until the point where Mr. Fenton [was] unfairly single[d] out. That is our objection to Mr. Fenton."

On appeal, the defendants argue: "In effectively excluding Fenton's testimony, the trial court focused on whether the roadway evidence alone could support a theory of a lane change before impact. Fenton, however, never limited the basis for his opinion to the skid marks on the roadway. Rather, he considered his own photogrammertry analysis, the filament on the [the decedent's] directional signal,[12] the tachograph report, the road configuration (including a bend in the road and an extreme line of sight leading up to [the] point of impact), Socha's position in the middle of his lane, Socha's perception/reaction time, and the time needed for [the decedent] to change lanes." We conclude that the defendants misconstrue the court's instruction. The court did not tell the jury that it could not consider Fenton's *theory* that the decedent changed lanes, but, rather, the court told the jury to disregard Fenton's testimony insofar as he opined that there was "*physical or other scientific evidence* of a lane change." (Emphasis added.)

The parties agree that, although the court gave the allegedly improper instruction during its final instructions to the jury, the propriety of this particular instruction involves an evidentiary issue rather than an instructional issue. Accordingly, our standard of review is abuse of discretion. "It is well established that . . . the trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused . . . the trial court's decision will not be disturbed." (Citation omitted; internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, supra, 280 Conn. 342. "The opinions of experts must be based upon facts which have been proved, assumed, or observed, and which are sufficient to form a basis for an intelligent opinion." (Internal quotation marks omitted.) *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, supra, 149 Conn. App. 848–49.

After reviewing the entire transcript of Fenton's testimony, all of the argument surrounding the court's instruction, and the instruction itself, we conclude that the court did not abuse its discretion in instructing the jury to disregard Fenton's testimony insofar as he opined that there was physical or scientific evidence that the decedent had changed lanes.

First, the defendants' counsel specifically asked the court to give an instruction rather than strike the testimony. Second, throughout much of Fenton's testimony, as quoted previously in this opinion, he set forth the physical and scientific evidence in this case, and he repeatedly stated that his conclusion that the decedent had changed lanes was derived from his examination and analysis of that evidence. This conclusion was his theory of the case, which the jury was free to consider.

We agree with the trial court's conclusion that there was no physical or scientific evidence that there was a lane change in this case. Rather, it was Fenton's theory that the decedent had changed lanes. The court's instruction to the jury did not prohibit the jury from considering Fenton's theory of the case. The court instructed the jury to disregard Fenton's opinion only insofar as he stated that there was physical and scientific evidence of a lane change. There being no such evidence, and taking into consideration the defendants' request that the court give the jury an instruction, we conclude that the court did not abuse its discretion in giving the jury this particular instruction. See *Liskiewicz* v. *LeBlanc*, supra, 5 Conn. App. 140–41 (trial court provides gatekeeper function, and where factual basis for expert's opinion is uncertain, court does not abuse discretion in precluding that testimony).

VI

The defendants also claim that the court abused its discretion in barring any reference to Michael Cei during closing argument. They argue that Grill testified that

he had reviewed Cei's report and that he, in part, had relied on that report in formulating his own expert opinion. The court's constraint on their argument about certain important aspects of Cei's report, they argue, was both an abuse of discretion and harmful error. Additionally, they argue that their comment on the plaintiffs' failure to call Cei to testify was not improper. We are not persuaded.

The following additional facts are relevant to our resolution of this claim. During opening statements, the plaintiffs told the jury that they would be calling Cei as an expert in this case. As the case progressed, however, the plaintiffs never called Cei to testify. Grill, another of the plaintiffs' experts, had testified that one of the reports upon which he had relied in formulating his opinion was Cei's report. Accordingly, during the defendants' cross-examination of Grill, the defendants' counsel questioned him about certain aspects of Cei's deposition, which they had taken earlier in the case, and in which Cei allegedly opined that there was no evidence that Socha was operating his vehicle unsafely prior to the accident.

During closing argument, the defendants' counsel told the jury that the plaintiffs had promised to present Cei as an accident reconstruction expert in this case and that they had gone over the important testimony he would offer, but that "[w]e didn't hear from Mr. Cei." He then stated that the plaintiffs, instead, had called Grill to testify and that Grill had relied on the deposition and work of Cei. The defendants' counsel then argued that Grill, however, "decided to just disregard everything." He then argued: "I asked [Grill] about Mr. Cei's testimony or where Mr. Cei said that Mr. Cei didn't believe in terms of the UPS vehicle that speed was a significant contributing factor to this accident. I asked Mr. Grill about that. Mr. Cei, who had drawn that conclusion. Mr. Grill confirmed. He said, I saw it, saw right where he said it. I saw where Mr. Cei said that. [I] asked Mr. Grill about Mr. Cei's conclusion that there was no evidence that Mr. Socha was in any way impaired. What was Mr. Grill's response? Right. No evidence of Mr. Socha being drowsy or sleepy according to Mr. Cei? What did Mr. Grill say? If you said he did, I don't recall." The plaintiffs then objected on the ground that the defendants' counsel was arguing facts not in evidence.

The defendants' counsel explained that he had questioned Grill about certain aspects of Cei's report, and that this was part of the evidence. The court responded that counsel's questions were not evidence, that Cei's deposition was not in evidence, and that counsel also could not comment on the absence of testimony of a witness who was not called, with no evidence that the witness had been available. The court then cautioned the defendants' counsel, outside of the presence of the jury: "I just want to caution you about continuing to

refer . . . to, first, things that are not in evidence in this case, and, secondly, about the failure of the plaintiff[s]—the suggestion and the innuendo that there's some reason adverse to the plaintiff[s] that there was a witness out there that was not called."

During its final charge to the jury, the court instructed in relevant part: "[C]omments . . . were made by counsel in closing about the failure of either side to call as a witness an individual named Michael Cei. Pursuant to the law in Connecticut, there are two preconditions before a party can comment in closing argument on the failure of the opposing party to call a witness. First, the party seeking to make the comment is required to present evidence in court demonstrating that the witness in question was available to testify. Second, the party seeking to make such a comment must . . . provide notice both to the court and to opposing counsel so that the court can make an advance ruling prior to closing argument. . . . Since counsel did not satisfy either of these conditions, it was wholly improper for them to make comments about the failure to call Michael Cei as a witness, and I instruct you to disregard them. I further instruct you that you are not to speculate about why this individual was not called as a witness. It would be improper for you to consider it in any way. Finally, as I have repeatedly instructed in this case, you are to base your deliberations and your ultimate verdict solely upon the admissible evidence presented and only upon the evidence. Accordingly, quotes from Mr. Cei's deposition are not in evidence in this case, and you are not to consider them in any way." The defendants argue that the court improperly restricted their closing argument, and that it was proper for them to comment on the plaintiffs' failure to call Cei as a witness after they told the jury that he would testify. We are not persuaded.

As a preliminary matter, we note that "[i]n general, the scope of final argument lies within the sound discretion of the court . . . . However, it is well established that in closing argument before the jury, counsel may comment upon facts properly in evidence and upon reasonable inferences drawn therefrom." (Citation omitted; internal quotation marks omitted.) *Madsen* v. *Gates*, 85 Conn. App. 383, 394, 857 A.2d 412, cert. denied, 272 Conn. 902, 863 A.2d 695 (2004).

Pursuant to General Statutes § 52-216c: "No court in the trial of a civil action may instruct the jury that an inference unfavorable to any party's cause may be drawn from the failure of any party to call a witness at such trial. However, counsel for any party to the action shall be entitled to argue to the trier of fact during closing arguments, except where prohibited by section 52-174, that the jury should draw an adverse inference from another party's failure to call a witness *who has been proven to be available to testify*." (Emphasis added.)

"[T]he language of § 52-216c does require that advance notice be given before counsel is allowed to argue that the jury should draw an adverse inference from the opposing party's failure to produce a witness at trial. It is obvious from both the 'proven to be available to testify' language of § 52-216c and the legislative history that the legislature intended not only that there be advance notice of counsel's intent to invite the jury to draw an adverse inference from a party's failure to call a witness, but that there be an advance ruling by the trial judge that counsel has provided some evidentiary basis entitling him or her to do so. This conclusion comports with the general principle that in closing argument before the jury, 'counsel may comment upon facts properly in evidence and upon reasonable inferences drawn therefrom.' . . . *Skrzypiec* v. *Noonan*, 228 Conn. 1, 16, 633 A.2d 716 (1993). 'Counsel may not, however, comment on or suggest [in closing argument] an inference from facts not in evidence.' " *Raybeck* v. *Danbury Orthopedic Associates, P.C.*, 72 Conn. App. 359, 369, 805 A.2d 130 (2002).

As to the defendants' comment on the absence of Cei, we conclude that the court properly cautioned their counsel from making further comment on the plaintiffs' decision not to call Cei to testify as their counsel's comments were in violation of § 52-216c, he having not established Cei's availability or informed the court that he would be making such an argument.

As to the defendants' claim that the court improperly barred their counsel from making any reference to Cei during closing argument, we conclude that the court did not make such a broad ruling. Rather, the court cautioned the defendants' counsel not to comment on facts not in evidence, and it later cautioned the jury that Cei's deposition was not in evidence. Cei did not testify in this case. Although Grill stated that he had reviewed Cei's deposition, among other things, and had relied on it in part, the deposition was not in evidence. The defendants' counsel asked Grill about some alleged statements that Cei had made during his deposition. Grill testified that he had read Cei's deposition, and that Cei had testified during the deposition that, in his opinion, there was no evidence that Socha was impaired. Grill also responded to some of the defendants' counsel's questions about Cei's deposition by stating that he did not recall some of Cei's deposition testimony. During closing argument, the defendants' counsel commented to the jury about Grill's answers to his questions regarding Cei's deposition testimony. The defendants' counsel argued to the jury that Grill "decided to just disregard everything" about Cei's opinions as expressed in his deposition, and he proceeded to argue about the content of the deposition and noted to the jury that Grill stated that he did not recall some of Cei's deposition testimony.

Because Cei's deposition was not in evidence, the defendants were not permitted to quote from it as if it was. Relatedly, there is no indication in the record that Grill disregarded "everything" in Cei's deposition, or that the defendants' counsel's questions to Grill accurately depicted the content of the deposition when Grill stated that he did not recall it, or when Grill did not acknowledge that the deposition said what counsel was expressing. Again, as the court noted, it was Grill's responses to the questions that were evidence, not the defendants' counsel's questions about the content of the deposition. Accordingly, we conclude that the court properly cautioned the defendants' counsel during closing argument to refrain from arguing facts not in evidence, and that it properly noted to the jury that the deposition was not in evidence.

VII

The final claim of the defendants is that the court erred as a matter of law by awarding interest and attorney's fees to the plaintiffs pursuant to § 52-192a (c).[13] The defendants argue that such an award is permissible only when each plaintiff's recovery exceeds the amount of the unified offer of judgment, and, in this case, neither plaintiff received more than the $2,700,000 unified offer. The plaintiffs argue that because Upton's claim was derivative of Birkhamshaw's claim and they, therefore, had to file a unified offer of compromise, the court properly awarded § 52-192a interest when the total verdict exceeded the unified offer. We agree with the plaintiffs.

In this case, the plaintiffs filed a unified offer of compromise in the amount of $2,700,000. The jury awarded Birkhamshaw $508,132 in economic damages and $1,500,000 in noneconomic damages; it awarded Upton $1,875,000 in loss of consortium damages. Thus, the total award was $3,883,132. After the plaintiffs filed a motion for offer of compromise interest, to which the defendants objected, the court determined that, because Upton's loss of consortium claim was derivative of Birkhamshaw's claim, the plaintiffs were entitled to such interest under § 52-192a.

"The question of whether the trial court properly awarded interest pursuant to § 52-192a is one of law subject to de novo review. Section 52-192a . . . requires a trial court to award interest to the prevailing plaintiff from the date of the filing of a complaint to the date of judgment whenever: (1) a plaintiff files a valid offer of judgment within eighteen months of the filing of the complaint in a civil complaint for money damages; (2) the defendant rejects the offer of judgment; and (3) the plaintiff ultimately recovers an amount greater than or equal to the offer of judgment." (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development*

Corp., 245 Conn. 1, 55, 717 A.2d 77 (1998).

"In interpreting the meaning of a statute, we attempt to determine the intent of the legislature as expressed by the common and approved usage of the words in the statute. . . . General Statutes § 1-1 (f) provides that [w]ords importing the singular number may extend and be applied to several persons or things and words importing the plural may include the singular. . . . In the interpretation of statutory provisions, the application of common sense to the language is not to be excluded . . . Indeed, the fundamental objective of statutory construction is to give effect to the intended purpose of the legislature." (Citation omitted; internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 741, 687 A.2d 506 (1997); see also *In re Stephen M.*, 109 Conn. App. 644, 659, 953 A.2d 668 (2008) ("The purpose of statutory construction is to give effect to the intended purpose of the legislature. . . . Common sense must be used [when construing statutes] and courts will assume that the legislature intended to accomplish a reasonable and rational result." [Internal quotation marks omitted.]).

As our Supreme Court explained in *Blakeslee Arpaia Chapman, Inc.*, the purpose of § 52-192a "is to encourage pretrial settlements and, consequently, to conserve judicial resources. . . . [T]he strong public policy favoring the pretrial resolution of disputes . . . is substantially furthered by encouraging defendants to accept reasonable offers of judgment. . . . Section 52-192a encourages fair and reasonable compromise between litigants by penalizing a party that fails to accept a reasonable offer of settlement. . . . In other words, interest awarded under § 52-192a is solely related to a defendant's rejection of an advantageous offer to settle before trial and his subsequent waste of judicial resources. . . . Of course, the partial settlement of a case does little for the conservation of our limited judicial resources. Accordingly, the ultimate goal in a multiparty lawsuit is the fair and reasonable settlement of the case on a global basis." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, supra, 239 Conn. 742–43.

We conclude that the plain words of § 52-192a do not address specifically the issue in this case. We do, however, find helpful our Supreme Court's decision in *Blakeslee Arpaia Chapman, Inc.*, discussing the sole plaintiff's unified offer of judgment of $300,000 to the multiple defendants in that case. Accordingly, in resolving the case before us, we are guided by the court's explanatory hypothesis in *Blakeslee Arpaia Chapman, Inc.*: "The enhancement of global settlement by permitting unified offers to multiple defendants is demonstrated by hypothesizing additional facts in this case.

If unified offers were not permitted, the plaintiff in this case just as easily could have submitted separate offers of judgment in the amount of $300,000 to each defendant, instead of the single offer of $300,000 to all the defendants, and [the defendant] Aetna would have been in the same position that it now finds itself. In that case, if only one defendant had accepted the offer of judgment, the case would have been settled for that one defendant, but would have remained pending as to the other defendants. Under those circumstances, there would be little incentive for the plaintiff to withdraw the case with respect to the remaining defendants without further compensation. On the other hand, the acceptance of the unified offer of judgment of $300,000 by any one defendant, with or without contribution from the remaining defendants, would have resulted in the global settlement of the case and complete removal from the judicial process." Id., 744–46.

"There are many instances in which it would be imprudent for a plaintiff to file individual offers of judgment to multiple defendants because partial settlement may inadvertently extinguish rights against nonsettling defendants by operation of law. Annot., 92 A.L.R.2d 533 (1963). A plaintiff, as a practical matter, would not file separate offers of judgment in cases involving vicarious liability based on respondeat superior, automobile owner/operator negligence, or statutory indemnification claims unless each of those offers of judgment were for the full value of the case. Accordingly, in cases in which global settlement is the only viable alternative, permitting unified offers of judgment promotes the purpose of § 52-192a of encouraging settlements." *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, supra, 239 Conn. 746.

Taking guidance from our Supreme Court's decision in *Blakeslee Arpaia Chapman, Inc.*, we conclude that the court in the present case properly awarded § 52-192a interest to the plaintiffs, when the combined jury verdict exceeded the unified offer of compromise. The clear purpose of § 52-192a is to save judicial resources and to encourage reasonable settlements. Id., 742–43. In extending the analysis in *Blakeslee Arpaia Chapman, Inc.*, to the facts of this case, we conclude that, if an award of offer of compromise interest was not determined on the basis of the total jury award in a case where the claim of the plaintiff widow is derivative of the claim of the plaintiff administrator of the decedent's estate, the purpose of the statute would not be served because it would not promote reasonable settlements and the saving of judicial resources.

In a case, like the present one, where there are two plaintiffs, and the claim of one of them wholly is derivative of the other, offer of compromise interest based on the full jury award would achieve the purpose of § 52-192a. If an interest award could be made only if

each plaintiff were awarded more than the unified settlement offer, there would be no incentive for the defendants to settle the case because the likelihood of such an award, if the offer of settlement had been reasonable, would be very small. Additionally, if, rather than a unified offer, each plaintiff were to make a reasonable individual offer of compromise on the basis of his or her own injuries, the defendant easily could settle with the administrator of the estate, leaving the widow, whose claim wholly is derivative, without a cause of action or any means of compensation for her damages. See *Voris* v. *Molinaro*, 302 Conn. 791, 797, 31 A.3d 363 (2011) ("settlement of the predicate claim extinguishes the derivative claim for loss of consortium"). Certainly, this is not the intent of the statute.

On the basis of the foregoing, guided by *Blakeslee Arpaia Chapman, Inc.*, we conclude that the statutory purpose of § 52-192a is served by awarding offer of compromise interest when the total of the jury award exceeds the unified offer of compromise in a case where the cause of action of one of the plaintiffs wholly is derivative of the other plaintiff's cause of action. Accordingly, the court in the present case properly made such an award.

The judgment is affirmed.

In this opinion the other judges concurred.

[1] General Statutes § 14-295 provides in relevant part: "In any civil action to recover damages resulting from personal injury, wrongful death or damage to property, the trier of fact may award double or treble damages if the injured party has specifically pleaded that another party has deliberately or with reckless disregard operated a motor vehicle in violation of section 14-218a, 14-219, 14-222, 14-227a, 14-230, 14-234, 14-237, 14-239 or 14-240a, and that such violation was a substantial factor in causing such injury, death or damage to property. . . ."

[2] The plaintiffs' counsel argues that, along with the amended complaint, the request for leave to amend the complaint, and the motion to add Upton as a plaintiff, a letter was sent to the defendants' counsel that stated: "Rather than have to formally serve the Amended Complaint, which adds the wife's loss of consortium claims, I am simply filing a request for leave to amend. The statute of limitations on her claim is November 23, 2012, so no prejudice will result to you.

"Would you kindly respond to the amended complaint for the estate, as well as Julie Upton. If you require actual service on Julie Upton's claims, please give me a call.

"I thank you for your cooperation on this matter."

A copy of this letter was submitted to the trial court as an exhibit to the plaintiffs' opposition to the defendants' motion to dismiss.

[3] Clearly, this order was in error as the court had granted Birkhamshaw's motion to add Upton as a plaintiff and not as a defendant. Accordingly, there was no need to summon her to appear. Although it would have been a better practice for Birkhamshaw to have asked the court for clarification of this order, the failure to do so, or to summon Upton, did not implicate the court's subject matter jurisdiction.

[4] General Statutes § 52-123 provides: "No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court."

[5] It does not appear, from our review of the record, that the trial court issued a written memorandum of decision.

[6] As a separate issue, in part III of this opinion, we will discuss whether

the court abused its discretion when it permitted Grill's expert testimony concerning the accident in this case.

[7] Although there are exceptions to this general rule, none of the exceptions are applicable in this case.

[8] A review of the plaintiffs' disclosure of Grill reveals that they disclosed him to be "a truck driving expert, expert in vehicle dynamics, expert in accident reconstruction, expert in accident investigation and expert in heavy vehicle accident reconstruction, with advanced training in human factors." They also disclosed that Grill would testify concerning "how to properly drive a tractor trailer truck . . . [w]hat the tractor trailer driver needs to do in certain situations to avoid collisions and keep others safe . . . standard safety rules . . . [h]ow to properly steer a tractor trailer . . . the mechanics of a truck and its operation and how the truck driver and truck react when steering, braking, avoiding collisions and when collisions occur . . . [and that Grill would] relate those matters . . . to the facts of this case and state what the driver did in this situation, what he did wrong and what the driver reasonably should have done to properly drive and control his truck in this situation. . . . Grill will review both accident reconstructionist reports and testimony and will testify as to the errors made by . . . Socha under both expert scenarios."

[9] Insofar as the defendants claim on appeal that "the court abused [its] discretion by allowing . . . Grill to testify at trial," we conclude that such a claim was waived when their counsel stated that he had no objection to Grill testifying as a truck driving expert.

[10] Section 7-4 of the Connecticut Code of Evidence provides: "(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion.

"(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.

"(c) Hypothetical questions. An expert may give an opinion in response to a hypothetical question provided that the hypothetical question (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case, (2) is not worded so as to mislead or confuse the jury, and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence."

[11] Practice Book (Rev. to 2012) § 13-4, regarding experts, provides in relevant part: "(a) A party shall disclose each person who may be called by that party to testify as an expert witness at trial, and all documents that may be offered in evidence in lieu of such expert testimony, in accordance with this section. The requirements of Section 13-15 shall apply to disclosures made under this section.

"(b) A party shall file with the court and serve upon counsel a disclosure of expert witnesses which identifies the name, address and employer of each person who may be called by that party to testify as an expert witness at trial, whether through live testimony or by deposition. In addition, the disclosure shall include the following information:

"(1) Except as provided in subdivision (2) of this subsection, the field of expertise and the subject matter on which the witness is expected to offer expert testimony; the expert opinions to which the witness is expected to testify; and the substance of the grounds for each such expert opinion. Disclosure of the information required under this subsection may be made by making reference in the disclosure to, and contemporaneously producing to all parties, a written report of the expert witness containing such information.

* * *

"(h) A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions. . . ."

Practice Book § 13-15, concerning the continuing duty to disclose, provides: "If, subsequent to compliance with any request or order for discovery and prior to or during trial, a party discovers additional or new material or information previously requested and ordered subject to discovery or inspection or discovers that the prior compliance was totally or partially incorrect or, though correct when made, is no longer true and the circumstances are such that a failure to amend the compliance is in substance a knowing concealment, that party shall promptly notify the other party, or the other party's attorney, and file and serve in accordance with Sections 10-12 through 10-17 a supplemental or corrected compliance."

[12] The filament did not indicate that the directional signal recently had been used.

[13] General Statutes § 52-192a (c) provides: "After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount, except in the case of a counterclaim plaintiff under section 8-132, the court shall add to the amount so recovered eight per cent annual interest on the difference between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise. The interest shall be computed from the date the complaint in the civil action or application under section 8-132 was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint or application. If such offer was filed later than eighteen months from the date of filing of the complaint or application, the interest shall be computed from the date the offer of compromise was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."