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WYATT ENERGY, INC. *v.* MOTIVA ENTERPRISES, LLC, ET AL.
(SC 18811)

Norcott, Palmer, Zarella, Espinosa and Sheldon, Js.

Argued January 11—officially released June 4, 2013

Robert A. Izard, Jr., with whom was *Mark P. Kindall*, for the appellant (plaintiff).

Sheila A. Huddleston, with whom were *Paul D. Sanson* and, on the brief, *Paul S. Bailin*, for the appellees (defendants).

Opinion

ZARELLA, J. In this breach of contract action, the plaintiff, Wyatt Energy, Inc. (Wyatt), appeals from the judgment of the Appellate Court, which affirmed the judgment of the trial court in favor of the named defendant, Motiva Enterprises, LLC (Motiva).[1] Wyatt unilaterally terminated an agreement[2] with Motiva granting Motiva exclusive use of logistical and storage services provided by a gasoline distribution terminal (terminal) owned by Wyatt after Motiva purchased a competing terminal owned by Cargill, Inc. (Cargill).[3] Wyatt subsequently sold its terminal to Williams Energy,[4] a distributor of petroleum products, without requiring Williams Energy to assume Wyatt's obligations under the agreement with Motiva. In the litigation that followed, including a complaint by Wyatt against Motiva and a counterclaim by Motiva, each of which charged breach of contract by the other party, Wyatt asserted a special defense of illegality premised on purported antitrust violations arising out of Motiva's purchase of the Cargill terminal. On appeal, Wyatt claims that the Appellate Court improperly based its affirmance of the trial court's judgment on a flawed analysis that relied on legally incorrect definitions of the product and geographic markets served by the Wyatt terminal. Motiva responds that the Appellate Court's analysis of the product and geographic markets was correct and that it properly upheld the trial court's judgment. As an alternative ground for affirmance, Motiva argues that the issue raised by Wyatt regarding the proper definition of the product and geographic markets is moot because Wyatt did not appeal from the trial court's finding that excess capacity and other competitive factors would have prevented Motiva from imposing higher, noncompetitive prices for the services supplied by Wyatt, even if it is assumed that Wyatt's definitions of the product and geographic markets were correct.[5] Having considered the parties' arguments, we dismiss the appeal as moot.

In its memorandum of decision, the trial court made the following findings of fact. On May 1, 1997, Wyatt entered into a ten year terminalling agreement with the defendant Shell Oil Company (Shell). The agreement provided for the delivery of gasoline to the Wyatt terminal by ship or barge, transportation by pipe into the terminal's storage tanks and distribution from the storage tanks to trucks through truck loading racks or to other gasoline terminals through a pipeline. The agreement also provided that all current or future truck loading racks within the facility or any other facility purchased or leased by Wyatt or its New Haven affiliates would be dedicated for use by Shell or its customers and that Wyatt would consult with Shell before any changes were made that might reduce the facility's capability or level of service.

Shell, in turn, agreed that it would endeavor to establish, where there were no preexisting agreements, throughput rates at Shell's terminal in Bridgeport equal to the rates at the Wyatt terminal for similar services. The agreement defined "throughput" as "the total revenue generated from a [c]ustomer including any dock use fee, rack access fee, additive injection verification and record keeping fees (excluding additive product costs), transshipment fee or any other fee collected for throughput of Shell's or its [c]ustomers' products."

Shell also agreed to pay Wyatt a terminalling fee for the use of its facility and for the services to be provided by Wyatt. Shell guaranteed Wyatt a minimum payment of $37,000 per month through December 31, 1997, and $65,000 per month from January 1, 1998, through the end of the agreement.[6]

The agreement further provided that, if Wyatt received a bona fide written offer of purchase for its New Haven terminal and intended to accept the offer, it was obligated to provide Shell with written notice, along with a copy of the offer. Upon receipt of the offer, Shell was guaranteed the exclusive right, within forty-five days, to enter into a binding agreement with Wyatt for the purchase of the facility under the same conditions provided in the written offer. If Shell elected not to purchase the terminal, Wyatt would be free to sell the facility to the third party, provided that the third party would accept assignment of the agreement and honor all of its terms and obligations regarding the provision of terminal services to Shell and its customers, should they desire the same services, except to the extent that the agreement allowed specific rights of cancellation by Wyatt in the event of a sale of the terminal.

In addition, the agreement required compliance with all federal, state and local laws, regulations, and rules, and with certain stipulated procedures if a default should occur. A default was defined in the agreement as "[a] material breach of any of the terms and conditions of the [a]greement by either party . . . ." The agreement specifically provided that, "[u]pon default, the non-defaulting party shall, within thirty (30) days of knowledge thereof, notify, in writing, the defaulting party of the particulars of such default and the defaulting party shall have thirty (30) days thereafter to cure such default. Upon the defaulting party's failure to cure the default within the thirty (30) day grace period, any and all obligations, including payments of fees due hereunder, shall, at the option of the non-defaulting party, become immediately due and payable. In the event of default and [the] defaulting party's failure to cure during the cure period, the non-defaulting party shall also have the option to terminate the [a]greement upon written notice to the defaulting party."

In August, 1999, approximately one year after Shell assigned the agreement to Motiva, Wyatt entered into a confidentiality agreement with Williams Energy for the purpose of allowing Williams Energy to evaluate the possible acquisition of the Wyatt terminal. Williams Energy subsequently made two preliminary offers to Wyatt, one for between $35 and $40 million, and the other for between $30.75 and $32 million. Motiva, however, estimated the value of the terminal to be between $14 and $20 million and thus was unwilling to match Williams Energy's offers.

In November, 1999, Motiva learned that the Cargill terminal was available for purchase, which Motiva initially valued at $13.5 million. Motiva therefore prepared and sent a nonbinding letter of intent, dated December 17, 1999, to Cargill and purchased the Cargill terminal in May, 2000.

Meanwhile, after Wyatt and Williams Energy became aware in early 2000 that Motiva was interested in buying the Cargill terminal, Wyatt unsuccessfully sought to persuade Motiva to relinquish its rights under the agreement or to cancel the agreement outright. On June 8, 2000, Wyatt sent a letter to Motiva stating that Motiva's purchase of the Cargill terminal had undermined the purpose of the agreement, which, according to Wyatt, was to give Motiva complete control over the Wyatt terminal's gasoline distribution facilities in exchange for Motiva's promise to use the Wyatt terminal as its sole terminal in the New Haven area. Wyatt also noted in the letter that Motiva already had begun to move customers to the Cargill terminal in violation of the agreement.

On June 15, 2000, Williams Energy determined that the value of the Wyatt terminal without the agreement in place was $31.375 million and with the agreement in place was $15 million. Williams Energy then made its first binding offer to purchase the Wyatt terminal for $31.375 million. In the letter containing its offer, Williams Energy noted that it had been advised by Wyatt that Wyatt believed it had the contractual right to terminate the agreement due to Motiva's material breaches and that Wyatt had commenced an action to do so. The letter also required Wyatt to accept the offer by June 26, 2000, or it would terminate.

On June 23, 2000, Wyatt faxed a letter to Motiva terminating the agreement due to what Wyatt claimed to have been Motiva's material breaches. The letter described the material breaches as Motiva's purchase of the Cargill terminal and Motiva's failure to use the Wyatt facility, as contemplated by the agreement.

On or about July 6, 2000, following receipt of the termination letter, Motiva delivered to Wyatt a demand for arbitration, alleging that Wyatt had breached the agreement. In August, 2000, Wyatt responded with a

statement of arbitration defenses and counterclaims, which it subsequently withdrew. On September 1, 2000, Wyatt sold its terminal to Williams Energy without requiring it to assume Wyatt's obligations to Motiva under the agreement, including the requirement to dedicate exclusive use of the truck racks to Motiva.

Thereafter, on July 23, 2002, Wyatt brought an action in the trial court, alleging negligent misrepresentation, fraudulent misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the Connecticut Antitrust Act, General Statutes § 35-24 et seq. Prior to trial, however, each of the various causes of action that Wyatt originally had asserted was either withdrawn or found to be arbitrable under the agreement.

Motiva filed an answer, special defenses and a counterclaim, including one count alleging breach of contract. In its counterclaim, Motiva alleged that Wyatt had breached the contract when, "[w]ithout proper cause, [it] unilaterally terminated the contract . . . [and] failed to comply with the notice and cause provision of the [t]erminalling [a]greement." Motiva also alleged that when Wyatt sold its terminal to Williams Energy, Wyatt did not assign to Williams Energy its obligations to Motiva, as required under the agreement. Motiva proceeded only on the first count of its counterclaim alleging breach of contract.

Wyatt filed an answer and special defenses in response to Motiva's counterclaim, including a special defense of illegality arising out of Motiva's alleged antitrust and CUTPA violations. On August 29, 2003, Motiva filed a motion for summary judgment on, inter alia, Wyatt's special defense of illegality. On December 8, 2003, the trial court granted Motiva's motion for summary judgment with respect to the special defense, thus foreclosing Wyatt from asserting the defense at trial.

The case then was tried to the court on Motiva's breach of contract counterclaim only. The court rendered judgment in favor of Motiva, awarding it $3,200,801 in damages, $891,224.98 in attorney's fees, and $11,338.44 in costs.

Wyatt appealed to the Appellate Court, which concluded that the trial court improperly had granted Motiva's motion for summary judgment. *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 104 Conn. App. 685, 700, 936 A.2d 280 (2007), cert. denied, 286 Conn. 901, 943 A.2d 1103 (2008). The Appellate Court thus reversed the trial court's judgment and remanded the case for a new trial. Id., 701.

In the second trial, Wyatt was permitted to present evidence regarding its special defense of illegality. Wyatt claimed, inter alia, that it had been justified in

terminating the agreement because continued performance could have subjected it to liability under Connecticut's antitrust laws. See General Statutes §§ 35-26[7] and 35-27.[8] Wyatt specifically contended that Motiva's actions in purchasing the Cargill terminal and moving its customers to that terminal while retaining exclusive control over the Wyatt terminal's loading racks had created a combination in restraint of trade and had achieved, or created the probability of achieving, a monopoly. According to Wyatt, Motiva's tactics were designed to prevent a strong competitor from entering the market and to keep the price of terminalling services above the level that a competitive market would permit by reducing utilization of the Wyatt terminal to a fraction of its capacity and by reducing the output of terminalling services in the geographic market. Wyatt also asserted that Motiva had monopolized terminalling services by controlling more than 75 percent of the Connecticut, and more than 80 percent of the coastal Connecticut, gasoline terminalling markets. Wyatt thus contended that it had been justified in terminating the agreement because Motiva's actions had created a potentially violative combination in restraint of trade. In other words, Wyatt argued that, if it had not terminated the agreement, it might have faced liability for being a party to such a combination.

Motiva responded that Wyatt had not demonstrated a violation by Motiva of Connecticut's antitrust laws because Wyatt had failed to prove a properly defined product or geographic market. Motiva contended that Wyatt improperly had defined the product market as terminalling or throughputting services but had excluded those services when bundled with gasoline and sold at "an all-in price." Motiva also asserted that Wyatt had ignored "the actual business significance of exchange agreements and terminalling agreements,[9] and improperly had restricted the geographic market to Connecticut."

Motiva further argued that Wyatt had failed to demonstrate actual monopolization by Motiva because the Connecticut gasoline terminalling market was experiencing significant overcapacity at that time, and Motiva had lacked the power to affect market prices even if it desired to do so. Moreover, Motiva contended that, even if it could have affected market prices in Connecticut, "its network of exchange agreements throughout its marketing area and the terminalling agreement[s] it had with customers in New Haven prevented it from being able to raise prices profitably. An increase in Motiva's New Haven prices would have quickly been met either by a retaliatory increase in the prices Motiva was paying for terminalling services in other markets or [by] customers reducing their purchases of Motiva's products or both." In addition, Motiva argued that it had purchased the Cargill terminal through an arm's-length transaction and had many legitimate business reasons

for buying the terminal.

Motiva also argued that it had continued to comply with its obligations under the agreement and had not offered below cost prices at the Cargill terminal in an effort to divert customers away from the Wyatt terminal. Thus, according to Motiva, Wyatt had not identified any unfair, predatory or anticompetitive behavior by Motiva.

Following the trial and posttrial briefing by the parties, the trial court determined that Wyatt had breached the agreement by not providing Motiva with the thirty day opportunity to cure and by not assigning its obligations to Williams Energy when it sold the terminal. The court then considered Wyatt's special defense of illegality and concluded that Wyatt had failed to prove that it was justified in terminating the agreement on the ground that continued performance could have subjected it to antitrust liability under §§ 35-26 and 35-27. The trial court thus rendered judgment for Motiva on its counterclaim, awarding it $2,627,750 in damages plus attorney's fees and costs. The court also granted Motiva's motion for prejudgment interest in the amount of $814,303.72. Wyatt thereafter filed separate appeals from the trial court's judgment and the decision on the motion for prejudgment interest, and the Appellate Court consolidated the appeals.

On appeal, Wyatt claimed, inter alia, that the trial court had applied an incorrect legal standard in defining the relevant product and geographic markets for purposes of its antitrust analysis, thus rendering the analysis fundamentally flawed. *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 128 Conn. App. 666, 668, 675, 19 A.3d 181 (2011). The Appellate Court disagreed, concluding that the trial court's definition of the relevant product and geographic markets was supported by ample evidence in the record and that its findings as to the markets were not clearly erroneous. Id., 679. The Appellate Court also found no merit to Wyatt's other claims and affirmed the trial court's judgment.

Wyatt appealed to this court from the judgment of the Appellate Court, and we certified the following question for review: "Did the Appellate Court properly conclude that the trial court applied the proper legal standard in defining the applicable product and geographic markets for the purpose of its antitrust analysis?" *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 301 Conn. 932, 23 A.3d 726 (2011). Motiva raises as an alternative ground for affirmance of the Appellate Court's judgment that the appeal is moot because Wyatt did not appeal the trial court's findings that excess capacity and other competitive factors would have prevented Motiva from imposing higher than competitive prices even if the product and the geographic markets, as characterized by Wyatt, were assumed to be correct. We agree with Motiva that the appeal is moot.

The following additional facts are relevant to our resolution of this appeal. In its memorandum of decision, the trial court initially found that "there was no evidence presented to prove the existence of any actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services following Motiva's acquisition of the Cargill terminal." (Internal quotation marks omitted.) The court thus turned to the question of "whether Motiva's acquisition of the Cargill terminal gave it market power, allowing it to raise prices beyond what would normally prevail in a competitive market."

The court began by reviewing the testimony of Joseph P. Kalt, Motiva's expert witness on antitrust economics in the petroleum industry. Kalt opined that, based on "the realities" of the industry, the marketplace and the competition, Motiva's acquisition of the Cargill terminal in 2000 did not create a danger of monopoly. Kalt also disagreed with Michael Williams, Wyatt's expert witness, as to the relevant product market. While Williams defined the product market as terminalling services only, Kalt defined the market as terminalling services and gasoline.

Kalt stated that there were four kinds of "market checks and balances" that introduced a competitive discipline in the marketplace: exchange agreements; terminalling agreements; direct local alternatives; and regional alternatives.[10] See footnote 9 of this opinion. After explaining these checks and balances in more detail and providing illustrations as to how they worked, Kalt testified that, in 2000 and 2001, there was excess capacity at terminals in Connecticut and Rhode Island. Kalt stated that he had performed calculations showing that, even if 50 or 100 percent of Motiva's terminalling capacity within Connecticut had been withheld, the market would have been satisfied from terminalling sources other than Motiva's, so that the withholding of supply would not have had an effect on the fees for terminalling services. Kalt stated that he had performed the same analysis for Connecticut and Rhode Island and obtained similar results. He stated that excess capacity has the effect of driving down prices within an industry and that, "with or without Motiva, the available Connecticut terminal capacity readily exceed[ed] non-Motiva demand . . . ." Kalt thus did not believe there was any prospect that Motiva could have sustained higher than competitive fees for terminalling services in the marketplace.

Thereafter, the trial court made the following findings with respect to Wyatt's claim alleging a violation of § 35-26: "The court finds the testimony of Kalt to be the more credible testimony of the parties' antitrust experts and finds that Wyatt did not prove that, had it not terminated the terminalling [a]greement, Motiva's acquisition of the Cargill terminal [would have given]

Motiva market power as defined in *Orson, Inc.* [v. *Miramax Film Corp.*, 79 F.3d 1358, 1367–68 (3d Cir. 1996)][11] within the relevant product market. Therefore, the court finds that, based on the more credible evidence presented, Motiva did not violate § 35-26. Thus, Wyatt's special defense alleging a violation of § 35-26 fails."

The court next made the following findings as to Wyatt's claim of a violation of § 35-27: "With regard to the actual monopolization claim . . . given Kalt's definition of the relevant product market [as] being gasoline and terminalling services, and his broader definition of the relevant geographic market [as] extending from the Northeast to the Gulf Coast because of the cross-geographical nature of the industry resulting from exchange agreements and terminalling agreements, the court finds Kalt's testimony to be the more credible of the antitrust experts and finds that Motiva's acquisition of the Cargill terminal did not give it monopoly power in the relevant market as defined by *United States* v. *Grinnell* [*Corp.*, 384 U.S. 563, 570–71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)],[12] for the reasons set out in this memorandum of decision with regard to § 35-26. Therefore, the court finds that Wyatt did not prove that Motiva's acquisition of the Cargill terminal led to an actual monopolization by Motiva in violation of § 35-27.

"With respect to the attempted monopolization claim, the court adopts Kalt's testimony as set out earlier in this memorandum of decision with regard to § 35-26 and actual monopolization, and finds that Motiva's acquisition of the Cargill terminal did not create a dangerous probability that Motiva would achieve market power in the relevant product and geographic market[s] as defined by the court in *Shea* [v. *First Federal Savings & Loan Assn. of New Haven*, 184 Conn. 285, 439 A.2d 997 (1981)].[13] . . . [T]his court finds Wyatt did not prove that Motiva's acquisition of the Cargill terminal led to an attempted monopolization by Motiva in violation of § 35-27.

"Therefore, the court [also] finds that, because Motiva did not violate § 35-27, Wyatt's special defense alleging such a violation fails.

"As the court has found that Motiva's actions did not violate the antitrust laws at issue, the court finds that Wyatt was not justified in terminating the terminalling agreement and is therefore liable to Motiva for breaching the agreement."

On appeal to this court, Motiva argues that, even if it held the large market share alleged by Wyatt,[14] the parties' dispute over the relevant product and geographic markets is moot. Motiva contends that Wyatt can be granted no practical relief because it did not challenge the trial court's predicate findings that Motiva could not have profitably sustained higher than competitive prices in light of the substantial excess capacity

and competitive forces that existed at the time, either of which constitutes an independent ground on which to uphold the trial court's judgment. Wyatt responds that the recitation of testimony is not a finding and that nothing in the trial court's memorandum of decision suggests that the court adopted wholesale all of Kalt's testimony regarding the effect of excess capacity or competitive forces on Motiva's ability to exercise market power or to engage in actual or attempted monopolization. Wyatt also argues that, to the extent the trial court made such findings, they were based on an incorrect definition of the market as terminalling services and gasoline from the Northeast to the Gulf Coast. We agree with Motiva that the appeal is moot.

We begin with the standard of review. "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction. . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable . . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . A case is considered moot if [the trial] court cannot grant the appellant any practical relief through its disposition of the merits . . . . Because mootness implicates this court's subject matter jurisdiction, it raises a question of law over which we exercise plenary review." (Citations omitted; internal quotation marks omitted.) *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 540–41, 985 A.2d 1052 (2010).

Turning to the governing legal principles, we note that the party raising a special defense has the burden of proving the facts alleged therein. See, e.g., *State ex rel. Capurso* v. *Flis*, 144 Conn. 473, 477, 133 A.2d 901 (1957) ("[b]y alleging the facts stated in [the special defenses], the defendants assumed the affirmative and had the burden of proving those facts"); see also *Curley* v. *Marzullo*, 127 Conn. 354, 359, 17 A.2d 10 (1940) ("the burden of proving the special defenses is on the defendant"); cf. *George M.* v. *Commissioner of Correction*, 290 Conn. 653, 661, 966 A.2d 179 (2009). Accordingly, because Wyatt raised the special defense of illegality in response to Motiva's breach of contract counterclaim, it had the burden of proving the facts alleged in its defense. Cf. Practice Book § 10-50 (illegality defense must be specially pleaded).

It is well established that "[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credi-

bility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 233, 939 A.2d 541 (2008); accord *State* v. *Lawrence*, 282 Conn. 141, 155, 920 A.2d 236 (2007).

In the present case, the trial court found that the testimony of Motiva's antitrust expert, Kalt, was more credible than the testimony of Wyatt's antitrust expert, Williams. The court thus rejected Williams' definition of the relevant product market as terminalling services and the relevant geographic market as coastal Connecticut or the state as a whole and determined that the relevant product market was terminalling services and gasoline, and that the relevant geographic market extended from the Northeast to the Gulf Coast. The court also found, on the basis of Kalt's testimony regarding the checks and balances that operate within the marketplace, that Wyatt had not satisfied its burden of proving that, if it had not terminated the agreement with Motiva, Motiva's acquisition of the Cargill terminal would have given Motiva market power within the relevant product and geographic markets.

In reaching this conclusion, the trial court relied in part on Kalt's testimony regarding the effect of excess capacity in terminalling services on market power in Connecticut. Kalt testified that one of the market checks and balances that potentially would have precluded Motiva from raising its prices when it purchased the Cargill terminal was the substantial excess capacity that existed in other New Haven terminals, including the terminals owned by Getty, Gulf and Hess. Kalt subsequently reiterated that there was excess capacity with regard to terminalling services in Connecticut, or in Connecticut and Rhode Island, in 2000 and 2001, and testified that he had performed calculations demonstrating that, even if Motiva theoretically had withheld 100 percent of its own excess capacity in Connecticut, the local market could have been satisfied by sources other than Motiva's. Kalt thus concluded that, "with or without Motiva, the available Connecticut terminal capacity readily exceed[ed] non-Motiva demand" such that Motiva would not have been able to profitably sustain a higher than competitive price in the marketplace.

Having considered the trial court's findings and the testimony on which they were based, we conclude that Wyatt's claim that the trial court incorrectly defined

the relevant product and geographic markets is moot because, even if Wyatt's proposed market definitions are assumed to be correct, Wyatt cannot be afforded any practical relief. In the course of his broader analysis, Kalt stated that there was substantial excess capacity in the product and geographic markets described by Wyatt, namely, terminalling services in Connecticut, and, specifically, in the New Haven area, where the Wyatt terminal was located. Thus, according to Kalt, a company subject to a price increase under a contract with Motiva could purchase terminalling services from another New Haven terminal owner with excess capacity, such as Getty, Gulf or Hess, or from another company with excess capacity at the Wyatt terminal that had an exchange agreement with Motiva. Wyatt has not challenged the trial court's findings regarding the existence of excess capacity or the effect of such excess capacity on the conduct of a company that might be subject to a price increase by Motiva. Consequently, even if the trial court had determined that the relevant market was terminalling services in Connecticut or in New Haven, the trial court's unchallenged findings that there was substantial excess capacity in both coastal Connecticut and Connecticut as a whole would have supported the trial court's conclusion that Motiva's acquisition of the Cargill terminal did not give Motiva the opportunity to exercise market power or to engage in actual or attempted monopolization in violation of §§ 35-26 and 35-27.

To the extent Wyatt claims that the trial court merely recited, without adopting, Kalt's extensive testimony, we disagree. The court repeatedly described its findings as being "based on" Kalt's testimony. Specifically, the court stated: "based on the more credible evidence presented [by Kalt], Motiva did not violate § 35-26"; "given Kalt's definition" of the relevant product and geographic markets, "the court finds Kalt's testimony to be the more credible of the antitrust experts and finds that Motiva's acquisition of the Cargill terminal did not give it monopoly power in the relevant market"; and "[w]ith respect to the attempted monopolization claim, the court adopts Kalt's testimony as set out [previously] in this memorandum of decision . . . and finds that Motiva's acquisition of the Cargill terminal did not create a dangerous probability that Motiva would achieve market power in the relevant product and geographic market[s] . . . ." Accordingly, although we agree with Wyatt that a trial court's recitation of testimony, without more, does not normally constitute a finding; see *Coast Central Mill Co.* v. *Russell Lumber Co.*, 88 Conn. 109, 113, 89 A. 898 (1914) ("[a] finding should state ultimate, not evidential, facts; the statement of what a witness testified to is not, in that form, even a statement of an evidential fact"); the trial court in the present case not only "based" its ultimate conclusions on Kalt's expert testimony but "adopt[ed]" his testimony in reaching its

conclusions. If Wyatt had found that the trial court's findings were ambiguous, it could have sought an articulation, which it failed to do. For all of the foregoing reasons, we conclude that the appeal is moot.

The appeal is dismissed.

In this opinion the other justices concurred.

[1] Shell Oil Company, Shell Oil Products Company, LLC, and Equiva Trading Company, also are defendants in the present case.

[2] We refer to this agreement as the terminalling agreement or the agreement throughout this opinion.

[3] Both the Wyatt terminal and the Cargill terminal are located in the city of New Haven.

[4] Williams Energy subsequently changed its name to Magellan Terminal Holdings, L.P.

[5] We note that, "[b]ecause mootness implicates this court's subject matter jurisdiction, it may be raised at any time . . . ." *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013).

[6] The agreement did not require that Shell use only the Wyatt terminal.

[7] "[General Statutes] § 35-26 is substantially identical to § 1 of the Sherman Act"; *Shea* v. *First Federal Savings & Loan Assn. of New Haven*, 184 Conn. 285, 305, 439 A.2d 997 (1981); see 15 U.S.C. § 1 (2006); and provides: "Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful." The essence of an antitrust violation under this provision is concerted action whereby two or more persons agree to act together. See *Shea* v. *First Federal Savings & Loan Assn. of New Haven*, supra, 305.

[8] "General Statutes § 35-27 is patterned after § 2 of the Sherman Act"; *Shea* v. *First Federal Savings & Loan Assn. of New Haven*, 184 Conn. 285, 304, 439 A.2d 997 (1981); see 15 U.S.C. § 2 (2006); and provides: "Every contract, combination, or conspiracy to monopolize, or attempt to monopolize, or monopolization of any part of trade or commerce is unlawful." Section 35-27 enumerates three separate offenses, the first of which, a contract, combination, or conspiracy to monopolize, requires a plurality of actors. *Shea* v. *First Federal Savings & Loan Assn. of New Haven*, supra, 304. The second offense, monopolization, "requires possession and [wilful] acquisition or maintenance of monopoly power . . . [which] is [the] power to fix or control prices or to exclude or control competition in the relevant market." (Citations omitted.) Id. The third offense, attempt to monopolize, "encompasses . . . specific intent to control prices or destroy competition, predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and a dangerous probability of success." Id.

[9] In its memorandum of decision, the trial court relied in part on the testimony of Daniel Grinstead, the general manager of strategy and planning, and of business development, for Motiva, who described an exchange agreement as follows: "An exchange agreement is when two parties get together, and, for example, if we have five terminals in markets where an exchange partner does not own the terminal and likewise they have five terminals and markets where Shell did not own a terminal, we would enter into an exchange agreement so we would load their trucks at our terminals, and they in turn would load our truck at our terminals." Grinstead further described a terminalling agreement as follows: "[T]he typical terminalling agreement is where we have excess capacity in one of our terminals, and we write a contract with another party that allows them to bring their own supply to our terminal, and we would offload their ships or receive their pipeline batches into our tankage, [and] in return load their trucks or barges or go back out to pipeline for a fee. But the difference [is] that the customer[s] supply themselves in a terminalling agreement. In an exchange agreement, each party would supply the other party on that side."

[10] With respect to exchange agreements, Kalt explained that increasing terminalling fees to one terminal customer could cause business to shift to other customers at the same terminal with exchange agreements containing lower contract fees for terminalling services. Alternatively, the customer subject to the increased fee could simply purchase unused terminalling capacity from other exchange agreement customers at the terminal with lower contract fees.

With respect to terminalling agreements, Kalt testified that "cross-geographic discipline" acts as a check against a rise in terminalling fees because a rise in fees in one locality may hurt a terminal owner's reputation and ability

to enter into other exchange or terminalling contracts within the industry.

Kalt further testified that direct, local alternatives act as market checks and balances because customers presented with a fee increase at one terminal have the option of utilizing another terminal within the same area. For example, three other oil companies, namely, Getty, Gulf and Hess, had terminals in New Haven with substantial excess capacity when Motiva purchased the Cargill terminal.

Kalt finally testified with regard to regional alternatives that, if a monopolist tried to raise fees in New Haven, it would affect competition throughout the region, including terminals in Providence, Rhode Island.

[11] In *Orson, Inc.*, the Third Circuit Court of Appeals stated: "In rule of reason cases, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. . . . The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services. . . . Due to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make. . . . Accordingly, the courts allow proof of the defendant's market power instead. . . . Market power—the ability to raise prices above those that would prevail in a competitive market—is essentially a surrogate for detrimental effects. . . .

"If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anticompetitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently procompetitive objective. . . . To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective." (Citations omitted; internal quotation marks omitted.) *Orson, Inc.* v. *Miramax Film Corp.*, supra, 79 F.3d 1367–68.

[12] In *Grinnell Corp.*, the United States Supreme Court stated that "[t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the [wilful] acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, supra, 384 U.S. 570–71.

[13] The court in *Shea* stated: "Monopoly power is power to fix or control prices or to exclude or control competition in the relevant market." *Shea* v. *First Federal Savings & Loan Assn. of New Haven*, supra, 184 Conn. 304.

[14] As previously noted, Wyatt's expert, Williams, testified that Motiva monopolized terminalling services by controlling more than 75 percent of the Connecticut market and more than 80 percent of the coastal Connecticut market.