LAURI ROSS *v.* BENJAMIN ROSS
(AC 42950)

Keller, Bright and Bear, Js.*

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the postjudgment orders of the trial court modifying the original unallocated alimony and child support order and awarding the plaintiff attorney's fees. The parties' separation agreement, which was incorporated into the dissolution judgment, required the defendant to pay the plaintiff 40 percent of his annual gross base cash salary and 25 percent of his gross cash bonus as unallocated alimony and child support from September, 2016 to March, 2023. In December, 2016, the defendant filed a motion for modification in which he sought to reduce his unallocated alimony and child support payments, alleging that there was a substantial change in circumstances because, inter alia, two of the parties' children had reached the age of majority. The trial court granted the motion for modification and ordered that the percentage of annual gross base salary that the defendant is obligated to pay to the plaintiff as unallocated alimony and child support be reduced to 37.5 percent, retroactive to the date the motion was filed. The court also ordered the defendant to pay $27,500 of the plaintiff's attorney's fees. *Held*:

1. The trial court abused its discretion when it determined the amount of the modified unallocated alimony and child support order; in modifying the original unallocated alimony and child support order, that court failed to unbundle the child support award from the alimony award and failed to consider and apply the child support guidelines and, thereby, to make a finding, as required by the guidelines, as to the presumptive amount of child support payable by the defendant to the plaintiff for the relevant dates, and, if necessary, a finding as to whether, on the basis of the child support guidelines, those amounts were inequitable or inappropriate and a deviation from the guidelines was appropriate.
2. This court declined to reach the merits of the defendant's claim that the trial court abused its discretion by ordering him to pay $27,500 of the plaintiff's attorney's fees; because that court's modified unallocated alimony and child support order will be reconsidered in its entirety on remand, its award of attorney's fees to the plaintiff was remanded for reconsideration in light of the newly calculated child support and alimony awards that will be issued at that time.

Argued May 29—officially released October 13, 2020

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

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Malone*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Robert J. Malone*, judge trial referee, granted the defendant's motion for modification of alimony and child support, issued certain orders and awarded the plaintiff attorney's fees and costs; subsequently, the court, *Hon. Robert J. Malone*, judge trial referee, issued a clarification of its decision, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Janet A. Battey, with whom, on the brief, was *Olivia M. Eucalitto*, for the appellant (defendant).

Christopher G. Brown, for the appellee (plaintiff).

Opinion

KELLER, J. The defendant, Benjamin Ross, appeals from the judgment of the trial court issuing postdissolution financial orders, as well as awarding attorney's fees and costs in favor of the plaintiff, Lauri Ross. On appeal, the defendant claims that the court (1) abused its discretion by failing to apply the child support guidelines, (2) erred by modifying the unallocated alimony and child support order without first unbundling the child support portion from the original order, and (3) abused its discretion by ordering the defendant to pay the plaintiff's attorney's fees. We reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The parties' marriage was dissolved on September 4, 2013. The judgment incorporated the parties' separation agreement. The parties have four children, three of whom were minors at the time of the dis-

solution: Noah, who turned eighteen in 2014; Nathaniel, who turned eighteen in 2017; and Claudia, who turned eighteen in May, 2019, and graduated from high school in June, 2019. The separation agreement gave the parties joint legal custody of the minor children, and the plaintiff was given physical custody.

Pursuant to the separation agreement, the defendant was obligated to pay unallocated alimony and child support to the plaintiff. Specifically, the separation agreement provides in relevant part: "Commencing on September 15, 2013, during the lifetime of the parties and until the earlier of the [plaintiff's] remarriage, cohabitation pursuant to statute, or September 15, 2016, whichever shall first occur, the [defendant] shall pay the [plaintiff] on the 15th and last day of each month, as and for unallocated alimony and support the following: (a) [45] percent of his gross base cash salary; and (b) [35] percent of his gross cash bonus. . . .

"Commencing September 16, 2016, during the lifetime of the parties and until the earlier of the [plaintiff's] remarriage, cohabitation pursuant to statute, or March 15, 2023, whichever shall first occur, the [defendant] shall pay to the [plaintiff] on the 15th and last day of each month, as for unallocated alimony and support the following: (a) [40] percent of his gross base cash salary; and (b) [25] percent of his gross cash bonus."

The separation agreement also provides that "[t]he [defendant] shall maintain no less than $2,000,000 of life insurance as long as he is obligated to make payments to the [plaintiff] as hereinbefore set forth in [a]rticle III, and shall name the [plaintiff] as primary beneficiary of said life insurance on his life."

On November 17, 2017, the defendant filed a motion for modification of his unallocated alimony and child support payments. In his motion, the defendant alleged that the following substantial changes in circumstances

had occurred since the dissolution of the marriage: "[T]hree of the parties' four minor children have emancipated.[1] . . . Upon information [and] belief, the plaintiff is engaged and is cohabiting with her fiancé. . . . Upon information and belief, the plaintiff is employed and is earning more than $25,000 per year. . . . The defendant's expenses have increased substantially because he is paying 100 [percent] of the expenses for the parties' two children who are in college. . . . Two million dollars of life insurance is no longer necessary to insure the defendant's alimony and support obligations." (Footnote added.) On the basis of these allegations, the defendant asked the court to "[r]educe the [unallocated] alimony and [child] support payments made by the defendant to the plaintiff," to "[r]educe the amount of life insurance that the defendant is obligated to maintain for the benefit of the [plaintiff]," and to "[o]rder such other and further relief as may be fair and equitable."

On February 23, 2018, the plaintiff filed a motion for attorney's fees in which she moved "under [§] 25-24 of the Practice Book, for an award of [attorney's] fees in order for her to defend and prosecute postjudgment motions."

The court held a hearing on both motions on March 29, April 2, and April 12, 2019.[2] Evidence at trial included the parties' past and current financial affidavits and their current child support guidelines worksheets, filed pursuant to Practice Book § 25-30. In support of her

[1] This is a scrivener's error because it is undisputed that only two of the parties' minor children reached the age of majority since the entry of the dissolution judgment in 2013. In their appellate briefs, both parties acknowledge this error.

[2] The plaintiff also filed a postjudgment motion for contempt on February 26, 2018, and an amended postjudgment motion for contempt on April 1, 2019. The court denied both motions on April 29, 2019. The court's rulings on the aforementioned motions are not relevant to this appeal.

motion for attorney's fees, the plaintiff submitted an affidavit from her attorney, Daniel D. Portanova, in which he represented that he had rendered services to the plaintiff in the amount of $42,582.42 and that there remained a balance to be paid of $82.42.

The parties submitted to the court their current financial affidavits. The parties also introduced into evidence the financial affidavits that each party had submitted at the time of the dissolution of their marriage. As previously noted, the parties also submitted child support guidelines worksheets setting forth the presumptive amount of child support for the one remaining minor child. The plaintiff's worksheet showed a presumptive amount payable from the defendant to the plaintiff of $465 per week. The defendant's worksheet showed a presumptive amount payable by the defendant to the plaintiff of $480 per week.[3]

The defendant also testified as to additional expenses he had paid on behalf of the parties' children. Those expenses included tuition for two of the children to attend college, other college-related expenses, as well as financial assistance that he provided to the children in connection with the purchase of cars, the purchase of car insurance, the purchase of cell phones, health care costs, and other miscellaneous expenses.[4]

The court made the following findings in its April 29, 2019 memorandum of decision: "The [plaintiff] is [forty-six] years of age. She has a [general equivalency diploma] and attended Northeastern University and Southern Connecticut State University. She has been

[3] These worksheets did not address the presumptive amount of supplemental child support that would be applicable to the defendant's bonus income under the child support guidelines.

[4] The dissolution court did not issue an educational support order or reserve jurisdiction to do so in accordance with General Statutes § 46b-56c because the parties explicitly waived their right to request a postmajority educational support order.

treated for depression and anxiety disorders which were diagnosed in February, 2019. She has taken various medications since November, 2018. In February, 2019, she was hospitalized for an overdose. She has a real estate license and works part-time at Bonfire Grill and earns $23 a week as a hostess. She has not worked full-time in a number of years.

"The [defendant] is [forty-seven] years of age and in good health. He attained a [bachelor of arts degree] in finance from Northeastern University. He has been employed with Cohen & Steers, and his annual salary is $330,000. Typically, he receives a cash bonus annually and restricted stock shares annually. In 2018, he received a $274,500 cash bonus and $447,068.70 in restricted shares.

"The present alimony and support order stems from the parties' [dissolution] judgment in article III [§] 3.2 [of the separation agreement] in which it sets forth that, from September 16, 2016 to March 15, 2023 (subject to the [plaintiff's] remarriage or cohabitation), the [defendant] shall pay to the [plaintiff] [40] percent of his gross base salary and [25] percent] of his gross cash bonus.

"The [separation agreement provided the] parties [with] . . . joint legal custody of their three minor children and the [plaintiff with] physical custody of the minor children.[5] The [defendant's] motion to modify the existing award is based partially on two children attaining the age of [eighteen]. The remaining minor child will attain the age of [eighteen] on May 19, 2019, and will graduate from high school in June, 2019.

"The other claims for modification alleged by the defendant were cohabitation and that the plaintiff is employed and earning more than $25,000 (a safe harbor

[5] The dissolution court incorporated the parties' separation agreement into the judgment of dissolution and made its provisions orders of the court.

provision in the judgment).[6] No evidence was provided to meet the statutory, factual or case law criteria [to establish these grounds] and, therefore, [these claims for modification] are denied.

"The defendant further seeks to reduce a judgment order that he maintain two million dollars of life insurance. Article V [of the separation agreement] address[es] the life insurance obligation. The language is clear that the defendant is to maintain no less than two million dollars of life insurance for as long as he is obligated to make payments to the [plaintiff]. Therefore, that portion of the defendant's motion is denied.

"The defendant further alleges as a basis for modification of his payments to the plaintiff that he pays all of his children's postsecondary education and provide[s] automobiles and insurance for his children. These expenditures, while laudatory, are not required by the judgment and could be ceased at any time by the defendant. Therefore, this argument is not persuasive to the court.

"General Statutes § 46b-86, which addresses the modification of [an] alimony or support order, makes reference to [General Statutes] § 46b-82, which provides for a court to consider evidence provided to meet the criteria in that statute.

"Certainly, it is clear that the [defendant's] financial responsibilities have significantly changed as a result of his two children attaining the age of [eighteen] and completing high school. The youngest child [will reach the age of eighteen in May, 2019, and graduate from high school in June, 2019, when] . . . the [defendant's] financial responsibility [for child support] will end . . . . While these . . . [child support] obligations

[6] Section 3.12 of the separation agreement provides as follows: "The [plaintiff] shall be entitled to a safe harbor of $25,000 per year before the [defendant] [may] seek a modification of alimony and support."

have/will and do constitute a substantial change of circumstances, the court must review the other statutory criteria together with the evidence provided.

"The incomes of the parties are essentially the same as they existed at the time of the dissolution of marriage. The defendant's estate, however, has increased substantially from approximately $498,000 to $1,799,197.89. The plaintiff's estate has decreased since the date of the dissolution. While the court has received evidence which provides a picture of the plaintiff's fiscal irresponsibility in her expenditures and weekly expenses, it does not appear . . . that their respective estates are and still would be significantly disparate . . . [even if] a more reasonable lifestyle [were] undertaken by the plaintiff. It is noteworthy that she, based upon her education and work experience, will likely never have the earning capacity of the defendant. She is, however, and has been since the date of the judgment, under/unemployed with little reason.

"Therefore, the court orders that the judgment be modified and that the defendant pay to the plaintiff [as unallocated alimony and child support] 37.5 [percent] of his base annual salary. This modification is retroactive to December 6, 2018 . . . [the effective date of] the defendant's motion for modification. The modification further addresses the youngest child attaining the age of [eighteen] and graduating from high school. . . .

"The final postjudgment motion [filed by the plaintiff] addresses her request for attorney's fees. [General Statutes § 46b-62 (a)] provides guidance [for awarding attorney's fees] as well as [when] a failure of the court to award counsel fees would undermine the court's other financial orders. See *Maguire* v. *Maguire*, 222 Conn. 32, 43–45, 608 A.2d 79 (1992);[7] *Berzins* v. *Berzins*, 306

[7] Section 46b-62 (a) does not provide for the exception stated in *Maguire*, that a court may award attorney's fees when a failure to do so would undermine the court's other financial orders.

Conn. 651, 657, 51 A.3d 941 (2012); *Pena* v. *Gladstone*, 168 Conn. App. 141, 158–59, 144 A.3d 1085 (2016). Therefore, the court orders the defendant to pay the sum of $27,500 to the plaintiff's attorney. . . . for the plaintiff . . . by May 31, 2019." (Footnotes added.)

On May 1, 2019, the defendant filed a motion for clarification with respect to whether the court intended to eliminate his obligation to pay the plaintiff 25 percent of his gross cash bonus as unallocated alimony and support, effective December 6, 2018. On May 3, 2019, the court clarified its order by stating that its order did not alter or modify the percentage of the defendant's gross cash bonus ordered to be paid to the plaintiff as unallocated alimony and support at the time of the dissolution. The defendant filed this appeal on May 17, 2019.

I

First, the defendant claims that the court abused its discretion when it determined the amount of the modified unallocated alimony and child support award. Specifically, he claims that the court failed to consider what portion of the unallocated award constituted child support and what portion constituted alimony. Central to the defendant's claim is that the court, prior to ruling on his motion for modification, failed to first apply the child support guidelines in determining what portion of the 2013 unallocated award, as reduced in 2016 in accordance with the parties' separation agreement and consisting of set percentages of the defendant's gross cash salary and gross cash bonus, should be categorized as child support.[8] We agree.

[8] The defendant makes two claims, one related to the court's failure to apply the child support guidelines and another related to the court's failure to unbundle the child support and alimony from the unallocated order. We, however, consider both of these claims together, as they are inherently intertwined.

We begin by setting forth the applicable standard of review. "The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case. . . . 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. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016).

We first turn to the defendant's assertion that, in ruling on the motion for modification, the court failed to unbundle the child support and alimony awards from the unallocated order that was effective on September 16, 2016, and required him to pay a percentage of both his gross base cash salary *and* gross cash bonus as unallocated child support and alimony. We begin with § 46b-86 (a), which sets forth the manner in which post-dissolution modification of alimony and support orders may occur. Specifically, § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a . . . ." Our

Supreme Court has interpreted this language generally to "[provide] the trial court with continuing jurisdiction to modify alimony and support orders" after the date of a final judgment of dissolution. *Amodio* v. *Amodio*, 247 Conn. 724, 729, 724 A.2d 1084 (1999); see also *Callahan* v. *Callahan*, 192 Conn. App. 634, 645, 218 A.3d 655 (observing that § 46b-86 (a) permits modification of support order *or* alimony after date of dissolution judgment), cert. denied, 333 Conn. 939, 218 A.3d 1050 (2019).

"Even though an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order . . . necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines." *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012). In *Tomlinson*, the unallocated child support and alimony order was nonmodifiable in amount and term of payments. Id., 543. Nevertheless, our Supreme Court ruled that such an order would be modifiable if a change in custody occurred because General Statutes § 46b-224 permits a modification of child support when a change of custody occurs, despite the provisions in § 46b-86 prohibiting the modification of nonmodifiable orders. Id., 549–50. The court then concluded that, to decide a motion to modify on the basis of an order of unallocated child support and alimony, the trial court must determine what part of the original decree constituted modifiable child support and what part constituted alimony. Id., 558.

Malpeso v. *Malpeso*, 165 Conn. App. 151, 165–66, 138 A.3d 1069 (2016), similarly supports the previously stated requirement for modification of unallocated orders in postdissolution matters. In *Malpeso*, this court stated: "In cases such as this one, where the parties

incorporate the child support into an unallocated alimony and child support order that limits the modification of the alimony pursuant to an agreement, modification requires additional considerations. Because an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines. . . . Thus, to decide a motion to modify in this situation, a trial court must determine what part of the original decree constituted modifiable child support and what part constituted nonmodifiable alimony." Id. (Citation omitted; internal quotation marks omitted.)[9]

Further, as our Supreme Court has explained, "[g]iven that [t]he original decree [of dissolution] . . . is an adjudication by the trial court as to what is right and proper *at the time it is entered* . . . the trial court must first determine what portion of the unallocated order represented the child support component at the time of the dissolution. Additionally, because questions involving modification of alimony and support depend . . . on conditions as they exist *at the time of the hearing* . . . it is necessary to evaluate the parties' present circumstances in light of the passage of time since the trial court's original calculation." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558.

In unbundling an unallocated order, the court "will also need to ascertain the intent of the parties." *Malpeso*

[9] The present case differs from *Tomlinson and Malpeso* in part because, in the present case, the unallocated child support and alimony award is modifiable. Other cases, however, have applied the same unbundling requirements set forth in *Tomlinson* to the modification of unallocated awards that were not unmodifiable. See, e.g., *Coury* v. *Coury*, 161 Conn. App. 271, 297–98, 128 A.3d 517 (2015); *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 553–54, 53 A.3d 1039 (2012), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013).

v. *Malpeso*, supra, 165 Conn. 171; see also *Brent* v. *Lebowitz*, 67 Conn. App. 527, 532, 787 A.2d 621 (court must determine what was intended to be child support within unallocated alimony and child support order to ensure agreement did not run afoul of guidelines), cert. granted on other grounds, 260 Conn. 902, 793 A.2d 1087 (2002) (appeal withdrawn April 25, 2002).

Finally, "[i]n modifying the [unallocated child] support [and alimony] order in a subsequent proceeding, a trial court may consider the same factors applied in the initial determination to assess any changes in the parties' circumstances since the last court order. . . . [General Statutes §] 46b-215b (c) mandates that the guidelines shall be considered in addition to and not in lieu of the criteria for such awards established in [General Statutes §§] 46b-84 [and] 46b-86 . . . . Specifically, § 46b-84 (d) stipulates that the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child." (Citation omitted; footnote omitted; internal quotation marks omitted). *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 559.

We next turn to the relevant law regarding the defendant's assertion that, in failing to determine what portion of the unallocated order was child support, the court failed to consider and apply the child support guidelines. Section 46b-215b (a) provides in relevant part that the child support and arrearage guidelines "shall be considered in *all* determinations of child support award amounts, including any current support, health care coverage, child care contribution and past-due support amounts, and payment on arrearages and

past-due support within the state. In all such determinations, there shall be a rebuttable presumption that the amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case, as determined under the deviation criteria established by the Commission for Child Support Guidelines under section 46b-215a, shall be required in order to rebut the presumption in such case." (Emphasis added.)

"The finding *must* include a statement of the presumptive support amount and explain how application of the deviation criteria justifies the variance. . . . This court has stated that the reason why a trial court must make an on-the-record finding of the presumptive support amount before applying the deviation criteria is to facilitate appellate review in those cases in which the trial court finds that a deviation is justified. . . . In other words, the finding will enable an appellate court to compare the ultimate order with the guideline amount and make a more informed decision on a claim that the amount of the deviation, rather than the fact of a deviation, constituted an abuse of discretion." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Kiniry* v. *Kiniry*, 299 Conn. 308, 319–20, 9 A.3d 708 (2010); see also *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 367–70, 999 A.2d 721 (2010); *Maturo* v. *Maturo*, 296 Conn. 80, 91, 995 A.2d 1 (2010); *Unkelbach* v. *McNary*, 244 Conn. 350, 367–68, 710 A.2d 717 (1998); *Favrow* v. *Vargas*, 231 Conn. 1, 29, 647 A.2d 731 (1994); *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 555, 53 A.3d 1039 (2012), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013); *Budrawich* v. *Budrawich*, 132 Conn. App. 291, 299–300, 32 A.3d 328 (2011).

"In any marital dissolution action involving minor children, it is axiomatic that the court must fashion

orders providing for the support of those children. There is no exception to this mandate, and certainly none for unallocated awards of alimony and child support, which necessarily include amounts for both child support and spousal support. *O'Brien* v. *O'Brien*, supra, 138 Conn. App. 553. Moreover, a trial court is "required to make its child support award in accordance with the applicable statutes and guidelines, and any deviation from the guidelines must be accompanied by a specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case. The fact that the defendant may have requested unallocated alimony and support does not alter the obligations of the trial court in making its award of child support . . . ." *Tuckman* v. *Tuckman*, 308 Conn. 194, 208, 208, 61 A.3d 449 (2013).

"When a court unbundles child support from an unallocated alimony and child support order, the guidelines continue to provide guidance. . . . Even in cases of high income parents, adherence to principles of the guidelines is mandatory. See *O'Brien* v. *O'Brien*, [supra, 138 Conn. App. 551] ('[o]ur Supreme Court [has] emphasized the importance of the mandatory application of the guidelines to *all* cases involving minor children, including those cases involving families with high incomes' . . .) . . . see also General Statutes § 46b-215b (a) (guidelines 'shall be considered in *all* determinations of child support award amounts' . . .)." (Citation omitted; emphasis in original; footnote omitted.). *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 166.

We now turn to the facts of this case. In assessing the defendant's motion for modification, the court found a substantial change in circumstances in that, since the dissolution and original orders, two of the parties' children had reached the age of majority. This finding as to a substantial change in circumstances gave the court

the authority, pursuant to § 46b-86, to modify the unallocated alimony and child support order. See *Malpeso* v. *Malpeso*, 140 Conn. App. 783, 786, 60 A.3d 380 (2013) ("§ 46b-86 (a) . . . permits the court to modify alimony and child support orders if the circumstances demonstrate that: (1) either of the parties' circumstances have substantially changed; or (2) the final order of child support substantially deviates from the child support guidelines" (internal quotation marks omitted)).

However, pursuant to *Tomlinson*, after determining that a substantial change in circumstances existed, the court was then required to determine what portion of the unallocated order, as revised in 2016, constituted child support and what portion constituted alimony. See *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558. The court, however, did not take the necessary steps to unbundle the 2013 child support and alimony orders relative to the change in the orders that became effective on September 16, 2016.[10] Rather, the court, without any reference to, let alone application of, the child support guidelines, merely reduced the unallocated order based on the defendant's gross base cash salary to be paid by him to the plaintiff by 2.5 percent. It did not provide any rationale for the amount of its stated reduction. Furthermore, the court, despite the fact that the dissolution order also required the defendant to pay 25 percent of his gross cash bonus to the plaintiff as unallocated alimony and child support, made no reduction in that obligation at all, without explanation.[11]

[10] Although the order changed effective September 16, 2016, the order was entered in 2013. The court, thus, was required to determine what the court and parties intended in 2013 as to the financial orders that became effective in 2016.

[11] The record reflects that, in 2013, the court found that the terms of the parties' separation agreement were fair and equitable and incorporated those terms into its judgment, but it did not set forth either a presumptive amount under the guidelines or a reason to deviate therefrom. Unfortunately, the court's failure to make these requisite findings at the time that it relied on the parties' agreement and rendered the judgment of dissolution is not uncommon. It is regrettable in the present case, because it makes the analysis

Despite *Tomlinson* and other subsequent case law, the court's order failed to apply the child support guidelines in determining what portion of the 2013 unallocated order that went into effect on September 16, 2016, constituted the presumptive amount of child support for the two children who, at that time, were minors. Moreover, having failed to determine the presumptive amount of child support under the guidelines, the court was not in a position to, and did not, make a finding as to whether the dissolution court in 2013 determined that application of the guidelines in 2013 would have been inappropriate in this case, thereby justifying a possible deviation therefrom. In particular, the court did not determine how much of the unallocated order the parties intended to constitute child support. Whether based on the guidelines or a deviation therefrom, the amount of child support intended at the time of dissolution to be payable in 2016 from both the defendant's gross salary and gross bonus income should have been subtracted from the total amount of the unallocated 2016 award, and the remaining sum should have constituted the alimony award that became effective on September 16, 2016. Furthermore, in modifying the order, the court did not provide a mathematical explanation for the reduction made on the basis of the fact that, since the time of the original order, two of the parties' children had reached the age of majority.

The court also stated ambiguously that its modification "addressed" the youngest child's attaining the age of eighteen, but it made its order retroactive to December 6, 2018, a date when the youngest child was still a minor. This, too, was improper. Having determined that there was a substantial change in circumstances, the court was required to undertake the necessary statutory analysis, which included unbundling the unallocated

that must be undertaken on remand far more cumbersome than it would be if the court, on remand, was aided by these necessary findings.

order. Simply stating, without explanation, that the modification took into account that the youngest child would soon turn eighteen is not sufficient.

The court's failure to apply the child support guidelines in crafting its modified order was not due to a lack of necessary information provided by the parties. Specifically, both the plaintiff and the defendant provided the court with financial affidavits evidencing their current net weekly incomes,[12] as well as child support guidelines worksheets evidencing the presumptive support amount payable by the defendant to the plaintiff.[13] The defendant also introduced evidence of his net income, both as to cash salary and bonus income, and the court also had before it the parties' financial affidavits at the time of the dissolution in 2013, the date of the previous unallocated child support and alimony order. Moreover, the court also had on file a child support guidelines worksheet that was submitted on September 4, 2013, the date of the dissolution. In the unbundling analysis, and pursuant to the child support guidelines in effect at the time of the court's order, the court was required to apply the guidelines in determining the presumptive amount of any supplemental order based on the defendant's bonus income. See *Maturo* v. *Maturo*, supra, 296 Conn. 96–99 (applying 2005 child support

[12] The plaintiff's net weekly income was $2909, comprised of $23 per week in wages, $3669 per week of unallocated alimony and child support, and $134 per week as partnership income. The defendant's net weekly income was $7994 per week.

[13] The plaintiff provided the court with a child support guidelines worksheet showing that the presumptive support amount payable by the defendant to the plaintiff was $465 per week. The defendant also provided the court with a child support guidelines worksheet showing that the presumptive support amount payable by the defendant to the plaintiff was $480 per week.

We note that neither party attempted to present to the court the presumptive amount applicable to a supplemental child support award based on the defendant's net bonus income. They should be prepared to provide the court with this information on remand.

guidelines); see also Regs., Conn. State Agencies § 46b-215a-1 (11) (A) (iii) (including in gross income "commissions, bonuses and tips"). Despite having this information before it, the court failed to make a finding as to the presumptive child support amount payable by the defendant to the plaintiff, for September 16, 2016, or December 6, 2018, the effective date of the modification, and, if necessary, a finding as to whether, on the basis of the child support guidelines, those amounts were inequitable or inappropriate and a deviation from the guidelines was appropriate.

For the foregoing reasons, we conclude that the court erred in modifying the unallocated alimony and child support award without unbundling the child support award from the alimony award, and, further, erred in failing to consider and to apply the child support guidelines or the principles espoused therein.

The court's failure to unbundle the child support and alimony awards from the unallocated order and failure to apply the child support guidelines requires reversal and a remand for further proceedings. On remand, the court should conduct a hearing to determine, on the basis of evidence presented by the parties, what portion of the award should be applied to child support and what portion should be applied to alimony. In doing so, the court should apply the child support guidelines as they existed in 2013 at the time of the original award to the 2016 award, as modified by the terms of the parties' separation agreement. Specifically, the court must ascertain the intent of the parties with respect to what portion of the unallocated alimony and child support order was intended for child support. See *Malpeso* v. *Malpeso*, supra, 165 Conn. App. 171. The determined amount constituting child support should then be subtracted from the 2016 unallocated award to determine the alimony award in 2016. Then, on the basis of the change in circumstances, the court should determine

whether the alimony portion of the unallocated award in 2016 should be modified. See *Gabriel* v. *Gabriel*, 324 Conn. 324, 340, 152 A.3d 1230 (2016). As we have explained previously in this opinion, this determination must be made on the basis of the parties' intent at the time of the dissolution. See *Malpeso* v. *Malpeso*, supra, 165–66.

The court also must determine, applying the child support guidelines, the appropriate amount of child support for the youngest child due and payable from the effective date of the modification to the date that child attained the age of eighteen, or the date she graduated from high school, whichever was later. Whether that amount and the amount of alimony arrived at after considering the defendant's motion for modification should be combined as a new unallocated order of alimony and child support for this time period, or separated into separate child support and alimony awards also will have to be decided. Ultimately, however, there should be a provision for only an alimony order to be in effect the day after the child support obligation for the youngest child terminated.

II

Finally, the defendant claims that the court abused its discretion by ordering him to pay $27,500 of the plaintiff's attorney's fees. The defendant argues, in broad terms, that the court abused its discretion because the undisputed evidence presented at the hearing demonstrated that the plaintiff was capable of paying her attorney's fees and, in fact, had paid all but $82.42 of the fees charged to her.[14] For the reasons that follow, in light of our conclusion in part I of this opinion that the case must be remanded for further proceedings,

[14] The defendant does not claim that the amount of attorney's fees charged, which totaled $42,582.42, was unreasonable.

we conclude that the issue of attorney's fees should be revisited by the court on remand. Accordingly, we do not reach the merits of this claim.

As this court has observed, "[i]ndividual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 226, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

We observe that an award of attorney's fees issued in connection with a postjudgment motion to modify, rather than at the time of the other financial orders that were issued at the date of the dissolution, is "not part of the mosaic of final financial orders by which the court initially attempted to chart the parties' financial future." *O'Brien* v. *O'Brien*, supra, 138 Conn. App. 555. The award of the attorney's fees at issue in the present claim pertains only to the defense of the requested modification of a single, unallocated alimony and support order. Although the award is not part of the mosaic of financial orders, an analysis of the award nonetheless is necessarily intertwined with the court's modified financial orders. An analysis of whether the court abused its discretion in awarding attorney's fees is dependent on the parties' financial circumstances, *as affected by the court's modified financial orders*, at the time that the request for attorney's fees was considered by the court; see id.; as well as a consideration of

the factors enumerated in § 46b-82, the alimony statute.[15] Because we have determined that the alimony and child support awards must be reconsidered on remand, so too must the award of attorney's fees in light of the possibility that, as compared with the financial orders that are the subject of the present appeal, the court will issue different financial orders on remand in this case.

Accordingly, because the court's modification order will be reconsidered in its entirety on remand, its award to the plaintiff of $27,500 in attorney's fees must also be remanded for reconsideration in light of the newly calculated child support and alimony awards that will be issued at that time.

The judgment is reversed with respect to the court's postdissolution orders modifying the unallocated alimony and child support order and awarding the plaintiff attorney's fees, and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

[15] "[Section] 46b-62 governs the award of attorney's fees in dissolution proceedings and provides that the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [§] 46b-82. These criteria include the length of the marriage, the causes for the . . . dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, [earning capacity] vocational skills, [education] employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to [§] 46b-81 . . . . In making an award of attorney's fees under § 46b-82, [t]he court is not obligated to make express findings on each of [the] statutory criteria. . . . Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to th[is] rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Misthopoulos* v. *Misthopoulos*, supra, 297 Conn. 385–86.

SILVER HILL HOSPITAL, INC. *v.* DAWN KESSLER (AC 42545)

Alvord, Elgo and Pellegrino, Js.

Syllabus

The plaintiff hospital sought to recover damages in connection with unpaid medical services that it provided to the defendant. The hospital billed Medicare for payment, which initially paid the entire balance. Subsequently, Medicare rescinded coverage for a portion of the services after discovering that the defendant had workers' compensation coverage for a portion of those medical expenses. The hospital informed the defendant of this development and asked the defendant to contact Medicare to resolve the coverage dispute. The defendant refused to contact Medicare and did not submit payment for the remaining balance to the hospital. Thereafter, the matter was referred to an attorney fact finder, who issued his report, finding that the defendant owed a balance to the plaintiff and that the defendant failed to prove her special defense of non compos mentis. The trial court overruled the defendant's objection to the fact finder's report and rendered judgment for the plaintiff. On appeal, the defendant claimed, inter alia, that the fact finder's conclusions were not based on evidence presented at trial. *Held*:

1. The defendant's claim that the fact finder's conclusions were not based on evidence presented at trial was unavailing, as there was adequate support in the record for the findings of fact reached by the fact finder; the record contained sufficient evidence for the fact finder to conclude that the plaintiff provided medical services to the defendant, that the defendant owed a balance for the services rendered, and that the defendant had not paid the balance and, therefore, the fact finder's findings were based on evidence presented at trial and were consistent with the applicable rule of practice (§ 19-8).
2. The defendant's claim that the fact finder improperly failed to consider her contention that the plaintiff had a duty to contact Medicare to resolve the coverage issue was unavailing, as the defendant's pleadings did not provide a legal framework from which the fact finder could properly assess whether it was the plaintiff's duty to resolve the coordination of benefits issues; the failure to perform a contractual or legal duty must be alleged as a special defense, and as there was no such special defense properly before the fact finder, the fact finder had no obligation to consider evidence not relevant to the legal issues before it.
3. The trial court properly denied the defendant's objections to the fact finder's report, as there were sufficient subordinate facts contained in the record for the fact finder's recommendations, and there was no legal framework for the fact finder or the trial court to determine whether

the plaintiff failed to perform a contractual or legal duty; the fact finder was not required to determine whether the plaintiff had a duty to dispute Medicare's claim that its liability was secondary, and the trial court appropriately declined to do so as well.

4. This court declined to review the defendant's claim that a certain hospital debt collection statute (§ 19a-673d) compelled judgment in favor of the defendant, as the record revealed that § 19a-673d did not appear in the operative pleadings; although the defendant originally pleaded a different statute (§ 19a-673) concerning collections by hospitals from uninsured patients as a special defense, that special defense was ultimately stricken, the defense was not repleaded, and it was not distinctly raised before the fact finder.

Argued May 15—officially released October 13, 2020

Procedural History

Action to recover damages for unpaid medical services, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the matter was referred to Joseph DaSilva, attorney fact finder, who filed a report recommending judgment for the plaintiff; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, overruled the defendant's objection to the acceptance of the report and rendered judgment in accordance with the fact finder's report, from which the defendant appealed to this court. *Affirmed.*

James T. Baldwin, for the appellant (defendant).

Patrick M. Fahey, with whom, on the brief, was *Michael G. Chase*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Dawn Kessler, appeals from the judgment of the trial court, rendered following a trial before an attorney fact finder, in favor of the plaintiff, Silver Hill Hospital, Inc., on the plaintiff's complaint in the amount of $17,087.15. On appeal, the defendant claims that (1) the fact finder's conclusions were not based on evidence presented at trial, (2) the fact finder failed to consider the issue of whether the plaintiff was

responsible for resolving a coverage dispute issue with Medicare, (3) the court improperly denied her objections to the fact finder's report, and (4) General Statutes § 19a-673d operates as a statutory bar to the plaintiff's debt collection action. We affirm the judgment of the trial court.

This case concerns a dispute over payment for medical services. The record reflects, and the parties do not dispute, that the plaintiff provided inpatient and outpatient services to the defendant from April 22 to June 6, 2014. The plaintiff's charges for those services totaled $59,291.50. The plaintiff billed Medicare,[1] which initially paid the entire sum. Medicare subsequently informed the plaintiff that, according to its records, the defendant had workers' compensation coverage for a portion of those medical expenses. On November 2, 2016, Medicare rescinded coverage for certain services and the plaintiff thereafter returned $17,087.15 to Medicare.

The defendant, as well as her son and her daughter-in-law, were informed of this development and were asked to contact Medicare to resolve the coverage dispute. The plaintiff's witness, Shakia Whitehurst, senior financial counselor for the plaintiff, testified at trial that the defendant refused to contact Medicare to resolve the coordination of benefits issue. In her testimony, the defendant acknowledged that she had not submitted any payment to the plaintiff.[2]

[1] "Medicare is the federal government's health-insurance program for the elderly. See Medicare Act (Title XVIII of the Social Security Act), 42 U.S.C. § 1395 et seq." *Connecticut Dept. of Social Services* v. *Leavitt*, 428 F.3d 138, 141 (2d Cir. 2005).

[2] There was substantial disagreement at trial regarding how, and to what extent, the defendant was informed of the issue as well as who was responsible for calling Medicare in order to dispute coverage. Because these disputes did not relate to any special defense properly before the fact finder, they were irrelevant and were appropriately not resolved by the fact finder. See part II of this opinion.

On May 1, 2017, the plaintiff commenced the underlying action to collect unpaid expenses for services provided to the defendant. In its complaint, the plaintiff alleged that it furnished medical services to the defendant from April 22 to June 5, 2014, and that the plaintiff submitted bills to the defendant totaling $59,291.50. By way of relief, the plaintiff sought the unpaid balance of $17,087.15.

On July 31, 2017, the defendant filed an answer in which she admitted that the plaintiff rendered the services in question but denied owing the unpaid balance. In addition to her answer, the defendant asserted eight special defenses including, inter alia, non compos mentis.[3] Each special defense contained a single conclusory sentence with no supporting factual allegations.

On August 3, 2017, the plaintiff moved to strike all of the special defenses due to the defendant's alleged failure to plead sufficient facts. The court subsequently granted the motion to strike all of the defendant's special defenses except the non compos mentis defense. The defendant thereafter filed a revised answer and asserted the sole special defense of non compos mentis.

Pursuant to Practice Book § 23-53, the matter was referred to an attorney fact finder, Joseph DaSilva, who presided over a one day trial on July 13, 2018. On October 9, 2018, the fact finder issued his report, in which he found that (1) the defendant owed a balance of $17,087.15 to the plaintiff and (2) the defendant failed to prove the sole special defense of non compos mentis. The fact finder therefore recommended that judgment should enter in favor of the plaintiff.

[3] Non compos mentis is a common law contract defense of incapacity that examines "whether at the time of [execution of the instrument the maker] possessed understanding sufficient to comprehend the nature, extent and consequence[s]" of the transaction. (Internal quotation marks omitted.) *Nichols* v. *Nichols*, 79 Conn. 644, 657, 66 A. 161 (1907).

On October 25, 2018, after the fact finder had submitted his report to the trial court, the defendant filed an objection to the findings of fact, arguing, in part, that the fact finder failed to address the issue of whether it was the plaintiff's responsibility to dispute the coverage issue with Medicare and that unspecified "federal code and regulations" prohibited the plaintiff from collecting from the defendant. Because that objection injected legal issues, which had not been raised in the pleadings or the fact finder's report, the court requested that the plaintiff file a memorandum of law addressing those issues. The court thereafter overruled the defendant's objection, concluding that because those issues were not raised in the pleadings, the fact finder had appropriately confined his analysis to the sole special defense raised by the defendant. The court thus rendered judgment in favor of the plaintiff, and this appeal followed.

Before considering the specific claims raised in this appeal, we begin by noting the applicable standard of review. "Attorney fact finders are empowered to hear and decide issues of fact on contract actions pending in the Superior Court . . . . On appeal, [o]ur function . . . is not to examine the record to see if the trier of fact could have reached a contrary conclusion. . . . Rather, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . 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.) *Walpole Woodworkers, Inc.* v. *Manning*, 126 Conn. App. 94, 98–99, 11 A.3d 165 (2011), aff'd, 307 Conn. 582, 57 A.3d 730 (2012).

"[B]ecause the attorney [fact finder] does not have the powers of a court and is simply a fact finder, [a]ny legal conclusions reached by an attorney [fact finder] have no conclusive effect. . . . The reviewing court is the effective arbiter of the law and the legal opinions of [an attorney fact finder], like those of the parties, though they may be helpful, carry no weight not justified by their soundness as viewed by the court that renders judgment." (Internal quotation marks omitted.) Id., 99. When the trial court reviews the findings of fact, "[the] reviewing authority may not substitute its findings for those of the trier of the facts." *Wilcox Trucking, Inc.* v. *Mansour Builders, Inc.*, 20 Conn. App. 420, 423, 567 A.2d 1250 (1989), cert. denied, 214 Conn. 804, 573 A.2d 318 (1990). A trial court "may not retry a case or pass judgment on the credibility of witnesses, [and] must review the [fact finder's] entire report to determine whether the recommendations contained in it are supported by findings of fact in the report." (Internal quotation marks omitted.) *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 692, 1 A.3d 157 (2010). "The trial court, as the reviewing authority, may render whatever judgment appropriately follows, as a matter of law, from the facts found by the attorney [fact finder]." (Internal quotation marks omitted.) *Beucler* v. *Lloyd*, 83 Conn. App. 731, 735, 851 A.2d 358 (2004), appeal dismissed, 273 Conn. 475, 870 A.2d 468 (2005). With those principles in mind, we turn to the claims presented in this appeal.

I

We begin with the defendant's claim that the fact finder's conclusions were not based on evidence presented at trial. The defendant contends that the fact finder failed to make reference to the witnesses or the exhibits submitted at trial, and that the subordinate facts do not support the conclusions made. We disagree.

Contrary to the contention of the defendant, there is adequate support in the record for the findings of fact reached by the fact finder. The law requires that we determine whether the findings " 'are supported by the evidence,' " not whether the fact finder could have reached a contrary conclusion. *Walpole Woodworkers, Inc.* v. *Manning*, supra, 126 Conn. App. 99. The record before us contains sufficient evidence for the fact finder to conclude that the plaintiff provided inpatient and outpatient medical services to the defendant, that the defendant owes a balance of $17,087.15 for the services rendered, and that the defendant has not paid that balance. We, therefore, conclude that the fact finder's findings were based on evidence presented at trial and consistent with the requirements of Practice Book § 19-8.

II

The defendant also claims that the fact finder improperly failed to consider the defendant's belated contention, which was not raised in the operative pleadings, that the plaintiff had a duty to contact Medicare to resolve the coverage issue. We disagree.

"It is indisputable that the pleadings establish the framework of any legal action." *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 731, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom.

Robbins Eye Center, P.C. v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 448 (2020) . For that reason, "[t]he court is not permitted to decide issues outside of those raised in the pleadings." *Yellow Page Consultants, Inc.* v. *Omni Home Health Services, Inc.*, 59 Conn. App. 194, 200, 756 A.2d 309 (2000). Further, "[o]nce the pleadings have been filed, the evidence proffered must be relevant to the issues raised therein. . . . A judgment upon an issue not pleaded would not merely be erroneous, but it would be void." (Internal quotation marks omitted.) *Kelley* v. *Tomas*, 66 Conn. App. 146, 160–61, 783 A.2d 1226 (2001).

A party cannot ask a fact finder to find facts related to a specific legal theory unanchored by the pleadings. As the court aptly stated during the hearing on the objection to the findings of fact, a fact finder does not find facts in a vacuum. As such, the fact finder could find facts only within the legal framework as articulated by the pleadings. At the time the fact finder considered the pleadings, the only special defense properly before him was non compos mentis.[4] Notwithstanding this deficiency, the defendant asserts that it was nevertheless appropriate to assert her legal theory as a general denial, and, accordingly, the fact finder should have considered this defense.[5] The defendant's claim that it

[4] The defendant stressed both in her appellate brief and in her objection to the findings of facts that she "expressly asked the fact finder to address in his findings whether or not the plaintiff made any efforts to dispute Medicare's claim that its liability was secondary . . . ." At the same time, the defendant repeatedly made vague references in the proceedings at trial to "federal code and regulations" that allegedly barred the plaintiff from collecting. These codes and regulations are not specified anywhere in the defendant's brief on appeal or in the record before us and were never asserted in the defendant's stricken special defenses. Moreover, we reiterate that the defendant's brief on appeal relies heavily on the effect of § 19a-673d, which appears nowhere in the record, even though the defense originally stricken referenced General Statutes § 19a-673 and the authority argued to the court were limited to allusions to "federal code and regulations."

[5] In her appellate brief, the defendant states that, "[i]nsofar as these special defenses were stricken by the court, the defendant was left to assert these claims in the form of a general denial and present evidence at trial in support

was the plaintiff's responsibility to process the denial of benefits or that the plaintiff was statutorily barred from collecting may not, however, be subsumed under a general denial. "The fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed until the trial is underway." *Bennett* v. *Automobile Ins. Co. of Hartford*, 230 Conn. 795, 802, 646 A.2d 806 (1994). "As a general rule, facts must be pleaded as a special defense when they are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." Id.; see also Practice Book § 10-50. "A denial of a material fact places in dispute the existence of that fact. Even under a denial, a party generally may introduce affirmative evidence tending to establish a set of facts inconsistent with the existence of the disputed fact. . . . If, however, a party seeks the admission of evidence which is consistent with a prima facie case, but nevertheless would tend to destroy the cause of action, the 'new matter' must be affirmatively pleaded as a special defense." (Citations omitted.) *Pawlinski* v. *Allstate Ins. Co.*, 165 Conn. 1, 6, 327 A.2d 583 (1973). Here, the defendant raised a theory of defense that is not inconsistent with the plaintiff's prima facie case and, instead, purports to statutorily bar the plaintiff from collecting its fees. Because that claim would theoretically destroy the cause of action, the defendant was required to specially plead this defense.

of them." The defendant has provided no legal authority for that proposition. On the contrary, our rules of practice allow a litigant to replead to cure the deficiencies or to seek judgment on the pleadings and to appeal the court's ruling. See Practice Book § 10-44; *Alarm Applications Co.* v. *Simsbury Volunteer Fire Co.*, 179 Conn. 541, 551 n.4, 427 A.2d 822 (1980) (motion to strike granted on ground that complaint lacked essential allegation does not preclude plaintiff from restating cause of action by supplying essential allegation). Rather than cure the deficiencies in the legal claims asserted by pleading facts to support them, which was the basis for the motion to strike, the defendant elected to plead over only the non compos mentis defense.

Without a properly pleaded special defense alerting the plaintiff and the fact finder of this claim, the fact finder had no obligation to consider evidence not relevant to the legal issues before it. In the absence of a special defense, evidence purportedly in support of the claim that the defendant insists the fact finder should have considered is simply irrelevant.

In the present case, the defendant's pleadings did not provide a legal framework from which the fact finder could properly assess whether it was the plaintiff's duty to resolve the coordination of benefits issues. The court correctly noted that the essence of the defendant's defense is that the plaintiff failed to perform a contractual or legally mandated duty. A failure to perform a contractual or legal duty must be alleged as a special defense, and there was no such special defense properly before the fact finder. See *DuBose* v. *Carabetta*, 161 Conn. 254, 260, 287 A.2d 357 (1971). For that reason, the defendant's claim fails.

III

We next address the defendant's claim that the court improperly denied her objections to the fact finder's report. As we have noted, our review is limited to whether the trial court's legal conclusions are legally and logically correct and whether they find support in the facts set out in the memorandum of decision. See *Walpole Woodworkers, Inc.* v. *Manning*, supra, 126 Conn. App. 98–99.

A trial court reviewing the findings of a fact finder is limited by the record presented.[6] A reviewing court

[6] Our rules of practice provide the trial court with six distinct options after reviewing the findings of facts and hearing any objections to the report of an attorney fact finder. The trial court is permitted to "(1) render judgment in accordance with the finding of facts; (2) reject the finding of facts and remand the case to the fact finder who originally heard the matter for a rehearing on all or part of the finding of facts; (3) reject the finding of facts and remand the matter to another fact finder for rehearing; (4) reject the finding of facts and revoke the reference; (5) remand the case to the fact

may not substitute its findings for those of the fact finder or make credibility determinations of witnesses. See *LPP Mortgage, Ltd.* v. *Lynch*, supra, 122 Conn. App. 692; *Wilcox Trucking, Inc.* v. *Mansour Builders, Inc.*, supra, 20 Conn. App. 423.

In the present case, the record before the court included only those claims asserted in the pleadings before the fact finder. After the court thoroughly reviewed the record to determine whether the pleadings supported the legal claims advanced by the defendant, the court concluded that the defendant's objection to the findings of fact raised a new legal issue that was not raised by the pleadings.[7] The court then asked the plaintiff to file a memorandum of law addressing that issue. After a hearing, the court again determined that "the fact finder did not address the issue because it was not raised by the pleadings."

In this case, there were sufficient subordinate facts contained in the record for the fact finder's recommendations, and no legal framework for the fact finder or the trial court to determine whether the plaintiff failed to perform a contractual or legal duty. The fact finder was not required to determine whether the plaintiff had a duty to dispute Medicare's claim that its liability was secondary, and the trial court appropriately declined to do so as well.[8] Accordingly, the court properly denied the defendant's objections to the fact finder's report.

finder who originally heard the matter for a finding on an issue raised in an objection which was not addressed in the original finding of facts; or (6) take any other action the judicial authority may deem appropriate." Practice Book § 23-58.

[7] As the court explained to the defendant, "I looked high and low for a special defense that—that framed that issue. . . . He has to base the facts on some law and you didn't provide him with any law. I looked. I searched high and low. . . . I certainly expected you to have cited some federal U.S. Code that requires that to be done, something like that, but there's absolutely nothing in the record on that."

[8] The defendant also argues that "[t]he trial court's denial of the defendant's objection to the findings of fact on the basis that these were not properly pled is . . . contrary to the court's ruling on the defendant's

IV

As a final matter, the defendant insists that § 19a-673d[9] compels judgment for the defendant, even at this belated stage in the proceedings. The plaintiff responds that because the defendant did not preserve this claim in the proceedings at trial and now raises it for the first time on appeal, we should decline to review it. We agree with the plaintiff.

"We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Citations omitted; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). "[B]ecause our review is limited to matters in the record, we will not

request to file a motion for summary judgement." Shortly before the scheduled trial, the defendant requested permission to file a motion for summary judgment. In denying the motion, the court stated that "[t]his is without prejudice to the parties' right to request time to brief any legal defenses or issues they wish to assert as a part of the normal trial and adjudication process." Contrary to the defendant's assertions, that remark did not constitute permission to assert defenses outside of the normal judicial process.

[9] General Statutes § 19a-673d provides in relevant part: "If, at any point in the debt collection process, whether before or after the entry of judgment, a hospital . . . becomes aware that a debtor from whom the hospital is seeking payment for services rendered receives information that the debtor is eligible for hospital bed funds, free or reduced price hospital services, or any other program which would result in the elimination of liability for the debt or reduction in the amount of such liability, the hospital . . . shall promptly discontinue collection efforts and refer the collection file to the hospital for determination of such eligibility. The collection effort shall not resume until such determination is made."

address issues not decided by the trial court." (Internal quotation marks omitted.) *West Farms Mall, LLC* v. *West Hartford*, 279 Conn. 1, 27–28, 901 A.2d 649 (2006).

Our review of the record reveals that § 19a-673d does not appear anywhere in the operative pleadings. Although the defendant originally pleaded General Statutes § 19a-673—a separate statute—as a special defense, that special defense was ultimately stricken and the defense was not repleaded.[10] Section 19a-673d was not raised in the operative pleadings, and it is notably absent from the defendant's objection to the findings of fact and was never raised before the court. Because that issue was not distinctly raised before the fact finder, we decline to review it on appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] In the initial statement of issues in her principal appellate brief, the defendant also claimed that the court improperly granted the plaintiff's motion to strike the defendant's special defense alleging that the plaintiff was barred from pursuing collection pursuant to § 19a-673d. She thereafter failed to brief that issue in any manner in the brief submitted to this court.

For multiple reasons, that contention is improper. First, we note that the stricken special defense did not reference § 19a-673d, but rather pleaded a violation of § 19a-673, an entirely different statutory provision. Second, the defendant did not preserve that claim before either the attorney fact finder or the trial court and instead has raised the applicability of § 19a-673d for the first time in this appeal. Third, to the extent that the defendant in her statement of issues challenges the propriety of the court's granting of the motion to strike, she has offered no analysis whatsoever of that issue in her appellate brief, rendering that claim inadequately briefed. Accordingly, we decline to review that claim. See, e.g., *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 480, 946 A.2d 239 ("[W]e 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. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.)), cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

MALISA COSTANZO, ADMINISTRATRIX (ESTATE OF ISABELLA R. COSTANZO), ET AL. *v.* TOWN OF PLAINFIELD ET AL.
(AC 42765)

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

Syllabus

The plaintiff mother, as the administratrix of her daughter's estate, sought to recover damages in connection with her daughter's drowning death in an aboveground pool from the defendants, the town of Plainfield and two town employees, for their failure to inspect the pool to ensure that mandated safety measures had been installed. The plaintiff was a tenant of the property where the accident occurred. The pool did not have a self-closing or self latching gate, or a pool alarm, which were required as part of the state building code. The defendants filed a notice of intent to seek apportionment pursuant to statute (§ 52-102b), as to the property owners for their alleged negligence in failing to ensure that the pool met all required safety requirements. The defendants also filed an apportionment complaint, as to the former tenants of the property, alleging that they were negligent in failing to notify the defendants that the pool had been constructed and that an inspection was needed. The plaintiff thereafter filed an objection to the defendants' notice of intent to seek apportionment as to the property owners, and an objection to the defendants' apportionment complaint against the former tenants, on the ground that the plaintiff's cause of action in the revised complaint was not grounded in negligence but, rather, an intentional or reckless tort pursuant to the municipal liability statute (§ 52-557n (b) (8)), and, therefore, the apportionment statute was inapplicable. The trial court sustained the plaintiff's objections. On appeal, the defendants claimed that the trial court erred in sustaining the plaintiff's objections on the basis that the plaintiff's revised complaint implicated both exceptions to municipal immunity contained in § 52-557n (b) (8) and that the first exception employed a negligence standard, not a recklessness standard, thus allowing the defendants to seek apportionment. *Held* that the trial court erred in sustaining the plaintiff's objections to the defendants' efforts to seek apportionment: the plaintiff alleged in her complaint that at all relevant times the town's employees acted within the scope of their employment with the town, those employees and thus, the town, knew that a pool had been built at the property and had actual notice that the construction of the pool was completed in violation of the applicable laws and/or that the pool constituted a hazard to health or

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

safety, thereby alleging that the town employees, with actual knowledge of a violation of a law and/or the existence of a hazardous condition, failed to conduct an inspection, in accordance with the first exception of § 52-557n (b) (8), which contains a negligence standard, and unlike the second exception of § 52-557n (b) (8), recklessness is not an element of the actual notice exception; as a result of the plaintiff's allegations of a claim of negligence on the part of the municipal actors, the defendants can seek apportionment as to the negligence of the former tenants and property owners pursuant to the apportionment statute (§ 52-572h (o)).

Argued June 17—officially released October 13, 2020

Procedural History

Action to recover damages for, inter alia, recklessness, brought to the Superior Court in the judicial district of Windham, where the defendants filed an apportionment complaint and a notice of intent to seek apportionment; thereafter, the trial court, *Cole-Chu, J.*, sustained the plaintiffs' objections to the defendants' apportionment complaint and the notice of intent to seek apportionment, and dismissed the notice and the apportionment complaint, and the defendants appealed to this court. *Reversed*; *further proceedings*.

Ryan J. McKone, with whom, on the brief, was *James G. Williams*, for the appellants (defendants).

Stephen M. Reck, for the appellees (plaintiffs).

Opinion

DiPENTIMA, C. J. This case arises out of the tragic drowning of a young child in an aboveground swimming pool. The defendants, the town of Plainfield (town), Robert Kerr and D. Kyle Collins, Jr., appeal from the trial court's orders sustaining the objections of the plaintiff Malisa Costanzo, as administratrix of the estate of the decedent, Isabella R. Costanzo,[1] to the defendants'

[1] In addition to the claims against the defendants brought in her capacity as administratrix of the decedent's estate, Malisa Costanzo, individually and as parent and next friend for her four children, Felicity Costanzo, Gabriel Costanzo, Xavier Costanzo and Giovanni Costanzo, also set forth claims of bystander emotional distress. See *Georges* v. *OB-GYN Services, P.C.*, Conn. , n.1, A.3d (2020) (noting general rule that minor

efforts to commence apportionment actions against the owners of the property where the pool was located and their former tenants who had the pool constructed. We agree with the defendants that the court improperly sustained the plaintiff's objections, and therefore we reverse the judgment of the trial court and remand the case for further proceedings.

The plaintiff alleged the following facts in her revised complaint dated August 28, 2018. The decedent drowned in an aboveground pool located at 86 Gelbas Road in Plainfield on June 22, 2016. At all relevant times, the town employed Kerr as a licensed building official and Collins as a licensed assistant building manager. One of their employment duties was to inspect all pools constructed in the town to ensure compliance with the State Building Code. See, e.g., General Statutes § 29-261.[2] The defendants issued a building permit for this aboveground swimming pool on July 25, 2013; however, Kerr and Collins, in violation of General Statutes § 29-265a,[3] issued that permit without having determined if

children may bring action only by way of parent or next friend). The claims of bystander emotional distress are not the subject of this appeal. In this appeal, we refer to Malisa Costanzo, in her capacity as administratrix of the estate of the decedent as the plaintiff. See id.

[2] General Statutes § 29-261 (b) provides: "The building official or assistant building official shall pass upon any question relative to the mode, manner of construction or materials to be used in the erection or alteration of buildings or structures, pursuant to applicable provisions of the State Building Code and in accordance with rules and regulations adopted by the Department of Administrative Services. They shall require compliance with the provisions of the State Building Code, of all rules lawfully adopted and promulgated thereunder and of laws relating to the construction, alteration, repair, removal, demolition and integral equipment and location, use, accessibility, occupancy and maintenance of buildings and structures, except as may be otherwise provided for."

[3] General Statutes § 29-265a provides: "(a) As used in this section, 'pool alarm' means a device which emits a sound of at least fifty decibels when a person or an object weighing fifteen pounds or more enters the water in a swimming pool.

"(b) No building permit shall be issued for the construction or substantial alteration of a swimming pool at a residence occupied by, or being built

a pool alarm had been installed. The plaintiff further alleged that the State Building Code[4] required the installation of a self-closing and self latching gate for all new pools and that Kerr and Collins had failed to ensure the installation of such a gate prior to issuing the building permit. The purpose of these safety features was to prevent children from drowning.

The plaintiff further alleged that Kerr and Collins were aware of these requirements and that they knew, or should have known, that an inspection of new pools was necessary to ensure compliance with these safety requirements. Finally, the plaintiff alleged that neither Kerr nor Collins had inspected or attempted to inspect the property to ensure that a pool alarm and a self-closing and self latching gate had been installed.

On July 27, 2018, prior to the filing of the revised complaint, the defendants moved for an order directing the plaintiff's counsel to provide a copy of the release agreement between the plaintiff and the owners of 86 Gelbas Road, Jenna Prink and Bruce Prink (Prinks).[5] The court, *Auger*, *J.*, granted the defendants' motion on August 23, 2018.

On October 19, 2018, the defendants filed a notice of their intent to claim that the negligence of the Prinks was a proximate cause of the injuries claimed in the plaintiff's action against the defendants. See General Statutes § 52-102b (c).[6] Specifically, the defendants maintained that, as the owners of the property, the Prinks

for, one or more families unless a pool alarm is installed with the swimming pool."

[4] See 2012 International Residential Code for One- and Two-Family Dwellings, Appendix G, § AG105.2 (8), p. 830 (adopted by the 2016 Connecticut State Building Code pursuant to General Statutes (Rev. to 2015) § 29-252, as amended by Public Acts 2016, No. 16-215, § 5) (aboveground swimming pools must have self-closing and self latching gate installed).

[5] The plaintiff's claim against the Prinks had resulted in a settlement and a release agreement.

[6] General Statutes § 52-102b (c) provides in relevant part: "If a defendant claims that the negligence of any person, who was not made a party to the

bore the responsibility for ensuring compliance with any requirements of the State Building Code, and that the Prinks had failed (1) to schedule an inspection of the pool by the defendants, (2) to obtain a certificate of occupancy for the pool and (3) to prevent their tenants from using the pool without obtaining a certificate of occupancy. The defendants further noted that the plaintiff had rented the property in November, 2014, and that the Prinks knew that four minor children would be living on the property. Finally, the defendants set forth the instances of the Prinks' negligence, including the failure to notify the town of the construction of the pool, the failure to seek an inspection, the failure to obtain a certificate of occupancy and the failure to warn the plaintiff of these omissions. Finally, the defendants contended that the Prinks could be liable for a proportionate share of the damages alleged in the plaintiff's complaint.

A few days later, the defendants filed an apportionment complaint, pursuant to General Statutes § 52-102b,[7]

action, was a proximate cause of the plaintiff's injuries or damage and the plaintiff has previously settled or released the plaintiff's claims against such person, then a defendant may cause such person's liability to be apportioned by filing a notice specifically identifying such person by name and last-known address and the fact that the plaintiff's claims against such person have been settled or released. Such notice shall also set forth the factual basis of the defendant's claim that the negligence of such person was a proximate cause of the plaintiff's injuries or damages. No such notice shall be required if such person with whom the plaintiff settled or whom the plaintiff released was previously a party to the action."

[7] General Statutes § 52-102b (a) provides: "A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability. Any such writ, summons and complaint, hereinafter called the apportionment complaint, shall be served within one hundred twenty days of the return date specified in the plaintiff's original complaint. The defendant filing an apportionment complaint shall serve a copy of such apportionment complaint on all parties to the original action in accordance with the rules of practice of the Superior Court on or before the return date specified in the apportionment complaint. The person upon whom the apportionment

against Eric Guerin and Merissa Guerin (Guerins), former tenants of the Prinks who occupied the property in 2013 at the time the pool was built. In this one count apportionment complaint, the defendants alleged that the Guerins had prepared and submitted the application for the construction of the aboveground pool to the town. The defendants further claimed that the Guerins specifically were advised that the pool was required to have a self-closing and self latching gate, that an inspection was necessary at the completion of the construction and that Eric Guerin had submitted an affidavit "wherein he attested that he would install a [pool alarm]." The defendants alleged that the Guerins failed to notify them that the pool had been constructed and thus that an inspection was needed. The defendants alleged that these actions amounted to negligence and, additionally, the Guerins negligently failed to obtain a certificate of occupancy for the aboveground pool and failed to notify the Prinks that (1) the aboveground pool did not comply with the requirements of the building code, (2) the town and its officials had not been notified of its construction or the need for an inspection and (3) there was no certificate of occupancy. In conclusion, the defendants claimed that the Guerins could be liable for a proportionate share of the damages alleged in the plaintiff's complaint.

On October 22, 2018, the plaintiff filed an objection to the defendants' notice of intent to seek apportionment as to the Prinks. The plaintiff argued that her complaint set forth a statutory cause of action pursuant to General Statutes § 52-572n (b) (8) alleging recklessness, and that the apportionment statute, General Statutes § 52-572h (o), applied only to claims of negligence.

complaint is served, hereinafter called the apportionment defendant, shall be a party for all purposes, including all purposes under section 52-572h."

On October 25, 2018, the plaintiff filed a similar objection to the defendants' apportionment complaint directed against the Guerins.

The court, *Cole-Chu*, *J.*, held a hearing on November 19, 2018. At the outset, it noted that the objection to the apportionment complaint "could reasonably be construed as a motion to strike." In his argument, the plaintiff's counsel stated that he had not pleaded a negligence cause of action in the revised complaint but rather an intentional or reckless tort pursuant to General Statutes § 52-557n (b) (8), and, as a result, the apportionment statute was inapplicable. He also indicated that the complaint was based on the second exception to municipal immunity contained in § 52-557n (b) (8)[8] with respect to property inspections. The defendants' counsel took the position that the complaint alleged negligence, and not recklessness; he acknowledged that claims of recklessness are not subject to apportionment.

On March 19, 2019, the court issued an order sustaining the plaintiff's objection to the defendants' notice of intent to pursue apportionment as to the Prinks. Specifically, it agreed with the plaintiff's contention that the complaint did not allege negligence such that the apportionment statute did not apply. The court stated that, "[i]f the defendants are found liable to the [plaintiff] on the revised complaint, it will be for reckless disregard for health and safety under all relevant [alleged] circumstances, not for negligence." (Internal quotation marks omitted.) In a separate order, the court dismissed the defendant's notice to seek apportionment, stating that, in sustaining the plaintiff's objection, it had essentially held "that it has no subject matter jurisdiction

[8] The second exception set forth in General Statutes § 52-557n (b) (8) provides in relevant part that a municipality shall not be liable for damages for the "failure to make an inspection . . . unless such failure to inspect . . . constitutes a reckless disregard for health or safety under all the relevant circumstances."

over the proceedings the defendants attempted . . . to set in motion."

The court also sustained the plaintiff's objection to the apportionment complaint filed against the Guerins. It again concluded that the plaintiff had alleged recklessness against the defendants and that therefore the apportionment statute was inapplicable. The court also issued a separate order dismissing the apportionment complaint against the Guerins on the basis of the lack of subject matter jurisdiction.[9] This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendants claim that the trial court erred in precluding their efforts to seek apportionment.

[9] We note that the parties have not substantively addressed the court's orders "essentially" holding that it lacked subject matter jurisdiction. The defendants have appealed from the court's two orders sustaining the plaintiff's objections and the two orders dismissing the notice to seek apportionment and the apportionment complaint due to the lack of subject matter jurisdiction.

A determination regarding the subject matter jurisdiction of the trial court raises a question of law subject to the plenary standard of review. See *Tatoian* v. *Tyler*, 194 Conn. App. 1, 35, 220 A.3d 802 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020); see also *Real Estate Mortgage Network, Inc.* v. *Squillante*, 184 Conn. App. 356, 360, 194 A.3d 1262, cert. denied, 330 Conn. 950, 197 A.3d 390 (2018). "Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . . [S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it . . . and a judgment rendered without subject matter jurisdiction is void." (Citation omitted; internal quotation marks omitted.) *Labissoniere* v. *Gaylord Hospital, Inc.*, 199 Conn. App. 265, 275–76, A.3d (2020); *Petrucelli* v. *Meriden*, 198 Conn. App. 838, 846, A.3d (2020).

We are not persuaded that these proceedings implicated the subject matter jurisdiction of the trial court. In any event, for the reasons set forth in this opinion, we conclude that the court erred, under these facts and circumstances, in rejecting the defendants' efforts regarding apportionment.

Specifically, they argue that the plaintiff's revised complaint implicated both exceptions to municipal immunity contained in § 52-557n (b) (8) and that the first exception employs a negligence, not recklessness standard. As a result, they argue, apportionment is not prohibited pursuant to § 52-572h (o). The defendants further contend that the cause of action recognized in § 52-557n (b) (8) is not excluded from apportionment pursuant to § 52-102b. We agree with the defendants that the plaintiff's revised complaint sets forth allegations that fall within the first exception of § 52-557n (b) (8) and that that exception contains a negligence standard. The trial court erred in sustaining the plaintiff's objections to the defendants' efforts to seek apportionment.

In order to resolve this appeal, we must review the relevant statutes and legal principles regarding municipal liability and apportionment, as they apply to the allegations contained in the plaintiff's revised complaint. "As a matter of Connecticut's common law, the general rule . . . is that a municipality is immune from liability for negligence unless the legislature has enacted a statute abrogating that immunity." (Internal quotation marks omitted.) *Grady* v. *Sommers*, 294 Conn. 324, 334, 984 A.2d 684 (2009); see also *Spears* v. *Garcia*, 263 Conn. 22, 28, 818 A.2d 37 (2003). "The tort liability of a municipality has been codified in § 52-557n. Section 52-557n (a) (1) provides that [e]xcept as otherwise provided by law, *a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties* . . . . Section 52-557n (a) (2) (B) extends, however, the same discretionary act immunity that applies to

Accordingly, we conclude that the court's determination regarding a lack of subject matter jurisdiction was improper.

municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Emphasis added; internal quotation marks omitted.) *Borelli* v. *Renaldi*, Conn. , , A.3d (2020); see also *Northrup* v. *Witkowski*, 332 Conn. 158, 167–68, 210 A.3d 29 (2019); *Ventura* v. *East Haven*, 330 Conn. 613, 629, 199 A.3d 1 (2019). In other words, "the statute provides that municipalities shall be liable for harm caused by ministerial acts in subsection (a) (1) (A) but shall not be liable for harm caused by discretionary acts in subsection (a) (2) (B)." *Ugrin* v. *Cheshire*, 307 Conn. 364, 381, 54 A.3d 532 (2012).[10]

Subsection (b) of § 52-557n defines additional circumstances in which a municipality, or an employee of that municipality, is not subject to liability. Id., 381. Stated differently, "[s]ubsection (a) [of § 52-557n] sets forth general principles of municipal liability and immunity, while subsection (b) sets forth [ten] specific situations in which both municipalities and their officers are immune from tort liability." (Internal quotation marks omitted.) *Elliott* v. *Waterbury*, 245 Conn. 385, 395, 715 A.2d 27 (1998); see also *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 59, 881 A.2d 194 (2005). Specifically, the relevant language in that section of the statute provides: "Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee . . . acting within the scope of his employment or official duties shall not be liable for damages to person or property resulting from . . . (8) [the] failure to make an inspection or making an

[10] Although § 52-557n (a) (1) (A) imposes liability on municipalities for certain negligent acts or omissions of its employees, § 52-557n (a) (2) (A) provides that municipalities are not liable for acts that constitute criminal conduct, fraud, actual malice or wilful misconduct.

inadequate or negligent inspection of any property . . . to determine whether the property complies with or violates any law or contains a hazard to health and safety, unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances . . . .'' General Statutes § 52-557n (b) (8).

Our Supreme Court has concluded that § 52-557n (b) (8) ''abrogates the traditional common-law doctrine of municipal immunity, now codified by statute, in . . . *two* enumerated circumstances.'' (Emphasis added.) *Ugrin* v. *Cheshire*, supra, 307 Conn. 382; see also *Williams* v. *Housing Authority of Bridgeport*, 327 Conn. 338, 356, 174 A.3d 137 (2017) (§ 52-557n (b) (8) carves out two distinct exceptions to municipal immunity for failure to inspect); see generally *Collins* v. *Greenwich*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-16-6028449-S (February 13, 2018) (''[a]ctual notice of the hazardous condition and recklessness are distinct alternate predicates to liability under [§ 52-557n (b) (8)]'').

We now turn to the matter of apportionment.[11] Section 52-572h (c) provides in relevant part: ''In a negligence action to recover damages resulting from personal injury, wrongful death or damage to property . . .

[11] ''Apportionment does not affect the determination of whether the defendant is liable under a theory of negligence but, rather, affects the determination of his degree of fault once a trier of fact has determined that his breach of a reasonable standard of care was a substantial factor in causing the plaintiff's injuries. . . . Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damages which may properly be assigned to the defendant, as distinguished from other causes.'' (Citation omitted; internal quotation marks omitted.) *Henriques* v. *Magnavice*, 59 Conn. App. 333, 338, 757 A.2d 627 (2000).

if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages . . . ." Additionally, subsection (o) of § 52-572h provides in relevant part that "*there shall be no apportionment of liability or damages between parties liable for negligence and parties liable on any basis other than negligence*, including, but not limited to, intentional, wanton or reckless misconduct, strict liability or liability pursuant to any cause of action created by statute, except that liability may be apportioned among parties liable for negligence in any cause of action created by statute based on negligence including, but not limited to, an action for wrongful death pursuant to section 52-555 or an action caused by a motor vehicle owned by the state pursuant to section 52-556." (Emphasis added.)

In *Allard* v. *Liberty Oil Equipment Co.*, 253 Conn. 787, 801, 756 A.2d 237 (2000), our Supreme Court stated that the our legislature made it "clear that *the apportionment principles of § 52-572h do not apply where the purported apportionment complaint rests on any basis other than negligence and that these other bases include, without limitation*, intentional, *wanton or reckless misconduct*, strict liability or liability pursuant to any cause of action created by statute." (Emphasis added; internal quotation marks omitted.) See also *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 726, 212 A.3d 646 (2019).

In light of the foregoing principles, the plaintiff's claims may be distilled as follows. In her revised complaint, the plaintiff alleged reckless conduct on the part of Kerr and Collins with respect to their failure to conduct an inspection of the aboveground pool to verify the installation of a pool alarm and a self-closing and

self latching gate. Thus, relying on § 52-572h (o) and our Supreme Court's decision in *Allard* v. *Liberty Oil Equipment Co.*, supra, 253 Conn. 787, the plaintiff contends that the defendants were barred from pursuing apportionment actions against the Guerins and the Prinks under § 52-102b (a) and (c), respectively.

We now examine the two exceptions to municipal immunity in § 52-557n (b) (8) to address the plaintiff's contention. At the outset, we note that this task presents a question of law subject to plenary review. See, e.g., *DeMattio* v. *Plunkett*, 199 Conn. App. 693, 698, A.3d (2020). "When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [the court seeks] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs [the court] 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., 698–99.

The second exception set forth in § 52-557n (b) (8) indisputably requires recklessness. Specifically, the text of the statute contains the phrase "a reckless disregard for health and safety under all the relevant circumstances . . . ." In *Williams* v. *Housing Authority of Bridgeport*, supra, 327 Conn. 358–74, our Supreme Court conducted a comprehensive analysis of how to assess recklessness in this context. Specifically, the court stated: "We concluded that, particularly when the failure to inspect violates some statute or regulation,

the question of recklessness ordinarily will be one for the jury, taking into account all relevant circumstances. We also concluded that when the failure to inspect is not an isolated incident but results from a general policy of not conducting inspections of a certain type, the jury reasonably may consider whether the policy itself indicates a reckless disregard for public health or safety." Id., 368–69.

As to the first exception contained in § 52-557n (b) (8), the relevant text abrogates municipal immunity in the case of a failure to inspect property or in the making of an inadequate or negligent inspection to determine if the property complied with or violated any law, or presented a hazard to health and safety when "*the political subdivision had notice of such a violation of law or such a hazard* . . . ." (Emphasis added.) General Statutes § 52-557n (b) (8). Stated succinctly, the first exception applies only when the municipality had notice of the violation of law or the hazard. Significantly, it does not contain any reference to recklessness. This exception is limited to instances of negligence with respect to the inspection of property for compliance with or violation of any law or the presence of a hazard to health and safety.

Having concluded that the first exception of § 52-557n (b) (8) contains a negligence, rather than a recklessness, standard, we now turn to the allegations contained in the plaintiff's revised complaint. If these allegations set forth a claim pertaining to the first exception of § 52-557n (b) (8) and negligent conduct, then § 52-572h (o) does not prevent apportionment at this stage of the proceedings.

"[T]he interpretation of pleadings is always a question of law for the court. . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather,

[t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *Carrico* v. *Mill Rock Leasing, LLC*, 199 Conn. App. 252, 261, A.3d (2020); see also *Lynn* v. *Bosco*, 182 Conn. App. 200, 213–15, 189 A.3d 601 (2018); *Harborside Connecticut Limited Partnership* v. *Witte*, 170 Conn. App. 26, 34, 154 A.3d 1082 (2016).

In count one of her revised complaint, the plaintiff alleged that at all relevant times, Kerr and Collins acted within the scope of their employment with the town. She also claimed that Kerr and Collins knew that all new pools required a pool alarm and a self-closing and self latching gate and that a permit cannot be issued without verification of these safety features. She further averred that these two town employees knew that these safety features were mandatory and vital to save the lives of children, who often reside at homes where new pools are constructed. The plaintiff then specifically alleged that (1) Kerr and Collins were aware that a pool had been constructed at 86 Gelbas Road, (2) they could

see the pool from the public road that they drove on repeatedly, (3) they could see that a self-closing and self latching gate had not been installed, and (4) they never inspected or attempted to inspect the pool, or otherwise determined if a pool alarm or a self-closing and self latching gate had been installed. We construe the complaint broadly and realistically rather than narrowly and technically. *Morton* v. *Syriac*, 196 Conn. App. 183, 192, 229 A.3d 1129, cert. denied, 335 Conn. 915, 229 A.3d 1045 (2020). We conclude, therefore, that the plaintiff set forth a claim alleging that the town's employees, and thus the town, knew that a pool had been built at the property, had actual notice that the construction of this pool was completed in violation of the applicable laws and/or that the pool constituted a hazard to health or safety.

We therefore conclude that the plaintiff has alleged that Kerr and Collins, with actual knowledge of a violation of law and/or the existence of a hazardous condition, failed to conduct an inspection, in accordance with the first exception of § 52-577n (b) (8). Unlike the second exception of § 52-577n (b) (8), recklessness is not an element of the actual notice exception. As a result of the plaintiff's allegations of a claim of negligence on the part of the municipal actors, the defendants could seek apportionment as to the negligence of the Prinks and Guerins under § 52-572h (o). Accordingly, we conclude that the trial court erred in sustaining the plaintiff's objections to the notice of apportionment as to the Prinks and to the apportionment complaint filed against the Guerins.

The judgment is reversed and the case is remanded with direction to overrule the plaintiff's objections to the notice of apportionment and the apportionment complaint and for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

CHRISTOPHER CASIRAGHI *v.* PAULA CASIRAGHI
(AC 42299)

Alvord, Prescott and Moll, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting the defendant's motions for contempt. He claimed that the court improperly determined that he wilfully had failed to comply with his financial obligations to the defendant despite a lack of any finding by the court regarding his assertion that he lacked the ability to pay and found that his investment in a certain franchise, C Co., breached the parties' separation agreement despite also finding that he was current on his financial obligations to the defendant at the time that the investment was made. *Held*:

1. The trial court's findings that the plaintiff engaged in wilful violations of his financial obligations were clearly erroneous and it was an abuse of discretion for the court not to have considered the issue of the plaintiff's ability to pay or to have rejected that defense before finding that his failure to meet his financial obligations was wilful: the plaintiff unquestionably raised as a defense that he no longer could fully satisfy his financial obligations as set forth in the dissolution judgment because he had suffered a considerable drop in income due to health problems, and, in support, provided evidence regarding his finances; moreover, the court expressly credited some of the plaintiff's evidence in its written decision and made no indication that it did not credit any of the financial information provided by the plaintiff and the defendant provided no contrary financial records to the court, and the court's finding of wilfulness stood in direct contradiction to the facts found related to the plaintiff's ability to pay; accordingly, the plaintiff met his burden of both raising the inability to pay defense and presenting evidence supporting it that was at least in part credited by the court.
2. The trial court's interpretation of the parties' separation agreement was clearly erroneous, and its finding that the plaintiff breached the agreement by investing in C Co. could not stand; the only evidence before the court was that the plaintiff's investment in C Co. occurred in July, 2015, which unquestionably was before the earliest date on which the plaintiff's obligation to make a lump sum installment payment arose pursuant to the agreement, December, 2015, and, because the agreement limited the plaintiff's right to make such investments only in the event that he was not current on his lump sum payment obligations, and no such obligation existed at the time he invested in C Co., the court's finding was a misinterpretation of the express terms of the agreement.

Argued February 20—officially released October 13, 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. Stanley Novack*, 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 Shay*, judge trial referee, granted two motions for contempt and denied a motion for contempt filed by the defendant, and granted certain other relief, and the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

Christopher Casiraghi, self-represented, the appellant (plaintiff).

Paula Casiraghi, self-represented, the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, Christopher Casiraghi, appeals from the judgment of the trial court rendered on three postdissolution motions for contempt filed by the defendant, Paula Casiraghi.[1] Specifically, the court

[1] According to the plaintiff's appeal form and his statement of the issues on appeal, the plaintiff ostensibly also appeals from the court's denial of his own postdissolution motions, which sought (1) a downward modification of his unallocated alimony and child support obligation, (2) relief from the payment terms of a lump sum property distribution award, and (3) an opportunity to reargue these rulings and its granting of the motions for contempt. The plaintiff, however, has not briefed any specific claims of error with respect to these other rulings and, thus, has abandoned those aspects of his appeal. See *Corrarino* v. *Corrarino*, 121 Conn. App. 22, 23 n.1, 993 A.2d 486 (2010) (failure to brief claims of error with respect to rulings listed on appeal form constitutes abandonment of any claim that could have been raised); see also *Traylor* v. *State*, 332 Conn. 789, 809 n.17, 213 A.3d 467 (2019) ("[r]aising a claim at oral argument is not . . . a substitute for adequately briefing that claim"). Although we are solicitous of self-represented parties, "the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 240, 98 A.3d 93 (2014). "It is necessary to this court's review of a party's claims on appeal that his brief contain, inter alia, argument and

granted two of the motions for contempt, concluding that the plaintiff wilfully had failed to pay in full his unallocated alimony and child support obligation to the defendant or to make required installment payments toward the satisfaction of a lump sum property distribution award. The court denied a third motion for contempt that alleged that the plaintiff wilfully violated the parties' separation agreement (agreement), which was incorporated into the dissolution judgment, by making a postdissolution investment in a CrossFit franchise, but nonetheless made a finding that the investment had breached the parties' agreement.[2]

On appeal, the plaintiff claims that the court improperly (1) determined that he wilfully had failed to comply with his financial obligations to the defendant despite a lack of any finding by the court regarding his assertion that he lacked the ability to pay, and (2) found that his investment in the CrossFit franchise breached the parties' agreement despite also finding that he was current on his financial obligations to the defendant at the time that the investment was made, which, according to the express terms of the agreement, rendered the investment permissible.[3] For the reasons that follow,

analysis regarding the alleged errors of the trial court, with appropriate references to the facts bearing on the issues raised." *Zappola* v. *Zappola*, 159 Conn. App. 84, 86, 122 A.3d 267 (2015).

[2] Although the court denied the motion for contempt, the plaintiff is aggrieved by the court's adverse factual finding with respect to that motion because any breach of the agreement could be used against him in subsequent contempt proceedings. See *McKeon* v. *Lennon*, 131 Conn. App. 585, 607, 27 A.3d 436, cert. denied, 303 Conn. 901, 31 A.3d 1178 (2011).

[3] Both parties were represented by counsel at the time of the dissolution judgment and throughout the postjudgment proceedings that underlie this appeal. Each has elected, however, to appear as a self-represented party before this court. The briefs provided to this court lack needed clarity with respect to the issues being raised and analysis of those issues. See footnote 1 of this opinion. Nonetheless, we address all issues properly raised and sufficiently briefed, albeit not necessarily in the same order. With respect to additional claims of error that the defendant has attempted to raise for the first time in her appellee's brief, all such claims are unreviewable because she failed to file her own appeal or a cross appeal challenging those aspects of the court's judgment. See also footnote 12 of this opinion.

we agree that the court improperly granted the defendant's motions for contempt regarding the unallocated support orders and the installment payments on the lump sum property award because the court failed to consider and to determine whether the plaintiff had the ability to pay. We further agree that the court's finding that the plaintiff breached the agreement by investing in the CrossFit franchise was clearly erroneous. We accordingly reverse those aspects of the trial court's judgment, including the court's remedial orders, and remand for further proceedings on the improperly granted motions for contempt. We otherwise affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. The plaintiff and the defendant married in August, 1997. For decades, the plaintiff has owned and operated a successful business that specializes in the installation and repair of paddle tennis courts. As the trial court indicated in its memorandum of decision, the plaintiff considers his business to be the premier company in this field, and it has operated, at least until recently, profitably and without significant competition. The business requires the plaintiff to travel all over the country, particularly between the months of January and July, to conduct tours of inspection that the court described as "fly-drive weekends in which he traditionally views and assesses literally hundreds of paddle tennis courts."

In December, 2012, the plaintiff filed for a dissolution of the parties' marriage, and, on September 11, 2014, the trial court, *Hon. Stanley Novack*, judge trial referee, rendered a judgment of dissolution on the stipulated ground that the parties' marriage had broken down irretrievably.[4] The court's dissolution judgment incorporates by reference a comprehensive, written agreement entered into by the parties, both of whom were

[4] The parties have three daughters from the marriage, who, at the time of the dissolution judgment, were fourteen, twelve, and nine years old.

represented by counsel. Of particular relevance to the issues in the present appeal are articles II, V, and VI of that agreement.

Article II of the agreement addresses the division of the parties' real property. It provides in relevant part that, following the dissolution of the parties' marriage, the parties would continue to own their former marital residence in Wilton as tenants in common, but that the defendant would have the exclusive use and occupancy of the home. The parties agreed to share equally in most of the ownership and maintenance expenses postdissolution, including with respect to, inter alia, payment of the mortgage, real estate taxes, and an existing home equity line of credit. The plaintiff is also responsible for one third of the cost of the homeowners insurance. Pursuant to the agreement, the defendant can elect to sell the marital residence at any time following the dissolution of the parties' marriage in accordance with the terms set forth in the agreement provided that, at the latest, she list the home for sale sixty days before their youngest daughter's completion of high school.[5] See footnote 4 of this opinion.

Pursuant to article V of the agreement, the plaintiff agreed to complete a lump sum property distribution of $485,950 to the defendant on or before December 1, 2024. The plaintiff further agreed to satisfy this obligation by making, at a minimum, ten annual installment payments of $48,595, which were due each year on December 1, beginning in 2015. Payments are to include "all interest due and payable on the remaining balance."[6] Simple interest of 3 percent is to accrue on any unpaid

[5] The agreement provides that the defendant is entitled to any equity left in the property provided that 50 percent of that amount is to be credited as an offset against any balance remaining on the plaintiff's lump sum property obligation to the defendant as described in article V of the agreement, and, if such credit exceeds any balance due, the resulting overage is to be paid directly to the plaintiff.

[6] The plaintiff is permitted under the agreement to prepay all or any part of the lump sum obligation at any time.

balance of the lump sum property distribution beginning on March 1, 2019. The agreement also provides, however, that, notwithstanding the 3 percent interest provision, "if the [plaintiff] tenders late a payment due under this [a]rticle V for any reason, defined as more than thirty days following December 1 in any given year, interest shall thereafter accrue on the remaining principal balance at a rate of [10] percent per annum." The plaintiff further agreed that the lump sum property payment as set forth in article V of the agreement is to take "precedence to [his] undertaking any new business ventures or opportunities" and that he would not open any new business or make any capital investment in a business of more than $25,000 "unless he [was] current on his obligations to the [defendant] pursuant to this [a]rticle V." Significantly, paragraph B of article V expressly provides that the plaintiff's obligation to make any lump sum property installment payments and the accrual of any interest on that obligation is "suspended . . . during any month that the [plaintiff] has paid all of the obligations set forth in [article II]," which, as we have discussed, pertains to the ownership and maintenance of the former marital residence.

Article VI of the agreement sets forth the plaintiff's obligation to make monthly unallocated alimony and child support payments to the defendant for a period of twelve years. For the first seventy-eight months, the plaintiff is required to pay to the defendant $16,666.66 per month, amounting to $200,000 per year, following which the payments would step down to $11,666.66 for an additional thirty months, and, finally, to $9000 a month through the end of August, 2026. Article VI expressly preserves the plaintiff's rights to seek modification pursuant to General Statutes § 46b-86 (b),[7] but

[7] General Statutes § 46b-86 (b) provides in relevant part that, following a dissolution of marriage awarding alimony, "the Superior Court may, in its discretion and upon notice and hearing, modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under

precludes him from seeking modification on the basis of any increase in the defendant's earnings unless they exceed $75,000 annually. It further precludes the plaintiff from seeking a downward modification for all other reasons other than a "medical catastrophe" that prevents him from operating his business or a declaration of a recession by the National Bureau of Economic Research, provided such recession also has a measurably negative effect on his own employment, income, or business.

At the time of dissolution, the plaintiff was in reasonably good health. In February, 2015, however, the plaintiff was diagnosed with atrial fibrillation. In July, 2015, he had open-heart surgery to repair his heart's mitral valve, which was followed by what the trial court found was "a four month period of recovery [in which] his activities, including driving, were limited." Although the plaintiff was current with his unallocated support obligations through the end of 2015, starting in January, 2016, he unilaterally began reducing his payment from $16,667 to $10,000 per month.

In February, 2016, the plaintiff filed a motion seeking a downward modification of the unallocated support order, arguing that he had suffered a serious decline in his health that rendered him unable to continue to operate his business in the same manner and pace that he had at the time of dissolution. The plaintiff also filed a motion seeking relief from the payment terms of the lump sum property distribution. According to the plaintiff, his declining health rendered his ability to comply

circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party. In the event that a final judgment incorporates a provision of an agreement in which the parties agree to circumstances, other than as provided in this subsection, under which alimony will be modified, including suspension, reduction, or termination of alimony, the court shall enforce the provision of such agreement and enter orders in accordance therewith."

with the payment schedule set forth in the parties' agreement impossible. He clarified that he was not seeking a modification of the total amount of the lump sum property distribution but, rather, was asking the court to order only his obligation to make annual payments suspended for two calendar years, to reduce the amount of each annual payment by one half, and to extend the number of annual payments as needed to allow for full payment at the lower annual rate.[8]

In March, 2016, the defendant filed several motions for contempt. One motion claimed that the plaintiff had failed to make the required monthly, unallocated support payments to her in May, 2015, and in January, February, and March, 2016. Another motion claimed that the plaintiff had failed to make the first annual installment payment toward the lump sum property distribution, which the defendant argued had become due on December 1, 2015.[9]

In May, 2016, the defendant filed objections to the plaintiff's motion to modify the unallocated support orders and to his motion seeking to alter the payment terms of the lump sum property distribution. The defendant argued that, under the express terms of the parties'

[8] The plaintiff captioned his motion as a motion "to effectuate judgment," making the argument that, because he was not seeking a reduction in the total amount of the lump sum distribution, the court could, pursuant to its general authority to make orders necessary to effectuate a dissolution judgment, alter the payment terms that were set forth in the parties' agreement. The court clearly rejected this argument by denying the motion, and this is among those determinations that the plaintiff has failed properly to challenge in the present appeal. See footnote 1 of this opinion.

[9] Another motion for contempt concerned the plaintiff's alleged failure to pay his share of certain medical and extracurricular expenses for the children. Although the court denied that motion, concluding that the defendant had failed to demonstrate that the plaintiff's actions were wilful, it nevertheless concluded that the plaintiff owed the defendant an arrearage of $3494.71 with respect to these items and incorporated that amount into the cumulative total arrearage owed to the defendant.

agreement, which the court incorporated into the dissolution judgment, the plaintiff could seek a modification only in the event of a "medical catastrophe" that "prevent[ed] him from operating his business . . . ." According to the defendant, although the plaintiff's asserted medical situation may have resulted in a *decline* in the business, it did not *prevent* operation of the business. Further, the defendant argued that the plaintiff had received a full medical clearance from his physicians and that he continued to participate in physically strenuous leisure activities such as ice hockey and CrossFit. With respect to the requested changes to the lump sum property distribution order, the defendant argued that the court lacked any authority to modify the property settlement terms to which the parties had agreed.

The plaintiff subsequently filed an objection to the defendant's motion for contempt regarding his lump sum property payment obligation. According to the plaintiff, he had been paying his portions of the ownership and maintenance expenses for the former marital home as required under article II of the agreement and, accordingly, his obligation to begin payment of the lump sum property distribution was suspended in accordance with paragraph 5.1 B of article V of the agreement, which provided that any payments and interest accrual "shall be suspended . . . during any month that the [plaintiff] has paid all of the obligations set forth in paragraph 2.1 [of article II]." Because his obligation to make payments regarding the lump sum property distribution was suspended, he argued, he could not have violated a court order by not making a payment on December 1, 2015, as alleged in the defendant's motion for contempt.[10]

[10] In its decision granting the motion for contempt, the trial court failed to address this argument.

On September 15, 2016, the defendant filed another motion for contempt. The defendant claimed in this motion that the plaintiff had opened a new business called CrossFit Science Park and had invested in excess of $25,000 in this new business despite not being current on his obligations to the defendant under article V of the agreement. The defendant argued that this was in direct violation and wilful disregard of paragraph 5.1 H of article V of the agreement, which prohibits such investments if the plaintiff was in arrears on his obligations to the defendant.

As a result of numerous continuances requested by both parties and additional delays related to discovery disputes, the court, *Hon. Michael Shay*, judge trial referee, did not hear argument on what the court described as the parties' "plethora of motions" until May 23, 2018. That hearing continued the following day and, subsequently, to August 21, 2018. Each party filed updated financial affidavits and child support guideline worksheets with the court.

On October 4, 2018, the court issued a memorandum of decision disposing of the parties' various motions. With respect to the plaintiff's motion to modify the unallocated support orders, the court concluded that the divorce decree unambiguously limited the plaintiff's right to seek a downward modification of the support orders to three grounds, only one of which was implicated by the plaintiff's motion. Relevant to the plaintiff's motion to modify was the provision that the plaintiff could seek modification if he suffered a "medical catastrophe" that "prevents him from operating his business." Although the court recognized that the plaintiff's heart surgery and atrial fibrillation were serious medical conditions that were "somewhat debilitating" to the plaintiff and, in the absence of the parties' agreement, likely would have constituted a substantial change in circumstances warranting modification, his adverse

medical condition did not constitute a "catastrophe" within the usual meaning of that term nor, despite the negative impacts on the business and loss of income, did it prevent him from operating his business. Accordingly, in light of the constraints on modification of the support orders placed on the court by the parties' agreement, the court denied the motion to modify.

The court also denied the plaintiff's so-called motion to effectuate the judgment, in which he had sought relief from his obligations under the lump sum property distribution award. The court first recognized that the lump sum property payment was an award of marital property and that, generally, such awards are not subject to postjudgment modification. As argued by the plaintiff, the court recognized its authority to enter orders merely effectuating rather than modifying the terms of a marital property settlement. The court concluded, however, that the relief requested by the plaintiff would alter the details of the parties' agreement and, thus, constituted an impermissible modification. The court also rejected the plaintiff's argument that his performance should be excused under the doctrine of impossibility, concluding that the parties had contemplated the risk that the plaintiff might be unable to meet his obligation due to an unexpected occurrence and provided contractual contingencies, including the accrual of interest and the application of future proceeds from the sale of the marital home against the obligation.

The court granted the defendant's motion for contempt regarding unallocated child support and alimony payments. The court determined that the support orders were clear and unambiguous, and that the plaintiff breached the orders by unilaterally choosing to reduce his unallocated support payments to the defendant from $16,666.66 per month to $10,000 per month, resulting in an arrearage of $213,333.12. The court indicated that

the defendant had "demonstrated by clear and convincing evidence that the [plaintiff]'s actions amount[ed] to wilful contempt," although the decision is silent as to the nature of this evidence.

The court also granted the defendant's motion for contempt regarding the lump sum property award, finding that the plaintiff was in arrears on his obligation to make annual payments toward the lump sum property distribution. The court found that article V of the parties' agreement, incorporated into the judgment as an order of the court, was clear and unambiguous. The court further found that, as of the date of the hearing, the plaintiff had "failed and neglected to make any annual lump sum payments to the [defendant] commencing December 1, 2015," and that this failure constituted a breach of the court's order. As a result of that breach, the court concluded that the plaintiff was in arrears on his obligation in the amount of $145,785 plus monthly accrued interest of $137,685.72. The court again indicated that the defendant had "demonstrated by clear and convincing evidence that the [plaintiff]'s actions amount[ed] to wilful contempt." The court did not discuss the evidence and, as previously noted; see footnote 10 of this opinion; failed to address the plaintiff's argument that his duty to pay was suspended by his continued payment of his obligations pertaining to the former marital residence.

The court denied the defendant's other motion for contempt concerning the plaintiff's investment in the CrossFit franchise. The court found that, although the plaintiff had breached the parties' agreement, his "actions were made in good faith, with the reasonable expectation that his financial situation would improve" and that the defendant had "failed to meet her burden of proof, by clear and convincing evidence, that the [plaintiff]'s actions amounted to wilful contempt." The plaintiff had argued that his investment in the CrossFit franchise had occurred in 2015 at a time when he was

current on his obligations to the defendant and, therefore, the investment technically had not breached the agreement. The court never expressly addressed that argument in concluding that the plaintiff was in breach.

By way of relief, the court found that the total arrearage owed by the plaintiff to the defendant was $500,298.55, and ordered him to make monthly installment payments of $5000, beginning on November 1, 2018, until the sum was paid in full.[11] The court also awarded the defendant $75,000 as "a contribution toward the legal fees and costs of suit incurred by [her] in connection with this case," which the plaintiff was ordered to pay in monthly installments of $2500 beginning on November 1, 2018. Finally, the court ordered a contingent wage withholding order pursuant to General Statutes § 52-362 (b) to secure future unallocated support payments. The court found that the plaintiff earned net income from employment of $180,700 based on gross income of $283,000, and that the plaintiff also received additional unspecified income from a rental property.

On October 22, 2018, the plaintiff filed a motion for reargument, asserting many of the same arguments he now makes on appeal.[12] The plaintiff sought reargument of the court's findings of contempt regarding the

[11] This amount later was amended by the court to $510,298.55, to reflect additional arrearages accumulated by the plaintiff for failing to pay in full his unallocated support obligations in September and October, 2018, which were not accounted for in the court's original October 4, 2018 decision. The change was made in response to a subsequent motion for contempt filed by the defendant and granted by the court. Additional motions for contempt against the plaintiff currently are pending before the trial court.

[12] On October 23, 2018, the defendant filed a "motion for articulation" with the trial court in which she essentially challenged the court's finding that the plaintiff was current on his obligations to the defendant through 2015 and, accordingly, sought changes to the court's calculation of the arrearage owed to her by the plaintiff. She also filed a motion to reargue, seeking an order for immediate payment of all arrearages rather than monthly installment payments. On October 24, 2018, the defendant filed a second motion to reargue raising additional issues. The court denied all three motions on November 6, 2018.

lump sum property distribution and unallocated support orders and its determination that his CrossFit investment had breached the parties' agreement. The plaintiff also sought reargument of the court's conclusions that the doctrine of impossibility was inapplicable and that the 10 percent interest penalty provision was not void and unenforceable as against public policy. Finally, the plaintiff sought reargument of the "structure of the court's order for payment of the arrearage and counsel fees." The court denied the motion for reargument on November 6, 2018, without comment. This appeal followed.

Following oral argument, we ordered the trial court to issue an articulation responding to the following questions: "In holding the plaintiff in contempt with respect to his obligation to pay the defendant $200,000 per year in unallocated alimony and child support, did the trial court conclude that he had an ability to pay such support notwithstanding its finding that his net yearly income as of August 21, 2018 was $180,700? If the court concluded that the plaintiff had the ability to make such payments, what facts did it find or rely upon in reaching that conclusion? In holding the plaintiff in contempt for failing to make annual lump sum property payments to the defendant pursuant to article [V, paragraph] 5.1 A and C of the parties' separation agreement, did the trial court find, pursuant to [paragraph] 5.1 B, that the plaintiff had not paid his obligations set forth in article [II, paragraph] 2.1 of the agreement? If the court concluded that the plaintiff had not complied with [paragraph] 2.1, what facts did it find or rely in reaching that conclusion?"

To the extent that the defendant was aggrieved by the court's October 4, 2018 rulings or the denial of her subsequent motions to reargue, she did not file an appeal or cross appeal from those judgments and, accordingly, any issues challenging the court's rulings, to the extent that they are raised in her appellee's brief, are not properly before us. See Practice Book § 61-8; *Gagne* v. *Vaccaro*, 311 Conn. 649, 661–62, 90 A.3d 196 (2014).

The court issued an articulation on March 17, 2020. The court indicated that it "made no specific finding that the plaintiff had the ability to pay the unallocated alimony and child support, either at the time of his motion or at the time of the judgment." The court went on to note, however, that the $180,700 of income reported on the plaintiff's updated August 21, 2018 financial affidavit reflected only a partial year's income. The court further indicated that, although it made no specific finding that the plaintiff had not paid all of the obligations set forth in article II, paragraph 2.1 of the agreement, the court believed that the defendant had offered unrebutted evidence that the plaintiff did not pay his share of the homeowners insurance premium in 2016, one of the obligations listed in paragraph 2.1, and, therefore, "the court proceeded as if there was no suspension" of his obligation to begin making the installment payments on the lump sum property distribution order contained in article V of the agreement.[13] We note that the parties were given an opportunity to file supplemental memoranda addressing the trial court's articulation, but neither party filed a response. We turn now to the issues raised by the plaintiff on appeal.

I

The plaintiff first claims that the court improperly granted two of the defendant's motions for contempt.

[13] In its articulation response, the trial court seeks to justify the lack of any findings regarding the plaintiff's ability to pay and the status of his obligations set forth in article II, paragraph 2.1 of the agreement, which was relevant to whether the lump sum property distribution payments were required, by pointing to evidence in the record that arguably may have supported *implicit* findings that he had the ability to pay and that he was not current on his obligations regarding the former marital home. By stating that it never made such findings, however, these recitations of fact, even if they find support in the record, are unavailing because they cannot substitute for the initial lack of findings. See *Koper* v. *Koper*, 17 Conn. App. 480, 484, 553 A.2d 1162 (1989) ("[a]n articulation is not an opportunity for a trial court to substitute a new decision nor to change the reasoning or basis of a prior decision").

Specifically, he claims that the court improperly found him in wilful noncompliance with his unallocated support obligation and with the lump sum property distribution order despite conclusive and unrebutted evidence that he lacked the ability to pay because of a reduction in his annual earnings. We agree that the court failed to give due consideration to whether the plaintiff had the ability to pay his financial obligations, particularly in light of the court's express findings regarding the amount of the plaintiff's net income.[14] This lapse in the court's analysis leaves us with a definite and firm conviction that the court's findings that the plaintiff engaged in wilful violations of his financial obligations are clearly erroneous. Accordingly, we reverse the court's granting of the defendant's motions for contempt and the resulting remedial orders, and remand for further proceedings on the motions, including a new hearing to identify properly any arrearage that may be owed to the defendant and to craft new remedial orders as appropriate.[15]

[14] As previously indicated, with respect to the lump sum property payments, the court failed to address in its decision whether the plaintiff's obligation to make one or more of the lump sum property installment payments at issue was suspended in accordance with the express terms of the agreement because the plaintiff was paying his portion of the ownership and maintenance of the former marital home. The court indicated in its response to an articulation request from this court that it never made any specific finding that the plaintiff was not current on his obligations under article II of the agreement and had "proceeded as if there was no suspension." Although the plaintiff has failed to raise or brief this issue as a claim of error on appeal, the question of whether lump sum property payments were due and owing should be considered by the court on remand in ruling on the motion for contempt and in recalculating the amount of any arrearage owed by the plaintiff. Any suspension of the plaintiff's payment obligation would have affected a proper determination by the court of whether the plaintiff was in contempt for failing to pay the lump sum property order and also would have affected the calculation of the total amount of any arrearage owed to the defendant by the plaintiff. Although the plaintiff has not briefed this issue as a separate basis for reversal of the contempt finding, that does not preclude its consideration by the trial court on remand.

[15] "[E]ven in the absence of a finding of contempt, a trial court has broad discretion to make whole any party who has suffered as a result of another party's failure to comply with a court order." (Internal quotation marks

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . If the underlying court order was sufficiently clear and unambiguous, we . . . determine whether the trial court abused its discretion in issuing . . . 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. . . . [T]his court will not disturb the trial court's orders unless it has abused its legal discretion or its findings have no reasonable basis in fact. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . [E]very reasonable presumption will be given in favor of the trial court's ruling, and [n]othing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . .

"To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . The inability of a party to obey an order of the court, without fault on his part, is a good defense to the charge of contempt. . . . The contemnor must establish that he cannot comply, or was unable to do so." (Citations omitted; internal quotation marks omitted.) *Brody* v. *Brody*, 145 Conn. App. 654, 662, 77 A.3d 156 (2013).

Accordingly, a party who is unable to comply with financial orders contained in a dissolution judgment due to a demonstrable inability to pay has a proper defense to a claim of contempt. See, e.g., *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, 294 Conn. 384, 397, 985

omitted.) *Brody* v. *Brody*, 153 Conn. App. 625, 636, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). In the present case, the lack of any findings by the court regarding the plaintiff's past or present ability to pay his obligations not only fatally undermines the court's finding of contempt but also the court's remedial orders.

A.2d 319 (2009) ("[i]nability to pay is a defense to a contempt motion" (internal quotation marks omitted)); *Bauer* v. *Bauer*, 173 Conn. App. 595, 600, 164 A.3d 796 (2017) ("inability of an obligor to pay court-ordered alimony, without fault on his part, is a good defense to a contempt motion"). "Whether [a party has] established his inability to pay the order by credible evidence is a question of fact. Questions of fact are subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence . . . we give great deference to its findings." (Internal quotation marks omitted.) *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 397–98.

In the present case, the plaintiff unquestionably raised as a defense before the trial court that he no longer could fully satisfy his financial obligations as set forth in the dissolution judgment beginning in 2016 because he had suffered a considerable drop in income due to his health problems.[16] In support of this defense, the plaintiff provided testimony regarding his finances. Through that testimony, he entered into evidence his federal tax returns for 2014 through 2016. These returns show the

[16] The plaintiff only filed a written objection to the motion for contempt directed at his failure to make installment payments toward the lump sum property award, and, in that objection, argued only that his obligation to make installment payments was suspended under the terms of the agreement and, thus, he could not be in violation for nonpayment. Nonetheless, it is clear from our review of the record, which includes the transcripts of the hearing, as well as other pleadings before the court, that the plaintiff clearly placed the court and the defendant on notice of his claim that he was unable fully to satisfy his payment obligations under the terms of the dissolution judgment because he did not have the financial means to meet his obligations.

plaintiff's net income declined from $474,128 in 2014, when the agreement was executed, to $220,324 in 2015, and $205,595 in 2016.[17] He also submitted yearly profit and loss statements from his business, including one for 2017 showing that his income from the business in 2017 was similar to the two prior years. Finally, he filed a financial affidavit at the August, 2018 hearing from which his 2018 annual gross income could be calculated as $282,880, resulting in a net annual income of $180,700. The record discloses no documentary evidence showing any additional substantial sources of income for the plaintiff.[18]

The court makes no indication in its memorandum of decision that it did not credit any of the financial information provided by the plaintiff. The defendant provided no contrary financial records to the court, and, although the defendant asserted at oral argument before this court and in her testimony to the trial court her belief that the plaintiff was "cooking the books"

[17] We have calculated these net income figures from the plaintiff's 1040 federal income tax returns by taking the adjusted gross income listed on line 37 of the return, adding back to that figure any alimony deducted from the adjusted gross income for that year, and subtracting the total tax liability paid by the plaintiff as listed on line 63 of the return. We chose this method because it is illustrative of the actual net income that was available to the plaintiff to satisfy his financial obligations to the defendant under the divorce decree, including the unallocated support payments. Our calculations are not meant to be viewed as factual findings, which we cannot make; see *Zitnay* v. *Zitnay*, 90 Conn. App. 71, 81, 875 A.2d 583, cert. denied, 276 Conn. 918, 888 A.2d 90 (2005); but merely as reflecting the undisputed evidence that was before the trial court.

[18] The court stated that the plaintiff also received "rental income from his property at 300 Post Road in Westport." This is the only finding by the court of any potential additional income source other than self-employment, but the court does not state the amount of the purported rental income. Form 8582 attached to the plaintiff's 2016 federal tax return lists the net annual rental income from the Post Road property as only $9808. The plaintiff's 2018 financial affidavit, credited by the court, lists no amount of income derived from rental and income producing property. In any event, this relatively small amount of additional income does not alter our analysis.

with respect to the amount of money available to him through his business, she also conceded that her lawyer had not offered evidence of any improper accounting to the court in support of her motions. The court expressly credited the plaintiff's financial affidavit provided to the court at the August, 2018 hearing in its written decision, finding that "the [plaintiff] has a net income from employment in the amount of $180,700 based upon a gross income of $283,000."

It is undisputed that the plaintiff's yearly unallocated support obligation to the defendant alone totals $200,000. On top of that obligation are the additional requirements that the plaintiff pay his share of expenses related to the ownership and maintenance of the former marital home, which the parties agreed amounts to, at a minimum, an additional $40,000 annually. The plaintiff is also required under the parties' agreement to maintain both medical insurance for the children and a $2.5 million life insurance policy benefitting the defendant, which annual premiums total approximately $42,000. To the extent that he is also responsible for making the approximately $48,000 yearly lump sum property distribution installment payments, his total obligations to the defendant and the children exceed $300,000, and this estimate of his total obligations does not account for any of his reasonable and necessary living expenses. In short, the plaintiff's financial obligations appear clearly to exceed the income attributed to him by the trial court.

Although the court explained that it lacked any authority to alter the parties' agreement, it nevertheless failed to set forth any analysis of the plaintiff's finances either at the time of the alleged contempt or as of the date of the hearing on the defendant's motions, and it acknowledges in its articulation that it "made no specific finding that the plaintiff had the ability to pay the unallocated alimony and child support, either at the

time of his motion or at the time of the judgment." A party's inability to pay in accordance with a court order is a proper defense to a motion for contempt; see *Afkari-Ahmadi* v. *Fotovat-Ahmadi*, supra, 294 Conn. 397; and the plaintiff met his burden of both raising that defense and presenting evidence supporting it—evidence that was at least in part credited by the trial court. It was an abuse of discretion for the court not to have considered the issue of the plaintiff's ability to pay or to have rejected that defense out of hand before finding that the plaintiff's failure to meet his financial obligations to the defendant was wilful. Because the court's finding of wilfulness stands in direct contradiction to the facts found by the court related to the plaintiff's ability to pay, we are left with the definite and firm conviction that the finding is clearly erroneous and, thus, cannot stand. Accordingly, we remand for a new hearing at which his defense may be duly considered by the court. Furthermore, because the plaintiff's ability to pay is a fact that also should have been considered by the court in constructing its remedial orders, we necessarily must also reverse those orders.

This decision should not be read as countenancing the plaintiff's decision to engage in self-help by unilaterally reducing his payments to the defendant prior to seeking modification or as taking any position on whether, in fact, the plaintiff has the ability to meet the substantial financial obligations to which he agreed, which agreement also included strictly limiting his rights to seek modification. Nevertheless, because the only evidence presented and relied on by the court in its decision supports the plaintiff's argument that he was unable to continue to pay in full his unallocated support payments and other financial obligations, and the trial court failed to reconcile its findings regarding the plaintiff's income with its determination that the plaintiff's failure to pay the defendant was wilful, we

conclude that the trial court improperly found him in contempt and granted the defendant's motions.[19]

II

The plaintiff also claims that the court improperly determined that his investment in the CrossFit franchise breached the parties' agreement. Specifically, the plaintiff argues that the court misinterpreted the relevant portion of the parties' agreement. We agree.

"Because a separation agreement incorporated into a dissolution decree is in the nature of a contract, we note the following general principles of contract interpretation. A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . [A]ny ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . When construing the contract, we are mindful that [t]he contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision

[19] The plaintiff raises and briefs as an additional claim on appeal that the court improperly concluded that the requirement in the parties' agreement that he pay 10 percent interest on any outstanding balance if he failed to make timely installment payments toward the lump sum property award was not a penalty that was void as against public policy. Because we reverse the court's decision finding the plaintiff in contempt for failing to make the lump sum property installment payments and having determined that a recalculation is needed regarding the total of any arrearage owed to the defendant, it is unnecessary to resolve any present challenge to the court's application of the 10 percent interest provision. Because it is unclear whether that issue likely is to arise again on remand, we decline to address the issue at this time.

must be given effect if it is possible to do so. . . . In giving effect to all of the language of a contract, the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Citations omitted; internal quotation marks omitted.) *Flaherty* v. *Flaherty*, 120 Conn. App. 266, 269–70, 990 A.2d 1274 (2010). Applying these principles to the agreement incorporated into the dissolution judgment in the present case, we conclude that the trial court's interpretation of the agreement was clearly erroneous, and, thus, its finding that the plaintiff breached the agreement cannot stand.

The agreement expressly and unambiguously provides that the plaintiff's obligation to complete the lump sum property transfer to the defendant in accordance with article V of the agreement was to take "precedence to [his] undertaking any new business ventures or opportunities . . . ." To ensure this, the plaintiff agreed to restraints on his right to open or to invest in new business ventures postdissolution. Specifically, the agreement provides that, going forward, the plaintiff, either individually or through his business, could not open any new businesses or make any capital investment in a business of more than $25,000 "*unless he is current on his obligations to the* [*defendant*] *pursuant to this* [*a*]*rticle V.*" (Emphasis added.) The agreement further provided in relevant part that any installment payments toward the satisfaction of the lump sum property award set forth in article V of the agreement "shall be payable annually *commencing on December 1, 2015* . . . ." (Emphasis added.)

In its memorandum of decision, the court found that the provision limiting the plaintiff's right to make postdissolution investments "was certainly clear and unambiguous . . . ." It also found that the plaintiff made an investment in the CrossFit franchise "[a]t some point in 2015," and that "his investment was well in excess

of [$25,000].'' The only evidence before the court was that this investment occurred in July, 2015, which unquestionably was before the earliest date on which the plaintiff's obligation to make a lump sum installment payment arose pursuant to article V of the agreement. The court appears not to have considered this fact, however, in reaching its conclusion that the plaintiff ''was clearly in breach'' of the investment limiting order. Legally and logically, however, because the agreement limited the plaintiff's right to make investments only in the event that he was not current on his lump sum payment obligations, and no such obligation existed at the time he invested in the CrossFit franchise, the court's finding was clearly erroneous and a misinterpretation of the express terms of the agreement. Although we reverse the court's factual finding, because the court denied the motion for contempt, it is unnecessary to reverse the court's judgment on the motion.

The judgment is reversed with respect to the granting of the defendant's two motions for contempt related to the unallocated support orders and the lump sum property distribution award, the related remedial orders, and with respect to the finding that the plaintiff was in breach of the investment limitation provision contained in article V of the agreement, and the case is remanded for a new hearing on the motions for contempt, at which the court may recalculate any arrearage owed by the plaintiff to the defendant and impose reasonable remedial orders as appropriate; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LA TANYA AUTRY *v.* BRENDAN HOSEY ET AL.
(AC 42869)

Lavine, Prescott and Moll, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, H and city of New Haven, for injuries she sustained when she was struck by a police cruiser driven by H while she was a pedestrian crossing a city street. Following a bench trial, the trial court found in favor of the plaintiff and awarded her economic and noneconomic damages. In calculating the noneconomic damages, the trial court found that the emotional trauma suffered by pedestrians struck by vehicles is "generally greater" than that suffered by the occupants of a motor vehicle involved in an accident. On the defendants' appeal to this court, *held* that the trial court's factual finding that pedestrians struck by motor vehicles suffer greater emotional trauma than occupants of a motor vehicle involved in an accident was clearly erroneous; there was no evidence in the record to support the court's finding and it was not a matter of common knowledge but, rather, a determination subject to verification by medical science and, in light of the weight given by the court to this finding in reaching its award of noneconomic damages and the lack of subjective complaints from the plaintiff regarding any emotional trauma she suffered, the judgment with respect to the award of noneconomic damages was reversed and the matter was remanded for a new hearing in damages.

Argued June 29—officially released October 13, 2020

Procedural History

Action to recover damages for personal injuries sustained as a result of the named defendant's alleged negligence, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abrams*, *J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Reversed in part*; *further proceedings*.

Audrey C. Kramer, assistant corporation counsel, for the appellants (defendants).

Stephen R. Bellis, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendants, Brendan Hosey and the city of New Haven, appeal from the judgment of the trial court rendered, following a trial to the court, in favor of the plaintiff, La Tanya Autry. The plaintiff brought the underlying negligence action against the defendants seeking compensation for damages that she sustained when she was struck by Hosey's police cruiser while she was a pedestrian crossing a city street. On appeal, the defendants claim that the trial court, in its order, improperly calculated noneconomic damages for emotional trauma because the court lacked the necessary evidence to find that pedestrians suffer greater emotional trauma when struck by a vehicle than occupants of a vehicle. We agree with the defendants and, accordingly, reverse in part the judgment of the court and remand the matter for a new hearing in damages.

The court set forth the following facts and procedural history in its memorandum of decision. "A short time after 1 p.m. on October 20, 2015, the plaintiff was waiting on the northwest corner of the intersection of Chapel Street and High Street in New Haven. She had just begun her lunch break from her job at the Yale Art Gallery and was planning to head to Atticus Books, which is located on the south side of Chapel Street. At the same time, the defendant police officer's cruiser was stopped on High Street facing northbound, waiting for the [traffic] light to change so that he could turn left onto Chapel Street, which runs one-way westbound in that area. The day was bright, with the sun behind the defendant's back as he waited for the [traffic] light. The area of Chapel Street where the accident took place was in the shade, the sun being blocked by the building on the southwest corner of the intersection.

"When the [traffic] light changed, the plaintiff began her southbound cross of Chapel Street about a foot

west of the marked crosswalk. At the same time, the defendant began to turn left into the southern lane of Chapel Street. The plaintiff 'cut the corner' as she crossed Chapel Street, so that she was approximately five feet west of the crosswalk when she was struck by the defendant's police cruiser. The impact propelled the plaintiff a foot or two from the point of impact. She was taken by ambulance from the scene and suffered pain to her entire body for a few days after the accident. She suffered ongoing neck and back pain for . . . approximately a year after the accident, but seems to have generally recovered from any accident-related injuries.

"Based on the plaintiff's testimony and the medical records admitted into evidence, the court is satisfied that the [cost of the] plaintiff's course of treatment which totaled $5738 was reasonable under the circumstances. In addition, the court finds that the evidence supports a finding that the plaintiff missed time from work for a short period of time, suffering lost wages in the amount of $626.01.

"The plaintiff and the defendant both provided entirely credible testimony, each appearing to accept the fact that they bore some level of responsibility for the accident. At the time of the accident, the plaintiff was clearly outside the crosswalk by a relatively significant distance and she should have realized that she was in an area with significant vehicular traffic, particularly at that time of day. The defendant, on the other hand, was turning from a sunny area into a shady area, which he should have recognized would diminish his ability to see clearly. In addition, he was operating his vehicle at a place and time where he should have expected significant pedestrian traffic. Based on the foregoing, the court assesses 65 percent of the liability for the accident to the defendant and 35 percent to the plaintiff.

"The court awards the full amount of $6364.83 in economic damages . . . . As relates to the plaintiff's noneconomic damages, while evidence supports the contention that the plaintiff has essentially returned to her pre-accident level of functioning about a year after the accident, her claims of pain during that period were entirely credible. *Perhaps more importantly, the court is of the opinion that the emotional trauma suffered by pedestrians struck by vehicles is generally greater than that suffered by persons involved in auto accidents as drivers or passengers and factors that into its noneconomic damages award of $30,000.*" (Emphasis added.) This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendants claim that the court improperly premised its award of noneconomic damages on the clearly erroneous factual finding that pedestrians suffer greater emotional trauma than the occupants of a vehicle involved in a motor vehicle accident, when there was no evidence in the record to support that finding.[1] We agree.

We first set forth our standard of review. "On appeal, the function of this court is limited solely to the determination of whether the factual findings of the trial court are clearly erroneous or whether the decision is otherwise erroneous in law." (Internal quotation marks omitted.) *Baretta* v. *T & T Structural, Inc.*, 42 Conn. App. 522, 525, 681 A.2d 359 (1996). "The determination of damages involves a question of fact that will not be

[1] The defendants also claim that the plaintiff failed to plead in her complaint that she suffered emotional trauma. This argument, however, lacks merit because the plaintiff alleged that as a result of the incident, she endured pain and suffering. Emotional trauma is part of pain and suffering. See General Statutes § 52-572h (a) (2) ("'noneconomic damages' means compensation determined by the trier of fact for all nonpecuniary losses including; but not limited to, physical pain and suffering and mental and emotional suffering").

overturned unless it is clearly erroneous." (Internal quotation marks omitted.) *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 735, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020). "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.) *Ventres* v. *Goodspeed Airport, LLC*, 275 Conn. 105, 142, 881 A.2d 937 (2005), cert. denied, 547 U.S. 1111, 126 S. Ct. 1913, 164 L. Ed. 2d 664 (2006).

At trial, the plaintiff offered evidence that, immediately after being struck by Hosey's police cruiser, she was stunned, lay on the ground crying, and experienced intense pain throughout her body. Additionally, for several months following the accident, she experienced pain in her back and left knee. The court stated that it found the plaintiff's claims of pain to be credible. It further stated that "[*p*]*erhaps more importantly* . . . the emotional trauma suffered by pedestrians struck by vehicles is generally greater than that suffered by persons involved in auto accidents as drivers or passengers . . . ." (Emphasis added.) A careful review of the record and transcripts reveals that this factual statement, which explicitly provided an important basis for the court's award of $30,000 in noneconomic damages, is not supported by any evidence presented to the court.

Contrary to the plaintiff's argument, the trial court's statement is not a matter of common knowledge. See *Commissioner of Transportation* v. *Bakery Place Ltd. Partnership*, 83 Conn. App. 343, 348, 849 A.2d 896 (2004) ("[f]acts which are of common knowledge, that is, facts

so well known that evidence to prove them is unnecessary are proper subjects of judicial notice" (internal quotation marks omitted)); see also *State* v. *Tomanelli*, 153 Conn. 365, 368, 216 A.2d 625 (1966) ("proof by evidence concerning a proposition may be dispensed with where the court is justified, by general considerations, in declaring the truth of the proposition without requiring evidence from the party"). Indeed, whether a pedestrian who is struck by a motor vehicle generally suffers greater emotional trauma than a driver or passenger of a vehicle that is struck, is something that would not be "within the knowledge of people generally in the ordinary course of human experience" and is subject to reasonable dispute. Conn. Code Evid. § 2.1 (c) (1) and commentary. To illustrate, consider a hypothetical scenario in which an individual in a car is unexpectedly hit by a police cruiser and suffers physical injuries identical to the plaintiff in this case. To determine whether that individual necessarily would experience less emotional trauma than the plaintiff would require a level of psychological acumen that, in our view, is not a matter of common knowledge.

In addition, although expert testimony generally is not required to prevail on a claim for mental suffering; see *Iino* v. *Spalter*, 192 Conn. App. 421, 477–78, 218 A.3d 152 (2019); our Supreme Court has recognized that "[m]edical science has unquestionably become sophisticated enough to provide reliable and accurate evidence on the *causes* of mental trauma." (Emphasis added; internal quotation marks omitted.) *Rivera* v. *Double A Transportation, Inc.*, 248 Conn. 21, 27, 727 A.2d 204 (1999); see id., 31 (concluding that "mental suffering, even if unaccompanied by physical trauma to the body, constitutes an injury to the person under [General Statutes] § 52-584"). Here, the trial court based its award of noneconomic damages on its unsubstantiated opinion that one category of automobile related

accidents causes a greater amount of emotional trauma than another. Such a determination, which is subject to verification by medical science, is beyond the field of the ordinary knowledge of a trial judge. See *Franchey* v. *Hannes*, 155 Conn. 663, 666, 237 A.2d 364 (1967) ("[t]he rule requiring expert testimony . . . applies when the question involved goes beyond the field of the ordinary knowledge and experience of a trial judge"); *Sickmund* v. *Connecticut Co.*, 122 Conn. 375, 379, 189 A. 876 (1937) (generally, "[t]he effects upon the human system of diseases or injuries . . . are not within the sphere of common knowledge" (internal quotation marks omitted)).

Because there was no evidence before the trial court to support its factual finding regarding the "generally greater" emotional trauma suffered by pedestrians who are injured by a motor vehicle, and, as we have discussed, that fact is not a matter of common knowledge, the finding is clearly erroneous. We now turn to the issue of whether this improper factual finding warrants reversal as to the award of noneconomic damages.

"[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Osborn* v. *Waterbury*, 197 Conn. App. 476, 485, 232 A.3d 134 (2020). It is true that "[a] plaintiff may recover damages in a personal injury action for pain and suffering even when such pain and suffering is evidenced exclusively by the plaintiff's subjective complaints." (Internal quotation marks omitted.) *Iino* v. *Spalter*, supra, 192 Conn. App. 477–78. Here, however, the plaintiff's subjective complaints of pain and suffering exclusively pertained

to the physical injuries she sustained as a result of the collision. She did not complain or otherwise indicate that she had experienced mental suffering, for instance, by way of losing sleep, experiencing anxiety, or going to see a therapist. Therefore, and in light of the trial court's explicit indication of the importance of its opinion regarding the "generally greater" emotional trauma suffered by pedestrians, we cannot conclude that the error was harmless.

The judgment is reversed only as to the award of noneconomic damages and the case is remanded for a hearing in damages consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.