****

The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

****

BORDEN, J., with whom VERTEFEUILLE, J., joins, dissenting. Until 1994, when we decided *Berger* v. *Cuomo*, 230 Conn. 1, 644 A.2d 333 (1994), and included therein one brief passage of dictum; see id., 7–8; which I discuss later in this opinion, our law on the bill of discovery was adequate to protect both those who sought such a bill and those who sought to resist it. By applying the *Berger* dictum dispositively to the facts of the present case, the majority has, in my view, unduly raised the bar to the issuance of a bill of discovery. I therefore dissent.

Our jurisprudence regarding bills of discovery prior to *Berger* may be summarized as follows. Two types of the bill of discovery exist at equity: the bill of discovery and relief, and the pure bill of discovery. The former is reserved for those circumstances in which a plaintiff not only seeks some information or document in the possession of the adverse party, but also requests that the court take some affirmative action on the asserted cause of action. The bill of discovery and relief is, therefore, the equitable equivalent of a plenary action at law. See generally G. Bispham, Principles of Equity (11th Ed. 1931) § 525, pp. 437–38 (bill of discovery and relief vehicle by which claim made for both discovery and equitable remedy; pure bill of discovery aids prosecution of legal claim); 3 J. Story, Equity Jurisprudence (14th Ed. 1918) § 1930, p. 519 (pure bill of discovery, as distinguished from bill of discovery and relief, seeks no remedy other than disclosure of certain information or documentation); 1 J. Pomeroy, Equity Jurisprudence (5th Ed. 1941) § 191, p. 277 (same). The second type of bill, the pure bill of discovery, is at issue in the present case and is the only bill addressed in this dissent.

A pure bill of discovery "is an action in equity ancillary to the original action. The only relief sought [therein] is a discovery of facts to be used as evidence in that action. . . . *A pure bill of discovery is favored in equity and will be granted unless there is some well-founded objection against the exercise of the court's jurisdiction*. *Peyton* v. *Werhane*, 126 Conn. 382, 389, 11 A.2d 800 [1940]; *Skinner* v. *Judson*, 8 Conn. 528, 533 [1831]; Swift, Evidence, p. 116; 2 Swift, Digest, p. 210; 1 [J. Pomeroy, supra] §§ 142, 144, 190a, 191, 195; 17 Am. Jur. 6, § 3; see *Middletown Bank* v. *Russ*, 3 Conn. 135, 140 [1819]; *Hoyt* v. *Smith*, 23 Conn. 177, 186 [1854]; *Norwich & W.R. Co.* v. *Storey*, 17 Conn. 364, 371 [1845]; *Welles* v. *Rhodes*, 59 Conn. 498, 506, 22 A. 286 [1890]. To sustain a pure bill of discovery, a party must show that the matter he seeks to discover is material and necessary to the proof of, or is needed to aid in the proof of, another action, already brought or about to

be brought, and that he has no other adequate means of enforcing discovery of the matter. 3 [J. Story, supra] §§ 1930, 1943; 1 [J. Pomeroy, supra, § 191, pp. 278–79 and] §§ 197a, 197b; Hare, Discovery, [1849] p. 110; 17 Am. Jur. 8. [In this regard, it] might be stated parenthetically that the cases in other jurisdictions, and the earlier cases in this state, make a distinction between pure bills of discovery and bills for discovery and relief. *In the latter, the petitioner must show that he has stated a valid cause of action for the equitable relief in support of which he seeks to invoke the equitable powers of the court for a discovery*. *Middletown Bank* v. *Russ*, supra [140]; *Norwich & W.R. Co.* v. *Storey*, supra [371]; *Welles* v. *Rhodes*, supra [506]; Story, Equity Pleadings (9th Ed.) § 324a; 1 [J. Pomeroy, supra] § 229, p. 404.

"The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role. The rationale of the remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, a bill in equity is maintainable to give him what he needs. . . . There were other reasons in times past, when parties were not permitted to be witnesses, and when there was no compulsory process for the production of books or documents. *Carpenter* v. *Winn*, 221 U.S. 533 [31 S. Ct. 683, 55 L. Ed. 842 (1911)]; *Pressed Steel Car Co.* v. *Union Pacific R. Co.*, 240 Fed. 135, 136 [1917]. Today the remedy survives, chiefly, if not wholly, to give facility to proof. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U.S. 689, 693, 53 S. Ct. 736, 77 L. Ed. 1449 [1933]. The right to a discovery, however, does not extend to all material facts but only to those which pertain to a party's cause of action or defense. Discovery cannot be used to pry into the opposing party's case or to find out the evidence by which that case will be supported. *Peyton* v. *Werhane*, supra [126 Conn. 389]; *Downie* v. *Nettleton*, 61 Conn. 593, 596, 24 A. 977 [1892]; 1 [J. Pomeroy, supra] § 201. Discovery does not sanction impertinent intrusion, and there must be a showing of good faith and probable cause. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, supra, 697. In passing upon the bill, the court exercises a discretionary power within recognized limits. [Id.]; see *Kiessling* v. *Kiessling*, 134 Conn. 564, 568, 59 A.2d 532 [1948]; *May* v. *Young*, 125 Conn. 1, 10, 2 A.2d 385 [1938]; *Katz* v. *Richman*, 114 Conn. 165, 171, 158 A. 219 [1932]; 1 [J. Pomeroy, supra] §§ 202, 203; 3 Story, Equity Jurisprudence [supra] § 1936." (Emphasis added; internal quotation marks omitted.) *Pottetti* v. *Clifford*, 146 Conn. 252, 257–59, 150 A.2d 207 (1959). "The granting of a bill and the terms of the judgment rendered call for the exercise by the trial court of a sound discretion as to what is

reasonably necessary.'' Id., 263.

Furthermore, this statement of the legal principles applicable to the pure bill of discovery is consistent with those articulated in the authoritative treatises on equity. According to those authorities, the party seeking a bill of discovery ''must . . . state a case which will, if he is the plaintiff at law, constitute a good ground of action . . . . If it is clear that the action . . . is unmaintainable at law, Courts of Equity will not entertain a bill for any discovery in support of it, since the discovery could not be material, but must be useless. *This however is so delicate a function that Courts of Equity will not undertake to refuse a discovery upon such grounds unless the case is entirely free from doubt. If the point be fairly open to doubt or controversy, Courts of Equity will grant the discovery and leave it to Courts of Law to adjudicate upon the legal rights of the party seeking the discovery*.'' (Emphasis added.) 3 J. Story, Equity Jurisprudence, supra, § 1941, pp. 525–26; see also 1 J. Pomeroy, supra, § 198, pp. 303–304 (''[i]f the result of the controversy at law is doubtful, even when the defendant in the suit for a discovery has denied the plaintiff's title, or has set up matter which if true would operate as a complete defense, the court of equity will, in general, grant the discovery, and leave the issue to be tried and finally determined by the court of law'').

Gauged by these standards, it is clear to me that the trial court did not abuse its discretion in issuing this limited bill of discovery. The court made specific findings that: (1) the material sought would be necessary or helpful to prove claims in a suit yet to be filed; (2) the plaintiff had no alternative means of obtaining the information other than by a court order; (3) there was a good faith basis to conclude that the material was necessary for the plaintiff to determine whether the defendant had violated the law; and (4) there was probable cause to believe that the plaintiff has a cause of action against the defendant on one or more of the bases stated in its petition.[1] As previously stated, such a bill is favored, and should be issued absent a well-founded objection to it. The fact that, ultimately, the plaintiff may not prevail on the lawsuit it intends to bring, should not constitute such an objection. Moreover, the discovery sought in the present case was limited to one contract document. Thus, this was not an instance in which the plaintiff sought to misuse the bill of discovery as a tool to pry needlessly into the defendant's affairs. Finally, even if the document sought ultimately did not support the plaintiff's cause of action, it hardly can be maintained that, at such an early stage of the proceedings, when the trial court exercised its discretion to issue the bill, the ultimate liability of the defendant on the claims that the plaintiff intends to bring was entirely free from doubt or controversy.

Indeed, as I read the majority opinion, it does not quarrel with the proposition that, measured solely by these standards, the trial court did not abuse its discretion in ordering the bill of discovery in the present case. Instead, the majority relies on, and applies in a very stringent way, the following passage from *Berger* v. *Cuomo*, supra, 230 Conn. 7–8: "*The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action*. 'Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. . . . Its existence or nonexistence is determined by the court on the facts found.' . . . *Cosgrove Development Co.* v. *Cafferty*, 179 Conn. 670, 671, 427 A.2d 841 (1980). Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong. *The plaintiff need not, however, state each claim with technical precision; he need only set forth facts that fairly indicate that he has some potential cause of action*. *Pottetti* v. *Clifford*, supra, 146 Conn. 259." (Emphasis added.)

I perceive several flaws in endorsing the probable cause standard articulated in *Berger*. For instance, the first, emphasized sentence of the previously quoted passage, which the majority singularly relies on in reversing the judgment of the Appellate Court in the present case, has no citation for the proposition stated therein, because none is available. Prior to *Berger*, we had never imposed a showing of detailed facts on a bill of discovery. Moreover, the last sentence of the passage in *Berger*, quoted from *Pottetti*, is inconsistent with the first sentence. Indeed, it is that last sentence that defines the contours of the notion of probable cause in the context of a bill of discovery: without stating or proving each claim with technical precision, the plaintiff need only set forth facts *fairly indicating that it has some potential cause of action*. Unless it is clear that it has none, whether that potential cause of action ultimately will survive a motion to strike or a motion for summary judgment, or whether the plaintiff will prevail on the merits after a trial, is to be left to a later determination, when and if that action is brought.

Thus, the majority has taken the requirement that the plaintiff establish "a valid cause of action," which is applicable only to the bill of discovery and relief; *Pottetti* v. *Clifford*, supra, 146 Conn. 258; and applied it to the present case, which involves the pure bill of discovery.[2] In other words, the majority has imposed on both types of the bill of discovery the requirement that the plaintiff show the existence of probable cause with respect to each and every element of the cause of action that he intends to file. That this is the effect of the majority opinion is demonstrated by the detailed

legal analyses that it presents in order to refute the plaintiff's potential causes of action. Neither our law, nor the law of equity generally, supports such a rigorous standard for the issuance of a bill.

As a practical matter, the majority's analysis requires a party who seeks to gain access to a single document, as in the present case, in order to facilitate its proof of the cause of action that it intends to bring—or, as is more likely, in order simply to determine whether it can, in good faith, bring such an action—to be able to establish a prima facie case on the merits of that potential cause of action. In effect, the party must demonstrate, and the trial court must determine, in advance of the issuance of the bill, that the plaintiff's underlying claim, in aid of which it seeks the bill of discovery, has merit. The issuance of a bill of discovery has never had to surmount such a high threshold.

Moreover, as a matter of policy, it should not have to do so. First, erecting such a high threshold is likely to inhibit, unduly, the bringing of bills of discovery, even where their laudable goal is to help the potential plaintiff who has a good faith—but mistaken—belief that he has a cause of action against the defendant to determine whether there is such a valid claim. For example, if the document in the present case is as legally benign as the majority says it is, and if the majority is as correct on the applicable law as it purports to be, then the issuance of the bill would, in all likelihood, demonstrate to the plaintiff the futility of its intended, potential causes of action. In that event, then, the result of the issuance of the bill would be that a claim that otherwise might have been brought will not be brought. We should not, as a matter of policy, rule out that possible result.

The majority's approach, moreover, effectively penalizes the cautious and prudent lawyer who, rather than simply alleging her cause of action and thereby engaging the full panoply of judicial machinery—discovery requests, depositions, interrogatories, and the like—instead seeks only to gain access to limited information or documents in order to determine that she will be able to prove that action. This record amply demonstrates such a cautious and prudent course of conduct.

Second, if the plaintiff nonetheless brings a bill of discovery despite the high threshold set by the majority in the present case, believing in good faith that it can surmount it, it will then have to put on its best version of a prima facie case, and the trial court will have to delve as deeply into the merits, not of the matter before it, but of the potential claim asserted in the bill, as the majority has done in the present case. Thus, every bill of discovery will be, in effect, a minitrial of the potential claim, without, however, the critical document or documents sought by the bill.

The unnecessary burdens of such a regime on the administration of justice are obvious. First, requiring a court to evaluate the probable success of a claim before suit is even initiated and without critical information sought in the bill itself is unfairly prejudicial and may, ultimately, thwart the administration of justice by needlessly defeating a potentially good cause of action. Second, as discussed previously, the majority's application of *Berger* creates a disincentive to utilize pure bills of discovery and an incentive to file suit and avail oneself of the vast array of discovery tools commonly employed in the initial stages of litigation. There is no justification, however, for the attendant waste of judicial resources that otherwise may be saved by first exploring the availability of information or evidence to support a claim in a bill of discovery. Third, forcing the trial court to evaluate the merits of a potential cause of action up front may result in the wasteful repetition of its duties, as there may be instances in which the trial court, after a detailed analysis of the claim such as the majority employs in this appeal, finds probable cause to bring a claim in a proceeding on the bill of discovery, but subsequently determines, in ruling on a motion to strike, motion to dismiss, or motion for summary judgment, that the claim is, ultimately, unsupportable.

I recognize what may lie behind the majority's high threshold, namely, a fear of opening the proverbial floodgates to numerous, bad faith fishing expeditions under the guise of bills of discovery. This fear, however, is unfounded. First, before *Berger*, and under *Pottetti*, no such flood of bills has ever occurred. This is undoubtedly because, in most cases, plaintiffs have the necessary information to state their claims, and then can use the normal rules of discovery to gain what they need in order to prove those claims. Furthermore, it is undoubtedly expensive to file and litigate a separate bill of discovery; there is, therefore, an economic disincentive to frivolous filings. Finally, the trial court always has the discretion to weed out bad faith claims, and to sanction parties and counsel for engaging in such conduct. I have full confidence in the abilities of our trial judges to recognize when the bill is being abused.

I would, therefore, affirm the judgment of the trial court issuing the bill of discovery.

[1] I discuss later in this opinion my disagreement with the majority regarding the quantum of proof necessary to meet the probable cause standard for the issuance of a bill of discovery.

[2] Although we did not expound upon our suggestion in *Pottetti* that a party seeking to sustain a bill of discovery and relief bears a greater burden than one who utilizes a pure bill of discovery, the reasoning behind such a distinction is obvious. As previously indicated, a bill of discovery and relief goes beyond an informational request and requires the court to resolve a party's substantive claims. Because, in that circumstance, the function of the court does not end upon disposition of the pure discovery request, but rather continues through a consideration of the merits of the case, it makes sense to require the court to determine, at the outset, whether there exists probable cause to support the various elements of the causes of action alleged. When dealing with a pure bill of discovery, however, the court's

only function is to pass upon the necessity of a party's informational request. Imposition of the more stringent probable cause standard articulated in *Berger* is thus improper in such a case because the underlying claims are not before the court for disposition on the merits, as are the claims in a proceeding on a bill of discovery and relief.