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ROGERS, C. J., concurring and dissenting. I agree with parts I A and B and part II of the majority opinion. I respectfully dissent, however, from my colleagues' conclusion in part I C that the trial court's memorandum of decision lacked clarity in setting forth the legal basis for its award of double damages.

In its memorandum of decision, the trial court awarded the plaintiff Barry Saunders<sup>1</sup> double damages, pursuant to General Statutes § 31-72, upon its finding "that the refusal of [the defendant Adco Medical Supplies, Inc. (Adco)]<sup>2</sup> to pay wages was wilful . . . ." The defendants claim that the trial court applied an incorrect legal standard, wilfulness, in awarding statutory double damages and that the trial court should have applied a different standard, namely, bad faith. The plaintiff responds that the bad faith standard proposed by the defendants is the equivalent of the wilfulness standard used by the trial court.

The majority concludes that the defendants' claim is not reviewable because the record is inadequate to demonstrate which standard the trial court actually used. In reaching its conclusion, the majority declares that the trial court's memorandum of decision is ambiguous because the definition of the term "wilful" varies according to the context in which it is used, and, therefore, the trial court could have made a finding of bad faith despite using the term wilful.<sup>3</sup>

This court, however, has stated explicitly that, in the context of § 31-72, the bad faith standard necessary to support an award of double damages is separate and distinct from the wilfulness standard used in the context of common-law punitive damages.<sup>4</sup> *Harty v. Cantor Fitzgerald & Co.*, 275 Conn. 72, 93 n.12, 881 A.2d 139 (2005). In light of that distinction in our case law, and the trial court's use of only the term wilful in its decision, the trial court must have measured Adco's conduct by an incorrect legal standard that does not support its award of double damages pursuant to § 31-72.<sup>5</sup>

Because the trial court, in awarding double damages to the plaintiff, unambiguously found that Adco wilfully refused to pay the plaintiff's wages, but failed to decide whether Adco had acted in bad faith, I would reverse the judgment of the trial court only as to its award of statutory double damages, and remand the case to that court for a determination of whether Adco's conduct demonstrated bad faith and, if so, whether statutory double damages may be awarded.

<sup>1</sup> See footnote 3 of the majority opinion.

<sup>2</sup> In addition to Adco, the defendants include Burton Firtel and Barbur Associates, LLC (Barbur). See footnote 3 of the majority opinion.

<sup>3</sup> The majority states that "[w]hether a party's conduct is wilful is a question of fact." The issue before this court, however, is not whether the trial court's factual findings were clearly erroneous, which would be a factual question,

but instead whether the trial court applied the facts that it found to a “wilful” or a “bad faith” legal standard. Whether the trial court chose the correct legal standard is a question of law subject to plenary review. See *Fish v. Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008) (trial court’s determination of proper legal standard in any given case is question of law subject to plenary review); *Cable v. Bic Corp.*, 270 Conn. 433, 440, 854 A.2d 1057 (2004) (whether Appellate Court correctly concluded that workers’ compensation commissioner had employed relevant legal standard, even though he had not expressed standard used, presents question of law subject to plenary review). Accordingly, the majority’s observation that the record in this case might support a finding of either wilfulness or bad faith, or both, lends no insight into which of those standards the trial court actually applied to the evidence in the present case.

<sup>4</sup> I agree that, in other contexts not involving § 31-72, we have suggested that bad faith conduct could include wilful behavior.

<sup>5</sup> The majority states that “[w]e cannot conclude that the trial court applied an incorrect legal standard when it was the conduct of the defendant that the court was describing . . . because of the multiple meanings ascribed to the word wilful in our case law.” Because the trial court necessarily applied some legal standard to Adco’s conduct and because the court describes that conduct only as wilful, it is clear to me that the standard chosen by the trial court was a wilfulness standard. Further, because this court’s opinion in *Harty v. Cantor Fitzgerald & Co.*, supra, 275 Conn. 93 n.12, clearly limits the number of definitions attributable to the term wilful in the context of § 31-72 claims for double damages, the trial court applied an incorrect standard to Adco’s conduct.

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