APPELLATE COURT
OF THE
STATE OF CONNECTICUT

A.C. 43965

KATHLEEN TRACEY, ET AL.

v.

MIAMI BEACH ASSOCIATION

BRIEF OF DEFENDANT-APPELLANT
WITH ATTACHED APPENDIX

TO BE ARGUED BY:

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STATEMENT OF ISSUES

I. Did the trial court improperly hold that a 1953 judgment that required the defendant to remove a fence that cut off access to its beach was res judicata, given that:

A. The plaintiffs were not parties to the 1953 suit and are not in privity with the actual parties to it?

B. The claims in this case are not the same as those in the 1953 suit?

[pp. 11-17]

II. Did the trial court improperly hold that the 1953 judgment collaterally estopped the defendant from defending its limited restrictions on public use of its beach, given that the 1953 suit concerned different claims and different facts, and given that the parties stipulated to the 1953 judgment after an in-chambers negotiation prior to trial? [pp. 17-20]

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STATEMENT OF FACTS AND PROCEEDINGS

I. INTRODUCTION

This appeal concerns the improper conclusion that a seventy-seven year old stipulated judgment involving different plaintiffs, issues, and facts bars the defendant from litigating the validity of limited restrictions on access to its private beach. The plaintiffs sued the defendant after it erected a fence and gated entrance to its beach, and began to require passes and charge a nominal fee for recreational use of it. Defendant's Appendix ("DA") 11-16, 22. The plaintiffs alleged that these actions violated a 1953 judgment that had forced the defendant to remove a fence that completely cut off public access to its beach. *Id.* at 22; see *Vitello v. Corsino, et al.*, J.D. of New London (Feb. 18, 1953). The trial court (Knox, J.) held that the 1953 judgment was res judicata as to the defendant and collaterally estopped it from litigating the validity of its actions. DA 28-33, 38. The court ordered the defendant to remove the fence, and enjoined it from erecting another fence, charging fees or issuing permits, or otherwise interfering with the public's right to enter, exit, and use the defendant's private property. *Id.* at 38, 48-49. The defendant appealed.[1] *Id.* at 50.

This Court should reverse and direct judgment for the defendant for two reasons:

First, the trial court improperly held that the 1953 judgment was res judicata as to the defendant. *Id.* at 31-33. Res judicata applies only if the parties in the two actions are the same or in privity, and if the actions concern the same claims. *Girolametti v. Michael Horton Assocs., Inc.*, 332 Conn. 67, 75 (2019). The plaintiffs were not parties to the 1953 suit and "the mere fact that [they] may be interested in the same question or in proving or disproving the same set of facts[,]" *id.* at 76, does not establish privity between them and the 1953 plaintiffs. In addition, the facts and issues in the 1953 suit differ from this case.

Second, the trial court improperly held that the 1953 judgment collaterally estopped the defendant from litigating the validity of its actions. DA 31-33. Collateral estoppel

[1] The trial court subsequently stayed its order to remove the fence – pending the outcome of this appeal – but the court refused to stay the remainder of the judgment. DA 55-56.

applies only if the parties to the prior suit "actually litigated" the "identical issue" to that in the subsequent suit. *Indep. Party of CT-State Cent. v. Merrill*, 330 Conn. 681, 714 (2019). The 1953 judgment concerned the complete denial of access to the Beach, not the limitations on access at issue now. Moreover, the 1953 judgment was the product of an in-chambers negotiation, not actual litigation.

Finally, a directed judgment is the proper remedy. The plaintiffs pled and prevailed solely on the preclusive effect of *Vitello*; DA 11-13, 22-38; they do not get a chance to try a new theory. See *Danbury v. Dana Inv. Corp./Lot No. GO8065*, 257 Conn. 48, 58 (2001). In any event, a new trial would be a foregone conclusion: The defendant has broad discretion how best to fulfill its obligation to care for the beach and protect public health. Likewise, the original public dedication of the Beach was for a narrow purpose that the defendant's actions do not hinder.

II. FACTUAL AND PROCEDURAL HISTORY

A. The original owner dedicates the defendant's beach to the public "as an open way for foot passengers and bicycles only."

The defendant is a specially-chartered municipal corporation within the town of Old Lyme responsible for "the improvement of the land in said territory … and its maintenance as a summer resort and for the health, comfort, protection and convenience of the inhabitants thereof." DA 57. The defendant's "territory" consists of 260 homes, a series of private roads that extend north from the mean high tide mark of Long Island Sound to Shore Road (Route 156), east to Hartford Avenue (a town road), and west to a private development, Hawks Nest Beach. *Id.* at 57, 103. The territory includes a small beach that sits between residential lots on the south side of one of the private roads and the mean high tide mark of Long Island Sound. *Id.* The beach is known colloquially as Miami Beach; its original name and its name on the land records is Long Island Avenue.[2] DA 22 n. 1.

[2] The maps, deeds of conveyance, and other documents refer to it as Long Island Avenue; DA 87-90, 98-109; but, to avoid confusion, the brief will refer to it as "the defendant's beach" or "the Beach".

The plaintiffs own properties in the Sound View section of Old Lyme. *Id.* at 22. Sound View Beach, which begins where the paved portion of Hartford Avenue ends, abuts the defendant's beach on the east and runs to the high tide mark of Long Island Sound. *Id.* at 22-23, 87-90, 110. Harry Hilliard formerly owned the land that is now the Sound View and Miami Beach communities. *Id.* at 25. Hilliard developed the land, laid out roads and streets, divided the adjacent land into building lots, and recorded maps of his development with the town clerk. *Id.* at 25, 87-90, 110. Hilliard dedicated the Beach for public use, *id.*, but "as an open way for foot passengers and bicycles *only*." *Id.* at 99 (emphasis added). The public accepted his dedication and has "continuously used and enjoyed" the Beach ever since. *Id.* at 25. Similarly, Hillard conveyed the lots in the Sound View and Miami Beach communities with an easement over the Beach "for foot passengers and bicycles only[.]" *Id.* at 105-08. Both the dedication and the deeds note that its southern boundary "is the mean flood tide of the waters of Long Island Sound." *Id.* at 99, 105-08.

Hilliard died in 1942 and willed title to the Miami Beach community to Edward Wilkins. *Id.* at 98-99. Later that year, Wilkins sold the Miami Beach community to Nunzio Corsino, a member of the defendant's original governing board. *Id.* at 101-02, 111-12. The legislature chartered the defendant in 1949; Corsino conveyed the roads in the Miami Beach community to the defendant in 1951. *Id.* at 57-61, 103. All three conveyances contain the same limitation on public use of the defendant's beach as Hilliard's dedication, i.e., "as an open way for foot passengers and bicycles only". *Id.* at 99, 101, 103.

To fulfill the obligation to "maint[ain] [Miami Beach] as a summer resort and for the health, comfort, protection and convenience of the inhabitants thereof[,]" *id.* at 57, the legislature empowered the defendant to:

- "care for the beaches and waterfronts";
- "keep streets and all public places within [its] limits … quiet and free from noise";

- "prevent the deposit upon property within [its] limits … of refuse, garbage or waste material of any kind, which, in the opinion of [its] board, may endanger the public health or safety or become a nuisance";
- "remove garbage, filth … and other refuse material within [its] limits";
- "regulate and limit the carrying on within [its] limits of any business that will, in the opinion of [its] board, be prejudicial to public health or dangerous to or constitute an unreasonable annoyance to those living or owning property in the vicinity";
- "*restrict the right of entry* on [its] property … except upon the highways"; and
- "examine into all nuisances and sources of filth injurious to the public health and cause to be removed all filth found within [its] limits, which, in its judgment, may endanger the health of the inhabitants".

Id. at 59, 61 (emphasis added).

B. In 1952, Sound View residents sue the defendant for erecting a fence that cut off public access to its beach.

In November 1951, the defendant blocked access to the Beach by fencing off its east side from the "end of the paved portion of Hartford Avenue … to the mean high water mark of Long Island Sound[.]" *Id.* at 64-65; see *id.* at 85. The fence, which "prevent[ed] free and unimpeded ingress and egress" onto the Beach, *id.* at 65, was 139 feet long: Its first eighty-one feet was six feet high and made of iron; its last fifty-eight feet was "wood pilings and a wooden fence[.]" *Id.* at 64-65.[3]

Eight months later, a group of Sound View residents sued the "defendant, amongst others, claiming the erection of a fence … was intended to and restricted public access to Miami Beach[.]" *Id.* at 24; see *id.* at 62. The plaintiffs alleged that:

- the deeds to some of their properties referenced the dedication of the defendant's beach "as an 'open way for foot passengers and bicycles only'" (Count One);

[3] Plaintiffs' Exhibit 2 is "[t]he content of [the *Vitello*] case file". DA 19. The cited portions of the *Vitello* file are in the Appendix: the complaint, the clerk's notes from the settlement conference, and the two judgment files. *Id.* at 62-86; see *infra*, p. 5.

- they had acquired prescriptive easement "to use Long Island Avenue both as an open way and as a beach" (Count Two); and
- Hilliard had dedicated the defendant's beach "as a public way and a beach" and the public had accepted it as such (Count Three).

Id. at 62-68.

However, the parties settled the plaintiffs' claims instead of actually litigating them. *Id.* at 76-86; see *supra*, n. 3. In order "to shorten the time of trial and to prevent further [illegible words][,]" DA 76, the parties agreed to: (1) a mandatory injunction that required the defendant to remove the fence within "a reasonable time[,]" (2) have the court "specially set[ ] forth the facts found" in the judgment file, and (3) submit the judgment file for court approval. *Id.* at 76-77. In addition, the plaintiffs agreed not to seek costs beyond those of the judgment and the defendants waived the right to appeal. *Id.* at 77.

The court rejected the first submitted judgment file, but it approved a revised version. *Id.* at 78-86. The revised version changes a critical proposed finding of fact about the scope of Hilliard's dedication of the defendant's beach; it limits the finding to <u>access</u>, and deletes the reference to <u>use</u>:

REJECTED JUDGMENT FILE	**APPROVED JUDGMENT FILE**
Hilliard "created certain private rights pertaining to the lands sold and the use of the strip of beach running westerly from Hartford Avenue, so-called, and known as Long Island Avenue, and that *the said plaintiffs by virtue of their deeds have rights of way … including the right to free entry and egress and to free and unimpeded use and enjoyment* ***of the beach*** *known as Long Island Avenue*…. *In addition to the facts specially set forth under the First Count, it is further found that the said Harry J. Hilliard … dedicated for public use,* ***as a beach****, the strip of land known as Long Island Avenue*[.]"	Hilliard "created certain private rights pertaining to the land sold and the use of the strip of beach running westerly from Hartford Avenue, so-called, and known as Long Island Avenue, and that in addition to that during his lifetime and prior to the year 1941 he dedicated for public use the strip of land known as Long Island Avenue … and this dedication for such use by the said Harry J. Hilliard was accepted by the unorganized public and has been continuously used and enjoyed by the public down to the date of the beginning of this action."

Id. at 80-81, 84-85 (italicized text deleted in revised version; boldface added in brief).

The court found for the "enumerated" plaintiffs on Count One, for all of the plaintiffs on Count Three, and the plaintiffs withdrew Count Two. *Id.* at 84-85. The court enjoined

> the defendants and their servants and agents … from maintaining and establishing … a steel and wire fence across said Long Island Avenue from the intersection of Long Island Avenue with the west line of Hartford Avenue … and … from interfering with the rights of the plaintiffs and the unorganized public to free entry and egress, and to free and unimpeded use and enjoyment of said Long Island Avenue along its entire length and width, from now henceforth[.]

Id. at 85-86.

C. The defendant implements the Clean Beach Program in response to littering, drinking, urinating, fighting, and sexual relations on its beach.

The public used the defendant's beach for decades; *id.* at 26; but, in recent years, "individuals using the beach acted disrespectfully and abusively…. [They] trespassed onto private residential property adjacent to the beach … discarded garbage and engaged in misconduct, including public drunkenness, public urinating, fighting, and sexual relations on the beach." *Id.* at 27. One resident woke up "every morning" to piles of litter and "[p]eople urinating on my fence," and found a used syringe near his house. Tr. 7/24/19, 184. Another saw "garbage that was worse than a landfill … [with] at least two dozen or more seagulls poking at [it][.]" *Id.* at 87. A third resident, who is "there 24/7" every summer

> witnessed adults, kids just acting rudely, swearing, *smoking marijuana on the beach*. I've witnessed kids – call them kids, teenagers *urinating in neighbors' shower stalls that are attached to their homes*. I've witnessed females *standing behind my car urinating*. I've witnessed couples *having what appeared to be sex under blankets on the beach directly in front of my home during the middle of the day*. I *came home one day with my three children and I had a clear view to the beach and witnessed a couple, both looking at me, having sex against my stone patio*. I've witnessed during the day people coming onto my deck and taking chaise lounges off the deck and putting them on the beach for their own use. I've come home *to strangers sitting at my patio table having lunch*. We've had – we had some instances *of property being stolen, vandalized*.

Id. at 168 (emphasis added); DA 91-96 (photographs of litter and misconduct on Beach).

The defendant responded to these threats to public health and safety by implementing the Clean Beach Program. *Id.* at 27. After the end of the 2017 summer season, the defendant installed "a wire fence with a gated entrance" and welcome sign on the boundary line with Hartford Avenue. *Id.* at 26, 96a-96c (photographs of entrance). The

fence ends "above or near the high water mark of Long Island Sound." *Id.* at 23. The defendant monitors the gate, "regulate[s] admission to the beach[,]" and requires members of the public who "intend to stay on the beach for recreation, leisure, sport, or socializing" to have a beach pass or proof that they reside in Old Lyme.[4] *Id.* at 23-24, 27-28. A pass costs ten dollars for adults and five dollars for children over the age of ten; children under ten use the Beach for free. *Id.* at 27 n. 3.

The defendant did not act clandestinely: Its president, Mark Mongillo, met with the Sound View Beach Association and "put on a slide presentation [that] showed them the reasons" for the Clean Beach Program. Tr. 7/24/19, 90. Mongillo also informed Old Lyme's first selectman about the "program and what we were proposing to do". *Id.* Any Old Lyme resident "with a driver's license … [or] a tax bill" can use the beach for free. *Id.* at 91; DA 27. The defendant took into account that Sound View residents were "the majority [of the] users" of the Beach. Tr. 7/24/19, 91. Sound View residents could purchase a five-year clean beach pass for five dollars, *id.*, which "cover[s] … an infinite number of people; anybody can come in. If you had … a party of 50 people, *you had one pass, you're fine because we recognize you as a member of the community*." *Id.* at 92 (emphasis added). Nor did the defendant discriminate: Its own members have to buy passes and show them in order to use the Beach. Tr. 7/24/19, 91; see *id.* at 180 ("[e]ven myself, when I go off my deck and onto the sand … I have my beach pass clipped to my chair").

In keeping with Hilliard's dedication, the defendant did not charge a fee or require identification from anyone who wanted to walk or bike across its beach. The fence and gated entrance are not obstacles to anyone who wants to do so. See DA 96a-96c. As such, "[t]he general public['s] … right to traverse the area of Miami Beach below the high water mark … *remains unimpeded by the 2017 fence*." *Id.* at 24 (emphasis added).

[4] Old Lyme provides a stipend for beach maintenance to all private beaches in the town; consequently, the defendant does not charge its residents to use the beach. DA 27-28.

The defendant's "laudable intentions[,]" *id.* at 36, have borne fruit: Its beach "now … is what you would imagine a beach should be[,]" Tr. 7/24/19, 171, i.e., family-friendly and virtually litter-free. *Id.* at 102 ("before and after … it's night and day"), 173 ("virtually no garbage on the beach"); DA 97 (photograph). The Clean Beach Program also has reduced incidents that required the police to be called by fifty percent. Tr. 7/24/19, 104.

D. The plaintiffs sue the defendant over the Clean Beach Program.

The Clean Beach Program had almost no impact on the plaintiffs: Dee and Jerry Vowles did not testify – and there was no evidence that they even used the Beach. Robert Breen has not used the Beach since the defendant began the Program; DA 26; but, he admitted that the only "impediment" would be having to show identification. Tr. 7/24/19, 67. Kathleen Tracey purchased a five-year pass and used it to bring visitors. *Id.* at 19. Although a representative of the defendant once asked Tracey to leave the Beach after she had entered without showing her identification or beach pass, she "just brushed him away … [she] just waved [her] hand and said, like, go away, because I'm not leaving. And he eventually went away." *Id.* at 37. Tracey found it annoying "to stop, put [her] things down, give them [her] name, show them [her] pass, tell them [her] address … [or] sometimes … to actually wait in line[.]" *Id.* at 38.

Though Tracey's longest wait was three to five minutes, *id.* at 39, she sued the defendant because she "wanted the fence down – and I trusted … my lawyer to do the things that he needed to do to make that happen." *Id.* at 21. Tracey convinced the other plaintiffs to join the suit; *id.* at 22; its sole basis is that the Clean Beach Program allegedly violates the judgment in *Vitello*. DA 11-13 (operative complaint). The plaintiffs challenged the defendant's authority to erect the fence, require beach passes, or charge fees to use the beach. *Id.* at 13-14. The plaintiffs sought a declaration "that Miami Beach is a public beach[,]" and an injunction (1) ordering the defendant to remove the fence and (2) barring it "from charging fees and issuing permits for use of Miami Beach." *Id.*

The dominant issue at trial was the preclusive effect, if any, of *Vitello*. *Id.* at 22. The plaintiffs argued that collateral estoppel and res judicata barred the defendant from "attempting to re-litigate [its] claim to the beach; i.e. its right to impede the public's access … and, in terms of the beach, the issue of what rights the public has." *Id.* at 116. The plaintiffs recognized that both doctrines "require privity of *parties* together with identical issues and claims[,]" *id.* (emphasis added), but they did not explain how they were in privity with the *Vitello* plaintiffs. *Id.* The plaintiffs also claimed that the Clean Beach Program was not the best method by which to keep the defendant's beach clean and safe. *Id.* at 119 (querying why defendant "doesn't … provide garbage cans" or call the police "when criminal behavior is observed").

The defendant argued that collateral estoppel and res judicata did not apply because: (1) the facts, issues, and parties are not identical to those in *Vitello*; and (2) the parties in *Vitello* stipulated to a judgment and thus did not actually litigate the beach access issue. *Id.* at 126-41. The defendant also argued that Hilliard had restricted his dedication to use as "an open way" by pedestrians and bicyclists and that the Clean Beach Program, which honors Hilliard's dedication, was a reasonable exercise of the powers given to it by the legislature. *Id.* at 121-22.

The trial court ruled for the plaintiffs. *Id.* at 22-38. The court held that "[t]he defendant's installation of the fence, gated entrance, fees, and permits are restrictions on the public dedication of the beach that violate the 1953 judgment." *Id.* at 33. Res judicata and collateral estoppel barred this "collateral attack" on *Vitello*, *id.* at 30, which involved the same defendant and plaintiffs who

> were residents of Sound View, as are the plaintiffs in this action, and respectively claim their access to Miami Beach has been restricted by the defendant's installation of a fence on the boundary. There is no evidence that the parties, particularly the defendant, were not presented an opportunity to litigate fully the controversy in 1953….
>
> In the 1953 action, the plaintiffs claimed a wrongful interference with their free use of … Miami Beach … and alleged continuous and uninterrupted use of [it]. The court found in favor of the plaintiffs on both counts. In this action, the plaintiffs claim

> the right to unrestricted use of the same beach as previously determined in 1953. In sum, [the] present controversy is *substantially similar* to the 1953 litigation; the facts and claims for unrestricted use of Miami Beach, as a public beach, are identical.

Id. at 31-32 (emphasis added). The court also "reject[ed]" the claim that language in the pre-1951 deeds, see *supra*, pp. 2-3, could supersede the terms of *Vitello*, even though the claims in *Vitello* turned on that very language. DA 34-35.

Finally, the trial court refused to exercise its "discretion … to reconsider the issues determined in the 1953 judgment" based on "claims by current association members that there was increased disrespectful and potentially criminal misconduct by persons using the beach[.]" *Id.* at 33. Though the defendant may have had "laudable intentions" when it began the Clean Beach Program, it "does not have the right to restrict access to the Beach to permit holders or paying users in order to remediate such conduct." *Id.* at 36. The court ordered the defendant to remove the fence on the boundary of the Beach. *Id.* at 38. The court further enjoined the defendant from maintaining or establishing any other boundary fence, charging fees or issuing permits for the use of the Beach by the public, or interfering with the rights of the plaintiffs and the public to free entry, egress, and unimpeded use of the Beach. *Id.*

The defendant moved for reargument on two grounds: First, the notion that the plaintiffs are in privity with the *Vitello* plaintiffs conflicts with controlling precedent; second, the trial court's judgment exceeds the scope of the judgment in *Vitello*. *Id.* at 40-42. The court denied the motion. *Id.* at 47. The defendant appealed. *Id.* at 50.

ARGUMENT

I. The trial court improperly held that the 1953 judgment was res judicata as to the defendant.

Standard of Review: Plenary; see *Girolametti*, 332 Conn. at 75.

The core purpose of res judicata is "to inhibit the ability *of a plaintiff* to litigate the same question over and over again, encumbering the mechanisms our society has established to resolve disputes." *State v. Pecor*, 179 Conn. App. 864, 872 (2018) (emphasis added). Allowing strangers to a seventy-seven year old judgment to use it as a sword because the defendant was a party to it is at odds with both that purpose and the careful application that the doctrine's "dramatic consequences" demand. *Id.* at 873; see *Wellswood Columbia, LLC v. Hebron*, 327 Conn. 53, 66 (2017) (doctrine "must give way when [its] mechanical application would frustrate other social policies").

A. The plaintiffs are not in privity with the plaintiffs in the 1953 action.[5]

Res judicata requires "the parties to the prior and subsequent actions [to be] the same or in privity[.]" *Girolametti*, 332 Conn. at 75. This appeal involves only the latter.

Privity is an exception to "[t]he basic premise of preclusion … that parties to a prior action are bound and nonparties are not bound." *Power Integrations, Inc. v. Semiconductor Components Indus., LLC*, 926 F.3d 1306, 1315 (Fed. Cir. 2019); see Restatement (Second) of Judgments § 34 (1982) (nonparties generally "not bound by or entitled to the benefits of … res judicata"). Res judicata "can yield harsh results, especially in the context of claims that were not actually litigated and parties that were not actually involved in the

[5] The defendant preserved this argument by (1) opposing the application of res judicata in its post-trial reply brief and (2) pointing out the lack of privity in its motion to reargue. See *Leisure Resort Tech., Inc. v. Trading Cove Assocs.*, 277 Conn. 21, 35 n. 7 (2006) (plaintiff preserved argument despite not including it in post-trial memorandum of law because trial court considered it and plaintiff "made th[e] argument the central focus of its motion to reargue). Indeed, the plaintiffs conceded preservation in their opposition to reargument: They claimed that the trial court "*has already addressed* the issue of whether there was privity of the parties in order to determine that res judicata applies." DA 44 (emphasis added). Moreover, the absence of privity is not a separate issue; it is an "*argument[ ] or factor[ ]* pertaining to [the res judicata issue]." *State v. Santiago*, 318 Conn. 1, 124 (2015) (emphasis in original); see *Michael T. v. Comm'r of Correction*, 319 Conn. 623, 635 n. 7 (2015) (Court "may review legal arguments that differ from those raised . . . if they are subsumed within or intertwined with arguments related to the legal claim raised").

prior action." *Wheeler v. Beachcroft, LLC*, 320 Conn. 146, 158 (2016). As such, though "strict privity of estate … is not required[,]" *id.* at 169, mere "commonality of interest in proving or disproving the same facts is not enough[.]" *Villages, LLC v. Longhi*, 187 Conn. App. 132, 142 (2019). Privity "should be applied *only* when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion." *Girolametti*, 332 Conn. at 76 (emphasis added; brackets omitted). This ensures that the prior action is a fair opportunity for the opposing party to litigate potential claims by nonparties who later rely on res judicata by proxy. See *Wheeler*, 320 Conn. at 168 (lot owners in prior suits "could litigate their own prescriptive easement claims … [but] could not … know the details of and adequately litigate the plaintiffs' claims").

Wheeler is an instructive example of a common interest insufficient to establish privity: The plaintiffs owned interior lots in a housing development; the defendants owned the four beachfront lots in the development. *Id.* at 150. Prior judgments in favor of other interior lot owners gave them a prescriptive easement for certain purposes over a lawn in between the beachfront lots. *Id.* at 152-54. Despite the plaintiffs' similar status, similar interests, and similar claims, they were not in privity with the other interior lot owners due to the "factually distinct" nature of the interior lot owners' claims "based on their individual uses of the lawn." *Id.* at 168. First, "some lot owners may be able to satisfy the elements of a prescriptive easement claim and others may not … [so they all] cannot be said to share the same prescriptive rights." *Id.* Second, it would be unfair, given the prior plaintiffs' ignorance, to bar the defendants from contesting the current plaintiffs' claims. *Id.*

As *Wheeler* suggests, this Court and the Supreme Court apply privity cautiously. See *Villages, LLC*, 187 Conn. App. at 132 (member of zoning commission sued as individual not in privity with commission, despite common interests, issues and facts in two suits); *Windsor Locks Assocs. v. Planning & Zoning Comm'n of Windsor Locks*, 90 Conn. App. 242, 253 (2005) (competing valet parking lot owners not in privity despite "common interest" in proving validity of nonconforming use); *Mazziotti v. Allstate Ins. Co.*, 240 Conn.

799, 816-17 (1997) (UM insurer not in privity with driver in underlying action despite common interest in disproving driver's liability). All the more so if a plaintiff who is a stranger to a prior judgment attempts to use res judicata as a sword, as its "offensive use … does not promote judicial economy in the same manner as defensive use does … [and] it may be unfair to a defendant … [who] is sued for small or nominal damages [and] may have little incentive to defend vigorously, particularly if future suits are not foreseeable." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-30 (1979).[6]

Thus, the manner in which the prior judgment is birthed matters. See *Dep't of Transp. v. White Oak Corp.*, 319 Conn. 582, 604 (2015) ("[t]he interpretation of a judgment may involve the circumstances surrounding [its] making"). A stipulated judgment has the same res judicata effect as a contested one as to the parties. See *Gagne v. Norton*, 189 Conn. 29, 31 (1983). Nonetheless, privity requires a prior action to have offered the precluded party a full and fair opportunity to litigate. See *Wheeler*, 320 Conn. at 168; *Villages, LLC*, 187 Conn. App. at 143-44. If the prior judgment came into being "based on a compromise verdict or finding[,]" Restatement (Second) of Judgments § 29(5) (1982), then the use of res judicata by a nonparty to the prior action is questionable. See *Torres v. Waterbury*, 249 Conn. 110, 137 (1999) (prior stipulated determination of value of condominium units not binding in subsequent suit); *SantaMaria v. Manship*, 7 Conn. App. 537, 542, *cert. denied*, 201 Conn. 807 (1986) (stipulated judgment about use of strip of property not res judicata as to uses outside scope of judgment).

The Ninth Circuit Bankruptcy Appellate Panel held that settlement and privity are a bad fit in *In re Hansen*, 368 B.R. 868 (B.A.P. 9th Cir. 2007). The debtor and trustee in *Hansen* settled an adversarial proceeding with court approval. *Id.* at 873. The debtor then claimed that the settlement was res judicata in a separate proceeding brought by two creditors. *Id.* at 873-74. Though the trustee and the creditors had

[6] Though *Parklane* concerns collateral estoppel, its fairness point applies to res judicata, too – perhaps even more so, given that privity remains a requirement of the latter doctrine.

> parallel legal interests [those] are not sufficient to establish privity. It must be shown that the subsequent plaintiff's interests were adequately represented by the plaintiff in the former litigation…. [T]he interests of trustees and creditors, while similar, are not identical…. [T]he trustee may settle a case with the idea of maximizing recovery for the estate, while still leaving creditors with unpaid claims. Creditors who receive less than a 100% distribution, on the other hand, want to be able to pursue payment in full.

Id. at 879-80 (citation omitted); see *Sales v. Grant*, 158 F.3d 768, 781 (4th Cir. 1998) (affirming refusal to allow plaintiff to apply offensive nonmutual collateral estoppel because prior suit against defendants "had been settled").

The trial court's expansive view of privity conflicts with these principles. The fact that the plaintiffs live in Sound View and claim that the defendant has impaired their access to the Beach does not establish privity with plaintiffs who lived in the same neighborhood eight decades ago and claimed that the defendant had denied them access.

First, *Wheeler* points in the opposite direction. The *Wheeler* plaintiffs lived in the same neighborhood as the prior interior lot owners and made the same basic claim for a prescriptive easement over the same strip of beachfront lawn. See 320 Conn. at 150-54. Those similarities did not establish privity for the <u>defensive</u> use claim preclusion – never mind for the less-favored, offensive variety.

Second, the trial court's 'same neighborhood' point glosses over a critical distinction between the two counts on which the *Vitello* plaintiffs prevailed: The first count alleged that the plaintiffs who owned property in Sound View had the right to use Miami Beach "as an 'open way for foot passengers and bicycles only'" <u>based on language in their deeds</u>. DA 63-64. The third count alleged that the general public had the same right based on Hilliard's dedication. *Id.* at 66-67. In this case, the plaintiffs allege only the latter; they have made no claim based on ownership of property in Sound View. *Id.* at 11-13. It is inaccurate, therefore, to lump them together with all of the plaintiffs in *Vitello*.

Finally, the parties settled *Vitello* in order to save time and money. DA 76. Indeed, the defendant waived its right to appeal as part of the *Vitello* stipulation, DA 77, which is a strong indicator that it chose not to fully litigate the issues. See *Sales*, 158 F.3d at 781.

Though the stipulated judgment is still a judgment, it is a shaky foundation on which to stand for anyone but the *Vitello* parties. See Restatement (Second) of Judgments § 29(5); *Hansen*, 368 B.R. at 879-80.

B. The claims in the two actions are not the same.

Res judicata only bars re-litigation of the "same" claim; the transactional test governs sameness. See *Wheeler*, 320 Conn. at 159. Under this test,

> res judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose…. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether *the facts are related in time, space, origin, or motivation*, *whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage*…. In applying the transactional test, we compare the complaint in the present action with the pleadings and the judgment in the earlier action.

Id. at 159-60 (emphasis added; citations and brackets omitted).

The highlighted language makes plain the oddity of deeming claims over events nearly eight decades apart the "same" for res judicata. First, of course, the facts are not related in time. See *Landmark Inv. Grp., LLC v. Chung Family Realty P'ship, LLC*, 137 Conn. App. 359, 368, *cert. denied*, 307 Conn. 916 (2012) (cases "sufficiently distinct" that res judicata did not apply; basis for second "occurred wholly subsequent to [prior] judgment"). The passage of even a few years distinguishes claims. See *Gonzalez v. City of New York*, 396 F. Supp. 2d 411, 420 (S.D.N.Y. 2005) (res judicata did not bar suit over defendant's actions in 2000 despite judgment as to its related actions from 1996-1999); *Hauschildt v. Beckingham*, 686 N.W.2d 829, 841 (Minn. 2004) (res judicata did not bar claims based on alleged actions six years apart). The passage of nearly eight decades ought to negate the possibility of grouping facts into a single transaction. Likewise, that much time makes the two sets of facts an impossible trial unit.

Second, the defendant had different motivations for the two fences: The 1953 fence cut off all access to the Beach on its eastward border. DA 64-65. Though the record is sparse as to why the defendant took that drastic step, people generally intend the natural

and probable consequences of their acts. See *Vermont Mut. Ins. Co. v. Walukiewicz*, 290 Conn. 582, 598 n. 18 (2009). The "natural and probable" consequence of a fence that runs from the start of the Beach to the water is to keep everyone on the other side out.

By contrast, the Clean Beach Program fence regulates access to preserve the Beach and protect public health. DA 23-24, 27; see *id.* at 36 (noting defendant's "laudable" intentions). This is part and parcel of the defendant's responsibilities under the special act that created it. *Id.* at 59-61. The defendant allows anyone who wants to cross the Beach on foot or a bike to do so without impediment and charges a nominal fee from those who want to recreate on the Beach. *Id.* at 23-24, 27-28. Though having to pay and to show a beach pass annoyed Ms. Tracey, and Mr. Breen found it too onerous to take his driver's license out of his pocket, the motivations for the two fences are different. See *Benisek v. Mack*, 11 F. Supp. 3d 516, 522 (D. Md.), *aff'd*, 584 F. App'x 140 (4th Cir. 2014) (per curiam), *rev'd sub nom. on other grounds*, 136 S. Ct. 450 (2015) (res judicata did not bar gerrymandering suit; unlike prior action involving same district, suit did not allege racial motivation); *Kirby v. Guardian Life Ins. Co. of Am.*, 231 P.3d 87, 105 (N.M. 2010) (res judicata did not bar suit to collect ERISA benefits despite dismissal of prior suit over partial denial of benefits; defendant had "distinct motivations" for denial and nonpayment).

Third, the defendant would not have expected a court to treat the 1953 fence and the Clean Beach Program as "a unit": The former blocks public access; the latter welcomes, but regulates, it. Courts judge a party's expectations from its perspective at the time of the prior suit. See *Sidney Coal Co. v. Massanari*, 221 F. Supp. 2d 755, 777 (E.D. Ky. 2002), *app'l dismissed*, 98 F. App'x 378 (6th Cir. 2004) (nature of miners' first Coal Act suit made it unlikely parties expected it to include claims in second). For a second suit over "different transactions, and especially subsequent transactions, there generally is no claim preclusion[,]" even if it alleges the same wrongful conduct by the same party. *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 91 (2d Cir. 1997); see *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 79 (D.C. Cir. 1997) (quotation marks omitted) (suit over "validity of

one past course of conduct is not the same claim as … challenging a rule in anticipation of its possible application to similar [future] events". The defendant might have expected the 1953 judgment to bar it from erecting another fence that cut off access to the Beach, but not to preclude reasonable limitations on beach access. Furthermore, nearly eight decades have passed. The defendant's founders are no longer alive; its board has changed members many times since then; and there is no paper trail for the decision to erect the 1953 fence. It is inconsistent with the core concern of res judicata – fairness – to hold the defendant to the (at best) unknown expectations of its 1950's predecessor.

II. The trial court improperly held that the 1953 judgment collaterally estopped the defendant from litigating the validity of the Clean Beach Program.

Standard of Review: Plenary; see *Doyle v. Universal Underwriters Ins. Co.*, 179 Conn. App. 9, 14 (2017).

Collateral estoppel precludes a losing party from taking a second bite at the apple, but only if the apple is identical and the party actually got to bite it. *Id.* at 14-15. Neither is so in this case, largely for the same reasons as for res judicata; as such, the trial court should not have barred the defendant from defending its Clean Beach Program.

A. The issues in the two suits are not identical.

Collateral estoppel requires the issue "for which relitigation is sought to be estopped … be identical to the issue decided in the prior proceeding." *Id.* at 14-15; see *Indep. Party*, 330 Conn. at 714 ("collateral estoppel has no application in the absence of an identical issue"). A mere "overlap in issues does not necessitate a finding of identity[,]" *id.*, which is a stricter test than the "same claim" element of res judicata. See *Pollansky v. Pollansky*, 162 Conn. App. 635, 649-50 (2016) ("collateral estoppel and res judicata are close cousins … not alternate expressions of the same principle"). Identity turns on "what facts were necessarily determined in the first trial … whether the party is attempting to relitigate *those facts* in the second proceeding." *Aetna Casualty & Surety Co. v. Jones*, 220 Conn. 285, 297 (1991) (emphasis added).

However, even if most of the facts and issues are the same, collateral estoppel applies only to those "decision[s] … necessary to the judgment." *Indep. Party*, 330 Conn. at 714. As such, this Court and the Supreme Court often reject collateral estoppel claims despite a near-identity of facts and issues. See *Deutsche Bank AG v. Sebastian Holdings, Inc.*, 174 Conn. App. 573, 588-90 (2017), *aff'd*, 331 Conn. 379 (2019) (per curiam) (finding defendant's sole shareholder personally liable for litigation costs did not collaterally estop it from litigating whether he was alter ego in later suit); *Corcoran v. Dep't of Soc. Servs.*, 271 Conn. 679, 690 (2004) (decision that "trust was not available to the plaintiff's *creditors* … not identical to … whether the trust constituted an asset available to the *plaintiff*") (emphasis in original); *Trinity United Methodist Church of Springfield, Massachusetts v. Levesque*, 88 Conn. App. 661, 670-71, *cert. denied*, 274 Conn. 907 (2005) (collateral estoppel did not bar claim that titled owner of property was not true owner despite prior determination that she held good title); *Nancy G. v. Dep't of Children & Families*, 248 Conn. 672, 681-82 (1999) (collateral estoppel did not bar issue of whether licensed, or unlicensed, but approved, adoption agency "placed" child despite prior approval of placement).

This bright line reflects collateral estoppel's "harsh consequences, namely, cutting off a party's right to future litigation on a given issue," which has bred "reluctan[ce] to uphold the invocation of the doctrine unless the issues are *completely* identical." *Deutsche Bank*, 174 Conn. App. at 591 (emphasis added); see Restatement (Second) of Judgments § 27 cmt. c (1982) (identity rule "balanc[es] … desire not to deprive a litigant of an adequate day in court … [with] desire to prevent repetitious litigation of what is essentially the same dispute"). Such reluctance grows when "one who *was not a party* to the previous action" attempts to use estoppel as a sword. *Filosi v. Elec. Boat Corp.*, 330 Conn. 231, 240 n. 7 (2018) (emphasis in original) (noting "hesitance to permit the offensive use of collateral estoppel" by non-parties); see *Parklane*, 439 U.S. at 329-30.

Viewed with the proper caution, the issues in *Vitello* and the issues in this case are not identical. First, the fences, their effects, and the motives for them differ. See *supra*, pp.

15-16. In *Vitello*, the fence blocked the Beach's entire eastern border from the "end of the paved portion of Hartford Avenue … to the mean high water mark of Long Island Sound[.]" DA 64-65. Hartford Avenue is the only public highway access to the Beach. *Id.* at 57, 103. The *Vitello* plaintiffs alleged that this "*prevent[ed]* free and unimpeded ingress and egress" onto the Beach. *Id.* at 65 (emphasis added). Thus, *Vitello* necessarily decides only that a denial of access violated the rights of the plaintiffs and the public. Under the Clean Beach Program, anyone who wants to cross the Beach on foot or a bike may do so and anyone who wants to use the Beach for recreation may do so for a nominal fee. Indeed, the plaintiffs alleged only that the defendant has "hindered and violated" their right to "freely access" the Beach, and has "restricted" public access to it. *Id.* at 13. At most, whether inconvenience and annoyance, but not denial of access, violates Hilliard's dedication of the Beach merely overlaps with the issue in *Vitello*.

Second, the plaintiffs made two claims in *Vitello*: for some, based on the language in their deeds, for all, based on Hilliard's dedication to the public. See *supra*, p. 14. Only the latter is at stake in this case. Moreover, the *Vitello* plaintiffs quoted Hilliard's pedestrian/bicyclist limitation on the use of the Beach in their pleadings. DA 63-64. The scope of the *Vitello* judgment shrinks in that context.

B. The parties did not actually litigate the beach access issue in 1953.

Collateral estoppel applies only to an issue "properly raised in the pleadings or otherwise, submitted for determination, and in fact determined." *Indep. Party*, 330 Conn. at 714. Because actual litigation is indispensable to issue preclusion, courts "generally err on the side of not finding an issue precluded when it is not clear that it was fully litigated." *De Prins v. Michaeles Tr. of Donald Belanger Irrevocable Tr. dated Oct. 28, 2008*, 942 F.3d 521, 525 (1st Cir. 2019). The trial court, by contrast, improperly expanded the reach of the stipulated judgment in *Vitello*.

A settlement casts graver doubt on the applicability of collateral estoppel than it does res judicata. See *supra*, pp. 13-14. For "a judgment entered by confession, consent, or

default, *none of the issues is actually litigated*. Therefore, the rule of … issue preclusion[ ] … does not apply with respect to any issue in a subsequent action." *Arizona v. California*, 530 U.S. 392, 414 (2000) (emphasis added). Even "stipulations and consent judgments … are preclusive only on issues for which the parties clearly intended that result." *De Prins*, 942 F.3d at 525; see *Wright v. Spaulding*, 939 F.3d 695, 704 (6th Cir. 2019) ("only issues actually litigated in a prior case are considered closed in a later one … [a]nd that does *not* include issues the parties conceded or stipulated to") (emphasis added; citation and quotation marks omitted). Settlements and estoppel work at cross purposes, too, as giving "preclusive effect … to issues not litigated … might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation." Restatement (Second) of Judgments § 27 cmt. e.

There was no actual litigation in *Vitello*: The parties chose, for some of the "many reasons why a party may choose not to raise an issue, or to contest an assertion," *id.*, to stipulate to a judgment before trial. DA 76-86. The parties did not submit the beach access issue for determination; nor did the *Vitello* court "determine" it in the usual sense. As a result, "it cannot be said that the issue was actually litigated to finality." *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045, 1055 (Fed. Cir. 2014). Moreover, the *Vitello* judgment reaches only as far as the parties "clearly intended". *De Prins*, 942 F.3d at 525; see *U.S. ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 913 (4th Cir. 2013) ("contractual nature" of settlement agreements "limits the preclusive effect of a judgment based on such an agreement"). All that is clear from *Vitello* is that the defendant does not have the right to <u>prevent</u> access to the Beach. That was the issue, as pled; that is the extent of the parties' settlement; and, so, that is the limit any collateral estoppel effect. The stipulated judgment in *Vitello* is not a basis to preclude the limited regulation of access to the Beach, especially given the respect shown for Hilliard's limited public dedication of it.

III. The erroneous holdings entitle the defendant to a directed judgment.

If this Court agrees with the defendant on both issues, then it should direct judgment for it. The law limits a plaintiff "to only one opportunity to prove its claim *Danbury*, 257 Conn. at 58. The plaintiffs pled and won their case solely on *Vitello*: The trial court ruled in the plaintiffs' favor on the basis of *Vitello*'s preclusive effect; the court did not agree with their claim that there are better methods than the Clean Beach Program by which to achieve the defendant's goals. See *supra*, pp. 7-10.

Vitello is the plaintiffs' only foot in the courthouse door. Unlike some of the *Vitello* plaintiffs, they did not rely on language in their deeds. Nor do the plaintiffs have general right to challenge the reasonableness of the defendant's conduct (despite having made that argument at trial). In general, "[w]hether [a corporation] is exceeding its charter powers is a question to be raised only by its stockholders or by the state or by parties who receive some special damage from the claimed ultra vires acts." *New Hartford Water Co. v. Vill. Water Co.*, 87 Conn. 183, 189-90 (1913). The plaintiffs are not members of the Association or state actors, and any "special damage" depends on *Vitello*.

Furthermore, seven provisions of the defendant's charter authorize it to enact the Clean Beach Program. It is well-settled that "[c]orporations may, within the fair intent and purpose of their creation, exercise all the powers which are reasonably proper to give effect to the powers expressly granted. In doing this, *they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation*." *Greenwich Water Co. v. Adams*, 145 Conn. 535, 541 (1958) (emphasis added). The legislature empowered the defendant to:

- "care for the beaches and waterfronts";
- "keep streets and all public places within [its] limits … quiet and free from noise";
- "prevent the deposit upon property within [its] limits … of refuse, garbage or waste material of any kind, which, in the opinion of [its] board, may endanger the public health or safety or become a nuisance";

- "remove garbage, filth … and other refuse material within [its] limits";
- "regulate and limit the carrying on within [its] limits of any business that will, in the opinion of [its] board, be prejudicial to public health or dangerous to or constitute an unreasonable annoyance to those living or owning property in the vicinity";
- "restrict the right of entry on [its] property … except upon the highways"; and
- "examine into all nuisances and sources of filth injurious to the public health and cause to be removed all filth found within [its] limits, which, in its judgment, may endanger the health of the inhabitants".

DA 59-61.

Even if there are other methods by which the defendant could care for and protect the Beach and the public's health and safety, it has leeway to decide what method is, or is not, "reasonable proper". 145 Conn. at 541; see *Weldy v. Northbrook Condominium Ass'n*, Inc., 279 Conn. 728, 738 (2006) (deferential test "preserves unfettered the concept of delegated board management"). The defendant chose the Clean Beach Program and took pains to respect the right of the public and Sound View residents. A court must honor the defendant's "choice of means adapted to ends, and … [not] confine[ ] [it] to any one mode of operation." *S.O. & C. Co. v. Ansonia Water Co.*, 83 Conn. 611, 633 (1910).

Finally, the plaintiffs did not plead a right of access independent of *Vitello* and the trial court did not hold that they have one. DA 11-13, 22-38. For good reason: The narrow scope of Hilliard's dedication would make any such claim a non-starter.

An easement is only as broad as its grantor intended. See *Stefanoni v. Duncan*, 282 Conn. 686, 700 (2007). Whether dedicated or deeded, "in determining the character and extent of an easement … the ordinary import of the language will be accepted as indicative of the intention of the parties[.]" *Id.* As with statutory construction, "the language of the grant *is paramount* in discerning the parties' intent. In order to resolve ambiguities in the language, however, the situation and circumstances existing at the time the easement was created may also be considered." *Fitch v. Forsthoefel*, 194 Conn. App. 230, 236-37 (2019)

(emphasis added); see *Leposky v. Fenton*, 100 Conn. App. 774, 777-78 (2007) (reversing trial court's expansive construction of easement due to "clear language of the deed"). Thus, a grantee may not use an easement for a purpose outside the scope of its language.

Hilliard used plain English in his dedication and the deeds of conveyance: He granted the public and the deeded property owners the right to use the Beach "as an open way for foot passengers and bicycles only." DA 99, 105-08. There is no wiggle room in "open way," "foot passengers," or bicycles"; they are ordinary words with well-known meanings. See *Fitch*, 194 Conn. App. at 236 (deed language "given its ordinary import" absent unusual circumstances). But, to erase any doubt, Hilliard added the word "only," and "[t]he plain meaning of "only" has the purpose and effect *of excluding the remaining universe*." *Farrell v. Comm'r*, 136 F.3d 889, 895 (2d Cir. 1998) (emphasis only).

CONCLUSION

For those reasons, this Court should reverse the trial court and direct judgment for the defendant.

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CERTIFICATION PURSUANT TO PRACTICE BOOK §§ 62-7 & 67-2

I hereby certify, pursuant to Practice Book § 67-2, that (1) the electronically submitted brief and separately-bound appendix have been delivered on June 29, 2020, to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and (2) on June 29, 2020, copies of the brief and separately-bound appendix have been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7:

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I further certify, pursuant to § 67-2, that: (1) the electronically submitted brief and separately-bound appendix and the filed paper brief and separately-bound appendix have been redacted or do not contain any names or other personal identifying information prohibited from disclosure by rule, statute, court order or case law; (2) the brief and separately-bound appendix being filed with the appellate clerk are true copies of the brief and separately-bound appendix that were submitted electronically; and (3) the brief complies with all provisions of this rule and the font used is Arial 12.

Daniel J. Krisch