VIRGINIA SILANO *v.* GEORGE COONEY ET AL.
(AC 40293)

DiPentima, C. J., and Sheldon and Moll, Js.

Syllabus

The plaintiff sought to recover damages from the defendant C and his business, the defendant H Co., for, inter alia, slander per se and libel per se. H Co. had conducted audits and investigations on behalf of P Co., a New York entity that bottled soda. The audits were conducted pursuant to a contract that H Co. had with W Co. While conducting audits, C purchased P Co.'s products throughout New York at his own expense in an attempt to procure contracts with other P Co. distributors, and as a result, C accumulated large quantities of soda. When a housing association of which C was a member installed a vending machine, C stocked it with soda, which was sold for the benefit of the association. The plaintiff, who also was a resident of the housing association, complained to C about discarded soda cans and the fact that they could not be returned for a bottle deposit refund in Connecticut because they had been purchased in New York. The plaintiff also made phone calls to P Co., complaining that C was redistributing expired P Co. products that were not redeemable in Connecticut. A, the president of W Co., thereafter informed C that the plaintiff had made false and misleading allegations to P Co. that C was selling expired and dirty soda in Connecticut, and that C had been acting in an otherwise rude and unprofessional manner while doing so. C then gave a written statement to the police in which he claimed that the plaintiff's allegations had caused a threat of cancellation of his services with P Co.'s organization, and that her allegations served no other legitimate purpose than to repeatedly annoy and alarm him and his business associates to the point of unnecessary disruption. The plaintiff was thereafter charged with harassment in the second degree in violation of statute (§ 53a-183), which was punishable by a term of imprisonment. The harassment charge was later dismissed, after which the plaintiff commenced this action. The trial court rendered judgment for C and H Co. on all counts of the plaintiff's complaint. The court concluded that C's statements to the police were not defamatory because they were true. The court also determined, inter alia, that the crime of harassment in the second degree did not involve moral turpitude and, thus, could not support a claim of defamation per se. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly concluded that harassment was not a crime that involves moral turpitude and that C's statements to the police did not constitute slander per se or libel per se. *Held* that the trial court properly rendered judgment in favor of C on the plaintiff's claims of slander per se and libel per se; although the trial court applied the law incorrectly when it concluded

that harassment in the second degree did not involve moral turpitude and, instead, should have also considered whether harassment would constitute a crime to which an infamous penalty is attached, that court's finding that C's statements were not defamatory because they were true was not clearly erroneous, as there was sufficient evidence for the court to find that A had made the statements to C that C in turn relayed to the police, the plaintiff conceded in her original complaint and testimony that she had contacted P Co. and discussed matters concerning C and the vending machine, and, notwithstanding the plaintiff's contention that the court failed to credit evidence that C had misled the police and sold soda that he had confiscated in connection with his business, it was the trial court's exclusive province to weigh conflicting testimony and to make determinations of credibility.

Argued January 3—officially released April 16, 2019

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of Fairfield, where the matter was tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Virginia Silano, self-represented, the appellant (plaintiff).

Brock T. Dubin, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, Virginia Silano, appeals from the trial court's judgment in favor of the defendant George Cooney[1] on her claims of slander and libel per se. Specifically, the plaintiff argues that the court erred (1) in finding that the defendant's statements to the Trumbull Police Department were not

[1] The plaintiff's complaint also named Hemlock Manor, LLC, as a defendant. Hemlock Manor, LLC, filed an appearance in this appeal and submitted a joint brief with Cooney. The plaintiff, however, has appealed only from the judgment on the third and fourth counts of her complaint; those counts were directed solely to Cooney. Accordingly, we refer to Cooney as the defendant in this appeal.

defamatory and (2) in concluding that the defendant did not abuse his qualified privilege in making such statements to the police.[2] We are not persuaded and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. In 2009, the plaintiff and the defendant were members of the Pinewood Lake Association (association) and residents of Trumbull. At that time, the defendant, a retired New York City police officer, owned and operated a business, Hemlock Manor, LLC (Hemlock), which conducted "audits" and investigations on behalf of Pepsi Cola Bottling Company of New York (Pepsi Bottling). The audits were conducted pursuant to a contract that Hemlock had with a business known as Winthrop Douglas, Inc. (Winthrop), which, in turn, had a contract with Pepsi Bottling.

When conducting a typical audit for Pepsi Bottling, the defendant would purchase Pepsi products at various locations throughout New York in order to recover certain "codes" from these items, which he would later provide to Winthrop. The defendant also would purchase Pepsi products at his own expense in an attempt to procure contracts with other Pepsi distributors. Significantly, as a result of these endeavors, the defendant accumulated large quantities of soda. He often donated the soda to various charitable organizations throughout New York, but he also stored a substantial portion in his home garage.

In 2009, the defendant, while serving as president of the board of governors of the association, proposed

[2] For the reasons set forth in this opinion, we do not disturb the trial court's finding that the defendant's statements were not defamatory and, thus, decline to reach the merits of the plaintiff's second claim regarding whether the defendant abused his qualified privilege in making such statements.

that if the association acquired a vending machine, he would stock it with soda at no cost. The board of governors approved the proposal, and the association eventually acquired a vending machine. The association had the vending machine installed near the community beach on Pinewood Lake and sold the soda for fifty cents each, which was "pure profit" for the association. According to the association's financial statements, the income from the soda was $1093.54 in 2009 and was $1955.83 in 2010.[3]

At some point in 2010, however, the plaintiff became concerned about the amount of litter the vending machine was causing around her home and the quality of the soda being sold. She complained to the defendant about the discarded soda cans and the fact that they could not be returned for a bottle deposit refund in Connecticut because they had been purchased in New York. Despite her complaint, the association continued to operate the vending machine and the defendant continued to stock it. In 2011, the plaintiff began making phone calls to Pepsi Bottling, complaining that the defendant was redistributing expired Pepsi products that were not redeemable in Connecticut. When making her complaints to Pepsi Bottling, the plaintiff provided her name and telephone number as return contact information.

On June 2, 2011, the president of Winthrop, Marc Aliberti, notified the defendant that the plaintiff was making complaints to Pepsi Bottling about him. Specifically, Aliberti told the defendant that the plaintiff was providing Pepsi Bottling with negative character references and making false allegations, including telling the company that the defendant was selling "expired" and

[3] The record does not indicate why the income from these two years is not a multiple of fifty cents, given the court's factual finding respecting the sale price for each can of soda. Nonetheless, the plaintiff does not challenge this finding, and it is ultimately not material to the issues on appeal.

"dirty" soda in Connecticut and acting in a negative manner while doing so. After he was provided with this information, the defendant prepared a statement to the Trumbull Police Department in order to make a record of the situation. Detective Kevin Hammel told the defendant that, while the matter appeared to be civil in nature, if the plaintiff's behavior continued, the defendant could file an additional complaint.

On July 28, 2011, Aliberti again called the defendant to tell him that the plaintiff had made additional false statements about the defendant to Pepsi Bottling. The defendant was informed that the plaintiff had accused him of selling Pepsi products to "every store in Trumbull" and that he was selling the products in an "otherwise negative manner." In a sworn statement, dated August 5, 2011, the defendant relayed this information to the Trumbull Police Department. The defendant indicated that the plaintiff's false allegations to Pepsi Bottling have "caused a threat of cancellation of [his] employment services with the Pepsi organization" and "serve no other legitimate purpose other than to repeatedly annoy and alarm [him] and [his] business associates to the point of unnecessary disruption and threat of cancellation of services."

As a result of the defendant's statements, the Trumbull Police Department commenced a criminal investigation into the matter. In connection with this investigation, Hammel on several occasions spoke with Aliberti, who corroborated the defendant's complaints.[4]

[4] In an affidavit that was appended to the application for an arrest warrant for the plaintiff, Hammel averred: "On October 18, 2011, the affiant received a typed written statement from Marc Aliberti of [Winthrop], related to his knowledge of the calls made to [Pepsi Bottling] and [Hemlock], which employs [the defendant]. Mr. Aliberti reports, among other things, that [Winthrop] conducts business with both, [Pepsi Bottling] and [Hemlock]. Aliberti has been, and continues to be a contact and business associate of both organizations. [Hemlock] is contracted in the scope of audits and investigations and does not represent Aliberti or [Pepsi Bottling] in the scope of sales, customer service or any other public or product interaction.

Hammel concluded on the basis of this information that there was probable cause to arrest the plaintiff on a charge of harassment. He applied for an arrest warrant, and the application was granted on November 22, 2011.

Following her arrest, the plaintiff was charged with harassment in the second degree in violation of General Statutes § 53a-183.[5] After several court appearances, the charge was dismissed. On June 10, 2014, the plaintiff

"Aliberti continues that on June 2, 2011, a representative from [Pepsi Bottling] notified him that they have been contacted by [the plaintiff], who was complaining that [the defendant] was misrepresenting them by selling expired and otherwise unfit Pepsi products and misrepresenting himself, while selling Pepsi products in a negative manner by cursing and being rude to customers in and around the area of Trumbull . . . . [The plaintiff] left her home telephone number as a return contact and there were several communications between [the plaintiff] and [Pepsi Bottling] before the allegation was deemed unsubstantiated. [Pepsi Bottling] expressed to Aliberti [its] displeasure with these allegations and discussed possible ramifications.

"On July 28, 2011, on a separate occasion, Aliberti was again contacted by [Pepsi Bottling] to inform him that they were again contacted by [the plaintiff]. [The plaintiff] once again complained that [the defendant] was misrepresenting the Pepsi organization by selling expired and otherwise unfit Pepsi products 'all over Trumbull' and she provided a negative character reference. [The plaintiff] left her home phone number as a return contact and there were several communications between [the plaintiff] and [Pepsi Bottling]. This time, the representative at [Pepsi Bottling] asked [the plaintiff] to provide further proof of her allegations, which she was unable to provide. [Pepsi Bottling] again expressed their displeasure of [the plaintiff's] continued allegations and further discussed a termination of [its] contract with [Hemlock] due to [the plaintiff's] continuing allegations. Aliberti also stated that he has discussed these incidents with representatives of [Pepsi Bottling] and can confirm that these events have put the future of their relationship with [Hemlock] in jeopardy."

[5] General Statutes § 53a-183 (a) provides: "A person is guilty of harassment in the second degree when: (1) By telephone, he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph or mail, by electronically transmitting a facsimile through connection with a telephone network, by computer network, as defined in section 53a-250, or by any other form of written communication, in a manner likely to cause annoyance or alarm; or (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

commenced a civil action against the defendant and Hemlock, alleging claims sounding in malicious prosecution, slander per se and libel per se. Following a bench trial, the court rendered judgment in favor of the defendant and Hemlock on all counts. The plaintiff now appeals from the judgment in favor of the defendant on the third and fourth counts of her complaint, which, respectively, allege slander per se and libel per se.

On appeal, the plaintiff claims that the court erred in finding that the defendant's statements to the Trumbull Police Department did not constitute slander per se or libel per se. Specifically, the plaintiff argues that the court misconstrued established precedent in concluding that harassment was not a crime involving "moral turpitude," despite the fact that it was punishable by a term of imprisonment. Although we agree with the plaintiff that the court misconstrued the applicable law, we nonetheless conclude that the court properly found that the defendant's statements were not defamatory.[6]

We begin our analysis by setting forth the relevant legal principles and the proper standard of review. "A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . . Defamation is comprised of the torts of libel and slander: slander is oral defamation and libel is written defamation. . . . To establish a prima facie case of defamation at common law, the plaintiff must prove that (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. . . .

[6] "We note that our rationale is slightly different than that of the trial court. [I]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Rafalko* v. *University of New Haven*, 129 Conn. App. 44, 51 n.3, 19 A.3d 215 (2011).

"Statements deemed defamatory per se are ones in which the defamatory meaning of the speech is apparent on the face of the statement. . . . Our state has generally recognized two classes of defamation per se: (1) statements that accuse a party of a crime involving moral turpitude or to which an infamous penalty is attached, and (2) statements that accuse a party of improper conduct or lack of skill or integrity in his or her profession or business and the statement is calculated to cause injury to that party in such profession or business." (Citations omitted; internal quotation marks omitted.) *Cohen* v. *Meyers*, 175 Conn. App. 519, 544–45, 167 A.3d 1157, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017). "Once the plaintiff has established that the words are false and actionable per se, barring any statutory provision to the contrary, she is entitled under Connecticut law to recover general damages without proof of special damages. . . . This is because the law presumes general damages where the defamatory statements are actionable per se. . . . On the other hand, if the words are defamatory, but not actionable per se, the plaintiff may recover general damages for harm to her reputation only upon proof of special damages for actual pecuniary loss suffered." (Citations omitted.) *Miles* v. *Perry*, 11 Conn. App. 584, 602, 529 A.2d 199 (1987). "In a defamation case brought by an individual who is not a public figure, the factual findings underpinning a trial court's decision will be disturbed only when those findings are clearly erroneous, such that there is no evidence in the record to support them." *Gambardella* v. *Apple Health Care, Inc.*, 291 Conn. 620, 628–29, 969 A.2d 736 (2009). Our review is plenary, however, in ascertaining whether the trial court applied the correct legal standard in deciding the merits of the plaintiff's claim. See *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002).

In finding in favor of the defendant on the plaintiff's claims of defamation per se, the court noted that although, "[t]o an attorney or person trained in the law," the defendant's statements to the Trumbull Police Department accused the plaintiff of harassment in the second degree, which is a class C misdemeanor punishable by up to three months incarceration, such a crime does not involve moral turpitude and, thus, cannot support a claim of defamation per se. The plaintiff contends that the court erred in reaching this conclusion because, under the modern view of defamation, a crime of moral turpitude is a chargeable offense punishable by a term of imprisonment, such as harassment in the second degree. To the extent that there is any confusion in our law with respect to this issue, we take this opportunity to clarify our definition of defamation per se vis-à-vis imputations of criminal conduct.

In *Hoag* v. *Hatch*, 23 Conn. 585, 590 (1855), our Supreme Court acknowledged that a statement that accuses a party of a crime involving moral turpitude, or a crime subject to an infamous penalty, is actionable without having to prove special damages.[7] Following

[7] The *Hoag* decision does not cite any authority for this precept, but some scholars contend that the special significance our common law places on accusations of criminal conduct involving moral turpitude or that is punishable by an infamous penalty is a "residue of a bygone age in which defamation was a disfavored action." 2 F. Harper et al., Torts (3d Ed. 2006) § 5.10, p. 118. Specifically, in the Middle Ages, in order to establish the jurisdiction of the English common law courts, the plaintiff was required to show "temporal" harm—i.e., that the false accusation could subject that party to endangerment of life or liberty. Id., p. 109 n.4. In the absence of temporal harm, the claim would likely be treated as a 'spiritual' matter under the jurisdiction of the ecclesiastical courts." Id.; see also W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 112, p. 788 ("[t]he exact origin of these exceptions is in some doubt, but probably it was nothing more unusual than a recognition that by their nature such words were especially likely to cause pecuniary, or 'temporal,' rather than 'spiritual' loss"). Some of these same scholars argue that courts should reevaluate their jurisprudence in this area, given that the ecclesiastical courts were abolished several centuries ago and the distinctions drawn between crimes for the purposes of defamation per se are in some manner arbitrary. Compare *Hoag* v. *Hatch*,

Hoag, our courts consistently have used the disjunctive "or" when listing the two types of criminal accusations that comprise this class of defamation per se under our law. See, e.g., *Proto* v. *Bridgeport Herald Corp.*, 136 Conn. 557, 565–66, 72 A.2d 820 (1950); *Cohen* v. *Meyers*, supra, 175 Conn. App. 544–45; *Lega Siciliana Social Club, Inc.* v. *St. Germaine*, 77 Conn. App. 846, 853, 825 A.2d 827 ("[t]o fall within the category of libels that are actionable per se because they charge crime, the libel must be one which charges a crime which involves moral turpitude or to which an infamous penalty is attached"), cert. denied, 267 Conn. 901, 838 A.2d 210 (2003). Although some crimes involving moral turpitude may also be subject to an infamous penalty; see *Yavis* v. *Sullivan*, 137 Conn. 253, 259, 76 A.2d 99 (1950); we are aware of no authority since *Hoag* that has expressly held that the accusation must allege a crime implicating both categories. We agree with the plaintiff, therefore, that the trial court wrongly concluded that, because harassment in the second degree does not involve moral turpitude, the statements at issue were not actionable in the absence of proving special damages.[8] Rather, the

supra, 23 Conn. 590–91 (bribery is crime involving moral turpitude), with *Moriarty* v. *Lippe*, 162 Conn. 371, 383, 294 A.2d 326 (1972) ("[a]ssault is a crime held lacking in the element of moral turpitude" [internal quotation marks omitted]).

[8] We disagree with the plaintiff, however, to the extent that she contends that a crime of moral turpitude is one that can be punished by a term of imprisonment. This argument, we believe, misconstrues *Battista* v. *United Illuminating Co.*, 10 Conn. App. 486, 493, 523 A.2d 1356, cert. denied, 204 Conn. 802, 803, 525 A.2d 1352 (1987), in which this court held that the modern view of a crime subject to an infamous penalty is a crime punishable by a term of imprisonment. See also 3 Restatement (Second), Torts § 571 (1977) ("[o]ne who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude"). Conversely, "[m]oral turpitude . . . [remains] a vague and imprecise term to which no hard and fast definition can be given. . . . A general definition . . . is that moral turpitude involves an act of inherent baseness, vileness or depravity in the private and social duties which man does to his fellowman or to society in general, contrary to the accepted

court should have also considered separately whether harassment, which is punishable by a term of imprisonment, would constitute a crime to which an infamous penalty is attached. See *Battista* v. *United Illuminating Co.*, 10 Conn. App. 486, 493, 523 A.2d 1356 ("[t]he modern view of this requirement is that the crime be a chargeable offense which is punishable by imprisonment"), cert. denied, 204 Conn. 802, 803, 525 A.2d 1352 (1987).

Despite our conclusion that the court applied the law incorrectly in deciding whether the plaintiff had established a prima facie case of defamation per se, we nonetheless affirm the court's conclusion that the defendant's statements were not defamatory because the court's finding that the statements were true was not clearly erroneous. "It is well settled that for a claim of defamation to be actionable, the statement must be false . . . and under the common law, truth is an affirmative defense to defamation . . . [and] the determination of the truthfulness of a statement is a question of fact . . . ." (Internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 431, 125 A.3d 920 (2015). "Questions of fact are subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *Cheshire Land Trust, LLC* v. *Casey*, 156 Conn. App. 833, 839–40, 115 A.3d 497 (2015). Further, "[c]ontrary to the common law rule that required the defendant to establish the literal truth of the precise

rule of right and duty between man and law." (Citations omitted; internal quotation marks omitted.) *Moriarty* v. *Lippe*, 162 Conn. 371, 383, 294 A.2d 326 (1972).

statement made, the modern rule is that only substantial truth need be shown to constitute the justification. . . . It is not necessary for the defendant to prove the truth of every word of the libel. If he succeeds in proving that the main charge, or gist, of the libel is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable. . . . The issue is whether the libel, as published, would have a different effect on the reader than the pleaded truth would have produced." (Internal quotation marks omitted.) *Cohen* v. *Meyers*, supra, 175 Conn. App. 546.

The alleged defamatory statements at issue in this case assert, in pertinent part, that the defendant had been informed by a business associate, Aliberti, that the plaintiff had made false and misleading complaints to Pepsi Bottling. The defendant further specified that Aliberti had told him that these complaints included allegations that the defendant was selling "expired" and "dirty" soda, that he was selling the soda in an otherwise rude and unprofessional manner, and that he was selling soda to "every store in Trumbull." In its memorandum of decision, the court found that there was uncontroverted evidence that Aliberti had made these statements to the defendant and that the defendant accurately conveyed Aliberti's statements to the Trumbull Police Department. The plaintiff contends that the court's finding that these statements were true was clearly erroneous because the defendant omitted information that would have corroborated the plaintiff's initial complaints to Pepsi Bottling, and the court ignored the testimony of several witnesses who impugned the veracity of the defendant's statements. We disagree.

Our review of the record reveals that there was sufficient evidence adduced at trial for the court to find that Aliberti had made the statements to the defendant that the defendant in turn relayed to the police. Additionally, the plaintiff conceded in her original complaint and trial

testimony that she had contacted Pepsi Bottling and discussed matters concerning the defendant and the vending machine at Pinewood Lake. Further, with respect to the plaintiff's contention that the court failed to credit evidence that supported her claim that the defendant was "selling" Pepsi that he had "confiscated" in connection with his business, and thus misleading the police in claiming that the plaintiff's complaints were made solely for the purposes of harassing him and his family, "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . It is not our role to reevaluate the credibility of witnesses or to overturn factual findings of a [trial] court unless they are clearly erroneous. . . . If there is any reasonable way that the [trier of fact] might have reconciled the conflicting testimony before [it], we may not disturb [its] [credibility determination]." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 741, 154 A.3d 989 (2017). Thus, having determined that the court's finding that the defendant's statements to the police were true was not clearly erroneous, we conclude that the court properly rendered judgment in favor of the defendant on the plaintiff's claims of slander per se and libel per se.

The judgment is affirmed.

In this opinion the other judges concurred.

LORNA J. DICKER *v.* MICHAEL DICKER
(AC 40644)

DiPentima, C. J., and Sheldon and Pellegrino, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying the parties' motions for contempt and issuing a remedial order

regarding certain prior court-ordered payments. In her motion for contempt, the plaintiff claimed that the defendant had wilfully underpaid the fees he owed for their children's extracurricular activities, and in his motion for contempt, the defendant claimed that the plaintiff failed to pay her share of the children's unreimbursed medical expenses. Thereafter, the trial court held hearings on the motions for contempt and various other pending motions, during which it determined that neither party could be held in contempt because they both believed that pursuant to certain prior court orders they were entitled to withhold payment from each other when and to the extent that the other party had failed to make a required payment to the other. The court also issued a remedial order that set forth a detailed procedure that the defendant was required to follow in the future for presenting proof of unreimbursed medical expenses to the plaintiff and calculating any amounts that he claimed the plaintiff owed him under prior court orders. The trial court then held an evidentiary hearing to determine the amounts that the parties currently owed each other related to the subject fees and expenses and ordered the parties to submit proposed orders. Following the hearing, the court found that the defendant owed the plaintiff $3742.08 for unpaid extracurricular activities fees and the plaintiff owed the defendant $2303.59 for unpaid unreimbursed medical expenses, and, therefore, it ordered the defendant to pay the plaintiff $1438.49, which was the net difference between the unpaid sums. Thereafter, the trial court denied in part the plaintiff's motion to reargue. On the plaintiff's amended appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court erred in finding that she had violated its medical reimbursement order and in finding, on that basis, that she owed the defendant $2303.59 in unpaid unreimbursed medical expenses, as she failed to establish that the court's findings were clearly erroneous: despite the plaintiff's claim that the trial court erred in finding that the defendant's accounting summaries as to the amounts he had paid for the children's medical expenses were credible, the record revealed that the court credited the defendant's testimony that he had, in fact, paid what he claimed to have paid for the children's medical expenses and that his testimony explained why there were discrepancies between the summaries and the documentation he had presented to the court; moreover, contrary to the plaintiff's assertions that the defendant's medical expense summaries were unsubstantiated and irreconcilable with the record, and that the court erred in its method of calculation of the amounts that the parties owed to each other, the court sought and received proposed orders from both parties, which included suggested methods of calculation and summaries of the expenses they wanted the court to consider, it heard lengthy testimony as to the amounts allegedly owed and it was well aware of the parties' differing accounting approaches and methods of calculating

those amounts, which it clearly indicated and discussed in its memorandum of decision.

2. The trial court did not abuse its discretion in denying the plaintiff's motion for contempt on the basis of its finding that the defendant was not in contempt for withholding from her payment of the amount he owed for the children's extracurricular activities, as the plaintiff failed to advance any compelling argument as to why the court's determination was not supported by the record, and this court was not left with the definite and firm conviction that a mistake had been made; although the plaintiff contended that because the defendant's actions were knowing and voluntary, they must have constituted wilful contempt, the court's refusal to find the defendant in contempt was not predicated on a finding that the defendant's actions were not knowing or voluntary but, rather, was based on its finding that the parties withheld payments from each other because of their common belief that it was proper to do so.

3. The trial court did not abuse its discretion by permitting the defendant unilaterally to deduct the amount of undisputed unpaid unreimbursed medical expenses owed by the plaintiff from future payments that the defendant owed the plaintiff for the children's extracurricular activities, as that court's remedial order, when viewed in the context of the court's prior orders and in light of the fact that the court was in the best position to give effect to those orders, was not manifestly unreasonable.

4. The plaintiff could not prevail on her claim that the trial court abused its discretion in denying her motion to reargue, which was based on her claim that the court incorrectly concluded that she had ample opportunity to submit any relevant evidence prior to the final hearing on the parties' various motions but had chosen not to do so; despite the plaintiff's contention that the trial court, without explanation, denied her request to present additional new evidence during the subject hearing, the record was clear that the court provided the plaintiff with a sufficient explanation as to why it denied her motion for contempt, and a review of the hearing transcripts indicated that the parties' counsel agreed in advance to prioritize certain issues before the court with respect to their various motions.

5. The plaintiff could not prevail on her claim that the trial court violated her due process right to be heard when it denied her motion for contempt before she had rested her case-in-chief, which she claimed deprived her of a reasonable opportunity to cross-examine the defendant or to present evidence in support of that motion: the record revealed that the plaintiff had a sufficient opportunity to provide the trial court with evidence of the defendant's contempt during the subject hearing and that at no point during the remainder of the hearing did she request to submit additional evidence, and although the plaintiff claimed that she was unable to bring certain relevant evidence to the court's attention, nothing in the record suggested that, had she been allowed even greater latitude and more time, she would have presented evidence with respect to the wilfulness

of the defendant's actions that was not already before the court; moreover, although the plaintiff claimed that the trial court ignored evidence that the defendant knowingly made deductions from court-ordered payments to her, which she claimed constituted acts of wilful contempt, noncompliance alone was not sufficient to support a judgment of contempt, as it was within the sound discretion of the court to deny her claim for contempt because there was an adequate factual basis to explain the defendant's failure to honor the court's prior orders.

Argued December 6, 2018—officially released April 16, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Abrams*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Albis*, *J.*, denied the parties' motions for contempt and issued a remedial order; subsequently, the court, *Albis*, *J.*, issued an order regarding certain unreimbursed medical expenses; thereafter, the court, *Albis*, *J.*, denied in part the plaintiff's motion to reargue, and the plaintiff appealed to this court; subsequently, the plaintiff filed an amended appeal. *Affirmed*.

Lorna J. Dicker, self-represented, the appellant (plaintiff).

Michael Dicker, self-represented, the appellee (defendant).

Opinion

PELLEGRINO, J. The plaintiff, Lorna J. Dicker, appeals from the judgment of the trial court, resolving several of the parties' postjudgment motions. On appeal, the plaintiff claims that the court improperly (1) found that the plaintiff owed sums to the defendant, Michael Dicker, for unreimbursed medical expenses for the parties' minor children, (2) found that the defendant

was not in contempt of existing court orders, (3) concluded that the defendant could deduct unreimbursed medical costs from future quarterly activity fee payments that he owed to the plaintiff, and (4) denied the plaintiff's motion to reargue. The plaintiff also claims that the court violated her due process right to be heard on her motion for contempt. For the reasons set forth in this opinion, we disagree with the plaintiff and affirm the judgment of the trial court.

The record discloses the following facts and procedural history. On March 29, 2012, the trial court, *Abrams*, *J.*, dissolved the parties' marriage, incorporating into its judgment of dissolution the parties' agreement dated February 17, 2012. The agreement provided, inter alia, that the defendant would be responsible for the first $3720 incurred for their children's unreimbursed medical and dental expenses each year and that the parties would share equally in any such expenses that exceeded that amount.[1] As for the children's extracurricular activities, the agreement provided that the plaintiff would pay for such activities up to the sum of $1200 per year and that the parties, thereafter, would share any expenses in excess of that amount equally.[2]

Thereafter, the parties filed numerous motions for contempt against each other for alleged failures to comply with the terms of their agreement. In an effort to resolve their disputes, the parties entered into two additional agreements. In an agreement dated May 27, 2014,

[1] Unreimbursed medical expenses refer to expenses not covered by the defendant's insurance policies.

[2] The parties entered into a postjudgment agreement, dated July 11, 2013, which modified their original agreement to require that the defendant pay the plaintiff, on a quarterly basis, $1200 per year, per child, for the children's extracurricular activities, otherwise, the terms of the 2012 agreement were to remain in full force and effect. The July, 2013 agreement was made a court order on July 15, 2013.

the parties decided, inter alia, that they would reconcile, on a quarterly basis, their respective payments for the children's unreimbursed medical expenses. In a second agreement dated August 18, 2014, the parties settled their dispute with respect to various prior unreimbursed medical expenses. Each of these agreements was approved by the court and made an order of the court.

On June 9, 2016, the plaintiff filed a motion for contempt, claiming that the defendant had wilfully underpaid the fees he owed for the children's extracurricular activities. See footnote 2 of this opinion. On September 23, 2016, the defendant also filed a motion for contempt, claiming that the plaintiff had failed to pay her agreed upon share of the children's unreimbursed medical expenses. The court, *Albis*, *J.*, held hearings on November 3 and 23, 2016, with respect to the parties' motions.[3] On November 23, 2016, the court ruled that neither party could be held in contempt because each of them believed that he or she was entitled, under the court's previous orders, to withhold payment from the other as a result and to the extent of the other party's nonpayment of sums due to him or her.

During that hearing, the court also issued a remedial order requiring, inter alia, that in the future the defendant provide the plaintiff with calculations sufficient to explain any amounts he claimed that she owed him under the previous orders. The order further provided that if the plaintiff disputed any amount so claimed and documented by the defendant, she was obligated to notify him of that dispute. The order finally provided that if any undisputed expense had not been paid to the defendant by the next due date, he could deduct that undisputed amount from a future installment of

[3] In addition to the parties' contempt motions, the court also heard various other motions filed by the parties. The court's rulings on those motions are not at issue in the present appeal.

the children's extracurricular activity expenses that he then owed to the plaintiff. Critically, if the plaintiff disputed any amount, so claimed and documented by the defendant, she was prohibited from deducting that amount from any future payments she then owed to him until the dispute was resolved by the parties themselves or by the court. At the conclusion of that hearing, the court ordered the parties to attempt to reconcile the amounts they currently owed to one another, but also stated that a subsequent evidentiary hearing would be scheduled to determine those amounts if they were unable to reach an agreement.

The parties could not reach an agreement regarding the amounts they owed one another for their children's extracurricular activities and medical expenses, and, therefore, the court held an evidentiary hearing to resolve those issues on March 28, 2017. At that hearing, the court ordered the parties to submit proposed orders by April 12, 2017. On May 9, 2017, the court filed a written memorandum of decision in which it found that for the period from August 18, 2014 to November 23, 2016, the defendant owed the plaintiff $3742.08 for extracurricular activity fees, while the plaintiff owed the defendant $2303.59 for unreimbursed medical expenses. As a result, the court ordered the defendant to pay the plaintiff $1438.49, the net difference between those unpaid sums.

On June 7, 2017, the plaintiff filed a motion to reargue, asking the court to reconsider many of its findings and rulings on the parties' motions for contempt, including its decision not to hold the defendant in contempt and its method of calculating the amounts the parties owed to one another for their children's expenses. On June 28, 2017, the court issued its memorandum of decision denying the plaintiff's motion to reargue with respect to all issues except that of reimbursement for additional

orthodontic expenses.[4] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court erred in finding that she had violated its medical reimbursement order and in finding, on that basis, that she owed the defendant $2303.59. She further argues that the court erred in finding that the defendant's accounting summaries, as to amounts he had paid for the children's medical expenses, were credible. Specifically, the plaintiff argues that the numerical values listed by the defendant on his quarterly spreadsheets, which were submitted as evidence on the issue of unreimbursed medical expenses, were unsubstantiated by proper documentation. We disagree.

"At the outset, we note that the court's factual determinations will not be overturned on appeal unless they are clearly erroneous. . . . As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . Our review of factual determinations is limited to whether those findings are clearly erroneous. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Chowdhury* v. *Masiat*, 161 Conn. App. 314, 324, 128 A.3d 545 (2015).

During the evidentiary hearing on March 28, 2017, the court heard lengthy testimony as to the amounts

[4] See footnote 10 of this opinion.

allegedly owed by each party to the other. The defendant testified that he had incurred medical expenses for his children's health care that had been paid directly either from his health savings account or by his insurance provider. He claimed that his health savings account, his insurance payment history and his spreadsheets summarizing his children's medical expenses corroborated one another. The plaintiff, who appeared with counsel, was able to cross-examine the defendant at length as to his accounting methods. Moreover, the court questioned the defendant on multiple occasions with respect to his accounting summaries and the other evidence of payments he had presented to the court.

Before issuing its memorandum of decision, the court sought and received proposed orders from each party, which included suggested methods of calculation and summaries of expenses they wanted to have considered. In its revised memorandum of decision, the court addressed the discrepancies between the plaintiff's and the defendant's calculations, noting that many of those discrepancies arose from the parties' different accounting methods.[5] The court stated that the plaintiff interpreted its August 18, 2014 order, which provided that all unreimbursed payments owed at the time of the order had been reconciled, as an indication that the period for determining if the minimum annual threshold had been reached had been restarted. The court explained, however, that "the August 18, 2014 order does not preclude such prior expenses from being included in the calculation of the $3720 threshold for the calendar year 2014 . . . [and] [t]herefore, the expenses found to be incurred by the defendant during

[5] The two approaches differed in that they calculated what was owed on the basis of when the expense was incurred versus when the expense was actually paid. In the present case, the defendant argued that expenses incurred during any relevant quarter could be included in the accounting for that quarter. Conversely, the plaintiff argued that only expenses paid in a relevant quarter should be reimbursed in that quarter.

the remainder of 2014 were in excess of the . . . threshold [amount].'' The court also concluded that the language of its May, 2014 order supported the plaintiff's method of accounting, however, ''[o]nly for the purpose of finding the amounts due at this time, the court adopts the approach of the defendant. It does so primarily because it finds, based on the *credible testimony* of the defendant, that all of his claimed expenses had been paid by him by the time of the [March 28, 2017] hearing.''[6] (Emphasis added.)

Despite the plaintiff's repeated claim that the court erred in finding that the defendant's medical expense spreadsheet summaries were credible, our review of the record reveals that the court, instead, credited the defendant's *testimony* that he had, in fact, paid what he claimed to have paid before the March 28, 2017 hearing.[7] Because the court deduced that a number of the defendant's quarterly summaries included expenses that had been incurred and claimed in one quarter, but

[6] The memorandum of decision also provided that, ''because the plaintiff's proposed findings and orders highlight an issue likely to recur in the reconciliation of future unreimbursed medical expenses, the court makes a remedial order regarding expenses incurred and paid after November 23, 2016 . . . . Going forward, consistent with the terms of the judgement as modified by the May 27, 2014 order, the quarterly unreimbursed medical expense reconciliations shall be based on *actual payments* made during the quarter, and *shall not include expenses* to be paid in the future for services rendered during the quarter.'' (Emphasis added.)

[7] The following exchange occurred on the record:

''The Court: All right. Sir, now, you were asked before about when expenses were accrued as opposed to when they were paid. Is it your testimony now that every expense that you're claiming to have paid for the children, except the ones that your former wife paid herself, any unreimbursed medical expense, that you've paid them all as of now?

''The Defendant: Yes.

''The Court: So, you might not have paid it as of the time you requested reimbursement?

''The Defendant: Yes, Your Honor.

''The Court: But you've paid it by now?

''The Defendant: Yes.''

paid in another quarter, the defendant's testimony was found to have explained why there were discrepancies between his summaries and the documentation he presented to the court. Our review of the record indicates that during the March 28, 2017 hearing and on appeal, these discrepancies provided the basis for many of the plaintiff's claims that the defendant's accounting summaries were inaccurate.

The plaintiff also argues, in addition to claiming that the court erred in its method of calculation, that expenses were listed in the defendant's medical expense summaries that are irreconcilable with the record. As proof of such a contradiction, the plaintiff directed the court's attention to the defendant's medical expense summary sheet and, specifically, to the entry labeled "[Daughter's] Root Canal" for $506.30. The plaintiff claims that this entry is inaccurate, arguing that the reason the defendant could not provide any documentation of any payment or subsequent repayment of the expense was because she had paid for it. We do not agree with the plaintiff's resulting claim that the defendant's medical expense summaries are irreconcilable with the trial court record.

Moreover, at the time the court issued its memorandum of decision, it was in possession of the parties' proposed orders relating to the amounts owed, along with explanations of how the parties believed the expenses should be calculated. It is clear that the court was well aware of the differing accounting approaches with respect to the calculation of amounts owed by both parties, which is clearly indicated and discussed in the court's memoranda of decision. After a thorough review of the record, including the parties' proposed calculations, the exhibits, and the hearing transcripts, we conclude that the plaintiff has failed to establish that the court's determinations as to the amounts the

parties owed one another for their children's expenses were clearly erroneous.

II

The plaintiff next claims that the court abused its discretion in not finding the defendant in contempt for withholding payment from her. Specifically, the plaintiff argues that the court order requiring the payment in question was clear and unambiguous and that there was no evidence before the court suggesting that the defendant's violation of the order was anything other than wilful. We disagree.

The following legal principles guide our resolution of the plaintiff's claim. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *In re Jeffrey C.*, 261 Conn. 189, 196, 802 A.2d 772 (2002). "A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in failing to find that the actions or inactions of the [defendant] were in contempt of a court order. . . . To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . A finding that a person is or is not in contempt of a court order depends on the facts and circumstances surrounding the conduct. The fact that an order has not been complied with fully does not dictate that a finding of contempt must enter. . . . [It] is within the sound discretion of the court to deny a claim for contempt when there is an adequate factual basis to explain the failure to honor the court's order. . . .

"It is therefore necessary, in reviewing the propriety of the court's decision to deny the motion for contempt, that we review the factual findings of the court that led to its determination. The clearly erroneous standard is the well settled standard for reviewing a trial court's

factual findings. A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Citations omitted; internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 326–27, 966 A.2d 292, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009).

In the present case, the plaintiff argues simply that because the defendant's actions were knowing and voluntary, they must have constituted wilful contempt. The court's refusal to find the defendant in contempt, however, was not predicated on a finding that the defendant's actions were not knowing or voluntary, but was based on its finding that each party withheld payments from the other because of their common belief that it was proper to do so. The court explained this conclusion as follows in its oral decision on the parties' contempt motions: "[G]iven the period of time covered and the number of bills, it would not be possible today to hear all the evidence the court would have to hear in order to make a specific finding as to how much was due with respect to each of those and an ultimate finding as to who owed what to whom. . . . But it is clear to the court based on the evidence presented so far that both parties acted in a way that they believed was permitted by the court order. I don't say that it was appropriate for them to do so and there are principles of Connecticut law against self-help, but I don't believe that there would be grounds for a finding by clear and convincing evidence that either party had wilfully violated the court order."

Because the plaintiff fails to advance any compelling argument as to why the court's determination was not supported by the record and we are not left with the definite and firm conviction that a mistake has been made, we conclude that the court did not abuse its discretion in denying the plaintiff's motion for contempt.

III

The plaintiff next claims that the court abused its discretion when it allowed the defendant to withhold money unilaterally from her in the future if he believed that she owed him money for unreimbursed medical expenses. The plaintiff further claims that the court unnecessarily combined two unrelated orders to provide the defendant with the option of self-help, whereas she had to file a motion for contempt if the defendant failed to make the correct payments. We disagree.

It is well settled that "[c]ourts have continuing jurisdiction . . . to fashion a remedy appropriate to the vindication of a prior . . . judgment . . . pursuant to [their] inherent powers . . . . When an ambiguity in the language of a prior judgment has arisen as a result of postjudgment events, therefore, a trial court may, at any time, exercise its continuing jurisdiction to effectuate its prior [judgment] . . . by interpreting [the] ambiguous judgment and entering orders to effectuate the judgment as interpreted . . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Internal quotation marks omitted.) *Lawrence* v. *Cords*, 159 Conn. App. 194, 198–99, 122 A.3d 713, (2015).

In the present case, contrary to the plaintiff's claim, the court's remedial order lays out a detailed rule of future application that the defendant was to follow when presenting proof of unreimbursed medical expenses to the plaintiff. The court's order provided: "If and when the accumulated receipts for the year reach the threshold so that the plaintiff, under the current orders of the court, would be responsible to reimburse a percentage of those to the defendant, he shall include his calculation of what that amount is. And if the plaintiff disputes that calculation, she shall notify

the defendant in writing within thirty days after she's received those receipts. If she doesn't dispute it, then she shall make payment of her share within sixty days after her receipt of those receipts. If her undisputed portion of those expenses has not been paid to the defendant by the due date of the next quarterly installment of the activity fee, he shall then be entitled to deduct from that quarterly installment the amount of the unpaid share of unreimbursed expenses for medical [costs] owed by the plaintiff. If any amount is in dispute as notified properly by the plaintiff, there shall be no deduction until that dispute has been resolved either by agreement of the parties or by court order."

The order clearly provides that if the plaintiff disputed a future expense claimed by the defendant, then the defendant was not permitted "to deduct from that quarterly installment the amount of the unpaid share of unreimbursed expenses for medical [costs] owed by the plaintiff." Only when the plaintiff did not dispute the expense and it was overdue by an entire quarter, did the order allow for the defendant to make a deduction. After viewing the court's remedial order in the context of its previous orders, and acknowledging that the court, being intimately familiar with the details of the present case, was in the best position to give effect to the prior orders, we conclude that the court's remedial order was not manifestly unreasonable. Accordingly, the plaintiff has failed to demonstrate that the court abused its discretion by allowing the defendant to deduct undisputed unpaid medical expenses from subsequent payments.

IV

The plaintiff also claims that the court abused its discretion when it denied her motion to reargue.[8] Specifically, the plaintiff argues that the court incorrectly

[8] The motion filed with the court was titled "Motion to open, to submit additional and new evidence, to reargue and for reconsideration [of] the court's decision dated May 18, 2017." The court correctly treated the plain-

concluded that she had ample opportunity to submit evidence prior to the final hearing but had chosen not to do so. We disagree.

"[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Internal quotation marks omitted.) *Liberti* v. *Liberti*, 132 Conn. App. 869, 874, 37 A.3d 166 (2012). "The standard of review for a court's denial of a motion to reargue is abuse of discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Mengwall* v. *Rutkowski*, 152 Conn. App. 459, 465–66, 102 A.3d 710 (2014).

In her motion to reargue, the plaintiff argued that she had not been given a meaningful opportunity to present evidence on her motion for contempt. Specifically, she argued that the court had used an improper method in calculating what unreimbursed medical expenses were owed and that representations made by the defendant were not supported by the record.[9] She

tiff's motion as a motion to reargue. See Practice Book § 11–12. For the purpose of our analysis, we adopt the court's characterization and refer to the plaintiff's motion as her motion to reargue.

[9] The plaintiff also argued that the court incorrectly included orthodontic costs with medical and dental costs, despite each being covered by different orders and subject to different calculations. She further argued that she was not afforded a reasonable opportunity to address the issue of the orthodontic costs because they were not previously in dispute. The court

further argued that an additional hearing was warranted because she had acquired relevant evidence on the issue of contempt that arose after the court made its oral order of November 23, 2016, but before it issued its written memorandum of decision.[10]

In its memorandum of decision on the motion to reargue, the court stated: "The plaintiff seeks, among other things, a further opportunity to present evidence in support of a finding of contempt against the defendant. . . . The record will reflect that on November 3, 2016, a hearing commenced with regard to multiple motions filed by the parties, including each party's contempt motion against the other. It was made clear at the outset, and agreed by the parties, that a single combined hearing would be held on all of the pending motions. The hearing lasted essentially the entire afternoon of November 2, 2016, resuming on November 23, 2016, and continuing for most of that day. Both parties testified, with the plaintiff giving testimony for several hours spanning both dates. . . .

"By the end of the second day of the hearing on multiple motions, the court had heard sufficient credible evidence to conclude that while the activity fee and medical reimbursement orders had not been followed,

granted the plaintiff's motion with respect to this issue and permitted both parties to submit to the court any relevant evidence with respect to orthodontic expenses. The court's order provided: "[U]nder all the circumstances, the court concludes that the plaintiff did not understand or expect that orthodontia expenses would be taken into account. In the interest of justice, the court wishes to afford both parties the opportunity to provide evidence of such expenses."

[10] The court restricted the March 28, 2017 hearing to the presentation of evidence with respect to specific amounts owed by either party. In her motion to reargue, the plaintiff claimed that she possessed additional evidence of wilful contempt that occurred after the November 23, 2016 hearing. The court's decision, however, related specifically to the period from August 18, 2014 to November 23, 2016. The court correctly denied the plaintiff's motion with respect to this evidence because it concerned conduct that was outside of the relevant time frame.

there was also sufficient credible evidence to preclude it from finding contempt on the part of either party under the *Brody* standard.[11] For the reasons of judicial efficiency, and after hours of testimony which was sometimes repetitive, the court issued remedial orders at the end of the day on November 23, 2016. . . .

"The bulk of the remainder of the plaintiff's motion requests either the court's reconsideration of evidence presented at the hearing, or its allowance of additional evidence that might have been submitted at the hearing or that relates to events occurring after the conclusion of the hearing. With the exception of one issue,[12] the court denies those requests." (Footnotes added.)

Despite the plaintiff's assertions that the "court, without explanation, denied the plaintiff's request to present additional and new evidence, other than related to the orthodontia payments," the record is clear that the court provided the plaintiff with a sufficient explanation as to why it denied her motion. Furthermore, a review of the hearing transcripts indicates that counsel for the parties agreed in advance to prioritize certain issues before the court with respect to their various motions. Accordingly, the plaintiff has failed to demonstrate that the trial court abused its discretion when it denied her motion to reargue.

V

Lastly, the plaintiff claims that the court violated her due process right to be heard when it denied her motion for contempt before she rested her case-in-chief on that motion. Specifically, the plaintiff claims that she was not afforded a reasonable opportunity to cross-examine the defendant or to present evidence in support of her

[11] See *Brody* v. *Brody*, 315 Conn. 300, 319, 105 A.3d 887 (2015) (finding of civil contempt must be proven by clear and convincing evidence, not by preponderance of evidence).

[12] See footnote 11 of this opinion.

motion for contempt. She further argues that it is unclear how the court could make a credibility finding without the plaintiff's testimony in support of that motion. We disagree.

"It is a fundamental tenet of due process . . . that persons whose property rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. . . . Where a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained. . . . [A] party's constitutionally protected right to present evidence [however] is not unbounded. . . . To the contrary, we previously have determined that the court reasonably may limit the time allowed for an evidentiary hearing." (Citations omitted; internal quotation marks omitted.) *Harris* v. *Hamilton*, 141 Conn. App. 208, 215 n.5, 61 A.3d 542 (2013), citing *Szot* v. *Szot*, 41 Conn. App. 238, 241–42, 674 A.2d 1384 (1996).

"In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial. . . . Although it is axiomatic that the scope of cross-examination generally rests within the discretion of the trial court, [t]he denial of all meaningful cross-examination into a legitimate area of inquiry constitutes an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Dubreuil* v. *Witt*, 65 Conn. App. 35, 42, 781 A.2d 503 (2001).

The plaintiff argues that our decision in *Szot* applies with equal force in the present case. "In *Szot*, the court, *despite the protests of the plaintiff's counsel* that she

still had additional evidence to present, ended not only cross-examination but also the entire presentation of evidence. . . . This court held that the trial court's termination of the proceedings violated the plaintiff's due process right to be heard." (Citation omitted; emphasis added; internal quotation marks omitted.) *Corriveau* v. *Corriveau*, 126 Conn. App. 231, 237, 11 A.3d 176, cert. denied, 300 Conn. 940, 17 A.3d 476 (2011). Here, unlike in *Szot*, the court's oral decision with respect to the issue of contempt did not terminate the entire presentation of evidence; nor did the court make the order in spite of the plaintiff's express protest that she still had evidence to present with respect to contempt. Rather, near the end of the second day of the evidentiary hearing on November 23, 2016, during a short recess, the trial court met with counsel for both parties in chambers to address the contempt issue; upon resuming the hearing, the court made its ruling with respect to the parties' motions for contempt.[13]

In the court's ruling, it explained the need to make two sets of remedial orders to properly effectuate its previous orders. It stated: "One [set] is a remedial order to make a finding as to exactly what is owed by whom to whom. . . . The other set concerns the future and how we can avoid the situation where these parties are again operating at cross purposes and wind up back in court over the same issues." Thereafter, the court described the basis for its decision not to hold either party in contempt, how it wanted to approach the disputed amounts that were claimed under the court's previous orders, and how it was going to craft the remedial order so as to create a more workable situation in the future. The court then asked counsel: "Any questions or need for clarification of any of those orders?

[13] The court made the following statement: "I would ask [the court] monitor to prepare a transcript of the remarks and the interim orders that I'm about to make following a discussion I had in chambers with counsel during the recess."

Counsel?" In response, both counsel raised issues concerning the manner in which the parties would reconcile amounts owed to one another, the manner in which they should present proof of their expenses to one another, and whether there was a need for a further order expressly stating that the parties must act in good faith when disputing amounts claimed by one another. None of the issues raised with the court, however, concerned the court's announced intention not to hold either party in contempt.

Thereafter, before proceeding to closing argument, the court asked counsel again: "[Are there] [a]ny other questions?" Hearing none, the court stated: "Then that will dispose [of], for the time being, the motions for contempt subject to [a] further hearing if the parties aren't able to resolve the issue of the amounts that, as of this date, are due from either party to the other for unreimbursed medicals or activity fees. If the parties aren't able to reach an agreement, the court will have further hearing for the purpose of those remedial orders . . . ."

At no point during the remainder of the hearing did the plaintiff ask to submit additional evidence. Although the plaintiff continues to argue on appeal that she was unable to bring several pieces of relevant evidence to the court's attention, nothing in the record suggests that, had the plaintiff been allowed even greater latitude and more time, she would have presented evidence with respect to wilfulness that was not already before the court. The record indicates that the evidence that the plaintiff repeatedly claimed the court ignored largely dealt with the fact that the defendant knowingly made deductions from amounts he was ordered to pay to the plaintiff, which she, therefore, claims to have constituted acts of wilful contempt. As discussed previously in this opinion, however, "[n]oncompliance alone will not support a judgment of contempt. . . . [It] is within

the sound discretion of the court to deny a claim for contempt *when there is an adequate factual basis to explain the failure to honor the court's order*." (Emphasis added; internal quotation marks omitted.) *Spencer* v. *Spencer*, supra, 177 Conn. App. 542.

Our review of the record reveals that the plaintiff had a sufficient opportunity to provide the court with evidence of contempt during the November, 2016 hearings. Accordingly, the plaintiff has failed to show that her constitutional rights were violated or that she was deprived of a fair hearing as a result of the court's decision.

The judgment is affirmed.

In this opinion the other judges concurred.

PMC PROPERTY GROUP, INC., ET AL. *v.* PUBLIC UTILITIES REGULATORY AUTHORITY ET AL.
(AC 39609)

Lavine, Bright and Harper, Js.

Syllabus

The plaintiff companies appealed to this court from the trial court's judgment affirming in part the decision of the defendant Public Utilities Regulatory Authority, which found that the plaintiffs had engaged in the unauthorized submetering of electricity and, pursuant to that finding, imposed sanctions. The plaintiffs had installed a heating, ventilation, and air conditioning system in a multifamily apartment building owned and managed by the plaintiff P Co. P Co.'s electric service was measured through an electric company meter that supplied electricity to seven heating and air conditioning outdoor units and the common areas of the building. Two nonutility wattmeters, which were installed after P Co.'s electric company meter, measured the electricity used by the seven outdoor units and provided an input signal to a heating and air conditioning billing program. The plaintiffs billed each tenant for a portion of the heating and air conditioning compressors' electric use in proportion to the thermal use of the rental space of each tenant. Subsequently, the Office of Consumer Counsel and the state attorney

general filed a joint petition requesting that the authority investigate possible unauthorized submetering at P Co.'s apartment building. The statute authorizing the authority to regulate submetering ([Rev. to 2011] § 16-19ff, as amended by Public Acts 2011, No. 11-80, § 1) did not provide a definition for submetering, and, thus, in determining that the plaintiffs had engaged in unauthorized submetering, the authority relied on a definition of submetering used in one of its prior decisions. *Held*:

1. The plaintiffs could not prevail on their claim that because the authority previously had not established what constitutes electric submetering and, thus, its definition was not time-tested, the trial court erred in deferring to the authority's definition of electric submetering; an agency interpretation may warrant deference, even if not time-tested, if it involves extremely complex and technical regulatory and policy considerations, the determination of what constitutes electric submetering is a complex and technical regulatory issue that calls for such specialized expertise and policy considerations, and because our statutes authorize the authority to regulate submetering and the authority's utility commissioners also possess the required expertise needed to regulate submetering, the trial court properly determined that, due to the technical nature of the definition, it was appropriate to defer to the authority's definition of electric submetering.
2. The plaintiffs could not prevail on their claim that the trial court erred in concluding that the heating and air conditioning system fell within the authority's definition of submetering, which was based on their claim that the definition of submetering in the authority's previous decision was applicable only to submetering in the context of public gas utilities and, thus, was not applicable to electric submetering: the authority reasonably found through its reliance on its previous decision that the plaintiffs had engaged in unauthorized submetering, as the definition of submetering relied on by the authority did not focus on the form of energy that the tenants received but, instead, focused on the type of energy billed, and although the plaintiffs claimed that the fundamental component of electric submetering is the furnishing of electric service by a nonutility such that electric service is the physical delivery through wires of electricity to the end user for consumption, combined with measuring the electric consumption with an electric submeter, the state regulations (§§ 16-11-100 and 16-11-238) cited by the plaintiffs in support of their claim do not include a definition of submetering, and the decisions of the authority cited by the plaintiffs do not condition electric submetering by an entity on the furnishing of electric service by such entity and, in fact, one of those decisions included a definition of submetering that was similar to the definition employed by the authority in its decision in the present case, namely, the measurement and billing of the consumption of a utility's electric service to an individual end-use customer; accordingly, the trial court did not err in affirming the authority's determination that the plaintiffs' computation of the amount

of electricity used by each residential unit in using the heating and air conditioning system, and the subsequent billing in proportion to each rental space's use, constituted unauthorized submetering of electricity.

Argued January 15—officially released April 16, 2019

Procedural History

Appeal from the decision of the named defendant finding that the plaintiffs had engaged in the unauthorized submetering of electricity and imposing sanctions, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Schuman*, *J.*; judgment sustaining in part the plaintiffs' appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Michael J. Donnelly, with whom was *Paul R. McCary*, for the appellants (plaintiffs).

Robert L. Marconi, assistant attorney general, with whom was *George Jepsen*, former attorney general, for the appellee (named defendant).

Joseph A. Rosenthal, for the appellee (defendant Office of Consumer Counsel).

Vincent P. Pace, for the appellee (defendant The Connecticut Light and Power Company).

Jeffrey R. Babbin, for the appellee (defendant The United Illuminating Company).

Opinion

HARPER, J. The plaintiffs, PMC Property Group, Inc. (PMC), and Energy Management Systems, Inc. (EMS), appeal from the trial court's judgment affirming in part the decision of the defendant Public Utilities Regulatory Authority (authority),[1] which found that the plaintiffs

[1] The other defendants in this appeal are the state Office of Consumer Counsel, The United Illuminating Company, and The Connecticut Light and Power Company. In addition, the Office of the Attorney General, Greater Hartford Legal Aid, Inc., and Mitsubishi Electric Cooling & Heating, a division of Mitsubishi Electric & Electronics USA, Inc., were also named as defendants but are not parties to this appeal. To avoid confusion, we refer to each of the plaintiffs and the defendants by name where necessary.

had engaged in the unauthorized submetering[2] of electricity and, pursuant to that finding, imposed sanctions. On appeal, the plaintiffs claim that the court erred in (1) deferring to the authority's definition of electric submetering where that definition was not time-tested with respect to the heating and air conditioning system at issue in this appeal and (2) affirming the authority's determination that the plaintiffs' use of the heating and air conditioning system constituted submetering of electricity. We affirm the judgment of the court.

The following facts, as found by the authority and adopted by the trial court, and procedural history are relevant to our resolution of this appeal. PMC owns and is the property manager of a multifamily apartment building located at 38 Crown Street, New Haven. The apartment building has sixty-five residential apartments and one commercial unit (rental space). EMS provides billing services for PMC. In 2011, the plaintiffs renovated the building and installed a heating, ventilation, and air conditioning (HVAC) system manufactured by Mitsubishi Electric Cooling & Heating, a division of Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi).[3] The HVAC system is a heat pump system with heat recovery.

Sensors and valves are installed in the indoor piping of each rental space and are used with computer software to measure the HVAC thermal use of each space.

[2] The definition of electrical utility submetering is at the heart of this appeal. Indeed, our research reveals that our General Statutes, regulations, and case law have not defined submetering in this context. New York case law has defined submetering in the electric utility context as when "[t]he owner or operator of a building buys current from a public utility at the wholesale rate and resells it through separate meters to individual tenants, usually at a retail rate." *Campo Corp.* v. *Feinberg*, 279 App. Div. 302, 303, 110 N.Y.S.2d 250, aff'd, 303 N.Y. 995, 106 N.E.2d 70 (1952). This definition is consistent with how the authority has defined the term in connection with the submetering of natural gas, as discussed in part I of this opinion.

[3] The plaintiffs note in their brief before this court that, although the trial court used the acronym HVAC in describing the system, the Mitsubishi system does not have a ventilation component.

Each rental space has a thermostat to control its heating and cooling level, and is separately served through its own meter from The United Illuminating Company (electric company). PMC's electric service is measured through one electric company meter that supplies electricity to seven HVAC outdoor units and the common areas of the building. Two nonutility wattmeters installed after PMC's electric company meter measure the electricity used by the seven outdoor units and provide an input signal to an HVAC billing program.

In March, 2012, PMC, acting through EMS, began billing each tenant for a portion of the seven HVAC compressors' electric use in proportion to the HVAC thermal use of the rental space of each tenant. On August 17, 2012, the Office of Consumer Counsel and the state attorney general filed a joint petition requesting that the authority investigate possible unauthorized submetering at PMC's apartment building. The authority conducted a hearing on November 19, 2012, and rendered a decision on June 5, 2013. In its conclusion, the authority ruled that PMC conducted unauthorized submetering at the building. The authority then entered an order providing that PMC shall immediately stop submetering electricity, EMS shall cease submetered billing to the tenants at the building, and PMC shall return all payments collected from each tenant for submetering electricity.

The plaintiffs appealed to the Superior Court, claiming that the authority erred in concluding that they had engaged in unauthorized submetering and challenging the authority's order of relief. In its memorandum of decision issued August 22, 2016, the court applied a deferential standard of review and concluded that the authority did not act unreasonably, arbitrarily, illegally

or in abuse of its discretion in concluding that the system at issue constituted unauthorized submetering.[4] This appeal followed.

I

The plaintiffs' first claim on appeal is that the trial court erred in deferring to the authority's definition of electric submetering. Specifically, the plaintiffs claim that because the authority previously had not established what constitutes electric submetering, its definition of such was not time-tested, and, thus, the court should not have afforded the authority deference. In response, the defendants claim that an agency's interpretation may warrant deference, even if not time-tested, if it involves extremely complex and technical regulatory and policy considerations. We agree with the defendants.

We begin our analysis with the applicable standard of review. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions

[4] Additionally, although the court concluded that the authority lacked the statutory power to order rebates in this case, it ordered the parties to arrange for the return, with interest, of tenant submetering funds to the tenants, which had been escrowed during the pendency of the appeal to the trial court. The plaintiffs have not challenged this order on appeal.

of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) *Recycling, Inc.* v. *Commissioner of Energy & Environmental Protection*, 179 Conn. App. 127, 139–40, 178 A.3d 1043 (2018).

Moreover, "[a]lthough the interpretation of statutes is ultimately a question of law . . . it is the well established practice of [our appellate courts] to accord great deference to the construction given [a] statute by the agency charged with its enforcement. . . . It is also well established that courts should accord deference to an agency's formally articulated interpretation of a statute when that interpretation is both time-tested and reasonable." (Citation omitted; internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 678–79, 99 A.3d 1038 (2014). Our Supreme Court has determined, however, that the "traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 163, 931 A.2d 890 (2007).

Although our Supreme Court has determined that deference is not ordinarily afforded to an agency's statutory interpretation that has not previously been time-tested or subject to judicial scrutiny, the court also has articulated an exception to that rule. See *Wheelabrator Lisbon, Inc.* v. *Dept. of Public Utility Control*, 283 Conn.

672, 692, 931 A.2d 159 (2007). In *Wheelabrator Lisbon, Inc.*, the Department of Public Utility Control, the authority's predecessor, was required "to determine whether the word 'electricity' as used in [General Statutes] § 16-243a (c) . . . included the renewable energy component of the electricity and whether the purchase of such electricity at the avoided cost rate entitled the utility [company] to credit for the purchase of renewable energy for purposes of [General Statutes] § 16-245a." Id., 691–92. The court stated that "[b]ecause this is a question of statutory interpretation that previously has not been subject to judicial scrutiny, our review ordinarily would be plenary." Id., 692. The court concluded, however, that "*in light of the extremely complex and technical regulatory and policy considerations implicated by this issue*, we are not persuaded that we may substitute our judgment for that of the department. Rather, this is *precisely the type of situation that calls for agency expertise*." (Emphasis added; internal quotation marks omitted.) Id. As such, the court limited its review "to a determination of whether the department [or agency] gave reasoned consideration to all of the relevant factors or whether it abused its discretion." Id.

In the present case, the authority was to determine whether the plaintiffs' method of billing each tenant for a share of the electricity cost to operate the HVAC system at PMC's apartment building constituted electric submetering. The statute authorizing the authority to regulate submetering is General Statutes (Rev. to 2011) § 16-19ff, as amended by Public Acts 2011, No. 11-80, § 1,[5] which does not provide a definition for submetering. As such, the authority relied on a definition of

[5] General Statutes (Rev. to 2011) § 16-19ff, as amended by Public Acts 2011, No. 11-80, § 1, provides: "(a) Notwithstanding any provisions of the general statutes to the contrary, each electric company or electric distribution company shall allow the installation of submeters at a recreational campground, individual slips at marinas for metering the electric use by individual boat owners or in any other location as approved by the authority and shall provide electricity to such campground at a rate no greater than

submetering used in its Decision and Order, Department of Public Utility Control, "DPUC Investigation into Sub-Metering Natural Gas," Docket No. 06-09-01 (October 17, 2007). That decision defined a "sub-meter" in a natural gas context as "any type of meter or metering device that is placed either in the gas stream, on an appliance, or control system located downstream of the [local distribution company's] meter, which is used to bill individual unit owners or apartment tenants for their usage or estimated usage of a portion of the [local distribution company] customer's total bill." Id., p. 8. In the present case, the authority applied this definition in determining that the plaintiffs had engaged in unauthorized submetering, and the trial court concluded that, due to the technical nature of the definition, it was appropriate to grant deference to the authority's use of it.

As the record reflects, the determination of what constitutes submetering is a complex and technical regulatory issue that calls for specialized expertise and policy considerations. Moreover, not only does § 16-19ff authorize the authority to regulate submetering, but the authority's utility commissioners also possess

the residential rate for the service territory in which the campground or marina is located, provided nothing in this section shall permit the installation of submeters for nonresidential use including, but not limited to, general outdoor lighting marina operations, repair facilities, restaurants or other retail recreational facilities. Service to nonresidential facilities shall be separately metered and billed at the appropriate rate.

"(b) The Public Utilities Regulatory Authority shall adopt regulations, in accordance with the provisions of chapter 54, to carry out the purposes of this section. Such regulations shall: (1) Require a submetered customer to pay only his portion of the energy consumed, which cost shall not exceed the amount paid by the owner of the main meter for such energy; (2) establish standards for the safe and proper installation of submeters; (3) require that the ultimate services delivered to a submetered customer are consistent with any service requirements imposed upon the company; (4) establish standards for the locations of submeters and may adopt any other provisions the authority deems necessary to carry out the purposes of this section and section 16-19ee."

the required expertise needed to regulate submetering in this context. See General Statutes § 16-2 (e).[6] Accordingly, we conclude that the trial court properly deferred to the authority's definition of submetering.

II

The plaintiffs next claim that the trial court erred in concluding that the HVAC system in this case fell within the authority's definition of submetering. Specifically, the plaintiffs argue that the definition of submetering in the authority's previous decision is applicable only to submetering in the context of public gas utilities and, thus, is not applicable to electric submetering.

Because we concluded in part I of this opinion that the trial court appropriately deferred to the authority's definition of submetering, our review is limited "to a determination of whether [the authority] gave reasoned consideration to all of the relevant factors or whether it abused its discretion" in concluding that the plaintiffs had engaged in unauthorized submetering. *Wheelabrator Lisbon, Inc.* v. *Dept. of Public Utility Control*, supra, 283 Conn. 692.

In analyzing whether submetering had occurred at the apartment building, the authority first focused on the situation at the building, including the building layout, the HVAC system and billing related thereto, and the electric service provided to tenants. The authority then applied § 16-19ff and correctly concluded that PMC was not authorized to submeter electricity to the building without the authority's express approval. Finally,

[6] General Statutes § 16-2 (e) provides in relevant part that "any newly appointed utility commissioner of the authority shall have education or training and three or more years of experience in one or more of the following fields: Economics, engineering, law, accounting, finance, utility regulation, public or government administration, consumer advocacy, business management, and environmental management. . . ."

the authority analyzed the activity alleged as submetering and applied the definition of submetering as laid out in its previous decision regarding natural gas. Specifically, the authority found that "PMC indicated that it used the measurements of the refrigerant or heating medium to allocate one of the costs of supplying HVAC to the [building], *by measuring the electricity used by the rooftop compressor to each tenant and billing the proportionate cost to each apartment*." (Emphasis added.) Moreover, the authority found that "in addition to the two third-party electricity meters and a computer program that determines the electricity used by the seven outdoor units, there are other mechanical devices installed in each tenant's [rental] space *that make measurement of thermal use and* [*allocate*] *the electricity costs for the seven outdoor units to each apartment in proportion to its thermal use*." (Emphasis added.) The authority concluded that PMC's use of its "HVAC system and the equipment's sensing devices, its use of two third-party wattmeters, and the allocation and billing of the outdoors units' [kilowatt-hour] use, constitute[d] submetering electricity use," and that this, in addition to EMS's billing of tenants for that use, had not been approved by the agency.

We agree with the trial court and conclude that the authority reasonably found through its reliance on its previous decision that the plaintiffs had engaged in unauthorized submetering. As did the trial court, we conclude that the definition of submetering relied on by the authority "does not focus on the form of energy that the tenants receive," but, "[r]ather, it focuses on the type of energy billed."

The plaintiffs additionally argue that electric submetering is defined as "the secondary furnishing of electric service by a customer to a third party." In particular,

the plaintiffs cite to §§ 16-11-100[7] and 16-11-238[8] of the Regulations of Connecticut State Agencies, in addition to the authority's decisions referencing electric submetering,[9] in arguing that the fundamental component of electric submetering is the furnishing of electric service by a nonutility such that electric service is the physical delivery through wires of electricity to the end user for consumption, combined with measuring the electric consumption with an electric submeter. We are unpersuaded.

As previously discussed, the trial court appropriately deferred to the authority's definition of submetering

[7] Section 16-11-100 of the Regulations of Connecticut State Agencies provides in relevant part: "(f) Submetering Customer means any recreational campground, or other facility as approved by the Department [of Public Utility Control], whose electric service is furnished by an electric company and who is authorized to submeter the service to other parties within such facility;

"(g) Submetered Party means any person, partnership, firm, company, corporation or organization whose electric service is furnished by a submetering customer of an electric company . . . ." (Internal quotation marks omitted.)

[8] Sections 16-11-238 of the Regulations of Connecticut State Agencies provides: "(a) All watt-hour meters installed and owned by a submetering customer shall be tested periodically in conformity with the most recent ANSI Code for Electricity Metering. Meter test data shall be furnished to the Department [of Public Utility Control] upon request.

"(b) Meter records shall be kept by the submetering customer and shall include the identification of each meter, the date and place of its latest installation or removal and the date and results of the most current meter test. These records shall be maintained for the previous two years.

"(c) Every submetering customer shall provide to the Department, upon request data or records as may be deemed necessary by the Department related to the submetering and furnishing of electric service to submetered parties."

[9] The plaintiffs cite to Interim Decision and Order, Public Utilities Regulatory Authority, "PURA Generic Investigation of Electric Submetering," Docket No. 13-01-26 (August 6, 2014) p. 5, and Decision and Order, Department of Public Utility Control, "Request of Brewers Pilots Point Marine et al., for a Declaratory Ruling Regarding Electric Service, Submetering and Rates Applicable to Boat Docks at Marinas," Docket No. 01-08-11 (November 27, 2002) p. 3.

and its decision applying § 16-19ff. See part I of this opinion. In addition, not only do §§ 16-11-100 and 16-11-238 of the Regulations of Connecticut State Agencies not provide for a definition of submetering, but § 16-11-238 is also only relevant to meter testing and record keeping by submetering customers. The authority's decisions cited by the plaintiffs also do not condition electric submetering by an entity on the furnishing of electric service by such entity. Rather, Decision and Order, Department of Public Utility Control, "Request of Brewers Pilots Point Marine et al., for a Declaratory Ruling Regarding Electric Service, Submetering and Rates Applicable to Boat Docks at Marinas," Docket No. 01-08-11 (November 27, 2002) p. 3, merely states that, subject to the authority's approval, marinas may submeter "provided they supply electric service at the same quality as that provided by the local utility." Moreover, the definition of submetering, as laid out in Interim Decision and Order, Public Utilities Regulatory Authority, "PURA Generic Investigation of Electric Submetering," Docket No. 13-01-26 (August 6, 2014) p. 5, does not include language conditioning submetering on the provision of electric service but, rather, appears similar to the definition employed by the authority in its decision in the present case: "measurement and billing of the consumption of a utility's electric service to an individual end-use customer . . . ." The plaintiffs acknowledge that "the system's computer software is used to determine the amount of refrigerant used by each unit." The plaintiffs also concede in their brief that "[this] software . . . uses the refrigerant meter results to allocate the cost of the electricity used by the outdoor compressor units across all the connected indoor units. The system, thus, meters the electricity used by the HVAC compressors and bills this usage to the sixty-five residential apartments . . . in proportion

to each tenant's HVAC thermal use." Finally, it is undisputed that the plaintiffs did not obtain the authority's approval prior to engaging in submetering.

On the basis of the foregoing, we conclude that the trial court did not err in affirming the authority's determination that the plaintiffs' computation of the amount of electricity used by each residential unit in using the HVAC system, and the subsequent billing in proportion to each rental space's use, constituted unauthorized submetering of electricity.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHELLE LEVINE *v.* RANDALL HITE ET AL.
(AC 40626)

Alvord, Prescott and Eveleigh, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries she suffered when her automobile collided with a vehicle that was operated by the defendant R and owned by the defendant T. Prior to trial, the trial court denied the defendants' motion to compel the production of certain of the plaintiff's medical payment records. The court determined that the motion to compel was untimely in light of a scheduling order that a previous trial court had entered more than one year before, which stated that written discovery was done. The court also noted that the parties were without a jury, as half of the jurors who previously had been chosen had been excused from service on the jury. Thereafter, a different trial court entered an order that included dates for jury selection and trial, and precluded, inter alia, further continuances, motions and discovery without prior permission from the court. The defendants then sought reargument and reconsideration of the denial of their motion to compel, claiming, inter alia, that because the matter had been rescheduled, there was plenty of time to secure the plaintiff's medical records. The trial court that denied the motion to compel denied the defendants' motion for reargument and reconsideration, stating that the motion for reargument and reconsideration had been filed in violation of the court order that required prior permission from the court to file additional pretrial motions. When the parties appeared for jury selection, a different judge,

who had been assigned as the trial judge, granted the plaintiff's motion for a continuance when her counsel requested a postponement for medical reasons and, sua sponte, permitted the defendants to continue with discovery. The trial judge thereafter declined the plaintiff's motion for reargument and reconsideration of his decision to allow the defendants to engage in further discovery, which was based on the plaintiff's assertion that the trial judge's ruling deprived her of her due process rights to notice and an opportunity to be heard, and was contrary to the law of the case doctrine. After a different trial court granted the defendants' motion for an order of compliance to procure certain of the plaintiff's medical records, the defendants filed a motion for a judgment of nonsuit in which they claimed that the plaintiff had failed to comply with the order of compliance. A different trial court denied the defendants' motion for a judgment of nonsuit without prejudice and ordered the plaintiff to produce the previously requested medical records. That court then entered an order of nonsuit after the defendants again sought a judgment of nonsuit on the ground that the plaintiff had failed to comply with the courts' discovery orders. On appeal to this court, the plaintiff claimed, inter alia, that her due process rights were violated when the trial judge improperly reconsidered the trial court's ruling denying the defendants' motion to reargue the denial of their motion to compel, and allowed the defendants to engage in further discovery without affording her a fair opportunity to respond. The plaintiff further claimed that her failure to comply with the trial courts' discovery orders did not warrant the rendering of a judgment of nonsuit against her. *Held*:

1. The trial judge did not violate the plaintiff's due process rights by reconsidering, sua sponte, the defendant's prior request to obtain additional discovery and permitting the defendants to engage in further discovery: the trial judge did not abuse his discretion by permitting additional discovery, as his ruling was a case management decision, he was aware of the filings in the case and was willing to accommodate the plaintiff's request to postpone trial when her counsel requested a continuance for medical reasons, and, notwithstanding the plaintiff's claim that the rulings of the prior trial court were the law of the case, the trial judge emphasized that circumstances had changed since the prior ruling; moreover, because the discovery issue was raised at a hearing that was necessitated by the plaintiff's motion to continue the trial for an additional six to eight weeks, it was not surprising that the trial judge would raise and decide other issues that were impacted by such a lengthy delay, the defendants' ongoing requests to obtain certain of the plaintiff's records, although previously determined to be untimely and made without prior permission of the court, could be seen as reasonable in light of the change in circumstances, the plaintiff made no request for a recess to review the file and prepare her arguments, there was no indication as to what the plaintiff would have argued if she had had advance notice and the opportunity to be heard on the defendants'

request to engage in further discovery, and there was no evidence to support the plaintiff's assumption that the trial judge was unfamiliar with the prior rulings in the case and acted without knowledge of the contents of the file.

2. The trial court did not abuse its discretion in rendering judgment of nonsuit against the plaintiff for failing to comply with three previous orders of the court concerning discovery; the discovery orders of three different trial courts were reasonably clear, it was undisputed that the plaintiff failed to comply with those orders, and the court that rendered judgment properly considered all of the relevant factors in ordering the nonsuit, and given that the plaintiff chose not to comply with the orders of three trial courts, she did so at the risk of having her claims fail on appeal, and the trial judge's sua sponte decision to allow the defendants to engage in further discovery was reasonable and proper.

3. The trial court did not abuse its discretion when it ruled on the defendants' motion for a judgment of nonsuit prior to considering the plaintiff's motion for an order of sanctions against the defendants' counsel; the court's decision was one of case management, and the plaintiff cited no relevant authority that would have required the court to consider her motion first.

Argued January 15—officially released April 16, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro*, *J.*, denied the defendants' motion to compel; thereafter, the court, *Sheridan*, *J.*, issued certain orders pertaining to trial; subsequently, the court, *Shapiro*, *J.*, denied the defendants' motion for reargument and reconsideration of its ruling denying the defendants' motion to compel; thereafter, the court, *Noble*, *J.*, granted the plaintiff's motion for a continuance, granted the defendants' motion for reargument and reconsideration of the denial of their motion to compel, and issued certain orders pertaining to discovery; subsequently, the court, *Noble*, *J.*, denied the plaintiff's motion for reargument and reconsideration of its orders pertaining to discovery; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the defendants'

motion for an order of compliance; subsequently, the court, *Hon. A. Susan Peck*, judge trial referee, denied the defendants' motion for a judgment of nonsuit and issued certain orders pertaining to discovery; thereafter, the court, *Hon. A. Susan Peck*, judge trial referee, issued an order of nonsuit and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (plaintiff).

William J. Melley III, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff, Michelle Levine, appeals from the trial court's judgment of nonsuit rendered in favor of the defendants, Randall Hite and Tanya Hite, as a result of the plaintiff's failure to comply with three previous orders of the court regarding discovery. On appeal, the plaintiff claims that (1) the court, *Noble, J.*, improperly raised and considered a prior ruling of the court, *Shapiro, J.*, without affording her a fair opportunity to respond, (2) the plaintiff's failure to comply with discovery orders did not warrant the rendering of a judgment of nonsuit by the court, *Hon. A. Susan Peck*, judge trial referee, and (3) Judge Peck improperly declined to consider the plaintiff's motion for sanctions against the defendants' counsel prior to rendering the judgment of nonsuit. We affirm the judgment of the trial court.

A review of the following somewhat complicated procedural history is necessary to our resolution of the issues on appeal. In December, 2012, the plaintiff commenced a personal injury action against the defendants claiming that she was operating her vehicle on or about December 6, 2010, when it was struck by another vehicle operated by Randall Hite and owned by Tanya Hite.

The matter was scheduled for trial with jury selection to commence on December 6, 2016. Because of scheduling issues raised by the plaintiff's counsel and the defendants' counsel, the parties discontinued jury selection after one day, and the court continued the trial to January 4, 2017.

Jury selection commenced on January 5, 2017. On January 6, 2017, the defendants filed a "Motion to Compel And/Or Preclude" (motion to compel) in response to a Blue Cross/Blue Shield printout, evidencing medical payments that the plaintiff had provided to the defendants on January 4, 2017. In the motion to compel, the defendants claimed that the plaintiff had failed to produce certain designated records. They requested that the court order her to produce those records at least twenty-four hours prior to the start of evidence or else be precluded from entering any evidence of her physical injuries at trial.

Jury selection was completed on January 11, 2017, and the trial was scheduled to commence on January 18, 2017. On January 12 and 13, 2017, Judge Shapiro heard arguments on the defendants' motion to compel and the defendants' objections to the plaintiff's proposed exhibits that were being premarked by counsel for trial. On January 18, 2017, Judge Shapiro informed the parties that four of the eight jurors selected had written letters to the court requesting that they be excused from serving on the jury. Judge Shapiro stated that the presiding judge had excused those jurors, which left the parties without a jury for trial. Because the case could not proceed at that time, Judge Shapiro indicated that he would put on the record his rulings on the matters previously argued by counsel.

With respect to the defendants' motion to compel, Judge Shapiro concluded that the motion was "untimely" and denied the motion for the following

reasons: "The return date in this matter was January 8, 2013. The plaintiff is proceeding on the original complaint dated November 20, 2012. The plaintiff's deposition was taken in January, 2015.

"On October 7, 2015, the court entered a scheduling order. Therein it was stated that written discovery was done and the—all depositions were to be completed by November 15, 2016.

"On that same date, October 7, 2015, which is obviously over a year ago, the court—not this court but a court officer—held a pretrial conference. It's undisputed that at that pretrial conference, as part of her written presentation, the plaintiff presented a printout of her medical expenses. See Plaintiff's Exhibit 1 to the January 12, 2017 hearing.

"That printout lists dates and services, types of services, and names of medical providers of the plaintiff beginning in December, 2010. The names of providers and dates of services were provided to the defendants, and the bulk of the dates of records they complain of not receiving were made known to them at that time.

"Had the defendants wanted more information or records, they could have taken steps to obtain them before jury selection began. For example, they could have asked the plaintiff to provide the additional records well in advance of the trial. They already had a medical authorization to obtain records and could have used it or asked for another from the plaintiff. The defendants could have sought to redepose the plaintiff. . . .

"Also, in their motion, the defendants provided no exhibits, such as the plaintiff's previous responses to their written discovery requests.

"The defendants could have timely filed a motion to compel long before trial saying that previous discovery

compliance was incomplete, that the plaintiff had failed to disclose her medical condition and treatment. They could have asked for a status conference to discuss issues they have belatedly raised in their motion. The court's docket reflects that no motion to compel was filed until January 6, which was after jury selection had begun.

"The court finds that the defendants were on notice in October, 2015, of issues which they are raising now in their motion, more than a year later. The defendants' presentation is untimely."

On January 20, 2017, the court, *Sheridan*, *J.*, entered the following order in this case:

"Jury selection will commence on March 14, 2017. This is a firm trial date. Both counsel are responsible for ensuring that they and their clients and witnesses are ready for trial on the scheduled date. NO FURTHER CONTINUANCES OF THE TRIAL DATE WILL BE PERMITTED, absent compelling circumstances which are fully beyond the ability of counsel to anticipate, prevent or control.

"Between now and the commencement of jury selection, no additional pretrial motions, pretrial discovery, or designation of additional witnesses or additional exhibits for trial will be permitted, without the prior permission of the court based upon a showing of good cause."

On January 27, 2017, the defendants filed a motion to reconsider Judge Shapiro's January 18, 2017 denial of their motion to compel. The defendants, noting that the matter had been rescheduled for mid-March, claimed that there was "plenty of time to secure the medical records" and that the plaintiff's prior medical authorization had expired. The defendants requested

that the court order the plaintiff to furnish an authorization for the defendants to secure those records. The plaintiff filed an objection to the defendants' motion on February 8, 2017. One month later, on February 27, 2017, Judge Shapiro denied the defendants' motion to reconsider, referencing Judge Sheridan's order requiring prior permission of the court to file additional pretrial motions and stating that the defendants' motion to reconsider had been filed in violation of that order.

On March 16, 2017, the parties appeared for jury selection before Judge Noble, now assigned as the trial judge for this matter. At that time, the plaintiff's counsel[1] presented the court with a physician's note that indicated she was temporarily "unable to carry out her duties" because of certain medical conditions. On the basis of the physician's note, the plaintiff's counsel requested a six to eight week continuance.

Judge Noble then addressed the defendants' counsel, Attorney William J. Melley III, with the following question: "You had a motion, Mr. Melley, to reconsider and to reargue Judge Shapiro's order denying you the right to continue discovery; is that correct?" Attorney Melley responded: "Yes, Your Honor." At that point, Judge Noble ruled: "All right. Your motion for continuance is granted. The motion to reargue is granted. Your motion to continue discovery is now permitted."

When the plaintiff's counsel objected, stating that she believed that the court was penalizing her because she currently was unable to proceed to trial, Judge Noble provided the following reasons for his ruling: "So, we have six to eight weeks. We have a case that is from

[1] Two attorneys, Harvey L. Levine and Jennifer Beth Levine, filed appearances on behalf of the plaintiff. Attorney Harvey L. Levine told Judge Noble that his health issues prevented him from being lead counsel for this jury trial. When we refer to plaintiff's counsel in the singular in this opinion, we are referring to Attorney Jennifer Beth Levine.

2013. We have a case that encountered significant difficulties because of all counsel in getting to trial. We have one attorney who is unable to continue because of [a] physical [condition] and another attorney who claims that he is unable to continue because of physical disabilities, so I will accommodate both your schedules. Given the fact that we have now another six to eight weeks to go, [the defendants' counsel] has an opportunity to conduct further discovery."

On April 5, 2017, the plaintiff filed a motion to reargue Judge Noble's decision allowing the defendants to engage in further discovery. In that motion, the plaintiff set forth the procedural history of the case, emphasizing that Judge Shapiro had denied the defendants' motion to compel and had denied the defendants' motion to reconsider that had been filed in violation of Judge Sheridan's order. The plaintiff argued that the court's sua sponte reconsideration of Judge Shapiro's ruling deprived her of her due process rights to notice and an opportunity to be heard, and also was contrary to the law of the case doctrine. The defendants filed an objection to the plaintiff's motion to reargue on April 11, 2017. On April 12, 2017, Judge Noble denied the plaintiff's motion to reargue and sustained the defendants' objection to that motion. In sustaining the defendants' objection, Judge Noble stated: "The continuance of the trial date operates to ameliorate the need for discontinuance of further discovery."

On March 30, 2017, the defendants filed a motion for an order for compliance, seeking specified medical records from the plaintiff that the defendants claimed had not been completely disclosed. In the motion, the defendants represented that, if the plaintiff preferred, they would accept an authorization to secure those records. The defendants moved for an order of compliance or, in the alternative, such other relief as the court deemed appropriate, including, inter alia, the entry of

a nonsuit against the plaintiff. The plaintiff filed an objection to the defendants' motion on April 10, 2017, claiming that her motion to reargue Judge Noble's decision should first be considered. She stated that she was incorporating all of the arguments set forth in her motion to reargue in her objection to the defendants' motion. On April 25, 2017, the court, *Hon. Constance L. Epstein*, judge trial referee, granted the defendants' motion for an order for compliance. Judge Epstein's order provided: "Plaintiff must comply with all outstanding discovery requests for medical records and billings by May 2, 2017." The plaintiff did not move to reargue Judge Epstein's decision.

On May 3, 2017, the defendants moved for a judgment of nonsuit, claiming that the plaintiff had failed to comply with Judge Epstein's order. The plaintiff filed an objection to the defendants' motion for judgment on May 11, 2017, again outlining in detail Judge Shapiro's prior orders denying the defendants' request for further discovery and Judge Sheridan's order requiring prior permission of the court to file additional pretrial motions before jury selection. The plaintiff argued that the prior rulings had never been vacated and, therefore, that Judge Noble's sua sponte ruling allowing the defendants the opportunity for further discovery was made "without any legal or statutory authority" and was "invalid." The plaintiff further claimed that the rulings of Judge Noble and Judge Epstein were contrary to the law of the case. Finally, the plaintiff argued that the sanction of a nonsuit was not proportional to the "purported failure" to comply with Judge Epstein's order.

On May 15, 2017, following a hearing before the court, Judge Peck ruled on the defendants' motion for judgment. In the following order, Judge Peck denied the defendants' motion without prejudice: "However, after review of the several court orders concerning discovery of certain of the plaintiff's medical records relating to

this case, as well as the plaintiff's extensive objection (#154) to this motion, in accordance with the two most recent court orders issued, #149.86 (*Noble*, *J.*), and #145.86 (*Hon. Constance L. Epstein*, judge trial referee), which have both required production of the documents at issue, the undersigned can discern no compelling reason to disturb those decisions, which now constitute the law of the case. Accordingly, the plaintiff is hereby ordered to produce the requested medical records identified in the defendants' motion for order of compliance (#145), and more particularly identified in [their] motion to compel (#122), or produce appropriate authorization(s) from the plaintiff to the defendants' counsel, no later than 5/30/17, authorizing him to obtain such records directly from the medical providers in question. The court notes that Judge Epstein originally ordered that the same records be produced by 5/2/17. . . ."

The plaintiff did not move to reargue Judge Peck's decision. She filed a notice of intent to appeal the court's ruling on May 26, 2017. Additionally, on May 26, 2017, the plaintiff filed a motion for an order of sanctions against the defendants' counsel. After reciting the extensive factual and procedural history of the case, the plaintiff argued that the defendants' counsel had "consistently misrepresented material facts and the law of the case to the court . . . ." On May 31, 2017, the defendants again moved that the court nonsuit the plaintiff for her failure to comply with the orders of Judge Epstein and Judge Peck. The defendants represented that the plaintiff failed to provide the specified medical records or to produce appropriate authorizations to secure those records. On June 7, 2017, the defendants' counsel filed a motion for an extension of time to respond to the plaintiff's motion for an order of sanctions. In that motion, the defendants stated that a motion for judgment was pending before the court and

that the court's ruling on the defendants' motion for judgment could render moot the issues raised in the plaintiff's request for sanctions.

On June 8, 2017, the plaintiff filed a "Reply To Defendants' Motion For Judgment." In her reply, the plaintiff again extensively reviewed Judge Shapiro's rulings, attaching a transcript of the January 18, 2017 hearing before Judge Shapiro as an exhibit. The plaintiff then claimed that she was "being forced to disclose irrelevant information so that the [d]efendants can inappropriately cause confusion . . . ." The plaintiff additionally requested that the court rule on her motion for an order of sanctions before ruling on the defendants' motion for judgment. Finally, after claiming "a gross violation of her due process rights," the plaintiff requested "that this action be dismissed at this point for the purpose of the plaintiff taking an appeal . . . ."

On June 19, 2017, Judge Peck issued a comprehensive order on the defendants' motion for judgment: "The court hereby orders a nonsuit as to the plaintiff for failure to comply with three previous orders of the court concerning discovery in this case. The discovery in question was specifically identified in the defendants' motion to compel (#122). Two such orders (#145.86 [*Hon. Constance L. Epstein*, judge trial referee,] and #152.86 [*Hon. A. Susan Peck*, judge trial referee]), contained deadlines of 5/2/17 and 5/30/17, respectively. The discovery subject of the motion to compel was originally authorized by a third order of the court issued on 4/12/17 (#149.86 [*Noble, J.*]).[2] On 1/20/2017, a jury trial in this case, which was scheduled to commence evidence on 1/18/2017 before Judge Shapiro, was postponed after several jurors asked to be excused. In

[2] Judge Noble's order actually was issued at a hearing held on March 16, 2017. His April 12, 2017 order was a denial of the plaintiff's motion to reargue that ruling.

connection with the postponement of that trial, the court (*Sheridan*, *J.*) issued an order which stated in pertinent part: 'Between now and the commencement of jury selection, no additional pretrial motions, pretrial discovery, or designation of additional witnesses or additional exhibits for trial will be permitted, without the prior permission of the court based on a showing of good cause.' See docket entry #137. Since 1/20/17, despite a notice by Judge Sheridan that no further continuances of the trial date would be permitted absent compelling circumstances, the trial of this 2013 case has been rescheduled numerous times. After a hearing held on 4/12/17,[3] Judge Noble granted such permission to defendants to obtain additional discovery in the form of medical record production.

"Jury selection is presently scheduled to recommence on June 20, 2017. Plaintiff's counsel has represented that for personal health reasons, Attorney Harvey Levine is not able to perform as trial counsel. In addition, some of the trial delay since February has been due to acknowledged health reasons personal to Attorney Jennifer Levine. Health issues, notwithstanding, both Attorney Harvey Levine and Attorney Jennifer Levine have recently submitted pleadings in this case and have appeared jointly at the hearings that have been held concerning the issue of discovery compliance. In contrast to the legitimate reasons communicated by both counsel relating to trial scheduling, there has been no legitimate or acceptable reason presented for the wilful and repeated failure of plaintiff's counsel to comply with the discovery orders of this court. Counsel continue to challenge the order of Judge Noble issued on 4/12/17,[4] whereby he authorized the defendants' request to obtain additional document production or medical authorizations in this case, despite the fact that

[3] See footnote 2 of this opinion.

[4] See footnote 2 of this opinion.

that no motion to reargue or reconsider that decision was filed.[5] In addition, as previously noted, plaintiff's counsel have also chosen to ignore the subsequent orders of Judges Epstein and Peck. Instead, they insistently seek to harken back to a prior order of Judge Shapiro issued in January, 2017, just prior to the commencement of the evidence then scheduled in this case and ultimately postponed due to juror unavailability. The plaintiff, albeit through her counsel, cannot selectively and unreasonably cling to an earlier order of one judge under circumstances then existing and choose to ignore the subsequent orders of three different judges under changed circumstances. Although this court has been reluctant to impose the sanction of nonsuit until this juncture, based on counsel's persistent, wilful disregard for the lawful orders of this court, the undersigned is left with no viable alternative. A fine would not do justice to what constitutes 'deliberate, contumacious . . . [and] unwarranted disregard for the court's authority . . . .' *Herrick* v. *Monkey Farm Cafe, LLC*, 163 Conn. App. 45, 51, 134 A.3d 643 (2016). This affront to the court, made on behalf of the plaintiff, has been both unjustified and unnecessary to preserve the rights of the plaintiff to prosecute her case to a successful conclusion. Plaintiff's counsel has not even attempted [to] articulate any particular prejudice that the plaintiff will suffer in connection with the production of the documents in question. Rather, counsel argues that the production of this information is not relevant to the plaintiff's claim, an improper objection to the broad mandate afforded requests for discovery. See Practice Book § 13-2. In fact, in a response to the defendants' motion, the plaintiff concedes that the document production in question relates to medical provider records apparently disclosed in her pretrial memo. See docket

[5] The plaintiff did file a motion to reargue Judge Noble's decision on April 5, 2017, which the court denied on April 12, 2017.

entry #159. For all the foregoing reasons, the court can find no reasonable alternative to vindicate the court's authority other than to issue this order of nonsuit." (Footnotes added.) This appeal followed.

I

The plaintiff's first issue on appeal is that Judge Noble improperly raised and considered a prior ruling of Judge Shapiro without affording her a fair opportunity to respond. Specifically, she argues that Judge Noble's ruling was an abuse of discretion because "the plaintiff did not have a fair opportunity to respond to the potential reconsideration of the defendants' motion to compel because she lacked notice that Judge Noble intended to use the hearing on the plaintiff's motion for continuance as an opportunity to address Judge Shapiro's denial of the defendants' motion to reconsider. . . . Indeed, had the plaintiff known that Judge Noble would act sua sponte in considering Judge Shapiro's denial of the motion to reconsider, she would have attempted to familiarize Judge Noble with the entire procedural history of the case, including the two days of oral arguments spent before Judge Shapiro and Judge Shapiro's extensive ruling on this issue." (Citation omitted.)

The plaintiff's first claim essentially attacks Judge Noble's ruling that allowed the defendants to engage in further discovery on two grounds: (1) the rulings of Judge Shapiro and Judge Sheridan constituted the law of the case, and (2) the plaintiff was denied her due process rights because she did not know Judge Noble intended to revisit the defendants' request for additional discovery, and, therefore, she had not been prepared at that time to argue fully the matter. We are not persuaded.

Simply put, Judge Noble's ruling was a case management decision. The parties appeared before him on March 16, 2017, for scheduled jury selection. At that

time, the plaintiff's counsel presented the court with a physician's note indicating that she was temporarily unable to perform her duties at trial. The plaintiff's counsel requested a six to eight week continuance. Judge Noble clearly was aware of the filings in the case because he asked the defendants' counsel whether he had filed a motion to reargue Judge Shapiro's ruling denying further discovery.[6] Given that Judge Noble was willing to accommodate the plaintiff's request for yet another postponement of the trial, it was not an abuse of discretion to permit additional discovery because of the change in circumstances.

"We review case management decisions for abuse of discretion, giving [trial] courts wide latitude. . . . A party adversely affected by a [trial] court's case management decision thus bears a formidable burden in seeking reversal. . . . A trial court has the authority to manage cases before it as is necessary. . . . Deference is afforded to the trial court in making case management decisions because it is in a much better position to determine the effect that a particular procedure will have on both parties. . . . The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases. . . . The ability of trial judges to manage cases is essential to judicial economy and justice." (Citations omitted; internal quotation marks omitted.) *Krevis* v. *Bridgeport*, 262 Conn. 813, 818–19, 817 A.2d 628 (2003).

Nevertheless, the plaintiff argues that Judge Shapiro had more familiarity with the case and that his rulings denying additional discovery had never been vacated. In essence, the plaintiff is arguing that Judge Shapiro's prior rulings were the law of the case that were binding

[6] No one has claimed that Judge Noble did not have access to the court file at the time he made his rulings.

on all subsequent judges. Assuming arguendo that the law of the case doctrine is applicable here,[7] the plaintiff's claim fails for the following reasons.

The law of the case doctrine provides that when "a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, *in the absence of some new or overriding circumstance*." (Emphasis added.) *Breen* v. *Phelps*, 186 Conn. 86, 99, 439 A.2d 1066 (1982). "The law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked." (Internal quotation marks omitted.) *McCarthy* v. *McCarthy*, 55 Conn. App. 326, 332, 752 A.2d 1093 (1999), cert. denied, 252 Conn. 923, 752 A.2d 1081 (2000). "A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Internal quotation marks omitted.) *Wagner* v. *Clark Equipment Co.*, 259 Conn. 114, 130–31, 788 A.2d 83 (2002).

Judge Noble emphasized in his rulings that the circumstances had changed since Judge Shapiro's prior rulings. The plaintiff had just requested a six to eight week continuance for medical reasons.[8] The court was

[7] There is some question as to whether the law of the case doctrine applies to rulings on matters left to the court's discretion. See *McCarthy* v. *McCarthy*, 55 Conn. App. 326, 333–34, 752 A.2d 1093 (1999), cert. denied, 252 Conn. 923, 752 A.2d 1081 (2000).

[8] The plaintiff stresses that her request for a continuance was based on the "plaintiff's counsel's need for accommodation for severe medical complications . . . which constituted a protected disability under state and federal law." Judge Noble did not say that her request for a continuance was not a legitimate request. Even if her condition was a protected disability, she

willing to grant that request, but, in its discretion, decided that the defendants now could pursue further discovery because of the trial delay: "Given the fact that we have now another six to eight weeks to go, [the defendants' counsel] has an opportunity to conduct further discovery." This ruling was not an abuse of the court's discretion. "Abuse is not present if discretion is not exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and [it is] directed by the reason and conscience of the judge to a just result. . . . And [sound discretion] requires a knowledge and understanding of the material circumstances surrounding the matter . . . ." (Internal quotation marks omitted.) *Krevis* v. *Bridgeport*, supra, 262 Conn. 819.

With respect to the plaintiff's argument that Judge Noble violated her due process rights by reconsidering, sua sponte, the defendants' prior request to obtain additional discovery, we note that the discovery issue was raised at a hearing necessitated by the plaintiff's motion to continue the trial for an additional six to eight weeks. It is not surprising that, given the lengthy postponement, the judge presiding over the trial would raise and decide other issues impacted by such a delay. The defendants' ongoing requests to obtain certain specified records, although previously determined to be untimely and made without prior permission by the court as required by Judge Sheridan's ruling, now could be seen as reasonable in light of this change in circumstances. If the plaintiff believed that she was not prepared to argue this issue, she could have requested a recess to review the file and prepare her arguments. She made no such request, instead accusing the court of penalizing her for the requested continuance.

nevertheless was asking to delay the trial for six to eight weeks. It was reasonable for the court to conclude that the length of the postponement of trial constituted a change in circumstances.

Moreover, there is no indication as to what the plaintiff would have argued if she had had advance notice and the opportunity to be heard on the defendants' request to engage in further discovery. She states in her appellate brief that she would have "attempted to familiarize Judge Noble with the entire procedural history of the case, including the two days of oral arguments spent before Judge Shapiro and Judge Shapiro's extensive ruling on this issue." The plaintiff assumes, without any evidence in the record to support it, that Judge Noble had not reviewed the file or was unfamiliar with the prior rulings of the court. There is no foundation for this assumption, and we will not presume that the court acted without knowledge of the contents of the file. Accordingly, we conclude that the plaintiff's due process rights were not violated by the sua sponte ruling of Judge Noble.

II

The plaintiff next claims that her failure to comply with discovery orders did not warrant the rendering of a judgment of nonsuit by Judge Peck. Specifically, she argues: "The trial court abused its discretion in entering a judgment of nonsuit against the plaintiff. In this case, the plaintiff deliberately chose to seek appellate review of the discovery order by failing to comply with the order and by appealing from the subsequent judgment of nonsuit. The plaintiff's conduct, considered in its entirety, does not evince a continuing pattern of violations that warranted the judgment of nonsuit against the plaintiff." We conclude that Judge Peck did not abuse her discretion by ordering a judgment of nonsuit.

"In order for a trial court's order of sanctions for violation of a discovery order to withstand scrutiny, three requirements must be met.

"First, the order to be complied with must be reasonably clear. In this connection, however, we also state

that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo.

"Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review.

"Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 17–18, 776 A.2d 1115 (2001). "[D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the

other party and the court. . . . The reasoning of *Millbrook Owners Assn.*, [*Inc.*, applies] equally to nonsuits and dismissals." (Citation omitted; internal quotation marks omitted.) *Blinkoff* v. *O & G Industries, Inc.*, 89 Conn. App. 251, 257–58, 873 A.2d 1009, cert. denied, 275 Conn. 907, 882 A.2d 668 (2005).

In the present case, Judge Peck rendered a judgment of nonsuit against the plaintiff for her "failure to comply with three previous orders of the court concerning discovery . . . ." Over the plaintiff's objection, Judge Noble authorized the defendants to engage in further discovery at the March 16, 2017 hearing on the plaintiff's request for an extended continuance of the trial. Judge Noble denied the plaintiff's motion to reargue that decision on April 12, 2017. Judge Epstein subsequently ruled on the defendants' motion for an order of compliance and ordered the plaintiff to comply with all outstanding discovery requests for medical records and billings by May 2, 2017. When the plaintiff failed to comply with Judge Epstein's order, the defendants moved for judgment in their favor. Judge Peck, following a hearing on May 15, 2017, denied the defendants' motion without prejudice. In her order issued that same day, Judge Peck cautioned the plaintiff by stating that the orders of Judge Noble and Judge Epstein now constituted "the law of the case." Judge Peck ordered the plaintiff to produce certain identified medical records or to provide authorizations to the defendants' counsel to obtain those records directly from the medical providers no later than May 30, 2017. When the plaintiff failed to comply with Judge Peck's May 15, 2017 order, the defendants again filed a motion for judgment in their favor. The plaintiff filed a reply to that motion, claiming the information sought was irrelevant and requesting that the court dismiss her action "for the purpose of the plaintiff taking an appeal . . . ."

In rendering the judgment of nonsuit, Judge Peck cited applicable case law relating to the sanction of nonsuit or dismissal. She recognized that a court should be reluctant to impose such a sanction, but she concluded that the plaintiff had evidenced "persistent, wilful disregard for the lawful orders of this court" and that the court was "left with no viable alternative." Judge Peck stated that a fine "would not do justice to what constitutes deliberate, contumacious . . . [and] unwarranted disregard for the court's authority . . . ." (Internal quotation marks omitted.) As further support for her decision to render a judgment of nonsuit, Judge Peck noted that the plaintiff unreasonably clung to the prior order of Judge Shapiro and chose to disregard the subsequent orders of three different judges under changed circumstances. Moreover, according to the court, the plaintiff had not even attempted to articulate any particular prejudice that she would suffer by producing the documents in question.

In considering the plaintiff's claim that the judgment of nonsuit was an improper sanction for her failure to comply with the previously referenced court orders, we first note that the orders of Judge Noble, Judge Epstein and Judge Peck, regarding the discovery requested by the defendants, were "reasonably clear." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17. Second, it is also undisputed that the plaintiff repeatedly failed to comply with those court orders. Finally, under the circumstances as set forth in detail in Judge Peck's judgment of nonsuit, we cannot conclude that the court abused its discretion in imposing this sanction. We are convinced that the trial court properly considered all of the relevant factors in ordering the nonsuit.

The plaintiff was adamant in her position that the orders of Judge Shapiro and Judge Sheridan were the law of the case and that the subsequent orders of Judge

Noble, Judge Epstein and Judge Peck were improper and invalid. Although she chose not to comply in order to have an appealable judgment of nonsuit rendered against her,[9] she did so at the risk of having her claims fail on appeal. As discussed previously in this opinion, Judge Noble's sua sponte decision to allow the defendants to engage in further discovery was reasonable and proper given the change in circumstances. The plaintiff has not challenged Judge Epstein's order and Judge Peck's May 15, 2017 order as being unreasonable, except for the fact that they were based on Judge Noble's authorization to the defendants to engage in further discovery. The plaintiff disregarded the three court orders at her peril. "[A] party has a duty to obey a court order even if the order is later held to have been unwarranted." *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 230 Conn. 641, 658 n.20, 646 A.2d 133 (1994).

For all of the foregoing reasons, we conclude that the plaintiff's claim that the court abused its discretion in rendering the judgment of nonsuit fails.

III

The plaintiff's final claim is that Judge Peck improperly declined to consider the plaintiff's motion for an order of sanctions against the defendants' counsel prior to rendering the judgment of nonsuit. Specifically, she argues that "no circumstances existed that justified such a refusal. Thus, the trial court lacked the authority to refuse to consider the plaintiff's motion."

As with the plaintiff's first claim, the court's decision as to the order of considering pending motions is one of case management. "Deference is afforded to the trial court in making case management decisions because

[9] In her "reply" to the defendants' motion for judgment, the plaintiff requested that Judge Peck dismiss her action. She now, however, claims on appeal that the rendering of the judgment of nonsuit for failure to comply with the three discovery orders was an abuse of discretion.

it is in a much better position to determine the effect that a particular procedure will have on both parties." *Krevis* v. *Bridgeport*, supra, 262 Conn. 819. The plaintiff cites no relevant authority that would have required Judge Peck to consider the plaintiff's motion first. Accordingly, we conclude that the court did not abuse its discretion in ruling on the defendants' motion for judgment prior to considering the plaintiff's motion for an order of sanctions against the defendants' counsel.

The judgment is affirmed.

In this opinion the other judges concurred.