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BORDEN, J., concurring and dissenting. I agree with, and join, all of the majority opinion, except part III D. In that part, the majority (1) announces a new rule governing the awarding of attorney's fees, but (2) declines to apply that rule to the present case, and (3) therefore affirms an award that, by its own reasoning, was not adequately supported by the record. I would conclude that, in accord with our existing and well considered case law, no abuse of discretion occurred in the award of attorney's fees and that, furthermore, no new rule such as that articulated by the majority is necessary. Accordingly, I would affirm the award of attorney's fees to the plaintiff corporation and its shareholders, and I dissent from the majority's new procedural requirement for such awards.

I

I first address the award of attorney's fees, and explain why I think it was properly made, both procedurally and substantively, under our existing case law. Although the defendants, former employees of the plaintiff corporation, had been defaulted and the trial was limited to a hearing in damages, the record of this case, including the trial court's factual findings and the defendants' claims in both the trial court and this court, demonstrates that the hearing in damages involved claims going to liability as well as damages. As a result of that contested hearing in damages, over which the trial court presided, the court awarded the plaintiffs: (1) $235,000 in compensatory damages under both the Connecticut Unfair Trade Practices Act (CUTPA) and the Connecticut Uniform Trade Secrets Act (trade secrets act); (2) $40,000 in punitive damages under the trade secrets act; (3) $40,000 in punitive damages under CUTPA; and (4) $20,000 in attorney's fees.[1]

I agree with the general standard set forth by the majority for the award of attorney's fees. "[W]e have repeatedly held that courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described. . . . *Piantedosi* v. *Floridia*, 186 Conn. 275, 279, 440 A.2d 977 (1982). We have applied this principle with regard to attorney's fees. See, e.g., *Andrews* v. *Gorby*, [237 Conn. 12, 24, 675 A.2d 449 (1996)]; *Appliances, Inc.* v. *Yost*, [186 Conn. 673, 681, 443 A.2d 486 (1982)]." (Internal quotation marks omitted.) *Shapero* v. *Mercede*, 262 Conn. 1, 9–10, 808 A.2d 666 (2002). More specifically, we have stated: "Time spent is but one factor in determining the reasonableness of an attorney's fee.[2] Although the better practice is for an attorney . . . to maintain time records, the failure to do so does not preclude the court from determining and awarding an attorney's fee. . . . *[C]ourts may rely on their general knowledge of what*

has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. . . . The court [is] in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues. Miller v. *Kirshner*, 225 Conn. 185, 201, 621 A.2d 1326 (1993).'' (Citation omitted; emphasis added; internal quotation marks omitted.) *Andrews* v. *Gorby*, supra, 24; see also *Miller* v. *Kirshner*, supra, 201 (trial court properly relied on plaintiff's itemized financial affidavit of what she owed counsel, ''and on its general knowledge and involvement with the entire trial to ascertain a reasonable attorney's fee''); *Bizzoco* v. *Chinitz*, 193 Conn. 304, 310–11, 476 A.2d 572 (1984) (award of attorney's fees sustained because ''trial court knew that the plaintiff's counsel had taken a lengthy deposition, had engaged in a two-day trial, and had prepared a post-trial brief . . . [and] was in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with [the] issues''); *Piantedosi* v. *Floridia*, supra, 279 (court's discretion in award of attorney's fees need not ''be based on factual evidence in the transcript''; trial court's ''[awareness] of the activities of counsel during the course of . . . trial,'' supported its valuation of reasonable attorney's fees). In addition, we explicitly have held that, even when the trial court that awarded attorney's fees was not the same court that presided over the rest of the case, it can employ its general knowledge of the value of attorneys' services performed in the case, and can estimate the amount of work involved from an examination of the pleadings in the file. *Shapero* v. *Mercede*, supra, 9 n.6; *Appliances, Inc.* v. *Yost*, supra, 681 n.5 (trial court had ''entire file before it from which it could estimate the approximate number of hours devoted to the pleadings''). Applying these standards to the record in the present case, I would conclude that the trial court did not abuse its discretion in its award of attorney's fees.

First, the trial court had presided over the entire contested hearing in damages, resulting in a successful award of a total of $235,000 in compensatory damages, and $80,000 in punitive damages based on the defendants' reckless, willful and malicious conduct toward the plaintiffs. Thus, it had firsthand knowledge of the length, difficulty and complexity of that proceeding, as well as the degree of its success. In addition, immediately prior to the commencement of the hearing in damages, the very same trial court entertained the defendants' motion to open the very default that had led to the hearing in damages. In opposing the motion, the plaintiffs' attorney gave the following detailed description of the procedurally tortured path of the case up to that time.

Eighteen months prior to the hearing in damages, the plaintiffs' attorney had first sought discovery, and continued to seek discovery over the ensuing months.

The defendants did not file any objection, yet they failed to comply with the discovery requests. Specifically, the defendants flagrantly had refused to comply.[3] Thus, the plaintiffs' attorney was forced to move for compliance, and he obtained a ruling that a default would enter if the defendants continued to fail to comply. Again, they failed to comply, and the plaintiffs' counsel was forced to move for a default. The defendants *then* filed an objection to discovery. The plaintiffs' counsel then took more depositions, coupled with further discovery requests, with which the defendants again failed to comply; this required a hearing, during which the plaintiffs' counsel was required to ''spend a lot of time going over this.'' The trial court then agreed with the plaintiffs' counsel that the defendants' discovery objections had been untimely, *and ordered the defendants to pay the plaintiffs' attorney's fees*. Nonetheless, the court opened the default, based on the defendants' representations that they would now comply with the discovery requests. Thereafter, counsel for the plaintiffs met with counsel for the defendants in an attempt to reach an understanding about the defendants' compliance. The defendants' attorney agreed that they would comply. The plaintiffs' counsel then sent a letter to the defendants' counsel reaffirming their understanding that the defendants would produce the relevant materials within thirty days, and stating if he had ''anything wrong . . . [or had] misconstrued something'' the defendants should ''please tell [counsel] . . . so we can address it now, rather than later.'' The defendants neither responded to the letter nor complied with the outstanding discovery requests, forcing the plaintiffs' counsel again to move for a default for failure to comply with discovery. As a result, the court again entered a default against the defendants for failure to comply with discovery requests. The defendants *again* moved to set the default aside, based on their earlier objections to discovery, which already had been determined to have been untimely. The plaintiff's counsel, consequently, was *again* required to file an objection laying out the prior history.[4]

It was on this state of the record that the court considered the defendants' motion to open the default. The court denied the motion, and proceeded immediately to the hearing in damages. Thus, although the preceding representations were not offered to the court in *specific* connection with the plaintiffs' ultimate request for attorney's fees, the court certainly was entitled to take them into account in connection with that request.[5]

Second, the trial court file, which the trial court that conducted the hearing in damages had available to it for use in connection with the claim for attorney's fees, confirms the history recounted by the plaintiffs' attorney, including the needless litigation costs associated with the defendants' repeated discovery abuses. That file includes the following, in addition to the normal

cohort of pleadings.[6] The plaintiffs' filed a second motion for default "for repeated refusal and non-compliance with discovery." That motion also notes the court's prior order for the defendants to comply with numerous discovery requests, and the defendants' untimely objections thereto. In addition, in October, 2000, the trial court again ordered compliance, with a warning that a default would enter if the defendants again refused to comply, and with an award of attorney's fees at that time. The file further reflects the defendants' continued failure to comply, and their failure to pay the attorney's fee award. The plaintiffs' filing also discloses the depositions at which the defendants failed to produce the documents requested in connection therewith, and the court's granting of the plaintiffs' motion for default based on the defendants' repeated discovery violations, together with copies of various renewed notices of depositions and ignored production requests.

This entire record—the hearing before the court on the defendants' final motion to open the default, the hearing in damages, and the trial court file—is more than ample to surmount any reasonable requisite procedural or evidentiary threshold so as to justify the court's award of attorney's fees. Thus, the majority's suggestion that the only evidence to support an award of attorney's fees was the plaintiffs' posttrial request for $25,000 is simply contrary to the record.

Indeed, *Bizzoco* v. *Chinitz*, supra, 193 Conn. 310–11, is directly on point. In that case, the promissory note signed by the defendant "expressly authorized the recovery of a reasonable attorney's fee." Id., 310.[7] The defendant challenged the trial court's award of such a fee in the amount of $5868, amounting to 15 percent of the judgment, claiming that "the evidence at trial was insufficient because there was nothing before the court about the services performed by the plaintiff's counsel or about the hours that counsel had spent on the case." Id. This court expressly rejected that challenge, stating that "*courts may rely on their general knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. In this case, the trial court knew that the plaintiff's counsel had taken a lengthy deposition, had engaged in a two-day trial, and had prepared a post-trial brief. The court was in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues. This record was sufficient to support the award made by the court.*" (Emphasis added.) Id., 310–11. Similarly, in the present case, the trial court knew that the plaintiffs' counsel had gone through lengthy and contentious discovery proceedings, including several depositions and repeatedly reopened defaults, had engaged in a one day trial on both liability and damages issues, and had filed a posttrial brief. As in *Bizzoco*, "[t]his record was sufficient to support the award made by the court." Id., 311.

The majority's concession that my reading of *Bizzoco* is ''reasonable,'' is, although generous, also disingenuous. In my view, that is not only a reasonable reading of *Bizzoco*, it is the only accurate reading of it. The majority, moreover, does not suggest an alternative reading. Therefore, the majority has, without explaining what is wrong with *Bizzoco*, implicitly overruled it. The doctrine of stare decisis requires more than that. *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003) (''[t]he doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it'' [internal quotation marks omitted]); *State* v. *Ferguson*, 260 Conn. 339, 367 n.18, 796 A.2d 1118 (2002) (same).

In addition, I note that the defendants do *not* claim that the award of $20,000 in attorney's fees was unreasonable in amount. Indeed, given the total award of $335,000, including $80,000 in punitive damages for reckless, willful and malicious conduct by the defendants, the fee award amounts to slightly less than 6 percent of the total award of damages. That strikes me as eminently reasonable in amount, based on the factors set forth by this court in *Andrews* v. *Gorby*, supra, 237 Conn. 24 n.19. See footnote 2 of this opinion.

In this connection, furthermore, I also note that at no time did the defendants attempt in the trial court to challenge the award, either as to its evidentiary basis or as to the reasonableness of its amount. When the plaintiffs filed their posttrial brief requesting $25,000 in attorney's fees, the defendants did not ask the court to postpone any such award until they had an opportunity to challenge it, they did not suggest to the court that the plaintiffs should present documentation or evidence to support the award, and they did not ask for a hearing on the award. When the court made the award, they did not ask the court for an articulation of its evidentiary basis. Had the defendants done any of these things, it is clear to me from this record that both the plaintiffs and the court could have and would have made explicit what is vividly implicit as to both the evidentiary basis of the award and its reasonableness in amount. Instead, the defendants remained silent on the entire issue until the filing of their brief in this court, in which they devoted a total of less than one page to it. Furthermore, the trial court did not perceive the necessity of further briefing, documentation or evidence, before rendering its award. Compare *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 681 (trial court sua sponte requested supplemental brief itemizing legal services rendered).

I agree that, as we have stated previously, it is the better practice for attorneys seeking fees to keep and produce time records, and I also agree that is the better practice for such attorneys, when they file a request for such fees, to enter into the record, in some appropriate form, a specific statement of the basis for the request.

See *Miller* v. *Kirshner*, supra, 225 Conn. 201. That does not mean, however, as the majority now holds, that a failure to make such a specific entry deprives the trial court of an evidentiary basis to render an unchallenged award based on it's the court's own firsthand knowledge of the case before it and of the file available to it.

II

This brings me to the majority opinion and my reasons for disagreeing with it. As a predicate, it is necessary to summarize what I perceive to be its reasoning.

I begin by noting that the majority opinion is a paradigmatic example of the tail wagging the dog.[8] This is an appeal from a total judgment of $335,000, of which only $20,000 is the attorney's fee portion. In addition, as I have already indicated, the portion of the defendants' brief challenging the attorney's fee award constituted less than one page. Furthermore, the majority spends approximately one-half of its opinion affirming the other substantive aspects of the judgment, which constituted $315,000 in damages, and approximately the same amount of the opinion going to great lengths to articulate a new procedural wrinkle for the award of attorney's fees, but, at the same time, the majority declines to apply that rule to the facts of the present case.

The majority opinion rests on the following chain of reasoning: (1) the weight of our case law requires more than the trial court's general knowledge of the proceedings before it and of the reasonable value of legal services; (2) there must be a clearly stated and described factual predicate for the fees sought, *apart* from the court's general knowledge of what constitutes a reasonable fee, and that ''a threshold *evidentiary* showing is a prerequisite for an award of attorney's fees'' (emphasis added); (3) therefore, the party seeking the fees ''must present to the court at the time of trial or, in the case of a default judgment, at the hearing in damages, a statement of the fees requested and a description of services rendered,'' thus leaving ''no doubt about the burden on the party claiming attorney's fees,'' and giving the other party ''an opportunity to challenge'' that request; (4) this holding will eliminate ''the undesirable burden imposed upon the courts when a party seeks an award of attorney's fees predicated solely upon a bare request for such fees''; (5) consequently, parties now ''must supply the court with a description of the nature and extent of the fees sought, to which the court may apply its knowledge and experience in determining the reasonableness of the fees requested''; *but* (6) none of this applies *to the present case* because the defendants took no action to challenge the plaintiffs' request for fees and, therefore, the award must be upheld. This chain of reasoning is fundamentally flawed.

To take the last link in the chain first, it escapes

me why, if this result is required by the weight of our preexisting case law, as the majority insists, it should not apply in the present case. If, as the majority concludes, and as I agree, an award of attorney's fees is part of the plaintiff's burden of establishing damages, and if, as the majority also concludes, and as I do *not* agree, that case law requires a *separate* statement ''of the fees requested and a description of services rendered,'' then I simply fail to see why the majority deprives the defendants of their right to prevail in the present case simply because they remained silent. After all, a defendant who is faced with an absence of necessary proof by the plaintiff on an essential element of the plaintiff's damages has no obligation to do any more than remain silent. Such a defendant may rely on the fact that its adversary simply has failed to establish that part of his case and may, as the defendants did here, claim such a lack of evidentiary sufficiency on appeal. See, e.g., *Lipshie* v. *George M. Taylor & Son, Inc.*, 265 Conn. 173, 175, 828 A.2d 110 (2003).

I do not, of course, advocate such a result in the present case, because in my view the plaintiffs must prevail on the basis of our existing case law. I merely point this out as an example of the self-contradictory nature of the majority's reasoning.

Furthermore, the majority appears to divide the requisite showing for an award of attorney's fees into two parts, namely: (1) a sufficient *evidentiary* basis; and (2) a ''*statement*''—presumably by the party's counsel—''of the fees requested and a description of services rendered.'' (Emphasis added.) Under the majority opinion, however, the second part apparently will satisfy the first part. But why? It is settled law that statements of counsel do not ordinarily constitute evidence. *Cologne* v. *Westfarms Associates*, 197 Conn. 141, 153, 496 A.2d 476 (1985); *Celentano* v. *Zoning Board of Appeals*, 135 Conn. 16, 18, 60 A.2d 510 (1948). I therefore fail to see why a formal statement of counsel satisfies any evidentiary requirement.

If, however, as seems more likely, the majority instead means that a ''threshold *evidentiary* showing''; (emphasis added); does not really mean ''evidence,'' but just the formal statement of counsel that the majority now requires, then the majority has elevated form over substance to Everestian heights, particularly as applied to this record. There can be little doubt that the trial court, as well as the defendants, knew full well the basis of the plaintiffs' request for attorney's fees, without a formal separate statement of that basis. To mix the metaphor even more, the tail that is wagging the dog is little more than a stump. Furthermore, on this understanding of the majority's meaning, it has rendered wholly superfluous our numerous statements that ''[c]ourts may rely on their general knowledge of what has occurred in the proceedings before them *to supply*

evidence in support of an award of attorney's fees.'' (Emphasis added; internal quotation marks omitted.) *Miller* v. *Kirshner*, supra, 225 Conn. 201; *Andrews* v. *Gorby*, supra, 237 Conn. 24.

The other links in the majority's chain of reasoning are similarly flawed. The majority elaborately describes the facts of the cases from which it draws the lesson that the weight of our case law requires more than the court's general knowledge of the proceedings and of the reasonable value of legal services, namely, that weight of authority requires a separate statement of the fees requested and services rendered. See *Shapero* v. *Mercede*, supra, 262 Conn. 1; *Miller* v. *Kirshner*, supra, 225 Conn. 185; *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 673; *Piantedosi* v. *Floridia*, supra, 186 Conn. 275; *Hartford Electric Light Co.* v. *Tucker*, 183 Conn. 85, 438 A.2d 828 (1981). It is true that in each of these cases, in which we affirmed the award of fees, there was in fact more than the court's knowledge of the proceedings and of the value of services in general. Contrary to the majority's assertion, however, in none of those cases did we say or even intimate that the ''more'' was a *requisite* for such an award. More important, in the only case in which the court made its award *without* the ''more,'' that is, on the basis of its knowledge of the proceedings before it and its general knowledge of the value of legal services; *Bizzoco* v. *Chinitz*, supra, 193 Conn. 304; we squarely affirmed the award, using the same analytical framework that we have employed in all of the cases on which the majority relies. I simply do not see why *Bizzoco* is deprived of its place on the scale measuring the weight of our authority. It is on point, it makes good sense, neither party has asked this court to overrule it, and the majority makes no attempt to justify doing so. Thus, the majority's characterization of the weight of our authority is more properly described as what the majority *wants* that weight to be.

Finally, the majority justifies its new rule on the basis that it will eliminate ''the undesirable burden imposed upon the courts when a party seeks an award of attorney's fees predicated solely upon a bare request for such fees.'' This justification falls of its own weight. First, I am unaware of any such ''burden,'' undesirable or desirable. Certainly, neither the majority nor the defendants in this case have presented any evidence thereof; indeed, the defendants have never even claimed that to be the case. Furthermore, the trial court in this case did not seem at all burdened by the plaintiffs' claim for fees, and had no apparent difficulty making an eminently reasonable award. Certainly this trial court was, as will be any of our trial courts, aware of the option of requesting supplemental briefing, itemizing the legal services rendered, if it determined that it needed more than it already had before it in order to make an intelligent award of attorney's fees. See *Appliances, Inc.* v. *Yost*, supra, 186 Conn. 681. Finally,

it borders on the facetious to suggest that the present case involves a request for attorney's fees "predicated solely upon a bare request . . . ." The record, as I have demonstrated in part I of this opinion, is wholly to the contrary. Thus, in my view, the majority has fashioned a remedy for a problem that has not been shown to exist.

I would, therefore, affirm the award of $20,000 in attorney's fees to the plaintiffs.

[1] This award was a reduction from the $25,000 requested by the plaintiffs.

[2] "Rule 1.5 of the Rules of Professional Conduct, entitled 'Fees,' provides in pertinent part: '(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

" '(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

" '(2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

" '(3) The fee customarily charged in the locality for similar legal services;

" '(4) The amount involved and the results obtained;

" '(5) The time limitations imposed by the client or by the circumstances;

" '(6) The nature and length of the professional relationship with the client;

" '(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

" '(8) Whether the fee is fixed or contingent. . . .' " *Andrews* v. *Gorby*, supra, 237 Conn. 24 n.19.

[3] The plaintiffs' counsel represented to the court, without objection from the defendants, that he had "taken two depositions with [the defendants] where I sat across the table from them, and they told me how they've made no attempt [to obtain or disclose] the [requested] discovery materials."

[4] The hearing in damages took place at the end of June, 2001. The plaintiffs' counsel's objection, dated December 26, 2000, provided the following: two depositions had been commenced, both with substantial production requests, which were "almost completely ignored," with no objections filed, and that the defendants "simply chose not to produce the requested documents"; the defendants had filed objections to the plaintiffs' interrogatories and production requests "long after the deadline for compliance," and used the late filed objections as a basis for opening a default; the trial court had opened the default, but imposed costs on the defendants, advising both counsel to work out the objections or place them on a calendar; thereafter both counsel reviewed all the discovery requests and the defendants' counsel agreed to comply with them, an agreement that was confirmed in writing by the plaintiffs' counsel's letter, which was attached; and because the original discovery requests had been filed on December 2, 2000, the plaintiffs had been unsuccessfully seeking discovery for one year.

[5] Curiously, the majority neglects to mention this entire proceeding in its discussion of the award of attorney's fees. Indeed, the majority does not even give any weight to the fact that the trial court had just completed hearing and deciding the hearing in damages, which covered both liability and damages. Instead, the majority suggests that this is a case in which the award was "predicated solely upon a bare request for such fees."

[6] The prayer for relief in the original complaint included a request for attorney's fees. Thus, it was apparent from the very beginning that such an award was at least a possibility, and the defendants have never claimed surprise regarding the request.

[7] In evaluating whether a trial court's award of an attorney's fee is based on sufficient evidence in the record, I can perceive no legitimate basis for distinguishing between a note calling for a reasonable fee and a statute calling for a reasonable fee. Indeed, I do not read the majority opinion to suggest otherwise.

[8] Lest I be accused, by virtue of the length of this opinion, of the same thing, I point out that, because I disagree with the majority's reasoning, I am compelled to add my tale to the story in order to explain that disagreement.