STATE OF CONNECTICUT *v.* MARLON SYMS (AC 42346)

Keller, Prescott and Devlin, Js.

Syllabus

The defendant, who had been convicted on pleas of guilty to robbery in the first degree and conspiracy to commit robbery in the first degree, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. The defendant claimed that the agreement with the state under which he pleaded guilty required that his sentence run concurrently with a sentence he was then serving on an unrelated conviction. The plea agreement provided, inter alia, that, if the court imposed a period of incarceration of less than twenty years, it could impose a period of special parole, provided that the period of incarceration and the period of special parole did not cumulatively exceed twenty years. Defense counsel requested that the sentence the court would impose run concurrently with the sentence the defendant was then serving. The court sentenced the defendant to concurrent terms of fourteen years of incarceration on the robbery charges followed by six years of special parole and ordered that the sentence run consecutively to the sentence the defendant was currently serving. On appeal, the defendant claimed that his rights to due process were violated because the court did not advise him that his sentence could run consecutively to the sentence he was then serving, and because his sentence violated the double jeopardy clause of the United States constitution. *Held*:

1. The defendant's unpreserved claim that the trial court accepted his guilty pleas without advising him that his sentence could run consecutively to the sentence he was then serving could not be reviewed; review under *State* v. *Golding* (213 Conn. 233) was unwarranted because the defendant could file another motion to correct an illegal sentence, and this court's decision to decline review would not result in any hardship or injustice to the defendant.
2. The defendant could not prevail on his claim that the combination of the sentence of incarceration followed by special parole violated the prohibition against double jeopardy; the defendant's sentence was expressly authorized by statute (§ 53a-28 (b) (9)), and the combined period of incarceration and special parole did not exceed the maximum statutory sentence for the crimes of which the defendant was convicted.

Argued June 15—officially released September 15, 2020

Procedural History

Information charging the defendant with the crimes of robbery in the first degree and conspiracy to commit

robbery in the first degree, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Gold*, *J.*, on pleas of guilty; judgment of guilty in accordance with the pleas; thereafter, the court, *Baldini*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

David B. Bachman, assigned counsel, for the appellant (defendant).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Richard R. Rubino*, senior assistant state's attorney, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Marlon Syms, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that (1) his sentencing violated his rights to due process under both the United States and Connecticut constitutions because the sentencing court did not ensure that his guilty pleas were knowing and voluntary, and (2) his sentence, consisting of a term of incarceration followed by a period of special parole, violated the federal constitutional protection against double jeopardy. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the defendant's claims on appeal. On March 19, 2009, in the Hartford judicial district, the defendant entered guilty pleas under the *Alford* doctrine[1] to one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), and one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (4). The

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

plea agreement provided for a sentence of incarceration ranging between ten and twenty years, subject to the discretion of the sentencing court. The plea agreement further provided that, if the court imposed a period of incarceration of less than twenty years, it could impose a period of special parole provided that the period of incarceration and special parole did not cumulatively exceed twenty years. The court, *Gold*, *J.*, canvassed the defendant on his pleas, accepted them, and entered findings of guilty on both charges.

The defendant's sentencing hearing occurred on June 24, 2009, in Hartford. During the hearing, defense counsel informed the court that the defendant was then serving a two year sentence imposed in July, 2008, in an unrelated case, in the judicial district of Tolland at Rockville. Defense counsel requested that the Hartford sentence run concurrently with the Rockville sentence. The court imposed a sentence of fourteen years of incarceration followed by six years of special parole on each of the counts to run concurrently with each other. The court further ordered that the Hartford sentence would run consecutively to the Rockville sentence that the defendant was already serving.

The defendant never moved to withdraw his plea, and he did not file a direct appeal challenging the validity of his plea. In 2010, he filed a petition for a writ of habeas corpus, asserting that his attorney had rendered ineffective assistance because he did not advise him of the risk that his robbery sentence in Hartford could run consecutively to the sentence he was serving that was imposed in Rockville. The habeas court denied the petition, ruling that the defendant had not proved prejudice under the standard set forth in *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985),[2]

[2] "For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court [in *Hill* v. *Lockhart*, supra, 474 U.S. 59] has modified the second prong of the [test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]

because, even if his attorney had advised him of the risk, he still would have pleaded guilty to the charges. This court affirmed that decision. *Syms* v. *Commissioner of Correction*, 153 Conn. App. 904, 100 A.3d 473, cert. denied, 315 Conn. 905, 104 A.3d 758 (2014).

On March 8, 2018, the defendant filed an amended motion to correct an illegal sentence, arguing that the plea agreement required his sentence in this matter to run concurrently with his previous two year sentence.[3] On June 8, 2018, the trial court, *Baldini*, *J.*, held a hearing on the motion. At the hearing, the defendant also argued that, by imposing a sentence that included both a period of incarceration and special parole, the trial court had violated the constitutional prohibition against double jeopardy. The trial court denied the defendant's motion. The court found that whether the Hartford sentence would run concurrently or consecutively to the Rockville sentence was not addressed in the plea agreement. The court also ruled that the sentence imposed was expressly authorized by General Statutes § 53a-28 (b) (9) and did not violate the double jeopardy clause or exceed the maximum statutory penalties. This appeal followed.

The following principles govern our review of a trial court's decision on a motion to correct an illegal sentence. "It is axiomatic that, in a criminal case, the jurisdiction of the sentencing court terminates once a defendant's sentence has begun and a court may no longer take any action affecting a sentence unless it expressly has been authorized to act. . . . Providing such authorization to act, Practice Book § 43-22 states: The judicial

to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 101, 111 A.3d 829 (2015).

[3] On March 11, 2018, the defendant also filed a motion for specific performance of the plea agreement, which is not at issue on appeal.

authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." (Internal quotation marks omitted.) *State* v. *Starks*, 121 Conn. App. 581, 585–86, 997 A.2d 546 (2010). "An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is inherently contradictory." (Internal quotation marks omitted.) Id., 586. With these principles in mind, we address the defendant's claims in turn.

I

The defendant first claims that the court violated his due process rights by accepting his guilty pleas without advising him that his sentence could run consecutively to the unrelated sentence he was then serving. As a result of this omission in the plea canvass, the defendant asserts, his guilty pleas were not knowing and voluntary. It is undisputed that this claim was not raised in the trial court. Because the defendant did not raise this due process claim in his motion to correct an illegal sentence, it is unpreserved and he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We conclude that the claim is unreviewable.

In *State* v. *Starks*, supra, 121 Conn. App. 592, this court held that *Golding* review of an unpreserved constitutional claim is unavailable in an appeal from the denial of a motion to correct an illegal sentence filed pursuant to Practice Book § 43-22. In *Starks*, this court reasoned that the extraordinary review of the claim under *Golding* was unwarranted in an appeal from a motion to correct an illegal sentence because the defendant may seek and obtain any appropriate redress before the trial court by

filing another motion to correct. Id. Accordingly, as in *Starks*, because declining to review the unpreserved constitutional claim in this case would not result in any hardship or injustice to the defendant, he is not entitled to *Golding* review of that claim. See id.[4]

II

The defendant also claims that the court improperly concluded that his total effective sentence did not violate the constitutional prohibition against double jeopardy. The state contends that Connecticut law expressly authorizes the sentence imposed on the defendant and, as such, does not violate the prohibition against double jeopardy. We agree with the state.

"A double jeopardy claim . . . presents a question of law, over which our review is plenary." (Internal quotation marks omitted.) *State* v. *Bennett*, 187 Conn. App. 847, 851, 204 A.3d 49, cert. denied, 331 Conn. 924, 206 A.3d 765 (2019). The double jeopardy clause prohibits multiple punishments for the same offense in a single trial. *State* v. *Hearl*, 182 Conn. App. 237, 271, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018).

This court, in *State* v. *Farrar*, 186 Conn. App. 220, 199 A.3d 97 (2018), rejected a due process claim on similar facts on the ground that the sentence was explicitly authorized by § 53a-28 (b) (9). Id., 223. In *Farrar*,

[4] We note that, even if the defendant's due process claim was reviewable under *Golding*, it would fail under *Golding*'s third prong because the trial court lacked subject matter jurisdiction over this claim. This is because the defendant's claim is not addressed to his sentence but, rather, to the court's acceptance of his guilty plea. "In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding, and not the [proceeding] leading to the conviction, must be the subject of the attack." *State* v. *Lawrence*, 281 Conn. 147, 158, 913 A.2d 428 (2007); see also *State* v. *Casiano*, 122 Conn. App. 61, 68, 998 A.2d 792 (trial court lacked jurisdiction to consider motion to correct illegal sentence that was based on "alleged flaws in the court's acceptance of the [guilty] plea"), cert. denied, 298 Conn. 931, 5 A.3d 491 (2010).

the defendant was sentenced to a total effective term of seven years of incarceration followed by eight years of special parole. Id., 222. The defendant filed a motion to correct an illegal sentence, claiming that his sentence was a violation of his constitutional right against double jeopardy. Id. The trial court denied the defendant's motion, and this court affirmed the judgment on the ground that the sentence was explicitly authorized by § 53a-28 (b) (9). Id., 223. Section 53a-28 (b) provides in relevant part that "when a person is convicted of an offense, the court shall impose one of the following . . . (9) a term of imprisonment and a period of special parole . . . ." Accordingly, the court in *Farrar* held that an imposition of a term of imprisonment and a period of special parole does not constitute an illegal sentence, provided that the term of imprisonment and the term of special parole do not exceed the statutory maximum for the crime of which the defendant was convicted. *State* v. *Farrar*, supra, 223.

In the present appeal, the same analysis applies. The defendant's sentence does not violate the prohibition against double jeopardy because it is expressly authorized by § 53a-28 (b) (9), and his combined period of incarceration and years of special parole—twenty years—does not exceed the maximum statutory sentence for the crimes of which the defendant was convicted.[5]

The defendant heavily relies on *State* v. *Boyd*, 272 Conn. 72, 861 A.2d 1155 (2004), to support his double jeopardy claim. Contrary to the defendant's assertion,

[5] The defendant was charged with one count of robbery in the first degree pursuant to § 53a-134 (a) (4) and one count of conspiracy to commit robbery in the first degree pursuant to §§ 53a-48 and 53a-134 (a) (4). Both charges are class B felonies pursuant to General Statutes § 53a-35 (b) (2) and carry maximum sentences of twenty years each. Accordingly, the maximum statutory sentence that the defendant faced was twenty years of incarceration on each count charged for a potential maximum of forty years of incarceration.

the decision in *Boyd* is not applicable to the appeal now before the court. In *Boyd*, the defendant received a sentence of two years and one day of incarceration followed by two years of special parole. Id., 74. In considering the defendant's motion to modify that sentence, the trial court ruled that the sentence exceeded three years and was, in effect, a definite sentence of four years and one day of incarceration, and, thus, the defendant needed prosecutor approval to seek modification pursuant to General Statutes § 53a-39.[6] Id. In arriving at its decision, the trial court relied on case law describing split sentences that have both an executed and unexecuted portion, the combination of which constitutes the definite sentence for sentence modification purposes. Id., 75. In *Boyd*, our Supreme Court, also in the context of a motion to modify a sentence pursuant to § 53a-39, held that for purposes of the special parole statute (General Statutes § 54-125e (a)), the term "definite sentence" refers only to the period of incarceration that precedes special parole. Id., 79.

In the present appeal, the defendant claims that the combination of the definite sentence of fourteen years of incarceration with the special parole of six years violates the prohibition against double jeopardy. This argument lacks merit because, as stated, our law contemplates and expressly authorizes sentences with components of incarceration and special parole in § 53a-28

[6] General Statutes § 53a-39 provides in relevant part: "(a) At any time during the period of a definite sentence of three years or less, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced.

"(b) At any time during the period of a definite sentence of more than three years, upon agreement of the defendant and the state's attorney to seek review of the sentence, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced. . . ."

(b) (9). *Boyd* concerned sentence modification and did not involve any constitutional claims asserting a violation of double jeopardy or motions to correct illegal sentences. Therefore, *Boyd* has no bearing on the current appeal, and the defendant's sentence of incarceration followed by special parole does not violate the constitutional prohibition against double jeopardy.

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL JOHN FERRI *v.* NANCY POWELL-FERRI ET AL.
(AC 42068)

Prescott, Devlin and D'Addabbo, Js.

Syllabus

The plaintiff, F, whose marriage to the defendant, P, previously had been dissolved, appealed to this court from the summary judgment rendered in favor of the defendants, an attorney and a law firm, who represented P in several interrelated dissolution proceedings. F sought to recover damages from the defendants as a result of alleged vexatious litigation, which arose out of a declaratory judgment action involving a trust. F was the beneficiary of the trust and, during the pending dissolution matter, the trustees, without F's knowledge or consent, formed a new trust and decanted the assets of the original trust into the new one. The trustees then brought a declaratory judgment action, seeking approval of their actions in forming the new trust. The defendants brought a cross complaint against F in the declaratory judgment action, alleging that F violated his duty to preserve marital assets by allowing the trustees to remove assets from the marital estate. The trial court rendered summary judgment in favor of F on the cross complaint, concluding that P failed to state a cause of action. On appeal, F claimed, inter alia, that the trial court erred in determining that the defendants had probable cause to bring the cross complaint. *Held* that the trial court properly granted the defendants' motion for summary judgment as that court properly determined that the defendants had probable cause to bring and to prosecute the cross complaint; contrary to F's argument, the trial court applied the correct standard for determining whether the defendants had probable cause to prosecute the cross complaint, and

properly determined that a meritless action did not necessitate the conclusion that it lacked probable cause or was frivolous, the viability of the cross complaint did not depend on any false allegation that F knew of the trustees' intention to decant the original trust prior to the actual decanting and did not allege that F failed to act prior to the decanting, rather, the cross complaint alleged that F failed to act after becoming aware of the trustees' decanting of the original trust, and, accordingly, the court properly rejected F's contention that the defendants lacked probable cause because they knew that F only learned about the decanting after the fact, the trial court correctly determined that the lack of precedent in other jurisdictions did not render the defendants' cross complaint as being without probable cause, as the extensive record in the interrelated cases and the briefs submitted demonstrated that the defendants zealously sought a remedy for their client, and, when presented with the trustees' action, the defendants attempted to defend and vindicate their client's interests.

Argued January 13—officially released September 15, 2020

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Moll*, *J.*, denied the plaintiff's motion for summary judgment and granted the motion for summary judgment filed by the defendant Thomas Parrino et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jeffrey J. Mirman, for the appellant (plaintiff).

Robert W. Cassot, for the appellees (defendant Thomas Parrino et al.).

Opinion

D'ADDABBO, J. In this vexatious litigation action, the plaintiff, Paul John Ferri, appeals following the rendering of summary judgment in favor of the defendants Thomas Parrino and the law firm of Nusbaum & Parrino,

P.C. (Parrino defendants).[1] On appeal, the primary issue is whether the trial court properly concluded that the Parrino defendants had probable cause to initiate and pursue their cross complaint filed against Ferri in a prior lawsuit. We affirm the judgment of the trial court.

The present action is the third in a series of interrelated matters involving a dispute over the assets of a trust account. In the first action, the defendant Nancy Powell-Ferri sought the dissolution of her marriage to Ferri. In that action, a major marital asset in dispute was a trust created in 1983 and valued at between $60 million and $70 million. Powell-Ferri was represented in this action by the Parrino defendants.

While the dissolution action was pending, the trustees of the 1983 trust brought a declaratory judgment action against Powell-Ferri and Ferri, seeking approval of the trustees' actions in forming another trust in 2011, into which they decanted all of the assets of the 1983 trust. The Parrino defendants also represented Powell-Ferri in the declaratory judgment action. As part of the trustees' action, the Parrino defendants filed a cross complaint against Ferri, on behalf of Powell-Ferri, alleging that Ferri had violated his duty to preserve the marital assets by allowing the trustees to remove assets from the marital estate. The trial court, *Munro*, *J.*, rendered

[1] Ferri filed a six count complaint against the defendant Nancy Powell-Ferri and the Parrino defendants. The counts of the complaint that pertain to Powell-Ferri are still pending in the trial court. This court's jurisdiction is limited to appeals taken from final judgments, unless otherwise provided by law. See Practice Book § 61-1. "Our rules of practice, however, set forth certain circumstances under which a party may appeal from a judgment disposing of less than all of the counts of a complaint. Thus, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3." *Krausman* v. *Liberty Mutual Ins. Co.*, 195 Conn. App. 682, 687–88, 227 A.3d 91 (2020). Because judgment has entered as to all counts of the complaint pertaining to the Parrino defendants, we have jurisdiction to hear Ferri's appeal from the judgment entered on those counts.

summary judgment in favor of Ferri on the cross complaint, concluding that Powell-Ferri failed to state a cause of action. Our Supreme Court affirmed this decision on appeal and declined to recognize the new cause of action. See *Ferri* v. *Powell-Ferri*, 317 Conn. 223, 235, 116 A.3d 297 (2015).

The cross complaint against Ferri in the declaratory judgment action, brought by the Parrino defendants on behalf of Powell-Ferri, forms the basis for the present vexatious litigation action brought by Ferri against Powell-Ferri and the Parrino defendants. In this action, Ferri alleged that the Parrino defendants lacked probable cause to institute and pursue the cross complaint. The trial court, *Moll*, *J.*, rendered summary judgment in favor of the Parrino defendants. Ferri then filed the present appeal, claiming that the trial court erred by (1) determining that the Parrino defendants had probable cause to bring a cross complaint, (2) concluding that the Parrino defendants had complied with their obligations under rule 3.1 of the Rules of Professional Conduct, (3) denying Ferri's motion for summary judgment as to the Parrino defendants,[2] and (4) determining that the Parrino defendants had not acted with malice in pursuing their cross complaint. Additional facts will be set forth as necessary.

We begin by setting forth the applicable standard of review. "The standard of review of a trial court's decision granting summary judgment is well established.

[2] "Although the denial of a motion for summary judgment is not a final judgment and thus is not ordinarily appealable; see Practice Book § 4000 [now Practice Book § 61-1]; *Gurliacci* v. *Mayer*, 218 Conn. 531, 541 n.7, 590 A.2d 914 (1991); *Greengarden* v. *Kuhn*, 13 Conn. App. 550, 552, 537 A.2d 1043 (1988); the rationale for this rule is not applicable where both sides have filed motions for summary judgment and the court has granted one of them. *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 295 n.12, 596 A.2d 414 (1991). Thus, [an appellate court] may consider both of the summary judgment rulings contested by [an appellant] on appeal." (Internal quotation marks omitted.) *Misiti, LLC* v. *Travelers Property Casualty Co. of America*, 132 Conn. App. 629, 630 n.2, 33 A.3d 783 (2011), aff'd, 308 Conn. 146, 61 A.3d 485 (2013).

Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *King* v. *Volvo Excavators AB*, 333 Conn. 283, 290–91, 215 A.3d 149 (2019). "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *NetScout Systems, Inc.* v. *Gartner, Inc.*, 334 Conn. 396, 408–409, 223 A.3d 37 (2020). "Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, supra, 291.

"A vexatious suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint. To establish either cause of action, it is necessary to prove want of probable cause, malice and a termination of suit in the plaintiff's favor. . . . Probable cause is the knowledge of facts sufficient to justify a reasonable person in the belief that there are reasonable grounds for prosecuting an action. . . . Malice may be inferred from lack of probable cause. . . . The want of probable cause,

however, cannot be inferred from the fact that malice was proven. . . . A statutory action for vexatious litigation under General Statutes § 52-568[3] . . . differs from a common-law action only in that a finding of malice is not an essential element, but will serve as a basis for higher damages. In either type of action, however, [t]he existence of probable cause is an absolute protection against an action for malicious prosecution, and what facts, and whether particular facts, constitute probable cause is always a question of law. . . . Accordingly, our review is plenary." (Footnote added; internal quotation marks omitted.) *Tatoian* v. *Tyler*, 194 Conn. App. 1, 57–58, 220 A.3d 802 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020).

With this procedural background and these legal principles in mind, we now set forth the following detailed facts, as stated in *Ferri* v. *Powell-Ferri*, supra, 317 Conn. 223, the trustees' declaratory judgment action, that are relevant to our resolution of this appeal. "Powell-Ferri filed an action for dissolution of her marriage to Ferri on October 26, 2010. . . . Ferri is the sole beneficiary of a trust created by his father, Paul John Ferri, Sr., in 1983 (1983 trust). . . .[4]

"The 1983 trust provides that, after Ferri attained the age of thirty-five, he would have the right to withdraw principal from the trust in increasing percentages depending on his age. In March, 2011, while the . . . dissolution action was pending, the [trustees] created

[3] General Statutes § 52-568 provides: "Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

[4] The plaintiffs in the declaratory judgment action were the trustees of the 1983 trust. Michael Ferri, who is Ferri's brother and business partner, was one of the trustees involved in the action.

a second trust whose sole beneficiary was Ferri (2011 trust). The [trustees] then distributed a substantial portion of the assets in the 1983 trust to the 2011 trust.[5]

"Unlike the terms of the 1983 trust, the terms of the 2011 trust do not allow Ferri to withdraw principal. Instead, under the terms of the 2011 trust, the [trustees] have all of the control and decision-making power as to whether Ferri will receive any of the trust income or assets.

"The trial court [in the trustees' declaratory judgment action] found that Ferri did not have a role in creating the 2011 trust or decanting any of the assets from the 1983 trust. The trial court further found that it was undisputed that Ferri took no action to recover the trust assets when Michael Ferri informed him of the creation of the 2011 trust and the decanting of the assets. The trial court characterized the reasoning behind this inaction as follows: '[Ferri] does not want to sue his family . . . and he believes the [trustees] are acting in his best interest.'

"After the [trustees] created the 2011 trust and transferred the assets from the 1983 trust to it, they instituted [a] declaratory judgment action seeking a ruling from

[5] Article II of the 1983 trust provides in relevant part: "My Trustee shall pay to Paul after he has attained the age of thirty-five (35) years such amounts of the principal as he may from time to time in writing request; provided however, that the aggregate amount of such payments of principal made before he attains the age of thirty-nine (39) years shall not exceed one-fourth (1/4) of the value of the principal of such property as determined on his thirty-fifth (35th) birthday; provided further that after Paul has attained the age of thirty-nine (39) years, the aggregate amount of such payments of principal made before he attains the age of forty-three (43) years shall not exceed one-half (1/2) of such value; and provided further that after Paul has attained the age of forty-three (43) years, the aggregate amount of such payments of principal made before he attains the age of forty-seven (47) years shall not exceed three-fourths (3/4) of such value. Such values shall be determined by my Trustee, whose determinations in this regard shall be final and binding on all concerned."

the court that they had validly exercised their authority in transferring the assets and that Powell-Ferri had no interest in the 2011 trust assets. Powell-Ferri filed a counterclaim asserting claims of common-law and statutory fraud, civil conspiracy, and seeking a declaratory judgment. After the trial court struck counts alleging fraud and conspiracy, Powell-Ferri filed a second amended counterclaim, later revised, asserting claims of breach of fiduciary duty, breach of loyalty, tortious interference with an expectancy, and seeking a declaratory judgment, as well as [a] cross complaint . . . .

"Ferri filed a motion for summary judgment, claiming that the cross complaint failed to state a cause of action, and that even if it did set out a cause of action, there was no genuine issue of material fact to support Powell-Ferri's claims. Powell-Ferri opposed the motion on procedural grounds, namely that summary judgment is not the proper means to test the legal sufficiency of a complaint, and on the merits.

"The trial court granted the motion for summary judgment, concluding that Powell-Ferri failed to state a cause of action. The trial court reasoned that, while marital partners have a fiduciary responsibility of full and open disclosure to each other, that responsibility does not extend to require spouses to recover assets belonging to the marital estate. The trial court observed that while spouses may not dissipate assets, 'at a minimum dissipation in the marital dissolution context requires financial misconduct involving marital assets, such as intentional waste or a selfish financial impropriety, coupled with a purpose unrelated to the marriage.' *Gershman* v. *Gershman*, 286 Conn. 341, 350–51, 943 A.2d 1091 (2008). The trial court concluded that there was no allegation that Ferri 'engaged in intentional waste or selfish impropriety.' The court further reasoned that if such allegations were present, '[t]here is no societal expectation embodied in the law which

impels or compels a divorcing spouse to take affirmative steps to recover an asset removed from the marital estate by the action of a third party alone.' Accordingly, the court determined that the cause of action Powell-Ferri urged should not be recognized in Connecticut." (Footnotes added; footnote omitted.) *Ferri* v. *Powell-Ferri*, supra, 317 Conn. 225–27.[6]

Thereafter, Powell-Ferri appealed the trial court's judgment granting Ferri's motion for summary judgment. Our Supreme Court concluded that the cross complaint filed by Powell-Ferri failed to state a legally sufficient cause of action. Id., 238. The court affirmed the trial court's ruling, determining that "this state does not require a party to a dissolution action to take affirmative steps to recover marital assets taken by a third party . . . ." Id., 225.

In February, 2016, Ferri commenced this vexatious litigation action against Powell-Ferri and the Parrino defendants.[7] The parties cross moved for summary judgment. After oral argument on all of the summary judgment motions, the trial court granted the Parrino defendants' motion for summary judgment. The trial court denied Ferri's motions for summary judgment directed

[6] In a subsequent appeal, our Supreme Court, relying on answers to certified questions that it had submitted to the Massachusetts Supreme Judicial Court, concluded that the trustees had the authority to create the second trust by decanting the assets from the first trust. See *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 441–42, 165 A.3d 1137 (2017).

[7] As stated by the trial court, Ferri's action claimed "that the initiation and prosecution of the cross complaint in the trustees' action were vexatious. The operative complaint is Ferri's revised complaint dated March 10, 2017 . . . which sets forth the following counts: (1) count one—common-law vexatious litigation, as to Powell-Ferri; (2) count two—statutory vexatious litigation under . . . § 52-568, as to Powell-Ferri; (3) count three—common-law vexatious litigation, as to Parrino; (4) count four—statutory vexatious litigation under § 52-568, as to Parrino; (5) count five—common-law vexatious litigation, as to Nusbaum & Parrino [P.C.]; and (6) count six—statutory vexatious litigation under § 52-568, as to Nusbaum & Parrino [P.C.]."

to the Parrino defendants and Powell-Ferri, respectively, as well as Powell-Ferri's motion for summary judgment. Ferri now appeals from the granting of the Parrino defendants' motion for summary judgment.

We must first address Ferri's claim that the court used the incorrect standard in determining whether the Parrino defendants had probable cause to prosecute the cross complaint. In its decision, the trial court stated that the probable cause standard in the context of a vexatious litigation claim against an attorney and/or a law firm is whether, "on the basis of the *facts* known by the law firm, a reasonable attorney familiar with Connecticut law would believe he or she had probable cause to bring or pursue the litigation." (Emphasis in original; internal quotation marks omitted.) The trial court further stated that "[t]he standard is an objective one that is necessarily dependent on what the attorney knew when he or she initiated and/or continued the litigation." Ferri argues, however, that the court was required to determine whether the attorney had probable cause to commence and to pursue the litigation, not to determine whether the attorney reasonably believed he or she had probable cause.[8]

[8] Ferri also claims that the court was required to analyze the question of probable cause in conjunction with the factors described in *ATC Partnership* v. *Coats North America Consolidated, Inc.*, 284 Conn. 537, 552–53, 935 A.2d 115 (2007), for recognizing a new cause of action: "When we acknowledge new causes of action, we also look to see if the judicial sanctions available are so ineffective as to warrant the recognition of a new cause of action. . . . To determine whether existing remedies are sufficient to compensate those who seek the recognition of a new cause of action, we first analyze the scope and applicability of the current remedies under the facts alleged by the plaintiff. . . . Finally, we are mindful of growing judicial receptivity to the new cause of action, but we remain acutely aware of relevant statutes and do not ignore the statement of public policy that such statutes represent." (Citations omitted.)

Ferri argues that because it is clear that the factors necessary to recognize a new cause of action were not met, it should have been clear to the Parrino defendants that they did not have probable cause to bring and prosecute the cross complaint. We note, however, that the court in *ATC Partnership* also recognized that there is "no hard and fast test that courts apply when determining whether to recognize new causes of action." Id., 552.

"[W]hether the court applied the correct legal standard is a question of law subject to plenary review. . . . When an incorrect legal standard is applied, the appropriate remedy is to reverse the judgment of the trial court and to remand the matter for further proceedings." (Citations omitted; internal quotation marks omitted.) *Deroy* v. *Estate of Baron*, 136 Conn. App. 123, 127, 43 A.3d 759 (2012).

"In the context of a claim for vexatious litigation, the defendant lacks probable cause if he [or she] lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Internal quotation marks omitted.) *Bernhard-Thomas Building Systems, LLC* v. *Dunican*, 286 Conn. 548, 554, 944 A.2d 329 (2008). "[I]n *Falls Church Group, Ltd.* [v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 103, 912 A.2d 1019 (2007)], our Supreme Court rejected the claim that a claim for vexatious litigation against an attorney should be judged by a higher standard than the general objective standard, it nonetheless observed that the reasonable attorney is substituted for the reasonable person in [vexatious litigation] actions against attorneys . . . . The court explained that, with respect to vexatious litigation actions brought against attorneys, the proper probable cause inquiry is whether a reasonable attorney familiar with Connecticut law would believe that he or she had probable cause to bring the lawsuit. . . . [T]he standard that applies to attorneys is an objective one that is necessarily dependent on what an attorney knew when he or she initiated the lawsuit, and that probable cause may exist even if a suit lacks merit." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Tatoian* v. *Tyler*, supra, 194 Conn. App. 63.

Applying the standard to the present case, the trial court stated: "Relatedly, taking into account the facts known by Parrino and the theory pressed in the cross complaint at the trial and appellate levels, the court

concludes that an attorney familiar with Connecticut law could reasonably believe that probable cause existed to initiate and prosecute the cross complaint and to pursue an appeal from the granting of Ferri's motion for summary judgment thereon. Thus, as a matter of law, the Parrino defendants had probable cause to initiate and prosecute the cross complaint at the trial and appellate levels. There is no dispute of material fact as to the circumstances that gave rise to the existence of such probable cause." Accordingly, we conclude that the court applied the correct standard for determining whether the Parrino defendants had probable cause to prosecute the cross complaint.

Ferri also claims that, even if the court applied the correct standard, the court incorrectly determined that, as a matter of law, the Parrino defendants had probable cause to bring and prosecute the cross complaint. Ferri argues that this determination was improper because "[t]he trial court failed to consider the Parrino defendants' inability to recall any case law research performed, the failure to have any memoranda supporting the decision to file the cross complaint, the Parrino defendants' failure to consider the effect of *Gershman* [v. *Gershman*, supra, 286 Conn. 341], or the fact that the Parrino defendants' consideration of whether [Ferri] had an affirmative obligation to seek a return of trust assets from a third party was based solely on what they thought was common sense."

The following additional facts are relevant to our resolution of this claim. As previously stated, Powell-Ferri filed an action for a dissolution of her marriage in October, 2010. Upon service of process, Ferri was subject to the automatic orders contained in Practice Book § 25-5.[9] The Parrino defendants appeared on

[9] Practice Book § 25-5 (b) provides in relevant part: "(b) In all cases involving a marriage or civil union, whether or not there are children: (1) Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order

behalf of Powell-Ferri in both the dissolution action and the trustees' action and attempted to pursue various avenues to address the decanting of the 1983 trust. In the dissolution proceeding, the Parrino defendants filed a motion for contempt against Ferri alleging that he violated the court's automatic orders by not taking action after becoming aware of the decanting. The court denied the motion for contempt concluding that "[n]owhere in the automatic orders is there a duty to act. The duties throughout the automatic orders are injunctive in nature, prohibiting conduct that would disturb the status quo, essentially."[10] *Powell-Ferri* v. *Ferri*, Superior Court, judicial district of Middlesex, Docket No. FA-10-4014157-S (July 10, 2013) (56 Conn. L. Rptr. 473, 476).

In the trustees' action, the Parrino defendants filed an answer containing special defenses, counterclaims and the cross complaint underlying the vexatious litigation action, on January 4, 2012. The Parrino defendants filed

of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action. . . ."

[10] The court explained further: "The question of whether [the automatic] orders, under the facts of this case, require [Ferri] to take an affirmative action to protect his interest in the 1983 [t]rust is a difficult one." *Powell-Ferri* v. *Ferri*, Superior Court, judicial district of Middlesex, Docket No. FA-10-4014157-S (July 10, 2013) (56 Conn. L. Rptr. 473, 475). Further, the court noted that "[w]hether any relief is available to [Powell-Ferri] under the facts of this case is not immediately clear. [Ferri] has taken no affirmative action to prevent the loss of this asset to the marital estate; and it is precisely the lack of affirmative action of which [Powell-Ferri] complains. Whether that meets the present definition of asset dissipation in the marital context is unclear. . . . '[C]ourts have traditionally recognized dissipation in the following paradigmatic contexts: gambling, support of a paramour, or the transfer of an asset to a third party for little or no consideration. Well defined contours of the doctrine are somewhat elusive, however, particularly in more factually ambiguous situations.' *Gershman* v. *Gershman*, [supra, 286 Conn 346–47]. . . . Whether inaction is tantamount to a 'factually ambiguous situation' alluded to in *Gershman* is not before the court presently. That shall wait until either the final hearing or a motion addressing the same." *Powell-Ferri* v. *Ferri*, supra, 56 Conn. L. Rptr. 473, 476.

an amended answer, special defenses, and a cross complaint on January 18, 2012.[11] In the cross complaint, the Parrino defendants alleged, on behalf of Powell-Ferri, that "by virtue of the dissolution action filed against him, Ferri had a duty to preserve marital assets, including those held in the 1983 trust; (2) Ferri was aware of the trustees' creation of a new trust with the intent to deprive Powell-Ferri of her equitable interest in trust assets and has taken no action to pursue his right and obligation to seek the return of the trust assets to the 1983 Trust; and (3) Powell-Ferri has been harmed as a result thereof." (Internal quotation marks omitted.) The parties filed cross motions for summary judgment on the Parrino defendants' counterclaim. The trial court noted that, in opposing Ferri's motion, the Parrino defendants "advocated for the recognition of a new cause of action sounding in tort, as an extension of duties already existent between spouses, whereby a divorcing spouse would have a duty to prevent the dissipation of marital assets by a third party or undo the dissipation after the fact."

The trial court granted Ferri's motion and denied Powell-Ferri's motion. On appeal, our Supreme Court affirmed the trial court's judgment, declining to recognize a new cause of action. *Ferri* v. *Powell-Ferri*, supra, 317 Conn. 235. The court explained that "whether a party to a dissolution has a duty to act to preserve martial assets" is a question of "first impression." Id., 229. The court acknowledged that there is no " 'hard and fast test' " for the court to use in deciding to recognize a new cause of action but recognized its power to do so.[12] Id. The court explained the factors it examines in

[11] The Parrino defendants alleged five special defenses: (1) conspiracy; (2) removal of marital assets; (3) irrevocable trust; (4) unclean hands; and (5) violation of public policy. The Parrino defendants raised four counterclaims: (1) common-law fraud; (2) statutory fraudulent transfer; (3) civil conspiracy; and (4) declaratory judgment.

[12] Our Supreme Court has explained: "We do have the inherent authority, pursuant to the state constitution, to create new causes of action. *Binette*

making this determination, namely, whether judicial sanctions are available and whether there are sufficient remedies to compensate the afflicted party, and whether other jurisdictions have recognized such a cause of action. Id. The court determined that Connecticut provides "significant remedies for when a party to a dissolution action has been found to dissipate assets." Id., 231. The court rejected Powell-Ferri's argument that our public policy in this state requires affirmative action, determining that our public policy only requires parties to attempt to maintain the status quo regarding marital assets. Id., 231–32. The court explained that dissipation requires a party to the dissolution proceeding to have committed some sort of financial misconduct and, if that determination is not made, Connecticut courts can consider the dissipation when fashioning asset distribution orders and alimony determinations in dissolution cases. Id., 232–33. The court determined that Powell-Ferri had not established dissipation because it was undisputed that Ferri did not have a role in creating the 2011 trust or decanting the assets of the 1983 trust; he only chose not to take action after the fact. Id., 233–34. The court explained that, even if a party believes his or her spouse had improperly removed assets from the marital estate, there were judicial remedies available to address this, including asking the court to exercise its discretion in considering those assets in fashioning orders and filing a motion for contempt if the party had fraudulently removed those assets. Id., 234. The

v. *Sabo*, 244 Conn. 23, 34, 710 A.2d 688 (1998). Moreover, it is beyond dispute that we have the power to recognize new tort causes of action, whether derived from a statutory provision or rooted in the common law. *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 235, 905 A.2d 1165 (2006); see, e.g., *Mead* v. *Burns*, 199 Conn. 651, 663, 509 A.2d 11 (1986) (recognizing action for damages under Connecticut Unfair Trade Practices Act for violations of Connecticut Unfair Insurance Practices Act); *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 480, 427 A.2d 385 (1980) (recognizing tort of wrongful discharge); *Urban* v. *Hartford Gas Co.*, 139 Conn. 301, 307, 93 A.2d 292 (1952) (recognizing torts of intentional and negligent infliction of emotional distress)." *ATC Partnership* v. *Coats North America Consolidated, Inc.*, 284 Conn. 537, 552–53, 935 A.2d 115 (2007).

court stated that a motion for contempt or a finding of dissipation were not suitable avenues, and, therefore, if the trustees were allowed to decant the assets in the trust, Powell-Ferri would have to ask the trial court to consider the removed assets in creating the financial orders. Id., 235.

In the vexatious litigation action, the trial court determined that, on the basis of the facts known to the Parrino defendants, they pursued the motion for contempt and the cross complaint "in order to advance their client's interest in the assets of the 1983 trust, as a marital asset, that existed at the time of the commencement of the dissolution action." The court also determined that "an attorney familiar with Connecticut law could reasonably believe that probable cause existed to initiate and prosecute the cross complaint and to pursue an appeal from the granting of Ferri's motion for summary judgment thereon." The trial court further rejected Ferri's claims that (1) the cross complaint raised frivolous arguments because the action was later found to lack merit, (2) the Parrino defendants falsely alleged that Ferri knew of the trustees' intent to decant the 1983 trust prior to the decanting, and (3) the action lacked probable cause because no other jurisdiction has recognized such a cause of action.

The court correctly explained that an action that lacks merit does not necessitate the conclusion that it lacks probable cause or is frivolous.[13] See *Tatoian* v. *Tyler*, supra, 194 Conn. App. 59 ("We are mindful that [p]robable cause may be present even where a suit lacks merit.

[13] Furthermore, rule 3.1 of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which *includes a good faith argument for an extension, modification or reversal of existing law. . . .*" (Emphasis added.) The commentary to this rule clarifies as follows: "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed.

Favorable termination of the suit often establishes lack of merit, yet the plaintiff in [vexatious litigation] must separately show lack of probable cause. . . . The lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ." (Internal quotation marks omitted.)).

Regarding the claim of false allegations, the court determined that "the viability of the cross complaint did not depend on any false allegation that Ferri knew of the trustees' intention to decant the 1983 trust prior to the actual decanting." The cross complaint did not allege that Ferri failed to act prior to the decanting. The cross complaint alleged that Ferri failed to act after becoming aware of the trustees' decanting of the 1983 trust.[14] The court, therefore, properly rejected Ferri's

However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

"The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." Rules of Professional Conduct 3.1, commentary.

[14] To be clear, the Parrino defendants alleged, as special defenses, that Ferri was aware of the trustees' intent to decant the 1983 trust before the 2011 trust was created and that the actions were a part of a conspiracy to keep those assets away from Powell-Ferri in the dissolution proceeding. Those allegations were stricken by the trial court, *Munro, J.*, in the trustees' action. The trial court in the vexatious litigation action addressed this claim, stating that "Ferri's counsel acknowledged during oral argument before this court that such special defense against the trustees does not serve as a basis for Ferri's vexatious litigation claims against the defendants in the present case." We agree with the trial court that claims alleged in special defenses are not relevant to this vexatious litigation suit brought on the basis of the Parrino defendants' filing and prosecution of the cross complaint.

contention that the Parrino defendants lacked probable cause because they knew that Ferri only learned about the decanting after the fact.

Finally, the trial court correctly determined that the lack of precedent in other jurisdictions did not render the Parrino defendants' cross complaint as being without probable cause. See *Tatoian* v. *Tyler*, supra, 194 Conn. App. 59 ("Were we to conclude . . . that a claim is unreasonable wherever the law would clearly hold for the other side, we could stifle the willingness of a lawyer to challenge established precedent in an effort to change the law. The vitality of our common law system is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." (Internal quotation marks omitted.)).

Our review of the extensive record in the interrelated cases and the briefs submitted on appeal demonstrate that the Parrino defendants zealously sought a remedy for their client. As our Supreme Court in the trustees' action explained, the available remedies in such a situation were a motion for contempt, arguing that Ferri had dissipated marital assets, and a request to the court to use its discretion to consider the removed assets when fashioning asset distribution orders. *Ferri* v. *Powell-Ferri*, supra, 317 Conn. 234. The Parrino defendants pursued all of those avenues to no avail.

The Parrino defendants also pursued another path in order to advance the law of our state to address situations in which a party to a dissolution proceeding takes no action to prevent others from removing assets from the marital estate to his benefit. When the trustees preemptively filed the declaratory judgment action seeking a court determination that Powell-Ferri had no right to the funds in the 2011 trust, the Parrino defendants filed the cross complaint at issue, asking the court to recognize a new cause of action that would have required a

party to a dissolution proceeding to take action to prevent the removal of assets that would benefit him. When presented with the trustees' action, the Parrino defendants, accordingly, attempted to defend and vindicate their client's interests.

On the basis of the foregoing, we conclude that the trial court properly determined that the Parrino defendants had probable cause to bring and prosecute the cross complaint. The trial court, therefore, properly granted the Parrino defendants' motion for summary judgment.[15]

The judgment is affirmed.

In this opinion the other judges concurred.

[15] As a result of this determination, we need not address Ferri's remaining claims for the following reasons. Ferri claims that the trial court erred in finding that the Parrino defendants did not act with malice. Although malice is an element of a common-law vexatious litigation cause of action, it is not an element of the statutory vexatious litigation cause of action; it is only a multiplier of damages. Probable cause is an element of both. Because we determine that there was no want of probable cause, we do not need to consider whether the trial court properly determined a want of malice. See *Schaeppi* v. *Unifund CCR Partners*, 161 Conn. App. 35, 36 n.1, 127 A.3d 304, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015).

Ferri also claims that the trial court erred in determining that the Parrino defendants did not violate rule 3.1 of the Rules of Professional Conduct. A violation of the Rules of Professional Conduct does not, in itself, create a private cause of action. See Rules of Professional Conduct, preamble ("[v]iolation of a [r]ule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached"); *Perugini* v. *Giuliano*, 148 Conn. App. 861, 879, 89 A.3d 358 (2014) ("the Rules of Professional Conduct do not give rise to a private cause of action"). Our review of the trial court record in the vexatious litigation action demonstrates that Ferri raised this argument, not as a separate cause of action, but as support for his claim that the Parrino defendants lacked probable cause to maintain the cross complaint. As we have already concluded that the trial court did not err in determining that the Parrino defendants had probable cause, we need not consider this claim in depth.

Finally, in light of our determination that the trial court properly granted the Parrino defendants' motion for summary judgment, it is not necessary to address Ferri's claim that the court should have granted his motion and rendered judgment in his favor.

JOHN BORG ET AL. *v.* LYNNE CLOUTIER
(AC 41693)

DiPentima, C. J., and Keller and Bright, Js.*

Syllabus

The plaintiffs, J, A and their minor child, sought to recover damages from the defendant for trespass, nuisance and invasion of privacy, and the defendant filed a counterclaim against J and A alleging claims of trespass, private nuisance, invasion of privacy, defamation and defamation per se in connection with an ongoing dispute between the parties, who are neighbors. Following prior litigation between the parties and in response to vandalism in the parties' neighborhood, the defendant installed surveillance cameras on the rear of her property, facing the backyard of the plaintiffs' property, which upset J and A because, inter alia, they believed that the cameras were angled to monitor their child's play area. Soon thereafter, J and A installed floodlights in their backyard that emitted bright light into the defendant's yard and through her windows, and the defendant discovered a website connected to J that contained references that she was associated with child pornography. Following a trial, the jury returned a verdict in favor of the defendant on the complaint and on the counterclaim and awarded $292,000 in noneconomic damages against both J and A on the private nuisance and intrusion on seclusion invasion of privacy claims, and $250,000 as to both the defamation claim and false light invasion of privacy claim against J. The jury also found that the actions of J and A were sufficiently reckless or intentional to justify an award of punitive damages. Thereafter, the court denied the motion to set aside the verdict filed by J and A, awarded the defendant $32,600 in punitive damages and ordered a permanent injunction against J and A, limiting their use of the floodlights directed at the defendant's property and requiring J to remove the defamatory statements about the defendant from the website. The court subsequently granted the defendant's motion for contempt, finding J and A in contempt for failing to comply with its permanent injunction order. On J and A's amended appeal to this court, *held*:

1. J and A's claim that the trial court abused its discretion in failing to set aside the verdict because it failed to inquire adequately into possible juror misconduct was unavailing: J and A waived their claim that that court should have conducted an evidentiary hearing on the issue of possible juror misconduct, as they assented to the court's decision to

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

proceed with the trial without conducting further inquiry after its preliminary inquiry into the issue; moreover, under the circumstances, the court properly limited the scope of its investigation of possible juror misconduct, it conducted a sufficient inquiry into the issue and its conclusion as to the absence of juror misconduct was adequately supported by the record.

2. J and A could not prevail on their claim that the trial court abused its discretion in denying the motion to set aside the verdict on the count alleging private nuisance against A and the jury's finding of recklessness, as there was sufficient evidence in the record to support the jury's verdict as to A; contrary to J and A's contention that A could not be liable for private nuisance because there was no direct evidence of her participation in the circumstances that led to the private nuisance claim, the jury was free to infer, on the basis of the circumstantial evidence before it, that A maintained sufficient control and responsibility regarding the activities on the subject premises to find her liable, and the jury was presented with evidence depicting a number of instances from which it could infer that A participated in the creation of the private nuisance intentionally and with a reckless disregard for the rights of the defendant.

3. J and A could not prevail on their claim that the trial court abused its discretion in denying the motion to set aside the verdict because there was insufficient evidence to support the jury's verdict on the counts alleging defamation and false light invasion of privacy against J and its finding of actual malice:

   a. There was sufficient evidence on which the jury reasonably could have concluded that J's actions in connection with the website constituted defamation, as the ample evidence linking J to the creation and maintenance of the website was sufficient to permit the jury reasonably to infer that he had registered the website domain name using a credit card and that he posted the statements about the defendant that the jury determined to be defamatory.

   b. There was sufficient evidence to support the verdict on the claim of false light invasion of privacy as to J, as the jury reasonably could have concluded that the false light into which the defendant had been placed, as an alleged child pornographer, would be highly offensive to a reasonable person and that J created and maintained the website that published this accusation with knowledge that it was false for the purpose of antagonizing the defendant by misrepresenting her character.

   c. There was sufficient evidence for the jury reasonably to find that J acted with actual malice in publishing the defamatory statements about the defendant on the website, as the jury reasonably could have concluded, on the basis of the ongoing hostile relationship between the parties, J and A's refusal to discuss the defendant's concerns about the floodlights and J and A's call to the police when the defendant put a

letter in their mailbox, that the website had been created solely to attack the defendant in her role as J and A's adversary.

4. The trial court abused its discretion in refusing to set aside the verdict on the ground that jury awarded double damages to the defendant; although the awards of $292,000 against both J and A for the private nuisance and intrusion on seclusion invasion of privacy claims related to the lights did not constitute duplicative damages, the awards of $250,000 as to both the defamation and false light invasion of privacy claims against J related to the website were duplicative, and, therefore, the court should have set aside the verdict on that ground.

5. J and A could not prevail on their claim that the trial court improperly awarded punitive damages to the defendant: J and A's contention that that court was required hold an evidentiary hearing, sua sponte, on punitive damages was unavailing, and the court's award of $32,600 in punitive damages to the defendant was well within its broad discretion; moreover, this court declined to review the J and A's argument that the trial court should have submitted to the jury the issue of the amount of punitive damages rather than resolving that issue itself, as J and A could not complain on appeal that the court's bifurcation of the punitive damages determination, to which they agreed at trial, entitled them to relief.

6. The trial court correctly determined that a permanent injunction was warranted; because that court's memorandum of decision fully addressed J and A's claim on appeal, this court adopted it as the proper statement of the facts and applicable law on this issue.

7. The trial court properly held J in contempt for failing to comply with its permanent injunction order requiring him to take down the website that contained the defamatory statements about the defendant; that order was sufficiently clear and unambiguous to support a finding of contempt, the record was unequivocally clear that J did not comply with the order and J failed to prove that his failure to comply was not wilful.

Argued March 5—officially released September 15, 2020

Procedural History

Action to recover damages for, inter alia, trespass, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim; thereafter, the matter was tried to the jury before *Povodator*, *J.*; verdict for the defendant on the complaint and on the counterclaim; subsequently, the court, *Povodator*, *J.*, denied the motion to set aside the verdict filed by the named plaintiff et al., granted the

motion for remittitur filed by the named plaintiff et al. and rendered judgment for the defendant, from which the named plaintiff et al. appealed to this court; thereafter, the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the defendant's motion to modify a temporary injunction and ordered certain permanent injunctive relief, and the named plaintiff et al. filed an amended appeal; subsequently, the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the defendant's motion for contempt, and the named plaintiff et al. filed an amended appeal. *Reversed in part*; *judgment directed.*

Christopher G. Winans, for the appellants (plaintiffs).

Brian M. Paice, with whom were *Raymond M. Gauvreau* and, on the brief, *Tara Racicot* and *Peter Sabellico*, for the appellee (defendant).

Opinion

KELLER, J. The underlying action is the latest chapter in a long-running dispute between neighbors. The plaintiffs John Borg and Alison Borg[1] brought several causes of action sounding in trespass, private nuisance, and invasion of privacy against the defendant, Lynne Cloutier. In a counterclaim, the defendant brought several causes of action against either one or both of the plaintiffs sounding in trespass, private nuisance, invasion of privacy, defamation and defamation per se, relating to the plaintiffs' allegedly directing flood lights at the defendant's residence for extended periods of time and for allegedly publishing a website containing defamatory statements about the defendant.[2] Following a trial,

[1] In addition to John Borg and Alison Borg, who are married, their minor daughter also is a plaintiff. The causes of action brought by the plaintiffs, however, are not before the court at this time. Rather, we are concerned only with the counterclaim brought by the defendant. All references to the plaintiffs, except where specifically noted, refer to John Borg and Alison Borg.

[2] Although defamation and defamation per se were pleaded as separate counts within the defendant's counterclaim, it appears that, based on the jury interrogatories, the jury was asked to award damages only for defamation generally. There is no claim on appeal that jury should have entered a

the jury returned a verdict in favor of the defendant on the complaint and on the counterclaim, and the court denied the plaintiff's motion to set aside the verdict, awarded the defendant common-law punitive damages and ordered a permanent injunction against the plaintiffs, limiting their use of the lights directed at the defendant's property and requiring John Borg to remove the defamatory statements about the defendant from the website. The court thereafter held both plaintiffs in contempt for not complying with the permanent injunction as to the lights and held John Borg in contempt for violating the terms of the injunction as to the website. On appeal, the plaintiffs claim that the court erred in (1) denying their motion to set aside the verdict in favor of the defendant on her counterclaim, (2) awarding punitive damages to the defendant, (3) granting the permanent injunction against John Borg regarding the website, and (4) holding John Borg in contempt with respect to the website containing defamatory statements about the defendant.[3] For the reasons set forth herein, we affirm in part and reverse in part the judgment of the trial court.

The court, in its well reasoned and thorough memorandum of decision on the plaintiffs' motion to set aside the verdict on the defendant's counterclaim, set forth the following facts and procedural history. "This is a lawsuit arising from a neighbor dispute. The plaintiffs and the defendant live in Westport, in an area of town where the houses are relatively small and in relatively close proximity to each other. The parties' properties generally back up to each other, with the rear property line essentially straddled by a ten feet wide right-of-way (approximately five feet from the centerline of the

separate award in accordance with its determination that John Borg's defamatory statement about the defendant on the website was defamatory per se.

[3] The plaintiffs appeal from only the court's ruling on their motion to set aside the verdict in favor of the defendant on her counterclaim, as they did not file a motion to set aside the verdict with regard to their complaint.

right-of-way encumbering each side's fee interest). The defendant is a relatively longtime resident of her home, and is the owner of the home. The plaintiffs . . . began occupying the property several years before this dispute arose. The nominal owner of the property on which the plaintiffs reside is a trust, established by [Alison Borg's] family.

"This dispute[4] involves [a complaint and a counterclaim with mutual claims of trespass, private nuisance, and invasion of privacy (seclusion)], with additional claims by the defendant against [John Borg] based on defamation and invasion of privacy (false light)." (Footnotes added and omitted.)

We now set forth additional facts, which the jury reasonably could have found. The defendant is a retired

[4] The court, in its memorandum of decision on the motion to set aside the verdict, referred to "this dispute" because "there had been a prior dispute that forms part of the history of the relationship between the parties. Shortly after the plaintiffs began to occupy their property, they learned that the then existing right-of-way (supposedly centered on the boundary between their respective properties) was improperly located, encroaching on the property occupied by the plaintiffs rather than straddling the property line as indicated by the appropriate deeds. One of the other residents in the area, whose property abutted the right-of-way and also was affected by this potential or actual problem, commenced litigation relating to the state of title and location of the right-of-way, resulting in an eventual settlement whereby the right-of-way was relocated closer to, if not exactly in, the deeded location. This required the defendant, and other property owners on her side of the right-of-way, to recognize that their backyards were not as large as had been believed, and required in some instances the relocation of fences (including the defendant's).

"The relevance of the prior litigation is that it likely created or exacerbated bad feelings on the part of at least some of the neighbors as related to the plaintiffs, and may have contributed to a defensive if not metaphorically paranoid attitude on the part of the plaintiffs (a sense that the neighbors did not like them or resented them). The earlier litigation, *Fellows* v. *Schor*, [Superior Court, judicial district of Fairfield, Docket No.] CV-14-6039942-S, was commenced with a return date in January, 2014, and was effectively settled in June–July, 2015 (judgment of dismissal entered on July 31, 2015). This action was commenced less than a year later, with a return date of May 17, 2016."

woman in her seventies who lives by herself in Westport. In the fall of 2015, following prior litigation between the parties; see footnote 4 of this opinion; and in response to recent vandalism in the neighborhood in which she and the plaintiffs live, the defendant installed surveillance cameras on the rear of her property, facing the backyard of the plaintiffs' property. The plaintiffs were upset by the defendant's installation of the cameras because they believed that the cameras were angled to monitor their minor child's play area and because they used their property to see clients and patients of their psychotherapy practice. The plaintiffs insisted that the defendant remove the cameras. The defendant made efforts to have the camera angles adjusted.

Not long after, the plaintiffs installed floodlights in their backyard that emitted bright light into the defendant's yard and through her windows at all hours of the day and night. Unable to sleep due to the bright lights, the defendant attempted to communicate her concerns about the lights with the plaintiffs on a number of occasions through different intermediaries but received no response from the plaintiffs. On one occasion, the defendant opened the plaintiffs' mailbox to put a handwritten letter inside it expressing her concerns, and the police thereafter were notified that the defendant had improperly and illegally opened the plaintiffs' mailbox.

In addition, the defendant discovered the existence of a website that contains the headline, "[The defendant] . . . [watches] kiddies," and lists the defendant's address in connection with accusations that she installed her surveillance cameras to observe "a child's playground area and the backyard of neighbor's property who were involved in the recent litigation," and, further, lists the defendant's name in connection with a harassment and child pornography case file pending in the Stamford Superior Court, thereby insinuating that the defendant

had an interest in child pornography.[5] The website also lists the contact number for the Department of Children and Families and contains photographs of the defendant's property and cameras. The website does not identify its owner or any of its contributors.

The court's memorandum of decision lays out the following additional procedural history. "[T]he plaintiffs initially sued the defendant, and the named plaintiffs included [John Borg and Alison] Borg, as well as their daughter. The [counterclaim] filed by the defendant, nominally directed to all of the plaintiffs, [was] clearly directed only to [John Borg and Alison Borg] (arguably belatedly acknowledged by the defendant at or around the time of trial).

"As presented to the jury, the claims of the plaintiffs were based on theories of private nuisance, invasion of privacy (right of seclusion), and trespass. As presented to the jury, the claims of the defendant directed to the . . . plaintiffs were reciprocal theories, i.e., private nuisance, invasion of privacy (right of seclusion) and as to [John] Borg only, trespass. There were additional claims of defamation and invasion of privacy (false light), directed only to [John] Borg.

"On January 24, 2018, after a trial that lasted approximately [three] weeks, the jury found for the defendant as to all of the plaintiffs' claims (including that of the minor plaintiff). The jury also found for the defendant with respect to all of her claims against the . . . plaintiffs, awarding $146,000 in noneconomic damages as against each plaintiff for each of the claims of private nuisance and invasion of privacy (right of seclusion) and $10 of nominal damages as to [John] Borg with respect to the trespass claim. As to the defamation and

[5] At trial, the defendant testified regarding these statements on the website, indicating that she had no knowledge of any such case against her and stating that she found these accusations to be upsetting.

invasion of privacy (false light) claims, the jury awarded the defendant $250,000 on each claim directed to [John] Borg. The jury also found that the defendant had proven that the plaintiffs had acted sufficiently recklessly or intentionally as to justify an award of common-law punitive damages." (Footnote omitted.)

On March 2, 2018, after the court accepted the jury verdict, the plaintiffs filed a motion to set aside the verdict and for remittitur. On that same day, the defendant filed a motion to set the amount of the punitive damages award. The court conducted a hearing on the proper amount of punitive damages and, by way of memorandum of decision, awarded the defendant $32,600 in the form of attorney's fees. On May 8, 2018, after a hearing that took place on April 2, 2018, the court denied the plaintiffs' motion to set aside the verdict after carefully considering the several grounds raised therein, and it granted a remittitur in the amount of $292,000,[6] which was accepted by the defendant as to a portion of the damages. On April 20, 2018, the defendant filed a motion to modify a temporary injunction that had been in place since prior to the trial, asking the court to award permanent injunctive relief regarding both the lights and the website. The court granted the requested permanent injunctive relief, over the plaintiffs' objection, after an evidentiary hearing. The permanent injunction ordered by the court required, inter alia, that both plaintiffs refrain from using any outside light at the rear of their property in excess of a specified

[6] In its memorandum of decision, by which the court ordered the remittitur of $292,000, the court stated: "[T]he court orders a remittitur of $292,000, but does so by ordering that the awards of $292,000 against each of the plaintiffs for noneconomic damages related to the private nuisance and invasion of privacy (seclusion) be treated as joint and several, thereby limiting the recovery for noneconomic damages related to private nuisance and invasion of privacy (seclusion) to an aggregate amount of $292,000 without impinging on the jury's determination that each plaintiff is or should be liable for (or up to) that amount."

lumen output threshold, and that John Borg remove or take steps to ensure the removal of the website and its postings. Thereafter, the defendant moved to hold in contempt the plaintiffs for failing to comply with the permanent injunction order, which the court granted. This appeal, which has been amended twice, followed.

We will address each of the plaintiffs' claims in turn. Additional facts and procedural history will be set forth as necessary.

I

MOTION TO SET ASIDE THE VERDICT

The plaintiffs claim first that the court erred in denying their motion to set aside the verdict in favor of the defendant on her counterclaim. Specifically, they assert that the court abused its discretion in failing to set aside the verdict on the grounds that (1) the court failed to investigate the possibility of juror misconduct and its effect on the verdict, (2) the evidence of Alison Borg's liability for nuisance was insufficient, (3) the evidence of Alison Borg's recklessness was insufficient, (4) the jury awarded double damages to the defendant, (5) the evidence presented on the false light claim asserted against John Borg was insufficient, (6) the evidence presented on the defamation claim asserted against John Borg was insufficient, and (7) the evidence presented on the actual malice claim against John Borg was insufficient. Each of these grounds was raised in the motion and rejected by the court. For purposes of judicial economy, although not necessarily in this order, we will address the juror misconduct and double damages claims independently, and will address together the various claims relating to the insufficiency of evidence, grouped by the particular plaintiff to whom they pertain.

Before we address the plaintiffs' claims as they relate to the court's denial of the motion to set aside the verdict,

we first set forth our standard of review. "The standard of review governing our review of a trial court's denial of a motion to set aside the verdict is well settled. The trial court possesses inherent power to set aside a jury verdict [that], in the court's opinion, is against the law or the evidence. . . . [The trial court] should not set aside a verdict [when] it is apparent that there was some evidence [on] which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside [when] the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles. . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb." (Internal quotation marks omitted.) *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, 149 Conn. App. 839, 847, 89 A.3d 993, cert. denied, 312 Conn. 920, 94 A.3d 1200 (2014).

A

Failure to Investigate Alleged Juror Misconduct

The plaintiffs claim that the court failed to inquire adequately into possible juror misconduct when a juror—who had been dismissed after the first day of deliberations and replaced by an alternate juror—made a remark while in the presence of the court clerk, outside of the courtroom and the presence of the other jurors, about his opinion that he was " 'uncomfortable' " with John Borg and that he was " 'creepy.' "[7] The plaintiffs, citing *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 104, 956 A.2d 1145 (2008), specifically argue that the court should have granted their request

[7] Following the dismissal of the juror in question, the court instructed the jury to begin its deliberations anew with the alternate juror who had been chosen as a replacement.

for an evidentiary hearing on whether the juror's "misbehavior [was] such to make it probable that the juror's mind was influenced by it so as to render him or her an unfair and prejudicial juror," and that, in denying such request for an evidentiary hearing, the court abused its discretion. The defendant counters that the court made a sufficient inquiry into the possibility of juror misconduct and, further, that the plaintiffs have waived this claim. We agree with the defendant.

The following additional undisputed facts, as set forth in the court's memorandum of decision on the plaintiffs' motion to set aside the verdict, and procedural history are relevant to our resolution of the plaintiffs' claim. "When the jury commenced deliberations, the parties and court were aware that one of the jurors would not be able to return the following day if the jury did not render verdicts on the complaint and [counterclaim] on that first day of deliberations. At the end of the day, as the court was releasing the jury for the day, the court acknowledged that one juror was unable to return the following day, and released/discharged that particular juror. A few minutes later, the clerk reported to the court that as that discharged juror was leaving—separate and apart from the other jurors—he made an unflattering comment concerning [John] Borg, something along the lines of [John] Borg being 'creepy.' Counsel were apprised of this interchange and in open court were given an opportunity to ask the clerk questions about the circumstances under which she had heard that comment. [The clerk] confirmed that the discharged juror had been separated from the remaining jurors when he made that comment.

"The court already had charged the jury that it should not allow its decision to be swayed by likes and dislikes, particularly since at least some of the parties could fit into somewhat stereotypical personas—the defendant could come across as a prototypical grandmother and

the minor plaintiff (testifying with a stuffed animal in her lap) coming across as a prototypical cute little girl. The court also was aware that there were claims that [John] Borg had been responsible for a website associating the defendant with child pornography (specifically identifying the defendant and one of her neighbors by name, immediately followed by the phrase 'Think Child Porn'), which could have an impact beyond relevance to the merits of the claims of defamation and invasion of privacy (false light).

"The court explained to the parties that it intended to give an additional/curative instruction, not referencing the comment of the discharged juror, but reemphasizing that the jury was to determine the merits of the claims based on the evidence, and not on whether they liked or disliked any of the parties. The court gave counsel an opportunity to comment and make suggestions, and the parties agreed that the court's proposed course of action was appropriate. No one, and especially the plaintiffs, suggested that the court take more aggressive action such as making inquiries of the remaining jurors, something that the court had identified as a possibility but expressed a preference not to do so as to avoid unduly emphasizing the question of the likeability of the parties.

"Although the plaintiffs had agreed to the course of action proposed by the court—and the court followed through as it had proposed without any exception or objection from any party—after the jury returned its verdicts in favor of the defendant as to both the complaint and [counterclaim] the plaintiffs raised the issue of juror misconduct as warranting setting aside the verdict based on this incident."

The court, in analyzing the impact, if any, of the dismissed juror's comment, then stated the following: "The plaintiffs must contend with at least two impediments

to relief. The court exercised its discretion in fashioning an appropriate response to a situation that unexpectedly arose. (Technically, it did not actually involve the jury itself but rather a former juror.) Additionally, the plaintiffs agreed to the course of action proposed by the court. Therefore, the plaintiffs must establish not only an abuse of discretion in the action taken, and a likelihood to taint the deliberation process, but they must also negate their waiver of any complaint about the course of action followed by the court. The court outlined its planned course of action, the plaintiffs were given an opportunity for input, and the plaintiffs did not object to the course of action proposed and actually taken by the court. To the extent that the plaintiffs are claiming that the excessiveness of the verdict in favor of the defendant is indicative of a pervasive negative attitude of the jury as directed to the plaintiffs, that is possibly a factor with respect to evaluation of the claim that the verdict was excessive. The plaintiffs have not provided any authority, however, that after agreeing to, or at least acquiescing in, a procedure adopted by the court, a party may retroactively complain about the procedure because the verdict was perceived to be excessive without anything more. . . .

"The court must emphasize that the comment was made after all of the evidence had been presented and the jury had begun deliberating—in any case in which a party engaged in actionable or criminal conduct, once the jury begins deliberating, the jury will be reaching implicit if not explicit conclusions relating to the character of the actions of parties, and often the egregiousness of that conduct. In civil cases, the issue of recklessness or malice often is an explicit determination, and in this case, the jury was instructed that it was to make those determinations in connection with the evaluation of the conduct of the parties (recklessness as to all parties against whom a claim had been

asserted; malice as a possible issue in the claim of defamation). The ultimate issue is not whether the jury (or individual jurors) liked or disliked a party; the issue is whether there was a fair and impartial determination of the merits, and there is no basis for concluding that the plaintiffs did not have a fair and impartial determination of the merits of the claims they were making and the claims asserted against them, based on the statement by a former juror that one of the plaintiffs was creepy.

"The court took appropriate prophylactic/curative action, and other than pointing to the claimed excessive nature of the verdict, the plaintiffs can point to nothing indicating impropriety by the jury. With respect to the claim that excessiveness of the verdict confirms some prejudice against [John] Borg, the actual verdict largely belies such a claim. The defendant pursued a trespass claim against [John] Borg; the jury recognized that the only evidence of a trespass by [John] Borg established a relatively trivial invasion of the defendant's property, and therefore awarded only nominal damages as would be appropriate for a relatively innocuous trespass ($10). That nominal award reflects that the jury was able to (and did) follow the court's instructions, even if there had been an undercurrent of dislike for him; the jury did not allow any collateral emotional attitudes to distort their analysis of an appropriate level of damages." (Footnote omitted.)

On appeal, the plaintiffs claim that the court should have conducted an evidentiary hearing because, "[a]bsent an inquiry as to [the juror's] relationship to his fellow jurors, the stain of prejudice and unfairness soils these proceedings and calls into question the fairness and propriety of the jury's verdict." The plaintiffs failed to object to the court's course of action in the trial court, and the record reflects that they acquiesced in the court's conduct. Thus, we conclude that they have waived their right to raise this claim. "Generally, [w]hen

a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Internal quotation marks omitted.) *State* v. *Bharrat*, 129 Conn. App. 1, 35, 20 A.3d 9, cert. denied, 302 Conn. 905, 23 A.3d 1243 (2011). As previously discussed, the plaintiffs declined the opportunity to object to the court's decision to proceed without questioning each juror individually. Only after the verdict was returned did the plaintiffs allege impropriety in the court's action and claim that the court should have conducted an evidentiary hearing. Having considered all of the relevant circumstances, we conclude that the plaintiffs assented to the court's decision to proceed without conducting further inquiry into the possibility of juror impropriety.

Even if we were to conclude that the plaintiffs had not waived this claim, we conclude that the trial court did not abuse its discretion in choosing not to conduct an evidentiary hearing on the issue of possible juror impropriety.

"To ensure that the jury will decide the case free from external influences that might interfere with the exercise of deliberate and unbiased judgment . . . a trial court is required to conduct a preliminary inquiry, on the record, whenever it is presented with information tending to indicate the possibility of juror misconduct or partiality. . . .

"Any assessment of the form and scope of the inquiry that a trial court must undertake when it is presented with allegations [or the possibility] of jury [bias or] misconduct will necessarily be fact specific. . . . We [therefore] have limited our role, on appeal, to a consideration of whether the trial court's review of alleged [or possible] jury misconduct can fairly be characterized as an abuse of its discretion. . . . Although we recognize that trial [c]ourts face a delicate and complex task

whenever they undertake to investigate [the possibility] of juror misconduct or bias . . . we nevertheless have reserved the right to find an abuse of discretion in the highly unusual case in which such an abuse has occurred. . . . Ultimately, however, [t]o succeed on a claim of [juror] bias the [plaintiffs] must raise [their] contention of bias from the realm of speculation to the realm of fact. . . .

"Consequently, the trial court has wide latitude in fashioning the proper response to allegations [or the possibility] of juror bias. . . . [W]hen . . . the trial court is in no way responsible for the [possible] juror misconduct [or bias], the [plaintiffs bear] the burden of proving that the misconduct [or bias] actually occurred and resulted in actual prejudice. . . .

"[W]here the [plaintiffs claim] that the court failed to conduct an adequate inquiry into possible juror bias or prejudice, the [plaintiffs bear] the burden of proving that such bias or prejudice existed, and [they] also [bear] the burden of establishing the prejudicial impact thereof." (Internal quotation marks omitted.) *State* v. *Osimanti*, 111 Conn. App. 700, 714–15, 962 A.2d 129 (2008), aff'd, 299 Conn. 1, 6 A.3d 790 (2010).

In this instance, the record reveals that the court conducted a sufficient inquiry. Upon learning of the juror's comment, the court permitted counsel for both parties to question the clerk who had heard the remark. The court provided a curative instruction to the jury, reminding the jurors that they must not base their determinations on their personal opinions of either party but, rather, on the merits of each claim and the evidence presented. Most significantly, the court presented counsel with the opportunity to comment and make suggestions as to the proposed course of action. Neither party objected to the court's plan to not conduct an evidentiary hearing or question individual jurors regarding the juror's comment. In fact, the plaintiffs' counsel admitted

that doing so could cause more problems than it would solve and chose not to proceed with individual juror questioning. It was only after the verdict was returned, in their motion to set aside the verdict, that the plaintiffs raised for the first time the claim of juror misconduct. The plaintiffs cite no case law in support of the notion that a plaintiff can allege juror misconduct, having not raised it previously, solely on the basis of the amount of the jury verdict.

Additionally, there is no duty imposed on the court to conduct an evidentiary hearing on a claim of juror misconduct. See *Harrison* v. *Hamzi*, 77 Conn. App. 510, 521–22, 823 A.2d 446, cert. denied, 266 Conn. 905, 832 A.2d 69 (2003). When a court's inquiry is adequate and the court has found the absence of any juror impropriety, the defendant has failed to establish juror bias. See *State* v. *Osimanti*, supra, 111 Conn. App. 716. In this instance, we find no fault with the court's conclusion that the statement of the dismissed juror—outside of the presence of the other jurors—that he found John Borg " 'creepy' " did not constitute juror impropriety nor did it prejudice the plaintiffs. Under this circumstance, therefore, the plaintiffs failed to demonstrate that juror misconduct likely occurred and resulted in actual prejudice to them. See id., 714–15. We conclude, therefore, that even if the plaintiffs did not waive their right to claim that the court erred by failing to hold an evidentiary hearing, the court did not abuse its discretion by limiting the scope of its investigation of alleged juror misconduct, and the court's conclusion regarding the absence of juror misconduct finds adequate support in the record.

B

Insufficiency of Evidence Relating to Claims Directed at Alison Borg

The plaintiffs next claim that, because there was insufficient evidence to support the jury's finding against Alison Borg on the count alleging private nuisance and its

finding of recklessness, the trial court abused its discretion by refusing to set aside the verdict. More specifically, with regard to the nuisance claim, the plaintiffs argue that Alison Borg "had nothing whatsoever to do with the offending lights save for living in the home where they were installed (by [John Borg])" and that "her liability was proverbially 'guilt by association.' " With regard to the finding of recklessness, the plaintiffs argue that "[a]rtificial illumination can hardly be classified as extreme . . . or dangerous" and that Alison Borg's conduct did not constitute recklessness. We disagree.

In reviewing claims of insufficient evidence, we are mindful that "[the trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach [its] conclusion . . . ." (Internal quotation marks omitted.) *Salaman* v. *Waterbury*, 246 Conn. 298, 304, 717 A.2d 161 (1998). Our review of the relevant transcript and exhibits, viewed in the light most favorable to sustaining the verdict; see *Gregorio* v. *Naugatuck*, 89 Conn. App. 147, 157, 871 A.2d 1087 (2005); reveals that there was sufficient evidence to support the jury's verdict against Alison Borg.

With regard to the count alleging private nuisance, the jury reasonably could have found that Alison Borg's control over her premises as the primary occupant of the home made her tortiously liable for private nuisance. In assessing the plaintiffs' claim, the court laid out the following facts that, based on our own review, were supported by evidence. "Although not owned in a title sense by either of the . . . plaintiffs, the property on which they lived was their Connecticut residence—especially, Alison Borg . . . and also was the location of the professional office for [Alison] Borg. (There was some evidence that [John] Borg also used the home for some of his professional pursuits.) Title to the property

was in a trust, established by [Alison] Borg's parents, with her mother being identified, at times, as . . . the trustee. On a number of occasions, the defendant tried to communicate with the plaintiffs concerning her complaints about the lights shining on her property, directly and through an intermediary . . . . On one occasion, the [defendant] placed a letter in the plaintiffs' mailbox . . . only to have the police called by the plaintiffs about the claimed unauthorized opening of their mailbox. (Although the plaintiffs deny receiving the letter, the jury could have credited the defendant's testimony that she placed it in the mailbox, and the jury could have rejected the plaintiffs' contention that they never received it—the letter was addressed to [John Borg] and [Alison] Borg.) There were numerous messages (in evidence) sent to the [plaintiffs] . . . relating to the lights and seeking at least an opportunity to discuss the problem, such that the jury could have inferred that [Alison] Borg was well aware of the problem and effectively opted for continuation of the objectionable status quo.

"The jury also was well aware that this was an ongoing battle between neighbors, and that it was not simply [John] Borg and the defendant. [Alison Borg's] family . . . had created the trust, and the trust was the title owner of the property that had been the actual litigant in the prior dispute concerning the proper location of the right-of-way. There was no evidence that [John] Borg had overridden the wishes of [Alison] Borg, and it is a reasonable inference that she knew where the outside lights were focused; at a minimum, she acquiesced in targeting the defendant. (Certainly after the counterclaim had been filed, and after the temporary injunction hearing, there could be no credible claim that she was unaware of the defendant's claim that the lights were perceived by the defendant to be a serious

intrusion and an interference with her ability to use and enjoy her property.)

"Somewhat more technically, in her counterclaim, the defendant asserted that '[t]he plaintiffs John Borg and/or Alison Borg erected two large floodlights on their property, that are turned on at all times of the day and evening, that shine into the defendant's entire home, including her bedroom.' In their answer, the plaintiffs stated: 'Admitted as to the existence of lights; the balance of the allegations are denied. [The plaintiffs' daughter] is nine years old.' Thus, although there was no generic reference to 'the plaintiffs' in paragraph [ten of the counterclaim], the answer to this paragraph took pains to . . . identify their daughter . . . separately from the [plaintiffs] . . . . In other words, an effort was made to distinguish individual plaintiffs, when appropriate . . . . No such distinction was made as to Alison Borg.

"Indeed, going somewhat further in this technical vein, [paragraph one] of the counterclaim alleged that all three plaintiffs resided at 5 Sterling Drive in Westport; the answer denied that status as to [John] Borg (also constituting another instance . . . to the effect that the plaintiffs differentiated among the plaintiffs in their answer, as they deemed appropriate). Therefore, according to the plaintiffs, the only adult who (admittedly) resided at the subject location was Alison Borg. Although the jury may not have been aware of the technical details of the pleadings, the pleadings indicate an equal if not more than equal role in the property, and in that sense confirms the jury verdict against [Alison] Borg. [Accordingly] the jury could have concluded that [John] Borg's involvement with the Westport property was somehow secondary to his primary residence elsewhere—leaving [Alison] Borg in primary control. . . .

"Therefore, in terms of relationship to the technical owner, in terms of admitted residency at the Westport address, and in terms of seemingly being at least an equal if perhaps somewhat passive participant with respect to dealing with [the defendant], the jury could have concluded that [Alison] Borg's control over the premises, which would include the objectionable lighting, made her tortiously liable for the installation and persistence of the lighting as a private nuisance and invasion of privacy (seclusion)." (Footnotes omitted; internal quotation marks omitted.)

The plaintiffs' argument on appeal—namely, that Alison Borg cannot be liable for private nuisance because there is no direct evidence of her participation in the circumstances that the led to the nuisance claim—must fail. Indisputably, the jury was presented with evidence that Alison Borg at least had equal or greater than equal control over their premises as John Borg. The jury also was aware that the family of Alison Borg owns the premises in trust and had participated in the prior action between these parties regarding the boundary line of the property. Accordingly, the jury was free to infer, on the basis of the circumstantial evidence before it, that Alison Borg maintained sufficient control and responsibility regarding the activities on the premises to find her liable in private nuisance, and the court did not err in leaving undisturbed the jury verdict on this count.

Regarding the finding of recklessness underpinning the punitive damages awarded against Alison Borg, the jury reasonably could have found that Alison Borg's actions were sufficiently intentional and, therefore, wilful; see *Elliott* v. *Waterbury*, 245 Conn. 385, 415, 715 A.2d 27 (1998); to justify such an award. In considering this claim, the court laid out the following facts, which we conclude, based on our review of the record, were supported by the evidence. "The jury was well aware

of the feud-like relationship between the parties. The jury could have credited the defendant's testimony that she repeatedly tried to contact the plaintiffs to discuss her concerns about lighting, both directly and through an intermediary, all to no avail. The jury was aware that this lawsuit had been pending for a period of time, such that [Alison] Borg clearly knew about the defendant's complaints, with nothing done to attempt to ameliorate the problems (other than by court order). The fact that when [the defendant] had put a letter in their mailbox, inviting the plaintiffs to discuss these problems, the police were called by the plaintiffs, all could lead to an inference of recklessness if not affirmative malice."

"Recklessness is a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. . . . Whether the [plaintiff] acted recklessly is a question of fact subject to the clearly erroneous standard of review." (Citation omitted; internal quotation marks omitted.) *Franc* v. *Bethel Holding Co.*, 73 Conn. App. 114, 137–38, 807 A.2d 519, cert. granted on other grounds, 262 Conn. 923, 812 A.2d 864 (2002) (appeal withdrawn October 21, 2003).

The jury was presented with evidence depicting a number of instances from which it could infer that Alison Borg participated in the creation of a private nuisance intentionally and with reckless disregard for the rights of the defendant. For example, the jury heard

evidence regarding multiple occasions on which the defendant tried to resolve the problems between herself and the plaintiffs outside of court but was met with both silence and, later, with a call made to the police. Additionally, the history between the parties, of which the jury was made well aware, further underscores the court's determination that the evidence in support of recklessness on the part of Alison Borg was not insufficient.

On the basis of those subordinate facts, we conclude that there was sufficient evidence to support the jury's verdict and that the trial court did not abuse its discretion in declining to set aside the verdict against Alison Borg.

C

Insufficiency of Evidence Relating to Claims Directed at John Borg

The plaintiffs next claim that, because there was insufficient evidence to support the jury's finding against John Borg on the counts alleging defamation and false light invasion of privacy, and its finding of actual malice, the trial court improperly refused to set aside the verdict. We disagree.

1

Defamation

With regard to the counts alleging defamation per se and defamation; see footnote 2 of this opinion; the jury reasonably could have found that John Borg's actions connected to the website posting constituted defamation. "[T]o 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." (Internal quotation marks omitted.) *Silano* v. *Cooney*, 189 Conn. App. 235, 241, 207 A.3d 84 (2019). The plaintiffs' claim on appeal, as well as in their motion to set aside the verdict on this count, pertains only to the sufficiency of the evidence regarding whether John Borg is the person responsible for the website posting. The plaintiffs do not challenge the other elements of defamation, and, accordingly, we need not address them.

The jury was presented with the following evidence, as was succinctly described by the court in its memorandum of decision: "Delving into the website content, personal and localized information—unlikely to be known or available to people outside the immediate area—was incorporated into the content of the various pages, including a video (generated during the earlier litigation) and photos taken from the right-of-way, if not on a property abutting the right-of-way. The website was registered in common with numerous other websites that specifically identified the properties in the area, with the notable exception of the plaintiffs' property address. Much of the content relates to the ongoing skirmishes and battles in this relatively limited area. Some of the links and pages adopt positions from the perspective of the plaintiffs, e.g., references to a civil rights lawsuit commenced by the plaintiffs against the Westport police, and separate reference to a minor whose rights were being violated. After the litigation was started, websites relating to the defendant's attorneys also were created (passing mention made during the trial).

"Although there was no smoking gun, the defendant retained forensic experts [who] were able to establish that the company that had registered the various domain names was one with which [John] Borg had been associated a few years earlier. [John] Borg was listed on the

documentation on file with the Secretary of the State relating to that entity, as having various roles with the company, but [John] Borg insisted that his involvement with that company had been highly limited and had terminated years ago. A forensic expert was able to link the payment for registration of some of the relevant domain names with the business entity account—but using a company card that specifically had been issued to [John] Borg."

The court then analyzed the jury's verdict, in light of the evidence, as follows: "As with all aspects of the plaintiffs' motion, the court must view the evidence in a light most favorable to sustaining the verdict which in this instance requires the court to determine whether the circumstantial evidence identified above, in aggregate, was a sufficient basis for the jury to determine that [John] Borg was in fact responsible for the offending website and its contents. . . .

"Viewing the evidence in a manner most favorable to sustaining the verdict, the court believes that the answer is in the affirmative. [That evidence includes the] nature of the information on the website; the perspective in the sense of position taken; the perspective in the sense of literal viewpoint from which photographs were taken; the existence of animosity; the linkage between [John] Borg and the entity that registered the websites; the existence of address based registered webpages with the exception of the address of the plaintiffs; the self-professed technical and technological skill of [John] Borg with respect to Internet technology; the highly localized knowledge contained on some of the pages; all in the context of litigation started by the plaintiffs with the primary purpose of protecting the perceived interests of their daughter—the alleged 'target' of the improper conduct of the defendant.

"No other child or backyard was identified as being viewed in the manner in which there was claimed viewing of the plaintiffs' backyard. (Certainly there was no evidence of anyone else in the neighborhood complaining about the defendant's security cameras and what they might be capturing.) The plaintiffs made a point of their perceived need to shield their daughter from the defendant's cameras, and tried to portray their daughter as reluctant to be photographed because of the defendant's cameras.

"To be sure, John Borg testified to the contrary—he denied any involvement with the website, denied any continuing affiliation with the company to which the website was registered, and indeed went so far as to indicate that he had had a somewhat contentious if not adversarial relationship at times with that company, having had to purchase certain rights relating to websites that he did wish to control. The jury, however, was not obliged to accept his explanations, and again, the court is required to view the evidence in a light most favorable to sustaining the verdict, not undermining it." (Footnote omitted; internal quotation marks omitted.)

We agree with the court that, on the basis of the evidence at trial, the jury reasonably could have found in favor of the defendant on her claim alleging defamation against John Borg, as the evidence submitted in support of that claim was sufficient. The ample evidence linking John Borg to the creation and maintenance of the website, although circumstantial, was sufficient to permit the jury reasonably to infer that John Borg had registered the website domain name using a company credit card and that he posted the statements the jury determined to be defamatory. Accordingly, we conclude that the court did not err in refusing to set aside the verdict on the basis of insufficient evidence of defamation.

2

Invasion of Privacy

We next turn to the claim of false light invasion of privacy as to John Borg. To establish a false light invasion of privacy claim, the claimant must show that "the false light in which [she] was placed would be highly offensive to a reasonable person, and . . . the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which [she] would be placed. . . . The essence of a false light privacy claim is that the matter published concerning the [claimant] (1) is not true . . . and (2) is such a major misrepresentation of [her] character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable [person] in [her] position." (Citations omitted; internal quotation marks omitted.) *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 131, 448 A.2d 1317 (1982).

The defendant's counterclaim for false light invasion of privacy hinges on many of the same facts and evidence relevant to the defamation claims, discussed in part I C 1 of this opinion. On the basis of that evidence, the jury reasonably could have concluded that the false light into which the defendant had been placed—as an alleged child pornographer—would be highly offensive to a reasonable person. In addition, the jury reasonably could have concluded that John Borg created and maintained the website with this accusation with knowledge that it was false for the purpose of antagonizing the defendant by misrepresenting her character in a major way. Accordingly, we conclude that the court did not abuse its discretion in refusing to set aside the verdict on the basis of insufficient evidence relating to the claim of false light invasion of privacy as to John Borg.

3

Actual Malice

Finally, regarding the claim of insufficient evidence with respect to the jury's finding of actual malice, we conclude that the jury, having found that John Borg created the defamatory website posts in question, reasonably could have found that he exhibited actual malice in so doing. Our Supreme Court has defined actual malice as "the publication of a false statement with knowledge of its falsity or reckless disregard for its truth . . . ." *Gambardella* v. *Apple Health Care, Inc.*, 291 Conn. 620, 634, 969 A.2d 736 (2009). We agree with the trial court that the jury reasonably could have concluded, on the basis of the ongoing hostile relationship between the parties, the plaintiffs' refusal to discuss the defendant's concerns about the floodlights, and the police being called when the defendant put a letter in the plaintiffs' mailbox, that the website was nothing "[o]ther than . . . an attack on the defendant, in her role as adversary, [as] no other possible motivation [for creating the website] appears likely."

Because we agree with the court that, on the basis of all of the aforementioned evidence, a jury reasonably could conclude that John Borg acted with actual malice in publishing defamatory accusations about the defendant on the website, we conclude that the court did not abuse its discretion in refusing to set aside the verdict as to the counterclaims against John Borg.

D

Double Damages Claim

The plaintiffs' final claim with regard to the motion to set aside the verdict is that the court erred in denying the motion because the jury's award of damages against both John Borg and Alison Borg constituted double damages. We agree with the plaintiffs that the jury awards

of $250,000 as to both the defamation claim and the false light invasion of privacy claim brought against John Borg related to the website were duplicative. Accordingly, we conclude that the court abused its discretion in refusing to set aside the verdict on that basis.

"[A] plaintiff may be compensated only once for his just damages for the same injury. . . . Plaintiffs are not foreclosed from suing multiple defendants, either jointly or separately, for injuries for which each is liable, nor are they foreclosed from obtaining multiple judgments against joint tortfeasors. . . . This rule is based on the sound policy that seeks to ensure that parties will recover for their damages. . . . The possible rendition of multiple judgments does not, however, defeat the proposition that a litigant may recover just damages only once." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 71–72, 557 A.2d 540 (1989). "Duplicated recoveries . . . must not be awarded for the same underlying loss under different legal theories." (Internal quotation marks omitted.) *Kelly* v. *Kurtz*, 193 Conn. App. 507, 533, 219 A.3d 948 (2019).

In the present case, the plaintiffs claim that the defendant was awarded double damages when (1) John Borg was assessed $146,000 plus $295.60 for the private nuisance claim and $146,000 for the intrusion upon seclusion invasion of privacy claim, both stemming from the use of the floodlights, (2) John Borg was assessed $250,000 for the defamation claim and $250,000 for the false light invasion of privacy claim related to the website, and (3) Alison Borg was assessed almost the same noneconomic damages as John Borg ($146,000 plus $295.59 and $146,000, respectively) for the private nuisance and invasion of privacy claims relevant to the floodlight placement.[8]

[8] Although the court determined that the damages awarded to the defendant were not duplicative in any of the ways asserted by the plaintiffs, the court ultimately granted the plaintiffs' motion for remittitur on other

In its memorandum of decision, the court stated as follows: "In the interrogatories, the court explicitly asked the jury to provide a net figure of damages as to each of the plaintiffs, allowing for any possible duplication. The jury indicated in its answers to the interrogatories that the $146,000 awarded as to each of two claims directed to each of the plaintiffs was intended to be cumulative, as to each plaintiff. As to John Borg, there was a similar indication with respect to the awards of $250,000. Specifically, at the conclusion of the section of the interrogatories directed to John Borg, interrogatory [number] 53 asked: Adjusting for any overlap or duplication of damages with respect to the claims asserted by [the defendant] against John Borg that you find to have been proven (your responses to interrogatories #36, #39, #42, #46 and #51),[9] the total (net) compensatory damages she sustained as a result of the John Borg's wrongful conduct total . . . .

"The jury entered $792,305.60 as that net figure, in the space provided. That is the sum of the entries to the interrogatories listed in [interrogatory number] 53: $146,295.60 + $146,000 + $10 + $250,000 + $250,000 (again, the damages awarded for each of the five claims asserted against John Borg). There is a similar interrogatory and similar answer as to [Alison] Borg—$146,295.59 + $146,000 = $292,295.59. (Only the claims of private nuisance and invasion of privacy (seclusion) were submitted to the jury with respect to [Alison] Borg—therefore, only two damages award figures.) Therefore, there can be absolutely no question that the jury intended to award a total (net of any adjustment

grounds. The court issued a remittitur in the amount of $292,000, leaving the plaintiffs jointly and severally liable for the remaining $292,000 on the nuisance and invasion of privacy (seclusion) claims. See footnote 6 of this opinion.

[9] Interrogatories numbers 36, 39, 42, 46 and 51 are the interrogatories asking for the determination of damages, as to each of the five claims asserted against John Borg.

for duplication) of $292,000 in noneconomic damages as against each of the plaintiffs [on the two counts related to the floodlights—those of private nuisance and invasion of privacy (seclusion)].

"The plaintiffs did not ask the court to charge the jury in a manner suggesting that the awards for private nuisance and invasion of privacy (seclusion) were inherently duplicative such that there could only be a single recovery, and likewise there was no analogous request relating to defamation and invasion of privacy (false light). Further, the manner in which the jury determined its awards is beyond the scope of review by the court (so long as not affirmatively improper), the court cannot determine whether the jury determined each award separately and then determined that the aggregated figures was the total intended award, or determined an aggregate award that was then allocated across the claims. The treatment of economic damages, discussed immediately below, indicates that the jury was conscious of the need to allocate/award damages in a nonduplicative sense, and the court has no basis—other than in the context of remittitur—to conclude that there was duplication of the awards directed to either of the plaintiffs.

"The court recognizes that it failed to ask the jury to make a similar determination with respect to the awards against the two plaintiffs—was there duplication in the award of $292,000 against each of the plaintiffs for these two claims? On the one hand, the jury was aware of the court's concern about duplicative awards, but on the other hand, there was no explicit mechanism provided to the jury for indicating whether there was an intent to award $292,000 against each . . . plaintiff, without any duplication, i.e., an intent to award aggregate damages [of] $584,000 as to those claims. . . .

"The court believes that it is compelled to conclude that the jury did, in fact, intend to award $292,000 in

noneconomic damages as against each of the plaintiffs, for an aggregate award on the private nuisance and invasion of privacy (seclusion) of $584,000. Although it may seem to be a tail wagging the dog approach, it is the economic damages component of the award that convinces the court that it cannot treat those awards as duplicative. The claim for economic damages relating to these claims was $591.19. If the jury had awarded that amount as economic damages against each of the plaintiffs, that might have been persuasive evidence of duplication of the award as to noneconomic damages—duplication as to one readily could suggest duplication as to the other. If the economic damages claimed had been an even number, and the jury had awarded a figure that was half of that claimed amount against each plaintiff, there would be at least a theoretical possibility of duplication of an award of a reduced amount. But the jury was faced with an odd number for the economic damages, and awarded different amounts (by a penny) against the two plaintiffs such that the total added up to the aggregate claim of $591.19. The jury made sure that there was no duplication in the award of economic damages, and given that level of care with a Iess than $600 figure, the court cannot conclude that they were not as conscious of potential duplication of noneconomic damages. The jury clearly was looking at an aggregate award to the defendant consisting of the damages assessed against . . . John Borg added to the damages assessed against . . . Alison Borg. . . .

"The manner in which the jury reached its conclusions is unknown; it is clear, however, that the jury intended an aggregate damages award, on the claims of private nuisance and invasion of privacy (seclusion) in the amount of $584,591.19. This is not a case in which the jury was given multiple theories of liability and can be deemed to have awarded duplicative damages . . . ." (Footnote added; internal quotation marks omitted.)

On appeal, the plaintiffs claim that the damages are unsupported by the record and "amount to a wholesale windfall for the defendant," and argue that the damages are duplicative in nature. First, with regard to the damages assessed against John Borg and Alison Borg for each of the claims pertaining to the use of lights, the court, in its analysis, considered the fact that neither party objected to the jury charge as given, nor did the plaintiffs ask the court to charge the jury in a manner that would instruct it to consider the nuisance and invasion of privacy claims related to the floodlights as one claim for purposes of awarding damages. The court assessed the fact that the responses to the jury interrogatories asking for the total amount of damages awarded each with respect to John Borg and Alison Borg revealed that "there can be absolutely no question that the jury intended to award a total . . . of $292,000 in noneconomic damages as against each of the plaintiffs." In addition, the court weighed the fact that, in terms of economic damages, the jury did *not* award identical damages against each plaintiff and, instead, awarded them totals that differed by one penny. It was upon this observation that the court premised its conclusion that the jury knew that its award against each plaintiff *could* permissibly be different, which therefore implies that its award of identical amounts against each plaintiff was not a mistake but was intended to constitute separate, cumulative awards on the nuisance and invasion of privacy claims.

Giving, as we must, great deference to the court's decision to not set aside the verdict on the basis of double damages, and upon review of the court's inquiry into the nature of the jury's award, there is no sound basis on which to disturb the court's conclusion that the award of damages on the claims related to the lights as against each plaintiff was not duplicative.

With regard to the two claims against John Borg related to the website, however, we conclude that the court should have set aside the verdict awarding $250,000 to the defendant for each of those claims. Our Supreme Court has observed that "we join those jurisdictions that have allowed causes of action for invasion of privacy and defamation to be pleaded together. *Miller* v. *News Syndicate Co.*, 445 F.2d 356, 357 (2d Cir. 1971); *Varnish* v. *Best Medium Publishing Co.*, 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987, 89 S. Ct. 1465, 22 L. Ed. 2d 762, reh. denied, 395 U.S. 930, 89 S. Ct. 1769, 23 L. Ed. 2d 251 (1969); *Rinsley* v. *Brandt*, 446 F. Supp. 850, 858 (D. Kan. 1977), and cases therein. This conclusion recognizes that each action protects different interests: privacy actions involve injuries to emotions and mental suffering, while defamation actions involve injury to reputation. [*Rinsley* v. *Brandt*, supra, 446 F. Supp. 858], quoting *Froelich* v. *Adair*, 213 Kan. 357, 516 P.2d 993 (1973). There can, of course, be only one recovery for any particular publication. *Dodrill* v. *Arkansas Democrat Co.*, 265 Ark. 628, 638, 590 S.W.2d 840 (1979), cert. denied, 444 U.S. 1076, 100 S. Ct. 1024, 62 L. Ed. 2d 759 (1980), citing 3 Restatement (Second), Torts § 652E, comment b, and 62 Am. Jur. 2d, Privacy § 5." *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 128 n.19. Relying on this authority, we conclude that, to the extent that the trial court sanctioned this recovery with respect to these two counts, it instead should have granted the plaintiffs' motion to set aside the verdict.

Accordingly, we conclude that the jury awards of $292,000 against each plaintiff for the private nuisance and intrusion upon seclusion invasion of privacy claims did not constitute duplicative damages. The jury awards of $250,000 as to both the defamation claim and the false light invasion of privacy claim brought against John Borg related to the website, however, were dupli-

cative, and, accordingly, we conclude that the court abused its discretion in refusing to set aside the verdict on that basis.

II

AWARD OF PUNITIVE DAMAGES

The plaintiffs next claim that the court improperly awarded punitive damages to the defendant because (1) the court failed to conduct an evidentiary hearing to determine the amount of punitive damages, in the form of attorney's fees, to be ordered, and (2) the court should have submitted to the jury the issue of the amount of punitive damages to be awarded, rather than resolving that issue itself. Specifically, with regard to their first claim, the plaintiffs argue that the court abused its discretion in awarding punitive damages to the defendant in the absence of any bills or invoices produced by the defendant. Regarding their second claim, the plaintiffs argue that, pursuant to this court's holding in *Iino* v. *Spalter*, 192 Conn. App. 421, 218 A.3d 152 (2019), the court should have submitted to the jury the issue of the amount of punitive damages to be awarded. We disagree.

The following additional facts are relevant to our resolution of this claim. In the court's memorandum of decision on the motion to set the amount of punitive damages, the court stated that "[t]he parties, prior to submission of the case to the jury, had agreed that the jury would only determine whether any party had proved entitlement to punitive damages, with the actual determination of the amount of punitive damages to be addressed by the court."[10] At trial, without objection,

[10] During a colloquy outside the presence of the jury, the court explained its proposed jury instructions to counsel and provided the parties with an opportunity to object. Specifically, the court stated: "What I . . . did is, if you look at the verdict forms, I've also added a place . . . for . . . entitle[-ment] to punitive damages. So, it's clear on the verdict form. My assumption is nobody has said anything to the contrary, nobody has offered any proof, so it's . . . I think we have that as a default that it's quite common, probably

the court instructed the jury in accordance with the agreed on bifurcation. The court stated: "If you conclude that any of the parties acted with reckless disregard for the rights of the adverse party with respect to invasion of privacy, trespass or private nuisance, you may award punitive or exemplary damages. Again, you only need to determine that a party is entitled to punitive damages. The court will do the actual calculation of the amount after your verdict is rendered." On March 2, 2018, after the court accepted the jury verdict in favor of the defendant, which included a determination that the defendant was entitled to punitive damages, the plaintiffs filed a motion to set aside the verdict. Also on March 2, 2018, the defendant filed a motion for the court to set the amount of punitive damages awarded to her on the basis of Alison Borg's recklessness and John Borg's actual malice, as found by the jury. In support of that motion, the defendant filed a sworn affidavit of her counsel asserting the total amount of attorney's fees she had incurred from the date she filed her counterclaim as being $96,855.25. The defendant did not submit law firm invoices or time records. On May 9, 2018, by way of memorandum of decision, the court awarded the defendant $32,600 in punitive damages, approximately 30 percent of the requested total.

On appeal, the plaintiffs argue that (1) the court should have held an evidentiary hearing at which the

most common, that the jury simply says, yea or nay on the punitive damages, and we would deal with that after the verdict. Nobody has said anything to the contrary. Nobody has offered any evidence to the contrary. So, I'm not sure how we can have any awards of punitive damages, except on that basis. So, I'm assuming that that's what you're doing and if anybody wants to say anything to the contrary in a couple of minutes, you'll have your opportunity to tell me where I've gone astray on any of the things I've commented on."

When provided with the opportunity to take issue with any of the court's proposed instructions, counsel for the plaintiffs indicated that he did not have any objections.

defendant would be required to produce evidence of her incurred legal fees, and (2) the determination of the amount of punitive damages to be awarded should have been left to the jury.

We first set forth the relevant standard of review and the legal principles that inform our analysis. "In awarding punitive damages . . . [t]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal absent a clear abuse of discretion." (Internal quotation marks omitted.) *Nelson* v. *Tradewind Aviation, LLC*, 155 Conn. App. 519, 542, 111 A.3d 887, cert. denied, 316 Conn. 918, 113 A.3d 1016 (2015).

First, in the absence of a request by the plaintiffs for an evidentiary hearing, we find unpersuasive the plaintiffs' argument that the court should have conducted an evidentiary hearing prior to determining the total amount of punitive damages to award the defendant. In addition to the broad discretion afforded to trial courts in determining issues of punitive damages, "[c]ourts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. . . . The court [is] in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues." (Internal quotation marks omitted.) *Andrews* v. *Gorby*, 237 Conn. 12, 24, 675 A.2d 449 (1996).

In the present case, the court was presented with a sworn affidavit of the defendant's counsel, setting forth the total amount of legal fees incurred by the defendant. The plaintiffs do not appear to challenge the fees charged by counsel to defend against the complaint and to pursue the counterclaim. Rather, it appears that they did nothing more than argue that the court should award only 20 percent of the amount requested. They did not

ask to examine the defendant's counsel and offered no affidavits or evidence of their own regarding the reasonableness of the fees claimed.

In addition, the court, *Povodator*, *J.*, had been involved with this case since the beginning and, therefore, was familiar with the claims and evidence involved. In its memorandum of decision, the court stated: "[T]he court has a singularly advantageous perspective . . . [in that] the undersigned has been involved with this case virtually from its inception . . . . Absent the particularity required by case law as identified by the court, the court is limited in its ability to rely on its own experience and judgment in determining the proper attorney's fees. Recognizing that the plaintiffs' 20 [percent] estimate [as being an appropriate fee award] was (not surprisingly) unreasonably low, the court will round down its conservative to low estimate of one third, to 30 [percent]." (Footnote omitted.) The court, after considering the history of the case—with which it was familiar—and in recognition of the fact that it had only been presented with an affidavit and not with actual fee bills, rounded down its own estimate of what it deemed appropriate attorney's fees. Accordingly, we find the plaintiffs' argument that the court was required to hold an evidentiary hearing, sua sponte, on punitive damages unavailing, and the court was well within its broad discretion in awarding $32,600 in punitive damages to the defendant.

Next, with regard to the plaintiffs' argument that the amount of punitive damages should have been left for the jury—and not the court—to determine pursuant to *Iino* v. *Spalter*, supra, 192 Conn. App. 421, we again are unpersuaded.

In *Iino*, the defendant executrix of the decedent's estate appealed from the judgment of the trial court in favor of the plaintiff, who brought an action sounding

in tort against the decedent's estate. Id., 424. The defendant claimed on appeal, inter alia, that the court improperly permitted the jury to find her liable for punitive damages without evidence as to the plaintiff's litigation expenses and that the court improperly reserved to itself the issue of the amount of punitive damages to be awarded. Id., 423. Prior to the plaintiff's presentation of evidence at trial, the defendant submitted a request to the court that the court submit any determination of punitive damage amounts to the jury. Id., 457. Following the plaintiff's failure to present any evidence of her legal fees as evidence, the defendant asked the court not to charge the jury on punitive damages because no such evidence had been presented but reiterated that, if the issue of liability for punitive damages were to go to the jury, the court must have the jury also determine the amount of those punitive damages. Id. The plaintiff agreed that the issue of punitive damages was a jury question but stated that the question of the amount of damages was for the court to determine. Id., 457–58. The trial court agreed with the plaintiff, and the defendant appealed to this court. Id., 458.

On appeal, this court, agreeing with the defendant, concluded that, "[b]ecause the defendant properly and timely requested that the question of the amount of punitive damages be decided by the jury, it was incumbent on the plaintiff to submit evidence supporting her claim to such damages in her case. It is undisputed that she did not do so. We conclude, on the basis of the foregoing, that the court improperly charged the jury on punitive damages when there was no evidence of damages to support that charge." Id., 470.

Iino, along with the cases to which this court refers within that opinion, contemplates the absence of any agreement between the parties regarding a bifurcation

of the issues of punitive damages liability and amount.[11] In the present case, unlike in *Iino*, the parties agreed prior to trial that the issues of liability and damages would be bifurcated between the jury and the court. Additionally, unlike in *Iino*, the plaintiffs here raised no objection to the court's instruction to the jury that the court would determine the amount of punitive damages to be awarded, if applicable.

In the present appeal, the plaintiffs do not challenge the court's observation, as set forth in its memorandum of decision, that the parties had agreed to submit the issue of the amount of punitive damages, if any, to the court, and not the jury. The plaintiffs' failure to object to the court's instruction to the jury that it was to consider solely the issue of whether punitive damages should be awarded, but not the amount of such damages, is consistent with the court's observation. "Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise its claim before the trial court. . . . For that reason, we repeatedly have held that we will not decide an issue that was not presented to the trial court. To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Citations omitted; internal quotation marks omitted.) *Dziedzic* v. *Pine Island Marina, LLC*, 143 Conn. App. 644, 654–55, 72 A.3d 406 (2013). Accordingly, the plaintiffs cannot be heard to complain on appeal that the court's bifurcation of the punitive

[11] In *Iino*, this court discusses the federal case of *Wolf* v. *Yamin*, 295 F.3d 303, 312 (2d. Cir 2002), and states the question certified to our Supreme Court in that case as follows: "[U]nder Connecticut law on punitive damages, is a plaintiff who does not offer any evidence of litigation costs at trial before a jury barred from recovering any punitive damages? (*This question assumes there has been no agreement by the parties to a bifurcation of the punitive damages determination between the jury/trier of fact as to liability and the judge as to amount.*)" (Emphasis altered; internal quotation marks omitted.) *Iino* v. *Spalter*, supra, 192 Conn. App. 460.

damages determination, with which they agreed at the time of trial, entitles them to relief. To review this aspect of the present claim would amount to an ambuscade of the trial court.

III

PERMANENT INJUNCTIVE RELIEF

The plaintiffs next claim that the court wrongly issued permanent injunctive relief because the defendant failed to sustain her burden of proving an absence of an adequate remedy at law.[12] More specifically, they claim that the defendant received an adequate remedy at law when she received a sizeable damages award from the jury and that the court "abused its discretion on the facts and erred on the law" in granting the defendant's request for an injunction.[13] The defendant argues that, "[d]espite the jury's finding in favor of [the defendant on her] counterclaim against the plaintiffs . . . and . . . awarding a significant amount of damages, the website remained up, thus denying [the defendant]

[12] The permanent injunction ordered by the court pertained to both the plaintiffs' use of the lights on their property, as well as to the defamatory website connected to John Borg. More specifically, the permanent injunction limited the plaintiffs' use of the lights directed at the defendant's property and required John Borg to remove the defamatory statements about the defendant from the website. On appeal, the plaintiffs do not challenge the permanent injunction limiting their use of the lights, and, accordingly, we address only the court's order to the extent that it pertains to the website.

[13] The permanent injunction order states in relevant part: "John Borg is ordered to remove, or take steps to ensure removal of, the webpage on battleofcompohill.com containing the reference to the defendant as being associated with child pornography, either by deleting the page or removing all references to child pornography and 'watching' children . . . it being the intent of the court that John Borg take all steps and measures reasonably within his power to remove the offending page, including but not limited to rights he has or may have as the nominal owner of the website or person in control of the entity-owner of the website or person acting as liaison with the host on behalf of the owner or in any way having any involvement or control over the content of the website. [John Borg] is ordered to comply no later than three weeks after issuance of this order."

the justice and peace that the trial should have afforded her," and, accordingly, the monetary remedy was not adequate. We agree with the defendant.

We begin by setting forth the relevant standard of review. "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . . Therefore, unless the trial court has abused its discretion . . . the trial court's decision must stand." (Internal quotation marks omitted.) *Commissioner of Correction* v. *Coleman*, 303 Conn. 800, 810, 38 A.3d 84 (2012), cert. denied sub nom. *Coleman* v. *Arnone*, 568 U.S. 1235, 133 S. Ct. 1593, 185 L. Ed. 2d 589 (2013). "How a court balances the equities is discretionary but if, in balancing those equities, a trial court draws conclusions of law, our review is plenary." (Internal quotation marks omitted.) *Morton* v. *Syriac*, 196 Conn. App. 183, 191, 229 A.3d 1129, cert. denied, 335 Conn. 915, 229 A.3d 1045 (2020).

The following additional facts and procedural history are relevant to our resolution of this claim. The court scheduled an evidentiary hearing on the motion to modify the permanent injunction on May 18, 2018, which was continued to June 28, 2018, following John Borg's motion for a continuance. The hearing occurred as scheduled, and, on August 23, 2018, the court granted the defendant's request for a permanent injunction.

In its memorandum of decision ordering the permanent injunction, the court stated, with respect to the website: "The issue of irreparable harm is relatively straightforward. The jury concluded that the website

is under the control of John Borg. The website associated the defendant with child pornography. There is continuing harm and there is no benefit to anyone from the continued existence of that particular aspect of the website and no cognizable harm if that particular page were to be deleted or edited so as to remove the association of the defendant with child pornography.

"[John Borg], while not acknowledging any involvement with that particular website or page, has often alluded to the ability of the defendant to contact the host of the website, asking/demanding that the page be taken down, or otherwise indicating that there is some level of self-help available. The problem is that the 'remedy' available is neither simple nor assured. [John Borg] is asking the defendant to identify the proper entity hosting the website and then contact that host—effectively asking for its assistance. The efficacy of this approach depends on proper identification of the host and determining the proper means of requesting that the page be taken down—and if that is done correctly, ultimately depending on the willingness of the host to take the offending page down, notwithstanding the presumed absence of a corresponding request from its client/customer. Against the uncertainty of an ability to ensure relief through her own efforts, the party responsible for the existence of the offending webpage can direct removal of the offending page without any apparent uncertainty attributable to intervening steps and intervening actors (who must be convinced to act, presumptively against the wishes of a client). In this context, the ability to ask someone to provide relief—asking as a stranger, with no clear right to relief—is not perceived to be an adequate remedy at law. Conversely, even if the page were to be taken down by the hopefully correctly identified (and compliant) host, in the absence of any mandate directed to [John Borg], there would be nothing preventing him from using a different host or

different website (or both) to repost the same offensive message. Given the jury determination of malice and entitlement to punitive damages, such a concern must be treated as more than hypothetical or speculative. Accordingly, the court has determined that the equities clearly warrant injunctive relief directed to . . . John Borg and that there is no adequate remedy at law."

Our examination of the record and briefs and our consideration of the arguments of the parties persuades us that the trial court correctly determined that a permanent injunction was warranted. Because the quoted portion of the court's memorandum of decision fully addresses the plaintiffs' claim on appeal, we adopt it as the proper statement of the facts and applicable law on this issue. It would serve no useful purpose to repeat the discussion contained therein. See *Morton* v. *Syriac*, supra, 196 Conn. App. 198.

IV

MOTION FOR CONTEMPT

Finally, the plaintiffs claim that the court erred in granting the defendant's motion for contempt against John Borg pertaining to his alleged failure to comply with the court's order; see footnote 13 of this opinion; requiring that he take down the website containing defamatory statements about the defendant. We disagree.

We begin our analysis by setting forth the relevant standard of review. "[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the

trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . [A] person must not be found in contempt of a court order when ambiguity either renders compliance with the order impossible, because it is not clear enough to put a reasonable person on notice of what is required for compliance, or makes the order susceptible to a court's arbitrary interpretation of whether a party is in compliance with the order." (Citation omitted; internal quotation marks omitted.) *Bruno* v. *Bruno*, 177 Conn. App. 599, 620, 176 A.3d 104 (2017).

The following facts are relevant to this claim. On August 23, 2018, as discussed in part III of this opinion, the court issued a permanent injunction order requiring John Borg, inter alia, "to remove, or take steps to ensure removal of, the webpage on battleofcompohill.com containing the reference to the defendant as being associated with child pornography, either by deleting the page or removing all references to child pornography and 'watching' children . . . ." The court issued this order despite John Borg's continued denial of having access to or the ability to remove the website because he claimed to have no involvement in its creation or maintenance. In issuing its order, the court explained that "[t]he court recognizes that John Borg has denied and apparently has continued to deny any ability or authority to take or effectuate any such corrective action, but in light of the jury determination and the court's own assessment of the evidence for purposes of this equitable phase of the proceedings, the court is not constrained by such persistent denials (recognizing that any enforcement/contempt proceeding might require a more intensive examination of the existence or absence of ability to comply)."

On October 12, 2018, the defendant filed a motion for contempt claiming, inter alia, that John Borg had failed to comply with the court's order because the website was still up and accessible. Following hearings on the motion for contempt, the court, on March 12, 2019, issued a written order in which it granted the defendant's motion.[14]

We first assess, whether the court's order was sufficiently clear and unambiguous as to put John Borg on notice of what was required for compliance. For purposes of analysis, we restate the relevant language of the order: "The plaintiff John Borg is ordered to remove, or take steps to ensure removal of, the webpage on battleofcompohill.com containing the reference to the defendant as being associated with child pornography, either by deleting the page or removing all references to child pornography and 'watching' children . . . it being the intent of the court that John Borg take all steps and measures reasonably within his power to remove the offending page, including but not limited to rights he has or may have as the nominal owner of the website or person in control of the entity-owner of the website or person acting as liaison with the host on behalf of the owner or in any way having any involvement or control over the content of the website. [John Borg] is ordered to comply no later than three weeks after issuance of this order." Upon our review of the permanent injunction order, we see no way in which the text of the order could be construed as being unclear or ambiguous and, accordingly, agree with the court that the order was sufficiently clear and unambiguous as to support a finding of contempt.

[14] Although John Borg was found in contempt of the court's permanent injunction order with respect to both the operation of lights on the plaintiffs' property and his connection to the website containing defamatory statements about the defendant, the plaintiffs challenge only the contempt ruling in connection with the website, and not the contempt ruling regarding the lights. Accordingly, we address only the former.

Having determined that the order was clear and unambiguous, we next must determine, as the plaintiffs argue on appeal, whether the trial court abused its discretion in holding John Borg in contempt. The plaintiffs argue that he did not wilfully defy the order because "[he] does not own the site . . . control the site . . . [or] know who owns or controls or runs the site . . . [and] [b]y definition, the only thing he *could* do was to contact the domain registrant to request that the site be taken down, which he did." (Emphasis in original.) Specifically, they argue that the trial court, in its memorandum of decision on the motion for contempt, noted that an inability to comply would not render him wilfully noncompliant. The plaintiffs' argument is belied by the following text of the memorandum of decision: "The inability to comply with an order is a defense to contempt, but the burden is on the alleged contemnor to prove that defense. . . . The burden of proving a defense of inability to comply with the order is on . . . John Borg, and he is saddled with a substantial credibility gap, with his lack of credibility substantially self-inflicted." Concluding that John Borg had failed to satisfy his burden of establishing the affirmative defense of inability to comply, the court—relying on the "presumed existence of harm arising from the continuing presence of the defamatory webpage"—imposed a fine of $50 per day until the webpage was removed, finding John Borg in contempt for failing to comply with the permanent injunction order.

The record is clear that John Borg was ordered to take down the website or, at least, attempt to mitigate the damage it had continued to cause the defendant. The record is also unequivocally clear that John Borg had not done so, and the court acted well within its discretion in finding that John Borg has failed to prove that his failure to comply was anything but wilful. Accordingly, we reject the plaintiffs' claim.

The judgment is reversed in part and the case is remanded with direction to vacate either the award of $250,000 in favor of the defendant on the defamation count or the award of $250,000 in favor of the defendant on the false light invasion of privacy count; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

NANCY GIORDANO *v.* RAY GIORDANO
(AC 42497)

Alvord, Moll and Bishop, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motions to modify alimony and for contempt. Pursuant to the parties' separation agreement, which was incorporated into the dissolution judgment, the defendant was required to pay the plaintiff periodic alimony equal to 30 percent of his gross annual compensation, up to an annual maximum limit. Thereafter, the trial court, following an evidentiary hearing, determined that the alimony provision was intended to include payments made to the defendant from certain pension benefits and, accordingly, granted the plaintiff's motion to modify the alimony order. The court additionally found the defendant in contempt for his failure to pay alimony, and this appeal followed. *Held*:

1. The defendant could not prevail on his claim that the trial court erred in interpreting the separation agreement to include his supplemental pension as a basis for a modification of alimony, which was based on his claim that the agreement unambiguously did not include that pension as part of gross annual compensation: the court correctly determined that the alimony provision was ambiguous, and correctly interpreted "gross annual compensation" as including the supplemental pension; moreover, the language of the agreement provided that the list of payments qualifying as "gross annual compensation" was not exhaustive, and it was apparent from the record that counsel and the defendant contemplated the fact that once he began receiving this supplemental pension, that event could serve as a basis for the plaintiff to file a motion to modify.
2. The defendant's claim that the trial court erred in failing to interpret the separation agreement as distributing the supplemental pension to him at the time of dissolution was unavailing; the defendant's argument was belied by the facts in the record and arguments of counsel at the modification hearing, and the fact that the defendant crossed off the reference to the supplemental pension on his financial affidavit, removing it from the list of property considered marital assets, led this court

to conclude that the supplemental pension was neither considered a marital asset nor distributed at dissolution.

3. The trial court did not abuse its discretion in modifying the alimony award: the court properly found that the alimony provision was modifiable with the exception of the annual maximum limit; the alimony provision was intended to remain modifiable upon a finding of a substantial change in circumstances, because there was no provision stating that alimony was nonmodifiable, and the actions taken by the court and counsel at the dissolution hearing ensured that the provision would remain modifiable; moreover, the court found a substantial change in circumstances, and applied the applicable statutory factors (§ 46b-82); furthermore, the court did not abuse its discretion as to the amount of alimony it ordered because, in order to ensure that the plaintiff received an award sufficient to maintain the standard of living she enjoyed prior to the dissolution of the marriage, the court modified the alimony award, in accordance with the intention of the original alimony order.

4. The trial court improperly granted the plaintiff's motion for contempt: although the court found the defendant in contempt for wilfully violating the separation agreement's provisions relating to alimony, the court also indicated that the agreement was ambiguous as to whether the supplemental pension was considered employment related income; this court, having agreed with the trial court that the provision was ambiguous, concluded that the alimony order was not clear and that the defendant's failure to make payments from it could not be considered a wilful violation of an unambiguous order and, therefore, the record did not support the court's conclusion that the defendant's failure to pay was wilful.

Argued May 27—officially released September 15, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Dennis F. Harrigan*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, granted the plaintiff's motions to modify alimony and for contempt, and the defendant appealed to this court. *Affirmed in part*; *reversed in part*; *judgment directed.*

Peter J. Zarella, with whom, on the brief, was *Gary I. Cohen*, for the appellant (defendant).

Samuel V. Schoonmaker IV, with whom, on the brief, were *Wendy Dunne DiChristina* and *Peter M. Brynic-zka*, for the appellee (plaintiff).

Opinion

BISHOP, J. In this postmarital dissolution matter, the defendant, Ray Giordano, appeals from the judgment of the trial court granting the motions of the plaintiff, Nancy Giordano,[1] for modification and for contempt relating to the defendant's failure to pay alimony. We affirm the judgment of the trial court related to the plaintiff's motion for modification of alimony, and we reverse the court's finding of contempt against the defendant.

The following undisputed facts are pertinent to our consideration of the issues on appeal. The marriage of the parties was dissolved on November 17, 2004. Included in the parties' separation agreement, which was incorporated into the judgment of dissolution, were provisions related to periodic alimony that, in essence, provided for the plaintiff to receive from the defendant a monthly amount equal to 30 percent of the defendant's " 'gross annual compensation' " up to a maximum limit of $150,000 per annum. In particular, the agreement provided the following: "3.1 Commencing as of the first day of December, 2004, the [defendant] shall pay to the [plaintiff], during his lifetime, until her death, remarriage, or cohabitation as defined by [General Statutes § 46b-86 (b)], whichever event shall first occur, as alimony in a sum equal to [30] percent . . . of the [defendant's] 'gross annual compensation' from employment, as hereinafter defined; provided, however, that in no event shall the [plaintiff] receive more than $150,000

[1] The plaintiff is now known as Nancy Evans.

per annum as alimony. Accordingly, the [plaintiff] shall not share in the [defendant's] 'gross annual compensation' in excess of $500,000 in any calendar year.

"3.2 Payments pursuant to paragraph 3.1 shall be calculated from the [defendant's] base salary, which is currently $249,000 per annum and payable in equal monthly installments on the first day of each calendar month, in advance. Any payments due to the [plaintiff] from the [defendant's] 'gross annual compensation' in excess of $240,000 per year shall be made within three . . . days of the receipt of such compensation by the [defendant].

"3.3 (a) For purposes of . . . Article III, 'gross annual compensation' shall mean all employment-related payments including, but not limited to, salary, base salary, bonus, draw, distributions, commission payments, severance payments, disability payments, unemployment compensation, and sign-on bonuses received by the [defendant] in cash, by check or by electronic transfer before any deductions, including, but not necessarily limited to, federal, state or municipal income taxes, social security, Medicare, insurance of any kind, or payments made voluntarily by the [defendant] to any defined contribution plan, e.g., a 401 (k) plan or qualified savings plan. 'Gross annual compensation' shall also include income voluntarily deferred by the [defendant] under a deferred compensation or similar plan and . . . any payments from disability insurance. Any court of competent jurisdiction, upon the motion of either party, shall retain jurisdiction to modify alimony except as provided in paragraph 3.1. The [defendant] shall take no action which has as its purpose the defeating of the [plaintiff's] right to receive alimony.

"(b) In the event that the [defendant] is self-employed or is employed by a privately-held entity where he has significant control over the amount and/or the structur-

ing of his compensation either by virtue of his direct or indirect ownership interest in the entity or by virtue of his position of authority in the entity, a court of competent jurisdiction, upon the motion of either party, shall have continuing jurisdiction to modify the definition of 'gross annual compensation' so as to ensure that both parties will be treated fairly in accordance with the spirit of this Article III."

On December 21, 2016, the plaintiff filed a postjudgment motion for modification and, on February 26, 2018, filed a motion for contempt, both relating to the defendant's retirement from employment and his failure to pay alimony. Thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, conducted an evidentiary hearing during which Judge Shay determined that the alimony provision in the agreement contained ambiguities related to the term "gross annual compensation." Upon consideration of the language of the agreement, the colloquy between counsel and the court, *Hon. Dennis F. Harrigan*, judge trial referee, at the time of the dissolution, and arguments of counsel and oral testimony at the modification hearing, Judge Shay determined that the term "gross annual compensation"—which the agreement further refined to include any compensation from employment—was intended to include the payments currently being made to the defendant from his deferred pension benefits.

Considering the amounts of the parties' respective incomes and expenses, and considering that the original purpose of the alimony provision was to enable the plaintiff to maintain a certain standard of living, the court modified the periodic alimony order to $8100 per month. Additionally, the court found the defendant in civil contempt for his failure to pay alimony, but declined to issue any sanctions based on this finding. This appeal followed.

On appeal, the defendant claims that the trial court erred in (1) failing to interpret the separation agreement as distributing the supplemental pension to the defendant at the time of the dissolution, (2) interpreting the separation agreement to include the supplemental pension as a basis for a modification of alimony, and (3) granting the plaintiff's motion to modify. We review each of these claims, albeit in a different order in which they are presented.

At the outset, we note that "[o]ur review of a trial court's granting or denial of a motion for modification of alimony is governed by the abuse of discretion standard. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Trial courts have broad discretion in deciding motions for modification." (Citation omitted; internal quotation marks omitted.) *Light* v. *Grimes*, 156 Conn. App. 53, 64, 111 A.3d 551 (2015). To the extent that the defendant has raised legal issues within his overarching claim, we review those claims de novo. See *Rudy's Limousine Service, Inc.* v. *Dept. of Transportation*, 78 Conn. App. 80, 84, 826 A.2d 1161 (2003).

I

The defendant claims on appeal that the trial court erred in interpreting the separation agreement to include his supplemental pension as a basis for a modification of alimony. Specifically, the defendant claims that the separation agreement, in its provisions, unambiguously did not include the supplemental pension as part of "gross annual compensation." In response, the plaintiff claims that the trial court correctly determined that the alimony provision was ambiguous and correctly interpreted "gross annual compensation" as including the supplemental pension. We agree with the plaintiff.

We begin our analysis by setting forth the applicable standard of review and principles of law. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . .

"If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law [and our review is plenary]. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . .

"Accordingly, [t]he threshold determination in the construction of a separation agreement . . . is whether, examining the relevant provision in light of the context of the situation, the provision at issue is clear and unambiguous, which is a question of law over which our review is plenary. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . The proper inquiry

focuses on whether the agreement on its face is reasonably susceptible of more than one interpretation. . . . It must be noted, however, that the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citations omitted; internal quotation marks omitted.) *Fazio* v. *Fazio*, 162 Conn. App. 236, 243–45, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

The following language from the separation agreement is relevant to our consideration of this issue: "3.1 Commencing as of the first day of December, 2004, the [defendant] shall pay to the [plaintiff], during his lifetime, until her death, remarriage, or cohabitation as defined by § 46b-86 (b), whichever event shall first occur, as alimony in a sum equal to [30] percent . . . of the [defendant's] 'gross annual compensation' from employment, as hereinafter defined; provided, however, that in no event shall the [plaintiff] receive more than $150,000 per annum as alimony. Accordingly, the [plaintiff] shall not share in the [defendant's] 'gross annual compensation' in excess of $500,000 in any calendar year. . . .

"3.3 (a) For purposes of . . . Article III, 'gross annual compensation' shall mean all employment-related payments including, but not limited to, salary, base salary, bonus, draw, distributions, commission payments, severance payments, disability payments, unemployment compensation, and sign-on bonuses received by the [defendant] in cash, by check or by electronic transfer before any deductions, including, but not necessarily limited to, federal, state or municipal income taxes, social security, Medicare, insurance of any kind, or payments made voluntarily by the [defendant] to any defined contribution plan, e.g., a 401 (k) plan or qualified savings plan. 'Gross annual compensation' shall also include income voluntarily deferred by the [defendant] under a deferred compensation or similar plan and . . . any payments from disability insurance. Any court of competent jurisdiction, upon the motion of either party, shall retain jurisdiction to modify alimony except as provided in paragraph 3.1. The [defendant] shall take no action which has as its purpose the defeating of the [plaintiff's] right to receive alimony."

In its memorandum of decision, the court found that the language of the agreement was ambiguous.[2] Upon our review of the relevant provision of the separation agreement, we agree with the court that the language is ambiguous as to what is included in the term "gross annual compensation" and, specifically, whether that term would include income from the defendant's supplemental pension.

We now turn to whether the defendant's supplemental pension is included in the term "gross annual compensation." The defendant, a former executive at General Electric (GE), retired subsequent to the dissolution

[2] In its memorandum of decision, the court, *Hon. Michael E. Shay*, judge trial referee, explained that, "[w]hat was not agreed [to at the time of dissolution], and which remains in dispute, is whether or not the supplemental pension is to be treated as 'gross annual compensation' subject to a

of the parties' marriage and began receiving this supplemental pension in the amount of approximately $23,000 per month in October, 2016.[3] As noted, paragraph 3.1 of the separation agreement provides that "gross annual compensation" means "income from employment" and, on the basis of our review of the court's colloquy with counsel at the dissolution hearing, we find no fault in the court's conclusion that the supplemental pension was intended to be included within that framework.

First, we note that the language of § 3.3 (a) of the separation agreement provides that the list of payments that qualify as "gross annual compensation" is not exhaustive because the list "[includes], but [is] not limited to" the items that follow. In addition, at the dissolution hearing, the defendant was questioned by counsel for the plaintiff and testified that he understood that the alimony award was subject to modification up to the cap of $150,000 per annum.[4] It is apparent from the record that counsel and the defendant contemplated

claim by the [plaintiff] for alimony." In addition, at the modification hearing, the court stated: "If [the separation agreement] was perfect you guys wouldn't be here today. If it was so clear, if it was not ambiguous you wouldn't be here today."

[3] At the modification hearing, the defendant testified that although the supplemental pension went into pay status on October 1, 2016, following his official retirement, he did not receive any cash flow from the supplemental pension until approximately five months later, due to a procedure by which GE prepays the retiree's Federal Insurance Contributions Act (FICA) and Medicare contributions, and the retiree repays GE with the first few payments of the supplementary pension proceeds.

[4] During this questioning, the following exchange occurred between the plaintiff's counsel and the defendant:

"Q. You understand that the alimony is subject to modification but that [the plaintiff] can never seek more than $150,000 dollars per year? Correct?

"A. Yes.

"Q. Okay. And, that, if for example, if you should retire and received supplemental pension payments which haven't been dealt with in this divorce, that there is the possibility that she may come back to court and seek alimony payments based on the fact that you're getting the supplemental pension payments?

"A. I understand that she always has the right to come back to court to seek some change in what we're agreeing to today."

the fact that once he had retired and had begun receiving this supplemental pension, that event could serve as a basis for the plaintiff to file a motion to modify in order to attempt to receive some of that supplemental pension in the form of alimony. Indeed, counsel for the defendant at the modification hearing invited the court to consider that colloquy in deciding the issue.[5]

Accordingly, we conclude that the court did not improperly interpret the separation agreement as including the defendant's supplemental pension within the definition of "gross annual compensation."

II

The defendant also claims on appeal that the court erred in failing to interpret the separation agreement as distributing the supplemental pension to him at the time of dissolution. Specifically, the defendant claims that the court incorrectly relied on parol evidence to rewrite the separation agreement in order to treat the supplemental pension as if it were undistributed property. The plaintiff argues that the defendant's claim is contrary to the position that he took at the modification hearing, and that article II of the separation agreement equally divided all of the defendant's clearly identified employment related assets, but it did not address the supplemental pension. We agree with the plaintiff.

At the modification hearing, the court observed that the defendant had originally listed the supplemental pension as an asset on his financial affidavit, but had

[5] At the modification hearing, counsel for the defendant stated: "[The plaintiff's counsel] suggests that Your Honor, and I agree, should review the transcript of the proceedings before Judge Harrigan and the terms of the separation agreement that were ultimately approved by the court. And I respectfully submit that the transcript and the separation agreement both confirm . . . that the plaintiff's claim to be awarded a share of [the defendant's] benefits under the supplemental pension plan to which he did not become eligible until postjudgment that that source of income is not one of the sources of income that is enumerated in the separation agreement and the judgment . . . ."

thereafter specifically crossed it out and placed his initials next to the change.[6] Additionally, counsel for the defendant at the modification hearing explicitly agreed that the pension had not been distributed. When questioned by the court as to whether the supplemental pension had been divided as property at the time of the marital dissolution, counsel for the defendant remarked that "nobody claims that this asset was ever a marital asset."[7] Further, at the dissolution hearing, the record reflects that counsel for the defendant had asked the defendant if he understood that the supplemental pension was not being divided along with his GE base pension, to which the defendant responded in the affirmative.[8]

[6] In its memorandum of decision, the court explained that the defendant had originally included the supplemental pension as an asset on his October 26, 2004 financial affidavit, but later crossed the entry out after concluding that his interest in the pension had not yet vested and, therefore, that the supplemental pension was not marital property subject to equitable division. The court then remarked: "In this he was clearly mistaken, as a then recent decision of the Connecticut Supreme Court clearly and unambiguously held that 'unvested pension benefits are property for equitable distribution . . . .' *Bender* v. *Bender*, 258 Conn. 733, [754, 785 A.2d 197] (2001). This holding was further elucidated in *Reville* v. *Reville*, 312 Conn. 428, 451, [93 A.3d 1076] (2014), when the court held that 'any retirement or employment benefit potentially receivable by a party to a dissolution action should be disclosed on that party's financial affidavit along with all known details as to its value, vesting requirements and current status.' [Emphasis omitted.] Despite this, the supplemental pension, which ultimately did vest, was neither divided nor offset by other marital property at the time of the dissolution."

[7] Additionally, in his opening remarks to the court, the defendant's counsel at the modification hearing stated: "I think that Your Honor will find, after hearing the evidence that [the defendant's] interest, if any, in this supplemental pension plan did not even spring up as an asset until he qualified as a participant at some time long after the entry of the dissolution decree because the terms of this particular plan require that in order for . . . a GE employee to be eligible for benefits under the plan there are two criteria that must be met . . . and neither of those criteria had been met as of the date of the dissolution in 2004."

[8] At the dissolution hearing, the following exchange occurred between the defendant and his counsel on redirect examination:

"Q. . . . [P]ursuant to paragraph 2.7, you are dividing your GE pension plan. Correct?

"A. The base plan that is subject to a [qualified domestic relations order]?

The defendant's argument that the supplemental pension had been distributed at the time of dissolution is belied by the facts in the record and the arguments of counsel at the modification hearing. In particular, the fact that the defendant had crossed off the reference to the supplemental pension on his financial affidavit, removing it from the list of property to be considered assets, leads us to the conclusion that the supplemental pension was neither considered a marital asset nor distributed at dissolution. Additionally, the defendant's counsel at the modification hearing repeatedly took the position that the pension was not a marital asset and, thus, the defendant's contradictory argument on appeal is unavailing.

III

The defendant's final claim as to the modification of alimony is that the trial court erred in a number of ways in granting the motion to modify. Specifically, he claims that (1) "[t]he trial court did not modify anything," (2) "if construed as a modification, the trial court exceeded its authority," (3) "there was not a sufficient change of circumstances to modify alimony," and (4) "the trial court made errors in setting the modified alimony." The plaintiff responds that the trial court, having found a substantial change in circumstances, did not abuse its discretion in modifying the alimony award. We agree with the plaintiff.

First, with respect to whether the court had authority to modify the alimony order, the court found that the alimony provision was modifiable with the exception

"Q. Yes.

"A. Yes.

"Q. Okay. And you understand that that's just the base plan and it does not include the supplemental pension plans?

"A. That's correct.

"Q. Okay."

of the $150,000 cap on what the plaintiff may receive. We agree with the court's finding on this issue.

"It is a well settled principle of matrimonial law that courts have the authority under . . . § 46b-86 to preclude the modification of alimony awards. . . . Section 46b-86 (a) itself provides in relevant part that [u]nless and to the extent that the decree precludes modification . . . any final order for the periodic payment of permanent alimony . . . may at any time thereafter be continued, set aside, altered or modified by said court upon a showing of a substantial change in the circumstances of either party. . . . This statute clearly permits a trial court to make periodic awards of alimony nonmodifiable." (Emphasis omitted; internal quotation marks omitted.) *Brown* v. *Brown*, 148 Conn. App. 13, 24–25, 84 A.3d 905, cert. denied, 311 Conn. 933, 88 A.3d 549 (2014).

In the present case, the alimony provision was clearly intended to remain modifiable by a court of competent jurisdiction upon a finding of a substantial change in circumstances. This is evidenced in the record by the fact that there is no provision stating that the alimony provision is nonmodifiable, along with the actions taken by the court and by counsel at the dissolution hearing to ensure that the separation agreement made clear that the alimony provision was to remain modifiable.[9] Therefore, once the court found a substantial change in circumstances, it thereafter had the authority to modify the alimony order. This includes both the authority

[9] At the dissolution hearing, counsel for both parties and the court engaged in the following colloquy:

"[The Defendant's Counsel]: . . . So, just to be clear they're agreeing that the alimony can be modified but that the terms in paragraph 3.1 which state that [the plaintiff] is not to receive more than $150,000 a year in alimony is nonmodifiable.

"The Court: I think that that's clear and also that it's the alimony that's modifiable.

"[The Plaintiff's Counsel]: Correct.

"[The Defendant's Counsel]: Correct.

"The Court: Not the definition."

to modify the amount of the order, as well as the authority to determine whether the supplemental pension is characterized as a percentage of the defendant's earnings; because the percentage provision was not stated as being nonmodifiable, it is, therefore, modifiable. Accordingly, we agree with the trial court's conclusion.

Next, with respect to whether the court erred in finding there to be a substantial change in circumstances as would warrant a modification of the alimony award and, further, whether the amount awarded was an abuse of the court's discretion, we are mindful that § 46b-86 (a) broadly provides that an alimony award may be modified by the court upon a showing of a substantial change in the circumstances of either party, and that a "trial court's discretion is essential" when it determines whether a modification is justified. *Dan* v. *Dan*, 315 Conn. 1, 9, 105 A.3d 118 (2014). We also adhere to the following legal principles. "Trial courts are vested with broad and liberal discretion in fashioning orders concerning the type, duration and amount of alimony and support, applying in each case the guidelines of the General Statutes. If the court considers the relevant statutory criteria when making its alimony and support award, the award may not be disturbed unless the court has abused its discretion." (Internal quotation marks omitted.) *Schwarz* v. *Schwarz*, 124 Conn. App. 472, 485, 5 A.3d 548, cert. denied, 299 Conn. 909, 10 A.3d 525 (2010). "When the initial award [is] not sufficient to fulfill the underlying purpose of the award . . . an increase in the supporting spouse's salary, in and of itself, may justify an increase in the award." *Dan* v. *Dan*, supra, 15–16.

In its memorandum of decision, the court found that there had been a substantial change of circumstances. Specifically, the court found that, "there has been a substantial change of circumstances since the date of the initial order in that, among other things: (a) the

assets of both the [defendant] and the [plaintiff] have increased; (b) the [defendant] has retired from his principal employment as of October 1, 2016; and (c) the [defendant's] salary and bonus have ceased." The court also found that, "in addition, the parties stipulated in open court . . . that the receipt by the [defendant] of his supplemental pension would be additional grounds for the [plaintiff] to seek a modification of the alimony order; and that the [defendant] did, in fact, become eligible to commence receipt of payments from the supplemental pension on or about October 1, 2016."

Accordingly, the court, having found a substantial change in circumstances in light of the termination of the defendant's salary and bonuses, in conjunction with the vesting of his supplemental pension, thereafter applied the factors in General Statutes § 46b-82, ultimately awarding $8100 per month to the plaintiff in alimony. We are not persuaded that the court's action in this regard would constitute an abuse of its discretion.

With regard to the defendant's claim that the amount of alimony ordered was an abuse of discretion, we also disagree. As found by the trial court, the dissolution court's original alimony order was intended to sustain a certain standard of living for the plaintiff for the remainder of her or the defendant's life. This is further evidenced by the transcript of the dissolution hearing, in which counsel for the plaintiff states: "The parties have agreed that [the plaintiff] is going to receive [30] percent of [the defendant's] gross annual compensation from employment as alimony and it's payable during his lifetime, her lifetime, until her death or marriage or cohabitation." In order to ensure that the plaintiff received an award sufficient to maintain the standard of living she enjoyed prior to the dissolution of her marriage to the defendant; see *Dan* v. *Dan*, supra, 315 Conn. 15–16; the court, after identifying a substantial change in circumstances, modified the alimony award

in accordance with the intention of the original order. Accordingly, we conclude that the court did not abuse its discretion in awarding $8100 per month to the plaintiff.

IV

Finally, with regard to the court's granting of the plaintiff's motion for contempt against the defendant, the defendant argues that the motion for contempt should have been denied because there was no basis for the court to conclude that the parties intended that the supplemental pension would be part of the defendant's "gross annual compensation" at the time of dissolution. While we disagree with the defendant's reasoning, we agree that the motion for contempt should have been denied.

"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." (Internal quotation marks omitted.) *Bauer* v. *Bauer*, 173 Conn. App. 595, 600, 164 A.3d 796 (2017).

"Guided by the principles that limit our review, our analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted

a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted.) *In re Leah S.*, 284 Conn. 685, 693, 935 A.2d 1021 (2007).

In its memorandum of decision, the court found the defendant in contempt for wilfully violating the separation agreement's provisions relating to alimony. The court stated: "The [defendant] admits that he failed to make monthly payments commencing in January, 2018 and ending in May, 2018, but excused his failure based upon the fact that the compensation on which he based the lump sum payment in June was subject to the upfront withholding of taxes. . . . Nevertheless, he did have available alternate sources with which to pay something. Moreover, the agreement provides that where a payment is based upon income in excess of $240,000 per annum, he has an obligation to make his required payment to her within three days of receipt. The evidence is clear that he did not make such timely payment, notwithstanding the fact that he had the wherewithal to do so." The court then went on to find that "the evidence supports a finding that the underlying order that periodic alimony be paid on a monthly basis was clear and unambiguous; that the income from the supplemental pension is an 'employment related payment'; that the [defendant] failed and neglected to pay the monthly installments for the months of January through May, 2018; that the [defendant] had the means to make said payments; that his choice not to

do so was wilful and amounts to contempt; that his lump sum payment of $150,000 on June 8, 2018, is a mitigating factor; and that the [plaintiff] failed to demonstrate any credible evidence of substantial harm as a result thereof that would warrant the imposition of sanctions."

Also in its memorandum of decision, as well as during the hearing on the motion for modification, however, the court expressed its view that the agreement was ambiguous as to whether the supplemental pension was considered employment related income for purposes of its inclusion in the alimony pool. In particular, at the hearing, the court stated: "If [the separation agreement] was perfect you guys wouldn't be here today. If it was so clear, if it was not ambiguous you wouldn't be here today." The court's determination that the provision at issue was ambiguous, with which we agree, leads to the conclusion that the alimony order was not clear and, therefore, that the defendant's failure to make payments from it could not be considered a wilful violation of an unambiguous order. In the absence of a clear and unambiguous order underpinning the court's finding of contempt, and on the basis of the court's own finding of ambiguity within the alimony order, we conclude that the record does not support the court's conclusion that the defendant's failure to pay the then existing alimony order was wilful, and, therefore, that the standard for a finding of contempt was not satisfied.

The judgment is reversed only as to the finding of contempt and the case is remanded with direction to deny the plaintiff's motion for contempt; the judgment as to the modification of alimony is affirmed.

In this opinion the other judges concurred.

ALICIA HILL *v.* OSJ OF BLOOMFIELD, LLC
(AC 42397)

DiPentima, C. J., and Moll and Bear, Js.*

Syllabus

The plaintiff, a business invitee of the defendant company, brought a premises liability action against the defendant, seeking damages for personal injuries she sustained when two empty boxes fell off a shelf and struck her in the head and shoulder as she was walking in an aisle of the defendant's store. After a trial to the court, the trial court rendered judgment for the plaintiff. The court applied the mode of operation rule enunciated in *Kelly* v. *Stop & Shop, Inc.* (281 Conn. 768), and concluded that the boxes fell and struck the plaintiff as a result of the defendant's negligence. The court determined that the store manager, M, and another employee, R, had been stocking merchandise in an adjacent aisle when a box on the top shelf of that aisle toppled over and into the boxes on the top shelf of the aisle in which the plaintiff was walking, thereby causing the boxes to fall off the shelf and onto the plaintiff. On appeal, the defendant claimed that the trial court improperly applied the mode of operation rule. *Held* that the evidence did not support the imposition of liability under the mode of operation rule or the affirmative act rule, under which proof of notice is not necessary because the defendant itself created the unsafe condition, as there was no evidence as to what caused the boxes to fall on the plaintiff: the plaintiff, relying on the mode of operation rule, failed to make out a prima facie case of negligence, as the record did not demonstrate that the defendant had a specific method of operation that was different from the general operation of a similar business, the only evidence about the regularity of any hazard came from M, who was unaware of merchandise ever falling onto a customer, the potential for which did not give rise to a regularly occurring or inherently foreseeable hazard, and the record was devoid of evidence that the plaintiff's injuries occurred within a limited zone of risk where the risk of injury was continuous or foreseeably inherent as a result of the mode of operation at issue; moreover, the evidence was insufficient to establish that an affirmative act on the part of the defendant caused the boxes to fall on the plaintiff, as M's testimony that neither he nor R touched the top shelf of the aisle in which they were working was not contradicted by any other evidence, there was no evidence that their actions in that aisle disrupted the boxes on the top shelf, and the court, even if it disbelieved M's statements, was not allowed to infer the opposite proposition, much less to infer that M and

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

R negligently knocked over those boxes into the boxes that struck the plaintiff, and a photograph of the shelving that the plaintiff took following the incident was insufficient to permit an inference that M and R engaged in an affirmative act that led to the boxes falling on her.

Argued January 9—officially released September 15, 2020

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Gordon, J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Bruce H. Raymond, with whom was *Evan K. Buchberger*, for the appellant (defendant).

Domenic D. Perito, with whom, on the brief, was *Richard E. Joaquin*, for the appellee (plaintiff).

Opinion

MOLL, J. "Drawing logical deductions and making reasonable inferences from facts in evidence, whether that evidence be oral or circumstantial, is a recognized and proper procedure in determining the rights and obligations of litigants, but to be logical and reasonable they must rest upon some basis of definite facts, and any conclusion reached without such evidential basis is a mere surmise or guess." (Internal quotation marks omitted.) *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 34, 734 A.2d 85 (1999). This important principle lies at the heart of this premises liability appeal. The defendant, OSJ of Bloomfield, LLC, doing business as Ocean State Job Lot, appeals from the judgment of the trial court, rendered after a bench trial, in favor of the plaintiff, Alicia Hill, for injuries she sustained when two empty cardboard boxes fell onto her head and shoulder from the top shelf of the aisle she was browsing. On appeal, the defendant claims that the trial court (1) improperly applied the mode of operation

rule as a basis for finding the defendant liable in negligence, and (2) erroneously found that the defendant's merchandise stacking methods caused the boxes to fall on the plaintiff.[1] The plaintiff argues that the judgment should be affirmed because she proved her premises liability claim under the affirmative act rule. We conclude that the evidence adduced at trial does not support the imposition of liability on the basis of the mode of operation rule or the affirmative act rule. Accordingly, we reverse the judgment of the trial court and remand the case with direction to render judgment for the defendant.

The trial court's memorandum of decision sets forth the following recitation, which is relevant to our resolution of this appeal. "The plaintiff testified that [on July 1, 2015] she was walking down the stationery aisle of the [defendant's] store when two empty boxes fell off of a shelf to her right and struck her in the head and right shoulder. [Devin] Gordon, [another shopper in the store], testified that he was in the same aisle and saw the boxes fall off the shelf and strike the plaintiff. The plaintiff testified that prior to the boxes falling on her, she saw two employees of the defendant stocking merchandise in the Internet coupon aisle directly adjacent to the stationery aisle. [The defendant's store manager, Aron Moore] admitted that he and another employee were stocking merchandise in the Internet coupon aisle in the moments preceding the incident, and that as soon as they heard a loud noise, they entered the stationery aisle where they saw the plaintiff and Gordon, who was holding one of the boxes.

"Moore testified that the top shelf of the Internet coupon aisle is seven feet tall and is used as a 'profile shelf' to hold overstocked merchandise. According to

[1] Because we consider these claims to be analytically related, we address them together.

Moore, the top shelf of the Internet coupon aisle is twelve inches wide and six inches higher than the top shelf of the stationery aisle. The plaintiff introduced a photograph that she took within minutes of the accident showing the top shelves of the stationery aisle and the Internet coupon aisle. The photograph shows a series of boxes containing nine inch fans stacked one on top of the other on the top shelf of the Internet coupon aisle. The photograph also shows one of the boxes containing the nine inch fans hanging over the box below it and cantilevered in the direction of the stationery aisle. The [photograph] also shows a gap in the top row of stacked nine inch fans in a location directly adjacent to the top shelf of the stationery aisle where the empty boxes had been displayed immediately before they fell. The [photograph] also shows one of the nine inch fan boxes in this precise location."

On June 13, 2017, the plaintiff commenced this action, alleging that she sustained injuries to her head, neck, and right shoulder as a result of the boxes falling onto her and that the incident was caused by the negligence of the defendant. On November 8, 2018, the case was tried to the court. Three witnesses testified: Moore (the store manager), Gordon (the eyewitness), and the plaintiff. Thereafter, the parties submitted posttrial briefs. On December 7, 2018, the trial court issued a memorandum of decision rendering judgment in favor of the plaintiff. Setting forth the principles from this court's decision in *Meek* v. *Wal-Mart Stores, Inc.*, 72 Conn. App. 467, 806 A.2d 546, cert. denied, 262 Conn. 912, 810 A.2d 278 (2002), the court concluded that the plaintiff "sustained her burden of proving by a fair preponderance of the evidence that the empty display boxes fell and struck the plaintiff as a result of the defendant's negligence." Specifically, the court found that "Moore and another employee of the defendant were stocking merchandise in the Internet coupon aisle when one of the

nine inch fan boxes on the top shelf of the Internet coupon aisle toppled over and into the display boxes on the top shelf of the stationery aisle, thereby causing the display boxes to fall off the shelf and onto the plaintiff." The court awarded the plaintiff $23,001.96 in past medical expenses and $7500 for pain and suffering for a total of $30,501.96 in damages. This appeal followed. Additional facts will be set forth as necessary.

The defendant principally claims on appeal that the trial court improperly applied the mode of operation rule in finding the defendant liable. Specifically, the defendant maintains that the record is devoid of any evidence that (1) the defendant employed a particular mode of operation that is distinct from a similar business, (2) such mode of operation created a regularly occurring or inherently foreseeable hazard, and (3) the plaintiff's injury occurred within a limited zone of risk. We agree with the defendant and conclude that the evidence at trial did not support the application of the mode of operation rule.

We begin with the standard of review and general principles of premises liability. "[T]he scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 776, 918 A.2d 249 (2007). "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.) *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 755, 159 A.3d 666 (2017). "In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled." (Internal quotation marks omitted.) *Coppedge* v. *Travis*, 187 Conn. App. 528, 532, 202 A.3d 1116 (2019).

"A business owner owes its invitees a duty to keep its premises in a reasonably safe condition. . . . In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover. . . . Nevertheless, [f]or [a] plaintiff to recover for the breach of a duty owed to [her] as [a business] invitee, it [is] incumbent upon [her] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [her injury] or constructive notice of it. . . . [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it. . . . In the absence of allegations and proof of any facts that would give rise to an enhanced duty . . . [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers."[2] (Citations omitted; internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116–17, 49 A.3d 951 (2012). As this court recently explained, to succeed in a traditional negligence action that is based on premises liability, "the plaintiff must prove (1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known

[2] The parties do not dispute that the plaintiff was a business invitee of the defendant.

about the defect and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it." (Internal quotation marks omitted.) *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 628, 195 A.3d 707 (2018).

There exist at least two circumstances, however, in which a plaintiff, as a business invitee, may recover in a premises liability case without proof that the business had actual or constructive notice of a dangerous condition alleged to have caused the plaintiff injury. In connection with the first exception, in *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 768, our Supreme Court adopted "the so-called 'mode of operation' rule, a rule of premises liability pursuant to which a business invitee who is injured by a dangerous condition on the premises may recover without proof that the business had actual or constructive notice of that condition if the business' chosen mode of operation creates a foreseeable risk that the condition regularly will occur and the business fails to take reasonable measures to discover and remove it."[3] Id., 769–70. Under the mode of operation rule, "a plaintiff establishes a prima facie case of negligence upon presentation of evidence that the mode of operation of the defendant's business gives rise to a foreseeable risk of injury to customers and that the plaintiff's injury was proximately caused by an accident within the zone of risk. The defendant may rebut the plaintiff's evidence by producing evidence that it exercised reasonable care under the circumstances. Of course, the finder of fact bears the ultimate responsibility of determining whether the defendant exercised such care. We

[3] As part of its analysis, the court stated that "in *Meek* v. *Wal-Mart Stores, Inc.*, supra, 72 Conn. App. 476–79, the Appellate Court recently employed a mode of operation analysis in the context of a claim arising out of the alleged negligence of a large, self-service department store." *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 783.

underscore, as most other courts have, that the defendant's burden in such cases is one of production, and that the ultimate burden of persuasion to prove negligence—in other words, that the defendant failed to take reasonable steps to address a known hazard—remains with the plaintiff." (Internal quotation marks omitted.) Id., 791–92.

On at least two occasions following our Supreme Court's decision in *Kelly*, our appellate courts have clarified the parameters of the mode of operation rule. First, shortly after *Kelly*, our Supreme Court refined its adoption of the rule, stating that "the exception is meant to be a narrow one . . . ." *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 437, 3 A.3d 919 (2010). Specifically, in *Fisher*, the court clarified that "the mode of operation rule, as adopted in Connecticut, does not apply generally to all accidents caused by transitory hazards in self-service retail establishments, but rather, only to those accidents that result from particular hazards that occur regularly, or are inherently foreseeable, due to some specific method of operation employed on the premises." Id., 423. Stated differently, "self-service merchandising itself" does not fall under the mode of operation rule. Id., 424. The rule applies only to specific areas of an establishment where the risk of injury is continuous or foreseeably inherent by virtue of the nature of the business or mode of operation. Id., 437. "Notably, [our Supreme Court] included the requirement that a plaintiff's injury occur within a 'zone of risk.' . . . If a 'mode of operation' could be self-service merchandising itself, then an entire store necessarily would be rendered a 'zone of risk' due to the readily established fact that merchandise, as a general matter, sometimes falls and breaks. Accordingly, the requirement of establishing that an injury occurred within some 'zone of risk' essentially would be rendered superfluous." (Citation omitted.) Id., 424.

Second, in *Konesky* v. *Post Road Entertainment*, 144 Conn. App. 128, 72 A.3d 1152, cert. denied, 310 Conn. 915, 76 A.3d 630 (2013), this court clarified that the mode of operation rule requires not only an identifiable zone of risk but also a business mode of operation that is appreciably different from that of a similar business. Id., 144. Applying these principles, in *Konesky*, this court rejected the proposition that a plaintiff, who was injured after she slipped and fell on a puddle of water created from " 'beer tub[s]' " used by a nightclub to serve chilled beer, could prevail under the mode of operation rule. Id., 142–43. This court reasoned that the defendant's "service of beer" did not constitute "an inherently hazardous mode of operation" because "the entire [premises] would become a zone of risk simply because drinks do sometimes spill or otherwise produce slippery surfaces." (Internal quotation marks omitted.) Id., 143. The court explained that such an expansive zone of risk "would be inconsistent with the Supreme Court's admonition that the mode of operation rule is meant to be a narrow exception to the notice requirements under traditional premises liability law." Id., 143–44.

As a result of those clarifications, this court has distilled three requirements for the mode of operation rule to apply: "(1) the defendant must have a particular mode of operation distinct from the ordinary operation of a related business; (2) that mode of operation must create a regularly occurring or inherently foreseeable hazard; and (3) the injury must happen within a limited zone of risk." *Porto* v. *Petco Animal Supplies Stores, Inc.*, 167 Conn. App. 573, 581, 145 A.3d 283 (2016). We return to these requirements subsequently in this opinion.

The second exception to the requirement in a premises liability case that a business invitee must prove that the business had actual or constructive notice of a dangerous condition alleged to have caused the plaintiff

injury is the affirmative act rule. "Under an affirmative act theory of negligence, if the plaintiff alleges that the defendant's conduct *created* the unsafe condition [on the premises], proof of notice is not necessary. . . . That is because when a defendant itself has created a hazardous condition, it safely may be inferred that [the defendant] had knowledge thereof." (Emphasis added; internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 306 Conn. 122. "Rather than acting as an alternative to notice, the affirmative act rule allows an inference of notice when circumstantial evidence shows that the defendant knew or should have known of the dangerous condition because it was a foreseeably hazardous one that the defendant itself created." Id., 124. Although closely related, affirmative act cases involving injuries from negligently displayed merchandise are principally distinguishable from mode of operation cases in that the injury in an affirmative act case "is not triggered by an intervening customer's act." Id., 122 n.10. "Analysis of the affirmative act rule as it has been applied shows that it permits the inference of actual notice only when the defendant or its employees created an obviously hazardous condition." Id., 123; see, e.g., *Tuite* v. *Stop & Shop Cos.*, 45 Conn. App. 305, 308, 696 A.2d 363 (1997) (slip and fall case in which employee left water in supermarket aisle after watering plants); *Fuller* v. *First National Supermarkets, Inc.*, 38 Conn. App. 299, 301–303, 661 A.2d 110 (1995) (slip and fall case in which employees left pricing stickers on floor).

At this juncture, we pause to observe the following with regard to the liability theory on which the plaintiff proceeded. First, our careful review of the record reveals that at no time did the plaintiff explicitly state before the trial court that she was seeking to establish the defendant's negligence on the basis of traditional premises liability doctrine, the mode of operation rule,

or the affirmative act rule. During trial and in the plaintiff's posttrial brief, the plaintiff focused almost exclusively on *Meek* v. *Wal-Mart Stores, Inc.*, supra, 72 Conn. App. 467, claiming that the *Meek* decision is "on all fours" with the present case. Our Supreme Court expressly has recognized *Meek* as a case applying the mode of operation rule; see footnote 3 of this opinion; see also *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 785 ("[a]lthough the Appellate Court did not expressly adopt the mode of operation rule in *Meek*, the analysis and reasoning employed in that case is no different from the analysis and reasoning that the court would have used it if explicitly had adopted the mode of operation rule"). Thus, by relying, essentially exclusively, on this court's decision in *Meek*, we conclude that the plaintiff was proceeding under the mode of operation rule. Second, the trial court did not explicitly state whether it was finding in the plaintiff's favor on the basis of traditional premises liability principles, the mode of operation rule, or the affirmative act rule, and the trial court's memorandum of decision similarly is limited to a discussion of *Meek*. Here, too, in light of the trial court's exclusive reliance on *Meek*, we conclude that the trial court was applying the mode of operation rule in its liability finding against the defendant. Accordingly, we begin our analysis by considering the applicability of the mode of operation rule.[4]

Our review of the evidence presented at trial, viewed in the light most favorable to the plaintiff, reveals that the evidence did not support the application of the mode of operation rule. We address each requirement of the mode of operation rule with dispatch because, notably, the plaintiff does not contend in her appellate

[4] We also note that, at the commencement of trial, the trial court suggested, sua sponte, that the doctrine of res ipsa loquitur might apply. The trial court's decision does not address res ipsa loquitur, nor do the parties' appellate briefs. Thus, we do not address it further.

brief that the mode of operation rule was satisfied. *First*, there was no evidence that the defendant employed a particularized mode of operation with respect to the stacking of the fans or the empty cardboard boxes (1) that was distinct from the ordinary operation of a related business and (2) that either resulted in a regularly occurring hazardous condition or rendered some hazardous condition inherently foreseeable. See *Konesky* v. *Post Road Entertainment*, supra, 144 Conn. App. 144. In addition, as stated previously in this opinion, "self-service merchandising itself" cannot be a negligent mode of operation. *Fisher* v. *Big Y Foods*, *Inc.*, supra, 298 Conn. 424. Here, the record simply does not demonstrate a specific method of operation that is different from the general operation of a similar business. See *Porto* v. *Petco Animal Supplies Stores*, *Inc.*, supra, 167 Conn. App. 582 (concluding that first requirement was not met where defendant operated as any other pet store would by permitting leashed animals into store). *Second*, "the store's mode of operation [must invite] careless customer interference, creating an expected, foreseeable hazard." Id. Here, the only evidence about the regularity of any hazard came from Moore, who explained that he was unaware of merchandise ever falling onto a customer. Furthermore, even where there is a potential for hazard, "that potential alone does not give rise to a regularly occurring or inherently foreseeable hazard." Id., 583. *Third*, the mode of operation rule applies only to "those areas where risk of injury is continuous or foreseeably inherent" as a result of the mode of operation at issue. (Internal quotation marks omitted.) *Fisher* v. *Big Y Foods*, *Inc.*, supra, 437. In the present case, the record is devoid of evidence that the plaintiff's alleged injuries occurred within a *limited* zone of risk.[5] We also note at this juncture that the

[5] In addition, the mode of operation rule, as it exists under Connecticut law, presumes that there was some customer interference. See *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 786–90; *Konesky* v. *Post Road Entertainment*, supra, 144 Conn. App. 141–42 n.11. Here, the plaintiff does not contend,

photograph of the shelving taken shortly after the incident, on which the trial court relied as described previously in this opinion, does not provide a sufficient evidential basis for any of these requirements.

In short, there was simply *no* evidence as to what caused the empty cardboard boxes to fall on the plaintiff (i.e., whether they had been stacked improperly by an employee of the defendant, whether the fans had been negligently stacked or handled in a manner that caused one or more of them to fall into the empty cardboard boxes that in turn fell on the plaintiff, and/or whether another customer had interfered with the placement of any of the foregoing merchandise leading to the incident at issue).[6]

In sum, the plaintiff failed to make out a prima facie case of negligence under the mode of operation rule and, as stated previously, she does not contend otherwise in her appellate brief. Instead, she asserts that the judgment should be affirmed on the basis of the affirmative act rule.[7]

Specifically, the plaintiff contends that there were two affirmative acts that support the court's conclusion: (1) he stacking of the fan boxes in a precarious manner,

and there was no evidence presented to suggest, that another customer interfered with the fans or empty cardboard boxes at all. Thus, the court's application of the mode of operation rule in this case was flawed for this independent reason. See *Konesky* v. *Post Road Entertainment*, supra, 144.

[6] Instead, Moore testified to the following. At some point immediately prior to the incident, Moore and another store employee, Kevin Reilly, had completed a safety walk, whereby they inspected the condition of various aisles in the store and discovered no hazards of any sort. No concern had ever been raised with respect to the display of the boxes that struck the plaintiff. Moreover, the shelving did not easily move, and bumping into the shelving in one aisle would not cause something to happen in the adjacent aisle.

[7] Although the plaintiff did not expressly rely on the affirmative act rule at trial, we nonetheless exercise our discretion to consider the merits of her argument, which we treat as an alternative ground for affirmance.

and (2) the defendant's employees moving merchandise in the adjacent aisle. The defendant argues that the court did not actually find that any affirmative act on the part of the defendant's employees caused the boxes to fall onto the plaintiff and that there was no evidence to support such a finding in any event. We agree with the defendant.

As an initial matter, we begin with the relevant language from the trial court's decision: "Moore and another employee of the defendant were stocking merchandise in the Internet coupon aisle when one of the nine inch fan boxes on the top shelf of the Internet coupon aisle toppled over and into the display boxes on the top shelf of the stationery aisle, thereby causing the display boxes to fall off the shelf and onto the plaintiff." A careful reading of the foregoing finding reveals that the trial court did not in fact make a finding that connects, other than temporally, the employees' activity in the Internet coupon aisle to the fall of the display boxes.

Even if such language could be construed, however, to reflect a finding of an affirmative act on the part of the defendant's employees that caused the empty cardboard boxes to fall on the plaintiff, the evidence presented at trial, viewed in the light most favorable to the plaintiff, was insufficient to support it. As stated previously in this opinion, three witnesses testified. Gordon, the sole eyewitness, testified that he saw two boxes fall from the top shelf of the stationery aisle onto the plaintiff, who was pushing a shopping carriage at the time, not reaching for or touching any merchandise on the shelving, and remained standing. With regard to any activity taking place in the adjacent aisle, Gordon testified that two male employees of the store had passed him, and he heard them talking in the adjacent aisle. He did not know why the boxes fell.

Moore, the store manager, testified that, on the day of the incident, he was training another employee, Kevin

Reilly. Moore explained that he and Reilly were "[r]esetting" the Internet coupon aisle (i.e., the location in the store where items advertised for sale through the Internet are displayed).[8] Moore unequivocally testified that this "[r]esetting" activity did not involve merchandise on the top shelves; in Moore's words, "we don't touch the top shelves." He explained that the top shelf of the Internet coupon aisle did not contain merchandise that was taken on and off because it was a main aisle of the store and that it was used to display product that looked more appealing than so-called "top stock," meaning extra merchandise used to continuously refill the aisles. Moore testified that he and Reilly were working in the Internet coupon aisle when they heard an unidentified sound in the stationery aisle and went around the corner, encountering the plaintiff and Gordon, who said that the boxes fell from the top shelf. Moore further testified that the "home location" of the empty cardboard boxes was the top shelf of the stationery aisle, which was approximately six and one-half feet tall and intentionally accessible to customers interested in interacting with the merchandise for sale. He could not explain how the boxes fell onto the plaintiff.

The plaintiff also testified in part as follows. Just prior to her arrival at the stationery aisle, she passed the Internet coupon aisle and saw two employees stocking merchandise there. Once in the stationery aisle, the plaintiff did not see the display boxes before they fell, nor did she see any employee handling the display boxes that fell. The plaintiff testified that the display boxes "flew off [the shelf] by themselves."

The evidence presented at trial, viewed in the light most favorable to the plaintiff, was insufficient to establish that an affirmative act on the part of the defendant

[8] Moore explained that "[r]esetting" the Internet coupon aisle meant removing merchandise from the shelves and replacing it with new merchandise.

caused the empty boxes to fall on the plaintiff. Moore's testimony that neither he nor Reilly ever touched the top shelf of the Internet coupon aisle was not contradicted by any other evidence. Although the court reasonably could find that Moore and Reilly were resetting the Internet coupon aisle at the time of the incident on the basis of the plaintiff's observations of two men stocking shelves just prior to the incident, there was no evidence to suggest that their specific actions in that aisle disrupted the fan boxes on the top shelf. Finding a negligent act on their part required the court to engage in impermissible speculation. Although the court was free to disbelieve Moore's testimony regarding the Internet coupon aisle's top shelf, it was not permitted to "draw a contrary inference on the basis of that disbelief." *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, supra, 250 Conn. 18; see also *Novak* v. *Anderson*, 178 Conn. 506, 508, 423 A.2d 147 (1979). Therefore, Moore's uncontested statements that neither he nor Reilly handled the fan boxes on the top shelf of the aisle they were resetting—even if disbelieved—did not allow the court to infer the opposite proposition, much less infer that they negligently knocked over those boxes into the display boxes, which ultimately struck the plaintiff.[9] Moreover, the photograph of the shelving

[9] Affirmative act cases from other jurisdictions involving circumstances that are factually similar to the present case bolster our conclusion. The Supreme Court of South Carolina considered whether the evidence was sufficient to support the conclusion that the defendant store created a dangerous condition when the plaintiff, shortly after removing two cans from a shelf, was struck in the face by approximately fifteen falling cans. See *Garvin* v. *Bi-Lo, Inc.*, 343 S.C. 625, 627–28, 541 S.E.2d 831 (2001). The court explained that the only evidence produced by the plaintiff related to the cans' selling price and reflected that the cans were stacked in their original boxes and above the plaintiff's height. Id., 628. That evidence was insufficient as matter of law to establish that the defendant had created a dangerous condition because nothing indicated that the goods were defectively stacked, or that the defendant knew of any such defect. Id., 628–29; see also *Vallot* v. *Logan's Roadhouse, Inc.*, 567 Fed. Appx. 723, 726 (11th Cir. 2014) (restaurant patron who slipped and fell on liquid could not prevail in negligence action because evidence did not demonstrate that defendant

following the incident, on which the trial court relied in finding the defendant negligent, is insufficient to permit an inference that the defendant's employees engaged in an affirmative act that led to the display boxes falling on the plaintiff.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion the other judges concurred.

LOIS R. STILKEY *v.* ELIZABETH A. ZEMBKO
(AC 42410)

DiPentima, C. J., and Keller and Flynn, Js.*

Syllabus

The plaintiff sought to recover damages from the defendant for statutory theft in connection with her actions in withdrawing certain funds from a retirement account belonging to the plaintiff. The defendant had previously represented the plaintiff in her divorce proceedings, as a result of which the plaintiff received one half of her former husband's pension funds, which were subsequently placed in an individual retirement account. Through the defendant's representation of the plaintiff, she obtained confidential information about the plaintiff and used it to withdraw money from the account without the plaintiff's knowledge or permission over a period of three years. In the defendant's answer, she raised the statute of limitations as a special defense, although she did not specify the statute on which she relied. The plaintiff did not plead the continuing course of conduct doctrine in avoidance of the special

knew of liquid or caused spill). In *Metts* v. *Wal-Mart Stores, Inc.*, 269 Ga. App. 366, 367, 604 S.E.2d 235 (2004), the plaintiff was injured when a number of boxes containing metal shelving units fell onto her from a display rack. The plaintiff did not know what caused the boxes to fall, nor did she observe any employees nearby. Id. The plaintiff produced no evidence with respect to the boxes' positioning prior to their fall. Id., 367–68. The court concluded that the defendant had no knowledge of the hazard because the evidence revealed that the boxes were stacked properly, and a safety inspection approximately fifteen minutes prior to the accident revealed no defect. Id., 367. Therefore, the court concluded that the defendant could not be held liable on the basis of any affirmative act.

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

defense of the statute of limitations in pleadings or at trial and, instead, raised it in posttrial briefs. The trial court ruled in favor of the plaintiff, finding that she did not authorize the defendant to remove moneys from the IRA and that the defendant took those funds with the intent of depriving the plaintiff of those moneys. The trial court also rejected the defendant's statute of limitations defense, concluding that the continuing course of conduct doctrine, despite being improperly pleaded, operated to toll the three year statute of limitations. On appeal, the defendant claimed, inter alia, that the trial court abused its discretion in considering the plaintiff's continuing course of conduct argument despite improper pleading. *Held*:

1. The court did not abuse its discretion in applying the continuing course of conduct doctrine, as it was within its discretion to reach the merits of the plaintiff's continuing course of conduct claim once it was put before the court, and it was within the court's discretion to determine that no party was prejudiced by the lapse in pleading; both parties failed to comply with the rules of practice, this court could not say that the trial court decided the matter so arbitrarily as to vitiate logic or decided the matter on the basis of improper or irrelevant factors, the defendant had ample opportunity to address the continuing course of conduct doctrine during posttrial briefing but she failed to specify how she was prejudiced by the plaintiff's posttrial invocation of that doctrine, and the trial court was in the best position to determine whether either party had been unfairly prejudiced by the defendant's failure to specify the statute on which her defense rested or by the plaintiff's failure to timely raise the continuing course of conduct doctrine in avoidance of that special defense.
2. The defendant could not prevail on her claim that the trial court improperly concluded that the continuing course of conduct doctrine tolled the statute of limitations, as this court concluded that this claim was briefed inadequately; the defendant's brief contained no citations and no legal authority, or citations to evidence in the record in support of her claim.
3. The trial court's findings that the plaintiff had no knowledge of the defendant's actions and had not consented to or authorized them were not clearly erroneous, as such findings were supported by the evidence and this court was not left with a definite and firm conviction that any mistake had been committed; it was not the function of this court to retry the case or to reassess the credibility of the witnesses.

Argued March 4—officially released September 15, 2020

Procedural History

Action to recover damages for, inter alia, statutory theft, brought to the Superior Court in the judicial district of New Britain, where Pamela Rustigian, admin-

istratrix of the estate of Lois R. Stilkey, was substituted as the plaintiff; thereafter, the matter was tried to the court, *Wiese*, *J.*; judgment in favor of the substitute plaintiff, from which the defendant appealed to this court. *Affirmed.*

Scott M. Schwartz, for the appellant (defendant).

Michael P. Barry, for the appellee (substitute plaintiff).

Opinion

DiPENTIMA, C. J. The defendant, Elizabeth A. Zembko, appeals from the judgment rendered after a court trial in favor of the substitute plaintiff, Pamela Rustigian, administratrix of the estate of Lois R. Stilkey (administratrix).[1] On appeal, the defendant claims that the court (1) abused its discretion in considering the administratrix' continuing course of conduct argument despite improper pleading, (2) improperly concluded that the continuing course of conduct doctrine tolled the statute of limitations, and (3) erroneously found that Stilkey had no knowledge of the defendant's actions and did not consent to or authorize those actions. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history, as set forth by the trial court in its memorandum of decision or otherwise gleaned from the record, are relevant to the defendant's claims on appeal. The defendant, an attorney, represented Stilkey in her 2003 divorce. As part of the dissolution action, Stilkey and her former husband executed a qualified domestic relations order

[1] Stilkey died on March 30, 2016, after the commencement of this action. On November 16, 2016, the Berlin Probate Court appointed Stilkey's sister, Rustigian, to serve as the administratrix of her estate. The court granted the administratrix' motion to be substituted as plaintiff in this action on March 20, 2017.

(QDRO),[2] under which Stilkey received a 50 percent interest in his Iron Workers' Local 15 and 424 Annuity Fund. The QDRO contained confidential information, including Stilkey's Social Security number, date of birth, home address and telephone number. The defendant had access to all of the confidential information contained in the QDRO.

Stilkey's QDRO funds were invested in a Prudential individual retirement account (IRA). The IRA enrollment form listed Stilkey's mailing address as 11 Townsend Road, Farmington, Connecticut. Stilkey never resided at that address; rather, the defendant had lived there with her husband. Additionally, the defendant was identified as the primary beneficiary of the IRA in the event of Stilkey's death.

From October, 2010 to January, 2013, the defendant made twenty-four phone calls to Prudential, which were recorded. During each call, the defendant misrepresented herself as "Lois Stilkey" and instructed the Prudential representative to disburse funds from the IRA and to send the funds to the defendant's address.

The defendant deposited nineteen of the twenty-four Prudential checks into her own checking account. The checks were endorsed "Lois Stilkey pay to the order of Elizabeth Zembko," or with similar language. The total sum of funds disbursed in the twenty-four checks was $155,002.18, and the total sum deposited into the defendant's checking account was $101,501.31. The five checks deposited into Stilkey's account totaled $56,500.80.

Stilkey commenced this action on July 16, 2015. The administratrix' revised complaint alleged statutory theft and sought treble damages pursuant to General Statutes

[2] "A QDRO is the exclusive means by which to assign to a nonemployee spouse all or any portion of pension benefits provided by a plan that is governed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq." (Internal quotation marks omitted.) *Callahan* v. *Callahan*, 192 Conn. App. 634, 685 n.29, 218 A.3d 655, cert. denied, 333 Conn. 939, 218 A.3d 1050 (2019).

§ 52-564. The defendant filed an answer and raised a statute of limitations special defense.[3] After the November 1, 2017 trial and a number of posttrial briefs, the court, *Wiese*, *J.*, issued a memorandum of decision on December 3, 2018. The court rendered judgment in favor of the administratrix in the amount of $304,503.93, awarding treble damages pursuant to § 52-564. The court found that Stilkey had not authorized the defendant to remove $101,501.31 from her Prudential account and that the defendant "took those funds with the intent to deprive . . . Stilkey of her moneys. The theft represented an ongoing scheme to appropriate the moneys and to deplete the Prudential account owned by . . . Stilkey."

Additionally, the court rejected the defendant's statute of limitations defense. Specifically, it concluded that the continuing course of conduct doctrine operated to toll the three year statute of limitations set forth in General Statutes § 52-577. The court stated: "The defendant's theft was not complete until January 4, 2013, and this action, having been commenced by service on July 16, 2015, is within the limitation period set forth in § 52-577." This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion in considering the administratrix' continuing course of conduct argument despite improper pleading. Specifically, she argues that the court should not have considered that doctrine as a consequence of the administratrix' failure to raise it "in the pleadings, at trial and in her initial posttrial brief." The administratrix counters that "[t]he trial court did not err in recognizing a 'continuing course of conduct' exclusion from the

[3] The defendant's special defense stated: "Plaintiff's cause of action is barred by the statute of limitations."

statute of limitations defense." We conclude that the court did not abuse its discretion in applying the continuing course of conduct doctrine.

The following additional facts are necessary for our discussion. The first check that the defendant wrongfully deposited into her own checking account was dated October 12, 2010. The final stolen check was dated January 3, 2013. Stilkey filed her complaint on July 15, 2015. The defendant first raised her statute of limitations special defense on May 10, 2017, by way of answer to the administratrix' revised complaint. After trial, the court ordered posttrial briefing on the statute of limitations defense. In the parties' posttrial briefs, they addressed the bilateral pleading deficiencies with respect to the statute of limitations defense and the continuing course of conduct doctrine. The administratrix argued that the defendant had waived the statute of limitations special defense by failing to specify the precise statute on which she relied. In that same brief, the administratrix argued for the first time that if the statute of limitations special defense had been pleaded properly, then she would have had the opportunity to plead the continuing course of conduct doctrine to toll the statute of limitations. After that "passing reference to the continuing course of conduct doctrine" the court ordered supplemental briefing, ordering the parties to address it specifically. The defendant responded that the continuing course of conduct doctrine should not be considered, because it must be pleaded in avoidance of a special defense pursuant to Practice Book § 10-57.[4]

The court addressed the statute of limitations issue and the deficient pleadings in its memorandum of decision. Specifically, the court explained that "[t]he defendant argues that the court need not reach the merits of the [administratrix'] continuing course of conduct

[4] Practice Book § 10-57 provides in relevant part that a "[m]atter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply."

argument because it was not specially pleaded and raised for the first time in a posttrial brief. The court rejects the defendant's argument. The defendant herself did not identify the specific statute on which she relied for her statute of limitations defense until her second trial brief. The court will not fault the [administratrix] for failing to plead the continuing course of conduct doctrine in avoidance of the defendant's special defense, when that special defense was a bare assertion that the '[p]laintiff's cause of action is barred by the statute of limitations.' Both parties have erred in their pleadings but however imperfectly they have each pleaded, the issues have been placed before the court and the merits will be reached." The court ruled that the continuing course of conduct doctrine applied, tolling the statute of limitations until the defendant's wrongful conduct terminated.

We agree with the court that both parties failed to comply with our rules of practice. The defendant did not identify specifically the statute on which her statute of limitations defense was based, in violation of the requirement of Practice Book § 10-3 (a). Then, the administratrix, in turn, did not comply with Practice Book § 10-57, due to her failure to plead the continuing course of conduct doctrine in avoidance of the defendant's special defense. The court, nevertheless, decided to overlook the parties' pleading deficiencies.

The issue, therefore, is whether the court properly considered the continuing course of conduct doctrine under these facts and circumstances. We begin with our standard of review. Our Supreme Court has stated that "when a party properly objects to a violation of the rules of practice, the trial court may disregard the improperly raised claim if doing so is not an abuse of discretion." (Internal quotation marks omitted.) *Zatakia* v. *Ecoair Corp.*, 128 Conn. App. 362, 367, 18 A.3d 604, cert. denied, 301 Conn. 936, 23 A.3d 729 (2011).

"In general, [an] abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors . . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required." (Internal quotation marks omitted.) *D'Ascanio* v. *Toyota Industries Corp.*, 133 Conn. App. 420, 428, 35 A.3d 388 (2012), aff'd, 309 Conn. 663, 72 A.3d 1019 (2013). "When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be in favor of its correctness . . . . Furthermore, we have stated in other contexts in which an abuse of discretion standard has been employed that this court will rarely overturn the decision of the trial court."[5] (Footnote added and omitted; internal quotation marks omitted.) *Zatakia* v. *Ecoair Corp.*, supra, 368.

In the present case, the court, in exercising its discretion, chose to resolve the statute of limitations issue on the merits despite both parties' clear procedural errors. For example, the court could have declined to consider the defendant's statute of limitations defense after she failed to plead a specific statute. Failure to plead the specific statute on which a statute of limitations defense rests is grounds for waiver of that special defense when, as in this case, that statute of limitations is procedural rather than jurisdictional. See *Cue Associates, LLC* v. *Cast Iron Associates, LLC*, 111 Conn. App. 107, 116–17, 958 A.2d 772 (2008) ("[t]he [limitation] period for tort actions found in § 52-577 is procedural rather than jurisdictional, thus making it subject to

[5] We note that the administratrix claimed in her appellate brief that the plenary standard of review applied because resolution of this claim involved the interpretation of our rules of practice. We disagree and conclude that the abuse of discretion standard applies.

waiver"). It was within the court's discretion, however, to overlook that procedural error.

Similarly, the court did not abuse its discretion by reaching the merits of the administratrix' continuing course of conduct argument, even though she did not raise it in her pleadings by way of a reply to the special defense but, instead, asserted it for the first time in a posttrial brief. This court said as much in *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 607, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007). In that case, this court explained that "we respond substantively to the issue . . . because, however imperfectly, the plaintiff placed the issue before the court and, in this instance, we believe it is just to reach the claim." Id. In the present case, the court explained that "[b]oth parties have erred in their pleadings but however imperfectly they have each pleaded, the issues have been placed before the court and the merits will be reached."

Our Supreme Court, in *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 301, 94 A.3d 553 (2014), explained that "[b]eyond the trial courts' discretion to overlook violations of the rules of practice in the absence of a timely objection from the opposing party . . . it may be just to reach the merits of a plaintiff's claim to a toll of the statute of limitations, even when not properly pleaded pursuant to Practice Book § 10-57, if the issue is otherwise put before the trial court and no party is prejudiced by the lapse in pleading." In the present case, the trial court was in the best position to determine whether either party had been unfairly prejudiced by the defendant's failure to specify the statute on which her defense rested *or* by the administratrix' failure to timely raise the continuing course of conduct doctrine in avoidance of that special defense.

The defendant had ample opportunity to address the continuing course of conduct doctrine during posttrial

briefing. In her supplemental posttrial brief, the defendant objected to the application of the continuing course of conduct doctrine on procedural grounds, arguing only that the court should not address that doctrine because it had not been pleaded in avoidance pursuant to Practice Book § 10-57. Nowhere in the defendant's posttrial briefs did she specify how she was prejudiced by the administratrix' posttrial invocation of that doctrine. Instead, the defendant makes the bald assertion in her appellate brief that "[i]mposing the continuing course doctrine raised after trial to allow the [administratrix] to escape the result of the statute of limitations violates the concept of fundamental fairness."[6]

It was within the court's discretion to reach the merits of the administratrix' continuing course of conduct claim once it was put before the court, and it was within the court's discretion to determine that no party was prejudiced by the lapse in pleading. The defendant has not proven an abuse of discretion in this instance, and we cannot say that the trial court decided the matter so arbitrarily as to vitiate logic, or has decided it on the basis of improper or irrelevant factors. Accordingly, the court did not abuse its discretion, and the defendant's argument to the contrary fails.

II

The defendant claims that the court improperly concluded that the continuing course of conduct doctrine tolled the statute of limitations. The court concluded that the continuing course of conduct doctrine applied to toll the statute of limitations until the defendant's

[6] We note also that, because the defendant failed to raise a claim of prejudice in her posttrial briefs, she cannot raise it for the first time on appeal. See *O'Connell*, *Flaherty & Attmore*, *LLC* v. *Doody*, 124 Conn. App. 1, 7–8, 3 A.3d 969 (2010). Regardless, we conclude that the court did not abuse its discretion in considering the continuing course of conduct claim.

series of thefts was complete on January 4, 2013, and that "this action, having been commenced by service on July 16, 2015, is within the limitation period set forth in § 52-577."

We conclude that the defendant's claim challenging the conclusion that the continuing course of conduct doctrine tolled the statute of limitations defense based on the evidence in this case is briefed inadequately. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Citation omitted; internal quotation marks omitted.) *Grasso* v. *Connecticut Hospice, Inc.*, 138 Conn. App. 759, 768, 54 A.3d 221 (2012).

The section of the defendant's brief devoted to this issue consists of two paragraphs. It contains no case citations, nor any citations to other legal authority. It fails to provide an analysis demonstrating why the court's conclusion that the continuing course of conduct doctrine applied was incorrect. See, e.g., *Martin* v. *Martin*, 101 Conn. App. 106, 122, 920 A.2d 340 (2007) (where parties cite no law and provide no analysis of claims, we will not review them). Other than to state, in a conclusory manner, that "[this] is not a typical context argument for this theory" and that "all the claimed acts evidenced at trial were discrete, distinct and identifiable," the defendant failed to cite evidence in the record supporting her claim on appeal that the court incorrectly applied the continuing course of conduct doctrine to these facts.

The defendant's reply brief fares no better. Her one page discussion of the continuing course of conduct doctrine likewise contains no case citations and no

legal analysis. Rather, it states that "the facts do not fit the continuing course narrative," and "[t]he continuing course exclusion should not apply where the party is on notice and wilfully blind." Consequently, based on this inadequate briefing, we do not review this abandoned claim.

III

The defendant claims that the court erroneously found that Stilkey had no knowledge of the defendant's actions and had not consented to or authorized them. Specifically, the defendant challenges the court's findings of fact, claiming that "the trial court erred in failing to consider the implications of [Stilkey's] knowledge of [the] defendant's actions, and consequently, failed to conclude that [the] defendant's such actions were authorized and consented to." The defendant further contends that the five checks deposited into Stilkey's account established "a proper information that Stilkey knew of [the defendant's] assistance for years and took no action . . . assumedly because she consented to such." Additionally, the defendant argues that the "[administratrix] has not evidenced that these checks were forged, has not proven [the] defendant signed the checks, and most importantly has not proven that Stilkey did not sign over those checks to [the defendant]." Finally, the defendant argues that because state and federal taxes were withheld from the checks drawn from Stilkey's Prudential account, "[t]hese deductions and the consequent benefit to Stilkey on her income tax clearly suggest that Stilkey was aware of the transactions and consented to them." (Emphasis omitted.) We disagree.

The following additional facts are relevant to the defendant's claim. In the administratrix' revised complaint, she alleged that, "[i]n 2009, the defendant reestablished contact with [Stilkey] and gained her trust, and [Stilkey] believed the defendant had become a

trusted friend." At trial, the administratrix' counsel asked the defendant two questions related to her 2009 reentry into Stilkey's life: "And sometime in 2009, you befriended Mrs. Stilkey again." "And you helped her with her taxes and learned her Social Security number and took other documents from her house." To both of those questions, the defendant responded: "Upon the advice of counsel, I hereby invoke my fifth amendment right."

Additionally, the administratrix' counsel asked the defendant a number of detailed, probative questions concerning the Prudential transactions. Specifically, the administratrix' counsel asked the defendant: (1) "and Lois Stilkey never gave you her permission to call [Prudential] on her behalf"; (2) "[a]nd you forged [Stilkey's] name on each and every one of those checks that are listed on exhibit two"; and (3) "[y]ou stole all of that money from Mrs. Stilkey, didn't you?" On each occasion the defendant similarly declined to answer, stating: "Upon the advice of counsel, I hereby invoke my fifth amendment right."

The court found that "Stilkey did not authorize [the defendant] to take $101,501.31 of her Prudential account moneys. [The defendant] took these funds with the intent to deprive Ms. Stilkey of her moneys. The theft represented an ongoing scheme to appropriate the moneys and deplete the Prudential account owned by Ms. Stilkey." The court also addressed the defendant's invocation of her fifth amendment right and her refusal to respond to probative questions at trial, noting that "[t]he court infers from the defendant's silence a tacit admission that she stole from Ms. Stilkey." Those findings in particular are the subject of the defendant's claim of error.

We begin by setting forth the applicable standard of review. The trial court's findings of fact "are binding upon this court unless they are clearly erroneous in

light of the evidence and the pleadings in the record as a whole . . . . 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. . . .

"In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court. . . .

"[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony . . . and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *FirstLight Hydro Generating Co.* v. *Stewart*, 328 Conn. 668, 679–80, 182 A.3d 67 (2018).

As we have noted, the defendant exercised her fifth amendment right several times during the trial. The fifth amendment privilege against self-incrimination "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." (Internal quotation marks omitted.) *Olin Corp.* v. *Castells*, 180 Conn. 49, 53, 428 A.2d 319 (1980), citing *Lefkowitz*

v. *Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). "The privilege does not, however, forbid the drawing of adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. The prevailing rule is that the fifth amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." (Emphasis omitted.) *Olin Corp.* v. *Castells*, supra, 53–54. Guided by those principles, we address each of the defendant's arguments in turn.

First, the defendant argues that the five checks deposited into Stilkey's account indicate that Stilkey "knew of [the] defendant's assistance." Indeed, the administratrix' revised complaint indicates that the defendant had become Stilkey's "trusted friend," and the defendant's invocation of the fifth amendment when asked whether she prepared Stilkey's tax returns permits the adverse inference that she did so. Accordingly, the court could have found that Stilkey was aware that the defendant was "assisting" her with her finances. The court could also have found, and, indeed, did find that, even if Stilkey had been aware of the defendant's general financial assistance, "[she] did not authorize [the defendant] to take $101,501.31 of her Prudential account moneys." Stilkey may have been aware of the defendant's general financial assistance, but that does not imply that she authorized or consented to the defendant's withdrawals from her IRA.

Second, the defendant argues that the administratrix failed to prove that the signatures on the checks deposited into the defendant's account were forged, that Stilkey did not sign the checks, and that Stilkey did not sign the checks over to the defendant. At trial, the administratrix presented evidence that the defendant falsely identified herself as Lois Stilkey during each of the Prudential phone calls in order to have checks issued from Stilkey's IRA. Additionally, the administratrix' counsel asked the defendant at trial, "and you

forged [Stilkey's] name on each and every one of those checks . . . ." The defendant responded by invoking her fifth amendment right against self-incrimination. Accordingly, the court was entitled to draw an adverse inference that the defendant forged Stilkey's signature on those checks.

Finally, the defendant claims that because state and federal taxes were withheld from the checks at issue, Stilkey must have been aware of the Prudential transactions and consented to them. We disagree. Indeed, there is evidence in the record that the defendant prepared Stilkey's tax returns after reentering her life in 2009. The fact that taxes were withheld from the fraudulently issued checks did not persuade the trial court that Stilkey was aware of the defendant's actions, and we, likewise, are not persuaded.

The court's findings are supported by the evidence and this court is not left with a definite and firm conviction that any mistake has been committed. We conclude, therefore, that the court's findings are not clearly erroneous. We iterate that it is not the function of this court to retry the case or reassess the credibility of the witnesses. Accordingly, the defendant's claims of factual error fail.

The judgment is affirmed.

In this opinion the other judges concurred.

AMY A. DAVIS *v.* ALEXANDER F. DAVIS, SR.
(AC 41360)

DiPentima, C. J., and Elgo and Moll, Js.*

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from certain postjudgment rulings of the

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

trial court, claiming, inter alia, that the court improperly calculated his child support arrearage in violation of statute (§ 46b-224) and granted the plaintiff's motion to modify his alimony obligation without first providing him notice that it would act on the motion. The parties had filed a litany of postjudgment motions between April, 2016 and December, 2017, that were either repeatedly continued or not acted on by the trial court. Thereafter, the court in January, 2018, issued an order notifying the parties that it would address all pending motions on a certain date in February, 2018. *Held*:

1. The defendant received adequate notice in satisfaction of his right to due process that the trial court might dispose of the plaintiff's motion for modification of alimony at the February, 2018 hearing: the January, 2018 order unambiguously stated that all pending motions were to be addressed at the February, 2018 hearing, the court had notified the parties at a previous hearing that the issue of alimony was to be addressed with all the other pending motions, at no point did the court affirmatively state that it would not rule on the motion for modification, and nothing in the record suggested that the defendant was without notice or that his ability to present evidence or to cross-examine the plaintiff was hindered; moreover, at no point did the defendant state his surprise or express the need for more time to present evidence, the record having suggested that he argued his position before the court and attacked the substance of the plaintiff's financial affidavit she presented in support of her motion.
2. The defendant could not prevail on his claim that the trial court improperly ordered him to reimburse the plaintiff for her expenses related to fixing the septic system at the marital residence, which was based on his assertion that the court abused its discretion by failing to consider the plaintiff's conduct relative to his efforts to make the repairs himself; the court acted well within its discretionary authority in ordering reimbursement, as the defendant was obligated under the dissolution judgment and a prior court order to maintain the residence until it was sold, there was no dispute that the septic system required repairs due to recurring problems, the court plainly considered the arguments of both parties and the evidence proffered in rendering its decision, and the defendant's unpreserved claim that the court failed to apply the unclean hands doctrine was without merit, as the defendant did not raise that doctrine with the court, which considered his argument that the plaintiff allegedly prevented him from accessing the septic system and was entitled to broad discretion in deciding whether to apply the unclean hands doctrine.
3. The trial court improperly failed to apply § 46b-224 in calculating the defendant's child support arrearage, the court's prior transfer of custody from the plaintiff to the defendant having suspended his child support obligation under § 46b-224 until the child was returned to the plaintiff's custody; the court improperly refused to deduct from the arrearage the

amount for the period of time that the child was in the defendant's custody, as it appeared that the court refused to credit that time because the defendant had not filed a motion for modification of child support, § 46b-224 plainly required that a court order changing custody shall operate to suspend a child support order, and because the court made no finding as to the precise period of time that the child was in the defendant's custody, that issue had to resolved on remand.

Argued February 6—officially released September 15, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Hon. Edward J. Dolan*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Abery-Wetstone*, *J.*, granted the plaintiff's motion to modify alimony and issued an order related to certain expenses, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

David V. DeRosa, for the appellant (defendant).

Amy A. Davis, self-represented, the appellee (plaintiff).

Opinion

ELGO, J. In this postdissolution matter, the defendant, Alexander F. Davis, Sr., appeals from a number of postdissolution decisions by the trial court in favor of the plaintiff, Amy A. Davis. On appeal, the defendant claims that the court (1) improperly granted the plaintiff's postjudgment motion to modify alimony without providing sufficient notice in violation of his right to due process, (2) improperly ordered the defendant to reimburse the plaintiff for expenses related to septic system repairs at the marital residence, and (3) abused its discretion under General Statutes § 46b-224 by calculating the defendant's outstanding child support obligations without crediting the time that the minor child was in his custody. We agree with the defendant's third

claim and, accordingly, affirm in part and reverse in part the judgment of the trial court.[1]

The record reveals the following facts and procedural history relevant to this appeal. On April 1, 2016, the parties' marriage was dissolved. The judgment of dissolution incorporated the parties' separation agreement, which provided for a number of conditions. These conditions included, in part, that (1) the parties were to have joint legal custody of their two children,[2] (2) the plaintiff was to receive $363 per week in child support, which was waived until she no longer resided at the marital residence, (3) the defendant would provide health insurance for the children, the plaintiff would cover copayments related to the children's health treatment, and the children's medical expenses would be allocated equally among the parties, (4) the plaintiff would receive $1 per year in alimony, an amount that could be revisited at a later date, for nine years,[3] (5) the plaintiff was to pay the defendant for the use of a 2016 GMC Acadia in the amount of $387 per month, (6) the plaintiff was to reside at the marital residence with the two children on the condition that she remit payment to the defendant of $1000 per month for rent, and (7) the defendant was to pay the mortgage, taxes, and the water bill for the marital residence and maintain that residence until it sold.

[1] We note that the plaintiff filed a cross appeal from the trial court's February 8, 2018 judgment, claiming that the court had improperly failed to make the alimony award retroactive. During oral argument before this court, however, the plaintiff acknowledged that she had abandoned that claim because it was not briefed. See, e.g., *Brody* v. *Brody*, 153 Conn. App. 625, 629 n.3, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014).

[2] The record reflects that the parties have two children, only one of whom was a minor child at the time that the court rendered its judgment on February 7, 2018. For convenience, we refer to the parties' child who is relevant to this appeal as "the minor child" in this opinion.

[3] In its order awarding the plaintiff $1 per year in alimony, the court expressly stated that the amount of alimony would be subject to modification "without the showing of a substantial change of circumstances."

From April 1, 2016 to December, 2017, the parties filed a litany of postjudgment motions. They included (1) the plaintiff's June 9, 2017 motion for modification of alimony, (2) the defendant's September 15, 2017 motion for order pendente lite regarding the GMC Acadia, (3) the defendant's October 20, 2017 motion for contempt, (4) the plaintiff's October 23, 2017 motion for contempt, and (5) the defendant's December 15, 2017 motion for modification requesting that the plaintiff vacate the marital residence, to which the plaintiff filed an objection on December 21, 2017. These motions were either continued or not acted on. On January 24, 2018, the court issued an order notifying the parties that all pending motions were to be heard on February 7, 2018.

On February 7, 2018, the court, *Abery-Wetstone*, *J.*, held a hearing on the pending motions. At the start of the hearing, the court provided an overview of the ten motions scheduled for that day.[4] After finding that some of the motions were either moot or duplicates, the court whittled down the specific motions it intended to hear. In particular, the court indicated that it would hear the defendant's September 15, 2017 motion for order, the defendant's October 20, 2017 motion for contempt, the plaintiff's October 23, 2017 motion for contempt, and the defendant's December 15, 2017 motion for modification.

Beginning with the first of these motions, the plaintiff admitted to the court that she had failed to pay the defendant for ten months of her use of the GMC Acadia. The plaintiff claimed that her failure to do so was due to a loan she allegedly had made to the defendant after the parties had divorced. The court rejected this reasoning, finding that the plaintiff had been ordered to

[4] During this canvass, the court did not consider whether the plaintiff's motion to modify alimony would go forward that day.

pay $387 per month for use of the vehicle and that the plaintiff did not subsequently move to modify that order. The court noted that a previous order of the court stated that the plaintiff owed the defendant $8322, which included the ten months of nonpayment for her use of the vehicle. The court found that, in addition to this amount, the plaintiff failed to pay the defendant for three months for use of the vehicle, totaling $1161.

With respect to the plaintiff's October 23, 2017 motion for contempt, the plaintiff asserted that she incurred a number of expenses for which the defendant was obligated to reimburse her. First, the plaintiff delineated her expenses as a result of her attempts to have the septic system at the marital residence repaired. The plaintiff stated that the problems relating to the septic system persisted over an extended period of time and, after the defendant failed to remedy the problem, she hired contractors to fix it. The plaintiff further asserted that, when the defendant did come to the home in an attempt to fix the problem, she refused both the defendant and his friend entry onto the property because she had to leave for work. In response, the defendant stated his concern with the particular invoices and further asserted that he had attempted to have the septic system diagnosed and repaired by a friend. The court noted that the defendant was liable for the maintenance of the house, which included repairs to the septic system, regardless of who made the repairs. The court thus found that the defendant owed $3943.66 to the plaintiff for her expenses related to repairing the septic system. In addition, the court found that the defendant owed the plaintiff $8609.19 with respect to the insurance proceeds he had received as a result of the property damage the plaintiff sustained from a leak in the basement.[5] It

[5] The defendant previously had been ordered to keep the insurance proceeds in an escrow account.

also determined that the defendant owed $107.50 for the children's dental treatment.

After addressing the defendant's December 15, 2017 motion for modification, the court determined that the defendant was owed $2000 in unpaid rent for the plaintiff's time at the marital residence in August and September, 2017. The court rejected the plaintiff's reasoning for withholding the rent to offset her alleged loan to the defendant, explaining that there was "a clear court order saying you pay him $1000 a month for the time you occupy the house." The court further recognized that the defendant had failed to pay the plaintiff child support since she vacated the marital residence.[6] Accordingly, it found that the defendant owed the plaintiff $5351.66 in unpaid child support.

After disposing of these motions, the court summarized the obligations of the parties. In doing so, it found that, in addition to the June 1, 2017 court order stating that the plaintiff owed the defendant $8322, the plaintiff further owed the defendant $2000 for unpaid rent and $1161 for unpaid payments related to her use of the GMC Acadia. The court also found that the defendant owed the plaintiff $3943.66 for her expenses related to the septic system repairs, $5351.66 for unpaid child support payments, and $107.50 for unpaid dental expenses. Thus, the court determined that the difference between the parties' obligations was $2080.18 owed to the defendant. The court ordered that, because the defendant was holding in escrow $8609.19 in insurance proceeds owed to the plaintiff, he should offset $2080.18 owed to him by the plaintiff and turn over to her the remaining proceeds within seven days. Accordingly, the defendant was ordered to pay the plaintiff $6529.01.

[6] We note that, although the court appears to have brought up the issue of the defendant's child support obligations in addressing the defendant's December 15, 2017 motion, the plaintiff raised this particular issue in her December 21, 2017 objection to that motion.

Later during the hearing, the plaintiff brought to the court's attention her June 9, 2017 motion to modify alimony. In response, the court noted that the parties did not provide financial affidavits and that, as a result, it could not rule on that motion. After discussing the terms of the alimony previously ordered, the court acknowledged that the plaintiff would not receive either child support or alimony until she vacated the marital residence. It commented that, because the motion was filed in July, 2017—when the plaintiff was still living at he marital residence—it would have been "moot . . . ." Clarifying the issue, the court noted that the plaintiff's June 9, 2017 motion was "not scheduled for today." The court further observed that the motion "appears never to have been acted on" but, considering that the plaintiff had since moved out of the marital residence, it would hear the motion on the condition that the parties provide current financial affidavits. After the plaintiff noted that the parties were ordered to bring updated financial affidavits and cancelled pay stubs, the court ordered a recess for the parties to "fill out a financial affidavit and bring it back . . . ."[7]

Upon returning from the luncheon recess, the court addressed the defendant's argument that, because the parties' minor son had been ordered to live with him for approximately one month to finish high school, he should not be required to pay child support for that period of time. In rejecting this argument, the court explained that, despite the order requiring that the minor child live with him, there still remained an order requiring him to pay child support. Because the defendant did not file a motion to modify his child support obligations, the child support order remained in effect

[7] During oral argument before this court, the plaintiff explained that the order requiring the parties to bring updated financial affidavits was made orally by Judge Abery-Wetstone. We note, however, that the relevant transcript at issue is not in the record before us.

"until it's modified by the court." The court further noted that, if the parties "agreed to do something else [concerning their minor child's custody], you're more than willing to do so, but the child support order remains in full force and effect until a judge . . . says it's different."

Afterward, the court stated that, "[b]ased on your current financial affidavits, I'm going to award alimony in the amount of $200 a week. I'm not going to make it retroactive despite Judge Dolan's indication he would think about it being retroactive. You lived in the house until September, [2017]. So, it . . . certainly wouldn't be retroactive to July, under the terms of your agreement . . . ." In response, the defendant argued that it was the plaintiff's circumstances that changed and pointed to her ability to sustain herself with the $1 per year of alimony previously awarded to her. The court dismissed this argument, noting that it "considered her current job. I considered your current job. I considered your financial affidavits, and that's my order." It further rejected the defendant's argument that, because the plaintiff purchased a new car, she was not entitled to an increase of alimony. The court reasoned that it does not "base child support or alimony on what people spend. I base it on what they earn."

On that same day, the court issued a written order in which it stated in relevant part: "[The] court finds that [the defendant] owes [the plaintiff] $3943.66 for septic repairs. $749.20 plus $893 [the plaintiff] spent on flooring prior to septic problem is not considered as part of the septic reimbursement. . . . [The defendant] owes the [plaintiff] $107.50 in dental bill reimbursement for the children. [The plaintiff] owes to the [defendant] $8322 per Judge Dolan's order dated [June 1, 2017] motion # 126.00. In addition, she owes rent for August and September in the amount of $2000, plus $1161 for

the [GMC] Acadia lease payments for December, 2017, and January and February, 2018 ($387 per month).

"[The defendant] owes child support in the amount of $247 per week for October, November, December, 2017, and January and February, 2018, in the amount of $5351.66.

"[The] court finds that the [plaintiff] owes to the [defendant a] total amount of $11,483 ($8322 plus $2000 plus $1161), and the [defendant] owes to the [plaintiff a] total amount of $9637.08 ($5585.92 plus $107.50 plus $3943.66).

"In addition, [the defendant] shall immediately pay the [plaintiff] $8609.19 held in escrow for damage to her property as a result of the septic failure. He may deduct the difference from the escrow balance ($11,483 minus $9637.08 equals $1845.92) so the [plaintiff] is paid in full within seven days from today. . . .

"[The defendant] shall pay to the [plaintiff] alimony in the amount of $200 per week, pursuant to the financial affidavits submitted February 7, 2018." This appeal followed.[8]

[8] After commencing this appeal, the defendant filed a motion to reargue the court's February 7, 2018 order increasing his alimony obligations to the plaintiff. On June 12, 2018, the court held a hearing and addressed the defendant's motion. That motion was subsequently granted.

During the hearing on that motion, the court acknowledged that Judge Dolan had previously stated that the motion to modify alimony would be argued "when everything was argued . . . ." The court also stated that, although Judge Dolan had previously indicated that the court could make alimony retroactive, "I did not make it retroactive." It continued that "[t]here were so many continuances filed in this matter that it's impossible to hear any motion in a timely manner because everything appears on the short calendar, they can't resolve it, they get a hearing date, the hearing date gets postponed; I mean, I was hearing motions that were filed months before February 7, [2018], which was the date that I heard the motion. . . . And . . . a substantial change of circumstances was the fact that [the plaintiff] was no longer residing in the house, and she was entitled to child support from September going forward and she was entitled to alimony going forward because the cost of her housing for herself and the children had significantly increased. That was the substantial change of circumstances." After the court emphasized the drastic changes in her rent after the plaintiff vacated

I

The defendant first claims that the trial court's order modifying the defendant's alimony obligations to the plaintiff violated his due process right to receive adequate notice. The defendant argues that the plaintiff's motion to modify alimony was not scheduled for February 7, 2018, and, accordingly, he was not provided notice that the court would act on that motion. The defendant further asserts that, because he did not receive notice, he was not provided with an opportunity to prepare to argue his position or to cross-examine the plaintiff. We disagree.

"It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard. . . . It is a fundamental premise of due process that a court cannot adjudicate a matter until the persons directly concerned have been notified of its pendency and have been given a reasonable opportunity to be heard in sufficient time to prepare their positions on the issues involved." (Citation omitted; internal quotation marks omitted.) *Shapiro* v. *Shapiro*, 80 Conn. App. 565, 568–69, 835 A.2d 1049 (2003). "In keeping with these principles of due process, we have reversed modifications of support orders where the issue of modification was not before the trial court, or where the court did not give adequate notice that it intended to address a modification issue." *Styrcula* v. *Styrcula*, 139 Conn. App. 735, 745, 57 A.3d 822 (2012).

the marital residence, it again reiterated that the plaintiff's rent "went from $1000 . . . to almost $1500 a month. So, that was a substantial change in circumstances."

Upon our review of the record, we conclude that the parties, including the defendant, received adequate notice that the plaintiff's June 9, 2017 motion for modification of alimony was subject to being disposed of on February 7, 2018. First and foremost, the record reveals that, on January 24, 2018, the court issued the following order in response to the vast number of motions filed by the parties: "All pending motions have been continued to [February 7, 2018] to be heard by Judge Abery-Wetstone. The [January 31, 2018] hearing date shall be marked off." The key phrase in the court's order is that *all pending motions* were to be continued until February 7, 2018, and, thus, all such motions were subject to disposition on that date.[9] The defendant does not dispute that the plaintiff's June 9, 2017 motion for modification of alimony was pending. Additionally, there is no indication that the court previously had rendered a decision with respect to that motion.[10] It is, therefore, clear that the defendant received notice prior to the February 7, 2018 hearing that the court intended to dispose of all pending motions, including the plaintiff's outstanding June 9, 2017 motion for modification of alimony.[11]

[9] We further find significant that, during the June 12, 2018 hearing on the defendant's motion to reargue, the court agreed with the plaintiff that Judge Dolan had notified the parties at a previous hearing that the issue of alimony would be argued "when everything was argued . . . ." In fact, on November 15, 2017, the court ordered the parties "to schedule a full day trial regarding the outstanding motions" with case flow, and further ordered that "[a]ll motions shall be consolidated to be heard on the trial date, including any motions filed up until two weeks before the trial date."

[10] Although the defendant's trial counsel appears to have argued that the court had previously ruled on the plaintiff's June 9, 2017 motion during the June 12, 2018 hearing, nothing in the record supports that assertion.

[11] We disagree with the defendant's emphasis on the court's acknowledgment that the plaintiff's June 9, 2017 motion was not "on" for the February 7, 2018 hearing. The court's January 24, 2018 order explicitly stated that it intended to dispose of all pending motions. Given the court's herculean efforts to untangle and dispose of multiple motions festering over six months on the court docket, we believe it to be immaterial that the court missed this particular motion in its preliminary overview of the pending motions at the beginning of the hearing.

The defendant principally relies on two cases in support of his position, both of which are easily distinguishable from the present matter. First, the defendant asserts that the circumstances here are "very similar" to those of *Pritchard* v. *Pritchard*, 103 Conn. App. 276, 928 A.2d 566 (2007). In *Pritchard*, this court, on remand from our Supreme Court, was tasked to resolve, inter alia, the state's claim that the trial court improperly had modified a family support magistrate's child support order without providing notice. Id., 278. After being found in contempt for unpaid arrearages, the defendant was arrested after the court issued a capias and was later found by a family support magistrate to have fraudulently conveyed a property to his companion. Id., 280. In response, the state of Connecticut, support enforcement services, filed a motion for reconveyance of that property. Id., 280–81. After the trial court held a hearing on the state's motion, it released the defendant from custody and vacated the arrearage. Id., 281. In doing so, it reasoned that, although it recognized that the defendant had never filed a motion for modification, it was "equitable and appropriate to treat the defendant's April 23, 2003 motion for contempt . . . as a motion to reopen the [contempt] judgment . . . ." (Footnote omitted; internal quotation marks omitted.) Id., 282. In reversing that judgment, this court noted that the only motion before the court when it modified the ongoing support order was the state's motion for reconveyance of real estate. Id., 287. It further emphasized that "there was no motion pending before the court to modify the prior support orders"; id.; and, even though the trial court construed the motion for contempt as a motion to modify, that motion "was not before the court, and the motion before the court did not pertain to child support . . . ." Id., 288. Thus, "none of the parties had notice that the court might vacate the prior contempt and arrearage orders and modify the support order." Id.

In the present case, the court unambiguously notified the parties in its January 24, 2018 order that *all* pending motions were expected to be addressed at the February 7, 2018 hearing. Unlike the defendant in *Pritchard*, the plaintiff did not fail to file a motion for modification of alimony prior to the hearing. The court in this case did not construe the plaintiff's motion for contempt as a motion to modify but, rather, modified the defendant's alimony requirements pursuant to a pending motion to modify such alimony—as consistent with the court's prior order. The parties clearly "had notice that the court might" modify the alimony order. Id.

The defendant also relies on *Styrcula* v. *Styrcula*, supra, 139 Conn. App. 735. In that matter, the trial court continued an August 9, 2010 hearing on the plaintiff's motion for contempt after questions arose regarding the need for discovery. Id., 739–40. On August 17, 2010, the defendant filed a motion to modify alimony. Id., 740. When the court reconvened on March 1, 2011, for the continuation of the August 9, 2010 hearing, both the parties and the court continuously affirmed that the only issue to be addressed was the plaintiff's motion for contempt. See id., 740–42. Notwithstanding these assurances, the court issued a memorandum of decision on April 5, 2011, granting the defendant's motion for modification. Id., 742–43. This court reversed the trial court's judgment, holding that "the court gave no indication to the parties that it planned to consider the defendant's motion for modification before, during or after the March 1, 2011 hearing. To the contrary, the court told the parties the exact opposite—it planned to use the hearing to resolve the 'unfinished business' from August, 2010, and 'finish up' the plaintiff's contempt motion . . . ." Id., 746–47. The court further observed that, after hearing argument from both parties as to what motions were to be disposed of, "the court specifically informed the parties that it would *not* be considering the defendant's modification unless 'lightning

struck' and both parties agreed to put the modification issue before the court." (Emphasis in original.) Id., 747. Thus, this court determined that, "[g]iven the clear statements of the parties and the court, we cannot conclude on this record that the parties had adequate notice that the court intended to decide the defendant's motion for modification after the March 1, 2011 hearing." Id., 747–48.

For the reasons that *Pritchard* is inapposite to the present matter, so, too, is *Styrcula*. As previously discussed, the court's January 24, 2018 order stated that *all* pending motions—the plaintiff's June 9, 2017 motion for modification included—were to be addressed at the February 7, 2018 hearing. Furthermore, and in contrast to *Styrcula*, the court made clear during the hearing that it intended to address the plaintiff's June 9, 2017 motion after the plaintiff noted that, like the panoply of motions the parties had filed, it, too, remained pending. The court thereafter notified the parties that it planned to address that motion for modification of alimony upon returning from the luncheon recess and ordered the parties to provide updated financial affidavits. At no point did the court affirmatively state that it did not intend to rule on the plaintiff's June 9, 2017 motion after the plaintiff notified the court about its pendency. To the contrary, the court explicitly stated that, because all pending motions were to be addressed at the hearing, it would do so after the recess.

We further note that, in contrast to the circumstances in *Styrcula*, the February 7, 2018 hearing was not a continuation of a previous hearing on a different motion. Rather, that hearing clearly was intended to act as a vehicle to dispose of motions that had cluttered the docket and that were pending for months after being repeatedly continued. Last, unlike the plaintiff in *Styrcula*, at no point did the defendant state his surprise or express the need for more time to present evidence

on the issue of modifying alimony.[12] Instead, the record reflects that the defendant argued his position before the court and attacked the substance of the plaintiff's financial affidavit proffered in support of her motion. Thus, we are unconvinced that the circumstances of the defendant in this matter are analogous to *Styrcula* in any material way.

In sum, our review of the record leads us to conclude that the defendant was on notice that the court might dispose of the plaintiff's June 9, 2017 motion for modification at the February 7, 2018 hearing. Cf. *Pritchard* v. *Pritchard*, supra, 103 Conn. App. 288. The court's January 24, 2018 order unambiguously stated that all pending motions were to be addressed on February 7, 2018. The record further indicates that, during a previous hearing, the court notified the parties that the issue of alimony was to be addressed with all the other pending motions. See footnote 8 of this opinion. Nothing in the record suggests that the defendant was without notice, that the court indicated it would not rule on the motion for modification, or that his ability to present evidence or to cross-examine the plaintiff was hindered. Cf. *Styrcula* v. *Styrcula*, supra, 139 Conn. App. 747 n.10 (noting potential arguments plaintiff claims she would have asserted in opposition to motion for modification in absence of lack of notice). Accordingly, we conclude that the defendant received adequate notice in satisfaction of his right to due process.

[12] We recognize that the defendant, during this stage of the underlying proceedings, was a self-represented party, whereas the plaintiff in *Styrcula* was represented by an attorney. "Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Aley* v. *Aley*, 97 Conn. App. 850, 853, 908 A.2d 8 (2006). Thus, we do not believe it to be insignificant that the defendant failed to ask for a continuance in light of his alleged lack of notice. See id. (in holding that self-represented defendant received notice of dissolution proceeding, court noted that defendant "could have made a motion for a continuance, but he did not").

II

The defendant next claims that the court improperly ordered him to reimburse the plaintiff for her expenses related to fixing the septic system at the marital residence. According to the defendant, the court abused its discretion by failing to consider the plaintiff's conduct in relation to the defendant's efforts to make the repairs himself. The defendant further argues that the court failed to apply the unclean hands doctrine. We disagree.

We begin by noting that, although the court's order arose out of the plaintiff's motion for contempt, it did not find the defendant in contempt of a prior order. Instead, the court's order requiring the defendant to reimburse the plaintiff for her expenses was remedial in nature. "[A] trial court possesses inherent authority to make a party whole for harm caused by a violation of a court order, even when the trial court does not find the offending party in contempt. . . . In addition, it has long been settled that a trial court has the authority to enforce its own orders. This authority arises from the common law and is inherent in the court's function as a tribunal with the power to decide disputes. . . .

"We further recognize that [a]lthough [a] court does not have the authority to modify a property assignment, [the] court, after distributing property, which includes assigning the debts and liabilities of the parties, does have the authority to issue postjudgment orders effectuating its judgment. . . . [A]n order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Citations omitted; internal quotation marks omitted.) *Nappo* v. *Nappo*, 188 Conn. App. 574, 596, 205 A.3d 723 (2019).

In the present matter, there is no dispute that, pursuant to the dissolution judgment and the court's April 1,

2016 order, the defendant was obligated to maintain the marital residence until it was sold. There is also no dispute that the septic system at the marital residence required repairs due to recurring problems. As the court correctly observed: "[T]here is a court order saying [that the defendant] has to maintain the family home, and if [the plaintiff] paid to have the septic pumped out, then [the defendant] has to pay you back for that." Yet, according to the plaintiff, she repeatedly notified the defendant of these issues and requested that he address them, ultimately to no avail. The receipts that the plaintiff introduced into evidence reflect that she hired licensed contractors throughout 2017. In response, the defendant argued to the court that the plaintiff blocked any effort he made to have his preferred contractors address the septic system issue.

On our review of the record, we conclude that the court acted well within its discretion to order the defendant to reimburse the plaintiff for costs related to repairing the septic system. The court plainly considered the arguments of both parties and the evidence proffered. As the court noted, "regardless of [which] person fixed [the septic system], [the defendant is] liable for the maintenance of the house . . . ." When asked by the court if his "septic guy" was available to testify that he diagnosed a problem with the septic system, the defendant responded in the negative. He acknowledged that this person was not a licensed contractor and did not charge him for the work. After hearing both parties on the issue of the septic system expenses, the court found that the plaintiff expended $3943.66 on septic repairs and ordered the defendant to, inter alia, reimburse her for that amount. In stating its conclusion, the court explicitly stated that it was excluding the costs of the repairs to the basement floor, finding that those expenses occurred "significantly prior to the septic mess." The court considered the

evidence presented by the parties and rendered its decision accordingly. Thus, we believe that the court's decision to require the defendant to reimburse the plaintiff for the septic system repairs was well within its discretionary authority.

The defendant further argues that the court failed to apply the unclean hands doctrine. According to the defendant, the plaintiff's alleged obstruction of the defendant's effort to repair the septic system constituted unclean hands.

"The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 380, 143 A.3d 638 (2016).

The defendant's claim fails for two reasons. First, our review of the record establishes that this claim on appeal is unpreserved. See *Curtis* v. *Curtis*, 134 Conn. App. 833, 847, 41 A.3d 318 (2012) ("[i]t is well settled that this court cannot review a claim that is advanced for the first time on appeal and not raised before the trial court" (internal quotation marks omitted)); see id. (refusing to review unpreserved claim that court failed to apply unclean hands doctrine). At no point during the underlying proceedings did the defendant raise the unclean hands doctrine with the trial court, either during the February 7, 2018 hearing or the subsequent June 12, 2018 hearing on his motion to reargue. Second, even

if this claim was preserved, and assuming that the unclean hands doctrine affords the relief that the defendant seeks; see *Spencer* v. *Spencer*, 177 Conn. App. 504, 523, 173 A.3d 1 (2017) (assuming, without concluding, that unclean hands doctrine affords relief sought by plaintiff in trial court's postdissolution termination of her alimony), cert. granted on other grounds, 328 Conn. 903, 177 A.3d 565 (2018); we conclude that it is without merit. The record reflects that the court considered the defendant's argument that the plaintiff should not be entitled to reimbursement because she allegedly prevented the defendant and his "septic guy" from accessing the septic system. The court was entitled to broad discretion with respect to its decision to apply the unclean hands doctrine. See *Bruno* v. *Bruno*, 177 Conn. App. 599, 622 n.5, 176 A.3d 104 (2017) (concluding that trial court did not abuse its discretion in finding defendant in contempt in postdissolution proceeding even after finding plaintiff had unclean hands). As we have discussed at length, the court acted well within its discretion to order the defendant to reimburse the plaintiff for these costs. Such discretion equally applied to the court's decision on the applicability of the unclean hands doctrine. Accordingly, we reject the defendant's claim.

III

In his final claim, the defendant argues that the court improperly failed to apply § 46b-224 by refusing to credit the time the minor child was in his custody when it calculated the defendant's child support arrearage. According to the defendant, § 46b-224 operates to automatically suspend a child support order in the event that the obligor receives custody of the minor child as a result of a court order. Thus, the defendant asserts that the court improperly calculated his arrearage without deducting a pro rata amount reflecting the time that the minor child remained in his custody. We agree.

The following additional facts are relevant to resolving this claim. On June 1, 2017, the court, *Hon. Edward J. Dolan*, judge trial referee, provided a written order in which it stated, inter alia, that "[w]hen only one child is eligible for child support the child support amount shall be $247 per week." On September 11, 2017, the court ordered the plaintiff "to move out of the marital [residence] by [September 30, 2017]."[13] On November 15, 2017, in a written order, the court, *Abery-Wetstone*, *J.*, ordered, inter alia, the plaintiff "to immediately bring [the minor child] back to [the defendant's] house to live with [the defendant] and finish high school. [The plaintiff] shall have visitation with [the minor child] every other weekend, with pickup from school on Friday and dropoff Monday morning at school. . . . [The plaintiff] shall have dinner with [the minor child] every Wednesday, with pickup from school and dropoff at 9:30 p.m. at [the defendant's] house."

During the February 7, 2018 hearing, the court, in disposing of the plaintiff's motion for contempt, addressed the defendant's child support arrearage obligations. The court recognized that, pursuant to Judge Dolan's June 1, 2017 order, the defendant was obligated to pay $247 a week in child support. The plaintiff stated that the defendant failed to pay child support for five months but further suggested that the court "could subtract two weeks because [the minor child] was living with [the defendant] for two weeks." The court explained to the defendant that "[i]f Judge Dolan ordered [the child support payments] and nobody filed a motion to—for clarification or to change . . . the $247, you're stuck with [it]. Okay. There's no appeal. There's nothing. So, you owed her $5351.66 from October to February for support of one child."

[13] The parties do not dispute that, at the time the plaintiff moved out of the marital residence on September 30, 2017, only one child—their minor son—was eligible for child support. See footnote 2 of this opinion.

Upon returning from the luncheon recess, the defendant asked the court to revisit the issue of the child support arrearage. The defendant corrected the court's previous statement by noting that it was Judge Abery-Wetstone, not Judge Dolan, who issued the order changing custody of the minor child. After the defendant renewed his previous argument about reducing the arrearage to credit the time the minor child lived with him, the court again rejected it. It noted that, although it remembered its previous order, "you still owe the child support even though [the minor child] was with you for a month." The court further stated that, if the defendant felt the need to file a motion to modify child support, he was entitled to do so. It explained that its order requiring the minor child to live with the defendant was an attempt "to make sure [the minor child] would be able to finish high school with his friends in his class. . . . If the [parties] agreed to do something else, you're more than willing to do so, but the child support order remains in full force and effect until a judge . . . says it's different." The court thereafter ordered the defendant to pay $5351.66 in child support arrearage for the unpaid months of October, November, December, 2017, and January and February, 2018.

The following legal principles govern our resolution of this claim. First, we note that the defendant's claim necessarily involves interpreting an existing statute. It is well settled that, under such circumstances, our review is plenary. See, e.g., *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 546, 46 A.3d 112 (2012). "To the extent that this task requires us to interpret the meaning and application of the relevant statutes in relation to the facts of the case, our analysis is guided by General Statutes § 1-2z, which directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and

unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., 546–47.

Section 46b-224 provides in relevant part: "Whenever the . . . Superior Court, in a family relations matter, as defined in [General Statutes §] 46b-1, orders a change or transfer of the guardianship or custody of a child who is the subject of a preexisting support order, and the court makes no finding with respect to such support order, such guardianship or custody order shall operate to: (1) Suspend the support order if guardianship or custody is transferred to the obligor under the support order; or (2) modify the payee of the support order to be the person or entity awarded guardianship or custody of the child by the court, if such person or entity is other than the obligor under the support order."

Our Supreme Court has previously interpreted § 46b-224, concluding that the statute's express terms are clear. See *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 551. In *Tomlinson*, our Supreme Court determined that § 46b-224 operates to allow modification of a child support order despite the existence of a nonmodification provision in the parties' separation agreement. Id., 550–51. In reaching that conclusion, the court explained that § 46b-224 "specifically addresses the question of how a change in custody affects the payment of child support . . . . Thus, [under § 46b-224] if the obligor becomes the new primary custodial parent, the obligor is no longer required to pay child support to the former custodian. Similarly, if custody is transferred to a third party, the obligor thereafter must make the child support payments to that third party rather than to the original custodian. The immediate result in either case is the same: the originally designated payee who no longer has custody of the child does not continue to receive support payments following the change in custody, and

the payments are retained by or redirected to the party who does have custody." Id., 549–50. The court in *Tomlinson* further noted that, "[b]y its own language, § 46b-224 suspends or redirects child support payments upon a change of custody when the court makes no finding with respect to such support order . . . . It therefore sets a default rule that child support follows the children, unless the trial court has made a finding that another arrangement is appropriate." (Internal quotation marks omitted.) Id., 554.

We believe that *Tomlinson* is instructive in the present case. There is no dispute that the defendant was ordered to pay $247 per week in child support. The plaintiff, by order of the court, left the marital residence on or before September 30, 2017, and was therefore entitled to child support payments as provided for under the dissolution judgment. Furthermore, there is no dispute that, on November 15, 2017, the parties' minor child was ordered by the court to live with the defendant for a period of time. As the court explained during the February 7, 2018 hearing, its order transferring custody of the minor child to the defendant was "to make sure [the minor child] would be able to finish high school with his friends in his class." Thus, pursuant to § 46b-224, the defendant's child support obligations were suspended for the period of time that the minor child was in his custody. That suspension ceased once the minor child left the defendant's custody.

Furthermore, the record provides no indication that, in ordering the change in custody of the minor child, the court made a finding "that another arrangement" with respect to the defendant's child support obligations was appropriate. See *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 554. Instead, it appears that the court's refusal to consider the period of time that the defendant had custody of the minor child rested on the defendant's failure to file a motion for modification of child support.

Section 46b-224, however, plainly requires that, upon the court's ordering a change of custody of the minor child from the plaintiff to the defendant—albeit temporarily—such "custody order *shall operate* to" suspend the child support order requiring the defendant to pay the plaintiff $247 per week.[14] (Emphasis added.)

Thus, because the November 15, 2017 order transferred custody of the minor child to the defendant, the court's child support order was suspended until the minor child returned to the plaintiff's custody pursuant to § 46b-224 (1). Accordingly, the court improperly calculated the defendant's child support arrearage by failing to deduct the amount for the period of time that the minor child was in the defendant's custody. Because the court made no finding with respect to the precise period of time that the minor child was in the defendant's custody, that issue "must be resolved by the court during the proceedings on remand." *Tatoian* v. *Tyler*, 194 Conn. App. 1, 66, 220 A.3d 802 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020).

The judgment is reversed only as to the calculation of the defendant's child support arrearage and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[14] We note that, unfortunately, the defendant, as a self-represented litigant, failed to cite to the court the provisions of § 46b-224, but, by asserting the principle that he was entitled to credit, properly preserved the issue for purposes of appeal. See *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 861, 213 A.3d 1 ("[a]lthough a party need not use the term of art applicable to the claim, or cite to a particular statutory provision or rule of practice to functionally preserve a claim, he or she must have argued the underlying principles or rules at the trial court level in order to obtain appellate review" (internal quotation marks omitted)), cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019).