McDONALD, J., with whom ZARELLA, J., joins, concurring. I agree with the majority that the Appellate Court properly concluded that the trial court's decision to strike the testimony of Daryl Ebersole, the expert witness for the plaintiffs Emilio D'Ascanio and Maria D'Ascanio, was an abuse of discretion. I write separately, however, to emphasize that the positions taken on appeal by the defendants Toyota Material Handling USA, Inc., BT Prime Mover, Inc., and Summit Handling Systems, Inc., compel such a conclusion.

The Appellate Court's recitation of the facts, cited in the majority opinion, omits the specific factual basis for the trial court's decision, which I believe provides useful context for the extraordinary sanction ordered. Specifically, the trial court found the following facts in its memorandum of decision striking Ebersole's testimony due to the admission of the videotape based on improper representations made in support of its admission: (1) the forklift depicted in the videotape is a sit-down reach lift truck, not a stand-up reach lift truck like the model at issue in the accident; (2) the depicted forklift was not designed, manufactured, or distributed by the defendants, but instead was designed and manufactured by a European subsidiary of a Toyota company that has no direct working relationship with the defendants; (3) the forklift as depicted in the videotape was first manufactured in 2009, five years after the accident at issue and ten or eleven years after the forklift at issue was manufactured, giving rise to the misimpression that the display panel depicted on the forklift (with twice as many directional signals and a different display mechanism than the forklift at issue) would have been available to the defendants in lieu of the one at issue; (4) Ebersole gave inaccurate information to the court regarding where he found the videotape, stating that he had found it on " 'Toyota's website for that model' " and at " 'Toyotaforklift.com,' " when it actually had come from a European website; and (5) Ebersole untruthfully represented that the videotape had not been edited, when it was "obvious" from watching a longer form videotape that the videotape shown to the jury had been edited.

The majority concludes that the decision to strike Ebersole's testimony was improper in large part because "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." I would point out, however, that the trial court clearly made no finding that the plaintiffs or their counsel had acted in good faith. Indeed, the trial court's explanation for declining to order a mistrial—that it did not want the plaintiffs

to have the opportunity for "the equivalent of a judicial 'do-over' "—is ambiguous as to whether the court implicitly found that the plaintiffs or their counsel also had acted improperly. The defendants had argued in their memorandum of law in support of their motion for a mistrial and monetary sanctions that both Ebersole *and the plaintiffs' counsel* had engaged in "blatant misrepresentations and false statements concerning the contents of [the videotape]." The defendants also argued that the introduction of the videotape purposely violated the trial court's ruling on their motion in limine.

In their briefs to this court, however, the defendants have abandoned this argument and effectively have conceded that the trial court only attributed misconduct to Ebersole. Had the defendants not conceded this point, we would have been required to read the trial court's ambiguous statement in the light most favorable to sustaining the trial court's decision striking Ebersole's testimony. See *Evans* v. *General Motors Corp.*, 277 Conn. 496, 523, 893 A.2d 371 (2006) ("[i]n reviewing a claim that th[e] discretion [to enter sanctions] 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" [internal quotation marks omitted]). Because the defendants have conceded this point, I agree that we must operate under the assumption that the Appellate Court properly concluded that the trial court attributed misconduct to Ebersole only.

Nonetheless, I cannot help but note that it seems somewhat incredulous that the plaintiffs' counsel was wholly unaware of, and/or failed to recognize the significance of, the numerous inconsistencies between the model shown in the videotape and the one at issue in the present case. Some of these discrepancies would appear to be blatantly obvious, such as the fact that the manufacturer of the depicted forklift, whose name (BT Reflex) was prominently displayed in the videotape, was not one of the defendants in this case. It appears from the record that the plaintiffs' counsel used a longer form of this videotape when deposing one of the defendants' expert witnesses, who indicated that he did not believe that the forklift depicted was one manufactured by the defendants. Other discrepancies, such as the date of manufacture and the different display screen of the depicted forklift, appear to be the kind of information that would come to light with the type of preparation of an expert witness that it is incumbent upon counsel to make in a case with this level of complexity. Indeed, the defendants filed a motion in limine seeking to preclude, inter alia, claims that they manufacture and sell twelve and sixteen position drive wheel indicators. The court denied the request as moot in reliance on the representation of the plaintiffs' counsel that he had no intention to make such a claim, and yet the plaintiffs' counsel introduced a videotape

depicting a forklift purportedly manufactured by the defendants that had a sixteen position display indicator. To the extent that the plaintiffs' counsel was aware of some of these discrepancies but failed to appreciate their potential to mislead the jury to the defendants' detriment, it bears emphasizing that further reflection and consideration obviously was warranted in the present case. The fact that this court's judgment will give the plaintiffs' counsel another opportunity to obtain a judgment should not signal to the bar that the trial court cannot, in the proper exercise of its discretion, preclude expert testimony, even when such a sanction is tantamount to dismissal, when counsel has engaged in misconduct or gross negligence in the preparation of his or her witness.

Finally, with respect to the proper remedy, I agree with the majority's rejection of the defendants' claim that granting a mistrial or continuance would have been unduly prejudicial and inconvenient, but for a different reason than the one cited by the majority. When the defendants realized the scope and nature of the misrepresentations in the videotape, they sought a mistrial and monetary sanctions as their preferred relief, asking the court to strike Ebersole's testimony only as an alternative if the court declined to grant them their preferred relief of a mistrial. While this posture suggests that the defendants were of the view at that time that the plaintiffs still could establish a prima facie case without expert testimony, a view that changed by the time they later moved for a directed verdict, it also undermines a claim that a mistrial would have been unduly prejudicial.

I respectfully concur in the judgment.