KATHLEEN TRACEY ET AL. *v.* MIAMI BEACH ASSOCIATION (AC 43965)

Elgo, Moll and Cradle, Js.

Syllabus

The plaintiffs, residents of a neighborhood that was adjacent to waterfront property owned by the defendant beach association, sought, inter alia, injunctive relief enjoining the defendant from blocking public access to and from charging fees and issuing permits for public use of its property. The defendant acquired the property in 1951 and, shortly thereafter, erected a fence that prevented the public from accessing the property. In 1952, owners of property in the adjacent neighborhood brought an injunctive action against the defendant, alleging violations of their rights to freely access and use the property and specifically alleging that they were acting as members of the general public. The 1952 plaintiffs claimed that H, a prior owner of the property, had, by deed and by his actions over a period of approximately fifty years, designated the property as an open way for public use. In 1953, the trial court rendered judgment in favor of the 1952 plaintiffs. That court found that H had dedicated the property for public use, ordered the defendant to remove the fence, and enjoined the defendant from interfering with the rights of the 1952 plaintiffs and the general public to free entry and egress and to free and unimpeded use and enjoyment of the property in the future. The public enjoyed unimpeded access to and use of the property until 2017, when the defendant erected a fence with an entry gate and created a fee structure and permit plan for the public to access and use the property. In 2018, the plaintiffs commenced the present action to enforce the 1953 judgment. Following a trial, the trial court rendered judgment in favor of the plaintiffs, ordered the defendant to remove the fence, and enjoined the defendant from erecting another fence and from charging fees and issuing permits for the use of the property by the public in the future. On the defendant's appeal to this court, *held*:

1. The trial court's decision to grant injunctive relief to the plaintiffs was an exercise of the court's equitable powers to protect the integrity of

the 1953 judgment, and the preclusive effect of the 1953 judgment was more precisely viewed through the lens of the doctrine of merger, which implicates res judicata only in its general sense.

2. The trial court properly determined that the defendant's conduct was within the scope of the 1953 judgment and, accordingly, that the 1953 judgment precluded the defendant from restricting public access to and use of the property: the 1953 judgment plainly recognized the rights of the general public both to free entry and egress to the property and to free and unimpeded use and enjoyment of the property along its entire length and width; moreover, the defendant's erection of a fence and a gated entrance and imposition of fees and permits in 2017 were restrictions encompassed by and in violation of the 1953 judgment.

3. The trial court properly concluded that the plaintiffs were proper parties in the present case because they were in privity with the 1952 plaintiffs and thus were entitled to the benefits of the 1953 judgment: the present case involved the same legal rights as those that were asserted in the 1952 action and memorialized in the 1953 judgment, as the 1952 plaintiffs specifically alleged that they were acting as members of the general public to vindicate the rights of the general public, and the plaintiffs in the present case asserted illegal interference with their rights as members of the general public to access and use the property in accordance with the mandate of the 1953 judgment; moreover, the same property was at issue in both the 1952 action and the present action, the source of the rights underlying both sets of claims, namely, the conveyance documents executed by H, was the same in both actions, and, in each instance, the defendant instituted measures that restricted the public's ability to freely access and use the property and faced legal challenges from local residents who sought to vindicate their rights as members of the general public; furthermore, the 1953 judgment had a preclusive effect on the defendant with respect to members of the general public because the defendant was a party to the 1952 action and had the opportunity to fully litigate the controversy during that action; additionally, the policies underlying the preclusion doctrines, including achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments, were served by finding the plaintiffs in privity with the 1952 plaintiffs and permitting them to maintain the action to enforce the 1953 judgment.

4. The trial court did not abuse its discretion in exercising its equitable authority to vindicate the 1953 judgment with respect to the plaintiffs' rights to freely access and use the property: the passage of time since the 1953 judgment did not, in itself, make the enforcement of the judgment inequitable, and the defendant failed to offer evidence of any substantive legal change in the terms of the dedication of the property since the 1953 judgment or any other change of circumstances that would make the enforcement of the judgment inequitable; moreover, the public used and enjoyed the property for more than sixty years following the 1953

judgment without obstruction by the defendant, demonstrating that the defendant and the public expected the terms of the 1953 judgment to govern the use of the property in perpetuity; furthermore, the 1953 judgment did not contain any temporal limitations on the relief it provided and there was no applicable statutory limitation period because the action was injunctive in nature.

(*One judge concurring separately*)

Argued January 14, 2021—officially released November 8, 2022

Procedural History

Action for, inter alia, an injunction requiring the defendant to remove a fence along the border of certain waterfront property, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Knox*, *J.*; judgment for the plaintiffs, from which the defendant appealed to this court; thereafter, the court, *Knox*, *J.*, granted in part the defendant's motion to stay the judgment. *Affirmed.*

Daniel J. Krisch, with whom, on the brief, was *Kenneth R. Slater*, *Jr.*, for the appellant (defendant).

William E. McCoy, for the appellees (plaintiffs).

Opinion

ELGO, J. This case involves an action to enforce a judgment that memorialized the rights of the general public to freely access and use a parcel of waterfront property in Old Lyme. Following a bench trial, the trial court concluded that the prior judgment in question precluded the defendant, Miami Beach Association, from restricting public access and use of that property. On appeal, the defendant challenges the propriety of that determination. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. At all relevant times, the plaintiffs,

Kathleen Tracy,[1] Robert Breen, Jerry Vowles, and Dee Vowles, resided in an area of Old Lyme known as Sound View, a neighborhood that is adjacent to the property in question. The defendant is a municipal corporation created by special act of the General Assembly in 1949.[2] This appeal concerns the ability of the defendant to restrict public access and use of a parcel of waterfront property owned by the defendant and known as Miami Beach.[3]

Miami Beach originally was owned by Harry J. Hilliard, who conveyed the property to a devisee through his will. Title thereafter changed hands between private individuals several times until the defendant acquired the property via quitclaim deed on July 12, 1951.

The present action concerns prior litigation that transpired soon after the defendant acquired the property. In November, 1951, the defendant constructed a six foot high iron fence that precluded access to Miami Beach. In response, twenty-six owners of property in the adjacent Sound View neighborhood brought an injunctive action (1952 action), alleging violations of their right to freely access and use Miami Beach.[4]

[1] Although her last name appears as "Tracey" in the case caption, the plaintiff Kathleen Tracy testified at trial that her last name is Tracy.

[2] By the terms of its charter, the defendant is permitted, inter alia, to enact ordinances "to care for the beaches and waterfronts," to "prevent the deposit upon property within the limits of [the] association of refuse, garbage or waste material of any kind," and "to regulate and limit the carrying on within the limits of said association of any business that will, in the opinion of the [association], be prejudicial to public health or dangerous to or constitute an unreasonable annoyance to those living or owning property in the vicinity thereof . . . ."

[3] At the time of both the defendant's acquisition of the property and the 1952 action discussed herein, the parcel was referred to as "Long Island Avenue" and consisted of undeveloped land along the Long Island Sound coast. For clarity, we refer to that waterfront parcel as Miami Beach throughout this opinion.

[4] The plaintiffs named the defendant and Nunzio Corsino as defendants in the 1952 action. Although the record before us indicates that Corsino conveyed Miami Beach to the defendant by quitclaim deed in 1951, the pleadings contain no particular allegations with respect to Corsino.

In the introductory paragraph of their complaint, the plaintiffs specifically alleged that, in bringing that injunction action, they were "also acting as members of the general public . . . ." In the first count of their complaint, the plaintiffs alleged that Hilliard "on or about 1900 laid out [Miami Beach] as an 'open way for foot passengers and bicycles only' " and had, "by deed to purchasers of property . . . abutting [Miami Beach], expressly covenanted for himself, his heirs and assigns, that [Miami Beach] would remain an open way for the use of the public . . . ." The plaintiffs further alleged that Hilliard, "by laying out [Miami Beach] on various maps, through his deeds . . . and by his actions, conduct and speech over a period of approximately fifty years, intended and designated [Miami Beach] as an open way for public use." The plaintiffs thus claimed that the erection of the iron fence wrongfully interfered with the rights memorialized in the respective deeds to their properties.

In count two, the plaintiffs claimed a prescriptive right to use Miami Beach "as an open way and as a beach." In the third and final count, the plaintiffs alleged that Hilliard, "[b]y various deeds subsequent to 1892 . . . reserved [Miami Beach] as an open public way for foot passengers and bicycles," that Hilliard had dedicated Miami Beach "to the public," and that "the plaintiffs and other members of the general public accepted the same as a public way and beach and never abandoned it as such." The plaintiffs further alleged that, by erecting the iron fence, the defendant interfered with their rights as "members of the general public to [the] free and unimpeded use of [Miami Beach and] have prevented their free use and enjoyment thereof . . . ."

As the defendant acknowledged in its posttrial brief in the present case, "[i]t is not clear from the file as to whether trial commenced, but the file does reflect that exhibits were presented to the court," and, on February

18, 1953, the court rendered judgment in favor of the plaintiffs on counts one and three (1953 judgment).[5] *Vitello* v. *Corsino*, Superior Court, judicial district of New London, Docket No. 20902 (February 18, 1953) (*Troland*, *J.*). The court issued a written ruling in which it specifically found that, "prior to the year 1941, [Hilliard] dedicated for public use the strip of land known as [Miami Beach, and] . . . this dedication for such use by [Hilliard] was accepted by the unorganized public and has been continuously used and enjoyed by the public down to the date of the beginning of this action."[6] By way of relief, the court ordered in relevant part: "[T]he [defendant is] . . . hereby enjoined . . . from maintaining and establishing after [May 29] 1953, a steel and wire fence across said [Miami Beach] from the intersection of [Miami Beach] with the west line of Hartford Avenue in [Old Lyme]; and it is further adjudged that the [defendant] and [its] servants and agents . . . are hereby ordered . . . to remove from [Miami Beach] the said steel and wire fence which they have erected . . . and it is further adjudged that the [defendant] and [its] servants and agents be, and they are hereby enjoined . . . from interfering with the

[5] In its written ruling, the court stated in relevant part: "The court, *having heard the parties*, finds the issues upon the first count for the plaintiffs . . . and also finds the issues for all of the plaintiffs upon the third count . . . ." (Emphasis added.) The plaintiffs withdrew count two before judgment was rendered. Cf. *Roche* v. *Fairfield*, 186 Conn. 490, 499, 442 A.2d 911 (1982) ("the unorganized public cannot acquire rights by prescription").

[6] As its name implies, the term "unorganized public" refers to "the public at large . . . rather than . . . one person, a limited number of persons, or a restricted group." (Internal quotation marks omitted.) *State* v. *Boucher*, 11 Conn. App. 644, 650, 528 A.2d 1165 (1987) (*Daly*, *J.*, dissenting), rev'd on other grounds, 207 Conn. 612, 541 A.2d 865 (1988); see also *Oxford* v. *Beacon Falls*, 183 Conn. 345, 347, 439 A.2d 348 (1981) ("[a] public beach is one . . . open to the common use of the public, and which the unorganized public and each of its members have a right to use" (internal quotation marks omitted)); *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 15–16, 48 A.3d 107 (using term "unorganized public" synonymously with term "general public"), cert. denied, 307 Conn. 932, 56 A.3d 715 (2012).

rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, from now henceforth . . . .''[7]

It is undisputed that, in the decades following the 1953 judgment, public use of Miami Beach continued without impediment.[8] More than one-half century later, following complaints regarding litter and other inappropriate behavior by beachgoers, the defendant instituted what it termed a ''Clean Beach Program'' in the fall of 2017. That program involved the erection of a fence with an entrance gate, the monitoring of the gate by security personnel, and the creation of a fee structure and permit program to access and use Miami Beach. Residents of Old Lyme were permitted to enter and use the beach at no cost, provided they furnished proof of residency. Residents also were permitted to bring nonresident guests to the beach, so long as they purchased a guest pass from the defendant. Nonresident

[7] Although the defendant argues that the 1953 judgment was a stipulated judgment, it concedes, as it must, that ''[a] valid judgment or decree entered by agreement or consent operates as res judicata to the same extent as a judgment or decree rendered after answer and contest.'' *Gagne* v. *Norton*, 189 Conn. 29, 31, 453 A.2d 1162 (1983); see also *SantaMaria* v. *Manship*, 7 Conn. App. 537, 542, 510 A.2d 194 (''[a] stipulated judgment may operate as res judicata to the same extent as a judgment after a contested trial''), cert. denied, 201 Conn. 807, 515 A.2d 378 (1986). As the Restatement (Second) of Judgments explains, ''[w]hen the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original claim is said to be 'merged' in the judgment. . . . *It is immaterial whether the judgment was rendered upon a verdict . . . or upon consent . . .*.'' (Emphasis added.) 1 Restatement (Second), Judgments § 18, comment (a), p. 152 (1982). For that reason, actions to enforce stipulated judgments properly are brought in the Superior Court. See, e.g., *Garguilo* v. *Moore*, 156 Conn. 359, 242 A.2d 716 (1968); *Ghio* v. *Liberty Ins. Underwriters, Inc.*, 212 Conn. App. 754, 276 A.3d 984, cert. denied, 345 Conn. 909, A.3d (2022); *Haworth* v. *Dieffenbach*, 133 Conn. App. 773, 38 A.3d 1203 (2012); *Nauss* v. *Pinkes*, 2 Conn. App. 400, 480 A.2d 568, cert. denied, 194 Conn. 808, 483 A.2d 612 (1984).

[8] In its principal appellate brief, the defendant concedes that ''[t]he public used [Miami Beach] for decades'' after the 1953 judgment was rendered.

members of the public were obligated to pay a fee to enter and use Miami Beach.

In 2018, the plaintiffs[9] commenced the present action to enforce the 1953 judgment. In the sole count of their complaint, the plaintiffs alleged that the defendant illegally interfered with the public's right to freely access and use Miami Beach "in direct violation" of the 1953 judgment.[10] In so doing, they specifically alleged that the court, in rendering the 1953 judgment, "found that [Miami Beach] . . . is dedicated for public use." They thus sought declaratory and injunctive relief, including an order mandating "the removal of the fence blocking public access to Miami Beach," an order "enjoining the defendant from charging fees and issuing permits for use of Miami Beach," and a declaration that "the [defendant's] actions preventing the plaintiffs' use of Miami Beach . . . are in violation of previous court orders."[11] In its answer, the defendant admitted that the 1953 judgment "was entered" but averred that it "cannot admit or deny the [plaintiffs'] characterization of the judgment in that it speaks for itself." The defendant also summarily denied the allegations of paragraph 10 of the complaint.[12] It did not assert any special defenses or counterclaim.

[9] The plaintiffs were longtime patrons of Miami Beach and, like the plaintiffs in the 1952 action, all owned property in the adjacent Sound View neighborhood.

[10] Unlike the plaintiffs in the 1952 action, the plaintiffs in the present case have raised no claim regarding the rights memorialized in the deeds to their Sound View properties. Rather, this action is predicated solely on their rights as members of the general public to freely access and use Miami Beach.

[11] The plaintiffs also requested "a [d]eclaratory [o]rder that Miami Beach is a public beach." In rendering judgment in favor of the plaintiffs, the trial court did not grant that request. Rather, the court emphasized that "[t]he present case . . . involves a beach dedicated for public use from *private property* rather than a town owned beach . . . ." (Emphasis added.) The propriety of that determination is not at issue in this appeal.

[12] In paragraph 10 of the operative complaint, the plaintiffs specifically alleged: "The [defendant has] hindered and violated the rights of the plaintiffs to freely access [Miami Beach], to wit:

In his opening remarks at trial, the plaintiffs' counsel explained that the plaintiffs brought the present action to compel the defendant to "abide by the rulings of [the Superior Court] in 1953 to enforce the free and unimpeded right of the public to use Miami Beach." On cross-examination, the following colloquy occurred between Tracy and the defendant's counsel:

"[The Defendant's Counsel]: You want [Miami Beach] to be a public beach, correct?

"[Tracy]: I don't want it to be anything. I want the public to have access to that beach; that's what I want.

"[The Defendant's Counsel]: All right. And they do have access, don't they?

"[Tracy]: No. I don't think they have free, unencumbered access; no, I do not believe that they have that."

The defendant's counsel asked Tracy to "describe what rights" the 1953 judgment conferred on the public with respect to Miami Beach; Tracy responded that the 1953 judgment memorialized "the right to unimpeded access—free, unimpeded access to the unorganized public." Tracy also testified that she "read the [1953 judgment as mandating] that there should be no impediment to the public to use" Miami Beach and opined that "access to [Miami Beach] means you have access to the sand, not just to the water."

Breen, whose family had owned property in Sound View since 1895, was born the year after the 1953 judgment issued. In his testimony, Breen indicated that,

"a. They have and continue to restrict public access to Miami Beach without any grant of authority to do so.

"b. They are in direct violation of the 1953 judgment . . . and [its] court orders against the defendant.

"c. They are charging fees to the public for use of a public beach without any grant of legal authority to do so.

"d. They are issuing permits for use of a public beach without any grant of legal authority to do so.

"e. The defendant's actions have a chilling effect on the rights of the public to [Miami Beach]."

with respect to the public's right to use the beach, he never understood it to be limited to "walking purposes only" and testified that the gate and fence erected by the defendant as part of the Clean Beach Program "denies me free and unimpeded access to [Miami Beach] that I had enjoyed the right to use whenever I pleased for most of my life." Breen thus indicated that he sought to have those barriers removed in accordance with the terms of the 1953 judgment. The defendant, by contrast, maintained that it could restrict the use of Miami Beach through the measures implemented as part of its Clean Beach Program.

By memorandum of decision dated January 15, 2020, the trial court ruled in favor of the plaintiffs. After providing a factual overview of both the 1952 action and the present dispute, the court observed: "[F]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . It has long been accepted that a system of laws upon which individuals, governments and organizations rely to resolve disputes is dependent on according finality to judicial decisions. . . . The convention concerning finality of judgments has to be accepted if the idea of law is to be accepted . . . . [A] party should not be able to relitigate a matter which it already has had an opportunity to litigate." (Citations omitted; internal quotation marks omitted.) The court then emphasized that, "[o]nce a final judgment has been issued, it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment, including injunctive relief." (Internal quotation marks omitted.)

After setting forth those principles of finality, the court noted that the plaintiffs were seeking to enforce

the 1953 judgment.[13] The court summarized the dispute between the parties as follows: "[T]he plaintiffs rely on the 1953 judgment of this court that found that [Hilliard] . . . dedicated the beach to public use and the unorganized public accepted this dedication. The defendant claims, notwithstanding the 1953 judgment, that it owns Miami Beach and has the right to restrict access or use thereto."

The court then discussed the doctrines of res judicata and collateral estoppel, finding that the parties were in privity with the parties to the 1952 action, that "[t]here is no evidence that the parties, particularly the defendant, were not presented an opportunity to litigate fully the controversy in 1953," and that the "present controversy is substantially similar to the [1952 action]; the facts and claims for unrestricted use of Miami Beach . . . are identical." The court emphasized that the 1953 judgment "concluded any controversy on the defendant's restriction of the public's access by installation of a fence on the boundary of Miami Beach" and found that, "[t]he defendant, whatever laudable intentions it may have [in enacting the Clean Beach Program], does not have the right to restrict access to Miami Beach to permit holders or paying users in order to remediate such conduct." The court also noted that the defendant had offered "no evidence of any substantive legal change in the terms of the dedication of Miami Beach since the 1953 judgment. The evidence presented in this case fails to convince the court that [it should] exercise [its] discretion . . . in order to reconsider the issues determined in the 1953 judgment. . . . The defendant's installation of the fence, gated entrance, fees, and permits are restrictions on the public dedication of the beach that violate the 1953 judgment."

[13] Indeed, after noting the applicable legal standard, the court titled the next section of its memorandum of decision "Enforcement of 1953 Judgment."

Accordingly, the court rendered judgment in favor of the plaintiffs. In exercising its equitable powers to protect the integrity of the 1953 judgment, the court ordered as follows: "[T]he defendant is ordered to remove the fence installed on the boundary of [Miami Beach] now and hereinafter; the defendant is enjoined from maintaining or establishing any other fence on the boundary of [Miami Beach], now and hereinafter, and the defendant is further enjoined from charging fees and issuing permits for use of [Miami Beach] by the public. The defendant shall comply with the [1953] judgment, which bears repeating as follows: the defendant is further enjoined 'from interfering with the rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, now and hereinafter.' " The defendant subsequently filed a motion for reargument, claiming, inter alia, that the court's decision exceeded the scope of the 1953 judgment. The court denied that motion, and this appeal followed.

I

APPLICABLE LEGAL PRINCIPLES

This case concerns the preclusionary effect of the 1953 judgment. For that reason, both the parties and the trial court discussed the doctrine of res judicata throughout this litigation, culminating in the court's determination that the measures implemented by the defendant as part of the Clean Beach Program were "restrictions on the public dedication of [Miami Beach] that violate the 1953 judgment." To properly determine the applicability of res judicata in the present case, additional context regarding that confounding doctrine is necessary.

Res judicata is a term of art of both general and specific meaning. Its general use stands for the proposition that a valid and final judgment should be accorded

preclusive effect. As Justice Blackmun observed decades ago, "[t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of 'res judicata.' " *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); see also *Taylor* v. *Sturgell*, 553 U.S. 880, 892 n.5, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (noting "confusing lexicon" surrounding preclusive effect of prior judgment). As the Supreme Judicial Court of Massachusetts has explained, " '[r]es judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another" and whose fundamental purpose is "assuring that judgments are conclusive, thus avoiding relitigation of issues that were or could have been raised in the original action." (Citation omitted; internal quotation marks omitted.) *Bagley* v. *Moxley*, 407 Mass. 633, 636, 555 N.E.2d 229 (1990); see also *State* v. *Ellis*, 197 Conn. 436, 464–65, 497 A.2d 974 (1985) (related "concepts" of finality "express no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest"); *Barr* v. *Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992) ("[b]roadly speaking, res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments"). In its generic sense, "[r]es judicata encompasses four preclusive effects, each conceptually distinct, which a final personal judgment may have upon subsequent litigation. These are merger, direct estoppel, bar, and collateral estoppel." (Internal quotation marks omitted.) *Lee* v. *Spoden*, 290 Va. 235, 245, 776 S.E.2d 798 (2015); see also *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 n.6, 75 S. Ct. 865, 99 L. Ed. 1122 (1955) (noting that "[t]he

term res judicata is used broadly in the Restatement [(First) of Judgments] to cover merger, bar, collateral estoppel, and direct estoppel").

In its specific sense, res judicata refers particularly to claim preclusion and provides that "a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim."[14] (Internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019). Under Connecticut law, the doctrine of res judicata is pleaded as a special defense. See, e.g., *Carol Management Corp.* v. *Board of Tax Review*, 228 Conn. 23, 27, 633 A.2d 1368 (1993); *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 667 n.9, 240 A.3d 1056 (2020), aff'd, 341 Conn. 332, 267 A.3d 162 (2021); Practice Book § 10-50. Its primary posture is defensive in nature, in that it bars relitigation of a claim on which "a valid and final personal judgment" has been rendered in favor of a party. 1 Restatement (Second), Judgments §§ 18 and 19 (1982). Indeed, we are aware of no Connecticut appellate authority in which res judicata has been endorsed for offensive use with respect to claim preclusion, and for good reason: "Offensive claim preclusion is nonexistent. A plaintiff cannot reassert a claim that he has already won." *Robbins* v. *MED-1 Solutions, LLC*, 13 F.4th 652, 657 (7th Cir. 2021); see also *St. Paul Mercury Ins. Co.* v. *Williamson*, 224 F.3d 425, 439 (5th Cir. 2000) (res judicata "is typically a defensive doctrine"); *Suryan* v. *CSE Mortgage, L.L.C.*, Docket No. 0452, 2017 WL 3667657, *15

[14] For res judicata to apply in the specific sense of claim preclusion, "four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 156–57, 129 A.3d 677 (2016).

(Md. Spec. App. August 25, 2017) ("Maryland has not recognized the offensive use of res judicata, and in those jurisdictions where its use has been attempted, it generally has been rejected").

In the present case, the plaintiffs did not attempt to wield the doctrine of res judicata offensively but, rather, sought something fundamentally distinct: vindication of the claim asserted in the 1952 action and embodied in the 1953 judgment.[15] As the trial court noted in its memorandum of decision, the present action is one to enforce a prior judgment of the Superior Court.[16]

An action to enforce a prior judgment is the consequence of the doctrine of merger, memorialized in the Restatement (Second) of Judgments and our decisional law, by which a plaintiff's "claim is extinguished and rights upon the judgment are substituted for it" following the rendering of a valid and final judgment.[17] 1

[15] The plaintiffs first invoked the doctrine of res judicata in their posttrial brief to describe the preclusive effect of the 1953 judgment.

[16] In part III A of its memorandum of decision, in which it set forth the applicable legal standard, the trial court observed that "[f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored." (Internal quotation marks omitted.) The court explained that, "[o]nce a final judgment has been issued, it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment, including injunctive relief," and emphasized that "[c]ourts have in general the power to fashion a remedy appropriate to the vindication of a prior . . . judgment." (Citations omitted; internal quotation marks omitted.) The court then proceeded to discuss the doctrine of res judicata in part III B of its decision, which is titled "Enforcement of 1953 Judgment."

[17] In *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 364, 511 A.2d 333 (1986), our Supreme Court's reference to an action to enforce a judgment was discussed in the context of the principle of res judicata and, more specifically, merger: "The principles that govern res judicata are described in Restatement (Second), Judgments (1982). The basic rule is that of § 18, which states in relevant part: 'When a valid and final personal judgment is rendered in favor of the plaintiff: (1) [t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof, *although he may be able to maintain an action upon the judgment* . . . .' As comment (a) to § 18 explains, '[w]hen the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon

Restatement (Second), supra, § 18, comment (a), p. 152; *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 348, 15 A.3d 601 (2011); see also *Milwaukee County* v. *M. E. White Co.*, 296 U.S. 268, 275, 56 S. Ct. 229, 80 L. Ed. 220 (1935) ("[a] cause of action on a judgment is different from that upon which the judgment was entered"); *National Union Fire Ins. Co. of Pittsburgh* v. *Owenby*, 42 Fed. Appx. 59, 63 (9th Cir. 2002) (explaining that "[t]he doctrine that a judgment creates its own cause of action is an entirely practical legal device, the purpose of which is to facilitate the goal of securing satisfaction of the original cause of action"), cert. denied, 538 U.S. 950, 123 S. Ct. 1629, 155 L. Ed. 2d 494 (2003); *Fidelity National Financial, Inc.* v. *Friedman*, 225 Ariz. 307, 310, 238 P.3d 118 (2010) ("every judgment continues to give rise to an action to enforce it, called an action upon a judgment" (internal quotation marks omitted)). Accordingly, when a party thereafter seeks to enforce those rights by maintaining "an action upon the judgment"; 1 Restatement (Second), supra, § 18 (1), pp. 151–52; *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, supra, 348; it is not seeking to "relitigate a matter [that] it already has had an opportunity to litigate." (Internal quotation marks omitted.) *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 66, 171 A.3d 409 (2017). Rather, it is attempting to enforce a valid judgment and, by extension, vindicate the very claim that gave rise thereto. For that reason, an action to enforce a prior judgment does not implicate res judicata in its specific sense.

Merger is a doctrine of preclusion that falls within res judicata in its generic sense. See *Lawlor* v. *National Screen Service Corp.*, supra, 349 U.S. 326; *Lee* v. *Spoden*,

the judgment are substituted for it. The plaintiff's original claim is said to be "merged" in the judgment.' Our recent case law has uniformly approved and applied the principle of claim preclusion or merger." (Emphasis added.)

supra, 290 Va. 245. Merger has been referred to as a component of res judicata; see *Freedom Mortgage Corp.* v. *Burnham Mortgage, Inc.*, 569 F.3d 667, 672 (7th Cir. 2009); and as "an aspect of res judicata which prevents relitigation of existing judgments . . . ." (Internal quotation marks omitted.) *Allison-Bristow Community School District* v. *Iowa Civil Rights Commission*, 461 N.W.2d 456, 460 (Iowa 1990). Accordingly, the doctrines of merger and res judicata in its generic sense "may be regarded as identical and, in some instances, the terms 'res judicata' and 'merger' have been used interchangeably." (Footnote omitted.) 46 Am. Jur. 2d 799, Judgments § 431 (2017); cf. *Legassey* v. *Shulansky*, 28 Conn. App. 653, 656, 611 A.2d 930 (1992) ("Connecticut's res judicata rules are derived from the theory of merger . . . set out in the Restatement (Second) of Judgments").

That context convinces us that the issue of the preclusive effect of the 1953 judgment is more precisely viewed through the lens of the doctrine of merger and the Superior Court's authority to enforce a prior judgment, which implicates res judicata in its general sense. Although the trial court also discussed both claim preclusion and collateral estoppel in its memorandum of decision, we are mindful that a judicial opinion "must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010); see also *McGaffin* v. *Roberts*, 193 Conn. 393, 408, 479 A.2d 176 (1984) ("[w]e examine the trial court's memorandum of decision to understand better the basis of the court's decision and to determine the reasoning for the conclusion reached by the trial court"), cert. denied, 470 U.S. 1050, 105 S. Ct. 1747, 84 L. Ed. 2d 813 (1985). The court's decision expressly acknowledges the unique context in which the issue of preclusion arises in this case—an attempt by the

plaintiffs to enforce a prior judgment of the Superior Court—and the court's reasoning comports with the principles of finality that underlie the doctrine of merger. Read as a whole, we therefore construe the court's decision to grant injunctive relief to the plaintiffs in this action to enforce a prior judgment as an exercise of its equitable powers to protect the integrity of the 1953 judgment.[18]

II

SCOPE OF 1953 JUDGMENT

In its memorandum of decision, the court held that the measures implemented by the defendant as part of the Clean Beach Program were "restrictions on the public dedication of [Miami Beach] that violate the 1953 judgment." The defendant, by contrast, essentially argues that those measures merely "regulate" access and use of Miami Beach and, thus, are outside the scope of the 1953 judgment.[19] Whether the court properly determined that the defendant's conduct fell within the scope of the 1953 judgment presents a question of law, over which our review is plenary. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 439, 219 A.3d 801 (2019) (affording plenary review "to the extent that we are required to interpret the court's judgment"), cert.

[18] We also note that, to the extent that "our rationale is slightly different than that of the trial court," it is "axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason." (Internal quotation marks omitted.) *Silano* v. *Cooney*, 189 Conn. App. 235, 241, 207 A.3d 84 (2019); see also *Helvering* v. *Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224 (1937) ("the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground").

[19] To the extent that the defendant has argued that the court improperly "expanded the reach" of the prior judgment and characterizes the scope of the judgment on page 19 of its brief, we acknowledge that the defendant preserved its claim regarding the scope of the 1953 judgment in its February 4, 2020 motion for reargument.

denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020); see also *Garguilo* v. *Moore*, 156 Conn. 359, 365, 242 A.2d 716 (1968) (explaining, in action to enforce prior judgment, that "resolution of the issues raised in this action necessarily required the trial court to interpret the terms of the [prior] judgment").

"The construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 355, 133 A.3d 402 (2016).

The court's interpretation of the 1953 judgment arises in the context of an action to enforce that judgment. It is well established that "[t]he Superior Court has the inherent authority to enforce its orders." *Rozbicki* v. *Gisselbrecht*, 152 Conn. App. 840, 846, 100 A.3d 909 (2014), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015). As our Supreme Court has explained, "the trial court's continuing jurisdiction to effectuate prior judgments . . . is not separate from, but, rather, *derives* from, its equitable authority to vindicate judgments." (Emphasis in original.) *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 241, 796 A.2d 1164 (2002). For that reason, "it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Rocque* v. *Light Sources, Inc.*, 275 Conn. 420, 433, 881 A.2d 230 (2005); see also *Connecticut Pharmaceutical*

Assn., Inc. v. *Milano*, 191 Conn. 555, 563–64, 468 A.2d 1230 (1983) ("the court, in the exercise of its equitable powers, necessarily had the authority to fashion whatever orders were required to protect the integrity" of prior judgment); *National Law Center on Homelessness & Poverty* v. *United States Veterans Administration*, 98 F. Supp. 2d 25, 26–27 (D. D.C. 2000) ("[a] court's powers to enforce its own injunction by issuing additional orders is broad . . . particularly where the enjoined party has not fully complied with the court's earlier orders" (citation omitted; internal quotation marks omitted)).

Historically, courts of equity entertained actions to execute a decree, the precursor to actions to enforce a judgment. "A bill to execute a decree, is a bill assuming, as its basis, the principle of the decree, and seeking merely to carry it into effect." *Huddleston* v. *Williams*, 48 Tenn. 579, 581 (1870). As the United States Supreme Court explained: "It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments . . . . [W]here a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle . . . ." (Internal quotation marks omitted.) *Root* v. *Woolworth*, 150 U.S. 401, 410–11, 14 S. Ct. 136, 37 L. Ed. 1123 (1893). The "main purpose" of an action to enforce a judgment likewise is to "facilitate the ultimate goal of securing satisfaction of the original cause of action." (Internal quotation marks omitted.) *Salinas* v. *Ramsey*, 234 So. 3d 569, 571 (Fla. 2018).

Under Connecticut law, when a party obtains a valid and final judgment, "[t]he plaintiff's original claim is . . . merged in the judgment." (Internal quotation marks omitted.) *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 364, 511 A.2d 333 (1986). An action to enforce a judgment ordinarily involves no new

claim or cause of action—it merely is an attempt to carry out and effectuate a prior decree. See *Root* v. *Woolworth*, supra, 150 U.S. 411. For that reason, an action to enforce a judgment necessarily involves the same underlying claim as that which animated the prior judgment.

Accordingly, when a party seeks to enforce a prior judgment, the critical question is whether the prior judgment encompasses the conduct of which the plaintiff now complains. See *Garguilo* v. *Moore*, supra, 156 Conn. 361–65 (in "action to enforce the terms of the [prior] judgment," it is "necessary to inquire into the meaning and scope of the provisions contained in that judgment"). Because a valid and final judgment manifests the merger of all claims that were brought in the prior action, conduct that falls within the scope of the prior judgment necessarily involves the same claim as that advanced in the prior action and, thus, is subject to preclusion.[20] Moreover, "[w]hen the plaintiff brings an action upon the judgment, the defendant cannot avail himself of defenses which he might have interposed in the original action" because those defenses would be responsive to the merged claims. 1 Restatement (Second), supra, § 18, comment (c), p. 154.

Because the critical inquiry in considering an action to enforce is whether the conduct in question is within

[20] For that reason, application of the transactional test that governs res judicata claims in the specific sense; see, e.g., *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 604, 922 A.2d 1073 (2007); is inapposite in the context of an action to enforce a prior judgment. The transactional test operates as a screening mechanism to prevent a party from obtaining "a second bite at the apple [when] the present claims are ones arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not in the [prior action]." (Internal quotation marks omitted.) *Larry* v. *Powerski*, 148 F. Supp. 3d 584, 597 (E.D. Mich. 2015). When a party brings an action to enforce a prior judgment, the prior claims, while relevant for purposes of considering the scope of the judgment, are not themselves being relitigated because they have been merged into the judgment.

the scope of the prior judgment, it is necessary to compare the complaint in the second action with the claims that were (1) alleged in the pleadings of the prior action and (2) resolved in the judgment rendered by the court. See *Commissioner of Environmental Protection* v. *Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993) (measuring preclusive effect of prior judgment by comparing "the complaint in the second action with the pleadings and the judgment in the earlier action"); *Dept. of Public Safety* v. *Freedom of Information Commission*, 103 Conn. App. 571, 582 n.10, 930 A.2d 739 (judicial decision "stands only for those issues presented to, and considered by, the court"), cert. denied, 284 Conn. 930, 934 A.2d 245 (2007); cf. *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 14 n.4, 151 A.3d 358 (2016) ("[i]t is fundamental to our law that the right of a [party] to recover is limited to the allegations in his [pleadings]" (internal quotation marks omitted)).

Accordingly, our analysis begins with an examination of the 1952 action. At issue was the defendant's construction of a six foot high iron fence that impaired the ability of the general public to freely access and use Miami Beach. In the third count of their complaint, the plaintiffs alleged that the defendant had "interfered with the rights . . . of the general public to free and unimpeded use of [Miami Beach], [had] prevented their free use and enjoyment thereof, and [had] caused . . . said general public irreparable loss and injury."

In rendering judgment in favor of the plaintiffs, the court first noted that the plaintiffs in the 1952 action sought both "a mandatory injunction requiring [the defendant] to remove from [Miami Beach] all obstructions to free entry and egress thereon," and "an injunction restraining [the defendant] from interfering with the rights of the plaintiffs to free entry and egress, and to free and unimpeded use and enjoyment of [Miami

Beach] along its entire length and width from now henceforth . . . .'' The court specifically found that Hilliard had ''dedicated for public use the strip of land known as [Miami Beach]'' and that ''this dedication for such use by [Hilliard] was accepted by the unorganized public and has been continuously used and enjoyed by the public down to the date of the beginning of [the 1952] action.'' The court then ordered in relevant part: ''[The defendant is] hereby enjoined . . . from maintaining and establishing . . . a steel and wire fence across [Miami Beach and must] remove from [Miami Beach] the . . . fence which [it has] erected . . . and it is further adjudged that [the defendant is] hereby enjoined . . . from interfering with the rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, from now henceforth . . . .''

In the present case, the plaintiffs alleged in their complaint that the court, in rendering the 1953 judgment, had ''found that [Miami Beach] . . . is dedicated for public use.'' The plaintiffs further alleged that measures implemented by the defendant as part of the Clean Beach Program illegally interfered with the right of the general public to freely access and use Miami Beach. See footnote 12 of this opinion. The plaintiffs thus requested, inter alia, injunctive relief ''ordering the removal of the fence blocking public access to Miami Beach'' and ''enjoining the defendant from charging fees and issuing permits for use of Miami Beach.''

In its principal appellate brief, the defendant concedes that it ''does not have the right to prevent access'' to Miami Beach in light of the mandate of the 1953 judgment but argues that the Clean Beach Program and fence merely ''regulate'' access and use of Miami Beach. For that reason, the defendant claims that the court improperly concluded that the 1953 judgment precludes

it from "defending" its Clean Beach Program because it is not the same claim, and its motives and the expectations of the parties are different. We do not agree.

In the third count of their complaint, the plaintiffs in the 1952 action alleged in relevant part that the defendant interfered with the rights of the plaintiffs and other members of the general public "to free and unimpeded use" of Miami Beach, and alleged that the defendant had "prevented their free use and enjoyment thereof . . . ." In rendering judgment in favor of the plaintiffs, the court agreed and found that Hilliard had "dedicated for public use the strip of land known as [Miami Beach]," and that "this dedication for such use by [Hilliard] was accepted by the unorganized public and has been continuously used and enjoyed by the public down to the date of the beginning of [the 1952] action." The court then ordered in relevant part: "[The defendant is] hereby enjoined . . . from maintaining and establishing . . . a steel and wire fence across [Miami Beach and must] remove from [Miami Beach] the . . . fence which [it has] erected . . . and it is further adjudged that [the defendant is] hereby enjoined . . . from interfering with the rights of the plaintiffs and the unorganized public to *free* entry and egress, and to *free and unimpeded use and enjoyment* of [Miami Beach] along its entire length and width, from now henceforth . . . ." (Emphasis added.)

Under Connecticut law, "judgments are to be construed in the same fashion as other written instruments." (Internal quotation marks omitted.) *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, supra, 320 Conn. 355. It is well established that "[a]n interpretation which gives effect to all provisions of the [written instrument] is preferred to one which renders part of the writing superfluous, useless or inexplicable." 11 R. Lord, Williston on Contracts (4th Ed. 2012) § 32:5, p. 704; see

also *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, 239 Conn. 284, 298, 685 A.2d 305 (1996) (parties do not insert meaningless provisions in written agreements); *Downs* v. *National Casualty Co.*, 146 Conn. 490, 495, 152 A.2d 316 (1959) ("[e]very provision is to be given effect, if possible, and no word or clause eliminated as meaningless, or disregarded as inoperative"); *Johnson* v. *Allen*, 70 Conn. 738, 744, 40 A. 1056 (1898) ("We cannot . . . regard [certain provisions] as surplusage, nor ignore them. We must take the [written instrument] as a whole as we find it and give effect, if possible to all its terms . . . .").

The 1953 judgment plainly recognized the right of the general public both "to free entry and egress" on Miami Beach and "to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width . . . ."[21] As such, the court properly concluded that the defendant's erection of a fence, a gated entrance, and the imposition of fees and permits are restrictions encompassed by, and thus violative of, the 1953 judgment.

The conduct complained of by the plaintiffs in the present case—the construction of a fence with an entrance gate, and the creation of a fee structure and permit program to use Miami Beach—is within the scope of the 1953 judgment, which enjoined the defendant "from maintaining and establishing" a fence on the property and from interfering with the right of the

[21] Webster's Third New International Dictionary defines the word "unimpeded" as "free from anything that impedes or hampers." Webster's Third New International Dictionary (2002) p. 2499.

Black's Law Dictionary defines the word "enjoyment" as "1. Possession and use, esp. of right of property. 2. The exercise of a right." Black's Law Dictionary (11th Ed. 2019) p. 670. In a more general sense, enjoyment is defined as "the action or state of enjoying something: the deriving of pleasure or satisfaction (as in the possession of anything)." Webster's Third New International Dictionary, supra, p. 754. The word "enjoy," in turn, is defined as "to have in possession for one's use or satisfaction . . . ." Id.

"unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width . . . ." We therefore conclude that the court properly determined that the 1953 judgment precluded the defendant from restricting public access and use of Miami Beach.

III

PRIVITY

The defendant also claims that the court improperly concluded that the plaintiffs were in privity with the plaintiffs in the 1952 action such that they could enforce the 1953 judgment. More specifically, it argues that the plaintiffs, as nonparties to the 1952 action, are not entitled to the benefits of that prior judgment. We do not agree.[22]

[22] We appreciate the sentiments expressed in the concurring opinion and recognize that privity and standing are distinct concepts. As one Connecticut judge has observed, there is a "distinction between standing (having a sufficiently colorable claim to be allowed to pursue a claim) and privity (actual effect of an actual or presumed legal relationship) . . . ." *Claridge Associates, LLC* v. *Pursuit Partners, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-15-6026069-S (November 14, 2018); accord *Ovnik* v. *Podolskey*, 86 N.E.3d 1093, 1100–1101 (Ill. App. 2017) (The court noted "the distinction between standing and privity. Standing refers to whether a litigant is entitled to have the court decide the merits of a dispute or a particular issue and requires some injury in fact to a legally recognized interest. . . . Privity, in turn, exists when parties adequately represent the same legal interests, irrespective of their nominal identities." (Citation omitted; internal quotation marks omitted.)), appeal denied, 94 N.E.3d 676 (Ill. 2018).

While we recognize that the defendant has raised no claim that the plaintiffs lack standing or a colorable claim of aggrievement, we are unaware of any authority that suggests that standing obviates the need to address, when raised by the defendant, a challenge to a plaintiff's claim of privity in an enforcement action where the plaintiffs are not identical to the plaintiffs who secured a favorable judgment in the prior action. Here, the defendant frames its challenge to the court's privity determination as one that operates to "bar the defendant from contesting the current plaintiffs' claims." As we discussed in part I of this opinion, in an action to enforce a valid and final judgment, the doctrine of merger precludes a defendant from relitigating the underlying claims, including the pursuit of any special defenses or counterclaims it could have raised in the prior action. Because the plaintiffs, as

"Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties. . . . The statement that a person is bound by or has the benefit of a judgment as a privy is a short method of stating that under the circumstances and for the purpose of the case at hand he is bound by and entitled to the benefits of all or some of the rules of res judicata by way of merger . . . ." (Citations omitted.) Restatement (First), Judgments § 83, comment (a), pp. 389–90 (1942). As our Supreme Court has explained, "[p]rivity is a difficult concept to define precisely. . . . There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that [the doctrines of preclusion] should be applied only when there exists such an identification in interest of one person with another as to

nonparties to the 1952 action, nevertheless claim entitlement to the benefit of that judgment, specifically, those remedies within the scope of the original judgment without having to relitigate the underlying claims via an enforcement action, the defendant's challenge to the court's privity determination is one this court properly must address.

In its principal appellate brief, the defendant argues that nonparties to a prior action generally are not entitled to the benefits of a prior judgment. Our discussion of the issue of privity is confined to the question of whether the plaintiffs in the present case are entitled to the benefits of the 1953 judgment. We are aware of no authority in which a court, in this jurisdiction or elsewhere, has held that privity among parties is a prerequisite to an action to enforce a prior judgment, and we do not so hold in this case. We simply address the claim raised by the defendant regarding the plaintiffs' entitlement to the benefits of the 1953 judgment.

represent the same legal rights so as to justify preclusion." (Citation omitted.) *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 813–14, 695 A.2d 1010 (1997).

"A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Internal quotation marks omitted.) Id., 813. "[O]ne person is in privity with another and is bound by and entitled to the benefits of a judgment as though he was a party when there is such an identification of interest between the two as to represent the same legal right . . . ." (Internal quotation marks omitted.) *Collins* v. *E.I. DuPont de Nemours & Co.*, 34 F.3d 172, 176 (3d Cir. 1994).

The present case involves the same legal rights that were asserted in the 1952 action and memorialized in the 1953 judgment. The plaintiffs in the 1952 action specifically alleged in their complaint that they were "acting as members of the general public" to vindicate "the rights of the plaintiffs and other members of the general public to free and unimpeded use" of Miami Beach. In rendering the 1953 judgment, the court enjoined the defendant "from interfering with the rights of . . . the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, from now henceforth . . . ." The present case is predicated entirely on those same legal rights, as the plaintiffs asserted illegal interference with their rights as members of the general public to access and use Miami Beach; see footnote 10 of this opinion; in accordance with the mandate of the 1953 judgment.[23]

[23] For that reason, the defendant's reliance on *Wheeler* v. *Beachcroft LLC*, supra, 320 Conn. 146, is misplaced. In *Wheeler*, our Supreme Court held that individual lot owners in a neighborhood were not in privity with other lot owners who brought earlier actions "with regard to their prescriptive easement claims . . . ." Id., 168. As the court explained, "[b]ecause parties may share some legal rights and not others, parties may be in privity with respect to some claims, but not others, for res judicata purposes. . . . The trial court . . . held as much, concluding that the plaintiffs are in privity

It also is noteworthy that this action involves a real property dispute. As the United States Supreme Court has observed, "[t]he policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water." *Nevada* v. *United States*, 463 U.S. 110, 129 n.10, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983). For that reason, "[a] finding of privity [when there is a sufficiently close relationship between the parties] is particularly appropriate in cases involving interests in real property . . . ." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003). Here, the same parcel of property underlies both the 1952 action and the present action. In addition, the source of the right underlying the claims of both sets of plaintiffs is the same—the conveyance instruments executed by Hilliard, the original owner of the property in question.[24] Moreover, both actions originated from

with the other lot owners with regards to their implied easement, express easement, and covenant appurtenant claims but not their prescriptive easement . . . claims." (Citations omitted.) Id., 167. The Supreme Court further noted that "each lot owner's [prescriptive easement] claim is factually distinct and based on their individual uses of the lawn. Because some lot owners may be able to satisfy the elements of a prescriptive easement claim and others may not, depending on each lot owner's use of the lawn over a fifteen year period, all of the lot owners in the subdivision cannot be said to share the same prescriptive rights. Although the lot owners in the previous cases could litigate their *own* prescriptive easement claims, they could not be expected to know the details of and adequately litigate the plaintiffs' claims, such that the application of res judicata to them would not be unfair." (Emphasis in original.) Id., 168.

The present case, by contrast, does not involve any prescriptive easement claim. Here, the plaintiffs seek vindication of their legal rights as members of the general public to free and unimpeded access and use of Miami Beach. Those rights are not factually distinct, do not accompany passage of title, and do not depend on an individual litigant's use of the individual's own property. *Wheeler*, therefore, is inapposite.

[24] At its essence, the right of the general public set forth in those conveyance instruments constitutes a servitude on the Miami Beach property. See *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 25 n.7, 165 A.3d 193 (2017) (servitude is legal device that creates right or obligation that runs with land); 2 Restatement (Third), Property, Servitudes c. 7, intro-

nearly identical circumstances. In each instance, the defendant instituted measures that restricted the public's ability to freely access and use Miami Beach without impediment and faced legal challenges from residents of the abutting Sound View neighborhood who sought to vindicate their rights as members of the general public.

As the Restatement (Second) of Judgments notes, "[a] judgment in an action that determines interests in real . . . property . . . [c]onclusively determines the claims of the parties to the action regarding their interests; and . . . [h]as preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself." 2 Restatement (Second), supra, § 43, p. 1. The party facing preclusion here—the defendant—was a party to the 1952 action. Because that action expressly was predicated on the plaintiffs' interests as members of the general public, and because the 1953 judgment, by its plain terms, memorialized the right of "the unorganized public" to freely access and use Miami Beach, that judgment has preclusive effect on the defendant vis-à-vis members of the general public like the plaintiffs here.

We also are mindful that the "crowning consideration [in resolving the privity question is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that [preclusion] is not inequitable." (Internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 77. The party to be precluded here—the defendant—was a party to the 1952 action, and, thus, the core concern in a privity analysis is not implicated here. As the court found in its memorandum of decision,

ductory note, p. 334 (2000) ("[t]he distinctive character of a servitude is its binding effect for and against successors in interest in the property to which the servitude pertains").

"[t]here is no evidence that . . . [the defendant was] not presented an opportunity to litigate fully the controversy in 1953." The record before us supports that determination and confirms that the defendant participated robustly in the 1952 action.

In light of the foregoing, the trial court properly concluded that the plaintiffs were in privity with the prior plaintiffs and thus entitled to the benefits of the 1953 judgment. As members of the general public, the plaintiffs in the present case share the same legal right as the plaintiffs in the 1952 action; see *Mazziotti* v. *Allstate Ins. Co.*, supra, 240 Conn. 813–14; and the record demonstrates that the defendant was a party to that prior action. Moreover, the policies that underlie our preclusion doctrines—"achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments"; *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 76;—would be served by finding the plaintiffs in privity with the plaintiffs in the 1952 action and permitting them to maintain this action to enforce the 1953 judgment. We therefore conclude that the plaintiffs were proper parties in the present case.

IV

EQUITABLE CONSIDERATIONS

As a final matter, we note that, when an action to enforce involves a judgment that "calls for performance, positive or negative, over a period of time, the question may arise whether circumstances have so changed as to make enforcement inequitable." 1 Restatement (Second), supra, § 18, comment (c), p. 155. On appeal, the defendant argues that it is unfair to bind it to the terms of the 1953 judgment due to the passage of decades. We disagree.

As the court found in its memorandum of decision, the defendant offered "no evidence of any substantive

legal change in the terms of the dedication of Miami Beach since the 1953 judgment." Unlike the stipulated judgment at issue in *Nauss* v. *Pinkes*, 2 Conn. App. 400, 480 A.2d 568, cert. denied, 194 Conn. 808, 483 A.2d 612 (1984), the 1953 judgment here contains no temporal limitations on the relief it provided.[25] Moreover, the public thereafter used and enjoyed Miami Beach for more than sixty years without obstruction by the defendant.[26] That conduct over one-half of a century demonstrates that both the defendant and members of the general public expected the terms of the 1953 judgment to govern the use of Miami Beach in perpetuity and undermines the defendant's claim that it is inequitable to enforce that judgment now.

Furthermore, the fact that the defendant's noncompliance with the 1953 judgment arose decades later has little bearing on the plaintiffs' ability to vindicate the rights memorialized therein. Although the General Assembly has imposed a twenty-five year statute of limitations on an action to enforce a judgment for money damages; see General Statutes § 52-598; no statutory limitation period exists for an action to enforce a judgment that is injunctive in nature. See *Quickpower International Corp.* v. *Danbury*, 69 Conn. App. 756, 759, 796 A.2d 622 (2002) (concluding that limitation period contained in "§ 52-598 (a) does not apply" because plaintiff was "seeking an injunction, not damages"); cf. *Bear* v. *Iowa District Court*, 540 N.W.2d 439,

[25] By its plain terms, the 1953 judgment enjoined the defendant "from interfering with the rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of [Miami Beach] along its entire length and width, *from now henceforth* . . . ." (Emphasis added.)

[26] As the court found in its memorandum of decision, "[i]n the intervening years from 1953 to 2017, the general public had free and open access to Miami Beach" and "regularly used the beach for recreation and leisure." In its principal appellate brief, the defendant likewise acknowledges that "[t]he public used [Miami Beach] for decades . . . ."

441 (Iowa 1995) ("[t]he mere passage of time . . . does not invalidate a permanent injunction").

As the court specifically noted in setting forth the applicable legal standard in its memorandum of decision, "it is within the equitable powers of the trial court to fashion whatever orders [are] required to protect the integrity of [its original] judgment." (Internal quotation marks omitted.) *Rocque* v. *Light Sources, Inc.*, supra, 275 Conn. 433; see also *Connecticut Pharmaceutical Assn., Inc.* v. *Milano*, supra, 191 Conn. 563–64. The appellate courts of this state review "the exercise of a trial court's equitable powers for an abuse of discretion." *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 639, 249 A.3d 327 (2020). On the record before us, we conclude that the court did not abuse its discretion in exercising its equitable authority to vindicate the 1953 judgment with respect to the plaintiffs' right to freely access and use Miami Beach.

The judgment is affirmed.

In this opinion CRADLE, J., concurred.

MOLL, J., concurring in the judgment. I agree with parts I, II, and IV of the majority opinion and, on the basis of the analysis set forth therein, concur that the trial court properly concluded that the 1953 judgment precludes the defendant, Miami Beach Association, from restricting public access and use of the property at issue. I disagree with the analysis set forth in part III of the majority opinion, however, because, having agreed with the majority that offensive res judicata, in its specific sense as the majority describes it, is not available under Connecticut law, I do not agree with the majority's implicit endorsement in part III of its opinion that there remains a privity requirement that the plaintiffs must satisfy under the circumstances of

this case, i.e., where the beneficiaries of the 1953 judgment are members of the unorganized public. And although the majority claims to disavow the requirement of a privity showing; see footnote 22 of the majority opinion; the majority nonetheless requires one insofar as it addresses, and rejects on the merits, the defendant's claim in part III of its opinion.

In contrast, I consider the defendant's claim that the plaintiffs are not in privity with the plaintiffs in the 1952 action to be based on the faulty premise that the offensive use of res judicata is available under Connecticut law—a premise that the majority properly rejects in part I of its opinion. In my view, the defendant's challenge, when properly framed, instead implicates the distinct question of whether the plaintiffs have standing to bring this enforcement action. Here, the requirement that a party must have standing is readily satisfied by virtue of the fact that the plaintiffs are members of the unorganized public protected by the 1953 judgment. See *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 469, 28 A.3d 958 (2011) ("[i]t is axiomatic that a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim" (internal quotation marks omitted)). Accordingly, with respect to part III of the majority opinion, I concur in the judgment only.

DOUGLAS JAYNES v. COMMISSIONER OF CORRECTION
(AC 44620)

Elgo, Suarez and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of the crime of murder, sought a writ of habeas corpus. The petitioner had previously filed numerous

habeas petitions that were either withdrawn or dismissed. The respondent Commissioner of Correction filed a motion pursuant to statute (§ 52-470 (d)) for an order to show cause as to why the petitioner's habeas petition should not be dismissed as a result of undue delay. The petitioner did not dispute that the petition was untimely filed but claimed that he suffered from a mental illness that impaired his ability to file a habeas petition in a timely manner. The habeas court dismissed the petition for the petitioner's failure to demonstrate good cause to overcome the statutory presumption of unreasonable delay. On the petitioner's certified appeal to this court, *held*:

1. This court declined to reach the merits of the petitioner's claim that the habeas court erred in dismissing his petition because it included a claim of actual innocence, which, pursuant to § 52-470 (f), cannot be dismissed for failure to meet the statutory deadline of § 52-470 (d), that claim having been asserted for the first time on appeal: the habeas petition did not use the phrase "actual innocence" and, at the show cause hearing, because the petitioner did not assert a claim of actual innocence, the court did not address it, instead, addressing the reason for the delay on which the petitioner expressly relied, namely, claims of mental illness; accordingly, the petitioner's claim plainly reflected a strategic shift by him to raise a new argument on appeal, and it would amount to nothing more than an ambuscade of the habeas court for this court to consider a newly raised argument that was neither raised by the petitioner nor considered by that court at the time that the petitioner attempted to demonstrate that the petition should not be dismissed as untimely.

2. The habeas court did not abuse its discretion by dismissing the habeas petition, the petitioner having failed to demonstrate good cause for an untimely filing pursuant to § 52-470 (e): the court found that the petitioner's testimony explaining his mental illness as the reason for the delay consisted of bare assertions that, without more, did not overcome the statutory presumption of unreasonable delay, and the record contained ample support for the court's conclusions, specifically, that, during the show cause hearing, the petitioner stated that his mental illness did not prevent from filing prior habeas petitions because he received assistance in filing the prior petitions; moreover, the court found that the petitioner's testimony, insofar as he testified that his mental illness or stress level was the reason for the delay in filing the petition, was not credible, and, as a reviewing court, this court must defer to the credibility findings of the habeas court based on its firsthand observation of a witness' conduct, demeanor, and attitude; furthermore, even if the habeas court had found that the petitioner credibly testified that he suffered from mental illness, it did not relieve the petitioner of his burden of demonstrating that his delay in filing the petition was attributable to his mental illness, which the petitioner failed to do.

Argued May 9—officially released November 8, 2022

Procedural History

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

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Brett R. Aiello, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Douglas Jaynes, appeals, following the granting of his petition for certification, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claims that the habeas court erred in dismissing the petition pursuant to General Statutes § 52-470 (e) because (1) it includes an allegation of actual innocence which, pursuant to § 52-470 (f), cannot be dismissed for failure to meet the statutory time limit codified in § 52-470 (d), and (2) he demonstrated good cause for the untimely filing of his petition under § 52-470 (d).[1] We affirm the judgment of the habeas court.

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in

The following facts and procedural history, as found by the habeas court or otherwise undisputed in the record, are relevant to the present appeal. On July 6, 1992, the petitioner was convicted, after a jury trial, of murder in violation of General Statutes § 53a-54a (a)[2] and sentenced to fifty-five years of incarceration. This court affirmed the petitioner's conviction on his direct appeal. *State* v. *Jaynes*, 36 Conn. App. 417, 432, 650 A.2d 1261 (1994), cert. denied, 233 Conn. 908, 658 A.2d 980 (1995).

Thereafter, the petitioner filed his first habeas petition, which was denied. Subsequently, the petitioner's uncertified appeal to this court was dismissed, and our Supreme Court denied the petitioner's petition for certification to appeal from this court's dismissal. *Jaynes* v. *Commissioner of Correction*, 61 Conn. App. 404, 406, 764 A.2d 215, cert. denied, 255 Conn. 945, 769 A.2d

this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section.

"(f) Subsections (b) to (e), inclusive, of this section shall not apply to (1) a claim asserting actual innocence, (2) a petition filed to challenge the conditions of confinement, or (3) a petition filed to challenge a conviction for a capital felony for which a sentence of death is imposed under section 53a-46a. . . ."

[2] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

58 (2001). The parties agree that the petitioner filed numerous additional habeas petitions that were either withdrawn or dismissed. On August 7, 2019, as a self-represented party, the petitioner filed the habeas petition at issue in this appeal.

On September 28, 2020, the respondent, the Commissioner of Correction, filed a motion pursuant to § 52-470 (d) for an order to show cause as to why the petitioner's habeas petition should not be dismissed as a result of undue delay. Specifically, the respondent asserts that, pursuant to § 52-470 (d), the petitioner had until October 1, 2014, to file a habeas petition subsequent to a judgment rendered on a prior petition challenging the same conviction, and, therefore, the habeas petition had to be dismissed unless the petitioner could demonstrate good cause for the delay. On October 22, 2020, the habeas court, *Oliver*, *J.*, granted the motion for a show cause hearing. On February 4, 2021, the habeas court held a hearing on the respondent's motion. At the hearing, the petitioner did not dispute that his habeas petition was untimely. Instead, he sought to show that there was good cause for the delay in filing the petition because he suffered from a mental illness that impaired his ability to file a habeas petition in a timely manner. At the hearing, the petitioner testified that he had been diagnosed as "paranoid schizophrenic" and had been prescribed antidepressants. He claimed that his mental illness left him "very confused and mixed up about a lot of things . . . ." On cross-examination, however, the petitioner admitted that his mental illness did not prevent him from filing habeas petitions. Rather, he claimed that his mental illness was "[s]ometimes" the reason for withdrawing his prior petitions, but other times it was due to his frustration with the legal system.

Following the hearing, in a memorandum of decision, the habeas court dismissed the habeas petition for the

petitioner's failure to demonstrate good cause to overcome the statutory presumption of unreasonable delay as established in § 52-470 (d) and (e). The habeas court specifically stated that it took judicial notice of the previous habeas filings and their dispositions, considered the evidence adduced at trial, and applied the factors set forth in *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 34–35, 244 A.3d 171 (2020), aff'd, 343 Conn. 424, 274 A.3d 85 (2022). The habeas court found that the testimony of the petitioner was not credible. Additionally, the habeas court found that the petitioner's testimony regarding his mental illness "consisted of bare assertions." Ultimately, the habeas court found that the petitioner's "assertions, without more, rendered the petitioner's evidence too loose and equivocal to overcome the aforementioned statutory presumption." Thereafter, the petitioner sought certification to appeal, which the habeas court granted. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner asserts, for the first time on appeal, that the habeas court erred in dismissing his habeas petition because it includes a claim of actual innocence, which, pursuant to § 52-470 (f), cannot be dismissed for failure to meet the statutory deadline of § 52-470 (d). In response, the respondent avers that "the petitioner never asserted a claim of actual innocence in his petition nor did he do so at the 'show cause' hearing." Therefore, according to the respondent, "the habeas court could not have abused its discretion with respect to a claim that the petitioner never raised below." We agree with the respondent.

Our review of the habeas petition reveals, and the petitioner does not appear to dispute, that in the petition filed by the petitioner as a self-represented party, he

did not use the phrase "actual innocence." In the space provided for question five on the state supplied form for bringing the habeas petition, which was utilized by the petitioner in this case, the petitioner was asked to set forth the reason why his conviction was illegal. The petitioner wrote that "the arrest was unsupervised by [the police]," he had an impaired mental state at the time of trial, and he "was never given the chance at [his] probable cause hearing to do questioning."[3]

The petitioner argues that it was unnecessary for him to have used the phrase "actual innocence" in his habeas petition, and that the habeas court should have recognized a claim of actual innocence based on statements in the habeas petition such as "I did not murder the male" and "life is priceless." The petitioner further alleged that he did not own the clothes a witness claimed the assailant was wearing, and that he was "in a[n] after-hours place drinking around the time of the incident." The petitioner asserts that it is well established that courts should not interpret habeas petitions in a hypertechnical manner but should, instead, construe pleadings broadly, and that "Connecticut courts [are] to be solicitous of [self-represented] litigants . . . when it does not interfere with the rights of other parties." (Internal quotation marks omitted.)

The respondent argues that the present claim is unreviewable because it was raised for the first time on appeal and, therefore, the habeas court could not have abused its discretion. In the alternative, the respondent argues that, even if the petitioner relied on the existence of an actual innocence claim at the show cause hearing, the habeas petition does not contain such a claim. The

[3] The petitioner attached to the completed state supplied form twenty-eight handwritten pages that we have also considered as part of the petition for a writ of habeas corpus. Because we do not reach the merits of the petitioner's claim that the petition, in substance, set forth a claim of actual innocence, it is unnecessary for us to describe these pages in detail.

petitioner does not address the respondent's arguments with any authority, nor are we aware of any, that abrogates his obligation to preserve this claim for appellate review by distinctly raising it before the habeas court.

We carefully have reviewed the transcripts of the show cause hearing. At the hearing, the petitioner, then represented by counsel, did not argue that the habeas petition should not be dismissed because it included a claim of actual innocence. Because the petitioner did not assert an actual innocence claim at the show cause hearing, the court did not address it. Instead, in its order, the court addressed the reason for the delay on which the petitioner expressly relied, namely, his mental illness.

"Our law is well settled that a party may not try its case on one theory and appeal on another. . . . Arguments asserted in support of a claim for the first time on appeal are not preserved. . . . Our Supreme Court has stated that shift[s] in arguments [on appeal are] troubling because, as [the court] previously ha[s] noted, to review . . . claim[s] . . . articulated for the first time on appeal and not [raised] before the trial court, would [be nothing more than] a trial by ambuscade of the trial judge." (Citations omitted; internal quotation marks omitted.) *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 181–82, 143 A.3d 1106, cert. denied, 323 Conn. 924, 149 A.3d 982 (2016); see also *Bligh* v. *Travelers Home & Marine Ins. Co.*, 154 Conn. App. 564, 577, 109 A.3d 481 (2015) ("[o]rdinarily appellate review is not available to a party who follows one strategic path at trial and another on appeal, when the original strategy does not produce the desired result" (internal quotation marks omitted)).

We are persuaded that the petitioner's claim, which relies on an allegation of actual innocence, plainly reflects a strategic shift by the petitioner to raise a new

argument on appeal. It would amount to nothing more than an ambuscade of the habeas court for us to consider this newly raised argument that was neither raised by the petitioner nor considered by the court at the time that the petitioner attempted to demonstrate that the petition should not be dismissed as untimely. Accordingly, we decline to reach the merits of this claim.

II

The petitioner next claims that the habeas court erred in dismissing the habeas petition because he demonstrated good cause for the untimely filing of his petition under § 52-470 (e). We are not persuaded.

The petitioner argues that, at the show cause hearing, he presented sufficient evidence with respect to his mental illness to establish good cause for the delay under the four factors set forth in *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 34–35.[4]

[4] In *Kelsey*, this court identified the following nonexhaustive list of factors to aid in determining whether a petitioner has satisfied the issue of good cause: "(1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition." *Kelsey* v. *Commissioner of Correction*, supra, 202 Conn. App. 34–35. In *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 441–42, our Supreme Court adopted these factors and, after a consideration of relevant legislative history, added that, "although . . . the legislature certainly contemplated a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing, the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause. As with any excuse for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge." (Footnote omitted.) Id., 444–45.

Consistent with *Kelsey*'s analytical approach, the petitioner argues: (1) his "mental health is outside of his control, which causes him confusion [and] stress and that his illness is severe," and he lacked "control over his mental health medication regime"; (2) the record is bare as to whether he or his counsel was the reason for the untimely filing; (3) there was evidence of which the habeas court took judicial notice, such as a decades old diagnosis of mental illness, that supports a finding that his mental illness was the cause of the delay; and (4) although the habeas petition was filed almost five years after the deadline, he has filed and withdrawn numerous habeas petitions during that time period. The petitioner argues further that the habeas court's dismissal of the habeas petition he filed as a self-represented party is contrary to what he characterizes as Connecticut's "historic efforts to preserve the Great Writ."

Additionally, the petitioner contends that the habeas court abused its discretion because, he claims, "[his] . . . significant mental health issues cannot reasonably be disputed." In support of his claim that his mental illness constitutes good cause for the delay in filing the petition, the petitioner asserts that the entirety of his first habeas proceeding was related to his trial attorney's alleged failure to investigate issues related to his mental illness, and he points to his "sprawling and at times rambling [self-represented] petition" in the present case.

The respondent argues that the habeas court did not abuse its discretion in finding a lack of good cause for the delay in filing the habeas petition. The crux of the respondent's argument is that the habeas court found the petitioner's testimony at the show cause hearing, that his mental illness was the cause of delay, not to be credible. This finding of fact, the respondent asserts, cannot be disturbed by this court. Therefore, the

respondent argues that, on the basis of this finding, it was reasonable for the habeas court to conclude that there was no good cause for the delay.

We begin by setting forth the applicable standard of review and legal principles that guide our resolution of this claim. "[A] habeas court's determination regarding good cause under § 52-470 (e) is reviewed on appeal only for abuse of discretion. Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Internal quotations marks omitted.) *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 440, 274 A.3d 85 (2022).

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay. . . . [I]n evaluating whether a petitioner has established good cause to overcome the rebuttable presumption of unreasonable delay in filing a late petition under § 52-470, the habeas court does not make a strictly legal determination. Nor is the court simply finding facts. Rather, it is deciding, after weighing a variety of subordinate facts and legal arguments, whether a party has met a statutorily prescribed evidentiary threshold necessary to allow an untimely filed petition to proceed. This process is a classic exercise of discretionary authority, and, as such, we will overturn a habeas court's determination regarding good cause under § 52-470 only if it has abused the considerable discretion afforded to it under the statute.

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and

in a manner to serve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . [Reversal is required only] [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done . . . . [A] habeas court's determination of whether a petitioner has satisfied the good cause standard in a particular case requires a weighing of the various facts and circumstances offered to justify the delay, including an evaluation of the credibility of any witness testimony. . . .

"It is well settled that this court does not disturb the factual findings of the habeas court unless they are clearly erroneous. . . . [T]o the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are 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." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Ortiz* v. *Commissioner of Correction*, 211 Conn. App. 378, 384–87, 272 A.3d 692, cert. denied, 343 Conn. 927, 281 A.3d 1186 (2022).

Bearing in mind our standard of review, we now examine the decision of the habeas court. The habeas court concluded that the petitioner "failed to demonstrate good cause to overcome the statutory presumption of unreasonable delay . . . ." Specifically, the habeas court noted that it did not find the petitioner's testimony regarding his reasons for the delay to be credible. Furthermore, the habeas court found that the petitioner's testimony explaining his mental illness as

the reason for the delay consisted of bare assertions that, without more, did not overcome the statutory presumption.

The record contains ample support for the habeas court's conclusions. During his direct examination at the show cause hearing, the petitioner testified that the underlying petition was untimely because he was "going through a whole lot of different issues . . . mentally wise and physically." The petitioner testified that he was experiencing "stress" from being incarcerated. He also testified that he was experiencing "pain and suffering . . . from what happened to [him] in 2017."[5] He testified that he was diagnosed with paranoid schizophrenia and that he was taking medication. He testified that he had been experiencing mental difficulties, including "racing thoughts, delusions, hearing voices," but that these issues had resolved when he received treatment beginning one month prior to the show cause hearing.

As the respondent points out, during the show cause hearing the petitioner stated that his alleged mental illness did not always explain his litigation history with respect to filing habeas petitions. For example, during his cross-examination by the respondent's counsel, the petitioner testified that his mental illness did not prevent him from filing prior habeas petitions because he received assistance in filing the prior petitions and did not do it by himself. The petitioner testified, "I'm still able to do it, but not without help."

During his redirect examination, the petitioner's counsel asked him whether his "mental health" was the cause of his withdrawal of prior petitions. The petitioner testified: "Sometimes. Sometimes. Not all of the time. Sometimes I get so frustrated, the legal system, and all I've been through that it's best for me to fall

[5] The petitioner did not articulate further what occurred to him in 2017.

back rather than just, you know, just totally just give up, you see. . . . [I]t's just that sometime you got to fall back. You have to fall back, you know. You have to . . . fall back the stress . . . especially the stress level. The stress level is not good. I just talked to the doctor about that the other day."

The habeas court found that the petitioner's testimony, insofar as he testified that his mental illness, or stress level, was the reason for the delay in filing the petition, was not credible. As a reviewing court, we must defer to the credibility findings of the habeas court based on its firsthand observation of a witness' conduct, demeanor, and attitude. See *David P.* v. *Commissioner of Correction*, 167 Conn. App. 455, 470, 143 A.3d 1158, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016). The court's unassailable assessment of the petitioner's uncorroborated testimony concerning the reason for his late filing supported its finding that the petitioner had not proven good cause for the delay. The petitioner has failed to demonstrate that the finding was not supported by the evidence or that, when considering the evidence as a whole, that a mistake has been committed.

To the extent that the petitioner argues that his mental illness cannot reasonably be disputed, we observe that the court, in its decision, states that his "assertions, without more, rendered [his] evidence too loose and equivocal to overcome the . . . statutory presumption" of unreasonable delay. Even if the habeas court had found that the petitioner credibly testified that he suffered from mental illness, it did not relieve the petitioner of his burden of demonstrating that his delay in filing was attributable to his mental illness. See *Ortiz* v. *Commissioner of Correction*, supra, 211 Conn. App. 388.

The petitioner did not provide the court with credible evidence sufficiently linking the claimed mental illness

to the late filing. The petitioner's reliance on his uncorroborated testimony, which was found not to be credible, is unavailing. Because the record contains ample support for the habeas court's conclusion, the habeas court did not abuse its discretion in finding that the petitioner did not establish good cause sufficient to overcome the statutory presumption of unreasonable delay.

We therefore conclude the habeas court did not err by dismissing the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

ALAN FISCHER ET AL. *v.* PEOPLE'S UNITED BANK, N.A., ET AL.
(AC 44872)

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

Syllabus

The plaintiffs, L Co., a mortgagor, F, its guarantor, and F Co., F's real estate company, sought to recover damages from the defendant bank and two of its officers after the bank rescinded its offer to refinance L Co.'s mortgage and L Co. defaulted on that mortgage. F commenced this action on behalf of all three plaintiffs, filing a five count complaint. Counts one through four were brought by all three plaintiffs and alleged breach of contract, breach of the implied covenant of good faith and fair dealing, violations of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.), and tortious interference with business expectancies, respectively. Count five was brought by F only and alleged negligent infliction of emotional distress. The trial court granted the defendants' motion to dismiss, dismissing for lack of standing all claims brought by L Co. and the claims brought by F and F Co. that were set forth in the first, second, and third counts of the complaint. On the plaintiffs' appeal to this court, *held*:

1. The portion of the appeal that pertained to the claims of F and F Co. was dismissed because they did not appeal from a final judgment: the trial court's ruling with respect to F and F Co. was only a partial judgment because it did not fully dispose of counts four and five of the complaint;

accordingly, this court did not have jurisdiction to review the appeal with respect to their claims.

2. The trial court properly determined that L Co. lacked standing to bring this action and, accordingly, the court properly dismissed the claims brought by L Co. for a lack of jurisdiction: L Co. failed to meet its burden to establish that F, acting alone on behalf of L Co.'s general partner, A Co., was legally authorized to commence the action on behalf of L Co., as L Co.'s partnership agreement granted A Co., a member managed limited liability company, full management and control over L Co., and, although F was one of the three members of A Co., because the decision to commence litigation on behalf of L Co. was not within the scope of A Co.'s ordinary business and was a decision that affected the policy and management of A Co., the authorization of A Co.'s other two members was required to commence litigation, which was not forthcoming; moreover, F's management responsibilities in his role as property manager of the mortgaged property and his statements asserting that he was the sole member of A Co. to carry out operations on behalf of L Co. did not undermine the clear and unambiguous language of L Co.'s partnership agreement, which granted A Co. the exclusive right to bring an action on L Co.'s behalf, or A Co.'s operating agreement, which required the unanimous consent of A Co.'s members for decisions affecting the policy and management of A Co. and those outside the scope of A Co.'s ordinary business; furthermore, L Co.'s partnership agreement and A Co.'s operating agreement prohibited A Co. from removing itself from its role as L Co.'s general partner and from delegating to F its exclusive control and management of L Co., and there was no support in the record that any such delegation had occurred.

Argued September 6—officially released November 8, 2022

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Pierson, J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Appeal dismissed in part*; *affirmed.*

Laurence V. Parnoff, Jr., and *Laurence V. Parnoff, Sr.*, filed a brief for the appellants (plaintiffs).

James T. Shearin, with whom were *Dana M. Hrelic*, and, on the brief, *Potoula Tournas*, for the appellees (defendants).

Opinion

PRESCOTT, J. This appeal arises out of an action brought by the plaintiffs, Alan Fischer, Fischer Real Estate, Inc., and 1730 State Street Limited Partnership (1730 LP), against the defendants, People's United Bank, N.A. (People's United), and two of its officers, Kenneth Nuzzolo and Virgilio Lopez.[1] The underlying action was brought after People's United, 1730 LP's mortgage lender, rescinded its offer to refinance a mortgage executed by 1730 LP in 2010 (2010 mortgage) on real property located at 1730 Commerce Drive in Bridgeport (property), following which 1730 LP defaulted on the 2010 mortgage.

The plaintiffs appeal from the judgment of the trial court granting the defendants' motion to dismiss. The trial court held that it lacked subject matter jurisdiction over all counts of the operative five count complaint brought by 1730 LP because 1730 LP was not legally authorized to bring the underlying action, thereby depriving it of standing. The court also held that Fischer and Fischer Real Estate, Inc., lacked standing to bring the first, second, and third counts of the complaint because Fischer and Fischer Real Estate, Inc., did not suffer a direct injury from the defendants' actions rescinding the mortgage commitment letter and, thus, did not have standing to bring those counts.

The plaintiffs claim on appeal that the court improperly held that 1730 LP lacked standing because, contrary to the court's determination, Fischer had authority under the relevant corporate governance documents to permit 1730 LP to commence the underlying action. The plaintiffs also claim on appeal that Fischer and

[1] We refer in this opinion to Fischer, Fischer Real Estate, Inc., and 1730 LP collectively as the plaintiffs and to People's United, Nuzzolo, and Lopez collectively as the defendants. Where appropriate, we refer to the parties individually by name.

Fischer Real Estate, Inc., had standing to bring counts one, two, and three because Fischer and Fischer Real Estate, Inc., suffered a direct injury from the defendants' actions separate from the injury suffered by 1730 LP. On appeal, prior to oral argument, this court ordered the parties to file supplemental briefs addressing whether Fischer and Fischer Real Estate, Inc., appealed from a final judgment because two of the counts brought by them were not disposed of in the trial court's judgment of dismissal and thereby remain pending in the trial court.

We conclude that (1) the judgment dismissing some, but not all, counts of the complaint brought by Fischer and Fischer Real Estate, Inc., is not an appealable final judgment, and (2) the court properly dismissed all counts brought by 1730 LP for a lack of subject matter jurisdiction because 1730 LP's general partner did not authorize the commencement of the action against the defendants. Accordingly, we dismiss the appeal as it pertains to Fischer and Fischer Real Estate, Inc., and affirm the court's judgment of dismissal as it relates to the claims brought by 1730 LP.

The following facts, which are either undisputed or are taken from the underlying complaint, and procedural history are relevant to our resolution of the appeal. Fischer is a licensed real estate broker who owns and operates Fischer Real Estate, Inc., and is the guarantor of the 2010 mortgage executed by 1730 LP on the property.

As provided in 1730 LP's partnership agreement, AJC Management, LLC (AJC), a limited liability company, is the general partner of 1730 LP and "ha[s] full, exclusive and complete discretion" to manage and control 1730 LP. This includes the general partner's right to "[c]ompromise, submit to arbitration, sue or defend any and all claims for or against [1730 LP]." The agreement

further restricts AJC from removing itself, or being removed, from its role as general partner. Fischer is one of three members of AJC. The other members of AJC are Jefferson Scinto and Christian Scinto.

Under AJC's operating agreement, which controls the rights and obligations of its members, "[a]ll decisions affecting the policy and management of [AJC] shall be made by unanimous consent of the Members." The operating agreement also limits the purpose and scope of AJC's business, stating in relevant part: "The business . . . shall be limited to (i) the sale, acquisition, ownership, development, operation, lease, investment and management of real properties . . . . The business of the Company shall not be extended by implication or otherwise beyond the scope of this Agreement."

On behalf of AJC, Fischer has managed the property owned by 1730 LP since 1998. Fischer's duties on behalf of AJC have included acting as the property's sole property manager and negotiating and securing mortgages for the property.

On or about December, 2019, Fischer began negotiating with People's United, through Lopez, to refinance the 2010 mortgage loan on the property. As a result of the negotiations, People's United offered to refinance the 2010 mortgage under new terms, which would include lower interest rates, and to extend a new loan for environmental remedial costs. People's United confirmed these offers in a mortgage commitment letter dated July 28, 2020. Thereafter, People's United sent Fischer a checklist of the documents it required in order to formalize the new loan and refinance the 2010 mortgage.

The initial checklist of required documents included the 1730 LP partnership agreement. After People's United received and reviewed the 1730 LP partnership

agreement, it requested that Fischer provide a resolution from AJC, 1730 LP's general partner, that was signed by all of AJC's members and stated that AJC authorized the loan and execution of the closing documents. Due to a dispute between the members of AJC, People's United never received a resolution that was signed by all members of AJC.[2] On August 24, 2020, People's United notified Fischer that the July 28, 2020 commitment letter was rescinded due to Fischer's failure to obtain an acceptable resolution from AJC. As a result of the unsuccessful refinancing of the property's loan, the 2010 mortgage was declared to be in default on August 26, 2020.[3]

Following the default on the 2010 mortgage, the plaintiffs initiated the underlying action. The plaintiffs' operative complaint alleged that, as a result of People's United having rescinded its refinancing offer, the plaintiffs suffered financial damages from 1730 LP's resulting mortgage default. The complaint contained five counts. Counts one, two, three, and four were brought by all three plaintiffs and alleged breach of contract, breach

[2] Fischer proposed that the language of the resolution from AJC read: "The undersigned manager/members of [AJC], the General Partner of [1730 LP] (the 'Borrower'), confirm that [Fischer] manager/member, pursuant to an agreement of the undersigned members of [AJC], had, and continues to have, full responsibility for the operation of [AJC] . . . ." Christian Scinto and Jefferson Scinto refused to sign a resolution containing the language proposed by Fischer and instead proposed different language: "The undersigned members of [AJC], the General Partner of [1730 LP] (the 'Borrower'), confirm that [AJC], had, and continues to have, full responsibility for the operation of the Borrower . . . ." Fischer refused to sign the resolution with the language proposed by the Scintos. Thus, no resolution was signed by all members of AJC due to a dispute over Fischer's purported responsibility for the operation of AJC.

[3] As a result of the default, People's United notified Fischer that a heightened default rate would apply until the note was paid in full. Counsel for People's United sent a letter to Fischer, Christian Scinto, and Jefferson Scinto on November 17, 2020, stating that the note had matured and payment was past due and providing the outstanding balance of the note as of November 16, 2020.

of the implied covenant of good faith and fair dealing, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and tortious interference with business expectancies. Count five was brought by Fischer only and alleged negligent infliction of emotional distress. Fischer commenced the action on behalf of all three plaintiffs. The remaining members of AJC, however, never authorized AJC to bring an action on behalf of 1730 LP.

On January 19, 2021, the defendants filed a motion to dismiss all counts of the complaint brought on behalf of 1730 LP and counts one, two, and three in their entirety. The defendants argued that the court did not have subject matter jurisdiction over those counts because the plaintiffs lacked standing. In support, the defendants filed a memorandum of law with exhibits, which included an affidavit from Christian Scinto. In response, the plaintiffs filed an objection to the defendants' motion to dismiss, a memorandum of law in opposition to the motion to dismiss with supporting exhibits, and an affidavit from Fischer. Subsequently, the defendants submitted a reply memorandum in support of their motion to dismiss. In addition to the affidavits from Christian Scinto and Fischer, the record before the court included, in relevant part, copies of the 1730 LP partnership agreement and AJC's operating agreement.

On August 3, 2021, the court issued a memorandum of decision granting the defendants' motion to dismiss all counts brought by 1730 LP and counts one, two, and three as to all plaintiffs. The court held that the factual allegations of the complaint, supplemented by the undisputed facts in the record, demonstrated that 1730 LP lacked standing to maintain the claims it brought and that Fischer and Fischer Real Estate, Inc., lacked standing with respect to the first, second, and third counts of the complaint. The fourth and fifth counts of

the complaint were not attacked in the motion to dismiss or addressed by the court in its ruling.

With respect to 1730 LP's standing to bring the action, the court held that AJC, in its role as general partner, had the sole authority to initiate an action by 1730 LP and that AJC, acting through a single member, was not legally authorized to commence the action against the defendants. Specifically, the court noted that AJC's operating agreement required unanimous consent from its members for an individual member to act outside the ordinary course of business or to engage in actions that affect the policy and management of AJC. The court was not persuaded by Fischer's argument that suing the property owner's mortgage lender was a common action for real estate companies and, therefore, he had authority to initiate the action as the property manager and without the unanimous consent of AJC's members. Instead, the court relied on the operating agreement's language that limited the scope and purpose of AJC to matters relating to the sale and management of real property and concluded that Fischer's filing of the action against the defendants did not fall within the ordinary course of business. The court also held that, even though AJC's operating agreement does not specifically address a single member's authority to commence litigation on behalf of AJC, any ambiguity is resolved by the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq., which provides that, at a minimum, the affirmative vote or consent of a majority of a company's members would be required.[4] It is undisputed that Fischer acted without

[4] AJC's operating agreement provides in relevant part: "Except as expressly provided for herein to the contrary, the rights and obligations of the Members and the administration and termination of [AJC] shall be governed by the Connecticut Limited Liability Company Act as the same may be amended from time to time." We note that AJC's operating agreement was executed in 1998; our legislature has since repealed the Connecticut Limited Liability Company Act, effective July 1, 2017, and replaced it with CULLCA.

the consent or affirmative vote of AJC's other two members.[5] The court concluded that Fischer acted alone in bringing the action and that, individually, he lacked authority to act on behalf of AJC to commence litigation on behalf of 1730 LP, pursuant to both the controlling agreements and CULLCA.

The court next addressed Fischer's and Fischer Real Estate, Inc.'s standing to maintain the first, second, and third counts of the amended complaint. The court held that Fischer and Fischer Real Estate, Inc., lacked standing to bring the first count that alleged a breach of the mortgage refinance agreement. The court noted that, regardless of Fischer's status as a guarantor of the 2010 mortgage, Fischer and Fischer Real Estate, Inc., were not parties to the 2010 mortgage and did not suffer any injury unique from the injury allegedly suffered by 1730 LP. In regard to the second and third counts, which asserted a breach of the covenant of good faith and fair dealing and CUTPA violations, the court noted that both counts relied on the first count's breach of contract claim and, because they did not suffer an injury unique from the injury suffered by 1730 LP, Fischer and Fischer Real Estate, Inc., lacked standing. The plaintiffs filed the present appeal.

On August, 17, 2022, this court, sua sponte, ordered the parties to file supplemental briefs "addressing whether this appeal should be dismissed as to the plaintiffs [Fischer] and Fischer Real Estate, Inc., for a lack of a final judgment because counts four and five of the

CULLCA, specifically General Statutes § 34-255f (b), provides in relevant part: "In a member-managed limited liability company . . . (2) Matters in the ordinary course of the activities of the company shall be decided by the affirmative vote or consent of a majority in interest of the members.

"(3) The affirmative vote or consent of two-thirds in interest of the members is required to: (A) Undertake an act outside the ordinary course of the company's activities and affairs . . . ."

[5] This fact was set forth in Christian Scinto's affidavit and was not disputed by Fischer.

[operative complaint] . . . were not disposed of by the August 3, 2021 judgment of dismissal and therefore remain pending in the trial court." Subsequently, the parties filed supplemental briefs. The plaintiffs acknowledged that "the judgment disposed of only the part of the complaint dealing with all the claims of [Fischer and Fischer Real Estate, Inc.]" but, nonetheless, argued that this court should review the trial court's judgment as it pertains to Fischer and Fischer Real Estate, Inc., on its merits.[6] In response, the defendants argued that the appeal should be dismissed as to Fischer and Fischer Real Estate, Inc., because there was no final judgment as to those plaintiffs.

I

Because it implicates the jurisdiction of this court to hear the appeal, we first consider whether the trial court's decision granting the motion to dismiss with respect to Fischer and Fischer Real Estate, Inc., constitutes a final judgment. See *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 755, 48 A.3d 16 (2012) (addressing first issue of whether trial court's order is appealable final judgment because it implicates court's subject matter jurisdiction). We conclude that because the court's decision did not dispose of all counts of the complaint with respect to Fischer and Fischer Real Estate, Inc., those plaintiffs did not appeal from a final judgment. Accordingly, we dismiss that portion of the appeal that pertains to them.

[6] The plaintiffs' supplemental brief failed to properly identify any exception that would allow the partial judgment to be considered a final judgment by this court. Although the plaintiffs quote *Heyward* v. *Judicial Dept.*, 159 Conn. App. 794, 801, 124 A.3d 920 (2015), which quotes Practice Book § 61-4 (a), that rule of practice is not applicable to the present case. Practice Book § 61-4 (a) requires the trial court to make a written determination "that the issues resolved by the judgment are of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified, and the chief justice or chief judge of the court having appellate jurisdiction concurs. . . ." No such determination was made in the present case.

We begin by setting forth the relevant legal principles. "Unless otherwise provided by law, the jurisdiction of our appellate courts is restricted to appeals from final judgments. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack] jurisdiction to hear. . . . Accordingly, a final judgment issue is a threshold matter that must always be resolved prior to addressing the merits of an appeal. . . . Whether an appealable final judgment has occurred is a question of law over which our review is plenary. . . .

"It is axiomatic that [a] judgment that disposes of only a part of a complaint is not a final judgment. . . . Accordingly, an appeal challenging an order issued during the pendency of a civil action ordinarily must wait until there has been a final disposition as to all counts of the underlying complaint. Our rules of practice, however, set forth certain circumstances under which a party may appeal from a judgment disposing of less than all of the counts of a complaint. Thus, a party may appeal if the partial judgment disposes of all causes of action against a particular party or parties . . . ." (Citations omitted; internal quotation marks omitted.) *Krausman* v. *Liberty Mutual Ins. Co.*, 195 Conn. App. 682, 687–88, 227 A.3d 91 (2020); see also Practice Book § 61-3 ("[a] judgment disposing of only a part of a complaint, counterclaim or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim or cross complaint brought by or against a particular party or parties").

The complaint in the underlying action contains five counts. Counts one, two, three, and four were brought by all three of the plaintiffs. Count five was brought only by Fischer. The trial court dismissed all counts brought by 1730 LP and counts one, two, and three in their entirety. The court's ruling thus disposed of all causes of action involving 1730 LP, rendering it a final

judgment under the rules set forth in Practice Book § 61-3. In contrast, the court's ruling was only a partial judgment with respect to Fischer and Fischer Real Estate, Inc., because it did not fully dispose of counts four and five. Because all causes of action brought by Fischer and Fischer Real Estate, Inc., have not been disposed of, there is no final judgment with respect to those parties.[7] This court is deprived of jurisdiction to review this appeal with respect to the claims brought by Fischer and Fischer Real Estate, Inc. Accordingly, that portion of this appeal is dismissed.

II

We now turn to 1730 LP's claim that the court improperly granted the motion to dismiss on the basis that 1730 LP lacked standing to bring the action. Specifically, 1730 LP argues that "[t]he misinterpretation of the [AJC operating agreement] and [the 1730 LP partnership agreement]" led to an improper determination that 1730 LP lacked standing to bring this action. We are not persuaded and agree with the trial court that 1730 LP did not have standing because Fischer was not legally authorized to commence the action on behalf of AJC without the unanimous consent of AJC's members. Accordingly, we conclude that the court was deprived of jurisdiction over all counts brought by 1730 LP and that the court properly dismissed those counts as they pertained to 1730 LP.

[7] We recognize that a court's disposition of one count that is legally inconsistent or mutually exclusive of another count may be deemed to implicitly dispose of the legally inconsistent count. See *Clinton* v. *Aspinwall*, 344 Conn. 696, 704, 281 A.3d 1174 (2022). On the other hand, if an undisposed count is based on a legally consistent alternative theory, such an implicit disposition cannot be presumed. Id., 705. In the present case, there is no legal inconsistency between the plaintiffs' first three counts, which are allegations of breach of contract, breach of the covenant of good faith and fair dealing, and CUTPA violations, and the fourth and fifth counts, which are allegations of tortious interference with a business expectancy and negligent infliction of emotional distress.

We begin our analysis by setting forth the applicable standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Citation omitted; internal quotation marks omitted.) *Hayes Family Ltd. Partnership* v. *Glastonbury*, 132 Conn. App. 218, 221, 31 A.3d 429 (2011).

To the extent that we are called on to interpret the partnership or operating agreements, our standard of review is also well established. "Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary] . . . and we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 403, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

In the present case, 1730 LP challenges the court's interpretation of the relevant partnership and operating agreements as it relates to the court's ultimate conclusion that Fischer lacked authority to commence litigation on behalf of AJC and, in turn, 1730 LP. Thus, our review is plenary. See id. The following legal principles are relevant to our resolution of this claim.

"[L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed. When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial

court may dismiss the action without further proceedings." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651–52, 974 A.2d 669 (2009).

"As we also have held, [i]t is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has . . . some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . The standing requirement is designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . To fulfill these goals, the standing doctrine requires a plaintiff to demonstrate two facts. First, the complaining party must be a proper party to request adjudication of the issues. . . . Second, the person or persons who prosecute the claim on behalf of the complaining party *must have authority to represent the party*. . . .

"A complaining party ordinarily can show that it is a proper party when it makes a colorable claim of [a] direct injury [it] has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy. . . . To demonstrate authority to sue, however, it is not enough for a party merely to show a colorable claim to such authority. Rather, the party whose authority is challenged has the burden of convincing the court that the authority exists. . . . The burden of proof for questions of authority is higher than that for questions of propriety because the former

questions are more important. Lawsuits must be authorized not only to ensure that the litigants fairly and vigorously represent the party's views . . . but also because, *if unauthorized lawsuits were allowed to proceed, future rights of the named parties might be severely impaired*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 552–54, 698 A.2d 245 (1997).

In the present case, it is not disputed that 1730 LP is the proper party to request adjudication of the causes of action alleged in the complaint. Therefore, the only question before this court is whether Fischer, acting alone on behalf of AJC, had authority to commence the action by 1730 LP.

The defendants' motion to dismiss was supplemented by undisputed facts, and the plaintiffs supplied a counteraffidavit in opposition to the motion to dismiss. Thus, the operative complaint, the undisputed facts that were put forth as evidence in support of the defendants' motion to dismiss, and Fischer's counteraffidavit must all be considered to determine whether a lack of jurisdiction has been conclusively established. See *Conboy* v. *State*, supra, 292 Conn. 651–52. Because 1730 LP's authority to bring the action is challenged, it bears the burden of establishing that authority exists. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, supra, 241 Conn. 554. The 1730 LP partnership agreement and the AJC operating agreement conclusively establish that 1730 LP lacked authority to commence the action; Fischer's counteraffidavit fails to undermine this conclusion. We conclude that 1730 LP did not meet its burden in establishing that Fischer, acting alone on behalf of AJC, was legally authorized to commence litigation against 1730 LP's mortgage lender.

To resolve this claim, we first consider the operative complaint. We need not conclusively presume the validity of the allegations in the complaint and, instead, must consider them in light of the undisputed facts in the record. See *Conboy* v. *State*, supra, 292 Conn. 651–52. The operative complaint alleges that "AJC delegated its management responsibility for the operation of AJC and the property to [Fischer] pursuant to the agreement between the members of AJC." The complaint also states that Fischer continually has managed operations of 1730 LP's property since 1998 as its sole property manager. We next consider these allegations in light of the undisputed facts in the record, particularly 1730 LP's partnership agreement and AJC's operating agreement.

The 1730 LP partnership agreement sets forth who has the rights and powers to control 1730 LP. See General Statutes § 34-9 (10) (general partner is "a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement"); General Statutes § 34-10 (3) (partnership agreement shall set forth name and address of each general partner); see also General Statutes § 34-17 (a) ("[e]xcept as provided in this chapter or in the partnership agreement, a general partner of a limited partnership shall have all the rights and powers . . . of a partner in a partnership"). The partnership agreement names AJC as its "[g]eneral [p]artner." The partnership agreement further grants AJC the "full, exclusive and complete discretion in the management and control of [1730 LP] . . . . Such discretion shall include, without limitation, the right to . . . [c]ompromise, submit to arbitration, sue or defend any and all claims for or against [1730 LP]." More so, the agreement restricts AJC from withdrawing from its position of general partner, stating: "[AJC] may not voluntarily withdraw from [1730 LP]. The Limited Partners shall have no right to remove [AJC]." According to the agreement, AJC is the proper,

and only, entity with the power to authorize the commencement of an action by 1730 LP.

AJC is a limited liability company consisting of three members: Fischer, Jefferson Scinto, and Christian Scinto. Accordingly, we turn to AJC's operating agreement to determine whether an individual member may act on behalf of AJC to commence this particular action. See General Statutes § 34-243d (a) (1) (operating agreement governs "[r]elations among the members as members and between the members and the limited liability company"). The AJC operating agreement provides in relevant part: "All decisions affecting the policy and management of the Company shall be made by unanimous consent of the Members. No change shall be made in the nature or scope of the Company business . . . ." It also provides in relevant part: "The Members may delegate to . . . an individual Member . . . any management responsibility or authority except as set forth in this Agreement to the contrary." Though the agreement does not define "decisions affecting the policy and management," it specifies a number of actions that require unanimous consent of its members, stating that a member shall not "borrow or lend money, make, deliver, accept or endorse any commercial paper, execute any mortgage, security instrument, bond or lease, or purchase or contract to purchase any property . . . or sell or contract to sell any assets of the Company, all other than in the ordinary course of the Company business, nor shall any authorization be given to any member or other Person to do any act on behalf of the Company in contravention of this Agreement, without the unanimous consent of the Members." The agreement also sets forth the purpose and scope of the company, stating in relevant part: "The business to be conducted by the Company shall be limited to (i) the sale, acquisition, ownership, development, operation, lease, investment and management of real properties . . . .

The business of the Company shall not be extended by implication or otherwise beyond the scope of this Agreement." Thus, the commencement of litigation on behalf of 1730 LP against its mortgage lender is not an act that is within the scope of AJC's ordinary course of business and is, instead, a decision that affects the policy and management of AJC.

Finally, the affidavit of Christan Scinto also sets forth undisputed facts. The affidavit states that neither he nor Jefferson Scinto authorized or agreed to commence the action on behalf of AJC or, in turn, 1730 LP.

We next turn to Fischer's counteraffidavit to determine whether it effectively refuted the alleged lack of authority found in the complaint and the undisputed facts in the record. Fischer's affidavit does not challenge the applicability of 1730 LP's partnership agreement or AJC's operating agreement. It also does not assert that the other members of AJC authorized the action. Instead, the affidavit, sounding much like the operative complaint, asserts that Fischer has been the sole management authority for the property by unanimous agreement of AJC's members and has also been the sole member of AJC that has carried out operations on behalf of 1730 LP. The affidavit also asserts that People's United has recognized Fischer as the sole member of AJC authorized to act on behalf of AJC for many years and that "[i]t is not uncommon in the management of and investment in real estate for litigation to be a part of the business activities . . . most commonly in, but not limited to, eviction and collection actions." These statements do not undermine the clear and unambiguous language of the controlling 1730 LP partnership agreement and AJC operating agreement.

The record conclusively establishes that 1730 LP's partnership agreement gave AJC, not Fischer, the exclusive role of general partner. Fischer, acting alone and

purportedly on behalf of AJC, brought the action on behalf of 1730 LP. The Scintos did not affirmatively vote for or consent to the commencement of the action; thus, Fischer would need to be authorized to act individually on behalf of AJC for the action to be legally authorized. As demonstrated by the language of AJC's operating agreement, Fischer's management responsibilities for AJC in his role as the property manager fall within the scope and purpose of AJC and Fischer's authority is not disputed in this regard. In contrast, bringing an action against 1730 LP's mortgage lender is outside the ordinary course of AJC's business and is a decision that affects the management and policy of AJC. AJC's operating agreement clearly requires that such actions must be made with the unanimous consent of all of AJC's members.[8]

Viewing the operative complaint in light of the undisputed facts put forth by the defendants and Fischer's counteraffidavit, it is clear that 1730 LP has not met its burden of proving that it had the requisite authority to bring the underlying action. Unanimous consent from AJC's members was required. 1730 LP provided no evidence that an action against 1730 LP's mortgage lender

[8] The trial court also considered the language of CULLCA to determine whether AJC bringing an action on behalf of 1730 LP was made with proper authority. AJC's operating agreement provides in relevant part: "Except as expressly provided for herein to the contrary, the rights and obligations of the Members and the administration and termination of [AJC] shall be governed by the Connecticut Limited Liability Company Act . . . ." CULLCA provides in relevant part that "[t]he affirmative vote or consent of two-thirds in interest of the members is required to: (A) Undertake an act outside the ordinary course of the company's activities and affairs . . . ." General Statutes § 34-255f (b) (3). Thus, even if the AJC operating agreement did not provide for the authority of a member to commence an action, Fischer alone could not authorize this action on behalf of AJC regardless of whether the action fell within or outside the ordinary course of business. On appeal, however, neither party argues that 1730 LP's partnership agreement and AJC's operating agreement are ambiguous as to the present issue. Thus, we need not consider the language of CULLCA.

falls within AJC's ordinary course of business or that such an action would not affect AJC's policy and management. Fischer's mere assertion that litigation is not uncommon in the management of real estate does not effectively refute the language of the AJC operating agreement or the 1730 LP partnership agreement or speak to the unique litigation at issue. This assertion alone thus fails to satisfy the burden of establishing that Fischer had authority to bring this action. 1730 LP had the burden of establishing that its action was brought with proper authority, and it failed to satisfy this burden.

1730 LP makes two primary arguments on appeal.[9] First, it argues that Fischer was delegated AJC's management authority and that this delegation effectively made him the "general partner" of 1730 LP. 1730 LP further argues that the trial court had before it undisputed "party admissions" that delegated Fischer the " 'General Partner' management responsibility and authority . . . ." We do not find 1730 LP's statement to be an accurate representation of the record and are not persuaded by its argument.

[9] 1730 LP also argues on appeal that the trial court improperly applied the law and deprived it of its "due process and equal protection rights." Specifically, 1730 LP argues that "[the court] failed to take the facts alleged in the complaint, including facts necessarily implied therefrom and to construe the allegations in the complaint in a manner most favorable to the pleader as it is mandated . . . in deciding a motion to dismiss." 1730 LP incorrectly states the law under *Conboy* v. *State*, supra, 292 Conn. 651. As previously stated in this opinion, the court is required to construe allegations in the complaint in a manner most favorable to the pleader when the facts in the complaint are not supplemented by undisputed facts on the record. See id. In the present case, the complaint was supplemented by undisputed facts that were brought before the trial court in support of the defendants' motion to dismiss. Under these circumstances, the court "need not conclusively presume the validity of the allegations of the complaint." (Internal quotation marks omitted.) Id., 652. Additionally, as discussed further in this opinion, because 1730 LP's authority to bring the action was challenged, the burden was on 1730 LP to establish that it had authority to commence the litigation. See *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, supra, 241 Conn. 554.

The "party admissions" that 1730 LP refers to are the assertions in the complaint that "AJC delegated its management responsibility for the operation of AJC and the property . . . ." Nowhere in the complaint or in Fischer's affidavit does it state that Fischer was delegated the role of 1730 LP's "general partner." Rather, the language of the complaint and Fischer's affidavit support that Fischer was delegated responsibility to act as property manager for the property on behalf of AJC. The role of general partner carries legal significance under 1730 LP's partnership agreement and § 34-17 and is not synonymous with the role of property manager.

Even assuming arguendo that Fischer was delegated the role of general partner, 1730 LP's partnership agreement and AJC's operating agreement clearly prohibit such a delegation. 1730 LP's partnership agreement names AJC as the "[g]eneral [p]artner" and grants AJC the exclusive right to bring an action by 1730 LP. Furthermore, the agreement states that the general partner may not voluntarily withdraw. If AJC did attempt to delegate its role as general partner to Fischer, this delegation would violate the agreement's restriction on AJC's right to withdraw from its position as general partner. See *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 322, 12 A.3d 995 (2011) (" 'in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous' ").

AJC's operating agreement also prohibits the delegation of AJC's general partner authority over 1730 LP. AJC's operating agreement states that "[t]he Members may delegate to . . . an individual Member . . . any management responsibility or authority *except as set forth in this Agreement* to the contrary." (Emphasis added.) A complete delegation of AJC's authority to act as the general partner of 1730 LP is precisely the type

of delegation prohibited by AJC's operating agreement, which requires the members' unanimous consent for actions outside the ordinary course of business and actions affecting AJC's policy and management.

1730 LP next argues that the trial court failed to distinguish between 1730 LP's partnership agreement and AJC's operating agreement and that this improperly led the trial court to determine that 1730 LP lacked standing. Specifically, 1730 LP argues that AJC's operating agreement is only relevant to the extent that it allows AJC to delegate authority and that, because AJC's authority as general partner was delegated, the court should have looked to the agreement that controls 1730 LP in determining what constituted proper authority. This argument relies on the same logical foundation of 1730 LP's first argument—that AJC was divested of its management authority because its authority as general partner was delegated to Fischer. Thus, it fails for the same reasons. Because of the language in both the 1730 LP partnership agreement and the AJC operating agreement, AJC could not delegate its exclusive control and management of 1730 LP or remove itself from its role as general partner. Furthermore, there was no support in the record that such a delegation was made. Accordingly, we affirm the trial court's motion to dismiss all counts brought by 1730 LP.

The appeal is dismissed as to the claims of Alan Fischer and Fischer Real Estate, Inc., challenging the dismissal of counts one, two, and three of the complaint; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GREGORY E. MCLAURIN (AC 44523)

Alvord, Seeley and DiPentima, Js.

Syllabus

Convicted of several crimes in connection with his role in the robbery of a restaurant, the defendant appealed to this court, claiming that the trial court improperly denied his motion to suppress evidence of his identification by B, an employee of the restaurant, during a one-on-one showup procedure arranged by the police. The defendant and an accomplice, F, had forced the restaurant's employees at gunpoint to give them money from the restaurant's safe and cash registers before fleeing on foot across a heavily trafficked road. Within ten minutes after receiving the call regarding the armed robbery, the police apprehended F and detained him in the parking lot of a car dealership about 800 feet from the crime scene, where they had set up a staging area. While the police continued to search for the defendant, an officer drove B from the restaurant to the car dealership, which was well lighted, for a one-on-one showup identification during which she promptly identified F as one of the robbers. After the police apprehended the defendant a short time later, they drove B from the restaurant back to the staging area where, without hesitation, she identified the defendant less than ninety minutes after the robbery. *Held* that the trial court did not abuse its discretion in denying the defendant's motion to suppress the evidence of B's identification of him, as the one-on-one showup identification procedure the police conducted was not unnecessarily suggestive in light of the exigencies of the situation: the police, who had found a gun in the restaurant, had no way of knowing whether other weapons were involved in the robbery, it was reasonable for the police to believe that the suspects remained armed and dangerous, which justified the need to act quickly, and the officers' belief that the safety of the public was at risk was confirmed when they apprehended F with an eight to nine inch knife on his person while the defendant was still at large; moreover, the showup identification was justified by the need to quickly confirm whether the defendant was the second perpetrator or whether the police needed to continue their search, and, even though there did not appear to be a risk that B would later become unavailable, the immediacy of her identification of the defendant ensured that she viewed him while her recollection was still fresh, and it was particularly important because the defendant wore a mask during the robbery and B had been able to see only his clothing, eyes, mouth and portions of his skin; furthermore, the police did not, as the defendant contended, conduct the showup in a suggestive place or stage it in a suggestive manner by returning B to

the parking lot where she had identified F about thirty minutes earlier but, rather, took significant steps to minimize the inherent suggestiveness of a showup identification by transporting B to a neutral location, the car dealership, where the defendant was seated in an ambulance, rather than in a police car, during the identification procedure, the police did not indicate to B that the person she would be viewing was the person responsible for the crime, and the fact that the defendant was handcuffed during the showup did not render the identification procedure unnecessarily suggestive.

Argued September 15—officially released November 8, 2022

Procedural History

Substitute information charging the defendant with four counts of the crime of unlawful restraint in the first degree and with one count each of the crimes of robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit, larceny in the fourth degree and conspiracy to commit larceny in the fourth degree, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Brown*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Brown*, *J.*; verdict and judgment of guilty of four counts of unlawful restraint in the first degree, and of robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit and conspiracy to commit larceny in the fourth degree; subsequently, the court, *Dennis*, *J.*, rendered judgment revoking the defendant's probation, and the defendant appealed to this court. *Affirmed.*

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Nathan J. Buchok, deputy assistant state's attorney, with whom, on the brief, was *Margaret E. Kelley*, state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Gregory E. McLaurin, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree with a deadly weapon in violation of General Statutes § 53a-134 (a) (2), conspiracy to commit robbery in the first degree with a deadly weapon in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), criminal possession of a firearm in violation of General Statutes § 53a-217, carrying a pistol without a permit in violation of General Statutes § 29-35 (a), four counts of unlawful restraint in the first degree in violation of General Statutes § 53a-95, and conspiracy to commit larceny in the fourth degree in violation of General Statutes §§ 53a-48 and 53a-125. On appeal, the defendant claims that the trial court improperly denied his motion to suppress a one-on-one showup identification. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On January 19, 2018, at approximately 8:30 p.m., the defendant and another individual, Royshon Ferguson, entered a Smashburger restaurant on Boston Post Road in Milford. Both men were wearing ski masks, but their eyes, mouths, and the skin around their eyes and mouths were visible. The defendant was carrying a silver-colored, semiautomatic gun in his hand.

There were three employees working at the restaurant that night. Jada Brinkley and Jamal McNeil were working in the front of the restaurant, and Casey Deloma, the shift lead, was in the back room, which was brightly lit and contained a small safe. There were four customers dining in the front of the restaurant. When the defendant and Ferguson entered Smashburger, two of the customers attempted to flee. The defendant pointed the gun at them and told them, "don't

run." The defendant then gathered the customers and employees at gunpoint and directed them to the back of the restaurant, where Deloma was located.

Once in the back room of the restaurant, the defendant handed the gun to Ferguson, who pointed it at Deloma and told her to unlock the safe. Deloma attempted to unlock the safe twice using a code, but it did not unlock. Ferguson told her, "I'm going to give you ten seconds or I'm going to shoot you." Deloma entered the code again and opened the safe. Ferguson took the money out of the safe and put it in his pockets. During this time, the defendant was standing in the back room, next to Brinkley.

After taking money out of the safe, Ferguson took Deloma to the front of the restaurant at gunpoint and directed her to open the cash registers. She opened the first register, and Ferguson began to take money from it while she opened the second register.[1] The defendant remained in the back room of the restaurant with the other victims. The defendant demanded that the victims give him their cell phones. At that point, one of the customers, Garfield Stewart, who was lawfully carrying a concealed firearm, drew his weapon on the defendant, who immediately took off running. As Stewart gave chase, the defendant ran into the front of the restaurant, past Ferguson, and out the front door. Stewart then pointed his gun at Ferguson, who was bent over a cash register, and started banging Ferguson's hand until he released the gun. Ferguson ran out of the restaurant, exiting within seconds of the defendant. The defendant and Ferguson fled in the same direction, turning right out of the front door and running down Boston Post Road.

At approximately 8:40 p.m., the Milford Police Department received a high priority call that an armed robbery

[1] The restaurant manager testified that, upon running sales reports for the day, $1456 was missing after the robbery.

was in progress at Smashburger on Boston Post Road. Three minutes later, Officer Matthew Joy arrived to a chaotic scene and immediately turned on his body camera. As the first responding officer on scene, Officer Joy secured the scene, ensured that no suspects remained on the premises, and determined that the employees and customers were uninjured. Additionally, he located a gun on the floor behind the front counter of the restaurant. After speaking with the employees and customers, Officer Joy learned that two suspects had fled the restaurant on foot, turning right out of the front door. One suspect, later identified as Ferguson, was described as "a black male, about five feet, six inches, heavyset, wearing jeans and a dark colored . . . hooded sweatshirt . . . ." The other suspect, later identified as the defendant, was described as "a black male, approximately six feet, six foot one, a thinner build wearing jeans, a red hooded sweatshirt with a dark colored top coat layer." Officer Joy did not receive descriptions of the suspects' faces because he was told that they were wearing dark-colored ski masks, one black and one green.

Officer Joy promptly relayed a description of the suspects to his fellow officers over his portable police radio. A passing motorist flagged down police officers responding to the scene and reported that he had just seen two black males run into a wooded area, behind a car dealership and storage facility, that was located approximately 800 feet across the street from Smashburger. At that time of night, there was limited pedestrian activity on Boston Post Road, but there was significant vehicular traffic.

Officer Sean Owens, a canine handler, and his partner, Canine Officer Czar, responded to the wooded area behind the car dealership. It was a cold night, there was some ice on the ground, and the wooded area was

dimly lit. Officer Owens casted[2] Czar into the general area where the subjects were last seen, and Czar immediately alerted to an apocrine odor, a particular odor that humans emit when they are emotionally charged or fearful. Czar began pulling south along the overgrown grass and wood line that ran between the storage facility and wooded area. Upon reaching the car dealership parking lot, Czar displayed a proximity alert[3] and then pulled deeper into the wooded area, toward a marsh, for approximately twenty-five to thirty yards, when Officer Owens saw the first suspect, later identified as Ferguson. Officer Owens, and his fellow officers who were providing backup, gave several verbal commands for Ferguson to get down on the ground and show his hands. Ferguson ignored the officers' commands and reached for his waistband, which prompted Officer Owens to give Czar a command to apprehend Ferguson. Czar subdued Ferguson with a bite to the leg. Once Ferguson complied with Officer Owens' commands, Czar was removed, and Officer Christopher Deida detained Ferguson.

Officer Deida searched Ferguson, who told him that he had a knife on his person. Officer Deida located an eight to nine inch kitchen knife in the front pocket of Ferguson's sweatshirt. Additionally, officers found $868 in cash on Ferguson, with many of the bills "hanging out of his pockets." Ferguson told Officer Deida that his friend "jumped the fence" and pointed to a nearby chain-link fence with barbed wire that ran along the

[2] Officer Owens testified that "casting is basically letting the dog engulf the immediate area in front of you and seeing if he picks up anything, as opposed to targeting him on say this cup right here where someone touched and this would be the evidence of I want you to smell this cup and then start your track. So, casting is more of a general, open, free of getting the odor that's right in front of you."

[3] Officer Owens testified that a proximity alert is a "change in a dog's behavior" that signifies to his handler "that someone is close, that this main pool of odor is getting stronger for the dog."

wooded area. Officer Deida and another officer moved Ferguson from the wooded area to the parking lot of the car dealership, where the officers had set up a staging area. The officers had called an ambulance to the car dealership, and Ferguson was treated for his dog bite.

At 8:50 p.m., ten minutes after the police received the call regarding the armed robbery, Officer Joy, who had remained on scene at Smashburger, received a radio transmission informing him that a suspect had been apprehended. Sergeant Christopher Dunn,[4] Officer Joy's commanding officer, instructed him to conduct an eyewitness showup,[5] at the car dealership, with a victim. Officer Joy selected Brinkley because he determined that she had the best view of the robbers. Shortly thereafter, Officer Joy brought Brinkley to the car dealership where she identified Ferguson as one of the robbers, without hesitation and within less than one minute.

Meanwhile, Officer Owens and Czar continued to search for the second suspect. Officer Owens attempted to get Czar back on task, which was difficult because of the excitement surrounding Ferguson's apprehension and the additional personnel in the area whose odor began to contaminate the scene. For twenty to thirty minutes, Officer Owens and Czar continuously tracked within the wooded area, even rechecking certain areas. Czar continued to return and show interest in the marsh area, near where Ferguson was found, and Officer Owens "felt confident that there was somebody

[4] We note that, at the time of trial, Sergeant Dunn had been promoted to lieutenant.

[5] Officer Joy testified that "[a] showup is when you transport a victim or witness to the area of where the suspect is detained to conduct an eyewitness showup where they would identify whether or not that suspect is the one who, in fact, committed the crime."

else in this area." However, Officer Owens became concerned that Czar was getting tired, and that the scene was overwhelmingly contaminated, so he decided to end the track and return Czar to his vehicle to regroup. As they began to walk back to the vehicle along the back of the storage building, Czar changed his behavior, hooked his head,[6] and pulled Officer Owens toward the marsh, deep within the wooded area.

Officer Owens found the second suspect about fifty to sixty yards from where Ferguson was apprehended and in a location "where the dog . . . twenty minutes earlier, wanted to kind of get into . . . ." The second suspect, who was later identified as the defendant, was "hunkered down in head high thickets . . . well hidden . . . in close proximity to all the noise and everything else going on for the first subject." Officer Owens told the defendant to show him his hands, but the defendant attempted to flee deeper into the woods and marsh. At that point, Officer Owens gave Czar the command to apprehend the defendant, which Czar did with a bite to the lower leg. As the only officer in the woods at that time, Officer Owens handcuffed the defendant, removed Czar, and radioed for backup. Officers took the defendant to the car dealership parking lot where medical personnel attended to his dog bite injury.

At 9:42 p.m., Officer Joy received information that a second suspect had been detained at the car dealership. Officer Joy was instructed to bring Brinkley back to the car dealership to conduct the second showup identification. After arriving at the car dealership, Brinkley identified, without hesitation, the defendant as one of the robbers.

On January 20, 2018, the day after the robbery, officers returned to the area where the defendant and Ferguson were apprehended to search for additional evidence. Officers recovered one black, knit ski mask, a

[6] Officer Owens testified that "[Czar] hooked his head to a direction, meaning he's interested in something that's going on in there . . . ."

black knit glove, and a ten dollar bill Additionally, officers recovered a camouflage jacket, which was located over the top of a tall chain-link fence with barbed wire along the top. The jacket was spread out, as though someone had used it as protection when trying to climb over the fence.

The defendant was subsequently arrested and charged with robbery in the first degree, conspiracy to commit robbery in the first degree, criminal possession of a firearm, carrying a pistol without a permit, four counts of unlawful restraint in the first degree, larceny in the fourth degree, and conspiracy to commit larceny in the fourth degree.

On June 11, 2019, the defendant filed a motion to suppress the identification evidence of him as improper, unreliable, and unnecessarily suggestive. The court held a hearing on the motion to suppress on July 15, 2019, prior to the start of trial. During the hearing, the state presented evidence from Officer Joy and Brinkley. The defendant cross-examined the state's witnesses but did not call any witnesses in support of his motion to suppress.

During the hearing, Officer Joy testified that, seven minutes after he had arrived at Smashburger, he received a radio transmission informing him that fellow officers had detained a suspect, later identified as Ferguson, at a car dealership across the road. Officer Joy was instructed to bring one witness to conduct a showup identification. He chose Brinkley because "[s]he was the employee near the front register closest to the front of the store [and she had] encountered the suspects first." Officer Joy testified that he had turned his body camera on upon arriving at Smashburger at 8:43 p.m. and that he had it recording the entire time he was on scene.

Officer Joy transported Brinkley to the car dealership in his patrol cruiser. Brinkley was seated in the rear driver's side seat, separated from Officer Joy by a metal and glass divider. Prior to showing Brinkley the suspect, Officer Joy read Brinkley the preprinted rules and instructions form for identification procedures, which had been provided to him by the supervisory sergeant on duty that evening. Officer Joy did not communicate to Brinkley that the police had the person in custody who was responsible for the robbery. After reading her the instructions, Officer Joy provided Brinkley with the opportunity to ask questions. Brinkley did not have any questions and appeared to understand the instructions.

At the dealership, Officer Joy rolled down Brinkley's window. The car dealership was well lit by the lights from the ambulance and streetlamps. Officer Joy's cruiser lights were on but did not face toward the suspect. At 9:12 p.m., Brinkley identified Ferguson as the first suspect, promptly and without hesitation. Following the identification, Officer Joy transported Brinkley back to Smashburger. He testified that, upon returning to the restaurant, he obtained written statements from the employees and customers who were present at the time of the robbery.

At 9:42 p.m., Officer Joy received a radio transmission informing him that a second suspect had been detained at the car dealership. Officer Joy was instructed to bring Brinkley back to conduct a showup identification. Officer Joy read Brinkley an identification instructions and advisement form, which Brinkley signed. He did not, in any way, indicate to Brinkley that the suspect she was going to view was responsible for the crime.

Upon arriving at the car dealership, Officer Joy proceeded to the same location where Brinkley previously had identified Ferguson. As with the prior identification, Brinkley was seated in the rear driver's seat and viewed

the defendant out of the rolled down window. The area remained well lit. The defendant was seated in the back of an ambulance, approximately two to three car lengths from Officer Joy's cruiser. Officer Joy did not recall whether the defendant was handcuffed at the time or whether there were officers standing near the defendant. Officer Joy testified that Brinkley identified the defendant as the second suspect at 9:56 p.m. and that she did not hesitate in making the identification.

Officer Joy testified that the exigent circumstances necessitating a showup identification of the defendant were "that an armed robbery had just occurred with a firearm and the suspects who had left the scene of the crime on foot, after having one suspect detained, possibly could still have other weapons on their person." He explained that it was "exigent to either clear or positively identify the suspect to make sure that they aren't further armed or clear the person who is being [identified]." Additionally, Officer Joy testified that it was important to eliminate the defendant as a suspect in the event that the perpetrator remained in the community. Moreover, he testified that, during the course of the investigation, he learned that Ferguson had been apprehended with a knife and that he did not know how many weapons were involved in the incident.

During cross-examination of Officer Joy, defense counsel introduced a document titled "Milford Police Department General Orders—Eyewitness Identification" over the objection of the state. Defense counsel highlighted a portion of the document, which stated that "[s]howup identification procedures are employed soon after a crime has been committed, when a suspect is detained at or near the crime, or under exigent circumstances such as the near death of the eyewitness or victim." Officer Joy confirmed that the contents of

the paragraph were accurate and answered in the negative when asked whether anyone was in a near death state at the time of identification.

Brinkley testified during the hearing that, in January, 2018, she was working as a cashier at Smashburger. When asked about a night in January, 2018, when two people came into the restaurant, she testified that she had no memory of the event or the night in question. She testified, "I just got into a car accident. I was unconscious, don't remember. I smoke weed. . . . I do not remember this night . . . ." The prosecutor showed Brinkley four clips of footage from Officer Joy's body camera wherein Brinkley can be seen and heard identifying Ferguson, identifying the defendant, and discussing the suspects' physical features and clothing. Brinkley confirmed that it was her voice and image in the clips but testified that she had no recollection or memory of the captured events.

The prosecutor also introduced Brinkley's written statement to the police in which she described the appearance of the robbers. Brinkley confirmed that the statement was handwritten and signed by her but testified that she had no recollection of writing the statement or the contents of the statement. Additionally, when shown the eyewitness instructions for identification procedures, which Officer Joy testified that he had read to Brinkley prior to her identification of the defendant, Brinkley confirmed that she had signed and dated the document. On cross-examination, Brinkley testified that she "[m]ost likely" smoked "weed" on the day of the robbery but ultimately stated that she did not know if she had done so.

Following the presentation of evidence at the hearing, defense counsel argued that Brinkley's identification should be suppressed on three grounds: (1) law enforcement did not comply with General Statutes § 54-1p,

which requires the use of fillers in lineups and photographic arrays, but that here, the defendant was the only person presented;[7] (2) Milford Police Department procedure allows for the use of showup identifications under certain circumstances, which were not present in this case;[8] and (3) Brinkley had no recollection of making the identification. In concluding his argument, defense counsel stated, "the prejudicial effect of this procedure in identifying the defendant as the person who perpetrated the crime far outweighs the probative value."

In response, the prosecutor argued that the relevant standard was the two-pronged due process standard, which required the defendant to prove that the showup identification was both unnecessarily suggestive and unreliable, not a probative-prejudicial balancing test. The prosecutor argued that the defendant had not met his burden of proof. As to the first prong, the prosecutor argued that the showup procedure was not unnecessarily suggestive under the circumstances at issue, in which the two perpetrators had committed an armed robbery and fled the scene on foot, the police had an

[7] In response to defense counsel's argument on the first ground, the court stated: "Well, this was meant as a showup and it wasn't meant as a lineup, right? I mean, this was not meant as a lineup, it's pretty clear. So, is your argument that showups are impermissible?" Defense counsel responded that no, that was not his argument and moved onto his second point. The prosecutor addressed defense counsel's argument, premised on § 54-1p, and argued that § 54-1p has no applicability to this case because the statute applies to lineup and photographic array identifications, not showup identifications.

[8] Defense counsel pointed specifically to language in the Milford Police Department General Orders, which states: "Showup identification procedures are employed soon after a crime has been committed when a suspect is detained at or near the crime or under exigent circumstances such as the near death of the eyewitness or a victim." In response to defense counsel's argument on the second ground, the court asked: "Was this not at or near the crime?" Defense counsel responded that it was but asserted that "there were no exigent circumstances with regard to why it needed to be done that way . . . ."

available eyewitness with a fresh memory of the perpetrators and needed to determine whether the defendant was the perpetrator or whether to continue searching for the perpetrator to safeguard the public. The prosecutor argued further that, even if the court concluded that the showup identification procedure was unnecessarily suggestive, it was nevertheless reliable because of "the detail of the description, the accuracy, [and] the quick identification . . . ."

The court stated that it had reviewed relevant case law and then orally denied the defendant's motion to suppress the identification evidence. In issuing its ruling, the court stated: "The court has had an opportunity to consider the motion to suppress identification, consider the testimony of Officer Joy and the testimony of Ms. Brinkley as well, and argument by counsel. The court finds that the identification, given all the facts and circumstances, was not unduly suggestive."[9]

At trial, Officer Joy testified in a manner consistent with the testimony he provided at the suppression hearing. He reiterated that, given the nature of the crime and the fact that a firearm was found on scene, it was "a priority, probably the main priority, to get out information regarding the suspects' location, direction of travel, description . . . as quick as possible, because you don't know if they're still armed. You don't know what they could be armed with, how many weapons. You know, there's already one weapon found on the scene prior to them leaving and it's a public safety issue

[9] Prior to filing his brief in the present appeal, the defendant filed a motion for articulation pursuant to Practice Book § 66-5. The defendant presented several questions for articulation, including, "[w]hat subordinate findings, if any, did the trial court make to support its determination that Brinkley's identification 'was not unduly suggestive?' " The state did not oppose this particular request for articulation. The court denied the defendant's motion for articulation. This court granted the defendant's motion for review of the denial of his motion for articulation but denied the relief requested therein.

as well as a time sensitive issue on, you know, capturing the subjects." Similarly, Officer Christopher Lennon, who was flagged down by the passing motorist that evening, testified that he and his fellow officers "didn't stop to take [the motorist's] name or information because we heard that there was a firearm involved in the robbery so we figured it was more important that we try to apprehend the suspects."

During cross-examination of Sergeant Dunn, who, at the time of the robbery, was supervising Officer Joy at Smashburger, defense counsel asked whether there was an emergency that necessitated a showup identification. Sergeant Dunn responded: "No, there was a request from the captain." During cross-examination of Detective Michael Cruz, who was in charge of the investigation, defense counsel inquired whether "there [was] anything that prevented [the officers] from doing a photo lineup of [the defendant] with the witnesses and the employees of Smashburger?" Detective Cruz responded that, "for this case and my training and experience the showup was appropriate. I believe there is enough probabl[e] cause on that night to arrest the two defendants for the robbery." When defense counsel again asked whether there was anything that prevented the officers from "doing a photo lineup" with the other witnesses and restaurant employees, Detective Cruz responded, "[n]o." Defense counsel then asked whether there was anything that prevented the officers from doing a "live lineup" with the defendant and the other restaurant employees, and Detective Cruz responded, "[n]o."

Brinkley also testified in a manner consistent with her testimony at the suppression hearing. She testified that, as a result of a recent car accident and regular marijuana use, she has a "short memory" and has no recollection of what happened on the night of the robbery. On cross-examination, Brinkley testified that she

"most likely" smoked weed on the day of the robbery because she "get[s] high almost every day . . . ." When asked how she was feeling on the day of the robbery, however, she stated, "I don't remember too much . . . ." Detective Cruz, who spoke with Brinkley on the night of the robbery, testified that she did not appear to be under the influence of any drugs that evening and that he did not have any concern about her participating in the showup identification on that night.

Due to Brinkley's lack of recollection, the court admitted into evidence, under *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986),[10] the signed witness statement Brinkley gave to the police on the night of the robbery. Brinkley read the statement aloud in its entirety.[11] Additionally, the prosecutor showed the jury

[10] "In *State* v. *Whelan*, supra, 200 Conn. 753, our Supreme Court adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination." (Internal quotation marks omitted.) *State* v. *Russaw*, 213 Conn. App. 311, 316–17 n.5, 278 A.3d 1, cert. denied, 345 Conn. 902, 282 A.3d 466 (2022). "Inconsistencies can be found in omissions, changes of position, denials of recollection or evasive answers. [*State* v. *Whelan*, supra], 748–49 n.4." Conn. Code Evid. § 6-10 (a), commentary.

[11] Brinkley's recitation of her statement was as follows: "On this day, January 19, 2018, at approximately 8:30 I was cleaning tables in the restaurant. As I was getting ready to walk in the back to grab a rag, I saw the door swing open and then came two black men, heavy set . . . with a dark blue hoodie, dark skin on and a mask; the other male was skinny, lighter skin, with a dark green mask, red camouflage coat on. I saw the gun in the skinny one's hand and I immediately went to the back to let my coworkers know what was behind me. I showed him where the safe was, he grabbed my arm, walked me, me and Casey, Jamal, further to the back where the safe was located. Then he pulled out the gun again and demanded someone to open the safe. It was silence. He started pointing the gun at everyone. Casey asked, do you want me to open it and went to put the code in. She put it in a couple of times but it didn't open. The heavy male then said she had 10 seconds to open it or he was going to shoot her. She put the code in again and the safe opened. He grabbed the drawer and started taking the money. Then along came the skinny individual with the four customers. The heavy set male took Casey back to the front to empty out the registers,

four video clips that were recorded from Officer Joy's body camera on the night of the robbery.[12] In the first two clips, Brinkley can be heard identifying Ferguson. In the third clip, Brinkley can be heard discussing the mask color of the "skinny" perpetrator. In the fourth clip, Brinkley can be heard identifying the defendant at the staging area. When asked if she recognized the individual's clothing, she stated: "Yep, I see. Can you put some light on his jeans?" Once the perpetrator stands up, Brinkley can be heard saying: "Yep, that's him." When asked how sure she is, she can be heard saying: "Yup, I'm sure."

The jury found the defendant guilty of all counts, except for larceny in the fourth degree. The defendant was sentenced to twenty-five years of incarceration, execution suspended after eighteen years, and five years of probation.[13]

meanwhile the skinny one was taking more money, he noticed one of the customers moving and before you know it the customer pulled out his gun and started to chase the robber. Jamal told me to call the police. I stayed in the back until Jamal came there again, I know it was clear that the robbers were gone."

[12] In his appellate brief, the defendant asserts that the court admitted the clips over defense counsel's objection. The record reflects, however, that, prior to the prosecutor publishing the exhibit to the jury, defense counsel stated, "[t]here's no objection. We've agreed to the exhibit coming in."

[13] The court, *Dennis*, *J.*, subsequently found that the defendant had violated a term of probation, which he was then serving in connection with a prior conviction under a separate docket number, CR-14-149028-T, as a result of his having committed the restaurant robbery and sentenced him to forty months to serve concurrently with the sentence on his conviction of the criminal charges for the restaurant robbery in docket number CR-18-0095601-T. Although the defendant also listed the judgment finding him in violation of his probation on his appeal form, he has failed to brief any claim relating to that judgment, nor did he list any claim related to that judgment on his statement of issues on appeal. We, therefore, dismiss the appeal to the extent that it purports to challenge the judgment finding him in violation of his probation. See *State* v. *Bletsch*, 86 Conn. App. 186, 188 n.3, 860 A.2d 299 (2004), aff'd, 281 Conn. 5, 912 A.2d 992 (2007); *State* v. *Gardner*, 85 Conn. App. 786, 787 n.1, 859 A.2d 41 (2004); *State* v. *Hannon*, 56 Conn. App. 581, 583 n.2, 745 A.2d 194 (2000), cert. denied, 274 Conn. 911, 876 A.2d 1203 (2005); see also *Casiraghi* v. *Casiraghi*, 200 Conn. App.

The defendant's sole claim on appeal is that the court improperly denied his motion to suppress the showup identification on the ground that it was unnecessarily suggestive and unreliable. In response, the state argues, inter alia, that the court properly concluded that the showup identification of the defendant was not unnecessarily suggestive given the exigent circumstances. We agree with the state.

"The test for determining whether the state's use of an [allegedly] unnecessarily suggestive identification procedure violates a defendant's federal due process rights derives from the decisions of the United States Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). As the court explained in *Brathwaite*, fundamental fairness is the standard underlying due process, and consequently, reliability is the linchpin in determining the admissibility of identification testimony . . . . Thus, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances . . . .

"With respect to the first prong of this analysis, [b]ecause, [g]enerally, [t]he exclusion of evidence from the jury is . . . a drastic sanction, [it] . . . is limited to identification testimony [that] is manifestly suspect . . . . [Consequently] [a]n identification procedure is unnecessarily suggestive only if it gives rise to a very substantial likelihood of irreparable misidentification.

771, 772 n.1, 241 A.3d 717 (2020) (deeming abandoned those aspects of appeal raised on appeal form and in statement of issues on appeal but not briefed). Accordingly, our decision in this appeal relates only to the judgment of conviction in docket number CR-18-0095601-T.

. . . We have recognized that [ordinarily] a one-to-one confrontation between a [witness] and the suspect presented . . . for identification is inherently and significantly suggestive because it conveys the message to the [witness] that the police believe the suspect is guilty . . . . For this reason, when not necessary, the presentation of a single suspect to a witness by the police (as opposed to a lineup, in which several individuals are presented [by] the police, only one of whom is the suspect) . . . has . . . been widely condemned . . . .

"It is well established, however, that the use of a one-on-one showup identification procedure does not invariably constitute a denial of due process, as it may be justified by exigent circumstances. . . . Thus, a showup identification procedure conducted in close temporal and geographic proximity to the offense may be deemed reasonable, and, therefore, permissible for federal due process purposes, when it was prudent for the police to provide the victim with the opportunity to identify [her] assailant while [her] memory of the incident was still fresh . . . and . . . [the procedure] was necessary to allow the police to eliminate quickly any innocent parties so as to continue the investigation with a minimum of delay, if the victim excluded the defendant as a suspect or was unable to identify him." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Ruiz*, 337 Conn. 612, 621–23, 254 A.3d 905 (2020).

Additionally, "the *entire* procedure, viewed in light of the factual circumstances of the individual case . . . must be examined to determine if a particular identification [procedure] is tainted by unnecessary suggestiveness. The individual components of a procedure cannot be examined piecemeal but must be placed in their broader context to ascertain whether the procedure is so suggestive that it requires the court to con-

sider the reliability of the identification itself in order to determine whether it ultimately should be suppressed." (Emphasis in original.) *State* v. *Aviles*, 154 Conn. App. 470, 477, 106 A.3d 309 (2014), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015).

"To prevail in his claim, the defendant must demonstrate that the trial court erred in *both* of its determinations regarding suggestiveness and reliability of identifications in the totality of the circumstances." (Emphasis in original; internal quotation marks omitted.) *State* v. *Wooten*, 227 Conn. 677, 685, 631 A.2d 271 (1993). "Furthermore, [w]e will reverse the trial court's ruling [on evidence] only where there is an abuse of discretion or where an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of factbound determinations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Internal quotation marks omitted.) *State* v. *Bouteiller*, 112 Conn. App. 40, 46, 961 A.2d 995 (2009).

After setting forth his general contention that showup identifications are "widely condemned" because they are inherently and significantly suggestive and that exigency is a "narrow exception,"[14] the defendant argues that the procedure by which Brinkley identified the

[14] Included in his arguments against the use of showup identification procedures in general, the defendant contends that "Connecticut courts view them with a jaundiced eye" and cites to ten decisions of our appellate courts. In parentheticals, the defendant asserts that the ten cases support the position that the court "assum[es] procedure unnecessarily suggestive" or "hold[s] procedure unnecessarily suggestive." In its brief, the state responds to the defendant's contention and asserts that "[i]n all but one of the cases cited by the defendant, however, the court ultimately held that the showup identification evidence at issue was *properly admitted* and there was no violation of the defendant's due process rights." (Emphasis in original.)

defendant was unnecessarily suggestive for three reasons: "First and foremost, the police admitted that they did not need to use a showup"; "[s]econd, Brinkley identified the defendant nearly ninety minutes after the crime, which belies any exigency"; and "[t]hird, the police conducted the showup in a suggestive place and staged it in a suggestive manner." In sum, the defendant contends that "the unnecessary use of a showup tempted [Brinkley] to presume that [the defendant] was the person police suspect."[15] (Internal quotation marks omitted.) The state argues, inter alia, that "the facts and circumstances of this case fit squarely within the well established jurisprudence in this state holding that, where police are engaged in a search for a possibly armed suspect fleeing from a crime scene, and detain an individual nearby who matches the description of the suspect, they are justified in using a showup to

In several of the cases, decided over the past few decades and relied on by the defendant, the court "assum[ed]" the procedure was unnecessarily suggestive as a means to reach the second prong of the analysis, reliability. See, e.g., *State* v. *Ruiz*, supra, 337 Conn. 624 ("even if we were to assume . . . that it was unnecessarily suggestive," the witness' identification was reliable). In one of the cases cited by the defendant, the court concluded that the identification procedure was not unnecessarily suggestive because it was justified by exigencies, as in *State* v. *Wooten*, supra, 277 Conn. 677. See *State* v. *Watson*, 50 Conn. App. 591, 603–604, 718 A.2d 497, cert. denied, 247 Conn. 939, 723 A.2d 319 (1998), cert. denied, 526 U.S. 1058, 119 S. Ct. 1373, 143 L. Ed. 2d 532 (1999), cert. dismissed, 255 Conn. 953, 772 A.2d 153 (2001). The sole case, cited by the defendant, in which the court found that the identification was improperly admitted, is distinguishable on its facts. See *State* v. *Mitchell*, 204 Conn. 187, 202, 527 A.2d 1168 (showup identification procedure was conducted at nonneutral setting, hospital; victim was wheeled past defendants twice; and defendants were viewed as pair, not individually), cert. denied, 484 U.S. 927, 108 S. Ct. 293, 98 L. Ed. 2d 252 (1987). In the remainder of the cases cited by the defendant, the court ultimately found that, although the circumstances did not necessitate a showup identification procedure, the identification was sufficiently reliable, and therefore, properly admitted. See, e.g., *State* v. *Brown*, 187 Conn. 602, 617, 447 A.2d 734 (1982).

[15] In support of his argument, the defendant relies on precedent from several federal circuit courts of appeals and the courts of other states. Given the availability of controlling appellate authority in our state, we decline the defendant's invitation to consider precedent from those courts.

quickly determine if they have the perpetrator or need to continue searching." We agree with the state and conclude that the showup identification procedure was not unnecessarily suggestive because it was justified by exigent circumstances. We are guided by our Supreme Court's decisions in *State* v. *Wooten*, supra, 227 Conn. 677, and *State* v. *Revels*, 313 Conn. 762, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

In *Wooten*, two passersby witnessed the defendant drag the victim across a street to a parking lot, where he forcibly disrobed the victim and compelled her to engage in sexual acts. *State* v. *Wooten*, supra, 227 Conn. 681. While the victim was being assaulted, another passerby, Jose Hernandez, witnessed the defendant lying on top of the victim. Id. When the defendant saw Hernandez, he quickly pulled up his pants, approached Hernandez, and told him that he had paid ten dollars to have sex with the victim. Id. The defendant abruptly left the scene and ran down the street. Id. Upon being led to the scene by the two passersby, the police obtained a description of the assailant from Hernandez, who "then got into a police car with [the officer] to reconnoiter the area in an attempt to locate the assailant" and successfully did so. Id., 682. Approximately one-half hour after the attack, the police brought the victim to where the defendant, the person Hernandez had identified as the assailant, was being detained. Id., 684. There, after being asked "to try to identify her assailant and told not to be frightened," the victim exited the police car, walked over to a distance of approximately eight to ten feet from the rear of the lit police car in which the defendant was seated, and positively identified the defendant as the person who had assaulted her. Id., 684–85. During a hearing on the defendant's motion to suppress the identification, the victim testified that, despite being reluctant to attempt the identification, "she was absolutely certain that the

person in the police car was her assailant" and stated she had not been coached. Id., 685. "At the close of the hearing, the trial court concluded that the victim's identification of the defendant, although suggestive, was not unnecessarily so." Id.

Our Supreme Court agreed that, although the showup identification was obviously suggestive, it was not unnecessarily so because "the exigencies of the situation justified the procedure." (Internal quotation marks omitted.) Id., 686. The court concluded that "[t]he confrontation was not unnecessary because it was prudent for the police to provide the victim with the opportunity to identify her assailant while her memory of the incident was still fresh . . . and because it was necessary to allow the police to eliminate quickly any innocent parties so as to continue the investigation with a minimum of delay." (Citations omitted; internal quotation marks omitted.) Id. The defendant contended that, because the victim was emotionally distraught and Hernandez had already made an identification of the defendant, the exigencies of the situation did not warrant a one-on-one identification procedure with the victim. Id., 687. The court disagreed and concluded that "[t]he immediate viewing enabled the police to focus their investigation and gave them greater assurance that innocent parties were not unjustly detained." (Internal quotation marks omitted.) Id.

Our Supreme Court's decision in *State* v. *Revels*, supra, 313 Conn. 762, is also instructive. In *Revels*, the police responded to a shooting, at about 11 p.m., and discovered the victim lying on the ground, unable to communicate, with a semiautomatic pistol near his right hand. Id., 766. While canvassing the area for suspects, the police were approached by a witness who claimed to have seen the shooting from her apartment window, approximately 265 feet away. Id., 767. The police subsequently apprehended a suspect who matched the description that the witness had provided. Id. Officers drove the witness to the location where the defendant

was "standing in the middle of the road, handcuffed and surrounded by uniformed police officers." Id. When the officer directed his cruiser's spotlight toward the defendant, the witness immediately identified the defendant, whose clothing matched the description the witness had previously provided. Id.

Our Supreme Court held that the showup identification procedure was not unnecessarily suggestive in light of the exigencies of the situation. Id., 773–74. The court recognized that it was unclear whether the gun found near the victim's body was the murder weapon but that its location made it reasonable for the police to conclude that it likely belonged to the victim. Id., 773. "It was reasonable for the police to believe, therefore, that the shooter was likely to be on the run, in the area, and armed. Safeguarding the public from a possibly armed and dangerous fugitive was an immediate and pressing need." Id. Additionally, the court concluded that "it was necessary to conduct a showup procedure in order to eliminate [the defendant] as a suspect as soon as possible so that the police could continue to search for the shooter and recover the murder weapon." Id., 773–74. Moreover, the court noted that, although there was no risk that the witness would become unavailable, the immediate identification ensured that "she viewed the suspect while her recollection was still fresh." Id., 774.

Here, as in *Wooten* and *Revels*, exigent circumstances justified the use of a showup identification of the defendant. The officers responded quickly to a high priority call concerning an armed robbery and learned that the two suspects had abruptly fled the crime scene on foot down and across a heavily trafficked road. Although the officers found one weapon at the scene,[16] the officers had no way of knowing whether other weapons were involved, and it was reasonable for them to believe

[16] The defendant contends that, "[i]f the perpetrators had more than one gun, then they would not have had to share a gun during the robbery";

that the suspects remained armed and dangerous, which justified the officers' need to act quickly. See *State* v. *Revels*, supra, 313 Conn. 775 ("[s]afeguarding the public from a possibly armed and dangerous fugitive was an immediate and pressing need"). In fact, the officers' belief that the public's safety was at risk was confirmed when they apprehended Ferguson and discovered that he was carrying an eight to nine inch kitchen knife on his person. Therefore, it was reasonable for the police to assume that the defendant was "on the run, in the area, and armed." Id., 773.

The officers were justified in conducting a showup identification, approximately 800 feet from the scene of the crime and seventy-six minutes after they arrived on scene, to quickly confirm whether the defendant,[17] who matched the description of one of the suspects, was the second perpetrator or whether they needed to

however, requiring the officers to make an assumption that the perpetrators were no longer armed due to this speculation would run contrary to the police "duty to protect the public." *State* v. *Revels*, supra, 313 Conn. 775; id. ("[T]he defendant's argument suggests that the police should have assumed that no further criminal activity would occur in the immediate future, and therefore, that quick action was not necessary to protect the public. Nothing in our case law supports this conclusion, which would require the police to make assumptions inconsistent with their duty to protect the public.").

[17] The defendant contends that the fact that "Brinkley identified the defendant nearly ninety minutes after the crime . . . belies any exigency" and cites to cases in support of his position that showup identifications are permissible "less than an hour" after the crime was committed. The state responds that the one hour "guideline" is one of "the defendant's own creation" and notes that the defendant has not "cited a single case where a court found a showup identification was inadmissible simply because it occurred more than an hour after the crime." Additionally, the state argues that "both this court and our Supreme Court, as well as courts from other jurisdictions cited by the defendant, have all concluded that showup identifications occurring well over an hour after the crime were not unnecessarily suggestive due to exigent circumstances." We agree with the state. See *State* v. *Hamele*, 188 Conn. 372, 377–78, 49 A.2d 1020 (1982) (showup conducted no more than two hours after incident not impermissibly or unnecessarily suggestive); *State* v. *Bell*, 13 Conn. App. 420, 425, 537 A.2d 496 (1988) (showup conducted less than two hours after crime was found to be reasonably necessary).

continue their search. See *State* v. *Ruiz*, supra, 337 Conn. 623 ("showup identification procedure conducted in close temporal and geographic proximity to the offense may be deemed reasonable"); see also *State* v. *Wooten*, supra, 227 Conn. 686–87 ("[a]n immediate viewing of the suspect may be justified where it [is] important for the police to separate the prime suspect gold from the suspicious glitter, so as to enable them . . . to continue their investigation with a minimum of delay" (internal quotation marks omitted)). Moreover, although there did not appear to be a risk that Brinkley would become unavailable, "the immediate identification ensured that [Brinkley] viewed the suspect while her recollection was still fresh." *State* v. *Revels*, supra, 313 Conn. 774. The immediacy of the identification was particularly important because the defendant was wearing a mask during the commission of the robbery; therefore, Brinkley could only see his eyes, mouth, the skin around his eyes and mouth, and his clothing. See *State* v. *St. John*, 282 Conn. 260, 279, 919 A.2d 452 (2007) (given that witnesses observed unmasked robber only from side and back, "it was important for the witnesses to be able to view the defendant as soon as possible while their memories remained fresh").

The defendant contends that there was no" 'necessity or urgency' " for conducting a showup identification because the "police admitted that they did not need to use a showup,"[18] "Brinkley was unhurt,"[19] and

[18] In making his assertion, the defendant appears to rely on the trial testimony from Sergeant Dunn and Detective Cruz during cross-examination by defense counsel. In response to defense counsel's question of whether there was an emergency that required a showup identification, Sergeant Dunn replied, "No, there was a request from the captain." In response to defense counsel's question regarding whether there was anything preventing them from doing a photographic lineup with the other witnesses, Detective Cruz initially responded that, "I think for this case and my training and experience the showup was appropriate. I believe there is enough probabl[e] cause on that night to arrest the two defendants for the robbery." When asked again, seconds later, however, Detective Cruz responded, "[n]o."

[19] In asserting that "Brinkley was unhurt," the defendant cites to Sergeant Dunn's testimony on cross-examination in which he testified that Brinkley

"the defendant was in custody." Additionally, the defendant cites to three Connecticut cases in which the court held that a showup identification procedure was unnecessarily suggestive due to the lack of exigent circumstances. See *State* v. *Gordon*, 185 Conn. 402, 414–15, 441 A.2d 119 (1981) (no exigent circumstances existed where defendant was in custody, defendant made incriminating statements, arresting officer testified he "had no doubt that he had found the assailant," showup identification did not take place at scene or at earliest opportunity, and state made no claim lineup was impractical) (overruled in part on other grounds by *State* v. *Artis*, 314 Conn. 131, 101 A.3d 915 (2014)), cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982); *State* v. *Theriault*, 182 Conn. 366, 373, 438 A.2d 432 (1980) (showup was unnecessarily suggestive where police informed witness someone had been arrested, showed witness gun used in crime, took witness to identify handcuffed defendant through one-way mirror, and there was no claim lineup procedure was impractical); *State* v. *Anderson*, 6 Conn. App. 15, 22–23, 502 A.2d 446 (1986) (officers did not testify that "there was a special need to have an immediate identification made"; therefore, "case presented no danger that the opportunity for an identification would be lost unless a speedy showup was held").

was not in a near death state, nor in physical distress. Although the defendant does not elaborate on this point further, he appears to be relying on the Milford Police Department General Orders, which the defendant introduced during the motion to suppress hearing, that state "[s]howup identification procedures are employed soon after a crime has been committed, when a suspect is detained at or near the crime, or under exigent circumstances such as the near death of the eyewitness or a victim." We note that during argument on the motion to suppress, the court addressed the defendant's argument on this point, and stated, "[w]as this not at or near the crime?" Moreover, our Supreme Court has found exigent circumstances exist, even where an eyewitness is "unhurt." See *State* v. *Revels*, supra, 313 Conn. 767, 770, 773–74 (eyewitness saw murder suspect from window of her apartment building more than 200 feet away; court found exigent circumstances to necessitate showup identification).

There was extensive evidence regarding the exigency that necessitated using the showup procedure; thus, we disagree with the defendant's contention that the testimony of Sergeant Dunn and Detective Cruz rendered the showup identification procedure unnecessarily suggestive. As set forth previously, Officer Joy testified in detail regarding the exigency of the situation at the suppression hearing and during trial. Additionally, his testimony was supported by that of Officer Lennon, who testified that, due to the severity of the crime—an armed robbery in a restaurant—the police did not gather information from the passing motorist because it was "more important that we try to apprehend the suspects." See *State* v. *Ledbetter*, 275 Conn. 534, 552, 881 A.2d 290 (2005) (focus of police investigation was to apprehend perpetrators; therefore, witness' "identification provided additional assurance that the police had done so") (overruled in part by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Moreover, even if police officers testify, after the fact, that they possibly could have used an alternative procedure, that is not compelling because our Supreme Court has upheld the use of a showup identification under circumstances in which it may have been possible to conduct a lineup, i.e., when the suspect was in custody. See *State* v. *Revels*, supra, 313 Conn. 773–74 (although defendant was in custody, police had not recovered weapon from him; therefore, showup identification was necessary to eliminate him as suspect as soon as possible); see also *State* v. *Ledbetter*, supra, 275 Conn. 552 (police were not required to place investigation on hold, and not conduct showup identification, "as soon as they had sufficient evidence to arrest the suspects"). The cases that the defendant cites to the contrary are factually inapplicable to the present case. Here, officers testified that the severe nature of the

crime necessitated the use of a showup identification to quickly determine whether the suspects were in fact the robbers in order to protect the public. Cf. *State* v. *Anderson*, supra, 6 Conn. App. 21 (defendant extensively questioned three officers during motion to suppress hearing, which resulted in "no indication that there was a special need to have an immediate identification made").

Furthermore, the defendant contends that "the police conducted the showup in a suggestive place and staged it in a suggestive manner" because they returned Brinkley to the parking lot where she had identified Ferguson thirty minutes previously, and she viewed both suspects in the same manner, "handcuffed and by the back of an ambulance," and from the same vantage point.[20] We disagree. The police, far from staging the showup suggestively, took significant steps to minimize its inherent suggestiveness. First, Brinkley was transported to a neutral location where the defendant had been taken after he was apprehended, rather than transporting the defendant back to the crime scene or conducting the showup at the police station. See *State* v. *Brown*, 113 Conn. App. 699, 704–705, 967 A.2d 127 (2009) (one-on-one showup at crime scene was not unnecessarily suggestive because it was justified by exigencies); see also *State* v. *Gordon*, supra, 185 Conn. 414 ("circumstances of the station house showup unnecessarily suggested to the victim that she should positively identify the defendant"). Second, the defendant was seated in the back of an ambulance, not in a police car. See *State* v. *Wooten*, supra, 227 Conn. 686 (confrontation obviously suggestive where "[t]he victim must have

[20] When asked during oral argument before this court whether defense counsel had found any cases with a similar factual background, i.e., where the witness was brought to a location to identify a second suspect after already having identified a first suspect in the same location, defense counsel stated that he had not.

realized that the defendant, seated alone in the rear of a police car, was a person whom the police at least believed to have had something to do with the crime"). Third, Officer Joy testified that, at no point did he indicate to Brinkley that the person she would be viewing was the person responsible for the crime. See *State* v. *St. John*, supra, 282 Conn. 278–79 (significant factors in determining showup identification procedure was not unnecessarily suggestive were that there was "no evidence that the police had suggested to the witnesses that they had to identify the defendant, that the defendant was indeed the person who had committed the crime or that the police had coerced the witnesses in any way"); cf. *State* v. *Ruiz*, supra, 337 Conn. 623 n.9 (The "procedure likely will be considered unnecessarily suggestive . . . if the police engage in conduct that is needlessly or gratuitously prejudicial. See, e.g., *Velez* v. *Schmer*, 724 F.2d 249, 250 (1st Cir. 1984) (during one-on-one showup identification procedure, police said to witnesses, [t]his is him, isn't it?") (Internal quotation marks omitted.)). Finally, as to whether the defendant was handcuffed,[21] our Supreme Court has recognized that the use of handcuffs and illumination does not render an identification procedure unnecessarily suggestive. See *State* v. *Ruiz*, supra, 337 Conn. 623; *State* v. *Revels*, supra, 313 Conn. 774. "A consideration of the entire identification procedure in light of the factual circumstances of the case"[22] reveals that the trial court

[21] Officer Joy testified that he could not recall whether the defendant was handcuffed during the showup identification. Officer Lennon testified that he "would assume" that the defendant was handcuffed at the time that he was identified by Brinkley "because he was apprehended in the woods as a suspect in an armed robbery, [and] it would be our policy to handcuff that individual." After further questioning, however, Officer Lennon testified that he did not recall whether the defendant was handcuffed.

[22] The factors discussed previously comport with the eyewitness identification instructions from the Milford Police Department General Orders, which the defendant introduced during the motion to suppress hearing. These instructions include: (1) "[s]uspects should not be transported back to the scene of the crime if avoidable . . . [and] [t]hey should never be transported

did not abuse its discretion in determining that the showup identification of the defendant was not unnecessarily suggestive.[23] *State* v. *Foote*, 122 Conn. App. 258, 268, 998 A.2d 240, cert. denied, 298 Conn. 913, 4 A.3d 834 (2010).

The judgment is affirmed.

In this opinion the other judges concurred.

CRISTINA GONZALEZ *v.* CITY OF NEW BRITAIN ET AL.
(AC 44749)

Bright, C. J., and Prescott and Moll, Js.

Syllabus

The plaintiff sought to recover damages from the defendant city of New Britain and its animal control officer, D, for injuries she allegedly sustained as a result of the defendants' negligence. D had responded to reported dog attacks in January and June, 2016, involving two pit bulls that occurred at certain real property in New Britain. The plaintiff sustained injuries during a 2018 attack by the same pit bulls and, at the time, was a tenant at the property. The plaintiff alleged that D was negligent for, inter alia, failing to remove the pit bulls from the property, and alleged claims for indemnification and statutory negligence against the city. The plaintiff filed an amended complaint alleging that, based on the 2016 attacks, D knew or should have known that, as a tenant on the property, the plaintiff would have been attacked by the pit bulls. The court granted the defendants' motion to strike the plaintiff's amended complaint on the basis of governmental immunity, and the plaintiff appealed to this court. On appeal, the plaintiff did not dispute that governmental immunity applied to her claims against the defendants in light of the discretionary nature of D's alleged conduct but, instead,

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to police station absent probable cause to arrest," (2) "the suspect should not be viewed when [he] is inside a police cruiser," (3) "[o]fficers must not say nor do anything that would convey to the eyewitness that they have evidence of the suspect's guilt," and (4) "[i]f the suspect is handcuffed, [he] should be positioned so that the handcuffs are not visible to the eyewitness."

[23] In light of our conclusion that the showup identification procedure was not unnecessarily suggestive, we need not address the defendant's claim that the identification was unreliable. See *State* v. *Revels*, supra, 313 Conn. 769 n.5.

alleged that the identifiable person-imminent harm exception to governmental immunity applied. *Held* that the trial court correctly concluded that the plaintiff's amended complaint was legally insufficient because she did not plead facts demonstrating that she was an identifiable victim for purposes of the identifiable person-imminent harm exception to governmental immunity: that complaint did not contain allegations demonstrating that she was legally compelled to be at the property when the pit bulls attacked her or that her tenancy was required by law, rather, the only logical reading of the amended complaint was that her residence at the property was purely voluntary; moreover, the only identifiable class of foreseeable victims that our case law has recognized in connection with this exception to governmental immunity has been that of schoolchildren attending public schools during school hours, the plaintiff did not fall within that class, and this court declined to recognize any additional classes of individuals who may be identifiable victims beyond that demarcated limit.

Argued October 3—officially released November 8, 2022

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the plaintiff filed an amended complaint; thereafter, the court, *Wiese, J.*, granted the defendants' motion to strike the amended complaint; subsequently, the court, *Wiese, J.*, granted the defendants' motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Lucas M. Watson, for the appellant (plaintiff).

John F. Diakun, corporation counsel, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, Cristina Gonzalez, appeals from the judgment of the trial court rendered in favor of the defendants, the city of New Britain (city) and James Davis, following the granting of the defendants' motion to strike the plaintiff's amended complaint on the basis of governmental immunity. On appeal, the plaintiff asserts that the court incorrectly concluded

that her amended complaint was legally insufficient because she did not plead facts demonstrating that she was an identifiable victim for purposes of the identifiable person-imminent harm exception to governmental immunity. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the plaintiff's amended complaint, and procedural history are relevant to our resolution of this appeal. On or before January 9, 2016, Davis was employed by the city as an animal control officer. Davis' responsibilities "included, but [were] not limited to, identifying dangerous dogs in the city . . . and removing them and/or quarantining them . . . ." Between January 9, 2016, and March 17, 2018, Davis responded to three separate reported dog attacks by two pit bulls that had occurred at 167 Oak Street in New Britain (property). On January 9, 2016, the pit bulls attacked a Chihuahua on the property. In response to the January 9, 2016 incident, Davis ordered the pit bulls' owner, who was the landlord of the property, to quarantine the pit bulls on the property for fourteen days. On June 21, 2016, the pit bulls attacked a tenant on the property, which resulted in the transport of the tenant to a hospital with severe bodily injuries. During his investigation of the June 21, 2016 incident, Davis learned that, on several prior occasions, the pit bulls had chased the tenant and the tenant's friends on the property. Following the June 21, 2016 incident, the pit bulls' owners[1] informed Davis that they intended to euthanize one of the pit bulls because of its "aggressive temperament . . . ." On March 17, 2018, the pit bulls attacked the plaintiff on the property, where she lived as

[1] The plaintiff's amended complaint refers to a single owner of the pit bulls when discussing the incident of January 9, 2016, as well as the subsequent incident of March 17, 2018, and to multiple owners of the pit bulls vis-à-vis the June 21, 2016 incident.

a tenant. The plaintiff sustained severe and permanent injuries as a result of the March 17, 2018 incident.[2]

On March 16, 2020, the plaintiff commenced the present action against the defendants. The plaintiff's original complaint set forth three counts. Count one alleged a common-law negligence claim against Davis. Count two alleged a claim for indemnification against the city pursuant to General Statutes § 7-465. Count three alleged a statutory negligence claim against the city pursuant to General Statutes § 52-557n. The crux of the plaintiff's claims was that Davis "knew or should have known of the dangerous propensity of the pit bulls . . . and [he should have] removed them from the [property] after the second dog attack, [which occurred on June 21, 2016]." On May 1, 2020, the defendants filed a motion to strike the original complaint in its entirety on the basis of governmental immunity. On October 13, 2020, the trial court, *Wiese*, *J.*, over the plaintiff's objection, granted the motion to strike the original complaint, concluding that (1) the parties did not dispute that governmental immunity applied to the plaintiff's claims, and (2) the plaintiff failed to allege facts satisfying the identifiable person element of the identifiable person-imminent harm exception to governmental immunity, such that the exception was inapplicable.

On November 16, 2020, the plaintiff requested permission to file an amended complaint, which the court granted, over the defendants' objection, on December 7, 2020. The plaintiff's amended three count complaint substantively tracked her original complaint, except that she added an allegation that, "[b]ased on the previous attacks that occurred on January 9, 2016 and June 21, 2016 . . . Davis knew or should have known that, as a tenant on the [property], the plaintiff would have been attacked by the pit bulls . . . ."

[2] The plaintiff's amended complaint is silent as to whether Davis took any actions in response to the incidents of June 21, 2016, and March 17, 2018.

On January 6, 2021, the defendants filed a motion to strike the plaintiff's amended complaint in toto on the basis of governmental immunity. First, the defendants asserted that the plaintiff failed to allege that Davis had violated a duty, arising from a statute, an ordinance, a rule, or a procedure, requiring him to seize the pit bulls following the June 21, 2016 incident. Even if Davis had such a duty, the defendants posited, that duty was discretionary in nature and, therefore, subject to governmental immunity. Second, the defendants contended that none of the three recognized exceptions to governmental immunity was implicated under the facts pleaded by the plaintiff. With respect to the identifiable person-imminent harm exception, the defendants claimed that the plaintiff failed to plead facts qualifying her as an identifiable person because she did not allege that she was legally compelled to be on the property at the time of the March 17, 2018 incident.

On February 22, 2021, the plaintiff filed an objection to the defendants' motion to strike her amended complaint. The plaintiff conceded that governmental immunity applied to her claims against the defendants, but she argued that she had pleaded facts establishing that she was an identifiable victim for purposes of the identifiable person-imminent harm exception to governmental immunity. The plaintiff contended that Davis "could have foreseen imminent injury" to her, as anyone who came onto the property and who did not own, care for, or have a relationship with the pit bulls was "highly likely" to be attacked by them. The plaintiff further argued that, as a tenant of the property, she was legally compelled to be on the property at the time of the March 17, 2018 incident. On February 24, 2021, the defendants filed a reply brief, inter alia, iterating that the plaintiff was not legally compelled to be on the property at the time of the March 17, 2018 incident

and, therefore, the identifiable person-imminent harm exception did not apply.

On April 9, 2021, following a hearing, the court issued a memorandum of decision granting the defendants' motion to strike the plaintiff's amended complaint. Citing *Borelli* v. *Renaldi*, 336 Conn. 1, 243 A.3d 1064 (2020), and *Kusy* v. *Norwich*, 192 Conn. App. 171, 217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019), the court stated that, to determine whether the plaintiff had pleaded facts satisfying the identifiable victim element of the identifiable person-imminent harm exception to governmental immunity, it had to consider whether the plaintiff was legally compelled to be present on the property when the pit bulls attacked her.[3] The court determined that the plaintiff was not legally compelled to be on the property, notwithstanding her status as a tenant of the property. Accordingly, the court concluded that the plaintiff had failed to allege facts demonstrating the applicability of the identifiable person-imminent harm exception and, therefore, her amended complaint was legally insufficient. Thereafter, pursuant to Practice Book § 10-44, the defendants filed a motion for judgment on the stricken amended complaint, which the court granted on May 10, 2021. This appeal followed.

On appeal, the plaintiff does not dispute that the claims in her amended complaint directed to the defendants were subject to governmental immunity in light

[3] The court did not expressly address whether the plaintiff's claims in her amended complaint were subject to governmental immunity. In granting the defendants' motion to strike the plaintiff's amended complaint, however, the court indicated that it was incorporating by reference its October 13, 2020 decision granting the defendants' motion to strike the plaintiff's original complaint. In its October 13, 2020 decision, the court stated that the plaintiff had conceded that governmental immunity applied to her claims. Moreover, the record reflects that the parties did not dispute that the plaintiff's claims were subject to governmental immunity.

of the discretionary nature of Davis' alleged conduct.[4] See General Statutes § 52-557n (a) (2) (B).[5] The plaintiff maintains, however, that the court incorrectly concluded that her amended complaint was legally insufficient on the basis that she failed to plead facts satisfying the identifiable victim element of the identifiable person-imminent harm exception to governmental immunity. The plaintiff argues that, contrary to the court's

[4] In her amended complaint, the plaintiff alleged that, as an animal control officer employed by the city, Davis' responsibilities "included, but [were] not limited to, identifying dangerous dogs in the city . . . and removing them and/or quarantining them," and that, following the June 21, 2016 incident, Davis should have removed the pit bulls from the property. The parties do not address in their respective appellate briefs whether the plaintiff sufficiently alleged that Davis owed her a duty of care vis-à-vis the pit bulls. For purposes of our analysis, we assume that the plaintiff adequately alleged that a duty of care existed.

[5] General Statutes § 52-557n (a) (2) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

"[Section] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law. . . . Accordingly, a municipality is entitled to immunity for discretionary acts performed by municipal officers or employees . . . .

"Municipal officials are immunized from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society. . . . Discretionary act immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury." (Citations omitted; internal quotation marks omitted.) *Buehler* v. *Newtown*, 206 Conn. App. 472, 481–82, 262 A.3d 170 (2021).

determination, she was legally compelled to be on the property at the time of the March 17, 2018 incident because she was a tenant of the property. We disagree.

We begin by setting forth the following standard of review and legal principles governing our review of the plaintiff's claim. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the [defendants' motion] is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a [defendant's] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks omitted.) *Wine* v. *Mulligan*, 213 Conn. App. 298, 302–303, 277 A.3d 912 (2022).

The plaintiff's claim implicates the identifiable person-imminent harm exception to governmental immunity, which is one of three recognized exceptions to that doctrine.[6] *Borelli* v. *Renaldi*, supra, 336 Conn. 28. "Our Supreme Court has recognized an exception to discretionary act immunity that allows for liability when

[6] "The other two exceptions are: where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; and . . . where the alleged acts involve malice, wantonness or intent to injure, rather than negligence." (Internal quotation marks omitted.) *Borelli* v. *Renaldi*, supra, 336 Conn. 28 n.14. Only the identifiable person-imminent harm exception is germane to this appeal.

the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply. . . . [Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state. . . . The exception is applicable only in the clearest of cases. . . .

"An allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm. . . . Although the identifiable person contemplated by the exception need not be a specific individual, the plaintiff must fall within a narrowly defined identified [class] of foreseeable victims. . . . [T]he question of whether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this exception to qualified immunity is ultimately a question of policy for the courts, in that it is in effect a question of duty. . . . This involves a mixture of policy considerations and evolving expectations of a maturing society . . . . [T]his exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims. . . . Our [Supreme Court's] decisions underscore, however, that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims. . . .

"Our courts have construed the compulsion to be somewhere requirement narrowly. . . . [T]his court

[has previously] concluded that a plaintiff did not satisfy the requirement because [t]he plaintiff [did] not [cite] any statute, regulation or municipal ordinance that compelled her to drive her car on the stretch of [the] [s]treet where [an] accident occurred . . . [and] [did] not [show] that her decision to take [the] particular route was anything but a voluntary decision that was made as a matter of convenience. [See *DeConti* v. *McGlone*, 88 Conn. App. 270, 275, 869 A.2d 271, cert. denied, 273 Conn. 940, 875 A.2d 42 (2005).] . . . [O]ur Supreme Court [has] determined that a person is not an identifiable victim if he is not legally required to be somewhere and could have assigned someone else to go to the location to complete the task in his place. . . . In *Grady* [v. *Somers*, 294 Conn. 324, 355–56, 984 A.2d 684 (2009)], the municipality did not provide refuse pickup service, and residents could either obtain a transfer station permit and discard their own refuse, or hire private trash haulers to come to their home. . . . Because the plaintiff . . . had the option of hiring an independent contractor to dispose of his refuse, the court did not classify him as an identifiable victim for injuries he sustained when he slipped on an ice patch at the transfer station." (Citations omitted; internal quotation marks omitted.) *Buehler* v. *Newtown*, 206 Conn. App. 472, 482–84, 262 A.3d 170 (2021); see *Borelli* v. *Renaldi*, supra, 336 Conn. 29 (no legal compulsion for decedent to be passenger in motor vehicle); *Buehler* v. *Newtown*, supra, 487 (no legal compulsion for plaintiff to officiate volleyball match at school); *Kusy* v. *Norwich*, supra, 192 Conn. App. 185 (no legal compulsion for plaintiff to be at school when carrying out contractual duty to deliver milk); see also *St. Pierre* v. *Plainfield*, 326 Conn. 420, 424, 438, 165 A.3d 148 (2017) (plaintiff "was in no way compelled to attend" aqua therapy sessions at municipal pool).

"Our Supreme Court has noted that [t]he only identifiable class of foreseeable victims that [the court has]

recognized . . . is that of schoolchildren attending public schools during school hours . . . . Students attending public school during school hours are afforded this special designation as identifiable victims because they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they [are] legally required to attend school rather than being there voluntarily; their parents [are] thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions. . . . Accordingly, this court has consistently held that students who are injured outside of school hours do not fall within the class of identifiable victims under the identifiable victim-imminent harm exception." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Buehler* v. *Newtown*, supra, 206 Conn. App. 484–85.

Applying the aforementioned binding legal principles, we conclude that the plaintiff did not plead facts in her amended complaint demonstrating that she was an identifiable victim or a member of an identifiable class of foreseeable victims for purposes of the identifiable person-imminent harm exception to governmental immunity.[7] The plaintiff's amended complaint did not contain allegations demonstrating that she was legally compelled to be at the property when the pit bulls attacked her. The plaintiff did not allege that her tenancy was required by law; indeed, the only logical reading of the amended complaint is that the plaintiff's residence at the property as a tenant was purely voluntary.

[7] As this court noted in a recent decision, "[a]t least three members of our Supreme Court recently have observed that the court's application of the identifiable person-imminent harm exception, particularly with respect to the identifiable person prong of the exception, may be doctrinally flawed, unduly restrictive, and/or ripe for revisiting in an appropriate future case. See *Borelli* v. *Renaldi*, supra, 336 Conn. 34, 59–60 n.20 (*Robinson*, *C. J.*, concurring); id., 67 (*D'Auria*, *J.*, concurring); id., 67–113, 146–54 (*Ecker*, *J.*, dissenting). Nevertheless, this court is required to follow binding Supreme

In addition, the only identifiable class of foreseeable victims that our case law has recognized in connection with this exception is that of schoolchildren attending public schools during school hours. See id. The plaintiff does not fall within that class, and we decline to recognize any additional classes of individuals who may be identifiable victims beyond that demarcated limit. See *Kusy* v. *Norwich*, supra, 192 Conn. App. 187 (declining "to extend the classes of individuals who may be identifiable victims beyond the narrow confines of children who are statutorily compelled to be on school grounds during regular school hours"). For these reasons, we conclude that the court did not commit error in striking the plaintiff's amended complaint as legally insufficient.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

Court precedent unless and until our Supreme Court sees fit to alter it." *Buehler* v. *Newtown*, supra, 206 Conn. App. 488 n.14.

[8] As an alternative ground for affirmance, the defendants argue that the plaintiff failed to allege that she was subject to imminent harm for purposes of the identifiable person-imminent harm exception to governmental immunity. It is not necessary for us to address this issue in light of our conclusion that the plaintiff failed to plead facts satisfying the identifiable victim element of the exception. See *Kusy* v. *Norwich*, supra, 192 Conn. App. 187 n.9 (declining to address whether plaintiff was subject to imminent harm after concluding that plaintiff was not identifiable victim, as "[a]ll three [elements] must be proven in order for the exception to apply" (internal quotation marks omitted)). Nevertheless, we note that, following the June 21, 2016 incident, there were no reported dog attacks by the pit bulls on the property until nearly two years later, on March 17, 2018, when the pit bulls allegedly attacked the plaintiff. Thus, the facts pleaded by the plaintiff did not establish that there was a sufficiently high probability that she would be harmed by the two pit bulls on the property. See *Williams* v. *Housing Authority*, 159 Conn. App. 679, 705–706, 124 A.3d 537 (2015) (setting forth four part test to satisfy imminent harm element of identifiable person-imminent harm exception, including that (1) "the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty . . . to alleviate the dangerous condition" and (2) "the probability that harm will occur must be so high as to require the defendant to act immediately to prevent the harm" (citation omitted; emphasis omitted; internal quotation marks omitted)), aff'd, 327 Conn. 338, 174 A.3d 137 (2017).