BUSINESS LITIGATION: 2016 IN REVIEW

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In 2016, Connecticut's appellate courts decided numerous business cases involving the issue of who can sue whom: who has standing to bring suit, who can be sued and in what capacity. The year also featured two significant Appellate Court decisions in which substantial damage awards were vacated due to a lack of supporting documentary evidence. The following is a summary of those decisions and the year's other noteworthy decisions in the realm of business litigation.

I. STANDING AND PROPER PARTIES

In *Scarfo v. Snow*,[1] the plaintiff, a fifty-percent member of a limited liability company called Cider Hill Associates, LLC, brought suit in his own name against his partner in the aftermath of a failed real estate project. The trial court rendered judgment on the merits for the defendant.

The Appellate Court reversed but nevertheless entered judgment for the defendant, a judgment of dismissal due to the plaintiff's lack of standing. The court noted that any benefit the plaintiff stood to gain from the project "would have flowed to him only through Cider Hill, first benefiting Cider Hill."[2] Although the decision does not feature a detailed legal analysis, it nevertheless provides a comprehensive survey of Connecticut case law on the issue of standing to pursue a derivative action on behalf of a closely held company.

In *Styslinger v. Brewster Park, LLC*,[3] the state Supreme Court ruled that the assignee of a membership interest in a limited liability company lacked standing, absent a dissolution of the entity, to compel a windup of its affairs. The plaintiff, who had obtained an assignment of his ex-wife's interest in a real estate LLC pursuant to a divorce decree,

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1 168 Conn. App. 482, 146 A.3d 1006 (2016).

2 *Id.* at 504.

3 321 Conn. 312, 138 A3d 257 (2016).

but was not admitted to the LLC as a full member, brought suit against the other member, seeking dissolution of the entity and appointment of a receiver to wind up its affairs. The trial court dismissed the complaint, holding that the plaintiff, lacking full membership status in the LLC, lacked standing to pursue those claims.

On appeal, the plaintiff abandoned the argument that he had standing to pursue dissolution of the LLC, but instead sought to leapfrog dissolution and proceed directly to windup of the entity. He relied on General Statutes Section 34-208(a)(2), which expressly confers standing upon assignees to apply for judicial assistance in the windup process.[4] The court rejected the plaintiff's argument, concluding that windup can proceed only as a follow-up to dissolution.

In *Warren v. Cuseo Family, LLC*,[5] the Appellate Court confirmed that the plaintiff, an executor of the estate of a woman who had been a member of a limited liability company, had standing to pursue dissolution of the company. The court characterized a probate statute, General Statutes Section 45a-234, as giving a fiduciary "the power to participate in reorganizations, which includes dissolution actions of property in which a decedent held an interest."[6] Furthermore, a provision of the limited liability companies act, General Statutes Section 34-173(a), provides "[t]he legal successor to a deceased member of a limited liability company, unless limited by the terms of the operating agreement, 'may exercise all of the member's rights for the purpose of settling the member's estate or administering the member's property.'"[7] The court suggested that the outcome may have been different if the company's operating agreement had provided that "the decedent's interest in the company passed immediately outside of probate to the remaining members."[8]

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4 *Id.* at 320.
5 165 Conn. App. 230, 138 A.3d 1099 (2016).
6 *Id.* at 236.
7 *Id.*
8 *Id.* at 237.

In *Astoria Federal Mortgage Corp. v. Genesis Ltd. Partnership*,[9] the Appellate Court held that the holder of an unrecorded assignment of mechanic's lien had standing to foreclose the lien. In so ruling, the court analogized mechanic's liens to mortgages. Pursuant to General Statutes Section 49-17[10] and "the well established common-law principle that the mortgage follows the note,"[11] the assignee of a mortgage note has standing to foreclose even without an assignment of the mortgage deed. Acknowledging that mechanic's liens differ from mortgage obligations in that, unlike mortgage obligations, they are not split into a note and deed, the court concluded that "the principle that the mortgage follows the note, or the debt, can be analogized to mechanic's liens for purposes of foreclosure standing."[12]

In *Allied Associates v. Q-Tran, Inc.*,[13] the Appellate Court applied an expansive definition of "mistake" as used in General Statutes Section 52-109 (substitution statute). The substitution statute allows the proper plaintiff to be substituted for an improper one, when a case has been "commenced in the name of the wrong person as plaintiff" through "mistake." The plaintiff in *Allied Associates*, which previously had owned commercial property in Bridgeport, brought suit against the defendant for nonpayment of rent. The defendant moved to dismiss the action, on the grounds that before the commencement of suit, the plaintiff had conveyed the property to a different entity. The plaintiff sought to cure that defect by substituting the new owner as plaintiff, relying upon the substitution statute. The court rejected the plaintiff's substitution motion and granted the defendant's motion to dismiss, finding that the plaintiff's negligence in bringing suit did not constitute an excusable "mis-

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9 167 Conn. App. 183, 143 A.3d 1121 (2016).

10 The statute provides in relevant part that "[w]hen any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed."

11 167 Conn. App. at 202.

12 *Id.* at 204.

13 165 Conn. App. 239, 138 A.3d 1104 (2016).

take" under the substitution statute.[14]

The Appellate Court reversed. Relying on a just-released decision of the Connecticut Supreme Court interpreting the substitution statute in the context of a tax appeal,[15] the court ruled that negligence on the part of a plaintiff can constitute a mistake justifying substitution.[16] The court remanded the matter to the trial court to reassess the matter in light of the clarified standard.

In *Computer Reporting Service, LLC v. Lovejoy and Associates, LLC*,[17] the plaintiff, a court reporting service, sued the defendant law firm and its sole member for nonpayment of three deposition transcripts. The trial court rendered judgment against both defendants. Although no express contract existed between the parties, the trial court found that the defendant's faxing of deposition notices to the plaintiff, with the intention of inducing the plaintiff to perform services, gave rise to an implied contract. The Appellate Court agreed.

The Appellate Court also affirmed the trial court's rejection of the defendants' argument that if they had in fact entered into such a contract, it was as an agent for their client in the underlying litigation. The court noted that, for a party to a contract to disclaim liability on the grounds that he is acting as an agent, he must clearly disclose up front that he is acting solely in a representative capacity.[18] "The notice of deposition certainly identified that [the defendant attorney] intended to take a deposition on behalf of a client whose name was clearly disclosed. There is no definitive language in the deposition notice, however, that reasonably can be construed as giving any clear indication as to which party would be responsible for payment of court reporting services."[19]

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14 *Id*. at 243.
15 Fairfield Merrittview Ltd. P'ship v. Norwalk, 320 Conn. 535, 133 A.3d 140 (2016).
16 165 Conn. App. at 244-45.
17 167 Conn. App. 36, 145 A.3d 266 (2016).
18 *Id*. at 50.
19 *Id*. at 51.

However, the Appellate Court reversed the trial court's imposition of personal liability on the defendant LLC's sole member, finding "no evidence that [he] acted in his individual capacity rather than as a member of the law firm."[20]

In *HSBC Bank USA, National Association v. Lahr*,[21] a residential mortgage foreclosure case against Camille Lahr and Charles Lahr, Charles died while the action was pending, and Camille argued that the case could not continue until Charles' executor or administrator was substituted as party defendant.[22] The trial court rejected her argument, and entered judgment of strict foreclosure. The Appellate Court affirmed, relying on General Statutes Section 52-600, which provides that if a co-plaintiff or co-defendant dies, "[a]fter the death is noted on the record, the action shall proceed." The court pointedly emphasized, in italics, that Charles' death did not stay the action "as to the defendant, the sole appellant in this case."[23]

In *Midland Funding, LLC v. Mitchell-James*,[24] the Appellate Court reversed summary judgment for the plaintiff, which claimed to be the assignee of a credit card debt. The trial court had found there was no genuine issue as to the plaintiff's ownership of the account, as established by an affidavit and accompanying documents filed with the summary judgment motion. Harkening back to Connecticut's seminal case on the admissibility of computer-generated business records, *American Oil Company v. Valenti*,[25] the Appellate Court hammered at the requirement for supporting testimony from a person "who is familiar with computerized records not only as a user but also as someone with some working acquaintance with the methods by which such records are made," in order to "establish the reliability of the plaintiff's computer system."[26] Finding the plaintiff's affidavit lacking in this critical regard, the court reversed

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20 *Id*. at 55-56.
21 165 Conn. App. 144, 138 A.3d 1064 (2016).
22 *Id*. at 145-47.
23 *Id*. at 150-51.
24 163 Conn. App. 648, 137 A.3d 1 (2016).
25 179 Conn. 349, 426 A.2d 305 (1979).
26 163 Conn. App. at 660-61.

the judgment below.

In *Pelletier Mechanical Services, LLC v. G & W Management, Inc.*,[27] the plaintiff, an HVAC contractor, had an oral agreement with the defendant, a condominium management company, to perform work on an as-needed basis. When the plaintiff brought suit for unpaid work, the defendant claimed its role had been one of agent for the condo association, and sought to deflect liability to that entity. Both the trial court and the Appellate Court rejected that defense, noting that to avoid liability, an agent must adequately disclose not only the fact of the agency, but also the identity of the principal.[28] Here, the defendant did not disclose the identity of the condo association until long after the work was completed, and never protested that the numerous invoices received from the plaintiff should have been directed to the association. The fact that partial payments had been rendered by the condo association did not suffice to put the plaintiff on notice that the defendant management company was serving only as agent for the association.[29]

II. Damages

In *System Pros, Inc. v. Kasica*,[30] the Appellate Court reversed the trial court's award of almost a half million dollars in lost wages to the plaintiff, finding his evidence of damages wholly speculative. Robert Majewicz, the half owner of System Pros, Inc., a consulting firm, claimed to have been squeezed out by the defendant, the other shareholder, and brought suit derivatively and individually on a number of theories. The lion's share of his damages claim was for lost wages, based on the premise that he had been deprived of the opportunity to pursue consulting placements with the company's clientele, insurance companies.

The trial court adopted the plaintiff's theory that but for

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[27] 162 Conn. App. 294, 131 A.3d 1189 (2016).
[28] *Id.* at 305.
[29] *Id.* at 309.
[30] 166 Conn. App. 732, 145 A.3d 241 (2016). The author's law firm represented the defendant-appellant in this appeal.

the defendant's conduct, the plaintiff would have been placed continuously for forty hours per week, every week of the year, at $85.00 per hour, throughout the forty-six months from January 2010 through October 2013.[31] The court relied in part on the plaintiff's trial exhibit number seventy, which listed twenty-one placements of other consultants that System Pros made during the timeframe in question.[32] Net of unemployment benefits and some wages that the plaintiff received during the timeframe at issue, the court awarded the plaintiff $467,786.00 in lost wages.[33]

Applying the familiar principle that damages must be proven with "reasonable certainty," the Appellate Court found "an enormous evidentiary gap between [the defendant's] improper conduct and the $467,786 award for lost wages."[34] The court noted uncontroverted testimony that the competition for every would-be placement was intense; that the plaintiff was not qualified for certain of the positions noted in exhibit number seventy; and that the plaintiff had expressed an unwillingness to work outside Connecticut, which would have disqualified him from certain positions.[35] The court also noted that the plaintiff "did not subpoena or call any witnesses from any of the employers listed on exhibit number seventy to establish his claim for damages. The plaintiff further did not offer any expert testimony thereon."[36] The Appellate Court concluded that the plaintiff "has not met his burden of producing evidence of sufficient quality to permit the fact finder to award damages for lost wages without resort to conjecture or speculation,"[37] and reversed this portion of the trial court's damages award.

In *Adler v. Rosenthal*,[38] the Appellate Court reversed a damages award for lost profits allegedly arising from the

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31 *Id*. at 748.
32 *Id*.
33 *Id*. at 749.
34 *Id*. at 750.
35 *Id*. at 752-54.
36 *Id*. at 752.
37 *Id*. at 757.
38 163 Conn. App. 663, 134 A.3d 717 (2016).

defendant's breach of an agreement to form a law partnership with the plaintiff. At the hearing in damages before the trial court, the plaintiff testified that in the discussions leading up to the agreement, the defendant had assured the plaintiff that he brought in billings of $250,000 per year. The plaintiff used that figure as the starting point for his calculation of lost profits, which the trial court adopted.

The Appellate Court found as a matter of law that this testimony, unsupported by hard evidence such as the defendant's profit and loss statements and tax returns, was insufficient to establish lost profits to the requisite standard of "reasonable certainty." The court reversed the judgment below, and remanded with instructions to vacate the lost profits award, with no re-hearing.

The Appellate Court's decision in *Whitney v. J.M. Scott Associates, Inc.*,[39] illustrates the broad latitude that trial courts have in calculating damages. The plaintiff entered into three agreements (agreements) with defendant Scott Swimming Pools, Inc. (company) and its principal owner, defendant James M. Scott, Jr. (Scott). Pursuant to the agreements, the plaintiff would work with the company for five years, after which Scott would retire and the plaintiff would purchase Scott's stock in the company for $1.27 million, payable with interest over a ten-year period. Near the end of the plaintiff's employment term, the defendants terminated his employment and reneged on the agreements, and the plaintiff brought suit.

Upon trial to the court, the plaintiff sought damages based on the "benefit of the bargain" theory. The plaintiff testified that he planned to own the company for ten years, then sell it for the same price at which he acquired it. He further testified that during those ten years he expected to earn $175,000 in salary and benefits per year, comparable to the $175,003 per year he was receiving when his employment was terminated. He thus reasonably expected to earn $1,750,030 over the ten years, but his actual substitute compensation plus unemployment compensation following his

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[39] 164 Conn. App. 420, 137 A.3d 866 (2016).

termination totaled only $408,970.60. He claimed damages for the difference of $1,341,059.40, and the trial court agreed.[40]

The defendants challenged this damages calculation, arguing that the only proper measure of damages was the difference between the purchase price of the stock and the value of the stock.[41] The Appellate Court disagreed, noting that the trial court has broad discretion in determining the proper measure of damages. Finding that the trial court's approach was factually supported and legally correct, the Appellate Court affirmed this part of the judgment below.[42]

III. Foreclosure

In *Bank of America v. Aubut*,[43] the Appellate Court ruled that "predatory lending" may be raised as a special defense to an action to foreclose a consumer mortgage loan. The defendants alleged that the loan was destined to fail from inception, given that the monthly payments consumed seventy percent of their take-home pay; that the defendants were insolvent at the time of the loan; that the loan proceeds had been used in part to pay $45,000 in credit card debt that they could otherwise have discharged in their subsequent bankruptcy; and that accordingly the loan had eaten into their homestead exemption.[44] Under the rubric of predatory lending, the defendants asserted that the loan should not be foreclosed.

The Appellate Court acknowledged a lack of previous appellate authority in Connecticut for a special defense bearing this title, but found that in substance, it drew on elements of recognized foreclosure defenses such as fraud, unconscionability, unclean hands and equitable estoppel.[45] Focusing on substance over form, the court found the defense viable, and reversed the trial court's summary judg-

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40 *Id*. at 427.
41 *Id*. at 426.
42 *Id*. at 429-30.
43 167 Conn. App. 347, 143 A.3d 638 (2016).
44 *Id*. at 366, n. 3.
45 *Id*. at 378-81.

ment for the lender.

The Appellate Court agreed with the trial court that CUTPA cannot be asserted as a special defense. The court noted that by its express terms, CUTPA "provides a cause of action for its violation, but it does not expressly provide a defense by invalidating, or otherwise rendering unenforceable, agreements that are the product of unfair trade practices."[46]

The Supreme Court's decision in *J.E. Robert Co. v. Signature Properties, LLC*[47] raised an issue about the proper methodology for appraising commercial rental property. For purposes of establishing the plaintiff's deficiency judgment, the plaintiff's appraiser valued the property's "leased fee" interest – by capitalizing the cash flow from the lease that was in place – rather than the fee simple interest. The defendant borrower argued that that methodology was per se improper. Both the trial court and Supreme Court disagreed, at least in a case, such as this one, in which the evidence established that the lease was at market rates.

In *TD Bank, NA v. Doran*,[48] the defendants appealed from a deficiency judgment on the grounds of laches, asserting that the bank had unreasonably delayed prosecuting the case, during which the property significantly devalued. The Appellate Court held that as a matter of law, the defendants' failure to raise a laches defense against the main foreclosure action barred them from raising it for the first time against the bank's deficiency motion.

In *The Neighborhood Association, Inc. v. Limberger*,[49] the state Supreme Court considered whether or not a condominium association had acted lawfully when commencing foreclosure against a unit owner for unpaid common charges. General Statutes Section 47-258m provides that such an action may be commenced only if "the executive board has either voted to commence a foreclosure action

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46 *Id*. at 374.
47 320 Conn. 91, 128 A.3d 471 (2016).
48 162 Conn. App. 460, 131 A.3d 288 (2016).
49 321 Conn. 29, 136 A.3d 581 (2016).

specifically against that unit or has adopted a standard policy that provides for foreclosure against that unit."[50] The issue was whether or not the plaintiff had properly "adopted a standard policy" allowing the foreclosure in question.

The defendant argued that a condo board's "standard policy" regarding foreclosures must be adopted as a "rule" under the procedures of General Statutes Section 47-261b, which requires among other things that all unit owners be provided advance notice of the intended rule, and an opportunity to comment.[51] It was uncontested that the condo board had not followed that procedure, but the board argued that its foreclosure policy was an "internal business operating procedure," not a "rule" that required statutory notice and comment.[52] A majority of the Supreme Court agreed with the defendant, and held that because a statutory prerequisite to foreclosure had not been met, the court lacked subject-matter jurisdiction over the case. Accordingly, the court ordered the case dismissed.[53]

IV. Legal Malpractice

It is universally recognized that in most legal malpractice cases, expert testimony is required to establish the standard of care, but in *Bozelko v. Papastavros,*[54] the Connecticut Supreme Court further noted that "although there will be exceptions in obvious cases, expert testimony also is a general requirement for establishing the element of causation in legal malpractice cases."[55] More particularly, such testimony is needed "to provide the essential nexus between the attorney's error and the plaintiff's damages."[56] In the context of a criminal matter, as in *Bozelko*, expert testimony is needed "for the plaintiff to show that the actions she alleges the defendant should have taken were likely to

50 *Id*. at 36.
51 *Id*.
52 *Id*. at 33.
53 *Id*. at 49. Chief Justice Rogers and Associate Justice Zarella dissented.
54 323 Conn. 275, 147 A.3d 1023 (2016).
55 *Id*. at 284-85.
56 *Id*. at 285.

have led to the plaintiff's acquittal."[57]

The plaintiff in *Bozelko* claimed that she should have been given the opportunity to call as witnesses the jurors who had convicted her at her criminal trial, to question them on how they would have voted if her defense had been presented differently. But the Supreme Court rejected that proposition. "When establishing causation in a legal malpractice action through the case within a case method, 'the objective … is to determine what the result *should have* been (an objective standard) not what the result *would have* been by a particular judge or jury (a subjective standard)."'[58]

In *Straw Pond Associates, LLC v. Fitzpatrick, Mariano & Santos, P.C.*,[59] the Appellate Court underscored the difference between claims against attorneys for malpractice and for breach of fiduciary duty. The plaintiffs sued their former attorneys under both theories. In the count of their complaint for breach of fiduciary duty, the plaintiffs supplemented their allegations of professional negligence with the assertion that the defendants "put their own or other interests ahead of the plaintiffs' [interests] and failed to keep loyalty and fidelity to the plaintiffs' project as paramount."[60] The trial court rendered summary judgment for the defendant attorneys on all claims.

Drawing on previous authority, the Appellate Court noted that "[p]rofessional negligence implicates a duty of care, while breach of fiduciary duty implicates a duty of loyalty and honesty."[61] The court deemed the plaintiffs' supplemental allegation "a conclusion that is insufficient to advise the defendants or the court of the facts on which the plaintiffs intended to rely in proving that the defendants breached their fiduciary duty."[62] Noting that the "facts at issue in the context of summary judgment are those alleged

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[57] *Id*. at 287-88.

[58] *Id*. at 289, quoting 5 R. MALLEN & J. SMITH, LEGAL MALPRACTICE (5th Ed. 2000), § 33.8 at 70.

[59] 167 Conn. App. 691, 145 A.3d 292 (2016).

[60] *Id*. at 729.

[61] *Id*. at 727, citing Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 247 Conn. 48, 56-57, 717 A.2d 724 (1998).

[62] *Id*.

in the pleadings,"[63] and finding the allegations insufficient as a matter of law, the Appellate Court affirmed this part of the judgment below.

V. Remedies and Procedure

In *BTS, USA, Inc. v. Executive Perspectives, LLC*,[64] the Appellate Court noted the difference between commencing a case in good faith and continuing it in good faith, for purposes of a fee award under the Connecticut Uniform Trade Secrets Act, General Statutes Section 35-50 et seq. (CUTSA). The plaintiff sued a former employee and his new employer under a number of theories, including violations of CUTSA. Following a courtside trial, the court entered judgment for the defendants. Furthermore, finding that the plaintiff had pursued its CUTSA claims in bad faith, the trial court ordered the plaintiff to reimburse the defendants for legal fees incurred after approximately the first year of litigation, reasoning that by that point in the case, the plaintiff should have realized those claims had no merit.

In so ruling, the trial court acknowledged that the plaintiff's initial suspicions were sufficient to support a colorable CUTSA claim. However, "not far into the discovery process," it became "abundantly clear" that those claims were groundless.[65] The court found that from that point forward, the plaintiff's maintenance of the case was in bad faith, justifying a fee shift. The Appellate Court affirmed.

In *Connecticut Housing Finance Authority v. Alfaro*,[66] a foreclosure action, the defendant homeowner moved for an award of attorneys' fees, after the plaintiff withdrew the action in the face of the defendant's objection to the plaintiff's summary judgment motion. The defendant's claim for attorney fees was based on General Statutes Section 42-150bb (fee statute), which allows fee-shifting when a consumer "successfully prosecutes or defends" an action based

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[63] *Id*. at 728, citing Larobina v. McDonald, 274 Conn. 394, 401, 876 A.2d 522 (2005).

[64] 166 Conn. App. 474, 142 A.3d 342 (2016).

[65] *Id*. at 502.

[66] 163 Conn. App. 587, 135 A.3d 1256 (2016).

on a contract that contains an attorney fees clause that benefits the commercial party.

The defendant sought to recover under the fee statute on the grounds that, because the plaintiff had withdrawn the case promptly after the defendant had filed his summary judgment opposition (contesting the plaintiff's standing to foreclose), it was apparent that his filing had prompted the withdrawal. Thus, he argued, he in effect had successfully defended the action, entitling him to fee-shifting under the statute.

The trial court denied the motion, citing the "myriad" of possible reasons for the plaintiff filing a withdrawal, and the absence of direct evidence that the defendant's arguments had prompted it. The Appellate Court affirmed, adopting the reasoning of the trial court. The decision is significant in holding open the possibility that a case terminated by withdrawal rather than a judgment could trigger fee-shifting under the fee statute.

In another case involving the fee statute, *Meadowbrook Center, Inc. v. Buchman*,[67] the Appellate Court considered the interplay between the statute, which imposes no deadline to request an award of attorneys' fees, and section 11-21 of the Connecticut Rules of Practice (attorney fee rule), which provides that motions for attorney' fees "shall be filed" within thirty days following the entry of judgment. The fee statute provides that when a consumer is a party to a contract that "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…" The defendant in *Buchman* successfully defended the plaintiff's suit on such a contract, and filed a motion for attorneys' fees, based on the fee statute, thirty-five days after the entry of judgment.[68] The plaintiff opposed the motion, claiming untimeliness under the attorney fee rule, and on that basis the trial court

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[67] 169 Conn. App. 527, 151 A.3d 404 (2016).
[68] *Id.* at 529-30.

denied the motion.[69]

The Appellate Court reversed. The court noted that the word "shall," while mandatory when applied to matters of substance, should be treated as merely directory as applied to matters of "convenience" or when the provision is "designed to secure order, system and dispatch in the proceedings."[70] In the latter instance, the statutory provision "prescribes what shall be done but does not invalidate action upon a failure to comply."[71] Noting that section 1-8 of the Rules of Practice provides for the rules to be "interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice," the Appellate Court remanded the matter to the trial court to exercise its discretion under that standard.[72]

In *Levinson v. Lawrence*,[73] the plaintiff unsuccessfully sued the defendant, his former romantic partner, in connection with payments he had made for her house. He had given her a check for some $61,000 that she used to pay off a mortgage to her ex-husband, and also used his own funds for improvements to the house while the parties jointly lived there. As for the $61,000, the plaintiff claimed a fifty percent interest in the house under the theory of resulting trust, which "arises by operation of law at the time of a conveyance when the purchase money for property is paid by one party and the legal title is taken in the name of another."[74] The determination is a fact-driven one, based on the intent of the parties. The trial court credited the defendant's testimony that there had been no agreement by which the plaintiff would obtain title to the property; it had been mutually understood as a loan to be repaid when the property was sold. The Appellate Court determined that this finding was not clearly erroneous.[75]

As for the improvements, the trial court found that most

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69 *Id*. at 530.
70 *Id*. at 537.
71 *Id*.
72 *Id*. at 535, 540.
73 162 Conn. App. 548, 133 A.3d 468 (2016).
74 *Id*. at 554.
75 *Id*. at 557.

had been made at the plaintiff's initiative, motivated in large part by his desire to share a more comfortable living space with the defendant. The Court thus found that the defendant had not been unjustly enriched, and the Appellate Court affirmed. "As a general rule, for the benefit to be unjust, the defendant must have solicited it... [W]here a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched."[76]

In *Pollansky v. Pollansky*,[77] the Appellate Court discussed the limited res judicata and collateral estoppel effect of judgments in summary process actions. The plaintiff son sued the defendant mother in connection with property that she owned, which she had previously held jointly with her late husband. The son had rendered many services to the property at his father's request, and claimed his father had orally promised to convey the property to him. He sued his mother on theories of breach of contract, adverse possession, unjust enrichment and quantum meruit.

The mother had previously litigated a summary process action against the son. In that case, the son had claimed to occupy the property as a matter of right, pursuant to his late father's alleged promise. The Housing Court judge rejected those arguments, and rendered a judgment of possession for the mother. In the second suit, the mother, citing that decision, moved for summary judgment on the grounds of res judicata and collateral estoppel. The trial court judge granted her motion in full.

The Appellate Court affirmed in part and reversed in part. As for the son's claim for breach of a contract to convey the property to him, the Housing Court judge had specifically considered and rejected that argument, which the son had asserted as a special defense to the mother's demand for possession. Accordingly, the trial court properly found that claim barred by res judicata.[78]

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[76] *Id*. at 559.
[77] 162 Conn. App. 635, 133 A.3d 167 (2016).
[78] *Id*. at 648-49.

As for the son's adverse possession claim, in the summary process case he had claimed to be occupying the property based on his father's previous permission. The Housing Court adopted that as a finding of fact, but also found that after the father's death, the mother had revoked that permission. Because the earlier judicial finding of permitted occupancy was wholly incompatible with the "hostility" element essential to sustain an adverse possession claim, the Appellate Court agreed with the trial judge in the contract case that that claim was barred by collateral estoppel.[79]

But the Appellate Court reversed the trial court's findings that the summary process judgment precluded the son's claims for unjust enrichment and quantum meruit based on the valuable services he had rendered to the property. The court noted that claims for money damages cannot be litigated in summary process actions, and so the Housing Court judgment of possession could not stand as a bar to those claims.[80]

VI. MISCELLANEOUS

In *Geysen v. Securitas Security Services USA Inc.*,[81] the Connecticut Supreme Court addressed several issues arising from the defendant's policy of refusing to pay a sales commission if the sales person's employment terminates before the sold services have been invoiced to the customer. The court ruled that such a policy does not violate General Statutes Section 31-72, which provides a cause of action for employees who have not been paid earned wages. The court described the statute as a remedial one that requires wages to be paid but does not define what those wages are, instead "leav[ing] the timing of accrual to the determination of the wage agreement between the employer and [the] employee."[82]

Under some circumstances, however, nonpayment may

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79 *Id.* at 654-56.
80 *Id.* at 659-60.
81 322 Conn. 385, 142 A.3d 227 (2016).
82 *Id.* at 395.

give rise to a breach of the implied covenant of good faith and fair dealing. Such a claim may accrue "when the termination of an employee was done with the intent to avoid the payment of commissions."[83]

Finally, the court agreed with the defendant employer that the trial court had properly stricken the employee's claim for wrongful termination, which had allegedly been "a pretext to deprive him of the just fruits of his labor."[84] The Supreme Court found that "the parameters of the public policy of this state with regard to the payment of wages is reflected in the wage statutes and that an employee cannot use the nonpayment of wages that have not accrued as the basis for a wrongful discharge claim. We leave it to the legislature to decide if it wishes to expand this public policy to include unearned wages in this context."[85]

The Appellate Court's decision in *Fernwood Realty, LLC v. AeroCision, LLC*[86] features a comprehensive discussion of the distinction between fixtures, which are deemed part of real property and thus owned by the landlord, and trade fixtures, which are deemed personal property owned by the tenant. The defendant, a tenant in the plaintiff's industrial building, bought the assets of a predecessor tenant, and operated a manufacturing business therein. When the defendant later relocated its operation to another facility, among the items that it removed from the building were components of the electrical system, valued at approximately $180,000.00.[87] Those items had not been listed in the asset purchase agreement as either included among, or excluded from, the assets that the defendant acquired from the predecessor tenant.[88]

The electrical components were "specifically adapted to the property for the purpose of manufacturing aircraft engine components," without which the property "became no

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[83] *Id*. at 406.
[84] *Id*. at 409.
[85] *Id*.
[86] 166 Conn. App. 345, 141 A.3d 965 (2016).
[87] *Id*. at 351.
[88] *Id*. at 352.

more than a warehouse as opposed to being an industrial manufacturing building."[89] They had been purchased and installed by a predecessor owner of the real estate.[90]

On the plaintiff's claim for civil theft, the trial court agreed with the plaintiff that the components were fixtures, and rejected the defendant's assertion that they were trade fixtures. The court further rejected the defendant's special defense that it had had a good-faith belief that it owned the components, and awarded the plaintiff treble damages for its claim of civil theft. Applying the "clearly erroneous" standard of review,[91] the Appellate Court affirmed the judgment below.

Tomey Realty Co. v. Bozzuto's, Inc.[92] presented a thorny issue of contract interpretation in the context of a commercial lease amendment and assignment. The plaintiff landlord had entered into the lease of a supermarket property with Southbury Food Center of Connecticut, Inc. (Southbury Food). The lease provided for flat base rent of $216,000.00 per year for four years, followed by a cumulative CPI adjustment in year five. Nine months into year five, the plaintiff and Southbury Food entered into a lease assignment with the defendant, by which the defendant assumed Southbury Food's obligations under the lease.[93]

The assignment document contained a recital that the current base rent – that is, for year five – was $216,000.00, without reference to the CPI adjustment. The assignment also stated, in the body of the document, that Southbury Food was current in its lease obligations. Southbury Food had continued to pay rent based on a flat $216,000.00 during year five, based on a separate letter agreement with the plaintiff providing a temporary rent concession.[94]

In a separate lease amendment executed contemporaneously with the lease assignment, the plaintiff and defendant

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89 *Id*. at 362.
90 *Id*. at 353.
91 *Id*. at 355, 356, 368.
92 168 Conn. App. 637, 147 A.3d 166 (2016).
93 *Id*. at 640.
94 *Id*. at 651, n. 9.

agreed that rents starting in year six would increase by 2.5% per year, using the rent for year five as the baseline. The lease amendment further provided that the original lease otherwise remained in full force and effect.[95] Based on the recital in the lease assignment that rent in year five was $216,000.00 without adjustment, the defendant argued that that was the proper baseline figure for calculating rents under the lease amendment. The trial court agreed, and entered summary judgment for the defendant.

The Appellate Court disagreed, finding a genuine issue of material fact as to the parties' intent, making summary judgment inappropriate. The court noted a holding from the United State Court of Appeals for the Second Circuit that "although a statement in a whereas clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document."[96]

In *Tyler v. Tatoian*,[97] the Appellate Court examined the scope of the litigation privilege as it applies to a witness's testimony. The plaintiffs, beneficiaries under a trust, brought suit against the defendant, the trustee of the trust, for allegedly false statements made under oath in a previous action. In the first action, the plaintiffs sued the defendant for failure to adequately diversify the corpus of the trust. In a deposition in that case, the defendant claimed he had relied on the advice of an investment advisor, but then at trial he testified to the opposite.[98] Following a verdict for the defendant in that first action, the plaintiffs brought a new action against the defendant based on his differing testimony, alleging fraud and unfair trade practice.

The defendant moved to dismiss the action, claiming that it was absolutely barred based on the litigation privilege. The trial court agreed, granting the motion, and the Appellate Court affirmed. The court took pains to note that

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[95] *Id*. at 641.

[96] *Id*. at 653, n. 10, quoting Aramony v. United Way of America, 254 F.3d 403, 413 (2d Cir. 2001).

[97] 164 Conn. App. 82, 137 A.3d 801 (2016).

[98] *Id*. at 84-86.

the harshness of the litigation privilege is alleviated in certain cases by a variety of other possible remedies, including the ability to open a judgment procured by fraud, perjury charges, contempt citations, and actions for vexatious litigation or abuse of process.[99]

[99] *Id*. at 92-93.