BONNIE DUART *v.* DEPARTMENT OF CORRECTION
(SC 18476)

Rogers, C. J., and Palmer, Zarella, McLachlan, Eveleigh, Vertefeuille and Bear, Js.*

Argued April 26, 2011—officially released January 24, 2012

Leon M. Rosenblatt, for the appellant (plaintiff).

Gregory T. D'Auria, solicitor general, with whom were *Antoria D. Howard*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, *Richard Blumenthal*, former attorney general, *Margaret Q. Chapple*, assistant attorney general, and *Jane B. Emons*, former assistant attorney general, for the appellee (defendant).

Kathleen Eldergill filed a brief for the Connecticut Employment Lawyers Association as amicus curiae.

Charles Krich filed a brief for the commission on human rights and opportunities as amicus curiae.

Opinion

McLACHLAN, J. The issue before us in this certified appeal is whether a party seeking a new trial on the basis of alleged knowing and deliberate discovery misconduct must show that the result at a new trial would likely be different.[1] The plaintiff, Bonnie Duart, appeals, upon our grant of her petition for certification, from the judgment of the Appellate Court affirming the trial court's denial of the plaintiff's motion for a new trial. She claims that the rule that we set forth in *Varley* v. *Varley*, 180 Conn. 1, 428 A.2d 317 (1980), to determine whether a new trial should be granted on the basis of allegations that the judgment was obtained through fraud—which requires, inter alia, that the movant demonstrate a substantial likelihood that the result of a new trial will be different—does not apply to a motion for a new trial on the basis of alleged discovery misconduct by the nonmoving party.[2] She claims, therefore, that the Appellate Court improperly applied the standard set forth in *Varley* in affirming the judgment of the trial court. We conclude that the *Varley* rule as reframed in this decision applies to motions for a new trial based on the discovery misconduct of the nonmoving party. Accordingly, we affirm the judgment of the Appellate Court.

The Appellate Court set forth the following relevant facts and procedural history. "This case arises out of an employment dispute between the plaintiff, a lieutenant with the department of correction, and the defendant, [the department of correction]. On May 28, 2002, the plaintiff filed an amended complaint against the defendant. In count one, she alleged that the defendant discriminated against her on the basis of her gender and sexual orientation. In count two, the plaintiff alleged that the defendant retaliated against her after she filed a complaint of discrimination with the commission on human rights and opportunities (commission).[3]

"The plaintiff alleged the following facts in support of her claims. On October 7, 1999, the plaintiff's supervisor, Duane Kelley, wrote an incident report in which he alleged that the plaintiff was dating another female correction officer, Cynthia Bruner, who was in the same chain of command as the plaintiff.[4] Kelley published this incident report to the warden, Gurukaur Khalsa. Following the publication of the incident report, both Kelley and Khalsa began making false or grossly exaggerated allegations against the plaintiff. They harassed her about her hair, despite her continual compliance with the rules governing hair length, and, at one point, Khalsa stated to the plaintiff that if she did not know how to put her hair up properly, she should get one of her many women friends to help her. The plaintiff understood this statement to be in reference to her sexual orientation. In addition, the plaintiff was accused falsely of being disrespectful to Kelley and was trans-

ferred to the third shift despite a medical condition that prevented her from working that particular shift.

"On April 24, 2000, the plaintiff filed her first complaint of discrimination with the commission and the federal Equal Employment Opportunity Commission. After she filed the complaint, the discrimination and harassment by Kelley and Khalsa became even more severe, as evidenced by the following events: (1) the plaintiff was suspended for five days under the pretext of not complying with the hair regulations and for supposed disrespectful behavior to Kelley; (2) the plaintiff received her first unsatisfactory evaluation and her pay raise was taken away; (3) the plaintiff was accused falsely of failing to follow procedures regarding sick days, scheduling training and storing facility keys; (4) the plaintiff was denied vacation time; (5) the plaintiff was demoted from her position of lieutenant; and (6) the plaintiff was transferred by another supervisor, Wayne Valade, to a different correctional facility, which resulted in a decrease in pay, authority and prestige. The plaintiff also alleged that both Valade and Kelley had a practice of harassing female officers." *Duart* v. *Dept. of Correction*, 116 Conn. App. 758, 760–62, 977 A.2d 670 (2009).[5]

A jury trial commenced on July 14, 2004. On July 27, 2004, the jury issued a verdict denying the plaintiff's claims of discrimination on the basis of gender, race and sexual orientation. On August 6, 2004, the plaintiff filed a motion in arrest of judgment for extrinsic causes, to set aside the verdict and for a new trial. In support of her motion, the plaintiff relied on the defendant's failure to disclose an anonymous note accusing the plaintiff of being in a relationship with Bruner, developments in the defendant's investigation of a complaint by Lieutenant Catherine Osten that Kelley and Valade had retaliated against her, and a 2002 discrimination complaint filed by Lieutenant Lisa Jackson against Osten and Kelley.[6] Assuming, without deciding, that the defendant had engaged in discovery misconduct, the trial court concluded that the evidence at issue was "merely cumulative" of evidence presented at trial and, as such, "would not have produced a different result." The court applied the "result altering" standard as set forth in *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59* v. *Superline Transportation Co.*, 953 F.2d 17, 21 (1st Cir. 1992) (*Teamsters*), which requires the movant to show that it "possesses a potentially meritorious claim or defense which, if proven, will bring success in its wake," and denied the plaintiff's motion for a new trial.

The plaintiff appealed from the judgment of the trial court to the Appellate Court, claiming that the defendant's discovery misconduct had "so perverted the process" that it had deprived her of the opportunity to fully and fairly discover evidence, and that consequently she

was entitled to a new trial. She argued that the trial court improperly applied the "result altering" standard set forth in *Teamsters*, and should have applied the "substantial interference" test set forth in *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 926 (1st Cir. 1988), which requires the movant to show that "the misconduct substantially interfered with its ability fully and fairly to prepare for, and proceed at, trial."

The Appellate Court upheld the trial court's decision by applying the "result altering" standard as articulated in *Varley* for a motion for a new trial grounded upon evidence of fraud, rather than by applying First Circuit case law. The Appellate Court held that, although the trial court's memorandum of decision did not expressly set out the standard established in *Varley*, it had "effectively applied the correct standard" in determining that, even if the defendant had disclosed the evidence at issue, the evidence was unlikely to produce a different result. *Duart* v. *Dept. of Correction*, supra, 116 Conn. App. 772–73. This certified appeal followed.

The plaintiff argues that the *Varley* rule is inapposite because discovery misconduct is distinct from misconduct at trial, and she should not be required to prove that the result of a new trial will be different. Instead, she suggests that the court should adopt the standard articulated by the First Circuit in *Anderson* v. *Cryovac, Inc.*, supra, 862 F.2d 926, or by this court in *Ramin* v. *Ramin*, 281 Conn. 324, 915 A.2d 790 (2007). In response, the defendant contends that the Appellate Court properly concluded that the "result altering" standard in *Varley* applies to both claims of fraud and discovery misconduct. We agree with the defendant.

Practice Book § 16-35 authorizes motions for a new trial.[7] Historically, this court has recognized the difficulty of articulating a "precise rule" applicable to all motions for new trials for verdicts against the evidence. *Laflin* v. *Pomeroy*, 11 Conn. 440, 445 (1836). In *Laflin*, we stated that while the court must not interfere with the "appropriate province of the jury," it was clear that it may exercise its authority to grant a new trial when necessary to serve the "great end of all trials, a fair and impartial administration of justice." Id. We further concluded that the "substantial ends of justice" would not require a new trial when it did not clearly appear that "the result would or ought to be different . . . ." Id.; see also *Wooster* v. *Glover*, 37 Conn. 315, 316 (1870) (denying petition for new trial when petitioner failed to show that injustice had been done, even though his default of appearance was not negligent, because "the result of a new trial would not probably be different" [internal quotation marks omitted]).

Over time and in a variety of contexts, this court consistently has required parties to demonstrate the likelihood of a different result to show that justice requires a new trial. For example, we have stated that

the discovery of new evidence warrants a new trial if "upon all the evidence an injustice had been done," but that a new trial will not be granted upon newly discovered evidence "unless . . . a new trial would probably produce a different result." *Turner* v. *Scanlon*, 146 Conn. 149, 163, 148 A.2d 334 (1959).[8] Likewise, if the court improperly admitted evidence, we will not disturb the judgment without a showing that the ruling was "so harmful as to require a new trial," or, in other words, that the "ruling [likely affected] the result." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 128, 956 A.2d 1145 (2008).

This court has also granted motions for new trials "[w]here an unsuccessful party has been prevented, by fraud or deception, from exhibiting fully his case and shows that there never has been a real contest in the trial or hearing of the case . . . ." *Varley* v. *Varley*, supra, 180 Conn. 2; see also *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 107, 952 A.2d 1 (2008) (applying *Varley* standard to motion to open when new evidence allegedly showed that judgment was tainted by fraud). In *Varley*, we set forth a four factor test to determine when fraud during the trial process warrants relief from the judgment. The fourth factor of this test requires the moving party to demonstrate "a substantial likelihood that the result of the new trial will be different." *Varley* v. *Varley*, supra, 4.

Finally, the "different result" requirement also applies outside of the civil context. The United States Supreme Court has held that a prosecutor's failure to disclose evidence material to guilt or punishment violates due process, thereby entitling the defendant to a new trial. *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Relief will not be granted, however, unless there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). A " 'reasonable probability,' " in turn, means "a probability sufficient to undermine confidence in the outcome." Id.; see also *State* v. *Skakel*, 276 Conn. 633, 700, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006) ("the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" [internal quotation marks omitted]), quoting *Kyles* v. *Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). *Brady* conditions relief on the "different result" requirement regardless of whether the failure to disclose was intentional or merely negligent, and regardless of the timing of the failure to disclose. *Brady* v. *Maryland*, supra, 87 (applying rule for first time to

prosecutor's failure to disclose requested materials prior to trial, "irrespective of the good faith or bad faith of the prosecution"); see also *United States* v. *Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) ("[n]or do we believe the constitutional obligation is measured by moral culpability, or the willfulness, of the prosecutor").

Requiring a movant to demonstrate that there is a reasonable probability that a new trial likely would yield a different result is consistent with the "equitable principle that once a judgment is rendered it is to be considered final . . . ." *Steve Viglione Sheet Metal Co.* v. *Sakonchick*, 190 Conn. 707, 713, 462 A.2d 1037 (1983). The principle of finality requires that judgments be "left undisturbed by post-trial motions except for a good and compelling reason." Id. The United States Supreme Court has emphasized that relief may be granted when the underlying judgment was founded on fraud, but that such an exception to the "deep-rooted policy in favor of the repose of judgments" must be reserved for exceptional circumstances, such as when enforcement of the judgment is " 'manifestly unconscionable . . . .' " (Citation omitted.) *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244–45, 64 S. Ct. 997, 88 L. Ed. 1250 (1944). Otherwise, there might "never be an end to litigation." *Turner* v. *Scanlon*, supra, 146 Conn. 163. Thus, the presumption of finality is necessary to promote stability, protect reliance interests, and prevent overly burdensome and duplicative litigation.

Although this is the first time that this court has directly considered what showing is required for a new trial when there is claimed discovery misconduct, we believe that the "different result" criterion best comports with the "deep-rooted policy in favor of the repose of judgments"; *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, supra, 322 U.S. 244; and properly balances the burdens on both parties. Not requiring the movant to prove a different result would invite endless litigation and deplete judicial resources. Given the breadth of discovery in modern trial practice, it is inevitable that the movant could find some fault with the other party's compliance with broadly phrased discovery requests. If we obliged the nondisclosing party to prove harmlessness every time the moving party claimed that the nondisclosure constituted misconduct, we would impose an insupportable burden on the nonmoving party to disprove amorphous assertions, as in the present case, that the "entire case would have gone differently . . . ." Requiring a showing of a different result serves as a means of differentiating those cases in which the nonmoving party's alleged misconduct materially affected the resolution of the underlying case—and in which, accordingly, the increased burden and expense is thereby warranted—from those cases in which relitigation would be a pointless exercise.

Nor do we believe that requiring some showing of a different result would set too high of a hurdle for the movant such that parties who wrongfully withhold documents would evade penalty. If it is self-evident that the withheld document may reasonably lead to a different result, the content of the document alone is sufficient to meet the *Varley* test. If prejudice to the movant is not clear from the document itself, the burden of proof is best shouldered by the movant, as she is in the best position to know how the nonmoving party's nondisclosure impaired her case, how the information might have altered her trial strategy, and what avenues might have been pursued.

And, finally, any suggestion that this standard invites noncompliance ignores the fact that discovery compliance is already regulated by the rules of practice. Practice Book §§ 13-7 and 13-10 make responses to interrogatories and requests for production mandatory, while Practice Book § 13-14 (a), in relevant part, permits the judicial authority, on motion, to "make such order as the ends of justice require" if a party fails to comply fully with its discovery obligations. Under § 13-14, the trial court has broad discretion "to fashion and impose sanctions for failure to comply with the rules of discovery" to meet the individual circumstances of each case. *Northeast Savings, F.A.* v. *Plymouth Commons Realty Corp.*, 229 Conn. 634, 638, 642 A.2d 1194 (1994).[9] In addition, rule 3.4 of the Rules of Professional Conduct provides in relevant part that "[a] lawyer shall not . . . (1) [u]nlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value . . . [or] (4) . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . ." An attorney who violates these rules will be subject to discipline. Rules of Professional Conduct 8.4, commentary. Together, these provisions serve to secure fair competition in the trial process by deterring deliberate discovery misconduct and by providing a remedy if misconduct nevertheless occurs.

We therefore conclude that a motion for a new trial based on discovery misconduct, like fraud, will not be granted unless the movant satisfies the test set forth in *Varley* v. *Varley*, supra, 180 Conn. 4. We take this opportunity, however, to rephrase the movant's burden in establishing the fourth prong of the *Varley* test with respect to all claims for relief that fall within the purview of *Varley*, including fraud and misconduct. Previously in this opinion, we described a variety of circumstances in which a movant may seek a new trial, and we set forth the differing linguistic formulations for the "different result" criterion corresponding to each context. For instance, *Varley* indicates that a movant must show "a *substantial likelihood* that the result of

the new trial will be different." (Emphasis added.) *Varley* v. *Varley*, supra, 4. This articulation differs from the phrasing in *Brady* v. *Maryland*, supra, 373 U.S. 87, and its progeny, which requires a criminal defendant to demonstrate "a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Emphasis added.) *United States* v. *Bagley*, supra, 473 U.S. 682.

Upon consideration, we see no reason why the victim of fraud or discovery misconduct in a civil case should be treated more or less favorably than the victim of nondisclosure in a criminal case. Therefore, we disavow the phrasing employed in *Varley* and rephrase the fourth prong to require a movant to demonstrate a reasonable probability, rather than a substantial likelihood, that the result of a new trial will be different. Furthermore and consistent with *Brady*, we interpret " 'reasonable probability' " to mean "a probability sufficient to undermine confidence in the outcome"; id.; or, in other words, that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, supra, 514 U.S. 435.[10] We recognize that this test may impose a somewhat less onerous burden on the movant than the "substantial likelihood" test in *Varley*. *Varley* v. *Varley*, supra, 180 Conn. 4. Nevertheless, we adopt this linguistic formulation because we believe that *Brady* articulates a more appropriate test.[11]

Although the trial court analyzed the plaintiff's motion for a new trial according to the standard set forth in *Teamsters*, rather than the *Varley* test as rephrased in this opinion, our review of the court's findings leads us to conclude that, even if the court had required a showing of a reasonable probability that the result of a new trial will be different, the plaintiff's motion for a new trial could not have prevailed.[12] The plaintiff's motion for a new trial alleged that the following items had been withheld during discovery: (1) the anonymous note received by Kelley in October, 1999; (2) documents regarding Osten's retaliation complaint against Kelley and Valade; and (3) Jackson's discrimination complaint against Osten and Kelley. According to the trial court, "[t]here is no question that these documents were germane to the case and requested in discovery. There is also no question that none of these documents were produced by the defendant, although they should have been." The trial court carefully analyzed the undisclosed evidence and concluded that the withheld items were "merely cumulative to other evidence introduced at trial and would not have produced a different result."[13]

In finding that the undisclosed evidence was merely cumulative, the trial court concluded that the withholding of these three items made little, if any, difference to the outcome of the case. With respect to the note,

the trial court concluded that the late disclosure "did not so taint the process as to in all equity warrant a new trial." The court reasoned that the note was cumulative of other evidence because "[m]ost of what the actual note had to contribute to the outcome was already before the jury, just not its exact language." Indeed, although the plaintiff argues that the "entire case would have gone differently, both in discovery and at trial," if the note had been disclosed sooner, the trial court found that both parties were aware of the note, had a rough idea of its contents for a considerable time prior to trial, and the plaintiff called the jury's attention to the note numerous times to support her claim of discrimination on the basis of sexual orientation. The plaintiff also examined Kelley, who testified that he had known of the plaintiff's sexual orientation before he received the note. Additionally, although the plaintiff states that she would have changed her strategy and theory of the case to focus on discrimination due to sexual orientation, she asserted discrimination based on sexual orientation in the first count of her amended complaint, and the trial court found that it was "at the core of the trial and articulated by counsel at the start." Further, to the extent that the plaintiff was surprised by the production of the actual note, she was granted a recess to consider what actions to take.

Similarly, with respect to the undisclosed results of the Osten investigation and the Jackson complaint, the trial court stated: "After reviewing the evidence at trial and the complaints in question, the court finds that these documents are cumulative of other evidence that was presented at trial." The trial court's finding that both items were cumulative is supported by the fact that Osten herself testified as to the contents of the complaint and the investigation at trial. The trial court pointed out that the discriminatory conduct Osten described to the jury was "the most salient part of the complaint and the most telling, had the jury concluded that it was a pattern of discriminatory conduct that . . . Kelley regularly engaged in." The subsequent actions that the defendant took to address Osten's allegations were, in contrast, merely "secondary . . . ." Lastly, the court found that neither the Osten investigation materials nor the Jackson complaint "discredit[ed] the testimony of [Kelley and Valade]." These findings compel the conclusion that the trial court believed that the withheld items could not reasonably be taken to put the plaintiff's whole case in such a different light as to undermine confidence in the outcome of the trial.

In addition to our review of the trial court's findings, we have examined the record as supplied to us, including the portions of the transcript filed. We note, however, that the plaintiff failed to file a complete copy of the trial transcript.[14] We are therefore limited in our review to the record presented and we are unable to find any evidence from which we can conclude that

there is a reasonable probability that the result of a new trial would be different. Consequently, the plaintiff could not have prevailed even under our rearticulation of the proper standard.

Notwithstanding the fact that in virtually all other contexts—including cases in which the state intentionally violates a criminal defendant's constitutional right to exculpatory material—we have required a movant to meet the "different result" requirement, the plaintiff argues that a motion for a new trial on the basis of discovery misconduct implicates different policy concerns that outweigh the interest in finality, and, consequently, that she should not have to prove that the result of a new trial would be different. The plaintiff urges us instead to adopt the rule set forth in *Anderson* v. *Cryovac, Inc.*, supra, 862 F.2d 926.

According to the United States Court of Appeals for the First Circuit, "in motions for a new trial under the misconduct prong of [r]ule 60 (b) (3) [of the Federal Rules of Civil Procedure], the movant must show the opponent's misconduct by clear and convincing evidence. Next, the moving party must show that the misconduct substantially interfered with its ability fully and fairly to prepare for, and proceed at, trial." Id.[15] Alternatively, a showing by the movant that the misconduct was "knowing or deliberate" gives rise to a presumption of substantial interference. Id. The opposing party then bears the burden to rebut that presumption by a "clear and convincing demonstration that the consequences of the misconduct were nugacious." Id.

We decline the plaintiff's invitation to adopt the *Anderson* test for three reasons. First and foremost, this court is guided by Connecticut common law in resolving issues of state law. In contrast, *Anderson* is founded on federal procedural law. In particular, the court in *Anderson* relied on the text of rule 60 (b) (3) of the Federal Rules of Civil Procedure and federal decisional authority interpreting the same. Because the procedure for granting a new trial in Connecticut state courts is governed by Connecticut's rules of practice, relying on federal case law that construes an analogous, but not identical, federal rule would impinge on the carefully demarcated bounds of the relationship between state courts and federal courts that this country has preserved since the time of the founding. Accordingly, we have stated that "[i]t is axiomatic that courts in Connecticut adjudicating matters of state law are not bound by a test that a federal court must apply. In Connecticut, the rules of practice and procedure are defined in our Practice Book and controlling case law." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 53, 970 A.2d 656, cert. denied sub nom. *Bridgeport Roman Catholic Diocesan Corp.* v. *New York Times Co.*, U.S. , 130 S. Ct. 500, 175 L. Ed. 2d 348 (2009). More particularly, "the federal rules of

civil procedure and the federal court's interpretations thereon are not binding upon the state courts . . . ." *Mac's Car City, Inc.* v. *American National Bank*, 205 Conn. 255, 260, 532 A.2d 1302 (1987).[16] The federal test for a rule 60 (b) (3) motion is, simply put, irrelevant to this case. The plaintiff has not cited any persuasive rationale for overruling this state's controlling case law in the context of discovery misconduct uncovered during or after trial by engrafting decisional authority from another jurisdiction onto our rules of practice. Thus, we adhere to the common law of this state.

Second, we disagree with the plaintiff's attempt to distinguish *Varley* in her claim that misconduct by a party before trial is distinct from fraud at trial such that we must adopt a different test for misconduct claims. The plaintiff's claim draws two distinctions: the timing of the misconduct and the type of misconduct; i.e., fraud or discovery misconduct. The plaintiff's suggestion that fraud and discovery misconduct may neatly be distinguished by their timing is puzzling. We easily can envision either type of misconduct commencing before or during trial. Moreover, although the timing of the misconduct will have some bearing on the degree of harm suffered by the movant, the plaintiff offers no explanation as to why a different rule should apply based on timing alone.

As for the plaintiff's suggestion that we should apply a different rule to discovery misconduct as distinguished from fraud, the plaintiff offers no explanation as to what differences between the two types of misconduct would justify the application of different rules to each. Indeed, the fraud at issue in *Varley* does not appear significantly distinguishable from the misconduct alleged by the plaintiff in the present action. In *Varley*, the alleged fraud, which pertained to a "subject on which both parties presented evidence"; *Varley* v. *Varley*, supra, 180 Conn. 3; included false testimony, bribery, misconduct of counsel, and misconduct of the state referee during the trial proceeding in which the movant was "present and participated at every stage . . . ." Id., 2–3 and 2 n.1. In the present action, the alleged misconduct consisted of the defendant's knowing and deliberate failure to disclose three separate sets of documents in violation of its duty to respond to the plaintiff's requests for production. The plaintiff has made no attempt to draw any meaningful distinction—nor do we discern any—between the fraud at issue in *Varley* and the discovery misconduct that forms the basis of her motion for a new trial.[17]

Furthermore, *Anderson* does not support the plaintiff's claim that we should apply different rules to fraud and discovery misconduct. As the court in *Anderson* explained, "fraud" and "misconduct" are related and overlapping types of wrong. See *Anderson* v. *Cryovac, Inc.*, supra, 862 F.2d 923. Given their similar nature, it

is appropriate that rule 60 (b) (3) of the Federal Rules of Civil Procedure couples fraud and misconduct within the same subsection, and that the prevailing test for granting new trials under rule 60 (b) (3) among the federal courts applies equally to motions based on misconduct and to motions based on fraud. Id. ("the moving party must demonstrate misconduct—like fraud or misrepresentation—by clear and convincing evidence, and must then show that the misconduct foreclosed full and fair preparation or presentation of its case"). Thus, the federal rules provide the same test for relief regardless of whether the movant seeks a new trial on the basis of fraud or discovery misconduct. *Anderson*, therefore, supports our determination that we should apply a single test to both fraud and discovery misconduct.

Third, we believe that the rephrased *Varley* standard together with the availability of discovery sanctions strikes the proper balance between the burdens on the parties in the context of discovery misconduct claims. In *Anderson*, the court distinguished between intentional withholding of discovery, destruction of documents sought in discovery, and unintentional failure to disclose. While we have in many contexts addressed the difficulty of proving the intent of an actor, in this context it is not necessary to do so because it is the result of the nondisclosure rather than the intent that is important.[18] Having said that, there is no doubt that the intentional destruction or withholding of information, if shown, would aid the movant in showing the importance of the undisclosed information. In addition to the "smoking gun" document, the import of which is self-evident, obvious machinations surrounding the undisclosed information will permit an inference, not unlike consciousness of guilt, that the nondisclosing party believed the information might lead to a different result.

Ultimately, a comparison of the *Anderson* and *Varley* tests leads to the conclusion that our standard in *Varley*, as restated with regard to the fourth prong, is the more appropriate. It is more likely that the ends of justice could be served consistently with our finality of judgments jurisprudence by granting the extraordinary relief of a new trial to a movant who can show a reasonable probability that the result of that new trial would be different, rather than to a movant who merely shows that the misconduct "substantially interfered with its ability fully and fairly to prepare for, and proceed at, trial." *Anderson* v. *Cryovac, Inc.*, supra, 862 F.2d 926. Consequently, we decline to follow *Anderson*, which follows the federal Rules of Civil Procedure, as it is unnecessary. We instead look to our common law, which provides adequate relief both in the instance of fraud and its closely related wrong, discovery misconduct.

The plaintiff also argues that if state law controls,

the governing precedent is not *Varley*, but rather this court's decision in *Ramin* v. *Ramin*, supra, 281 Conn. 349. *Ramin*, however, is distinguishable from the present case. First, although *Ramin* involved discovery misconduct, the issue arose in a direct appeal and not a motion for new trial attacking a final judgment. Second, we relied heavily on the heightened duty to disclose in marital cases. See *Billington* v. *Billington*, 220 Conn. 212, 222, 595 A.2d 1377 (1991). Third, we expressly recognized in *Ramin* that the unique circumstances of that case, that is the defendant's egregious misconduct, which included repeated flouting of orders compelling discovery, required a departure from the general rule that "ordinarily the burden to establish harm is borne by the party who claims the error . . . ." *Ramin* v. *Ramin*, supra, 348. A conclusion that *Ramin* established a general rule that whenever a party alleges discovery misconduct, the burden shifts to the nonmoving party to demonstrate harmlessness is simply a misreading of that decision.

First, the plaintiff in *Ramin* appealed from the judgment of the trial court dissolving her marriage; she did not file a motion for a new trial. Id., 326. Her appeal claimed that the trial court had abused its discretion when it refused to consider her motion for contempt and sanctions based on the defendant's failure to comply with discovery orders. Id., 327. Critical to our decision was our conclusion that the trial court's improper ruling deprived the plaintiff of discovery. We stated that it would be "grossly unfair" to require the plaintiff to establish how she was harmed by not having access to requested documents "to which she never gained access *solely as a result of the court's refusal* to consider her motion." (Emphasis added.) Id., 348. In the present case, the plaintiff has not alleged that the trial court bears any fault in the defendant's nondisclosure, nor does the record suggest any.

Additionally, our decision to shift the burden to the defendant to prove that his breach did not harm the plaintiff relied on the heightened duty to disclose in marital cases, set forth in *Billington*. Id., 349. In *Billington*, we recognized that "the settlement of a marital dissolution case is not like the settlement of an accident case"; *Billington* v. *Billington*, supra, 220 Conn. 221; and that considerations particular to the marital litigation context may outweigh the interests of finality and stability. Id., 222. Unlike civil litigants who stand at arm's length from one another, marital litigants have a duty of "full and frank disclosure" analogous to the "relationship of fiduciary to beneficiary . . . ." Id., 220; id., 221 ("[c]ourts simply should not countenance either party to such a unique human relationship dealing with each other at arms' length"), quoting *Grayson* v. *Grayson*, 4 Conn. App. 275, 299–300, 494 A.2d 576 (1985) (*Borden*, *J.*, dissenting), appeal dismissed, 202 Conn. 221, 520 A.2d 225 (1987). As the "special relationship

between fiduciary and beneficiary" in a fraud action compels "full disclosure by the fiduciary," marital litigants bear "no less" of a duty to disclose in a dissolution action. *Billington* v. *Billington*, supra, 221. Thus, in *Ramin*, the "fiduciary-like obligations of discovery" in the marital context formed the foundation for our decision to shift the burden of establishing harmlessness to the defendant. *Ramin* v. *Ramin*, supra, 281 Conn. 349–50. In the civil context, we have not held parties to such a heightened standard, and we decline to do so now.

Finally, even in the marital dissolution context, *Ramin* does not establish a general rule. Over the course of the proceedings in *Ramin*, the plaintiff filed five motions for contempt in response to which the court issued orders to comply, sanctions and attorney's fees against the defendant. Id., 330–31. The defendant's persistent failure to produce specifically requested documents prompted this court to describe his conduct as "egregious litigation misconduct . . . ." Id., 351. We expressly recognized that the particular facts of *Ramin*, because of the defendant's egregious misconduct, required a departure from the ordinary rule. *Ramin*, therefore, represents a narrow exception to the general rule that the party claiming error bears the burden to demonstrate harm.[19] By contrast, in the present case, the defendant's failure to disclose the anonymous note, the Osten investigation developments and the Jackson complaint do not rise to the level of egregiousness warranting a departure from our general rule, particularly when the trial court found that the plaintiff was generally aware of the contents of these documents. We therefore disagree with the plaintiff's suggestion that *Ramin* is controlling and conclude that it is inapplicable to the present case.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and PALMER, ZARELLA and BEAR, Js., concurred.

* This case originally was argued before a panel of this court consisting of Chief Justice Rogers, and Justices Palmer, Zarella, McLachlan and Eveleigh. Thereafter, Justice Vertefeuille and Judge Bear were added to the panel, and they have read the record and briefs and listened to the recording of oral argument.

[1] The issue certified stated: "Whether the rule of *Varley* v. *Varley*, 180 Conn. 1, 428 A.2d 317 (1980), which requires a movant to demonstrate that the results at trial would have been different, applies to posttrial motions alleging knowing and deliberate discovery misconduct." *Duart* v. *Dept. of Correction*, 293 Conn. 937, 981 A.2d 1078 (2009). We now rephrase the issue for ease of discussion.

[2] *Varley* requires the movant to establish the following: "(1) There must have been no laches or unreasonable delay by the injured party after the fraud was discovered. (2) There must have been diligence in the original action, that is, diligence in trying to discover and expose the fraud. (3) There must be clear proof of the perjury or fraud. (4) There must be a substantial likelihood that the result of the new trial will be different." *Varley* v. *Varley*, supra, 180 Conn. 4. Only the fourth prong, requiring a different result, is at issue in this appeal.

[3] The plaintiff also had alleged that she was discriminated against because of her physical disability, namely, endometriosis, but withdrew that claim prior to trial.

[4] Romantic relationships between two people in the same chain of command are forbidden pursuant to the defendant's administrative directive 2.17.

[5] In July of 2001, the plaintiff filed a second complaint with the commission asserting retaliation. In April of 2002, she elected to proceed in a civil action.

[6] The plaintiff's initial grounds for seeking a new trial included newly discovered evidence. She filed a supplemental memorandum on June 5, 2007, adding discovery misconduct as an additional justification for a new trial. In this certified appeal, she advances only her claim of discovery misconduct.

[7] Practice Book § 16-35 provides in relevant part: "[M]otions for new trials . . . must be filed with the clerk within ten days after the day the verdict is accepted; provided that for good cause the judicial authority may extend this time. The clerk shall notify the trial judge of such filing. Such motions shall state the specific grounds upon which counsel relies."

[8] Although a *motion* for a new trial is at issue in this case, the same showing is required for a *petition* for a new trial pursuant to General Statutes § 52-270 in both civil and criminal cases. See *Kubeck* v. *Foremost Foods Co.*, 190 Conn. 667, 670, 461 A.2d 1380 (1983) (civil litigant seeking new trial based on newly discovered evidence bears burden of proving that evidence "is likely to produce a different result in a new trial"); see also *Skakel* v. *State*, 295 Conn. 447, 467, 991 A.2d 414 (2010) (criminal defendant seeking new trial based on newly discovered evidence has burden of proving new trial "is likely to produce a different result"); *Shabazz* v. *State*, 259 Conn. 811, 821, 792 A.2d 797 (2002) (same).

[9] For example, in *Doe* v. *Saint Francis Hospital*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5008551-S (August 1, 2011), the court granted the plaintiff's motion for sanctions after the defendant failed to produce documents in response to the plaintiff's discovery requests. The trial court awarded the plaintiff attorney's fees and costs related to the motion and ordered the defendant to review all prior discovery requests to determine whether it withheld any additional documents. The trial court also granted a joint motion for sanctions that had been filed by all of the plaintiffs with matters pending under the master case of *Roe* v. *Saint Francis Hospital*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5008330-S (August 1, 2011), awarding the plaintiffs the opportunity to take additional depositions at the defendant's cost.

[10] This new formulation of the fourth prong of *Varley* brings the standard for new trials on grounds of fraud or misconduct into closer alignment with the standard for a petition for a new trial on grounds of newly discovered evidence in civil and criminal cases, although the two tests remain different. See *Kubeck* v. *Foremost Foods Co.*, 190 Conn. 667, 670, 461 A.2d 1380 (1983) (civil litigant seeking new trial based on newly discovered evidence bears burden of proving that evidence "is *likely* to produce a different result in a new trial" [emphasis added]); *Shabazz* v. *State*, 259 Conn. 811, 821, 792 A.2d 797 (2002) (holding that criminal defendant seeking new trial based on newly discovered evidence has burden of proving new trial "is *likely* to produce a different result" [emphasis added]).

[11] Although Justice Eveleigh would employ a "burden shifting" framework in all cases of fraud and misconduct, we have repeatedly observed that "the only fact-finding efforts that actually turn on the *allocation* of [the] burden [of proof] are those in which the fact finder, after weighing the evidence, finds its mind in perfect equipoise. . . . In such a rare case, the allocation of the burden of persuasion to the party asserting the truth of the proposition at issue means that that party cannot prevail." (Citation omitted; emphasis in original.) *State* v. *Webb*, 238 Conn. 389, 508, 680 A.2d 147 (1996), aff'd after remand, 252 Conn. 128, 750 A.2d 448, cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000).

[12] Although the plaintiff in fact conceded that she could not establish that the results of a new trial would be different absent the discovery misconduct, we observe that she drew this conclusion on the basis of the unmodified *Varley* test and not as we have rephrased it in this opinion.

[13] In analyzing the undisclosed evidence, the court "assume[d] that there was discovery misconduct, even though none has yet been demonstrated."

[14] The rules of practice place the burden on the appellant to file a transcript of the proceedings not already on file "which the appellant deems necessary for the proper presentation of the appeal. . . ." Practice Book § 63-8 (a).

[15] Even if this court adopted the *Anderson* test, the trial court expressly stated that "the facts in this case do not support . . . a conclusion [that the nondisclosure substantially interfered with the plaintiff's ability to fully and fairly prepare for and proceed at trial]."

[16] While it is true that a state court may look to federal law for guidance in the absence of Connecticut law; see *Bristol* v. *Tilcon Minerals, Inc.*, 284 Conn. 55, 88, 931 A.2d 237 (2007); that is not necessary in the present action. This court has already supplied a rule in *Varley*. The plaintiff has not petitioned this court to overrule *Varley*, nor do we find sufficient justification to distinguish it.

[17] In fact, the plaintiff's motion appears to set forth the functional equivalent of a claim that the defendant engaged in fraudulent nondisclosure, a species of fraud. "Mere nondisclosure . . . does not ordinarily amount to fraud"; *Egan* v. *Hudson Nut Products, Inc.*, 142 Conn. 344, 347, 114 A.2d 213 (1955); however, fraudulent nondisclosure or suppression arises from a "failure to disclose known facts, and, as well, a request or an occasion or circumstance which imposes a duty to speak." *Ceferatti* v. *Boisvert*, 137 Conn. 280, 283, 77 A.2d 82 (1950); see also *Billington* v. *Billington*, 220 Conn. 212, 215, 595 A.2d 1377 (1991) (where alleged fraud consisted of defendant's failure to disclose value of asset that defendant was obligated to disclose pursuant to rules of practice). The rules on discovery practice furnish such an occasion when a party is under a duty to speak. Practice Book § 13-7 (a) provides in relevant part that "interrogatories shall be answered" and Practice Book § 13-10 (a) provides in relevant part that a party receiving a request for production "shall serve" a response. It is clear from this language alone that compliance is mandatory, but the obligatory nature of discovery requests is further emphasized by the availability of sanctions for a party's failure to comply. See Practice Book § 13-14. It follows that when the plaintiff alleges that the defendant knowingly and deliberately concealed documents in the face of a duty to disclose the same, she in effect alleges the elements of fraudulent nondisclosure, and the *Varley* rule for fraud should therefore govern.

[18] Justice Eveleigh's analogy of the present case to the interests at issue in spoliation cases conflates intentional destruction of evidence with mere nondisclosure, harms that differ vastly in nature and related policy concerns. Like subornation of perjury, not only is the nature of the harm different, but the nature of the act itself is more egregious.

[19] For the same reasons, Justice Eveleigh's attempt to extract general jurisprudential principles from *Ramin* can result only in a misapplication of our law.