****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

****

CONNECTICUT HOUSING FINANCE AUTHORITY
v. ASDRUBAL ALFARO ET AL.
(SC 19720)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Espinosa, Js.*

Argued September 14, 2017—officially released January 26, 2018**

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Bank of America, N.A., et al. were defaulted for failure to appear; thereafter, the plaintiff withdrew the complaint as to all defendants; subsequently, the court, *Tyma*, *J.*, denied the named defendant's motion for attorney's fees, and the named defendant appealed to the Appellate Court, *Gruendel*, *Lavine* and *Prescott*, *Js.*, which affirmed the judgment of the trial court, and the named defendant, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

James Mandilk and *Nathan Nash*, certified legal interns, with whom were *Jeffrey Gentes*, *Peter V. Lathouris*, and, on the brief, *Richard M. Breen*, and *Wesleigh Anderson*, *Rebecca Cao*, and *Vinita Singh*, certified legal interns, for the appellant (named defendant).

Michael G. Tansley, with whom, on the brief, was *Mary Barile Pierce*, for the appellee (plaintiff).

Cecil J. Thomas, *David A. Pels*, and *Giovanna Shay* filed a brief for the Connecticut Fair Housing Center et al. as amici curiae.

Opinion

EVELEIGH, J. In this certified appeal, we are tasked with determining whether, pursuant to General Statutes § 42-150bb,[1] a defendant may be awarded attorney's fees when the plaintiff withdraws an action as a matter of right pursuant to General Statutes § 52-80.[2] The plaintiff, the Connecticut Housing Finance Authority, had obtained a promissory note guaranteeing the payment of $216,500 by the named defendant, Asdrubal Alfaro.[3] After the defendant failed to make the required payments on the note, the plaintiff filed a foreclosure action. When the action had been pending for almost one year, the plaintiff withdrew its action as a matter of right under § 52-80 prior to any hearing on the merits. The defendant thereafter sought an award of attorney's fees pursuant to § 42-150bb. The trial court denied the defendant's motion for attorney's fees, and the Appellate Court affirmed the judgment of the trial court. See *Connecticut Housing Finance Authority* v. *Alfaro*, 163 Conn. App. 587, 589, 135 A.3d 1256 (2016). We conclude that, in certain circumstances, § 42-150bb permits an award of attorney's fees to a defendant when a plaintiff withdraws an action as of right prior to a hearing on the merits and, accordingly, reverse the judgment of the Appellate Court.

The following undisputed facts and procedural history are relevant to this appeal. On May 24, 2004, the defendant executed a mortgage, which was secured by a parcel of residential property located at 465 Greenwood Street in the city of Bridgeport, and a promissory note in the amount of $216,500, which was made payable to Guaranty Residential Lending, Inc. On June 27, 2012, the plaintiff commenced the present foreclosure action alleging, inter alia, that the mortgage had been assigned to it and that the defendant had failed to make payments on the note. The plaintiff further alleged that, pursuant to an acceleration clause, it had demanded full payment of the note's balance.[4]

The defendant filed an answer to the plaintiff's complaint, admitting only that he was in possession of the property. The defendant also asserted two special defenses, each contending that the plaintiff lacked standing to bring the action. The plaintiff filed a motion for summary judgment, arguing that there was no genuine issue of material fact and that it was entitled to foreclose on the mortgage as a matter of law. The defendant objected to the plaintiff's motion for summary judgment, contending that there were several unresolved genuine issues of material fact, including whether the plaintiff owned the note and was entitled to enforce it.

Before the trial court ruled, however, the plaintiff withdrew its motion for summary judgment. Shortly thereafter, the plaintiff withdrew the present action as

a matter of right pursuant to § 52-80. The plaintiff did not provide any reason for these withdrawals. The defendant subsequently filed a motion for an award of attorney's fees pursuant to § 42-150bb, claiming that he had "successfully defended" the present action as a result of the plaintiff's withdrawal of the underlying complaint. The plaintiff objected to the defendant's motion, asserting, among other things, that it had an absolute right to withdraw the action pursuant to § 52-80, and that such a withdrawal, prior to any hearing on the merits of a case or the rendering of a judgment, does not constitute the successful defense of an action.

The trial court denied the defendant's motion for an award of attorney's fees. The trial court agreed that the plaintiff's withdrawal of the action as a matter of right pursuant to § 52-80, prior to any hearing on the merits, did not mean that the defendant had "successfully defended" the action. According to the court, there were "a myriad of reasons that the plaintiff withdrew the action, including but not limited to the plaintiff deciding that it did not want to redeem the property."[5] The trial court reasoned further that, "[i]f the defendant's claim were accepted, lenders would be unreasonably exposed to claims for attorney's fees every time a lender withdrew a foreclosure action."

The defendant appealed from the trial court's judgment to the Appellate Court, which affirmed. *Connecticut Housing Finance Authority* v. *Alfaro*, supra, 163 Conn. App. 594. The Appellate Court reviewed the trial court's decision for clear error only, reasoning that the question of whether the defendant had "successfully defend[ed]" the action was a factual one to which deference should be afforded. Id., 592. The Appellate Court concluded that, because the plaintiff's withdrawal of the action could have been for any reason, and there was no evidence offered to prove that withdrawal resulted from the special defenses, the defendant had failed to meet his evidentiary burden of establishing an entitlement to attorney's fees. Id., 593–94. The Appellate Court did not engage in any statutory construction of § 42-150bb, although it observed that, "to successfully defend an action, a consumer party must prevail on the merits of [an] answer or special [defense]." (Internal quotation marks omitted.) Id., 593. Specifically, the Appellate Court declined to reach the question of whether a plaintiff's withdrawal of an action, as of right, in response to a special defense could ever constitute a successful defense as contemplated by § 42-150bb, because the defendant had not established the factual predicate for such a claim in the present case. Id., 591.[6] This appeal followed.[7]

The defendant argues that, given the language used in § 42-150bb and the provision's legislative history, he was not required to prevail on the merits of his special defense, or to defeat the underlying obligation, in order

to show that he had successfully defended the present foreclosure action. According to the defendant, a plaintiff's withdrawal of its action, as of right, can qualify as a successful defense. Specifically, the defendant contends that the withdrawal of the present action followed, and was prompted by, his contesting of the plaintiff's standing. Moreover, the defendant claims the Appellate Court improperly required him to provide further evidence of the reason for the plaintiff's withdrawal of the action, because this information was uniquely in control of the plaintiff and provides an unworkable standard that is inconsistent with the statute's remedial purpose.[8] We agree that, in certain circumstances, a plaintiff's withdrawal of an action as of right under § 52-80 prior to a hearing on the merits may constitute a successful defense, entitling the defendant to attorney's fees pursuant to § 42-150bb. Consequently, we conclude that the Appellate Court improperly affirmed the judgment of the trial court on the ground that the defendant had failed to meet his burden of establishing his right to attorney's fees.

We begin with the standard of review. Because the defendant's claim requires us to construe the meaning and scope of the phrase "successfully . . . defends," as used in § 42-150bb, our review is de novo.[9] See *James* v. *Commissioner of Correction*, 327 Conn. 24, 29, 173 A.3d 662 (2017) (questions of statutory construction present issues of law subject to plenary review). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation. . . . In other words, statutory language does not become ambiguous merely because the parties contend for different meanings." (Citations omitted; internal quotation marks omitted.) *In re Elianah T.-T.*, 326 Conn. 614, 620–21, 165 A.3d 1236 (2017).

The term "successfully . . . defends" is not defined

within § 42-150bb or elsewhere in the General Statutes.[10] It is well established that "[w]here a statute does not define a term it is appropriate to look to the common understanding expressed in the law and in dictionaries." *Caldor, Inc.* v. *Heffernan*, 183 Conn. 566, 570–71, 440 A.2d 767 (1981). The word "successful" is defined with substantial similarity in a number of dictionaries. The American Heritage College Dictionary (4th Ed. 2002) defines "successful" as "[h]aving a favorable outcome," and "[h]aving obtained something desired or intended . . . ." Similarly, Webster's Third New International Dictionary (2002) defines "successful" as "resulting or terminating in success," "gaining or having gained success," and "having the desired effect . . . ." The word "defend" is also defined with substantial similarity in a number of dictionaries. The American Heritage College Dictionary, supra, defines "defend" as "[t]o make or keep safe from danger, attack, or harm." Webster's New Third International Dictionary, supra, defines "defend" as "to deny or oppose the right of the plaintiff [in regard to] a suit or a wrong charged," "to oppose or resist [a] claim at law," and "to contest [a] suit." Black's Law Dictionary (4th Ed. 1968) similarly defines "defend" as follows: "To prohibit or forbid. To deny. To contest and endeavor to defeat a claim or demand made against one in a court of justice." Likewise, Black's Law Dictionary (10th Ed. 2014) defines "defend" as follows: "To do something to protect someone or something from attack. . . . To use arguments to protect someone or something from criticism or to prove that something is right. . . . To do something, to stop something from being taken away or to make it possible for something to continue." These definitions suggest that the legislature intended "successfully . . . defends" to include any resolution of the matter in which the party obtains the desired result of warding off an attack made by the action, regardless of whether there was a resolution on the merits.

We next examine § 42-150bb in relation to other statutes. First, we examine § 52-80, which allowed the plaintiff in the present case to withdraw the action prior to a hearing on the merits. The language codified in § 52-80 was in existence long before the legislature enacted § 42-150bb in 1979, yet the legislature did not seek to exclude actions that were withdrawn as a matter of right from the attorney's fees provisions in § 42-150bb. See General Statutes (1949 Rev.) § 7801; Public Acts 1979, No. 79-453. In construing statutes, we presume that the legislature has created "a harmonious and consistent body of law . . . ." (Internal quotation marks omitted.) *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 198, 3 A.3d 56 (2010). "We are entitled to presume that, in passing a statute, the legislature not only did so with knowledge of the existing statutes but also that it did not intend to enact a conflicting statute." *Perille* v. *Raybestos-Manhattan-*

Europe, Inc., 196 Conn. 529, 541, 494 A.2d 555 (1985). With this principle in mind, the legislature's decision not to exclude matters that are withdrawn pursuant to § 52-80 from the provisions of § 42-150bb lends further support to interpreting § 42-150bb in a manner that allows for attorney's fees when an action is withdrawn, as of right, prior to a hearing on the merits.

Furthermore, General Statutes § 52-81 is also relevant to understanding how a defendant in a civil action that is withdrawn under § 52-80 is treated. Section 52-81 provides in relevant part: "Upon the withdrawal of any civil action after it has been returned to court and entered upon the docket, and after an appearance has been entered for the defendant, a judgment for costs, if claimed by him, shall be rendered in his favor, but not otherwise. . . ." Therefore, § 52-81 entitles a defendant in an action voluntarily withdrawn by a plaintiff to recover costs in the same manner as a defendant in an action in which there has been a determination on the merits in the defendant's favor. See General Statutes § 52-257. Section 52-81 was in existence at the time the legislature adopted § 42-150bb in 1979. Therefore, we presume that the legislature was aware of it. See General Statutes (1949 Rev.) § 7802; Public Acts 1979, No. 79-453. Accordingly, the presence of § 52-81 further supports the idea that the legislature intended for a defendant in an action that has been withdrawn to be treated similarly to when there has been a determination on the merits in the defendant's favor.

The plaintiff asserts, however that the term "successfully . . . defends" in § 42-150bb may be read interchangeably with "prevailing party." Indeed, the plaintiff cites to cases that have interpreted § 42-150bb in a manner requiring consumers to "prevail" in order to obtain attorney's fees. See *Wilkes* v. *Thomson*, 155 Conn. App. 278, 283, 109 A.3d 543 (2015); see also *Retained Reality, Inc.* v. *Spitzer*, 643 F. Supp. 2d 228, 239 n.6 (D. Conn. 2009). Relying on language from those cases, the plaintiff contends that a prevailing party includes only those defendants that have succeeded "on the merits of their answer or special defenses." *Wilkes* v. *Thomson*, supra, 283. In further support of its position, the plaintiff cites various definitions of the term "prevailing party." See Black's Law Dictionary (4th Ed. 1968) (defining "prevailing party" as "[t]hat one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention"); see also Black's Law Dictionary (10th Ed. 2014) (defining "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded"). Although not controlling, these prior interpretations of § 42-150bb, together with the definitions on which they are based, demonstrate that the plaintiff's proposed interpretation of § 42-150bb is plausible.

On the basis of our review of the plain language of § 42-150bb and other related statutes, we conclude that both parties' proffered interpretations are reasonable and that § 42-150bb is, therefore, ambiguous. Specifically, we deem plausible the defendant's reading of § 42-150bb, which reads the term "successfully . . . defends" in a manner permitting an award of attorney's fees following a withdrawal of an action before a hearing on the merits. We also find reasonable, however, the plaintiffs' understanding of § 42-150bb, which requires a party to demonstrate that it has prevailed on the merits of an action in order to be awarded attorney's fees. Accordingly, pursuant to § 1-2z, we turn to extratextual sources.

The legislative history surrounding the enactment of 42-150bb was discussed by this court in *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 74, 689 A.2d 1097 (1997). "In 1979, [the legislature] enacted No. 79-453 of the 1979 Public Acts, entitled 'An Act Concerning Attorney's Fee Clauses in Consumer Contracts.' . . . [S]peaking on behalf of the original bill, Senator Alfred Santaniello, Jr., remarked: 'This bill makes attorney's fee clauses reciprocal. For example, a clause for the benefit of the creditor will automatically allow the attorney's fees to the prevailing debtor who successfully prosecutes or defends an action or counterclaim based upon the contract or lease.' 22 S. Proc., Pt. 8, 1979 Sess., p. 2542. . . .

"Representative [Richard D.] Tulisano expressly stated that the statute was now 'self-enforcing' in that contractual attorney's fee provisions would be reciprocal. He stated: '[T]he legislation before us today provides [for] the first time the ability for consumers in this state to obtain attorney's fees, of [a] reasonable amount, as a result of defending or prosecuting any action in which the commercial party has provided for attorney's fees for their own behalf. What this does is give some equity to the situation. At the present time, many form contracts include attorney's fees provisions for the commercial party, and even though . . . that party may be wrong and a consumer successfully defends an action against him, or her, they would not be entitled to receive attorney's fees in defending that action. This will put some equity in the situation to the same extent that any commercial party will receive.' [22 H.R. Proc., Pt. 22, 1979 Sess., pp. 7487–90].

"Furthermore, during . . . subsequent consideration of [an amendment proposed Representative Tulisano] in the Senate, Senator Salvatore C. DePiano stated: '[That amendment] would, in effect, eliminate a provision of the bill which would have made it an unfair or deceptive trade practice for a commercial party to have included a clause in a contract or lease which provides for the recovery of attorney's fees by a consumer on terms less favorable than those for the commercial party. . . . This bill would require that in a

specified situation attorney's fees be awarded to a consumer who successfully brings or defends an action based upon a contract or lease whenever such contract or lease provides for the attorney's fees of a commercial party . . . .' " *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 74–76.

As we explained in *Aaron Manor, Inc.* v. *Irving*, 307 Conn. 608, 617–18, 57 A.3d 342 (2013), "[t]his court has previously discussed the legislative history of § 42-150bb and recognized that it was designed to provide equitable results for a consumer who successfully defended an action under a commercial contract and the commercial party who was entitled to attorney's fees. . . . The purpose of § 42-150bb is to bring parity between a commercial party and a consumer who defends successfully an action on a contract prepared by the commercial party." (Citation omitted; internal quotation marks omitted.) It would be wholly incongruous with the design of § 42-150bb to allow a commercial party to avoid paying attorney's fees simply by withdrawing the action pursuant to § 52-80. Indeed, if we were to interpret "successfully . . . defends" in the manner the plaintiff proposes, a commercial party that becomes aware, either through the consumer's defense or through its own discovery, of problems in successfully prosecuting its action, could simply withdraw the action to avoid paying the attorney's fees that it has required the consumer to incur. We conclude that allowing for such a result when a consumer has been required to defend an action would be wholly inconsistent with the recognized legislative purpose behind § 42-150bb. Instead, we conclude that, when a consumer moves for attorney's fees under § 42-150bb and is able to show that a commercial party has withdrawn an action, the burden then shifts to the commercial party to demonstrate that the withdrawal was unrelated to the defense mounted by the consumer.[11]

Furthermore, interpreting § 42-150bb in a manner that allows for attorney's fees in the event of a voluntary withdrawal pursuant to § 52-80 is consistent with the approach taken by other states. "In applying a statute providing for an award of costs to the 'prevailing party' or the 'successful party' to cases in which the plaintiff had voluntarily dismissed his action, the courts have generally held that the defendant in such a case is entitled to recover his costs as the 'prevailing party' . . . ." (Footnote omitted.) Annot., 66 A.L.R.3d 1087, § 2, p. 1090 (1975); see also id., § 3 (a), pp. 1091–95 (compiling cases in which plaintiff has voluntarily withdrawn action and attorney's fees have been awarded to defendant as "prevailing party"). For example, the Florida Supreme Court has explained that, "[i]n general, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party. . . . A determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to

the prevailing party." (Citation omitted.) *Thornber* v. *Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990). Likewise, the Florida District Court of Appeal has held that the fact that an action is voluntarily dismissed without prejudice does not affect whether the defendant is entitled to an award of attorney's fees under a statute that awards fees to a prevailing party. See *State ex rel. Marsh* v. *Doran*, 958 So. 2d 1082, 1082 (Fla. App. 2007) ("We hold that a defendant is entitled to recover attorney's fees under [the state statute awarding] fees to the prevailing party, after the plaintiff takes a voluntary dismissal without prejudice. The refiling of the same suit after the voluntary dismissal does not alter the appellees' right to recover prevailing party attorney's fees incurred in defense of the first suit."); see also *Dean Vincent, Inc.* v. *Krishell Laboratories, Inc.*, 271 Or. 356, 358, 532 P.2d 237 (1975) ("The trial court denied attorney's fees because it did not believe [the] defendant qualified as the 'prevailing party.' However, [the] defendant was the prevailing party because a voluntary nonsuit terminates the case in a defendant's favor. Even though the termination was without prejudice and [the] plaintiff could file another case upon the same cause of action, these facts did not prevent [the] defendant from being the party in whose favor the judgment was rendered in that particular case.").

A review of the cases from other jurisdictions also demonstrates that, even if we were to conclude that the term "successfully . . . defends" in § 42-150bb is the functional equivalent of "prevailing party," as the plaintiff asserts, our resolution of this appeal need not change. Many of the jurisdictions that conclude a defendant is entitled to attorney's fees when an action is voluntarily withdrawn have statutes that provide for an award of attorney's fees to a "prevailing party." See Fla. Stat. Ann. § 57.105 (5) (West 2016) (providing, in certain administrative proceedings, that "administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative"); Or. Rev. Stat. § 20.096 (1) (2015) ("[i]n any action or suit in which a claim is made based on a contract that specifically provides that [attorney's] fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the claim shall be entitled to reasonable [attorney's] fees in addition to costs and disbursements, without regard to whether the prevailing party is the party specified in the contract and without regard to whether the prevailing party is a party to the contract").

In the present case, the defendant properly moved for attorney's fees and made a proper assertion as to the success of his defense in causing the plaintiff to withdraw the action. Thereafter, the plaintiff did not provide any evidence that it had withdrawn the action

for a reason unrelated to the defense mounted by the defendant. Indeed, although the plaintiff's counsel may have asserted that the defendant's bankruptcy in federal court prohibited the current action, it did not introduce any evidence on that issue, and the trial court did not make a specific factual finding on that issue. See footnote 5 of this opinion. Accordingly, we conclude that the trial court incorrectly denied the defendant's motion for attorney's fees. The Appellate Court affirmed the judgment of the trial court, concluding that the defendant did not meet his burden of demonstrating that the withdrawal of the action was as a result of his defense. Having now clarified that once the consumer asserts that the action was withdrawn pursuant to § 52-80 as a result of the consumer's actions, the burden then shifts back to the commercial party to demonstrate that the withdrawal was not a result of the consumer's defense, we conclude that the Appellate Court incorrectly affirmed the judgment of the trial court and that the case must be remanded to the trial court for further proceedings consistent with this opinion.[12]

Once the defendant seeks attorney's fees on the ground that the action has been voluntarily withdrawn by the plaintiff as a result of the defendant's actions, the trial court must then make a factual determination, by a preponderance of the evidence, as to whether the withdrawal is a result of the defendant's defense. This court's decision in *Anderson* v. *Latimer Point Management Corp.*, 208 Conn. 256, 265–66, 545 A.2d 525 (1988), is instructive regarding what conduct is necessary to obtain attorney's fees pursuant to § 42-150bb. In *Anderson*, this court applied § 42-150bb to a lease agreement. Id., 265. Specifically, this court determined that the plaintiff in that case could not obtain attorney's fees following a judgment in his favor on certain counterclaims brought by a corporate defendant because that judgment was based on certain inadequacies in that defendant's bylaws, not the plaintiff's pursuit of the underlying complaint, which had alleged violations of the lease. Id., 265–66. In deciding that the plaintiff was not entitled to attorney's fees pursuant to § 42-150bb, this court examined the exact nature of the proceedings and what specifically caused the judgment to be rendered in the plaintiff's favor. Id.

We disagree with the plaintiff that permitting a defendant to recover attorney's fees in the present circumstances could lead to the "award of fees to those who raised meritless defenses or no defense at all, and that will result in wholly unreasonable and impractical results." The award of attorney's fees by the trial court is governed by this court's decision in *Rizzo Pool Co.* v. *Del Grosso*, supra, 240 Conn. 76–77. In that case, this court determined that the amount of the fees paid pursuant to § 42-150bb must be reasonable in relation to the amount of work performed by the defendant's counsel. Id. If the defendant's counsel performed any

amount of work that resulted in the plaintiff's withdrawal of that action, then the defendant's counsel should be permitted to recover the costs of doing that work so long as it is reasonable—a determination to be made by the trial court. The plaintiff's concern that fees will be awarded for "meritless defenses or no defenses at all" is baseless, as the trial court has the discretion to disallow attorney's fees in cases in which defense counsel took little or no action that resulted in the plaintiff's voluntary withdrawal.[13]

We conclude, therefore, that the trial court is permitted to make findings regarding the reasons for the plaintiff's withdrawal of an action. The findings need not be made after a full evidentiary hearing. Instead, once a defendant moves for an award of attorney's fees pursuant to § 42-150bb after a termination of proceedings that in some way favors the defendant, there exists a rebuttable presumption that the defendant is entitled to such fees unless the plaintiff can show, by a preponderance of the evidence, that the withdrawal occurred because of some reason other than the actions taken by the defendant's counsel. The plaintiff can show its reasons for withdrawing the action through affidavits, and it is for the trial court to determine whether an award of attorney's fees is proper in light of the totality of the circumstances. The trial court, after reviewing the affidavits, may wish to conduct a hearing to resolve any questions created; however, the trial court is not required to do so.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court for further proceedings consistent with this opinion.

In this opinion ROGERS, C. J., and PALMER, McDONALD and ROBINSON, Js., concurred.

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

** January 26, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 42-150bb provides in relevant part: "Whenever any contract or lease entered into on or after October 1, 1979, to which a consumer is a party, provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. Except as hereinafter provided, the size of the attorney's fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party. . . . For the purposes of this section, 'commercial party' means the seller, creditor, lessor or assignee of any of them, and 'consumer' means the buyer, debtor, lessee or personal representative of any of them. The provisions of this section shall apply only to contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes."

[2] General Statutes § 52-80 provides in relevant part: "The plaintiff may withdraw any action . . . entered in the docket of any court, before the commencement of a hearing on the merits thereof. . . ."

[3] We note that the original summons and complaint also named Bank of America, N.A., and Rosibel Aguero as defendants. Bank of America, N.A., was defaulted for failure to appear and Rosibel Aguero was defaulted for

failure to plead. Neither of those parties participated in the proceedings before the Appellate Court. See *Connecticut Housing Finance Authority* v. *Alfaro*, 163 Conn. App. 587, 589 n.1, 135 A.3d 1256 (2016). For the sake of simplicity, we refer to Alfaro as the defendant in this opinion.

[4] The note provides in relevant part: "If [b]orrower defaults by failing to pay in full any monthly payment, then [the lender] may . . . require immediate payment in full of the principal balance remaining due and all accrued interest."

[5] In objecting to the defendant's motion for attorney's fees, the plaintiff had also argued that, pursuant to federal law, the defendant's discharge in bankruptcy precluded the plaintiff from continuing to pursue its action. Nevertheless, the plaintiff did not introduce any evidence on this point, only an argument by counsel, and the trial court did not make a specific finding on this issue.

[6] We note that the Appellate Court restricted its analysis to whether the defendant had "successfully defend[ed]" the present action within the meaning of § 42-150bb, and therefore assumed, without deciding, that all other requirements for an award of attorney's fees pursuant to that statute had been met. *Connecticut Housing Finance Authority* v. *Alfaro*, supra, 163 Conn. App. 592.

[7] We granted the defendant's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly determine that the trial court correctly denied the defendant's request for attorney's fees pursuant to . . . § 42-150bb?" *Connecticut Housing Finance Authority* v. *Alfaro*, 321 Conn. 925, 138 A.3d 286 (2016).

[8] In his appeal to this court, the defendant further contends that a defendant should be entitled to recover attorney's fees pursuant to § 42-150bb in any case in which a plaintiff withdraws its action as a matter of right, for whatever reason, without securing any material relief from the defendant. Because this new claim is broader than the one made before the trial court and the Appellate Court, we decline to address it.

[9] The plaintiff contends that the standard of review should be the clearly erroneous standard, because the determination of whether the defendant "successfully prevailed" is a factual one to which we should defer. Additionally, the plaintiff claims that the defendant did not raise the issue of statutory construction before the trial court or the Appellate Court and, therefore, did not preserve it for appeal.

Contrary to the plaintiff's assertions, the issue of statutory construction is properly preserved. Although the defendant did not make a detailed statutory construction argument at the trial court, he cited § 42-150bb, along with cases applying that statute, as authority in his motion for attorney's fees. The plaintiff responded by distinguishing those cases, and other cases applying the statute, from the present case. The trial court, when denying the defendant's motion for attorney's fees, performed a similar analysis, concluding that an award of fees pursuant § 42-150bb would be proper only if there had been some type of hearing on the merits. Finally, on appeal to the Appellate Court, the defendant clearly raised a statutory construction claim although, as we have explained previously in this opinion, that court declined to address it. Although the Appellate Court decision was based on a factual determination regarding whether the defendant had proven that the plaintiff withdrew the action in response to the defendant's actions, that decision does not negate the fact that the defendant has properly raised a question of statutory construction.

[10] The term "successfully defends" has been employed three other times by our legislature. See General Statutes § 17b-261q (d) (in context of action by nursing home facility to collect debt for unpaid care, "[c]ourt costs and reasonable attorneys' fees shall be awarded as a matter of law to a defendant who successfully defends an action or a counterclaim brought pursuant to this section"); General Statutes § 17b-261r (e) (in context of action by nursing home facility to recover applied income, "[c]ourt costs and reasonable attorneys' fees shall be awarded as a matter of law to a defendant who successfully defends an action or a counterclaim brought pursuant to this section"); General Statutes § 42-410 (d) (in context of action for late fees, "[i]f a consumer lease provides for recovery of attorney's fees by the holder, a lessee who successfully defends a collection action is entitled to reasonable attorney's fees from the holder").

[11] The plaintiff asserts that allowing a defendant to recover attorney's fees when an action has been voluntarily withdrawn is contrary to the legislative intent of parity between the commercial entity and the consumer because the commercial entity is only entitled to attorney's fees in the event there

is a determination on the merits in its favor. We disagree. First, as we have explained previously in this opinion, although § 42-150bb was intended to provide parity, the genesis of that provision was to protect consumers in light of the fact that form contracts typically provided for attorney's fees to commercial entities. See 22 H.R. Proc., supra, pp. 7487–90. Second, because the plaintiff has the ability to voluntarily withdraw the action, it is necessary to allow for attorney's fees, even without a determination on the merits, so as to protect the defendant if a plaintiff withdraws the action after learning that the action will be unsuccessful as a result of the defendant's actions. Third, allowing the plaintiff to avoid paying the defendant's attorney's fees in the event it can demonstrate that the withdrawal was unrelated to the defense mounted by the defendant furthers the legislative intent of parity.

[12] Although the dissent acknowledges that the legislative history demonstrates that § 42-150bb was enacted to provide parity for consumers because commercial contracts typically already provided attorney's fees for commercial entities, the interpretation of § 42-150bb proposed by the dissent does not provide such parity. Instead, the dissent requires that there be a "material alteration of the legal relationship between the parties." Under the interpretation proposed by the dissent, a commercial entity could initiate an action requiring its consumer to incur significant attorney's fees, the consumer could then demonstrate that the action would ultimately be unsuccessful by filing a persuasive dispositive motion, and then the commercial entity could avoid attorney's fees by voluntarily withdrawing the action before the court has had a chance to rule. On the other hand, our interpretation provides for parity between commercial entities and consumers by allowing commercial entities to demonstrate that a withdrawal was not as a result of its consumer's defense. Furthermore, that determination by the trial court and the ability for a consumer to move for a judgment for costs under § 52-81 are arguably a "material alteration of the legal relationship between the parties."

[13] The dissent asserts that our interpretation of § 42-150bb "employs a rationale similar to the catalyst theory, which was discarded by the United States Supreme Court in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)." We disagree. Our interpretation of § 42-150bb is not based on the catalyst theory; it is based on unique statutory language in § 42-150bb, the legislative history underlying its enactment, and precedent from other jurisdiction. Furthermore, although a majority of the United States Supreme Court rejected the catalyst theory, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented. In that dissent, Justice Ginsburg explained as follows: "The [c]ourt today holds that a plaintiff whose suit prompts the precise relief she seeks does not 'prevail,' and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory. . . . The decision allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint. Concomitantly, the [c]ourt's constricted definition of 'prevailing party,' and consequent rejection of the 'catalyst theory,' impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general. . . . Nothing in history, precedent, or plain English warrants the anemic construction of the term 'prevailing party' the [c]ourt today imposes." *Buckhannon Board & Care Home, Inc.* v. *West Virginia Dept. of Health & Human Resources*, supra, 622–23.