HUGH F. HALL *v.* DEBORAH HALL
(SC 20181)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiff appealed to the Appellate Court from the trial court's judgment of civil contempt rendered against him in the course of marital dissolution proceedings. Following the commencement of the dissolution action, the parties entered into a stipulation, which was approved by the trial court and made a court order. The stipulation required that certain funds be deposited into a joint account and provided that the signatures of both parties were required for withdrawals from that

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Justice Mullins was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

account. In contravention of the stipulation, the parties set up a joint account that did not require signatures for withdrawals. After the plaintiff withdrew money from the account and placed it in a separate, personal account, the defendant filed a motion for contempt, which the trial court granted. The trial court thereafter rendered a judgment of dissolution, incorporating the parties' separation agreement, which contained a provision that they would file a joint motion to open and vacate the trial court's contempt finding. Although the parties subsequently filed the joint motion to open and vacate, the trial court denied it. While the plaintiff's appeal to the Appellate Court was pending, that court ordered the trial court to issue an articulation, in which the trial court stated, inter alia, that its decision to grant the defendant's motion for contempt was predicated on its finding that the plaintiff had violated the court's prior order when he initially deposited funds into the noncompliant joint account and on two other occasions when the plaintiff made unilateral withdrawals from the account. The plaintiff claimed in his appeal to the Appellate Court that the trial court had abused its discretion in finding him in contempt without addressing his claim that, in violating the court order, he acted in reasonable reliance on the advice of counsel. The Appellate Court affirmed the trial court's judgment, concluding that, although the plaintiff testified before the trial court that he had consulted with counsel prior to withdrawing funds from the joint account, he did not testify that counsel advised him to do so. With respect to the trial court's denial of the parties' joint motion to open and vacate, the Appellate Court determined that, although the basis for that motion was that the contempt judgment would have a deleterious effect on the plaintiff's career, the trial court properly denied it because the plaintiff had not offered any evidence supporting that assertion. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court did not abuse its discretion in finding the plaintiff in contempt on the basis of his wilful violation of a court order: the plaintiff did not present testimony or other evidence during the hearing on the motion for contempt that would have adequately apprised the trial court that he intended to claim that he acted reasonably in reliance on the advice of counsel, and, although the plaintiff did make that claim for the first time in his motion for reconsideration of the trial court's finding of contempt, he failed to present sufficient evidence to substantiate his claim; moreover, the trial court found three independent violations of the court order by the plaintiff, and, even if this court agreed with the plaintiff that his testimony regarding his consultations with counsel was sufficient to demonstrate that he reasonably relied on the advice of counsel in making the withdrawals, he did not testify that he had consulted with counsel prior to setting up the noncompliant joint account or that he had done so in reasonable reliance on the advice of counsel, and the plaintiff admitted

that he did not recall raising the issue of the noncompliant account with his attorney; furthermore, certain e-mail exchanges between the plaintiff and counsel, which the plaintiff offered as evidence in connection with his motion for reconsideration, did not support his claim that he acted on the advice of counsel but, rather, supported the trial court's conclusion that the plaintiff's dissatisfaction with his attorney's services was not a basis for reconsideration of the court's finding of wilful contempt.

2. The Appellate Court correctly concluded that the trial court did not abuse its discretion in denying the parties' joint motion to open and vacate the finding of contempt: the trial court enjoyed broad discretion in determining whether to grant the joint motion to open and vacate, and the court was not required to grant the motion merely because the parties were in agreement; moreover, the plaintiff failed to offer any evidence that the contempt finding would negatively impact his career, which, the plaintiff contended, formed the basis for the granting of the motion.

Argued October 17, 2019—officially released April 13, 2020**

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Colin*, *J.*, issued an order in accordance with the parties' stipulation; thereafter, the court, *Tindill*, *J.*, granted the defendant's motion for contempt and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court; subsequently, the court, *Hon. Stanley Novack*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Tindill*, *J.*, denied the parties' joint motion to open and vacate the judgment of contempt, and the plaintiff filed an amended appeal with the Appellate Court, *Lavine*, *Sheldon* and *Bear*, *Js.*, which affirmed the trial court's judgment of contempt, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

** April 13, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Barbara M. Schellenberg, with whom was *Richard L. Albrecht*, for the appellant (plaintiff).

Thomas P. Parrino and *Randi R. Nelson* filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

Opinion

KAHN, J. The plaintiff appeals[1] from the judgment of the Appellate Court, which affirmed the judgment of civil contempt rendered against the plaintiff. The plaintiff claims that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in (1) finding the plaintiff in contempt of court on the basis of the wilful violation of a court order, and (2) denying the parties' joint motion to open and vacate the judgment of contempt. We affirm the judgment of the Appellate Court.

The Appellate Court set forth the following relevant facts, which are undisputed. "The parties were married on August 10, 1996, and have three children together. On February 3, 2014, the plaintiff commenced a dissolution action. The parties subsequently entered into a pendente lite stipulation on October 27, 2014, which provided in relevant part: 'The funds currently being held in escrow [by a law firm] in the approximate amount of $533,588 shall be released to the parties for deposit into a joint bank account requiring the signature of both parties prior to any withdrawals . . . .' The court, *Colin*, *J.*, approved the parties' stipulation and made it

[1] This court granted the plaintiff's petition for certification to appeal, limited to the following issues: "(1) Did the Appellate Court properly conclude that the trial court did not abuse its discretion in finding the plaintiff in contempt of court based on the wilful violation of a court order?

"(2) If the answer to the first question is 'yes,' did the Appellate Court properly conclude that the trial court did not abuse its discretion by denying the parties' joint motion to open and vacate the judgment of contempt?" *Hall* v. *Hall*, 330 Conn. 911, 193 A.3d 48 (2018).

a court order. After this order, the parties set up a joint account and transferred the escrow funds into it.

"Approximately one year later, on September 23, 2015, the defendant, Deborah Hall, filed a motion for contempt. She alleged that on September 22, 2015, the plaintiff committed a wilful violation of the October 27, 2014 court order when he withdrew the sum of $70,219.99 from the joint account—the balance of the account at the time—and placed it into a separate, personal account.[2] Following an evidentiary hearing, the court, *Tindill*, *J.*, on December 7, 2015, granted the defendant's motion for contempt." *Hall* v. *Hall*, 182 Conn. App. 736, 738–39, 191 A.3d 182 (2018).

The plaintiff filed a motion seeking reconsideration of that decision on December 21, 2015. The trial court, after hearing oral argument from the parties, denied the relief requested in that motion on January 4, 2016, without issuing a written decision. After the court rendered judgment on the defendant's motion for contempt; see footnote 2 of this opinion; on January 27, 2016, the parties entered into a separation agreement, which the court, *Hon. Stanley Novack*, judge trial referee, accepted on that date and incorporated into the judgment of dissolution. Section 10 of the separation agreement provides in relevant part: "The parties stipu-

[2] "The plaintiff also filed a motion for contempt on September 24, 2015, alleging that the defendant violated the same October 27, 2014 order on various occasions. The court granted the plaintiff's motion in part and denied it in part. The defendant did not submit a brief in this appeal and, therefore, does not challenge the contempt judgment as to her. As discussed in this opinion, however, the court's contempt judgment against the defendant is partially implicated by this appeal insofar as the joint motion to open and vacate the judgments of contempt sought to vacate the court's judgments of contempt rendered against each of the parties. Because the judgment of contempt against the defendant is not otherwise implicated by this appeal, however, references in this opinion to the judgment of contempt refers to the judgment rendered against the plaintiff." (Emphasis omitted.) *Hall* v. *Hall*, 182 Conn. App. 736, 739 n.1, 191 A.3d 182 (2018).

late and agree that they will file a joint motion to open and vacate the findings of contempt in that they believe such findings could interfere with the parties' future employment. . . . The parties understand that this motion must be filed within four (4) months of each of the orders and it is within the discretion of the [c]ourt to act thereon." On January 27, 2016, the plaintiff filed an appeal with the Appellate Court from the trial court's contempt judgment and its January 4, 2016 decision on his motion for reconsideration.

On February 1, 2016, relying on § 10 of the separation agreement, the parties filed a joint motion to open and vacate the judgment of contempt in part. On March 9, 2016, the trial court, *Tindill*, *J.*, denied the motion without issuing a written decision. On March 28, 2016, the plaintiff filed an amended appeal with the Appellate Court, challenging the denial of the motion to open and vacate.

On July 15, 2016, the plaintiff filed a motion requesting that the trial court articulate, inter alia, the factual and legal bases for its decision on his motion for reconsideration. The plaintiff's July 15, 2016 motion for articulation also requested an articulation of the factual and legal bases for the court's denial of the parties' joint motion to open and vacate the judgment of contempt. The trial court denied the motion for articulation on July 27, 2016. On October 26, 2016, the Appellate Court granted the plaintiff's motion for review of the trial court's denial of the plaintiff's motion for articulation and ordered the trial court to issue both an articulation of the basis for its decision on the plaintiff's motion for reconsideration and a written memorandum of decision setting forth the factual and legal bases for the denial of the joint motion to open and vacate the contempt judgment. On January 9, 2017, in compliance with the order of the Appellate Court, the trial court issued both a memorandum of decision setting forth the factual and

legal bases for its denial of the joint motion to open and vacate and an articulation setting forth the legal and factual bases for its denial of the relief requested in the plaintiff's motion for reconsideration. In the trial court's articulation, the court clarified that its decision granting the defendant's motion for contempt was predicated on its finding that the plaintiff had thrice violated its October 27, 2014 order: when the plaintiff initially deposited the funds in the joint account, which did not comply with the court order, and on two separate occasions when the plaintiff made unilateral withdrawals from that account, $237,643.11 on April 28, 2015, and $70,219.99 on September 22, 2015.

The Appellate Court affirmed the judgment of the trial court. As to the plaintiff's claim that the trial court abused its discretion in finding him in contempt without addressing the plaintiff's claim of reasonable reliance on the advice of counsel, the Appellate Court's review of the record revealed that, although the plaintiff had testified that he had consulted with counsel prior to withdrawing funds from the joint account, he did not testify that he was advised by his counsel to do so. *Hall* v. *Hall*, supra, 182 Conn. App. 748. In rejecting the plaintiff's second claim, that the trial court abused its discretion in denying the motion to open and vacate the judgment of contempt, the Appellate Court reasoned that, although the basis for that motion was that the judgment would have a deleterious effect on the plaintiff's career, the trial court properly had denied the motion because the plaintiff had not offered any evidence supporting that assertion. Id., 755–56. This certified appeal followed.

I

We first address the plaintiff's claim that the Appellate Court incorrectly concluded that the trial court acted within its discretion in finding the plaintiff in

contempt on the basis of the wilful violation of a court order. The plaintiff contends that the trial court abused its discretion because it failed to consider his testimony during the hearing on the motion for contempt that, when he violated the October 27, 2014 order, he was relying in good faith on his counsel's advice. The plaintiff further claims that the Appellate Court incorrectly concluded, based on its review of the record, that, during the contempt hearing, the plaintiff had not adequately apprised the trial court of his reliance on this theory. We agree with the Appellate Court's conclusion that the record does not support the plaintiff's claim that the trial court abused its discretion in failing to consider whether the plaintiff's actions were not wilful because he reasonably relied on the advice of counsel. As we explain herein, the plaintiff did not present testimony or evidence during the hearing on the motion for contempt that would have adequately apprised the trial court that he intended to claim that he acted reasonably in reliance on the advice of counsel. Although the plaintiff did make that claim for the first time in his motion for reconsideration, he failed to submit sufficient evidence to substantiate the claim and to warrant reconsideration of the contempt judgment.

The following additional, undisputed facts and procedural history, as set forth by the Appellate Court, are relevant to our resolution of this claim. "After the parties set up the joint bank account pursuant to the court's October 27, 2014 order, they knew that the account did not comply with that order 'the very first day' they opened it. More specifically, the joint account they set up permitted online access and, therefore, did not require signatures from either party, as required by the order, prior to the withdrawal or transfer of funds. The plaintiff testified that banks no longer require dual signatures on accounts. Nonetheless, the court order mandating that the funds be placed in an account 'requiring

the signature of both parties prior to any withdrawals' was not modified before the defendant filed her motion for contempt." Id., 741.

On April 28, 2015, the plaintiff unilaterally withdrew $237,643.11 from the joint account and moved the money to a savings account solely in his name. The plaintiff testified that he did so because he was concerned that the defendant, who struggled with addiction and had previously "squandered funds" in connection with her substance abuse problems, would "go on another bender" and deplete the money in the joint account. On September 22, 2015, the plaintiff unilaterally withdrew the remaining amount in the joint account, $70,219.99, and placed it into a separate, personal account.

The court heard testimony and received evidence on the motion for contempt on three separate days, over the course of several months. During the hearing, the plaintiff, who is an attorney licensed to practice law in two states and, at the time of these proceedings, was employed as a senior vice president of a bank, testified at various times that he had "consulted with counsel" during the pendency of the case. Specifically, he testified on two occasions that he had consulted with counsel prior to the September 22, 2015 withdrawal from the joint account. On November 2, 2015, the court asked the plaintiff whether he was represented by counsel when he made the September 22, 2015 withdrawal from the joint account. The plaintiff responded: "Yes, I did consult with counsel." On December 2, 2015, the defendant's counsel questioned the plaintiff as to why he did not immediately move the money from the joint account when he learned in August, 2015, that the defendant had relapsed. In the context of that line of questioning, the court asked the plaintiff when he removed the money from the joint account. The plaintiff responded:

"Sometime in September, [2015], after consulting with my counsel about the situation."

The plaintiff also testified that, on two occasions, after discussions with counsel, he had determined *not* to unilaterally withdraw money from the joint account in August, 2015, when he learned that the defendant had relapsed. The plaintiff offered the following testimony to explain the timing of his withdrawal: "That's when I was discussing with my counsel the appropriate course of action, because once there was the violation by [the defendant] of the verbal agreement that we had online access, where we'd agreed we would just not do it even though the court order said something different from what we were doing, we were—we thought [we] were about to settle the entire case, we felt that it was best to just see it through. And it was only when the settlement process fell completely apart and she appeared to be acting erratically, we became more concerned that something had to be done." When the court subsequently asked him what prevented him from withdrawing the funds prior to September, 2015, he testified: "Nothing prevented me. It was more in discussion with counsel on what was the appropriate thing to do in that period of time when we were at the eve of settling the case."

At one point during the hearing, the plaintiff explained that, because he had consulted with counsel during the "entire process," he believed he should not be found in contempt. Specifically, the plaintiff testified: "I believe that what I was doing was in order to comply with Judge Colin's orders from October, 2014. And that I was not utilizing the funds in any way in violation of the spirit of that agreement and that I took steps to try and work with [the defendant] to comply with the order, set up a compliant account, but at that point in time, there was no further cooperation on her side. Furthermore, I would say throughout the entire process, I was

consulting with counsel about what was the proper course of action." At the end of the hearing, the parties waived their right to present argument to the court and agreed that the record was sufficient to allow the court to decide the motion for contempt.

The plaintiff presented no testimony that he consulted with counsel prior to setting up the joint account. In fact, when the court asked the plaintiff when his or the defendant's counsel became aware that the joint account did not comply with the court order, the plaintiff first responded that he could not recall whether he notified his counsel of the problem. When the court followed up by asking whether he had contacted his counsel to explain that he had set up a noncompliant account, the plaintiff responded that he did not believe that either he or the defendant had raised it as an issue with their respective counsel.

The trial court's December 7, 2015 memorandum of decision found that the October 27, 2014 order was clear and unambiguous, and that the defendant had engaged in self-help and wilfully violated the order when he unilaterally withdrew funds from the joint account on April 28, 2015, and September 22, 2015.[3] It is evident in reviewing the memorandum of decision that the trial court, at the time it issued its decision, was unaware of any intent by the plaintiff to raise the claim that his violations of the order were not wilful because he reasonably relied on the advice of counsel.

[3] In a subsection of the memorandum of decision entitled "Plaintiff's Violations of the Order," the court made clear that it considered the plaintiff's two unilateral withdrawals from the joint account to have violated the October 27, 2014 order. Although the court also stated that the joint account did not comply with the order, it did not expressly state that it found that the parties had violated the order when setting up the joint account. As we explained in this opinion, however, the trial court later clarified that it found that the setting up of the joint account was a violation of the court order.

The plaintiff does not dispute that his actions violated the October 27, 2014 order.

The court summarized its understanding of the arguments advanced by the plaintiff in support of his claim that the violations were not wilful as follows: "He offers a variety of reasons: (1) the original account did not 'comply' with the court order in that two signatures were not required for withdrawal, (2) he learned that the defendant had relapsed . . . and was using cocaine and drinking alcohol as of August 13, 2015, (3) the defendant [had] previously misappropriated tens of thousands of dollars in marital assets, (4) the parties were working amicably toward resolution of their differences and had reached agreement . . . and (5) the plaintiff did not wish to pursue the proper legal channels for compliance with the court order due to exorbitant legal fees which would only further diminish the marital estate to be divided." In its decision, the court rejected each of the arguments it understood the plaintiff to be advancing and made no reference to any argument by the plaintiff that his violations of the October 27, 2014 court order were not wilful because he had reasonably relied on the advice of counsel.

On December 21, 2015, two weeks after the court issued its memorandum of decision granting the defendant's motion for contempt, the plaintiff, representing himself, moved for reconsideration, arguing that the court had misapprehended the facts and had failed to address the issue of whether his actions were not wilful because he acted in reasonable reliance on the advice of counsel. In his motion for reconsideration, the plaintiff conceded that, during the hearing on the motion for contempt, his counsel did not pursue the theory that his violations of the court order were not wilful because he was acting on the advice of counsel. Specifically, the plaintiff argued: "During a hearing on the [motion for contempt] the court inquired of the plaintiff as to whether in moving funds from the parties' joint account he acted on the advice of counsel, to which he testified

that he had. The plaintiff's counsel did not pursue this line of questioning and *did not raise it in an oral argument*." (Emphasis added.) In his motion for reconsideration, the plaintiff claimed for the first time that his counsel had directed him to move the funds, and also alleged that his counsel had intentionally concealed that fact from the court. The plaintiff requested that, on reconsideration, the trial court consider additional information—e-mail exchanges between the plaintiff and his counsel—that he claimed demonstrated that he relied on the advice of counsel when he withdrew funds from the joint account in violation of the court order. In support of his motion for reconsideration, the plaintiff alleged that a contempt finding "could negatively impact his career and earnings potential." On December 24, 2015, the plaintiff, through his new counsel, filed an amendment to his motion for reconsideration to correct the date that he transferred the funds from the joint account into his personal account.

In its articulation of the factual and legal bases for its decision on the plaintiff's motion for reconsideration, the trial court noted that, "[i]n reaching its decision to deny [the relief requested in] the motion, the court heard argument from counsel for each party and carefully reviewed the motion, the [plaintiff's] amendment thereto, and reconsidered the evidence submitted during the course of the multiple day hearing."[4] In reaching

[4] Both the plaintiff and the Appellate Court's decision characterize the trial court's denial of the motion for reconsideration as a refusal to consider his claim that he did not act wilfully because of his reliance on the advice of counsel and his attachments in support of that claim. Although we understand how the trial court's summary denial of the motion might lead to the plaintiff's conclusion, a review of the record and the trial court's articulation of its decision on the motion for reconsideration demonstrates that its order is more properly characterized as a grant of the motion for reconsideration but a denial of the relief requested therein. In its articulation, the trial court specifically referred to and addressed the arguments raised in the motion for reconsideration, including the plaintiff's advice of counsel claim.

the merits of the plaintiff's motion for reconsideration, the trial court rejected the plaintiff's assertions that the court had misapprehended the facts and that his conduct was not wilful because he relied on the advice of counsel who subsequently refused to report it to the court. Specifically, the trial court noted that "the [plaintiff's] dissatisfaction with the services and counsel of his attorney of record during the evidentiary hearing [on the motion for contempt] is not a basis for reconsideration of the court's finding of wilful contempt based on the evidence . . . ." The court also rejected the plaintiff's reliance on the Appellate Court's decision in *O'Brien* v. *O'Brien*, 161 Conn. App. 575, 591 n.15, 128 A.3d 595 (2015), rev'd, 326 Conn. 81, 161 A.3d 1236 (2017), in support of the proposition that "a party may shield [himself] . . . from a finding of wilful contempt by showing that [he] relied on the advice of legal counsel." The trial court noted that, contrary to the plaintiff's argument, the Appellate Court took no position on that question in *O'Brien*. See id. The trial court also noted that, in light of its factual finding that "the act of transferring funds by the [plaintiff] in violation of the court order was intended to circumvent the [defendant's] access," the present case was factually distinguishable from *O'Brien* because, in *O'Brien*, the trial court declined to hold the plaintiff in contempt inasmuch as it found that the plaintiff's actions were not wilful or contumacious. The trial court in the present case also considered it significant that "the [plaintiff] is a licensed attorney in New York and Massachusetts and therefore has a better understanding and appreciation of the law and legal procedures than the average litigant or layperson . . . ."

Because the crux of the plaintiff's claim is that the trial court abused its discretion in failing to address an argument that he raised to that court in support of his claim that his actions were not wilful, we must first

resolve the threshold issue of whether he did in fact apprise the trial court of that argument. Our review of the record reveals that the plaintiff's motion for reconsideration was the first time that he had argued that his actions were not wilful because he undertook them in reasonable reliance on the advice of counsel to withdraw funds from the joint account. As we have detailed in this opinion, at the contempt hearing, the plaintiff testified on numerous occasions that he consulted or had discussions with counsel. We agree with the Appellate Court, however, that the plaintiff has not pointed to *any* testimony or any other evidence presented during the contempt hearing demonstrating that his counsel advised him to withdraw money unilaterally from the joint account and that he made the withdrawals in reasonable reliance on that advice.[5] Having established that the plaintiff adequately raised, in his motion for consideration, his claim that he acted on advice of counsel, we now turn to the claims that he raised before the trial court and that court's bases for its contempt order and subsequent denial of the relief requested in his motion for reconsideration.

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *In re Leah S.*, 284 Conn. 685, 692, 935 A.2d 1021 (2007). Our review of a trial court's judgment of civil contempt involves a two part

[5] The plaintiff argues that the Appellate Court improperly engaged in fact-finding when it reviewed the record to determine whether he argued to the trial court that he acted in reasonable reliance on the advice of counsel. To the contrary, the Appellate Court's analysis, like our own, focuses on whether the trial court was adequately apprised of the plaintiff's intent to argue that he had acted in reliance on the advice of counsel. The only available method for resolving that issue is to review the record. The Appellate Court properly considered all of the evidence that the plaintiff introduced that arguably could have alerted the trial court to his reliance on that theory and concluded it was inadequate. Nothing in that analysis involved fact-finding.

inquiry. "[W]e first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 380, 107 A.3d 920 (2015). "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." (Citation omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 98–99, 161 A.3d 1236 (2017).

The trial court found *three* independent violations of the October 27, 2014 order by the plaintiff—the opening of the noncompliant, joint account and the two unilateral withdrawals. Even if we agreed with the plaintiff that his testimony, during the evidentiary hearing, regarding his consultations with counsel was sufficient to demonstrate that he reasonably relied on the advice of counsel in making the unilateral withdrawals—and we do not—he did not testify that he had consulted with counsel prior to setting up the joint account or that he did so in reasonable reliance on the advice of counsel. To the contrary, when questioned by the court, the plaintiff admitted that he did not recall raising the issue of the noncompliant, joint account with his attorney.

Likewise, the plaintiff's motion for reconsideration does not support his claim that his conduct was not wilful because he acted on the advice and at the direction of his counsel. The evidence proffered in support of his claim consisted of e-mail exchanges between him and his counsel. The e-mail exchanges are not entirely clear because they lack some context, but they do appear to involve a discussion of whether the plaintiff should move funds from the joint account without first obtaining the defendant's approval. A reasonable reading of them reveals the following: The plaintiff e-mailed his counsel on September 8, 2015, requesting that a "motion for permission to control the joint funds" be filed, highlighting that the defendant had taken funds from the account. In response, on the same day, the plaintiff's counsel reminded him that "[he] suggested [the plaintiff] move the funds out of [the] Chase [account] and into a joint account with controls. That didn't happen?" The plaintiff responded by indicating that he did not do so because he had been out of town, had been busy, "[had] to time things carefully," and "need[ed] access to that money more than [the defendant did]." The plaintiff's counsel urged him to "just move the funds" to an account with joint controls in compliance with the court order, which would obviate the need for a motion for permission to control the joint funds, because the plaintiff would then "have control. Not exclusive . . . mutual control as the stip[ulation] intended." When the plaintiff continued to insist on filing a motion for exclusive control over the joint funds, his counsel responded, "move funds Monday, notifying [the defendant]. No motion." The plaintiff's counsel also reminded the plaintiff that, although the stipulation required the defendant to sign off on his withdrawals from the joint account, it also "entitled [the plaintiff to] take [$8000] out a month to pay for expenses in excess of [his] income . . . ." Contrary to

the plaintiff's claim, it is reasonable to conclude that the exchanges do not establish that he acted on the advice of counsel. The e-mail exchanges support the trial court's conclusion that the plaintiff's "dissatisfaction with the services and counsel of his attorney of record during the evidentiary hearing is not a basis for reconsideration of the court's finding of [wilful] contempt based on the evidence . . . ." Given the plaintiff's failure to present sufficient evidence to support a finding that he acted on advice of counsel,[6] the trial court's denial of the relief requested in the plaintiff's motion for reconsideration was not an abuse of discretion.

II

We next consider whether the Appellate Court correctly concluded that the trial court did not abuse its discretion by denying the parties' joint motion to open and vacate the judgment of contempt. The plaintiff argues that, in denying the joint motion, the trial court improperly ignored the stipulation of the parties that they believed that a contempt finding "could interfere with the parties' future employment." (Internal quotation marks omitted.) We are not persuaded.

The following additional facts and procedural history are relevant to our resolution of this question. Consistent with § 10 of the parties' separation agreement, on February 1, 2016, within the four month period set by General Statutes § 52-212a, the parties filed a joint motion to open and vacate the judgment of contempt. In the joint motion, the parties submitted that it would be in the interest of justice for the court to vacate the

[6] Because we conclude that the plaintiff did not establish that his actions were not wilful because he acted in reasonable reliance on the advice of counsel, we need not resolve whether such a defense would have had merit. Neither this court nor the Appellate Court has addressed the issue of whether acting on the advice of counsel is a viable defense in a contempt proceeding. See *Baker* v. *Baker*, 95 Conn. App. 826, 832 n.7, 898 A.2d 253 (2006).

findings of contempt as to both parties and to leave the compliance orders in force. See footnote 2 of this opinion. The plaintiff's counsel argued in support of the motion that a contempt finding would have a deleterious effect on the plaintiff's career. The plaintiff's counsel further noted that, as an attorney who "has licenses in the securities field," the plaintiff is required to report to licensing organizations whether he had been held in contempt. During the hearing on the joint motion to open, the trial court questioned the plaintiff's claim that he was in a unique position because he had securities certifications and licenses, observing generally that others are subject to similar oversight and reporting requirements. The plaintiff did not introduce any evidence to support his claim that a contempt finding would negatively impact his career.

In the trial court's memorandum of decision, issued in compliance with the order of the Appellate Court, the court set forth the factual and legal bases for its denial of the motion to open and vacate the judgment of contempt. The court observed in its decision that there had been no evidence presented that "the parties' circumstances are unique or distinguishable such that findings of [wilful] contempt, made after due process of law in accordance with applicable rules of practice and statutory authority, should be vacated in the interests of justice." (Footnote omitted.) The court also noted that the plaintiff had not argued during the hearing on the motion for contempt that a finding of contempt would negatively impact his career.

We begin by setting forth the principles that guide our review. "We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its dis-

cretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 440, 93 A.3d 1076 (2014).

The primary basis that the trial court relied on in denying the parties' motion to open and vacate the judgment of contempt was that the plaintiff presented no evidence to support his claim that a contempt finding would negatively impact his career. The court also considered that, prior to arriving at its finding that the plaintiff had wilfully violated the October 27, 2014 court order, it had given ample opportunity to the parties to present argument and to introduce evidence on the motion for contempt. Based on this record, we conclude that the Appellate Court correctly concluded that the trial court did not abuse its discretion in denying the motion to open and vacate the judgment of contempt.

We find unpersuasive the plaintiff's reliance on the fact that the motion to open and vacate the judgment of contempt was made jointly and was pursuant to the parties' stipulation that they would seek to have the judgment of contempt vacated. The trial court enjoyed broad discretion in determining whether to grant the motion to open and vacate the judgment of contempt—neither the parties' joint motion nor their stipulation narrowed the breadth of that discretion. See *O'Brien* v. *O'Brien*, supra, 326 Conn. 96 ("It has long been settled that a trial court has the authority to enforce its own orders. This authority arises from the common law and is inherent in the court's function as a tribunal with the power to decide disputes."), citing *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 737–38, 444 A.2d 196 (1982). In *O'Brien*, this court noted that a trial

court's enforcement power is "necessary to preserve its dignity and to protect its proceedings." (Internal quotation marks omitted.) *O'Brien* v. *O'Brien*, supra, 96–97, quoting *Allstate Ins. Co.* v. *Mottolese*, 261 Conn. 521, 530, 803 A.2d 311 (2002); see also *Middlebrook* v. *State*, 43 Conn. 257, 268 (1876) ("[a] court of justice must of necessity have the power to preserve its own dignity and protect itself"). A party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in "self-help" by disobeying a court order to achieve the party's desired end. The court was not required to grant the motion merely because the parties were in agreement.

The plaintiff points to various aspects of the record that he claims the trial court and the Appellate Court should have considered in determining whether he had offered any evidence in support of his assertion that his employment would be negatively impacted by the contempt finding. Specifically, he points to the following: (1) the joint stipulation, in which the parties stated that they believed that the contempt finding could interfere with the plaintiff's employment, (2) the trial court's finding that the plaintiff is an attorney employed as the senior vice president of a bank, and (3) the defendant's representation that she "would like to move forward with her life." (Internal quotation marks omitted.) None of this information calls into question the trial court's finding that the plaintiff failed to offer any evidence that the contempt finding would negatively impact the plaintiff's career.

The plaintiff also argues that, in its memorandum of decision setting forth the factual and legal bases for its denial of the joint motion to open and vacate the judgment of contempt, the trial court improperly discussed both the possible reasons that may have motivated the defendant to join the motion to open and vacate, and the amount of time that the court spent

hearing argument and receiving evidence on the motion for contempt. We find neither of these arguments persuasive. The trial court's decision properly focused on the failure of the plaintiff to produce evidence that a finding of contempt could negatively impact his career. Neither the court's discussion of the defendant's possible motives in agreeing to the stipulation nor its discussion of the amount of time the court allocated to the contempt hearings calls that determination into question.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

MARY BETH FARRELL ET AL. *v.* JOHNSON AND JOHNSON ET AL.
(SC 20225)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiffs, M and V, sought to recover damages from, among others, the defendant H, a urogynecologist, for, inter alia, lack of informed consent and innocent misrepresentation in connection with an unsuccessful surgery in which H implanted a mesh product in M's body for the purpose of treating M's pelvic organ prolapse. M experienced bleeding and pain after the procedure, and, despite several follow-up procedures to alleviate the pain and to remove the mesh product, her pain continued. M subsequently was diagnosed with nerve damage. Prior to trial, the plaintiffs sought to introduce into evidence two articles from medical journals containing certain statements regarding the limited data about the mesh product used in the present case and the experimental nature of the implantation procedure, including statements that patients should consent to the surgery with an understanding of the risks and experimental nature of the procedure. The plaintiffs claimed that the statements in the articles were admissible to demonstrate that H knew or should have known that the mesh surgery was experimental and the subject of medical controversy, and that H failed to properly advise M of the risks associated with the mesh product. Following a hearing, the trial court determined that the articles were being offered not for purposes of notice but for the truth of the matter asserted therein and, therefore,

were inadmissible hearsay. At the conclusion of the trial, the court directed a verdict in favor of H and another remaining defendant on the innocent misrepresentation claim. The jury subsequently returned a verdict in favor of the defendants on the remaining claims, and the trial court rendered judgment thereon. Thereafter, the plaintiffs appealed to the Appellate Court, which affirmed the trial court's judgment. The Appellate Court concluded, inter alia, that the trial court did not abuse its discretion by excluding the two journal articles on the ground that they were inadmissible hearsay and that the trial court properly directed a verdict for the defendants on the innocent misrepresentation claim because innocent misrepresentation claims primarily apply to business transactions, typically between a buyer and seller. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court did not abuse its discretion in declining to admit into evidence the two journal articles offered by the plaintiffs on the ground that those articles were inadmissible hearsay: the plaintiffs could not introduce the articles for the nonhearsay purpose of proving what H, as a physician, knew or reasonably should have known with respect to the experimental nature of the mesh product and procedure, as the plaintiffs failed to meet their burden of demonstrating that H read or reasonably should have read the contents of the articles; moreover, the defendants contested the authority of the articles, and the trial court did not abuse its discretion in excluding them for the purpose of establishing that they were so authoritative in the field that H should have been on constructive notice of their content.
2. The Appellate Court properly upheld the trial court's decision to direct a verdict for the defendants on the plaintiffs' innocent misrepresentation claim, this court having concluded that such a claim does not lie in the context of the present case: innocent misrepresentation claims in Connecticut generally are governed by § 552C of the Restatement (Second) of Torts, which requires that the misrepresentation occur in a "sale, rental or exchange transaction with another," and, in the present case, the plaintiffs and H were not parties to such a commercial transaction because M sought out the services of H not to purchase the mesh product but primarily for the provision of medical services, namely, the implantation of the mesh product; moreover, this court rejected the plaintiffs' claim that liability for innocent misrepresentation should be extended to statements made by physicians in the course of providing medical services because, although § 552C of the Restatement (Second) of Torts acknowledges that claims for innocent misrepresentation may be brought in the context of other types of business transactions, the provision of medical care often requires physicians to provide medical opinions rather than statement of facts, and a physician who makes a false statement of fact still may be liable for misrepresentation; furthermore, even if this court assumed that innocent misrepresentation claims could be pursued in the product liability context, that was of no conse-

quence because the plaintiffs did not seek to recover from H for product liability, and this court declined to apply the doctrine of strict liability for innocent misrepresentations made in the course of providing medical treatment, as such liability would be doctrinally inconsistent with the existing framework governing claims against physicians arising from acts of omission or commission during physician-patient communications.

Argued October 25, 2019—officially released April 15, 2020*

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligent misrepresentation, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Zemetis*, *J.*; thereafter, the court directed a verdict for the defendants on the plaintiffs' innocent misrepresentation claim; subsequently, the jury returned a verdict for the defendant Brian J. Hines et al. on the remaining counts, and the court rendered judgment thereon, from which the plaintiffs appealed to the Appellate Court, *Lavine*, *Keller* and *Bishop*, *Js.*, which affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Brenden P. Leydon, with whom, on the brief, was *Jacqueline E. Fusco*, for the appellants (plaintiffs).

David J. Robertson, with whom were *Heidi M. Cilano* and, on the brief, *Malaina J. Sylvestre*, for the appellees (defendant Brian J. Hines et al.).

Opinion

ROBINSON, C. J. This certified appeal requires us to consider (1) when exhibits that otherwise would constitute inadmissible hearsay may be admitted to prove notice on the part of the defendant, Brian J. Hines, and (2) whether the tort of innocent misrepresentation extends to communications made by a physician during the provision of medical services. The plaintiffs, Mary

* April 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Beth Farrell and Vincent Farrell,[1] appeal, upon our grant of their petition for certification,[2] from the judgment of the Appellate Court affirming the judgment of the trial court, rendered after a jury trial, in favor of the defendants Hines and Urogynecology and Pelvic Surgery, LLC,[3] on numerous tort claims, including informed consent, innocent misrepresentation, and negligent misrepresentation, following an unsuccessful pelvic mesh surgery on Mary Beth. See *Farrell* v. *Johnson & Johnson*, 184 Conn. App. 685, 688, 195 A.3d 1152 (2018). On appeal, the plaintiffs challenge the Appellate Court's conclusions that the trial court properly (1) excluded two medical journal articles from evidence as hearsay when they had been offered to prove notice, and (2) directed a verdict for the defendants on their innocent misrepresentation claims. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following background facts and procedural history. "At some point in 2007, Mary Beth's gynecologist diagnosed her with pelvic organ prolapse. As her condition worsened, her gynecologist recommended that she see Hines, a [urogynecologist], with whom she consulted in late Octo-

[1] For the purpose of simplicity, we refer to each of the plaintiffs individually by first name when appropriate.

[2] We granted the plaintiffs' petition for certification to appeal, limited to the following issues: "Did the Appellate Court correctly determine that the trial court did not improperly rule that the journal articles, offered to prove notice, were inadmissible as hearsay?" And "[d]id the Appellate Court correctly conclude that the theory of innocent misrepresentation is not applicable in the present case and that the trial court properly directed a verdict in favor of the defendants on this claim?" *Farrell* v. *Johnson & Johnson*, 330 Conn. 944, 944–45, 197 A.3d 389 (2018).

[3] The plaintiffs withdrew the action as to the defendant American Medical Systems, Inc., in July, 2015, and as to the remaining defendants, Johnson & Johnson, Ethicon, Inc., Ethicon Women's Health and Urology, Gynecare, A Division of Ethicon, Inc., and Stamford Hospital, in January, 2016. Accordingly, all references herein to the defendants are to Hines and Urogynecology and Pelvic Surgery, LLC, and we refer to each individually by name when appropriate.

ber, 2008. Hines explained that implanting a mesh product into Mary Beth would be the best surgery to treat her condition. Mary Beth agreed to the surgery, and Hines performed the procedure on November 19, 2008." (Footnote omitted.) Id., 688–89.

"Approximately four days after Mary Beth had returned home from the surgery, she experienced excessive bleeding and abdominal pain. Hines initially diagnosed her with two large pelvic hematomas. Mary Beth continued to follow up with Hines; however, she continued experiencing pain. In February, 2009, Mary Beth underwent another surgery during which Hines attempted to remove the mesh product that he had implanted in her. Hines removed as much of the mesh as possible; however, some of the mesh could not be removed because it was embedded in tissue. After a second surgery to remove the mesh in the summer of 2009, Mary Beth still experienced pain and was diagnosed with damage to the pudendal and obturator nerves." Id., 689.

"Mary Beth underwent several additional procedures, such as nerve blocks and mesh removal, but these procedures did not eliminate the pain. The pain that she experienced eventually caused her to resign her position as a teacher so she could focus on her health. At the time of trial in January, 2016, Mary Beth was considering additional surgery, which she described as 'major.' " Id.

"The plaintiffs served their original complaint on November 15, 2011. The plaintiffs filed the operative, third amended complaint on December 4, 2015, alleging the following claims against the defendants: (1) lack of informed consent; (2) innocent misrepresentation; (3) negligent misrepresentation; (4) intentional misrepresentation; and (5) loss of consortium." Id., 690.

"The plaintiffs' case was tried to a jury in January, 2016. On January 19, 2016, the court directed a verdict in favor of the defendants on the plaintiffs' innocent

misrepresentation claim. On January 20, 2016, the jury returned a verdict for the defendants on the remaining counts, and the court [rendered] judgment on July 13, 2016. The plaintiffs' motion to reargue was denied . . . ." Id.

The plaintiffs then appealed from the judgment of the trial court to the Appellate Court, raising several issues, including that the trial court (1) "abused its discretion by excluding from evidence as hearsay two journal articles," and (2) "improperly directed a verdict in favor of the defendants on the plaintiffs' claim of innocent misrepresentation . . . ." Id., 688. The Appellate Court agreed with the defendants' argument that the trial court did not abuse its discretion by excluding the two journal articles regarding the experimental nature of the surgery on the ground that they were inadmissible hearsay. Id., 699. In addition, the Appellate Court concluded that, under *Johnson* v. *Healy*, 176 Conn. 97, 405 A.2d 54 (1978), and § 552C of the Restatement (Second) of Torts, the trial court properly directed a verdict for the defendants on the innocent misrepresentation claim because "innocent misrepresentation claims primarily apply to business transactions, typically between a buyer and seller, and . . . the theory is based on principles of warranty." *Farrell* v. *Johnson & Johnson*, supra, 184 Conn. App. 703. Accordingly, the Appellate Court unanimously rendered judgment affirming the judgment of the trial court. Id., 708. This certified appeal followed. See footnote 2 of this opinion. Additional facts and procedural history will be set forth as necessary.

I

We first consider whether the Appellate Court properly upheld the trial court's exclusion from evidence of the two articles discussing the experimental nature of the mesh surgery as hearsay. The record reveals the following additional facts and procedural history that

are relevant to our resolution of this claim. The plaintiffs sought to introduce into evidence three journal articles for notice purposes, two of which are at issue in this appeal. Those two articles were (1) American College of Obstetrics & Gynecology, "Pelvic Organ Prolapse," 109 ACOG Prac. Bull. 461 (2007) (ACOG Practice Bulletin), and (2) D. Ostergard, "Lessons from the Past: Directions for the Future," 18 Intl. Urogynecology J. 591 (2007) (Ostergard article). At trial, Hines testified that he received the International Urogynecology Journal as part of his membership in a professional society and that he had read articles in Obstetrics & Gynecology, but he was not aware of and had not read the two specific articles at issue.

The plaintiffs sought to admit the following statement from the ACOG Practice Bulletin: "Given the limited data and frequent changes in marketed products (particularly with regard to type of mesh material itself, which is most closely associated with several of the postoperative risks, especially mesh erosion), the procedures should be considered experimental and patients should consent to surgery with that understanding." With respect to the Ostergard article, the plaintiffs sought to admit the following three statements: (1) "a physician can inform the patient of [the procedure's] experimental nature"; (2) "[t]here is a need for more information with specific graft materials to clarify success and adverse event rates"; and (3) "[w]ithout an adequate evidence base, practitioners cannot determine whether an innovative technique is the most safe and effective method for treating a patient. Without adequate data on the risks and benefits of new treatments, patients are unable to provide a true informed consent."

Both parties submitted briefing on the admissibility of the articles, and the trial court heard argument on January 12, 2016. The trial court, in its ruling, agreed

that the plaintiffs were offering the articles for their truth and that they therefore must be excluded as inadmissible hearsay.[4]

[4] At the hearing on the articles' admissibility, the trial court and the plaintiffs' counsel engaged in the following colloquy:

"The Court: I think that these are hearsay documents. . . . And the fact that they're being described as being offered for notice, I think that [the defendants'] most recent brief is exactly on point with my thinking; that is, that these [articles] are actually being offered for the truth of the matter contained. . . . So, under the circumstances, I think these [articles] are hearsay, and I don't see their existence, the fact [that] they exist, being relevant to any issue we have in front of us. And, for those reasons, I'm going to sustain the objection to the offer of these articles. . . . The fact [that] a medical controversy exists, the fact that, in these various authors' opinions, inadequate study has been done, that physicians have an obligation to advise their patients that inadequate study has been done, that there's not a scientific basis for the use of this mesh product and implantation of this product into patients absent such scientific basis and study. I'm understanding that's the thrust of the case, but that's the truth of the matter contained in each of these three articles. That's why I think that they are hearsay.

"[The Plaintiffs' Counsel]: The fact [that] there was a controversy in the medical community, the claim is that's a fact that should have been related to [Mary Beth].

"The Court: Don't you see that's the truth of the matter contained?

"[The Plaintiffs' Counsel]: No. A publication in a proceeding saying there's a controversy here, it's basically a declaration of fact. The fact it was published shows there is a controversy.

"The Court: No, it doesn't. It shows [that] the articles are published. And, if the question was before us whether these articles were published and that [was] a relevant fact, but not the topics within the articles, not the content of the articles. That's the truth of the matter contained. That the articles exist and that you perceive them to create a medical controversy that Hines should have informed [Mary Beth] of, I understand, but that exactly looks to the truth of the matter contained in these [articles] that there is such a controversy, that he does have such an obligation. . . . I do understand that the purpose of this is to show that three articles exist in journals that he received before he instructed [Mary Beth] as to the risk, benefits and alternatives, and that he either read these and forgot [about] them or didn't read them, and that he had an opportunity to read them. Had he read them, the content of those [articles] would have alerted him that there was a medical controversy or inadequate scientific basis for the implantation of this mesh product . . . here. That seems to me to be the heart of the question as to the adequacy of the instruction. You're saying to me [that] the content of these articles is such that [Hines] should have warned her of [their] contents. I think that's the classic definition of, we're not offering them for the existence of those but, rather, for the truth of the matter contained within them, that there is a controversy."

On appeal, the plaintiffs argue that the journal articles were admissible because they were offered for nonhearsay purposes, specifically, to show that Hines was on notice of a controversy regarding mesh products. In response, the defendants counter that the trial court properly excluded the articles as hearsay because the plaintiffs failed to show that Hines had read the articles and, therefore, that the articles could not be admitted for notice. The defendants also argue that the articles' probative value was outweighed by their prejudicial effect and that, even if the articles were admissible, any error was harmless.

We begin with the standard of review applicable to a trial court's evidentiary decisions. "[We] examine the nature of the ruling at issue in the context of the issues in the case. . . . To the extent [that] a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no 'judgment call' by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which

admission is being sought."[5] (Citations omitted.) *State* v. *Saucier*, 283 Conn. 207, 217–19, 926 A.2d 633 (2007). "Thus . . . the function performed by the trial court in issuing its ruling should dictate the scope of review." Id., 219. For example, the interpretation of a rule of evidence is a question of law (e.g., constitutes hearsay), but application of that interpreted rule of evidence is discretionary by the trial court (e.g., a hearsay exception applies). Id., 219–20.

"An out-of-court statement offered to establish the truth of the matter asserted is hearsay." (Internal quotation marks omitted.) Id., 223; see Conn. Code Evid. § 8-1 (3). "The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay. . . . This exclusion from hearsay includes utterances admitted to show their effect on the hearer." (Citation omitted; internal quotation marks omitted.) *State* v. *Hull*, 210 Conn. 481, 498–99, 556 A.2d 154 (1989). "Because, however, the effect on the hearer rationale may be misapplied to admit facts that are not relevant to the issues at trial . . . courts have an obligation to ensure that a party's purported nonhearsay purpose is indeed a legitimate one. . . . Evidence is . . . admissible [only] when it tends to establish a fact in issue or to corroborate other direct evidence in the case. . . . Accordingly, an out-of-court statement is admissible to prove the effect on the hearer only when it is relevant for the specific, permissible purpose for which it is offered." (Citations

[5] The plaintiffs contend that, although the Appellate Court utilized the correct legal standard initially, the court then improperly applied abuse of discretion review when it stated: "The court properly determined that the articles were inadmissible hearsay and did not fall within a hearsay exception and, accordingly, did not abuse its discretion in excluding the articles from evidence." *Farrell* v. *Johnson & Johnson*, supra, 184 Conn. App. 699. We disagree. We discuss the difficulty in applying this standard to the present case in footnote 6 of this opinion.

omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 574, 46 A.3d 126 (2012); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.3.1, p. 503. "The proffering party bears the burden of establishing the relevance of the offered testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant." (Internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 23, 1 A.3d 76 (2010).

Notice is a long recognized nonhearsay purpose in Connecticut. More than eighty years ago, this court observed: "Admission of testimony of a witness . . . that the day before the accident he had told [the foreman] . . . that the stone should be removed before someone was injured . . . was not hearsay . . . and was admissible as tending to impute to the defendants notice of the situation and its potential dangers." *Jenkins* v. *Reichert*, 125 Conn. 258, 264, 5 A.2d 6 (1939); see *Rogers* v. *Board of Education*, 252 Conn. 753, 767, 749 A.2d 1173 (2000) (statements in transcript were not inadmissible hearsay because they were offered "for the relevant purpose of showing that the statements had been made in the presence of the plaintiff"); *Whitman Hotel Corp.* v. *Elliott & Watrous Engineering Co.*, 137 Conn. 562, 574, 79 A.2d 591 (1951) (admitting letters from plaintiffs' attorney to defendants to show "the fact of the defendants' knowledge of the claimed effect of their operations, since that knowledge should influence their future conduct").

Although our decision in *State* v. *Saucier*, supra, 283 Conn. 207, contemplates that a hearsay determination, when based on an interpretation of the Code of Evidence, is solely a question of law, it also instructs us to "examine the nature of the ruling at issue in the context of the issues in the case." Id., 217. In the present case, the trial court determined that the two articles were inadmissible hearsay because they were irrelevant

with respect to the plaintiffs' asserted nonhearsay purpose. For a trial court to determine that a statement is admissible nonhearsay, the court must find that it is relevant for some reason other than its truth. See E. Prescott, supra, § 8.3.1, p. 503. The plaintiffs' stated purpose for offering the articles was to show that Hines had "notice . . . that there was a lack of sufficient risk-benefit information upon which informed consent could be made at that time. . . . [T]hat's the heart of this case." Thus, the trial court was required to exercise its discretion by finding facts regarding whether Hines had notice of these articles in order to determine whether they were relevant to the stated nonhearsay purpose. Because the trial court was required to make a "judgment call" in determining whether the articles were admissible nonhearsay, we review the court's determination for abuse of discretion and conclude that the trial court did not abuse its discretion.[6]

The purpose of notice evidence is to show an effect on the hearer. See E. Prescott, supra, § 8.8.1, p. 514 ("[a] statement is not hearsay if offered to prove notice to the hearer"); see also 2 R. Mosteller, McCormick on Evidence (8th Ed. 2020) § 249, pp. 196–200. Therefore, if the offering party has failed to demonstrate that the putative listener has heard or read the statement, it is inadmissible to prove notice. See, e.g., *Rotolo* v. *Digital*

[6] The standard of review set forth in *Saucier* can complicate appellate review of a trial court's hearsay determination. We note that Justice Norcott presciently foreshadowed this difficulty in his concurring opinion in *Saucier*. He disagreed with the majority's conclusion that "whether a statement is hearsay require[s] determinations about which reasonable minds may not differ; there is no judgment call by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility." (Internal quotation marks omitted.) *State* v. *Saucier*, supra, 283 Conn. 240 (*Norcott*, *J.*, concurring in part). Instead, according to Justice Norcott, trial courts' hearsay determinations should receive appellate deference because they often involve the "very kind of case and fact sensitive determination for which a trial court is particularly well suited." Id., 241 (*Norcott*, *J.*, concurring in part).

Equipment Corp., 150 F.3d 223, 224–25 (2d Cir. 1998) (holding that District Court improperly admitted videotape created by plaintiff's competitor for internal use only as notice evidence against defendant because plaintiff presented no evidence that defendant saw tape or reasonably should have seen it); *George* v. *Celotex Corp.*, 914 F.2d 26, 30 (2d Cir. 1990) (plaintiff must first prove that defendant's predecessor "saw the unpublished report or that it reasonably should have seen it as part of the published literature in the industry" because, "before [the] plaintiff can argue [nonhearsay] notice she must show that the defendant was at least inferentially put on notice by the report"); *Betts* v. *Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 924, 588 N.E.2d 1193 (trial court improperly admitted newspaper and magazine articles for notice purposes because "there [was] no evidence anyone at [the defendant company] read these articles such that notice can be established"), cert. denied, 146 Ill. 2d 622, 602 N.E.2d 447 (1992); 4 C. Fishman, Jones on Evidence (7th Ed. 2000) § 24:27, pp. 263–66 ("In civil litigation as well as criminal, a statement may be nonhearsay because it is relevant to show knowledge or notice. . . . But to be relevant for this nonhearsay purpose, the offering party must establish that the adverse party in fact heard, saw or read the statement." (Footnotes omitted.)); R. Mosteller, supra, § 249, p. 197 n.13 ("[o]f course, there must be evidence that the relevant party could hear the statements or they are inadmissible under a notice theory"); see also *State* v. *Rosales*, 136 N.M. 25, 30, 94 P.3d 768 (2004) (explaining that, if evidence was offered to show that witness heard victim's statement, it could prove motive, but, "[i]f [the witness] was unaware of the victim's claim, then [the defendant's] theory that the evidence was not being offered for its truth is difficult to understand").

Courts have concluded that articles are admissible, despite hearsay objections, to show whether a party

should have known a fact at issue. See *Coyne* v. *Taber Partners I*, 53 F.3d 454, 461 n.6 (1st Cir. 1995) (allowing newspaper article to show hotel's constructive notice of violent strike); *Toney* v. *Zarynoff's, Inc.*, 52 Mass. App. 554, 562–63, 755 N.E.2d 301 (reversing trial court's exclusion of newspaper articles to show defendants' knowledge of criminal activity in area, even though defendant's operator "had not read them"), review denied, 435 Mass. 1107, 761 N.E.2d 964 (2001). Or, in the context of a manufacturer: "For purposes of determining if it had notice of the hazardous character of its product, [the] defendant was chargeable with knowledge of the entire body of scientific learning and literature relating to that product . . . ." *Marsee* v. *United States Tobacco Co.*, 866 F.2d 319, 326 (10th Cir. 1989). We agree with these decisions insofar as they hold that, if the proponent of an article can demonstrate that another party *should have known* the contents of the article, *because of an independent duty to do so*, it may be admissible to prove notice constructively. For example, manufacturers are "held to the knowledge of an expert in its field . . . and therefore [have] a duty 'to keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.' " (Citations omitted.) *George* v. *Celotex Corp.*, supra, 914 F.2d 28.

Physicians possess a duty to stay abreast of the state of medical science in their areas of practice. See *Tomer* v. *American Home Products Corp.*, 170 Conn. 681, 687, 368 A.2d 35 (1976) ("[s]ince the defendants could not be held to standards which exceeded the limits of scientific advances existing at the time of their allegedly tortious conduct, expert testimony tending to show the scope of duties owed could have been properly limited to *scientific knowledge existing at that time*" (emphasis added)); C. Williams, Note, "Evidence-Based Medicine in the Law Beyond Clinical Practice Guidelines:

What Effect Will EBM Have on the Standard of Care?,'' 61 Wash. & Lee L. Rev. 479, 508–12 (2004) (describing duty and listing cases). In the present case, the defendants contested the authoritativeness of the two articles at issue. As such, the trial court did not abuse its discretion by excluding them for the purpose of establishing that they were so authoritative in the field that Hines should have been on constructive notice of their content—that is, that he reasonably should have read them. Put differently, because something is published in a journal does not mean, ipso facto, that it represents the state of medical science at the time, such that a physician is charged with a duty to know its contents. But cf. *George* v. *Celotex*, supra, 914 F.2d 28–30 (determining that asbestos report was relevant to defendant's liability because of defendant's duty to know and because of defendant's use of precise value criticized by report).

In the present case, the plaintiffs failed to meet their burden of demonstrating that Hines read or reasonably should have read the contents of these articles. Although one of the underlying issues in the case was what Hines, as a physician, knew or reasonably should have known with respect to the experimental nature of the mesh, the plaintiffs could not use the articles for that purpose without first establishing that Hines was on actual or constructive notice of the articles' contents. Although Hines testified that he had received or read certain articles in the two journals at issue and had published his own article in one of the journals, those facts alone do not permit an inference that, as a result, he read every article in each issue published by each of the journals. Nor did the plaintiffs argue or present evidence to establish an independent duty establishing that Hines reasonably should have read these two articles, beyond his receipt of one of the journals.[7]

[7] The trial court's other rulings reflected the importance of notice to the admissibility of evidence that otherwise would be hearsay. For example, the trial court admitted a Food and Drug Administration (FDA) public

The plaintiffs argue that proof of knowledge is not necessary to prove notice. On this point, the plaintiffs rely on *Blue Cross of California* v. *SmithKline Beecham Clinical Laboratories, Inc.*, 108 F. Supp. 2d 116 (D. Conn. 2000). In *Blue Cross of California*, the court considered the defendant's motion for summary judgment and concluded that "highly publicized information" released by "the national media and various professional organizations" put the plaintiffs on inquiry notice for statute of limitations reasons. Id., 123–24. The court denied the motion to strike the media reports on hearsay grounds because they showed "inquiry notice of the matters reported therein . . . ." Id., 123 n.5. *Blue Cross of California* is not inconsistent with our decision in the present case. The plaintiffs here have not asserted that the experimental nature of the pelvic mesh was a matter covered in "volumes" by the national media; had they done so, they would have a stronger argument that Hines should have known of that issue. Similarly, we disagree with the plaintiffs' reliance on *Kochan* v. *Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683 (1993), overruled by *Nolan* v. *Weil-McLain*, 233 Ill. 2d 416, 910 N.E.2d 549 (2009). In *Kochan*, the trial court permitted the plaintiffs' expert to summarize articles detailing the dangers of asbestos. *Kochan* v. *Owens-Corning Fiberglass Corp.*, supra, 803. The court held that this evidence was "intended to show when, in [the expert's] opinion, it

health notification into evidence for notice purposes. The FDA notification discussed "[c]omplications [a]ssociated with [t]ransvaginal [p]lacement of [s]urgical [m]esh" for pelvic organ prolapse and stress urinary incontinence and recommended certain actions for physicians. During the plaintiffs' examination of Hines, the plaintiffs established that he was aware of and had read that FDA notification, although he was not sure when he had first seen it. In the court's evidentiary ruling, it explained that the exhibit would be admitted because it showed "the effect on the doctor and what he knew or should have known with respect to the status of this type of surgical procedure so that he could adequately advise his patients as to the risks, benefits, and alternatives."

was generally known or should have been known in the industry that asbestos caused asbestosis and was linked to cancer." Id., 805. In the present case, the court allowed one of the three challenged articles to be admitted through the plaintiffs' expert under the learned treatise exception to the hearsay rule under § 8-3 (8) of the Connecticut Code of Evidence to show what Hines knew or should have known, but the plaintiffs failed to establish such a foundation when offering the ACOG Practice Bulletin and the Ostergard article.[8] Accordingly, we conclude that the Appellate Court properly upheld the trial court's conclusion that those two articles were hearsay and not admissible to prove notice.

II

We next turn to the plaintiffs' claim that the trial court improperly directed a verdict for the defendants on the count of innocent misrepresentation. The record reveals the following additional relevant facts and procedural history. On January 14, 2016, after the close of evidence, the trial court heard arguments on the defendants' motion for a judgment and a directed verdict[9] on several issues, including the innocent misrepresen-

[8] Accordingly, even if we assume, without deciding, that the trial court incorrectly concluded that the two articles were hearsay, we could uphold its evidentiary ruling on the alternative ground; see, e.g., *State* v. *Burney*, 288 Conn. 548, 560, 954 A.2d 793 (2008); that the plaintiffs failed to lay a proper foundation to prove their relevance. See *Price* v. *Rochford*, 947 F.2d 829, 833 (7th Cir. 1991) ("no hearsay problem" because articles reporting plaintiff's bankruptcy were not offered for their truth, but articles had low probative value because plaintiff "offered no specific facts tending to show that any of the defendants read these articles or even that they read the newspapers in which the articles appeared"); *Evans* v. *Hood Corp.*, 5 Cal. App. 5th 1022, 1044, 211 Cal. Rptr. 3d 261 (2016) (trial court properly excluded nonhearsay evidence offered for notice purposes because plaintiff failed to establish that defendants knew about documents, which had low probative value).

[9] The defendants made both a "motion for judgment at the end of [the] plaintiffs' case-in-chief and . . . [a motion] at the end of the evidentiary portion of the case for [a] directed verdict."

tation claim. At this hearing, the plaintiffs argued, inter alia, that the evidence at trial presented several misrepresentations by Hines, including his: (1) explanation that "I believe[d], not correctly, but I believed I had a pretty good understanding of what the risks of using this product were"; (2) failure to disclose certain payments; and (3) statement that the surgery "will improve [the plaintiffs'] sex life . . . ." The trial court indicated it had several questions regarding the applicability to this case of the tort of innocent misrepresentation and requested supporting case law from the plaintiffs. The next day, the trial court granted the defendants' motions for a directed verdict and judgment on the innocent misrepresentation claim and later rendered judgment accordingly.[10]

On appeal, the plaintiffs contend that the Appellate Court improperly upheld the trial court's decision to direct a verdict on the innocent misrepresentation counts because it was both procedurally and substantively improper. The plaintiffs argue that claims for innocent misrepresentation are not limited to economic loss, and, therefore, they should have been allowed to present their claimed pecuniary loss to the jury. In addition, the plaintiffs contend that the requisite commercial transaction existed between the parties because Hines was in the business of performing these types of procedures. The defendants counter that the trial court properly directed a verdict on the claim of innocent misrepresentation because there was no commercial relationship between the parties and because "[t]he mesh product that was used was entirely incidental to

[10] In granting the defendants' motions, the trial court indicated that it would not submit the plaintiffs' innocent misrepresentation claim to the jury because the plaintiffs had failed to produce case law establishing the claim's applicability in the informed consent context. The trial court also stated that it had performed its own research and could not reconcile the existing case law on innocent misrepresentation and its damages calculations with the claims in the present case.

the medical care that [Hines] rendered to [Mary Beth]." The defendants further argue that there was no factual foundation for the innocent misrepresentation claim, which, they contend, is inapplicable in cases arising from the provision of medical services. We agree with the defendants that the trial court properly directed a verdict because a claim for innocent misrepresentation does not lie as matter of law in this context.[11]

"Whether the evidence presented by the plaintiff is sufficient to withstand a motion for a directed verdict

[11] Procedurally, the plaintiffs argue that the trial court improperly allowed the defendants to raise the issue without ever raising the inapplicability of an innocent misrepresentation claim in any dispositive pretrial motions. The plaintiffs also claim that the trial court sua sponte raised the inapplicability of innocent misrepresentation because the defendants argued only that there was insufficient evidence to support a misrepresentation claim. In regard to any procedural impropriety, the defendants contend that they did raise "the legal insufficiency of the plaintiffs' claims by way of a special defense" in their answer because the trial court had earlier precluded them from filing a motion to strike.

The defendants moved for a directed verdict on several issues, including the insufficiency of the evidence to support the plaintiffs' claim of innocent misrepresentation, on January 14, 2016. After the defendants' motion, the trial court discussed the inapplicability of innocent misrepresentation and heard arguments from the parties. The next day, the court directed a verdict on innocent misrepresentation in the absence of any supporting case law from the plaintiffs. This was not improper. Motions for directed verdicts are properly made at the close of a plaintiff's evidence, which the defendants did here. Practice Book § 16-37; see also *State* v. *Perkins*, 271 Conn. 218, 271, 856 A.2d 917 (2004) (*Katz*, *J.*, dissenting) ("a motion for a directed verdict [is] made after the close of the plaintiff's case in a civil trial"). The trial court did not improperly raise the issue sua sponte but, instead, considered the applicability of innocent misrepresentation after the defendants moved for a directed verdict. The defendants' argument regarding the sufficiency of the evidence was a proper mechanism under which the trial court could consider the legal sufficiency of the plaintiffs' claim. See *Fisher* v. *Big Y Foods*, *Inc.*, 298 Conn. 414, 440, 3 A.3d 919 (2010) ("if, as a matter of law, [a claim for innocent misrepresentation] was not implicated by the circumstances of this case, then the trial court was required to direct a verdict in the defendant's favor"). Although this issue might have been more efficiently resolved as a pretrial matter, the trial court did not improperly direct the verdict on the plaintiffs' innocent misrepresentation claim because, as a matter of law, the court could not submit this claim to the jury.

is a question of law, over which our review is plenary. . . . Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to grant a defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Citation omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 744, 183 A.3d 611 (2018). "At the outset, we note that although we do not generally favor directed verdicts . . . [a] verdict may properly be directed where the decisive question is one of law." (Citation omitted; internal quotation marks omitted.) *Red Maple Properties* v. *Zoning Commission*, 222 Conn. 730, 735, 610 A.2d 1238 (1992).

"In Connecticut, a claim of innocent misrepresentation . . . is based on principles of warranty, and . . . is not confined to contracts for the sale of goods. . . . A person is subject to liability for an innocent misrepresentation if in a sale, rental or exchange transaction with another, [he or she] makes a representation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it . . . even though it is not made fraudulently or negligently. . . . We have held that an innocent misrepresentation is actionable, *even though there* [*is*] *no allegation of fraud or bad faith*, because it [is] false and misleading, in analogy to the right of a vendee to elect to retain goods which are not as warranted, and to recover damages for the breach of warranty." (Citations omitted; emphasis added; internal quotation marks omitted.) *Gibson* v. *Capano*, 241 Conn. 725, 730, 699 A.2d 68 (1997).

The seminal Connecticut case concerning innocent misrepresentation is *Johnson* v. *Healy*, supra, 176 Conn. 97. In *Johnson*, this court discussed the evolution of the common-law cause of action for innocent misrepresentation as an amalgam of tort and contract law. "Traditionally, no cause of action lay in contract for damages for innocent misrepresentation; if the plaintiff could establish reliance on a material innocent misstatement, he could sue for rescission, and avoid the contract, but he could not get affirmative relief. . . . In tort, the basis of responsibility, although at first undifferentiated, was narrowed, at the end of the [nineteenth] century, to intentional misconduct, and only gradually expanded, in this century, to permit recovery in damages for negligent misstatements. . . . At the same time, liability in warranty, that curious hybrid of tort and contract law, became firmly established, no later than the promulgation of the Uniform Sales Act in 1906. In contracts for the sale of tangible chattels, express warranty encompasses material representations which are false, without regard to the state of mind or the due care of the person making the representation. For breach of express warranty, the injured plaintiff has always been entitled to choose between rescission and damages. Although the description of warranty liability has undergone clarification in the Uniform Commercial Code, which supersedes the Uniform Sales Act, these basic remedial principles remain unaffected. At the same time, liability in tort, even for misrepresentations which are innocent, has come to be the emergent rule for transactions that involve a commercial exchange." (Citations omitted; footnote omitted.) Id., 100–101; see also 3 Restatement (Second), Torts § 552C, p. 141 (1977); 3 Restatement (Second), supra, § 524A, p. 51.

In *Johnson*, this court upheld the trial court's verdict for the plaintiffs on their innocent misrepresentation claim. *Johnson* v. *Healy*, supra, 176 Conn. 102–103. The

plaintiffs had relied on affirmative statements by the defendant that "the house was made of the best material, that he had built it, and that there was nothing wrong with it" when deciding to make their purchase. Id., 98–99. Because strict liability for innocent misrepresentation "is based on principles of warranty" that are clearly established in sales of goods, the court considered whether such warranty law extended to sales of real estate. Id., 101–102. The court held that such an extension was appropriate in this context because caveat emptor was no longer a barrier to misrepresentation and warranty law applied in the sale of "new homes . . . ." Id., 102.

In the present case, the plaintiffs seek to extend liability for innocent misrepresentation even further, effectively rendering physicians strictly liable for statements they make in the course of medical treatment. Unlike in *Johnson*, we are not persuaded that these facts dictate an extension of liability.

First, in Connecticut, the tort of innocent misrepresenation generally is governed by § 552C of the Restatement (Second),[12] which requires "a sale, rental or exchange transaction with another" before liability attaches. See *Gibson* v. *Capano*, supra, 241 Conn. 730 (relying on § 552C in innocent misrepresentation case involving sale of property); see also *Bartholomew* v. *Bushnell*, 20 Conn. 271, 274 (1850) (sale of horses); *Little Mountains Enterprises, Inc.* v. *Groom*, 141 Conn. App. 804, 806, 64 A.3d

[12] Section 552C of the Restatement (Second) of Torts provides: "(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

"(2) Damages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction." 3 Restatement (Second), supra, § 552C, p. 141.

781 (2013) (sale of real property); *Matyas* v. *Minck*, 37 Conn. App. 321, 333, 655 A.2d 1155 (1995) (same). The commentary to § 552C of the Restatement (Second) illuminates this language further, explaining that it encompasses "any sale, rental or exchange of land, chattels, securities or anything else of value, such as copyrights, patents and other valuable intangible rights." 3 Restatement (Second), supra, § 552C, comment (c), p. 144; see W. Prosser, Torts (4th Ed. 1971) § 107, p. 711 ("a large group of the American courts have succeeded in prying open the door, and extending strict liability to express representations made in the *course of other commercial dealings*, such as the sale of land, securities, or patent rights" (emphasis added)).

The few courts that have considered this issue have concluded that the provision of professional services is not a commercial transaction for purposes of § 552C of the Restatement (Second). See *Adams* v. *Allen*, 56 Wn. App. 383, 385, 393, 783 P.2d 635 (1989) (holding that "sale, rental or exchange transaction" language in § 552C is inapplicable to physician's representations in course of prescribing medication), overruled on other grounds by *Caughell* v. *Group Health Cooperative of Puget Sound*, 124 Wn. 2d 217, 876 P.2d 898 (1994). Similarly, with respect to other professional services, the United States District Court for the District of Massachusetts granted a motion to dismiss when a plaintiff sought to hold a law firm liable for alleged misrepresentations regarding "the tax advantages of [an] investment" under a theory of innocent misrepresentation because the law firm was "not a party to any sale . . . ." *Norman* v. *Brown, Todd & Heyburn*, 693 F. Supp. 1259, 1260, 1264–65 (D. Mass. 1988).

In the present case, Mary Beth did not seek out Hines for the purpose of purchasing a product; instead, as the complaint alleges, she sought his services in implanting the pelvic mesh. Therefore, Mary Beth's purchase of

the mesh was secondary to the main purpose of the transaction, namely, to seek surgical assistance for her pelvic organ prolapse. Hines, as a urogynecologist and a surgeon, did not function primarily as a seller of pelvic mesh. See *Zbras* v. *St. Vincent's Medical Center*, 91 Conn. App. 289, 294, 880 A.2d 999 ("[t]he transaction in this case, a surgery, clearly was labeled a service rather than the sale of a product"), cert. denied, 276 Conn. 910, 886 A.2d 424 (2005). For these reasons, and in the absence of any authority cited by the plaintiffs to the contrary, we conclude that Hines' provision of medical services did not qualify as a "sale, rental or exchange transaction" under § 552C of the Restatement (Second), and, therefore, a claim for innocent misrepresentation does not lie under our existing innocent misrepresentation precedent.[13] Although the plaintiffs assert that there was a commercial transaction between the parties, the core of their argument necessarily seeks to extend liability for innocent misrepresentations outside of commercial transactions.

Liability outside of "a sale, rental or exchange transaction" is not categorically excluded by the Restatement, as that provision includes a caveat declining to opine on "other types of business transactions, in addition to those of sale, rental and exchange, in which strict liability may be imposed for innocent misrepresentation under the conditions stated in [§ 552C]."[14] 3 Restate-

[13] This conclusion by no means creates a per se rule that physicians may never be held liable for innocent misrepresentations of fact under § 552C of the Restatement (Second). There are a growing number of situations in which a physician may be a party to a commercial transaction as the business of healthcare evolves. See L. Churchill, "The Hegemony of Money: Commercialism and Professionalism in American Medicine," 16 Cambridge Q. Healthcare Ethics 407, 410–12 (2007) (discussing commercialization of practice of medicine). But, outside of the fact that Hines routinely performs such surgeries, the plaintiffs have not presented any persuasive reason that transforms Hines' provision of medical services into a "sale, rental or exchange transaction . . . ."

[14] Comment (g) to § 552C of the Restatement (Second) of Torts explains the caveat: "There have, however, been occasional decisions in which the

ment (Second), supra, § 552C, caveat, pp. 141–42; see also *E. & F. Construction Co.* v. *Stamford*, 114 Conn. 250, 257–59, 158 A. 551 (1932) (building contractor could recover because of town's innocent misrepresentation of amount of rock that contractor would be required to excavate under contract for services). As a result, we next consider whether liability for innocent misrepresentations should be extended to statements made during the provision of medical services.

The plaintiffs argue that, "[i]f someone can be held liable for innocent misrepresentation in the sale of a horse, what possible reason is there to immunize a doctor—who owes a fiduciary duty to his patient—for similar omissions?" In addition, they argue that General Statutes § 52-572m (b),[15] the statute that governs product liability claims, permits recovery for personal injury damages from innocent misrepresentations. The defendants counter that personal injury damages are more appropriately obtained from malpractice actions that

same rule has been applied to other types of business transactions, such as the issuance of an insurance policy or the inducement of an investment or a loan. . . . The law appears to be still in a process of development and the ultimate limits of the liability are not yet determined." 3 Restatement (Second), supra, § 552C, comment (g), p. 145; see also A. Hill, "Damages for Innocent Misrepresentation," 73 Colum. L. Rev. 679, 704 (1973) ("[a]s to why cases like this are relatively uncommon, one may suppose that in some significant classes of contracts, such as those for services, representations of fact are infrequent as compared with representations of opinion; and that in other significant classes, such as those for the sale of real property, the extensive use of form contracts results in severe obstacles to proof of such representations, if made").

[15] General Statutes § 52-572m (b) provides: " 'Product liability claim' includes all claims or actions brought for *personal injury*, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product. 'Product liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; *misrepresentation* or nondisclosure, whether negligent or *innocent*." (Emphasis added.)

lie in negligence rather than in strict liability. They posit that "[i]t is not difficult to imagine the mischief that can potentially ensue if, rather than having to prove a medical malpractice case through expert testimony, a plaintiff could potentially recover some or all of the same damages by asserting instead that the alleged harm that was suffered at the hands of the physician was due to 'innocent misrepresentation,' in other words strict liability for the doctor not knowing before the procedure was undertaken that the outcome would be unfavorable." We agree with the defendants and conclude that strict liability should not extend to innocent misrepresentations made during the provision of medical services in this instance.

We initially note that the few courts that have considered this issue have uniformly declined to hold physicians strictly liable for statements made in the course of medical treatment. See *Christensen* v. *Thornby*, 192 Minn. 123, 126, 255 N.W. 620 (1934) (declining to hold surgeon strictly liable for representations in absence of negligence or fraudulent intent); *Black* v. *Gundersen Clinic, Ltd.*, 152 Wis. 2d 210, 214, 448 N.W.2d 247 (App.) ("[w]e have not recognized the imposition of liability upon a doctor under the strict liability doctrine based upon misrepresentation"), review denied, 449 N.W.2d 276 (Wis. 1989). Unlike product sellers, the medical profession requires the exercise of a highly particularized skill and is often accompanied by medical *opinions* rather than statements of fact.[16] That is not to say that

[16] Actions for fraudulent and negligent misrepresentation in Connecticut require the representation to be one of fact. See *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 73, 873 A.2d 929 (2005) ("an action for negligent misrepresentation requires the plaintiffs in the present case to prove that [the defendant] made a misrepresentation of fact"); *Crowther* v. *Guidone*, 183 Conn. 464, 467, 441 A.2d 11 (1981) ("[i]t is true that our cases have consistently required that, as one element of fraudulent misrepresentation, a representation be made as a statement of fact"). We need not decide, in this case, whether a false statement made as part of a medical opinion could support a cause of action for misrepresentation. See, e.g., *Van Leeuwan* v. *Nuzzi*, 810 F. Supp. 1120, 1124 (D. Colo. 1993); *Custodio* v. *Bauer*, 251 Cal. App. 2d 303,

a physician can never make a false statement of fact, because, if and when he or she does, a patient may sue the physician for misrepresentation. See, e.g., *Doe* v. *Cochran*, 332 Conn. 325, 342–45, 210 A.3d 469 (2019); *Duffy* v. *Flagg*, 279 Conn. 682, 697, 905 A.2d 15 (2006). But, on the facts presented by this case, the plaintiffs have not pointed to any persuasive policy reason for why this current misrepresentation scheme is insufficient and should be extended to include innocent misrepresentations.

The plaintiffs argue, however, that public policy permits the recovery of damages for personal injuries resulting from innocent misrepresentations because such claims are permitted as product liability claims under § 52-572m (b). See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 438, 119 A.3d 462 (2015) (legislature has "primary responsibility in pronouncing the public policy of our state" (internal quotation marks omitted)). We disagree. First, the fact that the legislature included the types of damages permitted in a product liability claim in the first sentence of the statute does not suggest that every theory in the following sentence permits such damages in any case against any defendant that implicates a defective product. See footnote 15 of this opinion (quoting text of § 52-572m (b)). Second, and most significant, the plaintiffs did not assert a product liability claim against Hines in this case. Thus, even if we assume without deciding that personal injury damages are permitted for innocent misrepresentation claims in a product liability context, this would be of no consequence in the present case.

Finally, the plaintiffs have not presented any authority applying strict liability for misrepresentations to

314, 59 Cal. Rptr. 463 (1967); see also F. Harper & M. McNeely, "A Synthesis of the Law of Misrepresentation," 22 Minn. L. Rev. 939, 951–52 (1938) (discussing opinion versus fact distinction).

medical services. This is likely because such strict liability for misrepresentations is doctrinally inconsistent with the existing framework governing claims against physicians arising from acts of omission or commission during physician-patient communications. Under the doctrine of informed consent, a physician must "provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy." (Internal quotation marks omitted.) *Duffy* v. *Flagg*, supra, 279 Conn. 691. Permitting a patient to sue for innocent misrepresentation would drastically alter this standard by rendering a physician liable for *any* inaccuracies that may be discovered in the future, not only those a reasonable patient would have found material at the time. This is inconsistent with the "numerous cases holding that a doctor is not liable for failing to warn a patient of risks flowing from an unknown and unknowable condition." *Latham* v. *Hayes*, 495 So. 2d 453, 461 (Miss. 1986) (Anderson, J., dissenting).[17] Because a reasonable patient could not expect to be informed of currently unknown risks, we decline to replace this state's informed consent action with one that would make physicians strictly liable for innocent statements made in the course of treatment.[18]

[17] Cf. *Howard* v. *University of Medicine & Dentistry of New Jersey*, 172 N.J. 537, 553–54, 800 A.2d 73 (2002) ("we are not convinced that our common law should be extended to allow a novel fraud or deceit-based cause of action in this doctor-patient context that regularly would admit of the possibility of punitive damages, and that would circumvent the requirements for proof of both causation and damages imposed in a traditional informed consent setting").

[18] The plaintiffs argue that informed consent actions do not displace claims for misrepresentation against physicians such as those brought under *Duffy* v. *Flagg*, supra, 279 Conn. 682. We disagree. In *Duffy*, this court likely was not envisioning liability for innocent misrepresentations about the treatment to be rendered, as it specifically was considering misrepresentations regarding "the physician's skills, qualifications, or experience," which are topics uniquely within the physician's knowledge. Id., 697. Put differently, it is rather difficult to contemplate that a physician would or could innocently misrepresent his or her own experience in a material way.

Accordingly, we conclude that the Appellate Court properly upheld the trial court's decision to direct a verdict on the plaintiffs' innocent misrepresentation claim.[19]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

OHAN KARAGOZIAN *v.* USV OPTICAL, INC.
(SC 20257)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiff employee sought to recover damages from the defendant employer, alleging that he was constructively discharged in violation of public policy. The plaintiff had been employed as a licensed optician manager in the defendant's optical department in a JCPenney store and alleged that the defendant improperly required him to provide optometric assistance services to the doctor of optometry in the store. The

[19] Although our case law does not expressly preclude damages for personal injuries arising from innocent misrepresentations, we observe that such liability would be inappropriate in the present case. "The defendant may be subjected to liability for innocent misrepresentation causing *stand-alone economic harm* when the defendant undertakes to guarantee the truth of the matter represented, that is, when his representation is a warranty. Where a warranty is breached, the plaintiff may *recover the contract or loss of bargain measure of damages*." (Emphasis added.) 3 D. Dobbs et al., The Law of Torts (2d Ed. 2011) § 669, p. 661; see 3 Restatement (Second), supra, §552C, comment (f), p. 145 (noting that innocent misrepresentation damages "are restitutionary in nature" and "in effect [restore the plaintiff] to the pecuniary position in which he stood before the transaction," and that, because "the defendant's misrepresentation is an innocent one, *he is not held liable for other damages*; *specifically, he is not liable for benefit of the bargain or for consequential damages*" (emphasis added)); see also *Johnson* v. *Healy*, supra, 176 Conn. 106 ("[t]he proper test for damages was the difference in value between the property had it been as represented and the property as it actually was"). Thus, it appears that this damages calculation would not provide the plaintiffs with any significant relief because the damages for personal injuries stemming from the mesh would be limited to the difference between what the plaintiffs paid for the mesh product and the value of the mesh retained.

plaintiff claimed that, under a declaratory ruling issued by the Board of Examiners for Optometrists and a cease and desist consent order issued by the Board of Examiners for Opticians, employees, including opticians, under the control of unlicensed third parties were prohibited from performing services for licensed optometrists. The plaintiff also alleged that his duties violated the public policy embodied in the statute (§ 31-130 (i)) requiring JCPenney and the defendant to have a staffing permit before providing staffing services to the optometrist. The plaintiff further alleged that he was forced to resign when the defendant refused his requests to be excused from these duties. The defendant moved to strike the plaintiff's complaint on the ground that its allegations could not satisfy the requirements of a constructive discharge claim. The defendant asserted that the declaratory ruling and the cease and desist order were not binding and did not create a private right of action for optometric assistants. The defendant also alleged that the plaintiff's reliance on § 31-130 (i) was misplaced because the plaintiff did not allege that optometrists employed by the defendant charged the defendant for hiring opticians. The trial court, relying on *Brittell* v. *Dept. of Correction* (247 Conn. 148), determined that, to prevail on his constructive discharge claim, the plaintiff was required to demonstrate that the defendant intended to force him to resign. The trial court granted the defendant's motion to strike the plaintiff's complaint and rendered judgment for the defendant. The plaintiff appealed to the Appellate Court, which affirmed the trial court's judgment. The Appellate Court, interpreting and applying *Brittell* in the same manner as the trial court, concluded, inter alia, that there was no allegation in the plaintiff's complaint that reasonably could be construed to claim that the defendant intended to create conditions so intolerable that a reasonable person in the plaintiff's shoes would be compelled to resign. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court incorrectly interpreted the standard set forth in *Brittell* to require the plaintiff to assert facts demonstrating that the defendant intended to force him to resign, *Brittell* having required the plaintiff to establish only that the defendant intended to create an intolerable work atmosphere; the *Brittell* standard for constructive discharge requires a subjective inquiry into whether the employer intended to create the complained of employment atmosphere or condition and an objective inquiry into whether that atmosphere or condition would have led a reasonable person in the employee's shoes to feel compelled to resign, and that standard does not require the employee to allege facts showing that the employer intended to force the employee to resign.
2. Although the Appellate Court incorrectly applied the standard for constructive discharge in *Brittell*, that court correctly upheld the trial court's granting of the defendant's motion to strike the plaintiff's complaint on the alternative ground that the plaintiff had failed to allege facts establishing that his work atmosphere was so difficult or unpleasant

that a reasonable person in his shoes would have felt compelled to resign, and, accordingly, this court affirmed the judgment of the Appellate Court: nothing in the plaintiff's complaint established that the defendant required him to violate the law, as the declaratory ruling evaluated the circumstances under which an optometrist would be considered an employee of an unlicensed person or entity, and the plaintiff was employed as an optician rather than an optometrist, the declaratory ruling was binding only on those, unlike the plaintiff, who participated in the hearing that led to the ruling, and the ruling, which was intended to provide guidance to optometrists, did not establish criminal liability or inflict repercussions for specific conduct that would compel a reasonable optician in the plaintiff's shoes to resign; moreover, the plaintiff failed to demonstrate that the cease and desist order either applied to him or bound the defendant, as the order required that a store different from the one in which the plaintiff worked not permit a licensed optician to act in the capacity of an optometric assistant to an independent optometrist leasing space in the store, and also failed to demonstrate how the consent order functionally created a work condition so intolerable that a person in the plaintiff's shoes would have been justified in walking off the job as if he had been fired; furthermore, contrary to the plaintiff's claim, § 31-130 (i) was inapplicable, as it requires only that a person who procures or offers to procure employees for employers register with the Commissioner of Labor, and the allegations of the plaintiff's complaint did not suggest that the defendant intended to create conditions different from what the plaintiff would have expected when he agreed to work as a licensed optician manager for the defendant.

Argued December 12, 2019—officially released April 15, 2020*

Procedural History

Action to recover damages for the plaintiff's alleged constructive discharge from employment, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *Hon. John F. Cronan*, judge trial referee, granted the defendant's motion to strike the revised complaint; thereafter, the court, *Harmon, J.*, granted the plaintiff's motion for judgment and rendered judgment for the defendant, from which the plaintiff appealed to the Appellate Court, *DiPentima, C. J.*, and *Lavine* and *Moll, Js.*, which affirmed the judg-

* April 15, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ment of the trial court, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

John R. Williams, for the appellant (plaintiff).

Robert M. Palumbos, pro hac vice, with whom was *Elizabeth M. Lacombe*, for the appellee (defendant).

Scott Madeo and *Brian Festa* filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Opinion

D'AURIA, J. The plaintiff, Ohan Karagozian, an optician formerly employed by the defendant, USV Optical, Inc.,[1] brought this action for constructive discharge, alleging that (1) the defendant required him to provide optometric assistance services to a doctor of optometry in violation of the public policy of the state of Connecticut, (2) the defendant refused and failed to excuse the plaintiff from those duties, and (3) "[a]s a result, the plaintiff was compelled to resign his position with the defendant . . . ." The defendant moved to strike the plaintiff's corrected revised complaint on the ground that the allegations in the complaint could not, as a matter of law, satisfy the requirements of a constructive discharge claim.[2] The trial court granted the defendant's motion to strike, relying on *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 178, 717 A.2d 1254 (1998), for the proposition that a claim of constructive discharge requires a plaintiff to demonstrate that the employer intended to force the employee to resign. The trial court

[1] The plaintiff alleged that USV Optical, Inc., is a Texas corporation headquartered in New Jersey that owns and operates optical departments in JCPenney stores at various locations in Connecticut.

[2] The operative complaint for purposes of the present appeal is the corrected revised complaint filed on December 19, 2016. The defendant also moved to strike the plaintiff's complaint on the ground that the plaintiff asserted a claim for which no private right of action exists. The trial court did not address that issue, and the parties did not raise it on appeal.

determined that the plaintiff had not only failed to allege this intent requirement in his complaint, but also failed to allege the second requirement of a constructive discharge claim—that his work conditions became so intolerable that a reasonable person in his shoes would have felt compelled to resign.

Interpreting and applying our decision in *Brittell* in the same fashion as the trial court, the Appellate Court affirmed the trial court's judgment, concluding that there was "no allegation in the complaint that reasonably [could] be construed to claim that the defendant *intended* to create conditions so intolerable that a reasonable person would be compelled to resign." (Emphasis in original.) *Karagozian* v. *USV Optical, Inc.*, 186 Conn. App. 857, 867–68, 201 A.3d 500 (2019). We disagree with the Appellate Court's interpretation of *Brittell*, although we affirm its judgment on the alternative ground it identified.

To plead a prima facie case of constructive discharge, a plaintiff must allege that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned. *Brittell* does not, as the Appellate Court has ruled in several cases, require a plaintiff claiming constructive discharge to allege that the employer intended to force the employee to quit, but only to allege that the employer intended to create the *conditions* that the plaintiff claims compelled the employee to quit. However, in the present case, we agree with the Appellate Court and the defendant that the plaintiff failed to sufficiently allege the second requirement of a constructive discharge claim in his complaint. Specifically, the plaintiff's complaint fails as a matter of law to allege that the defendant created a work atmosphere so difficult

or unpleasant that a reasonable person in the plaintiff's shoes would have felt compelled to resign.

The following facts and procedural history, as contained in the record and in the Appellate Court's decision, are relevant to this appeal. The plaintiff's complaint alleged that the plaintiff began working in an optical department operated by the defendant and located in a JCPenney store in Trumbull. As a licensed optician manager, the plaintiff's role involved providing optometric assistant services to the doctor of optometry at the store. His specific duties included, but were not limited to, maintaining records, scheduling appointments, preparing patients for vision examinations, adjusting and repairing glasses, modifying contact lenses, measuring intraocular pressure of eyes using a glaucoma test, and measuring the axial length of eyes using ultrasound equipment. About three months into his employment, the plaintiff asked his supervisors that "he not be required to perform such duties . . . ." According to the plaintiff, he made this request on at least three separate occasions on the basis of his belief that these duties violated the public policy of the state of Connecticut.

As support for his belief that these duties violated the state's public policy, the plaintiff attached to his complaint copies of a declaratory ruling issued by the Board of Examiners for Optometrists on May 1, 2002, and a cease and desist consent order issued by the Board of Examiners for Optometrists and the Board of Examiners for Opticians in February, 2006. In the plaintiff's view, the declaratory ruling "prohibits employees under the control of unlicensed third parties from performing services for licensed optometrists." The cease and desist consent order, the plaintiff alleged, provided that Walmart, Inc., had agreed not to permit licensed opticians to perform the duties of an optometric assistant or to perform services for optometrists by whom

they were not employed. Additionally, the plaintiff alleged that his duties violated public policy, as set forth in General Statutes § 31-130 (i),[3] in that "neither the defendant nor JCPenney had a staffing permit allowing either of them to provide staffing services to the doctor." The plaintiff's complaint alleged that the defendant refused the plaintiff's requests and failed to excuse him from these duties. As a result, the plaintiff claimed, he was compelled to resign his position. He then brought this action for constructive discharge.

The defendant moved to strike the complaint on the ground that the plaintiff's allegations did not, as a matter of law, satisfy the requirements of a constructive discharge claim. Specifically, the defendant argued, the documents on which the plaintiff relied—the declaratory ruling and the cease and desist consent order—were not binding on the parties in the present case and did not create a private right of action for optometric assistants. The defendant also contended that the plaintiff's reliance on § 31-130 (i) was misplaced because his complaint made no allegation that optometrists employed by the defendant charged the defendant for hiring opticians. As to the elements of a constructive discharge claim, the defendant argued that the plaintiff's complaint failed to establish that the employer intentionally created an intolerable work atmosphere that forced the plaintiff to quit.

The trial court agreed with the defendant and granted the motion to strike the complaint. The plaintiff declined to replead and, instead, after the court rendered judg-

[3] General Statutes § 31-130 (i) provides in relevant part: "No person shall engage in the business of procuring or offering to procure employees for persons seeking the services of employees or supplying employees to render services where a fee or other valuable thing is exacted, charged or received from the employer for procuring or assisting to procure or supplying such employees unless he registers with the Labor Commissioner. . . ."

ment in favor of the defendant, appealed to the Appellate Court, which affirmed the judgment of the trial court. The Appellate Court's decision relied on its interpretation of the standard we established in *Brittell* for a constructive discharge claim. The plaintiff then petitioned this court for certification to appeal, which we granted on one issue: "Did the Appellate Court correctly construe and apply *Brittell* v. *Dept. of Correction*, [supra, 247 Conn. 148], in holding that an action for constructive discharge in violation of public policy requires that the plaintiff allege and prove not only that the employer intended to create an intolerable work atmosphere but that the employer intended thereby to force the plaintiff to resign?" *Karagozian* v. *USV Optical, Inc.*, 331 Conn. 904, 201 A.3d 1023 (2019).

On appeal to this court, the plaintiff reasserts his position that a constructive discharge allegation should not focus on the "employer's state of mind but on the objective reality of the working conditions and the impact of that objective reality, not upon the particular worker in question, but upon a hypothetical reasonable person in the worker's position. . . . By requiring the employee to prove . . . that the employer intended to force him to resign, the Appellate Court . . . imposed a requirement that defeats the very purpose of the constructive discharge doctrine." (Citations omitted; emphasis omitted.) Accordingly, the plaintiff urges this court to reverse the Appellate Court's judgment upholding the trial court's decision to strike his complaint.

I

"Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favor-

able to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 398, 142 A.3d 227 (2016).

To evaluate whether the Appellate Court properly upheld the trial court's ruling that the plaintiff failed to allege facts sufficient to support a claim for constructive discharge, we first must determine whether the Appellate Court properly applied the constructive discharge standard that we described in *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 148: "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 178, quoting *Chertkova* v. *Connecticut General Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996).

The parties in the present case disagree in their interpretation of the *Brittell* standard, specifically as to the element of intent. The defendant candidly suggests that two different interpretations of the standard are plausible—either that the employer intended to create an intolerable work atmosphere or that the employer intended to create the intolerable work atmosphere and thereby intended to force the employee to quit. The defendant argues that a plaintiff claiming that he was constructively discharged should be required to show that the employer intended to force the employee to resign. As support for its claim, the defendant points to Appellate Court and Superior Court cases that "have consistently applied *Brittell* to require that the employer intend to

force the employee to resign."[4] According to the defendant, the Appellate Court in the present case correctly applied the standard in concluding that the plaintiff had failed to assert facts showing that the defendant intended to force his resignation.

The plaintiff, on the other hand, asserts that the proper interpretation of *Brittell* is that an employer's intent matters only in regard to the creation of the intolerable work atmosphere. He argues that the Appellate Court incorrectly interpreted the standard in *Brittell* by forcing him to show that the employer intended to force him to resign.

We agree with the plaintiff. An examination of our decision in *Brittell* reveals that we required that the plaintiff establish only that the employer intended to create the intolerable work atmosphere, not that the

[4] For example, the defendant relies on *Boucher* v. *Saint Francis GI Endoscopy, LLC*, 187 Conn. App. 422, 202 A.3d 1056, cert. denied, 331 Conn. 905, 201 A.3d 1023 (2019), in which the Appellate Court, interpreting *Brittell*, stated that "the plaintiff has presented no evidence from which it can be inferred that the defendant deliberately sought to force the plaintiff to quit." Id., 433; see also *Horvath* v. *Hartford*, 178 Conn. App. 504, 510–11, 176 A.3d 592 (2017) ("to meet the high standard applicable to a claim of constructive discharge, a plaintiff is required to show . . . that there is evidence of the employer's intent to create an intolerable environment that forces the employee to resign"). In fact, the Appellate Court panel in the present case was following *Horvath*. See *Karagozian* v. *USV Optical, Inc.*, supra, 186 Conn. App. 873 n.15.

The defendant also relies on a Superior Court case in which the court set out the standard for a constructive discharge claim as follows: "To plead a prima facie case of constructive discharge, a plaintiff must allege two elements. First, the plaintiff must show that the defendant acted deliberately to create an intolerable work environment. Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the employee to quit . . . ." *Harrelle* v. *Wendy's Old Fashioned Hamburgers of New York, Inc.*, Docket No. CV-14-6008428-S, 2017 WL 715754, *7 (Conn. Super. January 10, 2017). Applying that standard, the court found that a genuine issue of material fact existed as to whether the employer transferred the employee "for legitimate business reasons or to force the [employee] to quit." Id., *8. In light of our holding today, to the extent that those cases incorrectly applied the *Brittell* standard, we disavow that application.

employer intended to compel the plaintiff to quit. Recent United States Supreme Court precedent, applying federal law on which we relied in *Brittell*, supports our determination.

In *Brittell*, about one year into her employment, the plaintiff, a female correction officer employed by the Department of Correction (department) and assigned to one of its correctional centers, reported to her supervisors several incidents of inmates making obscene comments about her sexuality. *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 150–51. On the basis of one of the plaintiff's reports, the deputy warden met with her and thereafter issued a memorandum to the warden, noting "that all staff had been admonished regarding . . . possible consequences of any harassing statements or actions made to or about fellow staff [persons] . . . that he had advised the plaintiff to report any continued harassing behavior to her supervisors . . . and report[ing] that the plaintiff had declined the help of the employee assistance program . . . ." (Footnotes omitted.) Id., 153.

About seven months later, another incident occurred. Id., 154. The plaintiff reported the matter to a major, who "issued a notice to all employees that defined sexual harassment . . . . A similar notice was read at roll call for seven consecutive days." Id. The plaintiff then filed a written complaint with the warden and informed the major that she had sought psychiatric help. Id., 155. The major thereafter informed her that she should not return to work, and she was placed on medical leave. Id., 157. The plaintiff also contacted the department's affirmative action unit and filed a formal complaint. Id., 158. The affirmative action unit "offered to recommend a transfer for the plaintiff to any institution of her choice within the department . . . . The plaintiff, however, was not amenable to this suggestion." Id., 159. The plaintiff declined the idea of a transfer on three other

occasions: (1) at the suggestion of the affirmative action unit, stating as reasons that she had a new apartment, she did not have a car, and her mother lived nearby; (2) at the suggestion of an employee in the department's personnel department, citing as reasons certain medical problems and that she did not own a car; and (3) at the suggestion of the warden, voicing concern over the possibility that correction officers and inmates from the correctional facility also might be transferred to the same institution, which could lead to a recurrence of the rumors. Id., 159–60. The plaintiff applied for medical leave and continued on unpaid medical leave until she failed to submit necessary medical documentation. Id., 160–61. At that point, her employer considered her to have resigned. Id., 161.

The plaintiff thereafter brought an action in which she alleged that she had been constructively discharged "because the working conditions that she faced became so difficult that a reasonable person similarly situated would have felt compelled to leave . . . ." Id., 162. The trial court, after a court trial, rejected her constructive discharge claim "on the ground that the defendant had offered the plaintiff the opportunity to transfer to any one of a number of other correctional institutions within the general vicinity of her home, but the plaintiff had declined these offers." Id., 163. On appeal to this court, the plaintiff claimed that, "by failing to put an end to the harassment she faced at work for nearly two years, [the department] created a work environment so hostile that any reasonable person in her position would have left." Id., 178. This court, for the first time, set forth the now oft quoted standard for constructive discharge: "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . Working conditions are intolerable if they are so diffi-

cult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id. This quoted language came word for word from a then recent case from the United States Court of Appeals for the Second Circuit, with only one difference—we italicized the word "intentionally." See *Chertkova* v. *Connecticut General Life Ins. Co.*, supra, 92 F.3d 89 (concluding that plaintiff met burden of establishing prima facie case of constructive discharge due to harassment on basis of gender under Title VII of Civil Rights Act of 1964, as amended by Title VII of Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq.).[5]

In the context of the facts in *Brittell*, our emphasis on intent makes sense. The plaintiff in *Brittell* had claimed that the department's failure to remedy the hostile work environment equated to its intentionally having created the work environment of which she complained. See *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 178. Contrary to her argument, the trial court found that the facts supported the department's argument that it had in fact made efforts to remedy the situation and to provide the plaintiff with alternatives. For example, the employer on several occasions offered to transfer the plaintiff to the location of her choice. Id., 159–60. We specifically stated: "Even if we assume, arguendo, that an employer's failure to remedy a hostile working environment may be considered the intentional creation of an intolerable work atmosphere . . . the plaintiff has not met her burden of establishing an essential element of her claim, namely, the existence of an intolerable work atmosphere that would compel a rea-

[5] "We look to federal law for guidance in interpreting state employment discrimination law, and analyze claims under [the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., the state counterpart to Title VII] in the same manner as federal courts evaluate federal discrimination claims." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 636 n.11, 79 A.3d 60 (2013).

sonable person in that situation to resign. Had the plaintiff established that she was given the choice either to continue working with the officers and inmate population at the correctional center or to leave the employ of the defendant, she might well have prevailed on this element of her claim." (Citation omitted; emphasis omitted.) Id., 179.

Said another way, if the department had intentionally created the intolerable work atmosphere by refusing to address the issue, refusing to make any alteration in the plaintiff's work conditions, or refusing to offer her any relief (i.e., by forcing her to remain at the correctional facility or to quit), the plaintiff could have succeeded on her constructive discharge claim. The trial court in *Brittell* found that the opposite was true. In fact, the department *intentionally* attempted to improve the work atmosphere for the plaintiff by giving her the choice of transferring to another correctional institution, away from the correction officers and inmates who had made the work atmosphere intolerable. In light of our analysis of the facts in *Brittell*, it is clear that our emphasis of the word "intentionally" within the quotation from *Chertkova* v. *Connecticut General Life Ins. Co.*, supra, 92 F.3d 89, manifested an intent that "intentionally" modify the requirement that the employer created the complained of environment. Notably, by contrast, nowhere in *Brittell* did we require or allude to a requirement that the plaintiff establish that the department had intended to force her to quit.

To clarify the intent element of a constructive discharge claim for future cases, the phrase under examination—"[c]onstructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily"—should be understood to refer to the employer's intent to create the intolerable work atmosphere itself.

Thus, to plead a prima facie case of constructive discharge, a plaintiff must allege that (1) the employer intentionally created the complained of work atmosphere, (2) the work atmosphere was so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, and (3) the plaintiff in fact resigned. This standard does not require that the plaintiff allege facts to show that the employer intended to force the employee to resign, only that a reasonable employee would feel compelled to resign. See *Petrosino* v. *Bell Atlantic*, 385 F.3d 210, 229 (2d Cir. 2004) (stating that Second Circuit "has not expressly insisted on proof of specific intent," although in some constructive discharge cases, "where such evidence exists, the mens rea requirement is easily established").

In addition to being consistent with *Brittell* itself, recent United States Supreme Court precedent regarding constructive discharge does not dissuade us, as the plaintiff and the amicus argue, from our interpretation of the intent element. In *Green* v. *Brennan*, U.S. , 136 S. Ct. 1769, 195 L. Ed. 2d 44 (2016), the court explained: "The whole point of allowing an employee to claim 'constructive' discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him. . . . We do not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's intent all along." (Citation omitted; footnote omitted.) Id., 1779–80, citing *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141–43, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004).

Quoting the same language, the Commission on Human Rights and Opportunities (commission) filed an amicus brief in the present case, positing that we should

eliminate the element of intent altogether and adopt a completely objective standard. We do not agree with the commission that the court in *Green* completely eliminated the element of intent for a constructive discharge claim. A constructive discharge claim under Title VII requires a plaintiff to prove discrimination by an employer—inherently necessitating proof of an element of intent in creating the workplace condition. See *Pennsylvania State Police* v. *Suders*, supra, 542 U.S. 133 ("[t]o establish [a] hostile work environment [under Title VII], plaintiffs like Suders must show harassing behavior sufficiently severe or pervasive to alter the conditions of [their] employment" (internal quotation marks omitted)).

In *Green*, the plaintiff alleged that he was denied a promotion because of race and alleged that his supervisors threatened to bring criminal charges against him in retaliation for his complaint, thereby forcing his resignation in violation of Title VII. *Green* v. *Brennan*, supra, 136 S. Ct. 1774–75. The case turned on the question of whether the forty-five day limitation period for a constructive discharge claim by a federal civil servant begins to run after the last discriminatory act or when the employee resigns. Id.; see 29 C.F.R. § 1614.105 (a) (1) (2012) (federal civil servants, prior to filing complaint, were required to initiate contact with counselor at their agency within forty days of date of matter alleged to be discriminatory). To answer the question, the court set out the basic elements of a constructive discharge claim. "A plaintiff must prove first that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign . . . [and] he must also show that he actually resigned." (Citation omitted.) *Green* v. *Brennan*, supra, 1777. On the basis of, in part, the fact that a constructive discharge claim requires that the employee actually resign, the court concluded that the

limitation period should begin to run when the employee resigns. Id., 1776–77.

In a concurring opinion, Justice Alito stated that the majority ignored a bedrock principle of Title VII cases: "An act done with discriminatory intent must have occurred within the [limitation] period." Id., 1782 (Alito, J., concurring in the judgment). In accordance with this principle, Justice Alito concluded, an employee's resignation triggers a fresh [limitation] period when "the employer makes conditions intolerable *with the specific discriminatory intent of forcing the employee to resign*." (Emphasis in original.) Id., 1785 (Alito, J., concurring in the judgment). However, "[i]f the employer lacks that intent . . . the [limitation] period [should run] from the discriminatory act that precipitated the resignation." Id. The majority responded: "This sometimes-a-claim-sometimes-not theory of constructive discharge is novel and contrary to the constructive discharge doctrine. . . . We do not . . . require an employee to [prove] . . . that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's plan all along." (Citation omitted; footnote omitted.) Id., 1779–80. The majority rejected requiring that a plaintiff alleging constructive discharge prove specifically that the employer intended to force the employee to resign. See id. The court did not reject the requirement that a plaintiff prove some kind of discrimination, however. Rather, the required discrimination speaks to the first requirement under our standard in *Brittell*—the employer's intent in creating the work condition of which the plaintiff complains. In *Green*, the employer created the complained of condition by promising not to pursue criminal charges against the plaintiff in exchange for his promise to retire or take a position with a considerably lower salary, thereby forcing him to involuntarily resign. Id., 1783.

The constructive discharge requirements in *Green* are not purely objective and align with the standard we established in *Brittell*. If not made perfectly clear in that case, we are now afforded an opportunity to clarify that standard in the present case.[6] The standard contains a subjective inquiry (did the employer intend to create the working condition) and an objective inquiry (the impact the working conditions would have on a reasonable person). To evaluate the working conditions, we evaluate whether a reasonable person in the employee's shoes would have felt compelled to resign. The defendant in the present case argues that the standard should go one step further. It contends that the plaintiff must show that the defendant in fact subjectively intended that a specific employee resign under conditions deemed intolerable by an objectively reasonable person. That kind of showing would be difficult to allege and inconsistent with the aims of the objective requirement. We decline the defendant's request to require that a constructive discharge claim allege facts establishing that the employer intended for the employee to resign.

II

Having set forth the requirements to establish a prima facie case for constructive discharge, we turn to the Appellate Court's analysis in the present case and consider whether the Appellate Court properly upheld the

[6] Although the plaintiff in the present case did not allege a Title VII violation, we perceive no justification for altering the requirements for a constructive discharge claim depending on whether the claim is one for a constructive discharge resulting from race discrimination; *Grey* v. *Norwalk Board of Education*, 304 F. Supp. 2d 314, 320–21 (D. Conn. 2004); gender discrimination; *Usherenko* v. *Bertucci's Corp.*, Docket No. 3:05-CV-756 (JCH), 2006 WL 3791389, *1 (D. Conn. December 21, 2006); a sexually hostile work environment; *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 150; whistleblowing activities; *Horvath* v. *Hartford*, 178 Conn. App. 504, 506, 176 A.3d 592 (2017); or any other intentionally created circumstance resulting in work conditions that would compel a reasonable person to resign.

trial court's granting of the defendant's motion to strike the complaint in its entirety.

Although the Appellate Court quoted the proper standard for a constructive discharge claim, we conclude that the court incorrectly applied the standard. In applying the standard, the Appellate Court upheld the trial court's judgment on the basis of, in part, the plaintiff's failure to allege facts that the defendant intended to force him to quit. See *Karagozian* v. *USV Optical, Inc.*, supra, 186 Conn. App. 867–68. Specifically, the Appellate Court stated: "The plaintiff denies the plain language of *Brittell*, arguing that a more sensible reading of *Brittell* would [lead to the conclusion] that it is the employer's intent to create the work atmosphere in question that matters, rather than an intent that such atmosphere should force an employee to resign." Id., 868. On this point, we conclude that the Appellate Court incorrectly applied *Brittell*, and we reiterate that *Brittell* requires only that plaintiffs allege facts showing that the employer intended to create the conditions of which a plaintiff complains. See part I of this opinion.

On an alternative ground, the Appellate Court upheld the trial court's striking of the plaintiff's complaint, reasoning that the plaintiff had failed to satisfy the second requirement of a constructive discharge claim—he failed to allege facts establishing that the work atmosphere was so difficult or unpleasant that a reasonable person in his shoes would have felt compelled to resign. *Karagozian* v. *USV Optical, Inc.*, supra, 186 Conn. App. 870. We agree. Even when the allegations of the complaint are construed in the light most favorable to sustaining the complaint, we conclude that the plaintiff's allegations do not meet this standard.

In support of his allegation of intolerable work conditions, the plaintiff relied on the declaratory ruling issued by the Board of Examiners for Optometrists, the cease

and desist consent order issued by the Board of Examiners for Optometrists and the Board of Examiners for Opticians, and § 31-130 (i). In his brief to this court, he explained: "No employer may require its employees to violate the law. A reasonable employee, having been instructed to do so, would refuse and resign. The employer is responsible for that resignation, since the sole proximate cause of the resignation was the employer's illegal job requirement." Contrary to the plaintiff's assertion, however, nothing in his complaint establishes that the defendant required him to violate the law. The declaratory ruling evaluated the circumstances under which an optometrist would be considered an employee, and not an independent contractor, of an unlicensed person, firm, or organization so as to comply with General Statutes § 20-133a.[7] We agree with the defendant that the plaintiff cannot rely on the declaratory ruling because the ruling itself provides that it is only "binding upon those who participate[d] in the hearing" that resulted in the ruling. The plaintiff did not participate in the hearing. Moreover, the ruling concerned optometrists. Even if we were to credit the plaintiff's argument that the ruling established a public policy regarding optometrists, the plaintiff's tasks could not have violated that particular policy because he was employed as an optician, not an optometrist. Furthermore, the ruling "[was] intended to provide guidance" to individual licensed optometrists. It did not establish criminal liability or inflict repercussions or potential sanctions for any specific conduct that would compel a reasonable optician in the plaintiff's shoes to resign. See *Sheets*

[7] General Statutes § 20-133a provides in relevant part: "No licensed optometrist shall practice his profession as an employee of any unlicensed person, firm or corporation, provided that said prohibition shall not apply to health service organizations, hospitals, other optometrists or ophthalmologists. . . . No rule of the board shall prohibit the practice of optometry on a lessee or sublessee basis in or on the premises of a retail, commercial or mercantile establishment."

v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 480, 427 A.2d 385 (1980) ("an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment").

Similarly, the plaintiff's complaint failed to show how the cease and desist consent order either applied to the plaintiff or bound the defendant. The order required that Walmart, Inc., not permit a licensed optician to act in the capacity of an optometric assistant to an independent optometrist leasing space in a store owned by Walmart, Inc. We fail to see, because the plaintiff failed to allege, how the cease and desist consent order functionally created a working condition so intolerable that a person in his shoes would have been justified in walking off the job as if they had been fired. We also fail to understand how the defendant—which was not a party to the cease and desist consent order—could be bound by Walmart, Inc.'s agreement that, without admitting any fault, it would change its employment practices.

The statute the plaintiff relies on is also inapplicable. Section 31-130 (i) requires that persons engaged in the business of procuring or offering to procure employees for employers must register with the Commissioner of Labor before they may charge employers for their services. The plaintiff did not allege that the doctor of optometry charged a fee from the defendant for hiring the plaintiff as an assistant. Accordingly, the statute does not implicate the defendant.

Finally, we are not persuaded that the plaintiff's allegations suggest that the defendant intended to create conditions different from what the plaintiff would have expected when he agreed to work as a licensed optician manager at the defendant's operation. The plaintiff's complaint centered around the duties he was in fact hired to perform, not some intolerable work atmo-

sphere that forced him to quit involuntarily. The defendant contends that the plaintiff's allegations included that "he was asked to provide optometric assistant services to the on-site doctor of optometry *from day one*. It defies logic to conclude that, from the very first day of [the] plaintiff's employment, [the defendant] had intended to force [the] plaintiff to quit involuntarily." (Emphasis in original.) We agree with the defendant.

The complaint does not allege that any of the plaintiff's assigned tasks changed between his hire date in June, 2014, and September, 2014, when he first complained to his supervisors. All we know from the complaint is that the plaintiff began working for the defendant in June, 2014, and that the defendant required him to perform the tasks he complains of from "approximately June 28, 2014, to approximately October 17, 2014 . . . ." The complaint does not allege that the plaintiff was unaware of the duties he would be required to perform or that the defendant changed his responsibilities after he was hired. Nor does the complaint suggest that anything changed from what he agreed to perform within the scope of his employment and what he now asserts violates public policy. "In general . . . an employee's dissatisfaction with his job responsibilities and assignments do not suffice to establish a claim of constructive discharge." *Zephyr* v. *Ortho McNeil Pharmaceutical*, 62 F. Supp. 2d 599, 608 (D. Conn. 1999) (finding that plaintiff failed to establish that he was constructively discharged).

By failing to establish that his work conditions were so intolerable that a reasonable person in the plaintiff's shoes would have felt compelled to resign, the plaintiff's complaint fails. The Appellate Court correctly upheld the trial court's striking of the plaintiff's complaint in its entirety.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.