CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXV No. 37 March 12, 2024 102 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

JOSEPH DIBENEDETTO, *Publications Deputy Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

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The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

CONNECTICUT REPORTS

Vol. 348

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

DAVID O'SULLIVAN *v.* ALAN F. HAUGHT
(SC 20722)

Robinson, C. J., and McDonald, D'Auria, Mullins and Ecker, Js.

Syllabus

The plaintiff, the decedent's only child, sought to recover damages from the defendant, the decedent's second husband, for, inter alia, tortious interference with the plaintiff's expected inheritance from the decedent's estate. The decedent had executed a will that left her entire estate to the defendant and expressly disinherited the plaintiff. After the decedent's death, the defendant applied to have that will admitted to probate in the Probate Court. The plaintiff contested the will on various grounds, including undue influence, but the Probate Court rejected those claims and admitted the will to probate. The plaintiff appealed from the Probate Court's decree to the Superior Court, where the appeal was to take the form of a trial de novo pursuant to statute (§ 45a-186). While the probate appeal was pending, the plaintiff filed the present action, which the trial

court consolidated with the probate appeal. Thereafter, the defendant moved for summary judgment in the tort action, claiming, inter alia, that the plaintiff's claims were barred by the doctrines of res judicata and collateral estoppel. The trial court, however, denied the motion for summary judgment as to the count alleging tortious interference with the plaintiff's expected inheritance, concluding that the doctrine of collateral estoppel was inapplicable because the plaintiff did not have an adequate opportunity to fully litigate that claim in the Probate Court. The defendant appealed to the Appellate Court from the trial court's partial denial of his motion for summary judgment. The Appellate Court dismissed the appeal for lack of subject matter jurisdiction, concluding that there was no appealable final judgment. On the granting of certification, the plaintiff appealed to this court.

Held that the Appellate Court improperly dismissed the defendant's appeal from the trial court's partial denial of the defendant's motion for summary judgment, and, because the trial court properly rejected the defendant's collateral estoppel claim, albeit on different grounds, this court reversed the Appellate Court's judgment and remanded the case to that court with direction to affirm the trial court's denial of the defendant's motion for summary judgment as to the tortious interference with an expected inheritance claim and to direct the trial court to conduct further proceedings:

It is well established, and the plaintiff conceded, that a trial court's denial of a motion for summary judgment may constitute an immediately appealable final judgment when it is based on the ground of collateral estoppel or res judicata, and, because the defendant in the present case established a colorable claim that the plaintiff's tortious interference with an expected inheritance claim was barred by the doctrine of collateral estoppel, the Appellate Court improperly dismissed the appeal for lack of jurisdiction.

Specifically, there was an identity of the issues between the proceedings in the Probate Court and the trial court, insofar as both the plaintiff's complaint in the tort action and her challenge to the will in the Probate Court relied on the defendant's allegedly undue influence over the decedent when the decedent created her will, the plaintiff's presentation of the undue influence issue to the Probate Court involved a contested evidentiary hearing and posttrial briefs, and the undue influence issue was actually decided by the Probate Court and necessary to the Probate Court's decree, insofar as that court was required to make a finding as to whether the defendant had exerted undue influence over the decedent in order to determine the will's validity.

Although this court, having found that the Appellate Court improperly dismissed the defendant's appeal for lack of jurisdiction, ordinarily would reverse the Appellate Court's judgment and remand the case to that

court for consideration of the merits of the appeal, in the present case, it was preferable for this court to consider the merits of the collateral estoppel issue in the first instance pursuant to its supervisory authority over the administration of justice because the record was adequate for review, the issue presented a pure question of law, and the parties briefed the issue and had the opportunity to address it during oral argument.

Addressing the merits of the appeal, this court determined that the present case was governed by its recent decision in *Barash* v. *Lembo* (348 Conn. 264), in which it held that an appeal, such as a probate appeal, that is conducted as a trial de novo suspends the preclusive effect of the underlying judgment or decree for purposes of the preclusion doctrines, and concluded that, because the defendant's probate appeal was pending in the Superior Court and was to be tried de novo, the probate decree did not have a preclusive effect as to the plaintiff's tortious interference with an expected inheritance claim.

This court explained that the Probate Court's decision regarding the plaintiff's undue influence claim had no force in the probate appeal because the trial court, sitting as a Probate Court and conducting a trial de novo, would admit or preclude evidence, make factual findings, and arrive at its own conclusion with respect to the undue influence claim without regard to the Probate Court's findings or rulings, and, therefore, the Probate Court decree did not contain the necessary attributes of finality to warrant application of the doctrine of collateral estoppel.

Moreover, although the trial court properly rejected the defendant's collateral estoppel claim and correctly concluded that the probate decree had no preclusive effect, this court emphasized that the trial court's ultimate conclusion that the doctrine of collateral estoppel did not apply because the Probate Court did not have jurisdiction over the tortious interference with an expected inheritance claim was incorrect, and, instead, the probate decree had no preclusive effect because the issue of undue influence could not be determined with finality until the completion of the probate appeal in the form of a trial de novo.

(*Two justices dissenting in one opinion*)

Argued September 13, 2023—officially released March 12, 2024

Procedural History

Action to recover damages for, inter alia, tortious interference with an expected inheritance, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Sheridan*, *J.*, denied in part the defendant's motion for summary judgment, and the defendant appealed to the Appellate Court,

which granted the plaintiff's motion to dismiss the appeal, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

Kirk D. Tavtigian, with whom, on the brief, was *Peter J. Alter*, for the appellant (defendant).

Jesse A. Mangiardi, with whom was *John L. Bonee III*, for the appellee (plaintiff).

Opinion

ROBINSON, C. J. In this certified appeal, we consider the scope of an appellate court's jurisdiction over an interlocutory appeal from the denial of a motion for summary judgment on the ground of collateral estoppel that is based on the preclusive effect of a Probate Court decree. The defendant, Alan F. Haught, appeals, upon our grant of his petition for certification,[1] from the Appellate Court's dismissal of his appeal from the trial court's denial of his motion for summary judgment with respect to the claim of tortious interference with an expected inheritance brought in a tort action by the plaintiff, David O'Sullivan. Specifically, the defendant claims that the Appellate Court improperly granted the motion to dismiss his appeal because a trial court's denial of a summary judgment motion based on a colorable claim of collateral estoppel is an immediately appealable final judgment. We agree with the defendant and conclude that the Appellate Court improperly dismissed the defendant's appeal from the decision of the trial court.

Reaching the merits of the defendant's collateral estoppel claim pursuant to our supervisory powers over the

[1] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly dismiss, for lack of subject matter jurisdiction, the defendant's appeal from the trial court's denial of the defendant's motion for summary judgment based on collateral estoppel?" *O'Sullivan* v. *Haught*, 343 Conn. 930, 281 A.3d 1187 (2022).

administration of justice, and guided by our recent decision in *Barash* v. *Lembo*, 348 Conn. 264, 303 A.3d 577 (2023), we also conclude that, because there is an appeal pending in the trial court from the decree of the Glastonbury-Hebron Probate Court (Probate Court), which is in the form of a trial de novo, the probate decree does not have a preclusive effect on the issue of undue influence in the plaintiff's tortious interference with an expected inheritance claim. Accordingly, we remand the case to the Appellate Court with direction to affirm the trial court's denial of summary judgment as to count three of the complaint on the ground of collateral estoppel.

The record reveals the following relevant facts and procedural history. The underlying case involves a probate dispute over the will of Stephanie B. Haught (decedent), between the plaintiff, the decedent's only child, and the defendant, the decedent's second husband. In 2013, the decedent revoked a preexisting will that had left her entire estate to the plaintiff and executed a new will (2013 will). The 2013 will named the defendant as the decedent's sole beneficiary and expressly disinherited the plaintiff. Following the decedent's death in 2017, the defendant applied to have the 2013 will admitted to probate in the Probate Court. The plaintiff contested the 2013 will, claiming, among other things, that the defendant had exercised undue influence over the decedent in the creation of the 2013 will by isolating her from her family and friends and by tricking her into naming the defendant as her sole beneficiary. The Probate Court, following a contested evidentiary hearing and posttrial briefs, found "no evidence to support a finding that the decedent was not exercising her own free will in altering her estate plan" and admitted the 2013 will to probate. The plaintiff appealed from the decree of the Probate Court to the trial court. That appeal remains pending before the trial court and will

be heard as a trial de novo pursuant to General Statutes § 45a-186.

While the probate appeal was pending, the plaintiff also filed a separate tort action in the trial court that asserted three claims: (1) the inter vivos transfer of the decedent's assets to the defendant was invalid because of the defendant's undue influence, (2) the inter vivos transfer of the decedent's assets to the defendant was invalid because of the defendant's breach of his fiduciary duty, and (3) the defendant had tortiously interfered with the plaintiff's expected inheritance. The trial court subsequently consolidated the probate appeal with the tort action.

The defendant filed a motion for summary judgment in the tort action, claiming, among other things, that the plaintiff's claims were barred by the doctrines of res judicata and collateral estoppel. The trial court granted the defendant's motion for summary judgment as to counts one and two on the ground of res judicata but denied the motion as to count three, alleging tortious interference with the plaintiff's expected inheritance. With respect to the third count, the trial court concluded that the doctrines of res judicata and collateral estoppel were inapplicable because the plaintiff did not have an adequate opportunity to fully litigate the interference with an expected inheritance claim in the Probate Court.

The defendant appealed from the trial court's partial denial of his motion for summary judgment to the Appellate Court, claiming that the trial court improperly had denied his motion for summary judgment as to count three, alleging tortious interference with an expected inheritance. In a summary order, the Appellate Court subsequently granted the plaintiff's motion to dismiss the defendant's appeal for lack of subject matter jurisdiction on the ground that there was no appealable

final judgment. The defendant then filed a motion for reconsideration en banc, which the Appellate Court denied, also by summary order. This certified appeal followed. See footnote 1 of this opinion.

With respect to the certified question, the defendant claims that the Appellate Court improperly dismissed his appeal because it is well established that a trial court's denial of a motion for summary judgment, when based on the ground of collateral estoppel, is an immediately appealable final judgment. See, e.g., *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 346 n.7, 63 A.3d 940 (2013) ("[w]hen the decision on a motion for summary judgment . . . is based on the doctrine of collateral estoppel, the denial of that motion does constitute a final judgment for purposes of appeal" (internal quotation marks omitted)); *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 194, 544 A.2d 604 (1988) ("we view the issue of collateral estoppel as ripe for immediate appellate review"); *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 647–48, 164 A.3d 731 (2017) ("Although, as a general matter, this court . . . has jurisdiction to hear appeals [only] from final judgments, there are particular circumstances in which we may hear an appeal from an otherwise interlocutory judgment. The trial court's denial of a motion for summary judgment raising a claim of res judicata or collateral estoppel presents such an instance."), aff'd, 332 Conn. 67, 208 A.3d 1223 (2019). In response, the plaintiff concedes that this court has concluded that the denial of a motion for summary judgment on the ground of collateral estoppel can be an appealable final judgment. Nevertheless, he argues that, because the defendant cannot prevail on the merits of his collateral estoppel claim, the Appellate Court's dismissal of the defendant's appeal was ultimately proper.

We begin our analysis by setting forth the legal principles that govern our review of the certified question. Because an appellate court's jurisdiction over appeals is prescribed by statute, specifically, General Statutes § 52-263,[2] "we must always determine the threshold question of whether the appeal is taken from a final judgment . . . ." *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983). "[W]e have recognized that limiting appeals to final judgments serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings." (Internal quotation marks omitted.) *Smith* v. *Supple*, 346 Conn. 928, 937, 293 A.3d 851 (2023). Although the "subject matter jurisdiction of our appellate courts is limited by statute to appeals from final judgments . . . the courts may deem interlocutory orders or rulings to have the attributes of a final judgment . . . ." (Internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 745, 150 A.3d 1109 (2016). In *Curcio*, we determined that there are two circumstances in which an otherwise interlocutory order is appealable under § 52-263, namely, "(1) [when] the order or action terminates a separate and distinct proceeding, or (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 31. Relevant here is the second prong of the *Curcio* test, which "boils down to whether, as a practical and policy matter, not allowing an immediate appeal will create irreparable harm insofar as allowing

[2] General Statutes § 52-263 provides: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge, or from the decision of the court granting a motion to set aside a verdict, except in small claims cases, which shall not be appealable, and appeals as provided in sections 8-8 and 8-9."

the litigation to proceed before the trial court will—in and of itself—function to deprive a party of that right." *Halladay* v. *Commissioner of Correction*, 340 Conn. 52, 62–63, 262 A.3d 823 (2021). "The second prong of the *Curcio* test focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal. . . . Thus, a bald assertion that the defendant will be irreparably harmed if appellate review is delayed until final adjudication . . . is insufficient to make an otherwise interlocutory order a final judgment. One must make at least a colorable claim that some recognized statutory or constitutional right is at risk." (Internal quotation marks omitted.) *Smith* v. *Supple*, supra, 940.

"It is well established that [a] colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Emphasis in original; internal quotation marks omitted.) Id., 961; see, e.g., *State* v. *Curcio*, supra, 191 Conn. 36 ("[u]ndoubtedly, [when] defendants make a colorable claim that a trial court proceeding subjects them to double jeopardy, they are entitled to have this challenge heard on appeal before trial"). "[O]ur examination of whether a colorable claim exists focuses on the plausibility of the appellant's challenge . . . when the pleadings and motion are viewed in light of the relevant legal principles." *In re Santiago G.*, 325 Conn. 221, 233, 157 A.3d 60 (2017).

In considering whether the defendant can demonstrate the existence of a colorable claim that the plaintiff's claim of tortious interference with an expected inheritance is barred by collateral estoppel as a result

of the probate decree, we must consider the scope of the doctrine of collateral estoppel. "The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action. . . . Before collateral estoppel applies [however] there must be an *identity of issues* between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be *identical* to those considered in the prior proceeding. . . . Further, an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." (Citations omitted; emphasis in original; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 739–40, 183 A.3d 611 (2018).

We conclude that the defendant has established a colorable claim that the issue of undue influence in the plaintiff's tortious interference with an expected inheritance claim was fully and fairly litigated in the will contest proceeding before the Probate Court, and that there was an identity of the issues between the two proceedings. With respect to identity of the issues, both the complaint in the tort action and the challenge to the 2013 will in the Probate Court rely on the allegedly

undue influence of the defendant over the decedent in the creation of the 2013 will. The plaintiff presented his case regarding undue influence to the Probate Court, which included a contested evidentiary hearing and posttrial briefs. Further, the issue of undue influence was actually decided and necessary to the judgment of the Probate Court. In order to determine the validity of the 2013 will, the Probate Court was required to make a finding as to whether the defendant had exerted undue influence over the decedent in the course of her making the 2013 will. The Probate Court admitted the will to probate after finding that the plaintiff had failed to sustain his burden of proof as to, among other things, undue influence. We, therefore, conclude that the defendant has raised a colorable claim that the plaintiff's claim of tortious interference with an expected inheritance is barred by the doctrine of collateral estoppel. Because the defendant has raised a colorable claim, the Appellate Court incorrectly concluded that it lacked subject matter jurisdiction over the defendant's appeal from the trial court's denial of summary judgment as to count three of the plaintiff's complaint, alleging tortious interference with an expected inheritance.

Ordinarily, our conclusion that the Appellate Court improperly dismissed an appeal for lack of subject matter jurisdiction would result in a reversal of the Appellate Court's judgment and a remand to that court for consideration of the merits of the appeal. See, e.g., *Pryor* v. *Brignole*, 346 Conn. 534, 546, 292 A.3d 701 (2023). Although the certified question in this appeal contemplates only the subject matter jurisdiction of the Appellate Court, we may, in the interest of judicial economy, invoke our supervisory powers, pursuant to Practice Book § 60-2, to address issues outside the scope of the certified question, rather than remand the case to the Appellate Court for consideration of those issues in the first instance. See, e.g., *Meadowbrook Center, Inc.* v.

Buchman, 328 Conn. 586, 605 n.9, 181 A.3d 550 (2018) (addressing claim beyond scope of certified question in interest of judicial economy); *State* v. *James*, 261 Conn. 395, 410–12, 802 A.2d 820 (2002) (same). The exercise of our supervisory power is appropriate when the record is adequate to allow review of the merits, the parties have briefed the issues, and there is an opportunity to address the issue at oral argument. See, e.g., *Finan* v. *Finan*, 287 Conn. 491, 498, 949 A.2d 468 (2008). "Invocation of our supervisory powers [when] appropriate . . . carries the benefit of avoid[ing] the necessity of inordinate further delay . . . ." (Internal quotation marks omitted.) *State* v. *James*, supra, 411.

This case is a paradigmatic example of one in which it is preferable for us to consider the merits of the appeal in the first instance pursuant to our supervisory powers, rather than to remand the case to the Appellate Court. In the present case, the record is adequate for our review of the trial court's denial of the defendant's motion for summary judgment on the ground of collateral estoppel, which presents a pure question of law. Both parties dedicated significant portions of their respective briefs to this court to the merits of the collateral estoppel issue and had the opportunity during oral argument to address the merits. Accordingly, we conclude that, in the interest of judicial economy, the exercise of our supervisory power is appropriate in this case. We now turn to the merits of the collateral estoppel issue.

The defendant argues that the tortious interference with an expected inheritance claim is founded on the same undue influence issue that was fully litigated in the Probate Court. Relying on *Satti* v. *Rago*, 186 Conn. 360, 364–65, 441 A.2d 615 (1982), he contends that, because the probate decree, which contains no finding of undue influence, has not been reversed or modified, it remains in full force, and the doctrine of collateral

estoppel must apply. The plaintiff argues in response that, pursuant to the Appellate Court's decision in *In re Probate Appeal of Cadle Co.*, 152 Conn. App. 427, 440, 100 A.3d 30 (2014), although the probate decree remains in full force until it is modified or reversed by the trial court, the decree cannot have preclusive effect because the probate appeal is tried de novo, and all matters of fact and law are subject to de novo review. If the court applies collateral estoppel despite the de novo appeal, the plaintiff claims, the entire purpose of de novo review would be eliminated. Guided by our recent decision in *Barash* v. *Lembo*, supra, 348 Conn. 264, we agree with the plaintiff and conclude that the probate decree does not have preclusive effect with respect to the plaintiff's tortious interference with an expected inheritance claim.

Generally, a Probate Court decree is a final judgment for purposes of collateral estoppel. See, e.g., *Solon* v. *Slater*, 345 Conn. 794, 809, 287 A.3d 574 (2023); *Heussner* v. *Day, Berry & Howard, LLP*, 94 Conn. App. 569, 576, 893 A.2d 486, cert. denied, 278 Conn. 912, 899 A.2d 38 (2006). This court consistently has held that a pending appeal does not deprive a Probate Court order, judgment, or decree of finality for purposes of collateral estoppel. See *Barash* v. *Lembo*, supra, 348 Conn. 278. Indeed, the mere act of appealing from a Probate Court decree to the Superior Court "does not in and of itself vacate or suspend the decree." *Kerin* v. *Stangle*, 209 Conn. 260, 265, 550 A.2d 1069 (1988). The Probate Court decree remains in full force until it is modified or set aside on appeal. Id.

"An appeal from a Probate Court to the Superior Court [however] is not an ordinary civil action. . . . When 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 pow-

ers, not of a constitutional court of general or [common-law] jurisdiction, but of a Probate Court." (Internal quotation marks omitted.) *Salce* v. *Cardello*, 348 Conn. 90, 103, 301 A.3d 1031 (2023). "Although the Superior Court may not consider events transpiring after the Probate Court hearing; *Satti* v. *Rago*, [supra, 186 Conn. 369]; it may receive evidence that could have been offered in the Probate Court, whether or not it actually was offered." *Gardner* v. *Balboni*, 218 Conn. 220, 225, 588 A.2d 634 (1991). Under § 45a-186, "if a record, including a transcript, of the testimony was made before the Probate Court pursuant to [General Statutes] §§ 51-72[3] and 51-73,[4] the Superior Court shall review the decree of the Probate Court using an abuse of discretion standard." (Footnotes added.) *Andrews* v. *Gorby*, 237 Conn. 12, 16, 675 A.2d 449 (1996); see also *In re Probate Appeal of Harris*, 214 Conn. App. 596, 600–601, 282 A.3d 467 (discussing more limited standard of review for appeals taken from matter heard on record in Probate Court), cert. denied, 345 Conn. 918, 284 A.3d 299 (2022). When "no record was made of the probate proceedings," however, "the Superior Court [is] required to undertake a de novo review of the Probate Court's decision." (Internal quotation marks omitted.) *Salce* v. *Cardello*, supra, 104. In conducting a trial de novo in an appeal from a Probate Court decree, the Superior Court must arrive at "an independent determination, without regard to the result reached by the [P]robate [C]ourt." *Prince* v. *Sheffield*,

[3] General Statutes § 51-72 provides in relevant part: "Whenever, in any court of probate, the parties or their attorneys so agree in writing, the judge of the court may call in a competent and disinterested person who is capable to act as a stenographer to act as the official stenographer in the whole or in such portion of the cause or matter as may be agreed upon. . . ."

[4] General Statutes § 51-73 provides in relevant part: "Evidence taken by any such stenographer shall have the same effect and be evidence to the same extent as evidence taken by the official court reporter of the Superior Court. Appeals from any decision rendered in any case after a record is made under this section and section 51-72, shall be on such record and shall not be a trial de novo."

158 Conn. 286, 299, 259 A.2d 621 (1969). That is, the trial court decides a de novo probate appeal "as an original proposition unfettered by, and ignoring, the result reached in the [P]robate [C]ourt." Id., 298.

Our recent decision in *Barash* v. *Lembo*, supra, 348 Conn. 264, governs our conclusion with respect to the preclusive effect of a Probate Court decree that is the subject of a pending de novo probate appeal. In *Barash*, we considered, for the first time, whether the requirement of a trial de novo in a pending appeal from an order, judgment, or decree of the Probate Court renders inapplicable the doctrines of res judicata and collateral estoppel as to probate decrees. Id., 279. That case concerned the proper administration of the residue of a decedent's estate, which had been bequeathed to a trust. Id., 269–70. The plaintiffs, who included the beneficiaries of the trust, alleged that the defendant had breached her fiduciary duty as trustee by failing to, among other things, investigate the alleged misconduct of the executor of the estate. Id. A prior Probate Court decree, however, rejected the plaintiffs' claims that the executor had breached his fiduciary duty to the estate. Id., 276. The plaintiffs appealed from the decree of the Probate Court, which was scheduled for a trial de novo. Id., 277. We considered whether, although the appeal from the decree denying the petition to remove the executor was pending, the Probate Court's rejection of the allegations against the executor precluded the plaintiff from relitigating the same misconduct issues in a separate action. Id.

In *Barash*, we adopted the rule applied by the federal courts, namely, "that an appeal that is conducted as a trial de novo suspends the preclusive effect of the underlying judgment." Id., 279; see id., 284; see also *In re Parmalat Securities Litigation*, 493 F. Supp. 2d 723, 737 (S.D.N.Y. 2007) ("[T]he pendency of an appeal ordinarily does not suspend the preclusive effect of an oth-

erwise final judgment. But there is an exception for situations in which the appeal actually involves a trial de novo." (Footnote omitted.)), aff'd sub nom. *Bondi* v. *Capital & Finance Asset Management S.A.*, 535 F.3d 87 (2d Cir. 2008). Our reasons for adopting this approach are set forth in *Barash*. "[W]hen an appeal requires a trial de novo pursuant to . . . § 45a-186, the appellant is entitled to relitigate the issues that were addressed by the Probate Court without regard to the factual findings or legal conclusions there obtained. . . . Although the Superior Court may not consider events transpiring after the Probate Court hearing . . . it may receive evidence that could have been offered in the Probate Court, whether or not it actually was offered. . . . [T]he Superior Court possesses the same discretionary power as that exercised by the Probate Court, which the Superior Court must exercise in arriving at an independent determination, without regard to the result reached by the [P]robate [C]ourt." (Citations omitted; internal quotation marks omitted.) *Barash* v. *Lembo*, supra, 348 Conn. 281–82. Accordingly, we concluded that, because a Probate Court decree carries no force on appeal, such a decree "should not be accorded outcome determinative, preclusive effect in different litigation while that appeal is pending." Id., 284.

Pursuant to the rule that we adopted in *Barash*, we conclude that the pending appeal from the Probate Court to the trial court in the present case, which will be tried de novo, strips the Probate Court decree of any preclusive effect that it may otherwise have had on the subsequent action for tortious interference with an expected inheritance. Hypothetically, during the de novo appeal, the plaintiff could present new evidence of the defendant's allegedly undue influence, if it existed at the time of the original probate hearing, even if that particular evidence was not presented at the original hearing. See *Gardner* v. *Balboni*, supra, 218 Conn. 225.

If that new evidence leads the trial court to conclude that the defendant exercised undue influence over the decedent when she created the 2013 will, the trial court need not consider the Probate Court's finding before coming to that conclusion. The trial court could also conclude that the defendant had exercised undue influence with no new evidence from the plaintiff. Put differently, the decision of the Probate Court regarding the plaintiff's undue influence claim has no force in that probate appeal. Because the trial court, sitting as a probate court, will admit or preclude evidence, make factual findings, and arrive at its own conclusion with respect to the undue influence claim without according any force to the Probate Court's findings or rulings, "we cannot say that the Probate Court decree contains the necessary attributes of finality to warrant application of collateral estoppel." *Barash* v. *Lembo*, supra, 348 Conn. 282.

Finally, although we conclude that the trial court properly rejected the defendant's collateral estoppel claim, we emphasize that we reach our conclusion on the basis of different reasoning. The trial court's analysis with respect to its denial of the defendant's motion for summary judgment as to count three on the ground of collateral estoppel is inconsistent with our recent decision in *Solon* v. *Slater*, supra, 345 Conn. 794. In *Solon*, we considered the scope of the preclusive effect of an *unappealed* Probate Court decree. Id., 798. As in this case, the plaintiff in *Solon* contended that her tortious interference with an expected inheritance claims were not barred by the doctrine of collateral estoppel because the Probate Court lacked jurisdiction to adjudicate the tort claims. See id., 807–808. We concluded in *Solon* that it "is not uncommon that issue preclusion will be asserted in an action over which the court rendering the prior judgment would not have had subject matter jurisdiction" and that, "[i]n such circumstances, there

is no reason why preclusion should not apply if the procedures followed in the two courts are comparable in quality and extensiveness, and the first court was fully competent to render a determination of the issue on which preclusion is sought." (Internal quotation marks omitted.) Id., 824–25. Although the trial court is ultimately correct that the probate decree should have no preclusive effect, the trial court's conclusion that the doctrine of collateral estoppel did not apply because the Probate Court did not have jurisdiction over the tortious interference with an expected inheritance claim is incorrect. Instead, the probate decree has no preclusive effect because the issue of undue influence will not be determined with finality until the completion of the probate appeal, which takes the form of a trial de novo.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's denial of the defendant's motion for summary judgment as to count three of the plaintiff's complaint and to remand the case to the trial court for further proceedings.

In this opinion McDONALD and ECKER, Js., concurred.

D'AURIA, J., with whom MULLINS, J., joins, dissenting. The judgments of the Appellate Court and the majority of this court take different routes, but both arrive at the virtually identical destination: the tortious interference claim brought by the plaintiff, David O'Sullivan, in the third count of his complaint is permitted to go forward. I agree with the outcome. It is a fair question to ask, then, why I would bother to dissent from the majority's holding. My reasons are twofold, and both, I believe, are important to the proper functioning of our appellate system beyond this case. The first

involves the determination (almost always made in the Appellate Court in the first instance) of whether otherwise interlocutory appeals qualify as "final judgments," specifically, whether a prompt decision can be made that there is or is not a final judgment and, therefore, whether the appeal must be dismissed for lack of appellate jurisdiction or whether the appeal will advance to merits briefing, oral argument, and a considered opinion. In my view, the Appellate Court properly dismissed the appeal by the defendant, Alan F. Haught, for failing to raise a colorable claim of a final judgment for the same reason the majority rejects the defendant's collateral estoppel claim on the merits: the Probate Court decree was not final and binding. I am also concerned with the majority's invocation of this court's supervisory authority over the administration of justice to address the defendant's appeal on its merits because the plaintiff failed to properly present the issue for our determination, and neither party was given an opportunity to specifically brief that issue.

To recap, the trial court denied the defendant's motion for summary judgment on the third count of the plaintiff's complaint, concluding that the doctrines of res judicata and collateral estoppel did not apply because the plaintiff did not have an adequate opportunity to fully litigate his interference with an expected inheritance claim in the prior Probate Court proceeding. The defendant appealed from that ruling. The plaintiff moved to dismiss the defendant's appeal for lack of a final judgment, and the Appellate Court, without opinion,[1] granted the motion and dismissed the appeal.

[1] The Appellate Court's order simply provided: "Granted." It is worth noting that the plaintiff based his motion to dismiss on a different ground (identity of issues) than both I and the majority address here (final and binding judgment). It is to me very doubtful that the Appellate Court dismissed the appeal on the identity of issues ground because, as the majority correctly concludes, it is clear that there was an identity of issues between the two proceedings. Rather, as I will discuss, my confidence is high that the Appellate Court dismissed the appeal for lack of a final judgment based

Upon our grant of certification, a majority of this court today reverses the Appellate Court's judgment of dismissal because "a trial court's denial of a summary judgment motion based on a colorable claim of collateral estoppel is an immediately appealable final judgment."[2] Applying this standard, the majority holds that the defendant's appeal raises a "colorable claim" that "the issue of undue influence in the plaintiff's tortious interference with an expected inheritance claim was fully and fairly litigated in the will contest proceeding before the Probate Court, and that there was an identity of the issues between the two proceedings," and, therefore, there was a final judgment for purposes of appeal.[3] See, e.g., *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 194–95, 544 A.2d 604 (1988); see also *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 346 n.7, 63 A.3d 940 (2013).

on a correct application of our law that the Probate Court decree lacked sufficient finality to make it preclusive for purposes of collateral estoppel. Understanding fully that the Appellate Court, as the " 'workhorse' " of our appellate system; *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 701, 240 A.3d 249 (2020) (*D'Auria, J.*, concurring in part and dissenting in part); disposes of hundreds upon hundreds of motions each year, while this court rules on only a fraction of that number, providing a brief explanation of the Appellate Court's rationale—even a sentence or two, or even simply a case citation—can go a long way toward dispelling any uncertainty about the basis for the Appellate Court's action, perhaps obviating the need for any appeal to or review by this court.

[2] Although we require a ground of appeal to be "colorable" for appellate jurisdiction to attach in other types of interlocutory appeals; see, e.g., *Smith* v. *Supple*, 346 Conn. 928, 929–30, 293 A.3d 851 (2023) (special motion to dismiss pursuant General Statutes § 52-196a); *Markatos* v. *Zoning Board of Appeals*, 346 Conn. 277, 283 and n.6, 288 A.3d 1024 (2023) (denial of motion to intervene); *Dorfman* v. *Smith*, 342 Conn. 582, 594, 271 A.3d 53 (2022) (immunity); *State* v. *Bornstein*, 196 Conn. App. 420, 426, 229 A.3d 1097 (2020) (double jeopardy); I am not aware of any cases applying this standard in the collateral estoppel context, but I accept the majority's determination to apply it in the present case.

[3] Although it is indeed well established law in this court, it is not well established in the federal courts that a ruling denying the application of res judicata or collateral estoppel is immediately appealable. See *Strazza Building & Construction, Inc.* v. *Harris*, 346 Conn. 205, 211 n.2, 288 A.3d 1017 (2023).

Instead of simply reversing the Appellate Court's judgment of dismissal and directing that, on remand, the appeal proceed to briefing and argument on the merits in that court, the majority invokes this court's supervisory authority and, in the name of "judicial economy," cuts to the chase, reaches the merits and disposes of the defendant's collateral estoppel defense. Specifically, the majority holds that, although the defendant's appeal raised a "colorable" claim that the Appellate Court had jurisdiction over his appeal, because, generally, we have held that rulings denying the application of res judicata or collateral estoppel are immediately appealable, the appeal ultimately lacks merit because, like the federal courts, we have held "that an appeal that is conducted as a trial de novo suspends the preclusive effect of the underlying judgment," and, therefore, a Probate Court decree "should not be accorded outcome determinative, preclusive effect in different litigation while that appeal is pending." *Barash* v. *Lembo*, 348 Conn. 264, 279, 284, 303 A.3d 577 (2023).

I appreciate the salutary efforts of the majority, having decided that the Appellate Court indeed had jurisdiction over the appeal, to resolve this appeal with a modicum of dispatch because, while the defendant has pursued this appeal, the plaintiff's case on the merits of his third count awaits trial. Nonetheless, my disagreement with the way the majority has resolved this certified appeal is twofold.

First, I would credit the Appellate Court with knowing full well that, in general, a trial court's denial of a summary judgment motion based on a colorable claim of collateral estoppel is an immediately appealable final judgment. See footnote 2 of this opinion; see also *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011); *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, supra, 208 Conn. 194. I assume that the Appellate

Court was drawing a different conclusion about the defendant's appeal, something other than the proposition from *Convalescent Center of Bloomfield, Inc.* Specifically, I would also credit the Appellate Court with knowing full well that black letter law requires that the preclusive effect of the doctrine of collateral estoppel applies only to final, valid judgments. See, e.g., *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 714–15, 200 A.3d 1118 (2019). Although the majority in the present case relies heavily on our recent decision in *Barash* for its conclusion, the principle we applied in that case (that, because the Probate Court ruling was subject to a de novo appeal, there was no finality of judgment) is not a concept so new or extraordinary that the Appellate Court could not have easily relied on it for its determination to dismiss the appeal. Therefore, for the same reasons that the majority holds that the defendant's appeal in this case fails on the merits, I would conclude that the defendant's appeal fails to raise a colorable claim of a final judgment. I am rather confident that is the reason the Appellate Court dismissed the defendant's appeal. If I am mistaken about that having been the court's basis for dismissing the appeal, I would nonetheless affirm the judgment of dismissal. See *Alves* v. *Giegler*, 348 Conn. 364, 394, 306 A.3d 455 (2024); *Connecticut Dermatology Group, P.C.* v. *Twin City Fire Ins. Co.*, 346 Conn. 33, 40–41, 288 A.3d 187 (2023).

Second, even if I agreed that the Appellate Court erroneously dismissed the defendant's appeal, I would resist the temptation to invoke our supervisory authority to resolve the merits of that appeal, as the majority does in the present case, even though the rationale for doing so appears obvious to us. " 'The exercise of our supervisory powers is an extraordinary remedy' "; *In re Ivory W.*, 342 Conn. 692, 734, 271 A.3d 633 (2022); that we invoke "only in the rare circumstance [in which]

. . . traditional protections are inadequate to ensure the fair and just administration of the courts." (Internal quotation marks omitted.) *In re Aisjaha N.*, 343 Conn. 709, 724, 275 A.3d 1181 (2022). Several reasons convince me that this is not a case in which I would use our sparingly employed supervisory authority to reach an issue not otherwise before the court.

Primarily, upon our grant of certification, the plaintiff could have put the merits issue before us properly by filing a statement of alternative grounds for affirmance under Practice Book § 84-11 (b) and then have briefed the merits (i.e., the nonjurisdictional question). Moreover, because the plaintiff did not present the question as he should have, I am not as confident as the majority, which cites *Finan* v. *Finan*, 287 Conn. 491, 949 A.2d 468 (2008), and indicates that the defendant will not be prejudiced by the majority's resolution of the appeal "[b]ecause both parties have briefed the issue and it was addressed at oral argument before this court . . . ." (Internal quotation marks omitted.) Id., 498. In fact, the defendant's counsel mentioned several times at oral argument that, if we were inclined to reverse the Appellate Court's judgment of dismissal and reach the merits, he would be eager to submit a brief on the merits. Only under circumstances in which no party is prejudiced should we invoke our supervisory authority in such a way. See id. (court can exercise discretion to consider question outside scope of certified question only if both sides have had opportunity to brief issue); see also *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162, 84 A.3d 840 (2014); *State* v. *Benjamin*, 299 Conn. 223, 232, 9 A.3d 338 (2010). Finally, even if I were not concerned about whether it is appropriate to exercise our supervisory authority to reach the merits in the present case, I am concerned about arguably similar cases in which we do not exercise our supervisory

authority to reach alternative issues that we have not certified or that a party has not briefed. See, e.g., *Smith* v. *Supple*, 346 Conn. 928, 930, 293 A.3d 851 (2023) ("[b]ecause the defendants' appeal presents such a colorable claim, we transfer the appeal back to the Appellate Court for further proceedings according to law"); *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 60–61, 225 A.3d 953 (2020) (remanding case to Appellate Court so that it may decide, following briefing by parties, how best to proceed). Although it is not apparent whether we have an established standard for when we should be reaching and resolving issues instead of remanding the case to the Appellate Court for resolution, it is obvious to me that the Appellate Court is the best venue for the resolution of the merits of this appeal.

Accordingly, I respectfully dissent and would affirm the Appellate Court's judgment.

ORDERS

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LEON MERCER *v.* COMMISSIONER
OF CORRECTION

The petitioner Leon Mercer's petition for certification to appeal from the Appellate Court, 222 Conn. App. 713 (AC 45273), is denied.

Erica A. Barber, assistant public defender, in support of the petition.

Linda F. Rubertone, senior assistant state's attorney, in opposition.

Decided February 27, 2024

BEULAH GARDNER *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 223 Conn. App. 221 (AC 45594), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that an administrative law judge does not have the authority to award continued temporary incapacity benefits under General Statutes § 31-308 (a) after the claimant reaches maximum medical improvement and thereby becomes eligible to receive permanent partial disability benefits under § 31-308 (b)?"

Justin A. Raymond, in support of the petition.

Katherine A. Roseman, assistant attorney general, in opposition.

Decided February 27, 2024

SG PEQUOT 200, LLC *v.* TOWN OF FAIRFIELD

The defendant's petition for certification to appeal from the Appellate Court, 223 Conn. App. 333 (AC 45863), is denied.

Owen T. Weaver and *Barbara M. Schellenberg*, in support of the petition.

Decided February 27, 2024

J. G. *v.* JEREMIAH CURTIS-SHANLEY

The defendant's petition for certification to appeal from the Appellate Court, 223 Conn. App. 149 (AC 46371), is denied.

Jeremiah Curtis-Shanley, self-represented, in support of the petition.

Decided February 27, 2024

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* CHARLES H. FISHER ET AL.

The defendants' petition for certification to appeal from the Appellate Court (AC 47005) is denied.

Charles H. Fisher, self-represented, and *Maria D. Fisher*, self-represented, in support of the petition.

Kent J. Mancini, in opposition.

Decided February 27, 2024

PEOPLE'S UNITED BANK *v.* 1730 STATE STREET LIMITED PARTNERSHIP ET AL.

The petition of the named defendant, Gabriele Fischer and Alan M. Fischer, for certification to appeal from the Appellate Court (AC 47036) is denied.

Laurence V. Parnoff, Jr., in support of the petition.

James R. Byrne, in opposition.

Decided February 27, 2024

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CONNECTICUT APPELLATE REPORTS

Vol. 224

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

HINE BUILDERS, LLC *v.* ALEX GLASSCOCK ET AL.
(AC 46298)

Moll, Cradle and Bear, Js.

Syllabus

The plaintiff filed an application to compel arbitration pursuant to an agreement entered into by the parties. Following a remote status conference, the trial court issued an order directing the parties to commence arbitration within thirty days, and the defendants appealed to this court. The trial court granted the plaintiff's motion to terminate the automatic appellate stay pursuant to the rules of practice (§ 61-11), and the defendants did not file a motion for review of that decision. During oral argument before this court, the parties represented that arbitration proceedings were ongoing, including, inter alia, that a demand for arbitration had been filed and acknowledged and that an answer, counterclaim and special defenses had been filed, but shared the position that the appeal was not moot. *Held* that the appeal was dismissed as it had been rendered moot and, therefore, this court lacked subject matter jurisdiction to entertain the defendants' claims; when the arbitration proceedings commenced following the termination of the appellate stay, there was no practical relief that this court could afford the defendants because the trial court's judgment from which they appealed, ordering the parties to commence arbitration proceedings, had been executed and could not now be undone.

Argued November 7, 2023—officially released March 12, 2024

Procedural History

Application to compel arbitration, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Taggart D. Adams*, judge trial referee, rendered judgment granting the plaintiff's application, from which the defendants appealed to this court; thereafter, the court, *Hon. Taggart D. Adams*, judge trial referee, granted the plaintiff's motion to terminate the automatic appellate stay. *Appeal dismissed.*

Arash Beral, pro hac vice, with whom was *Alina Levi*, for the appellants (defendants).

Scott T. Garosshen, with whom were *William S. Wilson II*, and, on the brief, *Linda L. Morkan* and *Ileana Polanco-Cavazos*, for the appellee (plaintiff).

Opinion

MOLL, J. The defendants, Alex Glasscock and Susan Glasscock, appeal from the judgment of the trial court granting the application to compel arbitration filed by the plaintiff, Hine Builders, LLC. On appeal, the defendants claim that the court (1) committed plain error in granting the application to compel arbitration (a) following a remote status conference that was not transcribed or recorded by a court reporter or court recording monitor and (b) without providing the parties with an opportunity to brief the issues in connection with the application, (2) failed to review an agreement executed by the parties, pursuant to which the plaintiff sought to compel arbitration, before granting the application, and (3) improperly granted the application when the prerequisites to arbitration, as set forth in the parties' agreement, had not been satisfied. We do not reach the merits of the defendants' claims because, during the pendency of this appeal and following the termination of the appellate stay, arbitration proceedings commenced as ordered by the trial court, and, accordingly, we dismiss this appeal as moot.

The following procedural history is relevant to our resolution of this appeal. In January, 2023, the plaintiff filed with the Superior Court an application for an order to compel arbitration pursuant to the parties' agreement.[1] See General Statutes § 52-410.[2] On February 7, 2023, the defendants filed an answer. On February 14, 2023, following a remote status conference, the trial court, *Hon. Taggart D. Adams*, judge trial referee, issued an order directing "the parties to commence arbitration within [thirty] days."[3] On March 2, 2023, the defendants filed this appeal.

On March 14, 2023, pursuant to Practice Book § 61-11 (d) and (e), the plaintiff filed a motion to terminate the automatic appellate stay of § 61-11 (a)[4] (motion to

[1] The parties do not dispute that (1) on January 18, 2022, they executed "a written agreement . . . for the plaintiff to provide certain demolition, renovation and site improvements at a residence owned by the defendants . . . in Norwalk," and (2) the agreement contains various provisions concerning arbitration.

[2] General Statutes § 52-410 provides in relevant part: "(a) A party to a written agreement for arbitration claiming the neglect or refusal of another to proceed with an arbitration thereunder may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order directing the parties to proceed with the arbitration in compliance with their agreement. The application shall be by writ of summons and complaint, served in the manner provided by law. . . .

"(c) The parties shall be considered as at issue on the allegations of the complaint unless the defendant files answer thereto within five days from the return day, and the court or judge shall hear the matter either at a short calendar session, or as a privileged case, or otherwise, in order to dispose of the case with the least possible delay, and shall either grant the order or deny the application, according to the rights of the parties."

[3] On March 21, 2023, in response to a Practice Book § 64-1 notice filed by the defendants, the court issued a memorandum of decision as to its February 14, 2023 judgment. The court stated in relevant part that "[t]he defendants . . . admit there was an agreement with the plaintiff . . . to arbitrate or mediate disputes between them. At the status conference this court ordered the parties to arbitrate their dispute, and this memorandum serves as the written record and order to that effect."

[4] "It is axiomatic that, with limited exceptions, an appellate stay of execution arises from the time a judgment is rendered until the time to file an

terminate stay). On March 21, 2023, the defendants filed an opposition to the motion to terminate stay. On August 16, 2023, following a hearing held on May 8, 2023,[5] the court granted the motion to terminate stay. The defendants did not file a motion for review of the August 16, 2023 decision. See Practice Book § 61-14.[6]

On November 1, 2023, prior to oral argument, we ordered, sua sponte, the parties' respective counsel to "be prepared to address at oral argument whether the trial court's August 16, 2023 granting of the plaintiff-appellee's motion to terminate appellate stay, and/or any subsequent activity occurring on the basis thereof, render moot the appeal." During oral argument before this court on November 7, 2023, the parties' respective counsel (1) represented that arbitration proceedings were ongoing and (2) shared the position that this appeal was not moot. Thereafter, on November 15, 2023, we ordered, sua sponte, the parties to file supplemental

appeal has expired. Practice Book § 61-11 (a). If an appeal is filed, any appellate stay of execution in place during the pendency of the appeal period continues until there is a final disposition of the appeal or the stay is terminated. Practice Book § 61-11 (a) and (e)." (Internal quotation marks omitted.) *Wachovia Mortgage, FSB* v. *Toczek*, 189 Conn. App. 812, 816 n.3, 209 A.3d 725, cert. denied, 333 Conn. 914, 216 A.3d 650 (2019).

[5] At the conclusion of the May 8, 2023 hearing, the court ordered the parties to file supplemental briefs further addressing the issues attendant to the motion to terminate stay. The parties filed their respective supplemental briefs on May 18, 2023.

[6] Practice Book § 61-14 provides in relevant part: "The sole remedy of any party desiring the court to review an order concerning a stay of execution shall be by motion for review under Section 66-6. Execution of an order of the court terminating a stay of execution shall be stayed for ten days from the issuance of notice of the order, and if a motion for review is filed within that period, the order shall be stayed pending decision of the motion, unless the court having appellate jurisdiction rules otherwise. Any stay of proceedings that was in effect during the pendency of the motion for review shall continue, unless the court having appellate jurisdiction rules otherwise, until the time for filing a motion for reconsideration under Section 71-5 has expired. If such a timely motion for reconsideration is filed, any stay that was in effect shall continue until its disposition and, if it is granted, until the matter is finally determined. . . ."

briefs further addressing whether this appeal has been rendered moot following the grant of the motion to terminate stay.[7] On November 30, 2023, the parties filed supplemental briefs in accordance with our order.

In their respective supplemental briefs, the parties maintain that this appeal has not been rendered moot following the commencement of the arbitration proceedings, which, per their representations, remain ongoing.[8] The defendants argue that this court "still has the ability to grant 'practical relief,' which would effectively suspend the arbitration and require the parties to exhaust their [alternative dispute resolution] remedies under the governing contract documents."[9]

[7] The supplemental briefing order provided: "The parties are hereby ordered, sua sponte, to file simultaneous supplemental briefs, of no more than 2000 words, on or before December 1, 2023, addressing whether the trial court's August 16, 2023 granting of the plaintiff-appellee's motion to terminate appellate stay, and/or any subsequent activity occurring on the basis thereof, render the appeal moot. In such supplemental briefs, the parties are also ordered, inter alia, to set forth the following information: 1. the date of the claimant's demand for arbitration; 2. the date of the letter or email from the American Arbitration Association (AAA) notifying the parties that the case had been filed; and 3. the date, if filed, of the respondent's answer to the claimant's demand for arbitration, or, if not filed, the date that such answer currently is due."

[8] Specifically, the parties represent that (1) on September 7, 2023, the plaintiff filed a demand for arbitration with the American Arbitration Association (AAA), (2) on September 13, 2023, AAA acknowledged the plaintiff's filing, and (3) on October 10, 2023, the defendants filed an answer accompanied by a counterclaim, as well as, according to the plaintiff, special defenses. The plaintiff further represents, inter alia, that, on October 30, 2023, AAA selected an arbitrator, to whom the defendants did not object, and "[t]he next step is the initial scheduling conference between the parties and the arbitrator. At that conference, the arbitrator also will consider [the] [d]efendants' argument that the matter cannot yet be arbitrated. On November 27, [the] [d]efendants asked AAA to delay that conference." The defendants further represent, inter alia, that "[i]n the arbitration, the arbitrator's appointment is still being considered and subject to potential objections, and no hearings have been scheduled. Essentially, nothing meaningful has transpired in the arbitration and the parties are still in the pleading stage."

[9] Notably, in their opposition to the motion to terminate stay, during the May 8, 2023 hearing on the motion, and in their supplemental brief filed with the trial court; see footnote 5 of this opinion; the defendants took the position that terminating the stay would render this appeal moot.

The plaintiff argues that the commencement of the arbitration proceedings did not render this appeal moot, reasoning that "implementing the [trial court's] February 14, 2023 order [compelling arbitration] while the appeal is pending preserves [the] [d]efendants' ability to obtain effective relief on appeal because they can raise nonarbitrability in a motion to vacate whatever arbitration award is made." (Internal quotation marks omitted.) The plaintiff further argues that this appeal would become moot if either (1) the arbitrator enters an award or (2) the defendants "subject themselves to a default award in the arbitration," as, in either scenario, the arbitration proceedings will have been completed. Notwithstanding the parties' current, mutual stance that this appeal is not moot, we conclude that this appeal is moot and that, therefore, we lack subject matter jurisdiction to entertain the defendants' claims.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may

decide the case." (Internal quotation marks omitted.) *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, 208 Conn. App. 789, 798–99, 266 A.3d 921 (2021).

We conclude that this appeal has been rendered moot by the commencement of the arbitration proceedings following the termination of the appellate stay. In granting the plaintiff's application to compel arbitration, the court ordered the parties *to commence* arbitration proceedings. After the court's grant of the motion to terminate stay, of which decision the defendants did not seek appellate review by filing a motion for review, the parties moved forward with arbitration proceedings. Simply put, there is no practical relief that we may afford the defendants because the court's judgment from which they have appealed—ordering the parties *to commence* arbitration proceedings—has been executed and cannot now be undone.[10]

The appeal is dismissed.

In this opinion the other judges concurred.

[10] None of the substantive case law cited in the parties' respective supplemental briefs filed with this court advances the position that this appeal is not moot. See *MSO, LLC* v. *DeSimone*, 313 Conn. 54, 59–60 n.6, 94 A.3d 1189 (2014) (appeal from this court's judgment affirming trial court's decision to stay action pending arbitration not rendered moot on account of arbitration judgment rendered in defendants' favor); *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 300–302, 898 A.2d 768 (2006) (appeal from this court's judgment reversing trial court's judgment vacating arbitration award that reinstated defendant, a surgeon, to roster of plaintiff's preferred provider network rendered moot following defendant's resignation from network); *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 192 Conn. App. 245, 250–51, 217 A.3d 996 (2019) (appeal from trial court's judgment dismissing plaintiff's application to vacate arbitration award and granting defendants' application to confirm arbitration award not rendered moot as result of plaintiff's failure to file opposition to defendants' application to confirm and to address application to confirm on appeal), aff'd, 338 Conn. 651, 258 A.3d 1244 (2021); *Saad* v. *Colonial Penn Ins. Co.*, 32 Conn. App. 190, 193, 628 A.2d 623 (1993) (appeal from trial court's judgment granting motion to compel arbitration and prohibiting discovery proceedings rendered moot in light of plaintiff's agreement to submit to examination under oath "and because nothing in the trial court's decision can be interpreted to affect the issue of coverage to be decided in the upcoming arbitration proceeding").

KRISTEN KUSELIAS *v.* ZINGARO & CRETELLA, LLC, ET AL.
(AC 45952)

Suarez, Clark and Seeley, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, an attorney and the law firm with which he was engaged in the practice of law, for their alleged legal malpractice in connection with their representation of her during certain postdissolution proceedings. The trial court had rendered a judgment of nonsuit in a prior action against these same defendants as a result of the plaintiff's failure to comply with certain discovery orders and thereafter denied the plaintiff's motion to open the judgment. The plaintiff commenced the present action pursuant to the accidental failure of suit statute (§ 52-592), alleging, inter alia, that the defendants had entered into a stipulation with the plaintiff's former husband and his attorney that had been reached without her participation and, as a result, she had incurred additional legal fees, loss of income and financial obligations. The defendants filed a motion for summary judgment, arguing that the plaintiff's prior action against the defendants alleged nearly identical claims, and that her claims of legal malpractice and negligent misrepresentation were time barred and could not be saved by § 52-592. The defendants argued that the prior action had resulted in a judgment of nonsuit against the plaintiff for disciplinary reasons following her noncompliance with the court's discovery orders and, therefore, that judgment had not been rendered as a result of a matter of form. The trial court rendered judgment granting the defendants' motion for summary judgment, observing that it was undisputed that, at the time of the hearing on the motion to open the judgment of nonsuit, the plaintiff had still not disclosed an expert witness, and that the plaintiff's attorney, V, had claimed at the hearing that an expert had not been disclosed because he did not want to ask the plaintiff to pay for an expert witness after a judgment of nonsuit had been rendered. The court concluded that the failure to disclose an expert was a deliberate decision to avoid costs and that this failure constituted intentional, dilatory conduct and was clearly egregious. The court also noted that, although the plaintiff had averred that she experienced psychological stress and related mental health symptoms when she attempted to comply with her discovery obligations because they caused her to recall unpleasant facts related to her relationship with her former husband, these concerns did not constitute excusable neglect, inadvertence, or mistake. The court subsequently denied the plaintiff's motion to reargue and reconsider, and this appeal followed. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly rendered summary judgment in favor of the defendants with respect to the legal malpractice and negligent misrepresentation counts of her complaint, which was based on her claim that those counts were not time barred by the applicable statute of limitations (§ 52-577) because they were properly brought pursuant to § 52-592: the trial court correctly determined that there was no genuine issue of material fact that the conduct that led to the judgment of nonsuit in the prior action was not a matter of form, it was undisputed that the plaintiff had failed to disclose an expert witness by the time of the hearing on the motion to open the judgment of nonsuit in the prior action, and the plaintiff's deliberate strategy of failing to retain an expert to avoid costs was contrary to her obligations pursuant to the applicable rule of practice (§ 13-4) and the discovery deadlines imposed by the court in the prior action, and, thus, insofar as the judgment of nonsuit was based on the plaintiff's failure to disclose an expert, the judgment resulted from a deliberate disregard for the court's authority; moreover, the court considered the fact that the judgment of nonsuit in the prior action was based on the plaintiff's failure to respond to interrogatories and requests for production, and it was clear that the plaintiff had engaged in a pattern of missing deadlines for compliance and, after the fact, having sought extensions of time in which to comply; furthermore, this court agreed with the trial court that the personal trauma experienced by the plaintiff when attempting to comply with the trial court's clear and unambiguous discovery orders, although difficult, did not amount to excusable neglect, and neither the record nor the plaintiff's affidavit suggested that V counseled the plaintiff with respect to the effect of her failure to comply with the court's orders.
2. The trial court did not abuse its discretion in denying the plaintiff's motion to reargue and reconsider its ruling on the defendant's motion for summary judgment: the plaintiff's motion did not demonstrate to the trial court that there was some decision or other principle of law that would have had a controlling effect and had been overlooked or that there had been a misapprehension of facts but, rather, was the quintessential example of a party seeking the proverbial second bite of the apple, as the record reflected that the plaintiff used the motion to present a different argument than that on which she had relied in opposing the motion for judgment of nonsuit in the prior action, when she sought to open the judgment of nonsuit, and in opposing the motion for summary judgment in the present action; moreover, the plaintiff submitted certain evidence in support of the motion to reargue and reconsider that contradicted the evidence on which she had relied previously, and the nature of that evidence, which pertained to events that predated the judgment of nonsuit, compelled the conclusion that it was not newly discovered, and, under our rules of practice (§ 17-45), the time to submit relevant evidence in connection with a motion in support

of or in opposition to a motion for summary judgment is before the motion is heard, not following an adverse ruling on the motion.

Argued November 9, 2023—officially released March 12, 2024

Procedural History

Action to recover damages for, inter alia, the defendants' alleged legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the court, *Abrams*, *J.*, denied the plaintiff's motion to reargue and reconsider, and the plaintiff appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellant (plaintiff).

Valerie M. Ferdon, with whom, on the brief, was *Kerry R. Callahan*, for the appellee (defendants).

Opinion

SUAREZ, J. The plaintiff, Kristen Kuselias, brought the civil action underlying this appeal, in which she raised claims of legal malpractice, breach of contract, and negligent misrepresentation against the defendants, the law firm of Zingaro & Cretella, LLC, and Attorney Eugene J. Zingaro. The plaintiff appeals from (1) the judgment of the trial court rendered in favor of the defendants after it granted their motion for summary judgment with respect to all three counts of her complaint and (2) the denial of her subsequent motion to reargue and reconsider. The plaintiff claims that the court erred by (1) granting the defendants' motion for summary judgment with respect to her claims of legal malpractice and negligent misrepresentation, despite her assertion that these claims could properly be brought pursuant to General Statutes § 52-592, the accidental failure of suit statute, and (2) denying her motion to reargue and reconsider its ruling on the motion for

summary judgment. We affirm the judgment of the trial court.

The following procedural history is relevant to the claims raised in the present appeal. In July, 2021, the plaintiff commenced the underlying action. In the plaintiff's complaint, she raised three claims related to the legal representation that she received from Zingaro and the law firm with which he was engaged in the practice of law, Zingaro & Cretella, LLC, in connection with postdissolution proceedings involving her former husband.

In count one of the plaintiff's complaint, sounding in legal malpractice, she alleged that, from approximately August 12 to December 7, 2015, the defendants represented the plaintiff in the postdissolution proceedings. The plaintiff retained the defendants "to perform discovery and schedule a hearing to have the financial orders [that were the product of the dissolution action] opened and redetermined based on the discovery of new and significantly different financial information [than] was produced at the time of the divorce." The defendants' appearance was in lieu of another attorney, Michael Perzin. Perzin had successfully litigated a motion to open the August 30, 2012 judgment of dissolution on the basis of alleged fraud committed by the plaintiff's former husband during the dissolution proceeding.[1] Specifically, following an *Oneglia* hearing,[2]

[1] The alleged fraudulent conduct was related to the efforts of the plaintiff's former husband to conceal various types of information related to matters including his assets, employment, and earning capacity.

[2] "In *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269–70, 540 A.2d 713 (1988), this court held that, in considering a motion to open on the basis of fraud, a court must first make a preliminary determination of whether there is probable cause to believe that the judgment was obtained by fraud. *Oneglia* and its progeny are grounded in the principle of the finality of judgments. . . . [T]he finality of judgments principle recognizes the interest of the public as well as that of the parties [that] there be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligations to act further by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment

the court determined that the plaintiff had substantiated the allegations of fraud beyond mere suspicion, thus permitting her to engage in discovery.

The plaintiff further alleged that, on or about October 22, 2015, Zingaro filed a second motion to open and vacate the August 30, 2012 judgment of dissolution and requested that the court schedule a hearing on the motion. The court scheduled a hearing for December 7, 2015. In her complaint, the plaintiff alleged that, at the hearing on the motion to open, Zingaro, having failed to conduct reasonable discovery to reveal the nature and extent of the fraud that had occurred in connection with the dissolution action,[3] conferred with the plaintiff's former husband and his attorney. The result of this meeting was a stipulation that the plaintiff alleges was reached without her participation and was detrimental to her as it left her unable to support herself. The plaintiff alleged that the defendants "agreed to terminate the plaintiff's then existing support and alimony

could be relied on. . . . *Oneglia* carefully balanced that interest in finality with the reality that in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity. . . . The court in *Oneglia* thus ratified the gatekeeping mechanism employed by the trial court, whereby a court presented with a motion to open by a party alleging fraud in a postjudgment dissolution proceeding conducts a preliminary hearing to determine whether the allegations are substantiated. . . . [I]f the plaintiff was able to substantiate her allegations of fraud beyond mere suspicion, then the court [properly] would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held. . . . This preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he [or she] will prevail, only that there is probable cause to sustain the validity of the claim." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Karen* v. *Loftus*, 210 Conn. App. 289, 297–98, 270 A.3d 126 (2022).

[3] Specifically, the plaintiff alleged that the defendants failed to verify her former husband's actual income, his bonuses, his employment records, the value of his legal claims against his former employer, his tax returns, copies of his mortgage applications, his past and current bank records, and records regarding his pensions, his saving plans, and his hidden assets.

four years earlier than had been agreed to in the initial August 30, 2012 judgment [of dissolution], failed to obtain adequate support, and failed to obtain an adequate division of marital assets for the plaintiff." Additionally, the plaintiff alleged that "the defendants failed to structure, discuss with the plaintiff, and negotiate protections for the plaintiff relating to the plaintiff's former husband's retirement accounts. The defendants waived any and all claims for unpaid support, sanctions, additional discovery, and attorney's fees. The defendants actually disclaimed the fraud upon which the judgment was opened." Moreover, the plaintiff alleged that "[t]he defendants also waived claims for attorney's fees and support based upon the former husband's earning capacity." The plaintiff alleged that the defendants effectively "waived all the benefits obtained by opening the judgment for fraud." The plaintiff further alleged that the stipulation, which was "approved" by the defendants and which they pressured her to accept, failed to meet the applicable standard of care in several enumerated ways, caused her "sustained economic and monetary loss due to a loss of property and alimony rights, future alimony, and a division of hidden assets." Furthermore, the plaintiff alleged that the defendants' conduct caused her to incur additional legal fees, loss of income, and financial obligations.

In count two, sounding in breach of contract, the plaintiff, relying on the factual allegations set forth in count one, alleged that "[t]he legal relationship and agreement between the plaintiff and the defendants constituted a contract which was formed by the execution of the retainer agreement and by virtue of the oral agreements and understandings of the parties." The plaintiff alleged that the contract "was a contract for a specific result, namely, the representation of the plaintiff's interests during her postjudgment action." According to the plaintiff, the defendants breached the

terms of the contract, and, as a direct and proximate result of that breach, she suffered a variety of damages.

In count three, sounding in negligent misrepresentation, the plaintiff, relying on the factual allegations set forth in count one, alleged that "[t]he defendants, at various times during [their] representation, made material representations of fact that the defendants knew, or reasonably should have known, were untrue." These misrepresentations related to the adequacy of the alimony award and property division, the accuracy of the financial information provided by the plaintiff's former husband, the adequacy of the stipulation to protect the plaintiff's rights in the marital estate and the marital income, the fact that the defendants would conduct reasonable discovery, and the fact that the defendants would obtain for the plaintiff adequate alimony and support. The plaintiff alleged that she reasonably relied on these material factual misrepresentations and that, as a result, she "was damaged and lost the likelihood of additional alimony, additional property, incurred excessive and unnecessary attorney's fees, and lost support and interest."

In her complaint, the plaintiff alleged that the action was brought pursuant to the accidental failure of suit statute, § 52-592. Alternatively, the plaintiff alleged that the action was being brought pursuant to an executive order, namely, Executive Order No. 7G, which was issued by Governor Ned Lamont on March 19, 2020.[4] The plaintiff sought monetary and punitive damages, costs, attorney's fees, and any further relief that the court deemed fair, just, and equitable.

[4] The executive order provides in relevant part: "I hereby suspend, for the duration of this [COVID-19] public health and civil preparedness emergency, unless earlier modified or terminated by me, all statutory . . . (3) time requirements or deadlines related to the Supreme, Appellate, and Superior courts . . . ." (Citations omitted.) Executive Order No. 7G (March 19, 2020).

In their answer, the defendants admitted that they represented the plaintiff in the postdissolution proceedings and that they had advised her and negotiated a settlement on her behalf. The defendants either denied or left the plaintiff to her proof with respect to many of the factual allegations in her complaint. The defendants denied that they breached the applicable standard of care, breached any contract with the plaintiff, or made any misrepresentations to the plaintiff. By way of a first special defense, the defendants alleged that the first and third counts were barred by the three year statute of limitations applicable to tort actions, General Statutes § 52-577. By way of a second special defense, the defendants alleged that the second count was barred by the three year statute of limitations applicable to actions for breach of an oral contract, General Statutes § 52-581.

On January 11, 2022, the defendants filed a motion for summary judgment. The defendants argued in relevant part that "[t]he plaintiff initiated an original action against the defendants three years ago; [*Kuselias* v. *Zingaro & Cretella, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-19-6087780-S (*Kuselias I*)]; alleging legal malpractice, breach of contract, and negligent misrepresentation. *Kuselias I* resulted in a judgment of nonsuit against the plaintiff for her blatant disregard of court orders. The plaintiff has now [in the present case] filed a nearly identical complaint, *Kuselias II*,[5] seeking to relitigate the same claims. Contrary to the plaintiff's contentions, the first and third counts are time barred and cannot be saved by the accidental failure of suit statute . . . ."[6] (Footnote added.)

[5] In this opinion, we will refer to the present action as *Kuselias II*.

[6] In their motion for summary judgment, the defendants also argued that they were entitled to summary judgment as a matter of law with respect to the breach of contract cause of action as alleged in count two of the plaintiff's complaint "because there exists no issue of fact that the defendants did not breach an agreement to achieve a particular outcome." The court agreed with this argument. Because the plaintiff does not challenge that

In the defendants' memorandum of law accompanying their motion for summary judgment, the defendants elaborated on their argument, stating that, as a matter of law, the claims in the first and third counts of the complaint were subject to the three year statute of limitations for tort claims codified in § 52-577. The defendants argued that the plaintiff terminated the defendants' representation of her in the postdissolution proceedings on May 7, 2016, and, thus, she was required to commence the action based on counts one and three no later than May 7, 2019. The plaintiff, however, commenced the present action in July, 2021.

The defendants argued that there was no genuine issue of material fact with respect to whether the accidental failure of suit statute could be applied to save the claims set forth in counts one and three.[7] Specifically, the defendants argued that the facts in *Kuselias I* reflect that the judgment of nonsuit was rendered for

ruling in this appeal, we need not address the propriety of that ruling and, therefore, we will confine our analysis to the court's disposition of counts one and three of the complaint.

[7] We note that, in their memorandum of law in support of their motion for summary judgment, the defendants also argued that the undisputed facts demonstrated that the plaintiff was unable to rely on the executive order that was issued by Governor Lamont on March 19, 2020. The executive order, among other things, suspended certain statutes of limitations during the COVID-19 pandemic. See footnote 4 of this opinion. The defendants argued that it was undisputed that the plaintiff terminated their representation of her no later than May 7, 2016. By virtue of the applicable statutes of limitations, the plaintiff thus had to have commenced the present cause of action on or before May 7, 2019. The defendants argued that, as a matter of law, the executive order, which did not come into existence until after the tolling of the applicable statutes of limitations, could not be applied to save the untimely claims. In the plaintiff's opposition to the defendant's motion for summary judgment, she did not dispute the defendants' argument. In the court's memorandum of decision granting the defendants' motion for summary judgment, it concluded that the executive order on which the plaintiff had relied as a special defense was "wholly irrelevant to the issues presently before the court." Because the plaintiff does not challenge that aspect of the court's decision in this appeal, we need not address the propriety of that ruling.

disciplinary reasons following the plaintiff's egregious noncompliance with discovery, not because of a matter of form that would have brought the failure of the prior action to be tried within the purview of the accidental failure of suit statute. In an attempt to demonstrate that the accidental failure of suit statute could not be applied in the present case, the defendants relied on exhibits that they had attached to their memorandum of law. These exhibits detailed the procedural history in *Kuselias I* and, in particular, the history of the plaintiff's noncompliance with discovery that led the court, *Wahla*, *J.*, on October 26, 2020, to grant the defendants' motion for a judgment of nonsuit for the plaintiff's failure to comply with discovery.

In support of their motion for summary judgment in *Kuselias II*, the defendants presented evidence that, in *Kuselias I*, the plaintiff had repeatedly failed to meet deadlines, and then failed to meet extended deadlines, for compliance with a request for production of certain documents, interrogatories, and a request to disclose an expert witness. The defendants presented evidence that, in *Kuselias I*, in light of the plaintiff's repeated noncompliance, they brought a motion for order of compliance before the court, *Wilson*, *J.*, which granted the motion, thereby affording the plaintiff until March 16, 2020, to comply with discovery.[8] The plaintiff did not comply with this deadline, which led the defendants to bring the motion for nonsuit in *Kuselias I*.

In support of their motion for summary judgment in *Kuselias II*, the defendants also relied on the fact that,

[8] The court's order, dated February 10, 2020, stated: "Compliance via written discovery and disclosure of the plaintiff's expert is ordered on or before [March 16, 2020]. If the moving party does not receive compliance by that date, the moving party may file a motion for judgment of nonsuit referring to this order. Absent proof of compliance on file before the motion appears on this short calendar, the motion will be granted by the court and judgment will enter."

after the court granted the motion for nonsuit in *Kuselias I*, the plaintiff filed a motion to open in *Kuselias I*, which is governed by General Statutes § 52-212.[9] In connection with the motion for summary judgment, the defendants submitted as an exhibit the transcript from the May 5, 2021 hearing on the motion to open. The transcript reflects that, in *Kuselias I*, the court, *Wahla*, *J.*, afforded the plaintiff's counsel an opportunity to explain what reasonable cause existed that prevented the plaintiff from prosecuting her action. The plaintiff's counsel, Kenneth A. Votre, represented that the plaintiff had "difficult issues" as a result of the dissolution of her marriage and that he had difficulty obtaining the records sought, he had to depend on third parties to obtain the information sought, and someone working in his office had contracted COVID-19, which resulted in his office being closed for an undisclosed amount of time. In its ruling, the court emphasized the importance of compliance with the rules of discovery, and observed that, "when someone knocks on the door of the court, we have procedures in place to follow." The court was not persuaded by the arguments raised by the plaintiff's counsel, noting that the arguments were, in effect, an invitation for the court to ignore the noncompliance at issue. The court stated that it had reviewed the file and did not see that good faith efforts to comply with discovery had been made. Thus, in *Kuselias I*, the court ultimately denied the motion to open. The plaintiff did not appeal from the judgment of nonsuit or the denial of her motion to open in *Kuselias I*.

[9] General Statutes § 52-212 (a) provides in relevant part: "Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which the notice of judgment or decree was sent, and the case reinstated on the docket . . . upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause . . . that the plaintiff or defendant was prevented by mistake, accident, or other reasonable cause from prosecuting the action or making the defense."

The plaintiff in *Kuselias II* filed a memorandum of law in opposition to the defendants' motion for summary judgment. Not disputing that counts one and three were time barred, the plaintiff attempted to demonstrate that a genuine issue of material fact existed with respect to the applicability of the accidental failure of suit statute. In support of the plaintiff's memorandum of law, the plaintiff submitted her own affidavit. Relying on the averments therein, the plaintiff in her objection attempted to demonstrate that, in *Kuselias I*, she made attempts to comply with the court's discovery order but could not do so "[d]ue to the onset of panic attacks and anxiety [and that she] was triggered when she reviewed the documents from her divorce. This inability in the prior action led the trial court to grant [a] nonsuit in favor of the [defendants] without an evidentiary hearing." The plaintiff attempted to demonstrate that she "simply could not discuss and provide the information [regarding the discovery request at issue] to counsel." She argued that the averments in the affidavit demonstrated that she attempted to respond to the discovery request, developed anxiety and panic attacks when she attempted to respond to the request, became homeless and unemployed during the period of time at issue, concealed her suffering due to the fear that exposure would affect her children and custody, and "kept this information from her counsel and the court because of fear and embarrassment." In light of the foregoing, the plaintiff argued that a genuine issue of material fact existed with respect to whether the failure to comply with the court's discovery request in *Kuselias I* was due to excusable neglect, rather than serious misconduct. Thus, the plaintiff argued that the circumstances of her noncompliance in *Kuselias I* entitled her to the benefit of the accidental failure of suit statute in *Kuselias II*.

On May 16, 2022, the court, *Abrams*, *J.*, heard oral argument with respect to the defendants' motion for

summary judgment in *Kuselias II*. On August 29, 2022, the court, in a thorough memorandum of decision, rendered its judgment granting the motion. The court aptly summarized the plaintiff's argument, namely, that she was entitled to try her case on its merits because the judgment of nonsuit in *Kuselias I* had been rendered for a matter of form. The court noted that the plaintiff had attempted to demonstrate that she was unable to comply with discovery "as a result of the emotional turmoil triggered by her attempts to review the documents relevant to discovery. . . . She contends that she could not discuss and provide the information to counsel and that she hid her problem out of fear and embarrassment." (Citation omitted.) In its analysis of whether the accidental failure of suit statute applied, the court correctly stated that "[t]he critical question is whether the judgment of nonsuit entered in *Kuselias I* resulted from a 'matter of form.' The defendants argue that there is no genuine issue of material fact that the nonsuit did not result from mistake, inadvertence, or excusable neglect. Rather, they contend, the plaintiff blatantly disregarded the court's orders with respect to interrogatory responses, document production, and expert disclosure compliance. . . . They specifically point out that the plaintiff has not offered any explanation for her failure to disclose an expert witness. . . . Moreover, they argue that the noncompliance in this case was not a singular, isolated incident, but a pattern that persisted over one year and four months. . . . They point out that, neither the fact [that] the production demanded required review of a large volume of nearly 7000 pages of documents, nor that the plaintiff became confused with respect to timelines will carry the day. . . . Finally . . . they suggest that the explanation the plaintiff offers in her affidavit for discovery noncompliance—that she had a difficult time and her counsel did not understand how to help her—is vague at best."

The court observed that, setting aside the plaintiff's reasons for not responding to requests for production of documents or replying to interrogatories in *Kuselias I*, there was no genuine issue of material fact that, at the time of the May 5, 2021 hearing on the motion to open the judgment of nonsuit in *Kuselias I*, the plaintiff had still not disclosed an expert witness. Indeed, the court observed that, at the May 5, 2021 hearing, the plaintiff's counsel acknowledged that an expert had not been disclosed because he did not feel it was appropriate to ask his client to pay for an expert witness in light of the fact that a judgment of nonsuit had been rendered. The court stated that failing to disclose an expert witness without a viable explanation is not a matter of form, and that "there is no genuine dispute of material fact that the plaintiff's failure to disclose an expert did not result from excusable neglect, mistake, or inadvertence." In ruling on the motion for summary judgment, the court noted that "the plaintiff's only piece of evidence, her affidavit, does not address her failure to comply with expert disclosure, but only her purported inability to address the task of reviewing documents. . . . Nor does the plaintiff address noncompliance with expert disclosure in her brief. In the absence of a genuine dispute of material fact, whether a prior judgment of nonsuit resulted from a matter of form is a legal question for the trial court." (Citation omitted.) The court concluded that the record in *Kuselias I* reflected that the failure to disclose an expert was a decision made by the plaintiff to avoid costs, and that this failure amounted to intentional and dilatory conduct that was "clearly egregious" in nature.

With respect to the issue of noncompliance with discovery in *Kuselias I*, the court, in ruling on the motion for summary judgment in *Kuselias II*, noted that the plaintiff had attempted to demonstrate that it was very

difficult for her to comply with the defendants' interrogatories and its request for the production of documents. The court stated, however, that, because the plaintiff did not aver in her affidavit that her failure to respond to the defendants' discovery requests was the result of a serious illness or a circumstance beyond her control, her affidavit was, itself, proof that *Kuselias I* was not terminated due to mistake or inadvertence. Although the court noted that the plaintiff had averred that she experienced psychological stress and related mental health symptoms when she attempted to comply with her discovery obligations, the court reasoned that "[a] lack of diligence resulting from being busy, distracted, or otherwise experiencing the stresses of life is not, in and of itself, excusable neglect, inadvertence, or mistake." The court noted that, although it did not mean to diminish the plaintiff's psychological symptoms, it was presented with a situation in which it appeared that the plaintiff's counsel did not fulfill his obligation "to step in and address the issues outlined in the plaintiff's affidavit" but had, instead, pursued a policy of "simply [standing] back and [waiting] repeatedly [to] throw themselves on the mercy of the court after failure to meet deadline after deadline."

On September 19, 2022, after the court rendered summary judgment in favor of the defendants with respect to all three counts of the plaintiff's complaint, the plaintiff filed a motion to reargue and reconsider pursuant to Practice Book § 11-11 et seq. The plaintiff argued that the court had misapprehended the facts and misapplied the law. On September 27, 2022, the defendants filed an objection to the plaintiff's motion to reargue and reconsider. On September 30, 2022, the plaintiff filed a reply to the defendants' objection. By order dated October 11, 2022, the court denied the plaintiff's motion to reargue and reconsider. This appeal from the court's rendering of summary judgment and the court's denial

of the motion to reconsider followed. Additional procedural history will be set forth as relevant.

I

First, the plaintiff claims that the court erred in granting the defendants' motion for summary judgment with respect to her claims of legal malpractice and negligent misrepresentation because these claims could properly be brought pursuant to the accidental failure of suit statute. We are not persuaded.

We begin by setting forth the following applicable legal principles. "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]n the context of a motion for summary judgment based on a statute of limitations special defense, [the defendants] typically [meet their] initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. . . . Put differently, it is then incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists." (Citation omitted; internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 799, 99 A.3d 1145 (2014). In the present case, although the plaintiff relies not on an equitable exception to the statute of limitations, but on a remedial statute, the plaintiff's burden in opposing the defendants' motion for summary judgment is not in dispute. After the defendants set forth uncontroverted facts demonstrating that the claims set forth in counts one and three of *Kuselias II* were brought outside of the statutory limitation period established by § 52-277, it was incumbent on the plaintiff to establish a factual predicate from which it could be determined that a genuine issue of material fact existed with respect to the applicability of § 52-592.

Section 52-592 (a) provides: "If any action, commenced within the time limited by law, has failed one

or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

"Deemed a 'saving statute,' § 52-592 enables plaintiffs to bring anew causes of actions despite the expiration of the applicable statute of limitations." *Pepitone* v. *Serman*, 69 Conn. App. 614, 619, 794 A.2d 1136 (2002). Section 52-592 "is remedial and is to be liberally interpreted." *Ross Realty Corp.* v. *Surkis*, 163 Conn. 388, 393, 311 A.2d 74 (1972). "[B]y its plain language, [§ 52-592] is designed to prevent a miscarriage of justice if the [plaintiff fails] to get a proper day in court due to the various enumerated procedural problems. . . . It was adopted to avoid hardships arising from an unbending enforcement of limitation statutes. . . . Its purpose is to aid the diligent suitor. . . . Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts." (Internal quotation marks omitted.) *Davis* v. *Family Dollar Store*, 78 Conn. App. 235, 240, 826 A.2d 262 (2003), appeal dismissed, 271 Conn. 655, 859 A.2d 25 (2004).

The plaintiff expressly relies on the portion of § 52-592 (a) applicable to "any matter of form." Our Supreme Court has explained: "In previous cases considering the application of the accidental failure of suit statute, we have declined to adopt an extremely broad construction of the statute to the effect that, [t]he phrase, any matter of form, was used in [contradistinction] to matter of substance, as embracing the real merits of the controversy between the parties. . . . Rather, we have emphasized that § 52-592 (a) does not authorize the reinitiation of all actions not tried on . . . [their] merits, and that, [i]n cases where we have either stated or intimated that the any matter of form portion of § 52-592 would not be applicable to a subsequent action brought by a plaintiff, we have concluded that the failure of the case to be tried on its merits had not resulted from accident or even simple negligence. . . .

"In concluding that even disciplinary dismissals are not excluded categorically from the relief afforded by § 52-592 (a), we have noted the fact-sensitive nature of the inquiry and held that, [t]o enable a plaintiff to meet the burden of establishing the right to avail himself or herself of the statute, a plaintiff must be afforded an opportunity to make a factual showing that the prior dismissal was a matter of form in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as mistake, inadvertence or excusable neglect. . . . Indeed, even in the disciplinary context, only egregious conduct will bar recourse to § 52-592." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 49–51, 12 A.3d 885 (2011); see also, e.g., *Ruddock* v. *Burrowes*, 243 Conn. 569, 575–76, 706 A.2d 967 (1998) (holding that disciplinary dismissal in prior action did not automatically foreclose plaintiffs from seeking recourse under accidental failure of suit statute and

discussing balance that court must strike when weighing remedial nature of statute and "the responsibility of the court to establish standards for the processing of cases and also, when necessary, to enforce compliance with such standards" (internal quotation marks omitted)).

In the present case, the plaintiff was afforded an opportunity to present evidence and make a factual showing that the disciplinary dismissal—the judgment of nonsuit—that occurred in *Kuselias I* was a matter of form that fell within the ambit of § 52-592. In her opposition to the motion for summary judgment, the plaintiff relied on the procedural history of *Kuselias I* and the alleged circumstances of her noncompliance with discovery in *Kuselias I*, as detailed in her affidavit.

In its decision rendering summary judgment, the court accurately characterized the evidence before it with respect to the plaintiff's failure to disclose an expert in *Kuselias I*. The court explained: "Failure to disclose an expert without a viable explanation is not a matter of form. . . . This rule is particularly applicable in the present legal malpractice case because the plaintiff must furnish an expert to establish both the relevant standard of care and causation. . . . Consistent with Practice Book § 13-4, the [plaintiff was bound to adhere to the discovery deadline ordered by the court]. . . .

"In the present matter, there is no genuine dispute of material fact that the plaintiff's failure to disclose an expert did not result from excusable neglect, mistake, or inadvertence. Per the original scheduling order in *Kuselias I*, the plaintiff had a September 20, 2019 deadline, which the court twice extended, to disclose experts. . . . On May 5, 2021, at oral argument on the motion to open, the plaintiff's counsel informed the court that, '[i]n order for us to put this case on track, we would have to disclose our expert witness. And we

have not disclosed an expert because at this point the case is in a [nonsuit state]. I can't ask the client to pay for an expert for no reason at this point. But I could promptly do so within [thirty] to [forty-five] days . . . .' Counsel also pointed out that *Kuselias I* had not been scheduled for trial. Denying the motion [to open], Judge Wahla elaborated that the plaintiff had not complied with the expert disclosure deadline because she never obtained an expert in the first instance, and still had not done so as of the May 5, 2021 hearing. . . . Rejecting the plaintiff's contentions, Judge Wahla chastised the plaintiff's counsel: 'Disclosure is not meant whether it's going to be a jury trial or not. Disclosure is meant that the other party can depose, discern where the case stands so that the resolution can be brought.' For her part, the plaintiff's only piece of evidence, her affidavit, does not address her failure to comply with expert disclosure, but only her purported inability to address the task of reviewing documents. . . . Nor does the plaintiff address noncompliance with expert disclosure in her brief [submitted in opposition to the motion for summary judgment]." (Citations omitted; emphasis omitted; footnote omitted.)

It was not in dispute that the plaintiff failed to retain, let alone disclose, an expert witness by the time of the May 5, 2021 hearing on the motion to open the judgment of nonsuit in *Kuselias I*. In light of the explanation proffered by the plaintiff's counsel at the May 5, 2021 hearing on the motion to open, the failure to retain an expert may only be attributed to the plaintiff's deliberate goal of avoiding costs. This deliberate strategy was contrary to the plaintiff's obligations pursuant to Practice Book § 13-4, which governs the timely disclosure of expert witnesses, and the multiple deadlines for disclosure imposed by the court in *Kuselias I*. In granting the motion for summary judgment in *Kuselias II*, the court concluded that a genuine issue of material fact

did not exist with respect to the issue of whether "intentional dilatory conduct" led to the judgment of nonsuit in *Kuselias I*, and we agree. This is not a circumstance in which the action was defeated by mistake, inadvertence, or excusable neglect; insofar as it was based on the plaintiff's failure to disclose an expert, the judgment of nonsuit resulted from a deliberate disregard for the court's authority. Accordingly, the plaintiff did not demonstrate that there was a genuine issue of material fact with respect to whether the accidental failure of suit statute applied.[10]

In addition to examining the judgment of nonsuit as it related to the plaintiff's failure to disclose an expert, the court in *Kuselias II* also considered the fact that the judgment of nonsuit rendered in *Kuselias I* was based on the plaintiff's failure to respond to interrogatories and requests for production. It is clear from the relevant materials on which the defendants relied in support of their motion for summary judgment, related to the proceedings in *Kuselias I*, that the plaintiff engaged in a pattern of missing deadlines for compliance and then seeking further extensions of time in which to comply with the discovery requests. The evidence before the court reflects that Judge Wahla, in denying the plaintiff's motion to open the judgment of nonsuit, took issue with the fact that any difficulties that the plaintiff may have experienced in responding to these requests were not brought to the court's attention

[10] The plaintiff takes issue with the court's reliance on the fact that, in *Kuselias I*, the plaintiff did not disclose an expert. Specifically, the plaintiff asserts that in neither the motion for judgment of nonsuit nor the motion for summary judgment did the defendants raise that issue. This argument is not persuasive.

Regardless of whether the defendants moved for a judgment of nonsuit on the ground that the discovery violations included the plaintiff's failure to disclose an expert, the fact remains that this was a topic of the hearing on the motion and it cannot be disputed that it was one of the grounds on which the court relied in rendering the judgment of nonsuit. Moreover, in the defendants' memorandum of law in support of their motion for summary judgment, the defendants repeatedly relied on this ground.

until *after* she failed to comply. The court chastised the plaintiff for commencing *Kuselias I* and then engaging in a pattern of disregarding discovery orders. The court expressly stated that the plaintiff did not act in good faith with respect to the requests and, for that reason, it did not find that there was reasonable cause to grant the motion to open.

In opposing the motion for summary judgment in *Kuselias II*, the plaintiff submitted her own affidavit, in which she attempted to demonstrate that the judgment of nonsuit was rendered as the result of a matter of form. The reasons set forth in the affidavit, viewed in the light most favorable to the plaintiff, do not suggest mistake or inadvertence. The plaintiff does not dispute that noncompliance occurred but asserts that the noncompliance was the result of excusable neglect in that she experienced negative emotional, physical, and psychological effects when she either considered or attempted to comply with the discovery requests at issue that were made by the defendants. The plaintiff averred that she suffered anxiety, hopelessness, panic attacks, sleep disturbances, poor concentration, flashbacks, painful thoughts, nightmares, increased heart rate, and "severe pressure in [her] head." She did not, however, describe the frequency or duration of these negative events during the lengthy period in which she failed to comply with discovery orders. Rather, the plaintiff stated in her affidavit that the discovery requests triggered negative emotions and anxiety because they caused her to recall unpleasant facts related to her relationship with her former husband, the representation afforded to her by Zingaro, and the stipulation that Zingaro negotiated on her behalf. The plaintiff explained in the affidavit that she had made some attempts to respond to the discovery requests, but she was "unable to do so."[11] The plaintiff also averred that she was unaware of the importance

[11] The plaintiff averred that she "had a very difficult time during this process and [her] attorney did not understand how to help [her]." The

of her timely responses, did not understand at the time how her emotional issues were affecting her, and did not make her attorney aware of the reasons why she was not quickly responding to the requests. The plaintiff stated in her affidavit that myriad stressors, some of which were not directly tied to the postdissolution action, were affecting her emotional well-being, including general financial hardship, her beginning a new job, the onset of the COVID-19 pandemic, the fact that her children were "suddenly homeschooling" during the pandemic, and the fact that she decided not to undergo genetic testing to determine her future likelihood of suffering from a rare genetic and terminal disorder.[12]

In granting the motion for summary judgment, the court properly considered these averments in the light most favorable to the plaintiff.[13] The court concluded,

plaintiff recalled that she attempted to "get through the documentation . . . in short spurts," and she "tried very hard to sort through the information as fast as possible," and that the feelings of trauma "ultimately disrupted [her] ability to review the files."

[12] In her affidavit, the plaintiff stated that, at the time that she executed the affidavit on May 14, 2022, she was receiving treatment for "the situational trauma" related to the agreement that Zingaro had negotiated on her behalf. She also averred that she had begun a new job on April 11, 2022, and that the new employment offered her "greater flexibility, allowing [her] the opportunity to address this situation in a timely manner here forward." Thus, the plaintiff asserted that she was now "ready" to prosecute the action.

[13] In her brief to this court, the plaintiff argues that "[t]he court ignored all of the actions taken successfully to comply with discovery." The plaintiff also asserts that the court did not properly analyze the severity of the conduct giving rise to the disciplinary dismissal in *Kuselias I* and that the court "ignored [her] submissions." These bald assertions are belied by even a cursory reading of the court's thorough and well researched decision. The decision reflects that the court carefully evaluated the averments in the plaintiff's affidavit along with the other evidence properly before it at the time that it considered the motion for summary judgment. Moreover, the record plainly reflects that the court did not summarily conclude that the disciplinary dismissal in *Kuselias I* precluded the plaintiff from relying on § 52-592 but, rather, that the court properly analyzed the nature of the conduct that led to the disciplinary dismissal in order to determine if a genuine issue of material fact existed as to whether it could be considered a matter of form.

however, that they did not amount to excusable neglect. Rather, the court, although acknowledging "the severity of the problems the plaintiff encountered," reasoned that they were largely based on "the personal stress and strain engendered by litigation" related to an acrimonious divorce. The law does not provide an easily applied test to determine what situations amount to excusable neglect. Our case law merely contrasts excusable neglect, or matter of form in general, with conduct that might be deemed to be egregious or conduct that suggests gross negligence. *Kuselias I* does not reflect an isolated failure to comply with discovery requests, that a mistake was made, or that a delay occurred due to an unfortunate misunderstanding or oversight. Rather, *Kuselias I* reflects a reoccurring failure to comply timely with discovery obligations due to a lack of diligence by the plaintiff and her attorney. We agree with the court that the events and personal trauma experienced by the plaintiff when she attempted to respond to the court's clear and unambiguous discovery orders, although difficult for her to endure, did not amount to *excusable* neglect. The evidence before the court in connection with the motion for summary judgment reflects a pattern of the plaintiff attempting to comply with the orders at issue, repeatedly being "triggered" by the information related to her former husband and Zingaro, and then simply failing to comply with the orders. The plaintiff's affidavit, viewed in the light most favorable to her, reflects that compliance was difficult, but not impossible, and that, although she was mindful that she was having difficulty prosecuting the action that she had initiated, the result of the plaintiff's efforts was not to comply with the court's orders. The plaintiff describes numerous obstacles to justify her failure to respond to the discovery requests but does not describe a constant inability that made compliance impossible over the lengthy period of time in which noncompliance

occurred in this case. Like the trial court, we note that neither the record nor the plaintiff's affidavit suggests that the plaintiff's counsel took any steps to assist the plaintiff or to counsel her with respect to the effect of her failure to comply with clear and unambiguous court orders, let alone communicate these reasons to the court in a timely manner prior to missed deadlines. Instead, the plaintiff, in her affidavit, averred that "counsel did not make [her] aware [of] the importance of the responses" and that "[her] attorney did not understand how to help [her]."

The facts of this case are analogous to those that were at issue in *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 180 A.3d 595 (2018) (*Estela II*). *Estela II* followed a prior action between the parties; *Estela* v. *Bristol Hospital, Inc.*, Superior Court, judicial district of New Britain, Docket No. CV-11-6013260-S (*Estela I*); that resulted in a judgment of nonsuit as a result of the plaintiff's discovery noncompliance. Id., 200, 210. The plaintiff in *Estela II*, relying on the accidental failure of suit statute to avoid a claim that the action was time barred, commenced a second, nearly identical action against the same defendant that he had named in *Estela I*. Id., 201–202. The defendant filed a motion for summary judgment in *Estela II* on the ground that the action was time barred. Id. Later, the court granted the defendant's motion to bifurcate the trial to determine whether § 52-592 saved the plaintiff's case. Id., 205–206. The trial court, concluding that *Estela I* was not dismissed as a matter of form, determined that the plaintiff could not avail himself of the remedial benefit of § 52-592. Id., 202–203. An appeal to this court followed. Id., 203.

This court, in *Estela II*, noted that the trial court properly had considered the plaintiff's justifications for the discovery noncompliance that had led to the disciplinary dismissal in *Estela I* and had properly considered whether the plaintiff's conduct amounted to a matter of form in accordance with the analysis of our

Supreme Court in *Ruddock* v. *Burrowes*, supra, 243 Conn. 575–76. *Estela* v. *Bristol Hospital, Inc.*, supra, 179 Conn. App. 215. After conducting a thorough analysis of the evidence presented to the trial court in connection with the defendant's motion for summary judgment in *Estela II*, this court agreed with the trial court that § 52-592 did not apply because the plaintiff failed to demonstrate that the noncompliance at issue in *Estela I* was the result of mistake, inadvertence, or excusable neglect.[14] Id., 218. As was the case in *Estela II*, in the

[14] Following an appeal in *Estela II*, this court reasoned that "[t]he record readily supports the court's factual findings underlying its determination that the dismissal of *Estela I* did not occur in circumstances such as 'mistake, inadvertence or excusable neglect.' In *Estela I*, the plaintiff engaged in a pattern of delayed conduct by responding late to discovery requests, filing untimely objections, and filing notices of compliance after the filing of the defendant's motion for a judgment of nonsuit. The plaintiff failed to comply with two court orders, which ordered him to comply with outstanding discovery requests for his 2002–2004 tax returns and his expert report, by February 29, 2013, and March 29, 2013, respectively.

"As justification for his noncompliance, the plaintiff represented to the court that he could not comply with the defendant's request to provide the expert report absent information from the defendant that had not yet been provided. As the court noted, however, the plaintiff failed to explain why he did not file a motion for extension of time in *Estela I* while waiting for this purportedly essential information from the defendant. The plaintiff also asserted that he could not comply with the discovery request for his 2002–2004 tax returns because he did not have copies, and he was waiting on copies to be provided by the Internal Revenue Service. The request for the tax returns, however, was not sent to the Internal Revenue Service until November 5, 2013—several days after the court in *Estela I* rendered the judgment of nonsuit on October 28, 2013, and months after the court-ordered deadlines to comply. Further, as the court noted, the plaintiff could have provided the defendant with an authorization to contact the Internal Revenue Service itself, but failed to do so. Moreover, the plaintiff even admitted in his motion to open the judgment of nonsuit in *Estela I* that he 'purposefully held off on continuing his review and analysis of his own documents to cull out relevant information because he expected that the request[ed] patient information would be produced by the defendant" . . . further undercutting any argument that the nonsuit resulted from 'mistake, inadvertence or excusable neglect.'

"Also as justification for his conduct in *Estela I*, the plaintiff argued that he complied with the 'reasonable meaning' of the court's orders. Specifically, the plaintiff represented to the court . . . that the parties had come to an

present case, the disciplinary dismissal followed the plaintiff's repeated failures to comply with the court's discovery orders and, at least to the extent that it was based on the strategic decision of the plaintiff's counsel not to disclose an expert as a cost saving measure, was purposeful in nature.

We are mindful of the difficulties that the plaintiff experienced in her attempts to comply with discovery in *Kuselias I*, but there is an element of lackadaisical behavior with respect to the need to either comply with orders or to promptly seek an extension of time once it becomes apparent that compliance is impossible. See, e.g., *Gillum* v. *Yale University*, 62 Conn. App. 775, 783, 787, 773 A.2d 986 (concluding that § 52-592 (a) did not apply and describing conduct in first case as " 'lackadaisical behavior by the plaintiffs at every turn' "), cert. denied, 256 Conn. 929, 776 A.2d 1146 (2001).

In light of the foregoing, we conclude that the court correctly examined the evidence before it and correctly determined that a genuine issue of material fact did not exist with respect to whether the conduct that led to the judgment of nonsuit in *Kuselias I* was a matter of form. Accordingly, we conclude that the court properly rendered summary judgment in favor of the defendants

agreement amongst themselves to extend the deadline for compliance. 'In Connecticut, [however] the general rule is that a court order must be followed until it has been modified or successfully challenged. . . . Our Supreme Court repeatedly has advised parties against engaging in self-help and has stressed that an order of the court must be obeyed until it has been modified or successfully challenged.' . . . *Worth* v. *Commissioner of Transportation*, 135 Conn. App. 506, 520–21, 523, 43 A.3d 199 (rejecting plaintiff's claim that failure to comply with court order was 'excusable neglect' and affirming trial court's finding that plaintiff's case was not saved by § 52-592), cert. denied, 305 Conn. 919, 47 A.3d 389 (2012). Thus, even if the parties had come to an agreement between themselves to extend the discovery deadline, the plaintiff needed to first inform the court of the agreement and have the court orders modified. The plaintiff failed to do so." (Emphasis omitted; footnotes omitted.) *Estela* v. *Bristol Hospital, Inc.*, supra, 179 Conn. App. 216–18.

because the plaintiff was unable to demonstrate that she was entitled to the remedial benefit of the accidental failure of suit statute.[15]

II

Next, the plaintiff claims that the court erred in denying her motion to reargue and reconsider its ruling on the motion for summary judgment. We are not persuaded.

As stated previously in this opinion, after the court rendered summary judgment in favor of the defendants with respect to all three counts of the plaintiff's complaint, the plaintiff filed a motion to reargue and reconsider pursuant to Practice Book § 11-11. The plaintiff argued that the court had misapprehended the facts and misapplied the law. Specifically, the plaintiff argued that "[t]he court failed to apprehend or address the facts establishing that the plaintiff in fact cooperated fully in discovery in the underlying action. She was deposed, provided all requested documents, and responded to interrogatories. These facts alone establish a genuine issue of material fact sufficient to deny the motion for summary judgment."

[15] As part of her appellate argument in connection with this claim, the plaintiff urges us to consider the facts set forth in her "amended and corrected affidavit" and an affidavit from her attorney that were submitted in connection with her motion to reargue and reconsider. For the reasons articulated in part II of this opinion, we do not consider these submissions that were not before the trial court at the time that it rendered summary judgment in favor of the defendants. Setting aside these untimely submissions, there was no evidence before the court that a genuine issue of material fact existed with respect to whether the plaintiff had complied with the outstanding discovery requests before the court rendered a judgment of nonsuit in *Kuselias I*. It bears repeating that the evidence before the court at the time that it rendered summary judgment reflected that, at the time that the court rendered the judgment of nonsuit, noncompliance had occurred, and the plaintiff and her attorney were attempting, at that time, to characterize the conduct giving rise to the noncompliance as a matter of form.

In connection with the motion to reargue and reconsider, the plaintiff submitted the affidavit of Votre, the attorney who represented her in *Kuselias I* and *Kuselias II*. In his seven page affidavit, which sets forth fifty-four separate averments, Votre stated that the plaintiff "in fact substantially complied" with the discovery requests made by the defendants in *Kuselias I* but that the defendants had "twisted the facts before this court" to demonstrate otherwise. The plaintiff also submitted what is captioned as an "amended and corrected affidavit . . . in support of motion to reargue." In the plaintiff's affidavit, which is eleven pages long and sets forth seventy-three separately numbered averments, the plaintiff stated that she had "in fact substantially complied, if not completely complied, with the discovery requests in [*Kuselias I*]. The defendants' arguments twisted the facts before this court . . . ." She also averred that she had "produced in an organized manner nearly 6000 pages of documents in full compliance with the defendants' production requests long before any nonsuit was entered." The plaintiff also averred that, on December 14 and 29, 2020, she had responded to the defendants' second set of interrogatories, which was nearly a duplicate of the first set of interrogatories that had been submitted to her.

The defendants objected to the plaintiff's motion on several grounds, including that (1) the plaintiff's contentions were "blatantly false" and the record plainly revealed that the plaintiff had ignored all deadlines and discovery orders until after the judgment of nonsuit had been rendered against her in October, 2020, (2) the motion was an improper attempt by the plaintiff to obtain " 'a second bite at the apple,' " and (3) that the motion left unchallenged the court's reliance on the fact that the plaintiff failed to disclose an expert. The defendants argued that the motion should be denied because the plaintiff had failed to set forth any error

made by the court or any controlling legal principle that it had overlooked in granting the motion for summary judgment.

Thereafter, the plaintiff filed a reply to the defendants' objection. At this juncture, the plaintiff argued that the record did not reflect that the court, in rendering a judgment of nonsuit, relied on the fact that the plaintiff had failed to disclose an expert. The plaintiff argued that "expert disclosure has nothing to do with the status of this case and . . . the court was misled by the defendants [when it granted the motion for summary judgment]." By order dated October 11, 2022, the court summarily denied the motion to reargue and reconsider.

"The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. 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." (Internal quotation marks omitted.) *Fain* v. *Benak*, 205 Conn. App. 734, 746, 258 A.3d 112 (2021), appeal dismissed, 345 Conn. 912, 283 A.3d 980 (2022).

Even though the plaintiff captioned her motion as a "motion to reconsider" that was brought pursuant to Practice Book § 11-11, in the very first paragraph of the motion the plaintiff states that she "moves for *reconsideration* and *reargument* pursuant to Practice Book § 11-11." (Emphasis added.) This court has observed that "[m]otions for reargument and motions for reconsideration are nearly identical in purpose. [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. . . . A reconsideration implies reexamination and possibly a different decision by the [court]

which initially decided it. . . . While a modification hearing entails the presentation of evidence of a substantial change in circumstances, a reconsideration hearing involves consideration of the trial evidence in light of outside factors such as new law, a miscalculation or a misapplication of the law. . . . [Reargument] may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as 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 or to present additional cases or briefs which could have been presented at the time of the original argument." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 74–75, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021).

The plaintiff's motion to reargue and reconsider is the quintessential example of a party seeking the proverbial second bite of the apple. The record reflects that the plaintiff has not used the motion for one of the proper purposes discussed previously in this opinion. Rather, the plaintiff used the motion to reargue and reconsider to present a different argument than that on which she had consistently relied when opposing the motion for judgment of nonsuit in *Kuselias I*, when seeking to open the judgment of nonsuit in *Kuselias I*, and in opposing the motion for summary judgment in *Kuselias II*. Moreover, in connection with the motion to reargue and reconsider, the plaintiff submitted evidence that contradicted the evidence on which she had relied previously, particularly in opposing the defendants' motion for summary judgment.[16] The nature of the new evidence the plaintiff presented, which unquestionably

[16] As we previously discussed in this opinion, the court had unambiguous evidence before it concerning the fact that the plaintiff had failed to comply with its discovery orders. The plaintiff's affidavit was replete with her expla-

pertained to events that predated the judgment of nonsuit, compels the conclusion that it cannot be considered newly discovered. Under our rules of practice, the time to submit relevant evidence in connection with a motion in support of or in opposition to a motion for summary judgment is before the motion is heard, not following an adverse ruling on the motion; Practice Book § 17-45; and, unless a proper showing has been made that the evidence could not have been discovered by the exercise of due diligence, a court acts well within its discretion to refuse to consider untimely evidence in this regard. See, e.g., *Durkin Village Plainville, LLC* v. *Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006). For these reasons, we conclude that the plaintiff is unable to demonstrate that the court has abused its discretion in denying her motion to reargue and reconsider.

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIAM THOMAS CLARK ET AL. *v.* QUANTITATIVE STRATEGIES GROUP, LLC, ET AL.
(AC 45956)

Suarez, Clark and Prescott, Js.

Syllabus

The defendant judgment debtor, B, appealed to this court from the judgment of the trial court denying his claim that certain bank accounts were exempt from execution pursuant to statute ((Supp. 2022) § 52-367b) because the plaintiff judgment creditors executed on accounts that did not belong to him but, rather, belonged to his mother, J. The plaintiffs had obtained an arbitration award against B arising from a default on

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nation for why she had been unable to comply with these orders. The plaintiff's counsel, for his part, did not disagree that an expert had not been disclosed but, instead, explained why, even at the time of the hearing on the motion for judgment of nonsuit, the plaintiff had not disclosed an expert.

a loan, and the award was confirmed by the United States District Court for the Southern District of New York. The plaintiffs then domesticated the judgment in the Superior Court. After the trial court granted an application for a bank execution to satisfy the domesticated judgment, the plaintiffs served the execution on T Co., a bank, which identified two bank accounts on which B was listed as an account owner along with J and his sister. In his claim of exemption, B did not identify any of the statutory bases for an exemption set forth in § 52-367b or on the form prescribed by the Judicial Branch pursuant to § 52-367b (k). Instead, B indicated on his claim of exemption form that the basis of his claim was "[o]ther" and included a handwritten notation stating "[f]unds in these accounts are not my property." Following a hearing, the court denied B's claim of exemption. *Held* that the trial court did not improperly find that the accounts at issue were joint accounts and were not exempt from execution under § 52-367b, the court having correctly concluded that B's asserted exemption was not recognized or enumerated under § 52-367b: although B purported to claim an exemption under § 52-367b, specifically, that the funds in the accounts were not his but, instead, belonged solely to J, both the plain language of § 52-367b and case law make clear that the only cognizable exemptions are those provided for by that statute or any other laws or regulations of this state or the United States which exempt such debts from execution; moreover, although B noted in a supplemental brief to this court that he had filed a claim in the trial court for determination of interests pursuant to statute (§ 52-356c), that claim was neither pursued by B nor adjudicated by the trial court, and, because only a judgment creditor or a third person may make a claim for determination of interests pursuant to § 52-356c, not a judgment debtor, unless acting in a representative capacity for an appropriate third party with an alleged interest in the subject property, and B lacked any legal capacity to act on J's behalf, he was not authorized by statute to challenge T Co.'s determination that he was a co-owner of the accounts by pursuing a claim for determination of interests.

Argued October 16, 2023—officially released March 12, 2024

Procedural History

Action to enforce a domesticated judgment, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Baio, J.*, denied the motion for exemption from execution filed by the defendant John A. Brunjes et al., and the defendant John A. Brunjes et al. appealed to this court. *Affirmed.*

Paul R. Fenaroli, with whom, on the brief, were *Joseph M. Pastore III*, and *Melissa Rose McClammy*, for the appellant (defendant John A. Brunjes et al.).

Linda Clifford Hadley, for the appellees (plaintiffs).

Opinion

CLARK, J. In this appeal from postjudgment proceedings to obtain satisfaction of a domesticated judgment arising from an arbitration award, the defendant judgment debtor John A. Brunjes[1] appeals from the judgment of the trial court denying his claim of exemption filed pursuant to General Statutes (Supp. 2022) § 52-367b[2] claiming that the plaintiff judgment creditors, William Thomas Clark and TDA Construction, Inc., executed on bank accounts that did not belong to him but, rather, belonged to his mother, Josephine M. Brunjes. On appeal, the defendant claims that the court improperly found that he was a co-owner of the bank accounts at issue and that they were not exempt from execution under § 52-367b. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On November 5, 2019, the plaintiffs obtained an arbitration award

[1] The plaintiffs, William Thomas Clark and TDA Construction, Inc., brought the underlying action in federal court against QMG Global Holdings, LLC, Quantitative Strategies Group, LLC, QMG Founders I, LLC, QMG Investors, L.P., John A. Brunjes, individually and in his capacity as trustee of the John W. Brunjes Estate Trust, and Josephine M. Brunjes as defendants. See *Clark* v. *QMG Global Holdings, LLC*, United States District Court, Docket No. 7:17-cv-07233 (KMK). The plaintiffs named Quantitative Strategies Group, LLC, QMG Founders I, LLC, QMG Investors, L.P., and John A. Brunjes, individually and in his capacity as trustee of the John W. Brunjes Estate Trust in this state court proceeding. The only defendant participating in the present appeal is John A. Brunjes, individually and in his capacity as trustee of the John W. Brunjes Estate Trust. Accordingly, all references to the defendant in this opinion are to John A. Brunjes only.

[2] All references herein to § 52-367b are to the version of the statute in the 2022 Supplement to the General Statutes.

against the defendant arising from a default on a loan. On December 2, 2020, the United States District Court for the Southern District of New York confirmed the award (SDNY judgment). See *Clark* v. *QMG Global Holdings*, *LLC*, United States District Court, Docket No. 7:17-cv-07233 (KMK) (S.D.N.Y. December 2, 2020). On November 2, 2021, the plaintiffs domesticated the SDNY judgment pursuant to General Statutes § 52-605.[3] Thereafter, on January 10, 2022, the plaintiffs applied for a bank execution to satisfy the domesticated judgment against the defendant. The court granted the application and issued an execution on February 17, 2022. After the court granted the application, the plaintiffs served the execution on TD Bank. TD Bank identified two bank accounts (accounts) on which the defendant was listed as an account owner along with his mother and his sister. Having identified those two accounts, which held a combined total of $214,501.46, TD Bank subsequently "froze" the accounts and gave notice to the defendant pursuant to § 52-367b (d).[4]

[3] General Statutes § 52-605 provides in relevant part: "(a) A judgment creditor shall file, with a certified copy of a foreign judgment, in the court in which enforcement of such judgment is sought, a certification that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid and that the enforcement of such judgment has not been stayed and setting forth the name and last-known address of the judgment debtor.

"(b) Such foreign judgment shall be treated in the same manner as a judgment of a court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a court of this state and may be enforced or satisfied in like manner. . . ."

[4] General Statutes (Supp. 2022) § 52-367b (d) provides: "**Notice to judgment debtor and secured party.** If any funds are removed from the judgment debtor's account pursuant to subsection (c) of this section, upon receipt of the execution and exemption claim form from the serving officer, the financial institution shall (1) forthwith mail copies thereof, postage prepaid, to the judgment debtor and to any secured party that is party to a control agreement between the financial institution and such secured party under article 9 of title 42a at the last-known address of the judgment debtor and of any such secured party with respect to the affected accounts on the records of the financial institution, and (2) mail notice to the judgment

On June 30, 2022, the defendant filed a claim of exemption pursuant to § 52-367b (e).[5] In his claim of exemption, however, the defendant did not identify any of the statutory bases for an exemption set forth in § 52-367b (a)[6] or on the form prescribed by the Judicial Branch pursuant to § 52-367b (k).[7] Instead, the defendant indicated on his claim of exemption form that the basis of his claim was "[o]ther" and included a

debtor as required by 31 CFR 212.6 and 212.7. The financial institution shall hold the amount removed from the judgment debtor's account pursuant to subsection (c) of this section for fifteen days from the date of the mailing to the judgment debtor and any such secured party, and during such period shall not pay the serving officer."

[5] General Statutes (Supp. 2022) § 52-367b (e) provides: "**Claim of exemption and claim of prior perfected security interest.** To prevent the financial institution from paying the serving officer, as provided in subsection (h) of this section, the judgment debtor shall give notice of a claim of exemption by delivering to the financial institution, by mail or other means, the exemption claim form or other written notice that an exemption is being claimed and any such secured party shall give notice of its claim of a prior perfected security interest in such deposit account by delivering to the financial institution, by mail or other means, written notice thereof. The financial institution may designate an address to which the notice of a claim of exemption, or a secured party claim notice, shall be delivered. Upon receipt of such notice, the financial institution shall, within two business days, send a copy of such notice to the clerk of the court which issued the execution."

[6] General Statutes (Supp. 2022) § 52-367b (a) provides: "**Exempt debts.** Execution may be granted pursuant to this section against any debts due from any financial institution to a judgment debtor who is a natural person, except to the extent such debts are protected from execution by sections 52-352a, 52-352b, 52-352c of the general statutes, revision of 1958, revised to 1983, 52-354 of the general statutes, revision of 1958, revised to 1983, 52-361 of the general statutes, revision of 1958, revised to 1983 and section 52-361a, as well as by any other laws or regulations of this state or of the United States which exempt such debts from execution."

[7] General Statutes (Supp. 2022) § 52-367b (k) provides: "**Forms.** The execution, exemption claim form and clerk's notice regarding the filing of a claim of exemption shall be in such form as prescribed by the judges of the Superior Court or their designee. The exemption claim form shall be dated and include a checklist and description of the most common exemptions, instructions on the manner of claiming the exemptions and a space for the judgment debtor to certify those exemptions claimed under penalty of false statement."

handwritten notation stating "[f]unds in these accounts are not my property."

Thereafter, on October 13, 2022, the court held an evidentiary hearing pursuant to § 52-367b (f) (1)[8] to consider the defendant's claim of exemption. At that hearing, the defendant claimed that the accounts belonged to his mother, that he had no ownership interest in them, and that he had no intent to become an owner of the accounts. Following the hearing and the submission of posttrial briefs, the court, *Baio*, *J.*, issued a memorandum of decision dated October 26, 2022, denying the defendant's claim of exemption. The court found that (1) the accounts were joint bank accounts, (2) the defendant was a co-owner on those accounts, and (3) the funds within those accounts were not exempt from execution. The court further concluded that the defendant had not identified an exemption provided for by statute.

In the court's memorandum of decision, it stated: "The defendant does not dispute that the law permits the execution on joint accounts. He argues, rather, that this account is not a joint account. He submits that he is not an 'owner' of the account, the funds belong to his mother, and he has neither contributed to the funds nor exercised dominion or control over the funds.

[8] General Statutes (Supp. 2022) § 52-367b (f) (1), titled "**Hearing**," provides: "Upon receipt of an exemption claim form or a secured party claim notice, the clerk of the court shall enter the appearance of the judgment debtor or such secured party with the address set forth in the exemption claim form or secured party claim notice. The clerk shall forthwith send file-stamped copies of the exemption claim form or secured party claim notice to the judgment creditor and judgment debtor with a notice stating that the disputed funds are being held for forty-five days from the date the exemption claim form or secured party claim notice was received by the financial institution or until a court order is entered regarding the disposition of the funds, whichever occurs earlier, and the clerk shall promptly schedule the matter for a hearing. The claim of exemption filed by such judgment debtor shall be prima facie evidence at such hearing of the existence of the exemption."

Hence, the issue is whether the account at issue is a joint account. The defendant maintains that it was never his intention to claim ownership of this account.

"The problem for the defendant is that despite his intentions or desires, that does not change the nature of the account at issue. It also bears noting that the defendant is not an unsophisticated consumer who might be challenged in reading the bank forms. By his own testimony . . . he is a college and law school graduate . . . .

"Through the evidence submitted by the defendant, all three named individuals, the defendant, his sister, and their mother, are named as owners on the account. Each has the authority to make transactions on the account. . . . Even though the defendant testified that he had made no withdrawals, it is undisputed that he could have done so if he so chose.

"The bank form adding the defendant to the account expressly lists the defendant as an account owner. . . . The plaintiff correctly points out the express language on the form under the caption 'important information,' which provides that by signing the form, the defendant acknowledges that he is an account owner. The evidence establishes that the account at issue is a joint account, and there has been no evidence presented that the account funds are exempt from execution under the statute. To hold otherwise would be to improperly create an exemption not otherwise provided by statute. Cf. *Pac* v. *Altham*, 49 Conn. App. 503, 508–509, 714 A.2d 716 (1998). The defendant's claim of exemption is denied." (Citations omitted; footnote omitted.) This appeal followed.

On appeal, the defendant claims that the court improperly found that the accounts at issue were joint accounts and, therefore, were not exempt from execution under § 52-367b. Specifically, the defendant argues

that the funds held in the accounts are exempt from execution because they belong solely to his mother. He also claims that the court erred in determining that the burden of proof to establish the basis for the claimed exemption under § 52-367b did not shift to the plaintiffs once he filed his claim of exemption because such filing constituted prima facie evidence that the funds are exempt from execution. We disagree because, as the trial court correctly concluded, the defendant's asserted exemption is not a claim of exemption that he is entitled to assert under § 52-367b.

We begin with our standard of review and an overview of the pertinent statutory provisions. Because the defendant's claim on appeal rests on the meaning and application of § 52-367b, our review is plenary. See *Marchesi* v. *Board of Selectmen*, 309 Conn. 608, 614, 72 A.3d 394 (2013) ("[i]ssues of statutory construction raise questions of law, over which we exercise plenary review" (internal quotation marks omitted)). "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] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *TLOA of CT, LLC* v. *Taipe*, 220 Conn. App. 667, 673–74, 300 A.3d 647, cert. granted, 348 Conn. 923, 304 A.3d 443 (2023). Accordingly, we begin by examining § 52-367b.

Pursuant to General Statutes (Supp. 2022) § 52-367b (a), "[e]xecution may be granted . . . against any debts

due from any financial institution to a judgment debtor who is a natural person, except to the extent such debts are protected from execution by sections 52-352a, 52-352b, 52-352c of the general statutes, revision of 1958, revised to 1983, 52-354 of the general statutes, revision of 1958, revised to 1983, 52-361 of the general statutes, revision of 1958, revised to 1983 and section 52-361a, as well as by any other laws or regulations of this state or of the United States which exempt such debts from execution." Section 52-367b (c) (1) provides in relevant part: "[I]f any such financial institution upon which such execution is served and upon which such demand is made is indebted to the judgment debtor, the financial institution shall remove from the judgment debtor's account the amount of such indebtedness not exceeding the amount due on such execution . . . ." General Statutes (Supp. 2022) § 52-367b (c) (1). If a financial institution removes funds from a judgment debtor's account, it must provide proper notice to the judgment debtor and any secured party. General Statutes (Supp. 2022) § 52-367b (d).

A judgment debtor, upon belief that debts are exempt from execution, may file a claim of exemption pursuant to § 52-367b (e) by filing form JD-CV-24A, titled "Exemption Claim Form Financial Institution Execution."[9] Sec-

[9] General Statutes (Supp. 2022) § 52-367b (e) provides in relevant part: "To prevent the financial institution from paying the serving officer, as provided in subsection (h) of this section, the judgment debtor shall give notice of a claim of exemption by delivering to the financial institution, by mail or other means, the exemption claim form or other written notice that an exemption is being claimed and any such secured party shall give notice of its claim of a prior perfected security interest in such deposit account by delivering to the financial institution, by mail or other means, written notice thereof. . . . Upon receipt of such notice, the financial institution shall, within two business days, send a copy of such notice to the clerk of the court which issued the execution."

Form JD-CV-24A can be found on the Judicial Branch website. See Official Court Webforms, Form JD-CV-24A, available at https://www.jud.ct.gov/webforms/forms/CV024A.pdf (last visited March 4, 2024).

tion 4 of this form, titled "Affidavit of Claim of Exemption Established by Law," states: "I, the judgment debtor named above, claim and certify under the penalty of false statement that the money in the above account is exempt by law from execution as follows . . . ." The form then provides a checklist of the most common statutory exemptions and includes an "[o]ther" option with space to explain the legal basis for the claim of exemption.

Once a judgment debtor claims an exemption from execution pursuant to § 52-367b (e), the court must schedule a hearing on the exemption claim. The exemption claim filed by the debtor is considered prima facie evidence that the claimed exemption exists. See General Statutes (Supp. 2022) § 52-367b (f). The court, after conducting this hearing, must decide whether the exemption claim is meritorious; see General Statutes (Supp. 2022) § 52-367b (i); and, if so, whether all or only part of the money deposited in the subject account is exempt. See General Statutes (Supp. 2022) § 52-367b (j); see also *Pac* v. *Altham*, supra, 49 Conn. App. 507.

In the present case, the defendant purported to claim an exemption not recognized or enumerated under § 52-367b—specifically, that the funds in the accounts were not his but, instead, belonged solely to his mother. Both the plain language of § 52-367b and our case law, however, make clear that the only cognizable exemptions are those provided for by that statute. Section 52-367b (a) plainly and unambiguously states that the judgment debtor is only permitted to assert exemptions set forth by statute or "any other *laws or regulations* of this state or of the United States which exempt such debts from execution." (Emphasis added.) General Statutes (Supp. 2022) § 52-367b (a).

Indeed, this court previously has held that a judgment debtor may assert only those exemptions set forth in § 52-367b (a). See *Pac* v. *Altham*, supra, 49 Conn. App.

508. In *Pac*, the plaintiff, after obtaining a judgment against the defendant, applied for and received a bank execution, which, at a later hearing on the defendant's claim of exemption, was found to be untimely served and therefore, void. Id., 504–505. In the interim, the plaintiff had applied for and received a second bank execution to levy the defendant's funds, and the defendant filed another exemption claim form, this time asserting that the funds were exempt from execution because they had been improperly removed from the account by virtue of the first untimely served execution. Id., 505. Following a hearing on the second execution, the court ruled that the funds were exempt from execution because, but for the fact that the funds had been removed improperly under the first execution, the funds would have been available to the defendant to withdraw and would not have been available for execution at the time the second execution was served. Id.

On appeal to this court, the plaintiff argued that the trial court improperly recognized and applied an exemption not provided for by statute. Id., 504. This court agreed with the plaintiff and reversed the judgment of the trial court, explaining that "the trial court improperly created an exemption not otherwise provided by statute. . . . Specifically, the trial court found that the entire account was exempt from execution because of the proceedings related to the service of the first execution, which was untimely and therefore improper. This exemption is not provided for in the General Statutes. To the contrary, General Statutes § 52-352b sets forth the list of statutory exemptions. We conclude that the trial court's exemption is not provided for by statute, and, accordingly, the judgment should be reversed." (Citation omitted; footnote omitted.) Id., 508–509.

Here, as in *Pac*, the defendant's claimed exemption is not among the exemptions recognized and enumerated under § 52-367b (a). As a result, the trial court properly

concluded that the defendant's claim of exemption failed because "[t]o hold otherwise would be to improperly create an exemption not otherwise provided by statute."

Nevertheless, in his supplemental brief to this court,[10] the defendant notes for the first time that he also filed in the trial court a claim for determination of interests pursuant to General Statutes § 52-356c. That statute provides in relevant part that: "Where a dispute exists between the judgment debtor or judgment creditor and a third person concerning an interest in personal property sought to be levied on, or where a third person claims that the execution will prejudice his superior interest therein, *the judgment creditor or third person may*, within twenty days of service of the execution or upon application by the judgment creditor for a turnover order, make a claim for determination of interests pursuant to this section. . . ." (Emphasis added.) General Statutes § 52-356c (a).

Section 52-356c (b), in turn, provides that such claim "shall be filed with the Superior Court, on a prescribed form as a supplemental proceeding to the original action. . . ." Section 52-356c (c) further provides that, "[o]n filing of the claim, the clerk of the court shall assign the matter for hearing . . . and order that notice of the hearing be served by the claimant on all persons known to claim an interest in the disputed property."

Although the record in the trial court reveals that the defendant filed a claim for determination of interests in this case, that claim was neither pursued by the defendant nor adjudicated by the court. Instead, the

[10] At oral argument before this court, both parties were questioned as to whether the defendant had standing to argue that the money in the accounts belongs solely to his mother even though he is not her legal representative. On November 16, 2023, following oral argument, we ordered the parties to file simultaneous supplemental briefs on that issue. The plaintiffs and the defendant complied with the court's order by filing briefs on December 21 and 22, 2023, respectively.

defendant's sole claim before the court was that the funds were exempt from execution pursuant to § 52-367b (a). Indeed, that is the only claim the defendant has raised in this appeal.

More fundamentally, only a judgment creditor or a third person may make a claim for determination of interests pursuant to § 52-356c (a). Judgment debtors, unless acting in a representative capacity for an appropriate third party with an alleged interest in the subject property, may not file a claim for determination of interests under § 52-356c. See *Simko* v. *LaMorte*, 222 Conn. 793, 798, 610 A.2d 663 (1992) ("although generally the judgment debtor is not a party to the hearing [pursuant to § 52-356c] . . . in the present case, the defendant, as trustee for third parties with deposits in the account, may request a hearing pursuant to § 52-356c, on behalf of those third parties" (citation omitted)). Consequently, and because the defendant in this case lacked any legal capacity to act on his mother's behalf, he was not authorized by statute to challenge TD Bank's determination that he was a co-owner of the accounts by pursuing a claim for determination of interests pursuant to § 52-356c.[11]

[11] Although we need not reach the issue in light of our conclusion that the defendant failed to assert a valid exemption, we also conclude that the trial court's finding that the defendant was a co-owner on the accounts was not clearly erroneous, irrespective of whether the court applied the correct burden of proof. See *Maye* v. *Canady*, 214 Conn. App. 455, 460, 280 A.3d 1270 ("It is well established that [o]ur review of questions of fact is limited to the determination of whether the findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.)), cert. denied, 345 Conn. 919, 284 A.3d 627 (2022).

The judgment is affirmed.

In this opinion the other judges concurred.

In his brief to this court, the defendant argues that he had no intention of becoming a joint owner on his mother's account. However, despite the defendant's claimed intention, the evidence presented clearly demonstrated that the defendant signed a form indicating that he was to be added as a co-owner of the accounts. Indeed, the trial court found "[t]he bank form adding the defendant to the account expressly lists the defendant as an account owner. . . . The plaintiff correctly points out the express language on the form under the caption 'important information,' which provides that by signing the form, the defendant acknowledges that he is an account owner. The evidence establishes that the account at issue is a joint account . . . ." (Citation omitted; footnote omitted.) Moreover, our case law is clear that joint accounts can be executed upon in their entirety even when only one co-owner is the judgment debtor. *Fleet Bank Connecticut, N.A.* v. *Carillo*, 240 Conn. 343, 352, 691 A.2d 1068 (1997) (holding that in cases of joint bank accounts, "each coholder of a joint account . . . has a sufficient property interest [in the account] to permit a judgment creditor to exercise a bank execution, pursuant to § 52-367b, against the entire account" (emphasis omitted)); see also *Masotti* v. *Bristol Savings Bank*, 232 Conn. 172, 173–75, 653 A.2d 179 (1995) (adopting holding of trial court that coholders of joint account have sufficient ownership interests in account so that creditor of any one coholder may exercise setoff rights against account in its entirety).

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NOTICES

OFFICE OF CHIEF DISCIPLINARY COUNSEL V. HEIKS, COREY A. NNH CV20-6102022S

The court, having found the respondent Corey A. Heiks (Juris Number 432852) in contempt of the court orders of November 17, 2022, April 27, 2023 and May 15, 2023, hereby orders Corey A. Heiks suspended from the practice of law for one year consecutive to the current orders of suspension. The court further orders that the respondent shall reimburse the Client Security Fund (CSF) for any claims paid on behalf of the respondent pursuant to the court orders in the above-captioned file instead of making restitution to the named client as ordered.

By the court (Fischer, J.)
1/23/2024

Notice of Reprimand of Attorneys

Pursuant to Practice Book Section 2-54, notice is hereby given of the following reprimands ordered by the reviewing committee of the Statewide Grievance Committee:

Reviewing Committee Reprimands

November 17, 2023: Sylvia D. Reid – 410157

December 15, 2023: Michael Cruz – 419331

December 22, 2023: Gerald E. Linden – 302004

January 5, 2024: James J. Schultz - 308265

Copies of the full text of the decision of the Statewide Grievance Committee are available through the Committee's offices at 999 Asylum Avenue, Fifth Floor, Hartford, Connecticut 06105. The fee for copies is $.25 (twenty-five cents) per page. The full text of the decision is also available on the Connecticut Judicial Branch website (www.jud.ct.gov).

Attest:

Christopher L. Slack
Statewide Bar Counsel

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on 2/7/24 in docket number FBT CV17 6061784s, Jeanmarie Riccio-Ryan, juris number 402979, has been reprimanded.

The Court (Stevens, J.)

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on 2/7/24 in docket number FBT CV22 6118436s, Jeanmarie Riccio-Ryan, juris number 402979, has been reprimanded.

The Court (Stevens, J.)