EMILIO D'ASCANIO ET AL. *v.* TOYOTA INDUSTRIES CORPORATION ET AL.
(SC 18935)

Norcott, Palmer, Zarella, Eveleigh, McDonald and Espinosa, Js.

Argued April 24—officially released August 13, 2013

Paul D. Williams, with whom were *Erick M. Sandler* and, on the brief, *James E. Hennessey* and *Patrick W. Schmidt*, pro hac vice, for the appellants (defendant BT Prime Mover, Inc., et al.).

Jack G. Steigelfest, for the appellees (plaintiffs).

Opinion

EVELEIGH, J. In this products liability case, the defendants Toyota Material Handling USA, Inc., BT Prime Mover, Inc., and Summit Handling Systems, Inc.,[1] appeal[2] from the judgment of the Appellate Court reversing the judgment of the trial court directing a verdict in their favor. On appeal, the defendants claim that the Appellate Court improperly concluded that the trial court abused its discretion in striking the testimony presented by the plaintiffs' expert witness, precluding that expert witness from offering further testimony and denying the plaintiffs' motions for a mistrial and a continuance. In response, the plaintiffs, Emilio D'Ascanio and Maria D'Ascanio,[3] contend that the Appellate Court correctly determined that the trial court abused its discretion because the trial court's rulings, considered in their entirety, constituted an improper sanction of dismissal because they left the plaintiffs without an expert witness in a case in which one was required and, thus, led to a directed verdict in favor of the defendants. Specifically, the plaintiffs claim that the trial court had other reasonable remedies available to it rather than excluding their expert's testimony and that, even if it did exclude his testimony, it should have granted a mistrial or a continuance so that they could have disclosed another expert witness. Thus, the plaintiffs claim that, because the sanction of dismissal should be employed only as a last resort, the trial court improperly resorted to imposing that sanction in the present case. We agree with the plaintiffs and, accordingly, affirm the judgment of the Appellate Court.[4]

The opinion of the Appellate Court sets forth the following facts and procedural history. "On June 14, 2005, the plaintiffs filed this action for damages incurred as a result of serious personal injuries sustained by Emilio D'Ascanio when he was operating an allegedly defective stand-up forklift designed, manufactured and distributed by the defendants. The plaintiffs alleged that defects in the forklift's steering system and its electronic control display proximately caused Emilio D'Ascanio's injuries. The court bifurcated the trial of the case, commencing with the presentation of evidence on the issue of liability.

"The plaintiffs began their case by presenting the testimony of Daryl Ebersole, an engineer whom they had disclosed as their expert witness on the issue of whether the forklift in question was defective. After Ebersole had testified for the majority of the first day of trial, the plaintiffs sought to introduce into evidence a videotape that depicted a Toyota forklift with an electronic directional display system. The defendants objected to the admission of the videotape, and, in response, the court excused the jury to hear the arguments of counsel. The defendants objected first on the basis that they were unaware of any videotape involving

the exact model of forklift at issue in this case. In response, the plaintiffs' counsel asked Ebersole: '[H]ave you reviewed any video by any defendant in this action which portrays a directional control indicator as a [safety]-related device?' In an attempt to resolve the confusion of the court and the defendants' counsel as to what the videotape actually portrayed, the plaintiffs' counsel stated: '[M]y point being is it's the same person that puts the name on the truck—they're claiming that this directional control indicator on—same manufacturers is a safety-related device, and it does the same thing. It may look different but it does the same job.' In an attempt to further lay a foundation for the exhibit, the plaintiffs' counsel asked Ebersole: 'Have you seen a video by any defendant—by Toyota Material Handling [USA, Inc.] that shows a directional control indicator on one of its vehicles and they've portrayed it as a safety device?' Ebersole indicated that he had seen such a videotape and that he had obtained it from 'a Toyota [website].' He indicated that, although the directional control indicator and steering wheel might look different from those on the forklift at issue in the present case, they served the same safety purpose. The defendants' counsel then undertook his voir dire examination of Ebersole. He began by asking Ebersole: '[W]hat model Toyota is shown in the video?' Ebersole indicated that he believed it was a 'six series' but that he was not certain exactly which model it was. The plaintiffs' counsel then asked Ebersole about the number of indicator lights on the model in the videotape, and a discussion ensued between counsel and the court as to the contrast between the number of indicator lights on that model and the model at issue in the case before the jury. The defendants' counsel voiced various further objections as to foundation, and, in response, the plaintiffs' counsel offered the defendants' counsel the opportunity to view the videotape. The defendants' counsel did not avail himself of that offer, and the court overruled the objection and admitted the videotape into evidence.

"The videotape was first played for the jury and the court without commentary by Ebersole. The defendants' counsel did not raise any further objection to the videotape at that time. The videotape was then played a second time with Ebersole explaining what it depicted. The defendants' counsel objected only to any 'editorial comment' by Ebersole. The court sustained the objection, and the remainder of the videotape was played for the jury again with Ebersole intermittently pausing the tape and explaining what it depicted. After the videotape had been played for the jury for the second time, the plaintiffs' counsel suggested that it be played one more time, a *third* time, straight through, without any narration or commentary. At that point, the defendants' counsel asked to approach the court. The court dismissed the jury for the weekend, and the

defendants' counsel objected to the admission of the videotape. The thrust of the defendants' objection was that the forklift portrayed in the videotape was not the same model that was involved in this case, and the two forklifts did not have the same displays. The court agreed that it, too, thought that the videotape was going to depict the same control system and indicated that it assumed that the jury shared that understanding. The court indicated that, when the jury reconvened, it would strike the exhibit and instruct the jury that it should be disregarded on the ground that it 'is not a video which involves the model truck which is involved in this accident . . . .' Although the defendants' counsel accepted the court's ruling, further colloquy followed regarding the origin of the videotape, specifically regarding the date that the truck depicted in the videotape was manufactured. The plaintiffs' counsel indicated that he would attempt to obtain that information, and court adjourned for the weekend.

"By the time court reconvened on the following Tuesday, May 25, 2010, the defendants had filed a motion for a mistrial on the ground that Ebersole and the plaintiffs' counsel intentionally misled the jury and the court in their efforts to admit the videotape into evidence. The court questioned both the plaintiffs' counsel and Ebersole as to when they knew that the forklift in the videotape did not depict the model forklift that was the subject of the present litigation. The court also inquired as to the time of the making of the videotape. Following lengthy argument, the court ruled that both the videotape and Ebersole were 'out of the case,' striking the testimony that he had already given and precluding him from testifying further.

"Subsequently, on May 28, 2010, the plaintiffs filed a motion for a continuance to allow them to disclose another liability expert. On that same date, the plaintiffs also filed a motion for a mistrial on the ground that they could no longer proceed with their cause of action without a liability expert. On June 1, 2010, the court issued a memorandum of decision denying the plaintiffs' motions. In explaining its decision to strike the testimony, and to preclude further testimony of Ebersole, the court found that 'Ebersole's behavior was motivated by a desire to hide critical facts about the evidence in question and was therefore deceptive' and that such evidence 'certainly would have been prejudicial to the defendants.' The court concluded that a mistrial would not have been an appropriate remedy because it would 'excuse . . . Ebersole from the consequences of his behavior. If this trial had to be put on all over again . . . Ebersole could conceivably be replaced, and the plaintiffs would get the equivalent of a judicial "do-over."' The court concluded that a curative instruction would 'not do enough to undo the harm done here.' Finally, the court concluded that: 'When a witness whom the court has qualified as an expert demon-

strates, as . . . Ebersole has, that his testimony cannot be relied on to be honest and complete, the testimony should not be permitted.' The court found that the 'available alternative relief was simply not severe enough, under the circumstances, to address this witness' behavior.' The court summarily denied the plaintiffs' motion for a continuance of the trial to allow them to disclose another liability expert.

"The plaintiffs continued with their case without a liability expert. At the end of the plaintiffs' case, the defendants moved for a directed verdict on the basis that the plaintiffs had not presented expert testimony that the forklift at issue was defective. The court agreed and granted the defendants' motion for a directed verdict." (Emphasis in original; footnotes omitted.) *D'Ascanio* v. *Toyota Industries Corp.*, 133 Conn. App. 420, 422–27, 35 A.3d 388 (2012).

The plaintiffs thereafter appealed to the Appellate Court, claiming that the trial court abused its discretion in striking Ebersole's testimony, preventing him from offering any further testimony and failing to grant a mistrial or a continuance to allow them to procure another liability expert. Id., 421–22. The Appellate Court agreed with the plaintiffs, reversed the judgment of the trial court and remanded the case for further proceedings according to law. Id., 430–31. This appeal followed.

We begin our analysis with an overview of the applicable standard of review and relevant legal principles. It is well established that " 'a court may, either under its inherent power to impose sanctions in order to compel observance of its rules and orders, or under the provisions of [Practice Book] § 13-14, impose sanctions . . . .' *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 14, 776 A.2d 1115 (2001). The decision 'to enter sanctions . . . and, if so, what sanction or sanctions to impose, is a matter within the sound discretion of the trial court. . . . In reviewing a claim that this discretion has been abused the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [T]he ultimate issue is whether the court could reasonably conclude as it did.' . . . *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, [230 Conn. 148, 163–64, 645 A.2d 505 (1994)]." (Footnote omitted.) *Evans* v. *General Motors Corp.*, 277 Conn. 496, 522–23, 893 A.2d 371 (2006).

"At the same time, however, we also have stated: '[D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986).' . . . *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 239, 654 A.2d 342 (1995).

In addition, the court's discretion should be exercised mindful of the 'policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. *Snow* v. *Calise*, 174 Conn. 567, 574, 392 A.2d 440 (1978). The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Rules are a means to justice, and not an end in themselves . . . . *In re Dodson*, 214 Conn. 344, 363, 572 A.2d 328, cert. denied, 498 U.S. 896, 111 S. Ct. 247, 112 L. Ed. 2d 205 (1990). Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. *Johnson* v. *Zoning Board of Appeals*, 166 Conn. 102, 111, 347 A.2d 53 (1974).' . . . *Coppola* v. *Coppola*, 243 Conn. 657, 665–66, 707 A.2d 281 (1998). Therefore, although dismissal of an action is not 'an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority'; *Fox* v. *First Bank*, 198 Conn. 34, 39, 501 A.2d 747 (1985); see also *Pavlinko* v. *Yale-New Haven Hospital*, [192 Conn. 138, 145, 470 A.2d 246 (1984)] (dismissal proper where party's disobedience intentional, sufficient need for information sought is shown, and disobedient party not inclined to change position); the court 'should be reluctant to employ the sanction of dismissal except as a last resort.' *Fox* v. *First Bank*, supra, 39. '[T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of' the other party and the court. *Pietraroia* v. *Northeast Utilities*, 254 Conn. 60, 75, 756 A.2d 845 (2000)." *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16–17.

On appeal, the defendants claim that the Appellate Court improperly determined that the trial court abused its discretion in excluding Ebersole's testimony. Specifically, the defendants claim that, in arriving at its decision, the Appellate Court was inappropriately concerned with adhering to the well recognized policy preference in favor of reaching a trial on the merits and securing a litigant his day in court because the trial court's rulings at issue did not end the trial. The defendants further claim that the Appellate Court misapplied the standard of review because it did not afford " 'every reasonable presumption' " in favor of the trial court's decision to exclude Ebersole's testimony or its decision to decline the plaintiffs' requests for a mistrial and a continuance. Thus, the defendants claim that, when the standard of review is applied correctly, the trial court's actions must be upheld because its rulings demonstrated a careful review of the available evidence and constituted a genuine effort to fashion an appropriate remedy to Ebersole's conduct.

In response, the plaintiffs claim that the Appellate Court properly determined that the trial court abused its discretion in issuing rulings that prevented them from presenting expert testimony regarding the defendants' liability and, thus, ensuring an adverse judgment against them. Specifically, the plaintiffs claim that, although the trial continued after the trial court issued its rulings, those rulings led to a directed verdict in favor of the defendants and, therefore, amounted to a sanction of dismissal. The plaintiffs further contend that the Appellate Court correctly determined that the trial court abused its discretion because a trial court may dismiss a case without reaching the merits only in situations where lesser sanctions would be inadequate and that, in the present case, the trial court had other suitable sanctions available to it. We agree with the plaintiffs.

We first address the plaintiffs' claim that the totality of the trial court's rulings amounted to a sanction of dismissal. At trial, the plaintiffs claimed that Emilio D'Ascanio was injured while operating a defectively designed forklift that was manufactured by the defendants. In order to prevail on a strict product liability claim, a plaintiff must prove, inter alia,[5] that the product was in a defective condition unreasonably dangerous to the consumer or user and that the defect caused the injury for which compensation is sought. *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 214, 694 A.2d 1319 (1997). Depending on the type of product at issue—namely, its complexity—expert testimony regarding whether the product was defective and causation may be required in order to make out a prima facie product liability case. Under the ordinary consumer expectation test, a plaintiff may prove that the product is unreasonably dangerous without presenting expert testimony, but only "when the everyday experience of the particular product's users permits the inference that the product did not meet minimum safety expectations." Id., 222. Conversely, "there may be instances involving complex product designs in which an ordinary consumer may not be able to form expectations of safety." Id., 219. In those situations, the modified consumer expectation test applies, and the trier of fact must view a consumer's expectations of the product "in light of various factors that balance the utility of the product's design with the magnitude of its risks." Id., 220. Expert testimony is generally required in cases in which the modified consumer expectation test applies because, due to the complexity of the product design, the issues involved go "beyond the field of the ordinary knowledge and experience of the trier of fact." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 149, 869 A.2d 192 (2005); see also *Franchey* v. *Hannes*, 155 Conn. 663, 666, 237 A.2d 364 (1967). Thus, without expert testimony in such cases, a plaintiff cannot provide sufficient evidence for the case to be

submitted to the trier of fact. "[I]t is the function of the trial court to determine whether an instruction based on the ordinary consumer expectation test or the modified consumer expectation test, or both, is appropriate in light of the evidence presented." *Potter* v. *Chicago Pneumatic Tool Co.*, supra, 223.

In the present case, there appears to have been an implicit understanding between the parties and the court, prior to and during trial, that expert testimony regarding the defendants' liability was necessary in order for the plaintiffs to make out a prima facie case.[6] In denying the plaintiffs' motions for a mistrial and a continuance, which had the effect of preventing the plaintiffs from offering expert testimony regarding the defendants' liability, the trial court stated that "[t]he court is well aware of the impact which this ruling will probably have on the pending trial . . . ." The "impact," of course, was that the plaintiffs would be left without a liability expert and, therefore, they would be unable to prevail on their claim. The plaintiffs also recognized the severity of the trial court's ruling, evidenced by the fact that they sought a mistrial or a continuance so that they could procure another liability expert in order to provide sufficient evidence to make out a prima facie case. Specifically, the plaintiffs stated that, without expert testimony concerning the defendants' liability, there was a "fatal gap" in their evidence, and that the lack of expert testimony would "guarantee an adverse judgment" against them.

Thus, although the trial court allowed the plaintiffs to continue with their proof after the rulings at issue were made, the subsequent evidence put forth by the plaintiffs was futile because they lacked expert testimony regarding the defendants' liability in a case in which such testimony was necessary. Indeed, the lack of expert testimony concerning the defendants' liability formed the basis of the trial court's decision to grant the defendants' request for a directed verdict. In directing a verdict in favor of the defendants, the trial court stated: "This is a situation where the only way the plaintiff[s] can prove the existence of a defect which is unreasonably dangerous is through expert testimony, and clearly there wasn't any. . . . There is simply not enough evidence before this jury to allow it to deliberate on the issues of liability, because they could only resolve the issues of fact by resorting to speculation and conjecture." Accordingly, although the trial continued for several days after the rulings at issue were made, we conclude that the Appellate Court properly determined that the actions by the trial court were tantamount to a dismissal of the plaintiffs' case.

Having concluded that the totality of the trial court's rulings amounted to a sanction of dismissal, we now must determine whether the trial court abused its discretion in ruling as it did. As we have stated, although

the sanction of dismissal should only be imposed as a last resort, a trial court does not abuse its discretion in dismissing a case without reaching the merits "where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority." *Fox* v. *First Bank*, supra, 198 Conn. 39. For example, in *Fox* v. *First Bank*, supra, 38–39, the trial court dismissed the plaintiff's case for failure to comply with the orders of the court. In that case, the plaintiff obtained a loan from the defendant for the purchase of an automobile. Id., 35. After the plaintiff defaulted on the loan, the defendant repossessed the car and the plaintiff filed an action for wrongful repossession. Id., 35–36. Under the terms of an order by the trial court, the defendant returned the car to the plaintiff upon condition that the plaintiff would make monthly payments to the defendant in the amount established by the underlying contract. Id., 36. Thereafter, the plaintiff was found in contempt on three separate occasions, over a period of several months, for failing to make the monthly payments as required by the court's order. Id., 37–38. At the conclusion of the third contempt proceeding, the trial court ordered that the plaintiff pay to the defendant the arrearage that had resulted due to her repeated failure to make payments, by a specified date, or, failing that, the action would be dismissed. Id., 38–39. When the plaintiff failed to pay the arrearage by the date specified, the trial court dismissed the action. Id., 39. The plaintiff appealed from the order of dismissal and claimed that the trial court improperly invoked the "strongest possible sanction." (Internal quotation marks omitted.) Id.

On appeal, this court concluded that the trial court did not abuse its discretion in dismissing the action. Id. In so concluding, this court noted that "[t]he record is devoid of any reason why the plaintiff failed to make continuing payments as required. During this period the court expended a great deal of time entertaining the defendant's [contempt] motions and trying to accommodate the plaintiff. . . . The record does not reveal any explanation by the plaintiff for her noncompliance." Id., 40. Thus, this court concluded that the plaintiff's actions demonstrated a "sufficient disregard for the court's order and deliberate disregard of the authority of the court to warrant the trial court's imposition of [the sanction of dismissal]." Id. Additionally, this court noted that the plaintiff's noncompliance occurred "for almost two years" and, therefore, her action "justified the court's conclusion that such conduct would have persisted." Id. Accordingly, this court concluded that the trial court properly exercised its discretion in dismissing the action. Id.; see also *Pavlinko* v. *Yale-New Haven Hospital*, supra, 192 Conn. 144–45 (dismissal of action proper where plaintiff improperly refused to answer certain questions at deposition and where plaintiff represented to court that he would not comply with order requiring him to answer those questions).

Conversely, this court has concluded that the trial court abused its discretion in dismissing a party's case in situations where the sanctioned party's conduct did not evince a contumacious or unwarranted disregard for the court's authority. For instance, in *Usowski* v. *Jacobson*, 267 Conn. 73, 75–76, 836 A.2d 1167 (2003), the plaintiff filed a complaint against the defendants, alleging that the defendants had breached an oral partnership agreement. Thereafter, the defendants moved for a judgment of dismissal for the plaintiff's failure to comply with certain orders of the court. Id., 83. The trial court granted the motion, stating that it found a " 'continuing violation' " by the plaintiff of the court's discovery orders. Id. Specifically, the trial court based its ruling on the fact that the plaintiff had failed to comply with three different orders: the first being an order to produce certain documents; the second being an order of sanctions; and the third being an order modifying the order of sanctions. Id. The plaintiff appealed from the judgment of dismissal to the Appellate Court, which affirmed the judgment of the trial court. Id. An appeal to this court followed. Id., 84.

On appeal, this court concluded that the Appellate Court improperly affirmed the trial court's judgment of dismissal. Id., 91. In reversing the judgment of dismissal, this court stated that "[i]n each instance where the plaintiff . . . failed to comply with the trial court's order, other factors of a mitigating nature also were present." Id., 93. As to the plaintiff's failure to comply fully with the document production order, this court noted that the trial court found that the plaintiff had made " 'diligent efforts' " to locate and provide the documents requested, and that the violation of the order was due to the fact that the plaintiff was simply " 'not good at keeping records.' " Id., 94. Furthermore, this court found it even more significant that the trial court stated that it was " 'satisfied [that the plaintiff had] made a good faith effort' to produce the documents in question." Id. Likewise, this court determined that the plaintiff was justified in failing to comply with the trial court's order of sanctions because a party may appropriately fail to comply with an interlocutory order in order to obtain a final judgment so that the order can be immediately appealed. Id., 95. In light of these facts, this court concluded that the plaintiff's conduct "did not evince a 'contumacious or unwarranted disregard for the court's authority' " and that the plaintiff's failure to comply with the trial court's orders "did not constitute a pattern of abuse so egregious as to warrant dismissal, the remedy of last resort." Id., 95–96; see also *Hirsch* v. *Squillante*, 17 Conn. App. 354, 357–58, 552 A.2d 1222 (1989) (trial court improperly directed verdict and declined plaintiff's request for mistrial where plaintiff's expert witness refused to continue to testify, at no fault of plaintiff, because direct examination had taken longer than anticipated).

Turning to the present case, we find it significant that the only finding of fraud or intentional misrepresentation made by the trial court pertained to Ebersole. Thus, as in *Usowski*, the trial court did not find that either the plaintiffs or their counsel were complicit in Ebersole's allegedly deceitful conduct or, in other words, acted in any way other than in good faith. See *Usowski* v. *Jacobson*, supra, 267 Conn. 94. Indeed, in its memorandum of decision on the plaintiffs' motions for a mistrial and a continuance, the trial court made clear that it was primarily concerned with disciplining Ebersole for his conduct and that its rulings were not issued as a result of actions attributable to the plaintiffs or their counsel. Specifically, the trial court stated: "Under the circumstances of this case, *a mistrial would excuse* [*Ebersole*] *from the consequences of his behavior*. If this trial had to be put on all over again, [Ebersole] could conceivably be replaced, and the plaintiffs would get the equivalent of a judicial 'do-over.' " (Emphasis added.) The trial court went on to state: "Qualification by the court as an expert witness is not available to 'experts' as a matter of right, it is a privilege. . . . When a witness whom the court has qualified as an expert demonstrates, as [Ebersole] has, that his testimony cannot be relied on to be honest and complete, the testimony should not be permitted." These statements unequivocally indicate that the trial court's rulings were driven solely by its finding that Ebersole's testimony was dishonest and deceitful, and that those rulings were not, in any way, a product of misconduct on the part of the plaintiffs or their counsel. Despite the fact that the trial court attributed all of the allegedly deceitful behavior to Ebersole, the totality of its rulings had the primary effect of severely harming the plaintiffs by leading inexorably to a directed verdict in favor of the defendants.

The defendants claim, however, that the trial court did not abuse its discretion in preventing the plaintiffs from producing another liability expert because the plaintiffs selected Ebersole as their liability expert and, therefore, the plaintiffs were sponsors of Ebersole's testimony. Thus, the defendants contend that it is not unfair for the plaintiffs to suffer the consequences of Ebersole's conduct since they were the ones who retained, paid and proffered him. We disagree. The defendants do not allege, nor did the trial court find, that, in selecting Ebersole as their liability expert, the plaintiffs were aware that Ebersole would testify dishonestly at trial. In fact, it is not even alleged that the plaintiffs possessed knowledge of some fact that could have alerted them that Ebersole was likely to offer misleading testimony at trial, such as knowledge that Ebersole had a reputation for giving such testimony. Thus, in the absence of a finding by the trial court to the contrary, it is fair to assume that the plaintiffs chose Ebersole in good faith, and did not make the selection

with the intention to deceive the defendants or the court.[7] The mere fact that the plaintiffs chose Ebersole as their liability expert does not justify imposing a sanction of dismissal against them for conduct that is attributable solely to Ebersole. See, e.g., *Hirsch* v. *Squillante*, supra, 17 Conn. App. 357–58 (court rejected notion that plaintiff should suffer fatal consequences of directed verdict where his expert witness unexpectedly refused to continue to testify).

In addition to the fact that there was no finding that the plaintiffs intentionally engaged in any allegedly wrongful conduct, it is equally noteworthy that the objectionable conduct at issue was an isolated event and was not one in a series of actions in disregard of the court's authority. The allegedly deceitful testimony occurred on only one day, and made up merely a small portion of Ebersole's testimony as a whole.[8] Additionally, the plaintiffs were never given a chance to rectify the situation. Rather, when faced with the first and only instance of a witness offering allegedly deceitful testimony, the trial court issued rulings that effectively ended the case instead of first attempting to issue lesser sanctions. This stands in stark contrast to the actions of the trial court in *Fox*, where the trial court held the plaintiff in contempt on three separate occasions, and gave the plaintiff four opportunities to comply with the court's order over a period of nearly two years, prior to dismissing the action. *Fox* v. *First Bank*, supra, 198 Conn. 40. In that case, this court stated that the duration of the plaintiff's course of conduct "justified the [trial] court's conclusion that such conduct would have persisted." Id. Given the fact that the allegedly deceitful conduct at issue in the present case was an isolated, rather than a common, occurrence, we cannot draw the same conclusion.

We recognize that it is a reality of litigation that the fortunes of a party can turn conclusively on the experts that they sponsor. This is not a situation, however, where a party has selected a witness to serve as an expert, but who is ultimately deemed unqualified by the court; see, e.g., *Young* v. *Rutkin*, 79 Conn. App. 355, 359–61, 830 A.2d 340, cert. denied, 266 Conn. 920, 835 A.2d 60 (2003); or where a party's expert simply delivers unpersuasive testimony that is not credited by the jury. Nor is this a situation where a judgment of dismissal is issued against a party because disclosure of an expert witness occurred after a court imposed deadline. See, e.g., *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 813–15, 945 A.2d 955 (2008) (affirming trial court's exclusion of plaintiff's expert and resultant grant of summary judgment in favor of defendant). In those situations, the onus properly falls on the party who proffers that witness because that party could have chosen a witness whose credentials and experience would ensure that the court would qualify him as an expert, selected an experienced expert witness who is

more likely to present persuasive and credible testimony or made a timely disclosure. The present case differs from the aforementioned situations in that the plaintiffs merely chose Ebersole as their expert and, therefore, were not at fault, in any way, for his allegedly deceitful conduct. Additionally, as we have previously stated, the plaintiffs were never given any chance to rectify the situation, despite the fact that the plaintiffs did not show a continuous pattern of intentional misconduct.[9] Thus, on the basis of all of the foregoing factors, the trial court's ruling, which prevented the plaintiffs from presenting expert testimony regarding the defendants' liability, resulted in surprise and injustice to the plaintiffs. See *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16 ("[t]he design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice" [internal quotation marks omitted]).

We conclude, therefore, that the plaintiffs' conduct does not evince a "contumacious or unwarranted disregard for the court's authority"; (internal quotation marks omitted) *Usowski* v. *Jacobson*, supra, 267 Conn. 95; that would justify dismissal of the case. Dismissal was not the only option available to vindicate the legitimate interests of the defendants and the court. Rather, the trial court had an abundance of options at its disposal that would have sufficed. For example, the court could have struck Ebersole's testimony and precluded him from testifying further, but could have granted the plaintiffs' request for a mistrial or a continuance[10] to allow the plaintiffs to procure another liability expert.[11] The court also could have, as it was first inclined, stricken the videotape and Ebersole's accompanying testimony and instructed the jury to disregard both.[12] Additionally, the court could have fined Ebersole in conjunction with any of the aforementioned sanctions. Any of these sanctions would have accomplished the primary goal of the court—punishing Ebersole—without ensuring an adverse judgment against the plaintiffs. Thus, because the plaintiffs' conduct did not constitute a pattern of abuse so egregious as to warrant dismissal, we conclude that the Appellate Court properly determined that the trial court's rulings, considered in their entirety, constituted an abuse of discretion.

The judgment of the Appellate Court is affirmed.

In this opinion NORCOTT, PALMER and ESPINOSA, Js., concurred.

[1] On January 24, 2006, the action was withdrawn as to the named defendant, Toyota Industries Corporation, and the defendants Toyota Equipment Manufacturing, Inc., and Toyota Industries North America, Inc. We therefore refer to Toyota Material Handling USA, Inc., BT Prime Mover, Inc., and Summit Handling Systems, Inc., collectively as the defendants. See *D'Ascanio* v. *Toyota Industries Corp.*, 133 Conn. App. 420, 422 n.2, 35 A.3d 388 (2012).

[2] We granted the defendants' petition for certification to appeal limited

to the following issue: "Did the Appellate Court properly determine that the trial court's exclusion of expert testimony and refusal to grant a mistrial constituted an abuse of discretion?" *D'Ascanio* v. *Toyota Industries Corp.*, 304 Conn. 907, 39 A.3d 1118 (2012).

[3] We note that Wiremold Company, the employer of Emilio D'Ascanio, filed an intervening complaint in this action but is not a party to this appeal. Consequently, we refer to Emilio D'Ascanio and Maria D'Ascanio as the plaintiffs in this opinion. See *D'Ascanio* v. *Toyota Industries Corp.*, 133 Conn. App. 420, 421 n.1, 35 A.3d 388 (2012).

[4] Because we affirm the judgment of the Appellate Court, we need not reach the plaintiffs' alternative grounds for affirmance.

[5] In order to recover under the doctrine of strict liability in tort, the plaintiff must prove that: "(1) the defendant was engaged in the business of selling the product; (2) the product was in a defective condition unreasonably dangerous to the consumer or user; (3) the defect caused the injury for which compensation was sought; (4) the defect existed at the time of the sale; and (5) the product was expected to and did reach the consumer without substantial change in condition." (Internal quotation marks omitted.) *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 214, 694 A.2d 1319 (1997); see also 2 Restatement (Second), Torts § 402 A (1965).

[6] It was not until the defendants moved for a directed verdict that the plaintiffs argued that the ordinary consumer expectation test was applicable and that, therefore, expert testimony was not required in order for the case to be submitted to the jury. At all times prior, all parties represented that expert testimony regarding the defendants' liability was required.

[7] Although a finding that a party has engaged in intentional misconduct or acted in bad faith is not a prerequisite to a trial court's authority to dismiss an action, such a finding does lend support to a sanction of dismissal. See, e.g., *Fox* v. *First Bank*, supra, 198 Conn. 39–40; *Pavlinko* v. *Yale-New Haven Hospital*, supra, 192 Conn. 144–45.

[8] The trial court found no fault with any of Ebersole's testimony that preceded the testimony concerning the videotape at issue.

[9] Our analysis may well be different if, for example, the trial court granted a mistrial and at the second trial the plaintiffs again produced an expert who the trial court determined proffered fraudulent or deceptive testimony. If a party continuously offers witnesses who offer deceitful testimony, it may be appropriate for a trial court to determine that the party's conduct evinces a contumacious or unwarranted disregard of the court's authority that justifies dismissal. In the present case, however, Ebersole was the only witness offered by the plaintiffs who the trial court determined offered deceitful testimony.

[10] We note that, in most cases, granting a mistrial would be the more practical approach, given the amount of time that it generally takes to produce an expert witness and conduct a corresponding deposition.

[11] The defendants claim that granting a mistrial or a continuance would have been an undesirable remedy because such a ruling would have resulted in expense, prejudice and inconvenience to the defendants and the court. We disagree. Courts routinely issue rulings that result in delay, such as granting continuances where a party is late complying with an order of the court. Furthermore, the trial court could have assigned costs to the plaintiffs to prevent the defendants from bearing the financial burden that would accompany a mistrial or a continuance.

[12] We recognize that, in its memorandum of decision on the plaintiffs' motions for a mistrial and a continuance, the trial court concluded that a curative instruction would be insufficient to cure the prejudicial effect of the videotape and Ebersole's accompanying testimony. Although we do not purport to determine which remedy would have been best, we disagree that this remedy would not have been a more viable alternative to the sanction of dismissal issued by the trial court. We further note that, if the trial court had chosen this less extreme remedy, Ebersole's allegedly deceitful testimony could have been explored by the defendants on cross-examination because it would be probative of his credibility.