EUGENIO PIRRI *v.* CHEN CHUNG CHOW ET AL.
(AC 46974)

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

Syllabus

The defendant appealed from the trial court's judgment rendered in favor of the substitute plaintiff, the executor of the plaintiff's estate, on her claim of adverse possession with respect to a portion of the defendant's property. The defendant claimed that the trial court clearly erred in finding that the plaintiff had adversely possessed the disputed area under a claim of right. *Held*:

Although the trial court's finding that the plaintiff had installed a new fence at the edge of the disputed area shortly after 1985 was clearly erroneous, the error was harmless because the court made only a single reference in its opinion to the fence being erected in 1985, it in no way suggested that such fact was central to its analysis or impacted its findings as to other facts, and the other evidence in the record demonstrated that the plaintiff used the disputed area as his own without permission from the record owner continuously from 1985 to 2018.

The trial court's finding that the plaintiff possessed the disputed area under a claim of right was not clearly erroneous because the evidence was suffi-

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

cient to support the finding, and it was not the role of this court to second-guess the trial court's credibility determinations or to reweigh conflicting evidence.

Argued January 9—officially released March 25, 2025

Procedural History

Action seeking to quiet title to certain real property, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant American Mortgage Corporation, as trustee, was defaulted for failure to appear; thereafter, Mong Chin Liu was substituted as the party defendant; subsequently, Rosaria Pirri, executor of the estate of the plaintiff, was substituted as the party plaintiff; thereafter, the substitute defendant filed a counterclaim; subsequently, the case was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment for the substitute plaintiff, from which the substitute defendant appealed to this court. *Affirmed.*

Thomas M. Cassone, for the appellant (substitute defendant).

Catherine R. Keenan, with whom, on the brief, was *Philip Russell*, for the appellee (substitute plaintiff).

Opinion

CRADLE, J. The substitute defendant, Mong Chin Liu, appeals from the judgment of the trial court rendered in favor of the substitute plaintiff, Rosaria Pirri, executor of the estate of the plaintiff, Eugenio Pirri, on her claim of adverse possession with respect to a portion of the substitute defendant's property (disputed area).[1]

[1] In the original complaint, the plaintiff named Chen Chung Chow and American Mortgage Corporation, as trustee, as defendants. At that time, Chow was the record owner of the disputed area. Thereafter, Chow quitclaimed his interest in the real property to his wife, the substitute defendant, and the court granted the plaintiff's motion to substitute her as the party defendant. On October 22, 2020, American Mortgage Corporation, as trustee, was defaulted for failure to appear, and it has not participated in this appeal. Accordingly, in this opinion, we refer to Chow alone as the defendant.

On appeal, the substitute defendant claims that the trial court clearly erred in finding that the plaintiff adversely possessed the disputed area under a claim of right. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. In January, 1985, the plaintiff purchased the real property located at 31 Edgewood Avenue in Greenwich, which he owned until his death in April, 2022.[2] In December, 2018, Chen Chung Chow (defendant) purchased the real property located at 52 Oak Ridge Street in Greenwich, which abuts the rear yard area of the plaintiff's property, from the estate of Netta F. Evans.[3] Although the properties are adjacent, there is a "marked topographical change between the Oak Ridge Street lot and the Edgewood Avenue lot." Specifically, 31 Edgewood Avenue sits atop a steep cliff, making it approximately forty feet higher in elevation than 52 Oak Ridge Street. The disputed area is a 1715 square foot, level tract of land that is part of the rear portion of the 52 Oak Ridge Street property but is "located at the top of [the] cliff" and, therefore, is topographically level with the 31 Edgewood Avenue property. Because of its elevation, "[t]he disputed area is effectively landlocked from the remainder of the 52 Oak Ridge Street lot," in that "the only reasonable access to the disputed area is either through the [plaintiff's] property . . . or that of his immediate Edgewood Avenue neighbor . . . ."

After the plaintiff purchased 31 Edgewood Avenue, he began using the property as the headquarters and storage facility for his landscaping business.[4] "Shortly

[2] The plaintiff and his wife, the substitute plaintiff, jointly purchased 31 Edgewood Avenue on January 18, 1985. On February 11, 2000, the substitute plaintiff quitclaimed her interest in the property to the plaintiff.

[3] It is undisputed that Netta F. Evans owned 52 Oak Ridge Street prior to the plaintiff's purchase of 31 Edgewood Avenue in 1985 and until her death in September, 2017.

[4] The plaintiff never lived in the residential home on the property, which he used as "a multifamily rental house," but "[t]he shed, garage and extensions

after his 1985 purchase, [the plaintiff] installed . . . asphalt in the disputed area . . . utilizing his own labor. Later . . . asphalt was installed professionally by another contractor." "The [plaintiff and the substitute plaintiff] at their own cost and expense installed a new iron type chain-link fence at the cliff edge of the disputed area shortly after 1985." They later installed a new fence in the same area in 2019. Between January, 1985, and the plaintiff's retirement from landscaping in 2018, the plaintiff used the disputed area "consistently as a construction facility for [the plaintiff's] landscaping business" and to store various landscaping equipment and supplies.[5] The plaintiff and his employees parked their vehicles in the disputed area "every business day . . . ." Additionally, "[f]or a . . . portion of those thirty-three years, the disputed area was jointly used by [the plaintiff's son] Eugenio Pirri, Jr. [(Pirri)]," for his own landscaping business. The disputed area provided the only vehicle access to the rear lot of the adjacent property, 27 Edgewood Avenue, which Pirri leased and used for his landscaping business. "[Pirri] and his employees, as well as suppliers, used that access multiple times every day."

On July 10, 2019, the plaintiff commenced the underlying action against the defendant, alleging adverse possession of the disputed area and seeking a judgment quieting title thereto in his favor. The defendant asserted

thereof located at the rear of 31 Edgewood Avenue directly on the property line . . . were used by [the plaintiff] for his landscaping business."

[5] Specifically, "the following items were located within the disputed area: fence posts, wheel barrows, lawn mowers, scaffolding to hold various items of equipment, scrap wood, a snow blower, a leaf vacuum machine (giraffe), small construction material, a plow, a leaf blower, grass seed, Belgian blocks, a leaf vacuum, construction hardware, bricks, a skid skier machine with a large exhaust system, multiple snow plows, construction material, equipment to attach the snow plows to vehicles, worker's vehicles, a mixer, road salt, a pile of sand, a ladder, landscaping supplies, a bobcat vehicle, covers and tarps for equipment, and salted winter sand."

as a special defense to the claim of adverse possession that any use of his property alleged by the plaintiff was "permissive in nature."[6] The defendant subsequently quitclaimed title to 52 Oak Ridge Street to the substitute defendant. On September 3, 2021, the plaintiff filed a motion to substitute her as the party defendant, and, on September 20, 2021, the court, *Krumeich, J.*, ordered that she be substituted as the party defendant without objection. The case was tried remotely before the court, *Hon. Kevin Tierney*, judge trial referee, over six days, commencing on November 17, 2021, and concluding on January 6, 2023.[7] Prior to the conclusion of trial, on April 3, 2022, the plaintiff died.[8] On October 20, 2022, the court ordered that the substitute plaintiff, in her capacity as executor of the plaintiff's estate, be substituted as a party plaintiff without objection.[9]

Thereafter, the court rendered judgment quieting title to the disputed area in favor of the substitute plaintiff. In its September 20, 2023 memorandum of decision, the

[6] The defendant also asserted as a second special defense that "[t]he plaintiff comes to court with unclean hands" insofar as he had been using the disputed area for "an illegal commercial purpose . . . ." This second special defense was withdrawn prior to trial.

[7] We note that the court stated in its memorandum of decision that "[t]he trial was delayed due to periodic inaccessibility to the remote court machinery, COVID[-19], and the death of [the plaintiff]."

[8] The plaintiff had testified as a witness on his own behalf but died prior to the conclusion of his cross-examination by the substitute defendant's attorney. "Both [substitute] parties stipulated on the record [however] that [the] court [could] consider the [plaintiff's] direct and partial cross-examination testimony and all exhibits offered during [the plaintiff's] trial examination."

[9] The substitute pleadings filed by the parties were substantively the same as the original pleadings. Specifically, the substitute plaintiff filed a substitute complaint alleging adverse possession of the disputed area and seeking the same relief as the plaintiff's original complaint. The substitute defendant subsequently filed an answer denying that allegation and asserted the same special defense of permissive use as the defendant. In addition, the substitute defendant for the first time counterclaimed and sought a judgment quieting title to the disputed area in her favor.

court made the following factual findings. "When the [plaintiff and the substitute plaintiff] first purchased 31 Edgewood Avenue in January, 1985, they believed that the disputed area was a portion of their property . . . . It was not until fifteen years [had] passed that [the substitute plaintiff] found out that the disputed area" was not part of 31 Edgewood Avenue. "There was no evidence of any interruption of [the plaintiff's] uses of the disputed area from January, 1985, to his 2018 retirement." "[The plaintiff] never asked anyone for permission to use the disputed area for his landscaping business and the improvements he made in the disputed area. . . . There is no evidence that [the defendant, the substitute defendant, or Netta F. Evans, their predecessor in title] ever expended any funds or made any improvements to or on the disputed area . . . . All the evidence indicates that the only persons who expended any funds or labor to make improvements in the disputed area were [the plaintiff and the substitute plaintiff].

* * *

"There is no evidence that any of the three owners of 52 Oak Ridge Street ever entered . . . the disputed area or 31 Edgewood Avenue or ever asked any members of the [plaintiff's] family to use all or a part of the disputed area." (Citations omitted.) Accordingly, the court found that "[the plaintiff] obtained title to the disputed area by adverse possession in January, 2000."

The court further rejected the substitute defendant's special defense of permissive use, stating: "There is no direct evidence of permission . . . by the prior title owner of 52 Oak Ridge Street . . . Evans. Neither the successor owner, [the defendant], nor the current title owner, [the substitute defendant], ever executed any documents that granted [the plaintiff] the personal right, license, right-of-way or easement to use all or part of

the disputed area. There is no direct evidence of any oral statements made by any of those three individuals regarding permission extended to [the plaintiff] to any portion of the disputed area. The evidence is silent as to the issue of permission." This appeal followed.

As a preliminary matter, we set forth the legal principles relevant to the substitute defendant's appeal. "[T]o establish title by adverse possession, the claimant must oust an owner of possession and keep such owner out without interruption for fifteen years by an open, visible and exclusive possession under a claim of right with the intent to use the property as his own and without the consent of the owner.[10] . . . A finding of adverse possession is to be made out by clear and positive proof. . . . The burden of proof is on the party claiming adverse possession." (Footnote added; internal quotation marks omitted.) *Caminis* v. *Troy*, 300 Conn. 297, 311, 12 A.3d 984 (2011). "[C]lear and convincing proof denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, 302 Conn. 562, 576, 31 A.3d 1 (2011).

"[A] claim of right does not necessarily mean that the adverse possessor claims that [he or she] is the proper titleholder, but that [he or she] has the intent to disregard the true owner's right to possession." (Internal

[10] On appeal, the substitute defendant does not contest that the plaintiff continuously possessed the disputed area for the required fifteen years, nor does she challenge the court's findings with respect to the open, visible, and exclusive elements of adverse possession.

quotation marks omitted.) *Eberhardt* v. *Imperial Construction Services, LLC*, 101 Conn. App. 762, 768, 923 A.2d 785, cert. denied, 284 Conn. 904, 931 A.2d 263 (2007). In other words, a claim of right requires that the party seeking title through adverse possession must "[manifest] her unequivocal intent to use the property as her own and without the consent of the owner." (Internal quotation marks omitted.) Id., 769. "An adverse possessor may interrupt his or her continuous possession by acting in a way that acknowledges the superiority of the real owner's title. . . . [T]he possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other. . . . Occupation must not only be hostile[11] in its inception, but it must continue hostile, and at all times during the required period of fifteen years challenge the right of the true owner . . . ." (Citation omitted; footnote added; internal quotation marks omitted.) *Allen* v. *Johnson*, 79 Conn. App. 740, 746, 831 A.2d 282, cert. denied, 266 Conn. 929, 837 A.2d 802 (2003).

In determining whether a claimant has satisfied the elements of adverse possession, "[t]he inquiry is necessarily fact specific and context dependent. In evaluating such claims, [t]he location and condition of the land [at issue] must be taken into consideration and the alleged acts of ownership must be understood as directed to those circumstances and conditions. . . . Additionally, in assessing whether hostility exists, the relation that the [alleged] adverse possessor occupies with reference to the owner is important." (Internal quotation

[11] "The word hostile, as employed in the law of adverse possession, is a term of art; it does not, despite some troublesome early cases, imply animosity, ill will or bad faith. Nor is the claimant required to make express declarations of adverse intent during the possessory period. . . . Hostile possession can be understood as possession that is opposed and antagonistic to all other claims, and that conveys the clear message that the possessor intends to possess the land as his or her own." (Citation omitted; internal quotation marks omitted.) *Mulle* v. *McCauley*, 102 Conn. App. 803, 814, 927 A.2d 921, cert. denied, 284 Conn. 907, 931 A.2d 265 (2007).

marks omitted.) *Dowling* v. *Heirs of Bond*, 345 Conn. 119, 143–44, 282 A.3d 1201 (2022). "[When] there is no proof of an express permission from the [record owner of the property], on the one hand, or of an express claim of right by the person or persons using the [property], on the other, the character of the [use], whether adverse or permissive, can be determined as an inference from the circumstances of the parties and the nature of the [use]. . . . A trier has a wide latitude in drawing an inference that a [use] was under a claim of right." (Citation omitted; internal quotation marks omitted.) *Slack* v. *Greene*, 294 Conn. 418, 428, 984 A.2d 734 (2009).

Although evidence indicating a lack of permission is relevant to whether a claimant has established use under a claim of right, it is not incumbent on the claimant to prove a lack of permission. See *Lisiewski* v. *Seidel*, 72 Conn. App. 861, 873, 806 A.2d 1121, cert. denied, 262 Conn. 921, 812 A.2d 865 (2002), and cert. denied, 262 Conn. 922, 812 A.2d 865 (2002). "Such a rule would often charge a party with proving a negative." Id. Rather, "[w]hen the defendant raises permission by way of a special or affirmative defense, the burden of proof rests on the defendant . . . who must prove the special defense by a fair preponderance of the evidence." (Internal quotation marks omitted.) *Slack* v. *Greene*, supra, 294 Conn. 435.

Despite the substitute plaintiff's burden to prove her claim of adverse possession by clear and convincing evidence, "our scope of review is limited. . . . Because adverse possession is a question of fact for the trier . . . the court's findings as to this claim are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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 . . . .'' (Citation omitted; internal quotation marks omitted.) *Mulle* v. *McCauley*, 102 Conn. App. 803, 809, 927 A.2d 921, cert. denied, 284 Conn. 907, 931 A.2d 265 (2007). ''It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review.'' (Internal quotation marks omitted.) *Kiniry* v. *Kiniry*, 299 Conn. 308, 329, 9 A.3d 708 (2010). ''In applying the clearly erroneous standard of review, [a]ppellate courts do not examine the record to determine whether the trier of fact could have reached a different conclusion. Instead, we examine the trial court's conclusion in order to determine whether it was legally correct and factually supported. . . . This distinction accords with our duty as an appellate tribunal to review, and not to retry, the proceedings of the trial court.'' (Internal quotation marks omitted.) *O'Connor* v. *Larocque*, supra, 302 Conn. 575. ''A trial court's findings in an adverse possession case, if supported by sufficient evidence, are binding on a reviewing court . . . .'' (Internal quotation marks omitted.) *Mulle* v. *McCauley*, supra, 809.

Here, the substitute defendant raises several challenges to the court's finding that the plaintiff's possession was under a claim of right. We address each in turn.

I

The substitute defendant first claims that the court clearly erred in finding that ''[t]he [plaintiff and the substitute plaintiff], at their own cost and expense, installed a new iron type chain-link fence at the cliff edge of the disputed area shortly after 1985.'' The substitute plaintiff concedes, and we agree, that there is no

evidence in the record to support this finding.[12] Accordingly, we conclude that the court's finding with respect to the erection of a fence shortly after 1985 was clearly erroneous.[13]

This conclusion with respect to the court's finding, however, does not end our inquiry, as we must examine the court's clearly erroneous finding to determine whether it was harmless. "[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Osborn* v. *Waterbury*, 197 Conn. App. 476, 485, 232 A.3d 134 (2020), cert. denied, 336 Conn. 903, 242 A.3d 1010 (2021). The harmless error standard in a

[12] We note that the substitute plaintiff argues that the erroneous finding was "merely a scrivener's error and the trial court was referring to the 2019 fence." Her argument, although plausible, is unduly speculative. We are not convinced that the record before us is sufficient to support such a conclusion.

[13] The court found, and the record supports, that "[a] fallen down iron fence had existed at the top of the cliff since [the plaintiff and the substitute plaintiff] purchased the property on January 18, 1985." The court also found, and the record supports, that they installed a new fence along the edge of the cliff in 2019.

Our thorough review of the record, however, has disclosed no evidence indicating that the plaintiff and the substitute plaintiff had installed a new fence in the disputed area at any time prior to 2019. Rather, the substitute plaintiff testified: "[B]efore 1985, when we bought the house, there was a chain-link fence that was not up. It was down on the ground, so it was down there for so many years just like that . . . so it wasn't replaced. It wasn't repaired, but that chain-link fence was down there." She then confirmed that "[t]here was no chain-link fence installed upright [along the edge of the cliff] between 1985 and 2019." This testimony was corroborated by Roy Cary, a licensed land surveyor, who testified that, when he visited 31 Edgewood Avenue in 2017, there was no fence along the majority of the cliff edge apart from a small section of chain-link fence, and when he returned to the property in 2019, a new wire fence had been installed along the cliff edge.

civil case requires us to determine whether the court's clearly erroneous factual finding would likely affect the result of the trial. See, e.g., *JPMorgan Chase Bank, National Assn.* v. *Lakner*, 347 Conn. 476, 496, 298 A.3d 249 (2023).

The substitute defendant argues that the erroneous finding was harmful because it constituted "the only act attributed by the trial court to the plaintiff that, if true, could have demonstrated" possession under a claim of right. We are not persuaded. Between January, 1985, and 2018, the plaintiff, along with his family and employees, consistently used the disputed area to store equipment and supplies, for parking, to traverse the property, and as a construction facility for his landscaping business. The evidence reflects that the plaintiff and Pirri exclusively maintained the disputed area, which included clearing snow during the winter and removing leaves during the fall. The plaintiff also installed asphalt within the disputed area on two separate occasions. The court found, and the record supports, that the plaintiff never asked for or received permission to use, maintain, or improve the disputed area from any owner of 52 Oak Ridge Street.[14] The substitute defendant does not challenge the court's findings regarding the plaintiff's consistent use and maintenance of the disputed area. Additionally, she has not claimed that she or any other owner of 52 Oak Ridge Street ever tried to interfere with his use, nor has she or any other owner attempted to use, maintain, or access the disputed area themselves. Thus, although the plaintiff did not erect a fence within the disputed area shortly after 1985, the evidence demonstrates that the plaintiff used the disputed area as his

[14] Although we note that the substitute defendant argues that other evidence in the record reflects that the plaintiff in fact had permission from the record owner to use the disputed area, we reiterate that the record sufficiently supports the court's finding that the plaintiff's use was without permission.

own, without permission from the record owner, continuously from 1985 to 2018. Accordingly, we conclude that the court's erroneous finding with respect to the plaintiff's erection of a fence was harmless.

The substitute defendant further claims, however, that the court's clearly erroneous finding "tainted its interpretation of the remaining evidence" in that "there can be no reasonable doubt that the trial court's erroneous finding concerning the fence strongly influenced its determination to ignore" other evidence favorable to the substitute defendant. We conclude that her claim is without merit. The substitute defendant fails to point to any specific portions of the record that support her claim,[15] and our thorough review of the record has not disclosed any. In fact, the court made a single reference in its opinion to the fence being erected in 1985 and in no way suggested that that fact was central to its analysis or impacted its findings as to other facts. Consequently, our review of the record convinces us that the court did not place significant emphasis on its finding regarding the construction of the fence. Rather, the court's findings as to the plaintiff's consistent and extensive actual use of the property without the permission of the substitute defendant or her predecessors in interest fully support the court's conclusion, regardless of whether the plaintiff constructed a fence in 1985 shortly after he acquired 31 Edgewood Avenue.

II

Next, the substitute defendant claims that the court clearly erred in finding that the plaintiff's possession was under a claim of right in that the court "ignored and otherwise implausibly explained away evidence that easily should have overcome the clear and convincing

[15] Rather, the substitute defendant merely speculates that the court's decision to credit certain witnesses' testimony could have been influenced by its mistaken belief that the plaintiff had erected a fence shortly after 1985.

standard of proof that the [substitute] plaintiff needed to attain . . . .'' The substitute defendant advances this argument with respect to several portions of the evidentiary record. We address each in turn.

A

The substitute defendant first argues that the court clearly erred in finding that the plaintiff's use of the disputed area was under a claim of right when the evidence proved that the plaintiff, after commissioning a survey of 31 Edgewood Avenue in 1987, ''twice expand[ed] and/or replac[ed] the outbuildings located in the rear of [31 Edgewood Avenue] . . . right up to the deeded property line and not beyond.''[16]

The following facts, as set forth by the trial court, are relevant to this claim. ''The shed, garage and extensions thereof located at the rear of 31 Edgewood Avenue, directly on the property line . . . were used by [the plaintiff] for his landscaping business. Repairs to the

[16] In support of her claim, the substitute defendant appears to suggest that the court, in reaching its conclusion that the substitute plaintiff satisfied her burden in proving the elements of adverse possession, failed to consider this evidence entirely. Specifically, she argues that the court ''never even mentioned the existence of the 1987 survey in its decision except to make a passing reference . . . [to establish chain of title]'' and that it ''did not discuss the rather detailed evidence that while the [plaintiff] expanded the existing outbuildings . . . [he] did not place either of the structures in the disputed area . . . .'' (Citation omitted.)

In reviewing factual findings, ''we make every reasonable presumption . . . in favor of the trial court's ruling.'' (Internal quotation marks omitted.) *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 346 Conn. 391, 414, 291 A.3d 64 (2023). ''We cannot assume that the court's conclusions were reached without due weight having been given to the evidence presented and the facts found.'' (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 229, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017). Here, the court stated in its memorandum of decision that its ''conclusion as to the status of the disputed area and its use is based upon surveys, deeds, aerial photographs, and [witness testimony].'' Because the substitute defendant has failed to show otherwise, we presume that the court properly considered all relevant evidence in making its factual findings and reaching its conclusions.

garage roof, the siding and an extension to the garage were constructed by [the plaintiff] after 1985, which required access to the disputed area for their construction. The garage roof was added in 1997. New siding was placed on the shed to match the siding on the main house at 31 Edgewood Avenue.[17] Siding required the contractors to access and use the disputed area during the construction. When [the plaintiff] was asked on direct examination on the first day of trial what was behind the garage and shed, he immediately answered that he considered it to be a part of the 31 Edgewood Avenue property." (Footnote added.) Additionally, neither party disputes that in 1987, the plaintiff commissioned a land survey of 31 Edgewood Avenue.[18] The plaintiff testified that he had commissioned that survey "[t]o repair the terrace." When asked on cross-examination whether he had looked at the 1987 survey, the plaintiff responded: "I don't have a license. I don't have experience in this, and maybe I . . . didn't school long enough to read the numbers." In response to a follow-up question regarding whether he "could read the maps," the plaintiff answered, "[n]o."

The substitute defendant argues that the plaintiff "likely knew of . . . Evans' ownership of the disputed

[17] The substitute defendant claims that the court's factual finding with respect to the addition of new siding on the shed was clearly erroneous. We disagree. In support of her claim, the substitute defendant acknowledges that the substitute plaintiff testified on direct examination that new siding had been added to the shed but argues that the substitute plaintiff "conceded during cross-examination that the shed had in fact been replaced" rather than repaired. We reiterate that "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, *crediting some, all or none of any given witness' testimony*." (Emphasis added; internal quotation marks omitted.) *Kiniry* v. *Kiniry*, supra, 299 Conn. 329. Thus, we cannot conclude that the court clearly erred to the extent that it accorded greater weight to the substitute plaintiff's testimony on direct examination.

[18] The 1987 survey was admitted as a full exhibit. Although the survey did not show the disputed area, it depicted the boundary line between 31 Edgewood Avenue and 52 Oak Ridge Street.

area because of [his] own 1987 survey . . . .'' It is evident, however, from the court's findings, namely, that the plaintiff believed he owned the disputed area and that he had ''limited use of English,'' that the court credited the plaintiff's testimony that he was not aware from the 1987 survey that Evans owned the disputed area. The credibility of a witness is a matter exclusively for the trier of fact, and, therefore, such credibility determinations by the trial court are outside our limited scope of review.

In addition, it does not appear from the record before us that any witness testified as to the reason the outbuildings were expanded in the manner that they were. In the absence of such evidence, the substitute defendant's assertion that the plaintiff's decision to expand the outbuildings only to the deeded boundary disproves the hostility of his possession is mere speculation.[19] Moreover, even if the court had accepted the substitute defendant's interpretation of that evidence, it would not have precluded the court from according greater weight to contrary evidence. The court was presented with ample evidence, as set forth in part I of this opinion, indicating that the plaintiff used the disputed area under a claim of right, including the plaintiff's own testimony, which the court credited, that he believed that he owned the disputed area. In particular, we reiterate that the court found, and the record supports, that the plaintiff twice installed asphalt within the disputed area and did

[19] We further note that this evidence is susceptible to reasonable inferences other than the one endorsed by the substitute defendant, including that the plaintiff's reason for not expanding the outbuildings farther was to avoid interfering with his other uses of the disputed area. We reiterate that the plaintiff used the disputed area for storage, parking, and ''as a construction facility'' for his landscaping business. In addition, the court found that the only vehicle access to the adjacent lot leased by Pirri was ''along the driveway of 31 Edgewood Avenue . . . then between the garage and shed located at the rear of the property onto the disputed area, and then a turn onto the rear of [27 Edgewood Avenue] from the disputed area.''

not inform Evans or request her permission on either occasion. Because this evidence was sufficient to support the court's finding that the plaintiff used the disputed area under a claim of right, the substitute defendant's claim fails.

B

Next, the substitute defendant argues that "[t]he trial court erred by not accepting" the substitute plaintiff's "admission" that any use of the disputed area was pursuant to a verbal agreement with Evans, as evidenced by a 2019 police report that was admitted as a full exhibit at trial. The following facts, as set forth by the trial court, and procedural history are relevant to this claim.

On June 15, 2019,[20] Greenwich police officer Stephen Podmokly was called to 52 Oak Ridge Street to resolve a property dispute. After arriving, Podmokly spoke with the defendant and the substitute defendant and subsequently spoke with the substitute plaintiff over the phone. Podmokly's written incident report stated in relevant part: "The undersigned spoke with [the substitute plaintiff], the owner of 31 Edgewood [Avenue] who related [that] they have used [the disputed area] and taken care of it for the last [thirty-five] years. That there was a verbal agreement with the previous homeowner of 52 Oak Ridge [Street]. [The substitute plaintiff] related [that] she was advised by her attorney that [the disputed area] was in fact her property and [she] would go to court if necessary."[21]

[20] We note that the court initially stated in its memorandum of decision that Podmokly was called to the property on June 19, 2019. Every subsequent reference therein, however, stated that the call occurred on June 15, 2019. Although neither party addresses this discrepancy, we conclude from our review of the record that Podmokly was called to 52 Oak Ridge Street on June 15, 2019, and that the court's initial reference to June 19, 2019, was a scrivener's error.

[21] We note that the substitute plaintiff objected to the admission of her statements in the police report at trial on the ground that they were inadmissible hearsay because she was not a record owner of 31 Edgewood Avenue

At trial, Podmokly testified with respect to the report and his recollection of the incident. Additionally, the substitute plaintiff testified regarding her alleged statement in the report concerning "a verbal agreement with the previous homeowner of 52 Oak Ridge [Street]." She stated that, in 2016 or 2017, she and the plaintiff met with Attorney Patrick R. Gil to discuss acquiring title to the disputed area from Evans.[22] The substitute plaintiff explained that her statement regarding "a verbal agreement" reflected in the report was in reference to an agreement that Gil had reached with Evans wherein Evans agreed to transfer the disputed area to the plaintiff upon her death.[23]

In its memorandum of decision, the court stated: "[Podmokly] at trial admitted that he had no independent recollection of what [the substitute plaintiff] told

at the time that she spoke with Podmokly. The court overruled her objection and admitted her statements pursuant to § 8-3 (1) (G) of the Connecticut Code of Evidence, which provides as an exception to the hearsay rule "a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question." The substitute plaintiff does not challenge the court's ruling on appeal, and we therefore do not address it.

[22] The court noted in its memorandum of decision that Gil had represented the plaintiff in a "prior litigation between the [plaintiff] and . . . Evans . . . . It commenced . . . October 24, 2017. That court record was not offered in evidence although there was some testimony from [the substitute plaintiff] regarding that litigation. The lis pendens from that . . . litigation, dated November 28, 2017, was in evidence." Gil was not called by either party as a witness, and the court found that "[n]either [the plaintiff nor the substitute plaintiff] testified credibly as to the nature of any conversation between . . . Gil and . . . Evans." The court also found, however, that "[the plaintiff] credibly testified that his health was the reason that the lawsuit against . . . Evans was withdrawn." The court further found, with respect to the prior action, that the plaintiff and the substitute plaintiff first authorized Gil to contact Evans in 2016, sixteen years after the plaintiff's adverse possession rights to the disputed area had vested in 2000.

[23] Specifically, the substitute plaintiff testified: "[Gil] had the conversation with . . . Evans. [Gil] . . . had an agreement with . . . Evans that she was going to transfer the property to us before she died. I never spoke to . . . Evans. I never had a conversation, and I never said that she gave me

him other than what is in the June 15, 2019 written report . . . . [He] did admit that he did not ask [the substitute plaintiff] the specifics about the so-called verbal agreement contained in [his police report]. . . .

"[The substitute plaintiff] had some knowledge at the time that she spoke to [Podmokly] on June 15, 2019, that . . . Gil had reached an understanding with . . . Evans that the disputed area . . . was going to be transferred to [the plaintiff's] title upon the death of . . . Evans. Such an agreement was never reduced to writing . . . . This was the 'agreement' that [the substitute plaintiff] was referring to in her telephonic conversation with [Podmokly]. Neither [the plaintiff nor the substitute plaintiff] ever entered into any verbal agreement directly with . . . Evans. [The substitute plaintiff] testified that she did inform [Podmokly] . . . that [the plaintiff's] lawyer had been involved in the agreement, not [herself or the plaintiff] individually." (Citations omitted.)

It is thus apparent from its memorandum of decision that the court, in weighing the conflicting evidence before it, credited the substitute plaintiff's testimony with respect to what she meant by "a verbal agreement . . . ."[24] Her testimony was consistent with the plaintiff's testimony, which the court credited, that he had

permission. She gave [Gil] the permission. She told [Gil] that she was going to transfer the property to us before she died, but I never had the conversation with her, and I never said that . . . Evans gave me the permission."

[24] The substitute defendant further argues that the court's finding that the substitute plaintiff, in June, 2019, was referencing an agreement with Gil is belied by the fact that "the [plaintiff] and . . . Evans were unable to reach such an agreement . . . prior to [Evans'] death" in September, 2017. (Citation omitted.) In weighing the evidence before it, however, the court determined that the substitute plaintiff merely had "*some* knowledge" of that action. (Emphasis added.)

Moreover, the court emphasized that the substitute plaintiff had testified, and the police report indicates, that she told Podmokly that her attorney had advised her that the disputed area is in fact her property. In assessing her testimony, the court further considered a May 28, 2019 letter from Gil to the defendant and the substitute defendant, which was admitted as a full

never spoken to Evans. The substitute defendant, in arguing that the court should have accepted her interpretation of the evidence, essentially urges us to second-guess the court's credibility determinations and reweigh conflicting evidence, which we cannot do. Consequently, we cannot conclude that the court's finding as to what the substitute plaintiff meant when talking to Podmokly was clearly erroneous.

C

Finally, the substitute defendant argues that the deposition testimony of Pirri demonstrated that Evans had given the plaintiff permission to use the disputed area.[25] By way of background, the substitute defendant called Pirri as a witness at trial, and, at several points during Pirri's direct examination, the court admitted portions of his deposition testimony for impeachment purposes as prior inconsistent statements. On appeal, the substitute defendant claims that the court reviewed Pirri's deposition testimony and inconsistent trial testimony but "dismissed it entirely."[26]

exhibit, that stated in relevant part: "This office represents [the plaintiff], a neighbor and abutting land owner to the rear of the property at 52 Oak Ridge [Street]. . . . It is clear to me that [the plaintiff] has satisfied the requirements for adverse possession of [the disputed] area. . . . We attempted to reach a fair settlement of that lawsuit with the prior owner but were unsuccessful. My client temporarily withdrew the lawsuit with the hopes that he could negotiate a fair settlement with the future owner of the property." In crediting the substitute plaintiff's testimony, the court found that Gil's letter "is not inconsistent with the . . . limited facts possessed by [the plaintiff and the substitute plaintiff] regarding the 'agreement.' "

[25] The substitute defendant points specifically to the following portions of Pirri's deposition testimony: (1) he "probably met" Evans four times and "became kind of friendly with her"; (2) Evans "knew and . . . was fine with [the plaintiff] using the [disputed area]"; (3) the plaintiff "probably had a few discussions [with Evans] possibly"; and (4) "later on in the 2000s," the plaintiff became interested in purchasing the disputed area from Evans.

[26] In support of her claim, the substitute defendant incorrectly argues that "[i]t [was] . . . not [her] burden of proof to prove permission" because "it [was] the [substitute] plaintiff's burden to prove a claim of right and a hostile and adverse use by clear . . . and convincing evidence." As stated herein, the substitute plaintiff was not required to prove a lack of permission; rather,

The substitute defendant's claim, however, is belied by the court's memorandum of decision, in which it thoroughly addressed Pirri's deposition and trial testimony. Specifically, it noted that Pirri's deposition testimony "conflicted with some portion of his trial testimony" but concluded that "[t]he fact that [Pirri's] statements made in a pretrial deposition conflict with his trial testimony goes to his personal credibility but otherwise [is] not relevant and binding on [the substitute plaintiff's] claims of adverse possession." Moreover, the court specifically addressed each portion of Pirri's deposition testimony cited by the substitute defendant on appeal and found that much of it either was incomplete or too vague "to be persuasive on the proof of permission . . . ."[27] In any case, even if the court had found Pirri's deposition testimony to be credible and probative on the issue of permission, it is evident from its memorandum of decision that it accorded greater weight to the plaintiff's own testimony than to any potentially conflicting testimony by Pirri.[28] It is axiomatic that we must defer to factual findings made by the

the substitute defendant, pursuant to her special defense, had the burden to prove permission by a preponderance of the evidence. See *Slack* v. *Greene*, supra, 294 Conn. 435.

[27] With respect to Pirri's deposition testimony that the plaintiff "probably had a few discussions" with Evans about the disputed area, for example, the court stated: "There was no direct evidence that [the plaintiff], who had difficulty speaking English, ever had a specific businesslike meeting with . . . Evans on the subject of the disputed area. [Pirri] never testified that he saw them together. The dates or circumstances of any meeting were missing [from] this testimony. It would be speculation to find that those meetings, if they occurred, took place within the fifteen year [statutory] period [for adverse possession]."

[28] We emphasize that Pirri's deposition testimony directly conflicted with the plaintiff's testimony, which the court credited, that he never had a conversation with Evans or any other owner of 52 Oak Ridge Street and that he never sought or received permission from anyone to use the disputed area, which was further corroborated by the substitute plaintiff's testimony. In considering Pirri's deposition testimony, the court stated that "[n]o evidence was produced that . . . [Pirri] had the authority to bind [the plaintiff] by any statements [he] made . . . to . . . Evans at any time. . . . Inconsistent statements by a person with no authority from the principal cannot

trial court on the basis of its assessment of witnesses' credibility and its weighing of conflicting evidence where, as we conclude here, such findings are supported by sufficient evidence. Accordingly, we conclude that the court's finding that the plaintiff possessed the disputed area under a claim of right was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

GERALD METALS, LLC, ET AL. *v.* CERTAIN UNDERWRITERS AT INTERNATIONAL UNDERWRITING ASSOCIATION OF LONDON
(AC 46853)

Bright, C. J., and Suarez and Sheldon, Js.*

Syllabus

The plaintiff insureds appealed from the trial court's summary judgment for the defendant insurer on the plaintiffs' claim for a loss related to certain marine cargo insurance policies issued by the defendant. The defendant denied the plaintiffs' claim under the policies, which the plaintiffs filed after they were denied access to certain raw material they had purchased that was ultimately sold to a third party at a court-ordered auction in China. While the present case was pending before the Superior Court, the plaintiffs completed arbitration proceedings with the seller of the material. On appeal to this court, the plaintiffs claimed, inter alia, that the trial court improperly determined that they were collaterally estopped from relitigating the issues of whether the material was stolen and/or misappropriated or seized in light of the arbitrators' findings. *Held*:

bind the principal merely because their statements are not credible due to inconsistencies." Accordingly, because the court credited the contrary testimony of the plaintiff, it concluded that "[t]he [substitute] defendant cannot rely [on] any portion of [Pirri's] testimony or inconsistent deposition answers to sustain her burden to prove . . . [that] Evans gave permission to [the plaintiff] during the fifteen [year statutory period]" to use the disputed area.

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

The trial court properly concluded that, pursuant to the doctrine of collateral estoppel, the plaintiffs were precluded from arguing that the material was stolen or misappropriated and from disputing that the property was seized by Chinese government authorities, both issues having been actually and necessarily determined by the arbitrators in the arbitration proceedings.

The trial court properly granted the defendant's motion for summary judgment, as the court properly determined that no genuine issues of material fact remained as to whether the plaintiffs suffered "physical loss or damage" to the material within the meaning of the policies and that, in any event, the plaintiffs' alleged loss was subject to an exclusion for seizure contained in the policies.

Argued September 18, 2024—officially released March 25, 2025

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 Stamford-Norwalk, where the court, *Hon. Charles T. Lee*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Patrick F. Lennon, with whom were *Steven R. Winters* and, on the brief, *David S. Hardy* and *Damian K. Gunningsmith*, for the appellants (plaintiffs).

Thomas L. Tisdale, with whom were *Jamison T. Jedziniak* and, on the brief, *Timothy J. Nast*, for the appellee (defendant).

Opinion

BRIGHT, C. J. This appeal arises from a dispute over whether the plaintiffs, Gerald Metals, LLC, and Gerald Metals S.A., suffered a covered loss to their insured property under the marine cargo insurance policies issued by the defendant insurer, Certain Underwriters

at International Underwriting Association of London.[1] The plaintiffs appeal from the judgment of the trial court, rendered following its granting of the defendant's motion for summary judgment. On appeal, the plaintiffs claim that the court improperly (1) determined that the plaintiffs were collaterally estopped from relitigating the issues of whether the insured property was stolen and/or misappropriated and seized and (2) concluded that there were no genuine issues of material fact as to whether (a) the plaintiffs failed to demonstrate "physical loss or damage" under the policies and (b) the loss was subject to the policies' seizure exclusion. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following undisputed facts, viewed in the light most favorable to the plaintiffs, and procedural history. The defendant sold the plaintiffs a series of marine cargo insurance policies covering the period November 1, 2013, to October 31, 2016 (policies). The policies covered "goods and/or merchandise of every description consisting principally of Non-Ferrous Metals, Ores and Concentrates, Ferro Alloys, Mercury, Precious, Semi-Precious and Exotic Metals, Precious Metal Bearing Materials, in whatever form or shape, and all other goods and/or merchandise incidental to the business of the Assured consigned to or shipped by the Assured, or consigned to or shipped by others for the Assured's account or control, or in which the Assured may have an interest . . . ." (Emphasis omitted.) The "average terms and conditions" of the policies provided, inter alia, for coverage "[a]gainst all risks

[1] At various points throughout this appeal and before the trial court, Gerald Metals S.A. is alternatively referred to as Gerald Metals Sàrl or Gerald Metals Sarl. It is undisputed that all refer to the same entity.

We note that, in various pleadings in the trial court, the defendant also is referred to as Certain Underwriters Subscribing to Marine Cargo Insurance Policy No. B07853PC1309890000 Effective November 1, 2013 to November 1, 2014.

of physical loss or damage from any external cause including mysterious disappearance and infidelity of Assured's employees." The term "physical loss or damage" was not defined in the policies. The policies additionally included various warranties that excluded certain types of loss from coverage. One such warranty was the "[Free of Capture and Seizure] Warranty" (seizure exclusion) that provided in relevant part that "this insurance is warranted free from . . . capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise . . . ."

On or about December 13, 2013, the plaintiffs contracted to purchase 25,250 metric tons of alumina (material) from Shenzhen Shenhuo Trading Co., Ltd. (seller), a Chinese aluminum smelter. The material was previously shipped from the port of Bunbury, Australia, onboard the vessel M/V AS Elysia to the port of Qingdao, China (Qingdao port), where it was offloaded and bagged in individual metric ton bags. The material was stored in a warehouse at the Qingdao port. The warehouse was controlled and operated by the Qingdao Port Group Co. Limited Dagang Branch (QPGC). The plaintiffs agreed to pay $9,090,000 by a letter of credit that would be released to the seller upon receipt of various documents, including an original warehouse receipt issued by CWT Commodities (CWT), a warehousing company in Qingdao, China. The contract provided that title to the material would pass to the plaintiffs free and clear of all liens and encumbrances upon receipt of the warehouse receipt (CWT warehouse receipt). The letter of credit was issued to the seller on December 23, 2013. On December 30, 2013, the plaintiffs were provided with confirmation that the seller had provided the required documents and, pursuant to the letter of credit, the funds were released to the seller. There was

no physical delivery of the material. Rather, the material remained in the warehouse under the care of CWT.

On May 26, 2014, the plaintiffs gave CWT instructions regarding the release of the material in connection with a pending sale of the material. On June 4, 2014, CWT informed the plaintiffs that CWT was unable to release the material. Representatives of the plaintiffs arranged a site visit to the warehouse on June 7, 2014, to meet with CWT representatives but neither party was able to view the material or procure its release during the visit. On both September 15, 2014, and October 28, 2015, representatives of the plaintiffs again visited the warehouse and were able to view the material.

On January 15, 2015, the plaintiffs filed with the defendant a first notice of a claim for insurance coverage for loss of the material. On January 18, 2016, the defendant emailed the plaintiffs' broker, informing the broker that it was declining coverage of the plaintiffs' claim. The defendant's decision was based on a preliminary report produced by surveyors appointed by the defendant (CSL report) on October 19, 2015, that provided that "potentially the 25,250 [metric tons] [of material] is still on site and remains under the detention of the Chinese authorities." The defendant explained that, on the basis of the findings from the CSL report and a review of the policies, it believed coverage under the policies was not available. Specifically, the defendant stated that it did "not believe that being denied access to one's goods warrant[ed] a recoverable claim" under the policies and further referred to the policies' seizure exclusion, which the defendant asserted directly affected whether the claim was covered.

In response to the defendant's declination of coverage, on April 4, 2016, the plaintiffs sent the defendant a claim report dated March 25, 2016, which described the purchase history of the material and provided the

factual basis for the plaintiffs' claimed loss under the policies. The report stated that during the September 15, 2014 and October 28, 2015 visits, representatives of the plaintiffs observed a decreasing amount of material identified as belonging to the plaintiffs. Specifically, the report stated that their representatives observed "a total loss of no less than 24,746 [metric tons] of [material]." Further, the report provided that, during the September 15, 2014 visit, the representatives observed that the paper tags marking the individual bags of material with "AS Elysia" were either missing or faded beyond recognition. During the October 28, 2015 visit, the paper tags had been replaced with fabric tags with a different vessel name, unaffiliated with the plaintiffs. The plaintiffs stated in their reply email to the defendants that the "[c]laim [r]eport contradicts certain factual assumptions underlying the [defendant's] coverage position which, in large part, are based on the CSL [report]" and advised the defendant of its obligation to indemnify the plaintiffs.

In light of the plaintiffs' claim report, the defendant's surveyors issued a second CSL report on July 20, 2016, summarizing their undertakings to verify the amount of material in the warehouse in relation to the plaintiffs' claim. The report stated that the surveyors were able to access only one of the two areas in the warehouse where the material was being stored and there was no equipment available to facilitate a proper count of the bags. Consequently, the surveyors concluded that they were unable to verify the loss of 24,746 metric tons of material. As a result, the defendant continued to refuse coverage for the plaintiffs' claim.

Thereafter, the plaintiffs brought the underlying action against the defendant on January 24, 2017. In their revised second amended complaint (operative complaint), filed on July 31, 2019, the plaintiffs asserted one count each of breach of contract (count one) and

breach of the implied covenant of good faith and fair dealing (count two). In count one, the plaintiffs alleged that (1) under the policies, the defendant has an obligation to provide coverage for losses of insured goods and to pay the plaintiffs in the event of any such loss, (2) the loss resulted from the theft or misappropriation of the material and is covered under the policies, and (3) the defendant's refusal to pay constitutes a breach of contract. In count two, the plaintiffs alleged that the defendant "breached their duty of good faith and fair dealing by: (1) conducting a protracted and dilatory investigation into the loss; (2) . . . failing to adjust properly and promptly [the plaintiffs'] claim and inform [the plaintiffs] of their coverage position; (3) . . . placing their own interest ahead of that of their policyholders by drawing every inference in [the defendant's] favor and adversely to [the plaintiffs]; and (4) compelling [the plaintiffs] to seek to recover amounts due under the policies through litigation."

On June 1, 2021, the defendant filed an amended answer and special defenses in which it admitted to the issuance of the policies but denied or left the plaintiffs to their proof as to the remaining factual allegations. Specifically, the defendant denied that the plaintiffs had title to the material and that the material was stolen or misappropriated. The defendant raised fifteen special defenses, five of which were relevant to the defendant's summary judgment motion: (1) the loss alleged was not " 'physical loss or damage' " within the meaning of the policies, and therefore the claim was not covered; (2) the loss alleged "was the result of capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition, nationalization by the government or government-controlled entities of the People's Republic of China or other excluded reason" and, therefore, was excluded from coverage pursuant to the seizure exclusion contained within the policies; (3)

there was no coverage because the warehouse receipts purporting to cover the material were fraudulently issued or otherwise the result of fraud, and thus there was no insurable interest to which insurance coverage attached; (4) the plaintiffs have not demonstrated a loss of the material, nor a physical loss, such as would be covered under the terms and conditions of the policies; and (5) the plaintiffs have not demonstrated title to the material.

After the parties had engaged in extensive discovery, the defendant filed a motion for partial summary judgment as to count two of the plaintiffs' complaint, which was denied by the court, *Hon. Kenneth B. Povodator*, judge trial referee, on August 17, 2020. Following additional motion practice and further discovery, the case proceeded to trial and a jury was selected. The court explained: "[Evidence in the trial] was ultimately scheduled to commence on Tuesday, November 15, 2022. . . . However, two days before the commencement of [evidence], on Sunday afternoon, November 13, 2022, [the plaintiffs'] counsel sent [the defendant's] counsel an email enclosing [the plaintiffs'] Supplemental Response to Defendant's Interrogatory No. 8, dated October 16, 2017." The defendant's Interrogatory No. 8 was served on July 5, 2017. It requested that the plaintiffs identify "any legal proceedings relating to or concerning the material or insurance claim including but not limited to lawsuit(s), arbitration proceeding(s) or other dispute resolution forums to which the plaintiffs or their affiliates are or were parties anywhere in the world." In their initial response on October 16, 2017, the plaintiffs averred that "there are no other legal proceedings concerning the material or insurance claim to which the [plaintiffs] or their affiliates are or were parties anywhere in the world other than this current claim before the [Superior] Court of Connecticut." In their

supplemental response, however, the plaintiffs "disclosed that, unbeknownst to [the defendant] or [the trial] court, [the plaintiffs] had been engaged in an arbitration before the London Metals Exchange ([arbitrators]) with the [seller] of the [material] at issue in [the underlying] case . . . since October 29, 2019. Because of the confidentiality of the [arbitration] proceedings, [the plaintiffs'] counsel refused to disclose further details without a court order.

"[The defendant] filed an emergency motion for sanctions on Monday, November 14, 2022 . . . which the court heard on Tuesday, November 15, 2022. The motion contended that the failure to disclose [the arbitration proceedings] was a flagrant violation of [the plaintiffs'] discovery obligations. [The defendant further] contended [that] it would be unfair to proceed to trial without full discovery of [the plaintiffs'] positions in the [arbitration] proceedings, especially because its holdings could constitute collateral estoppel and would be subject to judicial estoppel. While [the defendant] sought dismissal or nonsuit against [the plaintiffs], it alternatively sought a mistrial. Further, [the defendant] sought discovery [concerning] the [arbitration] proceedings and an award of attorney's fees. . . .

"[At a November 15, 2022 hearing] [t]he court ordered [the plaintiffs] to immediately produce the third arbitration award handed down by the arbitrators on February 25, 2022, in the [arbitration] proceeding entitled *Gerald Metals Sarl* v. *Shenzhen Shenhuo Trading Co. Ltd.* (third award). At the continued hearing on November 18, 2022, the court heard further argument and, on November 21, 2022, issued an order . . . continuing the trial to dates in April, 2023, and discharging the jury. The order also directed the plaintiffs to produce by November 29, 2022, all filings in the [arbitration] proceedings and authorized limited depositions relating

to those proceedings. It set a briefing schedule, subsequently modified, for the [defendant's] motion for summary judgment. The court reserved consideration of the defendant's motion for sanctions." (Citations omitted; footnote omitted.)

Thereafter, on January 24, 2023, the defendant filed a second motion for summary judgment, this time as to both counts of the plaintiffs' operative complaint. The defendant argued that, given certain positions taken by the plaintiffs in the arbitration proceedings and certain conclusions reached by the arbitrators, the plaintiffs' claims against the defendant were barred by collateral estoppel and/or judicial estoppel. In opposition to the defendant's motion, the plaintiffs argued that collateral estoppel did not bar their claims in the present case because the factual issues resolved in the arbitration were not identical to the factual issues underlying the present case. They further argued that, even if the issues in the arbitration and the present case were identical, those issues either were not actually decided in the arbitration or their resolution was not necessary to the arbitration award. They also argued that judicial estoppel did not apply because their positions in the arbitration and in the present case were not inconsistent, and, even if they were, the plaintiffs did not gain an unfair advantage from, and the defendant was not prejudiced by, the alleged inconsistency. Finally, the plaintiffs argued that, even if certain facts were deemed established due to the application of collateral estoppel or judicial estoppel, there still remained disputed issues of material fact that precluded summary judgment.

The following additional undisputed facts informed the court's analysis of the defendant's motion. The plaintiffs[2] served a notice of arbitration on the seller

[2] We note that, although the third award only involves one claimant, Gerald Metals, Sarl "(formerly Gerald Metals [S.A.])," the plaintiffs in this matter are two related entities, Gerald Metals, LLC, and Gerald Metals S.A. For ease of reference, we continue to refer to the plaintiffs collectively throughout

on October 29, 2019. The notice alleged that the seller had failed to "provide evidence of full title and provenance" of the material. It further alleged that, after the seller sold the plaintiffs the material, the plaintiffs were "unable to remove [the material] from the bonded storage area at the [Qingdao port] where it was offloaded and stored . . . prior to [its] purchase" and "allowed minimal access" to the material. The notice acknowledged the ongoing Connecticut proceedings and the plaintiffs' position therein that they had good title to the material. The notice described the arbitration demand as "protective" due to the seller's failure to assist in demonstrating that title was properly and validly passed to the plaintiffs. The notice claimed that, in the event that the seller had failed to pass good and unfettered title to the plaintiffs, the seller was in breach of contract.

The seller served a counter notice in response on November 26, 2019. A three arbitrator panel was constituted by December 5, 2019. After additional filings, the parties to the arbitration submitted their respective claim submissions and defenses between January and May, 2021, with amendments in September and October, 2021. In their submissions, the plaintiffs claimed that the seller was in breach of two terms implied into the purchase contract pursuant to section 12 of England's Sale of Goods Act 1979: the quiet possession term and the right to sell term. In relation to their quiet possession claim, the plaintiffs asserted that they had been unable to remove, obtain possession of, or sell the material. They contended that there were several separate breaches of the quiet possession term at various points in time.

Regarding their right to sell claim, the plaintiffs argued, inter alia, that the seller did not have the right

this opinion, as the parties have before the trial court and in their briefs before this court.

to sell the material because the CWT warehouse receipt, with which the seller transferred title, was void. In support of this claim, the plaintiffs contended that a "warehouse receipt relating to the material with reference number ZJYY201304 bearing the date of [July 8, 2013] ([Rukudan]) was issued by QPGC to the order of CWT Commodities Shanghai Warehousing MGT Co. Ltd. (CWT Shanghai), an associate company of CWT." (Footnote omitted.) The plaintiffs alleged that the Rukudan was a fraudulent document, which rendered the CWT warehouse receipt that was issued in reliance on it void. Further, the plaintiffs argued that the CWT warehouse receipt was incapable of constituting constructive delivery because (1) the seller did not have title to the material and (2) the material was not in the possession of CWT, but in the possession of a third party (QPGC), which was not a party to the CWT warehouse receipt.

In its defense, the seller denied liability as to both claims. Addressing the quiet possession claim, the seller first argued that the claim was time barred. Further, the seller argued that, "as a matter of law, a seller is only liable if there is a supervening lawful intervention by a third party which is the seller's fault." The seller contended that it was not liable because the plaintiffs were denied the material due to specific unlawful events.

The seller also denied that it did not have the right to sell the material. The seller argued that the CWT warehouse receipt was "a document of title" and that, "by reason of the CWT [w]arehouse [r]eceipt . . . the [seller] and the [plaintiffs] each acquired title to the [m]aterial because under Chinese law, transfer of a warehouse receipt operates to transfer the right to possession of the goods and this right constitutes title to the goods." Moreover, the seller argued that, even if the Rukudan was forged or if title had not properly

passed, each previous seller in the chain of title was a bona fide purchaser for value after the material had been delivered to the transferee by way of constructive delivery of the CWT warehouse receipt. Therefore, the previous seller, who sold the material to the seller, had the legal right to do so, and thereafter, the seller and then the plaintiffs became the legal owners of the material.

After the parties' submissions, a hearing took place before the arbitrators in London in November, 2021. The parties made several evidentiary proffers, including testimony from factual and expert witnesses. On February 25, 2022, the arbitrators issued the third award, in which they concluded that the seller did not have the right to sell the material, did not give the plaintiffs quiet possession of the material and, therefore, was in breach of contract. Before reaching the plaintiffs' claims, the arbitrators made the following factual findings as to the disposition of the material. On January 20, 2014, the plaintiffs contracted to sell the material to Rio Tinto. Payment was made against the presentation of an irrevocable warehouse release. In preparation for this sale, CWT issued another warehouse receipt, dated January 22, 2014. The plaintiffs sought to arrange delivery of the material in May, 2014. On May 26, 2014, CWT was denied access to the material. The plaintiffs were informed of this denial of access in early June.

By late May, an investigation into fraud relating to certain aluminum and copper products stored at the Qingdao port was underway and access to the Qingdao port was limited. On June 3, 2014, CITIC, a mining company that contended that it owned the material, obtained preservation orders[3] from the Qingdao Maritime Court for the material. CITIC claimed that it purchased the material after it had arrived in the warehouse

[3] We note that, throughout the third award, the arbitrators refer to the June, 2014 orders of the Qingdao Maritime Court as both sequestration orders and preservation orders. For ease of reference, we refer to the orders as preservation orders.

and that it held a warehouse receipt in relation to it, issued by one of the parties in the purported chain of title.[4] On June 6, 2014, Qingdao Port International Co. issued a public announcement about the investigation that stated that, on June 3, 2014, QPGC was asked to assist in the enforcement of preservation orders. On June 7, 2014, representatives of the plaintiffs visited the Qingdao port but were unable to view, access, or procure release of the material. On July 14, 2014, the police closed the Qingdao port. Thereafter, two separate proceedings in two different Chinese courts commenced. On August 24, 2014, CWT Shanghai commenced civil proceedings on behalf of the plaintiffs before the Qingdao Maritime Court against QPGC as the "depository" of the material to obtain delivery of the material. In 2019, the court issued a judgment in which it found that CWT Shanghai failed to show that it had a warehousing contract with the QPGC. In 2017, criminal proceedings were brought against the alleged perpetrators of the fraud at the Qingdao port. In 2018, the Qingdao Intermediate People's Court found those defendants guilty of issuing multiple fraudulent documents in relation to the same material. Thereafter, the court ordered that "goods . . . that are seized or impounded on record will be auctioned. . . . The criminal evidence articles transferred with the case [(which included the material)] are confiscated according to law." (Emphasis omitted; internal quotation marks omitted.) Pursuant to this order, on April 11, 2020, the material was sold to a third party at auction.

On the basis of these factual findings, the arbitrators rejected the seller's argument that it was not liable for breaches of the plaintiffs' quiet possession because the plaintiffs were denied the material due to specific

[4] Thereafter, on December 1, 2014, "CWT filed an Objection to Preservation of Property with the Qingdao Maritime Court in connection with the preservation order obtained by CITIC."

unlawful events: (1) the theft and/or misappropriation of the material, (2) the unlawful action of QPGC denying delivery of the material, and (3) the unlawful auction of the material. The arbitrators concluded that the material was not stolen or misappropriated. They further concluded that they "were unable to accept that either the action of the QPGC or the auction were unlawful. QPGC could not deliver the [m]aterial because it had been seized and confiscated by the police and subsequently by order of the [Qingdao Intermediate People's Court]. The auction was conducted at the order of the [Qingdao Intermediate People's Court]." Consequently, because the breaches of the plaintiffs' quiet possession identified by the seller all emanated from Chinese court orders and, thus, were lawful, the arbitrators concluded that the seller was legally responsible for breach of the plaintiffs' quiet possession and therefore was in breach of contract. The arbitrators also rejected the seller's argument that the plaintiffs' quiet possession claim was time barred, finding that "there were independent causes of action [for breach of quiet possession] between 2013 and 2020." The arbitrators identified those breaches as including when "CITIC obtained its preservation order; the police seized the [m]aterial; the [plaintiffs] [were] unable to obtain possession from the QPGC; the [plaintiffs] [were] unable to clear customs; and . . . the [m]aterial was sold at auction so that possession was no longer available." Given these findings, the arbitrators concluded that the quiet possession claim was not time barred and succeeded on the merits.

The arbitrators then addressed the plaintiffs' right to sell claim. Before addressing the merits of the claim, the arbitrators first noted that their conclusion as to the plaintiffs' success on the quiet possession claim rendered their consideration of the plaintiffs' right to sell claim "unnecessary." Nevertheless, the arbitrators reasoned that, "given the time taken and evidence

adduced during this arbitration in dealing with this claim, and should this matter go further, we consider it next." The arbitrators noted that "[t]he essence of the [r]ight to [s]ell claim was whether the CWT [w]arehouse [r]eceipt was a valid warehouse receipt and if so, whether transfer of it transferred title in the goods in respect of which it had been issued." The arbitrators ultimately concluded that, for the reasons argued by the plaintiffs in their submissions, the CWT warehouse receipt was not a valid warehouse receipt because, among other reasons, CWT was not a depositary, and "[o]nly a depositary can issue a warehouse receipt." Accordingly, the arbitrators concluded that "[t]he [seller] did not have the right to sell the [m]aterial and did not give the [plaintiffs] quiet possession. It was therefore in breach of the [c]ontract." The arbitrators awarded the plaintiffs $9,090,000 with interest at the rate of 4.5 percent per annum.

On the basis of the findings and conclusions in the third award, the defendant argued in its motion for summary judgment in the present action that, pursuant to the doctrines of collateral estoppel and judicial estoppel, the plaintiffs cannot establish a prima facie case of insurable loss under the policies. Specifically, the defendant argued that the plaintiffs are estopped from disputing the following facts: (1) the plaintiffs never had title to the material; (2) at all relevant times, beginning in June, 2014, the material was seized or detained by the Chinese government; (3) the material was not stolen or misappropriated at any time; and (4) in April, 2020, the material was sold at public auction by order of the Qingdao Intermediate People's Court. Thus, the defendant argued that, when barred from relitigating these facts by collateral or judicial estoppel, the plaintiffs are unable to establish a prima facie case, as coverage is limited to all risks of "physical loss or damage" to the plaintiffs' property, which cannot occur if the plaintiffs

never owned the material, and the policies contain a seizure exclusion, which excluded coverage here. The defendant further asserted that the court should award sanctions against the plaintiffs for the defendant's reasonable attorney's fees and costs incurred following February 22, 2022, the date of the third award. On February 3, 2023, the defendant filed a notice of supplemental authorities in further support of its motion for summary judgment in which it noted three then recently published decisions from both the United States Court of Appeals for the Second Circuit and the Connecticut Supreme Court that involved the issue of "physical loss or damage" in relation to property and marine cargo insurance policies. In summarizing these cases, the defendant argued that they all generally stand for the proposition that mere deprivation of use of property or loss of access to property does not constitute "physical loss or damage."

On February 21, 2023, the plaintiffs filed a memorandum of law in opposition to the defendant's motion for summary judgment. The plaintiffs argued that summary judgment was inappropriate here as (1) the doctrines of judicial and collateral estoppel are not applicable in this case and (2) there remain numerous outstanding issues of material fact. The plaintiffs also addressed the defendant's supplemental authorities notice, arguing that it "raises an entirely new issue that has ultimately no bearing on the instant matter." Nonetheless, they argued that reliance on such authorities was misplaced as the facts in those cases are distinguishable from those in the present case.

On March 1, 2023, the defendant submitted a reply to the plaintiffs' opposition, in which it asserted that "[n]owhere [do the plaintiffs] raise any issues of fact once the estopped facts are deemed admitted . . . ." The defendant argued that, "[s]ince no other evidence

has been supplied by [the plaintiffs] to establish the loss of the material, summary judgment is appropriate."

On March 22, 2023, the trial court, *Hon. Charles T. Lee*, judge trial referee, heard oral argument on the motion for summary judgment.[5] On August 10, 2023, the court issued a memorandum of decision granting the defendant's motion for summary judgment. The court concluded that, pursuant to the doctrine of collateral estoppel, the plaintiffs were estopped from arguing that the material was stolen, that the plaintiffs had title or possession of the material, and that the material was not seized. The court also concluded that the plaintiffs were judicially estopped from asserting positions clearly inconsistent with their arguments in the arbitration proceedings. Finally, the court concluded that (1) the plaintiffs were unable to establish a prima facie case for coverage under the policies because (a) they failed to demonstrate an insurable interest and (b) the claim did not involve "physical loss or damage"; and (2) even if there was loss within the meaning of the policies, the seizure exclusion excluded the loss from coverage based on the arbitrators' finding that the material was seized. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[5] At the March 22, 2023 hearing, the plaintiffs' counsel requested leave to submit additional briefing on the specific issue of the "adoption" requirement of judicial estoppel. See *Barton* v. *Norwalk*, 163 Conn. App. 190, 202–203, 135 A.3d 711 (2016) ("[t]ypically, judicial estoppel will apply if . . . the party's former position has been adopted in some way by the court in the earlier proceeding" (internal quotation marks omitted)), aff'd, 326 Conn. 139, 161 A.3d 1264 (2017). Thereafter, the court entered an order granting the plaintiffs' request. On April 6, 2023, the plaintiffs filed their supplemental memorandum of law, in which they further argued that the doctrine of judicial estoppel did not apply because (1) the plaintiffs did not deceive the arbitrators, (2) the plaintiffs' positions before the arbitrators and the trial court were not irreconcilable, and (3) there was no unfair advantage to be derived and equity weighed against applying judicial estoppel. The defendant filed a memorandum in response on April 14, 2023, in which it noted that the plaintiffs failed to address the specific issue of adoption. The defendant further responded to each of the plaintiffs' supplemental arguments and argued that the court should render summary judgment in its favor.

On appeal, the plaintiffs claim that the court erred in rendering summary judgment because it improperly concluded that the doctrine of collateral estoppel applied to the issues of title, theft and seizure.[6] They further argue that, assuming that the court properly found that the plaintiffs were collaterally estopped from arguing that the material was stolen and/or misappropriated and not seized, "there [are] genuine issue[s] of material fact as to whether the [material] suffered 'physical loss or damage' within the meaning of the [policies] based on the [material] being inaccessible to [the plaintiffs]" and "whether the loss was excluded by the [seizure exclusion]."

Before addressing the plaintiffs' claims, we note the applicable standard of review. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [T]he scope of our review of the trial court's decision to grant the [defendant's] motion for summary judgment is plenary. . . . Additionally, the applicability of the

[6] The plaintiffs also claim that the trial court improperly concluded that the doctrine of judicial estoppel applied and precluded the plaintiffs from relitigating those same issues. Given our conclusion herein that the trial court properly applied collateral estoppel, we need not reach the plaintiffs' claim as to judicial estoppel.

doctrine of collateral estoppel presents a question of law, over which this court's review is also plenary." (Citation omitted; internal quotation marks omitted.) *Doyle* v. *Universal Underwriters Ins. Co.*, 179 Conn. App. 9, 13–14, 178 A.3d 445 (2017).

I

We first turn to the plaintiffs' claim that the trial court improperly applied the doctrine of collateral estoppel to the issues of whether the material was stolen and/or misappropriated and seized. Specifically, the plaintiffs argue that the issues of theft and seizure addressed in the third award were not necessarily determined by the arbitrators nor are they identical to the issues in the present case.[7] We disagree.

We begin by setting forth the general principles regarding the law of collateral estoppel. "[C]ollateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . To assert successfully the doctrine of issue preclusion, therefore, a party must establish that the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case. . . . For collateral estoppel to apply,

[7] The plaintiffs do not challenge the trial court's conclusion that the other two factors of collateral estoppel, that the issues were fully and fairly litigated and actually decided, were satisfied. Consequently, we confine our review to whether the issues are identical between proceedings and were necessarily determined.

the issue concerning which relitigation is sought to be estopped must be identical to the issue decided in the prior proceeding." (Citation omitted; internal quotation marks omitted.) Id., 14–15.

Thus, "[t]o establish [that] collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding." (Internal quotation marks omitted.) *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 297, 596 A.2d 414 (1991). "If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action. Findings on nonessential issues usually have the characteristics of dicta." (Internal quotation marks omitted.) *Torrington Tax Collector, LLC* v. *Riley*, 226 Conn. App. 211, 227, 318 A.3d 267, cert. granted, 350 Conn. 909, 323 A.3d 1093 (2024).

"[O]rdinarily a factual determination made in final and binding arbitration is entitled to preclusive effect. . . . Thus, a court properly may grant summary judgment on the ground that the plaintiff's claims are barred by the doctrine of collateral estoppel on the basis of a prior arbitration award." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Doyle* v. *Universal Underwriters Ins. Co.*, supra, 179 Conn. App. 15–16.

In the present case, the plaintiffs argue that "[a]ny determination by the [arbitrators] of the issues of theft, title or sale were not necessary to its award in [the plaintiffs'] favor on [their] claim against the seller of the [material] for breach of the sale contract based on the latter's breach of the implied covenant of quiet possession. . . . The only finding by the [arbitrators] in [the plaintiffs'] favor that was necessary to support

the [third award] was that [the plaintiffs were] deprived of possession of the [material] starting in 2013 and thereafter. . . . The trial court erred by failing to determine that such findings were not mere dicta entitling [the plaintiffs] to 'relitigate' such issues in the [present case]." (Footnote omitted.) For its part, the defendant argues, as the trial court concluded, that "[the issues] were actually and necessarily decided by the [arbitrators] because [they] needed to determine what happened to the [material] in order to render [their] decision . . . ." (Internal quotation marks omitted.) We agree with the defendant.

We first note that, contrary to the arguments in their appellate briefs, counsel for the plaintiffs conceded during oral argument before this court that the issue of whether the plaintiffs ever held title to the material was actually and necessarily decided by the arbitrators. This concession was consistent with their stated position in their opposition to the defendant's motion for summary judgment, in which the plaintiffs wrote that they "concede that the issue of title was actually and necessarily decided as part of the [arbitration] . . . ." In light of this concession, we confine our plenary review of the third award to the issue of whether the disposition of the material, i.e., whether it was stolen and/or misappropriated or seized from the plaintiffs, was essential to the arbitrators' conclusion that the seller was liable for breach of quiet possession. In the third award, the arbitrators explained that under the applicable law, England's Sale of Goods Act 1979, "the seller can be liable for breach [of the implied warranty of quiet possession] if the buyer's quiet possession is interrupted by the lawful acts of a third party. . . . [T]he seller can be liable for breach if the buyer's quiet possession is interrupted by the unlawful acts of a third party where

there is connivance of the seller . . . .'"[8] (Emphasis omitted.)

In their closing submissions to the arbitrators, the plaintiffs offered multiple theories for breach of quiet possession, including the failure to provide the plaintiffs with good title to the material and the seizure of the material by Chinese authorities. Specifically, the plaintiffs claimed that "[t]here are a number of separate breaches at various points in time arising from the CITIC preservation order; the police seizure; the inability [of] [the plaintiffs] to obtain possession from QPGC; the inability [of] [the plaintiffs] to clear customs; and ultimately the sale of [the plaintiffs'] material at auction, so that the material is no longer available. Each of these gives rise to a breach of the quiet possession term. . . . In addition, on the basis that [the plaintiffs are] right that [they] never received title to the material, [they] obviously did not receive quiet possession either." In their points of claim before the arbitrators, the plaintiffs

[8] The plaintiffs also claim that "the trial court neither sought nor received any evidence on English law, or what determinations the [arbitrators] [were] required to make in order to rule in [the plaintiffs'] favor on [their] breach of contract claim. It was incumbent upon the trial court to ensure that the [arbitrators'] findings that the [material] was not stolen and that it was seized by Chinese authorities and sold at auction were—as a matter of English law—necessary to its award in [the plaintiffs'] favor and against the seller on [the plaintiffs'] claim for breach of the implied warranty of quiet possession. The trial court erred by failing to determine that such findings were not mere dicta entitling [the plaintiffs] to 'relitigate' such issues in the [present case]." The plaintiffs ignore the arbitrators' clear articulation of the relevant law, which, as discussed further in this opinion, explains why their determination of the disposition of the material was necessary. Moreover, in their opposition to the defendant's motion for summary judgment, the plaintiffs failed to provide any analysis of the applicable English law in opposition to the defendant's motion for summary judgment and likewise have failed to provide such analysis in their appellate briefs. Thus, to the extent that they attempt to rely on this claim, it is not adequately briefed. "Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008).

asserted that, to the best of their knowledge and belief, "such of the material (possibly all of it) as had not gone missing prior to the auction was sold in the auction."

In response, the seller denied liability and "contend[ed] that the cause of action was time-barred, but that in any event, there was no breach of this implied term because as a matter of law, a seller is only liable if there is a supervening lawful intervention by a third party which is the seller's fault. . . . [T]he [plaintiffs] did not get possession of the [m]aterial through no fault of the [seller] and the interventions were unlawful."

In resolving the quiet possession claim, the arbitrators first addressed the issue of whether the material was stolen and/or misappropriated. The seller claimed that the material was stolen between June 7, 2014, and October, 2015, and that this theft constituted an unlawful interruption in quiet possession for which the seller would not be liable. The arbitrators found that "[t]he [m]aterial was still in the [p]ort area at the time of the auction. It had not been stolen or misappropriated." They instead concluded that the material had been seized by the Chinese government. The arbitrators found that "access to the [p]ort was restricted from the end of May 2014 because CWT complained that from [May 26] 2014, it had been denied access. By then the police investigation had started. On [June 3] 2014, [CITIC] obtained its preservation order [from the Qingdao Maritime Court]. Although there are conflicting accounts it does appear that the [plaintiffs or] CWT [were] given access on [June 7] 2014 and saw the [m]aterial. On [June 6, 2014], i.e. the day before, the [p]ort issued a public announcement that there was an investigation and that [QPGC] had been asked to assist with [the preservation] orders. On [July 14] 2014 the [p]ort was closed by the police. All of these facts paint a picture that access to the [p]ort was difficult and goods

were sealed and subject to investigation and court preservation orders. That was still the state of affairs up until [October 28] 2015 when [the plaintiffs' employee] found only 504 [metric tons of material] and beyond then, right through to the date of auction in April 2020."

These findings are not merely passing commentary. Rather, the issue of whether the material was stolen and/or misappropriated was presented to the arbitrators by the seller as a defense to liability and the arbitrators addressed it in the third award to decide whether the seller breached the implied warranty of quiet possession. Further, the plaintiffs had an opportunity to litigate before the arbitrators, and did litigate, in favor of a finding that the material was never delivered to them and neither was stolen nor misappropriated but rather had been seized and then auctioned off in its entirety. Consequently, we conclude that the issue of whether the material was stolen and/or misappropriated was necessarily determined by the arbitrators in the third award.

Likewise, the issue of whether the material had been seized was also necessarily determined in the arbitration because it was essential to the seller's defense that it was not liable because any actions depriving the plaintiffs of quiet possession were unlawful. The arbitrators concluded that, "[w]e were unable to accept that either the action of the QPGC or the auction were unlawful. *QPGC could not deliver the* [*m*]*aterial because it had been seized and confiscated by the police and subsequently by order of the* [*Qingdao Intermediate People's Court*]. The auction was conducted at the order of the [Qingdao Intermediate People's Court]. Those acts were therefore conducted under the aegis of the Chinese courts. It is difficult to understand how they could therefore be unlawful." (Emphasis added.) Thus, the fact that the material was seized by Chinese

authorities was essential to the arbitrators' determination that the interventions alleged by the seller to be unlawful (the denial of possession and the auction) were in fact lawful, which, in turn, was essential to the conclusion that the seller was liable.

The plaintiffs contend that "[t]he ultimate disposition of the [material] did not matter because the [arbitrators] made clear in the [third award] that the decision holding the seller liable to [the plaintiffs] for breach of the implied warranty of quiet possession was based on its finding that [the plaintiffs'] right to quiet possession had been interrupted in some manner." They argue that, because the arbitrators agreed with the plaintiffs that there were " 'different breaches of the implied warranty [of quiet possession] at various different times' . . . what happened to the [material] in the succeeding seven year period, i.e., seizure, auction, etc., was not necessary to the [arbitrators'] finding in [the plaintiffs'] favor on its breach of contract claim against the seller." In particular, the plaintiffs note that the third award acknowledges these other breaches, stating that "there were . . . different breaches of the implied warranty at various different times, starting with, at the earliest late 2013 when the CWT [w]arehouse [r]eceipt was transferred to the [plaintiffs], but ending with the latest when the [m]aterial was finally sold at auction in April 2020 because at that point the [m]aterial was irrevocably no longer available. There were other breaches in between, such as in mid-2014 when the [p]ort was closed and the ongoing impossibility for the [plaintiffs] to obtain possession. Thus, there were independent causes of action between 2013 and 2020." We are not persuaded.

The plaintiffs' argument too narrowly construes the third award. Underlying the breach of quiet possession claim in the third award were two necessary facts: first, the material was not stolen or misappropriated, and

second, the material was seized by agents of the Chinese government. Moreover, as discussed previously, the arbitrators had to determine whether the governmental interventions were lawful in order to resolve the seller's defense to liability for breach of quiet possession.

Furthermore, even if we accepted the plaintiffs' argument that the ultimate disposition of the material was not strictly necessary to every breach of quiet possession found by the arbitrators, it is clear that the arbitrators treated the disposition of the material as essential and, consequently, it was necessarily determined. In *Torrington Tax Collector, LLC* v. *Riley*, supra, 226 Conn. App. 211, this court adopted a new rule, "expand[ing] the applicability of the doctrine [of collateral estoppel] to encompass certain findings not strictly essential to the final judgment in the prior action. . . . Such findings may be relied upon [for purposes of collateral estoppel] if it is clear that the issues underlying them were treated as essential to the prior case by the court and the party to be bound. Stated another way, it is necessary that such findings be the product of full litigation and careful decision." (Internal quotation marks omitted.) Id., 229. Of the events constituting breach by the seller, the arbitrators focused in particular on seizure as the event that denied the plaintiffs quiet possession and treated it as essential to their conclusion that the material was not stolen or misappropriated but was lawfully seized, thus making the seller liable. Moreover, the arbitrators' finding that the material had been seized was the product of full litigation and careful decision. The plaintiffs had the opportunity to advocate before the arbitrators, and they did so, *in favor of a finding that the material was never delivered to them, had not been stolen, and had been seized.* To prove that the material had been seized by governmental authorities, the plaintiffs submitted the "Qingdao Intermediate People's Court of Shandong Province Criminal Court . . .

Criminal Judgment—2017-2018" (judgment). Among other things, "[t]he [judgment] ordered 'goods . . . that are seized or impounded on record will be auctioned. . . .' The judgment recorded that '[t]he public security organ sealed up, seized and frozen the real estate, land, equities, bank deposits . . . and goods . . . .' And that '[t]he criminal evidence articles transferred with the case are confiscated according to law. (The list attached hereinafter'). The list of goods 'attached hereinafter' included a specific reference to [the material] from the AS [Elysia] . . . ." (Emphasis omitted.)

Applying the Hollington rule, an English evidentiary rule that establishes that judicial findings on disputed issues of fact reached by earlier tribunals cannot be admitted as evidence in subsequent civil proceedings, the arbitrators acknowledged that they could not "have regard to findings of fact, but [concluded that] the [j]udgment recorded that the [m]aterial from the AS [Elysia] had been seized and was to be auctioned and this is . . . admissible as it is not a finding of fact, but merely a recitation of information provided to the [c]ourt." (Emphasis omitted.) The plaintiffs make much of this evidentiary ruling, asserting that "[the arbitrators] made no actual finding that the material had been seized and, instead, merely accepted that the [Qingdao Intermediate People's Court] in a completely separate proceeding had been told that the material had been seized." (Emphasis omitted.) The plaintiffs, however, overlook the several other pieces of evidence relied on by the arbitrators to find that the material had been seized. The arbitrators also considered the following: CWT's complaint that it had been denied access on May 26, 2014; the preservation orders issued by the Qingdao Maritime Court to CITIC on June 3, 2014; the public announcement issued by authorities at the Qingdao port that there was an investigation and that QPGC had been asked to assist with preservation orders; that the

Qingdao port was closed by the police on July 14, 2014; the list of goods attached to the judgment that specifically referenced alumina from the AS Elysia as "seized"; a 2019 appraisal report that was prepared after the Qingdao Intermediate People's Court order that the goods be auctioned and describes the material at that time as "sealed up by the Qingdao Intermediate People's Court"; the court's auction announcement; and testimony describing the warehouse where the material was stored as "a military port and heavily secured." It is evident from the thorough analysis of the issue in the third award that the arbitrators carefully weighed the proffered evidence and considered the relevant law in determining that the material had been seized.

We accordingly conclude that the issues of whether the material was stolen and/or misappropriated and whether it was seized were actually and necessarily decided in the arbitration proceedings and are identical to the issues involved in the present case. Because the arbitrators necessarily determined that the material was seized pursuant to an order of a Chinese court in the arbitration proceedings, the trial court properly concluded that the plaintiffs are precluded from arguing that the material was stolen or misappropriated in the present case or disputing that the material was seized by government authorities.

II

The plaintiffs next claim that, even if they are precluded from arguing that the material was stolen or not seized due to the application of collateral estoppel, genuine issues of material fact remain as to whether (1) the plaintiffs suffered "physical loss or damage" to the material within the meaning of the policies and (2) the plaintiffs' alleged loss was subject to the seizure exclusion.[9] Because we conclude that the resolution of

[9] The plaintiffs also claim that the court erred in concluding that the arbitrators' finding that the plaintiffs did not have title to the material meant that they did not have an insurable interest under the policies. We need not

these issues overlap, we address them together. We first set forth the applicable standard of review and relevant legal principles regarding the interpretation of insurance policies.

"[C]onstruction of a contract of insurance presents a question of law for the [trial] court which this court reviews de novo. . . . The determinative question is the intent of the parties, that is, what coverage the [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . In evaluating the expectations of the parties, we are mindful of the principle that provisions in insurance contracts must be construed as laymen would understand [them] and not according to the interpretation of sophisticated underwriters and that the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view. . . . [W]hen the words of an insurance contract are, without violence, susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses. . . . When construing exclusion clauses, the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim. . . . While the insured bears the burden of proving coverage, the insurer bears the burden of proving that an exclusion to coverage applies." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 364–65, 216 A.3d 629 (2019).

decide this issue because, even if we assume that there is a genuine issue of material fact as to whether the plaintiffs have an insurable interest under the policies, as we conclude in part II of this opinion, the plaintiffs are unable to establish physical loss or damage within the meaning of the policies that was not the result of actions excluded under the seizure exclusion to coverage.

The plaintiffs first contend that, assuming the court properly estopped them from arguing that the material was stolen or misappropriated, a genuine issue of material fact nonetheless remains as to whether there was "physical loss or damage" within the meaning of the policies based on the material being inaccessible to the plaintiffs. Specifically, the plaintiffs argue that "[their] loss was realized when [they were] unable to take possession of the [material] between December, 2013, and June, 2014 . . . after [they were] given a warehouse receipt in December, 2013."[10] (Citation omitted.) On the basis of our review of the relevant policy language and our prior conclusion as to the effect of collateral estoppel, we are not persuaded.

The specific language of the policies in this case provided in relevant part: "All goods and/or merchandise ON DECK, UNDER DECK or otherwise are insured . . . [a]gainst all risks of physical loss or damage from any external cause including mysterious disappearance and infidelity of Assured's employees."

[10] The plaintiffs additionally claim that "there exists a disputed issue of material fact as to whether [the plaintiffs] suffered a covered loss due to fortuitous incident [or] mysterious disappearance . . . ." We decline to address these two additional theories of loss given that they were not distinctly raised in the plaintiffs' complaint or opposition to summary judgment, nor are they adequately briefed on appeal. See *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229, 131 A.3d 771 (2016) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.)); *Wilson* v. *Jefferson*, 98 Conn. App. 147, 166, 908 A.2d 13 (2006) ("[w]here the parties cite no law and provide no analysis of their claims, we do not review such claims" (internal quotation marks omitted)). Further, the plaintiffs previously conceded the inapplicability of mysterious disappearance coverage before the trial court, arguing in a motion in limine that "there is no mystery as to the plaintiffs' loss of the material. . . . [T]his was incremental, systematic theft, not a mysterious disappearance." Accordingly, we decline to consider these new theories of loss that conflict with the plaintiffs' claims and arguments before the trial court.

The policies, however, do not define the phrase "physical loss or damage." Connecticut courts have had previous occasions to interpret the phrase "physical loss or damage," as the phrase is used in property insurance policies and both this court and our Supreme Court recently have held that "physical loss or damage" requires "some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible." *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, 346 Conn. 33, 51, 288 A.3d 187 (2023) (*CT Dermatology*); see also *Hartford Fire Ins. Co.* v. *Moda, LLC*, 346 Conn. 64, 72–73, 288 A.3d 206 (2023); *Mashantucket Pequot Tribal Nation* v. *Factory Mutual Ins. Co.*, 224 Conn. App. 429, 455–56, 313 A.3d 1219 (2024).

For example, in *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 63, our Supreme Court concluded that a property insurance policy did not provide coverage for lost business income and other incurred expenses arising from suspension of business operations during the COVID-19 pandemic. The policy in *CT Dermatology* provided coverage for " 'direct physical loss of or physical damage to' " covered property. Id., 36. In interpreting this phrase, the court held that "the plain meaning of the term 'direct physical loss of . . . [p]roperty' does not include the suspension of business operations on a physically unaltered property in order to prevent the transmission of the coronavirus. Rather, in ordinary usage, the phrase 'direct physical loss of . . . [p]roperty' clearly and unambiguously means that there must be some physical, tangible alteration to or deprivation of the property that renders it physically unusable or inaccessible." Id., 51. Accordingly, the court concluded that, given that "there has been no physical, tangible alteration of [the plaintiffs'] properties, no persistent, physical contamination of the properties rendering them uninhabitable,

and no imminent threat of physical damage to or destruction of the properties rendering them unusable or inaccessible"; id., 63; there was no genuine issue of material fact as to whether the policies did not cover the plaintiffs' claims because the plaintiffs suffered no "direct physical loss of . . . [p]roperty . . . ." (Internal quotation marks omitted.) Id., 63–64.

Similarly, in *CT Dermatology*'s companion case, *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 64, our Supreme Court determined that the insurance policies at issue did not provide coverage for financial loss suffered by a shoe supplier following mass cancellation of orders by retailers who were forced to temporarily close their business operations pursuant to state government orders during the COVID-19 pandemic, which created excess inventory of " 'unsellable' " shoes. Id., 68, 79. Those policies also contained language providing coverage for "direct physical loss or direct physical damage . . . ." (Internal quotation marks omitted.) Id., 75–76. On the basis of this language, and the court's holding in *CT Dermatology*, the court in *Moda, LLC*, likewise concluded that the supplier's claim failed because the losses it suffered "did not result from any tangible physical alteration to [its] stock or real property. Rather, those losses resulted from a transformation in governmental and societal expectations and behavior that had a seriously negative impact on [its] businesses." (Internal quotation marks omitted.) Id., 73.

We recognize that physical alteration of property is not the only way a covered loss can occur. In *CT Dermatology*, our Supreme Court agreed "with the plaintiffs to the extent that they contend that a 'direct physical loss' of a property need not always entail physical or tangible *alteration*. For example . . . a property that has been stolen has been physically lost even if its physical condition has not changed. . . . This is because a stolen property has been rendered *physically*

inaccessible to the insured." (Citations omitted; emphasis in original.) *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 56. Likewise, the court in *Moda, LLC*, explained that, "[f]or example, property that has been stolen or lost at sea may not be physically altered but has been physically removed from the owner's possession and rendered physically inaccessible." *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 73 n.6. Nevertheless, the court explained that "[m]ere loss of use or access is not enough, unless that loss is caused by a physical alteration of the property or the physical removal of the property." Id., 72–73. The controlling principle in both cases is that "physical loss or damage" arising from physical inaccessibility requires some discrete physical event creating such inaccessibility, such as physical removal from the possession of the insured.[11]

[11] We note that the policy language at issue here does not require "direct" physical loss. Although the plaintiffs argue that *CT Dermatology* and *Moda, LLC*, are inapposite because the relevant policy language in those cases required "direct" loss or damage, the absence of that adjective in the present case is of no import. Terms such as "direct," "remote," or "indirect" bear on the sufficiency of the causal connection between the loss and the covered peril. See 10A J. Plitt et al., Couch on Insurance (3d Ed. Rev. 2024) § 148:60 ("In a provision in a policy insuring against direct loss and damage caused solely by a particular cause, the word 'direct' means merely 'immediate' or 'proximate' as distinguished from 'remote.' . . . The word 'direct' as used in the phrase 'direct physical loss' in a property insurance policy is meant to exclude situations in which an intervening force played some role in the property damage." (Footnotes omitted.)); see also *Mashantucket Pequot Tribal Nation* v. *Factory Mutual Ins. Co.*, supra, 224 Conn. App. 447 n.22 (addressing similar difference in policy language and concluding that, "[a]lthough the policy does not specifically include the term 'direct' with regard to 'physical loss or damage,' we note that [the policy] excludes 'indirect or remote loss or damage' "); *Newman Myers Kreines Gross Harris, P.C.* v. *Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) ("[t]he words 'direct' and 'physical' . . . ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves"). We need not address causation in the present case. See footnote 14 of this opinion. Rather, the issue here is whether the plaintiffs alleged *physical* loss or damage within the meaning of the policies. Accordingly, we conclude that for the purposes of this appeal, the policy language in *CT Dermatology*

As alleged in the underlying complaint and in their opposition to the defendant's motion for summary judgment, the plaintiffs purchased the material in December, 2013, requested access to the material on May 26, 2014, pursuant to a pending sale of the material, and were denied such access on June 4, 2014. Although the plaintiffs now argue before this court that their loss was realized between December, 2013, and June, 2014, this claim is absent from both their operative complaint and their arguments in opposition to the defendant's motion for summary judgment. In count one of the operative complaint, the plaintiffs alleged that their loss resulted from the "theft and/or misappropriation" of the material. They further alleged that they first discovered the theft on October 28, 2015, when, during an inspection, they "only found 4522 [metric tons] of [material] in the storage areas, representing a physical theft of 5590 additional bags." They also alleged that during the inspection they discovered that the tags designating bags of material as belonging to the plaintiffs had been changed. Thus, the plaintiffs alleged that, "as of October 28, 2015, only 504 [metric tons] of [the plaintiffs' material] remained, with the other 24,746 metric tons apparently having been stolen or misappropriated by unknown entities either through outright removal or through the changing of identifying tags on the remaining bags." The plaintiffs thus alleged a loss due to the physical removal or exercise of dominion over the material by third parties. The complaint did not allege a covered loss due to the denial of access to the material between December, 2013, and June, 2014. Similarly, in their opposition to the defendant's motion for summary judgment, the plaintiffs argued that they could prove that they suffered a physical loss or damage because "a gradual diminution in the amount of material

and *Moda, LLC*, is sufficiently similar and, thus, it is instructive in our analysis of the claim before us.

could be observed over the course of site visits and that the tags identifying the material which were used to identify [the plaintiffs'] material were changed." Only on appeal, in an effort to avoid the effects of the application of collateral estoppel, have the plaintiffs attempted to change their theory of when the loss occurred. "Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229, 131 A.3d 771 (2016).

Furthermore, the plaintiffs' claim fails on its merits. They submitted no evidence before the trial court showing that they were denied any access to the material until they requested access on May 26, 2014, which request was denied on June 4, 2014. Thus, most of the period on which they rely in their appellate briefs, December, 2013, until May 26, 2014, is completely irrelevant to the analysis of when any loss occurred. More importantly, though, mere denial of access does not constitute a physical loss. See *Hartford Fire Ins. Co.* v. *Moda, LLC*, supra, 346 Conn. 72–73. Assuming that the plaintiffs could prove that they had an insurable interest in the material, any such loss did not occur until they were actually deprived of that interest in the material. The court determined that any such deprivation occurred when the property was seized by government authorities. Thus, the court concluded that the plaintiffs "cannot escape the collateral . . . estoppel effect of . . . the third award's finding that all the material was seized by the local authorities and all of it was sold at auction. . . . These holdings effectively preclude [the plaintiffs'] argument relating to the policies' grant of coverage." (Citation omitted.)[12]

[12] To the extent that the plaintiffs assert that a loss occurred upon their purchase of the material in December, 2013, we are not persuaded. Courts

The plaintiffs further argue that the trial court "assumed that the loss was the result of 'seizure' of the [material]" and "ignored that [the plaintiffs'] loss occurred years before the auction when it was denied possession of the [material]—as plainly reflected in the [third award]." They argue that, consequently, there is "a genuine issue of fact as to when [the plaintiffs'] loss occurred and if [their] loss predated the alleged seizure, and whether the [seizure exclusion] therefore even applies, rendering the grant of summary judgment improper." This argument is unavailing.

that have addressed such an argument have consistently concluded that loss arising from interference with intangible rights, i.e., legal interest in possession, does not constitute "physical loss or damage." See, e.g., *Curacao Trading Co.* v. *Federal Ins. Co.*, 137 F.2d 911, 914 (2d Cir. 1943) (The court concluded that " 'physical loss or damage from any external cause' . . . did not include protection against loss which resulted from the issuance of spurious warehouse receipts. To conclude otherwise would be to change a policy of property insurance to one comparable to a guarantee of the warehouseman's obligation to deliver . . . ."), cert. denied, 321 U.S. 765, 64 S. Ct. 521, 88 L. Ed. 1061 (1944); *Lennox* v. *Chubb National Ins. Co.*, Docket No. 24-cv-1397 (JGK), 2025 WL 219159, *3–4 (S.D.N.Y. January 16, 2025) ("At bottom, the plaintiff's claim stems from defective title. . . . Physical dispossession caused by defects in title is different from physical dispossession caused by, for example, theft. . . . In this case, the [p]olicy does not cover the plaintiff's claim because defective title is not a 'physical loss.' "); *Eveden, Inc.* v. *Northern Assurance Co. of America*, Docket No. 10-10061 (GAO), 2014 WL 952643, *5 (D. Mass. March 12, 2014) ("[i]ntangible losses, such as a defect in title or a legal interest in property, are generally not regarded as 'physical' losses in the absence of actually physical damage to the property"); *HRG Development Corp.* v. *Graphic Arts Mutual Ins. Co.*, 26 Mass. App. 374, 377, 527 N.E.2d 1179 (1988) (rejecting defective title as basis for loss, reasoning "[n]or do we think the salient phrase ('physical loss or damage') fairly can be construed to mean physical loss in the absence of physical damage" (emphasis omitted)). Cf. *Tiffany & Co.* v. *Lloyd's of London Syndicates 33, 510, 609, 780, 1084, 1225, 1414, 1686, 1861, 1969, 2001, 2012, 2232, 2488, 2987, 3000, 3623, 4444, 4472, & 4711*, Docket No. 651544, 2024 WL 2927657, *24 (N.Y. Sup. May 3, 2024) (concluding that there was genuine issue of material fact as to whether plaintiffs' *permanent physical loss* of property after it was sold by third party constituted " 'physical loss and/or damage' "). These conclusions are consistent with our Supreme Court's previous holding that "physical loss or damage" requires "some physical, tangible alteration to or deprivation of the property that

The seizure exclusion, titled "[Free of Capture and Seizure] Warranty," provides in relevant part: "The following warranty shall be paramount and shall not be modified or superseded by any other provision included herein or stamped or endorsed hereon unless such other provision refers specifically to the risks excluded by this warranty and expressly assumes the said risks. . . .

"Notwithstanding anything herein contained to the contrary, this insurance is warranted free from: (a) capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise . . . ."[13]

The trial court concluded that the seizure exclusion unambiguously applied to the circumstances giving rise to the plaintiffs' alleged loss. The court found that the defendant had "satisfactorily shown that the [seizure] exclusion bars [the plaintiffs'] claim under the policies."

The plaintiffs do not dispute that the seizure exclusion clearly and unambiguously excludes coverage for losses arising from government seizure or detention. See *Blaine Richards & Co.* v. *Marine Indemnity Ins. Co. of America*, 635 F.2d 1051, 1053 (2d Cir. 1980) ("the general [purpose] of the [c]lause . . . is to exclude from coverage losses arising from unforeseeable actions of sovereign states against the insured vessel or . . . the insured cargo"); see also *United States Surgical Corp.* v. *United States Fire Ins. Co.*, Docket No. 28 20 11, 1990 WL 277471, *3 (Conn. Super. October 5, 1990). Moreover, the prefatory language "notwithstanding anything herein contained to the contrary" has been

renders it physically unusable or inaccessible." *Connecticut Dermatology Group, PC* v. *Twin City Fire Ins. Co.*, supra, 346 Conn. 51.

[13] Although the seizure exclusion is titled as a "warranty" within the policies, we refer to it as an "exclusion" throughout this opinion as it is undisputed that it operates to exclude a loss due to seizure from coverage.

interpreted by courts to override any other provisions in an insurance policy. See *International Multifoods Corp.* v. *Commercial Union Ins. Co.*, 309 F.3d 76, 90 (2d Cir. 2002) ("the phrase '[n]otwithstanding anything herein contained to the contrary' . . . means that the [seizure exclusion] trumps any other provisions of the [policy]").

The plaintiffs further concede that the material was seized at some point but argue that there is a genuine issue of material fact as to whether their loss occurred before and independent of the seizure. In particular, they argue that there is evidence that their loss occurred when they were denied access to the material in June, 2014, years before when they claim that the seizure and auction occurred.

The plaintiffs' argument is contradicted by the findings of the arbitrators, which, as discussed in part I of this opinion, are entitled to preclusive effect. Specifically, we concluded that the arbitrators necessarily determined when the material was seized in the third award. They found that "access to the [p]ort was restricted from the end of May 2014 because CWT complained that from [May 26] 2014, it had been denied access. By then the police investigation had started. On [June 3] 2014, [CITIC] obtained its preservation order." The arbitrators also found that, on June 3, 2014, "the authorities had called upon [QPGC] to assist in the enforcement of [preservation] orders in relation to certain metal products that were the subject of the investigation" into fraud relating to certain aluminum and copper products stored at the Qingdao port. Thereafter, "[o]n [July 14] 2014 the [p]ort was closed by the police. All of these facts paint a picture that access to the [p]ort was difficult and goods were sealed and subject to investigation and court preservation orders. That was still the state of affairs up until . . . the date of auction in April 2020." In the third award, the arbitrators further

concluded that the seizure was the cause for the plaintiffs' denial of possession of the material, stating that "QPGC could not deliver the [m]aterial because it had been seized and confiscated by the police and subsequently by order of the [Qingdao Intermediate People's Court]." Consistent with our conclusion in part I of this opinion, given the arbitrators' findings in the third award that the preservation order was issued by the Qingdao Maritime Court on June 3, 2014, and that, following the issuance of the preservation order, "access to the [p]ort was difficult and goods were sealed and subject to investigation and court preservation orders," the plaintiffs are estopped from relitigating the fact that the material had been seized when they sought possession in June, 2014.

Moreover, courts have consistently concluded that the type of undisputed events that occurred in the present case constitute seizure within the meaning of the seizure exclusion. Although our research has revealed no Connecticut precedent addressing the precise issue, courts in other jurisdictions have applied similar policy exclusions when an insured's loss is attributable to seizure or detention by civil authorities. See *Blaine Richards & Co.* v. *Marine Indemnity Ins. Co. of America*, supra, 635 F.2d 1053–54 (concluding that Food and Drug Administration's detention of imported goods constituted seizure or detention under policy's seizure exclusion); *Northern Feather International, Inc.* v. *Those Certain London Underwriters Subscribing to Policy No. JWP108 through Wigham Poland, Ltd.*, 714 F. Supp. 1352, 1361 (D. N.J. 1989) (loss arising from lawful detention of goods by customs was excluded from coverage by seizure exclusion); *Resin Coatings Corp.* v. *Fidelity & Casualty Co. of New York*, 489 F. Supp. 73, 75 (S.D. Fla. 1980) ("the seizure of the goods and their sale by Arabian Customs . . . was a seizure within the meaning of the [seizure exclusion]"); *Intermondale*

Trading Co. v. *North River Ins. Co. of New York*, 100 F. Supp. 128, 130, 132 (S.D.N.Y. 1951) (detention of cargo for six months at Port of Gibraltar pursuant to governor's orders constituted seizure within meaning of policy's seizure exclusion).

We find particularly applicable the decision of the United States District Court for the Southern District of New York in *Petroterminal de Panama, S.A.* v. *Houston Casualty Co.*, 114 F. Supp. 3d 152 (S.D.N.Y. 2015), aff'd, 659 Fed. Appx. 46 (2d Cir. 2016), in which the court held that a judicial order resulting in the inability to access property constituted seizure within the meaning of the exclusion. Id., 161. In that case, the plaintiff owned and operated oil transportation and storage facilities in Panama. Id., 155. Following a minor oil spill at one of the plaintiff's storage facilities, the plaintiff faced a series of lawsuits in Panamanian courts. Id. Pursuant to one of those lawsuits, the Panamanian court issued an order that attached the oil stored by a third party at the plaintiff's facilities. Id. As a result of the attachment, the third party did not have access to its property for six weeks. Id. The third party alleged that because of the attachment, it incurred business interruption damages. Id., 156. Following suit with the third party, the plaintiff sought indemnification under its marine cargo insurance policies and the defendant insurers disputed coverage. Id. The District Court rendered summary judgment for the defendant insurers, concluding that the policies did not provide coverage for the third party's loss because the loss was caused by the attachment. Id., 161. As a result, the claim fell within the exclusion in one of the policies for losses "resulting from . . . [c]apture, seizure, arrest, taking, restraint, detainment, confiscation . . . or the consequences thereof . . . ." (Internal quotation marks omitted.) Id. In concluding that the attachment constituted seizure,

the court reasoned that "[t]he [a]ttachment by the Panamanian authorities was a form of seizure or detainment by legal process, and therefore falls squarely within the 'capture-seizure' exclusion. Accordingly, for this reason too, [the loss is] not covered by the . . . [p]olicy." Id. Thereafter, the United States Court of Appeals for the Second Circuit affirmed the District Court's conclusions. See *Petroterminal de Panama, S.A.* v. *Houston Casualty Co.*, 659 Fed. Appx. 46, 52 (2d Cir. 2016). Likewise, in the present case, the June 3, 2014 preservation order from the Qingdao Maritime Court, which resulted in the plaintiffs' inability to access the material, was a form of seizure or detainment by legal process. Like the attachment in *Petroterminal de Panama, S.A.* v. *Houston Casualty Co.*, supra, 114 F. Supp. 3d 152, the preservation order constituted a seizure squarely within the meaning of the seizure exclusion. Therefore, the plaintiffs' resulting loss, i.e., their inability to access the material in June, 2014, was excluded from coverage under the policies. See *General Star Indemnity Co.* v. *Driven Sports, Inc.*, 80 F. Supp. 3d 442, 450 (E.D.N.Y. 2015) (finding no coverage where "the allegations in . . . the underlying complaints plainly reveal that [the claims] are excluded from coverage, because each claim . . . 'aris[es] out of' " excluded risk). Therefore, we conclude that the plaintiffs failed to show that a genuine issue of material fact existed as to whether their loss was excluded from coverage by the seizure exclusion.[14]

[14] The plaintiffs also contend that the court failed to consider whether the seizure was the but for and proximate cause of the plaintiffs' loss. See *Blaine Richards & Co.* v. *Marine Indemnity Ins. Co. of America*, supra, 635 F.2d 1054–56 (considering whether detention or some earlier, covered peril was proximate cause of loss). As we have concluded in this opinion, however, the plaintiffs have failed to allege any other covered loss under the policies and, therefore, there are no genuine issues of material fact as to when the loss occurred or whether the loss predated the seizure. As a result, there is no genuine issue of material fact that the seizure exclusion applies in the present case. Consequently, it is unnecessary for us to consider whether the seizure of the material was the " 'predominant and determin-

In sum, the court properly concluded that the plaintiffs were precluded, pursuant to the doctrine of collateral estoppel, from relitigating the issues of whether the material was stolen and/or misappropriated and whether it was seized by agents of the Chinese government. For this reason, they are unable to establish a "physical loss or damage" within the meaning of the policies that was not excluded from coverage under the seizure exclusion to coverage. Accordingly, we conclude that the court properly granted the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH E.*
(AC 46582)

Alvord, Moll and Flynn, Js.

Syllabus

Convicted, following a conditional plea of nolo contendere, of the crime of criminal possession of a firearm, the defendant appealed, claiming that the trial court had improperly denied his motion to suppress evidence of a shotgun the police seized during a search of his home. K, who had accused the defendant of harassing and threatening her, had taken a photograph of a shotgun in the defendant's home office when she was there to clean his house fourteen months before the search warrant was executed. The defendant contended that the lapse of time between when the photograph was taken and the date that the search warrant was issued rendered probable

ing' " or " 'real efficient' " cause of the loss because seizure is the only cause of the loss alleged by the plaintiffs. Cf. id., 1054.

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

cause lacking to believe that the materials identified in the search warrant would be in his possession at the time the warrant was issued. *Held*:

The trial court properly denied the defendant's motion to suppress, as the passage of fourteen months did not render the information in the search warrant affidavit stale, and, on the basis of that information, it was reasonable for the judge who issued the warrant to believe that the items sought to be seized would be found at the time the warrant was executed.

Argued October 10, 2024—officially released March 25, 2025

Procedural History

Substitute information charging the defendant with two counts each of the crimes of violation of a protective order and criminal possession of a firearm, brought to the Superior Court in the judicial district of Danbury, where the court, *Stango*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Stango*, *J.*, on a conditional plea of nolo contendere to one count of criminal possession of a firearm; subsequently, the state entered a nolle prosequi as to the remaining charges; judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Russell C. Zentner, senior assistant state's attorney, with whom, on the brief, were *David R. Applegate*, state's attorney, *Mary-Caitlin E. Harding*, assistant state's attorney, and *Tori L. Ludwig*, deputy assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. Following a conditional plea of nolo contendere, entered pursuant to General Statutes § 54-94a,[1]

[1] General Statutes § 54-94a provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress . . . the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress . . . would be disposi-

the defendant, Joseph E., appeals from the judgment of conviction of criminal possession of a firearm in violation of General Statutes (Rev. to 2021) § 53a-217.[2] The defendant entered his conditional plea following the court's denial of his motion to suppress certain evidence seized from his home. On appeal, the defendant claims that the court improperly denied his motion to suppress because the search warrant application and affidavit failed to establish probable cause for the search of his home and the seizure of his property therein. We affirm the judgment of the trial court.

In its memorandum of decision denying the motion to suppress, the court found the following facts. "In May of 2021, a citizen-informant [K] . . . came to the

tive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress . . . . A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] General Statutes (Rev. to 2021) § 53a-217 provides in relevant part: "(a) A person is guilty of criminal possession of a firearm, ammunition or an electronic defense weapon when such person possesses a firearm, ammunition or an electronic defense weapon and . . . (4) knows that such person is subject to (A) a restraining or protective order of a court of this state that has been issued against such person, after notice has been provided to such person, in a case involving the use, attempted use or threatened use of physical force against another person, or (B) a foreign order of protection, as defined in section 46b-15a, that has been issued against such person in a case involving the use, attempted use or threatened use of physical force against another person . . . . For the purposes of this section, 'convicted' means having a judgment of conviction entered by a court of competent jurisdiction, 'ammunition' means a loaded cartridge, consisting of a primed case, propellant or projectile, designed for use in any firearm, and a motor vehicle violation for which a sentence to a term of imprisonment of more than one year may be imposed shall be deemed an unclassified felony.

"(b) Criminal possession of a firearm, ammunition or an electronic defense weapon is a class C felony, for which two years of the sentence imposed may not be suspended or reduced by the court, and five thousand dollars of the fine imposed may not be remitted or reduced by the court unless the court states on the record its reasons for remitting or reducing such fine."

All references herein to § 53a-217 are to the 2021 revision of the statute.

Bethel Police Department to make a complaint that she was being harassed and threatened by the defendant. [K] informed the police that she had loaned the defendant approximately $45,000 and that the defendant's efforts to repay the loan had become sporadic. Frustrated at the defendant's lack of consistent payments on the debt, [K] informed the defendant by text message that she 'would be moving in a different direction,' implying that she would be taking legal action to help ensure repayment of the $45,000, and concluded the text by stating that she believed that the defendant belonged in jail. The defendant angrily responded to [K] via text, 'I'm sick and tired of your harassment and you telling me I belong in jail.' He then concluded by texting, '[c]an I tell you something else right now and that's very important that everybody involved understand one thing . . . if I go back to jail at the hand of anybody else, when I get out, there (sic) DEAD.'

"The affidavit in support of the search and seizure warrant in question stated that [K] had knowledge of the defendant's criminal history consisting of felony convictions involving domestic violence and firearms. Further, it stated that the defendant's text message had caused her to believe that her personal safety was in jeopardy because she believed that the defendant had a firearm in his residence. ln support of that assertion, [K] provided the Bethel Police Department with information that she had been in the defendant's residence located at . . . Portland Avenue in Redding . . . and, while there, had observed what she believed to be a pump action shotgun in his office. Further, [K] stated to the police that the defendant had previously indicated to her that he sleeps with a firearm next to his bed.

"[K] shared a photo with the Bethel Police Department, dated March 6, 2020, of what appeared to be a pump action style shotgun laying across a desk. [K] stated that this was the weapon that she had seen in

the defendant's home when she had been inside the home to clean it and that she had taken this picture of it at that time. [K] expressed to the Bethel Police Department that she was fearful that the defendant still had that weapon. She provided all this information via a sworn written statement.

"The affidavit in support of the search and seizure warrant concluded by adding that the defendant did, in fact, have felony convictions and, in addition, was the respondent to active orders of protection, both of which would bar him from possessing firearms of any kind. On May 18, 2021, the court (*D'Andrea*, *J.*) authorized the search and seizure warrant for the defendant's residence. The warrant stated evidence discovered during the execution of the warrant would constitute evidence of violations of . . . General Statutes [§§] 53a-223 and 53a-217.

"On May 19, 2021, the search warrant was executed at the defendant's home, and the search uncovered [a firearm,[3] which was not] the firearm in the picture from March 6, 2020, at the residence. [This] firearm [was] seized as evidence." (Footnote added.)

In a substitute information filed November 8, 2022, the defendant was charged with, inter alia, criminal possession of a firearm in violation of § 53a-217. On November 8, 2022, the defendant filed a motion to suppress the evidence seized from his home. The defendant argued that there was no probable cause for the search because the search warrant relied on stale information. Specifically, the defendant contended that the information in the search warrant was stale because K's picture

[3] In its memorandum of decision, the trial court incorrectly stated that two firearms were seized from the defendant's residence during the search. The search warrant return references a single firearm in addition to ammunition. However, this error did not bear on the trial court's decision to deny the motion to suppress, and it is not considered in our review of the trial court's decision.

of the pump action style shotgun was more than fourteen months old when the search warrant was executed and, therefore, evidence was lacking that the firearm was still in the defendant's home. The state filed a memorandum of law in opposition to the defendant's motion to suppress. The court, *Stango*, *J.*, heard oral argument on the motion to suppress. On March 13, 2023, the court issued a memorandum of decision denying the defendant's motion.

Following the denial of the motion to suppress, the defendant entered a written, conditional plea of nolo contendere to one count of criminal possession of a firearm in violation of § 53a-217. In accordance with the plea agreement, he was sentenced to a total effective term of five years of incarceration, execution suspended after two years, which was the mandatory minimum, followed by three years of probation.[4] This appeal followed.

The defendant's sole claim on appeal is that the court improperly denied his motion to suppress because information relied on in the search warrant affidavit was stale at the time that the search warrant was issued. The defendant contends that the information was stale because the information was fourteen months old "with zero indication of subsequent criminal activity, no reasonable basis for an assumption of ongoing criminal activity, and no additional corroboration . . . ." The defendant argues that, as a result of the lapse of time,

[4] The defendant also entered a conditional plea of nolo contendere in a separate docket, to one count of threatening in the second degree in violation of General Statutes § 53a-62 and was sentenced to a concurrent term of 364 days of incarceration, execution suspended, followed by three years of probation. The defendant, in a third docket, also entered a plea of nolo contendere to violation of the conditions of his release in violation of General Statutes § 53a-222 and was sentenced to a concurrent term of five years of incarceration, execution suspended, followed by five years of probation. The defendant does not challenge these convictions in this appeal.

there was no probable cause to believe that the materials identified in the search warrant would be in his possession when the warrant was issued. We disagree.

We begin by setting forth the applicable standard of review. "When reviewing the trial court's denial of a motion to suppress, the standard of review to be applied depends on whether the challenge asserted on appeal is to the factual basis of the trial court's decision or to its legal conclusions. . . . [T]o the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. Where, however, the trial court has drawn conclusions of law, our review is plenary, and we must decide whether those conclusions are legally and logically correct in light of the findings of fact. . . . Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . Accordingly, [o]ur review of the question of whether an affidavit in support of an application for a search [and seizure] warrant provides probable cause for the issuance of the warrant is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Hanisko*, 187 Conn. App. 237, 245–46, 202 A.3d 375 (2019). "Because this issue implicates a defendant's constitutional rights . . . we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence." (Internal quotation marks omitted.) *State* v. *Shields*, 124 Conn. App. 584, 592, 5 A.3d 984 (2010), aff'd, 308 Conn. 678, 69 A.3d 293 (2013), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014).

The following legal principles are relevant to our resolution of the defendant's claim. "Both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution prescribe that a search warrant shall issue only upon a showing of probable cause. Probable cause to search exists if . . .

(1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Although [p]roof of probable cause requires less than proof by a preponderance of the evidence . . . [f]indings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. . . . Consequently, [i]n determining the existence of probable cause to search, the issuing [judge] assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . The determination of probable cause is reached by applying a totality of the circumstances test. . . .

"The role of an appellate court reviewing the validity of a warrant is to determine whether the affidavit at issue presented a substantial factual basis for the [issuing judge's] conclusion that probable cause existed. . . . [Our Supreme Court] has recognized that because of our constitutional preference for a judicial determination of probable cause, and mindful of the fact that [r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause . . . *we evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding*. . . . We therefore review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw. . . . In evaluating whether the warrant was predicated on probable cause, a reviewing court

may consider only the information set forth in the four corners of the affidavit that was presented to the issuing judge and the reasonable inferences to be drawn therefrom." (Emphasis in original; internal quotation marks omitted.) *State* v. *Hanisko*, supra, 187 Conn. App. 246–47.

"It is undisputed that [t]he determination of probable cause to conduct a search depends in part on the finding of facts so closely related to the time of the issuance of the warrant as to justify a belief in the continued existence of probable cause at that time. . . . Although it is reasonable to infer that probable cause dwindles as time passes, no single rule can be applied to determine when information has become too old to be reliable. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc." (Citation omitted; internal quotation marks omitted.) *State* v. *Vincent*, 229 Conn. 164, 174, 640 A.2d 94 (1994). "Accordingly, we have refused to adopt an arbitrary cutoff date, expressed either in days, weeks or months, beyond which probable cause ceases to exist." (Internal quotation marks omitted.) *State* v. *Buddhu*, 264 Conn. 449, 465, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004).

We first consider the character of the crime, which, here, was the criminal possession of a firearm. Although our appellate courts have not addressed a claim of staleness with respect to information about a firearm contained in a search warrant affidavit, decisions from other courts are instructive to our analysis. As the

United States Court of Appeals for the Sixth Circuit stated in determining that a search warrant affidavit's information was not stale based on a five month period between the date the firearm in question was stolen from another person's home and the date that firearm was found in the defendant's residence: "The illegal firearm possession alleged in the affidavit is not a one-time occurrence but rather a continuous and ongoing offense. Possession is a course of conduct, not an act . . . . The element of possession and the fact that a weapon has continuing value suggests these crimes are more like 'regenerating conspiracies' than 'chance encounters,' and therefore this factor weighs against a finding that the information was stale." (Citations omitted.) *United States* v. *Goodwin*, 552 Fed. Appx. 541, 544–45 (6th Cir.), cert. denied, 572 U.S. 1128, 134 S. Ct. 2324, 189 L. Ed. 2d 199 (2014).[5]

We next consider the second and fourth factors, the character of the criminal and the place to be searched. During oral argument before this court, the defendant's appellate counsel conceded that the defendant was not a "nomad." The address listed in the warrant was the defendant's home where he was living. Because the defendant was entrenched, rather than nomadic, his staleness argument is undermined. See *United States*

[5] Similarly, in *United States* v. *Lancaster*, 145 Fed. Appx. 508, 513 (6th Cir. 2005), the Sixth Circuit determined that information in a search warrant affidavit was not stale when an informant had witnessed the defendant fire a machine gun two years earlier.

The defendant emphasizes the fact that the weapons in question in *Goodwin* and *Lancaster* were machine guns, whereas the weapon described in the search warrant was a pump action style shotgun. However, in both *Goodwin* and *Lancaster*, the court's analysis did not turn on the type of the firearm used. See *United States* v. *Goodwin*, supra, 552 Fed. Appx. 544 (explicitly discussing "illegal firearm possession"); *United States* v. *Lancaster*, supra, 145 Fed. Appx. 513 (emphasizing that "firearms are not perishable items" and that firearm owners generally keep their firearms for long periods of time). Therefore, we are not persuaded by the defendant's argument.

v. *Goodwin*, supra, 552 Fed. Appx. 545 ("If a criminal defendant moves frequently with the hope of avoiding detection or capture, the probability that evidence of his criminal conduct will be found in a given location diminishes rapidly with the passage of time. . . . Here, however, the affidavit supported the conclusion that [the defendant] was an 'entrenched' criminal because the ongoing possession crimes were likely to have occurred at [the defendant's] residence." (Citation omitted.)). Our Supreme Court has recognized that the place identified by the search warrant can be considered a " 'secure operational base' " when it is the defendant's home. *State* v. *Johnson*, 219 Conn. 557, 568, 594 A.2d 933 (1991); see also *United States* v. *Goodwin*, supra, 546. In turn, the information in the warrant here is "less likely to be stale" because the defendant's home is not merely a " 'criminal forum of convenience . . . .' " *State* v. *Respass*, 256 Conn. 164, 180, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

Finally, we consider the third factor, the thing to be seized, and whether it is "perishable and easily transferable or of enduring utility to its holder . . . ." (Internal quotation marks omitted.) *State* v. *Vincent*, supra, 229 Conn. 174. The search warrant here sought a firearm, specifically "a pump action style shotgun," which qualifies as a durable good. See id., 174–75. "In contrast to perishable goods, durable goods can, by their nature, remain in a defendant's possession for a longer period of time." *United States* v. *Goodwin*, supra, 552 Fed. Appx. 545; see also *United States* v. *Hampton*, 760 Fed. Appx. 399, 403 (6th Cir. 2019).

Consistent with courts in other jurisdictions, our Supreme Court has recognized that firearms have an enduring utility to their holder. See, e.g., *State* v. *Carbone*, 172 Conn. 242, 251, 374 A.2d 215 ("people who own pistols generally keep them at home or on their

persons" (internal quotation marks omitted)), cert. denied, 431 U.S. 967, 97 S. Ct. 2925, 53 L. Ed. 2d 1063 (1977), and cert. denied, 431 U.S. 967, 97 S. Ct. 2925, 53 L. Ed. 2d 1063 (1977); *United States* v. *Piloto*, 562 Fed. Appx. 907, 913 (11th Cir.) ("unlike narcotics, firearms are not consumable items; it would be reasonable to believe that [the defendant] continued to possess his gun in his home for at least 13 months"), cert. denied, 574 U.S. 913, 135 S. Ct. 291, 190 L. Ed. 2d 213 (2014); *United States* v. *Neal*, 528 F.3d 1069, 1074 (8th Cir. 2008) ("[i]nformation that someone is suspected of possessing firearms illegally is not stale, even several months later, because individuals who possess firearms tend to keep them for long periods of time"); *United States* v. *Pritchett*, 40 Fed. Appx. 901, 906 (6th Cir.) ("[f]irearms are durable goods and might well be expected to remain in a criminal's possession for a long period of time"), cert. denied, 537 U.S. 1023, 123 S. Ct. 532, 154 L. Ed. 2d 433 (2002).[6] In the present case, the

[6] The defendant also argues that "there still should be something in the affidavit . . . showing that a person is still in possession of the weapon." We conclude that, contrary to the defendant's contention, there existed evidence reasonably suggesting that the defendant still possessed the firearm. Pursuant to the laws governing the transfer of firearms, including General Statutes § 29-37a (d), certain authorization and documentation is required for the legal transfer of firearms. As described in the search warrant affidavit, a police officer conducted a check with the special licensing and firearms unit of the Department of Emergency Services and Public Protection to confirm whether the defendant had a history of an authorized transfer of "any long gun matching the description of the firearm seen in the [photograph] provided by [K]." However, the officer could not find evidence that the shotgun was lawfully transferred to or from the defendant. Therefore, the issuing court reasonably could have considered the information that a search of firearm transfer records revealed no sale as a circumstance from which it could be inferred that probable cause continued to exist. See *United States* v. *Rahn*, 511 F.2d 290, 293 (10th Cir.), cert. denied, 423 U.S. 825, 96 S. Ct. 41, 46 L. Ed. 2d 42 (1975); see also *State* v. *Carbone*, supra, 172 Conn. 251 (citing *United States* v. *Rahn*, supra, 292–93, as holding that "warrant to search for guns issued on information eighteen months old not stale when affidavit showed the defendant had said guns would appreciate in value if kept, had been seen making personal use of one gun, and search of records of area pawnshops revealed no sales by the defendant").

continued utility of the defendant's firearm is particularly apparent considering K's sworn written statement, which provided that the defendant stated that he slept next to a firearm. As a result, the third factor supports a finding that the information was not stale.

All of the *Vincent* factors weigh against a claim of staleness. In light of the foregoing, we conclude that the passage of fourteen months between the date K took a photograph of the shotgun laying across the defendant's desk and the date that the search warrant was issued did not render the information in the search warrant affidavit stale. It was reasonable for the issuing judge to believe, on the basis of that information, that there was a fair probability that the items sought to be seized would be found at the time that the search warrant was executed. Accordingly, we conclude that the court properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

NICOLE C. JACKSON *v.* JOSHUA PRINCE ET AL.
(AC 46961)

Alvord, Suarez and Clark, Js.

Syllabus

The plaintiff appealed from the judgment of the trial court, rendered following its granting of the defendants' motions to dismiss her breach of contract action for lack of personal jurisdiction due to, inter alia, insufficient process. The defendants J and M sold certain real property in Fairfield to the plaintiff, and the defendants Z and D were attorneys who represented the parties in the real estate transaction. In their motion to dismiss, J and M claimed, inter alia, that M was served in hand at their home, but that no copy was left for J, nor was he served in hand. Z and D claimed in separate motions that the plaintiff failed to effectuate proper service because the state marshal attempted to serve them by leaving a copy of the summons and complaint at their respective law firms, rather than serving them through in person

or abode service, and they had not authorized anyone at their law offices to accept service on their behalf. On appeal, the plaintiff claimed that the court erred in, inter alia, concluding that it lacked personal jurisdiction over J and M on the basis of insufficiency of process and insufficient service. *Held*:

The trial court erred in concluding that the plaintiff's designation of "J and M" on the summons form as one defendant, rather than listing J and M as separate individuals, deprived the court of personal jurisdiction over M and J pursuant to statute (§ 52-45a), as the designation of "J and M" was a circumstantial defect that could not reasonably have resulted in any confusion about their identities, J and M did not dispute that they received actual notice of the action, and they did not claim that they suffered any prejudice from the plaintiff's failure to list them separately.

The trial court erred in dismissing the action as to J for insufficient service of process prior to holding an evidentiary hearing, as there was a factual dispute over whether the state marshal left a copy of the summons and complaint for J, and the court was not permitted to resolve that issue based solely on the parties' affidavits.

The trial court erred in concluding that it lacked personal jurisdiction over M, as the court found that the state marshal left one copy of the summons and complaint in the hands of M, thereby serving her in a manner allowed by statute (§ 52-57), and counsel for M conceded at oral argument before this court that M was properly served.

The trial court properly dismissed the action as to Z and D for lack of personal jurisdiction because the plaintiff failed to properly effectuate service pursuant to § 52-57 (a), and the record failed to support the plaintiff's claim that Z and D evaded service of process.

Argued February 3—officially released March 25, 2025

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Reed, J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *judgment directed in part; further proceedings.*

Nicole C. Jackson, self-represented, the appellant (plaintiff).

Christopher J. Jarboe, for the appellees (named defendant et al.).

Michael R. Keller, with whom, on the brief, was *Justin R. Bengtson*, for the appellee (defendant Amy Zabetakis).

Ryan V. Nobile, with whom, on the brief, was *Robert C. E. Laney*, for the appellee (defendant John B. Devine).

Opinion

CLARK, J. The self-represented plaintiff, Nicole C. Jackson, appeals from the judgment of the trial court dismissing her action against the defendants, Joshua Prince (Joshua), Melinda Prince (Melinda), Amy Zabetakis, and John B. Devine. On appeal, the plaintiff claims that the court erred in (1) concluding that it lacked personal jurisdiction over Joshua and Melinda on the basis of insufficiency of process and insufficient service of process, (2) failing to hold an evidentiary hearing prior to dismissing the action as to Joshua and Melinda, and (3) concluding that it lacked personal jurisdiction over Zabetakis and Devine on the basis of insufficient service of process. We conclude that the court erred in concluding that it lacked personal jurisdiction over Melinda and in failing to hold an evidentiary hearing prior to dismissing the action as to Joshua. We also conclude that the court properly dismissed the action as to Devine and Zabetakis. Accordingly, we reverse in part and affirm in part the judgment of the trial court.

The following facts as alleged in the pleadings and procedural history are relevant to this appeal. On January 4, 2022, the plaintiff purchased certain real property located in Fairfield (property) from Joshua and Melinda. Zabetakis and Devine are attorneys licensed to practice law in Connecticut. Devine represented Joshua and Melinda in connection with the transaction, and Zabetakis represented the plaintiff. The plaintiff alleges that in August, 2022, she discovered certain defects

with the property that were not disclosed at the time of the sale.

The plaintiff commenced the present action on December 21, 2022. The summons, which was completed on the civil summons form published by the Judicial Branch, identifies "Joshua and Melinda Prince" as the "first defendant." In the return of service, the state marshal attested that he served Joshua and Melinda "by leaving at [their] usual place of abode . . . two true and attested copies of the within [summons and complaint] . . . ." The marshal further attested that he served Zabetakis by leaving a copy of the summons and complaint at "Rucci Law Group, 19 Old Kings [Highway] South, Darien," and that he served Devine by leaving a copy of the summons and complaint at "Devine & Devine, 65 East [Avenue], Norwalk . . . ."

On March 1 and 3, 2023, Zabetakis and Devine, respectively, moved to dismiss the action for lack of personal jurisdiction due to insufficient service of process. Zabetakis and Devine both argued that the plaintiff failed to effectuate proper service because the state marshal attempted to serve them by leaving the summons and complaint at their respective law firms, rather than serving them through in person or abode service, as required by General Statutes § 52-57 (a).[1] Zabetakis filed an affidavit in which she averred that she did not receive personal service of the summons and complaint, that her usual place of abode is not 19 Old Kings Highway South in Darien, and that she did not authorize anyone at that address to accept service on her behalf. Likewise, Devine filed an affidavit in which he averred that he did not receive personal service of the summons and complaint, that his usual place of abode is not 65 East

[1] General Statutes § 52-57 provides in relevant part: "(a) Except as otherwise provided, process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state."

Avenue in Norwalk, and that he did not authorize anyone at that address to accept service on his behalf.

On March 3, 2023, Joshua and Melinda filed a motion to dismiss in which they claimed that the court lacked personal jurisdiction over them due to insufficient process because the summons identified "Joshua and Melinda Prince" as the first defendant, rather than listing them separately. In addition, Joshua claimed that the court lacked personal jurisdiction over him due to insufficient service of process because the marshal provided only a single copy of the summons and complaint to Melinda and did not leave a separate copy for Joshua. Melinda filed an affidavit in which she averred that she was personally served with a single copy of the summons and complaint and that the marshal did not leave a copy for Joshua. Joshua filed an affidavit in which he averred that he was not personally served with a copy of the summons and complaint and that a copy was not left for him at his usual place of abode.

On May 22, 2023, the court, *Reed, J.*, heard argument on the motions to dismiss. On September 12, 2023, the court entered separate orders granting all three motions to dismiss. As to Zabetakis and Devine, the court concluded that it lacked personal jurisdiction over them due to insufficient service of process "because service of process was not effectuated . . . by in hand or abode service in compliance with . . . § 52-57 (a) . . . ." As to Joshua and Melinda, the court concluded that it lacked personal jurisdiction over them due to insufficiency of process because the summons "describe[d] Joshua and [Melinda] as one defendant when they are two separate individuals," and due to insufficient service of process because the state marshal "left one copy [of the summons and complaint] only in the hands of [Melinda] . . . without leaving a true and attested copy of the process for [Joshua]."

This appeal followed. Additional facts and procedural history will be set forth as necessary.[2]

Before addressing the plaintiff's claims, we set forth the standard of review and legal principles applicable to the claims raised in this appeal. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous." (Citation omitted;

[2] Prior to filing the appeal, on September 19 and 20, 2023, the plaintiff filed three separate motions requesting that the court clarify whether the dismissal orders were "with or without prejudice." The court did not rule on those motions.

After filing the appeal, on October 16, 2023, the plaintiff filed a motion for articulation, in which she requested that the court articulate: (1) "the statute or law the trial court relies upon when ignoring . . . that [Devine] and [Zabetakis] avoided providing personal contact information including on their abode"; (2) "the statute or law the trial court relies upon in . . . denying an evidentiary hearing" to resolve whether the marshal left a copy of the summons and complaint at Joshua's usual place of abode; and (3) whether the dismissal orders were "with or without prejudice . . . ." Following a hearing, on October 27, 2023, the court entered an order articulating that the dismissal orders were "without prejudice," but denying the remaining requests for articulation. The plaintiff did not file a motion for review of that order.

In her appellate brief, the plaintiff argues that the "failure to clearly articulate the grounds for dismissal" justifies reversal of the trial court's judgment. To the extent the plaintiff challenges the judgment on the basis that the court partially denied her motion for articulation, we decline to review that claim because "[t]he motion for review, not the appeal, is the only appropriate means by which to obtain a remedy with regard to a decision on a motion for articulation." *Lynn* v. *Lynn*, 145 Conn. App. 33, 37 n.2, 74 A.3d 506 (2013); see also Practice Book § 66-5. We note that, although this court "may order a further articulation of the basis of the trial court's factual findings or decision" if "necessary to the proper disposition of the cause"; Practice Book § 60-5; no such articulation is necessary for the resolution of the plaintiff's claims.

internal quotation marks omitted.) *Prenderville* v. *Sinclair*, 164 Conn. App. 439, 451–52, 138 A.3d 336 (2016).

"[T]he Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction. . . . [W]hen a particular method of serving process is set forth by statute, that method must be followed. . . . Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction. . . . A proper officer serving process must comply with the provisions of . . . § 52-57(a), which require that process be served by leaving it with the defendant, or at his usual place of abode . . . . Abode service is not effective if it is left at an address that is not the usual address of the party to be served, and an action commenced by such improper service must be dismissed. . . .

"For service pursuant to § 52-57 (a), the 'usual place of abode' presumptively is the defendant's home at the time when service is made. . . . Whether a particular locale is the usual place of abode is a question of fact. . . . When . . . the defendant is a resident of Connecticut who claims that no valid abode service has been made . . . that would give the court jurisdiction over [the defendant's] person, the defendant bears the burden of disproving personal jurisdiction. . . . When jurisdiction is based on personal or abode service, the matters stated in the return, if true, confer jurisdiction unless sufficient evidence is introduced to prove otherwise." (Citations omitted; internal quotation marks omitted.) *Jimenez* v. *DeRosa*, 109 Conn. App. 332, 338–39, 951 A.2d 632 (2008).

I

The plaintiff first claims that the court erred in concluding that it lacked personal jurisdiction over Joshua

and Melinda due to insufficient process and insufficient service of process. The plaintiff argues that she accurately identified Joshua and Melinda as defendants on the civil summons form, and that listing "Joshua and Melinda Prince" on a single line on the form was merely a misnomer that did not render the summons insufficient. The plaintiff further argues that, because there was a factual dispute over whether the state marshal left two copies of the summons and complaint at Joshua and Melinda's usual place of abode, the court was required to hold an evidentiary hearing prior to dismissing the action for insufficient service of process. We agree.

The following additional procedural history is relevant to this claim. In the memorandum in support of their motion to dismiss, Joshua and Melinda argued that, by identifying "Joshua and Melinda Prince" as the "first defendant" on the civil summons form, the plaintiff had improperly "treat[ed] them as one defendant," rendering the process insufficient and depriving the court of personal jurisdiction over both of them. Additionally, Joshua argued that the court lacked personal jurisdiction over him because, contrary to the attestation in the return of service, the marshal did not leave a separate copy of the summons and complaint for him at his usual place of abode. On April 18, 2023, the court scheduled oral argument on the motions to dismiss. On May 18, 2023, Joshua and Melinda filed a request for an evidentiary hearing on their motion to dismiss, in which they requested that, "if the court determines that further evidence is required on the issues raised in their motion, that the evidentiary hearing be held simultaneously with the hearing already scheduled for May 22, 2023."

During oral argument on the motion to dismiss, counsel for Joshua and Melinda reiterated the arguments set forth in their written motion, namely, that the court

should dismiss the action as to both Joshua and Melinda due to insufficiency of process and that the action "should be dismissed as to Joshua . . . based on insufficiency of service of process." With respect to the latter argument, counsel noted that the affidavits submitted by Joshua and Melinda disputed the marshal's attestation that he had left two copies of the summons and complaint at their residence. Counsel further argued "that [the affidavits leave] us currently with a factual dispute" and noted that Joshua and Melinda were available to testify. The court responded that "[t]his is not an evidentiary hearing. . . . We've not set aside time sufficient for evidence if it's needed. So, we're not going to do that today."

On September 12, 2023, the court entered an order dismissing the action as to Joshua and Melinda without holding an evidentiary hearing. With respect to the contention that the summons failed to identify Joshua and Melinda separately, the court determined that "the summons and complaint improperly identify Joshua and [Melinda] jointly as one defendant. Yet, they are, in fact, separate individuals, and not a business or corporate entity called 'Joshua and Melinda Prince.' The legal process is defective in treating them as one defendant. It is axiomatic that individual persons who are claimed to be liable for damages should be listed as separate defendants so that they may appear and plead in their individual capacities and assert such rights and defenses that may individually apply." The court further noted that "General Statutes § 52-45a provides that civil actions shall be commenced by legal process consisting of a writ of summons or attachment, describing the parties, the court to which it is returnable, the return day, and the date and place for filing of an appearance." The court concluded that "[i]t is inaccurate and insufficient to describe Joshua and [Melinda] as one defendant

when they are two separate individuals, each with his or her own rights in the court process."[3]

The court then addressed Joshua's claim that the plaintiff failed to effectuate proper service. The court determined that, "[a]lthough the state marshal stated in his return of process that he served [Joshua] and [Melinda] by leaving two true and attested copies of the process at their usual place of abode, this is contradicted by Joshua and [Melinda] in their affidavits. In her affidavit, [Melinda] states that the state marshal . . . served her with one copy in hand,[4] and that the state marshal did not give her or leave a true and attested copy of the summons and complaint for her husband, [Joshua]. [Joshua] states in his affidavit that

[3] We note that the order did not expressly state that the court concluded that it lacked personal jurisdiction over Joshua and Melinda due to insufficiency of process. On appeal, however, the plaintiff and Joshua and Melinda treat the court's order as concluding that it lacked personal jurisdiction due to insufficiency of process, Joshua and Melinda argue that the court properly dismissed the action due to insufficiency of process, and the plaintiff argues that any defect in the summons did not deprive the court of personal jurisdiction. Construing the court's order as a whole, and in light of the arguments raised by the parties before the trial court and on appeal, we conclude that the court implicitly concluded that it lacked personal jurisdiction over Joshua and Melinda due to insufficiency of process. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 428, 219 A.3d 801 (2019) ("The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . The determinative factor is the intention of the court as gathered from all parts 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.)), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

[4] The order incorrectly states that Melinda averred in her affidavit "that the state marshal *never* served her with one copy in hand . . . ." (Emphasis added.) Later in the same paragraph, however, the order correctly states that "the marshal actually served [Melinda] in hand," and it is undisputed that Melinda's affidavit states that she "was served by a [s]tate [m]arshal in hand with one copy of the summons and complaint in this case." Thus, it appears that the court's statement that the marshal "never served [Melinda] with one copy in hand" was a scrivener's error.

he was never served in hand, and the return of process submitted by the state marshal does not claim that he served [Joshua] in hand (or by reading it). Rather, the marshal claims that he served [Joshua] and [Melinda] by abode with two true and attested copies. The fact that the marshal actually served [Melinda] in hand, while stating in his return that he served her by abode, shows that the return is inaccurate, and gives reason to doubt that he left two true and attested copies at the abode. The better evidence is that the marshal left one copy only in the hands of [Melinda], thereby serving her in a manner allowed by . . . § 52-57, but without leaving a true and attested copy for [Joshua] . . . .

"The fact that the civil summons lists Joshua and [Melinda] as one defendant . . . and that the complaint describes them as 'Defendant 1,' suggests that the plaintiff might not have been aware that individual persons who are being sued in their individual capacities, as opposed to a business or corporate entity named 'Joshua and Melinda Prince,' should be listed as separate defendants. The plaintiff's listing of them together suggests that the plaintiff considered them as one, leading to a reasonable inference that the plaintiff would have given the marshal only one copy of the process to be served on [them] jointly. This manner of service does not comply with . . . § 52-57, nor is it how summonses are typically served." (Citations omitted; footnote added.) The court concluded "that the plaintiff has failed to effectuate proper service of process upon [Joshua] and [Melinda] and the court, therefore, lacks personal jurisdiction over them."

A

We first address the court's conclusion that it lacked personal jurisdiction over Joshua and Melinda due to insufficiency of process. General Statutes § 52-123 provides that "[n]o writ, pleading, judgment or any kind

of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court." "Section 52-123 is a remedial statute and therefore must be liberally construed in favor of those whom the legislature intended to benefit. . . . Our Supreme Court has explained that § 52-123 replaces the common law rule that deprived courts of subject matter jurisdiction whenever there was a misnomer . . . in an original writ, summons or complaint. . . . When a misnomer does not result in prejudice to a party, the defect in the writ is circumstantial error." (Internal quotation marks omitted.) *Young* v. *Vlahos*, 103 Conn. App. 470, 478, 929 A.2d 362 (2007), cert. denied, 285 Conn. 913, 943 A.2d 474 (2008).

"When the correct party is designated in a way that may be inaccurate but which is still sufficient for identification purposes, the misdesignation is a misnomer. Such a misnomer does not prevent the exercise of [personal] jurisdiction if the defendant was actually served and knew he or she was the intended defendant. This is in contradistinction to the case in which the plaintiff has misconstrued the identity of the defendant and has therefore named and served the wrong party. The issue, then, is whether a misnomer is a designation of the right party in a way which may be inaccurate but which is still sufficient for identification purposes or whether the wrong person has been designated as a party." (Internal quotation marks omitted.) *Lussier* v. *Dept. of Transportation*, 228 Conn. 343, 350, 636 A.2d 808 (1994). "Service is proper despite a misnomer if the complaint is not susceptible to any reasonable doubt or confusion about who it was the plaintiff intended to sue." (Internal quotation marks omitted.) *Gaddy* v. *Mount Vernon Fire Ins. Co.*, 192 Conn. App. 337, 346, 217 A.3d 1082 (2019).

In the present case, it is apparent from our review of the record that the designation of Joshua and Melinda as "Joshua and Melinda Prince" could not reasonably have resulted in any confusion about the identity of the defendants. The complaint describes Joshua and Melinda as "the previous owners and sellers of the property." Attached to the complaint are copies of a rider to the real estate sales agreement and the residential property condition report from the sale of the property, both of which identify the sellers as "Joshua and Melinda Prince." Moreover, Joshua and Melinda do not dispute that they received actual notice of the action and do not claim that there was any confusion that they were the intended defendants or that they suffered any prejudice from the plaintiff's failure to list them separately on the summons. See, e.g., *Lussier* v. *Dept. of Transportation*, supra, 228 Conn. 348–49, 352 (designation in summons of defendant as "State of Connecticut, Department of Transportation" rather than "Commissioner of Transportation" did not deprive court of jurisdiction where commissioner was named in complaint and received actual notice); *Ryan* v. *Cassella*, 180 Conn. App. 461, 474–75, 184 A.3d 311 (2018) (summons that misspelled defendant's name was circumstantial defect that did not deprive court of jurisdiction where defendant received actual notice and claimed no prejudice as result of defect). Accordingly, we conclude that the designation of Joshua and Melinda as "Joshua and Melinda Prince" was a circumstantial defect that did not deprive the court of personal jurisdiction.

B

We next address the plaintiff's contention that the court erred by failing to hold an evidentiary hearing prior to dismissing the action as to Joshua and Melinda on the basis of insufficient service of process. We first note that, although the court concluded that it lacked personal jurisdiction over both Joshua and Melinda due

to insufficient service of process, Melinda did not move to dismiss the action on that basis. In their joint motion to dismiss, Joshua and Melinda both claimed that the action should be dismissed due to insufficiency of process, but only Joshua sought dismissal on the basis of lack of personal jurisdiction due to insufficient service of process. In her affidavit filed in support of the joint motion, Melinda conceded that she "was served by a state marshal in hand with one copy of the summons and complaint," and the trial court found that the state marshal "left one copy [of the summons and complaint] in the hands of [Melinda], *thereby serving her in a manner allowed by . . . § 52-57 . . .* ." (Emphasis added.) Moreover, during oral argument before this court, counsel for Melinda conceded that she was properly served. Accordingly, we conclude that the trial court erred in concluding that it lacked personal jurisdiction over Melinda.

With respect to Joshua, it is well settled that "where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." (Internal quotation marks omitted.) *Godbout* v. *Attanasio*, 199 Conn. App. 88, 97, 234 A.3d 1031 (2020). "When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Internal quotation marks omitted.) *Schaghticoke Tribal Nation* v. *Harrison*, 264 Conn. 829, 833, 826 A.2d 1102 (2003). "It [is] axiomatic . . . that in a case where the pleadings and submissions of the parties themselves necessarily raise a dispute about a fact that is central to the court's jurisdictional determination, the court has an independent duty, even in the absence of a part[y's] request, to hold an evidentiary hearing prior to resolving

the factual dispute." *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 772 n.13, 286 A.3d 467 (2022).

In the present case, the court's conclusion that the plaintiff failed to effectuate proper service on Joshua rested on its determination that the state marshal left only one copy of the summons and complaint with Melinda when he served her in person. The papers submitted by the parties, however, indicate that there was a factual dispute as to that issue: the marshal attested in the return of service that he left two copies at Joshua and Melinda's usual place of abode, but Joshua and Melinda averred in their affidavits that no copy was left for Joshua. In the order granting the motion to dismiss, the court relied solely on the papers submitted by the parties to support its determination that "[t]he better evidence is that the marshal left one copy [of the summons and complaint] only in the hands of [Melinda] . . . without leaving a true and attested copy [of the process] for [Joshua]." Likewise, Joshua argues on appeal that "the evidence regarding service of process was not equally balanced, but weighed in [Joshua's] favor" because Joshua and Melinda "filed two affidavits . . . showing that the state marshal's return was erroneous." Joshua further argues that, "[a]fter the defendants submitted affidavits squarely challenging the veracity of the marshal's return, it should be incumbent on the plaintiff to dispute the facts contained therein."

It is well established, however, that "an officer's return of abode service is prima facie evidence of the facts stated therein . . . [and] a defendant who contests the facts stated in the return bears the initial burden of *disproving* personal jurisdiction." (Citation omitted; emphasis in original.) *Jimenez* v. *DeRosa*, supra, 109 Conn. App. 341. Where a court's jurisdictional determination requires resolution of a factual dispute, "[a]n evidentiary hearing is necessary because a court

cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Internal quotation marks omitted.) *Godbout* v. *Attanasio*, supra, 199 Conn. App. 97. "Affidavits are insufficient to determine factual issues raised on a motion to dismiss unless . . . they disclose that no genuine issue as to a material fact exists. . . . If a motion to dismiss turns on disputed issues of fact, an evidentiary hearing *must be held* to afford the parties an opportunity to present evidence and to cross-examine adverse witnesses." (Citation omitted; emphasis added; internal quotation marks omitted.) *Adolphson* v. *Weinstein*, 66 Conn. App. 591, 594 n.3, 785 A.2d 275 (2001), cert. denied, 259 Conn. 921, 792 A.2d 853 (2002). Because the dispute over whether the marshal left a copy of the summons and complaint for Joshua was critical to the court's jurisdictional determination, the court was not permitted to resolve that issue solely on the basis of the affidavits. See, e.g., *Weinstein & Wisser, P.C.* v. *Cornelius*, 151 Conn. App. 174, 182–83, 94 A.3d 700 (2014) (remanding for evidentiary hearing where affidavits raised disputed factual issue regarding whether defendant was served at his usual place of abode). Accordingly, we conclude that the court erred by granting the motion to dismiss as to Joshua without holding an evidentiary hearing.

II

The plaintiff next claims that the court erred in concluding that it lacked personal jurisdiction over Zabetakis and Devine. The plaintiff does not challenge the court's determination that she failed to serve Zabetakis and Devine either in person or at their usual place of abode but argues that the court failed to consider evidence that Zabetakis and Devine "evad[ed] service by withholding their residential addresses . . . thus compelling the plaintiff to serve them at their last known professional addresses." The plaintiff further

argues that Practice Book § 10-13 authorizes service of process on an attorney at his or her last known professional address. We disagree.

The following additional procedural history is relevant to this claim. As discussed previously, Zabetakis and Devine moved to dismiss the action for lack of personal jurisdiction on the basis that the state marshal attempted to serve them by leaving the summons and complaint at their respective law firms, rather than serving them through in person or abode service. On March 17, 2023, the plaintiff filed an objection to the motions to dismiss, in which she argued that it was proper to serve Zabetakis and Devine at their place of employment because they did not provide her with information concerning their place of abode. The plaintiff indicated that she had emailed Zabetakis on two occasions to request "legal malpractice contact information," and that Zabetakis never responded to such emails. The plaintiff attached an affidavit to her objection, in which she averred that she "acted in good faith in serving appropriate notice to the defendants given the information provided and to the best extent possible in accordance with . . . [§ 52-57] and in the information provided by the Superior Court at Bridgeport concerning an approved list of [s]tate [m]arshals." The affidavit did not reference any attempt by the plaintiff to ascertain the usual place of abode of Zabetakis or Devine, and the plaintiff did not include copies of the emails she claimed to have sent to Zabetakis requesting "legal malpractice contact information." During argument before the trial court, the plaintiff reiterated her contention that Zabetakis and Devine evaded service by failing to provide her with information concerning their place of abode and argued that "if they do not . . . provide personal contact information, I have to serve them at a place of [employment] where I can find them." On September 12, 2023, the court entered separate orders

dismissing the action as to Zabetakis and Devine for lack of personal jurisdiction on the basis that the plaintiff failed to effectuate service in accordance with § 52-57 (a).

This court has recognized that, "if a putative party can be shown to have been evading service of process, [n]otice of a complaint coupled with good faith attempted service is sufficient to confer jurisdiction." (Internal quotation marks omitted.) *Jimenez* v. *DeRosa*, supra, 109 Conn. App. 339–40. "[W]here facts occur which would convince a reasonable man that personal service of process is being attempted, service cannot be avoided by denying service and moving away without consenting to take the document in hand; and service may be effected by depositing the paper in some appropriate place in his presence where it will be most likely to come into his possession . . . ." (Internal quotation marks omitted.) *Bove* v. *Bove*, 93 Conn. App. 76, 82, 888 A.2d 123, cert. denied, 277 Conn. 919, 895 A.2d 788 (2006), quoting 72 C.J.S. 629, Process § 43 (b) (1987). "Whether a defendant has engaged in such evasive maneuvers is a question of fact." *Jimenez* v. *DeRosa*, supra, 109 Conn. App. 340 n.3. When a defendant submits uncontested evidence demonstrating that the plaintiff failed to effectuate service in accordance with statutory requirements, a plaintiff claiming that the defendant evaded service bears the burden of proof. Id., 341.

In the present case, Zabetakis and Devine submitted affidavits averring that they were not served in person or at their usual place of abode, and that they had not authorized anyone at their law offices to accept service on their behalf. The plaintiff did not contest the information contained in those affidavits but, instead, claimed that she was excused from serving Zabetakis and Devine in accordance with § 52-57 (a) because they evaded service. The plaintiff, however, did not present any evidence in support of that claim; instead, she relied

solely on the unsubstantiated assertion in her objection to the motion to dismiss that Zabetakis failed to respond to her request for "legal malpractice contact information."

The plaintiff's failure to provide evidence to support her assertion that Zabetakis and Devine evaded service is fatal to that claim. See, e.g., *Jimenez* v. *DeRosa*, supra, 109 Conn. App. 341 (burden is on plaintiff to prove that defendant evaded service of process). Moreover, even if the plaintiff had presented evidence in support of her claim, the mere fact that a defendant does not voluntarily provide the plaintiff with information concerning his or her place of abode, without more, is insufficient to establish that the defendant evaded service of process. Rather, to establish that a defendant evaded service, the plaintiff is required to present evidence that the defendant took affirmative steps to avoid the plaintiff's good faith efforts at effectuating service in accordance with statutory requirements. See, e.g., *Bove* v. *Bove*, supra, 93 Conn. App. 80–81 (plaintiff's good faith attempt to serve defendant was sufficient to confer personal jurisdiction where defendant evaded service by running away from sheriff who was attempting to serve him and then, after witnessing sheriff leave process in mailbox, calling postal service to remove process rather than retrieving it). In the present case, there is no evidence that the marshal made any effort to serve Zabetakis or Devine in person, or that either defendant took any action to prevent the plaintiff from effectuating service. See, e.g., *Prenderville* v. *Sinclair*, supra, 164 Conn. App. 456 (defendant did not evade service by changing business address without notifying Secretary of the State; "[i]t was instead the plaintiffs' failure to use an alternative method of service once their original attempt failed that caused the untimely service and return of process"). Accordingly, the record does not support the plaintiff's claim that Zabetakis and Devine evaded service of process.

The plaintiff's contention that Practice Book § 10-13 authorizes service of process on an attorney at his or her last known professional address also is misplaced. The plaintiff relies on language in § 10-13 providing that "[s]ervice upon the attorney or upon a self-represented party, except service pursuant to Section 10-12 (c), may be by delivering a copy or by mailing to the last known address of the attorney or party. Delivery of a copy within this section means handing it to the attorney or to the party; or leaving it at the attorney's office with a person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein . . . ." This court has recognized, however, that § 10-13 does not provide a substitute for compliance with statutory rules of service. Rather, "[§] 10-13 describes the acceptable methods of service of the documents identified in Practice Book § 10-12." *Ciara* v. *Atlantic Motors, LLC*, 223 Conn. App. 164, 170, 307 A.3d 962, cert. denied, 348 Conn. 951, 309 A.3d 303 (2024). Section 10-12, in turn, provides in relevant part that "[i]t is the responsibility of counsel or a self-represented party filing the same to serve *on each other party who has appeared* one copy of every pleading *subsequent to the original complaint*, every written motion . . . and every paper relating to discovery, request, demand, claim, notice or similar paper . . . ." (Emphasis added.) Thus, the provision in § 10-13 allowing for service at an attorney's office applies to the service on a "party who has appeared" of pleadings and other papers filed "subsequent to the original complaint"; it does not provide a substitute means of serving process for purposes of commencing an action.[5]

[5] We also note that, although Zabetakis and Devine are attorneys admitted to practice in Connecticut, their status in the present case is as parties, not counsel. Thus, the provision in Practice Book § 10-13 allowing service of pleadings and other papers subsequent to the original complaint by "leaving it at the attorney's office" would apply to service on *counsel* for Zabetakis and Devine after they appeared in the action, not on them personally.

Section 52-45a governs the commencement of civil actions and provides that "[c]ivil actions shall be commenced by legal process consisting of a writ of summons or attachment," which "shall be accompanied by the plaintiff's complaint." As discussed previously, § 52-57 (a) requires that "process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state." "[W]hen a particular method of serving process is set forth by statute, that method must be followed. . . . Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction." (Internal quotation marks omitted.) *Jiminez* v. *DeRosa*, supra, 109 Conn. App. 338. Thus, the court did not acquire personal jurisdiction over Zabetakis and Devine based on the plaintiff's compliance with provisions of our rules of practice governing service on appearing parties of pleadings and other papers filed subsequent to the original complaint.

The plaintiff also argues that, as attorneys, Zabetakis and Devine had an ethical obligation to provide her with information concerning their usual place of abode. In support of that contention, the plaintiff relies on rule 1.4 (a) (4) of the Rules of Professional Conduct, which provides that "[a] lawyer shall . . . promptly comply with reasonable requests for information . . . ." We note that the plaintiff did not present any evidence that she asked Zabetakis and Devine for their home addresses. More importantly, as the commentary makes clear, rule 1.4 governs communication during the attorney-client relationship and is intended to ensure that "the client effectively [is able] to participate in the representation." Rules of Professional Conduct 1.4, commentary. The rule does not impose on attorneys an obligation to disclose their home address to a plaintiff in

the context of an impending lawsuit.[6] Accordingly, we conclude that the trial court properly dismissed the action as to Zabetakis and Devine for lack of personal jurisdiction.[7]

The judgment is reversed with respect to the order dismissing the action as to Joshua Prince and Melinda Prince and the case is remanded with direction to deny the motion to dismiss as to Melinda Prince and for an evidentiary hearing to determine whether the plaintiff properly effectuated service of process on Joshua Prince; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

PAUL DISPAZIO ET AL. *v.* EUGENE PACAPELLI ET AL.
(AC 47007)

Elgo, Westbrook and Bear, Js.

Syllabus

The plaintiffs appealed from the trial court's judgment for the defendants, rendered following its granting of the defendants' motion for summary

[6] The plaintiff also relies on rule 8.4 (3) of the Rules of Professional Conduct, which provides in relevant part that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ." The plaintiff does not explain how an attorney's failure voluntarily to disclose his or her home address constitutes conduct that falls within the ambit of that rule.

[7] The plaintiff argues that, as a self-represented litigant, she "made good faith efforts to comply with the procedural rules," and that "any alleged defects in service are minor and do not justify the dismissal of her claims." Although "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party . . . the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803–804, 256 A.3d 655 (2021). "While a trial court can exhibit some degree of leniency towards a [self-represented] plaintiff, the court cannot disregard established and mandatory requirements which circumscribe jurisdiction in the first instance." *Basilicato* v. *Dept. of Public Utility Control*, 197 Conn. 320, 324, 497 A.2d 48 (1985).

judgment, and from the trial court's order granting the defendants' motion for sanctions pursuant to the rule of practice (§ 1-25). The plaintiffs claimed, inter alia, that the court improperly concluded that a release of liability that they had executed in connection with prior litigation precluded the present action. *Held*:

The trial court appropriately rendered summary judgment for the defendants because it properly determined that there were no genuine issues of material fact and that the release barred the plaintiffs' claims against the defendants as a matter of law, as the claims were inchoate claims that were contemplated at the time of the release, although they may not have manifested themselves at that time.

The trial court's award of attorney's fees to the defendants as a sanction pursuant to Practice Book § 1-25 was not improper because the plaintiffs' claims were without a basis in law and fact, as they were barred under the clear and unambiguous terms of the release, and the award, made pursuant to § 1-25, did not require the court to find that the plaintiffs had acted in bad faith.

Argued January 8—officially released March 25, 2025

Procedural History

Action to recover damages for, inter alia, intentional misrepresentation, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon; thereafter, the court, *Abrams*, *J.*, granted the defendants' motion for sanctions, and the plaintiffs appealed to this court. *Affirmed.*

Kenneth A. Votre, for the appellants (plaintiffs).

Timothy M. Gondek, for the appellees (defendants).

Opinion

WESTBROOK, J. The plaintiffs, Paul DiSpazio and Maltby Street, LLC (Maltby Street), appeal from the trial court's rendering of summary judgment in favor of the defendants, Eugene Pacapelli and other officers and members of the board of directors of West Cove Marina

Coop, Inc. (West Cove),[1] and from its granting of the defendants' motion for sanctions. The plaintiffs claim that the court improperly granted (1) the defendants' motion for summary judgment because a release of liability entered into by the plaintiffs for the benefit of West Cove in connection with prior litigation (2015 release) did not preclude the present action; and (2) the defendants' motion for sanctions because the plaintiffs' claims were not without basis in law or fact and the court did not make a requisite finding of bad faith. We disagree and, accordingly, affirm the judgment of the court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. West Cove is a cooperative association and Maltby Street is a former dock unit owner in the association. In 2013, West Cove brought an action against Maltby Street seeking, inter alia, to foreclose on a statutory lien that West Cove held in accordance with General Statutes (Rev. to 2013) § 47-258 on property located at 13 Kimberly Avenue in West Haven (prior action). See *West Cove Marina Coop, Inc.* v. *Maltby Street, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-13-6038624-S. Maltby Street filed a counterclaim against West Cove. In January, 2014, West Cove sold the property located at 13 Kimberly Avenue to The City Point Yacht Club, Inc. In 2015, West Cove and Maltby Street resolved the litigation by way of a settlement agreement.

On July 2, 2015, as part of the settlement agreement, the plaintiffs executed the 2015 release. The 2015 release provided that the releasors included the plaintiffs and that the releasees included "West Cove . . .

[1] The other defendants are Cynthia Nicoletti, an officer and/or director of West Cove; Rogers Conant, the president of West Cove; Edward Hyland, an officer or director of West Cove; and Charles Ambrogio, an officer and/or director of West Cove.

and [its] officers, directors, shareholders, agents, and legal representatives . . . .'' It further provided that the plaintiffs, in exchange for $38,000, agreed to ''remise, release and forever discharge the said [r]eleasee[s] of and from all . . . causes of actions . . . which against the said [r]eleasee[s], the [r]eleasor[s] ever had, now ha[ve] or hereafter can, shall, or may have, including but not limited to . . . any and all claims arising out of or relating to the [r]eleasee[s'] approval, authority, decision to sell, and sale of the property known as 13 Kimberly Avenue . . . to The City Point Yacht Club, Inc. . . . in accordance with a purchase and sale agreement between the parties dated January 31, 2014 . . . including . . . any claim of lack of authority of the [r]eleasee[s] to receive the proceeds of the sale and hold or disburse those proceeds as the [a]ssociation determines is necessary and appropriate . . . .''

The plaintiffs commenced the present action in December, 2019. In the complaint, the plaintiffs asserted four counts alleging intentional misrepresentation, negligent misrepresentation, statutory theft in violation of General Statutes § 52-564,[2] and conversion. Each count was premised on the following allegations. The plaintiffs, holding membership and/or ownership interests in West Cove, ''made several requests to the defendants to provide them [with] an accounting and a synopsis of West Cove's records so that they could understand a certain distribution of assets and proceeds'' resulting from the sale of 13 Kimberly Avenue, which was ''done and authorized by the defendants.'' When West Cove sold 13 Kimberly Avenue, ''the proceeds were not properly distributed.'' Despite the plaintiffs' requests, ''[t]he defendants individually and personally have taken steps to conceal their activities relating to the distribution

[2] General Statutes § 52-564 provides: ''Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages.''

. . . and have refused to fully explain or to account for the assets in question and/or the proceeds from the disbursement and/or sale of the assets." "The defendants personally deceived the plaintiffs and provided scant details, little to no accounting and made misleading statements and representations regarding this transaction to the plaintiffs."

On April 14, 2021, the defendants filed an answer and special defenses in which they claimed, inter alia, that the plaintiffs' claims against the defendants were barred by the doctrines of collateral estoppel and res judicata.

On July 12, 2022, the defendants moved for summary judgment on the complaint in its entirety. The defendants argued, inter alia, that the 2015 release precluded the plaintiffs from bringing the present action. On March 30, 2023, following oral argument on the defendants' motion for summary judgment, the court, *Abrams*, *J.*, issued an order granting the motion. In its order, the court stated: "Upon review of the [2015 release], it is abundantly clear to the court that no genuine issue exists regarding the fact that it encompasses the plaintiffs' claims in their entirety. To find otherwise would run counter to the public policy supporting parties resolving their disputes through releases of claims. The plaintiffs' arguments that the claims were not released are conclusory at best. The court feels compelled to add that it considers the filing of this lawsuit in the face of the existence [of] the [2015] release to have tenuous ethical support." The court thereafter rendered summary judgment in favor of the defendants on the complaint in its entirety.

On May 3, 2023, the defendants, pursuant to Practice Book § 1-25,[3] filed a motion for sanctions, requesting

[3] Practice Book § 1-25 provides in relevant part: "(a) No party or attorney shall bring or defend an action, or assert or oppose a claim or contention, unless there is a basis in law and fact for doing so that is not frivolous. . . .

"(b) . . . [T]he judicial authority, solely on its own motion and after a hearing, may impose sanctions for actions that include . . . [f]iling of plead-

that the court order the plaintiffs to pay the defendants' attorney's fees and costs. The defendants argued, inter alia, that no good faith basis existed for the plaintiffs' commencement of the present action and that the defendants were forced to expend considerable time and money defending the claims. On August 21, 2023, after a hearing on the defendants' motion for sanctions, the court issued an order granting the motion. In its order, the court stated: "The court hereby concludes that the underlying action was brought 'without basis in law and fact' and orders the plaintiff[s] to pay the defendant[s] the requested sum of $16,548. Practice Book § 1-25." This appeal followed.

I

The plaintiffs first claim that the court improperly granted the defendants' motion for summary judgment because the 2015 release did not preclude the present action. Specifically, the plaintiffs argue that they did not release the present claims against the defendants because their claims arise out of their shareholder interests in West Cove, not the sale of 13 Kimberly Avenue. They further argue that they did not release the claims at issue because, at some point "[a]fter the resolution of the prior action, [the plaintiffs] became aware that the defendants were in the process of liquidating West Cove" and, therefore, their shareholder interests in the dissolution of West Cove had not yet accrued when the 2015 release was executed.[4] We disagree.

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ings, motions, objections, requests or other documents that violate subsection (a) . . . .

"(c) The judicial authority may impose sanctions including, but not limited to, fines pursuant to General Statutes § 51-84; orders requiring the offending party to pay costs and expenses, including attorney's fees; and orders restricting the filing of papers with the court."

[4] The plaintiffs additionally argue that, pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 812, 626 A.2d 729 (1993) (*Audubon*) (court properly summarily enforced release agreement executed in midst of litigation), and *Matos* v. *Ortiz*, 166 Conn. App. 775, 797–98, 144 A.3d 425 (2016) (court improperly summarily enforced release agreement executed prior to commencement of litigation because

As a preliminary matter, we note the well established standard that governs our review of a trial court's decision to grant a motion for summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Waterbury* v. *Brennan*, 228 Conn. App. 206, 212, 325 A.3d 237, cert. denied, 350 Conn. 923, 325 A.3d 1094 (2024).

claims had not yet fully accrued at time of execution), the court was not authorized to summarily enforce the 2015 release in the present matter. In *Matos*, this court explained that "[w]e have never extended *Audubon* to agreements that, when made, remained wholly outside the court's domain because no one had yet invoked the court's jurisdiction through service of a summons and complaint. That initial invocation of the court's authority distinguishes an agreement to settle litigation—which may be summarily enforced by [an] *Audubon* motion—from a preemptive release of claims—which may be enforced through a motion for summary judgment or by presentation at trial as a special defense." Id., 808. In the present matter, the defendants did not file an *Audubon* motion. Rather, they filed a motion for summary judgment in which they argued that the plaintiffs' claims were barred by the terms of the 2015 release. Accordingly, *Audubon* and *Matos* have no bearing on whether the court properly granted the defendants' motion for summary judgment in this case.

The following additional principles guide our review of whether the 2015 release barred the plaintiffs' claims against the defendants. "A release agreement is a contract. It is well settled that a release, being a contract whereby a party abandons a claim to a person against whom that claim exists, is subject to rules governing the construction of contracts. . . . A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. . . . Although ordinarily the question of contract interpretation, being a question of the parties' intent is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law. . . . The court's determination as to whether a contract is ambiguous is a question of law; our standard of review, therefore, is de novo. . . .

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citations omitted; internal quotation marks omitted.) *Dunn* v. *Etzel*, 166 Conn. App. 386, 392–93, 141 A.3d 990 (2016).

The plaintiffs first argue that their present claims arise out of their shareholder interests in the disbursement of West Cove's assets and proceeds rather than out of the sale of 13 Kimberly Avenue and, therefore, the 2015 release did not release their claims.[5] We disagree.

The 2015 release provided that the plaintiffs agreed to "release . . . any and all claims *arising out of or relating to*" the sale of 13 Kimberly Avenue, including claims related to the releasees' authority to receive, hold, or disburse the proceeds of that sale. (Emphasis added.) The language of the [2015] release is clear and unambiguous. There is no genuine dispute of material fact that the defendants are releasees under the 2015 release.[6] The record does not support the plaintiffs' argument that their claims against the defendants are unrelated to the sale of 13 Kimberly Avenue and the defendants' authority to disburse the proceeds from that sale. Although the plaintiffs' claims concern their shareholder interests in the disbursement of West Cove's assets and proceeds, the only asset at issue is 13 Kimberly Avenue and the only proceeds at issue are those generated by the sale of that property. Thus, the

[5] The plaintiffs rely on *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 281, 422 A.2d 311 (1979) (issue was "whether the trial court was correct in sustaining the defendants' motion for summary judgment . . . on the ground that . . . derivative claims . . . could only be brought by one who, unlike the plaintiff, was a shareholder of [an entity] acting on behalf of [that entity] at the time of suit"), to support their argument that they had a right to bring claims against the defendants based on their shareholder rights. The court in the present matter, however, granted summary judgment on the ground that the 2015 release precluded the plaintiffs' claims. Whether the plaintiffs could maintain derivative claims against the defendants is not at issue on appeal, and *Yanow* is therefore inapplicable.

[6] Although, in response to the defendants' requests for admissions, the plaintiffs denied that "the defendants are among the releasees of the 2015 release," they admit that the defendants are "officers, directors, shareholders, agents or legal representatives of West Cove" and that the 2015 release lists " 'West Cove . . . and their officers, directors, shareholders, agents, and legal representatives' " as releasees. Accordingly, the plaintiffs necessarily admit that the defendants are releasees.

plaintiffs' claims against the defendants directly originated from the sale of 13 Kimberly Avenue and the disbursement of those proceeds.

The plaintiffs further argue that their shareholder interests concerning the dissolution of West Cove had not yet accrued when the 2015 release was executed because the plaintiffs did not become aware that West Cove was liquidating until after the resolution of the prior action. Therefore, the plaintiffs argue that they did not release the present claims in the execution of the 2015 release. The defendants, on the other hand, contend that "[t]here are no causes of action or factual allegations within the complaint which seek damages related to an alleged 'dissolution' of West Cove as an entity." The defendants further argue that the plaintiffs' claims were "specifically contemplated by the [2015] release and, as such, cannot be held to have been unknown at the time of its execution." We agree with the defendants.

Our Supreme Court has stated that, "[e]xcept in very rare instances, the settlement and release of a claim does not cover claims based on events that have not yet occurred. . . . The usual general release, then, is not ordinarily construed to include in its coverage claims based upon occurrences which have their beginning after the instrument is executed. . . . For that reason, language covering future claims and unknown claims in releases is ordinarily construed to cover only inchoate claims that are in being at the time of release but which have not yet manifested themselves." (Citations omitted; internal quotation marks omitted.) *Muldoon* v. *Homestead Insulation Co.*, 231 Conn. 469, 481–82, 650 A.2d 1240 (1994). A claim is "much more analogous to an inchoate [claim] that [is] in being at the time of release but which [has] not yet manifested [itself] than it is to [an] unforeseeable subsequent injury

. . . [when the] consequence was likely within the contemplation of the parties when they agreed to bar all claims . . . .'' (Citation omitted; internal quotation marks omitted.) *Duni* v. *United Technologies Corp.*, 239 Conn. 19, 29, 682 A.2d 99 (1996).

Here, the plain language of the 2015 release clearly precluded subsequent claims, as it expressly provides that the plaintiffs released all causes of action that they ''ever had . . . *or hereafter can*, *shall*, *or may have*'' against the defendants related to the sale of 13 Kimberly Avenue. (Emphasis added.) The plain language also clearly precluded the claims at issue because it included ''any claim of lack of authority of the [r]eleasee[s] to . . . *hold or disburse those proceeds*'' from the sale. (Emphasis added.) The plaintiffs maintain that this unambiguous language did not release their rights as *shareholders* to pursue claims related to the disbursement of proceeds from the sale. At the time that the plaintiffs executed the 2015 release, however, they were aware that they held shareholder interests in West Cove, that West Cove had sold 13 Kimberly Avenue, and that West Cove would likely disburse the proceeds from that sale. Yet the 2015 release contained no exceptions or provisions intended to preserve the plaintiffs' claims against the defendants relating to their shareholder interests in the disbursement of the proceeds. In fact, the 2015 release expressly precluded such claims. Consequently, the claims at issue concerning the disbursement of proceeds from the sale of 13 Kimberly Avenue constitute inchoate claims that were contemplated at the time of release although they may not have manifested themselves at that time.

Furthermore, whether West Cove's alleged dissolution began after the execution of the 2015 release is irrelevant because the plaintiffs, in their complaint, make no claims or allegations relating to the dissolution or liquidation of West Cove. Rather, the plaintiffs' claims

are premised solely on allegations that the defendants improperly disbursed proceeds from the sale of 13 Kimberly Avenue and failed to fully account to the plaintiffs on the disbursement. The sale of 13 Kimberly Avenue took place *before* the plaintiffs executed the 2015 release, and the disbursement of the proceeds generated from that sale was clearly contemplated at the time that the plaintiffs released all claims related to the sale. Thus, we agree with the trial court that there are no genuine issues of material fact and the 2015 release barred the plaintiffs' claims against the defendants as a matter of law. Summary judgment was therefore appropriate.

II

The plaintiffs additionally claim that the court improperly granted the defendants' motion for sanctions because (1) their claims were not without basis in law and fact;[7] and (2) the court did not make a requisite finding of bad faith. We are not persuaded.

"[W]e review the trial court's granting of a motion for sanctions and attorney's fees for an abuse of discretion. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions

[7] The plaintiffs argue that the court improperly awarded sanctions to the defendants because they had probable cause to bring the action. In support of their argument that the court could not award sanctions if the plaintiffs had probable cause, the plaintiffs state that "[t]he trial court appears to order attorney's fees pursuant to Practice Book § 10-5 and [General Statutes] § 52-99." Practice Book § 10-5 and § 52-99 permit the court to order the payment of expenses if a party made allegations or denials "without reasonable cause . . . ." The court in the present matter, however, expressly awarded sanctions pursuant to Practice Book § 1-25. Because Practice Book § 1-25 authorizes the court to impose sanctions when a party brings an action without basis in law and fact, we construe the plaintiffs' probable cause argument as an argument that their action had a basis in law and fact.

of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . .

"Pursuant to Practice Book § 1-25, the trial court has the authority to impose sanctions and award attorney's fees where a party files a document that violates § 1-25 (a), which provides in relevant part that [n]o party . . . shall bring . . . an action . . . unless there is a basis in law and fact for doing so that is not frivolous." (Citation omitted; internal quotation marks omitted.) *M. B.* v. *S. A.*, 194 Conn. App. 721, 726, 222 A.3d 559 (2019).

The plaintiffs argue that their claims had a basis in law and fact because they did not release the claims at issue in this case. We have concluded in part I of this opinion, however, that the 2015 release clearly precluded their claims and have therefore rejected the predicate for the plaintiffs' argument in this regard. When the court granted the defendants' motions for summary judgment and sanctions, it considered the 2015 release and, in the context of Practice Book § 1-25, found that the plaintiffs' claims against the defendants were without a basis in law and fact and had "tenuous ethical support" because those claims were barred under the clear and unambiguous terms of the 2015 release. Accordingly, the court did not abuse its discretion in granting the defendants' motion for sanctions against the plaintiffs and ordering them to pay attorney's fees to the defendants pursuant to § 1-25 for filing a frivolous action.

The plaintiffs nevertheless argue that the court improperly awarded attorney's fees to the defendants because it failed to make a finding that the plaintiffs had acted in bad faith in pursuing the present action against the defendants. We disagree.

Our Supreme Court has explained that trial courts have two sources of authority to impose sanctions.

"One source of the trial court's authority to impose sanctions is the court's inherent power. We have long recognized that, apart from a specific rule of practice authorizing a sanction, the trial court has the inherent power to provide for the imposition of reasonable sanctions, to compel the observance of its rules. . . . In addition, our rules of practice, adopted by the judges of the Superior Court in the exercise of their inherent rule-making authority . . . also [provide] for specific instances in which a trial court may impose sanctions." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 9–10, 776 A.2d 1115 (2001).

If a trial court invokes its *inherent authority* to impose sanctions, "Connecticut . . . prohibits the award of such fees to the prevailing party unless such award is premised on statutory directives or is pursuant to contract. An exception to this doctrine may be successfully invoked if the losing party has acted in bad faith and/or vexatiously or wantonly acted for oppressive reasons." (Internal quotation marks omitted.) *Jacques* v. *Jacques*, 223 Conn. App. 501, 507, 309 A.3d 372 (2024). "[I]n order to impose sanctions under the bad faith exception, the trial court must find both that the litigant's claims were entirely without color and that the litigant acted in bad faith. . . . The court must make these findings with a high degree of specificity . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 511.

In the present matter, the court did *not* exercise its inherent authority to impose sanctions to compel the observance of its rules. Rather, the court awarded sanctions pursuant to Practice Book § 1-25, which expressly permits the court to "impose sanctions including, but not limited to . . . orders requiring the offending party to pay costs and expenses, *including attorney's fees* . . . ." (Emphasis added.) Practice Book § 1-25 (c).

Thus, because the court awarded attorney's fees pursuant to our rules of practice, the court was not required to make a finding that the plaintiffs acted in bad faith.

The judgment is affirmed.

In this opinion the other judges concurred.

TERRELL CANADY *v.* COMMISSIONER OF CORRECTION (AC 46729)

Suarez, Westbrook and Lavine, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, felony murder, appealed after the habeas court denied his petition for certification to appeal from its judgment denying in part his habeas corpus petition. The petitioner claimed, inter alia, that the court had improperly denied his ineffective assistance of counsel claim, in which he contended that his criminal trial counsel, C, failed to have the petitioner's mother, T, removed as his guardian ad litem because she was interfering with plea discussions. *Held*:

The habeas court did not abuse its discretion in denying the petition for certification to appeal to this court, as the petitioner failed to demonstrate that his claims related to C's actions involving T as his guardian ad litem involved issues that were debatable among jurists of reason, were adequate to deserve encouragement to proceed further or could be resolved by a court in a different manner.

The habeas court properly determined that the petitioner was not deprived of the effective assistance of his trial counsel stemming from C's failure to have T removed as the petitioner's guardian ad litem, as C did not perform deficiently but, instead, reasonably made a strategic decision not to seek the complete removal of T, taking into account the close relationship between the petitioner and T and that T's removal would have been counterproductive and could have further impeded C's discussions with the petitioner, and the failure to remove T did not prejudice the petitioner, there having been no reasonable probability that her removal would have resulted in a different outcome at trial.

The petitioner's due process claim that the trial court failed to ensure that T was acting in his best interests as his guardian ad litem was procedurally defaulted, as that claim was not raised at the petitioner's criminal trial or on direct appeal from his conviction, the petitioner did not establish that the failure to do so was the result of ineffective assistance by his appellate

counsel, the petitioner neither called appellate counsel to testify at the habeas trial nor presented other evidence regarding counsel's reason for not raising the due process claim, and this court declined to review the petitioner's unpreserved claim that the novel nature of his due process claim constituted cause to excuse his procedural default.

Argued October 23, 2024—officially released March 25, 2025

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, *Bhatt*, *J.*; judgment denying the petition in part; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Brett R. Aiello, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Angela R. Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Terrell Canady, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying in part his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly (1) denied his petition for certification to appeal, (2) rejected his claim that he was deprived of the effective assistance of trial counsel, and (3) concluded that his due process claim was procedurally defaulted. We disagree that the court improperly denied the petition for certification and, accordingly, dismiss the appeal.

The following facts underlying the petitioner's criminal conviction, which the jury reasonably could have found, were set forth by our Supreme Court in *State* v.

Canady, 297 Conn. 322, 998 A.2d 1135 (2010), its decision rejecting the petitioner's direct appeal. "During the late evening hours of October 17, 2004, the [fifteen year old petitioner], a New Haven resident, and his fourteen year old friend, Nadrian Campbell, a resident of West Haven, were walking through West Haven when they encountered the victim, Robin Swick. The [petitioner] asked the victim if she wanted to have sex with him, and the victim agreed to do so as long as the [petitioner] paid her. The victim, Campbell and the [petitioner] then went behind a store where the victim engaged in sexual acts with the [petitioner] and Campbell.

"Thereafter, the three continued to walk around West Haven. After a period of time, the [petitioner] decided that he wanted to have sex with the victim again, and he borrowed $50 from Campbell to do so. At this point, the victim and the [petitioner], who, along with Campbell, were standing in front of a furniture store, went behind one of the store's delivery trucks and engaged in sexual intercourse. When Campbell next saw the [petitioner] and the victim, the [petitioner] was holding the victim's clothes, and the victim, who was standing next to the [petitioner], was wearing only a pair of socks. The victim's cell phone fell from her clothes, and, as she went to pick it up, the [petitioner], who was wearing boots, kicked her in the mouth. Campbell walked away and did not see the [petitioner] strike the victim again. After Campbell left, however, the [petitioner] repeatedly assaulted the victim, leaving her severely wounded. Ten minutes later, the [petitioner], carrying the victim's clothes and cell phone, approached Campbell a few blocks away. The [petitioner] returned Campbell's money, informing Campbell that he had robbed the victim. Shortly thereafter, the [petitioner] threw the victim's clothes into a nearby alleyway.

"The [petitioner] and Campbell eventually walked to the home of Kendra Bryant, arriving there at approximately 3 a.m. on October 18, 2004. Bryant opened a

window and let Campbell climb inside, where he joined Bryant and her friend, Ebony Howell, who was spending the night at Bryant's residence. The [petitioner] remained outside but told the group of persons inside, who were within hearing distance, that 'he . . . beat up some lady and took her cigarettes and stuff.' Campbell also told Bryant and Howell that the [petitioner] had struck the victim and stole her cell phone and cigarettes. After approximately one hour, Campbell and the [petitioner] left.

"Later that morning, the [petitioner] went to the home of Roscoe Morrison. The [petitioner] told Morrison that, while the [petitioner] was out the previous evening, he had 'beat[en] [a] lady' and stolen her money and cell phone. The [petitioner] then asked Morrison's half sister, Shanette Hargrove, to charge the victim's cell phone and to lend him a t-shirt. The [petitioner] told Hargrove, 'I think I killed somebody.' Hargrove initially thought that the [petitioner] was joking, but the [petitioner] elaborated: 'I kicked her in the face, but I don't know if she's dead.' . . .

"[A]n employee of the furniture store behind which the [petitioner] left the victim . . . discovered the victim's body lying between two of the store's delivery trucks at approximately 8 a.m. that same morning and called 911. The victim, who was wearing only a pair of socks, was pronounced dead shortly after the police arrived. An autopsy revealed that the victim had eight broken ribs and between forty and fifty abrasions on her body, including her face."[1] Id., 325–27.

The petitioner subsequently was arrested and charged with, inter alia, felony murder in violation of General Statutes § 53a-54c, manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1),

[1] A more detailed recitation of the facts is set forth in our Supreme Court's decision. See *State* v. *Canady*, supra, 297 Conn. 327–28.

and robbery in the first degree in violation of General Statutes § 53a-134 (a) (1).[2] Id., 324. Thereafter, the case automatically was transferred from the juvenile court docket to the regular criminal docket in accordance with General Statutes (Rev. to 2003) § 46b-127.[3] Id., 328. Following a jury trial, the jury found the petitioner guilty of felony murder, first degree manslaughter and first degree robbery.[4] Id. The trial court rendered judgment in accordance with the verdict and sentenced the petitioner to a total effective sentence of seventy-five years of incarceration. Id., 324. Our Supreme Court affirmed that judgment of conviction on direct appeal. See id., 345.

On May 2, 2013, the petitioner filed a petition for a writ of habeas corpus. The petitioner, through counsel, filed an amended petition, the operative petition, on July 23, 2018. In count one, the petitioner alleged that his criminal trial counsel, Vito A. Castignoli, had rendered ineffective assistance by failing to have the petitioner's mother, Tanya Canady (Tanya), removed as the petitioner's guardian ad litem during his criminal proceedings. The petitioner claimed that, but for Castignoli's deficient performance in failing to remove Tanya as his guardian ad litem, he would have accepted a plea offer extended by the state. In count two, the petitioner alleged that the court had violated his right to due process under the federal and state constitutions

[2] "The [petitioner] also was charged with second degree kidnapping and a second count of felony murder. At the conclusion of the state's case, however, the trial court granted the [petitioner's] motion for a judgment of acquittal as to those two charges." *State* v. *Canady*, supra, 297 Conn. 328 n.6.

[3] General Statutes (Rev. to 2003) § 46b-127 provides in relevant part: "(a) The court shall automatically transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony, a class A or B felony or a violation of section 53a-54d, provided such offense was committed after such child attained the age of fourteen years . . . ."

[4] The manslaughter conviction was subsequently vacated. See footnote 7 of this opinion.

because it failed to conduct a hearing to determine whether Tanya was an appropriate guardian ad litem and to ensure that he had a guardian ad litem who could effectively represent his best interests.[5]

The respondent, the Commissioner of Correction, filed a return in which he either denied the substantive allegations of the petition or left the petitioner to his proof. With respect to the due process claim in count two, however, the respondent also raised an affirmative defense of procedural default on the basis of the petitioner's failure to raise his claim at trial or on direct appeal. In his reply to the respondent's return, the petitioner argued, inter alia, that the defense of procedural default did not apply to his due process claim, and, in the alternative, that he could establish cause and prejudice to overcome the procedural default on the basis of the ineffective assistance of his trial counsel.

The court, *Bhatt, J.*, held a trial on the habeas petition on May 10, 2023, at which four witnesses testified: the petitioner; Willie Melton, Jr., the petitioner's father; Stephanie Daniels, the petitioner's great aunt; and Castignoli.[6] In addition, a copy of the court clerk's file from the underlying criminal case and the transcripts from the petitioner's criminal proceedings were admitted into evidence as exhibits.

On May 30, 2023, the court issued a memorandum of decision denying the petition for a writ of habeas corpus. With respect to the ineffective assistance of counsel claim, the habeas court concluded that the petitioner

[5] The petition contained two additional counts. In count three, the petitioner raised a separate due process claim alleging that the sentencing court had incorrectly merged the convictions of manslaughter and felony murder because, under *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), the court should have vacated the manslaughter conviction. In count four, the petitioner raised a separate claim of ineffective assistance of counsel based on his trial counsel's failure to preserve his right to sentence review. Those claims are not at issue in this appeal. See footnote 7 of this opinion.

[6] Tanya was not a witness at the habeas trial. The petitioner testified that she died in November, 2018.

had failed to establish both deficient performance and prejudice. Specifically, the court determined that, although the petitioner claimed that Castignoli should have sought to remove Tanya as guardian ad litem, the evidence established that he *did* seek to replace Tanya as the guardian ad litem pursuant to a motion dated September 22, 2006. During a hearing on that motion, Castignoli specifically asked for removal of Tanya as the guardian ad litem as one option, and, as a second option, that another guardian ad litem be appointed. The court ultimately decided to appoint a second guardian ad litem, and Castignoli made a strategic decision at that point not to seek complete removal of Tanya as the guardian ad litem because he did not want to create further conflict in his relationship with the petitioner, and, given the closeness of the relationship between the petitioner and Tanya, he was certain that they would speak about the case anyway. As to prejudice, the habeas court concluded that the petitioner did not establish a reasonable probability that, but for Castignoli's allegedly deficient performance, he would have accepted a plea offer. The court pointed to the petitioner's own remarks at the motion hearing that he believed that his attorneys were pressuring him into accepting a plea offer and that he, *independently*, had decided not to accept any offer and that Tanya did not force him to do so. In addition, the court again emphasized the petitioner's close relationship with Tanya, concluding that it "[did] not believe that simply removing Tanya as the [guardian ad litem] . . . would have resulted in a different outcome" given that she still had access to and influence over the petitioner.

With respect to the petitioner's due process claim, the habeas court concluded that the claim was procedurally defaulted and, in any event, meritless because the criminal court had in fact conducted a hearing on the suitability of Tanya as the petitioner's guardian ad litem. After

that hearing, the court determined that a guardian ad litem was appropriate and took steps to secure and protect the petitioner's rights by appointing a second guardian ad litem to assist the petitioner. Accordingly, the habeas court denied the habeas petition as to those claims.[7] Thereafter, the petitioner filed a petition for certification to appeal, which the habeas court denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before we turn to the petitioner's claims, we briefly set forth our standard of review for habeas corpus appeals. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Collins* v. *Commissioner of Correction*, 202 Conn. App. 789, 793, 246 A.3d 1047, cert. denied, 336 Conn. 931, 248 A.3d 1 (2021).

I

The petitioner first claims that the habeas court abused its discretion by denying his petition for certification to appeal. We conclude that the habeas court's ruling did not constitute an abuse of its discretion.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of

[7] The court granted the habeas petition with respect to the petitioner's other two claims; see footnote 5 of this opinion; and, accordingly, vacated the petitioner's manslaughter conviction and restored his right to sentence review. The respondent has not challenged the habeas court's ruling on those counts, and those claims are not at issue in this appeal.

discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [a] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . .

"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 [claim] to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive [claim] for the purpose of ascertaining whether [that claim satisfies] one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 225 Conn. App. 309, 332–33, 315 A.3d 1135 (2024).

For the reasons set forth in parts II and III of this opinion, we conclude, on the basis of our review of the record and applicable legal principles, that the petitioner has failed to demonstrate that his underlying claims of error 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. See, e.g., *Glen S.* v. *Commissioner of Correction*, 223 Conn. App. 152, 159, 307 A.3d 951, cert. denied, 348 Conn. 951, 308 A.3d 1038 (2024).

II

Turning to his substantive claims on appeal, the petitioner asserts that the court improperly denied his ineffective assistance of counsel claim stemming from Castignoli's failure to have Tanya removed as the petitioner's guardian ad litem. Specifically, the petitioner contends that Castignoli should have sought to fully remove Tanya as the petitioner's guardian ad litem because she was interfering with plea discussions. The petitioner further contends that, but for Castignoli's allegedly deficient performance, he would have accepted a plea offer. We are not persuaded on the basis of our review of the record and applicable legal principles that the petitioner has demonstrated that his claim is debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the claim raises a question that deserves encouragement to proceed further.

At the outset, we set forth the following additional relevant legal principles governing ineffective assistance of counsel claims. "[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel

was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Citation omitted; internal quotation marks omitted.) *Crenshaw* v. *Commissioner of Correction*, 215 Conn. App. 207, 217, 281 A.3d 546, cert. denied, 345 Conn. 966, 285 A.3d 389 (2022).

"It is well settled that the two part *Strickland* test applies to challenges of ineffective assistance of counsel claims involving plea negotiations." *Watts* v. *Commissioner of Correction*, 194 Conn. App. 558, 565, 221 A.3d 829 (2019), cert. denied, 334 Conn. 919, 222 A.3d 514 (2020). "Counsel performs effectively and reasonably when he provides a client with adequate information and advice on which the client can make an informed decision as to whether to accept the state's plea offer." *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 462, 298 A.3d 588 (2023). "[C]ounsel must not only explain to the defendant the strengths and weaknesses of the state's case, the charges he is facing, and the maximum sentence he would be exposed to if he were unsuccessful at trial, he also must advise his client on how those strengths and weaknesses relate to the state's likelihood of prevailing at trial and on the challenges a defendant would face in putting on his own defense. . . . Instead of failing to meet a prescribed, mechanical standard, counsel's performance has been held to be constitutionally deficient when counsel failed to provide his client with sufficient information about the client's sentencing exposure to allow the client to make a reasonably informed decision [regarding] whether to accept a plea offer. . . . Although trial counsel must leave the ultimate decision of whether to accept or to reject a plea offer to a defendant—and must avoid coercing the defendant into taking a particular

plea—he must also provide the petitioner with adequate professional advice on his options." (Citations omitted; internal quotation marks omitted.) Id., 471.

"To demonstrate prejudice under the *Strickland* test when the deficient performance of counsel occurred in the plea process and resulted in a defendant not entering into a plea agreement, the habeas petitioner must show that but for the [deficient performance] of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. . . .

"Furthermore . . . the specific underlying question of whether there was a reasonable probability that a habeas petitioner would have accepted a plea offer but for the deficient performance of counsel is one of fact, which will not be disturbed on appeal unless clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 228 Conn. App. 701, 712–13, 324 A.3d 837, cert. denied, 350 Conn. 929, 326 A.3d 250 (2024).

The following additional procedural history is relevant to our resolution of this claim. The petitioner was fifteen years old at the time of these brutal offenses and at the time that the underlying criminal proceedings were initiated against him. At the petitioner's second

court appearance, on November 22, 2004,[8] the court appointed Castignoli as the petitioner's counsel. Castignoli was assisted by Attorney Richard Marquette. The court also appointed Tanya as the petitioner's guardian ad litem pursuant to Practice Book § 44-20.[9]

Prior to trial, the state extended a plea offer to the petitioner. Castignoli testified at the habeas trial that the offer would have resulted in a sentence of between twenty-five and thirty years of imprisonment. Castignoli testified that he conveyed this offer to the petitioner and Tanya, but Tanya did not want her son to accept an offer with a sentence of more than ten years. The state withdrew its offer in December, 2005, and the petitioner proceeded to trial.

On September 22, 2006, while jury selection was in progress, the petitioner's counsel filed a "motion to appoint additional and/or substitute guardian ad litem." In that motion, the petitioner's counsel claimed that it was "in the best interests of the ward to appoint a different or additional guardian ad litem for the [petitioner] because [Tanya] has made communication about evidence, trial strategy and other important matters between [the petitioner] and his counsel difficult if not impossible. Counsel does not believe it is in the best interests of [the petitioner] to continue [with] the present guardian ad litem although there is no doubt as to [Tanya's] love and affection for [the petitioner]. . . . Counsel believe that another guardian ad litem should be appointed to ensure that [the petitioner's] rights to a fair trial and adequate representation under the United

[8] At the time of the petitioner's arraignment two weeks earlier, a public defender had represented the petitioner, and the court temporarily appointed a family relations officer as the petitioner's guardian ad litem.

[9] Practice Book § 44-20 provides in relevant part: "The judicial authority may . . . appoint a guardian ad litem for a minor involved in any other criminal proceedings, including . . . those in which the minor is the defendant. . . ."

States and Connecticut constitution[s] are complied with."

On that same date, before jury selection continued, Castignoli addressed the court regarding the motion and the concerns he had about Tanya serving as the petitioner's guardian ad litem. Castignoli stated, among other things, that he believed the appointment of a guardian ad litem was wise in this case, but that his relationship with Tanya "has broken down at this point," and, "[w]ithout getting too deeply into it, I think our relationship is at a point now where I don't think . . . he's going to get adequate representation if she continues as the guardian."[10] He asked the court to "either appoint a substitute guardian or an additional guardian."

The court proceeded with jury selection, then continued the hearing to address the motion filed by the petitioner's counsel. The court inquired of Castignoli, Marquette, Tanya, and the petitioner regarding their communications and the nature of their disagreements.[11] Castignoli explained that he and Tanya "had . . . the normal disagreements up until very, very recently," and, "at this point . . . that's not a good situation." Castignoli further stated: "I think [the petitioner] should have a guardian . . . but . . . I find the present situation unacceptable, and I've explained that

[10] Castignoli further explained: "What's happened recently in the matter is that . . . we don't get along very well, and I feel my interactions with the [petitioner] . . . have been affected by that, and we haven't been able to discuss things that people who are on trial or are going to go on trial should be able to discuss. And it's because of the guardian. . . . [A]t this point, her and I don't get along. . . . [O]ur communication with [the petitioner] has been impeded on things that we would have to discuss to [e]nsure he gets a fair trial and that . . . his constitutional rights are vindicated here."

[11] The court also asked the prosecutor about his observations of the interactions between the petitioner's counsel and Tanya. The prosecutor recalled witnessing an interaction between Marquette and Tanya during which Tanya told Marquette to "shut the 'f' up" and "to mind his own business . . . ."

to her. . . . [O]ne of the issues is seeing [the petitioner] alone. I don't see that the law says that we cannot see him alone. There are decisions that, obviously, would have to be made with the guardian, but, as I've explained to her, the decisions . . . that are her province solely and his . . . are very few. Most of the decisions to be made as to trial strategy are to be made by his attorneys. I just think, at this point, our relationship has broken down, not with [the petitioner], but with his mother, to the point where I think it's going to affect his defense at this trial." Castignoli added that "we've attempted to discuss things with him, and she's . . . made them impossible to discuss by mean[s] of arguments, things of that nature." Marquette indicated that he "[stood] united" with Castignoli on this issue.

Tanya stated that, in her view, Castignoli did not listen to her and the petitioner, and that Castignoli "makes decisions on his own." The petitioner told the court that Castignoli would "get loud" when they would try to ask him something.[12] The petitioner added, among other things, that "he been talking to me without my mother present. So, I don't know where he's talking about he can't speak to me without her there. . . . I don't know what's the problem of making any decision. . . . I chose to go to trial myself. I chose to plead not guilty. My mother did not force me to do it. I chose that decision."

At the conclusion of the hearing, the court issued an oral ruling on the motion in which it indicated that it would appoint a family relations officer as a second guardian ad litem for the petitioner. The court explained: "All right, well the situation, to point out the

[12] Marquette subsequently told the court that his "observations [have] always been that there's a conversation, and [Tanya] is the first one to get agitated. And then, when [Castignoli] raises his voice, it becomes even more excited by her part. . . . It's not [Castignoli] that first starts to yell. It doesn't happen."

obvious, is that we have to have an effective guardian for [the petitioner], at least for the next several months. I think it is . . . in the motion itself [that the petitioner] will reach the age of majority on February 28, 2007. But we expect to go to trial and be on trial in October and November so that, while there is some discretion involved, I think the better part of discretion should be that [the petitioner] should have a guardian to advise him. . . .

"[T]his offense allegedly occurred when he was fifteen years old. He's been incarcerated now for almost two years, and I think he really needs an effective guardian in this case. Again, to point out the obvious, there's nothing more important than the charges here . . . . The consequences are potentially extreme in terms of the remainder of [the petitioner's] young life so that I think he should have guidance from a responsible adult."

Speaking to the petitioner, the court stated: "[Y]ou do have the services of two fine attorneys. Mr. Castignoli has done countless serious felony trials that I'm aware of, including a number in front of me, always quite effectively and so that having had this background with him, which goes back about two decades, when he files a motion such as this and says he's in this predicament . . . the court takes it very seriously.

"Now, under Practice Book § 44-20 the court does have the prerogative to appoint someone else as guardian, and I'm mindful of a recent case in this area, [*State* v. *Iban C.*, 275 Conn. 624, 881 A.2d 1005 (2005)]. . . . I'm aware of the dictates of that case as well and, I think, given the gravity of this situation and the important, very important and critical decisions which are forthcoming, that . . . the court must be assured that you are getting proper guidance from someone who has your legal interests in mind.

"Again, to reiterate, no one questions your mother's love and affection for you, but that's not what's important here. What is important at this point is that you're getting guidance in terms of these very important decisions, which you need to make along with your attorneys, during the course of the next several weeks.

"In that regard, given the situation with which we find ourselves presented, I'm going to appoint another guardian, a family relations officer, as a second, as requested by your attorneys, as a second guardian ad litem to be with you during these proceedings and to advise you and . . . act as your guardian again during the court proceedings. And, hopefully, with someone else there, another person to advise you, that will alleviate the situation that your attorneys find themselves in now. . . ."

After the court made its ruling, the following colloquy occurred:

"[The Petitioner]: You keep saying you want me to have proper advice. Well, Mr. Castignoli keep trying to advise me to plead out, and I keep telling him no. He keep pressuring me, and . . . my mother is right here, keep telling me the same thing. He keep coming toward me and pressuring me to cop out, and I say no and I don't want Mr. Castignoli to represent me anymore 'cause he keep pressuring me.

"[Marquette]: Your Honor, we dispute that characterization. . . . [W]e feel it's an obligation of ours to discuss plea options, but . . . we never sort of forced it, as he's intimating. It's not our style. . . . [W]e discuss all options."

"The Court: Obviously, you haven't been forced to do anything, Mr. Canady. You've been through other attorneys as well; as I said, you have two attorneys representing you now who are doing an excellent job.

The trial is going forward. . . . So, the attorneys will continue on, and there'll be a new guardian ad litem appointed to represent you and to advise you."

The case proceeded to trial in October and November, 2006, with Karen Kutno, a family relations officer, serving as the petitioner's second guardian ad litem. Castignoli testified at the habeas trial that he had drafted a letter for the petitioner to sign in which he stated his opinion that the state's evidence was strong and advised making an offer to the state that included a twenty year sentence in exchange for a guilty plea to the manslaughter charge.[13] Tanya did not want Castignoli to give the petitioner that advice, and she crumpled up the letter and threw it on the ground. The petitioner recalled this incident as well. Castignoli testified that, even though the petitioner did not receive the letter, he had reviewed with the petitioner the information contained in the letter regarding the evidence against him.

During preparations for closing argument, Tanya approached Castignoli and suggested a plea in exchange for a sentence of fifteen years. Marquette spoke to the prosecutor. The state then made an offer involving a sentence with a cap of thirty-two years and a base of twenty-eight years of incarceration. Castignoli conveyed that offer to the petitioner and Tanya, and the offer was rejected. As set forth previously in this opinion, the petitioner subsequently was convicted of felony murder, manslaughter in the first degree, and robbery in the first degree, and he was sentenced to seventy-five years of incarceration.

At the habeas trial, the petitioner and Castignoli both testified that Tanya was present at nearly all of their

[13] Although the precise timing of this incident is not clear from the record, the petitioner recalled that it occurred when trial was taking place, which is consistent with Castignoli's recollection that the second guardian ad litem was present at that time.

meetings. The petitioner described the meetings as "tense" and testified that Tanya would try to control the conversation. They both recalled discussing the state's evidence during their meetings and, from these discussions, the petitioner understood the nature of the state's case against him. Castignoli believed the state's evidence against the petitioner was strong, and he conveyed that to the petitioner and Tanya. Castignoli believed that the point of contention between him and Tanya was the strength of the state's evidence, as she did not believe the state's case was strong. She also believed that he was trying to "railroad" the petitioner into "do[ing] something" for the state.

With respect to pretrial plea negotiations, the petitioner and Castignoli both testified that Tanya did not want the petitioner to consider an offer that would result in a sentence of more than ten years of incarceration. Unfortunately, her love for her son distorted her ability to make an accurate appraisal of the strength of the state's case, with deleterious consequences for him. The petitioner testified that, as a result of Tanya's interference, Castignoli was unable to explain the plea offer to him. Castignoli, however, recalled having discussions about the plea offer. The petitioner testified that, if the plea offer had been explained to him and he had not followed Tanya's insistence on a plea offer of ten years, then he would have accepted the offer.

The petitioner acknowledged having a very close relationship with Tanya. When asked at the habeas trial whether he was relying on Tanya in her role as his mother, rather than as his guardian ad litem, he answered that he was relying on her as "[b]oth." He acknowledged that he wanted her input and, even if she had been removed as his guardian ad litem, they would still be able to speak to each other on the phone and she was on his visitor list at the Manson Youth Institution, where he was being held.

Castignoli did not recall requesting that Tanya be fully removed as the petitioner's guardian ad litem. He explained: "I really thought [Tanya] was going to speak to [the petitioner] anyways. They had a very close relationship. I thought it was counterproductive to take her out of everything all together." He thought having Tanya removed would be a disadvantage because, at the end of the day, she was the petitioner's mother, and they could speak on the phone or during visiting hours. The respondent's counsel asked Castignoli whether he thought, with keeping Tanya "in the loop, [he] would know what was going on with their conversations, versus being completely out of the loop and working against [him]," he answered: "Yeah. . . . I just felt taking her out of it completely would have been counterproductive. . . . Yes. The answer's yes." In addition, the respondent's counsel asked Castignoli whether it was his position that he and the petitioner "were going to be in a worse position for negotiation purposes . . . if you essentially turned [Tanya] into an enemy," and Castignoli responded: "Yes. Definitely."

In its memorandum of decision, the habeas court concluded that the petitioner had failed to meet his burden of demonstrating that Castignoli performed deficiently and that he was prejudiced by Castignoli's allegedly deficient performance. Specifically, the court concluded: "The evidence establishes that [Castignoli] *did* seek to replace Tanya as the [guardian ad litem]. During the hearing on the motion on September 22, 2006, he specifically asked for removal of Tanya as the [guardian ad litem] as one option, with another [guardian ad litem] being appointed as the second. The court had a lengthy hearing on the motion, hearing from [Castignoli and Marquette], [the petitioner], Tanya and the state, before deciding that a [guardian ad litem] was appropriate and appointing a second [guardian ad litem]. Additionally, the testimony establishes that [the petitioner] and his

mother had an extremely close relationship and he followed her lead on what to do in this case. [Castignoli] testified that he made a strategic decision not to seek complete removal of Tanya because he did not want to create further conflict in his relationship with [the petitioner], and, given the closeness of the relationship between [the petitioner] and his mother, he was certain they would speak about the case anyway. There was no deficient performance here.

"The court has no doubt that [the petitioner] was influenced by his mother to pursue the course he did, and that it was contrary to counsel's advice and that it probably was against his own best interests. The court understands [the petitioner's] frustration that, had he not listened to his mother, or had his mother not interfered in a manner contrary to his interests, that he may well have been serving a much shorter sentence. However, the blame, if any, lies with his mother, not with [Castignoli]. [Castignoli] made repeated attempts to communicate with [the petitioner] and conveyed offers to him and his mother. He explained the state's evidence to [the petitioner]. Tanya had a different view of the evidence and either convinced [the petitioner] to not accept any offer of less than ten years or interfered with [Castignoli's] ability to effectively represent his client. Clients are free to make bad choices after being appropriately advised by counsel. [The petitioner] did so here, whether on his own or under the influence of his mother. Fault for this cannot be placed at the feet of [Castignoli].

"There is also no prejudice. [The petitioner's] own remarks at the motion hearing make clear that he and Tanya felt that [Castignoli and Marquette] were pressuring them into accepting a plea, and [the petitioner] stated more than once that he, *independently*, had decided not to accept any offer: 'I chose to go to trial myself. I chose to plead not guilty. My mother did not

force me to do it. I chose that decision.' Of course, the court is mindful that these are the comments of a seventeen year old facing life imprisonment, still guided by his mother, in the heat of a contested hearing on the record. Nevertheless, this is contemporaneous evidence that undermines his burden of proof on the prejudice prong in this habeas petition. Perhaps if Tanya were not in the picture at all, there could arguably be a reasonable likelihood that [the petitioner] would have accepted the offer. However, the court does not believe that simply removing Tanya as the [guardian ad litem], while still preserving her access to and influence over [the petitioner], would have resulted in a different outcome. Put another way, the problem was not Tanya's status as the [guardian ad litem]; rather, it was her active participation in the case and influence over [the petitioner]. [The petitioner] has not proven that there is a reasonable likelihood that he would have accepted the offer and that the court would have conditionally accepted his guilty plea." (Emphasis in original; footnotes omitted.)

As the court concluded, Castignoli did seek Tanya's removal as the petitioner's guardian ad litem by requesting a substitute guardian ad litem in his motion and at the start of the hearing on September 22, 2006, with the appointment of an additional guardian ad litem as another option. Moreover, Castignoli's decision not to further pursue Tanya's complete removal as the petitioner's guardian ad litem was an appropriate matter of strategy. "[O]ur review of an attorney's performance is especially deferential when his or her decisions are the result of relevant strategic analysis. . . . Thus, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Citation omitted; internal quotation marks omitted.) *Spearman* v. *Commissioner*

of Correction, 164 Conn. App. 530, 540–41, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016). In the present case, Castignoli reasonably took account of the close relationship between the petitioner and Tanya and made a considered tactical decision not to further pursue removing Tanya as one of the petitioner's guardians ad litem because he thought it would be "counterproductive" and could further impede the discussions between him and the petitioner. Given the enmeshed relationship between Tanya and her son, we conclude that this was a reasonable strategic decision, as the habeas court determined.

The petitioner contends that Castignoli's September, 2006 motion and the resulting appointment of a second guardian ad litem was "too little and far too late to be of any use to the petitioner" because the pretrial plea negotiations that had been impacted by Tanya's interference took place almost one year earlier.[14] We are not persuaded. With respect to the timing of Castignoli's request, Castignoli stated at the hearing on his motion that his disagreements with Tanya had been "normal . . . up until very, very recently . . . ."[15] Moreover, at the habeas trial, both Castignoli and the petitioner recalled receiving an offer from the state during closing arguments—after the second guardian ad litem had been appointed—with a cap of thirty-two years and a base of twenty-eight years of incarceration, which was similar to the pretrial offer that would have resulted in a sentence between twenty-five and thirty years of imprisonment. Accordingly, we cannot conclude that Castignoli's efforts to ensure that the petitioner had a second guardian ad litem were too little, too late, as the petitioner argues.

[14] The petitioner's counsel made a similar argument at the habeas trial that getting an additional guardian ad litem "wasn't done in time."

[15] The record does not reflect why Castignoli did not seek a substitute or additional guardian ad litem prior to his September, 2006 motion.

We also conclude that, irrespective of the reasonableness of Castignoli's performance, his failure to have Tanya fully removed as the petitioner's guardian ad litem did not prejudice the petitioner. As the habeas court observed, even if Tanya were removed as guardian ad litem, she would still have had access to and influence over the petitioner, given that she was his mother, and the evidence demonstrated that they had a very close relationship. Thus, there is not a reasonable probability that Tanya's removal as a guardian ad litem would have resulted in a different outcome.

Moreover, in the present case, the only evidence presented by the petitioner in support of his claim of prejudice was his own testimony at the habeas trial that, if Tanya had not interfered with plea negotiations and he had received an explanation of the plea offer he was given, he would have accepted it. The habeas court, as the trier of fact, found that "[the petitioner] has not proven that there is a reasonable likelihood that he would have accepted the offer" and implicitly discredited the petitioner's testimony. See, e.g., *Watts* v. *Commissioner of Correction*, supra, 194 Conn. App. 566 (habeas court implicitly discredited petitioner's testimony that he would have accepted plea offer). "It is well established that [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) Id.

Finally, we note that the habeas court's finding is supported by contemporaneous evidence, specifically, the petitioner's own statements at the September 22, 2006 hearing that he believed that his attorneys were pressuring him into accepting a plea offer and that he, independently, had chosen to plead not guilty and that Tanya did not force him to do so. See, e.g., *Grant* v. *Commissioner of Correction*, 342 Conn. 771, 781, 272

A.3d 189 (2022) (considering whether petitioner produced contemporaneous evidence to support assertion that, but for deficient performance of trial counsel, there was reasonable probability he would have rejected plea offer and proceeded to trial). Accordingly, the petitioner failed to meet his burden of demonstrating prejudice.

III

The petitioner also claims that the habeas court improperly denied his freestanding due process claim on the basis of procedural default. Again, we are not persuaded that the petitioner has demonstrated that this claim is debatable among jurists of reason, that a court could resolve the issue in a different manner, or that the claim raises a question that deserves encouragement to proceed further.[16]

As an initial matter, "a habeas court's conclusion that a petitioner's claim is barred by the procedural default doctrine involves a question of law over which we exercise plenary review." *Kukucka* v. *Commissioner of Correction*, 225 Conn. App. 159, 165, 314 A.3d 631, cert. denied, 350 Conn. 904, 323 A.3d 342 (2024).

Under the procedural default doctrine, "a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding and that if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed

[16] The petitioner also claims that the habeas court incorrectly concluded, in the alternative, that his due process claim was meritless. Because the petitioner has failed to demonstrate that the habeas court's resolution of his claim on procedural default grounds is debatable among jurists of reason, that a court could resolve the issue in a different manner, or that the claim raises a question that deserves encouragement to proceed further, we do not address this aspect of the petitioner's claim.

to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016).

"The cause and prejudice standard [of reviewability] is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . . [T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule." (Internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 623, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021) (certification improvidently granted).

In the present case, the petitioner claimed that ineffective assistance of counsel served as the cause and prejudice for any procedural default. "[A] successful ineffective assistance of counsel claim can satisfy the cause and prejudice standard so as to cure a procedurally defaulted claim. . . . Indeed, [i]f a petitioner can prove that his attorney's performance fell below acceptable standards, and that, as a result, he was deprived of a fair trial or appeal, he will necessarily have established a basis for cause and will invariably have demonstrated prejudice." (Citation omitted; internal quotation marks omitted.) *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 810, 218 A.3d 638 (2019).

"Ineffective assistance of counsel is an objective factor external to the defense because the [s]ixth [a]mendment itself requires that responsibility for the default be imputed to the [s]tate. . . . In other words, it is not the gravity of the attorney's error that matters, but that

it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external factor, i.e., imputed to the [s]tate. . . . Although a petitioner is bound by his counsel's inadvertence, ignorance, or tactical missteps, regardless of whether counsel is flouting procedural rules or hedging against strategic risks, a petitioner is not bound by the ineffective assistance of his counsel." (Citation omitted; internal quotation marks omitted.) *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 347–48, 304 A.3d 431 (2023).

In its memorandum of decision, the habeas court concluded that the petitioner's due process claim was procedurally defaulted. The court explained that the petitioner "raises a self-admittedly novel claim that the trial court had an obligation to inquire into whether Tanya was fulfilling the role of a [guardian ad litem]. . . . The court finds that this claim is procedurally defaulted because it was not raised on appeal, and [the petitioner] has not proven cause and prejudice. The claim centers around the violation of his due process rights and the trial court's duty to ensure that the [guardian ad litem] was operating in [the petitioner's] best interests. The factual predicate for this claim was apparent from the record and did not need the development of facts outside the record. It could have been raised on direct appeal but was not. Appellate counsel was not called as a witness to explain their decision to not pursue this claim. Thus, the court finds that it is procedurally defaulted."

We agree with the habeas court that the petitioner's due process claim was procedurally defaulted. As the habeas court determined, the petitioner could have raised the claim on direct appeal, and he did not establish that his failure to do so was the result of ineffective assistance from his appellate counsel. The petitioner did not call his appellate counsel as a witness at the habeas trial, and he did not present any other evidence

regarding appellate counsel's reason for not raising the due process claim in the direct appeal.

In the absence of any evidence to the contrary, we presume that the petitioner's appellate counsel acted reasonably. "[I]t is not necessary for a reviewing court to resolve what strategic decisions defense counsel *actually* made, but it is required to presume that the challenged actions were within the wide range of reasonable professional conduct if, under the circumstances, it *might have been* sound [appellate] strategy." (Emphasis in original; internal quotation marks omitted.) *Revels* v. *Commissioner of Correction*, 229 Conn. App. 461, 474 n.8, 327 A.3d 418 (2024), cert. denied, 351 Conn. 906, 330 A.3d 133 (2025).

In the petitioner's direct appeal, the petitioner's appellate counsel raised several claims regarding the admission of evidence of certain incriminating statements made by the petitioner, including a claim under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). See *State* v. *Canady*, supra, 297 Conn. 324–25. "[Although] an appellate advocate must provide effective assistance, he is not under an obligation to raise every conceivable issue. . . . The determination of which issues to present, and which issues not to present, on an appeal is by its nature a determination committed to the expertise of appellate counsel, and not to his client. . . . [A] habeas court will not, with the benefit of hindsight, second-guess the tactical decisions of appellate counsel." (Citation omitted; internal quotation marks omitted.) *Donald G.* v. *Commissioner of Correction*, 224 Conn. App. 93, 125, 311 A.3d 187, cert. denied, 349 Conn. 902, 312 A.3d 585 (2024). Accordingly, the petitioner's appellate counsel may have made a reasonable tactical decision not to raise the due process claim. We therefore agree with the habeas court that the petitioner failed to establish ineffective assistance of counsel to satisfy the cause and prejudice

standard to overcome his procedural default in failing to raise his due process claim in his direct appeal.

On appeal, the petitioner focuses on the habeas court's characterization of his due process claim as "novel." He does not challenge the court's conclusion that he failed to establish ineffective assistance of appellate counsel, instead stating that "[t]here is no law on point in this jurisdiction and thus nothing that a reasonably competent appellate attorney should have researched and raised." He contends, for the first time on appeal, that the novelty of his claim, in and of itself, constitutes cause to overcome the procedural default.

"Although ineffective assistance of counsel . . . is the most commonly asserted basis for cause to excuse procedural default . . . it is not the exclusive basis. . . . [T]he cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. . . . [T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met." (Citation omitted; internal quotation marks omitted.) *Kukucka* v. *Commissioner of Correction*, supra, 225 Conn. App. 165; see also *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 26, 272 A.3d 169 (2022) (novel constitutional claim could give rise to cause and excuse procedural default).

Before the habeas court, the petitioner did not claim that the novelty of his due process claim excused his procedural default. "It is well settled that this court is not bound to consider any claimed error unless it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. . . . It is equally well settled that a party cannot submit a case to the trial court on one theory and then seek a reversal in the reviewing court on another. . . . To review such

a newly articulated claim, would amount to an ambuscade of the [habeas] judge." (Citation omitted; internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 677, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

Although the petitioner characterized his due process claim as "novel" at the habeas trial, he did not assert that it was so novel as to excuse the procedural default.[17] Instead, both in his reply to the respondent's return and at trial, he asserted that ineffective assistance of counsel served as the basis for good cause to excuse any procedural default. Accordingly, because the court was not provided with an opportunity to make any factual or legal findings with respect to the petitioner's claim that the novelty of his due process claim constituted cause to excuse his procedural default, we decline to review that claim now for the first time on appeal. See *Peeler* v. *Commissioner of Correction*, supra, 170 Conn. App. 676–77 (declining to review claim raised for first time on appeal that due process claim was " 'premature' " at time of direct appeal, as cause to excuse procedural default, where petitioner argued in reply that his failure to appeal issue was, instead, due to ineffective assistance of appellate counsel).

The petitioner has failed to demonstrate that his claims on appeal are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that they raise a question that deserves encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

[17] "[Even if a] constitutional claim would have been one of first impression if made at the trial court, that does not lead us to conclude automatically that the claim is so novel as to excuse the procedural default." *Brunetti* v. *Commissioner of Correction*, 134 Conn. App. 160, 173, 37 A.3d 811, cert. denied, 305 Conn. 903, 44 A.3d 180 (2012).