

## BUSINESS LITIGATION: 2024 IN REVIEW

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In 2024, Connecticut's appellate courts decided numerous cases of interest to business litigators. The following is a summary of the year's most noteworthy decisions.

## I. REMEDIES AND DEFENSES

A. *Tortious interference and CUTPA claims, as pled, were not barred by the litigation privilege.*

In *Deutsche Bank AG v. Vik*,<sup>1</sup> the Connecticut Supreme Court reversed the Appellate Court's holding<sup>2</sup> that the litigation privilege barred certain claims under the theories of tortious interference with business expectancy and violations of the Connecticut Unfair Trade Practices Act, General Statutes Section 42-110a *et seq.* (CUTPA).

The plaintiff held a judgment of approximately \$243 million that it had obtained in the courts of England against nonparty Sebastian Holdings, Inc. (SHI), resulting from an unpaid margin call.<sup>3</sup> Among SHI's assets were shares in a Norwegian software company, Conconfirm AS (Conconfirm).

The plaintiff sued Alexander Vik, who allegedly controlled SHI, and his daughter, Caroline Vik, for unlawfully interfering with the plaintiff's execution upon SHI's stock in Conconfirm. The plaintiff alleged, among other things, that Alexander fabricated and backdated a document that purported to give Caroline a right of first refusal to acquire the Conconfirm shares, as part of a scheme to thwart a liquidation of those shares ordered by a Norwegian court. She used that document as the basis to bring an action in the federal court in Connecticut to enjoin the sale. The court denied her request for a preliminary injunction, after which she withdrew the case and then commenced an action in the Norwegian court.<sup>4</sup>

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<sup>1</sup> 349 Conn. 120, 314 A.3d 583 (2024).

<sup>2</sup> The Appellate Court's decision is reported at 214 Conn.App. 487, 281 A.3d 12 (2022).

<sup>3</sup> *Vik*, 349 Conn. at 123.

<sup>4</sup> *Id.* at 127, 128.

That action too was unsuccessful, but by the time the Conconfirm shares were liquidated, they had dramatically declined in value.

The plaintiff alleged that, by wrongfully interfering with the sale of the Conconfirm shares, Alexander and Caroline had tortiously interfered with business expectancies and had violated CUTPA. The defendants moved to dismiss, arguing that “the plaintiff’s claims were barred by the litigation privilege because the claims were based on communications made and actions taken in prior judicial proceedings.”<sup>5</sup>

The trial court denied the defendants’ motion, concluding that the plaintiff’s claims “were not barred by the litigation privilege because the scheme alleged in the complaint did not involve the use of baseless litigation tactics only; it also involved extrajudicial misconduct to which the privilege does not apply... [T]he plaintiff’s claims relating to prior judicial proceedings do not concern how [those] cases were litigated, or the words used in communications by litigants or advocates ... but, rather, they allege improper use of the judicial system for purposes not intended to further the course of justice but rather to pervert the course of justice.”<sup>6</sup>

On the defendants’ interlocutory appeal, the Appellate Court reversed, and granted the defendants’ motion to dismiss. The court concluded that the extrajudicial misconduct alleged in the bank’s complaint was so inextricably intertwined with communications and participation in prior judicial proceedings that the plaintiff’s claims were barred by the litigation privilege.

The Supreme Court disagreed. The court noted that the litigation privilege is a “long-standing [common-law] rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy.”<sup>7</sup> But there is “a distinction between attempting to impose liability

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<sup>5</sup> *Id.* at 130.

<sup>6</sup> *Id.* at 131.

<sup>7</sup> *Id.* at 137.

[on] a participant in a judicial proceeding for the words used therein and attempting to impose liability [on] a litigant for his improper use of the judicial system itself.”<sup>8</sup> The litigation privilege applies to the former, but not the latter.

The court reversed the judgment of the Appellate Court, and remanded the case to that court with instructions to affirm the decision of the trial court.

B. *Plaintiff in partition action is awarded \$2,000 from house having \$148,000 in equity.*

In *D.J. v. F.D.*,<sup>9</sup> a partition action between joint tenants of a residential property having \$148,000 in equity, the Appellate Court affirmed the trial court’s determination that the plaintiff’s interest was worth \$2,000.

The plaintiff, who at the time was the boyfriend of the defendant, moved into a house that the defendant purchased in 2015. In 2017, the defendant quitclaimed the property to herself and the plaintiff, as joint tenants with rights of survivorship. Two years later, they broke up, and the plaintiff moved out. In 2021, he brought an action to partition the property.

Following a trial, the trial court determined that the plaintiff’s interest in the property was worth \$2,000, equal to the estimated value of his contribution toward its maintenance during the parties’ period of cohabitation. Rather than order the property to be sold, the court ordered the defendant to pay this sum to the plaintiff, and the plaintiff to simultaneously quitclaim his interest in the property to the defendant. This was in accordance with General Statutes Section 52-500(a), which provides, in relevant part, “[i]f the court determines that one or more of the persons owning such real or personal property have only a minimal interest in such property and a sale would not promote the interests of the owners, the court may order such equitable distribution of such property, with payment of just compensation to the owners of such minimal interest, as will better promote the interests of the owners.”

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<sup>8</sup> *Id.* at 138.

<sup>9</sup> 229 Conn. App. 137, 327 A.3d 405 (2024).

On appeal, the plaintiff claimed that as a joint tenant holding a 50 percent interest in the property, he did not have a “minimal interest” that would allow the court the option of ordering an equitable distribution rather than a sale of the property. The Appellate Court disagreed, finding that for purposes of the statute, “minimal interest ... contemplates consideration of both a property owner’s fee interest and any relevant equitable factors.”<sup>10</sup>

Here, the relevant equitable factors included the trial court’s determination that “(1) the parties, who were in a romantic relationship, lived together at the property for approximately four years, (2) the defendant purchased the property and paid the mortgage, taxes, and insurance for the property without financial assistance from the plaintiff, who acquired his interest in the property by way of a quitclaim deed a couple of years after the purchase, (3) the parties’ contributions to the property were far from equal, and (4) there was no evidence of any agreement setting forth the parties’ respective rights and responsibilities concerning the property.” On this basis, the Appellate Court found that the trial court “did not abuse its discretion in determining that the plaintiff had a minimal interest in the property for purposes of § 52-500(a).”

The plaintiff further claimed that the trial court “abused its discretion in awarding him, pursuant to § 52-500(a), \$2000 in just compensation for his interest in the property, which equates to 1.35 percent of the \$148,000 in equity in the property. The plaintiff maintains that the court failed ‘to consider the ownership percentages of the parties.’”<sup>11</sup>

The Appellate Court noted that it is “not always true that each tenant in common or joint tenant is entitled to equal shares in the real estate. Because a partition action is an equitable action, the court has the authority to determine an unequal award on the basis of the evidence presented, including the value of the property and the equitable interests of the parties.”<sup>12</sup> Here, the trial court found “that the plaintiff did

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<sup>10</sup> *Id.* at 152, 153.

<sup>11</sup> *Id.* at 155.

<sup>12</sup> *Id.* at 155. (Citation and internal punctuation omitted.)

not contribute financially to the property's purchase, mortgage, taxes, or insurance and that he participated financially only to the extent of (1) \$2000 in maintenance expenses and (2) \$400 per month for groceries and other household expenses during most of the time that he lived with the defendant."<sup>13</sup>

The Appellate Court concluded that the trial court "did not abuse its discretion in its award of just compensation to the plaintiff for his interest in the property,"<sup>14</sup> and affirmed the judgment below.

*C. Wrongful denials, as stated in defendants' answer to complaint, may give rise to a vexatious litigation claim.*

In *Dorfman v. Liberty Mutual Fire Insurance Company*,<sup>15</sup> a divided panel of the Appellate Court held that a vexatious litigation claim may be based upon the filing of an answer containing denials of allegations known by the defendant to be true.

The plaintiff had suffered injuries in a motor vehicle crash caused by an underinsured driver named Smith, and sued the defendant, her auto insurer, for underinsured motorist benefits. The defendant investigated the crash, and two of its claim specialists concluded that Smith was 100 percent liable for the collision. But the defendant nonetheless denied allegations in the plaintiff's complaint that the collision had been caused by Smith's negligence, and that he had failed to stop at a stop sign.<sup>16</sup> The defendant also denied the plaintiff's allegations that Smith was underinsured, and that the plaintiff had complied with her duties under her insurance contract with the defendant.<sup>17</sup> Following a jury trial, the plaintiff obtained a judgment against the defendant in the amount of \$169,928.00.<sup>18</sup>

The plaintiff then brought a second action against the defendant, asserting claims of common law and statutory vexa-

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<sup>13</sup> *Id.* at 156.

<sup>14</sup> *Id.* at 157.

<sup>15</sup> 227 Conn. App. 347, 322 A.3d 331 (2024).

<sup>16</sup> *Id.* at 360.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 355.

tious litigation, as well as violations of the Connecticut Unfair Trade Practices Act (CUTPA)<sup>19</sup> based on violations of the Connecticut Unfair Insurance Practices Act (CUIPA).<sup>20</sup> The plaintiff alleged that in the underlying case, the defendant had “refused to admit [various] allegations ... without probable cause and ‘with a malicious intent to unjustly vex and trouble [the plaintiff] and to force her to incur increased litigation costs.’”<sup>21</sup> The trial court granted the defendant’s motion for summary judgment on all counts.

The Appellate Court reversed in part. The court agreed with the plaintiff that “actions for vexatious litigation in Connecticut, both common-law and statutory, have been and can be based on a party’s conduct in the continuation of a civil or administrative proceeding without probable cause,”<sup>22</sup> including situations when a litigant “files an answer in which it falsely denies, or asserts that it lacks sufficient information to deny or admit, allegations it allegedly knows to be true.”<sup>23</sup> Applying that principle here, the court found that the “allegations in this case present the unique circumstances in which a defendant may be liable for vexatious litigation based on its responses to allegations in the complaint.”<sup>24</sup>

Expounding on the “uniqueness” of the present situation, the court rejected the proposition that its holding would “open floodgates to litigation.”<sup>25</sup> The court noted that, to sustain a claim for vexatious litigation, a plaintiff must show that the defendant “denied allegations that were known to be true at the time of the denial,” and that “because discovery in most cases is conducted *after* a party files an answer to a complaint, it typically will be difficult to establish a lack of probable cause at the time of the filing of the answer denying an allegation.”<sup>26</sup> That implicitly underscores the duty of defense counsel to periodically review the defendant’s answer

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<sup>19</sup> General Statutes §§ 42-110a *et seq.*

<sup>20</sup> General Statutes §§ 38a-815 *et seq.*

<sup>21</sup> *Dorfman*, 227 Conn. App. at 358, 359.

<sup>22</sup> *Id.* at 376.

<sup>23</sup> *Id.* at 380.

<sup>24</sup> *Id.* at 381.

<sup>25</sup> *Id.* at 382, 383.

<sup>26</sup> *Id.* at 384, 385.

and special defenses, to ensure their consistency with the record as it develops through the discovery process.

The court also noted that, “without question,” a defendant “need not accept a plaintiff’s allegations regarding causation of injuries.”<sup>27</sup> The court acknowledged that “generally, the truth of the allegations pleaded in a negligence action likely will not be within a defendant’s knowledge and that it is typically necessary to substantiate information and facts regarding a party’s claimed injuries. Indeed, it will be a rare case in which a party’s denial of allegations concerning causation of injuries will give rise to a vexatious litigation claim.”<sup>28</sup>

But the present case was “not a typical negligence action,”<sup>29</sup> and the denials at issue here were not of that type. The defendant had denied indisputable allegations that “Smith was responsible for the collision as a result of his failure to stop at a stop sign,” and “concerning the circumstances of the collision, that Smith was underinsured and that the plaintiff had complied with her duties under her insurance contract.”<sup>30</sup> Thus, although “ordinarily, to the extent an allegation in a complaint concerns causation or liability but also makes factual assertions, a defendant may, in good faith, deny the portion relating to causation or liability if it intends to controvert such allegations,” the defendant still has a duty to “admit any portion of [the allegations] which it knows to be true.”<sup>31</sup>

The trial court therefore erred in entering summary judgment for the defendant on the plaintiff’s claims of vexatious litigation.

However, the Appellate Court affirmed the judgment below with respect to the plaintiff’s claims under CUIPA and CUTPA. The court held that those claims, also based on the defendant’s litigation conduct, were “barred by the doctrine of absolute immunity under the litigation privilege.”<sup>32</sup> While

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<sup>27</sup> *Id.* at 390.

<sup>28</sup> *Id.* at 411.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 391.

<sup>32</sup> *Id.* at 420.

CUIPA indeed “prohibits the business practice of misrepresenting facts relating to coverage issues,” the statute “does not impose liability for this conduct by authorizing a private right of action but, instead, limits the remedy under that act to administrative action by the Commissioner of Insurance.”<sup>33</sup>

Judge Elgo filed a detailed and scholarly dissent to the majority’s decision with respect to the plaintiff’s vexatious litigation claims. She pointed out that the “expansion of the common-law action for vexatious litigation undoubtedly will result in more, and potentially interminable, litigation,”<sup>34</sup> and that “[i]f pleading a denial in response to a civil complaint constitutes a proper basis for a vexatious litigation action,” there will foreseeably be “increased conflict between clients and their attorneys.”<sup>35</sup>

#### *D. Parol evidence rule bars evidence of unclean hands.*

In *Benchmark Municipal Tax Services, Ltd. v. 899 ETG Associates, LLC*,<sup>36</sup> a foreclosure case, the Appellate Court agreed with the trial court that the parol evidence rule barred the defendant’s would-be evidence in support of its special defense of unclean hands.

The plaintiff brought suit to foreclose a mortgage securing a \$600,000 note that had an original maturity date of September 18, 2020. By a written modification agreement, the plaintiff agreed, in exchange for a \$55,000 increase in the note principal and \$30,093 in fees, to extend the maturity date by six (6) months. The modification agreement specified that the maturity date “shall not be further extended.”<sup>37</sup> When the defendant failed to pay the debt on the new maturity date, the plaintiff declared a default, and brought suit. The defendant asserted a special defense under the doctrine of unclean hands.

The plaintiff moved for summary judgment on the issue

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<sup>33</sup> *Id.* at 421.

<sup>34</sup> *Id.* at 464.

<sup>35</sup> *Id.* at 465.

<sup>36</sup> 227 Conn.App. 474, 322 A.3d 1118 (2024).

<sup>37</sup> *Id.* at 477.

of liability. In response, the defendant submitted an affidavit by its representative, averring that the plaintiff had “advised [the] [d]efendant ... that the maturity date could be extended up to a year”; that the defendant had entered into the six-month modification agreement “with the understanding that an additional six month extension would be available”; and that the defendant “would not have agreed to pay ... fees and to increase its indebtedness by that amount had it not believed it would receive an additional extension.”<sup>38</sup> The trial court rejected the defendant’s “self-serving” affidavit, and declared that purported contract terms “that are part of the negotiation that are not part of the final agreement [are] not enforceable as they are not included in the agreement.”<sup>39</sup> The court granted the plaintiff’s motion for summary judgment, and its subsequent motion for judgment of strict foreclosure.

On appeal, the defendant claimed that the trial court had erred in granting summary judgment, on the grounds that its affidavit “evinces misrepresentations by the plaintiff’s representative during negotiations to extend the maturity date” and thus “was sufficient to raise a genuine issue of material fact as to the defendants’ unclean hands defense.”<sup>40</sup>

The Appellate Court disagreed. “[T]he text of the modification agreement conclusively resolves this issue in the plaintiff’s favor. It provides, without caveat, that the maturity date ‘shall not be further extended’ past the initial six month extension....Because the modification agreement is integrated on this point, [the defendant] cannot manufacture a material factual dispute as to the parties’ intent by pointing to parol evidence of negotiations that contradict the express written terms of the modification agreement.”<sup>41</sup> The court affirmed the judgment below.

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<sup>38</sup> *Id.* at 478.

<sup>39</sup> *Id.* at 479.

<sup>40</sup> *Id.* at 481.

<sup>41</sup> *Id.* at 486.

E. *Contractual cap on amount of attorneys' fees did not limit remedy under fee-shifting statute.*

In *Centrix Management Co., LLC v. Fosberg*,<sup>42</sup> a residential summary process case, the defendant tenant prevailed, and thereupon moved for an award of attorneys' fees pursuant to General Statutes Section 42-150bb. That statute provides, in relevant part, “[w]henever any contract or lease ... to which a consumer is a party, provides for the attorney’s fee of the commercial party to be paid by the consumer, an attorney’s fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease.” The statute further provides, “the size of the attorney’s fee awarded to the consumer shall be based as far as practicable upon the terms governing the size of the fee for the commercial party.”

The subject lease included an attorney’s fees clause, “but only up to a maximum cap of \$750, and costs.”<sup>43</sup> The plaintiff argued that, under the statute, this provision imposes a hard cap on the amount of legal fees that the court could award to the defendant. The trial court disagreed, and awarded the prevailing defendant \$3,500, reasoning that “[i]n light of the equitable purpose of the statute ... the defendant was entitled to reasonable attorney’s fees.”<sup>44</sup> The plaintiff appealed.

The Supreme Court agreed with the defendant that the statute does not contemplate a hard cap based on the lease language. Analyzing the statutory language in the light of its purpose, the court determined that the phrase “as far as practicable” suggests some flexibility, and means “feasible under the circumstances, which are circumstances that achieve equity or fairness.”<sup>45</sup>

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<sup>42</sup> 349 Conn. 765, 322 A.3d 317 (2024).

<sup>43</sup> *Id.* at 769, fn. 4.

<sup>44</sup> *Id.* at 770.

<sup>45</sup> *Id.* at 777.

F. *Practice Book deadline of 30 days to file a motion for attorneys' fees applies to fee claims authorized both by statute and by contract.*

In *JPMorgan Chase Bank, N.A. v. Durante*,<sup>46</sup> the Appellate Court held that section 11-21 of the Practice Book, which requires a motion for an award of attorney's fees to be filed within thirty days following the date on which "the final judgment of the trial court was rendered" or "the Appellate Court or Supreme Court rendered its decision of the underlying appeal," applies not only to fee awards authorized by statute but also those authorized by contract.

The plaintiff obtained a judgment against the defendant as guarantor of an unpaid promissory note, and that judgment was affirmed on appeal. Six weeks after the Appellate Court decision, the plaintiff, for the first time, moved for an award of attorney's fees, based on a fees provision in the loan documents. The defendant argued that the motion was untimely under rule 11-21, but the trial court granted the plaintiff's motion. The defendant appealed from that order.

In attempting to defend the fee award, the plaintiff relied on the final sentence of the rule, which makes the rule inapplicable to "an award of attorney's fees assessed as a component of damages." The plaintiff argued that its claim for contractual attorney's fees was an element of damages, and thus unconstrained by rule 11-21 and its time limit.

The Appellate Court rejected that proposition, seeing no legal theory "that could support a postjudgment award of contractual attorney's fees – incurred entirely in connection with the prosecution of the plaintiff's breach of guarantee claim – as damages."<sup>47</sup> Accordingly, the "component of damages" exclusion did not apply, making the plaintiff's motion subject to the rule's 30-day deadline.

By way of contrast, the court noted various examples of awards of attorney's fees properly characterized as "damag-

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<sup>46</sup> 227 Conn. App. 617, 323 A.3d 1118 (2024).

<sup>47</sup> *Id.* at 627.

es” and thus outside the ambit of rule 11-21. Those include attorney’s fees awarded “(1) ...as common-law punitive damages ... (2) as damages pursuant to the trial court’s equitable authority ... (3) ... in connection with a plaintiff’s successful application for the discharge of a mechanic’s lien pursuant to General Statutes § 49-51(a), which ‘clearly contemplates those fees as a component of damages’ ...and (4) ... as compensatory damages for common-law vexatious litigation”<sup>48</sup>

The court also noted that by the rule’s terms, the 30-day clock begins to run when judgment is “rendered,” which is not necessarily the same event as when judgment is formally entered. The court quoted from *Black’s Law Dictionary*, which defines “render judgment” as to “pronounce, state, declare, or announce the judgment of the court in a given case or on a given state of facts; not used with reference to judgments by confession, and *not synonymous with* ‘entering,’ ‘docketing,’ or ‘recording’ *the judgment*. Judgment is ‘rendered’ when decision is officially announced, either orally in open court or by memorandum filed with clerk.”<sup>49</sup>

The Appellate Court reversed the decision below, and remanded the case with directions to the trial court to deny the plaintiff’s motion for attorney’s fees.

*G. Beneficiaries of decedent’s estate lacked standing to sue executor.*

In *Martinelli v. Martinelli*,<sup>50</sup> the Appellate Court affirmed the trial court’s dismissal of a lawsuit, based on lack of standing, by the beneficiaries of a decedent’s estate against the executor of the estate.

The plaintiffs were the children of Kevin Martinelli, deceased, and the sole beneficiaries under his will. They brought an action (first action) against the executor, Martin Martinelli, the decedent’s brother, claiming he had breached his fiduciary duty to them by selling assets of the estate to a third

<sup>48</sup> *Id.* at 628, 629.

<sup>49</sup> *Id.* at 632, 633, quoting *Black’s Law Dictionary* (6<sup>th</sup> Ed. 1990), p 1296 (emphasis added by the court).

<sup>50</sup> 226 Conn. App. 563, 319 A.3d 198 (2024).

brother for significantly less than their true value. That case proceeded to trial, but was dismissed at the conclusion of the plaintiffs' case due to failure to make out a prima facie case.

The plaintiffs then brought a second action against Martin, claiming he had improperly used estate funds to provide his legal defense in the first action. Martin moved to dismiss, claiming the plaintiffs lacked standing to pursue their claims against him. The trial court agreed, and entered a judgment of dismissal.

The Appellate Court agreed. The court noted the general rule that "actions designed to recover personalty belonging to the estate or for its use, conversion, or injury are brought by the fiduciary rather than by the beneficiaries."<sup>51</sup> This principle is codified at General Statutes Section 45a-234(18), which carves out an exception when there has been "fraud, bad faith or gross negligence of the fiduciary."

Here, it was "clear from the allegations of the complaint that the plaintiffs are seeking to recover for injuries to the estate."<sup>52</sup> Thus, to establish personal standing to pursue their claims, they would have needed to plead that the substitute fiduciary of the estate, who had been appointed shortly before the trial of the first action, had "improperly refused to pursue the claims against the defendants."<sup>53</sup>

But the complaint contained no allegation that the substitute fiduciary had "committed some type of fraud or bad act against the estate, or ... cannot or has refused to bring an action against the defendants on behalf of the estate improperly."<sup>54</sup> Indeed, the complaint "makes no mention of the appointment of a new administratrix<sup>55</sup> of Kevin's estate and consequently does not allege that the administratrix improperly refused to pursue claims against [the defendant]. The

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<sup>51</sup> *Id.* at 574. (Citation and internal punctuation omitted.)

<sup>52</sup> *Id.* at 576.

<sup>53</sup> *Id.* at 577.

<sup>54</sup> *Id.*

<sup>55</sup> It is unclear why the court referred to the substitute fiduciary as an "administratrix," the term for the fiduciary of an intestate estate, given the opinion's statement that the decedent had died testate, and Martin had been appointed as executor of that testate estate.

absence of such an allegation is fatal to the plaintiffs' claim of standing."<sup>56</sup>

H. *Vexatious litigation claim is not assignable.*

In *Northeast Building Supply, LLC v. Morrill*,<sup>57</sup> the Appellate Court ruled that an action for vexatious litigation is not assignable.

In the underlying case, a company called Northeast Building Supply & Home Centers, LLC (Home Centers) obtained a judgment against various defendants, after a court-side trial, for nonpayment for building supplies. Home Centers subsequently reorganized, and assigned its assets, including rights and claims associated with the underlying case, to the similarly named Northeast Building Supply, LLC (Building Supply).

Building Supply, as assignee of Home Centers, then filed an application for prejudgment remedies in support of an action against the defendants in the underlying case, and their attorneys, alleging that the defense of that case constituted vexatious litigation. The application was denied on the grounds of collateral estoppel, based on certain findings in the memorandum of decision of the trial court in the underlying case. The court also found that as to the attorney defendants, the applicant's potential claims were secured by insurance, making prejudgment remedies unnecessary. The applicant appealed from the denial of its PJR application.

On appeal, the respondents raised, for the first time, a jurisdictional argument: that the applicant was an improper plaintiff, and lacked standing. More particularly, the respondents argued that vexatious litigation claims are categorically not assignable, and that the applicant could not proceed on the basis of a void assignment.

The Appellate Court agreed. The court noted that under established Connecticut law, contract claims are assignable, but "tort claims alleging injuries that are personal in nature

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<sup>56</sup> *Id.*

<sup>57</sup> 224 Conn. App. 137, 312 A.3d 138 (2024).

are not assignable.”<sup>58</sup> Although certain types of claim cannot be neatly categorized as contract or tort for purposes of assignability, vexatious litigations claims are unambiguously tort claims involving injuries that are “personal in nature,” even when asserted by a business entity rather than a natural person.

## II. CREDITORS’ RIGHTS

### A. *Amendment to homestead exemption statute, increasing exemption from \$75,000 to \$250,000, applies retroactively.*

In *Ferreira v. Ward*,<sup>59</sup> the Appellate Court addressed the retroactivity of Public Act 21-161, adopted in 2021 and codified at General Statutes Section 52-352b(21), which increased Connecticut’s homestead exemption from \$75,000 to \$250,000.

In 2015, in an earlier lawsuit, the plaintiff obtained a judgment in the amount of \$123,533.05 against the defendant. That same year, the plaintiff recorded a judgment lien against the defendant’s primary residence. In 2018, the plaintiff commenced an action to foreclose the lien.

In response to the plaintiff’s motion for judgment of foreclosure by sale, the defendant objected, on the grounds that the homestead exemption precluded such a judgment. At the judgment hearing, the defendant argued that the increased exemption prescribed by Public Act 21-161 should apply, given that the statute had been amended before the entry of judgment. The defendant sought to testify at the hearing.

The plaintiff countered that the earlier version of the exemption statute should apply, because that version had been in effect when the foreclosure action began. Plaintiff’s counsel further argued that the “proper procedure is for the sale to happen, the proceeds get deposited with the court, and then the defendant files his exemption, if he has one.”<sup>60</sup>

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<sup>58</sup> *Id.* at 147.

<sup>59</sup> 224 Conn. App. 571, 312 A.3d 1075 (2024).

<sup>60</sup> *Id.* at 576.

The trial court declined to hear testimony from the defendant. Finding an unpaid debt of \$123,533.05 and property value of \$255,000.00, the court entered a judgment of foreclosure by sale, from which the defendant appealed.

The Appellate Court reversed, holding that “the expanded homestead exemption applies retroactively to a postjudgment proceeding in which a judgment lien was recorded and the action to foreclose on the judgment lien was commenced at a time when the now repealed statute was in effect, but the judgment of foreclosure was rendered after P.A. 21-161 became effective.”<sup>61</sup>

The court also addressed the procedural issue of how to address an exemption claim in this context. The court agreed with the defendant that “when a defendant asserts a homestead exemption claim before a judgment of foreclosure is rendered, the proper procedure is for the court to afford the defendant with the opportunity to present support for their claim by way of an evidentiary hearing.”<sup>62</sup> At that hearing, “the court should find the value of the property, which is ‘determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it’ and subtract from that value the amount of the exemption. General Statutes § 52-352b (21). The result is the amount to which the judgment lien can attach. If the result is negative, the court may determine to withhold foreclosure or deny the motion for a judgment of foreclosure.”<sup>63</sup>

*B. Mortgage holder was entitled to intervene in summary process action to assert claim to use and occupancy payments paid into court.*

The Appellate Court’s decision in *Altavista Investments, LLC v. Makeeva*<sup>64</sup> concerned the right of a mortgage holder to intervene in a summary process action, for the purpose of laying claim to use and occupancy payments rendered while the case was on appeal.

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<sup>61</sup> *Id.* at 583.

<sup>62</sup> *Id.* at 586.

<sup>63</sup> *Id.*

<sup>64</sup> 226 Conn. App. 175, 317 A.3d 850 (2024).

The would-be intervenor, Baotou Capital, LLC (Baotou), held a \$4.9 million mortgage on a residence in Greenwich. Under both the mortgage deed and a separate assignment of leases and rentals, Baotou held a security interest in all rents and income issuing from the premises.

The plaintiff property owner brought a summary process action against its tenants, and obtained a judgment of possession. The tenants appealed, and, pursuant to General Statutes Section 47a-35a, successfully petitioned the court for leave to deposit use and occupancy payments with the court, in lieu of posting an appeal bond, during the pendency of the appeal. The court set the payments at \$24,000 per month. By the time the landlord ultimately prevailed in the appeal, the tenants had paid \$336,000 into the court.

While the appeal was pending, Baotou, which had commenced a foreclosure of its mortgage on the premises, filed a motion to intervene, “for the limited purpose of asserting its rights with respect to the use and occupancy payments being deposited with the clerk of court and participating in any proceedings to determine the final distribution of those funds.”<sup>65</sup> The referenced “proceedings” would be pursuant to General Statutes Section 47a-35b, which provides in relevant part, “Upon final disposition of the appeal, the trial court shall hold a hearing to determine the amount due each party from the accrued payments for use and occupancy and order distribution in accordance with such determination.” The trial court deferred considering the motion until after the appeal was completed.

After the trial court’s judgment of possession was affirmed on appeal, the trial court heard Baotou’s motion. The court subsequently issued an order denying the motion, reasoning, “Baotou seeks to assert a money damages claim or a right to money held by the clerk in this eviction action for possession. Baotou is not the owner of the subject property nor able to terminate the possessory interest of the defendants through eviction as authorized in a summary process action. Its claims

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<sup>65</sup> *Id.* at 181.

for the money held by the clerk's office are based on contract principles and privity against the plaintiff. As Baotou does not seek a possessory interest in the subject property, it is not a proper party to this action."<sup>66</sup>

The Appellate Court reversed. In that court's view, the trial court's perspective – Baotou's lack of a possessory interest in the property that was the subject of the eviction action – was "far too narrow of a lens, or perhaps the wrong lens entirely, through which to view Baotou's request for intervention."<sup>67</sup> The post-judgment hearing that Baotou sought to participate in, pursuant to General Statutes Section 47a-35b, "is unrelated to the determination of the possessory interests in the property in a summary process action. Rather, in the present case, it involves a dispute that falls outside of the merits of the eviction action, one that is between primarily the plaintiff and Baotou over who should receive the benefit of the use and occupancy payments made by the defendants during their unsuccessful appeal."<sup>68</sup> Baotou's interest in that stage of the proceedings was "apparent on [the] record," and accordingly the trial court had "improperly denied its motion to intervene as a matter of right."<sup>69</sup>

*C. High bidder in foreclosure auction is entitled to notice of motion to compel forfeiture of his deposit.*

In *Chelsea Groton Bank v. Gates Realty Holdings, LLC*,<sup>70</sup> the plaintiff in error, Ross Weingarten, tendered the high bid at a foreclosure auction, but was unable to close the purchase within the timeframe prescribed by the Uniform Standing Orders for Foreclosure by Sale. The plaintiff bank – the defendant in error for purposes of the appeal – filed a motion for Weingarten to forfeit the \$367,000 deposit that he had remitted in connection with the auction. The bank did not serve its motion on Weingarten, who had not filed an appearance in the case. The trial court granted the bank's forfeiture motion,

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<sup>66</sup> *Id.* at 182. (Internal punctuation omitted.)

<sup>67</sup> *Id.* at 189.

<sup>68</sup> *Id.* at 190.

<sup>69</sup> *Id.* at 191.

<sup>70</sup> 227 Conn. App. 583, 323 A.3d 133 (2024).

one day before Weingarten filed an appearance.

Weingarten filed a writ of error, claiming the trial court had improperly granted the forfeiture motion without ensuring that he had received proper notice and an opportunity to be heard. The Appellate Court agreed. Because Weingarten was a nonparty at the time of the relevant events, he “was entitled to assume that ... an order to show cause would be issued, citing him to appear and be heard.”<sup>71</sup> But that did not happen, and “[t]he lack of service of the motion on [him] was ...legally insufficient to render [him] subject to the jurisdiction of the court.”

The court reversed the order below, and remanded the case for further proceedings.

*D. Superior Court has jurisdiction over counterclaim asserting violations of the automatic stay in a bankruptcy case.*

In *City of New London v. Speer*,<sup>72</sup> the Appellate Court held that the trial court had jurisdiction to adjudicate the defendant’s counterclaim based on the plaintiff’s alleged violation of the Bankruptcy Code automatic stay. The trial court had granted the plaintiff’s motion to dismiss the counterclaim, on the grounds that the Bankruptcy Court had exclusive jurisdiction, but the Appellate Court disagreed, and reversed the judgment below.

The plaintiff had sued the defendant to recover a balance due for water and sewer services provided to her property. At the time, the defendant was the debtor in an involuntary Chapter 7 bankruptcy case. After the bankruptcy case was closed, she filed a counterclaim in the Superior Court case, alleging that the plaintiff had sued her with knowledge of her then-pending bankruptcy case, in violation of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362. She sued for actual damages, punitive damages, and attorneys’ fees, under 11 U.S.C. § 362(k)(1).

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<sup>71</sup> *Id.* at 591.

<sup>72</sup> 227 Conn. App. 221, 322 A.3d 407, *cert. denied* 350 Conn. 909, 323 A.3d 1091 (2024).

The plaintiff filed a motion to dismiss the counterclaim, arguing that “the trial court lacked subject matter jurisdiction over the defendant’s counterclaim because her bankruptcy related claims are preempted by the Bankruptcy Code.”<sup>73</sup> The trial court agreed, and granted the motion.

The Appellate Court reversed. The court first addressed the threshold issue of “whether 11 U.S.C. § 362(k) provides an independent cause of action for damages that survives the disposition of the underlying bankruptcy case,”<sup>74</sup> and concluded that it does. As for the jurisdictional issue, the court analyzed conflicting federal court authority, and concluded that a claim under the statute “falls under the broad category of ‘all civil proceedings arising under or related to cases under [the Bankruptcy Code],’ over which the [federal] district courts ... have original but not exclusive jurisdiction ....” pursuant to 28 U.S.C. § 1334(b).<sup>75</sup>

*E. Borrower sufficiently challenged calculation of debt to require lender to present live testimony as to calculation, rather than rely on affidavit of debt.*

In *Deutsche Bank National Trust Company v. Bretoux*,<sup>76</sup> a residential foreclosure case, the Appellate Court provided partial relief to a homeowner who complained of unfair treatment in the process of attempting to negotiate a loan modification with the bank.

Several years into the case, the defendant filed an amended answer and special defenses, in which he alleged that over a four-year period, he had fruitlessly applied for a loan modification to the plaintiff’s loan servicer, Carrington Mortgage Services, twenty-five times. He claimed that after each denial, the servicer “encouraged him to reapply and represented that the loan would be modified,” but no modification was ever consummated, causing him to incur years of additional interest, fees and other costs.<sup>77</sup> The defendant alleged that this

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<sup>73</sup> *Id.* at 224.

<sup>74</sup> *Id.* at 229.

<sup>75</sup> *Id.* at 240.

<sup>76</sup> 225 Conn. App. 455, 317 A.3d 152 (2024).

<sup>77</sup> *Id.* at 459.

conduct gave rise to defenses of unclean hands and estoppel.

The trial court rejected these defenses, and granted the bank's motion for summary judgment on the issue of liability. The bank then moved for a judgment of strict foreclosure, and filed an affidavit of debt in support of that motion. The defendant "objected to the amount of debt described in the plaintiff's affidavit on the basis that the plaintiff wrongfully increased the amount of the debt through its own misconduct."<sup>78</sup> The trial court overruled the objection, accepted the affidavit of debt, and entered a judgment of foreclosure by sale.

On appeal, the defendant argued that the trial court erred in granting an interlocutory summary judgment notwithstanding his special defense of unclean hands. But the Appellate Court disagreed, holding that the defendant's affidavit, standing alone, did not provide sufficient evidence of wrongdoing by the plaintiff to create a genuine issue of material fact. The defendant's allegations did "not provide a basis to infer that Carrington, as the plaintiff's agent, engaged in wilful misconduct with the purpose of prejudicing the defendant's rights."<sup>79</sup>

But the defendant fared better in his attack on the bank's affidavit of debt. The Appellate Court noted that, pursuant to Section 23-18(a) of the Practice Book, the debt in a foreclosure case may be established by affidavit "where no defense as to the amount of the mortgage debt is interposed." Unlike the procedure that applies to motions for summary judgment, in which the opposing party must present evidence in support of the party's objection, the court has "never required, and the language of Practice Book § 23-18 (a) does not require, a defendant to provide any evidence."<sup>80</sup>

In this case, the defendant had filed an objection to the affidavit in which he "not only objected to the amount of the debt but also specifically objected as to why the amount of

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<sup>78</sup> *Id.* at 461.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 474.

the debt is incorrect on the basis of his estoppel based defenses.”<sup>81</sup> He had thus “sufficiently interposed a defense as to the amount of the debt, which prevented the plaintiff from relying on the affidavit of debt to prove the amount of the debt pursuant to Practice Book § 23-18 (a).”

The court reversed the judgment and remanded the case for the limited purpose of an evidentiary hearing on the amount of the debt.

F. *Service upon foreclosure defendant, and recordation of lis pendens, shortly before his death was sufficient to bind his widow to the proceedings.*

In *Homebridge Financial Services, Inc. v. Jakubiec*,<sup>82</sup> a residential foreclosure case, the defendant mortgagor died two days after abode service had been made upon him, and after the bank had recorded a lis pendens on the land records. Upon the bank’s motion, the court cited the decedent’s “Widow, Heirs, Beneficiaries, Representatives or Creditors” into the case as parties defendant, and granted the bank’s request to provide notice of the action to those persons via newspaper publication.<sup>83</sup>

The decedent’s widow then moved to dismiss the case, claiming improper service of process under the circumstances, and that the court therefore lacked personal jurisdiction over her. The bank countered that, because it had both served the decedent and recorded a lis pendens before he died, then under the lis pendens statute, it had had no obligation to make further service upon her. The trial court agreed with the bank, denied the defendant widow’s motion, and granted the bank’s motion for judgment of strict foreclosure.

The Appellate Court affirmed. The court noted that the lis pendens statute, General Statutes Section 52-325, provides in relevant part that the recordation of a lis pendens “shall, from the time of the recording only, be notice to any

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<sup>81</sup> *Id.* at 474. (Citation and internal punctuation omitted.)

<sup>82</sup> 223 Conn. App. 517, 309 A.3d 1223, *cert. denied* 349 Conn. 909, 314 A.3d 602 (2024).

<sup>83</sup> *Id.* at 530.

person thereafter acquiring any interest in such property of the pendency of the action; and each person whose ... interest is thereafter obtained, by descent or otherwise, shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, to the same extent as if he were made a party to the action...”

Given the operative sequence of events, by operation of the *lis pendens* statute, the defendant widow “was bound in this foreclosure action to the same extent as if she had been made a party to the action.”<sup>84</sup> It followed that the trial court had properly denied her motion to dismiss.

*G. Trial court improperly struck defense of unclean hands in foreclosure action.*

In *M&T Bank v. Lewis*,<sup>85</sup> the Connecticut Supreme Court reversed a judgment of foreclosure, finding that the trial court had improperly stricken the defendant’s special defenses.

At about the time that the loan went into payment default, the defendant allowed the flood insurance on his property to lapse. The plaintiff thereupon purchased force-placed insurance, and tacked the cost of the premium onto the defendant’s loan balance, as permitted by section 5 of the mortgage deed.

The defendant raised various special defenses based on this sequence of events. Those defenses centered on the contention that the bank charged the defendant more than its actual “cost” for the insurance, in violation of the applicable mortgage provision. More particularly, the defendant alleged that the bank had an exclusive arrangement with the insurer, which generated various rebates (or more colorfully, as the defendant sometimes characterized them, “kick-backs”) that reduced the true cost to the bank. As alleged by the defendant, the plaintiff bank “does not deduct the value

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<sup>84</sup> *Id.* at 534.

<sup>85</sup> 349 Conn. 9, 312 A.3d 1040 (2024).

of these alleged kickbacks from the amount it charges borrowers and, instead, charges them the ‘pre-rebate’ amount for the force placed insurance coverage.”<sup>86</sup>

The trial court granted the bank’s motion to strike the defendant’s special defenses, finding the allegations insufficiently related to the making, validity or enforcement of the mortgage, and entered a judgment of foreclosure by sale. But the Supreme Court reversed, finding that the trial court had erred in striking the defenses. The defendant’s allegations about “kickbacks” or “rebates” from the insurer to the bank, the bank’s failure to pass those savings on to the defendant, and the bank’s alleged misrepresentations was “directly related to the plaintiff’s reliance on and enforcement of section 5 of the mortgage agreement.”<sup>87</sup> Thus, “[w]ithout offering any opinion on the ultimate merits of this theory,” the court concluded that “the defendant has alleged that the plaintiff’s conduct relates to the validity of the mortgage,”<sup>88</sup> and therefore stated colorable special defenses.

H. *Remand order to set new law days after judgment of strict foreclosure was affirmed did not bar trial court from thereupon ordering judgment of foreclosure by sale.*

In *Wahba v. JPMorgan Chase Bank, N.A.*,<sup>89</sup> the Connecticut Supreme Court held that an Appellate Court decision affirming a judgment of strict foreclosure, and remanding the case to the trial court “solely for the purpose of setting new law days,”<sup>90</sup> did not bar the trial court from instead entering a new judgment of foreclosure by sale.

Following the Appellate Court’s remand, the borrower claimed that the value of her property – a waterfront estate in Greenwich – had appreciated dramatically during the course of the appeal. She backed up this assertion with a Zillow value estimate purporting to show \$2 million in equity,

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<sup>86</sup> *Id.* at 15.

<sup>87</sup> *Id.* at 29.

<sup>88</sup> *Id.* at 31.

<sup>89</sup> 349 Conn. 483, 316 A.3d 338 (2024).

<sup>90</sup> *Id.* at 489.

and asked the trial court to convert the judgment of strict foreclosure to a judgment of foreclosure by sale.

The trial court denied the borrower's request, concluding that under the literal language of the Appellate Court's rescript, it lacked the power to change the form of the judgment. The court granted the bank's request to reset the law days, and the Appellate Court agreed.<sup>91</sup>

But the Supreme Court reversed, concluding that the Appellate Court's earlier rescript had not stripped the trial court of discretion to modify the judgment as the borrower requested. Quoting earlier authority, the court noted, "remand orders should not be construed so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. ... So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing."<sup>92</sup>

I. *Denial of motion to intervene in foreclosure case did not automatically stay the running of the law days.*

In *DXR Finance Parent, LLC v. Theraplant, LLC*,<sup>93</sup> a foreclosure action, the Appellate Court determined that it lacked jurisdiction to consider an appeal by a would-be intervenor. After judgment of strict foreclosure had entered, but before the law days had run, nonparty Shareholder Representative Services, LLC (SRS) moved to intervene in the case. That motion was denied, and SRS appealed from the denial order.

The Appellate Court held that no automatic stay applied under the circumstances. For this reason, and because SRS had not moved for a discretionary stay of the trial proceedings, the law days continued to run, and title to the foreclosed premises vested in the mortgage holder. That rendered SRS's

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<sup>91</sup> The Appellate Court decision is reported at 216 Conn. App. 236, 283 A.3 1095 (2022).

<sup>92</sup> *Wahba*, 349 Conn. at 501, quoting *Rizzo Pool Co. v. Del Gross*, 240 Conn. 58, 65, 66, 689 A.2d 1097 (1997).

<sup>93</sup> 223 Conn. App. 362, 309 A.3d 347, *cert. denied* 348 Conn. 957, 310 A.3d 380 (2024).

appeal moot, thus depriving the Appellate Court of subject-matter jurisdiction and supporting a judgment of dismissal.

### III. BUSINESS TORTS

#### A. *Connecticut Supreme Court clarifies trade secrets act and confirms that continued employment may provide sufficient consideration for a non-compete.*

In *Dur-A-Flex, Inc. v. Dy*,<sup>94</sup> the Connecticut Supreme Court resolved a thorny issue under the Connecticut Uniform Trade Secrets Act<sup>95</sup> (CUTSA): whether a person can be deemed to have “misappropriated” a trade secret if he uses it (i) with knowledge that it had likely been initially misappropriated by someone owing a duty to the owner but (ii) lacking knowledge of the trade secret itself. The court agreed with the defendants that knowledge of the trade secret itself is a necessary element of misappropriation. The court also addressed other significant issues under CUTSA and the law of noncompetes.

The plaintiff was in the business of developing, manufacturing and selling commercial and industrial flooring systems and polymer component materials.<sup>96</sup> The first-named defendant, Samet Dy, was a research chemist who had worked for the plaintiff for a period of years before resigning. After leaving the company, he set up a laboratory in his garage, and worked on the development of competing products.

Dy eventually formulated a viable floor-coating product called ProKrete, which, as found by the trial court, was facilitated by his misappropriation of the plaintiff’s trade secrets.<sup>97</sup> He had a ready customer for ProKrete in Steven Lipman, another chemist formerly employed by the plaintiff, and Lipman’s company, Durafloor Industrial Flooring & Coating, Inc. (Durafloor). Dy also transferred to Lipman a company Dy had formed, ultimately bearing the name ProRez Performance Resins and Coatings, LLC (ProRez), and that compa-

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<sup>94</sup> 349 Conn. 513, 321 A.3d 295 (2024).

<sup>95</sup> General Statutes §§ 35-50 *et seq.*

<sup>96</sup> *Dur-A-Flex*, 349 Conn. at 525, 526.

<sup>97</sup> *Id.* at 528.

ny issued payments to Dy.<sup>98</sup> The plaintiff sued Dy, Lipman and his companies, and others for, among other things, violations of CUTSA. Following trial, the trial court concluded that Dy, Lipman, Durafloor and ProRez had misappropriated the plaintiff's trade secrets, within the meaning of General Statutes Section 35-51(b)(2)(B)(iii). That subsection defines "misappropriation" in relevant part as "use of a trade secret of another without express or implied consent by a person who ... (B) at the time of ... use, knew or had reason to know that his knowledge of the trade secret was ... (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use ...."

On appeal, the plaintiff and the Lipman defendants differed on the scope of the "knowledge" requirement under the statute. The plaintiff contended, and the trial court agreed, that the plaintiff "was required to prove only that the [Lipman] defendants knew or should have known that [Dy] misappropriated the plaintiff's trade secrets."<sup>99</sup> The Lipman defendants countered that knowledge of Dy's misappropriation, standing alone, would not satisfy the "knowledge" requirement; they claimed that the plaintiff needed to further prove that "Lipman himself and, through him, Durafloor and ProRez, had knowledge of the plaintiff's trade secrets."<sup>100</sup>

The Supreme Court agreed with the defendants. Relying heavily on a decision of the California Court of Appeal, *Silvaco Data Systems v. Intel Corp.*,<sup>101</sup> the court concluded that a person cannot be deemed to have wrongly "used" a trade secret for purposes of the statute by only using "something that was made using the [trade] secret."<sup>102</sup> Drawing on a "colorful analogy" in the *Silvaco* decision, the court noted, "[o]ne who bakes a pie from a recipe certainly engages in the use of the latter; but one who eats the pie does not, by virtue of that act alone, make use of the recipe in any ordinary sense, and

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<sup>98</sup> *Id.* at 527.

<sup>99</sup> *Id.* at 565, 566.

<sup>100</sup> *Id.*

<sup>101</sup> 184 Cal.App. 4th 210, 109 Cal.Rptr.3d 27 (Cal.App. 2010).

<sup>102</sup> *Dur-A-Flex*, 349 Conn. at 569, quoting *Silvaco*, 184 Cal.App.4th at 224, 109 Cal.Rptr.3d 27.

this is true even if the baker is accused of stealing the recipe from a competitor, and the diner knows of that accusation.”<sup>103</sup> It follows that “*using* a trade secret necessarily entails having *knowledge* of the trade secret; one cannot happen without the other.”<sup>104</sup> That knowledge may be vicarious, through an agent, and in some circumstances, constructive knowledge may suffice: “[O]ne who knowingly possesses information constituting a trade secret cannot escape liability merely because he lacks the technical expertise to understand it, or does not speak the language in which it was written.”<sup>105</sup>

The court summed up, “the defendant’s knowledge of the trade secret is an element of a claim of misappropriation under § 35-51 (b) (2) (B) (iii) and ... a defendant cannot ‘use’ a trade secret for purposes of that statute if the defendant does not have knowledge of the trade secret itself. That is, the defendant must actually or constructively possess the information that constitutes the trade secret, and not merely use or possess a product that embodies the trade secret but does not disclose to the defendant any material aspect of the trade secret itself.”<sup>106</sup>

The Supreme Court reversed the trial court’s judgment against the Lipman defendants on the misappropriation claims, and remanded the case for a new trial on that issue. The court noted that if the plaintiff were to prove misappropriation under the correct standard, “monetary and injunctive remedies for misappropriation ‘are appropriate only for the period of time that the information would have remained unavailable to the defendant in the absence of the appropriation.’”<sup>107</sup>

In a cross-appeal, the plaintiff challenged the trial court’s determination that “any common-law duty of confidentiality that [Dy] owed to the plaintiff was preempted by CUTSA.”<sup>108</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 569.

<sup>105</sup> *Id.* at 572, quoting *Silvaco*, 184 Cal.App.4th at 225 n. 7, 109 Cal.Rptr.3d 27.

<sup>106</sup> *Id.* at 574, 575.

<sup>107</sup> *Id.* at 587, quoting Restatement (Third) of Unfair Competition, Appropriation of Trade Values § 45, comment (h), p. 519.

<sup>108</sup> *Id.* at 596.

The plaintiff had asserted that “certain proprietary information obtained by [Dy] during his employment falls outside the statutory definition of a trade secret but is nonetheless protected under his common-law duty of confidentiality.” The trial court ruled that any such potential claims under the common law are preempted by General Statutes Section 35-57(a), which provides in relevant part that “the provisions of this chapter supersede any conflicting tort, restitutionary, or other law of this state pertaining to civil liability for misappropriation of a trade secret.”

The Supreme Court agreed with the defendants, and the trial court, that “CUTSA preempts noncontractual civil claims against a former employee based on the acquisition, disclosure, or use of confidential information that does not rise to the level of a trade secret. A noncontractual claim based on the misappropriation of commercial information by a former employee must be brought under CUTSA or not at all.”<sup>109</sup> But the court noted that this limitation applies only to former employees, not current employees. “[F]ormer employees are treated differently under trade secrets law than current employees, who have a duty of loyalty not to compete with the employer that includes the ‘duty to refrain from using *confidential information* acquired through the employment .... This distinction between current employees and former employees has its roots in the principle ... that “[t] here is a strong public interest in preserving the freedom of [former] employees to market their talents and experience in order to earn a livelihood.”<sup>110</sup>

The plaintiff also challenged another “preemption” finding by the trial court: that General Statutes Section 35-57(a) also preempted claims against the Lipman defendants for civil conspiracy to misappropriate the plaintiff’s trade secrets. The Supreme Court agreed with the trial court. “The objective of the civil conspiracy alleged by the plaintiff in the present case was the misappropriation of the plaintiff’s

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<sup>109</sup> *Id.* at 602, 603.

<sup>110</sup> *Id.* at 600, quoting Restatement, *supra*, comment (b), p. 479 and 480.

trade secrets. We conclude, therefore, that its civil conspiracy claims are preempted by § 35-57(a).<sup>111</sup>

The plaintiff also contended that the trial erred in rendering judgment for Dy on the plaintiff's claim that Dy had violated the parties' noncompete agreement. Dy had signed the noncompete several years into his tenure, and the trial court held that that "a party giving nothing more than the status quo of continuing employment ... offers no consideration [in] exchange for his promise, and the promise is, therefore, unenforceable."<sup>112</sup>

The Supreme Court agreed with the plaintiff that "the trial court incorrectly determined that continued employment can *never* be consideration for a noncompete agreement."<sup>113</sup> Consistent with the Appellate Court's 2023 decision in *Schimenti Construction Co., LLC v. Schimenti*,<sup>114</sup> which in turn relied on the Supreme Court's 1934 decision in *Roessler v. Burwell*,<sup>115</sup> "continued employment for at-will employees can be sufficient to make enforceable a restrictive covenant agreed to by the parties at some point after the commencement of employment."<sup>116</sup> Because the trial court "categorically rejected the notion that continued employment can ever suffice as consideration, it did not evaluate whether the noncompete agreement imposed an obligation on the plaintiff that would make the agreement enforceable."<sup>117</sup> The court therefore remanded the case for further proceedings concerning the adequacy of the consideration provided by the plaintiff.

*B. Judgment of fraudulent transfer affirmed, regardless of transferee's state of mind and "love and affection" as purported consideration for transfer.*

In *Cockerham v. Westphalen*,<sup>118</sup> the plaintiff sued his investment advisor for misconduct in the management of his

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<sup>111</sup> *Id.* at 609.

<sup>112</sup> *Id.* at 591.

<sup>113</sup> *Id.* at 593.

<sup>114</sup> 217 Conn. App. 224, 288 A.3d 1038 (2023).

<sup>115</sup> 119 Conn. 289, 176 A. 126 (1934).

<sup>116</sup> *Id.* at 593, quoting *Schimenti*, 217 Conn.App. at 246.

<sup>117</sup> *Id.* at 593, 594.

<sup>118</sup> 225 Conn. App. 484, 317 A.3d 166 (2024).

investment accounts, and added claims against the advisor and the advisor's wife for fraudulent transfers from husband to wife. The fraudulent transfer claims arose from the husband's transfer, after he had learned that the state banking department was investigating him, of more than \$200,000 from his personal bank account to an account owned solely by his wife. Following a courtside trial, the trial court entered judgment for the plaintiff.

On appeal, the wife challenged the trial court's determination that the transfers had been made with actual fraudulent intent, establishing a claim under General Statutes Section 52-552e(a)(1), a provision of the Uniform Fraudulent Transfer Act (UFTA). The Appellate Court affirmed the judgment below, holding that the trial court's factual finding of fraudulent intent was not clearly erroneous. The UFTA, at General Statutes Section 52-552e(b), enumerates eleven indicia of fraud that the court may consider when evaluating a claim of actual fraud under the statute, and the Appellate Court agreed with the trial court that numerous of these factors had been established.

The Appellate Court rejected the wife's argument for reversal based on a lack of evidence of fraudulent intent on her part; under the UFTA, her state of mind was irrelevant. "Unlike the common law, the statutory cause of action for a fraudulent transfer based on a transferor's actual intent to defraud a creditor does not require a plaintiff to prove that a transferee shared the transferor's fraudulent intent."<sup>119</sup>

The wife also challenged the trial court's finding, under both the common law and the UFTA,<sup>120</sup> that the transfers from husband to wife were constructively fraudulent, as they were given with no exchange of value, and left the husband insolvent. The wife argued that purported consideration in the form of "love and affection" provided "reasonably equivalent value" to support the transfers.

The Appellate Court disagreed. As for the plaintiff's com-

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<sup>119</sup> *Id.* at 498.

<sup>120</sup> General Statutes § 52-552d(a)(2).

mon law claim, the court cited an 1868 decision of the Connecticut Supreme Court, *Redfield v. Buck*,<sup>121</sup> for the proposition that “love and affection does not constitute adequate consideration for purposes of defeating a fraudulent conveyance claim under the common law.”<sup>122</sup> The same was true of the plaintiff’s statutory claim. The Official Comment to UFTA, and numerous decisions of federal courts in and outside of Connecticut, hold that “in order for an exchange to be of reasonably equivalent value under ... the UFTA, it must be something with monetary value capable of satisfying a creditor’s claims.”<sup>123</sup>

#### IV. CLOSELY HELD BUSINESSES

##### A. Appellate Court addresses rules of standing as applied to members of limited liability companies.

In *Rubin v. Brodie*,<sup>124</sup> members of three manager-managed limited liability companies sued the LLCs’ manager, Barnett Brodie, and entities affiliated with him, claiming he had committed self-dealing and other breaches of his fiduciary duty. The plaintiffs brought derivative claims on behalf of the LLCs (derivative claims), as well as parallel claims in the names of the LLCs, without reference to derivative procedure, based on their collective ownership of majority membership interests in each company (LLC direct claims). The plaintiff members also sued in their own names, claiming harm to their individual membership interests (member claims).

The defendants moved to dismiss all counts, which the trial court granted in full. The Appellate Court reversed in part.

As for the derivative claims, it was undisputed that the plaintiffs had not made a pre-suit demand upon the LLCs’ manager – the main defendant – to bring suit in the name of the companies. Pursuant to General Statutes Section 34-271a, such a demand is a prerequisite to an LLC derivative

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<sup>121</sup> 35 Conn. 328 (1868).

<sup>122</sup> *Cockerham*, 225 Conn.App. at 511.

<sup>123</sup> *Id.* at 512.

<sup>124</sup> 228 Conn. App. 617, 325 A.3d 1096 (2024).

action, unless such a demand would be futile. Section 34-271c, in turn, requires that the complaint “state with particularity ... why the demand should be excused as futile.”

The defendants pointed out that the plaintiffs had not expressly pled futility in their complaint. The plaintiffs countered that the allegations in their complaint were “sufficiently particular to form a basis from which the trial court could have logically inferred futility of demand on ... Brodie.”<sup>125</sup>

The Appellate Court agreed with the plaintiffs, holding that “a sufficiently detailed recitation of facts that support an inference that making a demand would have been futile and that the failure to do so should be excused will satisfy the particularity requirement in § 34-271c.”<sup>126</sup> Here, the complaint specifically described a series of bad acts by Brodie and associates of his, and there was little reason to believe that he would have authorized a suit by the LLC against himself and them.<sup>127</sup>

The Appellate Court also agreed with the plaintiffs that the trial court had erred in finding, as a requirement of bringing a derivative action, that the members of an LLC obtain “authorization” or “consent” to bring suit for the LLC, consistent with the entity’s operating agreement. The statutes do not require it, and under the circumstances, seeking such an authorization or consent would be futile.<sup>128</sup>

As for the LLC direct claims, the Appellate Court agreed with the defendants that the trial court had properly dismissed them. The LLCs’ operating agreements provided that only the manager, Brodie, had the authority to “commence litigation” or “resort to legal action” in the name of the entities.<sup>129</sup> The fact that the plaintiffs collectively owned a majority of the membership interests was irrelevant. “Because the individual plaintiffs, and not Brodie, initiated the direct action by the plaintiff LLCs, the plaintiff LLCs lacked stand-

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<sup>125</sup> *Id.* at 638.

<sup>126</sup> *Id.* at 639.

<sup>127</sup> *Id.* at 642.

<sup>128</sup> *Id.* at 644, 647.

<sup>129</sup> *Id.* at 658.

ing to maintain it.”<sup>130</sup> This part of the holding illustrates precisely why the availability of derivative practice is necessary.

The Appellate Court also affirmed the trial court’s dismissal of the member claims. “The crux of the plaintiffs’ claims is that the primary defendant, Brodie, with assistance from his codefendant business associates, conveyed and sold all of the real estate assets belonging to the plaintiff LLCs, that these actions forced the plaintiff LLCs into dissolution, and that the plaintiffs were injured as a result. ... [I]f there were injuries to the individual plaintiffs, those injuries were sustained by the plaintiff LLCs in the first instance and by the individual plaintiffs in the second. In other words, their alleged injuries were solely the result of injuries suffered by the plaintiff LLCs, and the individual plaintiffs, therefore, lacked standing to maintain their direct action.”<sup>131</sup>

*B. Lack of corporate authority to commence suit deprived corporation of standing.*

In *Fountain of Youth Church, Inc. v. Fountain*,<sup>132</sup> the Appellate Court affirmed the trial court’s judgment of dismissal, based on a lack of standing arising from lack of corporate authority to commence suit.

The plaintiff, a religious corporation, brought suit against its former pastor and an entity that he formed, claiming he had diverted church assets to the new entity. The pastor retained the positions of president of the plaintiff and chairman of its board of directors.

The defendants moved to dismiss, asserting that the plaintiff’s leadership did not properly authorize the lawsuit, thereby depriving the plaintiff of standing to sue. The plaintiff claimed that the suit had been authorized by its vice president, but lacked a written authorization by the board of directors empowering him to do so.

The trial court granted the defendants’ motion to dismiss.

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 661. (Citations and internal punctuation omitted.)

<sup>132</sup> 225 Conn. App. 856, 317 A.3d 106 (2024).

The Appellate Court affirmed, citing a corporate treatise for the proposition that “a vice president does not have power to act on behalf of the corporation in highly important and unusual transactions in the absence of specific authorization in the bylaws or a resolution of the board of directors.”<sup>133</sup> The court deemed that principle applicable to commencement of the suit.

## V. CONTRACTS

### A. *Unsuccessful bidder for stadium redevelopment project lacked standing to sue.*

In *Civic Mind, LLC v. City of Hartford*,<sup>134</sup> an unsuccessful bidder, which had responded to a request for proposals (RFP) seeking redevelopment concepts for Dillon Stadium in Hartford, sued the city and others for alleged improprieties in the bidding process. The Appellate Court agreed with the trial court that the plaintiff lacked standing to pursue its claims, and affirmed the trial court’s judgment of dismissal.

On behalf of the city, the Capital Region Development Authority (CRDA) had issued a request for proposals “from individuals, firms and/or organizations authorized to do business in the [s]tate of Connecticut who are interested in using, redeveloping and operating [the stadium] and potentially securing a professional sports team for that facility.”<sup>135</sup> The RFP expressly provided that it did not obligate the CRDA or city to “undertake any action” or “award a contract.”<sup>136</sup> It also reserved to CRDA “the right to use submissions as a basis for negotiation with one or more respondents and/ or with parties other than those responding to [the] RFP.”<sup>137</sup> The plaintiff submitted a proposal, but the contract was awarded to another respondent.

The plaintiff sued, alleging that the city “conspired with

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<sup>133</sup> *Id.* at 874, quoting 1 J. Cox & T. Hazen, *Treatise on the Law of Corporations* (3d Ed. 2023) § 8:8.

<sup>134</sup> 229 Conn. App. 615, 328 A.3d 225 (2024).

<sup>135</sup> *Id.* at 619.

<sup>136</sup> *Id.* at 620.

<sup>137</sup> *Id.*

other persons to award the contract to remodel [the stadium] to an underqualified and improper bidder that was not in the city's best interests."<sup>138</sup> The defendants moved to dismiss, arguing that the trial court "lacked subject matter jurisdiction over the present action on the ground that the plaintiff did not have standing to raise claims concerning the award of a contract pursuant to the RFP because it had no legal or equitable right in any such contract."<sup>139</sup> The trial court granted the motion.

The Appellate Court affirmed. The court noted the general principle that "an unsuccessful bidder on a state or municipal contract has no contractual right that would afford standing to challenge the award of a contract. [A] bid, even the lowest responsible one, submitted in response to an invitation for bids is only an offer which, until accepted ... does not give rise to a contract between the parties.... An unsuccessful bidder, therefore, has no legal or equitable right in the contract."<sup>140</sup>

An exception does exist, allowing judicial intervention "where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the competitive bidding process is defeated by the conduct of [the bidding] officials."<sup>141</sup> But the exception "contemplates the existence of a *competitive* bidding process, the integrity of which has been compromised."<sup>142</sup> To evaluate whether this exception applies, "the threshold inquiry is whether the RFP was subject to the statutory or municipal competitive bidding requirements at issue."<sup>143</sup>

The pertinent statutory provision, General Statutes Section 4b-91, provides in relevant part that "every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work by the state that is estimated to cost more than one

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<sup>138</sup> *Id.* at 626.

<sup>139</sup> *Id.* at 629.

<sup>140</sup> *Id.* at 635. (Citation and internal punctuation omitted.)

<sup>141</sup> *Id.* (Citation and internal punctuation omitted.)

<sup>142</sup> *Id.* at 636, 637. (Emphasis supplied by the court.)

<sup>143</sup> *Id.* at 637.

million dollars shall be awarded to the lowest responsible and qualified general bidder...”<sup>144</sup> The trial court held, and the Appellate Court agreed, that the statute was inapplicable to the proposed contract that was the subject of the RFP. The RFP “did not invite respondents to bid on a contract for ‘the construction, reconstruction, alteration, remodeling, repair or demolition of any public building or any other public work,’” but rather “invited respondents to submit their own proposed plans, taking into account baseline criteria identified in the RFP, for the redevelopment of the stadium.”<sup>145</sup> Given this “open-ended format, the responses could not be expected to reflect the uniformity required for competitive bidding.”<sup>146</sup>

This conclusion was “further bolstered by the RFP’s provisions that (1) the issuance of the RFP “[did] not obligate CRDA or the [c]ity ... to undertake any action” or “commit CRDA or the [c]ity ... to award a contract” and (2) CRDA reserved the right to use RFP submissions in negotiations with other respondents and/or others who did not respond to the RFP, as such provisions are not indicative of a solicitation governed by the competitive bidding requirements of § 4b-91(a).”<sup>147</sup>

The court employed a similar analysis with respect to the plaintiff’s claim that the bidding process also violated a provision of Hartford’s municipal code, and reached the same conclusion.

*B. Builder’s insurer had no duty to defend against defective workmanship claim.*

In *Westchester Modular Homes of Fairfield County, Inc. v. Arbella Protection Insurance Company*,<sup>148</sup> a building contractor sued its commercial general liability insurance carrier for failure to cover a claim of defective workmanship asserted by customers of the plaintiff. The insurance policy obliged the

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<sup>144</sup> *Id.* at 638.

<sup>145</sup> *Id.* at 641.

<sup>146</sup> *Id.* at 639.

<sup>147</sup> *Id.* at 641.

<sup>148</sup> 224 Conn. App. 526, 312 A.3d 1118 (2024).

defendant to pay damages arising from claims of “property damage,” which the policy defined in relevant part as “physical injury to tangible property, including all resulting loss of use of that property.”

Following cross motions for summary judgment, the trial court entered judgment for the defendant. The court concluded that the claims asserted by the customers in the underlying action – a counterclaim to the plaintiff’s action to foreclose a mechanic’s lien – did not include allegations of property damage as defined by the policy. The record from the underlying case suggested, at most, “the existence of possible defective work that could lead to future property damage if not remedied but ... did not demonstrate the existence of current property damage.”<sup>149</sup>

The Appellate Court affirmed. The court relied on a 2013 decision of the Connecticut Supreme Court called *Capstone Building Corp. v. American Motorists Ins. Co.* In that case, the court determined, based on the policy language, that “‘physical injury to tangible property’ would not include construction deficiencies unless they damage other, nondefective property ... [T]he commercial general liability policy covers claims for property damage caused by defective work, but not claims for repair of the defective work itself.”<sup>150</sup>

The defendants argued that “neither the allegations of the [customers’] counterclaim nor the extrinsic documents submitted raised the possibility of existing property damage. ... [A]t most, ... the construction deficiencies could potentially result in water damage to nondefective areas of the property if not fixed.”<sup>151</sup> The Appellate Court agreed with the defendants’ characterization of the record in the underlying case, and applying the *Capstone* decision, further agreed that the customers’ claims were not within the scope of the policy.

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<sup>149</sup> *Id.* at 536.

<sup>150</sup> *Id.* at 541, quoting *Capstone Building Corp. v. American Motorists Ins. Co.*, 308 Conn. 760, 785, 787, 67 A.3d 961 (2013).

<sup>151</sup> *Id.* at 540.