WELLS FARGO BANK, N.A., TRUSTEE *v.* MICHAEL JOHN MELAHN ET AL.
(AC 45699)

Prescott, Moll and Clark, Js.*

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property of the defendant M. Before it initiated the foreclosure action, the plaintiff sent M a notice of default, which included information regarding his rights under the Emergency Mortgage Assistance Program (EMAP) pursuant to statute (§ 8-265ee). After protracted litigation, including various appeals to this court and our Supreme Court, the plaintiff filed a motion for summary judgment as to liability only, and M filed a motion to dismiss, arguing that the plaintiff had failed to give him proper EMAP notice pursuant to § 8-265ee and that the court, therefore, lacked subject matter jurisdiction. The court, relying on *Bank of New York Mellon* v. *Tope* (202 Conn. App. 540), denied M's motion to dismiss as an impermissible collateral attack on the judgment of strict foreclosure and concluded that no evidentiary hearing on the issue of EMAP notice was necessary. The court granted the plaintiff's motion for summary judgment as to liability only and rendered a judgment of strict foreclosure. *Held*:

1. M could not prevail on his claim that the trial court improperly declined to hold an evidentiary hearing before denying his motion to dismiss; pursuant to our Supreme Court's holding in *KeyBank, N.A.* v. *Yazar* (347 Conn. 381), the plaintiff's alleged lack of compliance with the EMAP notice requirement did not implicate the trial court's subject matter

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

jurisdiction and, thus, the motion to dismiss did not raise a critical dispute regarding a jurisdictional fact that, if established, would have deprived the court of subject matter jurisdiction.

2. This court concluded that the trial court's denial of M's motion to dismiss did not constitute reversible error on the alternative ground that M's motion failed to raise properly a claim that the trial court lacked subject matter jurisdiction over the action: although the trial court relied on this court's holding in *Tope* as support for its conclusion that M's motion to dismiss was an impermissible collateral attack on the judgment, that decision was subsequently overruled by our Supreme Court in *Bank of New York Mellon* v. *Tope* (345 Conn. 662); moreover, even if this court's decision in *Tope* had not been overruled, the trial court improperly denied the motion to dismiss as an impermissible collateral attack on the judgment because it is well settled that, in the absence of a final judgment, a motion to dismiss is not an impermissible collateral attack, and, in the present case, there was no final judgment at the time that the court denied M's motion to dismiss, as a final judgment of strict foreclosure was not rendered until months after M had filed his motion to dismiss; furthermore, because our Supreme Court concluded in *Yazar* that the question of a plaintiff's compliance with the EMAP notice requirement does not implicate the court's subject matter jurisdiction over the foreclosure action and this court concluded that the trial court properly determined that M failed to raise a genuine issue of material fact regarding the plaintiff's compliance with the EMAP notification requirement the denial of M's motion to dismiss did not constitute reversible error.

3. The trial court did not err in granting the plaintiff's motion for summary judgment as to liability only and, thus, properly rendered a judgment of strict foreclosure: the court found a lack of a genuine issue of material fact regarding the plaintiff's compliance with EMAP as, pursuant to statute (§ 8-265dd (b)), the plaintiff submitted to the court, inter alia, two affidavits of compliance with the EMAP notice requirements and a copy of the notice of default with evidence, including a United States Postal Service bar code and tracking number, that it was sent to M via certified mail; moreover, the evidence M presented in opposition, an affidavit that he did not receive the required notice, was not sufficient to raise a genuine issue of material fact, as the plaintiff was obligated to show only that the notice had been sent.

Argued September 12—officially released December 19, 2023

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendants were defaulted for failure to appear; thereafter the court, *Pavia*, *J.*, granted the plaintiff's motion for judgment of strict foreclosure

and rendered judgment thereon; subsequently, the court, *Pavia*, *J.*, opened the judgment and granted the motion to dismiss filed by named defendant; thereafter, the court, *Pavia*, *J.*, granted the plaintiff's motion to reargue and vacated its order of dismissal, and the named defendant appealed to this court, *Gruendel*, *Bear* and *Flynn*, *Js.*, which reversed the trial court's judgment and remanded the matter for further proceedings; subsequently, the named defendant filed amended special defenses and a counterclaim; thereafter, the court, *Russo*, *J.*, granted the plaintiff's motion to strike the amended special defenses and counterclaim and rendered judgment on the counterclaim for the plaintiff, from which the named defendant appealed to this court, *Sheldon*, *Bright* and *Bear*, *Js.*, which dismissed in part the appeal and affirmed in part the trial court's judgment, and the named defendant, on the granting of certification, appealed to our Supreme Court, which vacated the judgment of this court and remanded the case to this court with direction to reconsider; subsequently, this court, *Bright*, *Moll* and *Bear*, *Js.*, dismissed in part the appeal and affirmed in part the trial court's judgment; thereafter, the trial court, *Shaban*, *J.*, denied the named defendant's motion to dismiss and granted the plaintiff's motion for summary judgment as to liability only and rendered judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

Ridgely Whitmore Brown, for the appellant (named defendant).

Marissa I. Delinks, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendant Michael John Melahn[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Wells

[1] The complaint also named Danbury Radiological Associates, P.C., and Danbury Hospital as additional defendants, but they were defaulted for

Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2007-6, Asset-Backed Certificates, Series 2007-6. The defendant claims that the court improperly (1) declined to hold an evidentiary hearing on his motion to dismiss, which asserted that the plaintiff failed to give him proper notice of the Emergency Mortgage Assistance Program (EMAP) as required by General Statutes § 8-265ee (a),[2] (2) denied his motion to dismiss as an impermissible collateral attack on the 2010 judgment of strict foreclosure, and (3) rendered summary judgment as to liability only despite the plaintiff's failure to comply with the EMAP notice requirement. We affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal.[3] The plaintiff commenced this action against the defendant in September,

failure to appear and have not participated in this appeal. Accordingly, we refer to Michael John Melahn as the defendant.

[2] General Statutes § 8-265ee (a) provides in relevant part that "a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to each homeowner who is a mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. Such notice shall advise the homeowner of his delinquency or other default under the mortgage and shall state that the homeowner has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the authority with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the homeowner and mortgagee are unable to resolve the delinquency or default."

Although § 8-265ee (a) has been amended since the events underlying this appeal; see Public Acts 2021, No. 21-44, § 8; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] This foreclosure action, which commenced in 2010, has a long and tortuous procedural history, which includes several prior appeals. See *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 3–6, 85 A.3d 1 (2014); *Wells*

2010, to foreclose a mortgage on residential property in Ridgefield. The defendant was defaulted for failure to appear, and the court rendered a judgment of strict foreclosure in November, 2010, with law days to commence in January, 2011. As part of the judgment, the court ordered the plaintiff to notify the defendant, who had not appeared in the action, in accordance with uniform foreclosure standing orders. Although the court sent notice of the order and judgment to the plaintiff on the day following the judgment, the plaintiff failed to send notice to the defendant until just four days prior to his law day. The defendant did not receive the notice until the actual law day. The notice also failed to contain all of the information required by the standing orders. Despite these deficiencies, the plaintiff nonetheless certified to the court that it had provided proper notice in compliance with the court's standing orders.

On February 22, 2011, an attorney filed an appearance in the matter on behalf of the defendant, and, one month later, the defendant filed a motion to dismiss the action citing the plaintiff's noncompliance with the court's standing orders and the false certification. The plaintiff opposed the motion, but, on July 14, 2011, the court nevertheless opened the judgment of strict foreclosure and granted the defendant's motion to dismiss.

The plaintiff filed a motion to reargue, which the court granted. The court subsequently vacated its order granting the defendant's motion to dismiss, concluding that, despite the plaintiff's actions, the court lacked authority to open the judgment because the law days had passed, vesting absolute title in the plaintiff. As a result, it denied the defendant's motion to dismiss. The

Fargo Bank, N.A. v. *Melahn*, 181 Conn. App. 607, 614, 186 A.3d 1215 (2018), rev'd, 333 Conn. 923, 218 A.3d 67 (2019); *Wells Fargo Bank, N.A.* v. *Melahn*, 198 Conn. App. 151, 153, 232 A.3d 1201, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020).

defendant appealed, claiming that the court improperly granted the plaintiff's motion for reargument and vacated the judgment of dismissal in his favor. See *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 85 A.3d 1 (2014). This court concluded on appeal that, "given the unusual specific facts and circumstances of this case"; id., 3; the trial court had both jurisdiction and authority to open the judgment, despite the running of the law days, and abused its discretion by vacating its prior order. Id., 12–13.

After the case was remanded to the trial court, the parties engaged in a protracted dispute regarding the adequacy of various counterclaims and special defenses filed by the defendant. These disputes resulted in the defendant's filing of a second appeal on July 18, 2016.

This court dismissed, for lack of a final judgment, a portion of that appeal and affirmed the judgment with respect to the court's judgment disposing of the defendant's counterclaims. *Wells Fargo Bank, N.A.* v. *Melahn*, 181 Conn. App. 607, 614, 186 A.3d 1215 (2018), rev'd, 333 Conn. 923, 218 A.3d 67 (2019). Our Supreme Court granted the defendant's petition for certification to appeal and, thereafter, vacated the judgment of this court and remanded the case with direction to reconsider the appeal in light of its recent decision in *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 212 A.3d 226 (2019). *Wells Fargo Bank, N.A.* v. *Melahn*, 333 Conn. 923, 218 A.3d 67 (2019). On remand, this court concluded that *Blowers* did not require a different result and once again dismissed, for lack of final judgment, the defendant's appeal from the striking of the defendant's second amended special defenses and affirmed the judgment in all other respects. *Wells Fargo Bank, N.A.* v. *Melahn*, 198 Conn. App. 151, 168–69, 232 A.3d 1201, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020).

Following this court's decision, the plaintiff demanded, and the defendant filed, a purported disclosure of defense.[4] The plaintiff subsequently filed a motion for summary judgment as to liability only and a supporting memorandum of law. The plaintiff attached, as an exhibit to an affidavit in support of its memorandum of law, a copy of the notice of default that the plaintiff had mailed to the defendant at the mortgaged property on April 19, 2010. That notice of default contains information about EMAP. At the top of the first page of the notice is a barcode with a twenty digit number below it, which the parties do not appear to dispute is the United States Postal Service (USPS) bar code and tracking number of the certified receipt for the mailed notice.

The defendant objected to the motion for summary judgment and also filed a motion to dismiss. In his motion to dismiss, the defendant argued, for the first time,[5] that the plaintiff failed to comply with the EMAP notice requirement and that the trial court therefore lacked subject matter jurisdiction over the action. He also requested an evidentiary hearing on the motion. The plaintiff filed an objection to the motion to dismiss, to which it again appended as an exhibit a copy of the notice of default to demonstrate its compliance with the requirements of § 8-265ee.

On October 12, 2021, the court, *Shaban*, *J.*, heard argument on the defendant's motion to dismiss and the plaintiff's motion for summary judgment as to liability only.[6] In January, 2022, the court issued separate memoranda of decision denying the motion to dismiss and

[4] The defendant's disclosure of defense alleges that he has a bona fide equitable defense to the plaintiff's action but does not describe with any detail the nature of that defense.

[5] The defendant failed to raise a claim at any point during the first ten years of the pendency of this case that the plaintiff had not complied with the EMAP notice requirements.

[6] The parties agreed to argue the motion for summary judgment and the motion to dismiss at the same hearing.

granting the motion for summary judgment.[7] With respect to the defendant's motion to dismiss, the court concluded, relying in part on *Bank of New York Mellon* v. *Tope*, 202 Conn. App. 540, 246 A.3d 4 (2021), rev'd, 345 Conn. 662, 286 A.3d 891 (2022), that the defendant's motion to dismiss was an impermissible collateral attack on the judgment of strict foreclosure. Additionally, the court found unpersuasive the defendant's argument that the plaintiff failed to comply with the EMAP notice requirement and concluded that no evidentiary hearing on the issue of EMAP notice was necessary. With respect to the motion for summary judgment, the court concluded that the defendant had neither submitted any evidence to rebut the plaintiff's prima facie case nor alleged any viable defense, and, therefore, that there was no genuine issue of material fact as to the defendant's liability. On July 18, 2022, the trial court rendered a judgment of strict foreclosure. This appeal followed.

We begin our analysis by noting that the defendant's brief on appeal is not a model of clarity. The defendant appears to claim that the court improperly (1) declined to hold an evidentiary hearing on his motion to dismiss, which raised the plaintiff's asserted failure to comply with the EMAP notice requirement, (2) concluded that the defendant's motion to dismiss was an impermissible collateral attack on the 2010 judgment of strict foreclosure, and (3) rendered a summary judgment as to liability only despite the plaintiff's failure to comply with the EMAP notice requirement.

Although the defendant's brief discusses at length the court's denial of his motion to dismiss, it does not

[7] The trial court issued the memorandum of decision on the motion to dismiss on January 12, 2022, and issued the memorandum of decision on the motion for summary judgment on January 19, 2022.

The defendant filed an interlocutory appeal to this court from the denial of the motion to dismiss and the granting of the motion for summary judgment. The plaintiff filed a motion to dismiss the appeal for lack of final judgment, which this court granted.

explicitly challenge the court's decision granting the plaintiff's motion for summary judgment. We conclude, however, that both orders, as well as the court's ultimate decision to render a judgment of strict foreclosure, are implicated by the EMAP notice issues that the defendant raises on appeal. Accordingly, we construe his brief as challenging both of these decisions. We further conclude, for the reasons that follow, that the court properly rendered the judgment of strict foreclosure, as there was no reversible error as to either the denial of the defendant's motion to dismiss or the granting of the plaintiff's motion for summary judgment as to liability only. We accordingly affirm the judgment of the trial court.

I

The defendant first claims that the court improperly declined to hold an evidentiary hearing before denying his motion to dismiss. We disagree.

"Trial courts addressing motions to dismiss for lack of subject matter jurisdiction . . . may encounter different situations, depending on the status of the record in the case. . . . [The] [l]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed.

"[If] a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those

alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits [or] other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits; see Practice Book § 10-31 (b); or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, [if] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 650–52, 974 A.2d 669 (2009).

The defendant argued in his motion to dismiss that an evidentiary hearing was necessary to resolve a critical factual dispute regarding the court's subject matter

jurisdiction because, in his view, the plaintiff filed false affidavits regarding its compliance with the EMAP notice requirement. We are not persuaded that he is entitled to reversal of the judgment on this claim.

First, the defendant raised this factual dispute by filing a motion to dismiss for lack of subject matter jurisdiction. It is true that, under existing law at the time the motion to dismiss was filed, a plaintiff's failure to comply with the EMAP notification requirements deprived the court of subject matter jurisdiction. See *MTGLQ Investors, L.P.* v. *Hammons*, 196 Conn. App. 636, 645, 230 A.3d 882, cert. denied, 335 Conn. 950, 238 A.3d 21 (2020). That case, however, was subsequently overruled by our Supreme Court's decision in *KeyBank, N.A.* v. *Yazar*, 347 Conn. 381, 397, 297 A.3d 968 (2023), which concluded that a plaintiff's lack of compliance with the EMAP notice requirement does not implicate the court's subject matter jurisdiction. Consequently, the defendant's motion to dismiss no longer raises a critical dispute regarding a *jurisdictional* fact that, if established, would have deprived the court of subject matter jurisdiction. Thus, an evidentiary hearing on the defendant's motion to dismiss is not required, and he is not entitled to a reversal of the judgment on this claim.

II

We next address the defendant's claim that the court improperly denied his motion to dismiss because it was an impermissible collateral attack on the judgment. Although we agree with the defendant that his motion to dismiss was not an impermissible collateral attack on the judgment, we conclude that the court's denial of the motion to dismiss may be affirmed on alternative grounds.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of

action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Conboy* v. *State*, supra, 292 Conn. 650.

The court understandably relied on this court's decision in *Bank of New York Mellon* v. *Tope*, supra, 202 Conn. App. 540, which was binding precedent at the time, as support for its conclusion that the defendant's motion to dismiss was an impermissible collateral attack on the judgment. That reliance, however, is no longer justifiable because that decision is no longer good law. On December 20, 2022, our Supreme Court in *Bank of New York Mellon* v. *Tope*, 345 Conn. 662, 286 A.3d 891 (2022), reversed this court's decision in *Bank of New York Mellon* v. *Tope*, supra, 202 Conn. App. 540. This court held in *Tope* that the defendant's motion to open the foreclosure judgment based on a lack of subject matter jurisdiction constituted an impermissible collateral attack on the judgment because he never directly challenged the foreclosure judgment and because he failed to demonstrate that the court's lack of subject matter jurisdiction was entirely obvious. Id., 548–50.

Our Supreme Court, in reversing this court's decision, recognized "that an attack on a judgment within the same action or proceeding in which it was obtained can be [an impermissible] collateral attack if the judgment has become final and the court that rendered the judgment no longer has jurisdiction to open it." *Bank of New York Mellon* v. *Tope*, supra, 345 Conn. 672. Our Supreme Court noted, however, that it was well settled law that "[i]n a foreclosure by sale, the court retains jurisdiction to modify the judgment until the foreclosure sale is approved"; id., 673; and reasoned that the court

in that case had jurisdiction to modify the judgment at the time the defendant filed the motion to open because the defendant filed the motion to open within the four month limitation period triggered by the court's modification of the sale date.[8] Id., 676. Our Supreme Court, therefore, held that the motion to open filed by the defendant was not an impermissible attack on the judgment of foreclosure because, although the judgment was final, the court retained jurisdiction over it. Id.

In the present case, a final judgment of strict foreclosure was not rendered until July 18, 2022, which was months after the defendant filed the motion to dismiss. Although an attack on a judgment made within the same action can be an impermissible collateral attack, that is only the case *if the judgment has become final* and the court that rendered the judgment no longer has jurisdiction. There was no final judgment in this case at the time the court decided the motion to dismiss. Therefore, even if this court's decision in *Tope* had not been overturned by our Supreme Court, the court improperly denied the motion to dismiss as an impermissible collateral attack on the judgment because it is well settled law that, in the absence of a final judgment, a motion to dismiss is not an impermissible collateral attack.

Nevertheless, "[if] the trial court reaches a correct decision but on [improper] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative]

[8] Our Supreme Court held that, "when a court opens a judgment of foreclosure by sale to change the sale date or otherwise to modify the terms of the sale and renders a new judgment, a new limitation period begins under [General Statutes] § 52-212a." *Bank of New York Mellon* v. *Tope*, supra, 345 Conn. 676. The court had opened, modified, and rendered the judgment on July 3, 2017, fewer than four months before the defendant had filed the motion to open the judgment of foreclosure by sale. Id., 673.

ground for which there is support in the trial court record." (Citation omitted; internal quotation marks omitted.) *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 794, 749 A.2d 1144 (2000).

As we discuss in part I of this opinion, the question of a plaintiff's compliance with the EMAP notice requirement no longer implicates the court's subject matter jurisdiction over the foreclosure action. See *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 397. Thus, the court would have been entitled to deny the motion to dismiss because it failed to raise properly a claim that the court lacked subject matter jurisdiction over the action. Finally, we note that the court addressed the merits of the defendant's EMAP claim when it adjudicated both the defendant's motion to dismiss and the plaintiff's motion for summary judgment. As we conclude in part III of this opinion, the court properly determined that the defendant failed to raise a genuine issue of material fact regarding the plaintiff's compliance with the EMAP notification requirement. Accordingly, the denial of the defendant's motion to dismiss does not constitute reversible error.

III

The defendant's final claim is that the court improperly rendered summary judgment as to liability only because the plaintiff failed to comply with the EMAP notice requirement. We disagree. As we previously discussed, the court decided the issue of whether the plaintiff properly provided notice of EMAP to the defendant before initiating this action in adjudicating both the defendant's motion to dismiss and the plaintiff's motion for summary judgment. Because we have concluded that this issue does not implicate the court's subject matter jurisdiction, we analyze the issue in the context of whether the court properly granted the plaintiff's motion for summary judgment.

The following additional procedural history is relevant to this claim. On March 12, 2021, the plaintiff moved for summary judgment against the defendant as to liability only. The plaintiff attached to its memorandum of law in support of its motion an affidavit from a senior loan analyst of the loan servicer of the plaintiff. Attached to the affidavit is a copy of the notice of default that indicates that it was sent to the defendant on April 19, 2010, well before the initiation of the action. That notice included information regarding the defendant's rights under EMAP.

In opposing the motion for summary judgment, the defendant argued in his memorandum of law that a genuine issue of a material fact existed regarding whether the plaintiff had provided notice of EMAP prior to initiating the foreclosure action. The defendant's opposition did not state the reasons why he believed that the plaintiff had not complied with the notice requirements. The only evidentiary support attached to the opposition was an affidavit executed by the defendant in which he averred that he never "received" the EMAP notice.

In the plaintiff's reply to the defendant's objection, it referenced again the April 19, 2010 notice of default, which contained the notice of EMAP. It also referred the court to two affidavits filed on November 12, 2010, and November 17, 2010, respectively, that set forth its compliance with the EMAP notice requirements contained in § 8-265ee. Finally, the plaintiff argued that it was not obligated to prove that the defendant had received the notice; rather, it had to prove only that the notice had been sent.

The court concluded in its memorandum of decision granting the motion for summary judgment as to liability only that the plaintiff had met its initial burden to demonstrate the absence of a genuine issue of material fact

with respect to its compliance with EMAP. The court also determined that the defendant failed to rebut this showing in part because the defendant's affidavit was unaccompanied by any evidentiary support and was simply a bald denial of the allegations in the plaintiff's complaint. The court also noted that the defendant had made equally unsupported factual assertions regarding EMAP compliance in his memorandum of law in support of his motion to dismiss.

"Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . [I]n seeking summary judgment, it is the movant who has the burden of showing . . . the absence of any genuine issue as to all the material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . .

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense. . . .

"A party opposing summary judgment must prove an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . In other words, [d]emonstrating a genuine issue of material fact requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can

be warrantably inferred. . . . A material fact is one that will make a difference in the result of the case. . . . To establish the existence of a [dispute as to a] material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact. . . . The issue must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment." (Citations omitted; internal quotation marks omitted.) *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 435–36, 190 A.3d 105, cert. denied, 330 Conn. 928, 194 A.3d 1195 (2018).

We next turn to the EMAP notice requirement. "[Section] 8-265ee prohibits the initiation of a valid suit without providing the EMAP notice by affirmatively providing that [n]o such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. . . . [General Statutes §] 8-265dd, which establishes EMAP, also prevents the court from rendering any judgment of foreclosure until the EMAP notice has been sent, the sixty day response time has expired, and, if relevant, a determination has been made on the application for emergency mortgage assistance payments. . . . Specifically, the statute provides in relevant part: [N]o judgment of strict foreclosure nor any judgment ordering a foreclosure sale shall be entered in any action instituted by the mortgagee . . . for the foreclosure of an eligible mortgage unless . . . notice to the homeowner who is a mortgagor has been given by the mortgagee in accordance with section 8-265ee and the time for response has expired . . . ." (Citations omitted;

internal quotation marks omitted.) *KeyBank, N.A.* v. *Yazar*, supra, 347 Conn. 392–93.

"Moreover, the EMAP does not require a return receipt for the provision of the required notice to a mortgagor, and the lack of a return receipt in the record does not affect [a mortgagee's] compliance with the [EMAP]. . . . Consequently, [it is sufficient] to establish that a letter was actually placed in the mail. . . . Whether a letter actually was placed in the mail may be proved either by direct or circumstantial evidence. It may be proved by the testimony of the person who deposited it or by proof of facts from which it may be reasonably inferred that it was duly deposited." (Citations omitted; internal quotation marks omitted.) *Pennymac Corp.* v. *Tarzia*, 215 Conn. App. 190, 203, 281 A.3d 469 (2022).

Consequently, to be entitled to summary judgment, the plaintiff in the circumstances of this case was obligated to demonstrate the lack of a genuine issue of material fact regarding whether it complied with the statutory scheme by sending to the defendant by certified mail a notification of EMAP prior to initiating this action.[9] We conclude that the plaintiff met this burden.

The plaintiff has submitted, pursuant to § 8-265dd (b), two identical affidavits of compliance with the EMAP notice requirements. In those affidavits, a representative of the plaintiff's loan servicer avers that "the [p]laintiff has complied fully with the requirements of [§] 8-265ee (a) by delivering a 60 day notice to the [defendant] in the proper form and content prescribed by § 8-265ee (a)." Although the affidavits do not describe the manner of "delivery," the record also includes an additional

[9] The defendant does not assert that the judgment was rendered prior to the expiration of the sixty day statutory period. Accordingly, we do not address that requirement.

affidavit, filed in connection with the motion for summary judgment, attached to which is a copy of the notice of default that the plaintiff sent to the defendant more than sixty days prior to the initiation of this action. That notice of default contains on its first page a USPS bar code and tracking number, which is evidence that the notice was sent by certified mail to the defendant.[10] Taken together, the averments and documents are sufficient to demonstrate the lack of a genuine factual dispute regarding the plaintiff's compliance.

The only evidence that the defendant proffered in response to the plaintiff's averments is his representation in his affidavit that he did not receive the required EMAP notice. As noted previously, however, the plaintiff was not obligated to demonstrate that the notice was in fact received by the defendant. See *Pennymac Corp.* v. *Tarzia*, supra, 215 Conn. App. 203. It was obligated to show only the absence of a genuine factual dispute regarding whether the notice was sent.

[10] In his motion to dismiss, the defendant asserted that he has proof that the plaintiff failed to send the notice by certified mail because when one searches the certified tracking number on the USPS tracking website, as the defendant's counsel did on July 27, 2021, the website responds with a message indicating "[l]abel [c]reated, not yet in system." He argues that, because there is no record of the EMAP notice being sent in the USPS system, it must therefore be the case that the plaintiff never sent EMAP notice to the defendant.

Even if we were to consider this argument in the context of our review of the summary judgment rendered by the court, we would not be persuaded that it raises a genuine issue of material fact regarding whether the plaintiff sent the notice. In adjudicating the motion to dismiss, the trial court took judicial notice of the undisputed fact that USPS stores tracking information for certified mail for only two years and the court, therefore, rejected the defendant's claim in its memorandum of decision on the motion to dismiss.

We agree with the court that the fact that the defendant's counsel was unable to obtain tracking information in 2021 for a mailing that was sent eleven years earlier is not evidence that the plaintiff did not send the required EMAP notice to the defendant. The same claim was made and rejected in *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 217 Conn. App. 93, 102–103, 287 A.3d 1124 (2022), vacated on other grounds by *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 346 Conn. 909, 288 A.3d 1031 (2023).

In conclusion, we are not persuaded that the court improperly rendered summary judgment for the plaintiff as to liability only. As a result, we also conclude that the court properly rendered the judgment of strict foreclosure.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

HALINA OSTAPOWICZ *v.* JERZY WISNIEWSKI
(AC 45889)

Prescott, Cradle and Suarez, Js.*

Syllabus

The plaintiff appealed to this court from the judgment of the trial court rendered on remand, claiming that the court exceeded the scope of this court's remand order. The trial court rendered judgment dissolving the plaintiff's marriage to the defendant and, in its memorandum of decision, ordered the plaintiff to be solely responsible for the payment of the debt on the parties' home equity line of credit and ordered that each party was solely responsible for the payment of his or her respective attorney's fees. The plaintiff appealed, claiming, in part, that the trial court's order regarding the home equity line of credit conflicted with its order regarding attorney's fees because, prior to trial, the defendant had borrowed $10,000 under the line of credit to pay a portion of his attorney's fees. This court agreed with the plaintiff that the two orders appeared to conflict. It reversed the trial court's judgment only with respect to the order that the plaintiff was solely responsible for the debt on the home equity line of credit and remanded the case with direction to resolve the inconsistency. On remand, the trial court issued an order stating that it was aware of and had taken into account the fact that the defendant had borrowed under the home equity line of credit to pay his attorney's fees and amending the attorney's fees provision of its memorandum of decision to order that each party was solely responsible for the payment of his or her respective attorney's fees in excess of those fees that already had been paid via the home equity line of credit. *Held* that the trial court acted within the scope of this court's remand order because it properly resolved the apparent inconsistency

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

between its order regarding the home equity line of credit and its order regarding the payment of attorney's fees: the plaintiff's unduly narrow interpretation of this court's remand order ignored the portion of the opinion in which this court specifically directed the trial court to resolve the apparent inconsistency between the two provisions; moreover, on remand, the trial court properly resolved the apparent inconsistency, concluding that each party was solely responsible for the payment of his or her respective attorney's fees in excess of the fees that previously had been paid via the home equity line of credit; furthermore, contrary to the plaintiff's contention, the remand order did not require that the trial court order the defendant to pay that portion of debt on the home equity line of credit that was attributed to the fees already paid to his attorney, nor did it require any specific outcome.

Argued September 19—officially released December 19, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the defendant filed a counterclaim; thereafter, the case was tried to the court, *Caron*, *J.*; judgment dismissing the counterclaim, dissolving the marriage and granting certain other relief in accordance with the parties' premarital agreement, from which the plaintiff appealed to this court, *Alexander*, *Clark* and *Sheldon*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings; subsequently, the court, *Caron*, *J.*, issued an order clarifying a provision of the dissolution judgment, from which the plaintiff appealed to this court. *Affirmed.*

Keith Yagaloff, for the appellant (plaintiff).

Kevin B. F. Emerson, for the appellee (defendant).

Opinion

PRESCOTT, J. This marital dissolution matter returns to us following our decision in *Ostapowicz* v. *Wisniewski*, 210 Conn. App. 401, 270 A.3d 145 (2022). In the prior appeal, this court reversed the judgment of the trial court only as to an order that the plaintiff, Halina

Ostapowicz, was solely responsible for the debt on the parties' home equity line of credit and remanded the case to the trial court to resolve a purported inconsistency between that order and an order regarding attorney's fees. Id., 420. The plaintiff now appeals from the judgment of the trial court rendered on remand, claiming that the court exceeded the scope of this court's remand order in *Ostapowicz*. We affirm the judgment of the trial court.

The following facts and procedural history, as set forth in *Ostapowicz*, are relevant to our resolution of this appeal. The plaintiff and the defendant, Jerzy Wisniewski, were married on August 21, 2006. Id., 402. The plaintiff commenced this action against the defendant on October 20, 2017, seeking a dissolution of the parties' marriage. Id. On December 30, 2019, following trial, the court issued a memorandum of decision dissolving the marriage on the grounds of an irretrievable breakdown and entering certain financial orders. Id., 403, 409. In its decision, "the court ordered, among other things, that the parties are responsible for their respective health insurance and unreimbursed medical expenses; neither party shall receive alimony; the defendant shall quitclaim the marital home to the plaintiff, who '*shall be solely responsible for payment of the* [*home equity line of credit*],' taxes, insurance and maintenance; the plaintiff has no interest in the defendant's family business; the parties shall retain their respective bank and retirement accounts and pay their respective debts; the defendant shall retain his rights in the family business; the parties shall retain their respective automobiles; and '[*e*]*ach party shall be solely responsible for payment of their respective attorney's fees incurred during the course of this case*.' " (Emphasis in original.) Id., 409.

The plaintiff appealed to this court from the judgment of the trial court, arguing, in part, that the trial court had abused its discretion in assigning to her the entire

outstanding debt on the parties' home equity line of credit.[1] Id., 418. Specifically, she argued that "the court's order regarding the home equity line of credit conflict[ed] with its order that the parties [were] responsible for the payment of their respective attorney's fees." Id., 419–20. In addressing this claim, this court set forth the following additional relevant facts. "In December, 2015, the parties obtained a home equity line of credit and used some of the funds to pay off the plaintiff's personal line of credit, totaling $24,271. The parties also drew on the line of credit for their respective attorney's fees in this dissolution matter. The court specifically found that the defendant borrowed $10,000 under this line of credit to pay his own attorney's fees in this matter but also ordered, among other things, that the 'plaintiff shall be solely responsible for payment of the [home equity line of credit],' and that '[e]ach party shall be solely responsible for payment of their respective attorney's fees incurred during the course of this case.' " (Footnote omitted.) Id., 419.

This court agreed with the plaintiff that the court's order regarding the home equity line of credit appeared to conflict with the court's order that the parties be responsible for the payment of their respective attorney's fees. Id., 419–20. This court, therefore, "reverse[d] the judgment only with regard to the order that the plaintiff is solely responsible for the debt on the home equity line of credit and remand[ed] the case with direction to resolve the inconsistency." Id., 420. This court's rescript in *Ostapowicz* provided: "The judgment is reversed only as to the order regarding the home equity

[1] In *Ostapowicz* v. *Wisniewski*, supra, 210 Conn. App. 402, the plaintiff also argued that the trial court "(1) lacked subject matter jurisdiction to enforce the parties' premarital agreement, [and] (2) erroneously found that certain property constituted the defendant's separate property under the premarital agreement and failed to assign a specific value to that property . . . ." This court affirmed the judgment of the trial court as to these issues; see id., 420; and they are not at issue in the present appeal.

line of credit and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects." Id.

On March 7, 2022, in response to the remand order, the trial court sent a proposed order to the parties clarifying that its intent when issuing the original order was that the parties would pay their respective attorney's fees in excess of what had already been paid to their attorneys via the home equity line of credit and that it had not intended to require the defendant to pay that portion of the home equity line of credit attributed to the $10,000 already paid to his attorney. The plaintiff filed an objection to the court's proposed order, in which she requested, inter alia, that the court order the defendant to be responsible for the $10,000 of attorney's fees that he borrowed under the home equity line of credit. Thereafter, the matter was scheduled for a hearing, which took place on September 26, 2022.

Following the hearing, the trial court issued an order in which it stated that, when it "ordered the plaintiff to be solely responsible for the payment of the home equity line of credit . . . [it] was aware of and had taken into account the fact that the defendant had borrowed $10,000 under the [home equity line of credit] to pay his attorney's fees (and that the plaintiff had borrowed $19,289.50 under the [home equity line of credit] to pay her attorney's fees). These payments to the attorneys were made in advance of trial preparations and trial." The court further stated that, when it "ordered that each party would be solely responsible for the payment of their respective attorney's fees incurred during the course of the case, the intention was that the parties would pay their own attorney's fees above what had already been paid to their attorneys via the [home equity line of credit]. The intention was not to require the defendant to be responsible to pay that portion of the [home equity line of credit] attributed to

the $10,000 already paid to his attorney. The intention was for the plaintiff to be solely responsible for the [home equity line of credit] payments." Accordingly, the court amended the attorney's fees provision of its memorandum of decision, ordering that " '[e]ach party shall be solely responsible for payment of their respective attorney's fees above those fees that were paid to their attorneys via the [home equity line of credit].' " This appeal followed.

On appeal to this court, the plaintiff claims that the trial court failed to comply with this court's remand order in *Ostapowicz*. According to the plaintiff, the remand order in *Ostapowicz* reversed solely the trial court's order as to the home equity line of credit and otherwise affirmed the judgment in all other respects. Instead of adjusting the order regarding the home equity line of credit as directed on remand, the plaintiff contends that the trial court improperly modified the order that the parties were responsible for their own attorney's fees by creating an exception for the defendant's attorney's fees paid through the home equity line of credit; in so doing, the plaintiff contends that the trial court shifted responsibility for $10,000 of the defendant's attorney's fees to the plaintiff. In response, the defendant contends that the trial court properly followed this court's remand order and resolved the purported inconsistency between the order regarding the home equity line of credit and the order regarding attorney's fees. We agree with the defendant.

"Determining the scope of a remand is a matter of law . . . [over which] our review is plenary. . . . In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . Compliance means that the direction is not deviated from. The trial court cannot adjudicate rights and duties

not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed. The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Citation omitted; internal quotation marks omitted.) *Fazio* v. *Fazio*, 199 Conn. App. 282, 287–88, 235 A.3d 687, cert. denied, 335 Conn. 963, 239 A.3d 1213 (2020). "We are mindful, however, that [w]e have rejected efforts to construe our remand orders so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. . . . So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing." (Internal quotation marks omitted.) *Marshall* v. *Marshall*, 200 Conn. App. 688, 703, 241 A.3d 189 (2020).

In applying these principles to the present case, we first review our analysis, remand and mandate in *Ostapowicz* v. *Wisniewski*, supra, 210 Conn. App. 401. As set forth earlier in this opinion, this court in *Ostapowicz* agreed with the plaintiff that the trial court's order assigning to her responsibility for the entire outstanding balance on the parties' home equity line of credit appeared to conflict with its order that the parties were separately responsible for the payment of their respective attorney's fees. Id., 419–20. This court specifically concluded that the two orders seemed irreconcilable. Id., 420. This court, therefore, "reverse[d] the judgment only with regard to the order that the plaintiff [was] solely responsible for the debt on the home equity line of credit and *remand*[*ed*] *the case with direction to*

resolve the inconsistency." (Emphasis added.) Id. This court's rescript in *Ostapowicz* stated: "The judgment is reversed only as to the order regarding the home equity line of credit and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects." Id.

A thorough examination of this court's opinion in *Ostapowicz* leads us to reject the plaintiff's unduly narrow interpretation of this court's remand order. Although the plaintiff argues that this court's remand order did not permit the trial court to modify its order regarding attorney's fees, the plaintiff ignores that portion of the opinion in which this court specifically directed the trial court to resolve the apparent inconsistency between the order regarding the home equity line of credit and the order regarding the payment of attorney's fees. On remand, the trial court properly resolved this apparent inconsistency, concluding that each party was solely responsible for the payment of their respective attorney's fees *in excess of those that were paid to their attorneys via the home equity line of credit*. Contrary to the plaintiff's contention, the remand order did not require that the trial court order the defendant to pay that portion of the debt on the home equity line of credit that was attributed to the $10,000 already paid to his attorney, nor did it require any specific outcome. Rather, it was left to the trial court to resolve the apparent inconsistency between the arguably conflicting provisions. Because the trial court properly resolved the apparent inconsistency between the two provisions, the trial court acted within the scope of this court's remand order in *Ostapowicz*.

The judgment is affirmed.

In this opinion the other judges concurred.

ERICA LAFFERTY ET AL. *v.* ALEX EMRIC JONES ET AL.

WILLIAM SHERLACH *v.* ALEX JONES ET AL.

WILLIAM SHERLACH ET AL. *v.* ALEX EMRIC JONES ET AL.

(AC 45401)

Elgo, Suarez and Seeley, Js.

Syllabus

The plaintiffs, a first responder, school staff, and certain family members of those killed in the mass shooting at Sandy Hook Elementary School, commenced separate actions, which the trial court consolidated, seeking to recover damages for, inter alia, invasion of privacy, arising out of statements made by the defendant J on his radio show that advanced certain conspiracy theories about the shooting. The trial court entered a default against J as a sanction for failing to fully and fairly comply with the plaintiffs' discovery requests, and the cases proceeded to a trial for a hearing in damages. Prior to the hearing in damages, the plaintiffs properly noticed a videotaped deposition of J. On the day prior to the first scheduled deposition day, J filed a motion for a protective order, asserting that he was under the care of a physician for medical conditions, which required immediate testing, and that, in his physician's opinion, he should not sit for the scheduled deposition. On the same day, the trial court held an emergency hearing on J's motion, which J did not attend, and his counsel submitted a letter from a physician, under seal, for an in camera review. After the trial court conducted an in camera review of the letter, the trial court stated that the letter was "bare bones" and lacked many elements typical of similar medical letters from physicians. The trial court also noted that the letter stated that J was remaining home under the doctor's supervision. The plaintiffs' counsel argued that J was not, in fact, at home under his physician's care but, instead, was broadcasting his radio program live during the hearing. Thereafter, the trial court denied J's motion for a protective order and ordered J's counsel to disclose the location of J's radio programming broadcast that was aired during the court's hearing of the motion for a protective order. The next day, J's counsel filed a notice with the trial court that J had conducted his live radio broadcast from his studio, which was not located in his home. The plaintiffs then filed an emergency motion for an order to require J to appear for the second day of the scheduled deposition on penalty of civil contempt and requested an order for a capias. The trial court held a hearing on the plaintiffs'

motion on the same day, allowing J to file an opposition to the plaintiffs' emergency motion and to submit additional medical documents by the end of the day. J's counsel responded by filing an objection to the plaintiffs' emergency motion and a renewed motion for a protective order with an attached affidavit from a physician and a letter from another physician, recommending that J not attend the deposition. Subsequently, the trial court declined to issue a capias, but ordered J to appear at the second scheduled day of deposition and denied J's renewed motion for a protective order, reasoning that J had not demonstrated that his alleged medical conditions were serious enough to excuse his attendance. Despite the trial court's order, J did not attend the deposition, and the plaintiffs thereafter filed a motion for civil contempt against J, to which he filed an objection. After a hearing, the trial court granted the plaintiffs' motion, finding, by clear and convincing evidence, that J, wilfuly and in bad faith, violated, without justification, several court orders requiring his presence at the scheduled depositions. The trial court ordered J to pay conditional daily fines until he attended the deposition and further ordered that J had the ability to purge the contempt when he completed two full days of depositions. Thereafter, J attended two days of deposition and the court granted his motion for an order declaring that he be purged of contempt and for the clerk to return the fines he had paid. On J's appeal to this court, *held*:

1. The trial court did not abuse its discretion in holding J in contempt of court for failing to appear at the scheduled deposition: although J's counsel provided the trial court with an affidavit and two letters from his physicians attesting that he was too ill to attend the deposition, the court, contrary to J's claim, did not improperly substitute its judgment regarding J's health for that of his physicians, as the undisputed fact that J chose to host a radio broadcast from his studio at the time of the scheduled hearing on his motion for a protective order significantly undercut his claim that he was too ill to attend the deposition; moreover, the court reasonably inferred, on the basis of the facts before it, that J's failure to attend his scheduled deposition was wilful.
2. J could not prevail on his unpreserved claim that the trial court violated his due process rights by not requesting additional information from his physicians regarding his medical condition prior to holding him in contempt of court: J failed to provide this court with any persuasive authority to support his argument that, once the trial court found the representations of his physicians to be lacking or tendered in bad faith, it was obligated to affirmatively seek additional evidence concerning his medical condition prior to making a determination as to whether he wilfully disregarded the court's orders to attend a deposition; moreover, the record sufficiently demonstrated that J was provided with sufficient due process of law regarding the court's contempt finding, as he was allowed a meaningful opportunity to be heard during the contempt hearing, was represented by counsel during the proceeding, and

was given the opportunity to submit additional evidence, which he failed to do, and the court did not preclude J from seeking review of additional information under seal in an in camera review.

Argued September 18—officially released December 19, 2023

Procedural History

Action, in the first case, to recover damages for, inter alia, invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of Fairfield, action, in the second case, to recover damages for, inter alia, invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Bellis*, *J.*, granted the plaintiff's motion to add Robert Parker as a plaintiff, and action, in the third case, to recover damages for, inter alia, invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of Fairfield; thereafter, the cases were consolidated and transferred to the Complex Litigation Docket, judicial district of Waterbury, where, in the first case, Jennifer Hensel, executrix of the estate of Jeremy Richman, was substituted as a plaintiff and withdrew her claims against the defendants; thereafter, in the first case, Richard Coan, trustee of the bankruptcy estate of the named plaintiff, was substituted as a plaintiff; subsequently, the court, *Bellis*, *J.*, granted the plaintiffs' motion for civil contempt against the named defendant in each case and rendered judgment thereon, from which the named defendant et al. in each case appealed to this court; thereafter, this court dismissed the appeal as to the defendant Infowars, LLC, et al. *Affirmed.*

Norman A. Pattis, for the appellants (named defendant in each case).

Alinor C. Sterling, for the appellees (plaintiff David Wheeler et al. in the first case, named plaintiff in the second case, and named plaintiff et al. in the third case).

Opinion

SUAREZ, J. The defendant Alex Jones appeals from the judgments of the trial court, *Bellis*, *J.*, granting the joint motion for contempt filed by the plaintiffs[1] for the defendant's violation of the court's orders to attend a deposition scheduled on March 23 and 24, 2022. On appeal, the defendant claims that the court (1) abused its discretion by holding him in contempt of court for

[1] There are three underlying actions. In the first action, the plaintiffs are Erica Lafferty, David Wheeler, Francine Wheeler, Jacqueline Barden, Mark Barden, Nicole Hockley, Ian Hockley, Jennifer Hensel, Jeremy Richman, Donna Soto, Carlee Soto-Parisi, Carlos Soto, Jillian Soto, and William Aldenberg. On November 29, 2018, the plaintiffs moved to consolidate the second and third cases; *Sherlach* v. *Jones*, Superior Court, judicial district of Waterbury, Docket No. CV-18-6046437-S, and *Sherlach* v. *Jones*, Superior Court, judicial district of Waterbury, Docket No. CV-18-6046438-S; with their action pursuant to Practice Book § 9-5. William Sherlach is a plaintiff in the second and third cases and Robert Parker is a plaintiff in the third case. On December 17, 2018, the court granted the motion to consolidate the cases. Jeremy Richman died while this action was pending, and, on June 7, 2021, the court granted the plaintiffs' motion to substitute Jennifer Hensel, executrix of the estate of Jeremy Richman, as a plaintiff in his place; however, on June 8, 2021, Jennifer Hensel, in her capacity as executrix of estate of Jeremy Richman, withdrew her claims against the defendants. On October 20, 2021, the court granted Erica Lafferty's motion to substitute Richard Coan, trustee of the bankruptcy estate of Erica L. Garbatini, in her place as a plaintiff in this case. All references in this opinion to the plaintiffs are to the remaining plaintiffs and do not include Erica Lafferty, Jeremy Richman, or Jennifer Hensel, as executrix of the estate of Jeremy Richman.

In the underlying actions, the plaintiffs originally named the following persons and entities as defendants: Alex Emric Jones, Wolfgang Halbig, Cory T. Sklanka, Infowars, LLC, Free Speech Systems, LLC, Infowars Health, LLC, Prison Planet TV, LLC, Genesis Communications Network, Inc., and Midas Resources, Inc. Throughout the course of the litigation, the plaintiffs have withdrawn their underlying actions against Wolfgang Halbig, Cory T. Sklanka, Genesis Communications Network, Inc., and Midas Resources, Inc., and, therefore, they are not participating in this appeal. On May 31, 2022, this court, sua sponte, ordered the parties to file memoranda giving reasons, if any, as to why this appeal should not be dismissed for lack of aggrievement as to any remaining defendant except Jones. On June 16, 2022, after reviewing the memoranda submitted by the parties, this court dismissed the appeal for all remaining defendants, except Jones, for lack of aggrievement. All references to the defendant in this opinion are to Jones only.

failing to appear at his deposition after the court was provided an affidavit and two letters from his physicians attesting that he was too ill to attend the deposition, and (2) violated his due process rights by not requesting additional information from his physicians regarding his medical condition prior to holding him in contempt.[2] We affirm the judgments of the trial court.

The following facts, as found by the court or otherwise undisputed in the record, and procedural history are relevant to this appeal. On December 14, 2012, Adam Lanza entered Sandy Hook Elementary School (Sandy Hook), and thereafter shot and killed twenty first-grade children and six adults, in addition to wounding two other victims who survived the attack. In the underlying consolidated actions, the plaintiffs, consisting of a first responder, who was not a victim of the Sandy Hook shooting but was depicted in the media following the shooting, and the immediate family members of five of the children, one educator, the principal of Sandy Hook, and a school psychologist who were killed in the shooting, brought these separate actions against the defendant. See footnote 1 of this opinion.

In the complaints, the plaintiffs alleged that the defendant hosts a nationally syndicated radio program and owns and operates multiple Internet websites that hold themselves out as news and journalism platforms. The

[2] We note that the defendant briefed his claim on appeal as "whether the trial court abused its discretion and relied on clearly erroneous findings of fact when, after reviewing sworn statements from his physicians attesting that [the defendant] was too ill to attend a deposition, the trial court ordered [the defendant] to appear nonetheless; when [the defendant] obeyed his doctor's order, the court held [the defendant] in contempt absent any real findings of fact?" We interpret his claim to be twofold: the first claim being that the court abused its discretion in determining that his violation of the court's orders to attend the deposition was wilful, and the second claim raising a due process violation due to the court not requesting additional information from his physicians at the contempt hearing. We will address these claims in that order.

plaintiffs further alleged that the defendant began publishing content related to the Sandy Hook shooting on his radio and Internet platforms and circulated videos on his YouTube channel. Specifically, the plaintiffs alleged that, between December 19, 2012 and June 26, 2017, the defendant used his Internet and radio platforms to spread the message that the Sandy Hook shooting was a staged event to the millions of his weekly listeners and subscribers. The complaints each consisted of five counts, including causes of action sounding in invasion of privacy by false light, defamation and defamation per se, intentional infliction of emotional distress, negligent infliction of emotional distress, and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. On November 15, 2021, the court entered a default against the remaining defendants as a sanction for failing to fully and fairly comply with the plaintiffs' discovery requests. The cases proceeded to trial for a hearing in damages, and, during the pendency of this appeal, a verdict was reached and a judgment was rendered in each case in favor of the plaintiffs.[3]

On March 11, 2022, prior to the hearing in damages, the plaintiffs properly noticed a videotaped deposition of the defendant to take place in his hometown of Austin, Texas. By agreement of the parties, the deposition was to be conducted on March 23 and 24, 2022. On March 22, 2022, the defendant filed a motion for a protective order, asserting that he was under the care of a physician for medical conditions that required immediate testing and that, in his physician's opinion, he should not sit for the scheduled deposition. On the same day, the court held an emergency hearing on the

[3] The present appeal relates to the plaintiffs' joint motion for contempt only. A separate appeal on the merits of the consolidated cases is currently pending before this court.

defendant's motion, during which the defendant's counsel, on behalf of the defendant who was not present for the hearing, submitted a letter from a physician, under seal, for an in camera review.[4] After the court conducted an in camera review of the letter, the court stated, on the record, that it had "never seen [a medical letter] as bare bones as this one. This [letter] does not have any letterhead. It had no address on it. . . . It doesn't indicate what kind of doctor it is. . . . The letter fails to address the length of the patient/physician relationship. It does not say that the physician examined [the defendant] or evaluated [him]. . . . [T]his is not actually a medical record, it is just this bare bones note." In addition, the court also noted that the physician's letter, dated March 21, 2022, stated that the defendant " 'is remaining home' under the doctor's supervision." However, during the court proceeding, the plaintiffs' counsel argued that the defendant was not, in fact, at home under his physician's care but, instead, "[the defendant] appears to be on the air right now broadcasting his live show . . . ." The court subsequently denied the defendant's motion for a protective order and issued an order for the defendant's attorney to disclose where the defendant's March 22, 2022 broadcast took place. The defendant's counsel later conceded that this denial of the defendant's motion for a protective order constituted a court order for the defendant to appear for the March 23 and 24, 2022 deposition.

On March 23, 2022, the defendant's attorney filed a notice with the court stating that, while the March 22, 2022 hearing on his motion for a protective order was taking place, the defendant simultaneously conducted

[4] The letter submitted under seal was a note from the defendant's physician, Benjamin Marble. The court marked the sealed letter as an exhibit and conducted an in camera review of it. The defendant has not authorized the letter to be part of the court's open file. We have reviewed the contents of the letter, in camera, as part of our review of the record.

his March 22, 2022 broadcast live at his studio in Austin, Texas. The defendant's attorney also represented that the defendant's studio was not located at his home. The plaintiffs further filed an emergency motion for an order to require the defendant to appear for the March 24, 2022 deposition on penalty of civil contempt and requested an order for a capias.[5] On the same day, the court held a hearing and allowed the defendant to file an opposition to the plaintiffs' emergency motion and to submit additional medical documents by the end of the day. The defendant responded, that day, by filing an objection to the plaintiffs' emergency motion, and a renewed motion for a protective order with an attached affidavit from Dr. Benjamin Marble and a letter from Dr. Amy Offutt,[6] recommending that the defendant not attend the deposition.[7]

[5] "A capias is a vehicle to compel attendance at a judicial proceeding. See *Pembaur* v. *Cincinnati*, 475 U.S. 469, 472 n.1, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) ('[a] capias is a writ of attachment commanding [an] official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt'); *DiPalma* v. *Wiesen*, 163 Conn. 293, 298, 303 A.2d 709 (1972) ('[i]f one is not warranted in refusing to honor a subpoena and it is clear to the court that his absence will cause a miscarriage of justice, the court [is permitted to] issue a capias to compel attendance'). As one court has noted, 'it is an extraordinary measure' . . . that involves the arrest of the witness in question. See General Statutes § 52-143 (e)." (Citation omitted.) *State* v. *Shawn G.*, 208 Conn. App. 154, 176–77, 262 A.3d 835, cert. denied, 340 Conn. 907, 263 A.3d 822 (2021).

[6] The defendant represents that Dr. Offutt's letter was a sworn statement, signed under oath. Dr. Offutt's letter, however, only includes the notary's stamp of acknowledgement and is not a verification that the letter is a sworn statement. "[A]n acknowledgement is a public declaration or a formal statement of the person . . . that the [signing of the document] was his free act and deed. . . . A verification, on the other hand, is a sworn statement of the truth of the facts stated in the [document] verified. It always involves the administration of an oath." (Internal quotation marks omitted.) *Stone-Krete Construction, Inc.* v. *Eder*, 280 Conn. 672, 680, 911 A.2d 300 (2006); see also General Statutes § 3-94a (1) and (3). Dr. Offutt's letter does not contain a jurat; see General Statutes § 3-94a (1) and (3); or a verification that the notary administered an oath; see General Statutes § 3-94a (1), (3) and (4); and, therefore, the letter is not a sworn statement.

[7] The affidavit from Dr. Marble, dated March 23, 2022, which also includes information on his background and credentials, states in relevant part: "On March 21, 2022, I was so alarmed by my personal observations of [the defendant's] physical health that I conducted a physical examination of him.

At the conclusion of the hearing, the court issued two orders on the plaintiffs' motion. The court declined to issue a capias but ordered the defendant to appear at the March 24, 2022 deposition. The court also denied the defendant's renewed motion for a protective order and reasoned that the defendant had not demonstrated that his alleged medical conditions were serious enough to excuse his attendance at his deposition. The court explained that "the [defendant's] medical issues, while potentially serious, are not currently serious enough to either require his hospitalization, or convince him to stop engaging in his broadcasts. [The defendant] cannot unilaterally decide to continue to engage in his broadcasts but refuse to participate in a deposition. . . . [If the defendant] develops escalating symptoms such that he is hospitalized, that change in circumstances would excuse his attendance at the court-ordered deposition."

On March 24, 2022, the plaintiffs filed a notice with the court indicating that the defendant did not attend

. . . Based on that assessment, I immediately advised [the defendant] to go to an [e]mergency [r]oom or call 911. . . . [The defendant] refused to do so. . . . I then advised him to stay at home and rest until further medical testing could be conducted. It is my understanding that [the defendant] has not remained home as advised. . . . I then arranged for [the defendant] to have a comprehensive medical workup, to be conducted by Dr. Amy Offutt—of Marble Falls, Texas. . . . [The defendant's] medical testing with Dr. Offutt was scheduled for this morning—March 23, 2022. . . . Based on my communications with Dr. Offutt's office, subsequent to [the defendant's] initial evaluation and testing, I stand by my recommendation that [the defendant] neither attend a deposition nor return to work until the test results are completed and returned. . . . In my opinion [the defendant] stands at serious risk of harm if he submits to stressors."

In a letter, dated March 23, 2022, Dr. Offutt made the following representations: "This morning, I had a medical visit with [the defendant] for acute medical issues that were time-sensitive and potentially serious. We started a comprehensive medical evaluation and he has labs that are pending to assess his . . . status. I have asked him to avoid too much stress until we have results from the blood tests this morning. I also gave him [emergency room] precautions if he develops escalating symptoms. As a result of these findings, I am advising him not to attend court proceedings for now."

the deposition scheduled for that day. On March 25, 2022, the plaintiffs filed a motion for civil contempt against the defendant.[8] On March 28, 2022, the defendant filed an objection to the plaintiffs' motion for contempt. On March 30, 2022, the court held a hearing on the plaintiffs' motion for contempt and, in an oral decision, granted the plaintiffs' motion, stating that "the court finds by clear and convincing evidence that the defendant . . . wilfully and in bad faith violated, without justification, several clear court orders requiring his attendance at his depositions on March [23] and March [24]. That is, the court finds that [the defendant] intentionally failed to comply with the orders of the court and that there was no adequate factual basis to explain his failures to obey the orders of the court." The court further ordered that the defendant "has the ability to purge the contempt . . . when [he] completes two full days of depositions at the office of [the] plaintiffs' counsel in Bridgeport. [The defendant] is to pay conditional fines of $25,000 each weekday beginning on Friday, April 1st, increasing by $25,000 per weekday . . . and it will be suspended on each day that [the defendant] successfully completes a full day's deposition . . . ."

On March 31, 2022, pursuant to General Statutes § 52-265a, the defendant filed a petition for an expedited public interest appeal of the trial court's contempt finding with our Supreme Court and an emergency motion to stay the court's order holding him in contempt until after our Supreme Court ruled on his petition.[9] This

[8] We note that, in the plaintiffs' motion for contempt, they alleged that, on March 25, 2022, the defendant went back on the air from his studio and told his audience that he had been suffering from an emergent medical condition that turned out to be "a blockage in his sinus," and now that the blockage has cleared, he "feels like a new person."

[9] The record reflects that, on the day the defendant filed the petition at the Supreme Court, the clerk returned his petition without consideration of its merits. The defendant did not subsequently file anything further regarding this public interest appeal.

appeal followed. On March 31, 2022, the defendant also filed an emergency motion to stay the trial court's orders, which the trial court denied. On April 1, 2022, the defendant filed, with this court, an emergency motion for review of the trial court's denial of his request to stay the trial court's orders pursuant to Practice Book § 61-14. On April 4, 2022, this court denied the defendant's emergency motion for review of the trial court's denial of his request for a stay. On April 5 and 6, 2022, the defendant appeared for a deposition at the offices of the plaintiffs' counsel in Bridgeport, Connecticut. On April 6, 2022, the defendant filed a motion for an order declaring that he be purged of contempt and for the clerk to return the paid fines he had deposited at the clerk's office. On April 14, 2022, the court granted the defendant's motion and directed the clerk to return $75,000 in fines to the defendant.[10]

I

The defendant claims that the court abused its discretion by holding him in contempt of court for failing to appear at his deposition after his counsel provided the court with an affidavit and two letters from his physicians attesting that he was too ill to attend the deposition.[11] Specifically, the defendant argues that the court

[10] We do not consider this appeal to be moot even though the defendant has been purged of contempt and the fines have been returned because the contempt finding may have collateral consequences for the defendant in the future. See *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 196, 167 A.3d 967 (2017) ("[w]e recognize that an appeal challenging the validity of a court's finding of contempt, even when purged by making payments, is not moot because a contempt finding has collateral consequences in that it may impact the contemnor's future status in the action").

[11] The defendant also argues that the court "relied on clearly erroneous findings of fact" when it found him in contempt after reviewing medical evidence from his physicians. Although it is unclear exactly what erroneous findings of fact the defendant believes the court relied on when making its contempt finding, we consider this to be in reference to the court's conclusion that his noncompliance was wilful.

improperly substituted its judgment about his health for that of his physicians. We are not persuaded.

"We begin by setting forth the legal principles relevant to this claim. Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . [C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is particularly harsh . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . . To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. . . . If we answer that question affirmatively, we then review the trial court's determination that the violation was wilful under the abuse of discretion standard." (Internal quotation marks omitted.) *Scott* v. *Scott*, 215 Conn. App. 24, 38–39, 282 A.3d 470 (2022). "Under the abuse of discretion standard, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Mazza* v. *Mazza*, 216 Conn. App. 285, 297–98, 285 A.3d

90 (2022), cert. granted, 346 Conn. 904, 287 A.3d 600 (2023).

The defendant does not challenge the court's findings that its orders requiring him to attend the March 23 and 24, 2022 deposition were clear and unambiguous, or that he did not attend the deposition.[12] Therefore, we focus our analysis on the sole issue of whether the court abused its discretion in determining that the defendant's violation of the court's orders was wilful.

"Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties." (Internal quotation marks omitted.) *Mitchell* v. *Bogonos*, 218 Conn. App. 59, 69, 290 A.3d 825 (2023).

In the present case, the court denied the defendant's motions for a protective order after reviewing, among other evidence, a letter and an affidavit from Dr. Marble, and a letter from Dr. Offutt, recommending that the defendant not attend the deposition due to a medical condition. The initial letter from Dr. Marble indicated that the defendant was "remaining home" under the care of his physician. The plaintiffs' counsel, however, alerted the court that the defendant was broadcasting his radio program live from his studio on March 22, 2022, when he purportedly was at home under the care of his physician. After the court issued an order requiring the defendant's attorney to disclose where the defendant's March 22 broadcast took place, the defendant's attorney confirmed that the defendant was, in fact, engaging in his live broadcasts from his studio at

[12] At oral argument before this court, the defendant's appellate counsel acknowledged that the trial court's orders were clear and unambiguous and that the defendant did not attend the deposition.

the same time his attorney was arguing in court that he was too ill to attend his deposition. In its denial of the defendant's motion for a protective order, the court reasoned that "the [defendant's] medical issues, while potentially serious, are not currently serious enough to either require his hospitalization, or convince him to stop engaging in his broadcasts. [The defendant] cannot unilaterally decide to continue to engage in his broadcasts, but refuse to participate in a deposition." We agree with the trial court that the undisputed fact that the defendant chose to host a live radio broadcast from his studio at the time of the scheduled hearing on his motion for a protective order significantly undercuts his claim that he was too ill to attend the deposition. We conclude that the court reasonably inferred, on the basis of the facts before it, that the defendant's failure to attend his deposition on March 23 and March 24, 2022, was wilful. Accordingly, the court did not abuse its discretion in finding the defendant in contempt of its orders.

II

The defendant next claims, for the first time on appeal, that the court violated his due process rights by not requesting additional information from his physicians regarding his medical condition prior to holding him in contempt.[13] Specifically, the defendant argues that, if the court suspected that his physicians' letters were tendered in bad faith, "the [c]ourt has a responsibility absent exigent circumstances to tread with caution" when evaluating a party's health and a court

[13] In his appellate brief to this court, the defendant specifically describes the gravamen of his due process claim to be that the trial court cannot "run roughshod over the unrebutted advice of a physician," and to do so "places litigants in the uncomfortable position of having to choose between their health and a judge's ire." Further, "[b]efore a judge makes a decision that countermands a doctor's orders, minimal due process requires that something more than what took place here occur."

should not make a determination as to whether a party's failure to abide by a court order was wilful "without [making a] further inquiry." We are not persuaded.

The defendant's claim that he did not receive the process that he was due focuses on his belief that the court improperly discredited the medical opinions of Dr. Marble and Dr. Offutt "on their face, ascribing the general disdain it felt toward [the defendant]—as evidenced by its prior rulings on sanctions—to his physicians. In any other context, the result would be, and should be even in this context, regarded as a shocking departure from judicial norms." The defendant's argument is not a model of clarity, but he appears to suggest that the court improperly rejected the "medical evidence [that he] tendered in the face of exigency" without having conducted a deeper inquiry. He argues that, "[i]f the [medical] letters were tendered in bad faith, the court could take what steps were necessary to vindicate the authority of the court in [an] orderly process and by the use of competent evidence." The defendant states that, "[i]f the trial court had reasons for stating that Dr. Marbles' instructions were not in fact made, or were not legitimate . . . then the trial court should have, and could have, requested additional information from the physicians. . . . The defendant would then have been in familiar territory sculp[t]ed by such cases as *State* v. *Esposito*, [192 Conn. 166, 179–80, 471 A.2d 949 (1984)], which provide interested parties the opportunity either to disclose otherwise confidential medical information, or face consequences."[14]

[14] In *Esposito*, our Supreme Court held that, "in certain circumstances, the privileged psychiatric records of a witness testifying for the state are subject to in camera review by the trial court so that the court can determine whether the accused's constitutional right of confrontation entitles him to access to those records; if the witness refuses to authorize such review, the witness' testimony generally must be stricken." *State* v. *Fay*, 326 Conn. 742, 744, 167 A.3d 897 (2017).

Initially, we note that the defendant's constitutional claim is unpreserved, as he did not adequately raise the claim before the trial court. Although he has adequately briefed the constitutional claim in his principal brief, he has failed to provide this court with any analysis of the reviewability of the unpreserved claim to invoke any extraordinary type of review, including review under the bypass doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). The defendant's failure to include any analysis of the reviewability of his unpreserved constitutional claim in his brief, however, does not bar our review of his claim under *Golding*.[15] See *State* v. *Elson*, 311 Conn. 726, 755, 91 A.3d 862 (2014). Further, we are persuaded that the defendant's analysis of his due process claim satisfies the first two prongs of *Golding* because the record is adequate for our review and a constitutional right is involved. Therefore, we turn to the third prong of *Golding* and consider whether he has satisfied his burden of demonstrating that a constitutional violation exists and deprived him of a fair trial.

"It is beyond question that due process of law . . . requires that one charged with contempt of court be

[15] "Under *Golding*, a party can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. [We are] free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances. . . . The test set forth in *Golding* applies in civil as well as criminal cases." (Internal quotation marks omitted.) *Tilsen* v. *Benson*, 347 Conn. 758, 787 n.15, 299 A.3d 1096 (2023). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Armadore*, 338 Conn. 407, 437, 258 A.3d 601 (2021).

advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. . . . Adjudication of a motion for civil contempt implicates these constitutional safeguards." (Internal quotation marks omitted.) *Barr* v. *Barr*, 195 Conn. App. 479, 484, 225 A.3d 972 (2020). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (Internal quotation marks omitted.) *Mathews* v. *Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The defendant has not provided us with any persuasive authority to support his argument that, because the court found the representations of his physicians to be lacking, it was obligated to affirmatively seek additional evidence concerning the defendant's medical condition prior to making a determination as to whether he wilfully disregarded the court's orders to attend the deposition. We conclude that the defendant's novel claim requires scant analysis.[16]

In the present case, the court held a hearing on the plaintiffs' motion for contempt and provided the defendant with an opportunity to be heard. The defendant was represented by counsel at the contempt hearing. Because of the recent prior hearings concerning the defendant's duty to attend his deposition, the court had evidence before it that was relevant to the contempt hearing. At the beginning of the contempt hearing, however, the court gave the defendant an opportunity to provide additional evidence when it asked the defendant's attorney, "Are you presenting any new evidence

[16] We note that the defendant's disparaging remarks concerning the fairness of the trial court, namely, the court's "high-handed rejection of [the] medical evidence" and its transfer of its "general disdain" of the defendant to his physicians, lack any support in the record.

today or are we proceeding on what's been submitted to date?" The defendant's attorney stated that "as far as what [we are] prepared to do today, we were proceeding on [what has] been submitted." During the contempt hearing, the defendant's attorney requested additional time to gather evidence and to decide whether to prepare a witness for the hearing, which the court addressed by noting, "[this hearing] was scheduled one week ago. . . . I never received any motion for continuance, formally or informally, from any party indicating that more time was needed to arrange for witness testimony or . . . other evidence." The defendant's attorney thereafter did not ask the court for a continuance and did not suggest that the defendant wished to submit any further evidence beyond what had been submitted.

Therefore, the record reflects that the defendant was provided sufficient due process of law regarding the court's contempt finding, as he was allowed a meaningful opportunity to be heard during the contempt hearing, was represented by counsel during the proceeding, and was given the opportunity to submit additional evidence. The court did not in any way preclude the defendant from presenting additional medical information to the court or from asking the court to review such information under seal in an in camera review, if he wished to do so. Instead, the defendant, who had notice that the court was considering the plaintiffs' motion for contempt, chose not to submit any additional evidence. As stated by the United States Supreme Court, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw* v. *United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008). Thus, our adversarial system places the responsibility on the parties and their counsel, rather than on the

court, to frame the issues and to submit additional information on behalf of their client if they deem it necessary.[17]

As we stated in part I of this opinion, the court reasonably exercised its discretion by concluding that the undisputed evidence established that the defendant, by going to work, disregarded the medical opinions that he had submitted to the court, and, therefore, his failure to comply with the court's orders to attend his deposition reflected a wilful disregard for the court's authority. The defendant's due process claim fails the third prong of *Golding* because the constitutional violation does not exist.

The judgments are affirmed.

In this opinion the other judges concurred.

---

[17] Our Supreme Court has articulated that "[t]he American legal system historically has been considered more adversarial than most, and its basic principle is that the parties, not the judge, have the major responsibility for and control over the definition of the dispute. . . . The justifications for the adversarial system are that self-interested adversaries will uncover and present more useful information and arguments to the decision maker than would be developed by the judicial officers in an inquisitorial system . . . the system preserves individual autonomy and dignity by allowing a person the freedom to make his case to the court . . . and a party who is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to present his case . . . is likely to accept the results whether favorable or not . . . . In addition, requiring parties to frame the issues promotes judicial economy, efficient resolution of disputes, and finality . . . . Finally, it has been argued that the adversarial system promotes judicial neutrality and the integrity of the adjudicative process itself . . . ." (Citations omitted; internal quotation marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 146–47, 84 A.3d 840 (2014). Indeed, the defendant's claim would subvert the adversarial process, by imposing an affirmative duty on the court to buttress evidence proffered by one party that it found inadequate.