CHIEF INFORMATION OFFICER
ET AL. *v.* COMPUTERS PLUS
CENTER, INC., ET AL.
(SC 19029)
(SC 19030)
(SC 19031)

Norcott, Palmer, Zarella, Eveleigh and Robinson, Js.

Argued January 3—officially released September 3, 2013

Robert J. Deichert, assistant attorney general, with whom were *Peter R. Huntsman*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, and *Gregory T. D'Auria*, solicitor general, for the appellants-appellees (plaintiffs).

Brett J. Boskiewicz and *James A. Wade*, for the appellees-appellants (defendants).

Opinion

NORCOTT, J. The principal issue in this appeal is whether, by bringing a cause of action against a private party, the state of Connecticut waives its sovereign immunity for all counterclaims against it, including those seeking monetary damages. The plaintiffs, the Department of Information Technology and its Chief Information Officer,[1] appeal[2] from the judgment of the trial court, rendered after a jury trial, awarding the named defendant, Computers Plus Center, Inc.,[3] $18.3 million on a counterclaim alleging that the department had violated its right to procedural due process. On appeal, the department claims, inter alia, that the trial court: (1) should not have allowed the defendant to proceed with any counterclaim seeking monetary damages because sovereign immunity deprived the court of subject matter jurisdiction over such counterclaims; and (2) made several improper evidentiary rulings during the trial. The defendant cross appeals, claiming that the trial court improperly: (1) reduced the amount of the jury's verdict in its favor from $18.3 million to $1.83 million; and (2) determined that the doctrine of absolute immunity bars common-law defamation claims against government officials. We conclude that the trial court improperly determined that the department had waived the state's sovereign immunity regarding the defendant's counterclaims and, accordingly, reverse the judgment of the trial court in favor of the defendant on the procedural due process counterclaim. We further conclude that the trial court's evidentiary rulings were not improper and, therefore, affirm the judgment of the trial court in all other respects. Finally, because we conclude that the trial court lacked subject matter jurisdiction over the defendant's counterclaims, we dismiss the defendant's cross appeals as moot.

The record reveals the following facts, which the jury reasonably could have found, and relevant procedural history. The present case arises from disputes between the department and the defendant, a computer equipment supplier, in connection with two contracts under which the defendant had agreed to provide computer servers for the department and the Department of Transportation (server contracts), and a contract under which the defendant had agreed to provide personal computers to state agencies on an as needed basis (computer contract). After the memory in the servers that the defendant had supplied under the server contracts malfunctioned in the summer of 2002, the department began to suspect that the defendant deliberately supplied equipment that failed to comply with the relevant contract specifications, despite the defendant's prompt remediation of the memory malfunctions.

In August, 2002, the department determined that the defendant was not a "responsible" bidder as that term is defined in General Statutes § 4a-59 (a),[4] rejected its

pending invitation to the defendant seeking a bid on a contract to provide an additional computer server for the Department of Education, and requested that the defendant certify that all of the equipment supplied to the state by the defendant over the previous four years complied with the relevant contract specifications. Because the defendant was not able to complete its review of all of the contract awards and purchase orders from the requested time period in the time frame that the department had set forth, however, it simply replied that it believed that it "*ha*[*d*] *always . . . adhered to all the terms and conditions of each contract award*" and requested the department, "[s]hould [it] find any other violations other than [the server memory violation]," to "bring them to [the defendant's] attention and [it would] take immediate action." (Emphasis in original.)

Unsatisfied with the defendant's response, the department performed a physical audit of all of the computers that the defendant had supplied under the computer contract. In conducting this audit, the department discovered that many of those computers contained only an integrated network interface card while, in the department's view, the contract specifications required both an integrated and a stand alone network interface card. On the basis of its findings during its audit, in December, 2002, the department notified the auditor of public accounts and the state comptroller of "apparently pervasive contract irregularities" with the defendant, and also requested that the Commissioner of Public Safety "conduct a more thorough review" of the defendant's activities in relation to the computer contract.

Shortly thereafter, the department terminated the computer contract with the defendant, citing, as reasons for the contract termination, that it was a financial burden to the state and that the purchasing process had not achieved the expected cost savings.[5] Over the following several months, the department began refusing to award contracts to the defendant, even when it was the lowest bidder and, in some cases, refused even to acknowledge the defendant's bids. When the defendant asked the department to clarify its status as a bidder during this time period, the department indicated that the defendant was "not prohibited from responding" to invitations to bid, but emphasized that the standard bid terms and conditions indicated that "[a]ward[s] will be made to the lowest responsible qualified bidder." In addition, in March, 2003, the department issued a notice to "[a]ll [u]sing [s]tate [a]gencies" indicating that it had discovered "certain performance failures" because the defendant had deviated from certain contract specifications, "charged the [s]tate for parts ordered but not delivered . . . and failed to properly credit the [s]tate for substitute parts." The department further stated, in that notice, that the "substitution of

generic parts . . . also occurred on a prior contract involving servers," and the state, therefore, "recommend[ed] that [the agencies] exercise appropriate caution if [they] contemplate[d] purchasing from [the defendant] under [their] direct purchasing authority."

Around the same time, state police officers obtained and executed search warrants at the defendant's office and the personal residence of Gina Kolb, the defendant's president.[6] On the basis of evidence obtained during those searches, and the department's internal audit and investigations, in April, 2004, the department decided to bring the present litigation against the defendant. The department held a press conference with the attorney general and the chief state's attorney announcing the commencement of this civil action against the defendant and issued a press release to similar effect. This announcement received significant media attention, and the defendant's other customers thereafter began cancelling their contracts with the defendant. Given that the department also declined to award the defendant bids on new contracts during this time period, the defendant was unable to continue operating its business, and ultimately ceased operations in 2005.

On April 8, 2004, the department filed this action against the defendant,[7] alleging breach of contract and fraud claims premised on allegations that the defendant intentionally provided computers that did not comply with the specifications set forth in the computer contract. The department also asserted claims for breach of contract and fraud premised on allegations that the defendant provided the state with computer servers that contained generic, after market memory when the server contracts required factory- installed memory.[8]

The defendant filed an amended counterclaim in response, wherein it alleged that the department: (1) took the defendant's property, namely its business expectancy in the computer contract, without just compensation in violation of article first, § 11, of the Connecticut constitution (takings counterclaim); (2) deprived the defendant of its liberty interest to pursue its business without due process of law in violation of article first, § 10, of the Connecticut constitution (procedural due process counterclaim); and (3) defamed the defendant by publicly suggesting that it had engaged in improper conduct in its dealings with the department (defamation counterclaim), and sought, inter alia,[9] monetary damages and a jury trial. The department then moved to dismiss the defendant's takings and procedural due process counterclaims on the basis of the state's sovereign immunity, and the defamation counterclaim on the basis of absolute immunity.

On November 27, 2007, the trial court, *Shortall, J.*, denied the department's motion to dismiss both the takings and the procedural due process counterclaims, concluding that, by asserting claims against the defen-

dant, the department had waived the state's sovereign immunity for *any* related counterclaims. Judge Shortall cited *State* v. *Kilburn*, 81 Conn. 9, 12, 69 A. 1028 (1908), and noted that, "[f]or almost 100 years, it has been the law that, when the state sues a party, it 'open[s] the door to any defense or cross complaint germane to the matter in controversy.' " Judge Shortall further stated that, "[t]his rule was announced in *Kilburn*, an equitable action, but no reason appears why it should be limited to suits in equity and not actions at law, and other courts have not so limited it."[10] Because Judge Shortall determined that the defendant's constitutional counterclaims arose out of the same controversy giving rise to the department's action against the defendant, he concluded that the department had waived the state's sovereign immunity regarding those claims. Judge Shortall also denied the department's motion to dismiss, on the basis of absolute immunity, the defendant's defamation counterclaim because the majority of the allegedly false statements made by the department were alleged to have been made outside of judicial proceedings and, therefore, were not entitled to absolute immunity.

Thereafter, the defendant filed a second amended counterclaim, wherein it reiterated its takings and procedural due process counterclaims, recharacterized its defamation counterclaim as one for trade libel, and added claims that the department: (1) breached the computer contract by terminating it early when the defendant was ready, willing and able to perform; (2) breached the covenant of good faith and fair dealing by terminating the computer contract early and engaging in conduct that impugned the defendant's integrity and reputation; and (3) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110 et seq., by terminating the computer contract early and impugning the defendant's integrity and reputation.[11] On May 13, 2008, the department moved to strike the defendant's second amended counterclaim in its entirety.[12] On September 16, 2008, the trial court, *Shortall*, *J.*, granted the department's motion to strike the defendant's second amended counterclaim with respect to both the takings counterclaim and the CUTPA counterclaim, but denied the motion regarding the remainder of the claims presented therein.[13]

The defendant then filed a fourth amended counterclaim,[14] removing its takings and CUTPA counterclaims, and leaving its procedural due process, trade libel, breach of contract, and breach of good faith and fair dealing counterclaims. Thereafter, this case was transferred to the complex litigation docket in the judicial district of Waterbury, where the department's claims alleging breach of contract and fraud, along with the defendant's counterclaims alleging deprivation of procedural due process, trade libel, breach of contract, and breach of the covenant of good faith and fair dealing,

were tried before the jury. After the presentation of evidence, during the charging conference, the trial court, *Stevens*, *J.*,[15] granted the department's motion for a directed verdict as to the defendant's trade libel counterclaim, concluding that the allegedly defamatory statements were made by agency heads of the executive branch in the performance of their official duties and, therefore, protected under the doctrine of absolute immunity.

The remainder of the department's claims and the defendant's counterclaims were then submitted to the jury. The jury found in favor of the defendant on all of the department's claims except for the claim that the defendant had breached the server contract regarding the servers that it had agreed to provide for the Department of Transportation. Although the jury found that the defendant had breached the Department of Transportation server contract by failing to provide the contractually required factory installed, Dell certified memory in the computer servers, however, it did not award the department any damages on that claim. Regarding the defendant's counterclaims, the jury found that the department had violated the defendant's liberty interest in pursuing its business in violation of the defendant's procedural due process rights by effectively disqualifying it from bidding on state contracts without providing the opportunity to contest the removal of its "responsible bidder" status. The jury then awarded $18.3 million in damages, the full value of the defendant's business, on the procedural due process counterclaim.[16] The jury also found that the department had breached the covenant of good faith and fair dealing "by refusing to meet [with the defendant] to discuss any alleged issues or concerns . . . about [the defendant's] performance of the [computer] contract" and by "engaging in a pattern of conduct that harmed [the defendant's] reputation and impugned [the defendant's] integrity," but did not award the defendant any damages on that counterclaim. Finally, the jury found in favor of the department on the defendant's breach of contract counterclaim, determining that the department had not breached the computer contract by terminating it early.

Thereafter, the department made several motions to set aside the verdict, including a motion to set aside the verdict regarding all of the department's claims on which the jury had found in favor of the defendant and regarding the defendant's procedural due process counterclaim, arguing that the trial court had improperly: (1) allowed the presentation of prejudicial and irrelevant evidence to the jury; and (2) precluded the department from presenting evidence that Kolb applied for and accepted accelerated rehabilitation as a means of resolving the criminal charges against her. The trial court denied these motions.

The department also made a number of other post-

verdict motions regarding the defendant's procedural due process counterclaim, including: (1) a renewed motion to dismiss, arguing, inter alia, that sovereign immunity deprived the court of subject matter jurisdiction over that counterclaim; (2) a motion to set aside the verdict and for judgment notwithstanding the verdict, arguing, inter alia, that any waiver of the state's sovereign immunity was limited to counterclaims sounding in recoupment and did not permit an affirmative award of damages against the department; and (3) a motion to reduce the $18.3 million verdict, arguing, inter alia, that the award was not supported by the evidence and was the result of the jury's inflammation and prejudice, as evidenced by its attempt to award "plus punitive damages," despite the trial court's specific instruction not to consider punitive damages for that counterclaim. See footnote 16 of this opinion. The trial court denied the department's renewed motion to dismiss and the motion to set aside the verdict and for judgment notwithstanding the verdict, but granted its motion to reduce the verdict.

Accordingly, the trial court ordered a remittitur reducing the jury's damages award to $1.83 million, concluding that the $18.3 million award "manifest[ed] a shocking injustice indicating that the jury's award . . . was influenced by partiality or mistake. The sense that the jury was moved by an erroneous or inflamed view in regard to . . . damages [was] further evidenced by the jury's conclusion that punitive damages should be imposed in addition to the $18.3 million compensatory award." The defendant refused to accept the reduced award and, on July 12, 2010, the trial court rendered judgment in accordance with the jury's verdict on all of the department's claims and the defendant's counterclaims, with the exception of the jury's determination of damages as to the defendant's procedural due process counterclaim. The trial court then set aside the jury's $18.3 million damages verdict and ordered a new trial on the defendant's procedural due process counterclaim as to damages only. The present appeals and cross appeals followed.

On appeal, the department claims, inter alia,[17] that: (1) sovereign immunity bars awards of monetary damages against the state and jury trials on claims against the state without statutory authority; and (2) the trial court's admission of evidence that was irrelevant and prejudicial to the department, coupled with its exclusion of crucial evidence that was favorable to the department, likely inflamed the jury and tainted its verdict. We address these claims in turn.[18] Additional facts will be set forth as necessary.

I

We begin with the department's claim that the trial court improperly determined that, by initiating the present action against the defendant, it waived the state's

sovereign immunity for all counterclaims, including those seeking monetary damages. Specifically, the department claims that the trial court improperly expanded the judicially created exception to sovereign immunity set forth in *State* v. *Kilburn*, supra, 81 Conn. 12, wherein this court allowed a defendant to advance equitable counterclaims in response to the state's equitable foreclosure action.[19] The department argues that, not only are courts required to construe exceptions to sovereign immunity narrowly—which would limit the application of *Kilburn* to equitable actions—but the adoption of article eleventh, § 4, of the Connecticut constitution[20] and the subsequent creation of the Office of the Claims Commissioner also indicate that the legislature did not intend state agencies to have the authority to waive the state's sovereign immunity as to any and all counterclaims for monetary damages simply by initiating litigation against private parties. Finally, citing *Beecher* v. *Mohegan Tribe of Indians*, 282 Conn. 130, 918 A.2d 880 (2007), the department argues that any waiver of the state's sovereign immunity by an agency's initiation of litigation should be limited to "counterclaims that arise out of the same transaction or occurrence as the sovereign's suit but only to the extent [that] those counterclaims are used to offset the government's affirmative claims and limit its recovery."[21]

In response, the defendant argues that, despite this court's acknowledgment of the equitable nature of the claims presented in *State* v. *Kilburn*, supra, 81 Conn. 12, the application of that case has never been expressly limited to equitable causes of action. The defendant further asserts that the creation of the Office of the Claims Commissioner, and the procedure for seeking permission from the legislature to bring claims against the state *as a plaintiff*—in the absence of litigation initiated by the state—is irrelevant to whether the state waives its sovereign immunity for counterclaims *asserted by a defendant* when the state initiates litigation. We agree with the department, and conclude that the state does not waive its sovereign immunity for counterclaims seeking monetary damages simply by initiating litigation against a private party. Accordingly, we conclude that the trial court improperly denied the department's motions to dismiss the defendant's procedural due process counterclaim on the basis of sovereign immunity.

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010). In addition, "[s]overeign immunity relates to a court's subject matter jurisdiction over a case, and therefore [also] presents a

question of law over which we exercise de novo review. . . . In so doing, we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . *Exceptions to this doctrine are few and narrowly construed under our jurisprudence*." (Emphasis added; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009).

Finally, we observe that, "[i]n its pristine form the doctrine of sovereign immunity would exempt the state from suit entirely, because the sovereign could not be sued in its own courts and there can be no legal right as against the authority that makes the law on which the right depends. . . . This absolute bar of actions against the state [however] has been greatly modified both by statutes effectively consenting to suit in some instances as well as by judicial decisions in others." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Heintz*, 204 Conn. 17, 31, 526 A.2d 1318 (1987). For example, we have held that the doctrine of sovereign immunity does not prevent a claimant from seeking declaratory or injunctive relief for allegations that a state official is acting either pursuant to an unconstitutional statute or in excess of his authority. See, e.g., *Gold* v. *Rowland*, supra, 296 Conn. 212; *Doe* v. *Heintz*, supra, 31. This is so because individuals have an important interest in being protected from improper governmental action and the state has no interest in allowing such activity to continue such that a court's action to curb that activity would interfere with the state's legitimate governmental functions. See *Gold* v. *Rowland*, supra, 214; see also *Antinerella* v. *Rioux*, 229 Conn. 479, 487–88, 642 A.2d 699 (1994), overruled on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

We have expressly limited the exceptions to sovereign immunity for when a state official acts pursuant to an unconstitutional statute or in excess of his authority to actions seeking declaratory or injunctive relief, however, because "a court may fashion these remedies in such a manner as to minimize disruption to government and to afford an opportunity for voluntary compliance with the judgment. . . . We have adjudicated the rights of the parties in such cases acting on the presumption that other governmental departments will accede

to our interpretation of the applicable law." (Citation omitted.) *Doe* v. *Heintz*, supra, 204 Conn. 32. In contrast, "[a] money judgment . . . is directly enforceable, without further court intervention, against *any* property of the judgment debtor that is not statutorily exempt. . . . [Therefore, even] where the monetary award is so minimal as the sum a prevailing party would be entitled to receive as taxable costs . . . this court has refused to sanction a monetary judgment against the state in the absence of *explicit* statutory authority." (Citation omitted; emphasis added.) Id.; see also, e.g., *Miller* v. *Egan*, supra, 265 Conn. 321 ("the exception to sovereign immunity for actions in excess of statutory authority or pursuant to an unconstitutional statute, applies only to actions seeking declaratory or injunctive relief, not those seeking monetary damages"). Because there is no dispute that there is no applicable statutory waiver of immunity in the present case, we must determine whether the department waived the state's sovereign immunity by initiating the present litigation and voluntarily invoking the jurisdiction of the courts.

A

We begin with the department's contention that the trial court, *Shortall, J.*, improperly concluded that *State* v. *Kilburn*, supra, 81 Conn. 12, articulated a rule under which the state subjects itself to any and all related counterclaims that a defendant may wish to bring when it initiates litigation. Specifically, the department takes issue with Judge Shortall's conclusion that, although *Kilburn* involved an equitable action, "no reason appears why it should be limited to suits in equity and not actions at law, and other courts have not so limited it." The department argues that, by emphasizing the equitable nature of the claims presented in *Kilburn* and the equitable principles underlying the rationale for the exception to sovereign immunity recognized in that case, this court intended to limit the application of that exception to cases involving equitable claims. The defendant responds, however, that this court's recognition of the equitable nature of the claims presented in *Kilburn* did nothing to abridge our conclusion that, by bringing a foreclosure action against a city, the state "opened the door to *any* defense or cross-complaint germane to the matter in controversy, that the city may see fit to interpose." (Emphasis added.) *State* v. *Kilburn*, supra, 12.

In *Kilburn*, the state had obtained a mortgage on a parcel of property located in city of Hartford (city) to secure a loan from the state's school fund. Id., 11. Thereafter, the city obtained liens upon the same property for a sewer assessment and an assessment for the expense of removing snow from the sidewalks on the property, which, pursuant to General Statutes (1902 Rev.) § 1954, had priority over mortgages to private individuals previously existing and recorded. Id. When

the state sought to foreclose its mortgage upon the property, the city, which, as a lienholder on the property, was made a defendant in the foreclosure action, filed a cross complaint claiming that its sewer and snow removal assessment liens had priority over the state's mortgage under § 1954. Id., 10. The state moved to dismiss the city's cross complaint on the basis of sovereign immunity. Id. This court concluded that, "[t]his action being an equitable one, the [s]tate, by bringing it, opened the door to any defense or cross-complaint germane to the matter in controversy, that the city might see fit to interpose. A sovereign who asks for equity must do equity." Id., 12. The court further concluded, however, that there was "no equity in favor of the city" and that liens for municipal assessments may override a prior mortgage to a private individual, but they could not take priority over a prior mortgage to the state. Id., 12–13. The court, therefore, ordered the trial court to grant the state's motion to dismiss the city's cross complaint. Id., 13.

In our view, this court's emphasis on the equitable nature of *Kilburn* provided the foundation for its willingness to consider the defendant's equitable counterclaims in that case.[22] Given that this court construes exceptions to sovereign immunity narrowly; see, e.g., *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349–50; and the emphasis that this court placed on the equitable nature of the claims raised in *Kilburn* by qualifying the sentence in which the court set forth the items to which the state had "opened the door" by initiating the foreclosure action with the phrase: "[t]his action being an equitable one," and further justifying its conclusion by stating that "[a] sovereign who asks for equity must do equity"; *State* v. *Kilburn*, supra, 81 Conn. 12; we conclude that the applicability of the exception to sovereign immunity recognized in *Kilburn* was intended to extend only to suits in equity and the related equitable counterclaims that would allow the court to make a full determination of the equities in that case.

The defendant contends, however, that subsequent cases citing *Kilburn* demonstrate that the applicability of the exception to sovereign immunity set forth in that case has not been limited to actions in equity or equitable counterclaims, and argues that it should also apply to counterclaims for monetary damages. For this proposition, the defendant relies on *Lacasse* v. *Burns*, 214 Conn. 464, 468–70, 572 A.2d 357 (1990), *State* v. *Hartford Accident & Indemnity Co.*, 136 Conn. 157, 160 n.1, 70 A.2d 109 (1949), *Reilly* v. *State*, 119 Conn. 217, 219–20, 175 A. 582 (1934), overruled on other grounds by *Cannavo Enterprises, Inc.* v. *Burns*, 194 Conn. 43, 46, 478 A.2d 601 (1984), *Isaacs* v. *Ottaviano*, 65 Conn. App. 418, 421–23, 783 A.2d 485 (2001), *University of Connecticut* v. *Wolf*, Superior Court, judicial district of New Haven, Docket No. CV-03-0482479-S

(October 26, 2004) (38 Conn. L. Rptr. 148), and *State* v. *Lex Associates*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 4259 (December 1, 1995) (15 Conn. L. Rptr. 611). None of the cases on which the defendant relies, however, support its argument that *Kilburn* provides the authority under which its counterclaims survive sovereign immunity.

First, the defendant contends that *Reilly* v. *State*, supra, 119 Conn. 219–20, "first applied *Kilburn* in an action for money damages . . . ." In *Reilly*, the state brought an action against a trustee who had failed to pay the state for the support of an inmate of the Connecticut state hospital as required by the trust. Id., 218–19. The trustee refused to participate in the litigation, and the state obtained a default judgment against the trustee in the amount of the state's expenditures for the inmate's support plus costs. Id., 219. Thereafter, the trustee brought a writ of error attacking the judgment of the trial court. Id. In response, the state filed a plea in abatement claiming that the writ of error was barred by sovereign immunity because a writ of error, as opposed to an appeal, is a new cause of action, and the state had not agreed to become a party in that "new" case. Id. This court rejected the state's claims, concluding that a writ of error is, like an appeal, a direct attack on the underlying judgment and, therefore, was not a new action for which the trustee, as the plaintiff in error, was required to obtain the state's consent to be sued. Id., 220. Accordingly, the court concluded that "[w]hen the [s]tate brought the original action it waived its [sovereign] immunity as regards this writ of error just as much as it would have waived it had the plaintiff in error appealed." Id., 221.

In reaching its conclusion, the court in *Reilly* observed that *Kilburn* had indicated that, "if the [s]tate itself invokes the jurisdiction of the court to secure affirmative relief, it subjects itself to any *proper* cross demand involved in the subject-matter of the action." (Emphasis added.) *Reilly* v. *State*, supra, 119 Conn. 219. This observation, however, was unnecessary to its conclusion that, "by bringing an action, the [s]tate subjects itself to the procedure established for its final and complete disposition in the courts, by way of appeal or otherwise." Id., 220. Therefore, not only was the *Reilly* court's reference to *Kilburn* dicta, but its use of the term "*proper* cross demands" to describe the court's holding in *Kilburn*, did not extend the type of allowable counterclaims beyond the equitable counterclaim that did not impact the state fisc approved of in *Kilburn*. This is particularly true given that the state, not the defendant, sought monetary damages in *Reilly*. Accordingly, *Reilly* does not, as the defendant contends, stand for the proposition that, when the state initiates a cause of action—legal or equitable—it opens the door to any and all potential counterclaims. On the contrary, all

that *Reilly* stands for is the proposition that, when the state brings a cause of action, it waives its sovereign immunity with respect to the procedure established for the action's final and complete disposition in the courts, including an appeal or a writ of error.

Next, the defendant argues that this court again relied on *Kilburn* in recognizing "the significance of the state having commenced suit against a contractor and its insurer for costs incurred to complete a road construction project" in *State* v. *Hartford Accident & Indemnity Co.*, supra, 136 Conn. 157. In *Hartford Accident & Indemnity Co.*, the Deliso Construction Company, Inc. (Deliso Construction) had been contracted to perform a road construction project for the state. Id., 164. After Deliso Construction began work on the project, however, it discovered that the excavation required far exceeded the estimate from the state on which its bid was based. Id. When its efforts to revise the contract price for the project failed, Deliso Construction stopped work and rescinded the contract. Id., 165. Thereafter, the state hired another contractor to complete the project and brought an action against Deliso Construction to recover the excess cost of completion. Id., 159, 165. Deliso Construction filed a counterclaim in which it sought to recover the reasonable value of work that it had completed before rescinding the contract. Id., 159–60. In a footnote, this court noted that Deliso Construction "was authorized by the General Assembly to sue the state on its claim" but opined that "[t]he special authority so given was unnecessary . . . [because] 'if the [s]tate itself invokes the jurisdiction of the court to secure affirmative relief, it subjects itself to any proper cross demand involved in the subject-matter of the action.' *Reilly* v. *State*, [supra, 119 Conn. 219]." *State* v. *Hartford Accident & Indemnity Co.*, supra, 160 n.1.

The defendant contends that the statement contained within the first footnote of *Hartford Accident & Indemnity Co.* indicates this court's recognition of a waiver of sovereign immunity for counterclaims for monetary damages whenever the state brings an action. The defendant, however, overstates the import of this footnote. First, because the question before the court in that case was whether Deliso Construction was entitled to rescind the contract on the ground that the state had misrepresented the scope of the job, and because the legislature had expressly waived sovereign immunity regarding the counterclaim, giving the court subject matter jurisdiction over that claim, our statement that such permission was unnecessary was merely dicta. Furthermore, although Deliso Construction sought to obtain money from the state in its counterclaim, it merely sought to recover the fair market value of work that it had completed, a claim premised on quantum meruit, an *equitable* theory of recovery. See *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 587 n.9, 57 A.3d 730 (2012) ("[q]uantum meruit is an equitable

remedy to provide restitution for the reasonable value of services despite an unenforceable contract"). Therefore, the statement made by this court in *Hartford Accident & Indemnity Co.* indicating that the legislative permission for the counterclaim was unnecessary does not support the defendant's claim that there is an exception to sovereign immunity that permits legal counterclaims seeking monetary damages.

Furthermore, *Lacasse* v. *Burns*, supra, 214 Conn. 468–70, is also inapposite to the present case. In *Lacasse*, the question before the court was whether the accidental failure of suit statute applied in a case where the state had expressly waived its sovereign immunity under the highway defect statute, General Statutes § 13a-144. Id., 468. Although this court quoted *Kilburn* in *Lacasse*, that quotation was merely an example of the concept that, once involved in a civil action, the state enjoys the same procedural status as any other litigant and, therefore, does not support the proposition that the state waives sovereign immunity entirely by initiating litigation.[23] Indeed, given that the state was the *defendant* in *Lacasse*, not only had sovereign immunity been waived by statute, but there also was no question as to whether the state could impliedly waive sovereign immunity by *initiating* litigation. See id., 468–69.

The defendant's reliance on *Isaacs* v. *Ottaviano*, supra, 65 Conn. App. 423, is similarly misplaced. Although, in *Isaacs*, the Appellate Court stated that, "[t]o allow the state to invoke the jurisdiction of the court to seek to establish that a defendant is liable to it and yet allow it to shield itself from a counterclaim by way of sovereign immunity would be patently unfair," it went on to conclude that "[t]hat rationale *simply does not apply here* . . . ." (Emphasis added.) Id. Indeed, the state did not initiate the litigation in *Isaacs* either. Thus, the Appellate Court's observation regarding the effect of bringing suit not only is not binding on this court, but also was merely dicta in that case.[24]

Thus, none of the cases on which Judge Shortall relied, and on which the defendant relies in this appeal, accurately stand for the proposition that *Kilburn* has been extended beyond the context of equitable actions. Our independent research also has failed to uncover such a case. Therefore, because we construe exceptions to sovereign immunity narrowly; see, e.g., *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349–50; we conclude that *Kilburn* does not provide authority justifying the extension of the recognition of equitable counterclaims in an equitable action to any and all counterclaims a defendant may wish to bring when it has been sued by the state.

B

We turn next to the department's claim that the adoption of article eleventh, § 4, of the Connecticut constitu-

tion and the subsequent enactment of General Statutes §§ 4-141 through 4-165c, which established the Office of the Claims Commissioner, who is empowered to "hear and determine all claims against the state"; General Statutes § 4-142;[25] preclude any judicial expansion of the limited exception to sovereign immunity for equitable counterclaims that the court established in *Kilburn*. Specifically, the department contends that, because the legislature enacted a comprehensive statutory scheme to implement article eleventh, § 4, it intended to occupy the field with respect to any and all claims for monetary damages against the state. In response, the defendant concedes that, had the department not initiated the present action, "it surely would have had to seek the permission of the claims commissioner pursuant to [General Statutes] § 4-160"[26] to assert its claims against the department. Nevertheless, the defendant argues that, because it asserted its claims against the department as counterclaims in an action initiated by the department, "it was not necessary for [the defendant] to seek anyone's permission before filing its counterclaim[s]." In this respect, the defendant essentially argues that the procedures required in order to assert claims against the state as a plaintiff do not apply to a defendant simply responding to litigation initiated by the state. We conclude that §§ 4-141 through 4-165c require that defendants first obtain permission from the claims commissioner to bring legal counterclaims seeking monetary damages from the state, and preclude any judicial expansion of the *Kilburn* rule.

It is well established that, "[w]hen the doctrine of sovereign immunity is applicable, the state must consent to be sued in order for a claimant to pursue any monetary claim against the state. . . . The claims commissioner may waive that immunity pursuant to . . . § 4-160 (a) and consent to suit, but until that occurs, the Superior Court has no jurisdiction to hear any such monetary claim." (Citation omitted.) *Capers* v. *Lee*, 239 Conn. 265, 267–68 n.3, 684 A.2d 696 (1996); see also *Krozser* v. *New Haven*, 212 Conn. 415, 423, 562 A.2d 1080 (1989), cert. denied, 493 U.S. 1036, 110 S. Ct. 757, 107 L. Ed. 2d 774 (1990). Thus, a claimant "who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner. . . . [T]he Superior Court does not have the authority to waive sovereign immunity on behalf of the state . . . . When sovereign immunity has not been waived, the claims commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim. See General Statutes §§ 4-141 through 4-165[c]. . . . This legislation expressly bars suits upon claims cognizable by the claims commissioner except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by

the commissioner or other statutory provisions. . . .

"The legislative history and purpose of chapter 53 of the General Statutes; General Statutes §§ 4-141 through 4-165[c]; entitled Claims Against the State, as well as the comprehensive nature of the statutory scheme, support our conclusion that, on a claim for money damages, regardless of whether the [claimant has] alleged that state officers acted in excess of statutory authority, the [claimant] must seek a waiver from the [claims commissioner] before bringing an action against the state in Superior Court. The [O]ffice of the [C]laims [C]ommissioner was created by Public Acts 1959, No. 685. Prior to 1959, a claimant who sought to sue the state for monetary damages, in the absence of a statutory waiver by the state, had but one remedy—namely, to seek relief from the legislature, either in the form of a monetary award or permission to sue the state. . . . In discussing the need for the claims commission, George Oberst, the director of the legislative council, explained that the commission was intended to ease the legislature's burden in handling claims for monetary relief. . . .

"In the same public act, the legislature enacted what is now General Statutes § 4-165, which provides in relevant part: No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment. *Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter*. . . . [Section] 4-165 makes clear that the remedy available to [individuals] who have suffered harm from the negligent actions of a state employee who acted in the scope of his or her employment must bring a claim against the state under . . . chapter 53 of the General Statutes, which governs the [O]ffice of the [C]laims [C]ommissioner." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Miller* v. *Egan*, supra, 265 Conn. 317–19.

Thus, the comprehensive nature of the statutory scheme, which specifies in detail the circumstances under which a claimant may bring an action against state employees individually, as well as when a claimant must seek the authorization of the claims commissioner before proceeding against the state, is consistent with the rule articulated in *Miller* that the exceptions to sovereign immunity apply only to equitable relief, not to those seeking monetary damages. See id., 321.

This conclusion is also consistent with this court's previous decisions in the related context of federal sovereign immunity. In *Davis* v. *Naugatuck Valley Crucible Co.*, 103 Conn. 36, 40, 130 A. 162 (1925), this court concluded that, because of sovereign immunity, a company could not maintain a counterclaim against a United

States official without first following the procedure established in the relevant statutes for bringing such claims and, accordingly, reversed the judgment of the trial court rendered in favor of the company on that counterclaim. In reaching this conclusion, this court stated that, "[w]hen [a] statute says that an action may be brought against [a United States official], it means that it *shall* be so brought, and this is equivalent to saying that it *must* be brought in this way, since this is the only way in which it can be brought against the United States. There is no statute or order waiving the immunity of the United States from suit in such an action, other than as provided in [the relevant statutes]." (Emphasis added.) Id.

Furthermore, the defendant's contention in the present case that the procedures for obtaining permission to bring a claim against the state as a plaintiff are inapplicable to the assertion of a counterclaim by a defendant is inconsistent with the nature of counterclaims under Connecticut law. Our rules of practice and case law make clear that, although counterclaims arise only in response to an action initiated by another party, they are essentially independent actions brought by the defendant against the plaintiff, which courts entertain concurrently simply in the interest of judicial economy. See, e.g., *Home Oil Co.* v. *Todd*, 195 Conn. 333, 341, 487 A.2d 1095 (1985) ("Under our rules of practice, a counterclaim, if proper, is an independent action. See Practice Book §§ [10-10, 10-54, 10-55] . . . . It has been defined as a cause of action existing in favor of a defendant against a plaintiff which a defendant pleads to diminish, defeat or otherwise affect a plaintiff's claim and also allows a recovery by the defendant." [Citations omitted; internal quotation marks omitted.]); *Moran* v. *Lewis*, 131 Conn. 680, 681, 41 A.2d 905 (1945) ("[T]he defendant's counterclaim . . . is in substance an action wherein affirmative relief is sought by the defendant against the plaintiff. *In effect, it was an action brought by the defendant against the plaintiff.*" [Emphasis added.]); *Davis* v. *Naugatuck Valley Crucible Co.*, supra, 103 Conn. 37 (counterclaim "sets forth an *independent cause of action* [not a matter of recoupment], which might have been made *the basis of a separate action* by the defendant, and is open to the same attack as if brought as a separate action" [emphasis added]).

In addition, the claims commissioner statutes do not distinguish between claims asserted by a plaintiff and counterclaims asserted by a defendant in defining claims against the state. Section 4-165 (a) provides that "[*a*]*ny person having a complaint*" for damages, caused by a state officer within the scope of his employment, "shall present it as a claim against the state under the provisions of [chapter 53]."[27] (Emphasis added.) Thereafter, the claims commissioner will determine whether the claim should be paid; see General Statutes

(Rev. to 2003) § 4-158 (a); or whether sovereign immunity should be waived such that the claim can be adjudicated in the courts. See General Statutes § 4-160. Furthermore, § 4-142 provides that the claims commissioner is empowered to hear "*all claims against the state*" with limited exceptions not applicable to this case. (Emphasis added.) See footnote 25 of this opinion. Finally, General Statutes § 4-148 (c) provides in relevant part: "*No claim cognizable by the* [*c*]*laims* [*c*]*ommissioner shall be presented against the state except under the provisions of this chapter*. . . ." (Emphasis added.) Nothing in these statutes demonstrates a legislative intent to treat counterclaims differently than claims asserted by plaintiffs.

We are mindful that the waiver of sovereign immunity is generally best left to the discretion of the legislature. See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 436, 54 A.3d 1005 (2012) ("We long have held that our authority over the common law does not extend to the doctrine of sovereign immunity in the same way or to the same extent that it extends to other common-law principles. This is so because the doctrine derives from the very sovereignty of the state."); id., 437 ("[W]e have continually expressed our reluctance to abolish [the doctrine of sovereign immunity] by judicial fiat . . . . The question [of] whether the principles of governmental immunity from suit and liability can best serve this and succeeding generations has become, by force of the long and firm establishment of these principles as precedent, a matter for legislative, not judicial determination." [Internal quotation marks omitted.]); *Krozser* v. *New Haven*, supra, 212 Conn. 423 ("[t]he question [of] whether the principles of [sovereign] immunity from suit and liability are waived is a matter for legislative, not judicial, determination" [internal quotation marks omitted]). It is clear that the legislature has not waived the state's sovereign immunity for claims seeking monetary damages against the state, other than as provided in General Statutes §§ 4-141 through 4-165b. Cf. *Davis* v. *Naugatuck Valley Crucible Co.*, supra, 103 Conn. 37. Therefore, the defendant's failure to present its counterclaims for damages to the claims commissioner and to obtain legislative permission to sue the department pursuant to § 4-160 prior to bringing its counterclaims deprives the trial court of subject matter jurisdiction over those counterclaims. Accordingly, we conclude that the trial court improperly denied the department's motion to dismiss the defendant's procedural due process counterclaim.

II

We next turn to the department's claims that the trial court improperly admitted evidence that was irrelevant and unduly prejudicial to it, while excluding evidence in the department's favor, which likely inflamed the passions of the jury and tainted its verdict.[28] Specifically,

the department challenges the trial court's: (1) admission of Kolb's testimony regarding the state police search of the defendant's office and her personal residence, the seizure of the defendant's business property, her ultimate arrest on felony larceny charges, and the disposition of those charges; (2) admission of expert testimony regarding the valuation of the defendant's business; and (3) exclusion of an e-mail in which the department alleged that Kolb had acknowledged that the computer contract required two network interface cards to be installed in the computers supplied under that contract. The department argues that "[v]iewed separately or together, those issues were the likely catalyst for the jury flouting the court's charge in an attempt to punish the state beyond the bounds of the law and the evidence." The department further argues that the trial court improperly denied its motion to set aside the verdict on the defendant's counterclaims because the evidentiary issues "call into question the reliability of the jury's verdict on both liability and damages . . . ."[29]

Before turning to each of the department's evidentiary claims in detail, we note that "[i]t is well settled that the trial court's evidentiary rulings are entitled to great deference. . . . The trial court is given broad latitude in ruling on the admissibility of evidence, and we will not disturb such a ruling unless it is shown that the ruling amounted to an abuse of discretion." (Internal quotation marks omitted.) *Daley* v. *McClintock*, 267 Conn. 399, 403, 838 A.2d 972 (2004). "When reviewing a decision to determine whether the trial court has abused its discretion, we make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 13, 60 A.3d 222 (2013). Similarly, with respect to our review of the trial court's denial of the state's motion to set aside the verdict, it is well settled that "[t]he trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles . . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb." (Internal quotation marks omitted.) *Allison* v. *Manetta*, 284 Conn. 389, 405, 933 A.2d 1197 (2007).

A

We first address the department's claim that the trial court improperly admitted Kolb's testimony regarding

the state police searches and seizures, her arrest, and the resolution of the criminal charges against her. Specifically, the department claims that this evidence was irrelevant to any of the defendant's counterclaims, and posits that, even if it was marginally relevant, it was "far more prejudicial than probative given the emotional nature of the testimony . . . ." The department also claims that the resulting prejudice to it was exacerbated because Kolb's testimony that the charges against her had been "dismissed" likely led the jury incorrectly to believe that the charges were groundless, rather than understanding that the charges were dropped only after Kolb had applied for, and completed, the accelerated rehabilitation program. Moreover, the department argues that it was plain error[30] for the trial court to refuse to set aside the verdict because the trial court should not have penalized the department for its mistaken belief that the trial court had precluded its additional questioning of Kolb in an attempt to clarify the disposition of her criminal charges for the jury.

In response, the defendant contends that the trial court properly admitted Kolb's testimony because it was relevant to the defendant's trade libel and procedural due process counterclaims by demonstrating that the defendant had suffered harm as a result of the false statements that the department made to the state police when it asked them to perform an investigation. Furthermore, the defendant argues that the emotional testimony does not automatically create undue prejudice and that the department failed to explain how Kolb's emotional testimony improperly aroused the emotions of the jury. Finally, the defendant asserts that Kolb's testimony regarding the disposition of her criminal charges was factually and legally accurate, and that the department's misunderstanding of the trial court's ruling with respect to whether it could question Kolb further regarding her acceptance of accelerated rehabilitation and the subsequent dismissal of her criminal charges does not amount to an extraordinary situation that warrants plain error review or reversal. We agree with the defendant and conclude that the trial court did not abuse its discretion in determining that Kolb's testimony was relevant to an aspect of the defendant's case and, despite the emotional nature of her testimony, that it was not unduly prejudicial. Accordingly, we further conclude that the trial court's denial of the state's motion to set aside the verdict on the basis of the state's misunderstanding of the trial court's ruling regarding its further questioning of Kolb does not constitute plain error.

The following additional facts are relevant to this claim. In its case-in-chief, the department introduced testimony indicating that it had reported what it believed was the defendant's fraudulent behavior to the state police for an investigation. This testimony also implied that the state police ultimately executed a

search and that Kolb was arrested. During the defendant's presentation of evidence, it called Kolb as a witness and attempted to elicit her explanation of the events that had transpired as a result of the department's referral of its concerns to the state police. The department objected on relevance grounds; the trial court overruled the objection but, before the defendant could continue questioning Kolb, she began to cry. The court excused the jury to give Kolb a moment to compose herself and to address the department's objection in greater depth. The court and the parties' attorneys then discussed, for the remainder of the court day, the department's objections on both relevance grounds and on the ground that Kolb's testimony in this respect would improperly inflame the jury. The court also took additional time the following morning to address and resolve the department's objections. The trial court ultimately overruled the department's objections and allowed Kolb to testify regarding the searches and seizures at the defendant's office and her personal residence as well as regarding her arrest and the subsequent dismissal of the charges against her. The trial court concluded that such testimony was relevant to the department's special defense that the defendant had failed to mitigate its damages "as to all counts" of the defendant's counterclaim.

Kolb also testified that she and the state had reached a compromise regarding the criminal charges against her and that those charges were ultimately dismissed. On cross-examination, the department sought to clarify that the charges had been dismissed only after she had applied for, and completed, accelerated rehabilitation. After several attempts by the department to elicit that testimony, the trial court, sua sponte, excused the jury and inquired as to the reason that the department was following this line of questioning when it previously had sought to exclude all testimony of Kolb's arrest and the subsequent dismissal of the charges against her. After a colloquy between the court and both attorneys, the trial court stated: "I don't want to hear any more," and "I think we're wasting time, but if you [two] don't think that, then we'll listen to this." When the jury reconvened, however, instead of pursuing the matter of accelerated rehabilitation further, the department moved on to another line of questioning.

Following the jury's verdict, the department filed a motion to set aside the verdict arguing, inter alia, that the trial court improperly admitted Kolb's testimony regarding the state police execution of the search warrants, Kolb's arrest, and the disposition of the charges against her because that evidence was irrelevant to any of the claims before the jury and served only to inflame the jury. The department also argued that the trial court had improperly prohibited it from presenting evidence that Kolb had applied for and accepted accelerated rehabilitation in order to obtain the dismissal of the

criminal charges against her. The trial court denied the department's motion, concluding that the department's evidentiary claims lacked merit, and noting that it "did not sustain any objection precluding the [department's] examination about accelerated rehabilitation or otherwise order any such preclusion." The trial court further noted that it had "questioned outside the presence of the jury the relevancy of the [department's] inquiry in light of the [department's] sustained objections to the topic and afterwards instructed the [department] that it could proceed with its inquiry."

1

It is well established that "[r]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative. . . .

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429–30, 64 A.3d 91 (2013). "[T]he primary responsibility for conducting the balancing test to determine whether the evidence is more probative than prejudicial rests with the trial court, and its conclusion will be disturbed only for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and [whether it] reasonably could have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *State* v. *James G.*, 268 Conn. 382, 396, 844 A.2d 810 (2004).

In the present case, we conclude that the trial court did not abuse its discretion in determining that Kolb's testimony regarding the state police's search of the defendant's office and her personal residence, her arrest, and the dismissal of the criminal charges against her was relevant to an aspect of the defendant's counterclaims. Indeed, the seizure of numerous business

records and inventory and the arrest of the defendant's president is plainly material to the jury's determination as to whether the defendant was able to continue serving its customers and develop new business thereafter. Furthermore, as the defendant contends, Kolb's testimony tends to elucidate the effects of the department's conduct in referring its concerns to the state police and its statements thereafter that the defendant had improperly charged it for parts that were required under the computer contract, but that it failed to provide.[31]

The department posits, however, that even if Kolb's testimony was logically relevant, the trial court improperly determined that it was admissible because its emotional nature rendered the testimony unduly prejudicial. In order to render otherwise admissible evidence inadmissible, the prejudice must be unfair in the sense that it "unduly arouse[s] the jury's emotions of prejudice, hostility or sympathy"; *State* v. *Wilson*, 180 Conn. 481, 490, 429 A.2d 931 (1980); or "tends to have some adverse effect upon [the party against whom the evidence is offered] beyond tending to prove the fact or issue that justified its admission into evidence." (Internal quotation marks omitted.) *State* v. *Graham*, 200 Conn. 9, 12, 509 A.2d 493 (1986).

Before the trial court, the department took issue with Kolb's testimony on the ground that it would make the jury upset over "how terrible it was" that the state police had searched the defendant's business. Immediately thereafter, however, the department conceded that "the fact that [the defendant's business] got searched has been entered into evidence. The fact that she was arrested was [also] mentioned in the opening statement." Therefore, although Kolb's testimony most likely had an adverse effect on the department's case, it simply provided additional context in which the search, seizure, and arrest—events of which the jury was already aware—took place. Furthermore, Kolb began crying before she answered any questions about the search, and the trial court excused the jury once it was alerted that Kolb had begun to cry. Thus, although Kolb was emotional, the jury was exposed to that emotion only momentarily. Moreover, in its brief to this court, the department fails to explain exactly how the single instance of Kolb crying, which promptly was addressed by the trial court, unduly inflamed the jury. We, therefore, conclude that the trial court did not abuse its discretion in declining to find that Kolb's testimony was inadmissible because it was unduly prejudicial.

2

As a final matter, we disagree with the department's contention that Kolb's testimony regarding the resolution of the criminal charges against her was misleading and, therefore, unduly prejudicial. Specifically, on direct examination, Kolb testified that she had reached a compromise with the state that resulted in the dis-

missal of the charges against her. Kolb further testified, on cross-examination by the department, that she had undertaken accelerated rehabilitation. This testimony was legally and factually accurate. "[A]cceptance of accelerated rehabilitation is not evidence of guilt . . . it cannot be used as evidence of guilt, and . . . indeed, acceptance of accelerated rehabilitation has *no probative value on the issue of guilt or innocence of the charged offense*." (Emphasis added.) *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 828, 6 A.3d 1142 (2010). As the trial court correctly noted, upon the successful completion of accelerated rehabilitation, the criminal charges are dismissed. See General Statutes (Rev. to 2007) § 54-56e.[32] Thus, we conclude that Kolb's testimony to that effect could not have misled the jury about how her criminal charges were resolved and was, therefore, properly admissible.

It is also clear from the record that the trial court did not preclude the state from questioning Kolb further with respect to the accelerated rehabilitation issue. Indeed, the trial court stated, "I think we're wasting time, but if you [two] don't think that, then *we'll listen to this*." (Emphasis added.) Thus, the department's claim that it was plain error for the trial court to refuse to grant its motion to dismiss on the ground that counsel believed at trial, albeit mistakenly, that the court had precluded further questioning on that issue lacks merit.

Accordingly, we conclude that the trial court did not abuse its discretion in admitting Kolb's testimony regarding the state police searches and seizures, her arrest, and the ultimate disposition of those charges.

B

The department next claims that the trial court improperly admitted testimony from the defendant's expert witness, Patricia Poli, a certified public accountant and certified valuation analyst, as to the valuation of the defendant's business. Specifically, the department asserts that the trial court allowed Poli to testify to an irrelevant and artificially inflated value of the defendant's business, which, because of the date that she selected for the valuation, bore no relationship to the issues in the present case. In response, the defendant argues that the trial court properly admitted the valuation testimony because it correctly determined that whether the defendant had met its burden of proving that the department's conduct caused "something in the range of or equivalent to a total loss of the business" was "a question for the jury." The defendant also asserts that the department's concerns regarding Poli's testimony do not relate to relevance or foundation but, rather, would have been more appropriately addressed by filing a motion challenging Poli's valuation methodology under *State* v. *Porter*, 241 Conn. 57, 68–69, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998),[33] questioning Poli's methodol-

ogy and opinions on cross-examination, or proffering its own expert to provide an alternative valuation. We agree with the defendant.

The following additional facts and procedural history are relevant to this claim. The defendant called Poli to testify regarding her expert opinion of the value of its business. During her testimony on direct examination, Poli stated that she chose December 31, 2002, as the appropriate date to assess the value of the defendant's business because, based on the company records that she reviewed, after that date the defendant was "unable to continue in business as a going concern . . . ." The department objected to this testimony, stating: "At this point we haven't established the causal link as of [December 31, 2002] to any of the issues in this case." The trial court overruled the department's objection on the ground that it was not a proper evidentiary objection, but indicated that the department could "take that up" at a later point. Poli then testified that, in her opinion, the defendant's business was worth $18.3 million as of December 31, 2002.

We note that, with respect to expert testimony, "the trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 342, 907 A.2d 1204 (2006).

In the present case, as the defendant correctly points out, the department's "chief complaint seems to be about the date on which . . . Poli chose to value [the defendant's business]." Whether the date that Poli determined, in her expert opinion,[34] was the appropriate date as of which to perform her valuation, however, does not implicate the *admissibility* of her testimony, but rather its *weight*. Indeed, the defendant claimed that the department's activities caused a total loss of business, and sought damages for that loss. Given that "[r]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue"; (internal quotation marks omitted) *State* v. *Wilson*, supra, 308 Conn. 429; the testimony of an expert to provide the jury with the value of the business shortly prior to its becoming unable to continue as a going concern was certainly relevant to the determination of the amount of damages that the defendant suffered if the jury determined that the department's conduct caused those losses.

The department, nevertheless, relies on *Larsen*

Chelsey Realty Co. v. *Larsen*, 232 Conn. 480, 519–22, 656 A.2d 1009 (1995), to support its argument that there was no evidence to support Poli's determination that December 31, 2002, was the correct date on which to value the business and, therefore, her testimony should have been excluded as irrelevant. That reliance is misplaced. In *Larsen Chelsey Realty Co.*, the trial court excluded certain documents that a real estate brokerage had offered as evidence of the value of the business immediately prior to March, 1989, when its president improperly told the brokerage's customers and other business contacts that the brokerage would no longer be doing business. Id., 485, 519. It was undisputed in *Larsen Chelsey Realty Co.*, however, that March, 1989, was the date upon which the president's actions caused the brokerage's harm. Id., 485. It was further undisputed that the documents that the brokerage sought to admit were prepared many months before March, 1989, and included exclusive real estate listings that had expired—and, therefore, were no longer potential sources of revenue to the brokerage—prior to that date. Id., 521. Finally, the trial court concluded that one of the documents, prepared in May or June, 1988, based on handwritten revenue projections provided by the president of the brokerage, " 'would be couched in very optimistic phrases' " because it set forth an income projection for the second half of 1988 and all of 1989 for the purpose of obtaining a line of credit for the brokerage. Id., 519–21. For all of these reasons, this court concluded that "it was well within the broad discretion of the trial court to conclude that [the documents] were not admissible for the purpose of determining the value of the [brokerage] in March, 1989." Id., 521.

Larsen Chelsey Realty Co. is inapposite. The events in question regarding the defendant's counterclaims in the present case cannot necessarily be tied to a specific date. It is clear, however, that the alleged pattern of wrongful conduct by the department began during the summer of 2002, when the defendant alleged that it was de facto disqualified from state bidding. The defendant also presented evidence that the department had refused to accept bids from or award contracts to the defendant during the time frame from the last quarter of 2002 through the first half of 2003. Poli explained that her reason for selecting December 31, 2002, as the date of her valuation was that, after that point, the defendant's business began to decline dramatically, and it was her opinion that it was not able to continue "as a going concern" from that point onward. Given that there was no one single action by the department that the defendant alleged had caused its losses, unlike in *Larsen Chelsey Realty Co.* v. *Larsen*, supra, 232 Conn. 519–21, the question of when the defendant sustained its losses, as well as the extent of those losses, were questions for the jury to determine. In this regard, that

the department disputed the date on which Poli valued the defendant's business simply does not create a relevance issue like that presented in *Larsen Chelsey Realty Co.* wherein the evidence of value was created almost one year before the undisputed date of loss. Accordingly, we conclude that the trial court did not abuse its discretion in overruling the department's relevance objection to Poli's valuation testimony.[35]

C

Finally, the department argues that the trial court improperly excluded a critical e-mail in which Kolb had acknowledged that the computer contract required two network interface cards. Specifically, the department contends that the e-mail was admissible under the hearsay exception for statements of a party opponent and that it made a prima facie showing of the e-mail's authenticity. The department also argues that the trial court abused its discretion in sustaining the defendant's objection to the e-mail on a ground other than that offered by the defendant, namely, that additional testimony would be necessary to explain the e-mail's meaning to the jury and avoid juror confusion. The department contends that the substance of the e-mail would have been clear to the jury given the abundance of testimony that it had already heard regarding the relevant technology. Finally, the department argues that the trial court further abused its discretion in refusing, on foundational grounds, to permit the department to use the e-mail as a prior inconsistent statement to impeach Kolb during her testimony. Specifically, the department argues that a foundation is not required before evidence of a prior inconsistent statement may be admitted and that, even if it is, Kolb's concession that the e-mail appeared to be from her e-mail address was more than sufficient foundation given that there was no evidence that her e-mail account had been compromised.

In response, the defendant argues that authentication is a necessary preliminary to the introduction of most writings into evidence, and that *State* v. *Eleck*, 130 Conn. App. 632, 637–39, 23 A.3d 818, cert. granted, 302 Conn. 945, 30 A.3d 2 (2011), establishes that, for e-mails, authentication requires more than a showing that the e-mail came from a particular e-mail account. Id. Given that Kolb testified that she did not recognize the e-mail that the department sought to introduce, the business logo on the printout of the e-mail was not her logo, the e-mail appeared to be generated in a program that the defendant did not use and, most significantly, that the e-mail that the department claimed was *from* Kolb was actually addressed *to* her, the defendant argues that the trial court properly excluded the e-mail because there was significant doubt that it was, in fact, what the department purported it to be, namely, an e-mail from Kolb in which she acknowledged to the department

that the computers to be provided under the computer contract would have two network interface cards. We conclude that, even if, arguendo, the department had presented sufficient evidence to authenticate the e-mail in question properly, the trial court did not abuse its discretion in refusing to admit the e-mail either as a statement of a party opponent or as impeachment evidence.[36]

The record reveals the following additional relevant facts and procedural history. During the department's cross-examination of Kolb, it attempted to introduce an e-mail that it stated was from Kolb and addressed to an employee of the state.[37] The department's attorney showed the document to Kolb, and asked what the document was. Kolb responded: "I don't know. I've never seen this document." She also stated that the e-mail address written at the top of the document was one of her personal e-mail accounts, but that that account was "[n]ot [used] for business" and that the document "ha[d] a logo next to [the e-mail address] that [she had] never seen." Kolb further testified that the e-mail was not part of the defendant's bid to the department regarding the computer contract and that she did not "recall this document ever."

On the next trial day, the department presented a certified copy of this e-mail from its bid file for the defendant's bid on the computer contract. The department's attorney showed the certified copy of the document to Kolb and asked whether it was "an e-mail from you to Pat Tower [the purchasing service operator for the department]," to which Kolb responded: "That's what this says, yes." The department then attempted to offer the e-mail as a certified state record and as an admission of a party opponent. The defendant objected because Kolb had previously testified that she did not recognize the document and could not "identify it or who it was from." At that time, Kolb stated: "Right. I don't know what this one is." The defendant also objected on the basis that it was a hearsay document in that someone had addressed the greeting *to* Kolb, and it did not identify who had sent the e-mail or "[whose] words those are." The defendant then clarified that its objection was hearsay "[a]nd relevance, because we don't know who it is. [Kolb] said she didn't recognize the logo that's on top of it. We don't know how this was put together, when it was put together, who put it together. . . . Kolb has no knowledge of it and no recognition of it, so it's a hearsay document." The department responded that the defendant had submitted exhibits into evidence that had the same logo on them and that the department intended to offer certified copies of other documents from its file related to the defendant's bid on the computer contract, that displayed the same logo and which showed that Kolb had previously copied content from other e-mails.[38] The trial court sustained the defendant's objection, concluding that "in

light of the objection and the court's reading of [the] document, it's still entirely unclear the context of [the] document and clarifying testimony . . . would be necessary in order for it to have any probative meaning for the jury to avoid total confusion. There's going to have to be some clarifying testimony to support [the document] in order for it to have any meaning whatsoever for the jury . . . ."

Thereafter, the department attempted to admit certified copies of several other documents that the defendant had submitted to the department for its bid on the computer contract. In particular, the department sought to elicit testimony from Kolb that some of those documents depicted the same logo shown on the e-mail at issue. In response, Kolb conceded that several of the documents had the same or similar logos depicted on them but reiterated, multiple times, that the logo did not belong to the defendant. Kolb also surmised that the logo was possibly generated by the software that the department used to print the documents.

The department then asked Kolb whether it was her understanding that Dell had informed the department that the computers supplied under the computer contract would have stand alone network interface cards. When Kolb testified that that was not her understanding, the department again attempted to introduce the e-mail, in which, according to the state, Kolb had acknowledged that the computers would have two network interface cards, as impeachment evidence. The defendant objected to the admission of the e-mail, and the trial court sustained the objection "on the basis of the record as to its foundation in this context." The department then moved onto another line of questioning.

1

We begin with the department's claim that the trial court improperly sustained the defendant's objection on a ground other than hearsay or relevance. In declining to admit the e-mail as proffered, the trial court stated that, "in light of the objection and the court's reading of [the] document, it's still entirely unclear *the context* of [the] document and clarifying testimony . . . would be necessary in order for it to have any probative meaning for the jury to avoid total confusion. There's going to have to be some clarifying testimony to support [the document] in order for it to have any meaning whatsoever for the jury . . . ." (Emphasis added.) According to the department, this statement by the trial court indicates that it improperly sustained the defendant's objection on the ground that additional testimony explaining the relevant technology would be necessary to avoid juror confusion. We, however, read the trial court's statement to reflect a concern regarding the relevance of the e-mail. It is clear to us that the trial court was concerned that Kolb's testimony was not

sufficient to provide *the context* of the e-mail and, without further testimony about the origin of the e-mail's contents and how it came to be sent to a department employee from Kolb's personal e-mail address, it would have no meaning for the jury, and would serve only to confuse the jurors. Therefore, we conclude that the trial court sustained the defendant's objection on the basis of relevance and, thus, did not abuse its discretion by sustaining the defendant's objection on a ground other than the grounds stated.

2

We further conclude that the trial court did not abuse its discretion in determining that the department's proffer of the e-mail did not sufficiently establish the e-mail's relevance to render the e-mail admissible under the hearsay exception for statements by a party opponent. See Conn. Code Evid. § 8-3 (1). "The trial court has wide discretion to determine the relevancy of evidence . . . . Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." *State* v. *Barnes*, 232 Conn. 740, 746–47, 657 A.2d 611 (1995). "The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant." (Internal quotation marks omitted.) Id., 747.

In the present case, the trial court determined that the department had not established a proper foundation for the e-mail to establish the relevance of that document as a statement by a party opponent. We cannot conclude that the trial court abused its discretion in determining that more testimony would have been required to provide the context of the e-mail, particularly to explain how content addressed *to* Kolb came to be sent *from* her e-mail address to the department. Indeed, it is completely unclear who initially created the content of the e-mail, from where the e-mail was initially sent, and why Kolb would send an e-mail to the department from her personal e-mail address without changing the greeting to address Tower, to whom the e-mail was sent, or adding her electronic signature. Furthermore, the content of the e-mail indicates that its author likely intended it to be a response to a previous inquiry but, unlike Kolb's responses to inquiries in other e-mails that were admitted into evidence, the e-mail at issue contains no context that would explain why it was sent. Furthermore, the trial court refused to admit, on the basis of the defendant's hearsay objection, the other e-mails that the department had proffered in an attempt to show that other documents from the defendant displayed a similar logo, and to demonstrate that Kolb had copied content from previous correspondence when sending e-mails to the department. See footnote 38 of this opinion.

Given the foundation that the department had established, and the concerns voiced by the defendant in raising its objections to the e-mail's admission as a statement by a party opponent, we conclude that the trial court did not abuse its discretion in determining that the foundation was insufficient to establish any relevance for the jury.

3

Next, we address the department's contention that the trial court improperly refused to admit the e-mail as impeachment evidence against Kolb. Relying on *State* v. *Saia*, 172 Conn. 37, 46, 372 A.2d 144 (1976), for the proposition that "[a]lthough laying a foundation is favored, it is not required and where the court requires a foundation it should be minimal," the department claims that the trial court improperly refused to admit the e-mail to impeach Kolb on foundational grounds. The department's reliance on *Saia*, however, is misplaced. In that case, we stated that "[t]he impeachment of a witness by extrinsic evidence [of a prior inconsistent statement] is somewhat *limited*. Not only must the inconsistent statements be relevant and of such a kind as would affect the credibility of the witness . . . but *generally a foundation should be laid at the time of cross-examination*." (Citations omitted; emphasis added.) Id., 45–46. Furthermore, although we acknowledged that there is "no inflexible rule regarding" the necessity of laying a foundation before either questioning the witness with respect to a prior inconsistent statement or "introducing extrinsic evidence tending to impeach [her]," we also stated that "[f]rom early times, it has consistently been held that it rests within the judicial discretion of the trial court whether to admit the impeaching statements where no foundation has been laid. . . . The trial court is vested with *liberal discretion* as to how the inquiry should be conducted in any given case." (Citation omitted; emphasis added.) Id., 46. Simply because the trial court has the discretion to admit impeaching statements where no, or little, foundation has been laid, however, does not *require* it to do so.

Under the circumstances of the present case as previously discussed, the court's refusal to admit the e-mail as evidence of a prior inconsistent statement on the basis of the foundation laid by the department was well within its discretion.

D

Finally, we address the department's claim that its claimed evidentiary issues, "[v]iewed separately or together . . . call into question the reliability of the jury's verdict on both liability and damages" such that the trial court improperly denied its motion to set aside the verdict. Although " '[t]he trial court possesses inherent power to set aside a jury verdict which, in the court's

opinion, is against the law or the evidence' "; *Allison* v. *Manetta*, supra, 284 Conn. 405; because we conclude that none of the evidentiary rulings with which the department takes issue were an abuse of the court's discretion, we similarly conclude that refusing to set aside the verdict on the basis of those evidentiary rulings was not an abuse of its discretion.

On the department's appeal, the judgment is reversed with respect to the defendant's counterclaims, the case is remanded with direction to dismiss those claims, and the judgment is affirmed in all other respects. The defendant's cross appeals are dismissed as moot.

In this opinion the other justices concurred.

[1] The caption of this case has been changed to reflect this court's policy of identifying state department heads in their official capacities rather than by the particular individual's name. For the sake of simplicity, we refer to the plaintiffs collectively as the department. We also note that, after this case was filed, the Department of Information Technology was merged into the Department of Administrative Services. See Public Acts 2011, No. 11-51, § 78.

[2] The present case consists of three appeals by the department and two cross appeals by the defendant, all of which were originally filed in the Appellate Court. In its first appeal, the department challenged the trial court's denial of its motion to set aside the jury's verdict in favor of the defendant on the state's claims; in the second appeal, the department challenged the trial court's denial of its motion to dismiss the defendant's procedural due process counterclaim and its motion to set aside the verdict; and, in the third appeal, the department challenged the trial court's order of a new trial on the issue of damages regarding the procedural due process counterclaim. The defendant's two cross appeals challenged the trial court's order of remittitur and the trial court's order setting aside the verdict and ordering a new trial for damages on its procedural due process counterclaim. Upon the motion of the defendant, we transferred the appeals and cross appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[3] At the time it initiated litigation against Computers Plus Center, Inc., the department also brought claims alleging unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and fraud against Gina Kolb, the president of Computers Plus Center, Inc., in her individual capacity. The department subsequently withdrew its CUTPA claim against Kolb and the jury found for Kolb on the department's claims of fraud against her. Kolb also filed a counterclaim alleging that the department had violated her individual right to procedural due process. The jury found for the department regarding this counterclaim. Thus, the only issues remaining on appeal relate to the claims against, and counterclaims asserted by, Computers Plus Center, Inc. We, therefore, refer to Computers Plus Center, Inc., as the defendant throughout this opinion.

[4] General Statutes § 4a-59 (a) (1) defines " 'lowest responsible qualified bidder' " as "the bidder whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary to faithful performance of the work based on objective criteria considering past performance and financial responsibility . . . ."

We note that, although § 4a-59 was amended in 2009; see Public Acts 2009, No. 09-184, § 3; and in 2012; see Public Acts 2012, No. 12-205, § 6; those changes are not relevant to the present appeal. In the interest of simplicity, we refer to the current revision of the statute.

[5] The computer contract had designated the defendant as one of several vendors approved to supply computers on an as needed basis to state agencies. The department terminated the computer contract with all of the other approved vendors at the same time that it terminated the contract with the defendant. At trial, Gregg P. Regan, who was then serving as Chief Information Officer, testified, however, that he had admitted, in a deposition conducted in April, 2003, that the reason that the department had terminated the computer contract with the defendant was because it believed that the defendant was not a responsible bidder.

[6] Shortly thereafter, Kolb also was arrested and charged with larceny in

the first degree in violation of General Statutes § 53a-122. Kolb's criminal case was resolved in February, 2007, when she applied for and completed accelerated rehabilitation pursuant to General Statutes (Rev. to 2007) § 54-56e.

[7] In its complaint, the department also asserted claims against Kolb. See footnote 3 of this opinion.

[8] The department also asserted claims under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., in connection with both the computer contract and the server contracts. The department subsequently withdrew all counts in which it had alleged violations of CUTPA against the defendant. Accordingly, the only causes of action relevant to the present appeal relate to the department's claims that the defendant breached contracts with the department and defrauded the state.

[9] The defendant also sought an injunction ordering the department to: (1) restore the defendant's status as a responsible bidder; (2) issue a press release withdrawing the allegedly false statements made by the department about the defendant's performance; and (3) notify all state and municipal agencies that it had restored the defendant to responsible bidder status and issued the press release withdrawing the allegedly false statements about the defendant.

[10] In support of this conclusion, Judge Shortall cited *State* v. *Hartford Accident & Indemnity Co.*, 136 Conn. 157, 70 A.2d 109 (1949), *Reilly* v. *State*, 119 Conn. 217, 175 A. 582 (1934), overruled on other grounds by *Cannavo Enterprises, Inc.* v. *Burns*, 194 Conn. 43, 478 A.2d 601 (1984), and *University of Connecticut* v. *Wolf*, Superior Court, judicial district of New Haven, Docket No. CV-03-0482479-S (October 26, 2004) (38 Conn. L. Rptr. 148).

[11] In addition to monetary damages, a jury trial, and an injunction; see footnote 9 of this opinion and accompanying text; in its second amended counterclaim, the defendant also added punitive damages and attorney's fees and costs for its unfair trade practices claim to its prayer for relief.

[12] Specifically, with respect to the defendant's procedural due process counterclaim, the department argued that the defendant lacked a protected liberty interest in governmental contracting.

[13] Specifically, with respect to the defendant's procedural due process counterclaim, Judge Shortall determined that the defendant had "a protected liberty interest in not being effectively disqualified from even being considered for a contract as a result of stigmatizing statements made by a government agency, without being afforded some process for challenging those statements."

[14] The defendant filed a third amended counterclaim that was substantially similar to the fourth amended counterclaim, except that, in the third amended counterclaim, the defendant had failed to remove its request for punitive damages and attorney's fees and costs from its prayer for relief. Without a valid CUTPA claim, however, the defendant was not entitled to seek those damages. Therefore, the defendant filed the fourth amended counterclaim, removing those requests for damages from the prayer for relief. The fourth amended counterclaim is, therefore, the operative counterclaim in the present case.

[15] Hereinafter, all references to the trial court are to Judge Stevens unless otherwise indicated.

[16] The jury also wrote the words "plus punitive damages" below the damages award for the violation of procedural due process claim on the jury interrogatory form.

[17] The department also claims that: (1) the trial court improperly created an official capacity due process claim; (2) damages are not available for violations of state procedural due process claims; (3) the defendant failed to prove a procedural due process violation as a matter of law; and (4) the jury charge regarding the defendant's due process counterclaim was legally incorrect and prejudiced the state. Because we conclude that the trial court improperly concluded that the department had waived the state's sovereign immunity regarding the defendant's counterclaims by bringing this action, we need not reach the remainder of the department's claims on appeal.

[18] The defendant also cross appealed, arguing that the trial court improperly ordered a remittitur reducing the jury's verdict regarding the defendant's procedural due process claim from $18.3 million in damages to $1.83 million, and improperly concluded that the doctrine of absolute immunity barred the defendant's trade libel counterclaim. Because we conclude that all of the defendant's counterclaims were barred by the doctrine of sovereign immunity; see part I of this opinion; we need not consider these claims, and dismiss the defendant's cross appeals as moot.

[19] The department also argues that, even if this court has the authority to create or expand an exception to sovereign immunity, neither *State* v. *Kilburn*, supra, 81 Conn. 12, nor any other judicially created exception to sovereign immunity can permit counterclaims against the state to be tried by a jury because, under *Skinner* v. *Angliker*, 211 Conn. 370, 559 A.2d 701 (1989), there is no constitutional right to a jury trial for claims against the state, and the legislature must unequivocally express consent for claims against the state to be tried by a jury. See, e.g., id., 380–81. Because we conclude that sovereign immunity deprived the trial court of subject matter jurisdiction over the defendant's counterclaims in their entirety, we need not address the issue of whether the defendant was entitled to a jury trial on those counterclaims.

[20] Article eleventh, § 4, of the Connecticut constitution provides: "Claims against the state shall be resolved in such manner as may be provided by law."

[21] None of the defendant's counterclaims in the present case sounded in recoupment and, therefore, whether the court should have limited the defendant's counterclaims in that respect is not at issue in this case. We note, however, that an exception to sovereign immunity for counterclaims properly sounding in recoupment would appear to be consistent with the equitable principles on which this court relied in *State* v. *Kilburn*, supra, 81 Conn. 12, and our recognition of an exception to sovereign immunity for affirmative claims seeking injunctive or declaratory relief when a state official acts in excess of his authority or pursuant to an unconstitutional statute. See *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003). Furthermore, an exception for recoupment counterclaims also appears to be consistent with the claims commissioner statutes outlining the procedure though which a claimant may assert a claim for damages against the state; see part I B of this opinion; because recoupment is both equitable in nature and used only as a defensive maneuver, rather than as an affirmative claim. See *Fadner* v. *Commissioner of Revenue Services*, 281 Conn. 719, 731 and n.14, 917 A.2d 540 (2007) (Describing recoupment as "a tool of equity" and stating that "[t]he defense of recoupment has two characteristics: [1] the defense arises out of the transaction constituting the plaintiff's cause of action; and [2] it is purely defensive, used to diminish or defeat the plaintiff's cause, but not as the basis for an affirmative recovery. . . . It rests on the principle that both sides of a transaction should be settled at one time in order to prevent circuity of actions." [Internal quotation marks omitted.]); see also *Boothe* v. *Armstrong*, 76 Conn. 530, 531, 57 A. 173 (1904) (recognizing defense of recoupment). The recognition of the recoupment counterclaim exception to sovereign immunity would also seem to mitigate the potentially harsh consequences of an otherwise rigid application of that doctrine without jeopardizing the dignity or financial stability of the state.

Furthermore, our research has revealed that the majority of courts to have considered this issue have recognized an exception to sovereign immunity for recoupment counterclaims. For example, with respect to the national sovereign, it is well settled that the United States government, when suing as a plaintiff in the federal courts, is subject to recoupment without regard to any statutory waiver of sovereign immunity. See, e.g., *Bull* v. *United States*, 295 U.S. 247, 262, 55 S. Ct. 695, 79 L. Ed. 1421 (1935) ("No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to [C]ongress. If the right of the party is fixed by the existing law, there can be no necessity for an application to [C]ongress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of [defense], to a suit by the United States." [Internal quotation marks omitted.]).

Federal courts have similarly recognized that sovereign immunity does not preclude recoupment claims in defense of a sovereign's claim. See, e.g., *Texas* v. *Caremark, Inc.*, 584 F.3d 655, 659–60 (5th Cir. 2009); *In re Lazar*, 237 F.3d 967, 978 (9th Cir. 2001); *Federal Deposit Ins. Corp.* v. *Hulsey*, 22 F.3d 1472, 1486–87 (10th Cir. 1994); *United States* v. *Forma*, 42 F.3d 759, 764–65 (2d Cir. 1994); *In re Friendship Medical Center, Ltd.*, 710 F.2d 1297, 1300–1301 (7th Cir. 1983); *In re Monongahela Rye Liquors*, 141 F.2d 864, 869 (3d Cir. 1944); see also, e.g., *Regents of the University of New Mexico* v. *Knight*, 321 F.3d 1111, 1125–26 (Fed. Cir. 2003) (permitting all compulsory counterclaims, not just counterclaims in recoupment); *Arecibo Community Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001) (same); *State* v. *Madeline Marie Nursing Homes*, 694 F.2d 449, 456 (6th Cir. 1982) (same).

The majority of state courts to have considered this issue also have concluded that, by initiating litigation, a state waives sovereign immunity for counterclaims sounding in recoupment. See *State Office of Child Support Enforcement* v. *Mitchell*, 330 Ark. 338, 346, 954 S.W.2d 907 (1997) (permitting recoupment counterclaim); *State Board of Regents* v. *Holt*, 8 Kan. App. 2d 436, 436–37, 659 P.2d 836 (1983) (same); *Commonwealth* v. *Barker*, 126 Ky. 200, 210–11, 103 S.W. 303 (1907) (same); *State* v. *Hogg*, 311 Md. 446, 471, 535 A.2d 923 (1988) (same), overruled on other grounds by *Dawkins* v. *Baltimore Police Dept.*, 376 Md. 53, 64, 827 A.2d 115 (2003); *Missouri Highway & Transportation Commission* v. *Kansas City Cold Storage, Inc.*, 948 S.W.2d 679, 684 (Mo. App. 1997) (same); *State* v. *Grants*, 69 N.M. 145, 149, 364 P.2d 853 (1961) (same); *State* v. *Sparks*, 208 Okla. 150, 154, 253 P.2d 1070 (1953) (same); *Reata Construction Corp.* v. *Dallas*, 197 S.W.3d 371, 383 (Tex. 2006) (same); *State* v. *Ruthbell Coal Co.*, 133 W. Va. 319, 329, 56 S.E.2d 549 (1949) (same); but see *Sarradett* v. *University of South Alabama Medical Center*, 484 So. 2d 426, 427 (Ala. 1986) (prohibiting all counterclaims against state); *People* v. *Cook Development Co.*, 274 Ill. App. 3d 175, 182, 653 N.E.2d 843 (1995) (same); *Scates* v. *Board of Commissioners*, 196 Tenn. 274, 280–82, 265 S.W.2d 563 (1954) (same, but acknowledging that counterclaims in recoupment would be different than counterclaims to recover from sovereign for alleged tort); see also *State* v. *Shinkle*, 231 Or. 528, 539–40, 373 P.2d 674 (1962) (permitting all counterclaims against state); *Dept. of General Services* v. *Frank Briscoe Co.*, 502 Pa. 449, 456–57, 466 A.2d 1336 (1983) (same).

[22] We also note that, given that the dispute in *Kilburn* was simply over which entity, the state or the city, would receive priority in the distribution of foreclosure proceeds, the city's counterclaim did not seek the payment of any state funds as damages and, therefore, was not an attempt to levy against the state treasury. Thus, unlike many of the cases in which we have determined that doctrine of sovereign immunity applied because of the public's interest in preserving the state fisc; see, e.g., *Pamela B.* v. *Ment*, 244 Conn. 296, 328, 709 A.2d 1089 (1998) ("[s]overeign immunity rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property" [internal quotation marks omitted]); the dispute in *Kilburn* did not implicate that issue.

[23] We also note that we recently have limited our statement in *Lacasse* that, once involved in litigation, the state is to be treated like any other litigant. See *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 456–57, 54 A.3d 1005 (2012). In *Lombardo Bros. Mason Contractors, Inc.*, we pointed out that, although we stated in *Lacasse* that the state enjoys the same status as any other litigant once involved in litigation, that statement followed a discussion regarding the fact that the state consistently has been treated in a manner identical to any other litigant with respect to *procedural matters* and that by bringing an action, the state subjects itself to the *procedure* established for its final and complete disposition. Id., 456. Furthermore, we emphasized that *Lacasse* did not apply to statutes or rules of court that would deprive the state of immunity beyond the scope of the explicit legislative waiver, which gave the court subject matter jurisdiction over the action in the first instance. Id., 457. Therefore, it is clear that the statement that "the state enjoys the same status as any other litigant"; *Lacasse* v. *Burns*, supra, 214 Conn. 469; refers only to the *procedure* that the state must follow throughout the duration of the case, within the substantive scope of the waiver of sovereign immunity for that case, once it is involved in litigation. It does not allow for an interpretation that would expand the waiver of sovereign immunity applicable to a given case.

[24] The defendant also cites two Superior Court cases involving the denial of motions to dismiss counterclaims for monetary damages against the state. Although, at first glance, these cases appear to support the defendant's claim that the counterclaims in the present case were proper, upon closer review, neither of these cases provides support for this claim. First, in *University of Connecticut* v. *Wolf*, supra, 38 Conn. L. Rptr. 150, the trial court relied on *Reilly* v. *State*, supra, 119 Conn. 219, and *Isaacs* v. *Ottaviano*, supra, 65 Conn. App. 423, for its conclusion that, when the state "seeks to affirmatively establish the defendant's liability, sovereign immunity is not a bar to any proper claim arising out of the original action" because it would be unfair to allow the state to use sovereign immunity as a shield under those circumstances. As we discussed, previously, however, neither *Reilly* nor *Isaacs* actually support that proposition because those cases did not

decide the precise question of whether the state waives sovereign immunity for counterclaims—beyond equitable counterclaims, which this court allowed in *Kilburn*—when it initiates litigation.

Second, we acknowledge that the trial court in *State* v. *Lex Associates*, supra, 15 Conn. L. Rptr. 612, denied the state's motion to dismiss the defendant's counterclaim for monetary damages on the ground that sovereign immunity deprived the court of subject matter jurisdiction over the counterclaim. Citing *Kilburn*, *Lacasse*, and *Reilly*, the trial court concluded that, by bringing an action for specific performance and damages against Lex Associates for its refusal to perform under the purchase option contained in the lease between the parties, the state "consented to the bringing of the [damages] counterclaim which [arose] from the subject matter of the complaint." Id. In reviewing the *Lex Associates* appeal after the trial court had granted summary judgment in favor of the state, however, it becomes clear that the defendant did not actually litigate its damages counterclaim in that case. See *State* v. *Lex Associates*, 248 Conn. 612, 617, 730 A.2d 38 (1999). Indeed, in that appeal this court noted that "the parties agreed to resolve their dispute by the filing of cross motions for summary judgment *based on a stipulation of facts, an amended complaint and an answer filed that same day*." (Emphasis added.) Id., 616. Because the state did not appeal from the denial of its motion to dismiss, and it appears that the defendant did not pursue its counterclaim thereafter, the trial court's decision in *Lex Associates* does not conclusively establish the principle that the state waives sovereign immunity for all counterclaims when it brings an action.

[25] General Statutes § 4-142 provides: "There shall be a Claims Commissioner who shall hear and determine all claims against the state except: (1) Claims for the periodic payment of disability, pension, retirement or other employment benefits; (2) claims upon which suit otherwise is authorized by law including suits to recover similar relief arising from the same set of facts; (3) claims for which an administrative hearing procedure otherwise is established by law; (4) requests by political subdivisions of the state for the payment of grants in lieu of taxes; and (5) claims for the refund of taxes."

[26] General Statutes § 4-160 provides in relevant part: "(a) When the [c]laims [c]ommissioner deems it just and equitable, the [c]laims [c]ommissioner may authorize suit against the state on any claim which, in the opinion of the [c]laims [c]ommissioner, presents an issue of law or fact under which the state, were it a private person, could be liable. . . .

"(c) . . . The state waives its immunity from liability and from suit in each such action . . . . The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances. . . ."

We note that the legislature made certain changes to § 4-160 in 2005 that are not relevant to the present appeal. See Public Acts 2005, No. 05-170, § 4. In the interest of simplicity, we refer to the current revision of the statute.

[27] General Statutes § 4-141 defines a claim against the state as "a petition for the payment or refund of money by the state or for permission to sue the state; 'just claim' means a claim which in equity and justice the state should pay, provided the state has caused damage or injury or has received a benefit . . . ."

We note that the legislature made certain changes to § 4-141 that are not relevant to the present appeal. See, e.g., Public Acts 2011, No. 11-152, § 7. In the interest of simplicity, we refer to the current revision of the statute.

[28] The department asserts that the trial court's individual evidentiary rulings during trial were improper and that the trial court improperly denied its motion to set aside the verdict based on the cumulative impact of those erroneous rulings.

[29] We acknowledge that, at trial, the defendant proffered Kolb's testimony and the expert's business valuation as relevant only to its counterclaims. Although we concluded in part I of this opinion that the trial court improperly allowed the defendant to maintain its counterclaims, we nevertheless address all of the department's evidentiary claims, including the rulings regarding Kolb's testimony and the expert's business valuation, because the department claims on appeal that, collectively, the evidentiary rulings likely impacted the jury's adverse verdict regarding its affirmative claims as well.

[30] "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain

error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009).

[31] The department contends, however, that the searches and seizures performed by the state police were carried out pursuant to valid warrants, which were issued upon a judicial determination of probable cause. The department argues that the independent judicial determination of probable cause broke any causal link between the department's allegedly improper conduct and the subsequent search and seizure and Kolb's arrest, rendering everything that occurred after the department's referral of its concerns to the state police for investigation irrelevant. That the state police obtained warrants, upon a showing of probable cause, however, does not undermine the defendant's arguments that the state police initiated their investigation at the department's behest or that the warrants were issued on the basis of affidavits that contained false statements that the department had provided to the state police. Furthermore, as the trial court aptly noted, causation is generally a factual determination properly left to the province of the jury. See, e.g., *Sapko* v. *State*, 305 Conn. 360, 373, 44 A.3d 827 (2012). Thus, whether the judicial determination of probable cause for the warrants severed the causal link between the department's actions and the subsequent searches, seizures, and Kolb's arrest was a question properly left to the jury, particularly given the defendant's allegations that the warrants were based on false affidavits. Furthermore, regardless of whether the causal link between the department's conduct and the actions of the state police was severed by the finding of probable cause, Kolb's testimony was nevertheless relevant as to the extent to which the defendant was able to mitigate its damages after the state police had seized its business records and inventory and arrested its president. Indeed, the department itself conceded before the trial court that this testimony was relevant to the issue of mitigation.

[32] General Statutes (Rev. to 2007) § 54-56e establishes an accelerated pretrial rehabilitation program applicable to certain criminal cases. As this court has previously stated, that statute "suspends criminal prosecution for a stated period of time subject to such conditions as the court shall order." *State* v. *Spendolini*, 189 Conn. 92, 95, 454 A.2d 720 (1983). Specifically, General Statutes (Rev. to 2007) § 54-56e (f) provides in relevant part that, when a defendant applies for dismissal of the charges against him, "the court, on finding such satisfactory completion [of the accelerated rehabilitation program], *shall dismiss* such charges. . . ." (Emphasis added.)

[33] "[In *State* v. *Porter*, supra, 241 Conn. 68–69, this court held that] the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability. . . . In *Porter*, this court followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that scientific evidence should be subjected to a flexible test, with differing factors that are applied on a case-by-case basis, to determine the reliability of the scientific evidence. . . . [Thus] scientific evidence, and expert testimony based thereon, usually is to be evaluated under a threshold admissibility standard assessing the reliability of the methodology underlying the evidence and whether the evidence at issue is, in fact, derived from and based upon that methodology . . . ." (Citations omitted; internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 343, 907 A.2d 1204 (2006).

[34] We note that the department does not challenge Poli's qualifications as an expert with respect to performing business valuations.

[35] The department also emphasizes that the jury's damages verdict "was based entirely on an expert valuation that was irrelevant to the [department's] alleged wrongdoing," and argues that it was an abuse of discretion for the court to have admitted Poli's testimony because, as a result, "the jury seized [upon her] $18.3 million number as the basis for its award even though it was inconsistent with [the] evidence and the jury's own finding that the state properly terminated the [computer] contract, which [the defendant's] own expert testified was a substantial portion of [the defendant's] value." These concerns, however, also do not implicate the admissibility of the expert's testimony. Although the trial court determined that the jury's finding that the department's conduct "caused a total loss of the market value of [the defendant's] business manifest[ed] a shocking injustice indicating that the jury's award of damages was influenced by partiality or mistake" and that "the award [was] excessive, not supported by the evidence or the law, and must be remitted or set aside," an apparent mistake made by the jury

regarding the weight of an expert's testimony, after all of the evidence in the case had been heard, does not affect the admissibility of the expert's testimony in the first instance. The trial court's recognition of the jury's incorrect or inflamed view of the evidence as a whole, in regard to its determination of damages, merely indicates that, when it performed its damages calculation, the jury improperly failed to account for the other evidence that it obviously had credited, most significantly that the department properly terminated the computer contract, which accounted for a significant portion of the defendant's business prior to its termination in December, 2002.

[36] Although "[t]he requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be"; Conn. Code Evid. § 9-1 (a); "[o]nce a prima facie showing of authorship is made to the court, the evidence, *as long as it is otherwise admissible*, goes to the jury, which will ultimately determine its authenticity." (Emphasis added; internal quotation marks omitted.) *State* v. *Garcia*, 299 Conn. 39, 57–58, 7 A.3d 355 (2010). Given our conclusion that the trial court did not abuse its discretion in determining that the e-mail was not otherwise admissible, we need not address whether the state had properly authenticated it.

[37] The subject line of the e-mail at issue was "motherboard/wol information," and the content of the e-mail stated: "Gina,

"Dell will ship the same motherboard as in the standard system part number 2336v, which was reviewed by Mr. Gary Clauss at the state department of information technology on January 22, 2001. Only in the event of technology change will an equivalent or better motherboard be shipped.

"Also, Dimension will have a network card as opposed to an integrated network card and will be wake on lan ready."

Additionally, there was no signature at the end of the e-mail.

[38] After the department actually offered these documents as full exhibits, however, the trial court sustained the defendant's hearsay objection and declined to admit them into evidence.