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STEPHEN C. FREIDHEIM *v.* EDWARD F. MCLAUGHLIN, TRUSTEE (EDWARD F. MCLAUGHLIN REVOCABLE TRUST), ET AL.
(AC 44731)

Prescott, Elgo and DiPentima, Js.

Syllabus

The plaintiff, who owned waterfront property abutting that of the defendants, sought, inter alia, injunctive relief in connection with the defendants' alleged obstruction of his view of Long Island Sound under an easement in the deed to the defendants' property. The original deed to the defendants' property, first conveyed in 1924, contained restrictions stating that the grantee could "not erect or maintain any division fences or hedges between said premises and the adjoining land," and that division fences or hedges on the property could not exceed five feet in height. The deed, which stated that the restrictions were to run with the land, also contained requirements as to the placement and approval of outbuildings on the property. The defendants initially took steps to bring hedges on their property into conformance with the height restriction but later planted hedges of evergreen trees that violated the view easement restriction. The plaintiff thereafter brought the present action, seeking, inter alia, to quiet title to the easement and to enforce its height restrictions as to the hedges, including the evergreen trees, and as to a pool house on the defendants' property that he claimed was in violation of the outbuilding restriction and obstructed his water view. The plaintiff further sought injunctive relief pursuant to statute (§ 52-480), claiming that the defendants had maliciously planted the evergreen trees in violation of statute (§ 52-570) for the purpose of impairing his view. The trial court denied the plaintiff's motion for summary judgment and granted the motion for summary judgment filed by the defendants, determining, inter alia, that, although the plaintiff had established the existence of the easement and that the defendants were obstructing his water view, the restrictions in the easement applied only to a fence or hedge along the boundary line between the parties' properties. The court further determined that the applicable statute of limitations (§ 52-575a) barred the plaintiff's claim as to the pool house but made no mention of his claim regarding the planting of the evergreen trees. The court thereafter denied the plaintiff's motion for reargument without addressing the issue of the evergreen trees and rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held*:

1. The trial court, having properly determined that the view easement existed in the deed to the defendants' property and that the defendants were obstructing the plaintiff's water view, should not have granted the defendants' motion for summary judgment as to that count of the plaintiff's complaint seeking to quiet title to the easement and, instead, should have granted the plaintiff's motion for summary judgment as to that claim.
2. The trial court improperly rendered summary judgment for the defendants as to the scope of the view easement, which was based on the court's erroneous determination that the language in the defendant's deed was clear and unambiguous:

   a. The trial court's determination as a matter of law that the easement limited the height of a fence or hedge only along the property line between the parties' parcels but not hedges beyond the property line was improper, as the deed's language reasonably could be read to apply to all hedges between the defendants" property and the plaintiff's property, and the language of the height restriction did not clearly and unambiguously require that the word "division" modify both fences and hedges, as the court found, as that would render superfluous language in the easement following the word hedges, namely, "between said premises and the adjoining land"; moreover, there was no authority for the plaintiff's claim that a division fence can be a fence located anywhere on the defendants' property in light of case law and because the term division fence at the time of the 1924 deed had a common, natural and ordinary

meaning as a fence along a boundary line between two adjoining parcels of real property; accordingly, because the court failed to consider the height restriction in light of the surrounding circumstances when it was imposed, the case had to be remanded for a determination of the scope of the easement and the plaintiff's rights thereunder, as that determination required a fact intensive inquiry that must be made by the trier of fact and not as a matter of law.

b. The trial court improperly determined that § 52-575a barred the plaintiff's claim that the defendants' pool house violated the easement's outbuilding restriction: although the parties did not dispute that the pool house had existed for more than three years before the plaintiff commenced this action, § 52-575a pertains to private restrictions and, therefore, was inapplicable to the easement at issue, which was not a private restriction and was intended to run with the defendants' land.

3. The defendants could not prevail on their claim that the trial court properly rendered summary judgment in their favor as to the claim that they maliciously planted evergreen trees that violated the easement's height restriction for the purpose of obstructing the plaintiff's water view: neither the trial court's memorandum of decision nor its ruling on the plaintiff's motion for reargument addressed the plaintiff's claims pertaining to the evergreen trees, and, without the necessary factual findings or a statement by the court that no genuine issue of material fact existed with respect to the elements of those claims, this court had no basis from which to conclude that the trial court properly rendered summary judgment on those claims; moreover, the defendants' assertion that they did not erect any structure for the purposes of §§ 52-570 and 52-480 because the pool house and any hedges near the pool were present when they purchased their property was of no consequence to the plaintiff's claim, which pertained to the evergreen trees the defendants planted after the plaintiff purchased his property.

Argued September 12, 2022—officially released February 28, 2023

Procedural History

Action, inter alia, to quiet title to a certain view easement that was allegedly being obstructed by the defendants and to determine the parties' rights under the view easement, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hernandez*, *J.*, granted the defendants' motion for summary judgment, denied the plaintiff's motion for summary judgment and rendered judgment for the defendants, from which the plaintiff appealed to this court; thereafter, Patricia Ann McLaughlin et al. were substituted as successor defendant cotrustees of the Edward F. McLaughlin Revocable Trust. *Reversed in part*; *further proceedings*.

Linda L. Morkan, with whom was *Brian R. Smith*, for the appellant (plaintiff).

John F. Carberry, with whom was *M. Juliet Bonazzoli*, for the appellees (defendant Patricia Ann McLaughlin et al.).

Opinion

DiPENTIMA, J. In this action concerning a dispute between the plaintiff, Stephen C. Freidheim, and the defendant adjoining landowners, Edward F. McLaughlin, in his capacity as trustee for the Edward F. McLaughlin Revocable Trust (trust), and Patricia Ann McLaughlin,[1] regarding an alleged view easement, the plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendants on all five counts of the plaintiff's complaint. On appeal, the plaintiff claims that the court improperly (1) granted the defendants' motion for summary judgment after determining that the plaintiff had established the existence of a view easement that was being obstructed by the defendants, (2) misapplied the scope of the view easement restrictions when it determined that those restrictions applied only to a fence or hedge along the boundary line between the parties' properties, (3) determined that the plaintiff's claim that a "pool changing/utility outbuilding" (pool house) on the defendants' property violates an outbuilding restriction of the view easement was barred by the statute of limitations in General Statutes § 52-575a and (4) rendered summary judgment in favor of the defendants as to count three of the complaint, which alleges a violation of General Statutes § 52-570 for malicious planting of hedges that exceed a five foot height restriction of the view easement, and as to count four, which seeks injunctive relief pursuant to General Statutes § 52-480 related to the malicious planting of the hedges. We affirm the judgment only with respect to the court's determination that a view easement exists. We reverse the summary judgment rendered in favor of the defendants in all other respects and remand the case for further proceedings.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The plaintiff owns a parcel of real property located at 1 Smith Road in Greenwich, which he purchased via a warranty deed dated April 6, 2000 (plaintiff's parcel). The defendants purchased an adjacent parcel of real property located at 9 Smith Road in Greenwich via a warranty deed dated April 28, 1995 (defendants' parcel). Both parcels directly abut the waterfront and have views of Greenwich Harbor and Long Island Sound. In the early 1920s, the parcels were part of a larger parcel of undeveloped land owned by Oliver D. Mead, which forms what is now known as Field Point Circle. In connection with his development of the parcel in the 1920s, Mead subdivided the parcel into residential lots, created a road known as Smith Road, and filed a map titled, "Property of Oliver D. Mead, Greenwich Conn[ecticut]," with the town clerk on December 16, 1924, which became designated as map number 989 (Mead map). See Appendix to this opinion. On the Mead map, the plaintiff's parcel, now 1 Smith Road, is comprised

of lots 4 and 5 and is situated to the north of the defendants' parcel, now 9 Smith Road, which is designated as lot 3. To the south of the defendants' parcel are lot 2, which is now 17 Smith Road, and lot 1, which is now 23 Smith Road. All five lots are bordered on the west by Smith Road and to the east by Greenwich Harbor. The original home located on the plaintiff's parcel was oriented to face in a southeastward direction, so as to fully capture the view of the waterfront across the neighboring properties. The current home on the plaintiffs' parcel is in the same location as the original home and is similarly oriented to face Long Island Sound.

In 1924, the first lot Mead conveyed was lot 3, the defendants' parcel, via a deed to Ella Rossiter (Rossiter deed) dated December 16, 1924. The Rossiter deed includes a number of restrictions relevant to this case and provides in relevant part: "The Grantee for herself, her heirs, executors, administrators, and assigns hereby covenants and agrees with the Grantor his heirs, executors, administrators and assigns as follows . . . (2) That she will not erect or maintain any division fences or hedges between said premises and the adjoining land other than a stone fence, brick fence or hedge; and if stone, brick or hedge is used, it is not to be over five feet in height [height restriction]. . . . (4) That she . . . agrees to submit all plans and elevations for dwelling house or other outbuilding to be erected on said lot for the approval of the grantor, John Faher, S. K. Minor, Douglass Grahame Smyth, Grace E. Dalgleish and the grantee or a majority of them [approval restriction] . . . and the grantor agrees to restrict the remaining lots on the shore in like manner, to wit: lots 1 [and] 2. (5) That . . . no dwelling house, garage or employee's cottage or any other outbuilding, other than a boat house of one story shall be erected on any of said lots, any part of which shall be more distant than 200 feet from the easterly line of said proposed road [Smith Road] [outbuilding restriction], and the grantor agrees to restrict lots 1 [and] 2 in like manner. And the above covenants shall run with the land hereby conveyed." The restrictions in the Rossiter deed are contained in all deeds thereafter conveying ownership of 9 Smith Road, including the defendants' deed.

On December 24, 1924, Mead conveyed lots 4 and 5, which now are owned by the plaintiff, to Louise A. Smyth (Smyth deed). The Smyth deed contains the same height restriction for any "division fences or hedges" as the one in the Rossiter deed but does not include the approval restriction or the outbuilding restriction from the Rossiter deed, although it provides that the grantor would include those restrictions in any deed of conveyance of lots 1, 2, and 3, as was done in the conveyance to Rossiter and as shown in the deeds conveying lots 2 and 1. The plaintiff's deed provides that the subject premises being conveyed is subject to the "[r]estrictive covenants and agreements contained" in

the Smyth deed. Thus, the deeds for the plaintiff's parcel, the defendants' parcel, and lots 1 and 2 all contain the height restriction for division fences and hedges, whereas only the defendants' parcel and lots 1 and 2 are subject to the approval and outbuilding restrictions as well.

The plaintiff brought this action via a complaint dated March 2, 2017, in which he alleged five counts against the defendants. The basis for this action is the plaintiff's claim that the original landowner of the parties' properties, Mead, sought to protect views of Long Island Sound for future landowners by establishing a view easement in the deeds conveying each of the five residential lots, as evidenced by the inclusion of the height and outbuilding restrictions in certain of those deeds. The plaintiff alleges that, in November, 2001, he requested that the defendants abide by the view easement by maintaining hedges on their property to the five foot height restriction. The defendants responded by a letter dated January 18, 2002, in which they acknowledged the view easement and agreed to maintain the height of the hedges to five feet but declined to apply the height restriction to certain evergreen plantings because they did not constitute a "hedge . . . ." Although the defendants initially took steps to bring the hedges in conformity with the view easement, in May, 2002, the defendants planted two new rows of evergreen trees, the height of which violated the view easement, and have since refused to abide by the view easement restrictions with respect to various hedges on their property. The plaintiff further alleges that a pool house on the defendants' parcel is an outbuilding that is more than 200 feet from the easterly line of Smith Road in violation of the outbuilding restriction, and that plans for the pool house were never submitted for approval as required by the approval restriction.

In count one, the plaintiff sought a judgment quieting title with respect to the view easement restrictions over 9 Smith Road as those restrictions pertain to all hedges, fences and walls, as well as the pool house. In count two, he requested a declaratory judgment determining the parties' rights, obligations, and interests under the view easement. The plaintiff alleged a violation of § 52-570 in count three premised on the evergreen trees that had been planted by the defendants, which the plaintiff claimed constituted a hedge that was maliciously erected and impaired his view. In count four, the plaintiff sought injunctive relief pursuant to § 52-480 for the malicious plantings as alleged in count three, and in count five, he sought a permanent injunction enforcing the view easement.

Thereafter, the plaintiff filed a motion for summary judgment as to counts one, two and five of the complaint. In support of his motion, the plaintiff submitted documentary evidence, including the Mead map; maps

of the plaintiff's parcel; relevant deeds conveying the lots depicted on the Mead map; aerial photographs of the properties, as well as photographs depicting the view toward the water from the plaintiff's parcel and various plantings and the pool house on the defendants' parcel; affidavits; and letters and notes exchanged between the parties[2] relating to their disagreement over the alleged view easement obstructions. The defendants countered by filing a motion for summary judgment as to all counts and submitted relevant deeds, maps, photographs, correspondence, and an affidavit in support of their motion. Following argument on the motions, the court issued a memorandum of decision on September 30, 2019, granting the defendants' motion for summary judgment as to all counts and denying the plaintiff's motion for summary judgment. Subsequently, the court denied the plaintiff's motion for reargument, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

We first set forth our well established standard of review pertaining to a trial court's decision to grant a motion for summary judgment. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an 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 [in support of a motion for summary judgment]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Idlibi* v. *Hartford Courant Co.*, 216 Conn. App. 851, 860, 287 A.3d 177 (2022). "[T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Laiuppa* v. *Moritz*, 216 Conn. App. 344, 356, 285 A.3d 391 (2022). On appeal, we "must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 792, 185 A.3d 643 (2018).

I

The plaintiff's first claim is that the court, having determined that the plaintiff established the existence of a view easement that was being obstructed by the defendants, improperly rendered summary judgment in the defendants' favor as to count one, at a minimum. At oral argument before this court, counsel for the defendants acknowledged that the judgment needs to be corrected to reflect judgment for the plaintiff on count one that there is a view easement.

In count one, the plaintiff sought a judgment quieting title with respect to the view easement as it pertains to all hedges, fences, walls and the pool house. The trial court specifically found that "the restrictive covenant [height restriction] burdening the defendants' property is a view easement" that was being impaired and ordered the defendants, in accordance with that easement, to take corrective action and "to trim the hedges along the property line to a height not exceeding five feet." On appeal, the defendants conceded at oral argument before this court that such a view easement exists. Accordingly, in light of the court's determination that a view easement exists and was being obstructed by the defendants, the court should not have granted the defendants' motion for summary judgment as to count one to the extent that it seeks to quiet title to the view easement and, instead, should have granted the plaintiff's motion for summary judgment[3] in part as to count one.

II

The plaintiff next claims that the court (1) misapplied the scope of the view easement restrictions when it determined that those restrictions applied only to a fence or hedge along the boundary line between the parties' properties and (2) improperly determined that the plaintiff's claim that a pool house on the defendants' property violated the outbuilding restriction of the view easement was barred by the statute of limitations in § 52-575a. We agree with both claims and address them in turn.

Before we reach the merits of the plaintiff's claims, we first set forth our standard of review and fundamental principles of law governing easements and the construction of deeds. "The principles guiding our construction of land conveyance instruments, such as the [deeds] at issue in this appeal, are well established. The construction of a deed . . . presents a question of law which we have plenary power to resolve." (Internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282 Conn. 686, 704, 923 A.2d 737 (2007). "In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance, and that it shall, if possible, be so con-

strued as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . The construction of a deed in order to ascertain the intent expressed in the deed presents a question of law and requires consideration of all its relevant provisions in the light of the surrounding circumstances. . . . Thus, if the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity. . . . Finally, our review of the trial court's construction of the instrument is plenary." (Citations omitted; internal quotation marks omitted.) *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 510–11, 757 A.2d 1103 (2000).

"It is well settled that [a]n easement . . . obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . . In determining the character and extent of an easement created by deed, the ordinary import of the language will be accepted as indicative of the intention of the parties, unless there is something in the situation of the property or the surrounding circumstances that calls for a different interpretation. . . . Except as limited by the terms of the servitude . . . the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . . Likewise, [e]xcept as limited by the terms of the servitude . . . the holder of the servient estate is entitled to make any use of the servient estate that does not reasonably interfere with enjoyment of the servitude." (Citations omitted; internal quotation marks omitted.) *57 Broad Street Stamford, LLC* v. *Summer House Owners, LLC*, 184 Conn. App. 834, 841, 195 A.3d 1143 (2018).

Because the term "view easement" is not explicitly used in the deeds, the present case involves an implied easement, which "is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property." (Internal quotation marks omitted.) *Sanders* v. *Dias*, 108 Conn. App. 283, 293, 947 A.2d 1026 (2008); see *Schwartz* v. *Murphy*, 74 Conn. App. 286, 297, 812 A.2d 87 (2002) ("[t]he law is settled that the obligation of

the owner of the servient estate, as regards an easement, is not to maintain it, but to refrain from doing or suffering something to be done which results in an impairment of it" (internal quotation marks omitted)), cert. denied, 263 Conn. 908, 819 A.2d 841 (2003), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

A

The first part of the plaintiff's claim concerns the court's misapplication of the view easement as it relates to the height restriction. Because the defendants concede that a view easement exists and do not challenge the court's determination to that effect on appeal, we limit our analysis to the issue of the scope of the view easement. Next, we set forth the language of the height restriction in the view easement that is at issue in this appeal. Starting with the Rossiter deed and continuing with every deed thereafter conveying 9 Smith Road, including the defendants' deed, the grantee agreed "not [to] erect or maintain any division fences or hedges between said premises and the adjoining land other than a stone fence, brick fence or hedge; and if stone, brick or hedge is used, it is not to be over five feet in height . . . ." Mead, the original grantor of the defendants' parcel, also included that restriction in the deeds conveying the plaintiff's parcel, as well as lots 2 and 1, which are located to the south of the defendants' parcel.

The trial court construed the language of the deed restriction to be clear and unambiguous as limiting the height of landscaping only along the property line between the plaintiff's and the defendants' parcels. In making that conclusion, the court rejected the plaintiff's argument that the scope of the view easement extends "beyond the property line hedges to include any landscaping throughout the property that is obstructing the plaintiff's view of . . . Long Island Sound." On appeal, the plaintiff contends that the court's interpretation renders the view easement meaningless, as the defendants were ordered to trim back hedges along the property line only but are not required to do so with respect to other plantings or hedges that are "only inches away" from the property line. The plaintiff asserts that he presented "undisputed evidence that the defendants had planted a second line of evergreens running parallel to the previously planted hedge on the property line . . . all of which was overgrown and exceed[ed] five feet . . . ." (Citation omitted.) The defendants argue that the court was correct in its interpretation of the limited scope of the view easement. The scope of the easement, therefore, is the primary issue in this appeal.

" 'Intent as expressed in deeds and other recorded documents is a matter of law. *Contegni* v. *Payne*, 18 Conn. App. 47, 51, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989); *Grady* v. *Schmitz*, 16 Conn. App. 292, 295–96, 547 A.2d 563, cert. denied, 209 Conn. 822, 551 A.2d 755 (1988).' *Perkins* v. *Fasig*, 57 Conn.

App. 71, 76, 747 A.2d 54 (2000). If, after a plenary review, an appellate court concludes that deeded easements exist, their nature and extent usually must be decided by a trial court, and ordinarily a remand is required for a finding of relevant facts to establish their boundaries. See *Bolan* v. *Avalon Farms Property Owners Assn., Inc.*, 250 Conn. 135, 146–47, 735 A.2d 798 (1999). Although the intent to create an easement by recorded instruments is a question of law, the deeds, maps and recorded instruments that created the easement must be considered in light of the surrounding circumstances to determine the nature and extent of the easement. *Perkins* v. *Fasig*, supra, 76." *Mandes* v. *Godiksen*, 57 Conn. App. 79, 82–83, 747 A.2d 47, cert. denied, 253 Conn. 915, 754 A.2d 164 (2000); see also *Stefanoni* v. *Duncan*, supra, 282 Conn. 699 ("Although in most contexts the issue of intent is a factual question on which our scope of review is limited . . . the determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary. . . . Nevertheless, [t]he determination of the scope of an easement is a question of fact . . . ." (Citation omitted; internal quotation marks omitted.)).

Although a reviewing court customarily does not give deference to a trial court's construction of the language of a deed; see *57 Broad Street Stamford, LLC* v. *Summer House Owners, LLC*, supra, 184 Conn. App. 840; as we stated previously in this opinion, the trial court found the existence of a view easement in the deed and the defendants have not challenged that finding on appeal. The focus of the parties' disagreement concerns the scope of that easement. Thus, the question before this court is whether the trial court properly determined, as a matter of law on the defendants' motion for summary judgment, that the language of the height restriction in the view easement was clear and unambiguous and was limited to the hedges on the property line between the plaintiff's and the defendants' parcels.

When considering whether an ambiguity exists in a deed, a court does "not decide which party has the better interpretation, only whether there is more than one reasonable interpretation of the . . . language at issue. If we conclude that the language allows for more than one reasonable interpretation, the contract is ambiguous and the trial court's decision to render summary judgment, based on the conclusion that the contract is unambiguous, must be reversed and the matter remanded for a trial. Conversely, if the contract is unambiguous, its interpretation and application is a question of law for the court, permitting the court to resolve a [claim concerning the contract] on summary judgment if there is no genuine dispute of material fact." *Salce* v. *Wolczek*, 314 Conn. 675, 683, 104 A.3d 694 (2014); see also *Wells Fargo Bank, N.A.* v. *Fitzpatrick*, 190 Conn. App. 231, 238–39, 210 A.3d 88 (construction of deed is

governed by same rules of interpretation that apply to written instruments or contracts, with primary goal being to ascertain intention of parties), cert. denied, 332 Conn. 912, 209 A.3d 1232 (2019); *Bueno* v. *Firgeleski*, 180 Conn. App. 384, 405, 183 A.3d 1176 (2018) ("[w]here a deed is ambiguous the intention of the parties is a decisive question of fact" (internal quotation marks omitted)).

Moreover, "[t]he determination as to whether language of a contract [or deed] is plain and unambiguous is a question of law subject to plenary review. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Fiorillo* v. *Hartford*, 212 Conn. App. 291, 302, 275 A.3d 628 (2022). "[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *New Milford* v. *Standard Demolition Services, Inc.*, 212 Conn. App. 30, 56, 274 A.3d 911, cert. denied, 345 Conn. 908, 283 A.3d 506 (2022). Our Supreme Court has cautioned that "[t]he intention of the parties, gathered from their words, is gathered not by reading a single clause of the covenant but . . . by reading its entire context." *Moore* v. *Serafin*, 163 Conn. 1, 10, 301 A.2d 238 (1972); see also *National Associated Properties* v. *Planning & Zoning Commission*, 37 Conn. App. 788, 795, 658 A.2d 114 (same), cert. denied, 234 Conn. 915, 660 A.2d 356 (1995); *Russo* v. *Stepp*, 2 Conn. App. 4, 6, 475 A.2d 331 (1984) ("It is not always easy to determine what was intended by the parties. The language employed is not the only criterion. The language used therefore must be considered with reference to the situation of the property and the surrounding circumstances in order to ascertain the intention of the parties. *Mackin* v. *Mackin*, 186 Conn. 185, 189, 439 A.2d 1086 (1982).").

In the present case, the court addressed the issue of whether the view easement extended beyond the property line hedges and concluded: "In accordance with the clear terms set forth in the deed, the court finds that it cannot extend the meaning of the covenant to include landscaping growth in areas beyond the property line hedges." In the court's perspective, the language of the height restriction of the view easement clearly and unambiguously applied to the property line hedges only. In the absence of any other findings or explanation by the court, we can only surmise from the court's decision that the court found the word "division" in the height restriction to modify both fences and hedges. As we will explain more fully in this opinion, we do not agree that the language of the height restriction clearly and unambiguously requires such a conclusion.

The term "division fences" is not defined in the deed, and, therefore, we must look to the ordinary meaning of the term. See *NPC Offices, LLC* v. *Kowaleski*, 320 Conn. 519, 527–28, 131 A.3d 1144 (2016); see also *Cohen* v. *Hartford*, 244 Conn. 206, 215, 710 A.2d 746 (1998) ("the words [in a deed] are to be given their ordinary popular meaning, unless their context, or the circumstances, show that a special meaning was intended" (internal quotation marks omitted)). In doing so, "[w]e often consult dictionaries . . . to determine whether the ordinary meanings of the words used . . . are plain and unambiguous, or conversely, have varying definitions in common parlance." (Internal quotation marks omitted.) *NPC Offices, LLC* v. *Kowaleski*, supra, 528; see also *Avery* v. *Medina*, 151 Conn. App. 433, 442, 94 A.3d 1241 (2014) ("[w]hether . . . a term is ambiguous turns on whether it has varying definitions in common parlance" (internal quotation marks omitted)). Ballentine's Law Dictionary (2d Ed. 1948) "defines a division fence as a fence erected on the boundary line between adjoining proprietors. The term does not, however, apply to such fences as may be erected by each proprietor on his own land, though near and parallel to the boundary line." (Internal quotation marks omitted.) *Grosby* v. *Harper*, 4 Conn. Cir. 196, 199, 228 A.2d 563, cert. denied, 154 Conn. 718, 222 A.2d 810 (1966).

The plaintiff argues for a very broad interpretation of the term division fence, asserting that a division fence includes "a fence located *anywhere* on a property . . . ." (Emphasis in original.) In doing so, the plaintiff relies on the definition of a division fence in the Merriam-Webster Dictionary as "a fence separating adjacent areas of the same farm or ranch . . . distinguished from line fence," which is defined in the Merriam-Webster Dictionary as "a fence built along the boundary or property line of a farm or ranch." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/division%20fence and https://www.merriam-webster.com/dictionary/line%20fence (last visited February 21, 2023). The plaintiff also directs our attention to a number of random, secondary sources, which include references by the United States Bureau of Land Management to a division fence to describe fencing to control livestock within a pasture; a registration form from the National Register of Historic Places, which refers to a division fence as being between areas of the same cemetery; an excerpt from a book about Kentucky beef that distinguishes between boundary and division fences; an appropriations bill from the United States Department of the Interior, which refers to division fences as being needed for an interior lot to separate cattle; a chart prepared by a subcommittee of the United States House of Representatives that distinguishes between boundary and division fences; and an advertisement for a certain fence that references a division fence between a barnyard and a house yard. It

appears that most of the sources relied on by the plaintiff reference division fences in the context of farming, specifically, corralling or controlling livestock.

This court has stated previously that "[t]he language [in a deed] should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it *in the context of the parcels of land involved*." (Emphasis added; internal quotation marks omitted.) *Jepsen* v. *Camassar*, 181 Conn. App. 492, 517, 187 A.3d 486, cert. denied, 329 Conn. 909, 186 A.3d 12 (2018); see also *Castonguay* v. *Plourde*, 46 Conn. App. 251, 263, 699 A.2d 226 ("[t]he terms of a covenant . . . cannot be construed in a vacuum, but are to be understood in context"), cert. denied, 243 Conn. 931, 701 A.2d 660 (1997). The present case does not involve a farm or ranch, or any livestock; rather, it concerns a deeded view easement in deeds to waterfront properties that were once part of a single parcel of land. Moreover, in our review of the limited Connecticut authority addressing division fences, we have found no authority for the plaintiff's proposition that a division fence can be a fence located anywhere on a property. Instead, it can be inferred from many of the cases, some of which were decided near or before the time of the deeds at issue in the present case, that a division fence is one that is erected on a property line between adjoining landowners. See *Christen* v. *Ruppe*, 131 Conn. 149, 152, 38 A.2d 439 (1944) (suggesting that division fence is fence located on boundary line by statement that "no division fence or other structure . . . evidenced the location of the westerly boundary of the defendant's land"); *Bland* v. *Bregman*, 123 Conn. 61, 64, 192 A. 703 (1937) (plaintiff attempted to establish boundary line with evidence of location of division fence); *Milardo* v. *Branciforte*, 109 Conn. 693, 696, 145 A. 573 (1929) (it was "necessary inference" that fence built on property line between two adjoining landowners was division fence); *Cooke* v. *McShane*, 108 Conn. 97, 98, 142 A. 460 (1928) (stating that hedge that followed boundary line "was considered by both parties as a division fence" and that "hedge may be a division fence, if its middle be upon the boundary line"); *Millner* v. *Elias*, 101 Conn. 280, 286–87, 125 A. 470 (1924) (in charge to jury, court instructed that jury had to determine whether fence at issue was divisional fence and stated that evidence was offered suggesting that fence was not located on property line to disprove claim that fence was divisional fence); *Wooding* v. *Michael*, 89 Conn. 704, 706, 96 A. 170 (1915) (fence was not division fence because it was "not quite on the division line"); *Murray* v. *Aparicio*, Docket No. CV-12-6014866-S, 2016 WL 4497603, *3 n.6 (Conn. Super. July 20, 2016) ("a division fence . . . is a fence dividing two adjoining properties"); *Pereira* v. *E & E Builders, Inc.*, Docket No. CV-93-0044086-S, 1996 WL 469738, *1 (Conn. Super. August 6, 1996) (because "center line of [stone] wall constituted the property line

. . . the wall as built was on both properties and could be considered a division fence").

That definition also is consistent with the one in Ballentine's Law Dictionary and with a Connecticut statute governing division fences, General Statutes § 47-43, which provides in relevant part: "The proprietors of lands shall make and maintain sufficient fences to secure their particular fields. . . . Adjoining proprietors shall each make and maintain half of a divisional fence, *the middle line of which shall be on the dividing line* . . . ." (Emphasis added.) Although the present case involves our construction of language in a deed and not a statute, the statutory language is informative to our determination of the definition of a division fence.

Although the plaintiff urges us to adopt a definition of "division fence" that includes interior fencing on real property, we decline to do so. Instead, we conclude, on the basis of Connecticut authority and Ballentine's Law Dictionary, that the term "division fence," as used in the 1924 deed, had at that time a common, natural and ordinary meaning as a fence along a boundary line between two parcels of real property. Given that definition, it necessarily follows that, if "division" also modifies "hedges" in the language of the view easement, a division hedge is a hedge located on a boundary line between adjoining landowners. That interpretation, however, would render superfluous the language that follows "hedges" in the view easement—"between said premises and the adjoining land . . . ." See *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, 153 Conn. App. 387, 416, 102 A.3d 87 ("[t]he law of contract interpretation militates against interpreting a contract in a way that renders a provision superfluous" (internal quotation marks omitted)), cert. denied, 315 Conn. 901, 104 A.3d 106 (2014). Moreover, the language of the view easement must be construed so as "to effectuate the intent of the parties." (Internal quotation marks omitted.) *NPC Offices, LLC* v. *Kowaleski*, supra, 320 Conn. 526. With that in mind, and giving effect to every provision in the restriction, we conclude that the height restriction reasonably can be read as applying to "division fences" and to "hedges between said premises and the adjoining land . . . ." Because the deed language is susceptible to more than one reasonable interpretation, it is ambiguous. See id., 529. The trial court, therefore, improperly rendered summary judgment in favor of the defendants on the basis of its erroneous determination that the language of the deed was clear and unambiguous.

Our Supreme Court has stated that, "[i]n arriving at the intent expressed . . . in the language used [in a deed] . . . it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing

should be considered with the help of that evidence. . . . Thus, if the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity. . . . [Appellate] review of the trial court's construction of the instrument is plenary." (Citation omitted; internal quotation marks omitted.) *Lakeview Associates* v. *Woodlake Master Condominium Assn., Inc.*, 239 Conn. 769, 780–81, 687 A.2d 1270 (1997); see also *Bueno* v. *Firgeleski*, supra, 180 Conn. App. 404–405 ("[L]anguage in a deed that purports to create a restrictive covenant must be construed in light of the circumstances attending and surrounding the transaction . . . . The primary rule of interpretation of such [restrictive] covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met." (Emphasis omitted; internal quotation marks omitted.)).

In determining the scope of the easement in the present case, the trial court, on the basis of its erroneous finding that the deed language was unambiguous, relied on the language of the deed only. Consequently, the court's failure to consider the restrictions in light of the surrounding circumstances when they were imposed was error.

Moreover, the fact intensive nature of the inquiry as to the scope of the view easement renders it ill-suited for summary adjudication. The appellate courts of this state repeatedly have held that " '[t]he determination of the scope of an easement is a question of fact.' " *Simone* v. *Miller*, 91 Conn. App. 98, 111, 881 A.2d 397 (2005); see also *NPC Offices, LLC* v. *Kowaleski*, supra, 320 Conn. 526 ("[t]he determination of the scope of an easement is a question of fact . . . [and] is for the trier of fact" (internal quotation marks omitted)); *Deane* v. *Kahn*, 317 Conn. 157, 166, 116 A.3d 259 (2015) (same); *Deane* v. *Kahn*, supra, 167 n.6 ("determining the location, scope, and use of an . . . easement is a fact-intensive inquiry"); *McBurney* v. *Paquin*, 302 Conn. 359, 367, 28 A.3d 272 (2011) (determination of scope of easement is question of fact); *Stefanoni* v. *Duncan*, supra, 282 Conn. 703–704 ("[t]he determination of the scope of an easement . . . is necessarily fact driven," and "the meaning of [an] ambiguous term in a deed is an issue 'of fact for the trial court' "); *Sack Properties, LLC* v. *Martel Real Estate, LLC*, 191 Conn. App. 383, 389, 214 A.3d 912 (2019) ("the determination of whether one has interfered with the use of an easement is a question of fact"); *Thurlow* v. *Hulten*, 130 Conn. App. 1, 2, 21 A.3d 535 (determination of scope of easement is question of fact for trier of fact), cert. denied, 302 Conn. 925, 28 A.3d 337 (2011); *Sanders* v. *Dias*, supra, 108 Conn. App.

295 (same).

"Additionally . . . [t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit. . . . The decision as to what would constitute a reasonable use of [an easement] is for the trier of fact . . . ." (Internal quotation marks omitted.) *Simone* v. *Miller*, supra, 91 Conn. App. 111; see also *57 Broad Street Stamford, LLC* v. *Summer House Owners, LLC*, supra, 184 Conn. App. 847. Indeed, this court has explained that "[f]actual findings are a necessary prerequisite to determine the scope and extent of [a plaintiff's] rights with respect to [an] easement. It is well established that appellate courts are not triers of fact and rely on the trial court's findings and conclusions related thereto." (Internal quotation marks omitted.) *Simone* v. *Miller*, supra, 111–12. "We cannot ourselves determine the precise scope of the easement on the basis of the evidence before the court because to do so would require us to make findings of fact." *First Union National Bank* v. *Eppoliti Realty Co.*, 99 Conn. App. 603, 610, 915 A.2d 338 (2007) (*First Union*).

This abundant authority leads us to the ineluctable conclusion that the fact intensive inquiry regarding the scope of the view easement must be made by the trier of fact and not as a matter of law. As was done by this court in *First Union* and *Simone*, we remand[4] the present case for further proceedings limited to the determination of the scope of the view easement and the plaintiff's rights thereunder. See id., 611; *Simone* v. *Miller*, supra, 91 Conn. App. 112. In making the determination as to the character and extent of the easement, the trier of fact must "look to the language of the deed, the situation of the property and the surrounding circumstances in order to ascertain the intention of the parties"; (internal quotation marks omitted) *Fitch* v. *Forsthoefel*, 194 Conn. App. 230, 236, 220 A.3d 876 (2019); and be mindful that, in giving meaning to the language of the deed, "we presume that the parties did not intend to create an absurd result." (Internal quotation marks omitted.) *South End Plaza Assn., Inc.* v. *Cote*, 52 Conn. App. 374, 378, 727 A.2d 231 (1999). Thus, because the court did not look beyond the language of the deed, on remand the trier of fact must consider the language of the deed in light of the circumstances surrounding and attending the transaction.

B

The plaintiff also claims that the court improperly determined that the statute of limitations in § 52-575a barred his claim that the pool house on the defendants' property violates the outbuilding restriction of the view easement. We agree.

The following additional facts are relevant to this claim. In connection with his claim that the trial court

misapplied the view easement, the plaintiff argues that the court improperly denied his request for relief with respect to the pool house on the defendants' property, which he claims impairs his view easement. The court addressed this issue in its memorandum of decision, stating: "The plaintiff also contends that the defendants violated the view easement by constructing a pool house/changing room on their property that obstructs the plaintiff's water view. The defendants, again, counter that the view easement does not burden their property beyond the limits of the height restriction to the property line hedges. The defendants further contend that the plaintiff's argument as to the pool house/changing room is barred by the three year statute of limitations set forth in . . . § 52-575a. Section 52-575a provides in relevant part: '[N]o action or any other type of court proceeding shall be brought to enforce a private restriction recorded in the land records of the municipality in which the property is located . . . unless such action or proceeding shall be commenced within three years of the time that the person seeking to enforce such restriction had actual or constructive knowledge of such violation.' The evidence in the record clearly establishes, and the parties do not dispute, that the subject pool house had been in existence for more than three years before commencement of the instant action. Accordingly, the court finds that the three year statute of limitations is applicable to this cause of action, and, therefore, the plaintiff's claim regarding the pool house/changing room is not viable and is hereby denied." The plaintiff argues that, because the view easement is not a "private restriction," it is not subject to the statute of limitations in § 52-575a.

The resolution of this claim is guided by our decision in *Kepple* v. *Dohrmann*, 141 Conn. App. 238, 60 A.3d 1031 (2013). In *Kepple*, the plaintiffs had brought an action against the defendant adjoining landowners for interference with a claimed view easement over the defendants' properties. Id., 241. In response, the defendants filed an answer and special defense, alleging that the plaintiffs had a private restriction, rather than a view easement, and that the action was barred by the statute of limitations in § 52-575a. Id. The trial court agreed with the defendants and rendered judgment in their favor. Id., 242. On appeal, this court reversed the judgment of the trial court, concluding that the covenant document at issue, which provided that the restrictions therein were restrictions that run with the land, granted the plaintiffs a view easement. Id., 244–45.

In reaching that decision, this court in *Kepple* explained that "[a] view easement generally is considered to be a negative easement. Negative easements prevent specific activities by the servient property such as a prohibition against certain types of improvements in order to protect the easement owner's right to sunlight or scenic views." (Internal quotation marks omit-

ted.) Id., 247. We stated further: "Although an easement does not create an ownership interest in the servient estate but creates a mere privilege to use the servient estate in a particular manner, an easement involves limited rights to enjoy or to restrict another's use of property. . . . If an easement is created to benefit and does benefit the possessor of the land in his use of the land, the benefit of that easement is appurtenant to the land. The land is being benefited by the easement in the neighboring property. . . . An important characteristic of appurtenant easements is that they continue in the respective properties, rather than being merely personal rights of the parties involved. The easement's benefit or its burden passes with every conveyance affecting either the servient or dominant property." (Citation omitted; internal quotation marks omitted.) Id., 249–50. Accordingly, this court, having found that the covenant document granted the plaintiffs a view easement, concluded in *Kepple* that "the statute of limitations contained in § 52-575a, concerning private restrictions, [was] not applicable in [that] case." Id., 251.

We agree with the plaintiff that *Kepple* controls the outcome of this issue. "A reservation in a covenant will be interpreted as appurtenant if, from the surrounding circumstances and other relevant provisions in the deed, the parties intended it to run with the land. . . . cf. *Blanchard* v. *Maxson*, 84 Conn. 429, 433, 80 A. 206 (1911) (easement of way will never be presumed to be personal when it can fairly be construed to be appurtenant to land). The only certain method of avoiding controversy and making sure that an easement or a covenant in an instrument . . . will be construed as other than personal is to use appropriate language to make the intention clear. . . . [W]here a restrictive covenant contains words of succession . . . a presumption is created that the parties intended the restrictive covenant to run with the land." (Citations omitted; internal quotation marks omitted.) *Castonguay* v. *Plourde*, supra, 46 Conn. App. 258.

In the present case, the language of the deed expressly indicates that the restrictions are intended to run with the land and are binding on the successors or assigns of the grantor and the heirs or assigns of the grantees. As we concluded in *Kepple*, § 52-575a, which applies to private restrictions, is not applicable to the easement at issue in the present case. The court, therefore, improperly rendered summary judgment in favor of the defendants on the basis of its determination that the statute of limitations barred the plaintiff's claim that the pool house obstructed the view easement. On remand, findings must be made as to whether the pool house falls within the scope of the view easement and, if so, whether it impairs the plaintiff's view easement.

III

The plaintiff's final claim is that the court improperly

rendered summary judgment in favor of the defendants as to count three of the complaint, which alleges a violation of § 52-570 for malicious planting of hedges that exceed the five foot height restriction of the view easement, and as to count four, which seeks injunctive relief pursuant to § 52-480 for the malicious plantings. We agree and remand the case for a trial on those counts.

Pursuant to § 52-570, "[a]n action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who maliciously erects any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land." In count three of his complaint, the plaintiff alleges a violation of § 52-570 by the defendants, claiming that a hedge of evergreen trees on the defendants' property constitutes a structure that was maliciously erected for the purpose of impairing the plaintiff's view easement. Specifically, paragraph 13 of the complaint alleges that, "[s]ometime after May, 2002, without the consent or knowledge of [the] plaintiff, [the] defendant[s] planted two new hedges of evergreen trees, which now also violate the view easement restrictions and obstruct [the] plaintiff's view of Long Island Sound . . . ." In count four, the plaintiff seeks injunctive relief pursuant to § 52-480[5] on the basis of the violation alleged in count three. In their memorandum of law in support of their motion for summary judgment, the defendants argued that a hedge is not a malicious structure under the statute and that the plaintiff could not satisfy the elements of § 52-570.[6] The trial court's memorandum of decision granting the defendants' motion for summary judgment as to all counts makes no reference to the claims in counts three and four concerning §§ 52-570 and 52-480. The plaintiff alerted the court to its omission in a motion to reargue dated October 21, 2019. The court, however, denied the plaintiff's motion to reargue without addressing the omission.[7] For the following reasons, we conclude that the court improperly granted the defendants' motion for summary judgment with respect to counts three and four of the complaint.

The necessary elements to establish a cause of action under §§ 52-570 and 52-480 are the same and include the following: "(1) a structure erected on the [defendant's] land; (2) a malicious erection of the structure; (3) the intention to injure the enjoyment of the adjacent landowner's land by the erection of the structure; (4) an impairment of the value of adjacent land because of the structure; (5) the structure is useless to the defendant; and (6) the enjoyment of the adjacent landowner's land is in fact impaired." (Internal quotation marks omitted.) *Errichetti* v. *Botoff*, 185 Conn. App. 119, 125, 196 A.3d 1199 (2018).

It is evident from case law that, unless a complaint is devoid of the necessary allegations for a cause of

action under §§ 52-570 and 52-480,[8] any inquiry into whether a plaintiff has established a claim under §§ 52-570 and 52-480 for the malicious erection of a structure is necessarily fact driven, as a court must make factual findings as to whether the defendants erected a structure on their land and, if so, whether it was done maliciously, with the intent to injure the plaintiff's enjoyment of his land, whether the structure impairs the value of the adjoining land, whether the structure is useless to the defendant, and whether the structure, in fact, impaired the plaintiff's enjoyment of his land. See id., 132, 135 (trial court's factual findings regarding usefulness of alleged spite fence and that fence impaired plaintiff's enjoyment of his property were not clearly erroneous); *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, 138 Conn. App. 289, 303, 50 A.3d 968 (2012) (determining that trial court's factual findings that alleged spite fence was useless to defendant and did not negatively affect defendant's property were not clearly erroneous).

Moreover, in determining whether the structure was erected maliciously, a court must consider the "character, location and use"; *DeCecco* v. *Beach*, 174 Conn. 29, 32, 381 A.2d 543 (1977); of the structure, which inherently requires factual findings made on the basis of the evidence presented. These factual inquiries also may involve an assessment of the credibility of testimony of witnesses, which must be determined by the trier of fact. See *Statewide Grievance Committee* v. *Dixon*, 62 Conn. App. 507, 511, 772 A.2d 160 (2001) ("[t]he weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact" (internal quotation marks omitted)); *In re Felicia B.*, 56 Conn. App. 525, 526, 743 A.2d 1160 ("This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.)), cert. denied, 252 Conn. 951, 748 A.2d 298 (2000).

As we stated previously in this opinion, the trial court neither addressed nor referenced the claims in counts three and four in its decision. Without the necessary factual findings or a statement by the court that no genuine issue of material fact existed with respect to each of the elements of the claims pursuant to §§ 52-570 and 52-480, we have no basis on which to conclude that the motion for summary judgment was properly granted as to counts three and four.

The defendants essentially argue that the court properly rendered summary judgment in their favor on counts three and four because the plaintiff cannot, as a matter of law, establish two elements of a claim under § 52-570.[9] Specifically, the defendants argue that (1) a

hedge cannot constitute a "structure" under § 52-570, and (2) they did not *erect* any structure for purposes of the statute because the pool house and any hedges near the pool were present when they purchased their property in 1995. Accordingly, the defendants claim that they could not have maliciously erected any structures that already existed on their property when they purchased it. We disagree with both claims.

First, in support of their argument that a hedge cannot constitute a structure under the statute, the defendants rely solely on *Dalton* v. *Bua*, 47 Conn. Supp. 645, 822 A.2d 392 (2003). The defendants' reliance on *Dalton*, however, is misplaced. We begin our discussion by noting that no appellate court of this state has yet determined whether a hedge or line of trees can constitute a "structure" for purposes of § 52-570. We also note that we are not bound by decisions of the Superior Court. See *Cavanagh* v. *Richichi*, 212 Conn. App. 402, 416 n.7, 275 A.3d 701 (2022). In *Dalton*, the trial court, *Blue*, *J.*, addressed the issue of whether a hedge is a structure for purposes of §§ 52-480 and 52-570.[10] *Dalton* v. *Bua*, supra, 645. In answering that question in the negative, Judge Blue reasoned: "The walls and fences at issue in the malicious structure cases decided since 1867 have been constructions built by persons. When a construction is malicious, the law says, 'Don't build it.' Hedges, however, grow naturally. *There is no suggestion that the hedge in question here was maliciously planted.* The suggestion, rather, is that it has maliciously been allowed to grow. . . . The complaint is not that the [defendants] have done something. The complaint, rather, is that they have not done something. Whatever the problems of the action/inaction distinction in the tort or criminal law . . . that distinction lies as the textual heart of the malicious structure statutes in question here. These statutes prohibit malicious 'structures' from being 'erected.' They do not require naturally growing plantings to be affirmatively trimmed." (Emphasis altered.) Id., 648.

Significantly, in the present case, the plaintiff expressly alleges in his complaint that, sometime after May, 2002, after the parties had engaged in discussions concerning the view easement and the defendants had taken steps to bring all hedges, including evergreen plantings, in conformity with the view easement restrictions, they planted two new hedges of evergreen trees in violation of the view easement. Thus, unlike in *Dalton*, in which "there was no suggestion that the hedge in question . . . was maliciously planted"; id.; the present case includes such an allegation. Moreover, in *Dalton*, Judge Blue repeatedly referred to the hedge at issue in that case as a naturally growing planting, stating: "The natural growth of trees is an inescapable fact of life. The law is reluctant to compel possessors of land to alter the natural condition of their property . . . ." (Citation omitted.) Id., 648–49. The present case, in

contrast, involves a hedge of trees that allegedly was planted by the defendants and was not an existing natural condition of their property.[11]

This issue also was addressed by the United States District Court for the District of Connecticut in *Williams* v. *Bean*, Docket No. 16-CV-1633 (VAB), 2017 WL 5179231, *14–15 (D. Conn. November 8, 2017). In that case, the defendants claimed that the plaintiffs maliciously " 'erected structures' on their property in the form of a uniform row of [thirty] trees" that were "fourteen feet in height . . . and designed to eliminate the [w]ater [v]iews that 'enticed' the [defendants] to purchase [their] property in the first instance." (Citation omitted.) Id., *14. The defendants argued further that the trees served no useful purpose to the plaintiffs "other than to annoy and injure the [defendants]" by eliminating the property's water views and impairing its fair market value. Id. The District Court concluded that the defendants' claims could proceed, as they plausibly had alleged a violation of §§ 52-570 and 52-480. Id. In distinguishing *Dalton*, the court explained: "*Dalton* . . . does not require a different outcome. . . . While *Dalton* notes that '[a]n obstruction that is not "artificially built up" is not a "structure"' . . . here, the [defendants] have plausibly alleged that the [t]ree [w]all, 'composed of parts and joined together in some definite manner' is 'artificially built up' to obstruct the [defendants'] use [or] enjoyment of their [p]roperty. . . . While the [plaintiffs] may foreseeably claim that they built the [t]ree [w]all with the intention of ensuring their ability to enjoy their property in privacy, it does not follow that they could not have acted with the malicious intention to also injure the [defendants] or that the entirety of the [t]ree [w]all is therefore of use to the [plaintiffs]." (Citations omitted.) Id., *15. In light of these authorities, we are not persuaded by the defendants' claim that a hedge of trees planted by a landowner can never constitute a "structure" for purposes of the malicious structure statutes.

As noted previously, we are not bound by the decision in *Dalton*. Nonetheless, we conclude that it is distinguishable from the present case; accordingly, the defendants' sole reliance thereon to support their claim that a hedge cannot be a structure under §§ 52-570 and 52-480 is unavailing. We find equally unavailing the defendants' claim that they did not *erect* any structure for purposes of the statutes because the pool house and any hedges near the pool were present when they purchased their property in 1995. A plain reading of the complaint indicates that the allegations of counts three and four pertain to two new hedges of evergreen trees allegedly planted by the defendants in 2002, and not to the pool house or any hedges near the pool. The defendants' assertion, therefore, that the pool house existed on their property at the time of purchase is of no consequence to the allegations of counts three and four pertaining to

the two new hedges of evergreen trees. The defendants, therefore, have failed to demonstrate that summary judgment was properly rendered in their favor as to counts three and four. Accordingly, we reverse the summary judgment on those counts and remand the matter for a trial thereon, at which the court can make the requisite findings pertaining to the claims under §§ 52-570 and 52-480.

In summary, we reverse the summary judgment rendered in favor of the defendants with respect to count one, in part, as it relates to the claim seeking to quiet title as to the view easement. The court determined that a view easement exists that was being obstructed by the defendants, and that determination has not been challenged on appeal. Accordingly, the court should have rendered summary judgment in the plaintiff's favor as to that claim in count one. Moreover, with respect to the remaining allegations[12] of counts one, and to counts two and five, the trial court improperly determined, as a matter of law on the defendants' motion for summary judgment, that the language of the height restriction in the view easement is clear and unambiguous and is limited to the hedges on the property line between the plaintiff's and the defendants' parcels. The court also improperly failed to address or make any findings relating to the pool house and whether it violates the view easement. Therefore, the case must be remanded for further proceedings relating to counts one, two and five only to determine the scope of the view easement and the plaintiff's rights with respect thereto, including which hedges fall within its scope, whether the pool house falls within the purview of the view easement, and, if so, whether it impairs the plaintiff's view easement. Finally, we reverse the summary judgment rendered in favor of the defendants as to counts three and four and remand the case for a trial on those counts.

The judgment is reversed in part and the case is remanded for further proceedings consistent with the preceding paragraph; the judgment is affirmed only with respect to the trial court's determination that a view easement exists.

In this opinion the other judges concurred.

[1] Edward F. McLaughlin died during the pendency of this action. Thereafter, Howard V. Sontag and Patricia Ann McLaughlin, as successor cotrustees of the trust, were substituted as defendants in this action in lieu of Edward F. McLaughlin, trustee. For simplicity, our references to the defendants are to the original defendants and to the substitute cotrustees and Patricia Ann McLaughlin collectively when appropriate.

[2] We note, with some bemusement, that the record contains correspondence between Patricia McLaughlin and her neighbor to the south at 17 Smith Road, which indicates that Patricia McLaughlin had advised her neighbor to "read your [d]eed and the height restrictions we are all subject to" and requested that the neighbor attend to certain overgrown landscaping on the neighbor's property. At the behest of Patricia McLaughlin, the neighbor removed a single olive tree and other "bushes/trees" that were not located on the boundary line but which allegedly obstructed the defendants' view

of Long Island Sound.

[3] We note that, "[a]lthough the denial of a motion for summary judgment is not ordinarily a final judgment and, thus, not immediately appealable, 'if parties file . . . motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal.' " *Dunn* v. *Northeast Helicopters Flight Services, LLC*, 206 Conn. App. 412, 415–16 n.2, 261 A.3d 15, cert. granted, 338 Conn. 915, 259 A.3d 1180 (2021).

[4] We note that, in *Mandes* v. *Godiksen*, supra, 57 Conn. App. 83, a remand was not necessary because the trial court in that case already had "defined the precise limits of the easements."

[5] General Statutes § 52-480 provides: "An injunction may be granted against the malicious erection, by or with the consent of an owner, lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

Thus, § 52-480 provides equitable relief for the same act for which § 52-570 provides a legal remedy in damages. See *Foldeak* v. *Incerto*, 6 Conn. Cir. 416, 427–28, 274 A.2d 724, cert. denied, 160 Conn. 567, 269 A.2d 293 (1970). The "two statutes have been on our books for about one hundred years and have been unchanged since 1875, but have been cited in comparatively few cases." (Internal quotation marks omitted.) Id., 428.

[6] In their memorandum of law in support of their motion for summary judgment, the defendants also argued that the three year statute of limitations set forth in General Statutes § 52-577 barred the plaintiff's claim because he had "been aware of the pool, the adjoining structure and hedges since he purchased [1] Smith [Road] in 2000." The defendants also have asserted this argument in their appellate brief. The defendants, however, never raised the statute of limitations in § 52-577 as a special defense in their answer and special defenses, as required by Practice Book § 10-50, and the trial court made no reference to § 52-577 in its memorandum of decision. When a statute of limitations is not jurisdictional in nature, it may be waived when not specially pleaded. See *Martino* v. *Scalzo*, 113 Conn. App. 240, 247, 966 A.2d 339, cert. denied, 293 Conn. 904, 976 A.2d 705 (2009); see also *Avon Meadow Condominium Assn., Inc.* v. *Bank of Boston Connecticut*, 50 Conn. App. 688, 698, 719 A.2d 66 (because defendant failed to specifically plead statute of limitations in § 52-577, it waived right to have defense considered by trial court), cert. denied, 247 Conn. 946, 723 A.2d 320 (1998), and cert. denied, 247 Conn. 946, 723 A.2d 320 (1998). Accordingly, we decline to consider the defendants' statute of limitations claim pertaining to counts three and four of the complaint. See *Alfred Chiulli & Sons, Inc.* v. *Hanover Ins. Co.*, 294 Conn. 689, 694, 987 A.2d 343 (2010) (plaintiff was not entitled to raise claim that counterclaim for equitable subrogation was time barred when plaintiff failed to raise statute of limitations as special defense prior to trial as required by Practice Book § 10-50); *Heim* v. *California Federal Bank*, 78 Conn. App. 351, 374–75, 828 A.2d 129 (declining to review statute of limitations defense raised for first time on appeal when statute of limitations provision at issue was not jurisdictional in nature), cert. denied, 266 Conn. 911, 832 A.2d 70 (2003).

[7] The court issued a one sentence decision denying the motion to reargue, which stated: "The movant has failed to demonstrate that the court misapprehended a material fact or otherwise failed to consider an applicable principle of law."

[8] Notably, the defendants have not claimed that the complaint lacks such necessary allegations.

[9] We note that the defendants' claim pertaining to § 52-570 applies equally to the claim pursuant to § 52-480, as the elements of a claim under both statutes are the same. See *Errichetti* v. *Botoff*, supra, 185 Conn. App. 125.

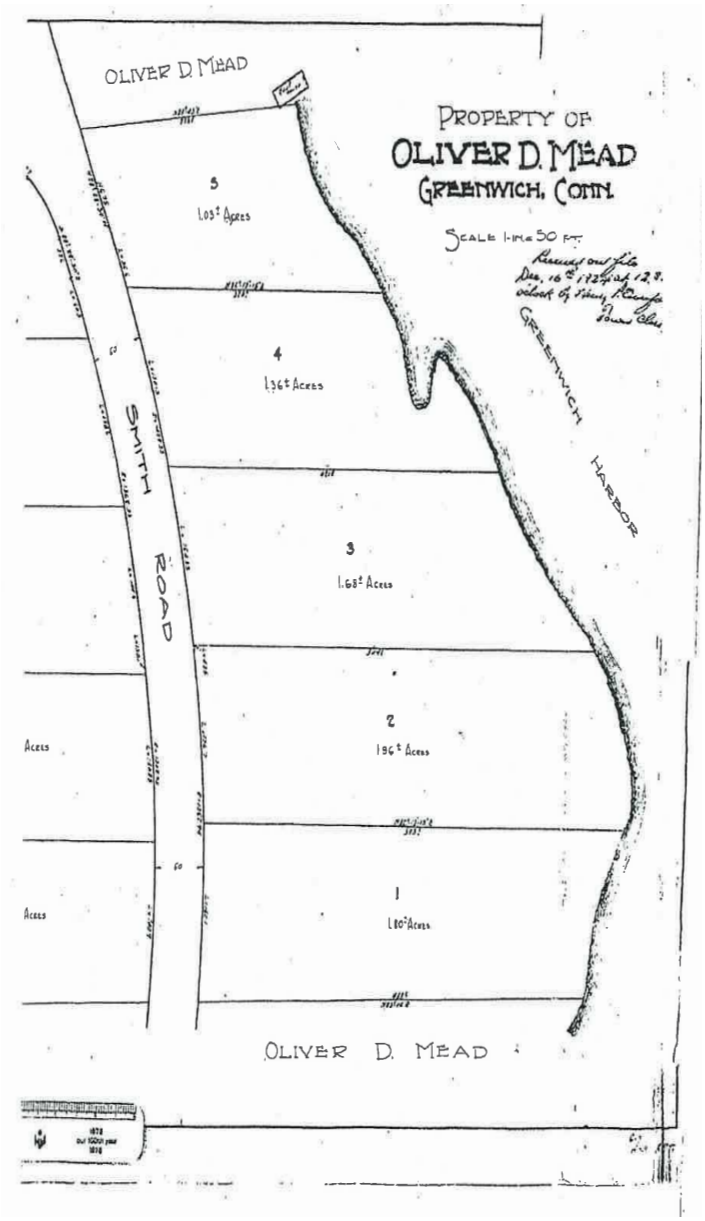
[10] In *Dalton*, the plaintiffs had alleged that the defendants "out of animosity . . . allowed [one hedge] to grow to a height of eight to nine feet . . . directly across from the [plaintiffs' property], creating a visual barrier that . . . obstruct[ed] and hinder[ed] the plaintiffs from viewing Long Island Sound from their property." *Dalton* v. *Bua*, supra, 47 Conn. Supp. 646.

[11] Other Superior Court decisions in Connecticut similarly have distinguished *Dalton*. For example, in *Lucas Point Assn.* v. *17950 Lake Estates Drive Realty, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6041009-S (June 29, 2020) (70 Conn. L. Rptr. 52), the defendant filed a motion to strike challenging the legal sufficiency of the second and third counts of the complaint, which alleged violations of §§ 52-570 and 52-480, arguing that a row of trees planted by a property owner cannot constitute a structure for purposes of those statutes. Id., 54. The

court in *Lucas Point Assn.*, after setting forth a number of trial court decisions that have addressed the question of whether trees can constitute a structure for purposes of the malicious structure statutes, concluded that those statutes "can be applied to a situation involving the planting of mature trees." Id., 55. The court distinguished *Dalton*, which did not involve an allegation "that the vegetation was planted out of malice but rather that it was 'allowed' to grow to an unacceptable height." Id.

Likewise, in *Patrell* v. *Gaudio*, Superior Court, judicial district of New London, Docket No. CV-95-012873-S (December 15, 2010) (51 Conn. L. Rptr. 163), the court rejected an argument raised by the defendant, citing *Dalton*, that hedges and trees cannot constitute structures under §§ 52-570 and 52-480 "because they are not artificial or man-made constructions." Id., 164. In doing so, the court reasoned: "*Dalton* does not stand for the proposition that there is some inherent quality of a hedge that categorically puts it outside of the definition of 'structure.' Instead, it stands for the proposition that the malicious erection statute does not impose an affirmative duty on a landowner to maintain naturally occurring objects on his or her property so that they do not injure another's use and enjoyment of his or her own property. . . . In the present case, it is undisputed that the defendant created a five foot high berm and then planted ten foot tall trees on top of the berm in a line. It could hardly be said that this obstruction was not 'artificially built up' or 'composed of parts and joined together in some definite manner.' Unlike in *Dalton*, the plaintiffs here are not seeking to affirmatively compel the defendant to maintain a naturally occurring tree line so as to not exceed a certain height; they are seeking to compel the defendant to remove an obstruction that she affirmatively created. That the obstruction consisted of naturally occurring elements, i.e. dirt and trees, is inapposite." (Citation omitted.) Id.

[12] Count one also seeks to quiet title "concerning the view easement restrictions over [the defendants' parcel] concerning all hedges, fences and walls, and the pool outbuilding." Any claims beyond the assertion that a view easement exists concern the scope of that easement, which must be resolved on remand. APPENDIX


OLIVER D. MEAD
PROPERTY OF
OLIVER D. MEAD
GREENWICH, CONN.
SCALE 1-INCH = 50 FT.
5
1.03± Acres
4
1.36± Acres
3
1.68± Acres
2
1.96± Acres
1
1.80± Acres
SMITH ROAD
GREENWICH HARBOR
OLIVER D. MEAD