BARBARA O. MURPHY ET AL. *v.* EAPWJP, LLC, ET AL.
(SC 18696)

Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.*

Argued April 24—officially released September 18, 2012

Thomas P. Moriarty, for the appellant (named defendant).

John R. Fitzgerald, for the appellees (plaintiffs).

Edward B. O'Connell, for the appellees (defendant Steven Dodd et al.).

Opinion

PER CURIAM. The named defendant, EAPWJP, LLC (EAP),[1] appeals from the judgment of the Appellate Court affirming the judgment of the trial court granting the plaintiffs, Barbara O. Murphy, Bruce Jablonski, Geoffrey B. Corkhill, Aline T. Pollard, and Donald L. Kooken, and the defendants-cross claimants, Steven Dodd and Marion Dodd,[2] a prescriptive easement over a pathway crossing property owned by EAP that the plaintiffs and the Dodds had used for many years to access a nearby beach. The pathway traversed protected tidal wetlands and was covered in part by a wooden walkway installed without appropriate permits. On appeal, EAP initially asked this court to address whether the Appellate Court improperly concluded that the plaintiffs and the Dodds "had acquired a prescriptive easement on a pathway over [EAP's] tidal wetlands even though the wooden walkway over which they traveled was in violation of [General Statutes §§] 22a-32 and 22a-361 during the prescriptive period" and was "deemed a public nuisance under [General Statutes] § 22a-362 . . . ." Thereafter, in granting certification to appeal, we reframed the certified question to omit reference to the statutory provisions and to ask "[w]hether the Appellate Court properly concluded that construction and use of a walkway deemed to be a per se public nuisance can establish a prescriptive easement over the underlying tidal wetlands . . . ." *Murphy* v. *EAPWJP, LLC*, 298 Conn. 930, 5 A.3d 489 (2010). We now conclude that the issue raised by the certified question, in both its original and revised form, goes beyond the scope of the record below, and, therefore, the issue has not been properly preserved. Accordingly, we conclude that certification was improvidently granted and dismiss the appeal.

The record reflects the following relevant facts and procedural history. All of the parties own residential property in the "White Beach" section of Lord's Point in the town of Stonington. Unlike EAP, however, neither the plaintiffs nor the Dodds own beachfront property. Instead, the plaintiffs and the Dodds accessed the beach for many years by traversing EAP's property using a pathway over the tidal wetlands, which was partially covered by the wooden walkway and a wooden bridge.[3] By 1972, all of the plaintiffs and the Dodds, or their predecessors in interest, had begun using the pathway to access the beach for recreational purposes, which included activities such as swimming, sunbathing and boating.[4] The plaintiffs and the Dodds did not seek permission from EAP to use the pathway. Several of the plaintiffs and the Dodds also undertook activities to maintain the walkway. Neither the plaintiffs nor the Dodds, however, sought permits from the department of environmental protection (department) before constructing, repairing or otherwise maintaining the

walkway.

In 2007, in response to notification by the department that the walkway was in violation of permitting requirements, EAP removed it and informed the plaintiffs and the Dodds that it was revoking its consent for them to use the pathway. The plaintiffs and the Dodds nonetheless continued to use the pathway to access the beach.

On or about May 8, 2007, the plaintiffs brought this action against EAP and the Dodds. In their complaint, the plaintiffs first sought to establish prescriptive easement rights to property owned by EAP and the Dodds[5] over which a portion of the pathway crossed. In separate counts that later were withdrawn, the plaintiffs also sought damages and injunctive relief for restoration of the wooden walkway.[6] The Dodds filed a cross claim against EAP on similar grounds, seeking a prescriptive easement over the same portion of EAP's property providing access to the beach.[7] The Dodds also sought damages and injunctive relief.

In its answers to the plaintiffs' complaint and the Dodds' cross claim, EAP raised several special defenses, one of which was that it had removed the walkway because it was in violation of §§ 22a-32 and 22a-361 and was adversely affecting statutorily protected tidal wetlands.[8] EAP based this assertion on a letter it had received from Susan L. Bailey, an environmental analyst with the department, in which she stated that EAP would be required to remove the unauthorized walkway before the department could grant EAP permission to make other improvements that it desired to undertake. In a motion in limine, however, the plaintiffs challenged the proffered testimony of Bailey and that of John B. Lust, EAP's permitting agent, regarding these alleged environmental violations, arguing that such testimony was no longer relevant following the withdrawal of their claim of a property right in the walkway. The trial court subsequently granted the plaintiffs' motion in limine and excluded the testimony.[9] EAP did not challenge this ruling on appeal.

On August 17, 2007, EAP filed a counterclaim against the plaintiffs, asserting trespass with respect to the pathway and the installation of certain mooring poles on or near the beach, and nuisance with respect to the mooring poles. Several weeks later, EAP filed a cross counterclaim against the Dodds, asserting one count of trespass with respect to the pathway. In these pleadings, EAP did not allege either private or public nuisance with respect to the walkway.

On May 7, 2009, before testimony began on the first day of the two day bench trial, the plaintiffs informed the trial court that they had withdrawn the second and third counts of their complaint seeking injunctive relief and damages, respectively. The Dodds also withdrew that part of their cross claim seeking injunctive relief

and damages on similar grounds.

On May 29, 2009, after the trial had concluded and the parties had submitted simultaneous trial briefs but before the trial court issued its memorandum of decision, EAP filed a motion for leave to amend its counterclaim against the plaintiffs to include a count of public nuisance with respect to the plaintiff's unauthorized use and maintenance of the walkway.[10] EAP also sought to add an analogous public nuisance count to its cross counterclaim against the Dodds. Considering "factors of fairness, injustice, negligence and delay," the trial court denied both requests on June 10, 2009, a ruling from which EAP did not appeal.

On June 17, 2009, the trial court issued its memorandum of decision. The trial court concluded that the plaintiffs and the Dodds had acquired a prescriptive easement over the portion of EAP's property where the pathway ran and rendered judgment accordingly. The court also concluded that "[t]he plaintiffs shall have the [right] to maintain and improve the [pathway] as reasonably necessary for the enjoyment of its intended purpose, subject to whatever regulation, if any, may be imposed by a governmental authority hav[ing] jurisdiction over such activity." In addition, the trial court determined that "[n]o rights are established in favor of the plaintiffs as to the unauthorized wooden walkway, which has since been removed," and that, "as the plaintiffs, their predecessors, and [the Dodds had] maintained, modified and replaced the wooden walkway over the years, they were in violation of . . . § 22a-361 and § 22a-32." With respect to the Dodds' claims, the trial court concluded that the Dodds also had established a prescriptive easement over the pathway and incorporated its decision regarding the plaintiffs' easement to define "[t]he scope, description, use and location" of the Dodds' prescriptive easement.

Thereafter, EAP appealed to the Appellate Court, asserting that the trial court improperly concluded that the plaintiffs and the Dodds had established an easement over its property to access the beach.[11] See *Murphy* v. *EAPWJP, LLC*, 123 Conn. App. 316, 318, 1 A.3d 1171 (2010). In its brief to the Appellate Court, EAP argued, inter alia, that the lack of a permit for the installation and maintenance of the walkway should render it a public nuisance under § 22a-362 and should nullify the prescriptive easement because the trial court had found that the walkway was in violation of § 22a-361. See *Murphy* v. *EAPWJP, LLC*, Conn. Appellate Court Records & Briefs, May Term, 2010, Named Defendant's Brief pp. 6–7. In their appellate briefs, the plaintiffs and the Dodds countered that such claims addressed whether the plaintiffs and the Dodds had a property right in the unauthorized walkway—a claim that both the plaintiffs and the Dodds had withdrawn at or immediately before trial—rather than whether

they could establish a prescriptive easement over EAP's property. Id., Plaintiffs' Brief pp. 2–3, 7–10; id., Brief of Defendant Steven Dodd et al. pp. 14–17. The plaintiffs also argued that EAP was seeking to apply an inapplicable statute, as § 22a-362 applies only to activities waterward of the high tide line. Id., Plaintiffs' Brief pp. 3–5. The plaintiffs maintained that the pathway was "not waterward of the high tide line but [was] *landward* of the high tide line." (Emphasis in original.) Id., p. 4. EAP did not expressly challenge, on appeal to the Appellate Court, the trial court's denial of its request to add a public nuisance count to its counterclaim against the plaintiffs and its cross counterclaim against the Dodds, nor did it challenge the trial court's failure to address whether the walkway constituted a public nuisance.

The Appellate Court concluded that the trial court properly determined that the plaintiffs and the Dodds had established an easement over EAP's property. See *Murphy* v. *EAPWJP, LLC*, supra, 123 Conn. App. 322–23. The Appellate Court also upheld the trial court's conclusion that the plaintiffs and the Dodds had "no right to maintain the wooden walkway over the pathway . . . ." Id., 322. On this basis, and without addressing the application of §§ 22a-361 and 22a-362 to the present case, the Appellate Court affirmed the trial court's judgment, thereby upholding the plaintiffs' and the Dodds' prescriptive easement claims. See id., 322–23, 335. This appeal followed.

As previously explained, EAP, in its petition for certification to appeal to this court, asked this court to certify the following question: "Did the Appellate Court err in concluding that the plaintiffs and the [Dodds] had acquired a prescriptive easement on a pathway over [EAP's] tidal wetlands even though the wooden walkway over which they traveled was in violation of . . . [§§] 22a-32 and 22a-361 during the prescriptive period . . . and deemed a public nuisance under . . . § 22a-362?" In reframing the certified question, we omitted any reference to § 22a-362 and simply stated that the question was "[w]hether the Appellate Court properly concluded that construction and use of a walkway deemed to be a per se public nuisance can establish a prescriptive easement over the underlying tidal wetlands . . . ." *Murphy* v. *EAPWJP, LLC*, supra, 298 Conn. 930. Significantly, neither version of the question adequately reflects the record of this case because neither the trial court nor the Appellate Court relied on the plaintiffs' or the Dodds' use of the walkway in concluding that a prescriptive easement had been established. Indeed, the trial court took pains to separate the withdrawn claims of a property right in the walkway from the claims of a prescriptive easement over EAP's land, an approach that the Appellate Court respected and followed.

It is well established that a claim must be distinctly

raised at trial to be preserved for appeal. Practice Book § 60-5; see, e.g., *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 498–99, 43 A.3d 69 (2012); *New Haven* v. *Bonner*, 272 Conn. 489, 498, 863 A.2d 680 (2005); *River Bend Associates, Inc.* v. *Conservation & Inland Wetlands Commission*, 269 Conn. 57, 82, 848 A.2d 395 (2004). In the present case, EAP attempted to amend its counterclaim and cross counterclaim to add public nuisance claims after the trial had concluded, but before the court rendered judgment, which the trial court denied for reasons of "fairness, injustice, negligence and delay . . . ." EAP, however, never challenged the trial court's denial of its eleventh hour attempt to amend its counterclaim and cross counterclaim, and, thus, the issue was not preserved for appeal and is not appropriately before this court.

Accordingly, after examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

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

[1] EAP, a limited liability company, is the successor in interest to Eunice A. Pasqualini and William J. Pasqualini. The Pasqualinis transferred their interests in the property at issue in this case to EAP, of which they were the only members. At the time of trial, following the death of Eunice A. Pasqualini, William J. Pasqualini was the sole member of EAP.

[2] Steven Dodd and Marion Dodd, who were named as defendants in the plaintiffs' complaint, filed a cross claim against EAP. EAP and the Dodds had both claimed title to a certain triangular shaped parcel over which a portion of the pathway passed. The trial court rendered judgment quieting title to that parcel in favor of the Dodds, a conclusion that the parties do not challenge on appeal. Like the plaintiffs, the Dodds also claimed that they have established a prescriptive easement over the portion of the pathway crossing EAP's property.

[3] The wooden bridge crossed over a stream or salt marsh drainage ditch and was attached to the wooden walkway. Hereinafter, all references in this opinion to the walkway include the bridge.

[4] Under Connecticut law, a party claiming a prescriptive easement may tack on the statutory period of predecessors in interest when there is privity of estate. See, e.g., *Caminis* v. *Troy*, 300 Conn. 297, 310 n.14, 12 A.3d 984 (2011); *Smith* v. *Chapin*, 31 Conn. 530, 531–32 (1863). Thus, in the interest of simplicity, and because the propriety of tacking is not disputed in the present case, references to the activities of the plaintiffs and the Dodds on the pathway include the activities of their predecessors in interest.

[5] See footnote 2 of this opinion.

[6] The plaintiffs withdrew these claims on the first day of trial, leading the trial court to consider only the plaintiffs' prescriptive easement claim.

[7] The trial court also found that the plaintiffs and the Dodds had established an easement to use a portion of the beach for recreational purposes, which EAP does not challenge on appeal.

[8] EAP also asserted a counterclaim against the plaintiffs, alleging trespass with respect to the pathway and the installation of certain mooring poles on or near the beach, and alleging nuisance with respect to the mooring poles. EAP asserted an analogous cross counterclaim against the Dodds, alleging trespass with respect to the pathway.

[9] Bailey's letter ultimately was admitted into evidence for other purposes during testimony introduced by EAP regarding its claim concerning the installation of the mooring poles. See footnote 8 of this opinion.

[10] In its brief to the trial court, EAP, using an argument similar to that which it used in trying to persuade the trial court to deny the plaintiffs' motion in limine, specifically sought to connect the unauthorized walkway

to the establishment of the prescriptive easement. EAP then sought to amend its counterclaim and cross counterclaim to include public nuisance claims. The trial court thereafter denied EAP's request.

[11] EAP also raised three other issues on appeal to the Appellate Court, which were related to the installation of the mooring poles; see footnote 8 of this opinion; and an implied easement claim asserted by the Dodds. See *Murphy* v. *EAPWJP, LLC*, 123 Conn. App. 316, 318–19, 1 A.3d 1171 (2010). None of these issues is germane to the present appeal.