Docket No. X04 HHD CV 09 5034089S	:	SUPERIOR COURT
CELIA W. WHEELER, ET AL.	:	COMPLEX LITIGATION DOCKET
	:	HARTFORD JUDICIAL DISTRICT
v.	:	AT HARTFORD
BEACHCROFT LLC, ET AL.	:	May 14, 2013

MEMORANDUM OF DECISION ON
MOTIONS FOR SUMMARY JUDGMENT (##286, 289, 293 & 294)

This matter is before this court on the defendants' motions for summary judgment[1] on Counts Six through Eleven of the plaintiffs' and intervening plaintiffs' amended complaints.[2] It is a continuation, unfortunately, of a century long property dispute between property owners in a development in Branford, Connecticut currently known as Crescent Bluff Avenue (the Avenue). In the operative complaints (##250 & 264), the plaintiffs and intervening plaintiffs allege that they own property located on Crescent Bluff Avenue that has become commonly known as "rear lots," meaning that they do not abut directly Long Island Sound (the Sound). The defendants are owners of "waterfront lots" that do abut the Sound. In order to get to the Sound the plaintiffs must travel up the Avenue and cross the lawn on the McBurneys' property (the Lawn) over which

---

1 The motions for summary judgment were filed by the following defendants only: Beachcroft, LLC; James McBurney and Erin McBurney; Roger A. Lowlicht; and Kay A. Haedicke. The Town of Branford and the Pine Orchard Association, Inc. are also named defendants in this action. However, for purposes of this decision, "defendants" shall only refer to those who have moved for summary judgment.

2 The defendants' motions seek judgment on Counts Five through Eleven of the complaints, however, they have agreed that if Count Five relates only to the Avenue and not the Lawn, they would withdraw their claim for summary judgment as to Count Five. Count Five claims an easement by necessity over the Avenue-Lawn parcel. If it is held to apply to both the Avenue and the Lawn, it would be duplicative of Count Eleven which claims an easement by necessity over the Lawn. To avoid such duplicative pleadings, the court hereby treats Count Five as claiming an easement by necessity over the Avenue portion only. As such, Count Five is no longer an issue for purposes of these summary judgment motions.

Mailed to all counsel of record and the OCR on 5/14/13. AH/CO
411.00

they have a right of way to pass to reach the Sound.

Count Six claims that the Lawn, as an extension of the paved portion of the Avenue-Lawn parcel, is a public way. Count Seven claims an express easement over the Lawn. Count Eight claims an implied easement over the Lawn. Count Nine claims a prescriptive easement over the Lawn. Count Ten claims a covenant appurtenant to the Lawn that exists for the benefit of the rear lot owners. Count Eleven claims an easement by necessity over the Lawn.

In the present action, the defendants claim they are entitled to summary judgment on Counts Six through Eleven of the operative complaints because the Supreme Court has already decided that the rear lot owners have an implied easement to pass and re-pass over the Lawn to access the shoreline. The defendants argue that any alternative claims or theories related to the Lawn should have been raised in either *McBurney v. Cirillo*, 276 Conn. 782, 889 A.2d 759 (2006), overruled in part on other grounds, ("*McBurney I*") and/or *McBurney v. Pacquin*, 302 Conn. 359, 28 A.3d 272 (2011) ("*McBurney II*") and if not raised, would now be barred by the doctrine of res judicata. The background giving rise to this dispute is recited in depth in the most recent Supreme Court ruling on this matter, *McBurney II*, and this court shall summarize those facts as necessary for the resolution of these summary judgment motions.

Background

In July, 1885, Ellis Baker filed in the Branford land records a development plan (the Baker plan) for a beachfront community along the Sound. At the time Baker filed the plan, he owned all the property within the development, as trustee for the beneficiaries of a trust, including Baker himself.

The Baker plan is a map depicting thirty-five lots, a strip of land labeled "Avenue" and an

area directly abutting the beach labeled "Lawn." Four of the lots abut the Lawn and face the Sound, while the remaining lots are located behind the waterfront lots and line the Avenue. These rear lots do not have direct access to the Lawn or the beach. The Avenue runs between the center two waterfront lots, lots 4 and 3, and, at its southern terminus, meets the Lawn. Facing the Sound, lot 2 is to the right of lot 4 and lot 1 is to the left of lot 3. The rear lots are numbered 5 through 36. The Avenue, which formerly was known as Maple Avenue and presently is known as Crescent Bluff Avenue, runs north and south through the development, perpendicular to the Sound.

In *McBurney I*[3], the McBurneys, who own lot 4, brought quiet title actions against rear lot owners[4] Cirillo, who owns lot 9 and the southerly half of lot 11, Verderame, who owns lot 13 and the northerly half of lot 11, Baldwin, who owns lot 10, and Pacquin, who owns 9 Crescent Bluff Avenue[5], for trespass and adverse possession and sought declaratory and injunctive relief with respect to their property. On appeal, the Supreme Court held that the filing of the Baker plan in

---

3

For clarity sake, the court shall refer to the parties in either *McBurney I* or *II* as "waterfront lot owners" or "rear lot owners" rather than "plaintiffs" or "defendants" through out the decision.

4

The original four actions were *McBurney v. Cirillo*, Superior Court, judicial district of New Haven, Docket No. CV 98 0414820; *McBurney v. Verderame*, Superior Court, judicial district of New Haven, Docket No. CV 99 0422102; *McBurney v. Baldwin*, Superior Court, judicial district of New Haven, Docket No. CV 99 0422100; and *McBurney v. Pacquin*, Superior Court, judicial district of New Haven, Docket No. CV 01 0455411. They were consolidated for trial purposes. A fifth case, *Verderame v. McBurney*, Superior Court, complex litigation docket at Hartford, Docket No. X04 CV 01 4027739 (which was originally a New Haven case, bearing the following docket number, NNH CV 01 0453999), was consolidated with the four other cases but was not before the Supreme Court as the trial court decided to consider the non-jury cases first, thus, although a jury had been picked, the trial court discharged the jury and instructed counsel that trial would proceed in the *Verderame* matter after resolution of the four non-jury cases. *McBurney v. Cirillo*, supra, 276 Conn. 786 n.4.

5

The Pacquin deed submitted by the intervening plaintiffs, Exhibit #305 of the February 26, 2013 Court Trial of Court One only (the "February Trial Exhibit"), does not identify which lot "9 Crescent Bluff Avenue" corresponds to on the original Baker plan - 36 building lots, which is February Trial Exhibit 21.

the land records, along with specific references to that plan in deeds conveying property within the development, had created an implied easement over the Lawn for the benefit of the rear lot owners. *McBurney v. Cirillo*, supra, 276 Conn. 799. In coming to that conclusion, the Court acknowledged that although only the second lawn parcel in front of the McBurneys' property was at issue, we "recognize, however, that the nature of this action, because it requires us to interpret the effect of the Baker plan on the relative rights of the parties to the '[l]awn' depicted in the plan necessarily implicates the rights of *all* the lot owners in the development to *all* portions of the lawn." (Emphasis in original.) Id., 789, n.9. After concluding that an implied easement existed over the Lawn, the Supreme Court remanded the case for further proceedings to determine the scope of that easement. Id., 823. The Supreme Court further ordered that notice of the remand action be provided to all lot owners in the development and that said lot owners be given the opportunity to join as parties. Id. It is undisputed that said notice was given to all lot owners. Subsequent to that notice being given, Beachcroft LLC, which owns the extension of the Avenue between lots 3 and 4, and Roger Lowlicht and Kay Haedicke, who own lot 2, all intervened as plaintiffs in *McBurney v. Pacquin*. Leslie Carothers, who owns lot 14, intervened as a defendant in *McBurney v. Cirillo*.

On remand, the trial court, *Shortall, J.*, held an evidentiary hearing to determine the scope of the implied easement. The court laid out certain principles announced by the Supreme Court in *McBurney I* that it found controlled its decision. Specifically, the trial court held that "[t]his court concludes that the Supreme Court in *McBurney* found that there exists an implied easement over the entire lawn shown on the Baker plan. Consequently, there is such an easement over the second lawn parcel. In other words, the Court has already established the *extent* of the easement.

It falls to this court to determine the *nature* of that easement, i.e., what uses can be made of it, at what times, by whom, etc." (emphasis in original.) *McBurney v. Pacquin*, Superior Court, complex litigation docket at Hartford, Docket No. X09 CV 01 4027736 (August 6, 2008, *Shortall J.*), p. 16-17, (8/6/08 MOD). The waterfront lot owners argued that the scope of the implied easement was limited to a right-of-way to access the shoreline. The rear lot owners argued that the easement's scope was broader and afforded them the right to recreate and socialize on the Lawn. The trial court reviewed four types of documentary evidence to determine the scope of the implied easement: the record in *Fisk v. Ley*, 76 Conn. 295, 56 A. 559 (1903); maps, including the Baker plan itself; photographs and picture postcards; and deeds evidencing various conveyances within the development. Id., 18. The court also considered the testimony of Jane Bouley, the Branford town historian, and Lawrence Fisher, a licensed land surveyor. Id. Based on all the evidence, the trial court found that the rear lot owners had an implied easement "only to pass and repass over the entire [L]awn . . . as a means of accessing the shoreline." Id., 32. This portion of the trial court's ruling was appealed by the rear lot owners.

In its 8/6/08 decision, the trial court withheld entering a final judgment and ordered a post-trial hearing to address several questions, including who should be bound by the judgment. Id., 33-34. After that hearing, the trial court issued a supplemental memorandum of decision on September 17, 2008, (9/17/08 MOD), in which it held that its orders were binding on all lot owners. See 9/17/08 MOD, p. 4. It reasoned that, because the Supreme Court in *McBurney I* had ordered that notice of the pending action be provided to all lot orders and that they be given an opportunity to intervene, and, because such notice was provided, all lot owners had the opportunity to intervene and be heard. Id. "That they chose not to, for whatever reason, does not

make it unfair for the court to bind them to its determination of the scope of the easement, given the notice and opportunity to be heard that was afforded them." Id., 5. Both the 8/6/08 and 9/17/08 memoranda of decisions were sent to all rear lot owners. See Exhibit B, Affidavit of Daniel J. Klau, to McBurneys' Motion for Partial Summary Judgment (#286).

In the supplemental memorandum of decision, the trial court also expanded its order with respect to the scope of the easement by holding that the rear lot owners may use their easement to pass and repass to property to the east of Crescent Bluff, not just the immediate shoreline. It is this portion of the supplemental order that the waterfront lot owners cross appealed.

In *McBurney II*, the Supreme Court, in dealing with both the rear lot owners' appeals and the waterfront lot owners' cross appeals, affirmed all respects of the trial court judgment except for that portion of the trial court's order permitting the use of the Lawn to pass to areas other than the shoreline.[6] Id., 384.

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 moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to

---

[6] Although all the rear lot owners received the trial court's 9/17/08 MOD, neither the defendants to the *McBurney I* action nor the other rear lot owners appealed the trial court's determination that its decision was binding on all lot owners. More importantly, the Supreme Court in *McBurney II* had no issue with the trial court's finding that its ruling was binding on all lot owners.

judgment as a matter of law." (Internal quotation marks omitted.) *Rodriguez v. Testa*, 296 Conn. 1, 6-7, 993 A.2d 955 (2010).

Discussion

"The applicability of the doctrines of collateral estoppel or res judicata presents a question of law . . . ." *Powell v. Infinity Ins. Co.*, 282 Conn. 594, 601, 922 A.2d 1073 (2007). "Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum . . . . [W]e have observed that whether to apply either doctrine in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim . . . . The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to re-litigate a matter which it already has had an opportunity to litigate . . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Citations omitted; internal quotation marks omitted). *Powell v. Infinity Ins. Co.*, supra, 282 Conn. 600-02. "The conservation of judicial resources is of paramount importance as our trial dockets are deluged with new cases daily." (Internal quotation marks omitted.) *Himmelstein v. Bernard*, 139 Conn. App. 446, 453, 57 A.3d 384 (2012).

"Under the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. . . . [C]laim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or might have been made. . . . The judicial doctrine of res judicata express[es] no more than

the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest. . . . The doctrine of res judicata [applies] . . . as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction . . . and promotes judicial economy by preventing relitigation of issues or claims previously resolved. . . . Furthermore, the appropriate inquiry with respect to [claim] preclusion is whether the party had an *adequate opportunity* to litigate the matter in the earlier proceeding." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Joe's Pizza, Inc. v. Aetna Life & Casualty Co.*, 236 Conn 863, 871-72, 675 A.2d 441 (1996).

In order to determine if res judicata would bar the claims being made in this action the court must conduct a transactional analysis. In *Lighthouse Landings, Inc. v. Connecticut Light & Power Co.*, 300 Conn. 325, 349, 15 A.3d 601 (2011), the Supreme Court described the transactional test as follows: "The transactional test of the Restatement [(Second) of Judgments] provides a standard by which to measure the preclusive effect of a prior judgment, which we have held to include any claims relating to the cause of action which were actually made or might have been made. . . . In determining the nature of a cause of action for these purposes, we have long looked to the group of facts which is claimed to have brought about an unlawful injury to the plaintiff . . . and have noted that [e]ven though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of action." (Internal quotation marks omitted.)

It is undisputed that the intervening plaintiffs were parties to *McBurney I* and *II*. As such, they are bound by the judgments rendered in those two decisions. The intervening plaintiffs argue, however, that those decisions only addressed rights to the McBurneys' property and not

the entire Lawn and any references to rights as to other areas of the Lawn by the court constitutes mere dicta. They reason that because the four original McBurney appeals were quiet title actions brought by the McBurneys regarding their property only, any decisions rendered in those matters only apply to the McBurneys' property. They further argue that the notice that was provided when the matter was remanded further confirms this theory as it only gave notice of the pendency of the hearing to determine the scope of the easement across the McBurneys' front lawn. As such, they argue that *McBurney I* and *II* only resolved issues related to the McBurneys' property.

This is clearly not the case.[7] In the 8/6/08 MOD, the trial court laid out the principles that it felt controlled its decision. Among those principles was the Supreme Court's finding in *McBurney I* that the implied easement exists over the entire Lawn as shown on the Baker plan. Id., 16. Dictum "is an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication." *DeSena v. Waterbury*, 249 Conn. 63, 78 n.16, 731 A.2d 733 (1999). That the Supreme Court had determined the implied easement exists over the entire Lawn is clearly not "mere dicta", but a fundamental principle which the

---

[7] The intervening plaintiffs' argument that only the lawn in front of the McBurneys' property was at issue in the original four *McBurney* cases is further discredited by their own pleadings in the underlying *McBurney* actions. In those four matters, they claimed an easement over the entire Lawn by way of special defenses. By alleging certain rights over the entire Lawn, the intervening plaintiffs brought the entire Lawn into those cases.

lower court felt it was obligated to follow.

In their second appeal of the trial court's decisions in *McBurney II*, the only issue the rear lot owners raised was the trial court's determination that the implied easement only allowed them to pass and repass over the Lawn to access the shoreline rather than allowing the rear lot owners to recreate and gather on the Lawn. They were aware of the lower court's determination that the easement existed over the entire Lawn and yet chose not to challenge that determination in their appeal. The Supreme Court subsequently upheld the lower court's rulings except for its expansion of the scope of the easement to allow the rear lot owners to access areas other than the shoreline. As such, the intervening plaintiffs had their opportunity to litigate any and all claims they may have had related to the Lawn. That they chose not to do so for whatever their reasons does not grant them the right to re-litigate them here.

Recognizing the above problems with their arguments, at the December 11, 2012 hearing on the summary judgment motions, the intervening plaintiffs conceded that judgment may enter on Counts Seven, Eight and Ten of their amended complaint. See December 11, 2012 hearing transcript pgs 61, 65. As stated above, Count Six claims that the Lawn, as an extension of the Avenue that they claim is a public way, is also a public way or park. Count Nine claims a prescriptive easement over the Lawn. Lastly, Count Eleven claims an easement by necessity over the Lawn.

In *McBurney I*, the question regarding the intervening plaintiffs' prescriptive easement claim as to the McBurney's property was addressed. There, the Supreme Court found that the lower court had improperly applied the doctrine of tacking with respect to the prescriptive easement claim. On remand, after the Supreme Court determined that the dispute involved the

entire Lawn parcel, the intervening plaintiffs had the opportunity to litigate the very same prescriptive easement claim they have asserted in Count Nine. Thus, the intervening plaintiffs are precluded from re-raising the same claim here.

As to Counts Six and Eleven, the intervening plaintiffs have not put forth any new or additional facts that significantly change or distinguish the situation here from that of *McBurney I* and *II*. They have not provided any convincing explanation as to why these claims could not have been raised in the earlier proceedings. They argue that the court should construe *McBurney I* and *II* as only dealing with the McBurneys' property and not the entire Lawn. For the reasons stated above, the court does not agree with that interpretation of *McBurney I* and *II*. As such, res judicata precludes the intervening plaintiffs from raising these claims here.

The plaintiffs argue that their claims are not precluded because they were not parties to *McBurney I* and *II* and are not in privity with any of the parties in those actions. They argue that because the deeds to their property contain different language, e.g., they do not make reference to the phrase "right of way", their rights to the Avenue-Lawn differ from the parties in *McBurney I* and *II*. They also argue that res judicata should not apply because they were not joined as parties to the prior actions as required by General Statutes §§47-31 and 52-107. In addition, they adopt and join in the intervening plaintiffs' argument that the notice given in *McBurney I* was limited to issues related to the second lawn parcel in front of the McBurney house, not the entire Lawn. Lastly, the plaintiffs argue that, with regards to their prescriptive easement claim, that claim is not dependent on their deeds and their rights were not and could not have been adjudicated in the prior actions because such claims are fact-specific and must be evaluated on an individual basis to determine if a particular party can prove such a claim.

"While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented because of his purported privity with a party at the initial proceeding. . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." *Joe's Pizza, Inc. v. Aetna Life & Casualty Co.*, supra, 236 Conn. 868. "In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather, it is, in essence, a shorthand statement for the principle that [res judicata] 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. . . . [T]he crowning consideration . . . [in regard to] the basic requirement of privity . . . [is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." *Smigelski v. Kosiorek*, 138 Conn. App. 728, 735, 54 A.3d 584 (2012).

The plaintiffs argue that they are not in privity with the parties in the McBurney actions because their rights are derived from deeds that are different from the deeds of the parties in the McBurney actions. That argument, however, ignores the fact that the trial court reviewed and considered *all* the deeds in the development and explained its interpretation of the significance or lack there of, of the deeds that did not contain the reference to a "right of way" in determining the scope of the implied easement. Specifically, the court stated, "[w]hile other deeds of real lots executed by Mr. Baker from 1885 through 1890 do not contain references to a "right of way", twenty of those deeds were conveyances by Mr. Baker in his capacity as trustee either to himself,

individually, or to the other beneficiaries of the trusts, A.M. Young and Hattie Fuller. As for the four remaining lots, in each of the conveyances there is specific reference to the same plan, and there is no evidence to suggest that Mr. Baker intended some of the rear lots to have more expansive rights under the plan than others. Equally telling is that in *none* of the conveyances by Mr. Baker contemporaneous with his creation of the easement is there *any* indication that the grantees were obtaining the right to gather and recreate on the lawn." (Emphasis in original.) 8/6/08 MOD, p. 25. Thus, the plaintiffs' interests were sufficiently represented by the rear lot owners who were parties to *McBurney II*.

The fact that the very deeds upon which the plaintiffs rely are part of the evidentiary record of *McBurney II* defeats their argument that their rights are somehow different from the parties in *McBurney II*. Clearly the trial court considered those deeds and found that the plaintiffs shared the same legal rights as other rear lot owners who were parties to the *McBurney* actions. Furthermore, all the rear lot owners were provided with a copy of the court's 8/6/08 and 9/17/08 memoranda of decision and yet the plaintiffs still chose not to intervene once they received those decisions. The legal significance of the different deeds has already been argued by the parties and determined by the court in *McBurney II*. Given all of the above, this court finds that the plaintiffs are in privity with the rear lot owners who were parties to *McBurney II*.

In any event, privity is not necessary here for the application of res judicata, given the procedural history of *McBurney I* and *II*. In particular, the plaintiffs' argument that res judicata is inappropriate because they were not joined as parties to the underlying *McBurney* actions was addressed by the Supreme Court in its discussion and analysis on subject matter jurisdiction in *McBurney I*. In *McBurney I*, the Supreme Court considered the question of whether the trial court

had subject matter jurisdiction to render its decision because not all of the lot owners in the development were parties to the four cases that were on appeal before it. The Court held that, although not all of the lot owners were notified of the pendency of these four actions, they were, however, given notice in the companion case, *Verderame v. McBurney*, Superior Court, judicial district of New Haven, Docket No. CV 01 0453999, which had been consolidated with the four cases that were on appeal. "Specifically, the *Verderame* plaintiffs seek a declaratory judgment that they enjoy an easement over the lawn and avenue areas of the development as depicted on the Baker plan, and over the area of land that lies between the lawn and the Sound. . . . Paragraph 23 (a) of count one, the declaratory judgment count of the complaint, asserts that [a]ll lot owners and residents of Crescent Bluff Avenue have been given notice of the pendency of this case by delivery of a copy of this complaint, with exhibits, and orders, on each of them by first class mail, postage prepaid, and by abode service at the respective addresses on Crescent Bluff Avenue. The supplemental return of service discloses that all of the lot owners and residents of Crescent Bluff Avenue were indeed served with notice of the pendency of the actions. Thus, in *Verderame*, which is a companion case to these four cases, all the lot owners in the development are either actual parties to, or were given notice of and the opportunity to join, these actions." *McBurney v. Cirillo*, supra, 276 Conn. 795-96.

Upon remand to the trial court for a determination of the scope of the implied easement, the Supreme Court ordered that notice be provided, yet again, to all lot owners *and that they be given an opportunity to intervene.* It is undisputed that said notice was provided to all lot owners. Lastly, it is undisputed that a copy of the trial court's 2008 decision wherein it stated that its holdings were binding on all lot owners was served on every lot owner. Consequently, the

plaintiffs were provided with repeated notices of the proceedings related to the Lawn. They were also provided with repeated opportunities to intervene. However, they chose not to, for whatever their reasons.

As such, their argument that they should not be bound by the decisions rendered in *McBurney I* and *II* because they were not joined as parties to those actions, is, at best, disingenuous. Having received ample notice and opportunity to intervene, the plaintiffs cannot now, in good faith, come to court and claim that they should not be bound by the earlier decisions because they were not joined as parties to the prior proceedings. They made a calculated decision not to participate in the remand proceedings, knowing full well that those proceedings could fundamentally affect their rights to the Lawn. Instead, they chose to wait to see how those proceedings turned out, preserving this second bite of the apple if the intervening plaintiffs were not sufficiently successful in *McBurney II*. Such conduct, if tolerated, would completely undermine the finality of the courts' determinations and render meaningless the Supreme Court's holding in *McBurney I* that the issues involved all of the Lawn, and that, therefore, all land owners potentially affected should be given notice of the remand and an opportunity to intervene in the proceedings.

Finally, as to their argument that *McBurney I* and *II* only resolved issues related to the McBurney property and not the entire Lawn, that argument has already been addressed above and need not be reiterated here. For these reasons, summary judgment is granted as to Counts Seven, Eight and Ten.

As to the prescriptive easement claim in Count Nine, the defendants agree that such a claim is highly fact-dependent and, thus, there potentially exists questions of fact as to that claim.

See hearing transcript, p. 28-29, 38. They argue, however, that the plaintiffs have failed to put forth any evidence that would demonstrate that there exists a genuine issue of material fact regarding their prescriptive easement claim. Specifically, the defendants reason that, because the Supreme Court has already found that all rear lot owners possess an implied easement to pass and repass over the Lawn, the plaintiffs would not be able to show adverse use for fifteen years. As such, they reason, no genuine issue of material fact exists with regard to their prescriptive easement claim. That argument, however, was raised for the first time in the defendants' reply brief and is not an argument based upon res judicata. At least one set of defendants, the McBurneys, conceded at oral argument that, procedurally, this was an improper way to raise such an argument. See 12/11/12 hearing transcript, p. 33. The defendants also argue that they are entitled to repose with respect to claims related to the Lawn. They argue that, based upon the policy considerations underlying the doctrines of res judicata, namely, the interests of parties and of the courts in bringing litigation to a close and conservation of judicial resources, the plaintiffs should be estopped from bringing these claims now when they had repeated opportunities to bring them in earlier proceedings but purposely chose not to do so.

Whether the plaintiffs would be able to prove successfully their prescriptive easement claim is not what is at issue before the court. What the court must consider is whether their prescriptive easement claim should be barred under the doctrine of res judicata. That turns on whether the parties could be considered to be in privity with the parties in the prior action with respect to their prescriptive easement claim. In *McBurney I*, the Supreme Court reversed the trial court on the prescriptive easement claim because of how the trial court had applied tacking. Specifically, the trial court relied on adverse use by the various rear lot owners over the years to

come to the conclusion that the fifteen year requirement had been met. The Supreme Court said that was not appropriate because all of those separate lot owners were not in privity with each other. Because the prescriptive easement claim is such a fact-bound inquiry, the court finds that there is no privity between the plaintiffs here and the rear lot owners in the *McBurney* actions. There does not exist such an identification in interest between the plaintiffs and the rear lot owners in the *McBurney* actions such that they shared the same legal rights so as to justify precluding their prescriptive easement claims. As such, summary judgment as to Count Nine of their complaint is denied.

Furthermore, any prescriptive easement claims raised by the plaintiffs had they intervened following the remand after *McBurney I* would have been beyond the scope of the remand. Such a claim is unrelated to a review of the Baker plan or a reading of the deeds associated with it. Consequently, the remand proceedings did not present the plaintiffs with an opportunity to litigate their prescriptive easement claims.

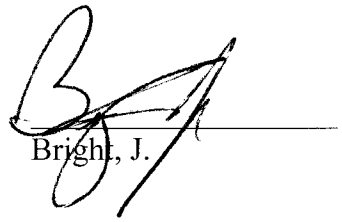
Finally, with respect to Count Six, that claim cannot be considered to have been at issue in *McBurney I* or *II*. In *McBurney I*, the Supreme Court remanded the matter to the trial court for a determination of the scope of the implied easement it found to exist over the Lawn. It is undisputed that the Avenue was never at issue in *McBurney I* or *II*. Thus, whether, as an extension of the Avenue, which is alleged to be a public way, the Lawn is also a public way/park was never an issue in *McBurney I* or *II*. Consequently, the plaintiffs never had an opportunity to litigate such a claim in the remand after *McBurney I*. For this reason, it would be improper to bar the plaintiffs from raising that claim here. Therefore, summary judgment is denied as to Count Six.

In Count Eleven, the plaintiffs claim an easement by necessity over the Lawn. "The requirements for an easement by necessity are rooted in our common law. . . . [A]n easement by necessity will be imposed where a conveyance by the grantor leaves the grantee with a parcel inaccessible save over the lands of the grantor, or where the grantor retains an adjoining parcel which he can reach only through the lands conveyed to the grantee. . . . The necessity element need only be a reasonable one. . . . Moreover, although it is true that [a]n easement of necessity may occur when a parcel has become landlocked from outside access such that the owner would have no reasonable means of ingress or egress except over lands promised by another and a right-of-way is necessary for the enjoyment of the parcel . . . [t]he inverse also is true; that is, a common-law right-of-way based on necessity expires when the owner of a dominant estate acquires access . . . through another means." (Citations omitted; internal quotation marks omitted.) *Christensen v. Reed*, 105 Conn. App. 578, 583-84, 941 A.2d 333 (2008), cert. denied, 286 Conn. 912, 944 A.2d 982 (2008). The plaintiffs acknowledge that *McBurney I* and *II* granted them an implied easement over the Lawn. If that is the case, it is unclear to the court how they can claim that they also possess an easement by necessity over the Lawn. No such necessity exists as the plaintiffs possess an implied easement to pass and repass over the Lawn. As such, summary judgment is granted as to Count Eleven of the plaintiffs' complaint.

Conclusion

Because there exists no genuine issues of material fact and the defendants have shown that they are entitled to judgment as a matter of law, judgment may enter in favor of the defendants on Counts Six through Eleven of the intervening plaintiffs' amended complaint. For the reasons stated above, judgment may enter in favor of the defendants on Counts Seven, Eight, Ten and

Eleven of the plaintiffs' amended complaint. The defendants' motion is denied as to Counts Six and Nine of the plaintiffs' complaint.



Bright, J.