THEODORE VECCHIARINO *v.* EDWARD B. POTTER, TEMPORARY EXECUTOR (ESTATE OF MATTHEW R. ISENBURG), ET AL.
(AC 45758)

Prescott, Elgo and Bishop, Js.*

Syllabus

The defendant E, a former romantic partner of the decedent, M, appealed to this court from the judgments of the Superior Court approving a

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

settlement agreement that resolved a dispute involving the beneficiaries of a contested will and M's heirs-at-law. Prior to the termination of their romantic relationship, E had been named a beneficiary in wills executed by M in 2003 and 2010. M died in 2016, and the plaintiff, a business partner of M, petitioned the Probate Court to admit M's 2014 will. E was neither a named beneficiary under the 2014 will, nor was she an heir-at-law. After the petition to admit the 2014 will was filed, certain of M's heirs-at-law objected to its admission and to the appointment of the plaintiff as the administrator of the estate. Thereafter, the Probate Court issued a written decree in which it concluded that, inter alia, M had been unduly influenced in executing the contested 2014 will and that, therefore, it should not be admitted to probate. The plaintiff and another named beneficiary of the contested will filed separate appeals to the Superior Court challenging this decree, which were subsequently consolidated. During the pendency of the claims in probate, E filed an appearance in the Probate Court as a creditor of M's estate on the basis of claims that she had unsuccessfully brought against M in a civil action while he was still alive. The Probate Court denied her creditor claims on the grounds that they were barred by res judicata and collateral estoppel, and she appealed to the Superior Court, which dismissed the appeal. E did not petition the Probate Court to admit either of the wills from 2003 or 2010 as the valid and operative will of the decedent. Instead, she filed a letter with the Probate Court and attached two Probate Court forms with copies of the 2003 and 2010 wills. Thereafter, all beneficiaries named in the 2014 will and the heirs-at-law who contested the will entered into an agreement in full compliance with the provisions of the applicable statute (§ 45a-434 (c)), which fully resolved all the issues between those parties with respect to the Probate Court decision on the application of the 2014 will and the resulting probate appeals. The Superior Court approved the settlement agreement over E's objection, in which she claimed, inter alia, that she was a "[person] interested in the estate" for purposes of settlement in accordance with § 45a-434 (c) and the agreement could not be approved without her participation and consent. *Held* that the trial court properly found that E had failed to establish any interest sufficient to require her participation in the agreement, as E was neither a named beneficiary of the only will that was sought to be admitted to probate and which was the subject of the probate appeals, nor was she recognized under intestacy statutes as an heir-in-law: contrary to E's claim that she attempted to have the 2003 and 2010 wills, in which she was named a beneficiary, admitted via her letter sent to the Probate Court, no other application to admit any other will of the decedent was before the Probate Court, the Probate Court did not treat the defendant's letter or its attachments as a petition to admit the wills to probate and E never raised a claim that the Probate Court improperly declined to consider her letter as a petition to admit one or both of the wills in any appeal from any of the relevant Probate

Court decrees; moreover, E's failure to seek to admit any other will for probate rendered her related assertion that her pecuniary interest in the estate might have been established through application of the doctrine of dependent relative revocation equally inapposite under the facts of this case, as the record was inadequate to have concluded that proper application of that doctrine would necessarily have revived any will in which E had any additional testamentary interest; furthermore, even assuming without deciding that persons interested in M's estate pursuant to § 45a-434 (c) could include an appearing creditor of the estate, E failed to establish such an interest in M's estate, as her civil action against the decedent, which was initiated prior to his death, was, with limited exception, fully and finally resolved against her, and her attempt to revive her claims or assert others before the Probate Court were rejected, her subsequent appeal from that ruling was dismissed, and, accordingly, principles of res judicata barred E from attempting to resurrect her creditor claims via the arguments in this appeal.

Argued October 5, 2023—officially released February 13, 2024

Procedural History

Appeals from the decree of the Probate Court for the district of Saybrook denying admission of the will of Matthew R. Isenburg to probate and appointing Edward B. Potter as temporary administrator of the estate of Matthew R. Isenburg, brought to the Superior Court in the judicial district of Middlesex, where the appeals were consolidated; thereafter, Danielle P. Ferrucci, the successor temporary administrator of the Estate of Matthew R. Isenberg, filed motions for approval of a mutual distribution, release and settlement agreement; subsequently, the defendant Elizabeth Isenburg filed an objection to the motions for approval of the mutual distribution, release and settlement agreement; thereafter, the court, *Hon. Edward S. Domnarski*, judge trial referee, granted the motions for approval of the mutual distribution, release and settlement agreement, and rendered judgments thereon, from which the defendant Elizabeth Isenberg appealed to this court. *Affirmed.*

Elizabeth Isenburg, self-represented, the appellant (defendant).

Christoher J. Cahill, with whom, on the brief, was *Patrick M. Fahey*, for the appellee (Danielle P. Ferrucci, successor temporary administrator of the estate of Matthew R. Isenburg).

Opinion

PRESCOTT, J. Matthew R. Isenburg (decedent) died on November 14, 2016, at the age of eighty-nine. In the underlying probate proceedings involving a contest to his will dated March 13, 2014, the beneficiaries named in the contested will and the decedent's heirs-at-law, who were omitted as beneficiaries from the will, resolved their dispute regarding its validity by entering into a mutual distribution, release, and settlement agreement (settlement agreement) that subsequently was approved by the Superior Court. In this appeal from the judgments of the Superior Court approving the settlement agreement, the defendant Elizabeth Isenburg, a former romantic partner of the decedent, who is neither a named beneficiary under the contested will nor an heir-at-law of the decedent,[1] claims that she is a "[person] interested in the estate" pursuant to General Statutes § 45a-434 (c)[2] and that the court should not have approved the settlement agreement without her participation in it.[3] We are not persuaded by her claim

[1] Elizabeth Isenburg and the decedent never married. In fact, the decedent remained married to Elinor Isenburg until his death. Nevertheless, the defendant legally changed her name from Elizabeth Soderberg to Elizabeth Isenburg.

[2] General Statutes § 45a-434 (c) provides in relevant part: "Whenever there has been a contest with respect to the validity, admissibility to probate or construction of a will, if all persons interested in the estate, including persons interested as contestants or fiduciaries acting on behalf of a contestant, make and file in the court an agreement as to the division of the estate, in writing, executed and acknowledged in the same manner as provided for conveyances of land in section 47-5, such agreement shall be a valid division of the estate if approved by the Court of Probate. Any such fiduciary may petition the court of probate which appointed him for permission to enter into such an agreement. The court of probate may grant such petition or may deny such petition. . . ."

[3] The following parties were named as defendants in the underlying probate appeals: Edward B. Potter, as temporary executor of the decedent's estate; Edward Isenburg; Mark Isenburg, both individually and as conservator for

and, accordingly, affirm the judgments of the Superior Court.

The following undisputed facts and procedural history are relevant to this appeal. In 2013, the defendant initiated a civil action against the decedent, who was still living at the time, following the breakup of their relationship (civil action). In that action, she asserted that the decedent had made gifts and promises to her that entitled her to recover $6,000,000 in cash, real property, and certain personalty from the decedent. Following a trial, the court rejected most of her claims, awarding only limited relief. She subsequently appealed to this court, which affirmed the judgment of the trial court. See *Isenburg* v. *Isenburg*, 178 Conn. App. 805, 177 A.3d 583 (2017), cert. denied, 328 Conn. 916, 180 A.3d 963 (2018).

After the decedent died in August, 2016, the plaintiff, Theodore Vecchiarino, a business partner of the decedent, petitioned the Probate Court for the district of Saybrook to admit the decedent's March 13, 2014 will. The plaintiff also sought to be appointed as the administrator of the estate. In addition to the plaintiff, the decedent named in the will as beneficiaries Steven Mossberg, a long-time business associate of the decedent; Sharon Goffe, the decedent's live-in companion and caretaker; and others.[4] The will, however, omitted as beneficiaries any of the decedent's heirs-at-law.

After the petition to admit the will was filed, certain of the decedent's heirs-at-law objected to its admission and to the appointment of the plaintiff as the administrator of the decedent's estate.[5] These heirs-at-law asserted in

Elinor Isenburg's estate; Sharon Goffe; Steven Isenburg; Steven Mossberg; Michael Lloyd; Andrew Isenburg; and Lynn Heckett. We refer to Elizabeth Isenburg as the defendant and to the other defendants by name when necessary.

[4] The other named beneficiaries are Steven Isenburg, Michael Lloyd, and Andrew Isenburg.

[5] These heirs-at-law included Elinor Isenburg, the decedent's surviving spouse; and Lynn Heckett, the daughter of the decedent and Elinor Isenburg.

their objection that the March 13, 2014 will was invalid because of undue influence and that the plaintiff had misused the decedent's funds and breached his fiduciary obligation while serving as the decedent's attorney-in-fact under a power of attorney executed by the decedent on December 20, 2012. The Probate Court appointed Edward B. Potter to be the temporary administrator of the decedent's estate.[6] The Probate Court conducted multiple evidentiary hearings on these claims.

On December 26, 2016, while her appeal to this court from the judgment in the civil action was still pending, the defendant filed an appearance on her own behalf in the Probate Court and asserted that she was a creditor of the decedent's estate on the basis of her claims that she unsuccessfully had brought against him in her civil action (creditor claims). Although she had been named as a beneficiary in prior wills executed by the decedent in 2003 and 2010 prior to the termination of their romantic relationship, the defendant did not petition the Probate Court to admit any of these wills as the valid and operative will of the decedent.

On December 19, 2017, this court affirmed the judgment of the trial court in the defendant's civil action brought against the decedent. *Isenburg* v. *Isenburg*, supra, 178 Conn. App. 820. Our Supreme Court subsequently denied her petition for certification to appeal, thereby ending her attempts to recover against the decedent directly. See *Isenburg* v. *Isenburg*, 328 Conn. 916, 180 A.3d 963 (2018).

On July 27, 2018, the Probate Court issued a written decree in which it concluded that the decedent had been unduly influenced in executing the contested will and that, therefore, it should not be admitted to probate. It also found that certain transfers that the plaintiff made

[6] Potter died on April 2, 2021. In a decree dated May 5, 2021, the Probate Court appointed Attorney Danielle P. Ferrucci as the successor temporary administrator of the estate.

pursuant to the power of attorney were void and must be returned to the decedent's estate. The plaintiff and Goffe filed separate appeals to the Superior Court challenging this decree.[7] These actions subsequently were consolidated.

On January 15, 2020, the Probate Court issued a written decree denying the defendant's creditor claims on the ground that they were barred by res judicata and collateral estoppel because they had been asserted unsuccessfully (or could have been asserted) in her civil action against the decedent while he was still alive. The defendant nominally appealed that decree to the Superior Court. See *Isenburg* v. *Vecchiarino*, Superior Court, judicial district of Middlesex, Docket No. CV-20-5012822-S (February 21, 2020). Instead of reasserting those creditor claims, however, the defendant raised different claims against the plaintiff and others, alleging that they had interfered with agreements between her and the decedent. That appeal ultimately was dismissed for lack of subject matter jurisdiction because it did not seek review of the decree from which the defendant appealed and, thus, was beyond the scope of a proper probate appeal.

On June 1, 2022, in the underlying consolidated probate appeals, Attorney Danielle P. Ferrucci, as temporary administrator of the decedent's estate, filed identical motions for approval of the settlement agreement that had been executed by all the various parties interested in the decedent's estate as named beneficiaries under the challenged will or as heirs-at-law. The defendant did not

[7] Other civil actions were also commenced in the Superior Court against individuals alleged to have participated in or benefited from a dissipation of the decedent's estate. See *Potter* v. *Vecchiarino*, Superior Court, judicial district of Middlesex, Docket No. CV-19-5011790-S; *Isenburg* v. *Vecchiarino*, Superior Court, judicial district of Middlesex, Docket No. CV-19-6025255-S. The decedent's daughter, Lynn Heckett, also brought a tort action against the estate asserting that the decedent had engaged in intentional and negligent infliction of emotional distress toward her. *Heckett* v. *Potter*, Superior Court, judicial district of Middlesex, Docket No. CV-19-6025055-S.

participate in the settlement negotiations or join the settlement agreement that formed the basis of the motions.

Pursuant to the terms of the settlement agreement, the parties, among other things, agreed that the decedent's March 3, 2014 will would not be admitted to probate and that the estate would be administered as intestate. The plaintiff and Goffe agreed to make payments to the estate in exchange for the withdrawal of certain monetary claims against them. They also agreed that they would waive any interest in the estate. Finally, the agreement set forth the distribution and division of the estate to the heirs-at-law in various percentages.

The self-represented defendant objected to the motions for approval of the settlement agreement because she was not a party to it. The precise grounds of her objection are difficult to discern, but it appears that she asserted three primary grounds as to why the settlement agreement should not be approved without her participation. First, she relied on the fact that she appeared and participated as an interested party in the underlying probate proceedings. Second, she appeared to claim that certain assets of the decedent fraudulently were transferred into the estate and should not be treated as assets of the estate but, in fact, belonged to her. Finally, she appeared to contend that the doctrine of dependent relative revocation[8] applied and that she is a named beneficiary under a prior will. On the basis of these contentions, she argued that she is a "[person] interested in the estate" pursuant to § 45a-434 (c) and that the settlement agreement cannot be approved in the absence of her participation and consent to it.

[8] The doctrine of dependent relative revocation provides that if a testator revokes a prior will by executing a new will and the new will is not effective for any reason, then "it [shall] be presumed that the testator preferred the old will to intestacy, and the old one [shall] be admitted to probate in the absence of evidence overcoming the presumption." (Internal quotation marks omitted.) *Churchill* v. *Allessio*, 51 Conn. App. 24, 27, 719 A.2d 913, cert. denied, 247 Conn. 951, 723 A.2d 324 (1998).

On August 17, 2022, the Superior Court, *Hon. Edward S. Domnarski*, judge trial referee, approved the settlement agreement over the objection of the defendant.[9] In a memorandum of decision, the court concluded that the defendant's mere participation in the underlying Probate Court proceedings did not, by itself, give rise to an interest in the estate within the meaning of § 45a-434 (c).[10] The court also reasoned that the defendant never challenged the admission of the May 13, 2014 will nor did she seek to admit for probate any earlier will under which she could claim an interest as a beneficiary. Under these circumstances, the court found that the defendant's status as a potential beneficiary of the decedent's estate was too remote to bring her within the scope of "persons interested in the estate" for purposes of settlement in accordance with § 45a-434 (c). The court concluded: "In these probate appeals, the circle of possible 'persons interested in the estate' are the beneficiaries under the decedent's March 13, 2014 will, the parties who appealed the Probate

[9] Although § 45a-434 (c) provides in relevant part that a settlement agreement executed in accordance with all statutory requirements is valid "if approved by the Court of Probate," the Superior Court had the authority to act on the motion for approval given the procedural posture of this case, and we reject the defendant's arguments to the contrary. It is axiomatic that, "[w]hen entertaining an appeal from an order or decree of a Probate Court, the Superior Court *takes the place of and sits as the court of probate*. . . . In ruling on a probate appeal, the Superior Court exercises the powers, not of a constitutional court of general or [common-law] jurisdiction, but of a Probate Court." (Emphasis added; internal quotations marks omitted.) *Salce v. Cardello*, 348 Conn. 90, 103, 301 A.3d 1031 (2023). Given that the settlement agreement in the present consolidated cases was reached and approval was sought within the confines of two valid probate appeals, the Superior Court, exercising the powers of a Probate Court, had the necessary authority to approve it.

[10] The court reasoned as follows: "The appearance [the defendant] filed in the Probate Court allowed [her] to receive notice of, and perhaps participate in, the subject probate proceedings. Having filed an appearance in the Probate Court, she was served notice of the two probate appeals filed in this court. [The defendant] did file appearances in the two probate appeals. Those appearances alone do not transform and elevate her status as a party interested in the probate and appeal proceedings, to a party that is interested in the estate for purposes of a mutual distribution." (Emphasis omitted.)

Court decision related to that will—notably, also beneficiaries under that will—and the decedent's heirs-at-law. All of those parties, and the successor temporary administrator, have agreed to the mutual distribution of the decedent's estate. [The defendant] is an outsider to the mutual distribution proceedings." The court, accordingly, granted the motions for approval of the settlement agreement. This appeal followed.

The sole claim raised by the defendant on appeal is that the Superior Court improperly granted the motions for approval of the settlement agreement because she was among the "persons interested in the estate" for purposes of § 45a-434 (c) and, therefore, any agreement reached without her participation was invalid. We agree with the Superior Court that the defendant failed to establish any interest sufficient to require her participation in the agreement. Accordingly, we reject her claim.[11]

We begin with our standard of review. To the extent that the defendant's claim "presents a question of statutory interpretation, our review is plenary. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the]

[11] The appellee, Attorney Ferrucci, acting in her role as successor temporary administrator, urges us to decline to review the defendant's claim as inadequately briefed. It is axiomatic that appellate courts "are not required to review issues that have been improperly presented to this court through an inadequate brief." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021). Although we agree that the defendant's brief is hardly a model of clarity, and that it contains a sparsity of relevant analysis, we nevertheless conclude that it manages to cross the requisite minimum threshold of adequacy to warrant our review of the asserted claim.

case." (Citation omitted; internal quotation marks omitted.) *Falvey* v. *Zurolo*, 130 Conn. App. 243, 249, 22 A.3d 682 (2011).

Section 45a-434 (c) sets forth procedures by which parties may agree on the division of a contested estate. As previously noted, § 45a-434 (c) provides in relevant part: "Whenever there has been a contest with respect to the validity, admissibility to probate or construction of a will, if all persons interested in the estate, including persons interested as contestants or fiduciaries acting on behalf of a contestant, make and file in the court an agreement as to the division of the estate, in writing, executed and acknowledged in the same manner as provided for conveyances of land in section 47-5, such agreement shall be a valid division of the estate if approved by the Court of Probate. Any such fiduciary may petition the court of probate which appointed him for permission to enter into such an agreement. The court of probate may grant such petition or may deny such petition. . . ."[12]

In the present case, an agreement in full compliance with the provisions of § 45a-434 (c) was reached between all beneficiaries named in the March 13, 2014 will and the heirs-at-law of the decedent, who contested the will. The agreement fully resolved all issues between those parties with respect to the July 27, 2018 Probate Court decision on the application to admit the March 13, 2014 will and the resulting probate appeals. In other words, all of the parties affected and having a direct interest in the distribution of the decedent's estate vis–vis the March 13, 2014

[12] As the Superior Court indicated in its memorandum of decision approving the parties' agreement in this matter, "[m]utual distribution agreements are favored in probate appeals involving distribution of estates." The rationale is that "[t]he result [of a mutual agreement between all interested parties] is that which the law was ready and seeking to accomplish; that which it had provided the machinery to accomplish. That the result has been obtained without a resort to the machinery, creates no legal irregularity upon which the law puts the stamp of its disapproval." *Merwin's Appeal from Probate*, 75 Conn. 33, 37, 52 A. 484 (1902).

will have agreed to a mutual distribution of the estate assets. The defendant maintains that she is also a member of the group that comprises "all persons interested in the estate" and that, therefore, she was a necessary party to any agreement.

No appellate court definitively has construed the term "all persons interested in the estate" as used in § 45a-434 (c) or set forth an exhaustive list of those persons or entities intended by that term. Nevertheless, given that the clear and obvious purpose of the statute is to facilitate the settlement of a dispute amongst "devisees, legatees or heirs"; General Statutes § 45a-434 (b); for the purpose of reaching a mutual agreement regarding distribution of the estate, "persons interested in the estate"; General Statutes § 45a-434 (c); certainly must include any party entitled to some distributive portion of the estate, whether through the will or, if the will were invalidated, by intestacy. See *Green* v. *King*, 104 Conn. 97, 103–104, 132 A. 411 (1926) (indicating that necessary parties for mutual distribution agreement to resolve contest involving will codicil were beneficiaries and heirs with pecuniary interest in distribution).

Section 45a-434 (c) also states that "persons interested in the estate" expressly include those parties contesting the admissibility or construction of a will. Logically, a person with a claim to a distributive portion of an estate arguably also could include a creditor of the estate or other person with a colorable claim to a portion of the estate's undistributed assets. In the present case, however, it is unnecessary for us to construe more definitively the term "persons interested in the estate" because the defendant has failed to demonstrate that she has *any* distributive interest in the estate that would warrant her inclusion as of right in any settlement negotiations. In short, we agree with the Superior Court that the defendant has failed to establish that she has some pecuniary interest, as contemplated under the relevant statutory scheme,

that would require her participation in the agreement regarding mutual distribution of the decedent's estate. We reach this conclusion for the following reasons.

First, it is undisputed that the defendant is neither a named beneficiary of the only will that was admitted to probate and which was the subject of the two probate appeals, nor is she recognized under our intestacy statutes as an heir-at-law.[13] The defendant contends that she did, in fact, attempt to have earlier wills in which she had been named a beneficiary admitted when she sent a letter dated May 29, 2018, to the Probate Court. As found by the Superior Court, however, no other application to admit any other will of the decedent was before the Probate Court.

The defendant attached two Probate Court forms to her May 29, 2018 letter, one form PC-211 for each copy of the decedent's 2003 and 2010 wills. Probate Court form PC-211 is entitled "Affidavit for Filing Will Not Submitted for Probate" and contains an instruction that "[a]ny person may use this form to file original will(s) and codicils(s), if any, when the will is not being submitted for probate." The defendant could have sought to have these prior wills admitted for probate by filing them with Probate Court form PC-200, which is entitled "Petition/Administration or Probate of Will," and contains an instruction that "[a]ny person may use this form to petition the court for administration or probate of a will and the appointment of an administrator or executor."

The Probate Court did not treat the defendant's May 29, 2018 letter or its attachments as a petition to admit the wills to probate and she never raised a claim that the Probate Court improperly had declined to treat her letter

[13] An "heir-at-law" or "legal heir" is a person "who would have been entitled to inherit from [the deceased] under our statutes of distribution, had he died intestate." *Daniels* v. *Daniels*, 115 Conn. 239, 240–41, 161 A. 94 (1932); see General Statutes §§ 45a-425 through 45a-457 (statutes of distribution).

as a petition to admit one or both of the wills in any appeal from any of the relevant Probate Court decrees. Finally, we note that the defendant appears to have conceded before the Superior Court that she never sought to have admitted for probate any of the wills in which she is named as a beneficiary but, instead, blamed the plaintiff for neglecting to complete and file a form PC-200.

Second, the defendant's failure to seek to admit any other will for probate renders the defendant's related assertion that her pecuniary interest in the estate may be established through application of the doctrine of dependent relative revocation equally inapposite. "The gist of the doctrine [of dependent relative revocation] is that if a testator cancels or destroys a will with a present intention of making a new one immediately and as a substitute and the new will is not made or, if made, fails of effect for any reason, it will be presumed that the testator preferred the old will to intestacy, and the old one will be admitted to probate in the absence of evidence overcoming the presumption. . . . The rule has been more simply stated in these words: [W]here the intention to revoke is conditional and where the condition is not fulfilled, the revocation is not effective. . . . [The doctrine of dependent relative revocation] is a rule of presumed intention rather than of substantive law . . . and is applicable in cases of partial as well as total revocation. . . . That it can only apply when there is a clear intent of the testator that the revocation of the old is made conditional upon the validity of the new is well [settled]." (Citations omitted; internal quotation marks omitted.) *La Croix* v. *Senecal*, 140 Conn. 311, 315, 99 A.2d 115 (1953).

Moreover, the modern approach to this common-law doctrine generally is to apply it only in cases in which relatively minor changes exist between the old and new wills, rather than wholesale changes in testamentary purpose. See id., 317 (noting invalid codicil at issue made

"very minor change" to original will); *Watson* v. *Landvatter*, 517 S.W.2d 117, 122 (Mo. 1974) (en banc) (holding that doctrine was inapplicable in case in which "family situation had changed radically between the time of the execution of the original will and the date of the alterations"); see also 95 C.J.S. 378–79, Wills § 408 (2022) ("if a substantial disparity in the terms of the two instruments reflects the testator's disfavor of the original will, it cannot be concluded that the testator would have preferred for the original will to control the distribution of the estate in the event that the subsequent will proves ineffective"). Accordingly, the doctrine of dependent relative revocation, although widely recognized, must be applied narrowly and with caution. 95 C.J.S., supra, p. 379.

There is simply no proper legal application of the doctrine of dependent relative revocation under the facts of the present case. The Superior Court made an undisputed finding that the decedent executed eight different wills between 2003 and 2014. First, as we have previously indicated, the only will that properly was before the Probate Court was the March 13, 2014 will. Accordingly, if the Superior Court were to agree with the Probate Court's determination that the March 13, 2014 will was invalid due to undue influence, it is unclear which of the earlier wills, if any, would be revived for administration if the doctrine of dependent relative revocation were deemed applicable or whether distribution of the estate would, by necessity, proceed under our intestacy statutes. In other words, the record is simply inadequate to conclude that proper application of the doctrine of dependent relative revocation would necessarily revive any will in which the defendant had any additional testamentary interest. Furthermore, even if any will in which the defendant was named a beneficiary were properly before the Probate Court, it is clear that such a will would not properly be admitted and revived under the doctrine of dependent relative revocation because the decedent, rather than

making only relatively minor changes to his will, manifested a clear and significant change in testamentary purpose by completely removing the defendant as a beneficiary following the end of their romantic relationship. It would strain logic to conclude that the decedent would have preferred an earlier will to control the distribution of his estate rather than intestacy. Accordingly, we reject the defendant's suggestion that she retains an interest in the estate because she was a named beneficiary in an earlier revoked will.

Finally, even assuming without deciding that "persons interested in the estate" could include an appearing creditor of the estate or someone with a similarly colorable pecuniary interest therein, the defendant has failed to establish such an interest in the decedent's estate. Her civil action against the decedent, which was initiated prior to his death, was, with limited exception, fully and finally resolved against her. See *Isenburg* v. *Isenburg*, supra, 178 Conn. App. 805. Her attempt to revive her claims or to assert others before the Probate Court was squarely rejected, and her subsequent appeal from that ruling was dismissed. Principles of res judicata thus bar the defendant from attempting to resurrect her creditor claims via her arguments in these probate appeals.

In short, having thoroughly reviewed the record and briefs in this matter, we reject all of the defendant's various arguments advanced to establish that she was a necessary party to the underlying settlement agreement. Accordingly, we conclude that the Superior Court properly approved it.

The judgments are affirmed.

In this opinion the other judges concurred.

VIRGINIA SILANO *v.* DIANA COONEY ET AL.
(AC 45538)

Bright, C. J., and Alvord and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant police officer for malicious prosecution arising out of the criminal prosecution of the plaintiff for a violation of conditions of release in the second degree pursuant to the applicable statute ((Rev. to 2011) § 53a-222a). The plaintiff, C and G were all members of the same lake association. According to allegations in the plaintiff's complaint, in 2012, the defendant opened an investigation after C and G falsely stated that the plaintiff had violated a no contact order with C, by making an obscene gesture toward C and G while they were on the premises of the lake association. During his investigation, the defendant took sworn statements from C and G, spoke with another association member, D, regarding the incident, and obtained video surveillance footage from the association. The defendant reviewed the surveillance footage and made notes while doing so, which indicated that the footage did not capture the plaintiff communicating with C on the day of the incident. Thereafter, the defendant returned the video footage to the association, and it was later erased. The defendant submitted an arrest warrant affidavit that included the sworn statements from C and G, D's statements, and the defendant's notes regarding the surveillance footage. The plaintiff was arrested, and, in 2016, the charges against her were dismissed. The plaintiff commenced the present action in 2018. The defendant filed a motion for summary judgment, claiming that the action was untimely, that there was probable cause for the challenged prosecution, and that the defendant had relied in good faith on the prosecutor's independent probable cause determination. In response, the plaintiff argued, inter alia, that certain evidence submitted by the defendant contained inadmissible hearsay and that her complaint charged the defendant with malicious prosecution through intentional spoliation. Thereafter, the plaintiff filed a motion for summary judgment. The trial court granted the defendant's motion, concluding that the defendant met his burden of demonstrating the absence of any genuine issue of material fact that the arrest warrant was supported by probable cause and, therefore, that he was entitled to judgment as a matter of law. The trial court denied the plaintiff's motion, determining that she did not successfully assert a claim for intentional spoliation of evidence. On the plaintiff's appeal to this court, *held*:

1. The trial court properly granted the defendant's motion for summary judgment because it did not err in determining that the defendant met his burden of demonstrating the absence of any genuine issue of material fact that the arrest warrant was supported by probable cause: contrary

to the plaintiff's contention that the defendant improperly relied on the sworn statements of C and G, which she contends he credited over the statements of the plaintiff and D and the video surveillance evidence, the defendant was permitted to rely on the complaints of third parties to establish probable cause, in this case the putative victim and an eyewitness; moreover, the defendant considered the available exculpatory evidence and identified it in his arrest warrant affidavit, including D's statements that the plaintiff did not have contact with C and G and the defendant's surveillance video notes, which indicated that the footage did not capture the plaintiff communicating with C, and the plaintiff failed to submit evidence to demonstrate a genuine issue of material fact as to the lack of probable cause; furthermore, whether the defendant acted with malice was not addressed by the trial court and was not at issue on appeal, and, contrary to the plaintiff's assertions, the defendant's state of mind did not negate the existence of probable cause.

2. The trial court properly rejected the plaintiff's arguments regarding spoliation of evidence: contrary to the plaintiff's assertion, her claimed entitlement to an adverse inference with respect to the surveillance video evidence was insufficient on its own to create a genuine issue of material fact as to the want of probable cause element for the purposes of defeating summary judgment, and, because the plaintiff failed to adduce any evidence to support want of probable cause, the trial court properly concluded that there was no genuine issue of material fact as to that issue; moreover, the plaintiff did not plead intentional spoliation of evidence as a separate cause of action in her complaint, and, even if this court were to construe her complaint as alleging such a separate cause of action, it failed as a matter of law on the first essential element of a claim for intentional spoliation, namely, that the defendant had knowledge of a pending or impending civil action involving the plaintiff, as the defendant returned the video to the association, its rightful owner, in 2012, and the plaintiff did not file her malicious prosecution claim until 2018; accordingly, no bona fide or rational argument could be made that, under the circumstances, the defendant knew or should have known that his return of the video in 2012 would be relevant to a malicious prosecution claim asserted by the plaintiff six years later.

3. This court declined to review the plaintiff's claim that the trial court should not have considered the defendant's notes relating to the surveillance video in addressing his motion for summary judgment because the notes did not satisfy the state of mind exception to the hearsay rule set forth in the Connecticut Code of Evidence (§ 8-3 (4)) and, as such, were inadmissible hearsay: the trial court determined that the notes satisfied the business records exception to the hearsay rule set forth in the applicable statute (§ 52-180), and the plaintiff abandoned any claim of error regarding the admissibility of the notes under that exception because she did not brief it; accordingly, it was uncontested that the

notes were considered properly under the business records exception to the hearsay rule.

Argued October 10, 2023—officially released February 13, 2024

Procedural History

Action to recover damages for malicious prosecution, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the plaintiff withdrew her claims against the defendant Diane Gromley et al.; thereafter, the court, *Stevens*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court, *Alvord*, *Suarez* and *Lavine*, *Js.*, which affirmed the judgment of the trial court; subsequently, the court, *Stevens*, *J.*, granted the motion for summary judgment filed by the defendant Kevin Hammel and denied the plaintiff's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

Virginia Silano, self-represented, the appellant (plaintiff).

Dennis M. Durao, with whom, on the brief, was *Kimberly A. Bosse*, for the appellee (defendant Kevin Hammel).

Opinion

ALVORD, J. The self-represented plaintiff, Virginia Silano, appeals from the summary judgment rendered by the trial court in favor of the defendant Kevin Hammel on count two of the plaintiff's complaint alleging malicious prosecution.[1] On appeal, the plaintiff claims

[1] Count one of the plaintiff's complaint alleged malicious prosecution against Diana Cooney. On January 9, 2020, the court rendered summary judgment in favor of Cooney on the basis that the plaintiff's claim was barred by the statute of limitations. Following the denial of the plaintiff's motion to reargue, the plaintiff filed an appeal with this court. This court affirmed the judgment of the trial court. *Silano* v. *Cooney*, 209 Conn. App. 904, 264 A.3d 211 (2021).

The plaintiff's original complaint in this action contained nineteen counts and also had named as defendants Diane Gromley and Christopher Kapteina,

that the court improperly (1) rendered summary judgment in favor of the defendant on her malicious prosecution claim, (2) rejected her arguments with respect to intentional spoliation, and (3) admitted into evidence the defendant's contemporaneous notes regarding his viewing of a surveillance video that the plaintiff contends the defendant failed to preserve.[2] We affirm the judgment of the court.

The following procedural history is relevant to our resolution of this appeal. This action was commenced on June 27, 2018. The fourth amended, and operative, complaint was filed on December 10, 2019. The second count alleges malicious prosecution against the defendant, arising out of the criminal prosecution of the plaintiff for violation of General Statutes (Rev. to 2011) § 53a-222a,[3] which charge ultimately was dismissed.

In her complaint, the plaintiff alleged that, on or about August 9, 2012, Trumbull police officer Michael Takacs "investigated an incident initially reported by the plaintiff wherein the plaintiff was being actively harassed by [Diana Cooney and Diane Gromley]. At that time . . . Cooney stated to Officer Takacs that a condition

but the plaintiff withdrew the action against these defendants in 2019. Accordingly, all references in this opinion to the defendant are to Hammel.

[2] The plaintiff also claims on appeal that the trial court improperly determined that any claim for intentional spoliation of evidence was barred by the three year statute of limitations of General Statutes § 52-577. Because we conclude that the court properly rejected the plaintiff's arguments with respect to intentional spoliation on their merits, we need not reach the plaintiff's claim on appeal with respect to the statute of limitations.

[3] General Statutes (Rev. to 2011) § 53a-222a (a) provides: "A person is guilty of violation of conditions of release in the second degree when, while charged with the commission of a misdemeanor or motor vehicle violation for which a sentence to a term of imprisonment may be imposed, such person is released pursuant to subsection (b) of section 54-63c, subsection (c) of section 54-63d or subsection (c) of section 54-64a and intentionally violates one or more of the imposed conditions of release."

All references to § 53a-222a in this opinion are to the 2011 revision of the statute.

of release was imposed upon the plaintiff prohibiting the plaintiff from communicating with . . . Cooney. Officer Takacs reported that he did not believe a violation of the [no contact] order occurred." The plaintiff alleged that the defendant, also a Trumbull police officer, commenced an investigation following "false statements" by Cooney and Gromley that the plaintiff had violated the no contact order by "giving . . . Cooney and Gromley the 'finger' in the presence of their children" on the premises of the Pinewood Lake Association (association). The plaintiff alleged that the defendant "initiated, instigated or procured the plaintiff's arrest without probable cause . . . ." The plaintiff alleged that, although the defendant took sworn statements from Cooney and Gromley, he "failed to take or memorialize in any way his interview with [Brad] Day (who has since passed away), a neutral eyewitness to the events of August 9, 2012." The plaintiff alleged that Day's statement was that "the plaintiff did not communicate with Cooney and Gromley" and that "Cooney and Gromley were harassing and instigating the plaintiff." The plaintiff alleged that, contrary to Cooney's and Gromley's statements that their children were present at the time of the alleged violation of the order, the children actually were approximately twenty feet away in the water.

The plaintiff alleged that, "[i]n the course of [the defendant's] investigation, [the defendant] took possession and control of the video surveillance system owned and operated by the [association]. . . . At all times, the plaintiff believed and trusted that [the defendant] preserved and protected the video evidence and that it would be available to the plaintiff to demonstrate not only the falsehood of Cooney['s] and Gromley's August, 2012 statements but to demonstrate the ongoing harassment and abuse sustained by the plaintiff as a result of . . . Cooney's actions. . . . In December of 2012, [the

defendant] submitted a warrant for the plaintiff's arrest which included Gromley['s] and Cooney's false statements and [the defendant's] interpretation of the surveillance evidence. The plaintiff was arrested in January of 2013, pursuant to [the defendant's] warrant." The plaintiff alleged that the defendant had a duty to preserve and maintain the video surveillance evidence, which the plaintiff alleged would have demonstrated that Cooney's and Gromley's statements were false. The plaintiff alleged that the defendant "was aware of the value of . . . Day's statement and the video evidence to the plaintiff and nevertheless acted with official animus by making a conscious effort to destroy or suppress the evidence." The plaintiff alleged that the video surveillance evidence was "relevant, material, essential and irreplaceable to establish Cooney['s] and Gromley's actions before, during and after" the claimed violation and "its absence deprived the plaintiff" of her defense on the criminal charge.

The plaintiff further alleged that the defendant had a personal relationship with Cooney's husband, George Cooney, who was president of the association and a former police officer. The plaintiff alleged that the defendant "falsified inventory records as to the same surveillance system, which was material and relevant to the plaintiff's defense of false criminal felony charges instigated by George Cooney and others on or about February 8, 2011, and was pivotal, relevant and material to the plaintiff's successful civil malicious prosecution and conspiracy action of George Cooney."

The plaintiff alleged that she had been damaged by "the deprivation of justice" resulting from the defendant's claimed aiding and abetting Cooney's and Gromley's false and malicious prosecution of the plaintiff and the defendant's "conscious destruction, suppression or loss of relevant and material evidence," which deprived the plaintiff of its use to institute a civil action against

Cooney and Gromley and to establish that Cooney and Gromley were actively harassing the plaintiff. The plaintiff alleged that she has suffered severe emotional distress as a result of the defendant's actions.

The plaintiff alleged that a trial was held "in November of 2013 for the false charges which ended in a mistrial after [the defendant] violated an evidence order set by the court." The criminal charges against the plaintiff were dismissed on July 1, 2016.

On October 29, 2021, the defendant filed the operative answer and five special defenses, including a special defense alleging that the plaintiff's malicious prosecution claim was barred by the statute of limitations set forth in General Statutes § 52-577.

On March 5, 2020, the defendant filed a motion for summary judgment, accompanying exhibits, and a memorandum of law in support, wherein he argued, inter alia, that no genuine issues of material fact existed and that he was entitled to judgment as a matter of law because the plaintiff's action was untimely, there was probable cause for the challenged prosecution, and the defendant relied in good faith on the prosecutor's independent probable cause determination. On May 14, 2021, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment and accompanying exhibits. In her opposition, the plaintiff argued that certain evidence submitted by the defendant contained inadmissible hearsay. The plaintiff further argued that her complaint "charges [the defendant] with malicious prosecution through spoliation and intentional spoliation." She argued that "the adverse inference doctrine should defeat [the defendant's] probable cause argument." The defendant filed a reply on June 2, 2021. With respect to spoliation, he first argued that the plaintiff improperly had raised her claim of intentional spoliation for the first time in her opposition

to the defendant's summary judgment motion. In addition, he argued that, even if the second count of her complaint could be read to include a claim of spoliation of evidence, such claim was barred by the statute of limitations contained in § 52-577. Third, he contended that the plaintiff had not demonstrated that she would be entitled to an adverse inference. As to probable cause, the defendant argued, inter alia, that the plaintiff had failed to demonstrate a lack of probable cause.

On July 15, 2021, the plaintiff filed a motion for summary judgment, seeking judgment in her favor on the malicious prosecution claim. On August 30, 2021, the defendant filed a memorandum of law in opposition to the plaintiff's motion for summary judgment. The plaintiff filed a reply on September 9, 2021. On January 10, 2022, the plaintiff filed a supplemental memorandum in opposition to the defendant's motion for summary judgment and in support of her own motion for summary judgment and accompanying exhibits. Oral argument was held on January 25, 2022.

On May 12, 2022, the court, *Stevens*, *J.*, issued a memorandum of decision in which it granted the defendant's motion for summary judgment and denied the plaintiff's motion. The court concluded that the defendant met his burden of demonstrating the absence of any genuine issue of material fact that the arrest warrant was supported by probable cause and, accordingly, the defendant was entitled to judgment as a matter of law. Specifically, the court considered that "Judge Iannotti issued an order as a condition of the plaintiff's release on criminal charges then pending against her precluding the plaintiff from having contact with certain individuals including Cooney. . . . On August 9, 2012, the defendant received a text message from George Cooney, informing the defendant that Cooney had claimed that the plaintiff gave her the finger in front of their daughters. . . . Cooney sent a sworn statement

to the defendant on August 10, 2012 . . . where Cooney stated that the plaintiff waved at her and, after she did not respond, the plaintiff stuck up her middle finger. . . . The defendant received a sworn statement from Gromley on August 15, 2012, which substantially corroborated Cooney's statement. . . . The statements from Cooney and Gromley both denied that Day was present when the incident occurred. . . . The defendant also reviewed the videos from the [association] surveillance system and took contemporaneous notes of the subject matter depicted, with corresponding time stamp[s]. . . . In both the defendant's incident report and arrest warrant affidavits, the defendant disclosed exculpatory information that the videos did not capture the plaintiff communicating with Cooney." (Citations omitted.) On the basis of this evidence, the court determined, as a matter of law, that the defendant acted with probable cause in seeking the arrest warrant.

Regarding the plaintiff's claim that she had alleged the tort of intentional spoliation, the court first noted that "it is questionable whether the allegations of the plaintiff's complaint are sufficient to satisfy all of the elements for this cause of action . . . ." The court concluded that, "[b]ased on [the] facts, as a matter of law, the plaintiff cannot successfully assert a claim for intentional spoliation of evidence." Specifically, the court found that the plaintiff could not satisfy the first element of an action for intentional spoliation of evidence, " 'the defendant's knowledge of a pending or impending civil action involving the plaintiff.' " See *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 244–45, 905 A.2d 1165 (2006).

The court stated: "As a matter of law, the defendant's return of the video in October, 2012, has nothing to do with the plaintiff's malicious prosecution action here because this action was filed years later in 2018. Stated differently, contrary to the plaintiff's position, the cause

of action for intentional spoliation of evidence is based on the destruction of evidence that is done with the intent to make the evidence unavailable in a pending or impending civil action involving the plaintiff. Here, the defendant was under no legal obligation to retain this video for six years and not return it to its rightful owner when no civil action between the parties was pending or impending. The video did not belong to the defendant, and he had a legal obligation to return the video to its rightful owner. Furthermore, no bona fide or rational argument can be made that under the circumstances presented the defendant knew or should have known that his return of this video in 2012 would be relevant to a malicious prosecution claim asserted by the plaintiff some six years later. As a matter of law, no malicious prosecution action could have been instituted or contemplated when the defendant returned the video to the [association] because at that time, the criminal complaint against the plaintiff, on which her malicious prosecution claim is based, had not even been instituted or adjudicated. It is obviously impossible for anyone to contemplate the assertion of a malicious prosecution claim before the prosecution itself even exists. The plaintiff's arguments to the contrary are rejected. Indeed, nothing in the plaintiff's complaint explicitly alleges that the video was returned to its owner specifically in order to disrupt the plaintiff's ability to assert the present malicious prosecution claim between the plaintiff and the defendant." (Emphasis omitted.)

Before turning to the plaintiff's claims on appeal, we set forth the relevant standard of review. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts,

which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [or to deny a] motion for summary judgment is plenary." (Footnote omitted; internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 539–40, 285 A.3d 1128 (2022).

I

The plaintiff's first claim on appeal is that the court improperly rendered summary judgment on her malicious prosecution claim. Specifically, she contends that the court erred in determining that probable cause existed and maintains that "[t]he defendant correctly argued that probable cause is a complete defense to malicious prosecution, but both the defendant and the court ignored the plaintiff's case. The resolution of probable cause in this case required the determination

of what material facts were known to the defendant before he submitted his arrest warrant affidavit but did not report in his arrest warrant affidavit." We are not persuaded that the court erred in determining that the defendant met his burden of demonstrating the absence of any genuine issue of material fact that the arrest warrant was supported by probable cause.

We begin with the applicable legal standards. An action for malicious prosecution "requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." *McHale* v. *W.B.S. Corp.*, 187 Conn. 444, 447, 446 A.2d 815 (1982); see also *Mulligan* v. *Rioux*, 229 Conn. 716, 731–32 n.19, 643 A.2d 1226 (1994) ("[i]n addition to malice, [a]n action for malicious prosecution . . . requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; [and] (3) the defendant acted without probable cause" (internal quotation marks omitted)); *Vandersluis* v. *Weil*, 176 Conn. 353, 356, 407 A.2d 982 (1978) (" 'The existence of probable cause is an absolute protection against an action for malicious prosecution, and what facts, and whether particular facts, constitute probable cause is always a question of law.' *Brodrib* v. *Doberstein*, 107 Conn. 294, 296, 140 A. 483 [1928]. And, as previously stated, want of probable cause may not be inferred from proof of malice.").

"Probable cause has been defined as the knowledge of facts sufficient to justify a reasonable [person] in the belief that he [or she] has reasonable grounds for

prosecuting an action. . . . Mere conjecture or suspicion is insufficient. . . . Moreover, belief alone, no matter how sincere it may be, is not enough, since it must be based on circumstances which make it reasonable. . . . Although want of probable cause is negative in character, the burden is upon the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendant had no reasonable ground for instituting the criminal proceeding." (Citations omitted; internal quotation marks omitted.) *Mulligan* v. *Rioux*, supra, 229 Conn. 739.

In concluding that the defendant acted with probable cause in submitting an arrest warrant affidavit charging the plaintiff with violation of § 53a-222a, the court considered the following: the February 3, 2012 transcript of proceedings before Judge Iannotti in which the plaintiff acknowledged that a no contact order was in existence that extended to Cooney; the defendant's statement in the arrest warrant affidavit that he received a text message from George Cooney, informing the defendant that his wife, Cooney, had reported that the plaintiff gave her the middle finger in front of their daughters; the defendant received a sworn statement dated August 9, 2012, in which Cooney stated that the plaintiff waved at her and, after she did not respond, the plaintiff stuck up her middle finger; the defendant received a sworn statement dated August 15, 2012, in which Gromley substantially corroborated Cooney's statement, particularly that the plaintiff had given them the middle finger; the statements of both Gromley and Cooney that Day was not with the plaintiff at the time of the incident; and the defendant's notes from his viewing of the videos from the association surveillance system that indicated that the videos did not capture the plaintiff communicating with Cooney.

The plaintiff argues on appeal that "there are two points of contention factoring against probable cause

which were known to the defendant and not reported in his warrant."[4] She argues first that the "conditions relied upon to establish the general intent element of the crime charged did not occur" and, second, that the defendant had a "duty to report facts from the video evidence . . . which further established Cooney and Gromley were not credible or reliable." We are not persuaded.

The plaintiff challenges the defendant's reliance on the statements of Cooney and Gromley, which she contends he credited over the statements of the plaintiff and Day and the video surveillance evidence. The plaintiff relies on case law stating that "[t]he scope of an arresting officer's obligation to consider exculpatory evidence is guided by two competing principles. On the one hand, once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest. Yet, on the other hand, an officer may not disregard plainly exculpatory evidence." (Internal quotation marks omitted.) *Marchand* v. *Hartman*, 395 F. Supp. 3d 202, 219 (D. Conn. 2019); see also *Martel* v. *South Windsor*, 562 F. Supp. 2d 353, 358 (D. Conn. 2008) ("In seeking an arrest warrant, a [p]olice officer . . . may not purposely withhold or ignore exculpatory evidence that, if taken into account, would void probable cause. . . . A failure to make further inquiry when a reasonable person would have done so may evidence a lack of probable cause." (Internal quotation marks omitted.)), aff'd, 345 Fed. Appx. 663 (2d Cir. 2009). The defendant responds by directing this court to case law providing that "[a] police officer may rely on the complaint of

[4] At oral argument on the motion for summary judgment, the plaintiff stated that she "[did not] contest that the warrant on its face establishes probable cause" but contended that the defendant submitted it in "reckless disregard of the truth . . . ."

a third party to establish probable cause." *Craig* v. *Krzeminski*, 764 F. Supp. 248, 250 (D. Conn. 1991). "[I]t is well established that a law enforcement officer has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness, who it seems reasonable to believe is telling the truth. Furthermore, [t]he veracity of citizen [complainants] who are the victims of the very crime they report to the police is assumed." (Internal quotation marks omitted.) *Crocco* v. *Advance Stores Co.*, 421 F. Supp. 2d 485, 506 (D. Conn. 2006).

In the present case, the defendant considered the exculpatory evidence available and identified it in his arrest warrant affidavit. The arrest warrant affidavit included information related to Day, specifically that Day had approached Officer Takacs while he was speaking with Cooney and Gromley and "said that [the plaintiff] did not instigate contact with either Gromley or Cooney. He also said that both [women] are constantly trying to provoke [the plaintiff]."[5] The arrest warrant

[5] The plaintiff argues that a December 24, 2018 affidavit of Michelle Kingsbury provides a "more accurate" version of Day's statement. The plaintiff describes the Kingsbury affidavit as "literally the only evidence against the defendant which establishes what he knew before he submitted his warrant which survived his spoliation purge." In the affidavit, Kingsbury avers that "Day also spoke to [the defendant] and stated that he witnessed the events of August 9, 2012 and that [the plaintiff] was being instigated by . . . Cooney but at no time did [the plaintiff] communicate with . . . Cooney in any way." The plaintiff highlights the distinction between the arrest warrant affidavit stating that Day reported that the plaintiff "did not instigate contact" with Cooney and Gromley and the Kingsbury recitation of Day's alleged statement that the plaintiff did not communicate with Cooney and Gromley. We note, however that the arrest warrant affidavit also included the statements of Cooney and Gromley, which both indicated that Day stated that he was with the plaintiff at the time of the incident and the plaintiff would not do "anything like this."

The defendant argues that Kingsbury's recitation of Day's alleged statement is hearsay and, thus, is inadmissible. Assuming, without deciding, that Kingsbury's recitation of Day's alleged statement was admissible, we conclude that probable cause would remain with the insertion of the Kingsbury version of Day's statement in the arrest warrant affidavit and, thus, the any dispute over the version of Day's statement was not material.

affidavit also included the defendant's notes from his viewing of the videos from the association surveillance system, which indicated that the videos did not capture the plaintiff communicating with Cooney. In response, the plaintiff did not submit evidence to demonstrate a genuine issue of material fact as to the lack of probable cause.

The plaintiff highlights in her appellate brief her concern with respect to "the defendant's uncontroverted history of abusing his authority by acting as [George] Cooney['s] and . . . Cooney's personal prosecutor, defense counsel and public relations officer." The recitation of the defendant's purported "history of bad acts" is relevant not to whether probable cause existed for the arrest warrant, but to showing that the defendant acted with malice, a distinct element of a claim of malicious prosecution that was not addressed by the trial court in the present case and is not at issue on appeal.

"In a malicious prosecution action, the defendant is said to have acted with malice if he [or she] acted primarily for an improper purpose; that is, for a purpose other than that of securing the proper adjudication of the claim on which [the proceedings] are based . . . such as the desire to occasion expense to the other party." (Citation omitted; internal quotation marks omitted.) *Mulligan* v. *Rioux*, supra, 229 Conn. 732. It is well established that "the plaintiff, to recover, must prove both want of probable cause and malice. While malice may be inferred from the want of probable cause, proof of malice does not dispense with the necessity of

See *Reese* v. *Garcia*, 115 F. Supp. 2d 284, 291 (D. Conn. 2000) ("[T]he first step in assessing the materiality of such omissions is to correct the allegedly defective affidavit by inserting the information withheld from the Superior Court Judge who issued the arrest warrant. . . . The second step is . . . [to determine] whether as a matter of law [the corrected affidavit] did or did not support probable cause." (Citation omitted; internal quotation marks omitted.)).

proving want of probable cause." *Brodrib* v. *Doberstein*, supra, 107 Conn. 299; see also *Thompson* v. *Beacon Valley Rubber Co.*, 56 Conn. 493, 497, 16 A. 554 (1888) ("[T]here was considerable evidence of probable cause, enough it would seem to warrant the jury in finding that it existed. We must therefore assume that the jury so found. If so, that alone would entitle the defendant to a verdict irrespective of the question of malice."). Regardless of the plaintiff's recitation of circumstances that could be relevant to the question of malice, the defendant's state of mind does not negate the existence of probable cause.

Because the court properly concluded that the defendant met his burden of demonstrating the absence of any genuine issue of material fact that the arrest warrant was supported by probable cause, it properly rendered summary judgment on the plaintiff's malicious prosecution claim.

II

The plaintiff's second claim on appeal is that the court improperly rejected her arguments with respect to intentional spoliation of evidence. She "requests that [this] court review the court's refusal to impose any sanction against the defendant for his spoliation of the video evidence as an abuse of discretion . . . . " We understand her contention to be that there necessarily must be a genuine issue of material fact as to the want of probable cause element for the purposes of defeating summary judgment based on her claimed entitlement to an adverse inference with respect to the surveillance video evidence. We conclude that the trial court properly rejected the plaintiff's arguments regarding spoliation.

We first set forth the relevant legal principles. As first recognized in *Beers* v. *Bayliner Marine Corp.*, 236 Conn. 769, 777–79, 675 A.2d 829 (1996), "[a]n adverse

inference may be drawn against a party who has destroyed evidence only if the trier of fact is satisfied that the party who seeks the adverse inference has proven the following. First, the spoliation must have been intentional. . . . [There need not have been] an intent to perpetrate a fraud by the party or his agent who destroyed the evidence but, rather . . . the evidence [must have] been disposed of intentionally and not merely destroyed inadvertently. . . .

"Second, the destroyed evidence must be relevant to the issue or matter for which the party seeks the inference. . . . Third, the party who seeks the inference must have acted with due diligence with respect to the spoliated evidence. . . . Finally . . . the trier of fact . . . is not required to draw the inference that the destroyed evidence would be unfavorable but . . . it may do so upon being satisfied that the above conditions have been met." (Internal quotation marks omitted.) *Surrells* v. *Belinkie*, 95 Conn. App. 764, 770–71, 898 A.2d 232 (2006).

This court in *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 477, 200 A.3d 202 (2018), remarked that "the plaintiff does not cite any authority, nor are we aware of any, for the claim that a permissive adverse inference predicated on a party's intentional spoliation of evidence can serve to raise a genuine issue of material fact for the purposes of defeating summary judgment . . . ." The court nevertheless addressed the merits of the contention. Id. We do the same.

"Pursuant to *Beers*, a party suffering from spoliation cannot build an underlying case on the spoliation inference alone; for an underlying claim to be actionable, the [party] must also possess some concrete evidence that will support the underlying claim. . . . Accordingly, in the context of summary judgment, a plaintiff cannot displace the evidentiary foundation necessary

to raise a genuine issue of material fact with the mere supposition that an adverse inference will be instructed at trial." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 477–78; see also *Rizzuto* v. *Davidson Ladders, Inc.*, supra, 280 Conn. 238 ("a plaintiff in a product liability action cannot rely solely on the spoliation inference to withstand a motion for summary judgment or a motion for a directed verdict; he must also have some independent concrete evidence of a product defect").

In the present case, the plaintiff has failed to adduce any evidence to support want of probable cause and, accordingly, the trial court properly concluded that there was no genuine issue of material fact as to this issue.

Although the plaintiff did not plead intentional spoliation of evidence as a separate cause of action in her complaint,[6] and the trial court recognized that "it is questionable whether the allegations of the plaintiff's complaint are sufficient to satisfy all of the elements for this cause of action," the trial court nevertheless analyzed the plaintiff's claim as purporting to allege a cause of action for intentional spoliation.

In *Rizzuto* v. *Davidson Ladders, Inc.*, supra, 280 Conn. 251, our Supreme Court recognized the tort of intentional spoliation of evidence as an independent cause of action. "[T]he tort . . . consists of the following essential elements: (1) the defendant's knowledge of a pending or impending civil action involving the plaintiff; (2) the defendant's destruction of evidence; (3) in bad faith, that is, with intent to deprive the plaintiff

[6] The defendant directs this court to the plaintiff's representations during a December 9, 2019 hearing on her request to amend her complaint, during which she stated that she was not amending her complaint to add a new cause of action and that the cause of action was "still malicious prosecution, prosecution without probable cause."

of his cause of action; (4) the plaintiff's inability to establish a prima facie case without the spoliated evidence; and (5) damages." Id., 244–45.

In the present case, the trial court rejected the plaintiff's claim on the first essential element, concluding that, "[a]s a matter of law, the defendant's return of the video in October, 2012, has nothing to do with the plaintiff's malicious prosecution action here because this action was filed years later in 2018. Stated differently, contrary to the plaintiff's position, the cause of action for intentional spoliation of evidence is based on the destruction of evidence that is done with the intent to make the evidence unavailable in a pending or impending civil action involving the plaintiff. Here, the defendant was under no legal obligation to retain this video for six years and not return it to its rightful owner when no civil action between the parties was pending or impending. The video did not belong to the defendant and he had a legal obligation to return the video to its rightful owner. Furthermore, no bona fide or rational argument can be made that under the circumstances presented the defendant knew or should have known that his return of this video in 2012 would be relevant to a malicious prosecution claim asserted by the plaintiff some six years later. As a matter of law, no malicious prosecution action could have been instituted or contemplated when the defendant returned the video to the [association] because at that time, the criminal complaint against the plaintiff, on which her malicious prosecution claim is based, had not even been instituted or adjudicated. It is obviously impossible for anyone to contemplate the assertion of a malicious prosecution claim before the prosecution itself even exists. The plaintiff's arguments to the contrary are rejected. Indeed, nothing in the plaintiff's complaint explicitly alleges that the video was returned to its

owner specifically in order to disrupt the plaintiff's ability to assert the present malicious prosecution claim between the plaintiff and the defendant." (Emphasis omitted.)

We agree with the trial court's analysis that, even were we to construe the plaintiff's complaint as alleging a cause of action for intentional spoliation, such claim fails as a matter of law on the first essential element of an intentional spoliation claim.[7]

III

Finally, the plaintiff argues that the defendant's notes, found within the arrest warrant affidavit, should not have been considered by the court when addressing the defendant's motion for summary judgment because they constitute inadmissible hearsay. Specifically, she contends that the court improperly considered the notes under the state of mind exception to the hearsay rule codified at § 8-3 (4) of the Connecticut Code of Evidence.[8] The only notes expressly identified in the plaintiff's appellate brief as having been improperly considered, however, are those contemporaneous notes regarding the defendant's viewing of the surveillance video, which the trial court determined satisfied the business records exception, codified at General Statutes § 52-180.[9] Because the plaintiff does not contest

[7] Accordingly, we need not reach the defendant's alternative ground for affirmance regarding judicial estoppel.

[8] Section 8-3 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule . . . (4) A statement of the declarant's then existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed. . . ."

[9] General Statutes § 52-180 (a) provides: "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time

that the notes were admissible under that exception, we decline to review the plaintiff's claim.

The following additional procedural history is relevant. In its memorandum of decision, the court addressed several evidentiary issues raised by the plaintiff, including that the defendant's contemporaneous notes regarding his viewing of the surveillance video constituted inadmissible hearsay. Specifically, the plaintiff challenged the admissibility of the following passage in the arrest warrant affidavit: "Upon reviewing the video the affiant observed:

"Camera #2. 14:14:01 Silano arrives to the patio with one dog (not two as she stated) and sits at a table with other known persons. (Blonde haired woman in pink dress. Man in suit).

"Camera #2. 14:30:55 Silano leaves table with one dog. (It appears that from the time Silano arrives and leaves she is having a conversation with the people at the table).

"Camera #3 also picks up Silano leaving with one dog.

"Camera #6 14:31:15 Silano walking along grass toward parking lot. Then changes direction and walks toward beach/fence area near large tree. Stops briefly to pet dog. She is now facing mostly toward the fence/beach area.

"14:31:44 Silano walking along fence and then out of sight. At [no] time does any camera pick up evidence of Silano communicating with Cooney."

The court rejected the plaintiff's argument that the notes were inadmissible, concluding: "The parties' submissions indicate that the defendant obtained the surveillance videos owned and operated by the [association] in the course of his investigation. . . .

of the act, transaction, occurrence or event or within a reasonable time thereafter."

Accordingly, there is no dispute that the defendant, a police officer assigned to investigate the reported incident, had a responsibility or duty to report what he observed in the videos as part of the investigation. The plain language of these entries indicates they were written by the defendant as result of his direct observation of the surveillance videos. There can be no bona fide dispute about the facts that the notes were made by the defendant contemporaneously with his observation of the tapes, and the making of these notes was fairly within the regular course of his investigation. Therefore, the defendant's notes as stated in the arrest warrant affidavit are admissible in these proceedings under the business records exception to the hearsay rule. The defendant's contemporaneous notes describe both Cooney and the plaintiff's actions to the extent that they were captured in the [association's] cameras. The defendant's notes explain that some of the plaintiff's actions were not captured due to a large tree blocking the cameras without further speculations. Therefore, the defendant's contemporaneous notes and assertions in the arrest warrant affidavit satisfy the requisites of the business records exception . . . ." (Citations omitted.)

In her appellate brief, the plaintiff argues that the court "erred in admitting the defendant's conclusions of fact derived from the video evidence he spoiled." The only material she includes in her appellate brief as objectionable is the contemporaneous notes previously identified, and she argues that they were improperly admitted under the state of mind exception to the hearsay rule. She does not brief, however, any claim of error regarding the notes being admissible under the business records exception to the hearsay rule. See, e.g., *In re Probate Appeal of Nguyen*, 199 Conn. App. 498, 507, 236 A.3d 291 (2020) (noting that "[p]olice reports are

normally admissible under the business records exception to the hearsay rule as set forth in . . . § 52-180" and that "[t]o be admissible under [that] exception, the report must be based entirely upon the police officer's own observations" (internal quotation marks omitted)). Accordingly, she abandons any claim of error based on the court's consideration of the notes under that exception. See *State* v. *Carattini*, 142 Conn. App. 516, 529–30, 73 A.3d 733 (defendant who briefed claim of error that statement was inadmissible as statement by coconspirator but failed to brief claim of error regarding statement being admitted as statement against penal interest had abandoned claim of error as to admission of statement as statement against penal interest), cert. denied, 309 Conn. 912, 69 A.3d 308 (2013). Even if the challenged material was inadmissible under the state of mind exception, the plaintiff's failure to challenge the material under the business records exception to the hearsay rule would leave uncontested that the material was considered properly under that exception. We, therefore, decline to reach the plaintiff's challenge to the admissibility of the defendant's notes under the state of mind exception to the hearsay rule.

The judgment is affirmed.

In this opinion the other judges concurred.

ESTHER WETHINGTON *v.* JOSHUA WETHINGTON (AC 45824)

Moll, Seeley and Prescott, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and from certain orders finding him in contempt. The plaintiff commenced the dissolution action in November, 2019, and thereafter filed several motions for contempt pendente lite alleging, inter alia, that the defendant had violated the automatic orders through his financial transactions in October, 2019. During

the pendency of the action, the parties executed a stipulation pendente lite providing, inter alia, that, following the sale of the marital residence, the defendant would make weekly support payments to the plaintiff and would also place $46,000 in escrow for the sole benefit of the plaintiff. The plaintiff alleged in a separate contempt motion that the defendant had failed to make all of the agreed upon support payments. In dissolving the marriage, the court found that the primary causes of the breakdown of the marriage were the defendant's excessive drinking and abusive behavior toward the plaintiff and that the defendant was not credible. The court granted, inter alia, several of the plaintiff's motions for contempt and summarily denied the defendant's postjudgment motions to reargue. *Held*:

1. The trial court improperly granted certain of the plaintiff's motions for contempt insofar as the court adjudicated the defendant in contempt of the automatic orders for his conduct prior to the effective date of those automatic orders and abused its discretion in denying the defendant's related motion to reargue: as a matter of law, the defendant could not be adjudicated in contempt of the automatic orders for his actions in October, 2019, as, pursuant to the clear and unambiguous language of our rule of practice (§ 25-5), the defendant was not subject to the automatic orders until they had been served on him, through counsel, in November, 2019; accordingly, the case was remanded with direction to grant the defendant's motion to reargue and to deny the plaintiff's motions for contempt relating to any of the defendant's financial conduct in October, 2019.
2. The defendant could not prevail on his claim that the trial court, in ordering him to pay $49,167 to the plaintiff as relief flowing from a contempt adjudication for his underpayment of required unallocated support, improperly failed to credit him for the $46,000 that he had escrowed, following the sale of the marital residence, in accordance with the parties' stipulation; the clear and unambiguous language of the stipulation demonstrated that the plaintiff was entitled to the $46,000 in addition to the weekly support payments, as the plain terms of the provision requiring the defendant to escrow $46,000 did not place conditions on the plaintiff's right to access those funds or minimize the defendant's obligation in a separate provision requiring him to make weekly support payments to the plaintiff, as those provisions imposed independent financial obligations on the defendant.
3. The trial court properly granted the plaintiff's motion for contempt alleging that the defendant's purchase of a motor vehicle during the pendency of the action violated the automatic orders: this court rejected the defendant's proposition that the purchase of the motor vehicle was a customary and usual expense authorized pursuant to the automatic orders, particularly in light of the trial court's finding that the defendant owned another vehicle; moreover, insofar as the defendant contended

that his trial testimony established that his personal circumstances justified this purchase, this court noted that the trial court repeatedly did not credit the defendant's testimony, including testimony concerning his finances.

4. This court concluded, after a review of the record, that the trial court did not abuse its broad discretion in distributing the parties' assets, particularly in light of the trial court's findings that the defendant was at fault for the breakdown of the parties' marriage and that he had engaged in financial maneuvers that dissipated the parties' funds and left the plaintiff with less funds available in her bank accounts.

5. The defendant could not prevail on his claim that the trial court abused its discretion in denying three of his motions to reargue: the defendant's motions relating to the trial court's award of $49,167 to the plaintiff in unallocated support and its distribution of the parties' assets did not raise any viable claims entitling him to reargument, as the record did not reflect that the court overlooked any controlling principle of law or misapprehended the facts in relation to these orders.

Argued October 16, 2023—officially released February 13, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the plaintiff filed motions for contempt; thereafter the case was tried to the court, *Egan, J.*; judgment dissolving the marriage and granting certain other relief and finding the defendant in contempt; subsequently, the court, *Egan, J.*, denied the defendant's postjudgment motions to reargue, and the defendant appealed to this court. *Reversed in part; judgment directed.*

Dante R. Gallucci, for the appellant (defendant).

Christopher T. Goulden, with whom, on the brief, was *Barbara M. Schellenberg*, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, Joshua Wethington, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Esther Wethington. On appeal, the defendant claims that the court improperly (1) granted several motions for contempt pendente lite filed by

the plaintiff, (2) distributed the parties' assets, and (3) denied several of his postjudgment motions to reargue. We reverse the judgment of the trial court only with respect to the court's (1) denial of one of the defendant's motions to reargue and (2) grants of two of the plaintiff's contempt motions, in whole or in part, insofar as the court adjudicated the defendant in contempt of the automatic orders pursuant to Practice Book § 25-5 (b)[1] for actions that he committed before the automatic orders had become effective against him. We affirm the judgment in all other respects.

The following facts, which are not in dispute, and procedural history are relevant to our resolution of this appeal. The parties were married in 2010. One child was born of the marriage in 2012. On November 21, 2019, the plaintiff commenced the present dissolution action against the defendant on the ground that the parties' marriage had broken down irretrievably. On December 20, 2019, the plaintiff filed her operative amended complaint.

The matter was tried to the court, *Egan*, *J.*, over the course of four total days in September, 2021, and March,

[1] Practice Book § 25-5 provides in relevant part: "The following automatic orders shall apply to both parties . . .

"(b) In all cases involving a marriage or civil union, whether or not there are children:

"(1) Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for reasonable attorney's fees in connection with this action. . . .

"(2) Neither party shall conceal any property. . . .

"(4) Neither party shall cause any asset, or portion thereof, co-owned or held in joint name, to become held in his or her name solely without the consent of the other party, in writing, or an order of the judicial authority. . . ."

"The automatic orders are intended to keep the financial situation of the parties at a status quo during the pendency of the dissolution action." (Internal quotation marks omitted.) *Fronsaglia* v. *Fronsaglia*, 202 Conn. App. 769, 778 n.5, 246 A.3d 1083 (2021).

2022. The court heard testimony from the parties and admitted several full exhibits. At the outset of the first day of trial, the court asked the parties to "confirm the motions going forward." The plaintiff's counsel cited six motions for contempt pendente lite that the plaintiff had filed, namely, (1) two contempt motions filed on March 11, 2020, (2) one contempt motion filed on September 11, 2020, (3) two contempt motions filed on December 11, 2020, and (4) one contempt motion filed on June 22, 2021.[2] On April 11, 2022, each party filed posttrial proposed orders.

On July 29, 2022, the court issued a memorandum of decision dissolving the parties' marriage.[3] The court found that the primary causes of the breakdown of the marriage were (1) the defendant's drinking, which the court found to be "excessive," and (2) the defendant's behavior toward the plaintiff, which included verbal and physical abuse. In addition, the court repeatedly stated that it deemed the defendant's testimony at trial to be not credible. The court entered several financial orders as part of the dissolution judgment, including awarding the plaintiff 60 percent of the net proceeds from the sale of the parties' marital residence in Southport. The court also granted the plaintiff's six motions for contempt identified previously in this opinion.[4] In granting relief as to three of the contempt motions, the court ordered the defendant to pay the plaintiff a total of $76,895 out of his share of the net proceeds from the sale of the marital residence. The court additionally

[2] Throughout the trial, the plaintiff's counsel referred to the contempt motions when presenting evidence to the court.

[3] On November 16, 2022, the court issued a corrected memorandum of decision, the purpose of which was to make a correction to its child support orders, which correction is not germane to this appeal.

[4] The court denied two other motions for contempt, one filed by the plaintiff and the other filed by the defendant. Those rulings are not at issue in this appeal.

awarded the plaintiff $25,000 in attorney's fees with respect to the contempt motions.

Between August 16 and 17, 2022, the defendant filed several motions to reargue, to which the plaintiff objected. The court summarily denied the defendant's motions to reargue and summarily sustained the plaintiff's objections.[5] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We begin with the defendant's claims concerning the trial court's (1) grants of four of the plaintiff's motions for contempt, namely, (a) the two contempt motions filed on March 11, 2020, (b) the contempt motion filed on September 11, 2020, and (c) one of the contempt motions filed on December 11, 2020, and (2) denial of one of the defendant's motions to reargue.[6] We address each claim in turn.

A

We first turn to the defendant's claims regarding the court's (1) grants of the plaintiff's motions for contempt filed on March 11, 2020, docket entries ##110.00 and 111.00 (contempt motion #110.00 and contempt motion #111.00, respectively), and (2) denial of one of the defendant's motions to reargue, docket entry #214.00 (motion to reargue #214.00), which concerned the court's adjudication of contempt motions ##110.00 and 111.00. With regard to the court's grants of contempt motions ##110.00 and 111.00, the defendant asserts that the court improperly adjudicated him in contempt of the court's

[5] In her objections to the defendant's motions to reargue, the plaintiff also requested that the court award her attorney's fees. Although the court sustained the plaintiff's objections, it denied her requests for attorney's fees. The plaintiff has not filed a cross appeal claiming error as to the court's denial of her requests for attorney's fees.

[6] For ease of discussion, we address the defendant's claims in a different order than they are presented in his principal appellate brief.

automatic orders because his conduct occurred before the automatic orders had become effective against him. As to the court's denial of motion to reargue #214.00, the defendant contends that, in granting contempt motions ##110.00 and 111.00, the court overlooked that, as a matter of law, he could not be held in contempt of the automatic orders until they had become effective against him. We conclude that the court (1) improperly granted contempt motions ##110.00 and 111.00 insofar as the court adjudicated the defendant in contempt of the automatic orders for his conduct prior to the effective date of those automatic orders against him, and (2) overlooked that, as a matter of law, the defendant's actions in October, 2019, could not constitute contempt of the automatic orders and, therefore, abused its discretion in denying motion to reargue #214.00.

The following additional procedural history is relevant to our resolution of this claim. The state marshal's return of service filed in the present action reflects that, on November 21, 2019, the state marshal served an attorney representing the defendant with, inter alia, the summons, the plaintiff's original complaint, and notice of the automatic orders. See Practice Book § 25-5 (service of automatic orders is "made with service of process of a complaint for dissolution of marriage").

On March 11, 2020, the plaintiff filed contempt motions ##110.00 and 111.00. In contempt motion #110.00, the plaintiff asserted that the defendant violated the automatic orders in failing to deposit certain income into the parties' joint checking account, including $15,000 in monthly disability payments that the defendant began receiving in October, 2019. In contempt motion #111.00, the plaintiff contended that the defendant violated the automatic orders in transferring, between October 23 and 28, 2019, a total of $196,000 from the parties' joint bank accounts into a personal bank account "in contemplation of divorce and while

the parties' marriage was in serious jeopardy and undergoing an irretrievable breakdown." The court determined that the defendant's actions violated the automatic orders and granted both contempt motions. The court did not order any specific relief vis-à-vis those contempt motions. It awarded, however, the plaintiff $25,000 in attorney's fees in relation to the plaintiff's various contempt motions.

On August 16, 2022, the defendant filed motion to reargue #214.00. The defendant sought reargument on the basis that, as a matter of law, he could not be held in contempt of the automatic orders for his actions in October, 2019, which predated the effective date of the automatic orders against him.[7] The defendant further argued that the $25,000 attorney's fees award had to be reduced to account for the court's erroneous contempt adjudication. The court summarily denied motion to reargue #214.00.[8]

On appeal, the defendant claims that the court's grants of contempt motions ##110.00 and 111.00 cannot stand insofar as the court adjudicated him in contempt of the automatic orders for his actions in October, 2019, which occurred prior to service of the automatic orders on him in November, 2019. He contends that the automatic orders were not in effect in October, 2019, and

[7] In motion to reargue #214.00, the defendant cited to contempt motions ##110.00 and 111.00; however, his analysis referred only to his transfers of the $196,000 in funds in October, 2019, which was the basis of contempt motion #111.00. We construe motion to reargue #214.00 to encompass both contempt motions ##110.00 and 111.00 insofar as they were predicated on conduct in which the defendant engaged in October, 2019.

[8] The court also summarily sustained the plaintiff's objection to motion to reargue #214.00, in which the plaintiff argued in relevant part that (1) the defendant failed to present any case law to support his position, (2) the court's "decision is clear on its face that [the contempt adjudication] is consistent with the relevant statutes supported by the evidence presented," and (3) a trial court is authorized to award attorney's fees without making an adjudication of contempt.

that he "could not possibly have had notice of the automatic orders" at that time. The defendant further claims that the court abused its discretion in denying motion to reargue #214.00, in which he asserted that the court overlooked that, as a matter of law, he could not be adjudicated in contempt of the automatic orders for his conduct in October, 2019. We agree.

At the outset, we set forth the following relevant legal principles and standards of review. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . [C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is particularly harsh . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . . To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. . . . If we answer that question affirmatively, we then review the trial court's determination that the violation was wilful under the abuse of discretion standard." (Internal quotation marks omitted.) *Scott* v. *Scott*, 215 Conn. App. 24, 38–39, 282 A.3d 470 (2022).

Whether the automatic orders were clear and unambiguous is not at issue; rather, the question before us

is whether the automatic orders applied to the defendant in October, 2019, before they had been served on him. This presents us with a legal question over which we exercise plenary review. See *Williams* v. *Mansfield*, 215 Conn. App. 1, 10, 281 A.3d 1263 (2022) ("[w]hen . . . a court's decision is challenged on the basis of a question of law, our review is plenary"). Moreover, to the extent that we must interpret and apply the rules of practice, our review is plenary. See *In re Ryan C.*, 220 Conn. App. 507, 524, 299 A.3d 308 ("The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary." (Internal quotation marks omitted.)), cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023).

"[I]n reviewing a court's ruling on a motion to open, reargue, vacate or reconsider, we ask only whether the court acted unreasonably or in clear abuse of its discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did. . . . [T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." (Internal quotation marks omitted.) *First Niagara Bank, N.A.* v. *Pouncey*, 204 Conn. App. 433, 440, 253 A.3d 524 (2021).

Practice Book § 25-5 provides in relevant part that the court's automatic orders "shall apply to both parties, with service of the automatic orders to be made with service of process of a complaint for dissolution of marriage . . . . *The automatic orders shall be effective with regard to the plaintiff . . . upon the signing of the complaint . . . and with regard to the defendant . . . upon service* and shall remain in place during the pendency of the action, unless terminated, modified, or amended by further order of a judicial authority upon motion of either of the parties . . . ." (Emphasis added.)

Pursuant to the clear and unambiguous language of Practice Book § 25-5, the defendant was not subject to the automatic orders until they had been served on him, through counsel, in November, 2019. It necessarily follows that, as a matter of law, the defendant could not be adjudicated in contempt of the automatic orders for his actions in October, 2019, namely, (1) failing to deposit his $15,000 monthly disability payment into the parties' joint checking account[9] and (2) transferring $196,000 out of the parties' joint bank accounts. The court overlooked this legal principle in adjudicating contempt motions ##110.00 and 111.00 and, therefore, abused its discretion in denying motion to reargue

[9] In contempt motion #110.00, the plaintiff asserted that the defendant began receiving $15,000 per month in disability payments in October, 2019, and that he had failed to deposit any such payments into the parties' joint checking account through the date of the motion, or March 10, 2020. In other words, the plaintiff contended that the defendant was in contempt of the automatic orders for failing to deposit the $15,000 monthly disability payments between October, 2019, and March 10, 2020. The plaintiff additionally asserted in contempt motion #110.00 that the defendant violated the automatic orders in (1) failing to deposit $12,500 in monthly income from a consulting job, which began in December, 2019, and (2) creating a limited liability company in January, 2020, without her consent. We construe the defendant's claim to be challenging the court's grant of contempt motion #110.00 only insofar as the court adjudicated the defendant in contempt of the automatic orders for his actions in October, 2019.

#214.00.[10] In light of the foregoing conclusions, the court's denial of motion to reargue #214.00 must be reversed, along with the court's judgment as to its grants, in whole or in part, of contempt motions ##110.00 and 111.00 insofar as the court adjudicated the defendant in contempt of the automatic orders for his conduct in October, 2019, and the case must be remanded to the court with direction (1) to grant motion to reargue #214.00 insofar as the defendant alerted the court that, in adjudicating contempt motions ##110.00 and 111.00, the court overlooked a controlling principle of law, (2) to deny in part contempt motion #110.00, to the extent that the court adjudicated the defendant in contempt of the automatic orders for his actions in October, 2019, and (3) to deny contempt motion #111.00.[11]

[10] The plaintiff argues that the issue of whether the court properly adjudicated the defendant in contempt of the automatic orders for his conduct in October, 2019, is unpreserved, and, therefore, we should decline to review it because the defendant raised the issue for the first time in motion to reargue #214.00. We disagree. As this court recently stated, although raising an issue for first time in a motion to reargue "generally does not preserve [the] issue for appellate review"; *Curley* v. *Phoenix Ins. Co.*, 220 Conn. App. 732, 745, 299 A.3d 1133, cert. denied, 348 Conn. 914, 303 A.3d 260 (2023); "[a]lerting the trial court to matters that the court may have overlooked is the proper use of a motion to reargue." Id., 750. The record demonstrates that (1) the defendant, in motion to reargue #214.00, raised the legal issue of whether his conduct before service of the automatic orders on him constituted contempt of the automatic orders, (2) the plaintiff filed an objection to motion to reargue #214.00, in which she acknowledged and briefly addressed this legal issue, (3) the court denied motion to reargue #214.00, and (4) the defendant on appeal is claiming that the court abused its discretion in denying motion to reargue #214.00. Under these circumstances, we conclude that the issue of whether, as a matter of law, the court properly adjudicated the defendant in contempt of the automatic orders for his conduct that predated service of the automatic orders on him is preserved for our review in this appeal.

[11] In its decision, the court cited *Dobozy* v. *Dobozy*, 241 Conn. 490, 497, 697 A.2d 1117 (1997), for the proposition that it was authorized to award attorney's fees without adjudicating the defendant in contempt. Although the defendant's briefs make isolated references to the court's award of $25,000 in attorney's fees in relation to the plaintiff's various contempt motions, we do not construe the defendant's claims on appeal to include a

B

Turning next to the court's grant of the plaintiff's motion for contempt filed on September 11, 2020, the defendant contends that, in ordering him to pay $49,167 to the plaintiff as relief flowing from the contempt adjudication, the court improperly failed to credit him for funds that he had escrowed in accordance with a stipulation pendente lite executed by the parties and approved by the court. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On July 14, 2020, the parties executed a stipulation pendente lite (stipulation). Paragraph 3 of the stipulation provided: "Once the marital residence [which was under binder at the time] is sold, the [defendant] shall pay to the [plaintiff] fifty (50%) percent of the total net weekly income received from both Revlon Inc. [(Revlon)] and [HairClub] for Men, LLC [(HairClub)].[12] Said weekly support payments represent unallocated alimony and [c]hild [s]upport . . . . The [defendant] shall make said payments into an account of the [plaintiff's] choosing on

request that we order the court on remand to recalculate, or to consider recalculating, attorney's fees. Even if such relief were encompassed in the defendant's claims, the defendant has not briefed on appeal the issue of whether reversing the court's contempt adjudications necessitates a reversal or reconsideration of the attorney's fees award. Moreover, in his principal appellate brief, the defendant acknowledges that, "even in the absence of a finding of contempt, a trial court has broad discretion to make whole any party who has suffered as a result of another party's failure to comply with a court order." (Internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 99, 161 A.3d 1236 (2017).

[12] With respect to the defendant's employment history, the trial court found in relevant part that (1) between December, 2016, and February, 2019, the defendant was employed by Revlon, (2) a period of severance, short-term disability payments, and long-term disability payments followed the defendant's separation from Revlon, (3) between December 15, 2019, and March 29, 2020, the defendant, through his limited liability company, worked as a consultant for HairClub, and (4) the defendant thereafter was employed directly by HairClub.

the day the payments are received by the [defendant]. Said payments shall continue until March 15, 2021, when the [defendant's] severance payments from Revlon . . . end." (Footnote added.) Paragraph 4 of the stipulation provided: "[U]pon the closing of the sale of the marital residence, the [defendant] shall place forty-six thousand ($46,000) dollars in escrow . . . for the sole benefit of the [plaintiff]. Said amount guarantees the [plaintiff] at least four (4) months of support payments, even if the [defendant] becomes unemployed. The [plaintiff] shall be entitled to draw on these funds for moving and living expenses when she moves from the marital residence." The court, *Stewart, J.*, approved the stipulation on July 23, 2020.

In the September 11, 2020 motion for contempt, the plaintiff represented that (1) the marital residence was sold on September 4, 2020, and (2) in accordance with the stipulation, upon receiving the proceeds from the sale, the defendant escrowed $46,000. The plaintiff then asserted that, on September 10, 2020, in violation of the stipulation, the defendant altered his direct deposit authorization such that his HairClub paychecks would be deposited into his personal bank account rather than into the parties' joint account. The plaintiff represented that the defendant believed that she could access the $46,000 held in escrow under the stipulation to pay for her living expenses.

In its decision, the court, *Egan, J.*, found that "[t]he defendant admit[ted] that [pursuant to the stipulation] he was supposed to deposit one half of the [net] weekly income of both employers, Revlon and [HairClub]. However, he took actions such as unilaterally changing the direct deposit of his paycheck to go into his personal account instead of the parties' joint account. The plaintiff did not receive any portion of the net weekly income." The court further found that "[t]he defendant

changed his withholdings, which resulted in a substantial reduction in his combined net pay. He admit[ted] that when the stipulation was entered his combined net [weekly] pay was $5771. . . . [T]he defendant transferred [to the plaintiff] monthly amounts such as $4423 (September, 2020), $4861 (October, 2020), and $4760 (November, 2020) rather than [the full amount of] $12,503.83 in each such month. Yet, he did deposit the accurate net amount for the three pay periods in February, 2021, which was prior to an upcoming hearing, although he denied that he did so based on the anticipated proceeding. . . . [T]he timing of such accurate payments [is] an indication that the defendant understood his obligation [under the stipulation].'' The court additionally found that, ''[a]s a result of the defendant's actions in denying and limiting the plaintiff access to the undisputed $5771 total net weekly income, the plaintiff was compelled to access the [$46,000] in escrow. . . . [T]he plaintiff was entitled to the escrowed funds in addition to the total net weekly income, which represented unallocated alimony and child support . . . . The defendant continued to deposit less than required at times when his income transitioned to be only from [HairClub]. . . . [T]he defendant failed to pay the plaintiff [unallocated] support as ordered [under the stipulation]. He shall pay her the amount owed based on the underpayments, which total $49,167.'' (Emphasis omitted.) Later in its decision, the court stated that the plaintiff's September 11, 2020 contempt motion was granted and, as relief, ordered the defendant to pay the plaintiff $49,167 from his share of the net proceeds from the sale of the marital home.

On August 16, 2022, the defendant filed a motion to reargue as to, inter alia, the court's order requiring him to pay the plaintiff $49,167. The defendant argued that the court should have credited the $46,000 that he had escrowed in accordance with the stipulation against

the $49,167 awarded to the plaintiff, as the $46,000 held in escrow was intended to guarantee the plaintiff approximately four months' worth of unallocated support payments.[13] The court summarily denied this motion.[14]

On appeal, the defendant does not dispute that he owed the plaintiff $49,167 in unpaid unallocated support pursuant to the stipulation. The defendant contends, however, that the court should have offset the $46,000 that he escrowed per the stipulation, which the plaintiff accessed during the pendency of the present action, against the $49,167 awarded to the plaintiff, leaving a balance of $3167. According to the defendant, the $46,000 escrow provision of the stipulation operated only as security to protect the plaintiff in the event that he failed to remit in full the unallocated support payments owed to her. The plaintiff argues in response that the clear and unambiguous language of the stipulation demonstrated that she was entitled to the $46,000 escrowed amount, *in addition to* one half of the defendant's net weekly income. We agree with the plaintiff.

"The order at issue is the stipulation, entered into by the parties, which was made an order of the court. In domestic relations cases, [a] judgment rendered in accordance with . . . a stipulation of the parties is to be regarded and construed as a contract. . . . It is well established that [a] contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to

[13] In his posttrial proposed orders, the defendant also had requested that the court credit him for the $46,000 that he had placed in escrow pursuant to the stipulation.

[14] The court also summarily sustained the plaintiff's objection to the defendant's motion to reargue, in which the plaintiff argued that the defendant's motion constituted an attempt to have a "second bite at the apple . . . ."

be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . In contrast, an agreement is ambiguous when its language is reasonably susceptible of more than one interpretation. . . . Nevertheless, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Bolat* v. *Bolat*, 191 Conn. App. 293, 298, 215 A.3d 736, cert. denied, 333 Conn. 918, 217 A.3d 634 (2019).

We conclude that, pursuant to the clear and unambiguous terms of the stipulation, the plaintiff was entitled to the $46,000 escrowed amount, as well as to one half of the defendant's net weekly income, following the sale of the marital home. Paragraph 3 of the stipulation required the defendant to pay the plaintiff one half of his net weekly income. Separately, paragraph 4 of the stipulation provided that the defendant would escrow $46,000 "for the sole benefit of the [plaintiff]," with said amount "guarantee[ing] the [plaintiff] at least four (4) months of [unallocated] support payments, even if the [defendant] becomes unemployed," and that the plaintiff would "be entitled to draw on these funds for moving

and living expenses when she moves from the marital residence." We construe the plain language of paragraphs 3 and 4 of the stipulation as imposing independent financial obligations on the defendant. Moreover, the plain terms of paragraph 4 did not place conditions on the plaintiff's right to access the $46,000 in escrowed funds or minimize the defendant's obligation pursuant to paragraph 3 of the stipulation to transfer one half of his net weekly income to the plaintiff. Accordingly, we reject the defendant's claim to an offset of $46,000 against the $49,167 awarded to the plaintiff.[15]

C

With respect to the court's grant of one of the plaintiff's motions for contempt filed on December 11, 2020, in which she claimed that the defendant's purchase of a Mercedes-Benz E350 during the pendency of the present action violated the court's automatic orders, the defendant contends that, on the basis of his testimony at trial, his purchase of the Mercedes-Benz E350 constituted a customary and usual household expense that the automatic orders permitted. We are not persuaded.

The following additional procedural history is relevant to our resolution of this claim. On December 11,

[15] In his principal appellate brief, the defendant also contended that the court improperly adjudicated him in contempt of the stipulation following March 15, 2021, which, the defendant posited, was the date on which the unallocated support payments were scheduled to end under the terms of the stipulation. In his reply brief, however, the defendant states that he "recognizes that, at the time of the trial court's decision, that figure [meaning the amount of unpaid unallocated support] had risen to $49,167." Likewise, during oral argument before this court, the defendant's counsel represented that the defendant did not contest the court's finding that he owed the plaintiff $49,167 in unpaid unallocated support. We construe these statements to be concessions by the defendant that he underpaid the plaintiff $49,167 in unallocated support under the stipulation, which amount, on the basis of the record, necessarily included underpayments remitted by the defendant after March 15, 2021. In other words, we conclude that the defendant has abandoned his claim regarding the propriety of the contempt adjudication vis-à-vis the plaintiff's September 11, 2020 motion for contempt.

2020, the plaintiff filed a motion for contempt asserting that, in violation of the automatic orders, the defendant unilaterally purchased a Mercedes-Benz E350 for $14,000 for his use while living in Florida. The plaintiff further represented that (1) the defendant traveled from Florida to Connecticut to have parenting time with the parties' child, (2) the defendant owned a motor vehicle, a Mercedes-Benz ML350, that he kept in Connecticut, and (3) on or about November 22, 2020, via email, the defendant asked the plaintiff for permission to purchase a second motor vehicle, which request she denied because she questioned his need for two motor vehicles. In its decision, the court found that, without the plaintiff's permission or leave of the court, the defendant, by his own admission, purchased the Mercedes-Benz E350 for $14,000 in cash during the pendency of the present action. The court further found that the defendant also owned a Mercedes-Benz ML350 valued at $32,000. The court proceeded to grant the December 11, 2020 motion for contempt and ordered the defendant to pay the plaintiff $8400, which calculated to 60 percent of the $14,000 expended by the defendant to purchase the Mercedes-Benz E350, out of his share of the net proceeds from the sale of the marital residence.

"A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in [finding] that the actions or inactions of the [alleged contemnor] were in contempt of a court order. . . . We are mindful that the court's automatic orders, applicable during the pendency of all marital dissolution actions, are set forth in Practice Book § 25-5 (b) and provide in relevant part: (1) Neither party shall sell, transfer, exchange, assign, remove, or in any way dispose of, without the consent of the other party in writing, or an order of a judicial authority, any property, except in the usual course of business or for customary and usual household expenses or for

reasonable attorney's fees in connection with this action. . . . The purpose of the automatic orders in marital dissolution actions is to maintain the status quo of the assets within the marital estate so that they may be distributed by the court at the time of dissolution. . . . In light of these legal principles, it is clear that a violation of the court's automatic orders will not arise when expenditures are used for customary and usual expenses." (Citations omitted; internal quotation marks omitted.) *Grant* v. *Grant*, 171 Conn. App. 851, 859–60, 158 A.3d 419 (2017).

On the basis of the record, we reject the defendant's proposition that his purchase of the Mercedes-Benz E350 was a customary and usual expense authorized pursuant to the automatic orders, particularly in light of the court's finding that the defendant owned another motor vehicle, a Mercedes-Benz ML350, valued at $32,000. Insofar as the defendant contends that his trial testimony established that his personal circumstances justified this expenditure, we note that the court repeatedly did not credit his testimony, including testimony concerning his finances. See *Delena* v. *Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022) ("[i]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony" (internal quotation marks omitted)). Thus, we conclude that the court properly granted the plaintiff's December 11, 2020 motion for contempt.

II

The defendant also claims that the trial court improperly distributed the parties' assets. We disagree.

"[General Statutes §] 46b-81 governs the distribution of the assets in a dissolution case. . . . That statute authorizes the court to assign to either spouse all, or

any part of, the estate of the other spouse. . . . In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates. . . . Moreover, [w]e have iterated that there is no set formula the court is obligated to apply when dividing the parties' assets and . . . the court is vested with broad discretion in fashioning financial orders. . . . As a panel of this court once expressed, the court has vast discretion in fashioning its orders." (Citations omitted; internal quotation marks omitted.) *Fronsaglia* v. *Fronsaglia*, 202 Conn. App. 769, 777, 246 A.3d 1083 (2021). "Generally, we will not overturn a trial court's division of marital property unless it misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) Id., 776.

The following additional procedural history is relevant to our disposition of this claim. In its decision, in addition to finding that the breakdown of the parties' marriage was caused by the defendant's (1) excessive drinking and (2) abusive conduct toward the plaintiff, the court discredited the defendant's testimony regarding actions that he took in relation to finances and found that "[h]is financial control and transactions resulted in his accounts having substantially more funds than the plaintiff's accounts and dissipation of funds." As part of its orders allocating the parties' assets, the court

awarded the plaintiff (1) $132,297.80, constituting 60 percent of the net proceeds from the sale of the marital home, (2) 60 percent of the parties' joint and individual bank accounts,[16] (3) 60 percent of the defendant's retirement accounts, subject to gains and losses,[17] and (4) $34,620, constituting 60 percent "of [certain] rent paid [by the defendant] to his parents and reduction in bank account funds."[18] The court additionally awarded the plaintiff (1) $76,895 in relief in granting three of the plaintiff's contempt motions, constituting (a) 60 percent of the amount that the defendant paid for his Mercedes-Benz E350, or $8400, (b) approximately 60 percent of the payoff amount of a loan on the defendant's Mercedes-Benz ML350, or $19,328, and (c) the sum of the unpaid unallocated support payments owed to the plaintiff pursuant to the stipulation, or $49,167, and (2) $25,000 in attorney's fees vis-à-vis the plaintiff's contempt motions.

The defendant maintains that the court's orders allocating the parties' assets were "grossly inequitable" and "create[d] an unfair, and unjust division of marital assets," in part stemming from the court's failure to credit him for a $36,400 pendente lite payment that he made to the plaintiff.[19] After a careful review of the record, we conclude that the court did not abuse its broad discretion in distributing the parties' assets, particularly in light of the court's findings that the defendant (1) was at fault for the breakdown of the parties'

[16] The court found that the plaintiff had $3800 in her bank accounts and that the defendant had $22,626 in his bank accounts.

[17] The defendant's financial affidavit, dated March 3, 2022, which was entered into evidence at trial, reflected that the current total value of the defendant's retirement accounts was $605,572.

[18] The court entered additional property allocation orders, including ordering that the parties would retain their respective motor vehicles and personal property.

[19] Paragraph 7 of the stipulation; see part I B of this opinion; required the defendant, inter alia, to transfer $36,400 to the plaintiff, constituting the cost of one year of rent and a security deposit for an apartment for the plaintiff and the parties' child.

marriage and (2) engaged in financial maneuvers that dissipated the parties' funds and left the plaintiff with less funds available in her bank accounts. Thus, the defendant's claim fails.[20]

III

The defendant next claims that the trial court abused its discretion in denying three of his motions to reargue, docket entries ##215.00, 216.00, and 217.00 (motions to reargue ##215.00, 216.00, and 217.00, collectively).[21] This claim merits little discussion.

"[I]n reviewing a court's ruling on a motion to open, reargue, vacate or reconsider, we ask only whether the court acted unreasonably or in clear abuse of its discretion. . . . When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did. . . . [T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity

[20] The defendant separately claims that the court abused its discretion in failing to credit him $85,197, representing the value of his premarital retirement assets less $53,000 of the plaintiff's premarital retirement assets that, the court found, the parties had utilized during their marriage. Although he concedes that allocating the parties' premarital assets was within the ambit of the court's authority, the defendant maintains that awarding the plaintiff 60 percent of his premarital retirement assets was inequitable. For the same reasons set forth in part II of this opinion, we discern no abuse of discretion by the court in its allocation of the defendant's premarital retirement assets.

[21] We address the defendant's distinct claim concerning a fourth motion to reargue, motion to reargue #214.00, in part I A of this opinion.

to have a second bite of the apple . . . .'' (Internal quotation marks omitted.) *First Niagara Bank, N.A.* v. *Pouncey*, supra, 204 Conn. App. 440.

The defendant maintains on appeal that motions to reargue ##215.00, 216.00, and 217.00 raised viable claims entitling him to reargument[22] with respect to the court's (1) failing to offset $46,000 against the $49,167 awarded to the plaintiff in unpaid unallocated support; see part I B of this opinion; and (2) entering its ''unconscionable cumulative'' orders distributing the parties' assets.[23] See part II of this opinion. As we have concluded previously in this opinion, the court neither erred in awarding the plaintiff $49,167 in unpaid unallocated support without offsetting the $46,000 escrowed amount nor abused its discretion in distributing the parties' assets. The record does not reflect that the court overlooked any controlling principle of law or misapprehended the facts in relation to its orders. Accordingly, we conclude that

[22] Motions to reargue ##215.00, 216.00, and 217.00 also requested permission to present additional evidence. As the defendant's counsel clarified during oral argument before this court, the defendant is not claiming on appeal any error by the trial court in failing to open the record and to permit him to introduce additional evidence.

[23] In his reply brief, the defendant states that ''[a] substantial reason for filing [motions to reargue ##215.00, 216.00, and 217.00] is that, rather than schedul[ing] and hear[ing] the pending motions for contempt that remained at the time of trial, the . . . court, without notice to the parties, decided the [contempt] motions at the conclusion of trial, apparently based upon the evidence presented at trial. The difficulty with that is that the defendant had no opportunity to specifically address the motions for contempt, and [to create] a record as needed.'' During oral argument before this court, the defendant's counsel clarified that the defendant is not claiming that the court committed error by not holding a separate hearing on the plaintiff's contempt motions. Thus, we do not discern the defendant to be pursuing a claim of error on appeal contesting the court's procedure in resolving the plaintiff's contempt motions. Moreover, as we noted previously in this opinion, (1) the court asked the parties on the first day of trial to ''confirm the motions going forward,'' (2) the plaintiff's counsel identified six pending contempt motions filed by the plaintiff, and (3) the plaintiff's counsel referred to the contempt motions when presenting evidence to the court throughout the trial.

the court did not abuse its discretion in denying motions to reargue ##215.00, 216.00, and 217.00.

The judgment is reversed only as to the denial of the defendant's motion to reargue, docket entry #214.00, and the grants of the plaintiff's motions for contempt, docket entries ##110.00 and 111.00, in whole or in part, insofar as the defendant was adjudicated in contempt of the automatic orders for actions that he committed in October, 2019, prior to service of the automatic orders on him, and the case is remanded with direction to enter orders consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

CAZENOVIA CREEK FUNDING I, LLC *v.* LOUIS ROMAN, IN TRUST FOR ALEXANDRIA K. ROMAN ET AL.
(AC 45810)

Alvord, Elgo and Eveleigh, Js.

Syllabus

The plaintiff sought to foreclose on certain real property owned by the named defendant, a trust. R filed a self-represented appearance in the action on behalf of the trust, and the trial court sua sponte struck R's appearance as improper, finding that the trust could only be represented by counsel. The court rendered a judgment of foreclosure by sale, and R appealed to this court, which dismissed the appeal on the basis that R was not a party to the action and could not file an appeal on behalf of the trust in a representative capacity. Thereafter, in the trial court, R filed two motions to dismiss the action against the trust, which the trial court denied. R subsequently filed a motion to substitute himself as the defendant, to which he attached a quitclaim deed that transferred the property from R as trustee to himself individually, which the court denied. The court then denied R's third motion to dismiss the action for lack of subject matter jurisdiction, and R appealed to this court. *Held* that this court dismissed the appeal because R, who was neither a party to the action nor an attorney, appeared without counsel on behalf of a trust and did not have the authority to represent the trust pursuant to statute (§ 51-88): to the extent that the appeal was brought

by R in his individual capacity, the appeal was dismissed on the basis that R was not a party to the action, as the defendant in the action was the trust, and, although R filed documents indicating that the property had been transferred from the trust to himself, R had not moved to intervene in the action in his individual capacity, and the court had denied his motion to substitute himself in his individual capacity for the trust; moreover, to the extent that R, a nonattorney, appeared on behalf of the trust in a representative capacity, R was not representing his own cause in this appeal and, therefore, did not have the authority pursuant to § 51-88 (d) (2) to represent the trust.

Submitted on briefs January 4—officially released February 13, 2024

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the named defendant was defaulted for failure to appear; thereafter, the court, *Bruno*, *J.*, rendered judgment of foreclosure by sale; subsequently, the court, *Hon. Dale Radcliffe*, judge trial referee, denied the motion to dismiss filed by Louis Roman; thereafter, Benchmark Municipal Tax Services, Ltd., was substituted as the plaintiff, and Louis Roman appealed to this court. *Appeal dismissed.*

Louis Roman, self-represented, filed a brief as the appellant.

Juda J. Epstein, filed a brief for the appellee (substitute plaintiff).

PER CURIAM. Louis Roman appeals from the judgment of the trial court denying his motion to dismiss this foreclosure action for lack of subject matter jurisdiction. Roman filed this appeal as a self-represented litigant seeking to represent the interests of the named defendant, Louis Roman, in Trust for Alexandria K. Roman and Dakota T. Roman (trust).[1] Because Roman,

[1] Edward McGivern and Aquarion Water Company of Connecticut were also named as defendants in this action, but they did not appear in the trial court and are not participating in this appeal. Water Pollution Control Authority of the City of Bridgeport, Fairfield County Federal Credit Union, and the Department of the Treasury, Internal Revenue Service, also were

who is neither a party to this action nor an attorney, has appeared without counsel on behalf of a trust, we conclude that Roman does not have the authority to represent the trust. Accordingly, we dismiss the appeal.

The following procedural history is relevant to our resolution of this appeal. In June, 2017, the plaintiff, Cazenovia Creek Funding I, LLC,[2] commenced a foreclosure action against the trust. On August 10, 2017, Roman filed a self-represented appearance in this foreclosure action on behalf of the trust. On December 21, 2018, the trial court, *Bellis*, *J.*, sua sponte struck Roman's appearance and any filings filed on behalf of the trust as improper, finding that the trust may only be represented by counsel. A default for failure to appear was granted against the trust on January 24, 2019. On January 31, 2019, Roman filed another appearance, as "Louis Roman, under a power of attorney from the trust," apparently seeking again to represent the trust. On February 11, 2019, the trial court, *Bruno*, *J.*, rendered a judgment of foreclosure by sale and set a sale date of June 15, 2019. On June 12, 2019, Roman filed an appearance as "Louis Roman, Pro Se," despite not being named individually as a defendant in the complaint.

Roman appealed from the court's February 11, 2019 judgment of foreclosure, and this court dismissed the appeal on the basis that, first, Roman is not a party to the action and, second, he cannot file an appeal on behalf of the trust in a representative capacity.

Thereafter, Roman filed with the trial court two motions to dismiss the foreclosure action against the trust, arguing, inter alia, that the court lacked subject

named as defendants in this action and, although they appeared in the trial court, they are not participating in this appeal.

[2] The action originally was commenced by Cazenovia Creek Funding I, LLC, but, on April 7, 2022, the trial court granted a motion to substitute Benchmark Municipal Tax Services, Ltd., as the plaintiff.

matter jurisdiction over the action. The plaintiff objected to both motions and argued, inter alia, that Roman is not an attorney and is improperly appearing on behalf of the trust. The court denied both motions.

On January 28, 2022, Roman filed a motion to substitute "Louis Roman for Louis Roman in trust for Alexandria K. Roman and Dakota T. Roman, et al. as party defendant," attaching a quitclaim deed that transferred the property from Roman as trustee to himself individually.[3] The trial court, *Hon. Dale W. Radcliffe*, judge trial referee, denied the motion on April 7, 2022, stating: "Roman represents that the trusts have been terminated or revoked. Therefore, any interest they might have had is an interest that he has individually, and he is already a self-represented party. The motions . . . are DENIED without prejudice. To the extent that . . . Roman represents his own interest, he has standing to do so as a self-represented party."

The plaintiff filed a motion to reset the sale date, alleging that Roman had filed a bankruptcy petition and a bankruptcy court had granted the plaintiff's motion for relief from stay. The court granted the plaintiff's motion and set a new sale date of July 16, 2022. Roman again appealed, and this court issued a delinquency order dismissing the appeal for Roman's failure to file any of the Practice Book § 63-4 documents.

On July 1, 2022, Roman filed with the trial court a third motion to dismiss the foreclosure action against the trust on the basis that the court lacked subject matter jurisdiction over the action. The plaintiff filed an objection to Roman's motion to dismiss on August 4, 2022, and argued, inter alia, that the motion "is . . .

[3] Roman filed two motions to substitute on January 28, 2022. The only difference between the motions is that one does not have the exhibits referenced in the motion included as attachments.

procedurally deficient. [Roman] . . . can only represent himself and his own interests. He is not permitted under Connecticut law to represent the interests of others, which would constitute the unauthorized practice of law." On August 24, 2022, the court held argument on the third motion to dismiss. The court orally denied the motion to dismiss and subsequently issued a written order that same day reiterating its denial of the motion on the basis that the court does have subject matter jurisdiction over the action. This appeal followed.

Prior to oral argument in this appeal, this court issued an order, sua sponte, instructing the parties to be prepared to address "whether this appeal should be dismissed as to . . . Roman, individually, because he is not a party to this action . . . and whether this appeal should be dismissed as to [the trust], because . . . Roman is not an attorney and cannot file an appeal in a representative capacity." (Citation omitted.) Roman did not appear before this court for oral argument and, instead, filed a request to have argument rescheduled or have his case taken on the papers. This court granted Roman's request to consider his appeal on the papers.

We first address whether this appeal, to the extent that it is brought by Roman in his individual capacity, should be dismissed on the basis that he is not a party to this action. General Statutes § 52-263 provides in relevant part: "[I]f either party is aggrieved by the decision of the court . . . he may appeal to the court having jurisdiction from the final judgment . . . ." Accordingly, "the appellant must be a party" in order to "establish subject matter jurisdiction for appellate review . . . ." *State* v. *Salmon*, 250 Conn. 147, 153, 735 A.2d 333 (1999).

In this case, the defendant in the underlying foreclosure action is the trust and not Roman in his individual capacity. Although Roman filed documents with the

trial court indicating that the subject property has been transferred from the trust to him, even if that is true, the fact remains that Roman is not a party to the action. Roman has not moved to intervene in the action in his individual capacity, and his motion to substitute himself in his individual capacity for the trust was denied by the court. Thus, this court lacks subject matter jurisdiction over the portion of the appeal brought by Roman in his individual capacity because he is not a party to the underlying action.

We next address whether this appeal should be dismissed to the extent that Roman appears on behalf of the trust in a representative capacity. General Statutes § 51-88 (a) provides in relevant part: "Unless a person is providing legal services pursuant to statute or rule of the Superior Court, a person who has not been admitted as an attorney under the provisions of section 51-80 . . . shall not: (1) Practice law or appear as an attorney-at-law for another in any court of record in this state . . . or (8) otherwise engage in the practice of law as defined by statute or rule of the Superior Court." Subsection (d) of § 51-88, however, provides in relevant part: "The provisions of this section shall not be construed as prohibiting . . . (2) any person from practicing law or pleading at the bar of any court of this state in his or her own cause . . . ."

"The authorization to appear pro se is limited to representing one's own cause, and does not permit individuals to appear pro se in a representative capacity." (Internal quotation marks omitted.) *Ellis* v. *Cohen*, 118 Conn. App. 211, 215, 982 A.2d 1130 (2009). "It is well established in our jurisprudence that a nonattorney does not have the authority to maintain an appeal on behalf of a trust. . . . The authorization to appear [self-represented] is limited to representing one's own cause,

and *does not permit individuals to appear* [*self-represented*] *in a representative capacity*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Cook* v. *Purtill*, 195 Conn. App. 828, 830–31, 228 A.3d 128 (2020).

In the present case, Roman, who is not an attorney, filed this appeal in his capacity as representative of the trust. Because Roman is not representing his "own cause" in this appeal; General Statutes § 51-88 (d) (2); he does not have the authority pursuant to § 51-88 to represent the trust.

The appeal is dismissed.

LESLIE WILLIAMS *v.* COMMISSIONER OF CORRECTION
(AC 45737)

Elgo, Clark and Sheldon, Js.

Syllabus

The petitioner, who had been convicted, on pleas of guilty, of the crimes of capital felony, assault in the first degree and attempt to commit escape from custody, sought a writ of habeas corpus, claiming that his trial counsel, L and S, had rendered ineffective assistance. The petitioner, armed with a handgun, had entered a residence occupied by two women where he shot one of the women and sexually assaulted the other before driving her in her vehicle to a secluded location where he shot and killed her. The petitioner thereafter gave the police a detailed, written confession admitting his participation in the crimes. After investigating the viability of various defenses, including a potential mental disease or defect defense, and concluding that the success of a motion to suppress the petitioner's confession was highly speculative, L and S advised the petitioner to enter into an agreement with the state, under which he would plead guilty and receive a sentence of life imprisonment without the possibility of release in exchange for the state's agreement not to pursue the death penalty against him. The court rendered judgment denying the habeas petition. The court concluded that the petitioner had failed to prove that his counsel had rendered deficient performance related to the motion to suppress claim or by failing to investigate and pursue a mental disease or defect defense. The court further held that

the petitioner had failed to establish that he was prejudiced by demonstrating that he would have rejected the plea agreement and gone to trial had he been advised regarding the motion to suppress or the potential mental disease or defect defense. The court thereafter granted the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly determined that L and S did not render ineffective assistance:

a. The habeas court correctly determined that the petitioner failed to prove that he was prejudiced by any purported failure of L and S to advise him properly regarding a possible motion to suppress his confession: the petitioner presented no evidence that he was prejudiced, and the court based its determination on the undisputed factual circumstances of the petitioner's case, in which he faced a possible death sentence at the time he considered whether to plead guilty to crimes for which there was a surviving eyewitness, significant physical evidence and little hope of being able to raise reasonable doubt because of an eyewitness identification error or by asserting that he had been wrongly accused; moreover, the court credited L's testimony that it would have been very difficult to personalize the petitioner to a jury in light of the facts of the case and the petitioner's criminal history, and that, even if L and S had moved to suppress the confession, the success of such a motion was highly speculative.

b. L and S did not render deficient performance, as the petitioner claimed, by failing to investigate and inform him about a potential mental disease or defect defense: L and S had no duty to inform the petitioner of a possible mental disease or defect defense because it was not established as a viable defense in the circumstances of the petitioner's case, as the court credited the testimony of L and S that they had investigated the petitioner's mental health and saw nothing to indicate that he was incompetent or that he suffered from a mental disease or defect; moreover, it was sound trial strategy for L and S to negotiate a guilty plea for a sentence of life imprisonment in exchange for the state's removal of the possibility that the death penalty would be imposed, and, although the petitioner claimed that he was unable to make informed decisions about the objectives of his counsel's representation because they had not properly informed him about the mental disease or defect defense, he provided no legal authority for the premise that counsel is required to fully inform a defendant of a factually unsupported defense that was never considered as a serious option except as a last resort if the state persisted in pursuing the death penalty.

2. This court did not need to reach the petitioner's claim that the habeas court abused its discretion when it sustained an objection by the respondent, the Commissioner of Correction, that prevented the petitioner from testifying that he would have rejected the plea agreement and insisted on going to trial had L and S more fully informed him of the

possibility of raising a mental disease or defect defense; although the petitioner contended that the habeas court's evidentiary ruling was harmful because it left him without a way to establish that he was prejudiced by his counsel's performance, there was no need for this court to adjudicate that claim, as the habeas court already had properly concluded that the petitioner failed to establish that L and S rendered deficient performance with respect to the pursuit of a mental disease or defect defense, this court having repeatedly explained that ineffective assistance claims may be resolved under either the performance prong or the prejudice prong of the test for ineffective assistance of counsel.

Argued October 25, 2023—officially released February 13, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *M. Murphy, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (petitioner).

Melissa E. Patterson, senior assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, and *Angela R. Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Leslie Williams, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus alleging ineffective assistance of trial counsel. The petitioner claims that he relied on the advice of counsel when he pleaded guilty to capital felony and other charges, accepting a total effective sentence of life imprisonment without the possibility of release in exchange for the state's agreeing

to not seek the death penalty against him.[1] On appeal, the petitioner contends that the court (1) improperly rejected his claims that counsel rendered ineffective assistance by failing to move to suppress his confession and failing to investigate or properly advise him of a potential mental disease or defect defense, and (2) abused its discretion in excluding his testimony that he would have rejected the plea agreement and insisted on going to trial if his counsel had properly informed him of the potential defense to his pending charges. We affirm the judgment of the habeas court.

The following facts and procedural history, as found by the habeas court or as undisputed by the parties, are relevant to our resolution of the petitioner's claims. On the morning of March 30, 2008, the petitioner entered a New Britain residence occupied by the owner, L, and her friend, M.[2] The petitioner brandished a handgun, demanded valuables, and forced the two women into the basement where he shot L in the head. L survived the shooting but pretended to be dead on the basement floor. The petitioner sexually assaulted M before abducting her from the residence and driving her in her vehicle to a secluded location in Bristol. When M exited the vehicle, the petitioner shot and killed her, then pushed her body over the edge of the road. At the residence, after the petitioner and M had left, L was able to leave the basement and make it to a neighbor's home. The neighbor called the police, and the police issued a notice to be on the lookout for M's vehicle. Later that day, the police spotted the petitioner in M's vehicle, and a high-speed chase ensued, culminating in the petitioner's apprehension. While the petitioner was

[1] Subsequent to the petitioner's conviction of capital felony, our Supreme Court abolished the death penalty in *State* v. *Santiago*, 318 Conn. 1, 139–40, 122 A.3d 1 (2015).

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

in custody following his apprehension, the police questioned him about what had happened before his apprehension, including the events at L's residence and their aftermath. Although the petitioner initially denied any knowledge of those events, he eventually provided and signed a seven page confession admitting his participation in those events in addition to telling authorities where they could find M's body.

On March 31, 2008, the petitioner was charged with capital felony in violation of General Statutes (Rev. to 2007) § 53a-54b (6)[3] and assault in the first degree in violation of General Statutes § 53a-59 (a) (5).

On December 8, 2011, pursuant to a plea agreement under which the petitioner pleaded guilty and accepted a sentence of life imprisonment without the possibility of release in exchange for the state's agreement not to pursue the death penalty against him, the petitioner pleaded guilty to capital felony in violation of § 53a-54b (6), assault in the first degree in violation of § 53a-59 (a) (5), and attempt to commit escape from custody in violation of General Statutes § 53a-49 and General Statutes (Rev. to 2011) § 53a-171.[4] Prior to accepting the guilty pleas, the court canvassed the petitioner, asking in relevant part, whether the recitation of facts presented by the prosecutor was correct and he was pleading guilty due to actual guilt; whether he had adequate time to meet with counsel before pleading guilty and was satisfied with the advice of counsel regarding his guilty pleas; whether counsel had explained to him

[3] Section 53a-54b was amended by No. 12-5, § 1, of the 2012 Public Acts to substitute "murder with special circumstances" for "capital felony." See *State* v. *McCleese*, 333 Conn. 378, 425 n.24, 215 A.3d 1154 (2019). We refer to § 53a-54b as capital felony because that is the nomenclature employed by the parties and the habeas court. All references to § 53a-54b in this opinion are to the 2007 revision of the statute.

[4] The petitioner had been charged in a separate docket with attempt to commit escape from custody in 2011. The petitioner did not challenge that conviction in the habeas court or on appeal to this court.

that the state had the burden of proving the elements of capital felony, assault in the first degree, and attempt to escape from custody beyond a reasonable doubt; and whether he understood that, by pleading guilty, he was giving up the ability to present any defenses, including "a mental state defense" if his counsel thought it would be helpful. The court additionally asked whether the petitioner understood that, if the case proceeded to trial and he was found guilty, a jury of twelve would have to vote unanimously in favor of the death penalty or a three judge panel would have to vote at least two to one in favor of that penalty before it could be imposed against him; and whether avoiding the death penalty was a reason he was entering his pleas of guilty. The petitioner answered in the affirmative to each of the court's inquiries.

During the plea canvass, the petitioner's counsel, Attorneys R. Bruce Lorenzen and David G. E. Smith, denied that any issues had arisen involving the petitioner's competence or mental disease when asked directly by the court. Upon completing the canvass, the court found that the guilty pleas had been made knowingly, voluntarily, and intelligently, with the effective assistance of counsel. The court then sentenced the petitioner to life imprisonment without the possibility of release for capital felony pursuant to § 53a-54b (6) and imposed concurrent sentences for the assault and attempted escape crimes. The petitioner did not file a direct appeal from his convictions.

On March 9, 2021, the petitioner filed an amended petition for a writ of habeas corpus, alleging that trial counsel had rendered ineffective assistance by (1) "[f]ailing to advise [him] regarding the possibility that he could move to suppress" his confession and failing to move to suppress the confession, and (2) "[f]ailing to advise [him] that [he] could . . . raise a mental disease or defect defense [in] the guilt phase of his capital

felony trial" and allowing him to plead guilty without advising him of the same.[5]

A habeas trial was held on March 9, 2022. The petitioner provided exhibits to the court in the form of transcripts from the plea and sentencing hearings, a mitigation outline, which had been prepared by trial counsel and their capital defense team, and the court clerk's file from the underlying criminal case. The court heard testimony from the petitioner and the petitioner's criminal trial counsel, Lorenzen and Smith. No other witnesses were presented. Lorenzen and Smith testified that, together, they acted as the petitioner's trial counsel at all relevant times for the purpose of the habeas petition.[6] Lorenzen described his role in the underlying case as that of focusing on the guilt phase of the trial, while Smith, as a member of the Office of the Chief Public Defender's capital defense unit, had the role of focusing on the development of mitigating evidence for the penalty phase of the trial. Lorenzen stated, however, that mitigating evidence "would be useful either in discussing a potential plea with the state or, if the case did come to trial, in terms of arguing to the jury that a life sentence would be warranted."

In its June 29, 2022 memorandum of decision, the habeas court found that the petitioner had failed to prove that his counsel rendered deficient performance as to the motion to suppress claim or the mental disease or defect defense claim. The court further held that, given "the factual circumstances in this case," the petitioner had "failed to prove that he was prejudiced" by

[5] The petitioner's amended petition for a writ of habeas corpus additionally alleged a due process violation, claiming that his confession was not made voluntarily, knowingly, or intelligently due to a then existing mental disease or defect. The habeas court rejected the petitioner's claim, finding that "[he had] not prove[d] that he suffered from a mental disease or defect." The petitioner does not contest that ruling on appeal.

[6] For ease of discussion, we refer in this opinion to Lorenzen and Smith together as counsel and individually by name.

demonstrating that he would have rejected the plea agreement and gone to trial had he been advised regarding the motion to suppress or the potential mental disease or defect defense. The court thus denied the petition for a writ of habeas corpus. It thereafter granted the petitioner's petition for certification to appeal, and this appeal followed.

I

The petitioner first claims that the court improperly denied his ineffective assistance of counsel claims. We disagree.

In considering the merits of that claim, we first set forth the well settled standard of review in a habeas corpus proceeding. "When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . The issue, however, of [w]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . Under the [test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)], when a petitioner alleges ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Furthermore, because a successful petitioner must satisfy both prongs of the [*Strickland-Hill*] test, failure to satisfy either prong is fatal to a habeas petition. . . .

"To satisfy the first prong, that his counsel's performance was deficient, the petitioner must establish that his counsel made errors so serious that [counsel] was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. . . . The petitioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Furthermore, the right to counsel is not the right to perfect counsel." (Citations omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 212–13, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

"In the context of a habeas petition claiming ineffective assistance of counsel where the petitioner pleaded guilty, a petitioner satisfies the prejudice prong of the [*Strickland-Hill*] test if he reasonably demonstrates that, but for the conduct of counsel, the petitioner would not have pleaded guilty. . . . However, a petitioner must make more than a bare allegation that he would have pleaded differently to demonstrate prejudice . . . because such a statement suffers from obvious credibility problems and must be evaluated in light of the circumstances the defendant would have faced at the time of his decision." (Citations omitted; internal quotation marks omitted.) *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 669, 289 A.3d 1206, cert. denied, 348 Conn. 917, 303 A.3d 1193 (2023).

It is well settled that "courts may decide against a petitioner on either prong [of the *Strickland-Hill* test], whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice

prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Citations omitted; internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 120, 281 A.3d 1189 (2022).

A

The petitioner's first claim of ineffective assistance of counsel stems from the detailed confession that the petitioner gave to the New Britain police after he was apprehended. The petitioner claims that counsel was deficient because he was not properly advised that he could move to suppress the statement, and if he had been properly advised, he would not have pleaded guilty and instead would have insisted on going to trial. We are not persuaded. In particular, we agree with the habeas court that the petitioner failed to prove that he was prejudiced by any purported failure by his trial counsel to advise him regarding a possible motion to suppress.[7]

The following additional facts are relevant to resolving this claim. After the petitioner's arrest and prior to the appointment of counsel, the petitioner provided a detailed confession to the police. After the petitioner read his confession, he made and initialed eighteen separate corrections in it.

Both Lorenzen and Smith testified that their primary objective in the underlying case was to prevent the petitioner from receiving the death penalty, but the

[7] In light of this conclusion, we need not consider the petitioner's claim that counsel's performance was deficient. See part II of this opinion.

ultimate decision of whether to plead guilty was left to the petitioner. The habeas court noted that "the state had an extremely strong case against the petitioner," which included not just the confession, but also the identification of the petitioner by the surviving victim, physical evidence linking the petitioner to the crimes, and the fact that the petitioner was apprehended while driving M's vehicle. Lorenzen stated that he and Smith would not have "been able to argue reasonable doubt, or that it was a question of identification, or the wrong person had been accused." Smith testified that, had the case gone to trial, the petitioner's prior criminal history would likely have been disclosed, which included robbery and sale of narcotics, both felonies, as well as the fact that the petitioner had been released from prison less than three weeks before the crimes at issue after having served a sentence for a prior conviction of sexual assault of a five year old child. Lorenzen stated that it would "be very difficult to personalize [the petitioner] to a jury" given the facts counsel had to work with.

At the habeas trial, the petitioner testified that he had told his counsel to suppress the confession, but they told him, "we're not getting it." Lorenzen acknowledged that the initialed corrections the petitioner made to the confession would make it difficult to argue that the confession had not been made freely and voluntarily, or that the petitioner had been suffering under some qualifying disability or burden when he made his confession. Lorenzen stated that it was "highly speculative" as to whether the petitioner would have met the requisite legal standard to have the statement suppressed and that he "would not have been optimistic" about the success of the motion. If the case had proceeded to trial, however, Lorenzen said, it would have been standard strategy in a death penalty case to "litigate as many issues as possible, including suppression." Ultimately, counsel were able to secure a plea agreement for a life

sentence in exchange for the state's agreement not to pursue the death penalty.

In its memorandum of decision, the court concluded, inter alia, that the petitioner had "failed to prove that he was prejudiced . . . by demonstrating that he would have gone to trial had trial counsel filed or advised him as to filing the motion to suppress given the factual circumstances in this case." On our review of the record, we agree.

"[A] petitioner must make more than a bare allegation that he would have pleaded differently to demonstrate prejudice . . . because such a statement suffers from obvious credibility problems and must be evaluated in light of the circumstances the defendant would have faced at the time of his decision." (Citation omitted; internal quotation marks omitted.) *Foster* v. *Commissioner of Correction*, supra, 217 Conn. App. 669. "In evaluating the credibility of such an assertion, the strength of the state's case is often the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial, in light of newly discovered evidence or a defense strategy that was not previously contemplated. . . . Likewise, the credibility of the petitioner's after the fact insistence that he would have gone to trial should be assessed in light of the likely risks that pursuing that course would have entailed." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36–37, 177 A.3d 1162, cert. denied, 328 Conn. 907, 178 A.3d 390 (2018). Here, beyond the allegation that the petitioner would have pleaded differently, the petitioner presented no evidence relative to the prejudice prong of the *Strickland-Hill* test, and the court considered "the factual circumstances in this case" as its basis for concluding that the petitioner was unable to demonstrate prejudice.[8]

[8] To demonstrate prejudice under the *Strickland-Hill* test, it is common for petitioners to testify what their course of action would have been in the

As previously stated, the factual circumstances facing the petitioner at the time he considered whether to plead guilty included a possible death sentence for crimes in which there was a surviving eyewitness, significant physical evidence, and little hope of being able to raise reasonable doubt via an eyewitness identification error or asserting that the petitioner had been wrongly accused. Lorenzen stated that it would "be very difficult to personalize [the petitioner] to a jury" given the facts of the case and the petitioner's serious criminal history, and, even if counsel had moved to suppress the confession, the success of a suppression motion would have been highly speculative at best. In its memorandum of decision, the court credited that testimony. See, e.g., *Collins* v. *Commissioner of Correction*, 202 Conn. App. 789, 812, 246 A.3d 1047 (habeas court is sole arbiter of credibility of witnesses and weight to be given to their testimony), cert. denied, 336 Conn. 931, 248 A.3d 1 (2021). In light of that testimony and the uncontroverted factual circumstances reflected in the record before us, we conclude that the petitioner failed to satisfy his burden under the prejudice prong of the *Strickland-Hill* test.

B

The petitioner's second claim of ineffective assistance of counsel is related to a possible mental disease

absence of the purported deficient performance of counsel. See, e.g., *Soto* v. *Commissioner of Correction*, supra, 215 Conn. App. 123 (petitioner testified regarding how his actions would have differed if he had received effective assistance of counsel); *Rogers* v. *Commissioner of Correction*, 194 Conn. App. 339, 348, 221 A.3d 81 (2019) (same); *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 73, 174 A.3d 206 (2017) (same).

The record reflects that the petitioner never testified as to what his course of action would have been in the absence of the purported deficient performance. When the petitioner was asked during the habeas trial what his course of action would have been "had [his] attorneys moved to suppress [his] statement at any point prior to [his] guilty plea," the court sustained the objection by counsel for the respondent, the Commissioner of Correction, on the grounds that the question called for speculation and that it was a

or defect defense that counsel briefly considered as part of their mitigation plan. The petitioner claims that counsel rendered deficient performance because they "fail[ed] to investigate a potential mental disease or defect defense and . . . fail[ed] to advise [him] of such a defense before allowing him to plead guilty." We do not agree.

The following legal principles and additional facts are relevant to this claim. The mental disease or defect defense is governed by General Statutes § 53a-13 (a), which provides that "it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

The petitioner first claims that counsel "fail[ed] to investigate a potential mental disease or defect defense . . . ." At the habeas trial, Lorenzen testified that he was familiar with the mental disease or defect defense and had "utilized the defense on behalf of other clients," but, in the case of the petitioner, it "was certainly considered" but was "quickly discounted" and "never . . . became a serious option" because "it was not realistic." He further stated that being an experienced public defender afforded him "pretty good practical training" when working with clients who "struggle with mental health or substance abuse," but the petitioner "did not, in any way, strike [him] as being mentally ill" or incompetent, which is why Lorenzen "saw no reason to move for an evaluation based on mental disease or defect." Lorenzen stated that, in his opinion, it was not credible for the petitioner to enter a plea of not guilty by reason of mental disease or defect, as he did not think the petitioner "fit the parameters" for such a plea.

compound question. The petitioner has not challenged that evidentiary ruling in this appeal.

Smith testified in a similar fashion, indicating that he had thirty years of professional experience working on capital cases with "clients [where] mental health and competency is a very fluid concept . . . ." Smith opined that, in the petitioner's case, he did not have a reason to believe it would be appropriate to request a competency examination. Smith stated that, rather than discounting the mental disease or defect defense, "it was more of an issue of back burnering it, but if . . . we had nothing else and we needed to go forward, we would do that," making clear that "saving the life of our client is always . . . the primary goal."

The record contains a mitigation outline that Smith created with his capital mitigation team. The outline mentions positron emission tomography and magnetic resonance imaging brain scans that the petitioner underwent while in custody, and Smith testified that the scans showed "abnormalities" that could be attributed to potential exposure to lead paint or poor prenatal care. Smith acknowledged, however, that, even with those scans, "a very qualified expert may say that the abnormality has no . . . effect on impulse control [or] cognitive learning . . . ." When asked whether the items contained in the mitigation outline were ever evaluated in the context of forming a mental disease or defect defense, Smith responded that he "always evaluate[s] information in that context" and then "rank[s]" potential defenses. Smith stated that, without other defenses such as reasonable doubt, being wrongly accused, or an alibi, "if death had remained on the table and we were going to go to trial . . . then certainly the mental disease or defect . . . would have simmered to the top." Smith further testified that, even "after the testing that was done and all of the mitigation avenues [were] explored," it was his and Lorenzen's "professional opinion that, if we could get the death penalty off the table, legally, that would be the best route on

behalf of [the petitioner], but the actual decision was made by [the petitioner], not by us."

The petitioner additionally claims that counsel rendered deficient performance by "failing to advise the petitioner of [the possibility of a mental disease or defect] defense before allowing him to plead guilty." The petitioner testified that counsel "might have . . . mentioned [the defense] in passing, but we never sat down and discussed it as . . . a strategy" and that counsel never discussed the elements of the mental disease or defect defense with him. Lorenzen testified that he "did cover the matter" of why the defense was "not a serious consideration" and kept the petitioner apprised of what he believed were the strategies and theories that best served the petitioner's interests. Smith testified similarly that he kept the petitioner "up to date" with the theories, strategies, and investigations into the case.

In its memorandum of decision, the court concluded that "the petitioner failed to sustain his burden of proving that trial counsel's performance was deficient in failing to investigate and advise the petitioner as to a potential mental disease or defect defense." The court found that "the petitioner's mental health was investigated, and trial counsel credibly testified that they saw nothing to indicate that the petitioner was incompetent or suffered from a mental disease or defect."

Under the performance prong of the *Strickland-Hill* test, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, supra, 214 Conn. App.

212–13. The petitioner concedes that "legitimate strategy decisions made by trial counsel are all but immune from challenge on appeal." Here, counsel's legitimate strategy, after evaluating the viability of possible defenses, was to negotiate a guilty plea with the state for a sentence of life imprisonment in exchange for removing the possibility that the death penalty would be imposed. Because this represented a sound trial strategy in the circumstances of this case, counseling the petitioner to accept the plea deal did not constitute deficient performance of counsel.

Nevertheless, the petitioner contends that, because he was not "properly informed" about the possible mental disease or defect defense, his counsel provided ineffective assistance resulting in the petitioner's inability to "make informed decisions regarding the objectives of the representation." Yet the petitioner has not provided, nor can we find, legal authority for the premise that counsel is required to fully inform a defendant of a defense that was factually unsupported and never considered as a serious option, except possibly as a last resort, if the state persisted in pursuing the death penalty.

In this regard, we note that the United States Court of Appeals for the Second Circuit, in a case in which a possible defense "had little chance of success" and presented a "high likelihood that the . . . defense . . . would have exposed [the petitioner] to significant additional punishment," concluded that "counsel served adequately during the plea negotiations because he had no duty to disclose the . . . defense under [those] circumstances." *Panuccio* v. *Kelly*, 927 F.2d 106, 109–10 (2d Cir. 1991); see also *Jamison* v. *Senkowski*, 204 F. Supp. 2d 610, 613 (S.D.N.Y. 2002) (representation does not fall below objective standard of reasonableness when counsel fails to inform petitioner of defense that is not, in fact, viable). Here, there was no duty to inform

the petitioner of the possible mental disease or defect defense because it was not established as a viable defense in the circumstances of his case. The court determined that "trial counsel credibly testified that they saw nothing to indicate that the petitioner was incompetent or suffered from a mental disease or defect." This court will not revisit that credibility determination on appeal. See, e.g., *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 368, 273 A.3d 380 (2022) ("we will not second-guess the habeas court's credibility determination").

In light of the foregoing, we conclude that counsel did not render deficient performance in failing to investigate and inform the petitioner of a potential mental disease or defect defense.

II

The petitioner's last claim is that the court abused its discretion by sustaining an objection by the respondent, the Commissioner of Correction, during the petitioner's testimony, which effectively prevented the petitioner from testifying that he would have rejected the plea agreement and insisted on going to trial if his counsel had more fully informed him of the possibility of raising a mental disease or defect defense. The petitioner claims that this evidentiary ruling was harmful because it left him without a way to establish prejudice, the second prong of the *Strickland-Hill* test, with respect to his ineffective assistance of counsel claim concerning that defense.

We need not reach this claim in light of our conclusion in part I B of this opinion. This court has repeatedly explained that a court may resolve ineffective assistance of counsel claims on either the performance prong or the prejudice prong. See, e.g., *Soto* v. *Commissioner of Correction*, supra, 215 Conn. App. 120. Because we have determined that the habeas court

properly concluded that the petitioner's ineffective assistance of counsel claim failed under the performance prong of the *Strickland-Hill* test, we need not reach the petitioner's evidentiary claim as it relates to the prejudice prong of that test. See, e.g., *Quint* v. *Commissioner of Correction*, 211 Conn. App. 27, 36 n.7, 271 A.3d 681 ("[i]n light of our determination that the petitioner failed to establish that [counsel's] performance was deficient, we need not address the prejudice prong"), cert. denied, 343 Conn. 922, 275 A.3d 211 (2022); *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 818 n.7, 194 A.3d 316 ("[w]hen a petitioner has failed to meet the performance prong of *Strickland*, we need not reach the issue of prejudice" (internal quotation marks omitted)), cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

The judgment is affirmed.

In this opinion the other judges concurred.