TOTAL RECYCLING SERVICES OF CONNECTICUT, INC., ET AL. *v.* CONNECTICUT OIL RECYCLING SERVICES, LLC
(SC 18823)

Rogers, C. J., and Palmer, Zarella, Eveleigh and Harper, Js.*

Argued November 28, 2012—officially released April 23, 2013

William J. Sweeney, Jr., for the appellant (defendant).

Jonathan J. Klein, for the appellees (plaintiffs).

ZARELLA, J. The certified issue in this appeal is whether the Appellate Court properly upheld the trial court's denial of the defendant's motion for contractual attorney's fees. The defendant, Connecticut Oil Recycling Services, LLC, claims that the Appellate Court improperly concluded that the trial court did not abuse its discretion when it declined to award any attorney's fees, applying the law of the case doctrine, after the defendant was unable to itemize such fees to the court's satisfaction. The defendant maintains that itemization under these circumstances was impracticable because the fees related to the same transaction and could not be adequately allocated among the contracts. The plaintiffs, Whitewing Environmental Corporation (Whitewing) and Total Recycling Services of Connecticut, Inc. (Total Recycling), a wholly-owned subsidiary of Whitewing, respond that the Appellate Court properly upheld the trial court's denial of attorney's fees because the trial court correctly (1) determined that the standard set forth by the Appellate Court in *Jacques All Trades Corp.* v. *Brown*, 57 Conn. App. 189,752 A.2d 1098 (2000) (*Jacques*), was the law of the case, and (2) applied the *Jacques* standard in denying attorney's fees when the defendant failed to prove the amount of fees that resulted from the contracts providing for fees. We reverse the judgment of the Appellate Court.

The following facts and procedural history are relevant to our resolution of the present appeal. The defendant contracted with the plaintiffs to purchase their oil recycling business, which the parties carried out using three contracts. These contracts, which were entered into on or about March 1, 2004, included (1) a contract between Total Recycling and the defendant for the purchase of certain equipment (equipment contract), (2) a contract between Total Recycling and the defendant for the purchase of goodwill (goodwill contract), and (3) an agreement not to compete between Whitewing and the defendant (noncompete agreement). Of these, all but the equipment contract contained provisions entitling the defendant to attorney's fees in the event that the plaintiffs breached the agreements.[1] See *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 114 Conn. App. 671, 679–80, 970 A.2d 807 (2006).

In April, 2006, the plaintiffs commenced the present action, seeking damages for the defendant's alleged breach of the three contracts at issue and for unjust enrichment. The defendant denied the allegations in the plaintiffs' four count complaint and responded with a five count counterclaim, alleging, inter alia, breach of contract and seeking attorney's fees under the relevant provisions of the goodwill contract and the noncompete agreement. The jury found in favor of the plaintiffs with respect to their unjust enrichment claims but rejected

the plaintiffs' contract claims, finding that the plaintiffs' failure to perform under the contracts barred their recovery. With respect to the counterclaim, the jury likewise concluded that the plaintiffs had breached the contracts with the defendant but awarded damages to the defendant only with respect to the plaintiffs' breach of the equipment contract.

Thereafter, the trial court denied the defendant's motion for attorney's fees because the defendant was awarded damages solely with respect to the breach of the equipment contract, which did not provide for attorney's fees. On the defendant's initial appeal to the Appellate Court, the Appellate Court reversed the trial court's determination with respect to attorney's fees, concluding that "the trial court improperly [determined] that the jury's verdict with respect to the [equipment contract] precluded the defendant's recovery of reasonable attorney's fees under the other two contracts between the parties"; id., 681; because the contracts conditioned the entitlement to attorney's fees on breach rather than an award of damages.[2] Id., 680–81. The Appellate Court remanded the case to the trial court for a new hearing on the defendant's claim for attorney's fees. Id., 681.

On remand, the defendant filed a motion for attorney's fees and an affidavit in support of such fees, to which it attached detailed billing records. The plaintiffs opposed this motion and further claimed that the defendant's recovery, if any, was limited to no more than 5 percent of the maximum recoverable amount under their calculations.[3] In a memorandum of decision dated November 27, 2009, the trial court, *Jones*, *J.*, found it "necessary for the defendant to identify which reasonable attorney's fees were incurred in prosecuting its breach of contract counterclaim with regard to the contracts that specifically provide[d] for attorney's fees." The court "invited" the defendant "to make that showing and to provide authority to the court for an award of the attorney's fees incurred in its appeal."

On January 12, 2010, in response to the trial court's invitation, the defendant filed a renewed motion for costs and attorney's fees, which the plaintiffs opposed. The defendant maintained that the apportionment of fees that the trial court sought was impossible under the circumstances, and analogized the present case to *Heller* v. *D. W. Fish Realty Co.*, 93 Conn. App. 727, 734–36, 890 A.2d 113 (2006), a case in which the Appellate Court allowed for an unapportioned recovery of attorney's fees, even though only one of the claims allowed for attorney's fees, where the claims depended on the same facts. The defendant likewise brought to the court's attention certain federal cases that had extended this principle beyond discretionary attorney's fees under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., to encom-

pass contractual attorney's fees, and claimed that *Jacques All Trades Corp.* v. *Brown*, supra, 57 Conn. App. 189, an earlier Appellate Court case that required apportionment, was factually distinguishable from the present case. See id., 199–200.

The trial court, *Bear*, *J.*, thereafter ordered an evidentiary hearing on the defendant's motion for attorney's fees. At a hearing held on March 29, 2010, the defendant presented the unopposed expert testimony of William Gallagher, an attorney with forty-seven years of experience, who opined that apportionment in a case such as the present one was neither practicable nor consistent with general legal billing practices. Gallagher also explained that *Heller* allowed for an award of attorney's fees when "[legal] services are intertwined in such a way that [it is] not possible to sort them out . . . ." Accordingly, the defendant did not attempt to apportion the attorney's fees among the claims and counterclaims, or among the three contracts and, instead, claimed that it was entitled to recover the full amount of attorney's fees.

On April 19, 2010, the court, *Bear*, *J.*, denied the defendant's motion for attorney's fees, explaining that "Judge Jones' determination that . . . [the] defendant needed to identify which reasonable attorney's fees were incurred in prosecuting its breach of contract counterclaim with regard to the two . . . contracts that specifically provided for attorney's fees is the law of this case. . . . The defendant did not address the law of the case issue at the March 29, 2010 hearing. Instead, the defendant tried . . . to justify its noncompliance with such order. The defendant thus did not prove which of its claimed attorney's fees related to the two contracts that permitted the award of such fees and in such hearing it particularly did not . . . identify which reasonable attorney's fees were incurred in prosecuting its breach of contract counterclaims with regard to the contracts that specifically provide for attorney's fees . . . [and] make that showing . . . ." (Citation omitted; internal quotation marks omitted.)

Following the trial court's denial of the defendant's motion for attorney's fees, the defendant appealed to the Appellate Court. A divided Appellate Court upheld the trial court's denial of attorney's fees. *Total Recycling Services of Connecticut*, *Inc.* v. *Connecticut Oil Recycling Services*, *LLC*, 129 Conn. App. 296, 305, 20 A.3d 716 (2011). In the majority opinion, the Appellate Court first considered the defendant's arguments that the trial court "should not have applied the law of the case doctrine and that *Heller*, rather than [*Jacques*], govern[ed] the outcome of [the] case." Id, 302. Specifically, the defendant argued that, "under *Heller*, all related claims become eligible for attorney's fees [when] a statutory or contractual provision provides for such fees" and that, when "litigation arises out of the same transac-

tion and the same set of facts, it is not practical to distinguish the fees incurred for such related claims." Id., 303. The Appellate Court disagreed, concluding that this was an overly broad interpretation of *Heller*. Id. Instead, the court determined that "[n]either *Heller* nor [*Jacques*] stands for the general proposition that [when] a party is entitled to attorney's fees, whether by statute or by contract, fees incurred for litigating any and all related claims may be recoverable by the litigant." Id. The court was not persuaded by the defendant's argument that the pleadings in the case did not distinguish between the contracts involved in the transaction, reasoning that, "despite the form of the pleadings, the [jury] interrogatories . . . enabled the jury to find in favor of the defendant on one or more of the breach of contract claims . . . but find in favor of the plaintiffs on one or more of the others."[4] Id., 304. The Appellate Court likewise rejected the defendant's claim that the trial court had abused its discretion in declining to award appellate attorney's fees, similarly reasoning that the failure to apportion such fees to identify "which fees were incurred with respect to the contracts that provided for such fees" proved fatal to the defendant's claim.[5] Id., 305.

The defendant thereafter sought certification to appeal, which we granted, limited to the following question: "Did the Appellate Court improperly affirm the judgment of the trial court denying the defendant's motion for contractual attorney's fees?"[6] *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 302 Conn. 908, 23 A.3d 1247 (2011). On appeal, the defendant claims that the Appellate Court improperly upheld the trial court's denial of the defendant's motion for attorney's fees. Specifically, the defendant claims that the Appellate Court should have concluded that the trial court abused its discretion in (1) finding that *Jacques* was the law of the case, precluding consideration of the defendant's claim that the fees could not and need not be apportioned, (2) requiring the defendant to apportion the attorney's fees among the contracts at issue, and (3) failing to award appellate attorney's fees.[7] The plaintiffs, by contrast, assert that the Appellate Court properly upheld the trial court's denial of the defendant's motion for attorney's fees. We address the defendant's claims in turn.

I

We begin with the defendant's claim that the Appellate Court improperly concluded that the trial court correctly determined that apportionment of fees under *Jacques* was the law of the case and, accordingly, improperly declined to award any attorney's fees when the defendant was unable to apportion the fees to the court's satisfaction. The plaintiffs maintain, however, that the law of the case was properly applied because there were no new or overriding circumstances that

would lead the court to reconsider the first ruling, and that, by failing to address the law of the case specifically at the evidentiary hearing, the defendant effectively waived any challenge to the trial court's ruling. We agree with the defendant.

The application of the law of the case doctrine involves a question of law, over which our review is plenary. E.g., *Johnson* v. *Atkinson*, 283 Conn. 243, 249, 926 A.2d 656 (2007), overruled in part on other grounds by *Jaiguay* v. *Vasquez*, 287 Conn. 323, 948 A.2d 955 (2008). "The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . [When] a matter has previously been ruled [on] interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance." (Internal quotation marks omitted.) *Testa* v. *Geressy*, 286 Conn. 291, 306–307, 943 A.2d 1075 (2008), quoting *Johnson* v. *Atkinson*, supra, 249. "A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . Nevertheless, if . . . [a judge] becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Citation omitted.) *Breen* v. *Phelps*, 186 Conn. 86, 99–100, 439 A.2d 1066 (1982).

As we noted previously, the defendant in the present case responded to Judge Jones' invitation to identify which fees were attributable to the contracts allowing for attorney's fees by producing evidence to demonstrate that all of the fees in fact related to the contracts that provided for attorney's fees because such fees could not be practicably apportioned among the contracts. The defendant likewise presented a memorandum of law in support of its argument that *Heller* and federal cases such as *Diamond D Enterprises USA, Inc.* v. *Steinsvaag*, 979 F.2d 14, 18–19 (2d Cir. 1992) (*Diamond*), cert. denied, 508 U.S. 951, 113 S. Ct. 2442, 124 L. Ed. 2d 660 (1993), rather than *Jacques*, provided the applicable standard for analyzing the claim of attorney's fees asserted in the present case. Judge Bear nevertheless determined that "[t]he defendant did not address the law of the case issue at the March 29, 2010 hearing. Instead, the defendant tried to explain its difficulty and/or practical inability to comply with . . . Judge Jones' order to justify its noncompliance with such order." Thus, Judge Bear apparently rejected Gallagher's unopposed expert testimony, which emphasized the impracticality of apportionment under the circumstances, on the basis of his application of the

law of the case doctrine.

Our reading of the record, however, persuades us that Judge Bear's analysis of the law of the case issue was premised on an incorrect construction of Judge Jones' November 27, 2009 memorandum of decision. In that decision, Judge Jones determined that it was "necessary for the defendant to identify which reasonable attorney's fees were incurred in prosecuting its breach of contract counterclaim with regard to the contracts that specifically provide[d] for attorney's fees" and further "invited" the defendant "to make that showing and to provide authority to the court for an award of the attorney's fees incurred in its appeal." Rather than interpreting this to mean that Judge Jones had decisively determined that the fees were apportionable, we instead conclude that Judge Jones was inviting a further submission regarding the appropriate fees, together with supporting legal authority.[8] The defendant did just this in claiming that the appropriate amount of fees to which it was entitled was the entire amount, providing both factual support and legal authority for this position. The law of the case therefore did not necessarily preclude Judge Bear from considering the defendant's evidence regarding the appropriate standard for apportioning attorney's fees under such circumstances.

For similar reasons, we are not persuaded by the plaintiffs' argument that the defendant waived the opportunity to contest the application of *Jacques*, because the defendant clearly did so within the context of the January 12, 2010 motion for attorney's fees, as well as at the March 29, 2010 hearing. As Judge Alvord explained in her dissent, "[a]lthough the plaintiffs claimed that the defendant ignored Judge Jones' directive and simply waited until the hearing to challenge that directive, the record belies that argument. Months before the hearing, the defendant argued the applicability of [*Heller*] . . . to its claim for attorney's fees in its memorandum [in support of its motion for attorney's fees]. Judge Jones 'invited' the defendant to identify which fees could be claimed with respect to the two contracts that provided for attorney's fees, and the defendant responded that all of the fees were incurred in the defense of the breach of contract claims relating to those two contracts."[9] (Citation omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 129 Conn. App. 308 n.1 (*Alvord, J.*, dissenting). To conclude otherwise simply because the defendant did not expressly reference the law of the case doctrine by name would inappropriately elevate form over substance. Accordingly, we conclude that the Appellate Court incorrectly concluded that the trial court properly applied the law of the case doctrine under these circumstances and that the court properly rejected the defendant's motion for attorney's fees without reaching the merits of that

claim. We therefore reverse the judgment of the Appellate Court and direct that court to remand the case for further proceedings regarding the issue of attorney's fees.

II

Having concluded that a remand is warranted, we deem it appropriate to address the parties' additional claims regarding (1) the appropriate standard to apply in determining whether apportionment of attorney's fees is necessary, and (2) whether appellate attorney's fees may be awarded under the procedural posture of this case, as these issues are likely to arise on remand. Cf. *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164, 971 A.2d 676 (2009) ("[b]ecause of our conclusion that this case must be remanded for a new trial, it is appropriate for us to give guidance on issues that are likely to recur on retrial").

A

We turn first to the defendant's claim that the Appellate Court improperly concluded that the trial court did not abuse its discretion when it required the defendant to apportion attorney's fees among the various contracts and claims and counterclaims, ultimately declining to award any attorney's fees when the defendant was unable to do so, even though the defendant was entitled to reasonable attorney's fees under the terms of two of the parties' three contracts. The defendant claims that the trial court misapplied *Jacques*, which the defendant claims is factually distinguishable from the present case, and that the Appellate Court's decisions in *Heller* and *Taylor* v. *King*, 121 Conn. App. 105, 131–32, 994 A.2d 330 (2010), as well as federal decisions such as *Diamond*, provide a more appropriate approach when attorney's fees are authorized only for some of the parties' claims and when the various claims are intertwined and arise out of the same factual nucleus. The plaintiffs maintain, however, that *Jacques* is applicable because the claims for which the jury found in the defendant's favor were based on different facts, which serves to distinguish the present case both from *Heller* and from the federal cases on which the defendant relies. The plaintiffs further argue that *Heller* is "not a single transaction test" but rather applies only when the factual elements of the causes of action are identical. We agree with the defendant.

Turning to the standard of review, we note that the parties dispute the appropriate standard pursuant to which the trial court was to evaluate whether attorney's fees should be awarded and whether apportionment among the contracts was required. "The trial court's determination of the proper legal standard in any given case is a question of law subject to our plenary review." *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008).

With respect to the relevant legal principles, we have

often explained that Connecticut adheres to the "American rule" regarding attorney's fees. Under the "American rule," in the absence of statutory or contractual authority to the contrary, a successful party is not entitled to recover attorney's fees or other "ordinary expenses and burdens of litigation . . . ." (Internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 148, 943 A.2d 406 (2008), quoting *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 72, 689 A.2d 1097 (1997). "There are few exceptions. For example, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a statute may confer such rights." (Internal quotation marks omitted.) *TES Franchising, LLC* v. *Feldman*, supra, 148–49. In reviewing a claim that attorney's fees are authorized by contract, we apply the well established principle that "[a] contract must be construed to effectuate the intent of the parties, which is determined from [its] language . . . interpreted in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) *FCM Group, Inc.* v. *Miller*, 300 Conn. 774, 811, 17 A.3d 40 (2011).

Even when a party is entitled to such fees by contract or under statute, however, the party seeking the award of fees must first satisfy a threshold evidentiary showing. See, e.g., *Smith* v. *Snyder*, 267 Conn. 456, 471, 839 A.2d 589 (2004); *Appliances, Inc.* v. *Yost*, 186 Conn. 673, 680, 443 A.2d 486 (1982); see also *Shapero* v. *Mercede*, 262 Conn. 1, 6 and n.3, 808 A.2d 666 (2002). As we have explained previously, "courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described . . . and . . . may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. . . . Even though a court may employ its own general knowledge in assessing the reasonableness of a claim for attorney's fees, we also have emphasized that no award for an attorney's fee may be made when the evidence is insufficient." (Citations omitted; internal quotation marks omitted.) *Smith* v. *Snyder*, supra, 471–72; see also *Storm Associates, Inc.* v. *Baumgold*, 186 Conn. 237, 246, 440 A.2d 306 (1982) ("a contract clause providing for reimbursement of 'incurred' fees permits recovery upon the presentation of an attorney's bill, [as] long as that bill is not unreasonable [on] its face and has not been shown to be unreasonable by countervailing evidence or by the exercise of the trier's own expert judgment").

The issue we are presented with in the present case arises when an action involving certain claims for which the recovery of attorney's fees is allowed also includes other claims for which such recovery is not, because the court must determine whether the fees may be apportioned accordingly. Although this is an issue of

first impression for this court, similar issues have arisen before federal courts; see, e.g., *Diamond D Enterprises USA, Inc.* v. *Steinsvaag*, supra, 979 F.2d 18–19; *Burger King Corp.* v. *Mason*, 710 F.2d 1480, 1497–98 (11th Cir. 1983), cert. denied, 465 U.S. 1102, 104 S. Ct. 1599, 80 L. Ed. 2d 130 (1984); see also *Bernhard-Thomas Building Systems, LLC* v. *Weitz Co., LLC*, United States District Court, Docket No. 3:04-cv-1317 (CFD) (D. Conn. October 31, 2011) (applying Connecticut law); *Rand-Whitney Containerboard Ltd. Partnership* v. *Montville*, United States District Court, Docket No. 3:96CV413 (HBF) (D. Conn. September 5, 2006) (same); *J.P. Sedlak Associates* v. *Connecticut Life & Casualty Ins. Co.*, United States District Court, Docket No. 3:98CV145 (DFM) (D. Conn. March 31, 2000) (same); and the Appellate Court, which has grappled with this issue in several cases involving CUTPA. See *Taylor* v. *King*, supra, 121 Conn. App. 131–32; *Heller* v. *D. W. Fish Realty Co.*, supra, 93 Conn. App. 735–36; *Jacques All Trades Corp.* v. *Brown*, supra, 57 Conn. App. 199–200.

In *Jacques*, for instance, the plaintiff brought an action against the defendants, Laverne Brown and the city of Hartford, for breach of two separate home improvement contracts, one private contract with Brown, and the other contract with the city. *Jacques All Trades Corp.* v. *Brown*, supra, 57 Conn. App. 192. The city contract, which the city and the plaintiff entered into approximately two weeks after Brown and the plaintiff entered into their private contract, was to be funded at least in part by the city. See id. Brown filed a counterclaim, alleging that the plaintiff had violated CUTPA, which affords a trial court discretion to award attorney's fees if a violation is established. See General Statutes § 42-110g (d). In rejecting Brown's claim for attorney's fees beyond those awarded to her for the prosecution of her CUTPA counterclaim, the Appellate Court explained that, "[i]n the absence of [an] abuse of discretion, the court can award attorney's fees under CUTPA only for those expenses that were related to the prosecution of a CUTPA claim." *Jacques All Trades Corp.* v. *Brown*, supra, 200. Accordingly, the Appellate Court determined that the trial court had not abused its discretion in limiting Brown's award of attorney's fees to the amount attributed to Brown's CUTPA claim. Id.

In *Heller*, however, the Appellate Court reversed the trial court's denial of attorney's fees after the trial court improperly relied on *Jacques* to mandate that a party seeking attorney's fees apportion the fees among closely related claims. *Heller* v. *D. W. Fish Realty Co.*, supra, 93 Conn. App. 735–36. In that case, the plaintiffs alleged breach of contract, negligence and violations of CUTPA; id., 730; with only the latter providing for attorney's fees. See General Statutes § 42-110g (d). Although the plaintiffs prevailed, and therefore were eligible for attorney's fees in the trial court's discretion,

the trial court "ordered the plaintiffs to submit evidence as to the portion of the fees requested specifically related to the CUTPA [claim]," which the plaintiffs were unable to do because of the close factual connection between the claims. (Internal quotation marks omitted.) *Heller* v. *D. W. Fish Realty Co.*, supra, 735. The trial court, relying on *Jacques*, denied the motion for attorney's fees in light of the plaintiffs' inability to apportion the fees. See id. The Appellate Court reversed, explaining that "the plaintiffs' breach of contract and negligence claims were related to their CUTPA claim because they depended on the same facts. . . . The [trial] court therefore should not have ordered the plaintiffs to submit evidence apportioning their attorney's fees among their claims." Id., 735–36; see also *Taylor* v. *King*, supra, 121 Conn. App. 131 ("when the facts underlying the CUTPA claim are indistinguishable from those facts relating to other claims, [the CUTPA provision allowing for attorney's fees] encompasses claims related to the prosecution of a CUTPA claim . . . not only one claim explicitly labeled as a CUTPA claim").

Several federal courts also have addressed this issue. See, e.g., *Diamond D Enterprises USA, Inc.* v. *Steinsvaag*, supra, 979 F.2d 18–19; *Burger King Corp.* v. *Mason*, supra, 710 F.2d 1497–98; *Nguyen* v. *Wells Fargo Bank, N.A.*, United States District Court, Docket No. C-10-4081 (EDL) (N.D. Cal. January 3, 2011); *Bernhard-Thomas Building Systems, LLC* v. *Weitz Co., LLC*, supra, United States District Court, Docket No. 3:04-cv-1317 (CFD); *Rand-Whitney Containerboard Ltd. Partnership* v. *Montville*, supra, United States District Court, Docket No. 3:96CV413 (HBF); *J.P. Sedlak Associates* v. *Connecticut Life & Casualty Ins. Co.*, supra, United States District Court, Docket No. 3:98CV145 (DFM). In *Diamond*, for instance, the defendants contested the plaintiff's award of attorney's fees after the plaintiff prevailed both on its claims and on the defendant's counterclaims because these included both the attorney's fees expended for the plaintiff's breach of contract claims as well as the plaintiff's defense against the defendant's counterclaims. See *Diamond D Enterprises USA, Inc.* v. *Steinsvaag*, supra, 18. These counterclaims, which "alleged various contract, tort, and statutory claims," nevertheless "shared a common nucleus" with respect to the underlying agreement between the parties. Id., 16. Although the defendants urged a strict interpretation of the relevant attorney's fee provision, which would exclude fees relating to the defense of the counterclaims as not " 'incurred in enforcing' " the contract, the court rejected this interpretation, concluded that "the nature—not the nomenclature—of a claim is controlling." Id., 18. Accordingly, because the counterclaims "arose out of the contract" and were factually intertwined with the contract claims; id.; the court determined that the attorney's fees provision provided for a full recovery of the plaintiff's attor-

ney's fees. Id., 18–19.

Similarly, in *Bernhard-Thomas Building Systems, LLC*, the plaintiff challenged the claim of the named defendant, Weitz Company, LLC (Weitz), for contractual attorney's fees because Weitz failed to "distinguish between the fees attributable to the litigation of [Weitz'] counterclaim and the fees attributable to the defense of [the plaintiff's] claims," relying on the Appellate Court's decision in the present case in support of this argument. *Bernhard-Thomas Building Systems, LLC* v. *Weitz Co., LLC*, supra, United States District Court, Docket No. 3:04-cv-1317 (CFD), citing *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 129 Conn. App. 296. In rejecting this argument, the District Court first distinguished the Appellate Court's decision in the present case, then applied the rationale of the Second Circuit Court of Appeals in *Diamond*, to conclude that the defendants were "entitled to all of its reasonable attorney's fees" because the plaintiff's claims and Weitz' counterclaim "[arose] from a common nucleus of facts," and the attorney's time spent on both claims therefore was "intertwined . . . ." *Bernhard-Thomas Building Systems, LLC* v. *Weitz Co., LLC*, supra; see also *Rand-Whitney Containerboard Ltd. Partnership* v. *Montville*, supra, United States District Court, Docket No. 3:96CV413 (HBF) ("[t]he law in Connecticut clearly follows the analysis applied in *Diamond*"); *Atlantic Pipe Corp.* v. *Quadrangle Ltd. Partnership*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV 87-0336982 (October 28, 1993) ("[when] a party with a contractual right to recover legal fees must incur attorney's fees to preserve his contractual rights and interest, he may recover those legal fees as damages").

In a similar vein, in *J.P. Sedlak Associates* v. *Connecticut Life & Casualty Ins. Co.*, supra, United States District Court, Docket No. 3:98CV145 (DFM), the plaintiff and the defendant entered into several contracts, which, together, were intended to lead to the completion of a single transaction, namely, a new computer system for the defendant. Only one of the contracts provided for attorney's fees, but the plaintiff maintained that it was entitled to a full award of fees "because Connecticut law provides that a trial court may consider all time spent on a case involving multiple claims and defenses even if only one provides the basis for a fee recovery." Id. After observing that the contracts at issue were "closely interwoven," the court noted that "[t]he breaches arose out of the same conduct, involved the same parties and occurred in the same time frame." Id. The court observed that the parties' pleadings and motions demonstrated the interrelation between the claims, including the fact that "the same witnesses were called to prove the allegations concerning breaches of all [of the] contracts," which further suggested that the contracts related to the same transaction. Id. Accord-

ingly, "the court determine[d] that there [was] no reasonable way to segregate counsel's time by contract or by claim. . . . [D]uring the entire course of the litigation, the parties' claims were interrelated and the time and money expended, including time spent prosecuting and/or defending the [claims relating to the contracts without attorney's fees provisions], were in the pursuit of one common goal. Moreover . . . each of [the plaintiff's] claims [was] based on a core of common proof." Id.; see also *Burger King Corp.* v. *Mason*, supra, 710 F.2d 1497 ("[T]he issues in this case overlapped to a significant extent. For example, [the plaintiff's] proof of . . . a compensable issue . . . also served as proof of . . . a [noncompensable] issue . . . .").

Thus, although this issue is a matter of first impression for this court, we note that the federal courts in the District of Connecticut have applied the standard for which the defendant advocates and have found support in the decisions of our Superior Court. See *Bernhard-Thomas Building Systems, LLC* v. *Weitz Co., LLC*, supra, United States District Court, Docket No. 3:04-cv-1317 (CFD); *Rand-Whitney Containerboard Ltd. Partnership* v. *Montville*, supra, United States District Court, Docket No. 3:96CV413 (HBF); *J.P. Sedlak Associates* v. *Connecticut Life & Casualty Ins. Co.*, supra, United States District Court, Docket No. 3:98CV145 (DFM); see also *Atlantic Pipe Corp.* v. *Quadrangle Ltd. Partnership*, supra, Superior Court, Docket No. CV 87-0336982. We now confirm that this standard is indeed the law of Connecticut. Accordingly, when certain claims provide for a party's recovery of contractual attorney's fees but others do not, a party is nevertheless entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined. On remand, the trial court, in applying this standard, must determine the appropriate award of attorney's fees to which the defendant is entitled.

B

Finally, we turn to the issue of whether the defendant may be entitled to appellate attorney's fees, in addition to the attorney's fees incurred at trial, as this also is an issue that is likely to arise on remand. See, e.g., *Sullivan* v. *Metro-North Commuter Railroad Co.*, supra, 292 Conn. 164. The defendant maintains that the rationale of the Appellate Court's holding in *Gagne* v. *Vaccaro*, 118 Conn. App. 367, 371, 984 A.2d 1084 (2009), which addressed awards of appellate attorney's fees in the context of a statutory attorney's fee provision, is equally applicable to contractual attorney's fees and therefore allows for appellate attorney's fees in the present case. The plaintiffs assert, however, that (1) this issue is beyond the scope of the certified question and therefore should not be considered, and (2) in the

alternative, *Gagne* is inapplicable because it is limited to statutory attorney's fees.[10]

At the outset, we address the plaintiffs' argument regarding the scope of our review with respect to the certified question. The plaintiffs maintain that we are precluded from addressing the defendant's claim regarding appellate attorney's fees in light of the manner in which we rephrased the certified question originally framed by the defendant.[11] As noted previously, we granted the defendant's petition for certification, limited to the following question: "Did the Appellate Court improperly affirm the judgment of the trial court denying the defendant's motion for contractual attorney's fees?" *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 302 Conn. 908. In the plaintiffs' view, this question, coupled with the fact that the defendant's petition for certification addressed appellate attorney's fees in a separate question for which certification was not granted, indicates that our review was intended to be limited to the award of attorney's fees incurred at the trial level alone. We are not persuaded by the plaintiffs' argument.

The plaintiffs rely on Practice Book § 84-9, which provides in relevant part: "The issues which the appellant may present are limited to those raised in the petition for certification, except where the issues are further limited by the order granting certification." In the present case, the certified question before us requires us to consider "contractual attorney's fees"; *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 302 Conn. 908; and nothing in the language of that question indicates that appellate attorney's fees cannot also be contractual. Accordingly, in certifying only the first question presented for certification, we simply sought to avoid redundancy, not to constrain the scope of review in the narrow manner for which the plaintiffs advocate.

Turning to the substantive issue of whether a provision for contractual attorney's fees entitles a party to recover appellate attorney's fees, we note that this issue appears to be one of first impression for this court.[12] We are persuaded, however, that the rationale described in part II A of this opinion applies with equal force to the issue of appellate attorney's fees. This is consistent with the policy underlying similar decisions of the Appellate Court; see *Gagne* v. *Vaccaro*, supra, 118 Conn. App. 371 (construing statutory provision authorizing attorney's fees "as extending to attorney's fees incurred on appeal as well as at the trial level"); *Premier Capital, Inc.* v. *Grossman*, 92 Conn. App. 652, 659–60, 887 A.2d 887 (2005) (reading provision in contract as permitting award of appellate attorney's fees); and is likewise the approach taken in a number of other jurisdictions. See, e.g., *Gamble* v. *Northstore Partnership*, 28 P.3d 286, 290 (Alaska 2001) (interpreting contractual provision

as allowing appellate attorney's fees); *Parrish* v. *Terre Haute Savings Bank*, 438 N.E.2d 1, 3 (Ind. App. 1982) ("We know of no rationale for any distinction between the scope of a statutory and a contractual provision for reasonable [attorney's] fees. We must therefore conclude [that] the contractual provision in the . . . case authorizes an award for both trial and appellate fees."); *Management Services Corp.* v. *Development Associates*, 617 P.2d 406, 409 (Utah 1980) ("a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial"); *Kinstler* v. *RTB South Greeley, Ltd. LLC*, 160 P.3d 1125, 1129 (Wyo. 2007) ("[when] a contract allows [for] the award of attorney's fees, that includes fees incurred on appeal"); see also 25 C.J.S. 430, Damages § 77 (2002) ("[a]s a general rule, contract provisions for allowance of [attorney's] fees are construed to include both trial and appellate fees"); annot., "Contractual Provision for Attorneys' Fees as Including Allowance for Services Rendered upon Appellate Review," 52 A.L.R.2d 863, 864 (1957) (observing that appellate attorney's fee awards are upheld in majority of cases construing contractual attorney's fee provisions). But cf. *RPR Landholding Partnership* v. *Safeway Stores, Inc.*, 128 Or. App. 304, 307, 879 P.2d 186 (1994) ("The provision [at issue] does not specifically provide for the recovery of [attorney's] fees on appeal. Absent such a specific provision, [such] fees on appeal may not be awarded.").

The Alaska Supreme Court, for instance, faced a similar question in *Gamble* v. *Northstore Partnership*, supra, 28 P.3d 286. That court previously had concluded that, "in an action under a fee-shifting statute . . . the eventual prevailing party was entitled to full reasonable attorney's fees on appeal as well as at trial. The statute did not specifically provide for appellate attorney's fees but [the court] concluded that it would be 'incongruous' to construe the statute to apply only in the [trial] court. A similar incongruity would result if fees under the contract provision at issue . . . were . . . allowed [only for attorney's fees incurred at the trial level]. The provision has the evident purpose of shifting reasonable fees to the winner in litigation concerning the contract. This purpose would only be partly achieved by limiting application of the provision to fees incurred in the [trial] court. We therefore conclude that the contract calls for fee shifting at all court levels." (Citation omitted.) Id., 290.

We find this rationale persuasive and, accordingly, will construe an attorney's fees provision that is silent with respect to appellate attorney's fees as encompassing such fees in the absence of contractual language to the contrary. See *Premier Capital, Inc.* v. *Grossman*, supra, 92 Conn. App. 659–60. As with attorney's fees incurred at the trial level, however, such fees can be awarded only when there is a contractual or statutory

basis for doing so. On remand, because only two of the three contracts provided for an award of attorney's fees, the trial court should therefore consider whether, and to what extent, an award of appellate attorney's fees is appropriate under the standard announced in part II A of this opinion.

The judgment of the Appellate Court is reversed and this case is remanded to that court with direction to reverse the trial court's denial of the defendant's motion for attorney's fees and to remand the case to the trial court for further proceedings to determine, consistent with this opinion, the amount of attorney's fees that the defendant may recover.

In this opinion the other justices concurred.

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

[1] Paragraph 14.2 of the goodwill contract provides: "[Total Recycling] agrees to indemnify and hold [the defendant] harmless from any costs or damages, including reasonable attorney fees, resulting from any breach of any representation, warranty or covenant contained in this [a]greement."

Paragraph 1.2 of the noncompete agreement provides: "[Whitewing] agree[s] to indemnify and hold [the defendant] harmless for any costs or damages, including reasonable attorney fees, resulting from any breach of any representation, warranty or covenant contained in this [a]greement."

[2] See footnote 1 of this opinion.

[3] The plaintiffs also disputed certain costs that the defendant included in the attorney's fees calculation, claiming that the maximum recoverable amount should be approximately $52,000 rather than the approximately $82,000 claimed by the defendant, which the parties later reduced to approximately $42,000 and $72,000, respectively, when addressing the renewed motion for attorney's fees.

In addition, the plaintiffs claimed that the language of the attorney's fee provisions precluded any recovery under the circumstances of this case because "reasonable attorney's fees" modified "damages," not "costs." The trial court, however, in its November 27, 2009 memorandum of decision, found that the plain meaning of the clauses was "that the respective plaintiffs obligated themsel[ves] to compensate [the defendant] for any costs, plus reasonable attorney's fees which [the defendant] suffered or incurred to establish the breach."

[4] In dissent, however, Judge Alvord responded to this observation by noting that "the jury found that the plaintiffs had breached all three contracts, lending further support to the claim that the three contracts were inextricably connected or intertwined." *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 129 Conn. App. 310 n.2 (*Alvord, J.*, dissenting).

[5] Judge Beach, who concurred in the result, explained that the reasoning of *Heller* was applicable to issues involving contractual attorney's fees: "If an attorney's time and effort practicably can be allocated between two contracts, one which is subject to contractual attorney's fees and one which is not, then the time should be so allocated. If no allocation is practicable under the circumstances of the case . . . a reasonable attorney's fee should be awarded without division between the contracts." *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 129 Conn. App. 306 (*Beach, J.*, concurring in result). Nevertheless, under the circumstances of the case, Judge Beach would treat the trial court's silence on whether the overall fee could be apportioned among the contracts as a finding that such an allocation was practicable. In her dissent, Judge Alvord likewise reasoned that *Heller* was applicable under these circumstances but would have remanded the case for a hearing regarding the appropriate amount of attorney's fees, including appellate attorney's fees. See id., 312 (*Alvord, J.*, dissenting).

[6] The petition for certification contained the following two questions: First, "[d]id the Appellate Court err when it failed to award contractual attorney's fees to the defendant, which it was entitled to under [the] contract?" Second, "[d]id the Appellate Court err when it failed to award attorney's fees to the defendant for a successful appeal where the contract did

not contain any restriction on such an award?" We reframed the first question and granted the petition for certification to appeal limited to this question. For the reasons set forth in part II B of this opinion, however, we conclude that the second question falls within the scope of the first question and is properly before us.

[7] The defendant also claims that the Appellate Court should have concluded that the trial court abused its discretion in denying attorney's fees because the defendant met its burden of proving the reasonableness of those fees. Because we conclude that the Appellate Court improperly concluded that the trial court correctly applied the law of the case doctrine, however, we do not reach the issue of the reasonableness of the fees.

[8] Notably, the parties did not address the apportionment of fees before Judge Jones in their respective memoranda in support of and in opposition to the defendant's motion for attorney's fees, which further indicates that Judge Jones' ruling did not resolve definitively the question of apportionment.

[9] "As the defendant's counsel stated at the hearing on March 29, 2010: 'I thought Judge Jones' opinion pretty much left things wide open for me to put on whatever evidence I thought was appropriate in order to support this. So, please don't consider anything we've done here as an intention to disagree with the court in the sense of, I think it was left pretty wide open and I'm just putting on the evidence I think is appropriate.' " *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 129 Conn. App. 308 n.1 (*Alvord, J.*, dissenting).

[10] The plaintiffs did not address the merits of this argument in their principal brief but instead did so when we ordered them to submit a supplemental brief addressing the issue of whether the Appellate Court should have remanded the case to the trial court for a determination of appellate attorney's fees.

[11] See footnote 6 of this opinion.

[12] The Appellate Court, however, has considered the question. See *Premier Capital, Inc.* v. *Grossman*, 92 Conn. App. 652, 659–60, 887 A.2d 887 (2005) ("[A]ppellate attorney's fees are recoverable when authorized by contract. Because appellate attorney's fees are allowed by law, and the contract authorizes all attorney's fees allowed by law, we conclude that the provision of the note requiring the defendants to pay the plaintiff's collection costs, including attorney's fees, includes appellate attorney's fees.").