JOSEPH DECICCO, ADMINISTRATOR (ESTATE OF NANCY LOYD OLAIVAR ABAD), ET AL. *v.* DYNATA, LLC, ET AL.
(AC 45862)

Alvord, Elgo and Seeley, Js.

Syllabus

The plaintiffs commenced this action against the defendants, D Co. and certain officers of D Co., to recover damages for the wrongful death of twenty-nine adults who died as a result of a four-story building fire in Davao City, Philippines. The fire occurred at a call center where the decedents worked as employees of S Co. The officers of D Co. were also directors and shareholders of S Co. On or before the date of the incident, D Co., whose principal place of business was in Shelton, had

secured contracts in the United States to perform work and to provide reports and data to its United States based clients on the basis of that work. D Co. outsourced certain of the work to S Co., specifically, to provide telephone, survey, polling, and data collection services from call centers in the Philippines. The defendants filed a motion to dismiss the plaintiffs' complaint on the ground of forum non conveniens, arguing that the Philippines was an adequate alternative forum to litigate the matter because the defendants were amenable to service of process, had stipulated to accept service of process and had agreed to litigate the dispute in the Philippines. The trial court granted the defendants' motion to dismiss, finding that the Philippines was an adequate alternative forum, and the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court applied the wrong test, namely, "that consent may be used as a substitute for jurisdiction," to determine whether the Philippines was an adequate alternative forum: the plaintiffs misinterpreted the court's decision, as a proper interpretation of the court's memorandum of decision was that the court used the test enunciated in *Schertenleib* v. *Traum* (589 F.2d 1156) to support its determination that the Philippines was a suitable forum notwithstanding competing expert testimony regarding whether the action was barred in the Philippines by the statute of limitations; moreover, the court correctly relied on *Picketts* v. *International Playtex, Inc.* (215 Conn. 490) to determine that the Philippines was an adequate alternative forum because the defendants were amenable to service of process in the Philippines and the Philippines was a suitable forum considering the competing expert testimony regarding whether the action was barred in the Philippines by the statute of limitations; furthermore, the court left open the possibility that the case could be restored to the docket if a Philippine court dismissed the case for lack of jurisdiction.
2. The plaintiffs could not prevail on their claim that the trial court improperly dismissed the case on the ground of forum non conveniens: the court did not abuse its discretion in applying *Picketts* in finding that, because the defendants agreed to accept service and litigate in the Philippines, they were amenable to service there; moreover, the court necessarily recognized the bipolarity of the parties' competing expert affidavits regarding whether the statute of limitations barred the plaintiffs from bringing the action in the Philippines in determining that the Philippines was an adequate alternative forum; furthermore, it was evident that the court had a justifiable belief that the plaintiffs could bring the action in the Philippines, such that the court's decision to grant the motion to dismiss on a conditional basis did not constitute an abuse of its discretion.

Argued March 5—officially released June 4, 2024

Procedural History

Action to recover damages for the wrongful death of the plaintiffs' decedents as a result of the defendants'

alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, and transferred to the Complex Litigation Docket, where the court, *Bellis*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Michael S. Taylor, with whom were *Brendon P. Levesque*, and, on the brief, *Eric P. Anderson*, *Corinne A. Burlingham*, *Welsen T. Chu*, pro hac vice, and *Thomas P. Routh*, pro hac vice, for the appellants (plaintiffs).

Scott Stirling, pro hac vice, with whom, on the brief, were *James E. Nealon*, and *Edward P. Gibbons*, pro hac vice, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiffs, Attorney Joseph DeCicco, administrator of the estates of twenty-nine Philippine citizens,[1] Jehmar Bongcayao, Mostes B. Castillo, Sylvester B. Celades, Guidhavio C. Garzon, Jexter D. Generales, and Cecilline Sismar, appeal from the judgment of the trial court granting the motion of the defendants, Dynata, LLC (Dynata), Christopher Mark Fanning, and David Ian Weatherseed, to dismiss the plaintiffs' complaint on the ground of forum non conveniens. On appeal, the plaintiffs claim that the court (1) applied

[1] The twenty-nine deceased individuals, who are named as parties via their estates, are Nancy Loyd Olaivar Abad, Ian Kiem Porras Adlawan, Christine Cajes Alviola, Rodderick Cutay Antipuesto, Shiela Mae Anod Bacaling, Randy Balando Balcao, Kurtchin Angela Yumo Bangoy, Jonas Oroyan Basalan, Mary Louielyn Maningo Bongcayao, Alexander May Moreno Castillo, Apple Jane Abes Celades, Antioco Esguerra Celestial, Jr., Roderick Cabugsa Constantinopla, Mikko Salazar Demafeliz, Christen Joy Ibañez Garzon, Regine Alcano Generales, Jimbo Lupos Limosnero, Charlyn Relacion Liwaya, Johanie Undagan Matondo, Rosyl Chavez Montañez, Rhenzi Nova Duco Muyco, Janine Joy Culipapa Obo, Joyne Ramayla Pabelonia, Analiza Mosquera Peñarijo, Jim Benedict Sazon Quimsing, Ivan Nebelle Limosnero Roble, Jeffrey Cabantingan Sismar, Ellen Joy Dawa Yorsua, and Desiree Gayle Aperocho Zacarias. The remaining plaintiffs are the surviving spouses of the decedents.

the wrong test to determine whether the Philippines was an adequate alternative forum, and (2) improperly dismissed this case on the ground of forum non conveniens. We disagree and, accordingly, affirm the judgment of the court.

The following facts, as alleged in the plaintiffs' operative complaint, dated August 28, 2020, and procedural history are relevant to the resolution of this appeal. The plaintiffs commenced this action to recover damages for the wrongful death of twenty-nine adults who died on December 23, 2017, from carbon monoxide poisoning and asphyxiation followed by severe postmortem burns and charring, as a result of a four-story building fire in Davao City, Philippines. The fire occurred at a call center where the twenty-nine decedents worked as employees of SSI Philippines, Inc. (SSI Philippines).[2] On or before December 23, 2017, Dynata, a limited liability company with its principal place of business in Shelton, Connecticut, had secured contracts in the United States to perform work and to provide reports and data to its United States based clients on the basis of that work. Dynata outsourced the contract work to SSI Philippines to provide telephone, survey, polling, and data collection services from call centers in the Philippines. In December, 2017, Fanning was the president and chief executive officer of Dynata and a director and shareholder of SSI Philippines, and Weatherseed was the controller of Dynata and a director and shareholder of SSI Philippines.

In December, 2019, the plaintiffs commenced this action against the defendants. The operative complaint alleges ten counts of wrongful death and loss of consortium claims under theories of direct negligence and vicarious liability due to agency and joint venture relationships.

[2] SSI Philippines, Inc., is not a party in this action.

On March 20, 2020, the defendants filed a motion to dismiss the plaintiffs' complaint on the ground of forum non conveniens, an accompanying memorandum of law in support of their motion, and an appended exhibit. The defendants also submitted the affidavit of Francisco Edralin Lim, a law professor and attorney admitted to the Philippine bar, with additional exhibits. In their memorandum of law, the defendants argued, inter alia, that the Philippines is an adequate alternative forum because the defendants (1) are amenable to service of process in the Philippines, (2) have stipulated to accept service of process in the Philippines, and (3) have agreed to litigate this dispute in the Philippines. Lim averred that under Philippine law "several fora exist" in the Philippines for the plaintiffs to bring this action.

On March 28, 2022, the plaintiffs filed a memorandum of law in opposition to the defendants' motion to dismiss with appended exhibits. Further, the plaintiffs submitted the affidavit of Elizabeth Aguiling Pangalangan, a law professor and attorney admitted to the Philippine bar. The plaintiffs argued, and Pangalangan averred, inter alia, that the Philippines is not an adequate alternative forum because this action would be barred by the statute of limitations, and, thus, a Philippine court sua sponte would dismiss the plaintiffs' action.

Thereafter, the defendants filed a reply memorandum in further support of their motion to dismiss and submitted a supplemental affidavit from Lim. The defendants maintained that "the statute of limitations in the Philippines has not expired, and neither the defendants nor the court sua sponte could raise the statute of limitations as a defense." The defendants challenged Pangalangan's averments that a court sua sponte would dismiss the case as barred by the statute of limitations and relied on Lim's averment that a Philippine court would recognize the defendants' affirmative waiver of the statute of limitations and hear the plaintiffs' action.

The plaintiffs filed a motion to strike Lim's supplemental affidavit, arguing, inter alia, that it contained incorrect recitations of Philippine law. The defendants filed a memorandum in opposition to the plaintiffs' motion to strike, and the plaintiffs filed a reply. A hearing on the defendants' motion to dismiss and the plaintiffs' motion to strike was held before the court, *Bellis*, *J.*, on July 20, 2022. The court denied the plaintiffs' motion to strike on September 12, 2022, stating in relevant part: "[T]he primary argument advanced by the plaintiffs in their motion to strike is that the defendants' expert is incorrect in his analysis of Philippine law. As this court is not nearly as well equipped as a Philippine court to resolve issues of Philippine law, and the court is already dismissing the case on forum non conveniens . . . the court will allow the affidavit to remain in the record for the purposes of a potential appeal. Therefore, the motion to strike is denied."[3]

That same day, the court issued a memorandum of decision on the defendants' motion to dismiss. The court applied our Supreme Court's decision in *Durkin* v. *Intevac*, *Inc.*, 258 Conn. 454, 782 A.2d 103 (2001), which sets forth the following four step process for consideration by the court of a forum non conveniens motion to dismiss: (1) "whether an adequate alternative forum exists that possesses jurisdiction over the whole case"; (2) "all relevant private interest factors with a strong presumption in favor of—or, in the present case, a weakened presumption against disturbing—the plaintiffs' initial choice of forum"; (3) "if the balance of private interest factors is equal, the court should consider whether any public interest factors tip the balance in favor of trying the case in the foreign forum"; and (4) "if the public interest factors tip the balance in favor of trying the case in the foreign forum, the court must

[3] There are no claims on appeal regarding the court's ruling on the motion to strike.

. . . ensure that [the] plaintiffs can reinstate their [action] in the alternative forum without undue inconvenience or prejudice." (Internal quotation marks omitted.) Id., 466.

In determining that the Philippines was an adequate alternative forum, the court stated in relevant part: "In the present matter, the defendants have agreed to accept service and litigate in the Philippines. Nevertheless, the parties' experts disagree on whether the defendants are subject to jurisdiction in the Philippines. In his affidavit . . . Lim . . . contended that an action of this nature can be brought in the Philippines. Lim cited to Article 35 of the Philippines Code, which recognizes civil liability arising from a criminal act and Article 2176, which allows civil liability arising from fault or negligence under the concept of quasi-delicts. Further, Lim testified that the December 17, 2018 investigation resolution stated that the vicarious liability of the corporations among others 'can be better threshed out in a separate civil suit between the parties.'

"Nevertheless, the plaintiffs produced an affidavit from . . . Pangalangan . . . which asserts that the Philippine court would have a duty to dismiss this action if it were filed in the Philippines because it is barred by the statute of limitations, even if the defendants represent that they will waive any applicable statute of limitations in the Philippines. Pangalangan also testified that the Philippine court will dismiss this case pursuant to its doctrine of forum non conveniens because Dynata is an American corporation with its principal place of business in Connecticut.

"In Lim's reply affidavit, he stated that the statute of limitations has not expired because it was paused when this case was filed in Connecticut and will only begin running again if Connecticut dismisses the case. Additionally, he stated that under Philippine law, a party

can waive a defense and voluntarily expose itself to a lawsuit. Further, the defendants have agreed to litigate in the Philippines, therefore, they would not invoke the doctrine of forum non conveniens to then dismiss the case in the Philippines.

"In *Schertenleib* v. *Traum*, 589 F.2d 1156 (2d Cir. 1978), the Second Circuit Court of Appeals was faced with a similar issue where the district court, in deciding whether dismissal was warranted on forum non conveniens grounds, received conflicting expert opinions regarding whether the foreign court had jurisdiction over the matter. The Second Circuit ultimately dismissed the case on the condition that the defendants would consent to jurisdiction in the foreign court and if the case was dismissed from the foreign court, the plaintiffs could move to restore the action in the American court. Id., 1166. The court stated that, '[w]hen the alternative forum is foreign, particularly where . . . it is a civil law country, our courts have difficulty discerning whether a non-resident defendant really would be subject to jurisdiction in the foreign country without his consent. Indeed, the court may receive conflicting expert opinions on this issue. If the defendant consents to suit in the foreign alternate forum, and if that appears to be sufficient under the foreign law, why waste the litigants' money and the court's time in what is essentially an unnecessary and difficult inquiry into the further intricacies of foreign jurisdictional law?' Id., 1163. Similarly, here, the defendants have agreed to submit to jurisdiction in the Philippines. While there is conflicting evidence as to whether that is sufficient for the Philippine court to take jurisdiction, the court finds that the Philippine court is an adequate alternative forum. Accordingly, the court may dismiss this case on forum non conveniens grounds because it finds that the Philippines is an adequate alternative forum, the defendants have agreed to jurisdiction there, and, in the event that

the Philippine court dismisses the case for lack of jurisdiction, the plaintiffs can move to restore the action in this court." The court, after applying the remaining *Durkin* factors, granted the defendants' motion to dismiss. This appeal followed.

Before turning to the claims on appeal, we first recognize "the four step process for examining forum non conveniens claims outlined in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. [501, 508–509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)], and clearly set forth in *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 784–85 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128, 102 S. Ct. 980, 71 L. Ed. 2d 116 (1981), which [our Supreme Court has] stated is a useful frame of reference for the law of Connecticut. . . . First, the court should determine whether an adequate alternative forum exists that possesses jurisdiction over the whole case. . . . Second, the court should consider all relevant private interest factors with a strong presumption in favor of—or, in the present case, a weakened presumption against disturbing—the plaintiffs' initial choice of forum. . . . Third, if the balance of private interest factors is equal, the court should consider whether any public interest factors tip the balance in favor of trying the case in the foreign forum. . . . Finally, if the public interest factors tip the balance in favor of trying the case in the foreign forum, the court must . . . ensure that [the] plaintiffs can reinstate their [action] in the alternative forum without undue inconvenience or prejudice." (Citations omitted; internal quotation marks omitted.) *Durkin* v. *Intevac, Inc.*, supra, 258 Conn. 466.

I

The plaintiffs first claim on appeal that "the trial court applied the wrong test to determine whether the Philippines was an adequate alternative forum." Specifically, the plaintiffs argue that the court adopted a rule

"that consent may be used as a substitute for jurisdiction," and that such a rule "has never been adopted, so far as the plaintiffs can ascertain, by any court in Connecticut (or by a court applying Connecticut law)." We disagree with the plaintiffs that the court applied the wrong test and instead conclude that the plaintiffs' claim fails because it rests on a misinterpretation of the trial court's decision.

We begin our analysis with the applicable standard of review. Resolution of this claim "requires us to interpret the court's memorandum of decision. The construction of a judgment is a question of law for the court, such that our review of the [plaintiffs'] claim is plenary." (Internal quotation marks omitted.) *In re Jacquelyn W.*, 169 Conn. App. 233, 241, 150 A.3d 692 (2016). "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 interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Windham* v. *Doctor's Associates*, *Inc.*, 161 Conn. App. 348, 356, 127 A.3d 1082 (2015).

In the present case, the plaintiffs argue that the court misapplied the relevant legal standard and "applied the wrong test to determine whether the Philippines was an adequate alternative forum." The plaintiffs maintain that the court improperly relied on *Schertenleib* v. *Traum*, supra, 589 F.2d 1156, as support for what the plaintiffs contend constituted a determination that the defendants' consent to jurisdiction in the Philippines is sufficient to satisfy the adequate alternative forum requirement. In response, the defendants contend that

the plaintiffs' argument "misunderstands both the trial court's analysis and the proper analysis of an adequate alternative forum." We agree with the defendants.

We are not persuaded that the court's reliance on *Schertenlieb* as support for its determination that the Philippines is a suitable forum improperly created a rule that "consent may be used as a substitute for jurisdiction . . . ." The court's memorandum of decision makes clear that *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981), and *Picketts* v. *International Playtex, Inc.*, 215 Conn. 490, 504 n.13, 576 A.2d 518 (1990), guided its determination that the Philippines is an adequate alternative forum and quoted language from *Picketts* on the doctrine of forum non conveniens. "Ordinarily, the alternative forum prerequisite will be satisfied simply if the defendants are amenable to service in another jurisdiction. *Piper Aircraft Co.* v. *Reyno*, supra, [254 n.22]; *Gulf Oil* [*Corp.*] *v. Gilbert*, supra, [330 U.S. 506–507]. The United States Supreme Court, however, has identified at least some instances in which mechanical inquiry into the amenability of process in the other forum must surrender to a more meaningful assessment of the *suitability* of the alternative forum. In *Piper Aircraft Co.* v. *Reyno*, supra, [254 n.22] the United States Supreme Court noted that, in rare circumstances, where the remedy offered by the other forum is clearly unsatisfactory, such as where the alternative forum does not permit any litigation of the subject matter of the legal controversy, the other forum may not meet the threshold requirement of an adequate alternative." (Emphasis in original.) *Picketts* v. *International Playtex, Inc.*, supra, 504 n.13.

With respect to the standard inquiry, the court found that, "[i]n the present matter, the defendants have agreed to accept service and litigate in the Philippines."

The court then proceeded to perform "a more meaningful assessment of the suitability of the alternative forum." (Emphasis omitted.) *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 504 n.13. The court considered the Lim and Pangalangan affidavits, which provided conflicting testimony as to whether a Philippine court would dismiss this case as barred by the statute of limitations. The court relied on *Schertenleib*, which it described as another case in which "the district court, in deciding whether dismissal was warranted on forum non conveniens grounds, received conflicting expert opinions regarding whether the foreign court had jurisdiction over the matter." The court in the present case reasoned: "The Second Circuit ultimately dismissed the case on the condition that the defendants would consent to jurisdiction in the foreign court and if the case was dismissed from the foreign court, the plaintiffs could move to restore the action in the American court. [*Schertenleib* v. *Traum*, supra, 589 F.2d 1166]. The court stated that, '[w]hen the alternative forum is foreign, particularly where . . . it is a civil law country, our courts have difficulty discerning whether a non-resident defendant really would be subject to jurisdiction in the foreign country without his consent. Indeed, the court may receive conflicting expert opinions on this issue. If the defendant consents to suit in the foreign alternate forum, and if that appears to be sufficient under the foreign law, why waste the litigants' money and the court's time in what is essentially an unnecessary and difficult inquiry into the further intricacies of foreign jurisdictional law?' Id., 1163. Similarly, here, the defendants have agreed to submit to jurisdiction in the Philippines. While there is conflicting evidence as to whether that is sufficient for the Philippine court to take jurisdiction, the court finds that the Philippine court is an adequate alternative forum."

Accordingly, the court's reliance on *Schertenleib* does not, as the plaintiffs contend, create a new test that

"consent may be used as a substitute for jurisdiction . . . ." Rather, a proper interpretation of the court's memorandum of decision is that the court used *Schertenleib* to support its determination that the Philippines is a suitable forum notwithstanding the competing expert testimony regarding whether this action is barred in the Philippines by the statute of limitations. The court correctly relied on *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 504 n.13, to determine that the Philippines is an adequate alternative forum because (1) the defendants are amenable to service of process in the Philippines and, (2) the Philippines is a suitable forum considering the competing expert testimony regarding whether this action is barred in the Philippines by the statute of limitations. Finally, the court left open the possibility that the present case could be restored to the docket if a Philippine court dismisses the case for lack of jurisdiction. Thus, the court in no way concluded that consent to suit can overcome a lack of jurisdiction. We conclude, therefore, that the plaintiffs misinterpreted the court's memorandum of decision. Accordingly, we reject the plaintiffs' claim.[4]

[4] The plaintiffs' claims on appeal are limited to challenging the court's determination that the Philippines is an adequate alternative forum. Nevertheless, the plaintiffs make a passing statement in their principal appellate brief that "[t]he balance of interests must favor the plaintiffs' choice, as the 'central principle of the forum non conveniens doctrine [is] that unless the balance is strongly in favor of the defendant[s], the [plaintiffs'] choice of forum should rarely be disturbed.' *Durkin* [v. *Intevac, Inc.*, supra, 258 Conn. 464]." (Emphasis omitted.) In the forum non conveniens analysis, the balancing of the private and public interests occurs only *after* a court has determined that an adequate alternative forum exists. See *Schertenleib* v. *Traum*, supra, 589 F.2d 1159–60 (proving adequate alternative forum is "a prerequisite for application of forum non conveniens"); see also *Durkin* v. *Intevac, Inc.*, supra, 466 (second and third step of forum non conveniens analysis is balancing private and public interest factors). In this appeal, the plaintiffs do not claim that the court abused its discretion in analyzing the private and public interest factors after making its determination that the Philippines is an adequate alternative forum. Accordingly, we deem any claim related to the court's balancing of interests abandoned. See, e.g., *Maurice* v. *Chester*

II

The plaintiffs' second claim on appeal is that the court improperly dismissed the case on the ground of forum non conveniens. The plaintiffs argue that, assuming it applied the correct legal test, the court nonetheless improperly found that the Philippines is an adequate alternative forum because "there is conflicting evidence on whether the defendants could be sued at all in the Philippines, and on the effect of the statute of limitations." We disagree.

"We begin with the applicable standard of review and the well established legal principles that guide our analysis of the defendants' claim. A ruling on a motion to dismiss for forum non conveniens is reviewed under an abuse of discretion standard. . . . As a common law matter, the doctrine of forum non conveniens vests discretion in the trial court to decide where trial will best serve the convenience of the parties and the ends of justice. . . . In our application of the abuse of discretion standard, we must accept the proposition that simply to disagree with the [trial] court as if the facts had been presented to this court in the first instance cannot be the basis of our decision. . . . [T]he trial court's exercise of its discretion may be reversed only upon a showing of clear abuse. [W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. . . . Meaningful review, even from this circumscribed perspective, nonetheless encompasses a determination whether the trial court abused its discretion as to either the facts or the law. . . .

"Emphasis on the trial court's discretion does not, however, overshadow the central principle of the forum

Housing Associates Ltd. Partnership, 189 Conn. App. 754, 756 n.1, 208 A.3d 691 (2019) (claim merely raised in passing, deemed abandoned).

non conveniens doctrine that unless the balance is strongly in favor of the defendant[s], the [plaintiffs'] choice of forum should rarely be disturbed. . . . Although it would be inappropriate to invoke [a] rigid rule to govern discretion . . . it bears emphasis that invocation of the doctrine of forum non conveniens is a drastic remedy . . . which the trial court must approach with caution and restraint. The trial court does not have unchecked discretion to dismiss cases from [the plaintiffs'] chosen forum simply because another forum, in the court's view, may be superior to that chosen by the plaintiff[s]. . . . Although a trial court applying the doctrine of forum non conveniens must walk a delicate line to avoid implicitly sanctioning forum-shopping by either litigant at the expense of the other . . . it cannot exercise its discretion in order to level the playing field between the parties. The [plaintiffs'] choice of forum, which may well have been chosen precisely because it provides the plaintiff[s] with certain procedural or substantive advantages, should be respected unless equity weighs strongly in favor of the defendant[s]. . . .

"[T]he overriding inquiry in a forum non conveniens motion is not whether some other forum might be a good one, or even a better one than the [plaintiffs'] chosen forum. The question to be answered is whether [the plaintiffs'] chosen forum is itself inappropriate or unfair because of the various private and public interest considerations involved. . . . Accordingly, the trial court, in exercising its structured discretion, should place its thumb firmly on the [plaintiffs'] side of the scale, as a representation of the strong presumption in favor of the [plaintiffs'] chosen forum, before attempting to balance the private and public interest factors relevant to a forum non conveniens motion.

"When, as in the present action, the plaintiffs are foreign to their chosen forum, the trial court must readjust the

downward pressure of its thumb, but not remove it altogether from the plaintiffs' side of the scale. Even though the plaintiffs' preference has a diminished impact because the plaintiffs are themselves strangers to their chosen forum . . . Connecticut continues to have a responsibility to those foreign plaintiffs who properly invoke the jurisdiction of this forum . . . especially in the somewhat unusual [situation in which] it is the forum resident who seeks dismissal. . . . [Therefore] [w]hile the weight to be given to the choice of a domestic forum by foreign plaintiffs is diminished, their entitlement to a preference does not disappear entirely. The defendants challenging the propriety of this choice continue to bear the burden to demonstrate why the presumption in favor of [the plaintiffs'] choice, weakened though it may be, should be disturbed." (Citations omitted; internal quotation marks omitted.) *Durkin* v. *Intevac, Inc.*, supra, 258 Conn. 463–65.

"[A] defendant has the burden of establishing that an adequate alternative forum exists and that the relevant factors favor litigating in the alternative forum. . . . If a defendant fails to carry this burden, the forum non conveniens motion must be denied regardless of the degree of deference accorded [the] plaintiff's forum choice. . . . An alternate forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute. . . . It is well established that an alternative forum need not have identical causes of actions or remedies—or, more generally, law as favorable to the plaintiff's chance of recovery as the chosen forum—to be adequate. . . . However, a forum may be inadequate if the remedy it offers is so clearly inadequate or unsatisfactory that it is no remedy at all . . . or if there is a complete absence of due process or an inability . . . to provide substantial justice to the parties in the alternative forum . . . ." (Citations omitted; internal

quotation marks omitted.) *Owens* v. *Turkiye Halk Bankasi A.S.*, United States Court of Appeals, Docket No. 21-610-cv (2d Cir. May 2, 2023), cert. denied, U.S. , 144 S. Ct. 551, 217 L. Ed. 2d 293 (2024).

Our resolution of this claim on appeal requires us to consider whether the court abused its discretion in applying *Picketts* v. *International Playtex, Inc.*, supra, 215 Conn. 504 n.13, to reach the conclusion that the Philippines is an adequate alternative forum. The court determined that (1) the defendants are amenable to service of process in the Philippines, and (2) notwithstanding the disagreement of the parties' experts as to whether the Philippines has subject matter jurisdiction over this action, the Philippines is a suitable forum to litigate this case.

As to the first inquiry of *Picketts*, the plaintiffs contend that "there is conflicting evidence on whether the defendants could be sued at all in the Philippines . . . ." In the present case, the defendants stipulated, inter alia, that "upon dismissal of this suit, they will: (1) consent to jurisdiction in the Philippines; [and] (2) accept service of process in connection with an action in the Philippines . . . ." Additionally, the defendants "consent[ed] to the reopening of the action in Connecticut in the event the above conditions are not met as to any proper defendant in this action." The defendants' stipulation in the present case mirrors that in *Durkin* v. *Intevac, Inc.*, supra, 258 Conn. 481 n.23, wherein the defendants stipulated, inter alia, that they "agreed to: (1) consent to jurisdiction in [the foreign jurisdiction]; (2) accept service of process in connection with an action in [the foreign jurisdiction] . . . and (6) consent to the reopening of the action in Connecticut in the event the above conditions are not met as to any proper defendant in this action." (Internal quotation marks omitted.)

A court does not abuse its discretion in finding that a defendant's representation that it will accept service in the alternative forum is sufficient to show that the defendant is amenable to service in that forum. See, e.g., *Wamai* v. *Industrial Bank of Korea*, United States Court of Appeals, Docket No. 21-1956-cv (2d Cir. March 8, 2023) (defendant's "agreement to accept service in Korea, to submit to the jurisdiction of the Korean courts, and to waive any statute of limitations defenses that may have arisen since the filing of these actions" was sufficient to show amenable to service), cert. denied, U.S. , 144 S. Ct. 552, 217 L. Ed. 2d 294 (2024); *Carney* v. *Beracha*, 996 F. Supp. 2d 56, 72 (D. Conn. 2014) (defendants' statement that they are amenable to suit in Venezuela was sufficient). We, therefore, disagree with the plaintiffs' contention that "it is not clear that the defendants are amenable to service in the Philippines." Rather, the court properly determined that because "the defendants have agreed to accept service and litigate in the Philippines," they are amenable to service there.

As to the second inquiry of *Picketts*—whether the Philippines is a suitable forum—the plaintiffs argue, inter alia, that the court incorrectly concluded that a Philippine court would have jurisdiction. In support of this contention, the plaintiffs rely on *Norex Petroleum Ltd.* v. *Access Industries, Inc.*, 416 F.3d 146, 159 (2d Cir. 2005), cert. denied, 547 U.S. 1175, 126 S. Ct. 2320, 164 L. Ed. 2d 860 (2006) (*Norex*), for the proposition that "such a finding [that a foreign jurisdiction is capable of hearing the merits of a claim] is impossible where an action that can be maintained in the United States is foreclosed in the foreign jurisdiction . . . an adequate forum does not exist if a statute of limitations bars the bringing of [a] case in a foreign forum that would be timely in the United States." (Emphasis omitted; internal quotation marks omitted.)

Norex, however, is factually distinguishable from the present case because the court determined that the "defendants failed to carry their burden to demonstrate that Russia affords [the] plaintiff a presently available adequate alternative forum . . . ." Id., 160. In reaching this conclusion, the court was provided with "[e]xpert opinions from both sides reveal[ing] that Russian courts would likely deem the core issues underlying [the] plaintiff's claims largely precluded . . . ." Id., 159. In the present case, the parties submitted to the court conflicting expert affidavits regarding whether the statute of limitations bars the plaintiffs from bringing this action in the Philippines. Specifically, Lim averred that a Philippine court would have jurisdiction over this action, whereas Pangalangan averred that a court sua sponte would dismiss this action as barred by the statute of limitations. In determining that the Philippines is a suitable forum to litigate this case, the court necessarily recognized the bipolarity of the expert opinions and stated that, notwithstanding the "conflicting evidence as to whether [agreement to submit to jurisdiction] is sufficient for the Philippine court to take jurisdiction, the court finds that the Philippine court is an adequate alternative forum."

The United States Court of Appeals for the Second Circuit has observed that a trial court does not abuse its discretion when it considers the parties' competing expert testimony to assist in determining whether an alternative forum is suitable. See *Wamai* v. *Industrial Bank of Korea*, supra, United States Court of Appeals, Docket No. 21-1956-cv (court properly weighed testimony of competing experts and did not abuse its discretion in finding that defendant's expert was more convincing). In the present case, the court did not abuse its discretion in considering the opinions of Lim and Pangalangan and determining that the Philippines is a

suitable forum. The court, therefore, properly found that the Philippines is an adequate alternative forum.

Finally, the plaintiffs argue that "the trial court's conditional dismissal cannot save its decision" to grant the defendants' motion to dismiss. This contention warrants little discussion. A "court may dismiss on forum non conveniens grounds, despite its inability to make a definitive finding as to the adequacy of the foreign forum, if the court can protect the non-moving party by making the dismissal conditional. This . . . does not, however, excuse the . . . court from engaging in a full analysis of those issues of foreign law or practice that are relevant to its decision, *or* from closely examining all submissions related to the adequacy of the foreign forum. If, in the end, the court asserts its 'justifiable belief' in the existence of an adequate alternative forum, it should cite to evidence in the record that supports that belief." (Emphasis added; footnote omitted.) *Bank of Credit & Commerce International (Overseas) Ltd.* v. *State Bank of Pakistan*, 273 F.3d 241, 247–48 (2d Cir. 2001). In the present case, it is evident that the court had a justifiable belief that the plaintiffs could bring this action in the Philippines. The court's memorandum of decision "closely examin[ed] all submissions related to the adequacy of the foreign forum"; id., 248; by setting forth a thorough examination of the Lim and Pangalangan affidavits. We, therefore, conclude that the court's decision to grant the defendants' motion to dismiss on a conditional basis did not constitute an abuse of its discretion.

Accordingly, we conclude that court did not abuse its discretion in granting the defendants' motion to dismiss on the ground of forum non conveniens.[5]

The judgment is affirmed.

In this opinion the other judges concurred.

[5] The plaintiffs do not challenge on appeal the court's findings as to the remaining factors set forth in *Durkin* v. *Intevac, Inc.*, supra, 258 Conn. 466.

MARY GLEASON ET AL. *v.* PAUL ATKINS
(AC 46321)

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

Syllabus

The plaintiffs appealed to this court from the judgment of the trial court rendered for the defendant in the plaintiffs' action to quiet title to a certain strip of land to the south of Lake Waramaug in New Preston and to obtain damages for trespass. The property of the plaintiffs and the property of the defendant were both part of a subdivision of a parcel of land created by way of an approved subdivision map filed in 1969 and subsequently revised in 1970. In 1971, the owners of the subdivided land conveyed Lot #3 as shown on the 1970 subdivision map to P by warranty deed. That deed contained a description of Lot #3, which did not include any frontage on Lake Waramaug. The deed also contained language granting the exclusive right to use, "in common with owner or owners of Lots #1, #2, #4 and #5 as shown on [the 1970 subdivision map], a certain piece or parcel of land situated on the shore of Lake Waramaug and also shown on said map . . . ." The grantee and the other owners entitled to use the lakefront premises were required to maintain the premises and to pay their pro-rata share of taxes that accrue on the lakefront premises. V owned a lot immediately adjacent to the easterly boundary of the lakefront premises and, as depicted on the 1970 subdivision map, the southerly boundary of V's lot was the edge of the unpaved portion of West Shore Road. West Shore Road contained a paved way of approximately twenty-five feet in width with unpaved unimproved shoulders approximately 12.5 feet in width on each side of the pavement. The chain of title for Lot #3 and the exclusive right to the use of the lakefront premises ultimately led from P's deed to a warranty deed to the plaintiffs using the same descriptions of both parcels as contained in P's deed. The defendant acquired Lot #10 of the subdivision by warranty deed. Lot #10 was a contiguous parcel encompassing land on either side of West Shore Road, including the lakefront premises and the strip of land abutting the southerly boundary of V's property and West Shore Road itself. The defendant's deed stated that the conveyance of Lot #10 was subject to the rights of others to use the lakefront premises. The unpaved shoulders of the road were not shown on the 1970 subdivision map in the area where the lakefront premises were situated, although the shoulder was shown to the south of V's lot and at other places on the map. The state of Connecticut did not own the fee interest in the improved or unimproved portion of the public highway easement, but the general public maintained a right-of-way over the improved and unimproved portions of West Shore Road pursuant to the state's highway easement. The defendant, with the

approval of the state, constructed a three foot high picket fence approximately in the middle of the northerly unpaved shoulder of West Shore Road. The fence was located on the defendant's property within the state's highway easement. Several years later, with the approval of the state, the defendant planted a hedge along the northerly side of the picket fence. As a result, a dispute arose between the plaintiffs and the defendant as to the exact location of the southerly boundary of the lakefront premises. The plaintiffs alleged that the picket fence and hedge had been installed on the lakefront premises, over which they claimed to have exclusive use rights, and that such action constituted trespass. At the trial before the court, the plaintiffs argued that the language of P's deed should be interpreted so that the words "the state highway known as West Shore Road," describing the southerly boundary of the lakefront premises, meant only the paved portion of the entire highway easement. In support of their position, the plaintiffs offered factual evidence from the defendant's disclosed expert surveyor, N, who had drawn a map showing the defendant's property, including the lakefront premises. The defendant argued that the plain language of the description of the lakefront premises in P's deed was clear and did not include the shoulder of the road. In support of this argument, the defendant relied on the testimony of N about the boundaries of the lakefront premises. N testified that he was able to determine with a reasonable degree of scientific certainty that the fence and hedgerow were not located within the lakefront premises. N opined that that the lakefront premises ended at the highway easement line, at the edge of the unpaved shoulder of West Shore Road. He testified that the location of the highway on the 1970 subdivision map was consistent with its location on his survey map, except that the 1970 subdivision map appeared to show only the paved road and not the highway easement line. The court credited, in particular, N's testimony that he found a vehicle axle in the northerly line of the state's highway easement and that sometimes a small vehicle axle is used for noting property corners. N explained that, when marking property boundaries near a state highway, surveyors place markers along the edges of the highway easement, but they would place a marker within the state's highway easement if there was an easement within the property of the highway for some other purpose. According to the survey map, N concluded that, in this case, the vehicle axle in the northerly line of the highway easement marked both the southwestern corner of the lakefront premises and the northerly boundary of the highway easement. Following trial, the court issued a memorandum of decision, concluding that the words "the state highway known as West Shore Road" as used in P's deed meant the entire easement held by the state and not just the paved portion. The court also rejected the plaintiffs' alternative argument that their right to exclusive use was the equivalent of a fee simple title that entitled them to a rebuttable presumption that they owned to the center of West Shore Road and

concluded, on the basis of the plain language of P's deed, that the grantors' intention was to have the lakefront premises remain as part of Lot #10 subject to the plaintiffs' right of exclusive use. *Held*:

1. The plaintiffs could not prevail on their claim that the language in P's deed describing the boundaries of the lakefront premises, when considered with the 1970 subdivision map referenced therein, was unambiguous and that, therefore, the legal interpretation of the location of the southerly boundary of the lakefront premises was a legal question for this court subject to plenary review: this court concluded that P's deed was ambiguous as to the meaning of the phrase "the state highway known as West Shore Road" that defined the southerly boundary of the lakefront premises because, although the 1970 subdivision map showed three physical monuments referenced in P's deed, namely Lake Waramaug, West Shore Road, and V's lot, it did not include the boundaries of the lakefront premises because the 1970 subdivision map was prepared prior to the creation of the lakefront premises, and, given the depiction of the boundaries of V's lot on the 1970 subdivision map and the fact that the lakefront premises were not separately defined on that map, it was unclear based on P's deed and the map referenced therein whether the parties to P's deed intended that "the state highway known as West Shore Road" would refer to only the paved portion of the highway depicted on the map, such that the lakefront premises extended to the edge of the paved road, or to the entirety of the state's highway easement, including both the paved and unpaved portions, such that, like V's lot shown on the 1970 subdivision map, the lakefront premises extended only to the edge of the unpaved shoulder; moreover, because both interpretations were reasonable based on P's deed and the incorporated 1970 subdivision map, P's deed was ambiguous and, accordingly, the trial court properly considered extrinsic evidence to resolve the ambiguity.
2. The plaintiffs could not prevail on their argument that, because P's deed described the lakefront premises as abutting the public highway and because their interest in the lakefront premises was akin to fee simple, they were entitled to the rebuttable presumption that the lakefront premises ran to the center of the paved portion of the highway: it was clear from the plain language of P's deed that the grantor intended to convey only an easement over the lakefront premises rather than an unlimited interest akin to fee simple title, and the Supreme Court has interpreted almost identical language as conveying an easement; moreover, although the plaintiffs described their right to use and possess the property as unlimited, the plaintiffs' use was in fact subject to several restrictions, including that the plaintiffs' use of the property was limited to their private use, the plaintiffs were limited to only one dock and one float, they were prohibited from placing any fence or building on the lakefront premises, and the plaintiffs were required to pay their prorata share of taxes that accrued on the lakefront premises, with the

failure to pay such taxes acting as a termination of the plaintiffs' right to use, and such limitations, and the possibility that the plaintiffs' use would terminate if they failed to pay taxes, was inconsistent with the grant of a whole or unlimited interest embracing all the elements of complete ownership; accordingly, the plaintiffs were therefore not entitled to the presumption of ownership to the center line of West Shore Road.

3. The plaintiffs could not prevail on their claim that the trial court's finding that the southerly boundary of the lakefront premises ended at the highway easement was clearly erroneous for three separate reasons:

a. The trial court's conclusion that, if the lakefront premises extended to the edge of the paved road, the southerly boundary of the lakefront premises would not close with the westerly boundary of V's lot was not clearly erroneous: there was ample evidence in the record to support the court's finding that V's lot extended only to the unpaved shoulder of West Shore Road, as opposed to the paved edge of the road, as the 1970 subdivision map incorporated into P's deed clearly depicted V's lot as extending to a point short of the paved road, the court was entitled to rely on this map feature as though it were expressly recited in P's deed, N testified that he found an iron pin in the southwestern corner of V's lot, coinciding with the highway easement line, and N's survey map depicted V's lot as extending only to the location of that iron pin at the unpaved shoulder of the highway; moreover, although the plaintiffs' argument that the iron pin at the corner of V's lot and the southerly boundary line of V's lot shown on the 1970 subdivision map did not mark the boundaries of that lot but instead merely designated the location of the highway easement line was one possible interpretation of the 1970 subdivision map and the existence of the iron pin, it was not the only one, and the plaintiffs offered little evidence in support of their argument and ignored the fact that the court had evidence to the contrary, including what appeared to be clearly drawn property boundaries of V's lot on the 1970 subdivision map and N's unrebutted survey map and testimony; furthermore, to the extent that the plaintiffs challenged the court's reliance on the vehicle axle that N found in the southwestern corner of the lakefront premises, this court rejected that argument for the same reason; additionally, although the plaintiffs argued that the deed for V's lot stated that V's lot was bounded southerly by the highway, and there is a rebuttable presumption that, when a deed contains such a description, the landowner owns the fee to the center of the highway, the court was entitled to disregard that presumption and instead credit the evidence supporting a contrary conclusion.

b. The trial court's conclusion that the boundaries of the lakefront premises closed at the southwestern corner of V's lot only when the court adopted the defendant's position was supported by the record and was not clearly erroneous: given that P's deed described the lakefront premises as both beginning and ending at V's lot, the court properly relied

on the boundaries of that lot as shown on the 1970 subdivision map; moreover, because accepting the plaintiffs' interpretation of P's deed that the southerly boundary of the lakefront premises was the paved portion of West Shore Road would mean that there would be a 12.5 foot gap between the southwestern corner of V's property and the southeastern corner of the lakefront premises, this court could not say that it was unreasonable for the trial court to reject the plaintiffs' interpretation in favor of one that both resulted in a closed plot of land and gave effect to all of the monuments called out in P's deed; furthermore, the court credited N's testimony and survey map, which indicated that the southerly boundary of the lakefront premises extended only to the unpaved shoulder of the highway and closed with the westerly boundary of V's lot and, to the extent that the plaintiffs challenged N's survey method, N's survey properly tracked the monuments referred to in P's deed, which he identified and located by reference to the vehicle axles and iron pins in the field; additionally, the trial court found that N was highly credible and rejected the plaintiffs' arguments challenging his testimony, and this court would not second-guess those determinations on appeal.

c. The plaintiffs' argument that there was no legal or logical basis for the trial court's conclusion that the strip of land south of V's lot would be useless to the grantors unless they also retained the unpaved shoulder abutting the lakefront premises was unavailing; the unpaved shoulder of the highway abutting V's lot, although perhaps not entirely useless to the grantors if they did not own the unpaved shoulder abutting the lakefront premises, would nonetheless have had more value to the grantors if they also retained ownership of the neighboring strip of land, and the court reasonably inferred on the basis of the evidence that the grantors' intention to retain ownership of the unpaved shoulder abutting V's lot, which was apparent from the 1970 subdivision map, made it more likely that they also intended to retain ownership of the unpaved shoulder abutting the lakefront premises so as to retain for themselves a single contiguous parcel subject only to the public right-of-way over the highway, and this court could not say that the inferences drawn by the trial court in reaching its conclusion were either unreasonable or illogical.

4. The plaintiffs' argument that any ambiguity as to the location of the southerly boundary of the lakefront premises must be construed against the grantor and not the grantee was unavailing: although it is true that ambiguous language in a grant is ordinarily construed against the grantor and in favor of the grantee, the trial court was not required to apply that principle in this case because that rule is one of last resort, and courts have applied the principle advanced by the plaintiffs only where the evidence already favored construing the deed in the grantee's favor or when, even after considering extrinsic evidence and other rules of construction, doubt remained as to the intention of the parties to an ambiguous deed such that the ambiguity was irreconcilable; moreover,

in the present case, the court properly considered extrinsic evidence to resolve the ambiguity and determine the intent of the parties to P's deed and, because the court was able to resolve the ambiguity on the basis of that evidence, it was unnecessary for the court to resort to the rule advanced by the plaintiffs.

Argued January 17—officially released June 4, 2024

Procedural History

Action, inter alia, seeking to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of Litchfield and tried to the court, *Hon. John W. Pickard*, judge trial referee; judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Kenneth R. Slater, Jr., for the appellants (plaintiffs).

Jonathan B. Nelson, with whom was *Venesha White*, for the appellee (defendant).

Opinion

BRIGHT, C. J. The plaintiffs, Mary Gleason and Keavy Ann Gleason, appeal from the judgment of the trial court rendered in favor of the defendant, Paul Atkins, in the plaintiffs' action to quiet title to a strip of land in the town of New Preston and to obtain damages for trespass. The disputed strip of land is the unpaved shoulder of a public highway, which extends across the defendant's property and lies to the south of a lakefront parcel (lakefront premises) that the plaintiffs have the exclusive right to use in common with other property owners who are not parties to this action. On appeal, the plaintiffs claim that the court improperly concluded that the lakefront premises is bounded by the unpaved shoulder rather than the paved portion of the highway. We disagree and, accordingly, affirm the judgment of the trial court.

The court's memorandum of decision sets forth the following facts and procedural history. "The property

of the plaintiffs and the property of the defendant were both part of a subdivision of a parcel of land created by Thomas F. and Marian Quinlan (Quinlan land). The Quinlan land was divided into building lots by way of an approved subdivision map filed on November 12, 1969, and subsequently revised on August 16, 1970, by a new subdivision map (1970 subdivision map). [See appendix to this opinion.] The 1970 subdivision map, as well as [each] of the other relevant maps in this case, was drawn by Charles F. Osborne Associates.

"In 1971, Thomas F. and Marian Quinlan conveyed Lot #3 as shown on the 1970 subdivision map to Bonnie J. Peoples by warranty deed (Peoples deed). That deed contained a description of Lot #3, which does not include any frontage on Lake Waramaug. However, the deed also contained the following language (exclusive use language):

" 'Together with the exclusive right to use, in common with owner or owners of Lots #1, #2, #4 and #5 as shown on [the 1970 subdivision map], a certain piece or parcel of land situated on the shore of Lake Waramaug and also shown on said map, running in a westerly direction for a distance of 125 feet from the land of Nancy Velardi along the shore of Lake Waramaug, thence running in a southerly direction for a distance of about 90 feet to the state highway known as West Shore Road, thence running in an easterly direction along said highway for a distance of about 125 feet to land of Nancy Velardi.

" 'Said use to be limited to the private use of grantee and friends with no commercial activities to be conducted thereon and also limited in that only one dock and one float be permitted and that no fence or building, permanent or otherwise, be permitted on said parcel.

" 'The grantee and other owners entitled to use of aforesaid lake-front premises shall maintain said premises as their sole cost and expense and shall assume all

responsibilities as to any damage or injuries sustained thereon.

" 'The grantee and other owners of Lots #1 through #5 shall pay their pro-rata share of taxes that accrue on said lakefront premises and such tax payments shall be paid during July of each year. Failure to pay the proportionate share of said taxes thirty (30) days after receiving written notice from grantors shall act as termination of said right to use.'

"Thus, the Peoples deed conveyed title to Lot #3 as well as an exclusive right to use, in common with the owners of Lots #1, #2, #4, and #5, a second parcel described above. The court will refer to this parcel as the 'lakefront premises' because it is called that in the Peoples deed. The chain of title for Lot #3 and the exclusive right to the use [of] the lakefront premises ultimately led from the Peoples deed to a November 17, 2015 warranty deed to the plaintiffs using the same descriptions of both parcels as contained in the Peoples deed.[1]

"Lot #10 as shown on the 1970 subdivision map was the subject of a resubdivision in 1973 and is shown on a plot plan in 1975. Although the evidence [at trial] [did] not contain a copy of the first conveyance of Lot #10 out of the subdivision, there [was] circumstantial evidence that it was a deed to Richard C. Kleinburg soon after the plot plan in 1975. By warranty deed from Richard C. Kleinburg dated August 5, 2011, the defendant

[1] The parties and the court quote the relevant deed language from the Peoples deed rather than from the plaintiffs' deed. We note that the plaintiffs' deed differs only in that Velardi is misspelled as "Vilardi," the term "grantee" is replaced with "grantees," the term "grantors" is replaced with "Quinlans," and it provides that the grantees are entitled "to use aforesaid lakefront premises" instead of "to use *of* aforesaid lakefront premises." (Emphasis added.) Because none of these differences is material to the plaintiffs' claims, in the interest of simplicity we refer only to the language of the Peoples deed throughout this opinion.

acquired Lot #10 of the subdivision (defendant's property). The warranty deed states that the conveyance of Lot #10 to the defendant is '[s]ubject to rights to use a portion of the lake frontage more particularly described in Warranty Deeds recorded in Volume 76, Page 260, Volume 76, Page 262, and Volume 76, page 396, and Volume 218, Page 214 of the Washington Land Records.'[2] The Peoples deed is recorded in Volume 76, Page 262, of the Washington Land Records. As a result of this title history, the defendant's property is subject to the plaintiffs' exclusive right to use the lakefront premises together with the owners of Lots #1, #2, #4 and #5.

"A public highway known as West Shore Road extends across the defendant's property. The portion of West Shore Road extending across the defendant's property is a three rod[3] highway which is approximately fifty feet in width containing a paved way of approximately twenty-five feet in width with unpaved unimproved shoulders approximately 12.5 feet in width on each side of the pavement. The state of Connecticut does not own the fee interest in the improved or unimproved portion of the public highway easement. The general public maintains a right-of-way over the improved and unimproved portion[s] of West Shore Road pursuant to the state of Connecticut's highway easement.

"The only other relevant title history concerns two lots which are adjacent to the easterly boundary of the lakefront premises. These lots were also created by Thomas F. Quinlan acting on behalf of The Quinlan Corporation. The immediately adjacent lot was conveyed to Nancy Ann Velardi in April, 1970, and is shown on a map also drawn by Charles J. Osborne Associates

[2] The defendant's deed incorporates the 1975 plot plan, which does not differ from the 1970 subdivision map in any way that is material to this appeal.

[3] "A rod is a unit of measurement equal to 16.5 feet." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 328 Conn. 615, 644 n.22, 181 A.3d 531 (2018).

and will be referred to as the 'Velardi lot.' The adjoining lot to the east was conveyed by The Quinlan Corporation in 1969 and will be referred to as the 'Lafata lot.'

"Within a few days after July 23, 2014, the defendant, with the approval of the state of Connecticut, constructed a three foot high picket fence approximately in the middle of the northerly unpaved shoulder of West Shore Road. The fence is located on the defendant's property within the state's right-of-way. During the spring or summer of 2019, with the approval of the state . . . the defendant planted a hedge along the northerly side of the picket fence." (Footnotes added.) As a result, a dispute arose between the plaintiffs and the defendant as to the exact location of the southerly boundary of the lakefront premises.

"The plaintiffs . . . brought this case against the defendant . . . [on November 5, 2019] and [they] filed a two count amended complaint on December 20, 2021.[4] The first count ask[ed] the court to quiet title to [the lakefront premises]. The second count [was] based on trespass on that property." (Footnote added.) In their amended complaint, "[t]he plaintiffs allege[d] that the defendant installed . . . [the] picket fence and . . . hedge on [the lakefront premises] over which they claim to have exclusive use rights. The defendant respond[ed] that he installed the picket fence and hedge on his own property over which the plaintiffs have no rights. The defendant also allege[d] several special defenses, including that the plaintiffs' claims are barred by the statute of limitations.

"This case was tried to the court on May 17, 2022. The court viewed the property on June 2, 2022."

[4] The plaintiffs' original complaint also included a third count alleging public nuisance. The court struck this claim from the plaintiffs' complaint on November 30, 2021, and it is not at issue on appeal.

During trial, "[t]he plaintiffs argue[d] that the language of the [Peoples deed] should be interpreted so that the words 'the state highway known as West Shore Road' mean only the paved portion of the entire highway easement. The plaintiffs point[ed] out that the paved portion of West Shore Road is a known and fixed monument [that] is shown on the 1970 subdivision map and must prevail over the distance call of 'about 90 feet' in the description of the westerly length of the lakefront premises. The unpaved shoulders of the road are not shown on the 1970 subdivision map in the area where the lakefront premises is situated, although the shoulder is shown to the south of the Velardi and Lafata lots and at other places on the map. Alternatively, the plaintiffs argue[d] that the Peoples deed actually conveyed a fee interest in the lakefront premises because it conveyed only possessory rights and not nonpossessory rights associated with an easement. The plaintiffs argue[d] that as fee owners they are entitled to the well established rebuttable presumption that when a public highway is not owned by a state or municipality, the landowner that abuts the highway owns up to the center line."[5]

"In support of their position, the plaintiffs offered factual evidence from the defendant's disclosed expert

[5] During trial, the defendant called Attorney Gerald Garlick to testify regarding this issue as an expert in real estate law. Over the objection of the plaintiffs' counsel, the court allowed Garlick's testimony, including his opinion that the defendant owned the lakefront premises in fee simple subject to the rights of the plaintiffs and the other property owners referred to in the Peoples deed to exclusively use the property. The plaintiffs' counsel also objected to a question about Garlick's opinion as to who owned the unpaved shoulder of the highway, to which Garlick responded that, in his opinion, the defendant owned the shoulder area. In its memorandum of decision, the court stated that it "now sustain[ed] the plaintiffs' objection and str[uck] [Garlick's] opinion as to the ownership of the shoulder of West Shore Road . . . [because] the issue of the ownership of the shoulder of West Shore Road is an ultimate issue in the case and calls for a legal conclusion which the court must make. [Therefore] [t]he court [did] not consider the opinion given by [Garlick]."

surveyor named Bryan Nesteriak, who had drawn a map showing the defendant's property including the lakefront premises. He testified as a fact witness to many of the underlying facts set forth in [the court's memorandum of] decision."

"The defendant argue[d] that the plain language of the description of the lakefront premises in the Peoples deed is clear and does not include the shoulder of the road." In support of this argument, the defendant relied on the testimony of Nesteriak, whom he called as an expert witness to offer Nesteriak's opinion about the boundaries of the lakefront premises. The plaintiffs stipulated to Nesteriak's qualifications as an expert in land surveying.

Nesteriak testified that he was able to determine with a reasonable degree of scientific certainty that the fence and hedgerow are not located within the lakefront premises. He testified that "the definition of a highway includes the unimproved portions on the side [and] the improved portions." He also testified that the state highway known as West Shore Road is 49.5 feet wide, and to determine the total area designated for the highway, he measured one half of that width from the center of the highway on either side. He concluded that the lakefront premises ends at the highway easement line—that is, at the edge of the unpaved shoulder. He testified that the location of the highway on the 1970 subdivision map is consistent with its location on his survey map, except that the 1970 subdivision map appears to show only the paved road and not the highway easement line.

Nesteriak further testified that the southerly boundary of the Velardi lot "coincides with the highway [easement] line," which he believed also is consistent with the 1970 subdivision map. He stated that he extended that same highway easement line to create the southerly boundary of the lakefront premises. The court credited,

in particular, Nesteriak's testimony that he found a vehicle axle in the northerly line of the state's highway easement and that sometimes "a small vehicle axle" is "used for noting property corners." He explained that, when marking property boundaries near a state highway, surveyors place markers "along the edges" of the highway easement, but they would place a marker *within* the state's highway easement "[i]f there was an easement over the highway, that's within the property of the highway, for some other purpose." According to the survey map, Nesteriak concluded, however, that in this case the vehicle axle in the northerly line of the highway easement marks both the southwestern corner of the lakefront premises and the northerly boundary of the highway easement.

Nesteriak testified that, when determining the boundaries of the lakefront premises, he considered the distance of "about 90 feet" stated in the Peoples deed. He acknowledged, however, that distances are less reliable than physical monuments as a method of locating boundary lines. According to Nesteriak, "[t]he ninety feet is a measurement that is put in the [Peoples] deed, it says 'about 90,' which means, it's more or less [than] ninety. The eastern side of the easement did end up being approximately ninety, it was 89.9 feet. The western section did not end up being exactly ninety, it was 82.46, which still, in surveying terms, is about ninety feet." He also testified that if the westerly boundary of the lakefront premises were ninety feet instead of only 82.46 feet, although it would be "[a]bout eight feet" closer to the pavement than where he determined that the westerly boundary line ends, it nonetheless would end "short of the hedgerow, approximately," such that the fence and hedgerow would still be on the defendant's property and not within the lakefront premises. Nesteriak did not agree that the boundary should be

extended in that manner "[b]ecause the [state's] easement was there before this exclusive right to use [the lakefront premises] was given, and the description says, specifically, that it goes to the highway."

On the basis of his survey, Nesteriak concluded that the four boundaries of the lakefront premises are as follows: (1) the easterly boundary runs in a northerly direction for 89.9 feet, from an iron pin[6] found at the southwestern corner of the Velardi lot to the edge of Lake Waramaug, passing through another iron pin near the northwestern corner of the Velardi lot, (2) the northerly boundary runs in a westerly direction along the edge of Lake Waramaug for approximately 125 feet, (3) the westerly boundary runs in a southerly direction for 82.46 feet from Lake Waramaug, passing through a vehicle axle found a short distance from the edge of the lake and ending at another axle that coincides with the highway easement line, and (4) the southerly boundary runs from the axle at the highway easement line in

[6] During oral argument before this court, there was some confusion as to whether the vehicle axles and the iron pins that Nesteriak found in the field were one and the same. Counsel for the defendant asserted that, other than the lake and the highway, the only physical monument that Nesteriak found in the field was an iron pin in the southwestern corner of the Velardi lot. Counsel for the plaintiffs initially disputed that Nesteriak found a vehicle axle in the field but, after reviewing the record, the plaintiffs' counsel asserted that Nesteriak found "an object" not "on the Velardi side" of the lakefront premises but "on the distance between the road and the lake where there was no line shown on the 1970 [subdivision] map." The plaintiffs' counsel changed his position again during his rebuttal argument, when he agreed with the defendant's counsel that the references to an axle in the record are to a marker "near the Velardi line." Nonetheless, counsel's expressed understanding at oral argument before us is inconsistent with the court's factual findings and with Nesteriak's testimony and survey map, which indicate that Nesteriak found two vehicle axles and two iron pins during his survey of the lakefront premises. The court credited Nesteriak's testimony that he found a vehicle axle in the southwestern corner of the lakefront premises, which he used to locate the boundary lines. Moreover, Nesteriak's survey map shows that he found a second axle in the northwestern corner of the lakefront premises and found an iron pin in the southwestern corner of the Velardi lot and another in the northwestern corner.

an easterly direction for approximately 125 feet and closes with the easterly boundary at the iron pin found at the southwestern corner of the Velardi lot. Thus, it was Nesteriak's opinion that the southerly boundary of the lakefront premises is located at the highway easement line, that is, at the edge of the unpaved shoulder of West Shore Road.

"The plaintiffs filed their posttrial brief on August [8], 2022, the defendant filed his posttrial brief on September 7, 2022, and the plaintiffs filed their posttrial reply brief on September 19, 2022. On December 19, 2022, the parties filed a written stipulation that the court's time to enter judgment would be extended to February 28, 2023."

On February 22, 2023, the court issued a memorandum of decision rendering judgment for the defendant. On the basis of the evidence presented at trial, the court concluded that "the words 'the state highway known as West Shore Road' as used in the Peoples deed means the entire easement held by the state and not just the paved portion." The court explained: "The court's finding is influenced, in part, by the opinions of the defendant's expert surveyor, [Nesteriak]. The court found him to be highly credible and convincing. He conducted a thorough review of the available deeds and maps, performed field work and produced a clear and detailed map of his own. . . .

"The plaintiffs did not have a surveyor to contradict the testimony of [Nesteriak], but this does not mean that the court is bound to accept it. . . . Here, the court accepts the testimony of [Nesteriak], along with other evidence to be discussed weighing in favor of the defendant.

"The plaintiffs point out three principal reasons why [Nesteriak] is wrong. The court will address those reasons in turn. The first reason can be summarized as

follows: the lakefront premises [are] described in the Peoples deed as being 'shown on said map.' 'Said map' is the 1970 subdivision map. The effect of the reference to the map is to incorporate the 1970 [subdivision] map into the Peoples deed. . . . The plaintiffs argue that the 1970 subdivision map only depicts the paved portion of West Shore Road; it does not include a demarcation of the shoulder of the road in the area of the lakefront premises, although such a demarcation is shown at other places on the 1970 [subdivision] map.

"The weakness of this argument is that the lakefront premises is not depicted as a separate property on the 1970 subdivision map. The defendant's property, Lot #10, is depicted as including the highway and the entire area north of the pavement and south of the lake. The 1970 subdivision map was drawn before the lakefront premises was created in 1971 by the Peoples deed and the deeds to Lots #1, #2, #4 and #5. There would have been no reason for the surveyor to have drawn the shoulders of the highway because it was all included within Lot #10 and would have had no significance at the time the 1970 subdivision map was drawn.

"The plaintiffs' next reason to doubt [Nesteriak's] opinion is that, although the Peoples deed describes the lakefront premises as having a westerly side of 'about 90 feet,' [Nesteriak's] map shows the westerly side as being only 82.46 feet. This is because [Nesteriak's] map shows the westerly side of the . . . lakefront premises ending at an axle he found in the northerly line of the state's easement, not at the edge of the highway pavement. [Nesteriak] testified that a small vehicle axle placed on its end is sometimes used for noting property corners. [Nesteriak] admitted that the westerly side of the lakefront premises would have been closer to ninety feet if it ended at the pavement but that a distance of exactly ninety feet would still place the fence and hedge outside the lakefront premises.

The plaintiff[s] [argue] that this discrepancy is a reason to reject [Nesteriak's] map. The court does not find this point to be significant because the language of the [Peoples] deed is 'about 90 feet.' [Nesteriak] testified that in surveying terms 'about' means the same thing as 'more or less' and that 82.46 feet is 'about 90 feet.' Words such as 'more or less' are to be taken in connection with all other features in any transaction; they are words of caution, denoting some uncertainty in the mind of one using them and a desire not to misrepresent. . . . It is clear that the westerly side of the lakefront premises had not been surveyed when the Peoples deed description was written. 'About 90 feet' represented an approximation of the distance to West Shore Road. The approximation is 91.6 percent of the stated distance. The court does [not] find this small discrepancy determinative of the intention of the parties to the Peoples deed.

"The plaintiffs' next argument is that the meaning of the words 'the state highway known as West Shore Road' must be the paved surface of the highway because of a principle that physical monuments have a higher priority than distance calls. [Nesteriak] admitted this to be an established principle in surveying. He also admitted that the paved portion of the state highway is a man-made physical monument, but he did not believe that this principle would change his ultimate conclusion that the fence and hedges were not within the lakefront premises. . . .

"[The plaintiffs argue that] '[a] highway has always been regarded as a fixed monument.' *Frank Towers Corp.* v. *Laviana*, 140 Conn. 45, [51, 97 A.2d 567] (1953). But the principle as stated in our appellate cases is actually, '[w]here the boundaries of land are described by known and fixed monuments which are definite and certain, the monuments will [control] over courses and distances.' [Id., 50.]

"This statement is slightly different from the one advanced by the plaintiff[s] in that 'known and fixed monuments' are not necessarily physical monuments. It is true that '[t]he land of an adjoining proprietor whose boundaries can be fixed by known monuments is also considered to be a monument to establish a boundary.' [Id., 51.] Thus, if the pavement of a three rod state highway easement is a known and fixed monument, the shoulders of the highway are also known and fixed monuments which can easily be calculated and mapped. The court does not believe that the physical pavement of the highway is any more 'known and fixed' than the shoulders.

"The court finds that the most significant part of the description of the lakefront [premises] is the southerly line. That line is described as 'running along said highway for a distance of about 120 feet to the land of Nancy Velardi.'[7] The land of Nancy Velardi is shown on the 1970 subdivision map as a surveyed lot with a westerly boundary extending 89.5 feet[8] in a southerly direction from the shore of Lake Waramaug. The surveying had been done by Charles J. Osborne Associates, the same firm which created the 1970 subdivision map and the

[7] The Peoples deed, from which the court purported to quote, actually states: "running in an easterly direction along said highway for a distance of about 125 feet to land of Nancy Velardi." Elsewhere in its memorandum of decision, the court quoted the language correctly. The court's misquote here does not affect its analysis or our conclusions.

[8] In their appellate brief, the plaintiffs state that the 1970 subdivision map shows that the westerly boundary of the Velardi lot is 82.5 feet. At other points in their brief, however, the plaintiffs refer to this same boundary as being 89.5 feet, which is consistent with the court's memorandum of decision, and the plaintiffs do not otherwise challenge the court's statement as to the length of that boundary. We thus presume that the plaintiffs' statement that the westerly boundary of the Velardi lot is 82.5 feet is a scrivener's error. Although the 1970 subdivision map is unclear as to the exact measurement of the westerly boundary of the Velardi lot, because neither party has challenged the court's statement that the map indicates that the boundary is 89.5 feet, we presume that the court is correct.

maps showing the resubdivision of the defendant's land. The exhibit copy of the 1970 subdivision map is not clear enough to read all of the courses and distances, but the common creation of all maps leads the court to find that the westerly boundary of the Velardi lot is known and fixed.

"If the plaintiff[s] [are] correct that the southwest[ern] corner of the lakefront premises is located at the edge of the road pavement and runs along the pavement in an easterly direction, it won't close with the westerly boundary [of] the Velardi lot. In fact, it will be approximately 12.5 feet south of the corner of the Velardi lot. This fact is easily determined just by looking at the 1970 subdivision map and seeing that the southerly boundary of the Velardi lot is separated from the road pavement by the entire shoulder of the highway. The court finds that the plaintiffs' argument that the pavement is the southerly boundary of the lakefront premises results in a description of the lakefront premises which does not close—and not by a small amount. This problem would have been obvious when the Peoples deed was written and weighs heavily on finding the intent of the words in the description. On the other hand, if [Nesteriak's] map is accepted as accurate, the southerly boundary closes perfectly at the southwest corner of the Velardi lot.

"Close scrutiny of the area south of the Velardi and Lafata lots as depicted in the 1970 subdivision map shows that the shoulder of [West] Shore Road separating the two lots from the pavement of the road is part of Lot #10, now owned by the defendant. If the plaintiffs are correct that the plaintiffs own the entire shoulder south of the lakefront premises, it would separate the defendant's small section of the shoulder south of the Velardi and Lafata lots from the rest of Lot #10. It would make no sense that Thomas P. and Marian S. Quinlan, the creators of the entire subdivision, would create such

a small, useless strip of land with no contact with the remainder of Lot #10.

"The court has weighed the evidence and has applied the appropriate law and finds against the plaintiff[s] on the issue of the ownership of the shoulder of [West] Shore Road. Thus, the fence and hedge are not located within the lakefront premises." (Citations omitted; footnotes added.)

The court also rejected the plaintiffs' alternative argument that their right to exclusive use was the equivalent of a fee simple title that entitled them to a rebuttable presumption that they owned to the center of West Shore Road. Instead, the court concluded, on the basis of the plain language of the Peoples deed, that "the intention was to have the lakefront premises remain as part of Lot #10 subject to the [plaintiffs'] right of exclusive use."[9] In its memorandum of decision, the court stated that, "in the absence of any Connecticut authority, [it] [was] not prepared to find that the plaintiffs' chain of title from the Peoples deed grants the plaintiffs fee simple title to the lakefront premises such that they would be entitled to take advantage of a presumption that they own fee simple title to the center of West Shore Road including the shoulder of the highway where the defendant placed the fence and hedge. . . .

* * *

"The court does not need to decide the question as to the exact nature of the plaintiffs' exclusive right to

[9] The court also found it "significant that the creators of the subdivision . . . did not obtain resubdivision approval in order to create the lakefront premises. The 1970 subdivision map . . . was marked 'Approved by the Washington Planning Commission at its meeting on January [5], 1971,' and is signed by its chairman, all in conformance with General Statutes § 8-25," which provides that a planning commission must approve all plans for subdivisions of land. The court explained that "this approved subdivision does not depict the lakefront premises as a separate lot. If the Peoples deed had been intended to create a separate lot in fee simple, it would have been separately depicted. The fact that it is not depicted as a separate lot is

use the lakefront premises. It is enough to decide that it is not the equivalent of fee simple title such that it entitles the plaintiffs to a rebuttable presumption that they own to the center of West Shore Road." This appeal followed.

As a preliminary matter, we first set forth the applicable standard of review and relevant legal principles regarding the construction of a deed. Ordinarily, "[t]he construction of a deed . . . presents a question of law which we have plenary power to resolve. . . . In determining the location of a boundary line expressed in a deed, if the description is clear and unambiguous, it governs and the actual intent of the parties is irrelevant." (Citations omitted; internal quotation marks omitted.) *Mackie* v. *Hull*, 69 Conn. App. 538, 541–42, 795 A.2d 1280, cert. denied, 261 Conn. 916, 806 A.2d 1055 (2002), and cert. denied, 261 Conn. 917, 806 A.2d 1055 (2002). When the description of a boundary line in a deed is ambiguous, however, "the question of what the parties intended that line to be is one of fact for the trial court. . . . In the construction of an ambiguous instrument of conveyance, the decisive question of fact is the intent of the parties to the instrument." (Citation omitted.) *Lake Garda Improvement Assn.* v. *Battistoni*, 160 Conn. 503, 511, 280 A.2d 877 (1971); see also *Freidheim* v. *McLaughlin*, 217 Conn. App. 767, 782, 290 A.3d 801 (2023) ("[w]here a deed is ambiguous the intention of the parties is a decisive question of fact" (internal quotation marks omitted)).

"Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed . . . and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language

persuasive evidence that no fee simple interest was intended and that no subdivision approval was required."

used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . .

"In the construction of a deed or grant, the language is to be construed in connection with, and in reference to, the nature and condition of the subject matter of the grant at the time the instrument is executed, and the obvious purpose the parties had in view. . . . [I]f the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity. . . .

"Furthermore, [a] reference to [a] map in [a] deed, [f]or a more particular description, incorporates [the map] into the deed as fully and effectually as if copied therein. . . . [T]he identifying or explanatory features contained in maps referred to in a deed become part of the deed, and so are entitled to consideration in interpreting the deed as though they were expressly recited therein." (Internal quotation marks omitted.) *Williams* v. *Green Power Ventures, LLC*, 221 Conn. App. 657, 674, 303 A.3d 13 (2023), cert. denied, 348 Conn. 938, 307 A.3d 273 (2024). We must consider both the deed and the map as a whole to determine the parties' intent. See *Rocamora* v. *Heaney*, 144 Conn. App. 658, 666, 74 A.3d 457 (2013) ("In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . This is so not just when the words in a deed are ambiguous, but also when the court determines that a map is unclear or ambiguous." (Citation omitted; internal quotation marks omitted.)).

In the present case, the court concluded that the phrase "the state highway known as West Shore Road"

in the Peoples deed was ambiguous as to whether it included the unpaved portion of the highway, and the court considered extrinsic evidence of the meaning of that phrase in reaching its conclusion. See *Mierzejewski* v. *Laneri*, 130 Conn. App. 306, 313, 23 A.3d 82 ("[t]he court's finding that the defendants' southerly boundary was the stone wall rested on its credibility determinations of the parties' surveyors, which would be necessary only if there was ambiguity in the deed"), cert. denied, 302 Conn. 932, 28 A.3d 344 (2011). Thus, to the extent that the plaintiffs challenge the court's factual findings on appeal, "our review is limited to deciding whether such findings were clearly erroneous. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence . . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . 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." (Internal quotation marks omitted.) *Mackie* v. *Hull*, supra, 69 Conn. App. 545. By contrast, to the extent that the plaintiffs challenge the court's conclusion that the Peoples deed is ambiguous, our review is plenary. See *Freidheim* v. *McLaughlin*, supra, 217 Conn. App. 782–83 ("[t]he determination as to whether language of [an instrument] is plain and unambiguous is a question of law subject to plenary review" (internal quotation marks omitted)).

I

The plaintiffs first claim that the court's conclusion is contrary to the unambiguous description of the lakefront premises in the Peoples deed. The plaintiffs assert that "the [Peoples] deed used three fixed monuments"—namely, the Velardi lot, West Shore Road, and Lake Waramaug—"to establish a clear and unequivocal

boundary of the [lakefront premises] that could only be understood by the buyer as extending over the entire area between the lake and the physical road . . . .'' According to the plaintiffs, because the 1970 subdivision map referenced in the Peoples deed depicts only the paved portion of the highway, the reference in that deed to ''the state highway known as West Shore Road'' must mean the paved portion that appears on the map.

Additionally, the plaintiffs argue that the grantor drafted the Peoples deed ''consistent with [his] understanding, as reflected in his prior deed to Velardi, that the [southerly] Velardi boundary ran to the [paved portion of the] highway and did not end at the point where [that] boundary met the [highway] easement line as marked in the field'' and as depicted on the 1970 subdivision map. The plaintiffs assert that the deed to the Velardi lot states that it is bounded southerly by the highway and cite the principle that, when a deed contains such a description, the landowner is presumed to own the fee to the center of the highway.

In advancing these arguments, the plaintiffs minimize the significance of both the iron pin in the southwestern corner of the Velardi lot and the line at the southerly boundary of that lot on the 1970 subdivision map. As depicted on the 1970 subdivision map, the southerly boundary of both the Velardi property and the adjoining Lafata lot, which was transferred by the Quinlans in 1969, is the edge of the unpaved portion of the West Shore Road highway easement. Despite what the 1970 subdivision map seems to clearly show, the plaintiffs argue that, instead of depicting the actual boundary, those features merely designate ''the location of the [highway] easement line, [which] would be important to [the] owners [of the Velardi lot] to assure that they did not build homes or other accessory structures within the highway easement line.'' On the basis of their understanding of the physical monuments referred to

in the Peoples deed, the plaintiffs assert that the grantee would have been able to establish "all four corners of the [lakefront premises] based on those monuments identifiable in the field and shown on the map . . . ."

Because the plaintiffs argue that the Peoples deed is unambiguous, they assert that "the legal interpretation of the [Peoples] deed to determine whether the southerly boundary is the highway easement line drawn on the survey or the road which was also on the survey . . . is a legal question for the court" that is subject to plenary review.

We are not convinced that the plaintiffs' interpretation of the Peoples deed and incorporated map is the only reasonable one. Instead, we conclude that the Peoples deed is ambiguous as to the meaning of "the state highway known as West Shore Road" and that the court therefore properly considered extrinsic evidence to resolve the ambiguity.

We begin with the language of the Peoples deed, which describes the lakefront premises as follows: "a certain piece or parcel of land situated on the shore of Lake Waramaug and also shown on [the 1970 subdivision] map, running in a westerly direction for a distance of 125 feet from the land of Nancy Velardi along the shore of Lake Waramaug, thence running in a southerly direction for a distance of about 90 feet to the state highway known as West Shore Road, thence running in an easterly direction along said highway for a distance of about 125 feet to land of Nancy Velardi."

Because the Peoples deed specifies that the 1970 subdivision map describes the parcel of land intended, that map is controlling as to our interpretation of the description provided in the deed. See *Lake Garda Improvement Assn.* v. *Battistoni*, supra, 160 Conn. 510 ("[s]ince the deed specifies that the map describes the roadways intended, that map is controlling"); see also

Williams v. *Green Power Ventures, LLC*, supra, 221 Conn. App. 674 (features on map referenced in deed "are entitled to consideration in interpreting the deed as though they were expressly recited therein" (internal quotation marks omitted)). The 1970 subdivision map was prepared prior to the creation of the lakefront premises and thus does not depict the lakefront premises as a separate parcel with defined boundaries. Although the 1970 subdivision map does not include the boundaries of the lakefront premises, it does show the three physical monuments referenced in the Peoples deed—Lake Waramaug, West Shore Road, and the adjacent Velardi lot. The 1970 subdivision map, though, does not appear to depict the paved portion of West Shore Road as a boundary, because the westerly boundary of the Velardi lot is depicted as extending from the shore of Lake Waramaug to a point short of the paved portion of West Shore Road, leaving a strip of land consistent with the unpaved portion of the highway easement between the southerly boundary of the Velardi lot and the paved road.[10] The 1970 subdivision map also depicts the defendant's property, Lot #10, as a contiguous parcel encompassing land on either side of West Shore Road, including the lakefront premises and the strip of land abutting the southerly boundary of the Velardi lot, and West Shore Road itself.

Given the depiction of the boundaries of the Velardi lot on the 1970 subdivision map and the fact that the lakefront premises is not separately defined on that map, it is unclear based on the Peoples deed and the map referenced therein whether the parties to the Peoples deed intended that "the state highway known as West Shore Road" would refer to (1) only the paved

[10] This becomes clear upon comparing the 1970 subdivision map to the 1969 subdivision map, which shows the entire 49.5 foot wide highway, including both the paved and unpaved portions, abutting the southerly boundary of the Velardi lot.

portion of the highway depicted on the map, such that the lakefront premises extends to the edge of the paved road, or (2) the entirety of the state's highway easement, including both the paved and unpaved portions, such that, like the Velardi lot shown on the 1970 subdivision map, the lakefront premises extends only to the edge of the unpaved shoulder. Because both interpretations are reasonable based on the Peoples deed and the incorporated 1970 subdivision map, we conclude that the Peoples deed is ambiguous. See *Freidheim* v. *McLaughlin*, supra, 217 Conn. App. 788 ("[b]ecause the deed language is susceptible to more than one reasonable interpretation, it is ambiguous"). Accordingly, we reject the plaintiffs' claim that the Peoples deed can only be read to support their interpretation as a matter of law.

II

Alternatively, the plaintiffs claim that, assuming arguendo that the Peoples deed is ambiguous as to the meaning of "the state highway known as West Shore Road," the court should have resolved the ambiguity in their favor. Specifically, the plaintiffs argue that, because the exclusive use grant of the lakefront premises in the Peoples deed constituted a transfer of a fee simple interest and not an easement, the court should have applied a presumption that they are the owners of the land to the center of West Shore Road. They further argue that, even without that presumption, the court's finding that the southerly boundary of the lakefront premises ends at the unpaved edge of the highway easement is clearly erroneous for three separate reasons. We address each of the plaintiffs' arguments in turn.[11]

A

First, the plaintiffs argue that, because the Peoples deed describes the lakefront premises as abutting the

[11] For ease of discussion, we address the plaintiffs' arguments in a different order than they are set forth in their principal appellate brief.

public highway, and because their interest in the lakefront premises is akin to fee simple, they are entitled to the rebuttable presumption that the lakefront premises runs to the center of the paved portion of the highway.[12] See *Mierzejewski* v. *Laneri*, supra, 130 Conn. App. 315 ("[a]n abutting owner is presumed under the law of this state, no evidence having been offered to the contrary, to own the fee of the land to the center of the highway" (internal quotation marks omitted)). According to the plaintiffs, their right to the exclusive use of the lakefront premises "is not an easement interest which, by definition, is not possessory." The plaintiffs assert that "the right to exclusive possession of a parcel of land limited only by the possible reversion to another person if taxes are not paid is nearly identical to fee simple ownership." Pointing to precedent from other states, the plaintiffs argue "that [the conveyance of the right to] exclusive use is akin to [the conveyance of] fee simple title and that the rules regarding the boundaries of land [owned] in fee simpl[e] should apply equally to parcels created for the exclusive use of owners of that right."

The defendant argues that the plaintiffs' interest in the lakefront premises is "plainly and clearly" an easement, that he "remains the owner in fee" of the lakefront premises, and that the plaintiffs "have provided no case law or authority whatsoever from this state which finds that an easement can or should be treated . . . as title in fee simple for the application of a presumption regarding expansion of the boundary lines." We agree with the defendant and, accordingly, conclude that the plaintiffs are not entitled to a rebuttable presumption that they own to the center of West Shore Road.

[12] In their appellate brief, the plaintiffs present this as a separate claim, and the court also addressed it as one in its memorandum of decision. Because we view it as an argument in support of the plaintiffs' overall claim that the court's conclusion as to the boundaries of the lakefront premises was improper, we do not address it as a separate claim.

Because the Peoples deed contains no ambiguity as to the type of property interest conveyed, "the determination of the intent behind [the] language in [the] deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary." (Internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282 Conn. 686, 699, 923 A.2d 737 (2007).

The following principles pertaining to fee interests and easements guide our analysis. "[F]ee simple ownership [is] a term that merely reflects ownership of a whole or unlimited estate." (Internal quotation marks omitted.) *Morton* v. *Syriac*, 196 Conn. App. 183, 202, 229 A.3d 1129, cert. denied, 335 Conn. 915, 229 A.3d 1045 (2020); see also *Redevelopment Agency* v. *Norwalk Aluminum Foundry Corp.*, 155 Conn. 397, 401, 233 A.2d 1 (1967) ("[a] fee simple interest with possession . . . is a whole or unlimited interest embracing all the elements of complete ownership"). By contrast, "[a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . . In determining the character and extent of an easement created by deed, the ordinary import of the language will be accepted as indicative of the intention of the parties, unless there is something in the situation of the property or the surrounding circumstances that calls for a different interpretation." (Citation omitted; internal quotation marks omitted.) *Stefanoni* v. *Duncan*, supra, 282 Conn. 700.

Here, it is clear from the plain language of the Peoples deed that the grantor intended to convey only an easement over the lakefront premises rather than an unlimited interest akin to fee simple title. The paragraph of the Peoples deed granting the easement first provides: "Together with the exclusive[13] right to use, in common with owner or owners of Lots #1, #2, #4 and #5 as shown on [the 1970 subdivision] map, a certain piece or parcel of land . . . ." (Footnote added.) Our Supreme Court has interpreted almost identical language as conveying an easement. See *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 506, 757 A.2d 1103 (2000) (by its express terms, deed conveying various parcels " 'together with the right to use in common with others' " certain roadways conveyed easement). Moreover, although the plaintiffs describe their right to use and possess the property as "unlimited," the plaintiffs' use is in fact subject to several restrictions.[14] Specifically, the Peoples deed limits the plaintiffs' use to "the private use of grantee and friends with no commercial activities to be conducted thereon . . . ." The plaintiffs also are limited to "only one dock and one float" and are prohibited from placing any "fence or building, permanent

[13] Our Supreme Court has stated that, in the context of an exclusive easement, "exclusive means that the easement holder[s] ha[ve] the sole right to engage in the type of use authorized by the servitude." (Internal quotation marks omitted.) *Zhang* v. *Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 642, 866 A.2d 588 (2005).

[14] Contrary to the defendant's assertion, however, the Peoples deed does not indicate that the plaintiffs were conveyed an easement only for the purposes of ingress and egress over the lakefront premises in order to access the lake. In connection with this assertion, the defendant argues that the plaintiffs "attempt to improperly expand" the scope of the right conveyed in the Peoples deed "to include parking." The court concluded that there was no evidence presented at trial in support of the defendant's argument, and our review of the record has revealed none. Moreover, in their reply brief, the plaintiffs clarify that they only "ask the court to interpret the deed language together with the map reference[d] in the deed to determine its boundaries." Accordingly, we do not address the defendant's argument that the plaintiffs are attempting to expand the scope of their right to use the lakefront premises.

or otherwise" on the lakefront premises. Finally, the plaintiffs are required to "pay their pro-rata share of taxes that accrue on [the] lakefront premises," and failure to pay such taxes thirty days after receiving written notice from the grantors "shall act as a termination of [the plaintiffs'] right to use." These limitations, and the possibility that the plaintiffs' use will terminate if they fail to pay taxes, are inconsistent with the grant of a "whole or unlimited interest embracing all the elements of complete ownership." *Redevelopment Agency* v. *Norwalk Aluminum Foundry Corp.*, supra, 155 Conn. 401; see also *Eis* v. *Meyer*, 17 Conn. App. 664, 668, 555 A.2d 994 ("[a]n easement may be created which will terminate upon the happening of an event or contingency, or which may be terminated on the occurrence, [or] breach . . . of a condition" (internal quotation marks omitted)), aff'd, 213 Conn. 29, 566 A.2d 422 (1989). Instead, the Peoples deed expresses an intent to create only an exclusive easement over a portion of the defendant's property, which does not entitle the plaintiffs to the presumption of *ownership* to the center line of West Shore Road.[15] Accordingly, the plaintiffs' argument fails.

B

Second, the plaintiffs argue that the court's finding as to the southerly boundary of the lakefront premises

[15] The California and Idaho cases cited by the plaintiffs merely recognize the possibility that an exclusive easement may equate to a fee interest if, despite being labeled an "easement," the interest conveyed creates an unlimited right to use the subject property, which clearly is not the case here. See *Blackmore* v. *Powell*, 150 Cal. App. 4th 1593, 1600, 59 Cal. Rptr. 3d 527 (2007) (easement for parking and garage purposes, with right of exclusive control over garage, did "not rise to fee ownership" because (1) rights accorded grantee were expressly circumscribed and (2) right to exclusive control was intended solely to protect those restricted rights); *Raab* v. *Casper*, 51 Cal. App. 3d 866, 877, 124 Cal. Rptr. 590 (1975) ("[i]f a conveyance purported to transfer to A an *unlimited* use or enjoyment of Blackacre, it would be in effect a conveyance of ownership to A, not of an easement" (emphasis in original; internal quotation marks omitted)); *Latham* v. *Garner*, 105 Idaho 854, 856 n.1, 673 P.2d 1048 (1983) (observing

is clearly erroneous because it is premised on the incorrect conclusion that, if the lakefront premises extends to the edge of the paved road, the southerly boundary of the lakefront premises would not close with the westerly boundary of the Velardi lot. The plaintiffs make two arguments challenging this conclusion. First, they argue that the southerly boundary of the lakefront premises would close "perfectly" with the Velardi lot "based on the Velardi deed that . . . state[s] that [the Velardi lot] was bounded by the road itself . . . ." Second, the plaintiffs argue that, even if the court was correct that the Velardi lot does not extend to the paved road and the defendant therefore owns the unpaved shoulder in front of the Velardi lot, "that discrepancy would not result in lack of closure but would only result in the defendant owning a portion of the land abutting the [lakefront premises] to the east." We are not persuaded by either argument.

Both of the plaintiffs' arguments essentially challenge the court's factual findings. We reiterate that "our review is limited to deciding whether such findings were clearly erroneous." (Internal quotation marks omitted.) *Mackie* v. *Hull*, supra, 69 Conn. App. 545. Under that deferential standard of review, it is not our role "to weigh the evidence and the credibility of the parties and to find the facts . . . [or to] examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Citation omitted; internal quotation marks omitted.) *Chebro* v. *Audette*, 138 Conn. App. 278, 284, 50 A.3d 978 (2012).

that exclusive easement "ceases to be an easement *only where the whole exclusive use of a thing is conveyed*" (emphasis altered)).

First, as to the plaintiffs' argument challenging the court's finding that the Velardi lot extends only to the unpaved shoulder of West Shore Road, as opposed to the paved edge of the road, we conclude that there is ample evidence in the record to support that finding. The 1970 subdivision map incorporated into the Peoples deed clearly depicts the Velardi lot as extending to a point short of the paved road.[16] In reaching its conclusion, the court was entitled to rely on this map feature as though it were expressly recited in the Peoples deed. See *Williams* v. *Green Power Ventures, LLC*, supra, 221 Conn. App. 674 ("[t]he identifying or explanatory features contained in maps referred to in a deed become part of the deed, and so are entitled to consideration in interpreting the deed as though they were expressly recited therein" (internal quotation marks omitted)). Nesteriak's survey lends further support to the court's conclusion. He testified that he found an iron pin in the southwestern corner of the Velardi lot, coinciding with the highway easement line, and his survey map depicts the Velardi lot as extending only to the location of that iron pin at the unpaved shoulder of the highway.

The plaintiffs argue that the iron pin at the corner of the Velardi lot and the southerly boundary line of the Velardi lot shown on the 1970 subdivision map do not mark the boundaries of that lot but instead merely designate the location of the highway easement line. Although that is one possible interpretation of the 1970 subdivision map and the existence of the iron pin, it certainly is not the only one. In fact, the plaintiffs offered little

[16] We note that the Velardi deed references another 1970 map that is not part of the record in this case. The plaintiffs do not argue that the boundaries of the Velardi lot might be depicted differently on the map referenced in the Velardi deed than on the 1970 subdivision map. Instead, they appear to assume that, because the map referenced in the Velardi deed was prepared by the same firm that prepared the 1970 subdivision map referenced in the Peoples deed, the maps are substantially the same.

evidence in support of their argument.[17] They also ignore the fact that the court had evidence to the contrary, including what appears to be clearly drawn property boundaries of the Velardi lot on the 1970 subdivision map and Nesteriak's unrebutted survey map and testimony. "[I]t is well settled that [t]he weight to be given the evidence and the credibility of the witnesses are within the sole province of the trial court." (Internal quotation marks omitted.) *Commissioner of Transportation* v. *ACP, LLC*, 221 Conn. App. 708, 722, 302 A.3d 936 (2023). To the extent that the plaintiffs similarly challenge the court's reliance on the vehicle axle that Nesteriak found in the southwestern corner of the lakefront premises, we reject that argument for the same reason. Furthermore, although the plaintiffs argue that the Velardi deed states that the Velardi lot is bounded southerly by the highway, and there is a rebuttable presumption that, when a deed contains such a description, the landowner owns the fee to the center of the highway, the court was entitled to disregard that presumption and instead credit the evidence supporting a contrary conclusion. See *In re Blake P.*, 222 Conn. App. 693, 707, 306 A.3d 1130 (2023) ("[a]lthough there may be evidence in the record that would support the [plaintiffs'] position, it is not the role of this court to examine

[17] At most, counsel for the plaintiffs elicited testimony from Nesteriak that when surveyors mark property boundaries near a state highway, they place markers "along the edges" of the highway easement, and that whether they place markers "within the area that the state could improve the highway . . . depends on what [they are] staking out." For instance, Nesteriak testified that a surveyor would place a marker within the state highway easement "[i]f there was an easement over the highway, that's within the property of the highway, for some other purpose." One possible interpretation of this testimony is that the iron pin at the southwestern corner of the Velardi lot was placed there to designate where the state's highway easement begins, although the Velardi lot extends beyond that point. Another possible interpretation, however, is that the iron pin serves to designate both the northerly boundary of the state highway easement *and* the actual southerly boundary of the Velardi lot. Ultimately, Nesteriak concluded, as reflected on his survey map, that he believed the iron pin marked the corner of the Velardi lot itself, not just the beginning of the highway easement.

that evidence and substitute our judgment for that of the trial court").

Second, the court's conclusion that the boundaries of the lakefront premises close at the southwestern corner of the Velardi lot only when the court adopts the defendant's position is supported by the record. Given that the Peoples deed describes the lakefront premises as both beginning and ending at the Velardi lot, the court properly relied on the boundaries of that lot as shown on the 1970 subdivision map. See *Marshall* v. *Soffer*, 58 Conn. App. 737, 744, 756 A.2d 284 (2000) ("[a]djacent land may be a monument if the boundary of it is fixed"). Thus, accepting the plaintiffs' interpretation of the Peoples deed that the southerly boundary of the lakefront premises is the paved portion of West Shore Road would mean that there would be a 12.5 foot gap between the southwestern corner of the Velardi property and the southeastern corner of the lakefront premises.[18] We cannot say that it was unreasonable for

[18] The plaintiffs contend that, by viewing this as the most significant part of the description in the Peoples deed, the court improperly prioritized distances over physical monuments. We are not convinced. It is true that, where there is a conflict between calls in a deed description, "a default hierarchy has developed, in which various classifications of monuments are deemed generally to be of greater dignity than others. Under the prevailing general hierarchy, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument) and thereafter to courses and distances." (Emphasis omitted; internal quotation marks omitted.) *Mackie* v. *Hull*, supra, 69 Conn. App. 543. Nesteriak's survey method, on which the court relied, did not deviate from this principle. His testimony indicates that he considered the distances set forth in the Peoples deed but viewed the physical monuments referred to in the deed as controlling. That Nesteriak's survey of the lakefront premises resulted in boundaries that, when measured by reference to the monuments called out in the Peoples deed, came close to the approximate distances set forth in the deed only further supports that he properly identified and located those monuments. Indeed, the court found that the greatest discrepancy between the measurements shown on Nesteriak's survey map and the distances set forth in the Peoples deed was insignificant because it was only 8.4 percent short of the "about 90 feet" distance called out in the deed.

the court to reject the plaintiffs' interpretation in favor of one that both resulted in a closed plot of land and gave effect to all of the monuments called out in the Peoples deed. See *Thurlow* v. *Hulten*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket Nos. CV-05-4050315-S, CV-09-4050303-S (October 15, 2014) (reprinted at 173 Conn. App. 698, 164 A.3d 862) (trial court accepted survey that established closed boundaries by reference to monuments identified in field over survey that simply drew arbitrary line from end point of incomplete property description to boundary of adjacent property), aff'd, 173 Conn. App. 694, 164 A.3d 858 (2017); see also *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 19, 22, 682 A.2d 1046 (1996) (affirming trial court's conclusion as to location of boundary line where court adopted boundary line "that track[ed] the calls set out in [the] deed and [did] not ignore any of those calls").

Moreover, the court credited Nesteriak's testimony and survey map, which indicate that the southerly boundary of the lakefront premises extends only to the unpaved shoulder of the highway and closes with the westerly boundary of the Velardi lot. To the extent that the plaintiffs challenge Nesteriak's survey method, we note that Nesteriak's survey properly tracked the monuments referred to in the Peoples deed, which he identified and located by reference to the axles and iron pins in the field.[19] The court found that Nesteriak was highly

[19] To the extent that the plaintiffs argue that the court improperly relied on the vehicle axles and iron pins that Nesteriak found in the field despite those objects not being mentioned in the Peoples deed or shown on the 1970 subdivision map, we are not persuaded. A court may rely on extrinsic evidence to help "identify and locate" a boundary or monument that is referred to in the deed. See *Tierney* v. *Second Ecclesiastical Society of North Canaan*, 103 Conn. 332, 334–35, 130 A. 286 (1925) (where deed described property conveyed to plaintiff as "bounded [n]orth on highway, [e]asterly and [s]outherly on highway and [w]est on Lucy Joslin's land," fence along easterly side of plaintiff's land adjoining highway, even though not called out in deed, "helped identify and locate the easterly boundary as the monument described in the deed"); *Roberti* v. *Atwater*, 43 Conn. 540,

credible and rejected the plaintiffs' arguments challenging his testimony. We will not second-guess those determinations on appeal. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 441, 219 A.3d 801 (2019) ("to the extent that the court's decision is founded on its credibility determinations, we cannot second-guess those determinations on appeal"), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

Accordingly, because the court's findings as to the locations of the boundaries of the Velardi lot and the lakefront premises find support in the record, and therefore are not clearly erroneous, we reject the plaintiffs' arguments challenging those findings.[20]

C

Third, the plaintiffs argue that "[t]here is no legal or logical basis" for the court's conclusion that the strip of land in front of the Velardi and Lafata lots would be "useless" to the grantor unless he also retained the

547 (1876) (extrinsic evidence that fences "mark[ed] definitely and visibly the line of the lots on which the distributed premises were bounded . . . was admissible, upon the ordinary principle that you may always by such evidence identify and locate the boundaries or monuments described in the deed"); see also *Young Men's Christian Assn. of Meriden* v. *Zemel Bros., Inc.*, 171 Conn. 310, 311–12, 370 A.2d 937 (1976) (affirming trial court's conclusion that boundary of plaintiff's land described in deed as " 'top of the mountain' " was town line, which was clearly designated on mountain by brownstone monuments). Therefore, the court, by relying on Nesteriak's survey map in reaching its conclusion, properly relied on the iron pins and axles to locate and identify the monuments referred to in the Peoples deed.

[20] To the extent that the plaintiffs argue on appeal that, under the court's construction of the Peoples deed, the lakefront premises is landlocked because "no easement was granted [to the plaintiffs] over the shoulder [of West Shore Road] to the [lakefront premises]," that argument merits little discussion. It is undisputed that the general public maintains a right-of-way over both the paved and unpaved portions of the highway and that, despite the fence and hedge, the plaintiffs can still access the lakefront premises by traveling farther east on West Shore Road.

unpaved shoulder abutting the lakefront premises. According to the plaintiffs, "the shoulder of the highway [in front of the Velardi and Lafata lots] . . . would have no more or less value if [it] adjoined the road shoulder on the [lakefront premises]. The strip in front of the Velardi [and Lafata lots] would be fully accessible by the highway and could be used only as the state would permit. . . . What does not make sense is why . . . a grantor establishing a lot fronting on a highway would retain title to the shoulder of the highway." We disagree.

The unpaved shoulder of the highway abutting the Velardi lot, although perhaps not entirely useless to the grantor if he does not own the unpaved shoulder abutting the lakefront premises, would nonetheless have more value to the grantor if he also retained ownership of the neighboring strip of land. In other words, the court reasonably inferred on the basis of the evidence that the Quinlans' intention to retain ownership of the unpaved shoulder abutting the Velardi lot—an intention that is apparent from the 1970 subdivision map—made it more likely that they also intended to retain ownership of the unpaved shoulder abutting the lakefront premises, so as to retain for themselves a single contiguous parcel subject only to the public right-of-way over the highway. The court "is not required to draw only those inferences consistent with one view of the evidence, but may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Emphasis omitted; internal quotation marks omitted.) *Cheshire Land Trust, LLC* v. *Casey*, 156 Conn. App. 833, 852, 115 A.3d 497 (2015). We cannot say that the inferences drawn by the court in reaching its conclusion are either unreasonable or illogical. Accordingly, we reject the plaintiffs' argument.

D

Finally, the plaintiffs argue that any ambiguity as to the location of the southerly boundary of the lakefront

premises "must be construed against the grantor, [Quinlan], and not Peoples," the grantee. According to the plaintiffs, "[a]pplying that rule regarding ambiguities, the lakefront [premises] would close by running its [easterly] boundary along the land of Velardi to [the iron] pin [at the southwestern corner of the Velardi lot] and continue along the 12.5 feet of land formerly of [Quinlan] who was the grantor who created the ambiguity." As a result, the lakefront premises would extend to the edge of the paved road.

It is true that "[a]mbiguous language in a grant is ordinarily construed against the grantor, and in favor of the grantee." *Lake Garda Improvement Assn.* v. *Battistoni*, supra, 160 Conn. 514. We do not believe, however, that the court was required to apply that principle in this case. Our case law suggests that this rule is one of "last resort," similar to the rule of contra proferentum, which can be used when interpreting ambiguous contracts. See *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 107, 84 A.3d 828 (2014) (describing contra proferentum as rule of construction of contracts that is "applicable *only as a last resort*, when other techniques of interpretation and construction have not resolved the question of which of two or more possible meanings the court should choose" (emphasis added; internal quotation marks omitted)).

In construing deeds, our courts have applied the principle advanced by the plaintiffs only where the evidence already favored construing the deed in the grantee's favor[21] or when, even after considering extrinsic evidence and other rules of construction, doubt remained

[21] Notably, this was true in both cases cited by the plaintiffs. See *Lake Garda Improvement Assn.* v. *Battistoni*, supra, 160 Conn. 513–14 (trial court's conclusion that beach area was intended to be conveyed to plaintiff-grantee as portion of roadway was supported by circumstances at time of conveyance, including that charter of plaintiff-grantee, which was adopted only nineteen days before deed was executed, permitted it to control, own, and care for roadways and beaches and that roadway was not "substantially straight" such that larger roadway grant than usual might have been neces-

as to the intention of the parties to an ambiguous deed such that the ambiguity was "irreconcilable." See, e.g., *Mackin* v. *Mackin*, 186 Conn. 185, 189, 439 A.2d 1086 (1982) ("[a]ny ambiguity in the instrument creating an easement, *in a case of reasonable doubt*, will be construed in favor of the grantee" (emphasis added)); *Bueno* v. *Firgeleski*, 180 Conn. App. 384, 405, 183 A.3d 1176 (2018) ("Where a deed is ambiguous the intention of the parties is a decisive question of fact. . . . *In case of doubt*, the grant will be taken most strongly against the grantor." (Emphasis added; internal quotation marks omitted.)), quoting *Faiola* v. *Faiola*, 156 Conn. 12, 18, 238 A.2d 405 (1968); *Mackie* v. *Hull*, supra, 69 Conn. App. 544 ("[T]he search for greater certainty in one of the calls [in the deed] to prevail over the other as an expression of the parties' mutual intent leaves us at an impasse. *In such a case of irreconcilable ambiguity*, we are left with the principle that the ambiguity is to be resolved against the grantor." (Emphasis added.)); see also *Clark* v. *Beloff*, 71 Conn. 237, 243–44, 41 A. 801 (1898) ("the rule that the words of a deed shall be construed most strongly against the grantor . . . only means that if the words are capable of two or more meanings, and *after all the legitimate aids to the discovery of their meaning have been used*, we are still unable to determine which of those meanings was the one intended, we must take that one of them which is most favorable to the grantee" (emphasis added)). In the present case, the court properly considered extrinsic evidence to resolve the ambiguity and determine the intent of the parties to the Peoples deed. Accordingly,

sary to allow room to straighten road); *Faiola* v. *Faiola*, 156 Conn. 12, 18, 238 A.2d 405 (1968) (affirming trial court's conclusion that deed conveyed fee simple title rather than life estate to grantee where trial court had found that plaintiff-grantor's testimony as to parties' intent to convey life estate was " 'utterly unconvincing' "). Thus, neither of these cases suggest that a court should construe an ambiguous deed in the grantee's favor where the evidence indicates that a different meaning was intended.

because the court was able to resolve the ambiguity on the basis of that evidence, it was unnecessary for the court to resort to the rule advanced by the plaintiffs.

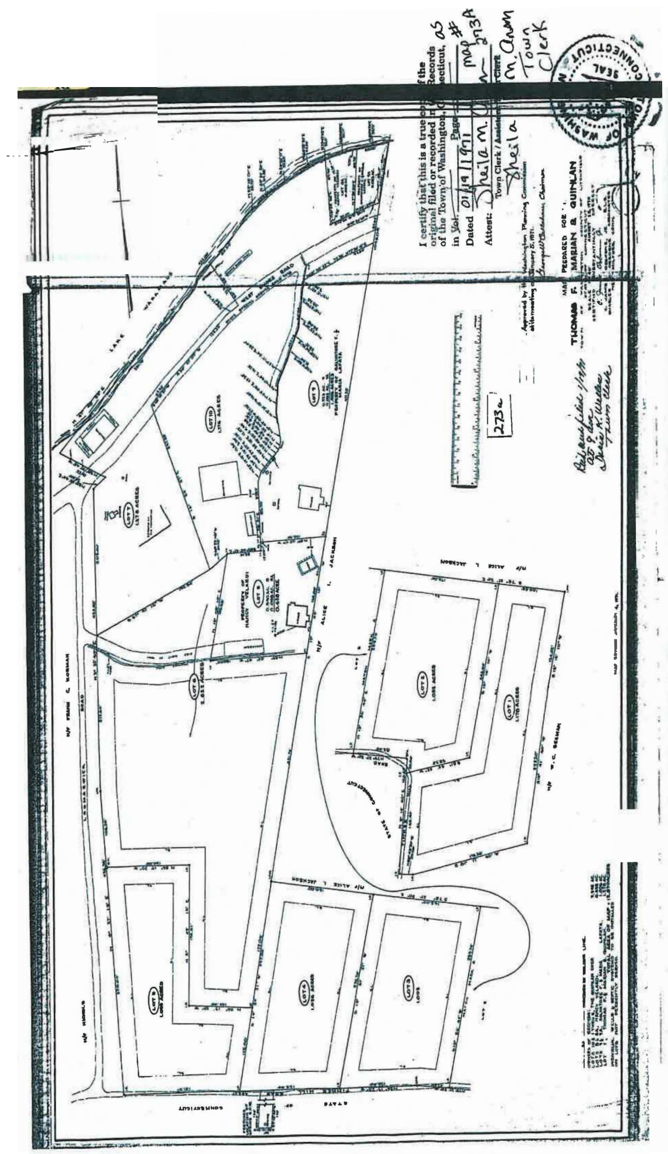
In sum, we conclude that, because there is ample evidence in the record to support the court's finding that the lakefront premises extends only to the unpaved portion of West Shore Road, that finding is not clearly erroneous.[22]

The judgment is affirmed.

In this opinion the other judges concurred.

[22] Given our conclusion, we do not address the defendant's argument that the plaintiffs' claims are barred by the statute of limitations.

APPENDIX



STATE OF CONNECTICUT *v.* JOHN MALLOZZI (AC 46060)

Elgo, Cradle and Prescott, Js.

Syllabus

The defendant, who had been convicted of fourteen counts each of false statement in absentee balloting and forgery in the second degree, appealed to this court. The defendant, who was the Democratic city chairman for the city of Stamford during the 2015 municipal election cycle, regularly appeared at the Stamford town clerk's office to "check on" ballots. L, the Republican town clerk, admitted that she gave certain absentee ballots to the defendant and his associates, even though delivering a ballot to an individual other than the applicant was improper. Other individuals in L's office accepted applications from the defendant, even though many of them should have been rejected because they were not filled out properly. P worked in the town clerk's office under L's supervision, and she prepared ballot sets for the defendant to pick up and would write the defendant's initials on the applications. After receiving a complaint, B, an investigator for the State Elections Enforcement Commission, conducted an investigation, which revealed a "scheme" between the defendant and L involving the submission of thirty-one fraudulent absentee ballot applications and twenty-six fraudulent absentee ballots to the Stamford town clerk's office. During the bench trial in the present case, the trial court directed the state to file an amended information to add an individual name for each count of false statement in absentee balloting. K, a handwriting and document examination expert, testified on behalf of the state. K compared handwriting exemplars given by the defendant to the handwritten information on the ballot applications and opined that there were indications that the questioned signatures and the defendant's exemplars shared common ownership. The trial court denied defense counsel's request to disclose a handwriting expert to rebut K's opinions, as well as his motion to strike P's testimony, which was provided during the state's case-in-chief, after she asserted her fifth amendment privilege against self-incrimination when the defense called her as a witness in the defendant's case. The court found the defendant guilty of all charges, and subsequently issued a memorandum of decision denying the defendant's motion to dismiss. *Held*:

1. The defendant's claim that the evidence was insufficient to support his conviction, which was based on his claim that the state failed to prove beyond a reasonable doubt that he authored the forged signatures, was unavailing: although the defendant argued that K's testimony that it was highly probable that the defendant's signature exemplars and the

questioned documents shared a common author was not a proper evidentiary basis for guilt as to each individual ballot, defense counsel did not ask at trial that the evidence as to each ballot be limited only to the counts specifically identifying each ballot, and he did not argue before the trial court that K's opinion was an improper consideration in determining the defendant's guilt as to each count; moreover, K's testimony was not the only evidence of the defendant's guilt, as L testified that she gave ballots to the defendant and his associates, P confirmed that she prepared ballots for the defendant to pick up and that she put his initials on those ballots, and B testified that the ballots that bore the defendant's initials appeared to share similar handwriting.

2. The defendant could not prevail on his claim that the trial court improperly permitted the state to amend its information during trial to include the names of the alleged victims with respect to each count of false statement in absentee balloting, which was based on his claim that the state did not provide good cause for such an amendment, pursuant to the applicable rule of practice (§ 36-18): the trial court did not permit the state to amend its information, it directed it to do so, and, accordingly, the state was not required to show good cause; moreover, the amendment directed by the court, which was specifically requested by defense counsel earlier in the trial, did not charge an additional or different offense, and it did not prejudice any substantive rights of the defendant, rather, the amendment narrowed the charges against the defendant, allowing defense counsel to focus on the ballots identified in the amended information; furthermore, the identities of all of the victims were known to the defendant because their names were listed in the arrest warrant affidavit and were contained in K's case notes, which were disclosed prior to trial.

3. The trial court properly denied defense counsel's request during trial to obtain and disclose a handwriting expert witness to rebut the state's expert witness: our rules of practice (§§ 40-13 and 40-26 (2)) require a defendant to disclose to the state, within forty-five days of a written request, the names of any witnesses the defendant intends to call at trial, in addition to any reports or statements of experts made in connection with the case, and the failure to comply with those rules may result in the preclusion of specific evidence; moreover, the defendant was aware of the state's reliance on K's opinions since he was arrested, as K's opinions were referenced in the arrest warrant affidavit, and, nevertheless, the defense did not seek to discuss K's opinions with him or disclose its own expert to rebut them, and, accordingly, this court rejected the defendant's argument that he was "sandbagged" by K's testimony; furthermore, defense counsel did not disclose the name of his intended expert, he did not proffer a curriculum vitae or a summary of the expert's proposed opinion, and it was unlikely that a rebuttal expert could render an opinion in the one hour indicated by defense counsel as K had spent years examining the evidence in this case and

provided three days of testimony, and the rebuttal expert's testimony would then have necessitated a response by K, which would have disrupted and delayed the proceedings in a manner not contemplated by defense counsel.

4. The defendant could not prevail on his unpreserved claim that his right to due process was violated by the lack of a rule of practice that the state disclose the substance of any expert opinion on which it intended to rely at trial; the defendant's claim essentially was alleging a constitutional right to discovery, and, because a criminal defendant has no general constitutional right to discovery, the defendant's claim was not of constitutional magnitude alleging the violation of a fundamental right, and, accordingly, failed under the second prong of the test set forth in *State* v. *Golding* (213 Conn. 233).

5. The defendant's claim that his right to confrontation under the sixth amendment to the United States constitution was violated because the trial court declined to strike P's testimony was unavailing: the defense had ample opportunity to cross-examine all aspects of P's testimony that were elicited on direct examination, defense counsel questioned P relating to the investigation by the State Elections Enforcement Commission in this case, her various communications with B and the written statement that she provided to him, and, thus, the defense had an unrestricted opportunity to explore on cross-examination any motive or bias that P may have had and to impeach any portion of her testimony.

6. The defendant could not prevail on his claim that the trial court improperly denied his motion to dismiss on the ground of selective prosecution, which was based on his claim that the court ignored the allegations of a "scheme" allegedly involving several individuals, all of whom, the defendant contends, were similarly situated, and that the only difference between him and those other individuals was that he was the only one who exercised his right to counsel: the defendant ignored the difference between his conduct and that of the other individuals whom he claims were similarly situated because the defendant was the one who fraudulently filled out the absentee ballot applications and forged the signatures of the victims; moreover, the defendant's claim was devoid of any argument of animus or invidious discrimination on the part of the state.

Argued January 29—officially released June 4, 2024

Procedural History

Amended information charging the defendant with fourteen counts of the crime of false statement in absentee balloting and fourteen counts of the crime of forgery in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, and tried to the court, *Randolph*, *J.*;

thereafter, the court, *Randolph*, *J.*, denied the defendant's motions to strike certain testimony and to dismiss; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Stephan E. Seeger, with whom, on the brief, was *Igor Kuperman*, for the appellant (defendant).

Nathan J. Buchok, assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, *Laurence G. Tamaccio*, assistant state's attorney, and *Michael C. Bivona*, deputy assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, John Mallozzi, appeals from the judgment of conviction, rendered following a court trial, of fourteen counts of false statement in absentee balloting in violation of General Statutes § 9-359a and fourteen counts of forgery in the second degree in violation of General Statutes § 53a-139 (a) (3). On appeal, the defendant claims that (1) the evidence presented at trial was insufficient to support his conviction; (2) the court improperly permitted the state to amend its long form information in the middle of trial; (3) the court improperly denied defense counsel's request to obtain and disclose, in the middle of trial, an expert witness to rebut the state's expert witness; (4) his right to due process was violated by the lack of a requirement that the state disclose the substance of any expert opinion upon which it intended to rely at trial; (5) the court improperly denied his motion to strike the testimony of a witness, proffered by the prosecutor during the state's case-in-chief, after that same witness invoked her fifth amendment privilege against self-incrimination when she was called to testify by the defense; and (6) the court improperly denied his motion to dismiss on the ground of selective prosecution. We affirm the judgment of the trial court.

The following facts, as set forth by the trial court, and procedural history are relevant to the defendant's claims on appeal. "The city of Stamford . . . held municipal elections in 2015. On the ballot were candidates for the Board of Representatives, the Board of Education and the Board of Finance. The Stamford town clerk's office was responsible for maintaining election records. During elections, the town clerk's office issued absentee ballot applications and ballot sets (referred to as 'ballots').

"In 2015, Donna Loglisci was the Republican town clerk, an elected public official. She was elected to the office in 2001 and reelected numerous times. She last served as town clerk in 2017. She was also the chairman of the Republican Party in Stamford for six years before being elected town clerk.

"During the municipal election of 2015, registered voters who wanted an application for an absentee ballot could request one from the town clerk's office. A registered voter could also obtain an absentee ballot application from their party of registration or online from the Secretary of the State's office. After filling out the application, the voter could return the application to the town clerk's office by mail or by dropping it off at the office.

"In 2015, there was an 'election office' within the town clerk's office. Applications that arrived at the town clerk's office were clocked and date stamped. The town clerk's office would then place a district number and a voter number on the applications. After checking the applications for completeness, the office would mail or hand out the actual ballot package to the voter. Absentee ballots had to be returned to the town clerk's office by 8 p.m. on election evening. Absentee voting was permitted for thirty days prior to the election.

"The ballot package, that is, the ballot set, contained a ballot, an inner and an outer envelope and instruction forms. When mailing the ballot back to the town clerk's office, the voter would place the ballot into the inner envelope and then place the inner envelope into the outer envelope. The inner envelope had to be signed and dated by the voter. The ballots could then be mailed or delivered in person to the town clerk's office.

"When the ballots arrived at the town clerk's office, they were date stamped. The ballots were kept in banker's boxes, marked by district numbers, and placed in vaults in the town clerk's office until election day. The town clerk's office would not open the envelopes containing the ballots. The office of registrar of voters, a public office, would open the envelopes on election day. The office would count the votes and the Secretary of the State's office would have to record and certify a vote count.

"After the registrar retrieved the banker's boxes containing ballots, the registrar marked its own books, thereby identifying absentee ballot voters. The books identifying voters who cast absentee ballots were then placed at the polls on election day. Voters whose names and addresses were listed in the books would not be allowed to vote in person.

"During the 2015 election cycle, the defendant, who was the [Stamford Democratic City Committee] chairman, was regularly in the town clerk's office 'checking on ballots.' Loglisci had known the defendant through his political activity for over twenty years. On at least one occasion, the defendant asked whether he could get ballots if he had ballot applications from people who could not vote in person. The office policy allowed anyone to deliver applications to the town clerk's office. But those applications had to be signed by the voter. If a person requesting a ballot was not the applicant,

the ballot should have been mailed to the applicant's address. To deliver ballots to [an individual] other than the applicant was improper. . . . Loglisci admitted she gave ballots to [individuals] other than the applicants . . . she provided ballots to the defendant . . . .

"Loglisci's office also received applications from the defendant. Her office accepted applications even though many of them should have been rejected because they were not filled out properly. Diane Pesiri worked in the town clerk's office under . . . Loglisci. She prepared ballot sets for the defendant to pick up. When employees in the office either saw or were told that [the defendant] delivered applications, Pesiri would write the initials of [the defendant], JM, or on one occasion JL, on the upper right-hand corner of the applications. However, the initials JM or JL placed in the upper right-hand corner did not necessarily mean that Pesiri saw the defendant come into the office to deliver applications.

"On multiple occasions, the town clerk's office processed applications that did not contain required information. The office had the authority to reject ballot applications, including applications containing only the name and address of the applicant. Moreover, the town clerk had the authority to reject applications that contained only the name, address and signature of the applicant. All applications required that a box be checked stating the reason the applicant wanted an absentee ballot. Loglisci accepted numerous incomplete and invalid applications. Among them were applications on which the putative applicant listed no reason for wanting to receive an absentee ballot. Compounding the town clerk's missteps, the office would enter into its logbook the reasons an applicant wanted an absentee ballot when the putative applicant failed to check off any reason. In other words, the town clerk's office sometimes created reasons when the applications contained none.

"Loglisci admitted that she broke the law when she gave ballots to people who were not applicants. She handed ballot sets to a Mr. Figueroa who was not an applicant. She handed ballot sets to a Mr. Giraldo who was not an applicant. Both were associates of the defendant. On more than one occasion she provided ballot sets to the defendant. . . .

"Isen Hoti became a registered voter in the early 2000s. At the time of trial, he remembered voting two or three times. He always voted in person. He denied signing an absentee ballot application for the 2015 municipal election and stated the signature on the application was not his. The signatures on the envelopes in which the ballots were placed were not his. He gave no one permission to fill out an absentee ballot application for him. He gave no one permission to vote on his behalf. . . .

"Hoti's true signature appeared on the voter registration card. However, the voter registration card signature did not match the signatures on the ballot application nor the signatures on the ballot sets. The town clerk's office placed the initials 'JM' on Hoti's application, which indicates that the defendant or one of his associates delivered the application. . . .

"Scott Branfuhr is a legal investigator for the State Elections Enforcement Commission [(SEEC)]. He has been involved in over 400 investigations. On December 3, 2015, the [SEEC] received a complaint from the Stamford Republican Registrar of Voters, Lucy Corelli, a public official. . . . Corelli alleged that an individual named Shkadran Hoti voted twice in the 2015 Stamford municipal election . . . once by absentee ballot and once by voting in person. Shkadran Hoti explained that he arrived at his polling place to vote in person but was denied because he was marked off as having already voted by absentee ballot. He protested and was allowed

to vote after completing an affidavit in which he stated he did not vote by absentee ballot.

"Branfuhr compared the absentee ballot application signatures of Isen Hoti and Shkadran Hoti to the signatures on their voter registration cards. Isen's signature on his voter registration card did not match the signature on the absentee ballot application. Shkadran's signature on his voter registration card did not match the signature on the absentee ballot application.

"Branfuhr then obtained all ballot applications containing the initials JM or JL. He also obtained voter registration cards for each individual whose application contained the initials JM or JL. None of the signatures on the absentee ballot applications were similar to the true signatures of those same individuals on their voter registration cards.

"A total of thirty-one applications were marked with the initials JM or JL. The handwriting was similar on all of the applications. Branfuhr's investigation revealed what he called a 'scheme' between [the defendant], as chairman of the Stamford Democratic City Committee and Loglisci, the Stamford town clerk. The 'scheme' involved the submission of thirty-one fraudulent absentee ballot applications and twenty-six fraudulent absentee ballots to the Stamford town clerk's office. The goal of the scheme was to count the fraudulent ballots as valid votes, first to be recorded by the registrar of voters, a public office. Ultimately, the Secretary of the State's office, a governmental entity, records the results of the election.

"Branfuhr said the case was the most 'severe' case he had seen in his nine year career with the [SEEC]. The [SEEC] found [the defendant], Loglisci and Pesiri liable, but only [the defendant's] matter was referred to the state's attorney's office for prosecution. Branfuhr explained that [the defendant's] conduct constituted

felonies but Loglisci's conduct constituted misdemeanors. The [SEEC] suspends enforcement actions when criminal matters are pending. The [SEEC] plans further enforcement action against Loglisci. . . .

"Greg Kettering is a handwriting and document examination expert. Kettering retired from the state police Forensic [Science] Laboratory in 2021. He was the chief handwriting and document examiner for the state of Connecticut. He had extensive specialized training in handwriting and document analysis and had conducted at least 1500 examinations. Handwriting analysis is a highly specialized discipline, and experts are trained to look at different fundamentals of handwriting. The fundamentals include slant, shape, space, use of margins, use of baseline, feather strokes, termination strokes, entry strokes, and the size of letters compared to other letters. In comparing handwriting submissions, Kettering examined, among other indicators, 'speed, proportion, pressure and design.' He spent approximately forty hours on every suspect ballot submission.

"Kettering compared handwriting samples, referred to as 'exemplars,' given by [the defendant] to the *handwritten* information, referred to as 'entries,' on the absentee ballot applications. ([The defendant] provided handwriting samples by writing the names in print and cursive of each of the questioned absentee ballot applicants.) Kettering also compared the handwritten information on the applications to the *signatures* on the applications.

"1. There were 'indications' that the questioned signature of 'Isen Hoti' and the defendant's exemplars share common authorship. There were indications that the questioned entries in the Isen Hoti application and the defendant's exemplars share common authorship.

"2. There were indications that the questioned signature of 'Patricia Velaj' and the defendant's exemplars

share common authorship. There were indications that the questioned entries of Patricia Velaj and the defendant's exemplars share common authorship.

"3. There were indications that the questioned signature of 'Nedzmije Vrzivoli' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Nedzmije Vrzivoli and the defendant's exemplars share common authorship.

"4. There were indications that the questioned signature of 'Blerim Vrzivoli' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Blerim Vrzivoli and the defendant's exemplars share common authorship.

"5. There were indications that the questioned signature of 'Gjinji Agron' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Gjinji Agron and the defendant's exemplars share common authorship.

"6. There were indications that the questioned signature of 'Avdi Gjinji' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Avdi Gjinji and the defendant's exemplars share common authorship.

"7. There were indications that the questioned entries of 'Tone Shtufag' and the defendant's exemplars share common authorship. However, the questioned Tone Shtufag signature could not be 'intercompared' to the defendant's exemplars.

"8. There were indications that the questioned signature of 'Martha Pepaj' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Martha Pepaj and the defendant's exemplars share common authorship.

"9. There were indications that the questioned signature of 'Josephine Mallozzi' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Josephine Mallozzi and the defendant's exemplars share common authorship.

"10. There were indications that the questioned signature of 'Linda Tomaj' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Linda Tomaj and the defendant's exemplars share common authorship.

"11. There were indications that the questioned signature of 'Alexander Velaj' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Alexander Velaj and the defendant's exemplars share common authorship.

"12. There were indications that the questioned signature of 'Avni Ukperaj' and the defendant's exemplars share common authorship. There were indications that the questioned entries of Avni Ukperaj and the defendant's exemplars share common authorship.

"13. There were indications that the questioned signature of 'Isaku Toshe' and the defendant's exemplars share common authorship. There were indications that the questioned entries of lsaku Toshe and the defendant's exemplars share common authorship.

"14. There were indications that the questioned signature of 'Isaku Burim' and the defendant's exemplars share common authorship. There were indications that the questioned entries of lsaku Burim and the defendant's exemplars share common authorship.

"The state did not charge the defendant in each instance in which signatures and entries of other individuals and the defendant's exemplars shared common authorship. In each individual instance in which there were indications of common authorship, the evidence falls far short

of a *definite* conclusion. However, *in all instances taken together*, it was virtually certain and highly probable that the exemplars, entries and signatures shared a common author." (Emphasis altered.)

On the basis of the foregoing, the court found the defendant guilty of all charges and rendered judgment accordingly. The court thereafter sentenced the defendant to a total effective sentence of thirteen months of incarceration, execution suspended, followed by two years of probation, and ordered the defendant to pay a fine of $35,000. This appeal followed.

I

The defendant first claims that the evidence presented at trial was insufficient to support his conviction.[1] Notably, the defendant does not argue that the state failed to prove a specific element of the crimes of which he was convicted.[2] Rather, the defendant argues that the state failed to prove beyond a reasonable doubt that he was the author of the forged signatures. In other words, the defendant seems to contend that the evidence was insufficient to support his conviction

[1] For jurisprudential reasons, we address the sufficiency of the evidence claim first, although this differs from the order that the claims were presented by the defendant in his principal appellate brief.

[2] General Statutes § 9-359a provides in relevant part: "(a) A person is guilty of false statement in absentee balloting when he intentionally makes a false written statement in or on or signs the name of another person to the application for an absentee ballot or the inner envelope accompanying any such ballot, which he does not believe to be true and which statement or signature is intended to mislead a public servant in the performance of his official function. . . ."

General Statutes § 53a-139 provides in relevant part: "(a) A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument or issues or possesses any written instrument which he knows to be forged, which is or purports to be, or which is calculated to become or represent if completed . . . (3) a written instrument officially issued or created by a public office, public servant or governmental instrumentality . . . ."

because the state failed to prove identity.[3] We are unpersuaded.

"[T]he question of identity of a perpetrator of a crime is a question of fact that is within the sole province of the [trier of fact] to resolve. . . . To determine whether the evidence was sufficient to establish the essential element of identity, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom, the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . In doing so, we are mindful that the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Abraham*, 343 Conn. 470, 476, 274 A.3d 849 (2022).

The defendant argues that the evidence was insufficient to support his conviction because Kettering's report concluded that, when reviewing each ballot individually, there were indications that the defendant was the author but there was not enough evidence to reach a definite conclusion. The defendant argues that Kettering's testimony that, based upon the totality of the evidence, it was "highly probable that the [defendant's] signature exemplars and the question[ed] documents shared a common author," was not a proper evidentiary basis for guilt as to each individual ballot.

"[Although] [e]vidence [that] is offered and admitted for a limited purpose only . . . cannot be used for

[3] We note that the defendant devotes only two paragraphs of his appellate brief to his sufficiency claim.

another and totally different purpose"; (internal quotation marks omitted) *State* v. *Robles*, 348 Conn. 1, 21, 301 A.3d 498 (2023); the finder of fact "is [otherwise] free to consider *all* of the evidence adduced at trial in evaluating the defendant's culpability, and presumably does so . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Sabato*, 321 Conn. 729, 742, 138 A.3d 895 (2016).

Defense counsel did not, at trial, ask that the evidence as to each ballot be limited only to the counts specifically identifying each ballot. Although defense counsel objected to Kettering's testimony as to common authorship based on the totality of the ballot documents on other grounds, he did not argue to the trial court that Kettering's opinion was an improper consideration in determining the defendant's guilt as to each count.

In support of his claim, the defendant cites *State* v. *Juan A. G.-P.*, 346 Conn. 132, 180, 287 A.3d 1060 (2023), for the proposition that, "[w]hen charges involve different victims, the [trier of fact] must also . . . separately consider the charges relating to each victim, and the evidence pertaining to each victim must be clearly distinguished." (Internal quotation marks omitted.) *Juan A. G.-P.* does not hold that the trier of fact is precluded from considering all evidence presented at trial when determining the guilt or innocence of the defendant as to each victim. Indeed, the court referenced instruction 2.6-11, now instruction 2.2-6, of the Connecticut model criminal jury instructions, which provides that the jury "may find that some of the evidence applies to more than one count of the information. The evidence, however, must be considered separately as to each element in each count." (Internal quotation marks omitted.) Id. Thus, as stated herein, where there has been no limitation on the admission of evidence, it is the obligation of the trier of fact to consider all of the evidence in its

determination of whether the state has met its burden of proof.

Moreover, as the state aptly points out, Kettering's testimony that the totality of the evidence proved that the author of the exemplars also authored the ballots at issue was not the only evidence of the defendant's guilt. In addition to Kettering's findings that the ballots and the defendant's exemplars contained indications of common authorship, Loglisci testified that she gave ballots to the defendant and his associates, Pesiri confirmed that she prepared ballots for the defendant to pick up and that she put his initials on those ballots, and Branfuhr testified that the ballots that bore the defendant's initials appeared to share similar handwriting. On the basis of that evidence, which demonstrated that the ballots in question had been given to the defendant and the handwriting on them was similar to the defendant's handwriting, the court reasonably could have inferred that the defendant was the individual who forged them. Accordingly, the defendant's claim that there was insufficient evidence to support his conviction fails.

II

The defendant next claims that the court improperly permitted the state to amend its information in the middle of trial to include the names of the alleged victims of each count of false statement in absentee balloting. We disagree.

The following additional procedural history is relevant to this claim. On January 30, 2019, the defendant was arrested by warrant on fourteen counts of false statement in absentee balloting and fourteen counts of forgery in the second degree. The arrest warrant affidavit contained the names of thirty-four individuals on whose behalf the ballots in question were submitted to the Stamford town clerk's office. According to the

affidavit, SEEC investigators attempted to contact those individuals and the SEEC investigators learned that fourteen of them, who are identified in the affidavit, did not complete absentee ballot applications or vote by absentee ballot in 2015. It was averred in the affidavit that, according to Kettering, those fourteen ballots, and the defendant's exemplars, contained indications of common authorship. Each count of the state's original information specified the date, place and nature of the charged offense but did not identify the names of any of the individuals that appeared on the ballots and ballot applications in question.

On the first day of trial, after the clerk read the information into the record, defense counsel orally moved to dismiss all of the charges against the defendant on the grounds that the information was deficient in that none of the counts identified the individuals on whose behalf the allegedly fraudulent documents were filed, and the forgery counts failed to include a citation to the specific subdivision of § 53a-139 (a) under which the defendant was being charged. The court explained that the defendant had an opportunity to file a bill of particulars, but failed to do so, and denied the defendant's motion as untimely.

On the second day of trial, the prosecutor orally moved to amend the state's information to include "the alphanumerical designation for the subsection" of the forgery statute pursuant to which the defendant was being charged. In other words, whereas the original information charged the defendant with forgery in the second degree in violation of § 53a-139, the amended information charged the defendant with forgery in the second degree in violation of § 53a-139 (a) (3). Defense counsel had no objection to the state's amendment but renewed his "objection" as to the lack of individual names associated with each count of the information.

The court indicated that "it would certainly be necessary in order for the court to make factual findings, to know which individuals the counts refer." The prosecutor objected on the ground that the identity of the victim was not an element of the offenses charged and, therefore, was not required to be included in the information. The prosecutor assured the court that the state would present evidence as to the identity of victims. The court replied, "[t]hat's what the court wanted to know," and continued with the trial.

Following the third day of trial, the court, through the clerk of the court, contacted both counsel, and directed the state to file an amended information to add an individual name for each count of the charge of false statement in absentee balloting. On the morning of the fourth day of trial, the court explained: "The court made such contact because . . . the court determined that it would be inappropriate for the court to fill in the names of the individuals whose signatures were allegedly forged. So, the court was not going to select fourteen names out of the number of alleged forged signatures. The court instructed [the clerk] to inform counsel that the court needed names for each of the counts. Specifically, the counts alleging false statement [in] absentee balloting." Defense counsel acknowledged that the amendment was "exactly what [he] asked" the state to do on the first and second days of trial but, nevertheless, objected to the amendment on the grounds that the state failed to demonstrate good cause for the amendment, as required by Practice Book § 36-18, and that the defendant would be prejudiced by it on the fourth day of trial.[4]

[4] Defense counsel also argued that he had no notice or opportunity to be heard as to six of the names added to the state's amended information. He never identified those six names, and the defendant has not reasserted that argument on appeal.

The court overruled defense counsel's objection on the grounds that the defendant had been apprised that Branfuhr had identified thirty-one suspect ballots and that the state was pursuing charges on fourteen of those ballots, all of which were identified in the arrest warrant affidavit. The court also noted that none of the witnesses who already had testified could have "testified about signatures in any significant way . . . ."

On appeal, the defendant claims that the court "erred in allowing the state to amend its long form information [in the middle] of trial, where the state did not provide a 'good cause' for such an amendment" pursuant to Practice Book § 36-18. Section 36-18 provides in relevant part: "After commencement of the trial for good cause shown, the judicial authority may permit the prosecuting authority to amend the information at any time before a verdict or finding if no additional or different offense is charged and no substantive rights of the defendant would be prejudiced. . . ." Here, the court did not permit the state to amend its information; it directed the state to do so. Accordingly, the state was not required to show good cause.

Moreover, the amendment directed by the court, which was specifically requested by defense counsel earlier in the trial, did not charge an additional or different offense, nor did it prejudice any substantive rights of the defendant. Indeed, the amendment narrowed the charges against the defendant, allowing defense counsel to focus on the specific ballots identified in the amended information. As the court aptly found, the identities of all of the victims were known to the defendant since the date of his arrest because their names were listed in the arrest warrant affidavit. The defendant also was apprised of those identities when Kettering's case notes were disclosed to defense counsel prior to trial. The defendant does not contend otherwise.

Accordingly, the defendant's claim that the court improperly permitted the state to amend its information is unavailing.

III

The defendant next claims that the court improperly denied him "an opportunity to obtain and disclose a handwriting expert where the state's handwriting expert's testimony at trial diverged from the findings in his previously disclosed report and where the expert's conclusions at trial were completely different from those in the disclosed report." We are not persuaded.

The following additional procedural history is relevant to this claim. As noted herein, the defendant was arrested by warrant in January, 2019, and the warrant affidavit identified Kettering as the document examiner at the state laboratory who was examining the ballots at issue. According to the affidavit, as of December 1, 2017, Kettering "was still going through them due to the large number of ballots but he could say it appears the same individual filled out the majority of the ballots sent up but would need handwriting samples from a suspect in order to complete the comparison." The affidavit later set forth Kettering's conclusion that " 'the totality of the case points strongly toward [the defendant] as having authored the ballots in question.' "

Prior to trial, the state timely disclosed its intent to call Kettering as an expert witness on handwriting analysis and provided to defense counsel Kettering's case notes related to the ballots in question. In Kettering's case notes, he set forth his analysis and conclusions as to each of the ballots in question. As to several of them, he found that there were " 'indications' " of common authorship with the exemplars provided by the defendant, but he further concluded that those indications, as to each individual ballot, were not sufficient to form a definite conclusion.

On February 9, 2022, the state filed a motion seeking disclosure of the defendant's intention to offer expert testimony.[5] The defendant neither disclosed an expert of his own, nor did the defense seek to speak to Kettering regarding his opinions in this case.

On the third day of trial, the prosecutor called Kettering as the state's final witness. Defense counsel objected to Kettering testifying as an expert witness on the ground that "the trier of fact may himself determine handwriting." The court overruled defense counsel's objection. That day, the prosecutor began his direct examination of Kettering. Due to scheduling issues, there was a one month delay until the trial resumed. When the trial resumed, Kettering's direct examination continued and he explained his analyses for each of the fourteen ballots identified in the state's amended information, concluding that there were indications of common authorship between those ballots and the handwriting exemplars provided by the defendant. He explained the various levels of certainty that handwriting experts ascribe to their findings and that those levels are determined based upon the number of similarities between the compared samples. He testified that, when comparing the handwriting on each of the ballots at issue to the exemplars provided by the defendant, there were indications of common authorship but, due to the

[5] Practice Book § 40-26 provides in relevant part: "Upon written request by the prosecuting authority filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the defendant, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing to the prosecuting authority the existence of and make available for examination and copying in accordance with the procedures of Section 40-7 the following items . . . (2) Any reports or statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments or comparisons, which the defendant intends to offer in evidence at trial or relating to the anticipated testimony of a person whom the defendant intends to call as a witness."

limited number of similarities, "the evidence falls far short of . . . a definite conclusion." Kettering further explained, however, that when comparing all of the handwriting on all of the ballots to the exemplars, he found approximately 178 similarities, making it "virtually certain [and] highly probable" that the ballots in question and the defendant's exemplars shared a common author.

On cross-examination, defense counsel questioned Kettering at length as to the findings contained in his case notes and the lack therein of any findings based upon an examination of all of the ballots and exemplars. Defense counsel orally moved to strike Kettering's testimony "as it pertains to any conclusion that's not found in [Kettering's] reports." Defense counsel argued that "[t]he reports were disclosed to us, we're entitled to rely on them," and "we were never provided with a formal Practice Book compliant disclosure for an expert. . . . [T]his is the first time anybody is hearing anything about these types of conclusions." In response, the prosecutor argued that the state had disclosed Kettering on its witness list months earlier, and, "[i]f there were questions that [defense counsel] wanted to ask [Kettering], he was free to do so." The court denied the defendant's motion to strike and defense counsel continued with cross-examination of Kettering.

After the luncheon recess on the fifth day of trial, defense counsel indicated that he would like to call his own expert witness to respond to Kettering's opinion that his comparison of the handwriting on all of the ballots to the exemplars indicated that it was "virtually certain [and] highly probable" that they shared a common author. Defense counsel argued that he had "not seen this conclusion, this methodology anywhere in any of the documents we've been provided with, and it's the polar opposite conclusion of the ones that this witness has come to, and we've had in our hands for a

long time. I think the record is clear that the first time anybody's ever heard about that was yesterday. So, in anticipation of counsel being late on this, I'd like the record to reflect that everything in front of me, and all the reports, point to a different conclusion that this court may consider."[6]

In response, the prosecutor argued that Kettering's examination of the documents and his conclusion was known to the defendant when he was arrested in 2019 and defense counsel could have discussed Kettering's findings with him at any time since then, but he never sought to do so. The prosecutor argued that the defendant had not disclosed an expert and only provided the state with a witness list on the third day of trial. The prosecutor noted that Kettering testified that he spent one and one-half years investigating this case and writing his report and that it was disingenuous to contend that a defense expert could render an opinion at trial in only one hour that rebuts Kettering's testimony, which spanned three days.

[6] Defense counsel stated his "intention . . . to attempt to call our own expert for the purposes of clarifying the procedural rules and the [standard industry procedures] that the current witness is operating under, and whether or not such a conclusion is viable." Defense counsel explained to the court, inter alia, that he had been "diligently searching since yesterday night" and that "it's very difficult to get an expert to do anything, especially on short notice. I may have an outside chance of providing limited one hour of testimony, limited both in time and also in substance, [it] would not be an expert witness, if I can, in fact, get them here—[it] would not be an expert witness. It would be doing charts and his own analysis. No opinions on that would be delivered. But there's been some sophisticated terms and themes have arisen in this case, including natural range of variation, what needs to be documented [and] [w]hat doesn't need to be documented. Following of procedures, the cut and paste of the suite docs that I think would certainly inform the court and go beyond . . . the average individual, especially with respect to averaging the way this witness has testified on average.

"So, I'd like to inform the court that we'd like to call our expert. I'd like to provide a [curriculum vitae] to counsel, as early as the break, or by the end of the day for that limited testimony, which, further complicating things, I believe I can only have the witness appear by Zoom."

The court denied defense counsel's request to present a defense expert. In so doing, the court reasoned that, when the state discloses an expert witness, it typically means that the state is going to rely heavily on expert testimony to prove its case and that anticipated reliance should prompt the defense to retain its own expert witness so it is prepared to challenge the testimony of the state's expert. The court noted that "[t]his case is essentially seven years old. There has been no expert disclosed to the state." The court further noted that the anticipated testimony of a defense expert could not take the one hour that was proposed by defense counsel.[7]

The defendant claims that the court abused its discretion in denying defense counsel's request to present a defense expert. Our rules of practice require a defendant to disclose to the state, within forty-five days of a written request, the names of any witnesses the defendant intends to call at trial; Practice Book § 40-13;[8] in

[7] Specifically, the court reasoned: "What counsel is suggesting is, we want to bring in an expert to ask this question. Have you ever heard of this aggregate theory? Now let's explore the answers. No, I've never heard of it. Do you think that that aggregate theory is a bogus theory? I've never heard of it.

"And, so, where does it go from there? Do you think if this expert used the aggregate theory, his conclusions are suspect? Well, I would have to see the entire, basically, experiment to determine whether I would have come out the same way, whether he used that theory or not.

"You'd have to do the whole thing over again to see if it makes a difference whether this expert used what has been deemed an aggregate theory, and the other expert would have to testify, he used another kind of theory, or didn't use another theory at all.

"So, when you know who your opponent is, you prepare for your opponent. You don't have to know every point he's going to throw, to use a boxing analogy. You know my opponent is so and so. It's likely that the expert you call may be familiar with the state's expert.

"But, the seminal question would be, have you ever heard of this aggregate theory? And, then, where you go from there will lead to having to conduct the analysis all over again. That request is denied."

[8] Practice Book § 40-13 (b) provides: "Upon written request by the prosecuting authority, filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the defendant, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of

addition to, inter alia, "[a]ny reports or statements of experts made in connection with the case . . . ." Practice Book § 40-26 (2).[9] The failure to comply with those rules may result, inter alia, in the preclusion of specific evidence. Practice Book § 40-5.[10] This court previously has explained: "Practice Book § 40-5 [grants] broad discretion to the trial judge to fashion an appropriate remedy for noncompliance with discovery. . . .

"Appellate review of a trial court's remedy for noncompliance with discovery, [a]s with any discretionary action of the trial court . . . requires every reasonable presumption in favor of the action, and the ultimate issue is whether the trial court could reasonably conclude as it did. . . . 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

the request, unless such time is extended by the judicial authority for good cause shown, disclose to the prosecuting authority the names and, subject to the provisions of subsection (g) of this section, the addresses of all witnesses whom the defendant intends to call in the defendant's case-in-chief and shall additionally disclose to the prosecuting authority any statements of the witnesses other than the defendant in the possession of the defendant or his or her agents, which statements relate to the subject matter about which each witness will testify."

[9] Practice Book § 40-26 provides in relevant part: "Upon written request by the prosecuting authority filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the defendant, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing to the prosecuting authority the existence of and make available for examination and copying in accordance with the procedures of Section 40-7 the following items . . . (2) Any reports or statements of experts made in connection with the case . . . ."

[10] Practice Book § 40-5 provides in relevant part: "If a party fails to comply with disclosure as required under these rules, the opposing party may move the judicial authority for an appropriate order. The judicial authority hearing such a motion may enter such orders and time limitations as it deems appropriate, including, without limitation . . . (4) Prohibiting the noncomplying party from introducing specified evidence . . . ."

irrelevant factors." (Citations omitted; internal quotation marks omitted.) *State* v. *Billings*, 217 Conn. App. 1, 43–44, 287 A.3d 146 (2022), cert. denied, 346 Conn. 907, 288 A.3d 217 (2023). "When this court reviews a decision of the trial court for abuse of discretion, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable. . . . Accordingly, the abuse of discretion standard reflects the context specific nature of evidentiary rulings, which are made in the heat of battle by the trial judge, who is in a unique position to [observe] the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 832, 135 A.3d 1 (2016).

As previously stated in this opinion, the defendant was aware of the state's reliance on Kettering's opinions since he was arrested in January, 2019. According to the 2019 arrest warrant affidavit, Kettering had specifically concluded that " '*the totality of the case* points strongly toward [the defendant] as having authored the ballots in question.' " (Emphasis added.) The defendant therefore had notice of Kettering's conclusion that *all* of the evidence strongly implicated him because Kettering's conclusion had been disclosed in the arrest warrant affidavit, which had been served more than three years prior to trial. Nevertheless, the defense did not seek to discuss Kettering's opinions with him or retain its own expert to rebut them. We therefore reject the defendant's argument that he was "sandbagged" by Kettering's testimony.

In his brief to this court, the defendant contends that he "was ready to disclose [his] expert immediately and

have him testify, albeit remotely, within the confines of the allocated trial dates in this case." The defendant claims that his expert "would have opined on the propriety or legitimacy of 'aggregating' multiple signatures to arrive at a conclusion of the author's identity." These assertions are belied by the record. In stating his intention to call his own expert, defense counsel did not provide such definite assurances to the trial court. Defense counsel did not disclose the name of his intended expert, and he did not proffer a curriculum vitae or a summary of the expert's proposed opinion. Rather, as recounted herein, defense counsel asserted that he "[would] like" to provide an expert's curriculum vitae that afternoon and vaguely suggested that his expert would perhaps provide one hour of testimony. As the prosecutor aptly pointed out when he objected to the defense's attempted late disclosure, Kettering spent years examining the evidence in this case and had, at that point, provided three days of testimony during trial. It was unlikely that an expert could render a rebuttal opinion in the one hour indicated by defense counsel, and such testimony would then have necessitated a response by Kettering, which would have disrupted and delayed the proceedings in a manner not contemplated by defense counsel.

On the basis of the foregoing, we cannot conclude that the court abused its discretion in denying defense counsel's request to present undisclosed expert testimony on the fifth day of trial, especially in the absence of any meaningful proffer as to the substance of that opinion.

IV

The defendant also claims that "the Connecticut rules of criminal procedure violated [his] due process rights where the disclosure rules do not mandate advance

notice as to the sum and substance of an expert's testimony and/or the expert's conclusions/opinions."[11] Although the defendant failed to preserve this claim at trial, we address it under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989). Under *Golding*, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 239–40, as modified in *In re Yasiel R.*, supra, 781. "The first two [*Golding*] requirements involve a determination of whether the claim is reviewable; the second two requirements involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Mitchell*, 170 Conn. App. 317, 322–23, 154 A.3d 528, cert. denied, 325 Conn. 902, 157 A.3d 1146 (2017).

In claiming that his right to due process was violated by the lack of a rule of practice requiring the state to disclose the substance of the opinions of its expert witnesses, the defendant essentially is alleging a constitutional right to discovery. Because a criminal defendant has no general constitutional right to discovery;

[11] The defendant argues that, due to the absence of such a rule, "if [a state's] expert has not prepared a report, he or she need not be disclosed as an expert, and [his or] her opinion can be shrouded in mystery until the stand is taken." These arguments do not apply to the defendant because Kettering's identity and opinions in this case were disclosed as early as the service of the arrest warrant and were supplemented by the state's production to the defendant of Kettering's case notes.

Weatherford v. *Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); the defendant's claim is not of constitutional magnitude alleging the violation of a fundamental right, and, accordingly, fails under the second prong of *Golding*.

V

The defendant next claims that his right to confrontation under the sixth amendment to the United States constitution[12] was violated because the court declined to strike Pesiri's testimony, which was provided in the state's case-in-chief, after she asserted her fifth amendment privilege against self-incrimination and declined to testify when the defense called her as a witness in the defendant's case. We are not persuaded.

Pesiri testified during the state's case-in-chief on July 27, 2022. On direct examination, she testified, in sum, that she worked in the town clerk's office under Loglisci's supervision, and that she prepared ballot sets for the defendant to pick up. She stated that, when employees in the office saw or were told that the defendant had delivered applications, Pesiri wrote the defendant's initials on the upper right-hand corner of the applications. On cross-examination, defense counsel asked Pesiri, inter alia, whether she ever reported Loglisci for her improper handling of the absentee ballots, and whether there was anything that stopped Pesiri from doing so. Defense counsel also asked Pesiri about her knowledge of the SEEC investigation, including whether she knew she was a potential respondent in that investigation and whether she cooperated with the investigation. Defense counsel asked Pesiri about the various communications that she had with Branfuhr

[12] "The right to confrontation guaranteed by the sixth amendment is made applicable to the states through the due process clause of the fourteenth amendment." *State* v. *Robles*, 348 Conn. 1, 5 n.4, 301 A.3d 498 (2023).

throughout the SEEC investigation and the written statement that she gave in that investigation.

On August 30, 2022, the prosecutor rested the state's case-in-chief and the defense began its case the next day. In the intervening month between Pesiri's testimony and the commencement of the defendant's case, it came to the court's attention that the Federal Bureau of Investigation (FBI) was investigating the Stamford town clerk's office regarding the 2017 municipal election. In light of the pending FBI investigation, as well as testimony from Branfuhr that the SEEC investigation was ongoing, the court informed the parties that it would be advising any witnesses from the Stamford town clerk's office of their fifth amendment rights. Neither party objected to this procedure.

The following day, the prosecutor orally moved to preclude any inquiry regarding the investigation of the 2017 election on the ground that it was irrelevant to the prosecution in this case, which relates to the 2015 election. The prosecutor also argued that, to the extent that questions regarding the 2017 election were relevant for impeachment purposes, any probative value was outweighed by their prejudicial impact. Defense counsel objected to the state's motion, arguing that an inquiry into the 2017 investigation was relevant to expose witnesses' "interest in telling a story in a certain way to avoid liability or exposure. So, that's the real relevance here. It's not for impeachment purposes." Defense counsel asserted that the witnesses "have an interest of pointing away from themselves about what happened in 2015 so as to avoid uncovering what happened in 2017 . . . ." The court granted the state's motion, explaining that "[b]ias, interest, and motive have been fully explored on cross-examination."

Defense counsel then called Pesiri to testify. The court canvassed Pesiri on her fifth amendment rights

and she declined to testify. Defense counsel moved to strike Pesiri's earlier testimony claiming that her assertion of her fifth amendment privilege, when recalled as a defense witness, violated the defendant's sixth amendment right to confrontation. Defense counsel maintained that he had a right to recall Pesiri so that he could, among other things, impeach her credibility using transcripts of her earlier trial testimony. Defense counsel argued that the defendant had "a consistent and persistent right to expect the ability to impeach [Pesiri] by her own testimony and through others and test the truthfulness of what she said on the stand. I shouldn't be hampered by that, by expecting that, because I had a long cross-examination. . . . [A]s a practical matter, we investigate statements. You see it's very common . . . we have paid for transcripts. We have done other investigation. We have heard other things in the trial past what . . . Pesiri has testified about that could be linked up to her impeachment to test the credibility that she has for truthfulness."

The court denied the motion to strike, explaining: "The opportunity to cross-examine is not unlimited. The opportunity to examine an adverse witness by leading questions is not unlimited. It is this court's view that, in this case, there is every indication that the testimony of . . . Pesiri as an adverse witness would be cumulative to her cross-examination as the state's witness."

On appeal, the defendant reiterates his claim that his constitutional right to confrontation was violated when Pesiri asserted her fifth amendment right and declined to testify. "[T]he sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an

important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . . However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . Additionally, [a]lthough it is within the trial court's discretion to determine the extent of cross-examination . . . the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements of the sixth amendment. . . . The right of confrontation is preserved [however] if defense counsel is permitted to expose to the [court] the facts from which [it], as the sole trier of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . .

"If a defendant's cross-examination is restricted by the competing fifth amendment right of a witness, it may be necessary to strike the direct testimony of that witness. . . . [T]he sixth amendment is violated only when assertion of the privilege undermines the defendant's opportunity to test the truth of the witness' direct testimony." (Citations omitted; internal quotation marks omitted.) *State* v. *Moore*, 293 Conn. 781, 791–92, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010).

Here, as the court aptly explained, the defense had ample opportunity to cross-examine all aspects of Pesiri's testimony that was elicited on direct examination during the state's case-in-chief. In fact, as noted herein, defense counsel questioned Pesiri on cross-examination relating to the SEEC investigation in this case and her various communications with Branfuhr and the written statement that she provided to him. The defense

had an unrestricted opportunity to explore on cross-examination any motive or bias that Pesiri may have had and to impeach any portion of her testimony on direct examination. We therefore conclude that the defendant's right to confrontation was not violated. Accordingly, the court's denial of the defendant's motion to strike Pesiri's testimony was not improper.

VI

The defendant finally claims that the court improperly denied his motion to dismiss based upon his allegation of selective prosecution. We disagree.

Defense counsel moved to dismiss the charges against the defendant on the ground that the state engaged in selective prosecution because the state could have prosecuted Loglisci because she was named as a respondent by the SEEC and was liable for her role in what the SEEC called a scheme to have invalid votes counted in the 2015 municipal election. Defense counsel argued that the defendant was singled out for prosecution because he did not cooperate with the SEEC investigation and exercised his constitutional rights to counsel and to remain silent.

In denying the defendant's motion, the court first found that the defendant and Loglisci were similarly situated in all relevant aspects because both were involved in Stamford party politics, both were involved with handling the absentee ballot applications and ballot sets, Loglisci's office placed the defendant's initials on ballot applications that he or his associates delivered to the town clerk's office to facilitate the distribution of ballot sets that should not have been issued, Loglisci allowed the defendant to pick up ballots even though the applications for those ballots should have been rejected, and both were named as respondents in the SEEC investigation.

Despite that determination, the court concluded that the defendant was not singled out for prosecution because he invoked his rights to counsel or to remain silent. The court reasoned that "[t]he [SEEC] plans further enforcement action against Loglisci once the instant matter is resolved. The [SEEC] also concluded that, initially, it would refer felonies for prosecution rather than misdemeanors. The [SEEC] deemed the defendant, not Loglisci, liable for felonies. Finally, the defendant's alleged forgeries distinguish his conduct from Loglisci's. By the defendant's hand alone, [twenty-six] people could have had their civil right to vote extinguished." The court therefore concluded that the defendant was not selectively prosecuted and denied his motion to dismiss.

On appeal, the defendant claims that the court improperly rejected his claim of selective prosecution, arguing that the court ignored the allegations of a " 'scheme' " that allegedly involved several individuals, all of whom, he contends, were similarly situated, and that the only difference between him and those other individuals was that he was the only one who exercised his right to counsel.

"In cases in which the defense of selective prosecution has been asserted, before a motion to dismiss can be granted, the defendant must prove (1) that others similarly situated have generally not been prosecuted and that he has been singled out and (2) that he is the victim of invidious discrimination based on impermissible considerations such as race, religion, or the exercise of a constitutionally protected right." (Internal quotation marks omitted.) *State* v. *Payne*, 100 Conn. App. 13, 19, 917 A.2d 43, cert. denied, 282 Conn. 914, 924 A.2d 139 (2007). "[A]bsent a showing of a selection deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification . . . conscious selectivity in enforcement of the law is not

in itself a constitutional violation." (Internal quotation marks omitted.) Id., 25–26.

"To establish an actual vindictive motive, a defendant must prove objectively that the prosecutor's charging decision was a direct and unjustifiable penalty . . . that resulted solely from the defendant's exercise of a protected legal right . . . . Put another way, the defendant must show that (1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered a stalking horse, and (2) [the defendant] would not have been prosecuted except for the animus." (Internal quotation marks omitted.) *State* v. *Lee*, 86 Conn. App. 323, 328, 860 A.2d 1268 (2004), cert. denied, 272 Conn. 921, 867 A.2d 839 (2005). "A . . . court's factual findings on prosecutorial vindictiveness are reviewed for clear error and the legal principles which guide the . . . court are reviewed de novo." (Internal quotation marks omitted.) Id., 326.

Here, the defendant argues that he was selectively prosecuted because he exercised his right to counsel. In so arguing, the defendant ignores the difference between his conduct and that of the other individuals whom he claims were similarly situated. As the court aptly found, the defendant was the one who fraudulently filled out the absentee ballot applications and forged the signatures of the victims. Moreover, the defendant's claim is devoid of any argument of animus or invidious discrimination on the part of the state. We therefore conclude that the court properly rejected the defendant's claim of selective prosecution.

The judgment is affirmed.

In this opinion the other judges concurred.

DEVON EARLINGTON SMITH *v.* COMMISSIONER OF CORRECTION
(AC 46420)

Bright, C. J., and Cradle and Seeley, Js.

Syllabus

The petitioner, who previously had been convicted of murder, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had provided ineffective assistance and that the state had violated *Brady* v. *Maryland* (373 U.S. 83). The petitioner had filed a petition for a writ of habeas corpus alleging those same claims in 2011, after having withdrawn seven previous actions seeking a writ of habeas corpus. At the petitioner's request, his trial date for the 2011 petition was postponed multiple times. In 2017, on the day that trial was scheduled to commence, the petitioner's counsel, L, informed the habeas court that the petitioner wanted to withdraw his petition. The habeas court canvassed the petitioner regarding this desire and informed the petitioner that, if he withdrew his petition, it would be with prejudice, meaning that he would be unable to raise the same claims in a subsequent petition. L argued that, although exhibits had been marked and witnesses had been subpoenaed and were present, the petitioner should be able to withdraw his petition without prejudice because the evidence had not yet been presented, the petitioner had not previously litigated a habeas petition, and there were potential witnesses whom the petitioner and L had been unable to locate. Although the habeas court stated that, if the trial proceeded that day, it would provide the petitioner with a second trial date to allow him to locate the missing witnesses, following a second canvass, the petitioner reiterated his desire to withdraw the petition. Thereafter, L and the petitioner signed a withdrawal form that included a notation stating that the withdrawal was accepted by the habeas court with prejudice. That same day, the petitioner filed a motion to reconsider the habeas court's ruling that the withdrawal was with prejudice, which the habeas court denied. On the granting of certification, the petitioner appealed to this court, which affirmed the habeas court's judgment. In 2019, the petitioner filed the present habeas petition, and the habeas court raised a motion to dismiss sua sponte. Following a hearing on that motion, the court denied the petition, finding that the petitioner was barred from litigating his claims due to the withdrawal with prejudice of the 2011 petition. Thereafter, the habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, the petitioner having failed to present an issue that was debatable among jurists of reason,

that a court could resolve in a different manner, or that deserved encouragement to proceed further: the court did not err in finding that the petitioner knowingly, voluntarily, and intelligently had withdrawn the 2011 petition with prejudice and, thus, was barred from litigating the claims raised in the 2019 petition because, to the extent that statements made to the habeas court by L or counsel for the respondent, the Commissioner of Correction, during the 2017 proceeding created any ambiguity as to the consequences of the withdrawal of the 2011 petition, those ambiguities were resolved by the habeas court's thorough canvass of the petitioner, the record having supported the conclusion that the court adequately and accurately informed the petitioner that he would be barred from raising the same claims raised in the 2011 petition in a subsequent petition; moreover, contrary to the petitioner's assertions, the habeas court in the present action reasonably could have inferred that the petitioner fully understood the consequences of withdrawing the 2011 petition, namely, that he would be barred from pursuing his habeas claims unless he succeeded on appeal in distinguishing his case from *Marra* v. *Commissioner of Correction* (174 Conn. App. 440) or, alternatively, that he would have to take his chances that the respondent would not raise a collateral estoppel or res judicata defense if the petitioner were to file a subsequent petition raising the same claims as those raised in the 2011 petition; furthermore, the petitioner's statements during the canvass that he understood that he could withdraw his petition at any time prior to a hearing without prejudice merely demonstrated that he believed that the habeas court should allow him to withdraw without prejudice, not that he did not understand the consequences should the court instead grant the withdrawal with prejudice; additionally, the petitioner's argument that he believed he was not bound by *Marra* due to the statements the habeas court made at a hearing that was held more than one week prior to the canvass, noting that the situation was dissimilar to that in *Marra*, was without merit, as the petitioner could not have reasonably believed that such statements applied to conduct that had not yet occurred, including the withdrawal with prejudice of the 2011 petition and the petitioner's subsequent filing of the 2019 petition raising the same claims.

Argued April 9—officially released June 4, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Raynald A. Carre, Jr., deputy assistant state's attorney, with whom, on the brief, were *Jo Anne Sulik*, senior assistant state's attorney, and *Zenobia G. Graham-Days*, assistant attorney general, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Devon Earlington Smith, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) erroneously concluded that he knowingly, voluntarily, and intelligently withdrew a prior habeas petition with prejudice, thereby waiving his right to bring the same claims in the present petition. We disagree and, accordingly, dismiss the appeal.

The following undisputed facts and procedural history are relevant to the present appeal. In 1993, a jury found the petitioner guilty of murder in violation of General Statutes § 53a-54a, and he was sentenced to sixty years of incarceration. *Smith* v. *Commissioner of Correction*, 187 Conn. App. 857, 858, 204 A.3d 55, cert. denied, 331 Conn. 912, 203 A.3d 1247 (2019). On direct appeal, this court affirmed the petitioner's conviction, and our Supreme Court subsequently denied his petition for certification to appeal. See *State* v. *Smith*, 46 Conn. App. 285, 286, 699 A.2d 250, cert. denied, 243 Conn. 930, 701 A.2d 662 (1997).

In January, 2011, the petitioner filed a petition for a writ of habeas corpus[1] (2011 petition) alleging, inter alia,

[1] The petitioner was self-represented at the time the petition was filed but was appointed counsel on November 21, 2011. *Smith* v. *Commissioner of Correction*, supra, 187 Conn. App. 859.

that his criminal trial counsel had provided ineffective assistance and that the state had violated *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–70, 71 A.3d 512 (2013).[2] The petitioner initially represented in the 2011 petition that he had not previously filed a habeas petition but later acknowledged that he had filed seven prior habeas actions challenging his 1993 conviction, all of which he had withdrawn before trial. *Smith* v. *Commissioner of Correction*, supra, 187 Conn. App. 859–60. Ultimately, the petitioner withdrew the 2011 petition with prejudice. He then appealed from the judgment that resulted from that withdrawal, claiming that the habeas court, *Prats*, *J.*, abused its discretion by requiring that the withdrawal be with prejudice. Id., 862–63. In rejecting the petitioner's claim, this court set forth the following procedural history regarding the 2011 petition. "On April 3, 2013, the habeas court [*Newson*, *J.*] issued a scheduling order, in which it set the first day of trial for October 7, 2013. On September 13, 2013, less than a month before trial was scheduled to begin, the petitioner filed a motion requesting a continuance. The habeas court . . . granted this motion on September 19, 2013. . . . In October, 2013, [after the petitioner's former counsel withdrew from representation] Wade Luckett entered an appearance as the petitioner's counsel.

"On June 6, 2014, the habeas court issued a new scheduling order, which postponed the start of trial until June 18, 2015. On January 2, 2015, the petitioner, through counsel, filed an amended habeas petition. On June 4, 2015, two weeks before trial, the petitioner again filed a motion to continue the trial date. In support

[2] "The petitioner also alleged a claim of actual innocence that was dismissed by the habeas court." *Smith* v. *Commissioner of Correction*, supra, 187 Conn. App. 859 n.1.

of this motion, the petitioner identified four potential witnesses that he had yet to interview. The habeas court, *Oliver*, *J.*, granted the petitioner's motion on June 9, 2015, and subsequently rescheduled the trial for May 26, 2016.

"On May 3, 2016, approximately three weeks before the trial was scheduled to begin, the petitioner filed a motion to amend his habeas petition because he had become aware that another witness, 'Jesus Rodriguez, would have provided favorable, if not outright exculpatory, testimony on [the petitioner's] behalf . . . and was available to testify if he [were] called as a witness.' The habeas court granted the petitioner's motion to amend and marked off the trial that had been scheduled to begin on May 26, 2016. The start of trial was then postponed to March 20, 2017. The petitioner filed a third amended habeas petition on March 8, 2017.

"On March 15, 2017, five days before trial was scheduled to begin, the petitioner again asked that trial be continued, this time to accommodate two of his witnesses. The habeas court granted this request and rescheduled trial for July 17, 2017. . . .

"Prior to the commencement of trial on July 17, 2017, Luckett informed the habeas court, *Prats*, *J.*, that he was not ready to proceed because the petitioner wanted to withdraw his petition. [Judge Prats] canvassed the petitioner regarding his desire to withdraw and informed him that if he withdrew his petition, it would be with prejudice, meaning he would be unable to raise the same claims in a subsequent habeas petition." Id., 860–61.

During the canvass, the petitioner stated that, on and prior to that morning, he had spoken to Luckett about withdrawing the petition. The petitioner also indicated that he was making the decision to withdraw "freely and voluntarily," was not being threatened or forced,

and had not taken any medications. Judge Prats then asked the petitioner: "[Y]our attorney said the possibility, but if the court grants the withdrawal of this action, you understand that you will be barred in the future from raising these claims again in another habeas . . . ?" The petitioner replied: "My understanding is I could withdraw the habeas at any time prior to a hearing." Judge Prats explained: "[I]f you try to [file] a new habeas in the future, there will be objection from the respondent [the Commissioner of Correction] in this case, and rightfully so . . . we're on the eve of trial today. We have witnesses who have been subpoenaed for today. This case goes back six years . . . . [Present] [c]ounsel has been involved . . . since 2013. It's been scheduled for trial. [There have] been continuances.

"All of that has been done between now and then with a full opportunity to be heard. So just withdrawing it with the hope that later on you're going to file another [petition] with the same claims would not be appropriate. Do you understand? And it's going to [be met] with objection, and if the court accepts your withdrawal today, it would be with prejudice, meaning that it would bar you from raising these claims today." The petitioner stated: "I understand everything you said, Your Honor, but we just had a hearing about this . . . two weeks ago,[3] and the court established the case law regarding

[3] The petitioner was referring to the July 6, 2017 hearing before the court, *Sferrazza*, *J.*, on the respondent's motion to dismiss the 2011 petition. The respondent argued that the petition should be dismissed because it was "successive and constitute[d] an abuse of the writ and deliberate bypass." During the hearing, Judge Sferrazza granted the respondent's motion as to the petitioner's actual innocence claim but denied the motion as to the petitioner's claim of ineffective assistance of counsel. As to the ineffective assistance claim, Judge Sferrazza stated: "This is not a situation where I can find that the petitioner is trying to avoid an order, which, in the *Marra* case, they found that he was trying to avoid—I think they call it—game the system with procedural . . . chicanery. . . . None of that occurred here so . . . I'm not going to grant the motion to dismiss as to the ineffective assistance count." See *Marra* v. *Commissioner of Correction*, 174 Conn. App. 440, 457, 166 A.3d 678 ("although the party initiating an action generally

this type of situation, and prior [to] a hearing, I can withdraw the habeas without prejudice. That's my understanding." (Footnote added.)

Luckett acknowledged that exhibits had been marked and that witnesses had been subpoenaed and were present. He argued that the court should nonetheless allow the petitioner to withdraw his petition without prejudice because evidence had not yet been presented; unlike in *Marra* v. *Commissioner of Correction*, 174 Conn. App. 440, 444, 446, 166 A.3d 678, cert. denied, 327 Conn. 955, 171 A.3d 456 (2017), the petitioner had not previously litigated a habeas petition; and there were potential witnesses whom the petitioner had been unable to locate despite Luckett's efforts. Judge Prats informed Luckett that, if the petitioner started trial that day, she would grant him another day of trial in the future, which would allow the petitioner to locate the missing witnesses. Judge Prats reiterated to Luckett, however, that "if [the petitioner] withdraws, it's going to be done with prejudice, and then you would have to argue with the [respondent] in the future to try and see if you can get around it if [the petitioner] tries to raise again an ineffective assistance claim in the future." Luckett stated that he was ready to begin trial but that he would let the petitioner decide whether to withdraw the case.

The court then canvassed the petitioner again, stating: "We're ready to start today. We can do that, and I would give you a second date. As you heard, [Luckett] has made diligent efforts to try and reach these possible witnesses, but to no avail, but the court would be willing

enjoys a right to withdraw litigation unilaterally prior to a hearing on the merits, a later filing of an identical case by that party can be deemed an abuse of that right if it constitutes procedural chicanery, that is, it offends the orderly and due administration of justice and is intended to avoid the consequences of [his or] her [previous] waiver" (internal quotation marks omitted)), cert. denied, 327 Conn. 955, 171 A.3d 456 (2017).

to give you a second date . . . and so, if I grant the withdrawal, just for the record, I want you to be very clear that the court is going to do it with prejudice, and that later on, if you try to raise the same basis, there's going to be [a] strong objection, and you're possibly going to be very barred from raising this claim again. You understand that?" The petitioner responded: "I understand what you're saying, Your Honor. . . . I just want a fair shot at my freedom." The court restated that the petitioner's "fair shot is starting today, and if you need a second date, the court will give you a second date. If not, I'll accept your motion to withdraw, but it's going to be done with prejudice and with the possible ramifications and consequences as the court has outlined. So, you tell me." The petitioner replied: "I'll take my chances. Rather [not] have a hearing today and lose with certainty. Doesn't make sense to me."

The petitioner and Luckett subsequently signed a withdrawal form featuring the notation: "Withdrawal w[ith] prejudice accepted by the court (Prats, J.) after canvass on the record." That same day, the petitioner filed a motion to reconsider the court's ruling that the withdrawal was with prejudice, which the court denied on July 28, 2017. The petitioner then filed a petition for certification to appeal the court's decision, which the court granted. On appeal to this court, the petitioner argued that the circumstances of his case were distinguishable from those in which a court may order that a petition be withdrawn with prejudice. This court affirmed the judgment, concluding that, "under [the] circumstances, the court acted within its discretion in granting the petitioner's motion to withdraw with prejudice." *Smith* v. *Commissioner of Correction*, supra, 187 Conn. App. 868.

This court observed that the petitioner's case was factually similar to *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 440, and *Mozell* v. *Commissioner of Correction*, 147 Conn. App. 748, 83 A.3d 1174,

cert. denied, 311 Conn. 928, 86 A.3d 1057 (2014). *Smith* v. *Commissioner of Correction*, supra, 187 Conn. App. 866–68. In those cases, this court concluded that the habeas court had acted within its discretion in accepting a withdrawal with prejudice. *Marra* v. *Commissioner of Correction*, supra, 459–61; *Mozell* v. *Commissioner of Correction*, supra, 759–60. In particular, this court stated: "Like the petitioners in *Marra* and *Mozell*, the petitioner in the present case had filed and withdrawn numerous prior habeas petitions. Indeed, the petitioner in the present case had filed more petitions than the petitioners in *Marra* and *Mozell*, who filed two and three petitions, respectively. The petitioner in the present case filed at least seven petitions, all of which he withdrew before trial.

"The petitioner attempts to distinguish the present case from *Marra* and *Mozell* by arguing that in those cases a final judgment had been rendered on other petitions filed by the petitioners, whereas, in the present case, none of the petitioner's prior habeas petitions had reached final judgment or even received a hearing on the merits. In the present case, final judgment was not reached on any of the petitioner's many habeas petitions because the petitioner chose to withdraw them. Despite his choice to withdraw the petitions, the petitioner was provided every opportunity to continue to litigate them and, therefore, had a full opportunity to be heard. In this case, trial was continued on five occasions, more times than in *Marra* and *Mozell* combined. . . . Four of the continuances in the present case were granted at the petitioner's request. Moreover, the habeas court was willing to continue the case in response to the petitioner's request to withdraw his petition. The court offered the petitioner a second day of trial in the future so that he could attempt to find Rodriguez. The petitioner was afforded ample time to prepare his case.

"As did the petitioners in *Marra* and *Mozell*, the petitioner sought to withdraw his petition on the eve of trial when the case was ready to proceed after efforts and resources had been expended in preparation for trial. Similarly, exhibits in the present case had been marked, counsel were ready to proceed, and witnesses had been subpoenaed and were ready to testify. Moreover, as in *Mozell* where expenses had been incurred in setting up videoconferencing for a witness in Nevada, in the present case, witnesses were subpoenaed and were present to testify.

"Additionally, like the petitioner in *Marra*, the petitioner in the present case made the ultimate decision to withdraw the habeas matter on the day of trial and was fully aware of the potential consequences of withdrawal, as he had been extensively canvassed by the habeas court." (Footnote omitted.) *Smith* v. *Commissioner of Correction*, supra, 187 Conn. App. 867–68.

On May 9, 2019, the petitioner filed the present habeas petition, which he subsequently amended on December 27, 2021, alleging the same constitutional claims raised in the 2011 petition. The respondent filed an amended return on October 27, 2022, denying the petitioner's constitutional claims and arguing, inter alia, that "[t]he prior withdrawal with prejudice bar[red] the petitioner from raising [those] claims . . . and [that] any attempt to relitigate the 'with prejudice' determination [was] barred by the principles of res judicata and/or collateral estoppel." In his reply, the petitioner argued that the withdrawal with prejudice was not knowing, voluntary, and intelligent, and his claims thus were not barred by that withdrawal, because he "did not fully understand the consequences of withdrawing" and his "mental health rendered him unable to make a knowing, voluntary, and intelligent waiver of his rights . . . ."[4]

[4] In addition, the petitioner alleged that the withdrawal with prejudice resulted from the ineffective assistance of habeas counsel. The court, *Newson, J.*, rejected this claim because "there [was] simply no credible evidence

On November 1, 2022, the court, *Newson, J.*, issued a sua sponte notice of a motion to dismiss hearing as to whether the petitioner's claims should be dismissed pursuant to Practice Book § 23-29 (1), (2), and (3)[5] because this court affirmed the prior habeas court's withdrawal with prejudice of the same claims raised in the present petition. The parties each filed a memorandum of law in response to the court's order, reiterating their arguments regarding that issue as set forth in their initial pleadings. Additionally, the petitioner argued that this court's decision in his prior habeas appeal does not preclude further litigation on the issue of the withdrawal with prejudice because Judge Newson had evidence before him that was not reasonably available at the time of the prior proceeding. Specifically, the petitioner asserted that, because Judge Newson had sworn testimony from both the petitioner and Luckett about the circumstances surrounding the withdrawal that was not previously available to the prior habeas court and this court in the petitioner's prior habeas appeal, Judge Newson was "in a different position . . . to assess the validity of the petitioner's waiver . . . ."

On October 31 and December 22, 2022, the parties appeared before Judge Newson for a hearing on the court's motion to dismiss, during which both the petitioner and Luckett testified. In particular, the petitioner testified that, on the Friday before trial was set to begin

in the record whatsoever to support [it]. . . . In fact, the record . . . warrant[ed] an affirmative finding that [Luckett] provided competent and thorough representation . . . ." (Citation omitted.) The petitioner does not challenge that conclusion on appeal.

[5] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted; (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ."

on Monday, July 17, 2017, he and Luckett discussed the issue of withdrawal, and the petitioner told Luckett that he wanted to withdraw the case because he believed that he would be unsuccessful at trial without his main witness, whom Luckett had been unable to locate. The petitioner stated that, although Luckett gave him the weekend to think about the withdrawal, he did not need time to consider the issue because, "[i]n my mind, I thought the case was going to be decided on [the missing witness'] testimony." The petitioner testified that, when he got to court on the day trial was set to begin, he reiterated to Luckett that he did not want to go to trial without the missing witness. The petitioner further testified that, while in segregation at Northern Correctional Institution (Northern), the conditions of confinement affected his ability to make a knowing, intelligent, and voluntary decision about the withdrawal. He stated that, once he was released to general population at Northern, his thinking "clarified" and he did not think that anybody "in their right mind" would have withdrawn the habeas petition if they had possessed the evidence that Luckett had at the time of the withdrawal.[6] Additionally, the petitioner testified that, when he withdrew the petition, Judge Prats told him that it would be with prejudice and that the petitioner told the court that he would "take [his] chances" only "because [he] didn't understand what was going on." When asked if Judge Prats gave him the option to start trial and return for a second day of trial in the future, the petitioner initially indicated that he remembered that occurring

[6] The petitioner was referring to transcripts from criminal proceedings against one of the state's witnesses in the petitioner's criminal case. Counsel for the petitioner argued that these transcripts revealed that the witness had received consideration in exchange for his testimony against the petitioner. The petitioner explained that, prior to the withdrawal, "Luckett didn't explain to me the value of the transcripts he uncovered, so based on what I knew, I thought the case would be decided on [another missing witness] being present. And that was wrong."

and that it was his decision to decline that offer. When asked again on the second day of the hearing whether he remembered Judge Prats offering a second day of trial, however, the petitioner stated, "I was not in my right mind," and then said that he did not remember.

Luckett testified that he "vaguely recall[ed] having a discussion with [the petitioner at] Northern" around the time that the petitioner's actual innocence claim was dismissed. Luckett indicated that the petitioner "was wavering" at that time and "was not certain . . . until the date of the actual hearing" as to whether he wanted to withdraw the petition. Luckett testified that, prior to the day of the withdrawal, he did not talk to the petitioner about the possibility that the court would require that the withdrawal be with prejudice and that he advised the petitioner that he could withdraw the petition at any time prior to a hearing without prejudice, so long as the parties did not present any evidence, call any witnesses, or mark any exhibits. Luckett indicated that he learned only after speaking with Judge Prats in chambers that she may not allow a withdrawal without prejudice.

Luckett believed that he had "two conversations [with the petitioner] on the date of [the] actual withdrawal with prejudice. The first was [when] I went down to lock up, as I do with every habeas case, spoke with him in lock up, and . . . among other things, he said he wanted to withdraw. At that point, I told him it was a possibility." Luckett further testified that, when the petitioner was brought to the courtroom that morning, Luckett informed the petitioner that Judge Prats was going to allow the withdrawal with prejudice. Luckett stated that he did not remember whether he explained to the petitioner at that point in time what withdrawing with prejudice would mean. Luckett stated that, at some point on the morning of, but prior to, the withdrawal, he also told the petitioner: "I don't write the laws, so

listen to what the judge says. And, obviously, you know, if the judge says you can't ever do this again then I can't, you know, it's not like I make the rules. So, you have to listen to what the court says."

Following the hearing, the court denied the petitioner's habeas petition, finding that the petitioner was barred from litigating his claims due to the withdrawal with prejudice of the 2011 petition.[7] The court concluded that "the record wholly contradicts the petitioner's assertion that he was not adequately canvassed by Judge Prats before the withdrawal with prejudice was entered.

* * *

"[T]he petitioner knowingly, intelligently, and voluntarily waived his right to pursue [his] claims . . . when he . . . [withdrew] the [2011] petition raising [the same] claims, knowing that the withdrawal would be entered with prejudice and knowing that with prejudice meant he could be prohibited from litigating those claims if he tried to raise them again in a future habeas." (Citations omitted; footnotes omitted; internal quotation marks omitted.) This uncertified appeal followed.

On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal because the court erroneously concluded that the petitioner's claims were barred by the withdrawal

[7] The court explained that it denied rather than dismissed the petition because, "[u]nder *Marra*, the prior withdrawal 'with prejudice' does not actually deprive the habeas court [of] jurisdiction over [the petitioner's claims], so the proper judgment is to deny [the] petition on the grounds that the petitioner is barred from litigating these issues, rather than dismiss it." See *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 461 ("[The court's] determination that the prior action should be deemed to be withdrawn with prejudice does not implicate the subject matter jurisdiction of the court over this petition. Accordingly, [the court] should have denied, rather than dismissed, the petition, and the form of the judgment is thus improper.").

with prejudice of the 2011 petition. Before we address the petitioner's claims, we first set forth the legal principles and standard of review that guide our analysis.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 344–45, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021). We thus turn to the merits of the petitioner's

claim that Judge Newson erroneously concluded that the present habeas petition is barred by the withdrawal with prejudice of the 2011 petition.

"The term with prejudice means [w]ith loss of all rights; in a way that finally disposes of a party's claim and bars any future action on that claim . . . . The disposition of withdrawal with prejudice exists within Connecticut jurisprudence. . . . Indeed, the disposition of withdrawal with prejudice is a logically compelling disposition in some circumstances. A plaintiff is generally empowered, though not without limitation, to withdraw a complaint before commencement of a hearing on the merits. . . . A plaintiff is not entitled to withdraw a complaint without consequence at such hearing. . . . The decision by a habeas court to condition a withdrawal of a habeas petition on that withdrawal being with prejudice is, when authorized, a decision left to that court's discretion." (Citations omitted; internal quotation marks omitted.) *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 454–55.

In an effort to avoid the preclusive effect of the prior withdrawal with prejudice, the petitioner argues, on the basis of several purported ambiguities surrounding Judge Prats' canvass, that he did not knowingly, voluntarily, and intelligently waive his right to bring his claims.[8] In particular, the petitioner argues that (1) Luckett's statements to Judge Prats on the day of the withdrawal, and his testimony at the motion to dismiss hearing before Judge Newson, were "ambiguous" as to the advice that he gave the petitioner regarding the withdrawal; (2) Judge Prats' use of terms denoting

[8] Although the petitioner testified at the motion to dismiss hearing that his conditions of confinement affected his ability to make a knowing, intelligent, and voluntary decision about the withdrawal, he makes no claim on appeal that the court's findings were clearly erroneous because it did not sufficiently consider such testimony. Thus, we deem any such claim abandoned. See *Tetreault* v. *Eslick*, 271 Conn. 466, 471 n.5, 857 A.2d 888 (2004).

uncertainty as to the consequences of the withdrawal created further ambiguity in the canvass; (3) counsel for the respondent "amplified" the ambiguity by similarly using uncertain terms;[9] (4) the petitioner logically believed that his case was distinguishable from *Marra* because of Luckett's arguments before Judge Prats and Judge Sferrazza's statements at the July 6, 2017 motion to dismiss hearing;[10] and (5) the petitioner's responses during the canvass demonstrate that he did not understand the consequences of a withdrawal with prejudice. We are not persuaded.

"[A] habeas court may accept the withdrawal of a habeas petition 'with prejudice,' allowing the petitioner to waive any future habeas rights, as long as the withdrawal is knowing, voluntary, and intelligent." *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 785–86, 167 A.3d 952 (2017). "In evaluating the propriety of the court's finding, that an intentional and knowing waiver occurred, we are mindful that [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility

[9] The petitioner cites the following statement of the respondent's counsel just prior to the court's acceptance of the withdrawal with prejudice: "There's certain recent case law that discusses [the issue of withdrawal with prejudice], but I'm not certain at what juncture it discusses the ramifications of with prejudice, forcing someone to withdraw with prejudice prior to the start of evidence, so I do believe that [the filing of a new petition is] something that we probably would object to, but it could be hashed out at a later point. That's my position."

[10] See footnote 3 of this opinion.

of witnesses and the weight to be given to their testimony. . . . Thus, the court's factual findings are entitled to great weight. . . . Furthermore, [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." (Internal quotation marks omitted.) *Fine* v. *Commissioner of Correction*, 147 Conn. App. 136, 142, 81 A.3d 1209 (2013).

In the present case, we conclude that the court's finding that the petitioner knowingly, voluntarily, and intelligently waived his right to pursue the claims raised in the 2011 petition finds support in the record and, therefore, is not clearly erroneous. To the extent that the statements to the court by Luckett or the respondent's counsel created any ambiguity as to the consequences of withdrawal, those ambiguities were resolved by Judge Prats' thorough canvass of the petitioner. In particular, Judge Prats clearly informed the petitioner that, despite what Luckett may have told him, "if the court grants the withdrawal of this action, you understand that *you will be barred* in the future from raising these claims again in another habeas . . . ." (Emphasis added.)

Although at other points during the canvass Judge Prats used phrases denoting less certainty, such as "possibly [will] be . . . barred" and "possible ramifications," Judge Newson was not required, based on the totality of the canvass, to find that the petitioner did not understand the consequences of a withdrawal with prejudice. In *Mozell*, the habeas court "explained to the petitioner the '*potential* ramifications' of a withdrawal with prejudice" and stated that the "*risk*" of such withdrawal was that the respondent would "*likely*" oppose a new petition filed by the petitioner but that the court "[did not] know . . . what would happen . . . ."

(Emphasis added; internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, supra, 147 Conn. App. 759. Additionally, "[p]rior to finally accepting the withdrawal with prejudice, the court informed the petitioner that if the court accepted the withdrawal, there *could well be* significant impediments to bringing the same claims again. The court stated that *it could not predict with certainty what might happen* but said that the respondent would *likely* argue that he had been prepared before and that the petitioner ought not be able to bring the same claim again." (Emphasis added.) Id., 759 n.12. On appeal, this court concluded that the court had "adequately informed the petitioner of the ramifications" of a withdrawal with prejudice; id., 759; noting that, "[i]n light of our law regarding successive petitions, the court's advice was substantially accurate." Id., 759 n.12.

Accordingly, in the present case, Judge Prats' use of both certain and less certain terms to describe the consequences of a withdrawal with prejudice does not undermine Judge Newson's finding that the petitioner's waiver was knowing, voluntary, and intelligent. Instead, the record supports the conclusion, even more so than in *Mozell*, that the court adequately and accurately informed the petitioner that there was not only a possibility, but a certainty, that he would be barred from raising the same claims in a subsequent petition. From the petitioner's statements that he understood the court's explanation of the consequences and that he would "take [his] chances" by withdrawing the petition with prejudice, and his subsequent signing of the withdrawal form, Judge Newson reasonably could have concluded that the petitioner fully understood the consequences of a withdrawal with prejudice as Judge Prats explained them. As "the sole arbiter of the credibility of witnesses and the weight to be given their testimony";

(internal quotation marks omitted) *Fine* v. *Commissioner of Correction*, supra, 147 Conn. App. 142; Judge Newson was entitled to credit this evidence over the petitioner's later testimony at the motion to dismiss hearing that he "didn't understand what was going on" during the canvass.

Nevertheless, the petitioner maintains that his statement that he would "take [his] chances" in response to Judge Prats' canvass is evidence that he did not understand the preclusive effect of his withdrawal with prejudice and reflected his understanding that he could take his chances with a subsequent habeas petition. We are not persuaded. Judge Newson reasonably could have inferred from the petitioner's references to *Marra* during the canvass and from the petitioner's conduct following the withdrawal that he understood that he would be barred from pursuing his habeas claims unless he succeeded in distinguishing his case from *Marra* on appeal. Indeed, the petitioner immediately filed a motion for reconsideration following the withdrawal and, after the court denied that motion, filed an appeal to this court, in both of which the petitioner unsuccessfully attempted to distinguish his case from *Marra*. Had the petitioner believed that he could simply file a new habeas petition without consequence, he would have had no reason to file a motion for reconsideration nor to appeal Judge Prats' decision.[11] Instead, his claim in his prior habeas appeal that Judge Prats abused her discretion by requiring that his withdrawal of the 2011

[11] At oral argument before this court, counsel for the petitioner argued that, although the filing of the motion for reconsideration and the appeal suggest that the petitioner's counsel may have understood what "with prejudice" meant, it is not fair to impute that understanding to the petitioner. We disagree. It would have been fair for Judge Newson to impute that understanding to the petitioner given the evidence in the record that Judge Prats informed the petitioner of the consequences of a withdrawal with prejudice and that the petitioner stated that he understood those consequences.

petition be with prejudice is clear evidence that the petitioner fully understood the significance of that requirement.

Alternatively, the petitioner could have meant that he would take his chances that the respondent would not raise a collateral estoppel or res judicata defense if the petitioner were to file a subsequent petition raising the same claims and that the petitioner would then be permitted to proceed with his petition despite the prior withdrawal with prejudice. See *Mozell* v. *Commissioner of Correction*, supra, 147 Conn. App. 759 n.12 ("court's advice [regarding withdrawal with prejudice] was substantially accurate" where it informed petitioner that "it could not predict with certainty what might happen but . . . that the respondent would likely argue that he had been prepared before and that the petitioner ought not be able to bring the same claim again"). Because either inference is reasonable, and because we construe the evidence in the light most favorable to sustaining the court's judgment, the petitioner's argument fails. See *Cheshire Land Trust, LLC* v. *Casey*, 156 Conn. App. 833, 852, 115 A.3d 497 (2015) (court "is not required to draw only those inferences consistent with one view of the evidence, but may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical" (emphasis omitted; internal quotation marks omitted)).

As to the petitioner's statements during the canvass that he understood that he could withdraw his petition at any time prior to a hearing without prejudice, those statements merely demonstrate that he believed that the court should allow him to withdraw without prejudice, not that he did not understand the consequences should the court instead grant the withdrawal *with* prejudice. Notably, each of the statements cited by the petitioner to this effect either immediately followed his assertion that he understood the court's explanation of

the consequences of the withdrawal being "with prejudice" or was followed by the court's reiteration of those consequences.

Finally, the petitioner's argument that he believed that he was not bound by *Marra* due to Judge Sferrazza's statement at the July 6, 2017 hearing[12] is similarly without merit. The petitioner could not reasonably have believed that Judge Sferrazza's statement on July 6, 2017, applied to conduct that had not even occurred yet—namely, the withdrawal with prejudice on July 17, 2017, and the petitioner's filing of a subsequent petition raising the same claims.

Accordingly, we conclude that the court did not err in finding that the petitioner knowingly, voluntarily, and intelligently withdrew the 2011 petition with prejudice. The court thus properly determined that the petitioner is barred from litigating the claims raised in the present petition.[13] The petitioner has failed to present an issue that is debatable among jurists of reason, that a court could resolve in a different manner, or that deserves encouragement to proceed further. Therefore, we conclude that the court did not abuse its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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[12] See footnote 3 of this opinion.

[13] The respondent argues that the petitioner's conduct also constitutes deliberate bypass. See *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 459–60 n.15. It is not necessary for us to determine whether the deliberate bypass rule applies here. Regardless of the label, the outcome of this appeal is the same—the petitioner is barred from raising the claims alleged in the 2011 petition. See id., 459–60.

TIMOTHY MARTIN *v.* TODD ARTHURS COMPANY, INC.
(AC 46009)

Elgo, Moll and Keller, Js.

Syllabus

The plaintiff sought to recover damages from the defendant, a business selling heating, ventilation and air conditioning equipment, in connection with the defendant's sale of allegedly defective equipment. The plaintiff commenced an action, alleging, inter alia, breach of contract. The defendant filed a request to revise, and the plaintiff revised his complaint. The defendant thereafter filed a motion to dismiss based on a lack of subject matter jurisdiction due to a forum selection clause contained in the underlying contract. The trial court, noting that the forum selection clause implicated personal jurisdiction and not subject matter jurisdiction, denied the motion to dismiss, both as untimely and because the defendant waived the right to file a motion based on lack of personal jurisdiction when it filed a request to revise. The parties engaged in settlement negotiations, both written and oral, including an offer by the plaintiff that the defendant could take possession of the equipment if it chose. The defendant filed an offer of compromise with the court pursuant to statute (§ 52-193) and the rule of practice (§ 17-11). The plaintiff emailed the defendant's counsel to communicate that he agreed on the settlement amount contained in the offer of compromise and the defendant's counsel replied that she would send the plaintiff a draft settlement agreement. Prior to the receipt of the draft settlement agreement, the plaintiff emailed the defendant's counsel that he had disposed of the equipment. Thereafter the defendant withdrew the offer of compromise, and the plaintiff objected and filed a motion with the court to compel the settlement. The trial court granted the motion to enforce the settlement agreement, finding that the defendant did not condition its offer to settle upon the return of the equipment. On the defendant's appeal to this court, *held*:

1. The trial court erred in granting the plaintiff's motion to enforce the settlement agreement as the parties had not reached a binding and enforceable contract: the parties were engaged in ongoing negotiations regarding the terms of the settlement agreement but the terms of the agreement had not been finalized, as the plaintiff created an outstanding offer regarding the possession of the equipment, and he did not revoke that offer prior to unilaterally disposing of the equipment before the agreement had been completed, memorialized or signed by either party; accordingly, this court reversed the judgment of the trial court and remanded the case for further proceedings in accordance with its opinion.

2. This court declined to review the defendant's unpreserved claim that the trial court abused its discretion in declining to enforce a forum selection clause in the contract after it determined that the defendant's motion to dismiss based on a lack of personal jurisdiction was both untimely and that the defendant had waived its ability to contest personal jurisdiction; the defendant did not challenging the court's rulings on timeliness or waiver on appeal, and it failed to distinctly raise its claim before the trial court that the court should have conducted an analysis to determine whether the forum selection clause was reasonable and gave effect to the parties' expectations prior to denying the motion.

Argued November 15, 2023—officially released June 4, 2024

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 Hartford, where the court, *Rosen*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Rosen*, *J.*, granted the plaintiff's motion to enforce a settlement agreement and rendered judgment thereon, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Jeffrey J. Mirman, for the appellant (defendant).

Opinion

ELGO, J. The defendant, Todd Arthurs Company, Inc., doing business as Alpine Home Air Products, appeals from the judgment of the trial court granting a motion to enforce a settlement agreement between it and the self-represented plaintiff, Timothy Martin, and denying its motion to dismiss based on a lack of personal jurisdiction.[1] On appeal, the defendant claims that (1) the court incorrectly determined that the parties reached an enforceable settlement agreement, and (2) the court abused its discretion in declining to enforce a forum selection clause when it denied the defendant's motion

[1] The plaintiff has not filed a brief in this appeal and did not participate in oral argument.

to dismiss. We affirm in part and reverse in part the judgment of the trial court.

Our review of the record and, in particular, the court's order granting the plaintiff's motion to enforce the settlement agreement, reveals the following facts and procedural history. The defendant is in the business of selling heating, ventilation, and air conditioning (HVAC) equipment for use in residential and commercial construction projects. On or about November 19, 2019, the plaintiff contracted to purchase certain HVAC units from the defendant. The plaintiff alleged that the units he purchased from the defendant were defective and commenced the present action in July, 2021, by way of a complaint in which he alleged breach of contract and violations of the Uniform Commercial Code. On October 5, 2021, the defendant filed a request that the plaintiff revise his complaint, ultimately resulting in the operative complaint being filed on January 3, 2022. On January 28, 2022, the defendant filed a motion to dismiss premised on lack of subject matter jurisdiction due to a forum selection clause contained in the underlying contract.[2] On April 11, 2022, the court, in denying the defendant's motion to dismiss, noted that the forum selection clause implicated personal jurisdiction as opposed to a court's subject matter jurisdiction. The court denied the motion as untimely and because the defendant waived the right to file a motion to dismiss based on lack of personal jurisdiction when it filed the October 5, 2021 request to revise. See Practice Book § 10-7.

The plaintiff made various preliminary offers to settle the dispute and even attempted to reach a settlement

[2] The contract's forum selection clause states in relevant part: "Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois, without giving effect to the conflict of laws principles thereof. . . . Disputes. Any dispute arising from this Agreement shall be resolved in the courts of the State of Illinois."

before he filed his initial complaint. The plaintiff's offers included, inter alia, his willingness to settle for $30,000 contingent upon his ability to keep the HVAC units and not provide receipts for costs incurred, $25,000 with the option for the defendant to take possession of the units, and $22,000 with no mention of contingencies. The defendant's counter offer expressed a willingness to reimburse the plaintiff for the cost of the units along with reasonable expenses incurred, conditioned upon the plaintiff providing copies of the expense receipts. These settlement efforts did not result in an agreement.

On August 16, 2022, the court set a date for a trial management conference and ordered the parties to be prepared to engage in settlement negotiations. The following day, on August 17, 2022, the defendant filed an offer of compromise with the court pursuant to General Statutes § 52-193 and Practice Book § 17-11, in which it offered "to settle the claims of the plaintiff . . . for the sum of . . . $11,000 . . . inclusive of any and all fees, costs and attorney's fees the plaintiff might claim." Between August 17 and 29, 2022, the parties engaged in continued email communications regarding the offer of compromise and a potential settlement agreement. On August 21, 2022, the plaintiff communicated that he agreed to settle for $11,000 and told the defendant's counsel to "[p]ut it together and I will file the withdrawal of action." The defendant's counsel thanked him and stated she would "get working on this and be back in touch soon"; one week later she apologized for the delay and stated that she would "get a draft settlement agreement to [him] for comment this week." The plaintiff thanked her for the response and stated that he "junked the [HVAC] equipment."

On September 20, 2022, three weeks after the last documented email communication, the defendant filed a withdrawal of the offer of compromise with the court. That same day, the plaintiff filed an objection to the

withdrawal of the offer of compromise and asked the court to compel the settlement, alleging that the offer had been accepted by email communication with the defendant's counsel on August 21, 2022, and that the plaintiff disposed of the equipment "in good faith" under the belief that they had reached a settlement. The defendant filed a reply to the plaintiff's objection to the withdrawal, stating, inter alia, that it believed the return of the equipment was a factor that had not yet been decided through the settlement negotiations.

On October 24, 2022, the court conducted a remote hearing regarding the withdrawal of the offer of compromise and the objection thereto. The court stated that it would treat the plaintiff's request to compel settlement as a motion to enforce a settlement agreement. The defendant's counsel indicated that there were verbal communications between the parties and that it was the defendant's desire and understanding that the equipment would be returned upon reaching a settlement. As a result, when the defendant learned that the plaintiff had disposed of the equipment, it withdrew its offer of compromise. The plaintiff acknowledged that there were discussions regarding returning the units when the settlement amount was double that which was ultimately offered. The plaintiff hypothesized that "either they screwed up, or . . . just forgot to say in the [offer] we want return of the units. They never said it." The court then confirmed with the defendant's counsel that there were no written communications between the parties indicating that the $11,000 offer was contingent on the return of the units.

On October 25, 2022, the court entered an order granting the plaintiff's motion to enforce the settlement agreement and further stated that the plaintiff's objection to the withdrawal of the offer of compromise was overruled as moot as a result of that order. The court found that "the defendant did not condition its offer to

settle the dispute for $11,000 upon the return of the equipment. The defendant's email communications confirming its agreement to settle the action for $11,000 are not conditioned upon the return of the equipment. Similarly, the offer of compromise simply offers to settle the matter for $11,000, with no conditions. Even after the plaintiff advised the defendant's counsel in his August 29 email that he had 'junked the equipment' the defendant never responded and told the plaintiff that he had somehow breached the settlement agreement."

The defendant now appeals from the judgment granting the plaintiff's motion to enforce the settlement agreement and denying its motion to dismiss.

I

On appeal, the defendant claims that the parties did not reach an enforceable settlement agreement. More specifically, the defendant contends that there was no " 'meeting of the minds' between the parties" because the defendant understood that the equipment would be returned upon settlement, while the plaintiff did not have the same understanding. We agree.[3]

As an initial matter, we note that there is more than one appropriate pathway for parties to settle a legal claim. Here, the parties concurrently engaged in two distinct, permissible methods: out-of-court settlement negotiations with the goal of reaching a legally cognizable settlement agreement, and an offer of compromise governed by statutory requirements and the rules of practice. Although "the purpose of the offer of compromise statute [is the] promotion of pretrial settlement"; *Larmel* v. *Metro North Commuter Railroad Co.*, 200

[3] The defendant alternatively argues that the parties "did not clearly and unambiguously agree to settle the dispute" and that the court's failure to hold an evidentiary hearing constituted reversible error. Because we conclude that there was no meeting of the minds between the parties, we do not address those alternative claims.

Conn. App. 660, 678, 240 A.3d 1056 (2020), aff'd, 341 Conn. 332, 267 A.3d 162 (2021); the process is still governed by various statutes with their attendant timelines and potential penalty.[4] Here, the defendant filed a valid offer of compromise in accordance with § 52-193 and Practice Book § 17-11. However, the plaintiff did not satisfy the requirements for acceptance detailed in General Statutes § 52-194 and Practice Book § 17-12 before the defendant filed a withdrawal of its offer. Because the plaintiff failed to file a written acceptance of the offer of compromise as is required by statute, and because there was no issue raised on appeal regarding the court's determination that the objection to the withdrawal of the offer of compromise was moot, our consideration of the issues is not governed by the statutory framework that controls an offer of compromise. Rather, we consider only whether the court properly granted the plaintiff's motion to enforce a settlement agreement.

Whether an enforceable settlement agreement has been reached is a matter of law over which we exercise plenary review. Here, "[t]he issue on appeal is whether the communications between the parties constituted an enforceable settlement agreement. . . . Because the [defendant challenges] the trial court's legal conclusion that the [settlement] agreement was summarily enforceable, we must determine whether that conclusion is legally and logically correct and whether [it finds] support in the facts set out in the memorandum of

[4] A defendant is permitted to file an "offer of compromise" with the court for a "sum certain"; General Statutes § 52-193; after which the plaintiff will have sixty days to file a written acceptance of the offer. General Statutes § 52-194. If a plaintiff fails to file the written acceptance prior to the sixty day deadline, then "the offer shall be deemed to be withdrawn and shall not be given in evidence." General Statutes § 52-195 (a). Section 52-195 (b) imposes a penalty on a plaintiff who fails to accept the offer of compromise but ultimately recovers an amount equal or less than the initial offer. These statutory provisions are echoed in Practice Book §§ 17-11 through 17-13.

decision. . . . In addition, to the extent that the [defendant's] claim implicates the court's factual findings, our review is limited to deciding whether such findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Wittman* v. *Intense Movers, Inc.*, 202 Conn. App. 87, 98, 245 A.3d 479, cert. denied, 336 Conn. 918, 245 A.3d 803 (2021).

"Whether a meeting of the minds has occurred is a factual determination." *M.J. Daley & Sons, Inc.* v. *West Haven*, 66 Conn. App. 41, 48, 783 A.2d 1138, cert. denied, 258 Conn. 944, 786 A.2d 430 (2001). To resolve this issue, we apply the clearly erroneous standard of review.

"A settlement agreement is a contract among the parties. . . . In order to form a binding and enforceable contract, there must exist an offer and an acceptance based on a mutual understanding by the parties. . . . The mutual understanding must manifest itself by a mutual assent between the parties. . . . In other words, [i]n order for an enforceable contract to exist, the court must find that the parties' minds had truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make. . . . Meeting of the minds is defined as mutual agreement and assent of two parties to contract to substance and terms. It is an agreement reached by the parties to a contract and expressed therein, or as the equivalent

of mutual assent or mutual obligation. . . . This definition refers to fundamental misunderstandings between the parties as to what are the essential elements or subjects of the contract." (Citations omitted; internal quotation marks omitted.) *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 824–25, 277 A.3d 200 (2022).

The requirement that the parties have a "meeting of the minds" is "consistent with the objective theory of contracts, that [t]he making of a contract does not depend upon the secret intention of a party but upon the intention manifested by his words or acts, and on these the other party has a right to proceed." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 267–68, 152 A.3d 470 (2016). Therefore, the proper inquiry is "whether a reasonable person in the defendant's position" would have relied on the plaintiff's words and actions to proceed on the belief that possession of the equipment was an outstanding term of a settlement agreement that had not yet been finalized. Id., 268.

A careful review of the record reveals that the parties engaged in extensive, ongoing, out-of-court settlement negotiations in their attempt to reach a finalized settlement agreement. Both parties acknowledge that these negotiations took place in oral and written form. There are two documented offers made by the plaintiff to the defendant that involved possession of the equipment, both of which were communicated through email.[5] The first of these, on May 9, 2022, proposed that the defendant pay $30,000 and allow the plaintiff to keep the

[5] The record indicates that verbal communications and discussions also took place regarding possession of the HVAC units. The defendant stated that the parties "discussed verbally the return of the units on a number of occasions and [that the defendant] had . . . conveyed . . . [the] desire to have the units returned, if [they] were to reach a settlement." The plaintiff stated that these discussions took place when settlement amounts were "double" the monetary amount ultimately agreed upon.

units. The second proposal was communicated on July 29, 2022, suggesting settlement for $25,000 and allowing the defendant to "leave or take the units . . . . Let me know . . . ." On August 17, 2022, the defendant filed the offer of compromise with the court, then the same day communicated that fact to the plaintiff by email. The plaintiff countered that he wanted the defendant to "double" the offer, which was a continuation of the out-of-court settlement negotiations. After several additional email exchanges, the plaintiff stated: "I will take the [$11,000] and move on. Put it together and I will file the withdrawal of action." The defendant's counsel acknowledged the email, stated that she "will get working on this," and one week later communicated that she would "get a draft settlement agreement to you for comment this week." Minutes after the defendant's counsel sent that email, the plaintiff replied stating that he "junked the equipment."

In its memorandum of decision, the court stated that "the defendant did not condition its offer to settle the dispute for $11,000 upon the return of the equipment." However, when viewing the totality of the evidence before the court, it is clear that the parties were engaged in ongoing negotiations regarding the terms of the settlement agreement, and both parties anticipated but never finalized that agreement. Specifically, the plaintiff created an outstanding offer that held open the term of possession of the HVAC units until further direction was given by the defendant by stating that "[t]hey can leave or take the units . . . . Let me know . . . ." There is nothing in the record to indicate that the plaintiff revoked this offer prior to unilaterally disposing of the units and notifying the defendant of his action thirty days after agreeing to hold open that term. Further, it is clear that both parties anticipated memorializing the agreement in some type of writing,[6] but the plaintiff

[6] The record indicates that, when agreeing to accept the defendant's $11,000 offer, the plaintiff asked the defendant's counsel to "[p]ut it together

disposed of the units prior to the agreement being drafted.

In sum, the parties did not reach a binding and enforceable contract because, on the basis of the record before us, the terms of the agreement had not yet been finalized. The agreement was still in the process of being drafted and had not yet been completed, memorialized, or signed by either party. As a result of the plaintiff's creation of an outstanding offer regarding the possession of the HVAC equipment, and the lack of evidence resolving that offer, the parties did not reach a meeting of the minds. The court's finding that a summarily enforceable agreement had been reached was clearly erroneous.

II

The defendant next claims that the court abused its discretion in declining to enforce a forum selection clause after it determined that the defendant's motion to dismiss based on a lack of personal jurisdiction was both untimely and that the defendant had waived its ability to contest personal jurisdiction. The defendant does not challenge the court's rulings concerning timeliness or waiver. Rather, for the first time on appeal, it argues that the court should have conducted an analysis to determine whether the forum selection clause contained in the parties' contract was reasonable and gave effect to the parties' expectations prior to denying the motion.

"It is well established that an appellate court is under no obligation to consider a claim that is not distinctly

. . . ." The defendant's counsel stated she would "get working on this and [would] be back in touch soon," then later stated she would "get a draft settlement agreement to you for comment this week." Taken together, these email exchanges indicate that both parties anticipated a writing to memorialize a settlement agreement.

raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Emphasis in original; internal quotation marks omitted.) *Downing* v. *Dragone*, 216 Conn. App. 306, 327, 285 A.3d 59 (2022), cert. denied, 346 Conn. 903, 287 A.3d 601 (2023).

The record reflects that the defendant's motion to dismiss was premised on its assertion that the court lacked subject matter jurisdiction due to the forum selection clause in the contract between the parties. In its order denying the motion to dismiss, the court stated that the "forum selection clause in the parties' agreement does not, as the defendant suggests, implicate the court's subject matter jurisdiction, but rather lack of personal jurisdiction." The court then addressed the defendant's jurisdictional argument, ultimately denying the motion because the defendant "waived . . . personal jurisdiction by filing its request to revise . . . and because the motion is untimely."

Because the defendant failed to preserve its claim on appeal before the trial court, we decline to review it.

The judgment is reversed only with respect to the granting of the motion to enforce the settlement agreement and the case is remanded for further proceedings in accordance with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

FOUNTAIN OF YOUTH CHURCH, INC. *v.* FRANKLIN L. FOUNTAIN ET AL.
(AC 46249)

Clark, Seeley and Palmer, Js.

Syllabus

The plaintiff church appealed to this court from the judgment of the trial court granting the motion by the defendants, F and F Co., to dismiss its action alleging fraud, constructive trust, conversion, and statutory theft. In its operative complaint, the church alleged that it owned certain real property and that F had been named pastor of the church. More than one year after his appointment, F advised the church's board of directors at a board meeting that the church owed taxes and that the church should change its legal name and business structure in order to avoid that tax obligation. The church alleged that, unbeknownst to it and its board, F had incorporated F Co. prior to the board meeting, that F knew that the church, which was a tax-exempt entity, did not in fact owe any taxes despite his representations to the contrary, that F, in his purported role as president of the church, had filed documents dissolving the church as a corporation without receiving authorization from the church's board and that, without the knowledge of the church or its board, F signed and filed documents purporting to transfer the church's properties to F Co. and removed money from the church's bank accounts. The defendants filed a motion to dismiss the church's complaint, arguing, inter alia, that D and J, the persons who purported to have commenced the present action in the name of church, were not authorized to initiate litigation on behalf of the church and, therefore, the church lacked standing to bring the present action and the court consequently lacked subject matter jurisdiction. In support of their motion to dismiss, the defendants filed, inter alia, an affidavit of F and deposition testimony of D and J. The church filed an objection to the defendants' motion to dismiss, arguing, inter alia, that, contrary to the defendants' contentions, the church was not properly dissolved by a duly authorized action of its board of directors and that, because the church had not been properly dissolved, the defendants could not rely upon their improper actions to deprive the church of its ability to pursue its claims that stemmed from those very actions. The church further argued that J, who the church claimed was the vice president of the church prior to the church's dissolution, and D, who the church claimed was a member of the church's deacon board, were authorized to bring the present action in the church's name because they more fairly and accurately represented the interests of the church. At the hearing on the defendants' motion to dismiss, the court's principal concern was that, even if the court were to assume that the dissolution of the church was improper, there were no indicia

of authorization for D or J to bring the action in the name of the church. The court subsequently granted the defendants' motion to dismiss and overruled the church's objection to the motion. In the court's written order that followed, the court explained that there was no written authorization for the church to initiate the present action, nor was the action brought by any member of the religious congregation in a derivative capacity. Accordingly, the court concluded that it lacked subject matter jurisdiction over the matter and dismissed the action. The church subsequently filed a motion for reargument and reconsideration in which it argued, inter alia, that the court's ruling ignored that F's wrongful actions were the reason that no written authorization existed and that the defendants should not be permitted to benefit from those wrongful actions. One day after filing its motion for reargument and reconsideration, the church filed a supplement to its motion, which included a document dated May 4, 2019, purporting to be a resolution authorizing the present action against the defendants. The defendants objected and argued that the church's filings called into question the credibility of the claims asserted in both the church's motion for reargument and reconsideration and the supplemental filing in support of that motion. The defendants noted that the church had conceded in its motion for reargument and reconsideration that there had been no authorization because F's actions purportedly made that impossible but in its supplemental filing had purported to submit a written resolution from May 4, 2019, authorizing the present action. The defendants further noted that J had testified during a deposition in October, 2019, that the church's board never voted to commence a lawsuit against the defendants or to authorize any person to act on the church's behalf against the defendants. At the hearing on the motion for reargument and reconsideration, the court expressed concerns with the purported May 4, 2019 resolution and concluded that the purported authorization was not credible and, accordingly, denied the church's motion for reconsideration. *Held* that the church could not prevail on its claim that the trial court improperly dismissed its action against the defendants for lack of standing: the defendants' motion to dismiss and the affidavits and evidence in support of it conclusively established that the church lacked the authority to sue the defendants, as F averred that the church's board never authorized any individual to bring the present lawsuit, D testified in his deposition that he did not attend any meeting about bringing the present action, and J testified in his deposition that he did not conduct any board meetings after the church was purportedly dissolved, that he was not aware of any votes or minutes by the board that were taken in relation to the church after the purported dissolution, and that the board never took any vote in relation to instituting the present lawsuit; moreover, the church's opposition to the motion to dismiss failed to overcome the defendants' evidence establishing that no person was authorized to bring the present action in the name of the church, as the affidavits and

documents attached to the church's objection to the motion to dismiss, which aimed to show that F improperly dissolved the church and subsequently transferred property to F Co., did not demonstrate that the church was authorized to commence the present action against the defendants and, even if this court were to assume arguendo that the church was improperly dissolved by F, the church's objection to the motion to dismiss and the evidence submitted in support of that objection failed to demonstrate that any individual, including J or D, had the authority to maintain the present action in the church's name, either as a result of internal church proceedings or by law; furthermore, although the church contended on appeal to this court that the May 4, 2019 document that it submitted was evidence that the church was authorized to bring the present action against the defendants, the trial court properly concluded that the document had significant shortcomings and therefore was entitled to no weight, as the May 4, 2019 document did not specifically authorize the present lawsuit, the church failed to explain why an unquantified number of members of the church, as opposed to a majority of a quorum of the board of directors of the church, were legally empowered to authorize the church to commence a lawsuit, the document stated that the meeting was presided over by J and D but recorded no roll call, no number of members present, no identity of a movant pressing a motion, and no identity of a second to the motion, the document purported to be from a meeting that took place months after the commencement of the present litigation with no indication that any purported business conducted that day was to apply retroactively, and J testified at a deposition in October, 2019, many months after the purported May 4, 2019 members meeting took place, that no vote to initiate the present action had been taken or recorded, which further called into question the veracity of the document submitted by the church; additionally, although the church argued in its appellate brief that a corporation acts through its officers, suggesting that J, in his purported role as vice president, or D, as a purported member of the deacon board, could authorize the church to commence the present action, the church failed to demonstrate that J or D was authorized to commence the present action in the name of the church and, in fact, most courts have held that a vice president does not have power to act on behalf of the corporation in highly important and unusual transactions in the absence of specific authorization in the bylaws or a resolution of the board of directors.

Argued January 11—officially released June 4, 2024

Procedural History

Action to recover damages for, inter alia, fraud, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Dale*

W. Radcliffe, judge trial referee, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Ryan P. Driscoll, for the appellant (plaintiff).

Eroll V. Skyers, for the appellees (defendants).

Opinion

CLARK, J. This appeal arises from an action commenced by Fountain of Youth Church, Inc. (Church), against the defendants, Franklin L. Fountain (Fountain) and Fountain of Youth Cathedral, Inc. (Cathedral), asserting claims of fraud, constructive trust, conversion, and statutory theft. The trial court granted the defendants' motion to dismiss, concluding that the Church lacked standing because it failed to demonstrate that it was acting pursuant to a valid authorization when it initiated the present action against the defendants. On appeal, the Church claims that the court improperly concluded that it was not authorized to initiate the present action. We disagree and affirm the judgment of the trial court.

The record reveals the following procedural history. On October 23, 2018, the Church commenced the present action against the defendants. In its operative complaint, the Church alleged that it is a Connecticut corporation and owns real property located at 314-316 Madison Avenue and 324 Madison Avenue in Bridgeport (properties). The complaint alleges that, in or about November, 2013, Fountain was named pastor of the Church. In January, 2015, the Church's board of directors held a meeting, at which time Fountain advised the board that the Church "owed taxes" and that the Church should change its legal name and business structure in order to avoid that tax obligation. The Church alleged that, unbeknownst to it and its board, Fountain had already incorporated another entity, the Cathedral,

on October 17, 2014. The Church further alleged that, upon information and belief, Fountain knew that the Church, which is a tax-exempt entity, did not in fact owe any taxes despite his representations to the contrary.

The complaint alleges that, on or about March 5, 2015, Fountain, in his purported role as president of the Church, filed documents with the Secretary of the State's office dissolving the Church as a corporation without receiving authorization from the Church's board to take steps to dissolve the Church. The Church further alleges that Fountain, without the knowledge of the Church or its board, then signed and filed documents purporting to transfer the Church's properties to the Cathedral and removed money from the Church's bank accounts. The Church alleges that this was done for Fountain's personal gain and/or for the gain of the Cathedral, all to the Church's detriment. It further alleges that the Cathedral knew Fountain had no authority to transfer the funds in question and that it willingly accepted them into its bank account and further assumed and exercised ownership rights over the Church's property.

On December 11, 2018, the Church filed a motion for a temporary injunction seeking to prohibit the defendants from disposing of the properties and the personal property at those locations, arguing, inter alia, that Fountain, on behalf of the Cathedral, had listed the properties for sale with Colonial Realty and that it appeared that tangible property had been or may be in the process of being moved out of the buildings located at the properties. The Church argued that there was probable cause that judgment would be rendered for the Church and that irreparable harm would result if the injunction was not entered. In support of the Church's motion, the Church provided an affidavit by Donald Fountain attesting to many of the facts alleged in its motion. In an order dated December 20, 2018, the court, *Bellis*, *J.*,

with agreement of the parties, ordered the defendants not to transfer, encumber, or dispose of its assets until further order of the court, except to the extent ordinary business expenses must be paid.

On February 13, 2020, the defendants filed a motion to dismiss the Church's complaint, arguing that the Church could not demonstrate that it was authorized to commence the present action and, therefore, lacked standing. Specifically, they argued that Donald Fountain and James Fountain, the persons who purport to have commenced the action in the name of Church, were not authorized to initiate litigation against Fountain or the Cathedral on behalf of the Church. The defendants argued that the Church's board voted unanimously to dissolve the Church as a religious corporation and, after it was dissolved, the Church ceased all activities as a religious corporation. The defendants further argued that the Church's name had been unjustly misappropriated and misused in a manner that falsely portrayed it as an aggrieved plaintiff against the defendants.

In support of their motion to dismiss, the defendants filed a memorandum of law and exhibits, which included an affidavit of Fountain and deposition testimony of Donald Fountain and James Fountain. Fountain averred that during his tenure as pastor of the Church, the Church had a board of directors that made decisions regarding the actions taken by the Church as a corporate body. He also averred that he was the chairman of the Church's board of directors and that the Church never authorized any individual to bring a lawsuit in the courts of Connecticut or in any other jurisdiction on behalf of the Church. He further averred that Donald Fountain and James Fountain did not have authorization to bring the present civil action against him or the Cathedral on behalf of the Church and that they never had the unilateral authority to represent, speak for, or act on behalf of the Church. Accordingly,

the defendants argued that the Church lacked standing to bring the present action and that the court consequently lacked subject matter jurisdiction.

On April 21, 2020, the Church filed an objection to the defendants' motion to dismiss. It argued that, contrary to the defendants' contentions, the Church was not properly dissolved by a duly authorized action of its board of directors. It argued that Fountain, using a board of directors handpicked by him, attempted to dissolve the Church but failed to follow the protocols required by law. The Church claimed in its objection that, despite failing to follow the procedure required by law, Fountain nevertheless advised the Secretary of the State in filings that the Church had been dissolved. The Church also claimed that Fountain had transferred some, but not all, of the Church's assets to the Cathedral, again without a proper board vote that was required under state law. In addition, the Church claimed that Fountain's purported dissolution of the Church caused chaos and confusion among the Church's members, leading many members to leave.

The Church further claimed in its objection that, because the Church was not properly dissolved, the defendants cannot rely upon their improper actions to deprive the Church of its ability to pursue its claims that stem from those very actions. The Church argued that James Fountain, who the Church claimed was the vice president of the Church prior to the Church's dissolution, and Donald Fountain, who the Church claimed was a member of the Church's deacon board, were authorized to bring the present action in the Church's name because they more fairly and accurately represented the interests of the Church. The Church's objection indicated that James Fountain is the younger brother of Fountain, and Donald Fountain is the uncle of Fountain. In support of the Church's objection, the

Church attached numerous exhibits, including deposition testimony of Donald Fountain, deposition testimony and an affidavit of Fountain, printouts from the Secretary of the State's website, a document purporting to be minutes of a meeting at which the board had purportedly dissolved the Church and authorized the transfer of its assets, and a document purporting to be the Church's constitution and bylaws.

On November 2, 2022, the court, *Hon. Dale W. Radcliffe*, judge trial referee, held a hearing on the defendants' motion to dismiss. The court's principal concern during the hearing was that there were no indicia of authorization for Donald Fountain or James Fountain to bring the action in the name of the Church, even if the court were to assume that the dissolution of the Church was improper. During a colloquy with the Church's counsel, the court noted that a corporation can only act through its authorized agents and asked the Church's counsel if there was "a written authorization allowing anyone to act on behalf of the [Church] and bring this action." The Church's counsel responded: "I would concede there is no specific written authorization saying that James or Donald Fountain can bring an action." Counsel argued, however, that James Fountain's position as vice president of the Church gave him the ability to institute the action in the Church's name. In response, the court asked counsel if "there [was] any statute that gives an individual as an officer, in this case [James] Fountain as the vice president, without authorization the ability to bring an action in the name of the Church or any provision of the Church bylaws that would allow someone who is an officer." Counsel for the Church stated: "Your Honor, I have to admit I don't have anything handy that would support that." The court stated: "Well, I'm just looking . . . for anything. . . . I'm just asking if there is a provision of the bylaws, is there a statute, or is there a resolution of the church council.

Anything of that nature that allows this particular suit." Counsel for the Church again responded: "Your Honor, I would say that I don't have any written authorization . . . in the form of a resolution that would authorize that."

At the conclusion of the hearing, the court granted the defendants' motion to dismiss and overruled the Church's objection to the motion. In the court's written order that followed, the court explained that there was no written authorization authorizing the Church to initiate the present action, nor was the action brought by any member of the religious congregation in a derivative capacity. Accordingly, the court concluded that it lacked subject matter jurisdiction over the matter and dismissed the action.

On November 14, 2022, the Church filed a motion for reargument and reconsideration in which it argued that James Fountain was authorized to act due to the void in leadership that had been caused by Fountain's alleged improper actions. The Church argued that the court's ruling "ignore[d] that [Fountain's] wrongful actions [were] the exact reason that no written authorization for the instant action exists" and that the defendant should not be permitted to benefit from those wrongful actions. The Church also argued in a conclusory manner that the court's decision ignored the fact that James Fountain specifically authorized the current civil action.

On November 15, 2022, one day after filing its motion for reargument and reconsideration, the Church filed a "supplement" to its motion, which included an exhibit purporting to be "a resolution and written document dated May 4, 2019, authorizing the instant action against the defendants . . . ." The supplemental filing stated that the document "should satisfy the court that there was written approval for the instant action and that it may have been overlooked previously."

On November 28, 2022, the defendants filed an objection to both the motion for reargument and reconsideration and to the supplemental filing in support of that motion. The defendants argued that the Church's filings called into question the credibility of the claims asserted in both the Church's motion for reargument and reconsideration and the supplemental filing in support of that motion. The defendants noted that the Church had conceded in its motion for reargument and reconsideration that there had been no authorization because Fountain's actions purportedly made that impossible and that a written resolution should not be a prerequisite to a civil action but, in its supplemental filing, had purported to submit a written resolution from May 4, 2019, authorizing the present action. The defendants further noted that, although "the written resolution purports to authorize the hiring of legal counsel [and] the placement of a lis pendens upon the subject properties and purports to record the result of a vote ousting its pastor [Fountain]," and the Church appeared to argue that this constituted authorization to commence the present action, James Fountain had previously testified during a deposition that the Church's board never voted to commence a lawsuit against the defendants or to authorize any person to act on the Church's behalf against the defendants. The defendants attached that deposition testimony to their objection.

The defendants further argued that the eleventh hour nature of the Church's supplemental filing alone cast suspicion on the authenticity of the underlying document purporting to authorize the Church to commence the action and that the document itself included many shortcomings. Specifically, the defendants argued that the document "records no roll call, no number of members present, no identity of a movant pressing a motion, and no identity of a second to the motion. The document fails to declare that any authority was granted to any

person to proceed with a lawsuit, fails to authorize the placing of a lis pendens, and fails to authorize any person to provide an affidavit in support of the pending litigation." The defendants also argued that, "most glaringly, the document is dated seven months after the commencement of the lawsuit with no mention of its retroactive effect . . . ." Accordingly, the defendants argued that the Church's motion for reargument and reconsideration should be denied.

On January 25, 2023, the court held a hearing on the motion for reargument and reconsideration. The Church's counsel argued that "there is the document dated May 4, 2019, in which the individual named there acted to authorize [a law firm] to act as their attorneys in connection with this matter." Counsel indicated that his argument was twofold: "[E]ither it is an authorized act . . . but if it's not, our argument is that equity dictates that there should be some individual from this entity that was, in our estimation, wrongly dissolved and improperly transferred assets from to act on its behalf to protect its interests."

The court expressed concerns with the May 4, 2019 document. The court observed that the document "says that minutes were recorded by acting secretary Sister Annie Moore, but there's no signature here by her. It says that a meeting was held, but it doesn't give the names of the individuals who attended. It says it was presided over by Deacon James Fountain and Deacon Donald Fountain. It doesn't indicate anyone else who attended. And essentially, it was dated May 4, 2019, which is after the return date on this particular matter. So, I don't know how an unsigned document, which doesn't identify the people present, isn't signed by the recording secretary, talks about motions, but doesn't give the name of the individual making the motion or seconding the motion, I don't know how that can be

even authenticated." The court concluded that the purported authorization was not credible. It accordingly denied the Church's motion for reconsideration. This appeal followed.

We begin our analysis by setting forth the applicable standard of review. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Manning* v. *Feltman*, 149 Conn. App. 224, 230, 91 A.3d 466 (2014). "In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014).

Our courts have acknowledged that "[t]rial courts addressing motions to dismiss for lack of subject matter jurisdiction . . . may encounter different situations, depending on the status of the record in the case." (Internal quotation marks omitted.) *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 274, 193 A.3d 520 (2018). "[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).

On appeal, the Church claims that the court erred in dismissing its action against the defendants for a lack of standing. Specifically, the Church claims that the court improperly concluded that there was no authorization for it to initiate the present action against the defendants. In the Church's view, the May 4, 2019 document that it submitted as evidence demonstrated authorization for the Church to bring the present action against the defendants. The Church also argues that, to the extent this court does not accept the May 4, 2019 document as evidence of authorization to act, the evidence nevertheless shows that the Church's remaining officers and director had the ability to authorize action on the Church's behalf because any inability to demonstrate authorization was caused by the chaos and confusion resulting from Fountain's wrongful conduct. The

Church maintains that the defendants should not be permitted to benefit from their improper actions to deprive the Church of its ability to pursue its claims that stem from those very improper actions. We are not persuaded.

"It is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction." *Unisys Corp.* v. *Dept. of Labor*, 220 Conn. 689, 693, 600 A.2d 1019 (1991). "Standing is the legal right to set judicial machinery in motion." (Internal quotation marks omitted.) *Nonhuman Rights Project, Inc.* v. *R.W. Commerford & Sons, Inc.*, 197 Conn. App. 353, 360, 231 A.3d 1171, cert. denied, 335 Conn. 929, 235 A.3d 525 (2020). "One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." (Internal quotation marks omitted.) *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 316, 138 A.3d 257 (2016). "When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009).

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept 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." (Internal quotation marks omitted.) *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 471, 239 A.3d 272 (2020).

In order to fulfill these goals, our Supreme Court has explained that 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." (Citation omitted; internal quotation marks omitted.) *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, 241 Conn. 546, 553, 698 A.2d 245 (1997); see also *Fischer* v. *People's United Bank, N.A.*, 216 Conn. App. 426, 440, 285 A.3d 421 (2022), cert. denied, 346 Conn. 904, 287 A.3d 136 (2023).

"To demonstrate authority to sue . . . 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." (Internal quotation marks omitted.) *Schaghticoke Tribal Nation* v. *Harrison*, 264 Conn. 829, 832–33, 826 A.2d 1102 (2003). "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." (Citation omitted; internal quotation marks omitted.) *Golden Hill Paugussett Tribe of Indians* v. *Southbury*, 231 Conn. 563, 572–73, 651 A.2d 1246 (1995).

In the present case, the defendants' motion to dismiss argued that the Church lacked standing because it could not demonstrate that it was authorized to commence the present action against the defendants. Specifically, the defendants argued that no individual, including Donald Fountain or James Fountain, had authorization from the Church's board of directors to bring the present action in the name of the Church. The defendants'

motion to dismiss therefore properly called into question the jurisdiction of the trial court. In the face of this challenge, the Church had the burden of convincing the court that it was authorized to initiate this action. See, e.g., *Community Collaborative of Bridgeport, Inc.* v. *Ganim*, supra, 241 Conn. 554 ("the party whose authority is challenged has the burden of convincing the court that the authority exists" (internal quotation marks omitted)). We conclude that it failed to satisfy that burden.

The defendants' motion to dismiss and the affidavits and evidence in support of it conclusively established that the Church lacked the authority to sue the defendants. In particular, Fountain averred that he was the chairman of the board of the Church, that the board never authorized any individual to bring the present lawsuit, and that Donald Fountain and James Fountain did not have the authority to bring the present action in the name of the Church. Additionally, the defendants submitted deposition testimony of Donald Fountain in which he testified that he did not attend any meeting about bringing the present action and that the defendants' counsel would have to talk to James Fountain about that. Donald Fountain testified that James Fountain, as vice president of the board, empowered him to sign an affidavit in support of the application for a temporary injunction but that he could not say whether a meeting of the board was held or that a resolution authorizing his conduct was made.

The defendants also submitted deposition testimony of James Fountain. James Fountain testified that he did not conduct any board meetings after the Church was purportedly dissolved and that he was not aware of any votes or minutes by the board that were taken in relation to the Church after the purported dissolution. He also testified that the board never took any vote in relation

to instituting the present lawsuit. He did testify, however, that a meeting of members of the Church was held on May 4, 2019.

The Church's opposition to the motion to dismiss failed to overcome the defendants' evidence establishing that no person was authorized to bring the present action in the name of the Church. Although the Church attached various affidavits and documents to its objection to the motion to dismiss, which aimed to show that Fountain improperly dissolved the Church and subsequently transferred property to the Cathedral, the affidavits and other documents did not demonstrate that the Church was authorized to commence the present action against the defendants. Indeed, even if this court assumes arguendo that the Church was improperly dissolved by Fountain (as the Church contends and the defendants dispute), the Church's objection to the motion to dismiss and the evidence submitted in support of that objection failed to demonstrate that any individual, including James Fountain or Donald Fountain, had the authority to maintain the present action in the Church's name. On the contrary, the Church's counsel conceded at argument on the motion to dismiss before the trial court that "there is no specific written authorization saying that James or Donald Fountain can bring an action." Counsel further conceded that there was no statute or bylaw that gave James Fountain, as the purported vice president of the board of directors, the authority to sue in the name of the Church.

Although the Church now contends on appeal that the May 4, 2019 document that it submitted (purporting to be minutes of a meeting of members of the Church) is evidence that the Church was authorized to bring the present action against the defendants, the court properly concluded that the document had significant shortcomings and therefore was entitled to no weight. Aside from the fact that the May 4, 2019 document

does not specifically authorize the present lawsuit, the Church also fails to explain why an unquantified number of members of the church, as opposed to a majority of a quorum of the board of directors of the Church, are legally empowered to authorize the Church to commence a lawsuit. Furthermore, as the trial court noted, the document states that the meeting was presided over by James Fountain and Donald Fountain but records no roll call, no number of members present, no identity of a movant pressing a motion, and no identity of a second to the motion. The document also purports to be from a meeting that took place months *after* the commencement of the present litigation with no indication that any purported business conducted that day was to apply retroactively. What is more, James Fountain testified at a deposition on October 17, 2019—many months after the purported May 4, 2019 members meeting took place—that no vote to initiate the present action had been taken or recorded. This further called into question the veracity of the document submitted by the Church.

The Church argues that, to the extent this court does not accept the May 4, 2019 document as evidence of authorization to act, this court should conclude that there is ample evidence that the Church's remaining officers and directors were authorized to commence the present action on its behalf to recoup the moneys and the property taken from it. The Church argues in its appellate brief that a corporation acts through its officers, suggesting that James Fountain, in his purported role as vice president, or Donald Fountain, as a purported member of the deacon board, could authorize the Church to commence the present action. While there is no dispute that a corporation, in general, acts through its officers and agents; see, e.g., *Maharishi School of Vedic Sciences, Inc. (Connecticut)* v. *Connecticut Constitution Associates Ltd. Partnership*, 260

Conn. 598, 606, 799 A.2d 1027 (2002); the Church failed to demonstrate that James Fountain or Donald Fountain was authorized to commence the present action in the name of the Church. Indeed, "[a] corporation's vice president is generally held to have no authority merely by virtue of the office to dispose of the corporation's property or to bind the corporation by notes or other contracts." 1 J. Cox & T. Hazen, Treatise on the Law of Corporations (3d Ed. 2023) § 8:8; see also *Hudson United Bank* v. *Cinnamon Ridge Corp.*, 81 Conn. App. 557, 573, 845 A.2d 417 (2004) ("[g]enerally, a corporate vice president does not have the inherent authority to bind the corporation to notes or to contracts"). Most courts agree that "a vice president does not have power to act on behalf of the corporation in highly important and unusual transactions in the absence of specific authorization in the bylaws or a resolution of the board of directors." 1 J. Cox & T. Hazen, supra, § 8:8.

In a final attempt to establish standing, the Church contends that this is a "novel scenario where the defendant improperly dissolves a corporation, improperly transfers moneys and property in connection with the improper dissolution and then attempts to utilize that improper dissolution against the plaintiff to argue that because it was, in effect, dissolved by the defendants' wrongful actions it no longer has the standing. Common sense, equity and justice dictate that this cannot be the case."

Although we acknowledge that the Church alleges that there was some confusion following the dissolution (or purported dissolution) of the Church, general pronouncements that the Church has standing or that Donald Fountain and James Fountain had the legal authority to cause the Church to commence suit, without any evidence in support of those pronouncements, are insufficient to establish that the Church was authorized to initiate the present lawsuit. Because the Church

failed to satisfy its burden of convincing the court that it was authorized to commence this action, we conclude that the trial court properly granted the defendants' motion to dismiss for lack of standing.

The judgment is affirmed.

In this opinion the other judges concurred.