C06 - Construction Law Year in Review (2024CLC-C06)

Monday, June 10, 2024

2:00 p.m. to 3:30 p.m.

Connecticut Convention Center

Hartford, CT

CT Bar Institute, Inc.

CT: 1.5 CLE Credits (General)
NY: 1.5 CLE Credits (AOP)

No representation or warranty is made as to the accuracy of these materials. Readers should check primary sources where appropriate and use the traditional legal research techniques to make sure that the information has not been affected or changed by recent developments.

Table of Contents

Lawyers' Principles of Professionalism **3**

Faculty Biographies **6**

Agenda **8**

Construction Law Year in Review Presentation Slides **9**

2023 Case Law Summary **20**

Approved by the House of Delegates October 19, 2020

LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

Faculty Biographies

Larry E. Grijalva

Larry Grijalva's commercial and legal construction experience provides a unique perspective in his representation of construction industry companies, developers, and project owners. His background at a family construction firm specializing in framing and carpentry built the foundation of his project management skills and meticulousness, which allows him to understand all facets of the construction and development process. At Robinson+Cole, he provides legal counsel on construction disputes, in addition to reviewing and drafting construction contracts.

Prior to joining Robinson+Cole, Larry managed construction litigation matters, defended large and medium manufacturing, pharmaceutical, and medical device clients in product liability, class action, mass tort, and other complex litigation in state and federal courts. Before that, Larry served as an assistant corporation counsel for the New York City Law Department, Tort Division, where he defended municipal employees in state court tort matters from inception to resolution.

At the University of Connecticut's School of Law, Larry served as the Vice President of the Latino Law Students' Association, and on the Connecticut Moot Court Board. He also interned for the university's tax clinic, representing low-income taxpayers in federal tax disputes before the Internal Revenue Service and the United States Tax Court.

Outside of the office, Larry is an avid wristwatch collector and car enthusiast. He is bilingual, speaking English and Spanish fluently.

Beth N. Mercier

Beth Mercier has practiced law with Michelson, Kane, P.C., for twenty-one years. She practices in the areas of Construction & Surety, Personal Injury, Workers Compensation, and Civil Litigation.

Beth provides strategic counsel and skilled advocacy on issues such as construction claims and risk minimization strategies. She takes pride in her proven ability to negotiate fair and acceptable settlements for clients, yet understands the importance of litigation in resolving certain disputes.

Beth is admitted to the state and federal courts of Connecticut.

Joseph D. Szerejko

Joseph D. Szerejko, a Murtha Cullina associate, is a litigator who represents municipalities, government officials, corporations and individuals in matters ranging from real estate, land use and zoning to property tax and foreclosure matters.

Joe regularly advocates on behalf of clients in state and local administrative proceedings and judicial proceedings, including appeals filed with the Connecticut Appellate Court and

Connecticut Supreme Court. He often represents municipalities and government officials before the Connecticut Freedom of Information (FOI) Commission; municipal boards of assessment appeals; municipal planning and zoning commissions; and other administrative agencies hearing Uniform Administrative Procedure Act (UAPA) cases. Representing both defendants and plaintiffs, he advises retail and skilled nursing home clients in landlord-tenant, collection and other disputes. In addition to representing various corporate entities and individuals in general litigation involving disputes over contractual and real property rights, Joe regularly represents clients in Connecticut property tax disputes.

In 2022, Joe was appointed to a one-year term as the independent consumer advocate for The Metropolitan District of Hartford, Connecticut (MDC), a nonprofit municipal corporation responsible for the region's water and sewage services. In this role he represents MDC consumers' interests concerning water quality, water supply and wastewater service quality.

Sought-after for both his legal and industry insight, Joe also shares his knowledge with government officials and community leaders, and he has both presented at professional organization events and written articles about topics of interest in his practice areas.

In his spare time, Joe enjoys skiing, golf, hiking, cooking and gardening.

Construction Law Year in Review
(2024CLC-C06)
2024 Connecticut Legal Conference
Connecticut Convention Center
June 10, 2024
2:00 p.m. – 3:30 p.m.

Agenda

Presenters:
Larry E. Grijalva, Robinson + Cole LLP, Hartford
Beth N. Mercier, Michelson Kane PC, Hartford
Joseph D. Szerejko, Murtha Cullina LLP, Hartford

2:00 p.m. – 2:30 p.m.:	Mechanic's Leins – Beth Mercier
2:30 p.m. – 3:00 p.m.:	Payment Bonds – Larry E. Grijalva
3:00 p.m. – 3:30 p.m.:	Legislative Review - Joseph D. Szerejko

Construction Law Year in Review

June 10, 2024

Larry E. Grijalva, Robinson + Cole LLP, Hartford

Beth N. Mercier, Michelson Kane Royster & Barger PC, Hartford

Joseph D. Szerejko, Murtha Cullina LLP, Hartford

CONNECTICUT LEGAL CONFERENCE

Connecticut Bar Association

Mechanic's Leins

Beth Mercier



Connecticut Bar Association

Payment Bonds

Larry E. Grijalva



Connecticut Bar Association

2024 Connecticut Legal Conference

C06 (Construction Law Year in Review (2024CLC-C06) – Legislative Update

Joseph Szerejko (Murtha Cullina LLP)

Disclaimer

- This presentation contains educational material that provides only a general overview. This presentation and associated materials do not constitute legal advice. Please contact us if you would like specific legal advice.

Select Public Acts

- **P.A. 23-129 –** *AAC Liability for False and Fraudulent Claims*
- **P.A. 23-185 –** *AAC Certain Producers of Concrete Aggregate*
- **P.A. 23-162** – *AAC Stop Work Orders*
- **P.A. 23-114 –** *AAC Online Building Permit Applications*
- **P.A. 23-175 –** *An Act Amending Codification of Prevailing Wage Contract Rates*
- **P.A. 23-91 –** *AAC Oversight of and Requirements for Certain Contracts of the CT Port Authority*
- **P.A. 23-137 –** *AAC Resources and Support Services for Persons with an Intellectual or Developmental Disability* (**Sec. 22:** *Modernizing and Maintaining Bus Stops and Shelters*)

Notable Sections in Budget Implementer

P.A. 23-204—HB 6941 (*Emergency Certification)*

**AAC Concerning the State Budget for the Biennium Ending June 30, 2025, and Making Appropriations Therefor, and Provisions Related to Revenue and Other Items Implementing the State Budget*

- **Section 68** (Set-Aside Program Goal Report)
- **Section 387** (Task Force on Building Inspection Timeliness)
- **Section 427** (Nondiscrimination Affirmation)
- **Section 430** (UCONN Capital Projects)
- **Sections 431, 432** (UCONN Contractor Prequalification Requirements)
- **Sections 433-437** (DAS Contractor Prequalification and Related Thresholds)

CT's New False Claims Act …. *More Teeth*

PA 23-129 – HB 6826 (**eff. Oct. 1, 2023**)

Government Administration and Elections Committee, Appropriations Committee



- CT's FCA (CGS §§ 4-274 – 4-289) no longer just applicable to state-administered health & human services programs → ***now applies to nearly all state contractors***

- Violators still liable for:
  1. Civil penalty that is periodically adjusted for inflation;
  2. Treble damages; and
  3. Prosecution costs (*sans* investigation costs)

- Liability is joint and several for multiple actors subjected to claims

Other Notable Acts, *in a Nutshell…*

- **P.A. 23-185 – *AAC Certain Producers of Concrete Aggregate*:** Establishes material testing and reporting requirements for entities that process coarse aggregate intended to be mixed with other component ingredients to create concrete for residential or commercial concrete foundations. (eff. on passage, includes 7/1/24 deadlines)
- **P.A. 23-162 – *AAC Stop Work Orders:*** Expands labor commissioner's authority to issue stop work orders to include instances when a contractor or sub knowingly or willfully pays an EE less than the prevailing wage required on a public works project. Increases civil penalty for violating a stop work order from $1k to $5k for each day an order is violated. (eff. 10/1/23)
- **P.A. 23-114 – *AAC Online Building Permit Applications:*** Authorizes municipalities to accept electronically submitted building permit applications from contractors, aligning the law's building permit signature requirements with existing practice; *see* Conn. Uniform Electronic Transactions Act (codified at CGS §§ 1-266 to 1-286) (eff. 10/1/23)
- **P.A. 23-175 – *An Act Amending Codification of Prevailing Wage Contract Rates:*** Modifies how residential construction rates are set under law requiring prevailing wages to be paid on public works projects meeting prevailing wage cost thresholds. Generally requires labor commissioner to apply rates set in CBAs or other agreements covering same work in same trade/occupations in locality where work is being done. (eff. 7/1/23)
- **P.A. 23-91 – *AAC Oversight of and Requirements for Certain Contracts of the CT Port Authority:*** Prohibits construction managers on quasi-public agency projects from self-performing work and prohibits, on or after 7/1/23, quasi-public agencies from entering into contracts or agreements for success fees (eff. 7/1/23 for provisions on CPA construction projects and prohibiting success fees; 10/1/23 for provisions on goods and services contracts and State Contracting Standards Board's authority)
- **P.A. 23-137 (Sec. 22) – *Modernizing and Maintaining Bus Stops and Shelters:*** This public act generally evaluates and expands support and services for people with intellectual or developmental disabilities (IDD). Section 22 of the bill requires DOT and each transit district to jointly develop plans to modernize and maintain Connecticut's bus stops and shelters and for new construction of them to be done according to these plans. (eff. on passage, 7/1/24 is when stops and shelters must meet requirements and is also deadline for DOT's submission of plan to Transportation Committee)

Other Notable Acts, *in a Nutshell… continued*

- ***P.A. 23-204, Section 68*** ***(Set-Aside Program Goal Report):*** Delays, from 8/30 to 9/30, annual deadline by which state agencies and political subdivisions (other than municipalities) must submit to DAS their SBME contracting set-aside goals for current fiscal year. (eff. 7/1/24)
- ***P.A. 23-204, Section 387*** ***(Task Force on Building Inspection Timeliness):*** Establishes 7-member task force to study timeliness of building inspections required for work performed under building permits. At minimum, the study must: (1) review average time it takes to complete inspections once work is ready for them; (2) examine frequency with which scheduled inspections are cancelled/rescheduling, and if possible, which party did so; (3) determine whether inspectors are muni. Ees or ICs, and whether there are any regional arrangements; (4) recommend initiatives to incentivize or attract additional inspectors to CT and increase timeliness; and (5) recommend statutory changes to implement initiatives. (initial appointments required by 7/12/23, report due by 1/1/24)
- ***P.A. 23-204, Section 427*** ***(Nondiscrimination Affirmation):*** Allows state contractors to affirm their understanding of the law's nondiscrimination requirements with respect to sexual orientation by signing the contract. Prior law required affirmative response to specific question in online bidd/RFP response or initialing affirmation provision in contract. (eff. upon passage)
- ***P.A. 23-204, Section 430*** ***(UCONN Capital Projects):*** Allows, for UCONN CMR projects that involve renovating existing buildings/facilities, (1) certain work to begin before projects GMP is set and (2) a separate GMP to be set for each phase of multi-phase project. Aligns UCONN's CMR requirements with those for DAS CMR projects (CGS § 4b-103) (eff. upon passage)
- ***P.A. 23-204, Sections 431, 432*** ***(UCONN Contractor Prequalification Requirements):*** Generally increases threshold requiring separate contractor prequalification by UCONN to $1M for capital projects; eliminates requirement that university separately prequalify contractors for each project and instead allows UCONN to prequalify contractors for 1 year and renew prequalification for 2 years. (eff. 10/1/23)
- ***P.A. 23-204, Sections 433-437*** ***(DAS Contractor Prequalification and Related Thresholds):*** Increases, from $500k to $1M, several thresholds relating to DAS contractor prequalification; requires contractors and substantial subcontractors to include specified information in their bids for DAS contracts of more than $500k but less than $1M; requires DAS to hold annual training on state contracting requirements. (eff. 10/1/23)

QUESTIONS



CONNECTICUT BAR ASSOCIATION

CONSTRUCTION LAW SECTION

2023 CONSTRUCTION CASE LAW SUMMARY & LEGISLATIVE REVIEW

Paul R. Fitzgerald, Esq.
Executive Editor

INTRODUCTION

The 2023 Construction Case Law Summary & Legislative Review was prepared by members of the Construction Law Section of the Connecticut Bar Association. Its purpose is to provide the practitioner with a comprehensive review of cases and legislation for the year 2023 that affect the practice of construction law in Connecticut.

This year's review was edited by Paul R. Fitzgerald of Michelson, Kane, P.C. The individual sections were authored by the following:

I. **Bids** – Beth Mercier of Michelson, Kane, P.C.

II. **Arbitration** – Justin Garcia of Garcia & Milas, P.C.

III. **Contract Interpretation** – Jonathan Friedler of McElroy, Deutsch, Mulvaney & Carpenter, LLP

IV. **Design Professionals** – Scarlett Lara-Alcantara of Shipman & Goodwin LLP

V. **Bonds** –Larry Grijalva of Robinson & Cole

VI. **Damages** -Thomas Lambert and Liana Feinn of Pullman & Comley, LLC

VII. **Home Improvement and New Home Contracts** - Michael J. Barnaby of Law Offices of Michael J. Barnaby, LLC

VIII. **CUTPA** – Chelsea McCallum of Shipman & Goodwin LLP

IX. **Statutes of Limitation** – Anita C. Di Gioia of Di Gioia Berger, LLC

X. **Legislation** - Joseph Szerejko of Murtha Cullina LLP

XI. **Mechanic's Liens** – Beth Mercier of Michelson, Kane, P.C.

TABLE OF CONTENTS

Page

I. BIDS

Civic Mind, LLC v City of Hartford,
No. X03-HHD-CV-22-6151713S, 2023 WL 3317329 (Conn. Super. May 4, 2023) 1

II. ARBITRATION

Fraser Lane Assocs., LLC v. Chip Fund 7, LLC, 221 Conn.App. 451 (2023) 3

Ahmed v. Oak Mgmt. Corp., 348 Conn. 153 (2023) 4

III. CONTRACT INTERPRETATION

Centerplan Constr. Co. LLC v. City of Hartford,
No. X07-CV-16-6069748-S, 2023 WL 6121116 (Conn.Super. Sep. 11, 2023) 5

A. Pappajohn Co. v. Mende,
No. X08-FST-CV-17-6032424, 2023, WL 5699426 (Conn.Super. Aug. 31, 2023) 7

Caravella v. Hopmeadow Assoc., LLC,
No. FST-CV-216049688-S, 2023 WL 8740010 (Conn.Super. Dec. 12, 2023) 8

Ridge Rd. Dev. Grp., LLC v. Town of Wethersfield,
No. HHB-CV-21-6066476-S, 2023 WL 2133432 (Conn.Super. Feb. 14, 2023) 9

Crescimano v. CSS Morello, Inc.,
No. MMX-CV-19-6025265-S, 2023 WL 2769867 (Conn.Super. Mar. 29, 2023) 10

J&S Mech., LLC v. Morston,
No. CV20-6105310-S, 2023 WL 5547196 (Conn.Super. Aug. 25, 2023)..... 12

Badalucco v. MAC-State Square, LLC,
No. HHD-CV-21-6136825-S, 2023 WL 7148003 (Conn.Super. Oct. 23, 2023) 13

AEGCM, LLC v. Am. Fin. Res., Inc.,
No. HHD-CV-216137934S, 2023 WL 3193966 (Conn.Super. Apr. 26, 2023)..... 14

Barbara v. Colonial Sur. Co., 221 Conn.App. 337 (2023)..... 16

IV. DESIGN PROFESSIONALS

Hockenberry v. Wapping Cemetery Ass'n., Inc.,
No. HHD-CV-20-6127670-S, 2023 WL 8432034 (Conn.Super. Nov. 30, 2023) 18

Vill. At Black Rock Condo. Assn., Inc. v. DCBuilds LLC,
No. FBT-CV-21-6106152-S, 2023 WL 2769700 (Conn.Super. Mar. 27, 2023)..... 19

V. BONDS

Barbara v. Colonial Surety Company, 221 Conn.App. 337 (2023)..... 20

Autobuilders General Contracting Services, Inc. v. NEWS, LLC,
No. HHD-CV-18-6100213-S, 2023 WL 1794216 (Conn.Super. Jan. 31, 2023)..... 23

Blakeslee Arpaia Chapman, Inc. v. Kiewit Infrastructure Co.,
No. KNL-CV22-6059097S, 2023 WL 2662022 (Conn.Super. Mar. 24, 2023)..... 24

Centerplan Constr. Co. LLC v. City of Hartford,
No. X07-CV-16-6069748-S, 2023 WL 6121116 (Conn.Super. Sep. 11, 2023)..... 25

VI. DAMAGES

Fraser Lane Assocs., LLC v. Chip Fund 7, LLC, 221 Conn. App. 451 (2023)..... 26

VII. HOME IMPROVEMENT ACT

HM Constr. & Painting, LLC v. 32 Wilmot Place, LLC,
222 Conn.App. 261 (2023)..... 30

Hero v. Crown Builders, LLC, No.FST-CV-22-6056978-S, 2023 WL 3595629
(Conn.Super. May 16, 2023)..... 32

VIII. CUTPA

Country Landscaping, LLC v. DiMauro,
No. MMX-CV-20-6029480-S, 2023 WL 8230378 (Conn.Super. Nov. 21, 2023)..... 33

Garrido v. Salinas, No. FST-CV-205023304-S, 2023 WL 6996420
(Conn.Super. Oct. 20, 2023) 34

Silva v. Betolatti,No. DBD-CV-22-6043014-S, 2023 WL 6307319
(Conn.Super. Sept. 18, 2023)..... 35

Korytoski v. Michael Ricci & Ricci's, LLC,
No. HHB-CV-21-6068609, 2023 WL 3840431 (Conn.Super. June 1, 2023) and
Korytoski v. Michael Ricci & Ricci's, LLC,
No. HHB-CV-21-6068609, 2023 WL 5696970 (Conn. Super. Ct. Aug. 28, 2023) 36

Coomes v. Langrock, No. UWY-CV21-6062515-S, 2023 WL 5363784
(Conn.Super. Aug. 16, 2023) 37

HM Constr. & Painting, LLC v. McEnery, No. DBD-CV-21-6039856-S, 2023 WL
4882643 (Conn.Super. July 26, 2023) 37

Titan Painting, LLC v. Klimm, No. DBD-CV-21-6039988-S, 2023 WL 4574533
(Conn.Super. July 11, 2023) 38

Chen v. Chen, No. FST-CV 18-6036769-S, 2023 WL 3597448
(Conn.Super. May 17, 2023)..... 39

Materas v. Parker, No. KNL-CV21-6049644S, 2023 WL 3477078
(Conn.Super. May 9, 2023)..... 40

Coastal Luxury Homes, LLC v. Concrete Superstructures, Inc.,
No. FST-CV-226057139-S, 2023 WL 2134431 (Conn.Super. Feb. 17, 2023) 41

Advanced Window Sys., LLC v. Turnquist, No. KNL-CV22-6054976S, 2023 WL
2134414 (Conn.Super. Feb. 15, 2023) 41

IX. STATUTES OF LIMITATION

Hockenberry v. Wapping Cemetery Ass'n, No. HHD-CV-20-6127670-S, 2023 WL
8432034 (Conn.Super. Nov. 30, 2023) 42

Village at Black Rock Condominium Ass'n v. DCBuilds, LLC,
No. FBT-CV-21-6106152-S, 2023 WL 2769700 (Conn.Super. March 27, 2023)..... 45

X. 2023 LEGISLATION

House Bill 6826 [Public Act (P.A.) 23-129]:
An Act Concerning (AAC) Liability for False and Fraudulent Claims 46

House Bill 6798 [P.A. 23-185]: AAC Certain Producers of Concrete Aggregate..... 48

Senate Bill 1035 [P.A. 23-162]: AAC Stop Work Orders 49

Substitute Senate Bill 1123 [P.A. 23-175]:
An Act Amending Codification of Prevailing Wage Contract Rates 50

Substitute House Bill 6903 [P.A. 23-91]:
AAC Oversight of and Requirements for
Certain Contracts of the Connecticut Port Authority 50

Substitute House Bill 5001 [P.A. 23-137] (Select Section):
AAC Resources and
Support Services for Persons with an Intellectual or Developmental Disability 51

House Bill 6941 [P.A. 23-204] (*Select Sections*):
AAC The State Budget for the Biennium Ending June 30, 2025, and Making Appropriations Therefor, and Provisions Related to Revenue and Other Items Implementing the State Budget. 52

House Bill 6942 [P.A. 23-205] (Select Sections):
An Act Authorizing and Adjusting Bonds of The State and Concerning Certain Grant and Financing Programs, State Construction Related Thresholds, School Construction Projects, The Failure to File for Certain Grand List Exemptions, The Validation of Certain Actions Taken by Certain Municipalities, Capital City Projects, Certain Consumer Agreements, Certain Modifications to Municipal Charters and Petitions for Certain Town Referenda, Elections Administration and Campaign Finance, Certain Cases Before The Commission on Human Rights And Opportunities and Other Items Implementing The State Budget 58

Substitute House Bill 5317 [P.A. 23-114]:
AAC Online Building Permit Applications 61

XI. MECHANIC'S LIENS

Macre v. East Haven Builders Supply-US LBM, LLC, No. NNH-CV-19-6096339, 2023 WL 196044 (Conn.Super. Jan 13, 2023). 62

Huribal v. Tunali Properties, LLC, No. AAN-CV-22-6048858, 2023 WL 5031025 (Conn.Super. Jul 26, 2023). 64

HM Construction & Painting, LLC v. 203 CMO Zone Fund, LLC, No. DBD-CV-23-6045208-S, 2023 WL 5031044 (Conn.Super. Aug. 3, 2023). 66

One Evergreen Properties, LLC. V. New England Masonry & Roofing Company, No. CV-22-6119795-S, 2023 WL 5216822 (Conn.Super. Aug. 8, 2023). 67

Pittu v. T&J Custom Woodworking, LLC, No. CV-22-6118478-S,
2023 WL 7147529 (Conn.Super. Oct. 24, 2023). 68

I. BIDS

Civic Mind, LLC v City of Hartford, No. X03-HHD-CV-22-6151713S, 2023 WL 3317329 (Conn. Super. May 4, 2023)

[Trial court held that plaintiff lacked standing to seek declaratory and injunctive relief because the RFP was not governed by state or local competitive bidding laws]

The plaintiff, Civic Mind, LLC, brought a 56 count complaint against multiple defendants including the City of Hartford and the Capital Region Development Authority ("CRDA") alleging a violation of state and municipal bidding requirements arising out of a request for proposal (RFP) issued by CRDA for the redevelopment and operation of Dillon Stadium in Hartford. The RFP sought submissions by persons "interested in using, redeveloping and operating Dillon Stadium." The plaintiff claimed that the CRDA and Hartford had obligations to follow either the competitive bidding requirements in Conn. Gen. Stat. § 4b-91 or the bidding requirements of the Hartford Code. The plaintiff alleged that the entire RFP process was fraudulent and intended to disguise favoritism in awarding the contract to Hartford Sports Group LLC ("HSG"). The defendants moved to dismiss for lack of subject matter jurisdiction, arguing the plaintiff lacked standing because the RFP was not subject to either of the competitive bidding laws and because the RFP did not result in an award of a contract.

The court found that the RFP's terms provided that the issuance of the RFP did not obligate CRDA or Hartford to award any contract and that the RFP even reserved the right to use the respondents' submissions as a basis for negotiation with other respondents and non-respondents on other terms. Further, the court noted that it was undisputed that Hartford and CRDA decided to go in a different direction than the RFP and that the CRDA entered into a license agreement with HSG and "essentially abandoned" the RFP. The court found that the license agreement was not a contract to redevelop and operate Dillon Stadium and that the license agreement was not governed

by Conn. Gen. Stat. § 4b-91 because it did not involve the "construction, reconstruction, alteration, remodeling repair or demolition" of Dillon Stadium. Further, the court found that Hartford's procurement ordinances had no applicability. Hartford Code § 2-537 (H) defines "Contract" in pertinent part as "a written arrangement between the City and other competent parties to perform or not to perform specific work...." Here the RFP sought proposals from respondents to establish the scope of work and how it could be financed and neither it nor the license agreement specified any public work to be performed.

Based on the foregoing, the court held that the RFP and the HSG license agreement were not subject to either state or local bidding laws. Further, the plaintiff cited no authority establishing a right to challenge the award of a government contract that was not subject to competitive bidding based on alleged fraud or favoritism. In the absence of such authority the court held that the plaintiff lacked standing to assert its claims for declaratory and injunctive relief and granted the defendants motion to dismiss. The court reiterated that, "[A]n unsuccessful bidder to a municipal contract has no standing to assert a cause of action for money damages for failure of the municipality to follow its competitive bidding laws, regardless of whether the plaintiff alleges fraud, corruption or favoritism." Lawrence Brunoli, Inc. *v.* Town of Branford, 247 Conn. 407, 411, 722 A.2d 271 (1999), and dismissed plaintiff's tort claims for money damages based on the "sham" RFP.

II. ARBITRATION

Fraser Lane Assocs., LLC v. Chip Fund 7, LLC, 221 Conn.App. 451 (2023)

[Defendant was not entitled to an evidentiary hearing before trial court to determine whether liquidated damages were a penalty, where defendant failed to provide a transcript of underlying arbitration]

In this case, the parties brought competing motions to vacate and affirm an arbitration award. The superior court affirmed the award finding that the arbitrator acted within the scope of his authority and that the defendant was not entitled to an evidentiary hearing to determine whether liquidated damages were a penalty.

Challenges to an arbitrator's authority are limited to a comparison of the award to the submission and additional challenge exists under Conn. Gen. Stat. § 52-418(a)(4) when the award rendered is claimed to be in contravention of public policy.

The Appellate Court conducted a review of the trial court's decision based on the applicable record. As part of the analysis, the Appellate Court determined the validity of the liquidated damages provision. The defendant argued it was entitled to an evidentiary hearing to determine if the liquidated damages equated to a penalty. The defendant also attempted to assert that the trial court erred as demonstrated by witness testimony developed during the arbitration. To the defendant's detriment, the defendant neglected to have the proceedings transcribed and the Appellate Court agreed that the trial court had no obligation to allow an evidentiary hearing. In fact, the Appellate Court viewed an evidentiary hearing as a second bite at the apple. The defendant's failure to provide a sufficient record in the form of a transcript of the arbitration served as a determinative factor.

While the defendant appropriately challenged the decision of the arbitrator as a potential violation of public policy, the defendant failed to meet its burden and provide a sufficient evidentiary basis for the trial court and Appellate Court to review additional material.

Ahmed v. Oak Mgmt. Corp., 348 Conn. 153 (2023)

[Arbitrator did not exceed the scope of his authority in rendering a decision without participation of the respondent]

Ahmed v. Oak Mgmt. Corp. presented the Connecticut Supreme Court with the application of the fugitive disentitlement doctrine to arbitration proceedings governed by an employment agreement. The claimant/employer brought claims against employee/respondent for damages from fraudulent financial activity. The arbitrator awarded claimant approximately $57,000,000. Respondent sought to vacate the award and claimant sought to confirm the award. The trial court ruled in favor of the claimant. Upon review, the Connecticut Supreme Court affirmed the decision by the trial court.

At issue was whether the arbitrator exceeded the scope of his authority in rendering a decision without participation of the respondent. The Court determined the arbitrator did not exceed his authority in violation of Conn. Gen. Stat. § 52-418. The arbitrator did not disregard the contractual language and dispense his own brand of industrial justice. Instead, the arbitrator confronted a situation not expressly contemplated by the parties, made his own interpretation of the agreement, and reached a conclusion. Respondent was not denied the ability to participate in the arbitration. Respondent did not indicate what evidence it would have submitted but for application of the fugitive disentitlement doctrine. Respondent provided arbitrator with exhibits appended to his motions that the arbitrator considered and deemed legally insufficient.

The fact the fugitive disentitlement doctrine was not contemplated by the parties to the employment agreement was not fatal to the arbitration proceedings. The arbitrator had the

authority to interpret the contract. Simply because the remedy was not provided did not mean the remedy was barred. Rather AAA Rule R-47 permits relief of remedies not expressly contemplated. Even if the arbitrator misapplied the fugitive disentitlement doctrine as a matter of law, vacatur can only be based on manifest disregard for the law and not merely legal error. Arbitrators have broad discretion to issue orders, well beyond the remedies contemplated by the parties.

III. CONTRACT INTERPRETATION

Centerplan Constr. Co. LLC v. City of Hartford, No. X07-CV-16-6069748-S, 2023 WL 6121116 (Conn.Super. Sep. 11, 2023)

[Contractor had standing to sue City, notwithstanding contractor's assignment of claim to its bonding surety]

Plaintiff Centerplan Construction Company ("Centerplan") was hired to construct a ballpark for Defendant City of Hartford. Plaintiff's bonding surety, Arch Insurance ("Arch") issued performance and payment bonds for the project. As a condition of issuing the bonds, Arch required Centerplan and various other indemnitors to sign a General Indemnity Agreement ("GIA"), which provided that upon the execution of the GIA, but enforceable only in the event of a default under the bonded contract, Centerplan assigned all of its rights "under all Bonded Contract(s)" and "all claims and causes of action against any parties" to Arch. Under the GIA a "default" included a declaration of default of the bonded contract or Centerplan's failure to honor any obligation under the GIA.

The City terminated Centerplan in 2016 and called upon Arch to perform its obligations under the bonds. Arch paid certain amounts to Centerplan's subcontractors and entered into a Takeover Agreement to finish the project. In the Takeover Agreement, Arch reserved all of Centerplan's rights under the bonded contract and all claims that could be asserted by any party in a dispute related to the bonded project. This included "Claims by [Centerplan] for recover from

the City of any sums paid by the Surety pursuant to this Takeover Agreement…" Thereafter, Arch secured a judgment in the US District Court against Centerplan and the other indemnitors under the GIA for amounts it paid to complete the project. At a hearing on Arch's application for prejudgment remedy, Arch's vice president testified that Arch negotiated the reservation of rights in the Takeover Agreement because it wanted to make sure Centerplan preserved its day in court and that it did not settle Centerplan's claims pursuant to the GIA because Centerplan had contested what the City was done and was pursuing those claims against the City in the instant litigation. The City filed a Motion to Dismiss arguing that the assignment provision of the GIA was triggered when the City declared Centerplan to be in default of the construction contract, and therefore Centerplan lacked standing for its claims against the City. Centerplan argued that the plain language of the assignment indicated that the assignment was merely enforceable at Arch's election, but Arch did not elect to enforce it. Centerplan also argued that it had standing because, as an assignor of claims for collateral security, it retained a colorable claim of direct injury.

The Court observed that "[a]n assignment is a contract between the assignor and the assignee and is interpreted or construed according to rules of contract construction." Under those principles, the contract must be construed to give effect to the parties' intent. The Court determined that the clear language of the assignment is that, as of the date of the GIA, Arch received an assignment subject to the condition precedent of a default. The assignment thus became effective upon the default of Centerplan. "The GIA cannot be read… that the assignment is void or invalid unless enforced."

With respect to Centerplan's second argument, that it was an assignor of claims for security and thus retained a colorable claim of direct injury, the Court agreed. The Court determined that the assignment, while absolute in its terms when read alone, is clearly one provided as collateral

security to ensure that Centerplan acquitted itself of its obligation to indemnify Arch from any loss it sustained from performing under the bonds. Application of the doctrine that an assignment for purposes of collateral security does not extinguish all rights possessed by the assignor in the context of surety/ principal indemnity agreements in construction contracts was warranted by the sweeping rights afforded a surety under similar GIA's. The Court further found that the present action by Centerplan against the City was authorized by Arch. The Court therefore denied the City's Motion to Dismiss.

A. Pappajohn Co. v. Mende, No. X08-FST-CV-17-6032424, 2023 WL 5699426 (Conn.Super. Aug. 31, 2023)

[General contractor's indemnification claim against subcontractor was not barred as a result of general contractor's failure to provide subcontractor with notice and opportunity to cure under the subcontract's termination clause, where there was no evidence that the subcontract was terminated.]

Plaintiff general contractor APC brought a third-party complaint against its subcontractor GSE seeking contractual indemnification for allegedly defective work. Plaintiff also claimed that GSE breached its duty to defend APC and obtain insurance. GSE moved for summary judgment, claiming its subcontract obligated APC to provide notice and an opportunity to cure any alleged defects before APC could make a claim. GSE pointed to the "Termination" provisions under Article 7.1 of the subcontract, which provided that "If in the opinion of the Contractor, the Subcontractor at any time (i) refuses or fails to provide sufficient or properly skilled workmen or materials of the proper quality, (ii) fails in any respect to prosecute the Work according to the Master Schedule of Work and updates thereto, (iii) by any action or inaction, causes the stoppage, delay of, or interference with the Work …, or (iv) fails to comply with the provisions of the Subcontract of the Contract Documents . . . then after providing two (2) days' written notice, the Contractor may (unless the condition(s) specified in such notice are cured by the Subcontractor

within those two (2) days) take such steps as are necessary to have the conditions cured, and then hold the Subcontractor liable for the costs of same or terminate the Subcontract, in whole or in part, for default. . . ." There was no evidence that the subcontract had ever been terminated. With respect to APC's claim that GSE breached its duty to defend APC and obtain insurance, GSE also claimed that it was entitled to notice and an opportunity to cure.

The court held that the provisions of Article 7 on which GSE relied did not bar APC's indemnification claim because there was no evidence that the subcontract was terminated. Similarly, the Court held that GSE's obligation to defend APC and obtain insurance was governed by a separate provision of the subcontract which contained no notice and opportunity to cure requirement, nor any requirement that APC make a demand on GSE's liability insurer.

Caravella v. Hopmeadow Assoc., LLC, No. FST-CV-216049688-S, 2023 WL 8740010 (Conn.Super. Dec. 12, 2023)

[Home improvement contract failed to complete project within a reasonable time and was therefore liable to home owners for completion costs]

Defendant contractor was hired to construct addition to plaintiffs' home. The original contract had a contract price of $120,000 and a completion date of August 3, 2019. The work was not completed on that date, and the parties entered into an "Addendum Agreement," which increased the total contract price to $144,000 and extended the completion date to on or before October 20, 2019. By March of 2020, the work had still not been completed, and plaintiffs terminated the contract and incurred costs in hiring a replacement contractor to complete the project. Plaintiffs then sued defendants to recover those costs, alleging, among other things, that defendants breached the contract by failing to substantially complete the project by the completion date.

The court found that the defendant had not provided substantial performance of compliance with the terms of the contract by April 2020. In assessing when substantial completion was due under the parties' contract, the court noted that it must attempt to ascertain the parties' intent from the language used in the contract. It observed that "where a time for performance is stated in an agreement, a party's tender of performance within a reasonable time thereafter will be considered substantial performance unless the parties intend that time for performance be of the essence. Because delays are typical in transactions involving real property or building contracts, time is ordinarily not of the essence." In the contract at issue, the contract did not contain a time is of the essence provision, and thus substantial performance was premised on substantial completion within a reasonable time. However, the defendant had not substantially completed the project by April of 2020, a more than 25-week delay following the deadline set forth in the "Addendum Agreement." This delay was deemed to be unreasonable.

Ridge Rd. Dev. Grp., LLC v. Town of Wethersfield, No. HHB-CV-21-6066476-S, 2023 WL 2133432 (Conn.Super. Feb. 14, 2023)

[Whether the term "certificate of occupancy" in agreement referred to "temporary certificate of occupancy" or "final certificate of occupancy" presented a genuine issue of material fact that was not appropriate for summary judgment]

Plaintiff-Development Group ("RRDG") entered into a Tax Incentive Agreement ("Agreement") with defendant, Town of Wethersfield ("Wethersfield"). The Agreement provided that "[d]uring the construction phase of this Project and during the first two tax years after the issuance by the Town of a certificate of occupancy for the apartment project to be built upon the property, the assessed value of the property shall be fixed at $384,300 (the "Base Assessment"), and real estate taxes on the property for those years shall be calculated at the mill rate then in effect." Wethersfield's resolution approving RRDG's tax abatement, which granted "a tax incentive of a 100% abatement . . . through construction of the project and continuing two years

from the date of first allowed tenant occupancy per the tax incentive policy of the Town of Wethersfield . . . ." was attached to the Agreement as an exhibit. A dispute arose as to when the two-year abatement period began to run and the parties filed cross motions for summary judgment. Wethersfield contended that the Agreement's reference to a "certificate of occupancy" unambiguously referred to a temporary certificate issued when the first tenant moved into RRDG's new apartment complex. RRDG contended that "certificate of occupancy" unambiguously referred to the final certificate of occupancy issued when the apartment complex was complete.

The Court employed its standard contract interpretation analysis, first looking to the language of the contract to see if it was ambiguous. It concluded that the meaning of the term "certificate of occupancy" was ambiguous; Wethersfield contended that the term "certificate of occupancy" should read "temporary certificate of occupancy" and RRGD contended that it should read "final certificate of occupancy." Since neither the words "temporary" nor "final" appeared in the Agreement, the court concluded that the parties' intent as to the meaning of the term "certificate of occupancy" could not be determined from a plain reading of the contract language. Therefore, the meaning of the term "certificate of occupancy" was a question of the parties' intent, which was a factual issue that could not be resolved on a motion for summary judgment.

Crescimano v. CSS Morello, Inc., No. MMX-CV-19-6025265-S, 2023 WL 2769867 (Conn.Super. Mar. 29, 2023)

[Court granted plaintiff's motion to enforce settlement agreement where email between counsel set forth clear and unambiguous terms of settlement]

Plaintiffs hired defendant to construct a back deck and perform other improvements at his residence. Plaintiff agreed to $38,675 for the deck, and the parties further verbally agreed that plaintiff would pay $38,450 for the construction of a sunroom and $8,275 to build a rear staircase. Defendants failed to perform, and plaintiff sued seeking to recover damages from the home

improvement projects. On the eve of trial, the parties reported a settlement, pursuant to which defendant agreed to make an initial payment on or before October 27, 2022. When defendant failed to make that payment, plaintiff sued to enforce the settlement agreement. Plaintiff's counsel submitted an e-mail with defendant's counsel memorializing the parties' understanding, which provided that counsel would report to caseflow that the matter was settled and asked defendants to confirm its understanding of the following terms, which would be incorporated into a writing to be circulated "shortly": "Settlement in the amount of $48,500[;]$20,000 to be paid within 30 days (prior to the withdrawal being filed)[;] $28,500 to be paid within six months (March 27, 2023). … In the event of default on the second payment, a motion for enforcement of settlement agreement may be filed with a request for judgment to enter in the amount of the remaining balance." Defendant's counsel replied that those terms were consistent with his understanding of the agreement and asked that the draft be sent so he could review it with his client. Defendant claimed that there was no final settlement and the e-mail shows that a meeting with the client was necessary, and whether the defendants were going to enter into the stipulation was an outstanding issue. Defendants presented no other evidence other than these statements by counsel.

The court held that it had the inherent power to summarily enforce a settlement agreement provided its terms are clear and unambiguous. The Court agreed with the Plaintiff that the salient terms of the agreement were agreed upon and that they were clear. The Court granted the plaintiff's motion to enforce the settlement agreement and set payment dates for the first and second payment.

J&S Mech., LLC v. Morston, No. CV20-6105310-S, 2023 WL 5547196 (Conn.Super. Aug. 25, 2023)

[Total price of work in home improvement contract was clear and unambiguous and did not contain a scrivener's error]

Defendants purchased a 3-unit property with the intention to rent it to tenants. Plaintiff was hired to perform plumbing and heating work. The contract provided that plaintiff was to perform: "(1) [Installation of] new plumbing and heating for unit located on the left hand side of the house and basement; (2) Installation of 2 new boilers for first and second floor; (3) relocation of second floor toilet; (4) relocation of some of waste lines; (5) Boilers to be installed are Navien NCB-240; (6) the installation of new gas lines for 3 units; and (7) Plumbing fixtures are to be supplied by the Defendants, as the homeowners of the property." The contract price required a deposit of $9,000 and a balance due of $1,800 for a total of $10,800. Defendants expected the work to be completed within three weeks.

Plaintiff proceeded to remove boilers and copper wiring, damaging the walls and causing delays. This prevented defendants from performing other repairs on the property because the property was gutted and had no heat or running water. Plaintiff started its work on December 26, 2018, and did not complete until June or July of 2019. The court determined that the plaintiff did ultimately perform nearly all the work pursuant to the written agreement, however it did not relocate the second-floor toilet. Plaintiff sued defendants for failing to pay the contract price under the written agreement. Plaintiff claimed that the $1,800 shown on the written agreement was a scrivener's error and that the total price agreed upon for the work was $18,000. Plaintiff also claimed that defendants had orally agreed to pay an additional $4,000 for extra work. Defendants denied these claims.

The Court applied its standard interpretation of contract analysis and determined that the language of the written contract was clear and unambiguous. The agreed price was for $10,800. The court did not credit the plaintiff's testimony with respect to defendants' alleged agreement to pay an additional $4,000. With respect to the plaintiffs' unjust enrichment count, the Court held that there was a clear and unambiguous valid, written contract that existed between the parties. Thus, the allegations of unjust enrichment were governed by the written agreement.

Badalucco v. MAC-State Square, LLC, No. HHD-CV-21-6136825-S, 2023 WL 7148003 (Conn.Super. Oct. 23, 2023)

[Contractor had contractual duty to indemnify building owners for personal injuries sustained by plaintiff whose sustained injuries when she fell on uneven flooring installed by contractor]

Plaintiffs sued defendant-property owners when she allegedly injured herself on construction project they owned. Defendants brought crossclaims against defendant-contractor, alleging it breached its contractual duty to defend them against the plaintiff's claims. In indemnity provision of the subject contract provided "To the fullest extent permitted by law, Contractor shall defend, indemnify and hold harmless Owner[s]… from and against … any and all liabilities, losses, … claims, lawsuits, … for any property damages, personal injury or economic losses … sustained by and/or brought against the Indemnitees … and which are caused in whole or in part, directly or indirectly, by Contractor or which in any way arise out of, relate to or involve any of Contractor's acts or omissions, performance hereunder or breach of any of its obligations contained herein or the acts or omissions of anyone or any entity providing services relating hereto at the direction of or otherwise on behalf of Contractor. . . ." Contractor argued that there were issues of fact genuinely in dispute regarding whether the plaintiff was injured as a result of its activities, rather than the owners' failure to control or warn patrons walking through the area of the building that was under construction.

The court noted that several trial courts have held that the same standard that applies to assessing an insurer's duty to defend under an insurance policy also applies to cases involving a contractual agreement to defend between commercial parties. That analysis turns on looking at the four corners of the plaintiff's complaint to determine whether the claims possibly fall within coverage: if an allegation of the complaint falls even possibly within the coverage, then there is a duty to defend. The Court determined that the indemnity language in the parties' construction contract was clear and unambiguous: it obligated contractor to defend the moving parties against claims for injuries which were caused by contractor, or otherwise arose out of its acts or omissions. Here, the complaint alleged that the dangerous and defective condition that gave rise to her injuries was the uneven flooring near the elevators that was created when the flooring was removed from the hallway. The Court held that contractor had a duty to defend the owners.

AEGCM, LLC v. Am. Fin. Res., Inc., No. HHD-CV-216137934S, 2023 WL 3193966 (Conn.Super. Apr. 26, 2023)

[Contractor was not a third-party beneficiary of FHA 203(k) Rehabilitation Loan Program Agreement between lender and borrower and was therefore not entitled to payments from lender for work it performed on behalf of borrower]

Defendant McGee financed the purchase of property located in Windsor, Connecticut through defendant AFR through its HUD FHA 203(k) Rehabilitation Loan Program (the "Program"), which enables prospective homebuyers to purchase distressed properties and renovate them into habitable dwellings. Pursuant to the Program requirements, McGee selected the Plaintiff, AEG, as her home improvement contractor to perform the rehabilitation work. Pursuant to the Homeowner/ Contractor agreement, AEG agreed to provide renovations at a total cost of $29,690.00, which sum was to be funded by AFR. This amount was to be disbursed in two equal payments, one at the outset that was paid, and the other upon completion of the work.

As work commenced, there were a number of delays, change order requests and requests for extension of time made by AEG. AEG sought to have the contract modified to include changes requested by McGee and submitted a $12,175.81 change order, which AFR rejected. AEG revised its change order to $2,900, which AFR accepted. The additional work beyond the scope of the contract was to be paid by McGee.

Ultimately, AEG sent a letter indicating it intended to terminate the contract. However, AEG continued to work on the property, including punch list items and finished most of its work, albeit well beyond the original completion estimate of 90 days. Plaintiff filed a mechanic's lien on the property claiming it was not paid a balance of $17,085. The 203(k) Loan Agreement provided that if the work was stopped at any point, AFR could refuse to make further payments to the contractor and could make a principal reduction from the escrowed funds. Relying on that provision and having not received the completion requirements for the second payment to AEG, AFR applied the second payment to a principal reduction and advised McGee that she would be responsible for the final payment to the contractor. AEG sued AFR, claiming it was a third-party beneficiary of the 203(k) Loan Agreement.

The Court observed that in order to have rights to enforce a contract as a third-party beneficiary, the contract must reflect that the parties intended AEG to be a third-party beneficiary. It noted that Paragraph 6 of the agreement provided that "Lender shall, subject to the foregoing, release the Escrowed Funds by check, payable to the Contractor, or other appropriate payee who performed the Work, as defined in the Homeowner/Contractor Agreement, and supplied the materials in connection with this Agreement." However, when read in context and as a whole, the contract supports a finding that the parties did not intend for it to establish enforceable rights to AEG. It provided that if problems arose with the work, AFR had discretion to make a principal

reduction which would make McGee responsible for payment under the Homeowner/Contractor agreement. It further provided that if a principal reduction was made, "the final payment to the Contractor will not be available from LENDER and shall be the sole responsibility of Borrower." The Court held that this language expressly addressed the AFR's right to make the principal reduction and the obligation the borrower owed under the loan agreement. Reading the contract as a whole, AEG was not a third-party beneficiary.

Barbara v. Colonial Sur. Co., 221 Conn.App. 337 (2023)

[Performance bond surety entitled to judgment against indemnitors for payment made by surety to settle claims against bond, where indemnitors failed to demonstrate bad faith on the part of the surety]

Phoenix Contracting Group ("PCG") and its owners ("Barbaras") (collectively, "Indemnitors") executed a general indemnity agreement ("GIA") in favor of Colonial Surety ("Colonial") as consideration for the issuance of surety bonds for a hotel project in New York on which PCG was the exterior window supplier/installer subcontractor. The GIA provided that PCG agreed to indemnify Colonial for any losses that Colonial might incur from issuing bonds on behalf of PCG, (2) granted Colonial the authority to settle any claims on bonds and assigned to Colonial all their rights in and to the subcontract, and (3) appointed Colonial as their attorney-in-fact "with the right but not the obligation, to exercise all of the rights assigned" to Colonial in the GIA. The GIA also provided that if a claim was made against Colonial, Colonial could demand that indemnitors furnish a reserve for potential claims in an amount that it deemed appropriate in its sole discretion.

The general contractor, who was a bond obligee, brought a claim on the bonds against Colonial in New York based on PCG's alleged failure to perform. Colonial brought an action against Indemnitors in Connecticut to enforce the GIA (the "Indemnity Action"). It also demanded

that Indemnitors furnish a $2 million reserve, which they advised they did not have the financial resources to do. In the New York action, Colonial ultimately settled and released all claims arising from the hotel project, PCG's subcontract and the bonds over PCG's objection. This released PCG's counterclaims. In the Indemnity Action, Colonial sought to recover the amounts it paid to settle the claim, as well as its attorney's fees and costs in defending itself.

The Barbaras brought an action against Colonial in Connecticut asserting breach of contract and bad faith claims, as well as seeking to invalidate the GIA. The crux of its bad faith claims was that Colonial knew it had no liability to the general contractor under the performance bond, yet it remained in the New York action instead of making a pre-answer motion for dismissal because it wanted to cut a deal with the general contractor for future business. The trial court rendered judgment for Colonial on its indemnity claim and the Barbaras appealed.

The Court stated that the GIA was unambiguous and therefore the determination of what the parties intended by their contractual commitments was a question of law. It noted that the GIA contained a provision giving Colonial the right in its sole discretion to settle any claims… "in any claim… an itemized statement of the aforesaid loss and expense, sworn to by an officer of [Colonial], or the vouchers or other evidence of disbursement… shall be prima facie evidence of the fact and extent of the liability hereunder of Indemnitor." Colonial satisfied the "prima facie evidence" and "right to settle" provisions by submitting an affidavit from its president that included an itemized statement of the losses. This shifted the burden to the Barbaras to raise a genuine issue of material fact as to whether Colonial acted in bad faith in settling the New York action. The Appellate Court agreed with the trial court that the Barbaras failed to meet that burden.

IV. DESIGN PROFESSIONALS

Hockenberry v. Wapping Cemetery Ass'n., Inc., No. HHD-CV-20-6127670-S, 2023 WL 8432034 (Conn.Super. Nov. 30, 2023)

[Superior Court granted third-party defendant's Motion for Summary Judgment upholding the seven-year statute of limitation under § 52-584a where third-party plaintiff waited sixteen-years to execute landscape plans prepared by third-party defendant]

A cemetery, acting as a third-party plaintiff, filed a claim for apportionment and indemnification against a landscape architect, the third-party defendant. The claim was related to plans prepared by the third-party defendant in 2003 for landscape improvements. The trial court determined that if a property owner waits for more than seven years to make improvements based on the plans provided by the architect or engineer, then the statute of limitations in § 52-584a runs from the completion of the plans. Thus, the third-party plaintiff's apportionment claims were barred by the seven-year statute of limitations.

The Superior Court also examined whether the statute of limitation in § 52-584a applies to the indemnification claim or whether § 52-598a governs. After applying the principles of statutory interpretation, the court concluded that to avoid rendering a word meaningless, the indemnification provision in §52-584a governed, and the third-party plaintiff's indemnification claim was barred.

In its analysis, the trial court first considered the sequence of events leading to the third-party plaintiff's claim. In 2003, the third-party plaintiff received architectural plans from the third-party defendant but decided not to proceed with the project. Sixteen years later, the third-party plaintiff hired a contractor to complete the project based on the 2003 plans. The third-party plaintiff argued that the statute of limitations began to run when the improvements were completed. The Superior Court considered the legislative intent and determined that the third-party plaintiff's reading would lead to absurd or unworkable results and contradict the statute's legislative intent to limit design professionals' liability. Instead, the Superior Court concluded that when a property

owner waits over seven years to perform the improvements under plans prepared by architects or engineers, the statute of limitation begins to run when the plans are completed. In conclusion, the Superior Court found that the third-party plaintiff's apportionment claim was barred by the statute of limitations in § 52-584a.

The trial court also considered the third-party plaintiff's argument that its indemnification claim is governed by the statute of limitations in § 52-598a, thus not barred by § 52-584a. The Superior Court, in its interpretation, concluded that ignoring the identification reference in § 52-584a and applying § 52-598a would render a portion of the statute void or insignificant. Therefore, the statute of limitations in § 52-584a governed, and the indemnification claim was barred.

Vill. At Black Rock Condo. Assn., Inc. v. DCBuilds LLC, No. FBT-CV-21-6106152-S, 2023 WL 2769700 (Conn.Super. Mar. 27, 2023)

[Superior Court upheld a third-party apportionment claim under §§ 52-572h and 52-102b, focusing on whether the damages were proximately caused by third-party defendant's actions and finding that the original construction and renovations were the same occurrence despite a ten-year gap between the two events]

The third-party plaintiff, an engineering and design firm, filed a third-party apportionment claim against the third-party defendant, an architect who had designed the 2005 construction project. In 2016, third-party plaintiff was hired to investigate and design a construction plan to modify the design of the walkways that had developed defects. The third-party plaintiff argued that negligence by the third-party defendant caused the damages to the walkways, further injuring the plaintiff. The plaintiff pleaded over against them in a Second Revised and Amended Complaint. The third-party defendant filed a motion to strike the plaintiff and third-party plaintiff's counts, alleging the complaints failed to state a claim upon which relief can be granted based on their legal insufficiency and the alleged harms did not arise from the same transaction or occurrence.

The Superior Court first considered the sufficiency of the counts under §§ 52-572h and 52-102b. The Court focused on whether the damages were determined to be proximately caused by the negligence of multiple parties. In this case, the Court found that the plaintiff had complied with the requirements set out in §§ 52-572h and 52-102b because the allegations necessarily implied that the third-party defendant's failure to provide proper design and construction during the 2005 construction adversely affected the 2016 repair work.

The Superior Court then considered whether the 2005 construction and the 2016 repair work constituted the same transaction or occurrence. Connecticut affords "transaction" a flexible meaning; thus, the Superior Court found that the 2005 construction and the 2016 repair work constituted a single transaction or occurrence.

V. BONDS

Barbara v. Colonial Surety Company, 221 Conn.App. 337 (2023).

[Surety found not to have acted in bad faith by settling claims asserted against it and bond principal despite colorable defenses to the bond claims. Bond principal failed to demonstrate bad faith as: (1) Surety performed a reasonable investigation of the bond claims; (2) the settlement amount was reasonable in light of the claimed damages; (3) potential defenses to the bond claims were speculative; and (4) bond principal failed to avail itself of the opportunity to control the defense of the bond claims by posting collateral in accordance with the terms of its indemnity agreement with Surety]

This case involves the issuance of payment and performance bonds in connection with a hotel construction project in New York. In consideration of surety's issuance of the payment and performance bonds, which the subcontractor was required to obtain as a condition of its subcontract for the project, the subcontractor and its individual owners (collectively, the "Indemnitors") agreed to (1) indemnify the surety for losses arising out of issuance of the bonds, (2) grant the surety authority to settle any claims arising from the bonds, (3) assign all rights in the subcontract to the surety, and (4) appoint the surety as attorney-in-fact for Indemnitors. Following

commencement of the subcontract work, surety received claims under both subcontractor's payment and performance bonds. In accordance with the indemnity agreement, the surety demanded that the Indemnitors collateralize the surety for any losses arising under the bonds.

Disputes arose between surety and Indemnitors when Indemnitors refused to post collateral in accordance with the indemnity agreement. As a result, surety filed suit against Indemnitors seeking enforcement of the indemnity agreement. While the indemnity action was pending, surety agreed to settle the bonds claims on behalf of its itself and subcontractor. Indemnitors objected to the settlement and claimed that surety had settled the claims in bad faith. Indemnitors claimed that surety knew that it had no liability under the bonds, but that surety chose to defend the claims, rather than dismiss them at an early stage, in order to persuade the bond claimants to give the surety future bond business.

Indemnitors sought to amend their answer in the indemnity action to add affirmative defenses and counterclaims generally seeking to invalidate the indemnity agreement and bonds due to surety's alleged bad faith. Following the denial of Indemnitors' motion to amend, Indemnitors commenced a new action against surety alleging breach of the indemnity agreement, breach of the bonds, and breach of the implied covenant of good faith and fair dealing. Indemnitors also sought a declaratory judgment invalidating the indemnity agreement. Subsequently, both actions were consolidated.

The surety filed motions for summary judgement in the indemnity action and in Indemnitors' bad faith action. In the indemnity action, surety sought summary judgment on its claim seeking enforcement of the indemnity agreement as it argued that there was no issue of material fact that Indemnitors were liable to it for the expenses incurred to defend and settle the bond claims. In Indemnitors' bad faith action, surety sought summary judgment on Indemnitors'

bad faith claims arguing that they were precluded by the doctrines of res judicata and collateral estoppel. The court granted surety's motion seeking enforcement of the indemnity agreement but denied its motion for summary judgment on indemnitor's bad faith claims. Surety appealed the denial of its motion for summary judgment on indemnitor's bad faith claims. Indemnitors appealed the granting of surety's motion for summary judgment on surety's claims seeking enforcement of the indemnity agreement. The Appellate Court consolidated the parties' appeals.

On appeal, Indemnitors argued that the surety incurred defense costs unreasonably and settled the bond claims out of self-interest in order to persuade the bond claimants to give surety future bond business. Surety argued that the defense costs and settlement were reasonable in light of the bond claimants alleged damages. Further, surety argued that the Indemnitors' claimed defenses to the bond claims were too speculative and that, in any event, Connecticut courts have held that a surety does not necessarily act in bad faith when settling a bond claim simply because a bond principal has raised colorable defenses to a bond claim. Finally, surety argued that it was indisputable that Indemnitors failed to avail themselves of the opportunity to defend against the bond claims by posting collateral in accordance with the terms of the indemnity agreement.

Ultimately, the Appellate Court ruled in favor of the surety and upheld the lower court decision granting summary judgment on surety's indemnification claims. In reaching its decision, the Court found persuasive the fact that (1) surety's investigation of the bond claims was thorough and timely, (2) the settlement amount was reasonable in light of the alleged damages, (3) Indemnitors contention that the bond claims could have been dismissed was too speculative and, in any event, a surety does not necessarily act in bad faith by settling claims to which a bond principal has raised colorable defenses, and (4) Indemnitors failed to avail themselves of the opportunity to defend against the bond claims by posting collateral.

As to the denial of the surety's motion for summary judgment on the Indemnitors' bad faith claims, the Appellate Court affirmed the lower court's holding that the Indemnitors' claims were not barred by the doctrines of res judicata and collateral estoppel. Regardless, the Appellate Court acknowledged that, on remand, the surety would be entitled to move for summary judgment on the Indemnitors' bad faith claims based on the preclusive effect of the grant of summary judgment on the surety's indemnification claims.

Autobuilders General Contracting Services, Inc. v. NEWS, LLC, No. HHD-CV-18-6100213-S, 2023 WL 1794216 (Conn.Super. Jan. 31, 2023)

[The penal sum of a surety bond substituted in lieu of a mechanic's lien held not to limit the amount recoverable for pre-judgment, post-judgment and offer of compromise interest and costs]

This matter arises out of a dispute between plaintiff general contractor and defendant site contractor relating to certain sitework and demolition performed by the site contractor during the construction of a car dealership in Hartford, Connecticut. General contractor and site contractor each asserted breach of contract and related claims against each other. Separately, site contractor also brought an action against general contractor's surety to recover under a mechanics' lien substitution bond posted by general contractor and surety. Following trial, defendant site contractor obtained a judgment including interest, attorneys' fees, and costs against general contractor and the surety. Site contractor was directed to file post-judgment papers detailing its claims for interest, attorneys' fees, and costs. After post-judgment proceedings, the Court granted site contractor's request for pre-judgment, post-judgment, and offer of compromise interest as against the surety, even though the combined judgment with interest was greater than the penal sum of the bond. The Court reasoned that the bond penal sum did not cap the surety's liability for interest because, under Conn. Gen. Stat. §49-37, a mechanics' lien substitution bond must be in an amount equal to the amount secured by the lien with interests and costs.

Blakeslee Arpaia Chapman, Inc. v. Kiewit Infrastructure Co., et al. No. KNL-CV22-6059097S, 2023 WL 2662022 (Conn.Super. Mar. 24, 2023)

[Violation of Conn. Gen. Stat. §49-42 held to be a sufficient predicate to a Connecticut Unfair Trade Practices Act claim based on allegedly unfair insurance practices]

Plaintiff subcontractor asserted claims against defendant construction manager and defendant surety for amounts allegedly owed to subcontractor under a subcontract for dredging and demolition work which subcontractor performed during the renovation of the Connecticut State Pier in New London, Connecticut. As to the surety, subcontractor alleged a violation of the Connecticut Unfair Trade Practices Act ("CUTPA") based on the surety's alleged failure to pay undisputed amounts due under the subcontract and under the project's payment bond within the time required by Conn. Gen. Stat. §49-42.

Surety filed a motion to strike subcontractor's CUTPA claim as it argued that conduct by a surety may only violate CUTPA if the allegedly unfair conduct also violates the Connecticut Unfair Insurance Practices Act. In support of its argument, surety cited the Connecticut Supreme Court's decision in *State v. Acordia, Inc*. wherein the Supreme Court held that "unless an insurance related practice violates CUIPA or, arguably, some other statute regulating a specific type of insurance related conduct, it cannot be found to violate any public policy and, therefore, it cannot be found to violate CUTPA." *State v. Acordia, Inc*., 310 Conn. 1, 37 (2013). The Court denied surety's motion to strike as the Court reasoned that the Supreme Court's decision in *Acordia* reserved judgment as to whether other statutes regulating insurance conduct could serve as a predicate to a CUTPA claim for allegedly unfair insurance practices. As Conn. Gen. Stat. §49-42 is a statute regulating insurance conduct, the Court held that it was a sufficient predicate to subcontractor's CUTPA claim.

<u>Centerplan Construction Company LLC., et al. v. City of Harford, et al.</u> No. X07-CV-16-6069748-S, 2023 WL 6121116 (Conn.Super. Sept. 11, 2023)

[Plaintiff general contractor had standing to sue defendant city despite general contractor's assignment of its claims to a surety in accordance with an indemnity agreement. Held that an assignor who assigns claims as collateral to secure an obligation under an indemnity agreement retains an interest in the assigned claims and has standing to assert its claims]

Plaintiff developer entered into a development agreement with Defendant City of Hartford for the development of Dunkin Donuts Park in Hartford, Connecticut (the "Project"). As part of its development agreement, developer retained co-plaintiff general contractor for the design and construction of the Project. Prior to commencing work on the Project, general contractor obtained payment and performance bonds to secure its obligations under its contract with developer. As consideration for the issuance of the payment and performance bonds, surety required general contractor to execute indemnity agreements under which general contractor agreed to (1) defend and indemnify surety for claims asserted against the bonds and, (2) assign all rights and potential claims under the contract to surety in the event general contractor was in default. Disputes arose between the parties when the Project was not completed by the substantial completion date. In 2016, the City terminated general contractor and developer due to their alleged failure to achieve substantial completion and due to alleged deficiencies and code violations at the Project. Plaintiffs sued the City and sought to recover for the City's alleged breach and wrongful termination of the parties' development and construction contracts.

City sought to dismiss general contractor's claims against it on the ground that contractor had assigned all its rights and potential claims under the contract to the surety when general contractor defaulted on its contract with developer. As general contractor had assigned its rights and claims, the City argued that general contractor lacked any real interest in its claims and the Court was, therefore, without subject matter jurisdiction to consider general contractor's claims.

General contractor objected to the City's motion to dismiss and argued that: (1) the plain language of the indemnity agreements states that the assignment of its rights and claims was merely enforceable and surety had not enforced its right to assignment, (2) the assignment was taken as collateral or security for payment of a debt and, therefore, general contractor retained an interest in its claims, and (3) that surety impliedly or expressly recognized general contractor's right to assert claims against the City.

Ultimately, the Court agreed with the general contractor and denied the City's motion to dismiss. In reaching its decision, the Court found that under the plain language of the indemnity agreements, general contractor had assigned its rights and potential claims to the surety. Further, the Court found that the surety's express or implied permission would not, on its own, give general contractor standing to assert its claims. Regardless, the Court found that the general contractor's assignment of its rights and potential claims was given as collateral to secure its obligations to surety under the indemnity agreements. As the assignment was taken as collateral, the Court held that general contractor retained an interest in its claims and had standing to assert its claims against the City.

VI. DAMAGES

Fraser Lane Assocs., LLC v. Chip Fund 7, LLC, 221 Conn. App. 451 (2023)

[Appellate Court affirmed the trial court's affirmation of an arbitration award of liquidated damages in favor of condominium developer following the defendant solar panel installer's installation delays]

In this case, the Appellate Court affirmed the trial court's decision to affirm an arbitration award in favor of condominium developer following the defendant solar panel installer's installation delays. The dispute arose out of an alleged breach of a power purchase agreement ("PPA") entered into in March 2016 which required Defendant, Chip Fund 7, LLC ("the Defendant") to install, operate, and maintain solar panels at the condominium development

containing twenty condominiums owned by Fraser Lane Associates, LLC ("the Plaintiff"). Pursuant to the PPA, the Plaintiff agreed to pay for all the electricity that the panels produced for twenty years. The PPA also contained a binding arbitration clause.

Over four years after the PPA was entered into, the Plaintiff filed a demand for arbitration, alleging serious delays and seeking $200 a day in liquidated damages for ever day the project was not completed after January 28, 2018. Furthermore, the Plaintiff alleged that the project was not yet completed at the time of filing. The Defendant counterclaimed, alleging that the Plaintiff had failed to purchase the electricity as required by the PPA.

During the arbitration, the Plaintiff argued in its brief that a $200 per day liquidated damages provision, which the parties agreed to verbally and subsequently set forth in an email, was valid and reasonable because the potential damages stemming from the delay—buyers walking away, reputational damage, and condominiums being less marketable—were uncertain in amount and difficult to prove. The Defendant, however, argued that the liquidated damages provision was a penalty, and therefore unenforceable, because $200 per day was not commensurate with the anticipated damages and that, even if the provision itself did not constitute an unenforceable penalty, enforcement of the provision would violate public policy because the plaintiff suffered no actual damages. The arbitrator upheld the liquidated damages provision and ordered it enforced against the Defendant pursuant to the arbitration's last best offer procedure. Thus, the arbitrator awarded $210,000 to the Plaintiff and $5348 to the Defendant, both without interest. The parties were also ordered to split evenly the administrative fees associated with the arbitration and the arbitrator's compensation.

Subsequently, the Defendant filed an application before the trial court to vacate the arbitration award. Before the trial court, the Defendant asked that the arbitration award be vacated

as it had no basis in fact as the Plaintiff suffered no actual damages, it was an unenforceable penalty, and that, to the extent evidence was provided as to damages, it was not sufficient to meet the amount of the award. The Defendant also argued that the manner in which the arbitrator solicited the parties' last best offers was improper because the arbitration provision of the agreement called for each party to submit one proposal, but the arbitrator required the parties to make one proposal for the Plaintiff's claim and another for the Defendant's counterclaim. The Defendant argued in the alternative that, if the court found that the arbitrator did not err by accepting separate proposals for each claim, the arbitrator should have required separate proposals for the two counts of the Defendant's counterclaim.

The Plaintiff countered that the precise amount of actual damages suffered was irrelevant because this was a last best offer arbitration and the arbitrator's sole obligation was to choose one of the two offers before him, which he did. The trial court agreed with Plaintiff and affirmed. The trial court also refused the Defendant's request to consider its public policy arguments under de novo review which the Defendant claimed was done in error.

The Defendant appealed, claiming (1) that the arbitration award violated public policy because the award was made pursuant to an unenforceable liquidated damages provision and because the Plaintiff suffered no actual damages as a result of the Defendant's breach; and (2) that the arbitrator exceeded his authority under the arbitration provisions of the PPA. As it relates to the analysis of the liquidated damages provision of the agreement, the Appellate Court, in deciding whether the arbitrator's decision that the liquidated damages provision was enforceable or violated public policy, noted that: "Although an arbitration award that enforces a penalty clause violates public policy… a liquidated damages clause is not an unenforceable penalty if three conditions are satisfied: (1) The damage which was to be expected as a result of a breach of the contract was

uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of the contract."

The Appellate Court then found that the Defendant failed to meet its burden of demonstrating its claim that the award was made pursuant to an unenforceable penalty and that the Plaintiff suffered no actual damages because the Defendant failed to submit to the trial court a sufficient record to prevail on its claim. Rather, the Appellate Court found that the "Defendant made bare assertions to the trial court about the nature of the evidence from the arbitration and now repeats those same assertions in its appellate brief." It failed, for instance, to provide the court with a copy of the liquidated damages provision itself, which was set forth in an email between the parties. And, although it relies almost entirely on the testimony of witnesses who testified at the arbitration to support its claims, it failed to provide the court with a transcript from the arbitration proceedings. Accordingly, the Appellate Court concluded that the Defendant did not meet its burden for vacating the arbitration award as to its arguments that the arbitration award violated public policy because the award was made pursuant to an unenforceable liquidated damages provision and that the Plaintiff suffered no actual damages as a result of the Defendant's breach. The Appellate Court thus affirmed the trial court's decision.

VII. HOME IMPROVEMENT

HM Constr. & Painting, LLC v. 32 Wilmot Place, LLC, 222 Conn.App. 261 (2023)

[Homeowner entitled to summary judgment against contractor who admitted it was not a licensed home improvement contractor and who further failed to introduce any evidence that homeowner had acted in bad faith by asserting contractor's violation of the Home Improvement Act]

In five separate actions, the plaintiff sought to recover damages from the defendants for, inter alia, breach of contract in connection with work it had performed on the defendants' respective real properties. Each of the defendants alleged, as a special defense, that the plaintiff was not a licensed home improvement contractor. Thereafter, the defendants filed motions for summary judgment, claiming that the contracts between the parties were unenforceable and that the plaintiff could not recover on its claims because it was not in compliance with the Home Improvement Act (Conn. Gen. Stat. §20-418 et seq.). The defendants' motions were supported by affidavits from O, an individual who was a member or agent of each of the defendants, which stated that the plaintiff was not a licensed home improvement contractor when it started work on the properties or when it filed mechanic's liens on the properties related to that work. In their motions, the defendants indicated that they would be relying on the plaintiff's forthcoming answers to requests for admissions that the defendants had served on the plaintiff. These included a request for admission that the plaintiff was not a licensed improvement contractor on certain dates.

The trial court heard arguments on the motions for summary judgment, ordered the plaintiff to respond to the defendants' answers and special defenses, and indicated that it would hold a status conference after the plaintiff had done so. Thereafter, the defendants filed notices, pursuant to the applicable rule of practice (§13-23), indicating that, because the plaintiff had not

responded to the defendants' requests for admission within thirty days, it was deemed to have admitted the facts therein. At a subsequent hearing, the trial court indicated that it was prepared to rule on the motions for summary judgment even though the pleadings had not been closed and it had not yet held a status conference. Thereafter, the plaintiff filed replies to the defendants' special defenses, in which it admitted that it was not a licensed or registered home improvement contractor but indicated that the special defense alleging the same should fail because the defendants had asserted it in bad faith. The trial court granted the defendants' motions for summary judgment on the ground that the contracts were unenforceable because the plaintiff was not a licensed or registered home improvement contractor, as required by the Act. On the plaintiff's appeal to the Connecticut Appellate Court, the appellate court affirmed the trial court's decision for two main reasons.

First, the appellate court held that plaintiff's claim that the defendants' motions for summary judgment were not supported by admissible evidence was without merit. By failing to reply to the defendants' requests for admission within thirty days, the plaintiff admitted that it was not a licensed or registered home improvement contractor, and, after the thirty-day period had elapsed, the defendants filed notices with the trial court indicating that their requests were deemed admitted. Moreover, the plaintiff admitted that it was not a registered or licensed home improvement contractor in its responses to the defendants' special defenses.

Furthermore, contrary to the plaintiff's assertion, in granting the defendants' motions for summary judgment, the appellate court held the trial court did not indicate that it was relying on O's affidavits, which the plaintiff claimed were inadmissible hearsay, but, instead, stated that the plaintiff's failure to respond to the defendants' request for admission that the plaintiff was not a licensed or registered home improvement contractor resulted in that fact being admitted.

Accordingly, the defendants provided that trial court with undisputed evidence from which it properly could conclude that there was no genuine issue of material fact that the plaintiff was not properly licensed or registered under the act, and the defendants were entitled to judgment as a matter of law.

Second, the appellate court held that the plaintiff's claim that judgment for the defendants was improper because the trial court failed to consider the plaintiff's assertion the defendants had acted in bad faith in raising the special defense that the contracts were unenforceable due to the plaintiff's noncompliance with the act was unavailing; since the record did not contain any affidavits or proof offered by the plaintiff to support its allegations that the defendants had acted in bad faith. Additionally, in its motions opposing the defendants' motions for summary judgment, the plaintiff failed to brief or support with admissible evidence of the defendants' alleged bad faith, it failed to establish the factual predicate needed to raise a genuine issue of material fact on that issue, and the plaintiff's claim in its motion to reargue that the trial court failed to consider the defendants' bad faith avoidance of the act was insufficient to cure that evidentiary deficiency.

Hero v. Crown Builders, LLC, NO. FST-CV-22-6056978-S, 2023 WL 3595629 (Conn.Super. May 16, 2023)

[Home improvement contractor's mechanic's lien discharged due to contractor's failure to provide homeowners with a contract that complied with the Home Improvement Act]

The plaintiff homeowner brought this application to the court to discharge a mechanic's lien placed upon her home by the defendant builder for renovation work performed pursuant to a contract. Although the parties stipulated at the hearing that the contract at issue failed to comply with the Home Improvement Act, the defendant argued that the provisions of the Act should not

apply because the plaintiff acted in bad faith since she had no complaints about the work performed and made payments regarding same.

Citing *Wadia Enterprises, Inc. v. Hirschfeld*, 224 Conn. 240, 618 A.2d 506 (1992) and *Lucien v. McCormick Construction, LLC*, 122 Conn. App. 295, 998 A.2d 250 (2010), the trial court ruled that a homeowner's actions in raising the HIA violations as a defense after a claim on non-payment is not sufficient evidence of bad faith where the facts stipulated to by the parties do not state that the plaintiff knew of the violation earlier or that she purposely drafted the contract in violation of the act in order to later avoid her obligation to pay. Here, there was nothing in the facts that indicated that the plaintiff previously knew of the defects in the contract at issue. Therefore, the court granted plaintiff's application to discharge the mechanic's lien.

VIII. CUTPA

Country Landscaping, LLC v. DiMauro, No. MMX-CV-20-6029480-S, 2023 WL 8230378 (Conn.Super. Nov. 21, 2023)

[Superior Court found that Counterclaim Plaintiff-Homeowners failed to establish a violation of CUTPA where the Counterclaim Defendant-Contractor's work was substandard and the disagreements were poorly handled, but there was no evidence of bad faith]

Plaintiff, landscaping contractor, filed suit against defendants, homeowners, in connection with a contract for the installation of a bluestone patio. The parties' relationship irrevocably broke down after the homeowners were dissatisfied with the landscaping contractor's performance, and the landscaping contractor became frustrated with the homeowners' repeated requests to swap out the installed bluestone tiles. Contractor retrieved his equipment from the home and filed a mechanic's lien for the unpaid balance of the contract. Contractor brought this action seeking to foreclose on the lien, and homeowners filed two counterclaims, asserting violations of the Connecticut Products Liability Act and CUTPA.

After a bench trial, the court concluded that the homeowners had failed to establish a CUTPA claim because, although the evidence established "poor workmanship and perhaps poor quality" and that the contractor "handled the situation badly[,]" there was no evidence that the contractor's conduct was "unlawful, immoral, unethical or unscrupulous" such that the homeowners could sustain a CUTPA claim.

Garrido v. Salinas, No. FST-CV-205023304-S, 2023 WL 6996420 (Conn.Super. Oct. 20, 2023)

[After a bench trial, the Superior Court found CUTPA violations in favor of homeowners based both on violations of the HIA and a review of the conduct under the cigarette rule and awarded separate punitive damages under each theory of violation]

Plaintiffs, Francisco and Monica Garrido, homeowners, filed suit against defendant, contractor, in connection with a large home improvement project. Plaintiff-homeowners had a strict $1 million budget for the renovations, which defendant-contractor ultimately bid at and agreed to adhere to; homeowners agreed to contractor's bid, which was higher than other bids, based on a pre-existing trusting relationship. During the contract signing, the contractor produced a single page document for Francisco to sign, assuring him that the rest would be filled in per their discussions; contractor later sent a three-page document to Monica, but not Francisco, which he asserted was the full contract, but which was dated after the signing and included a $240,000 project management fee in addition to the $1 million contract price. Contractor assured homeowners that the $240,000 was contained in the $1 million, but later told homeowners that they owed the $240,000 in addition to the $1 million. Construction was plagued with issues that the court found contractor "should have anticipated prior to construction." After plaintiffs had paid approximately $600,000 and had concerns with the progress, a new contractor reviewed the work and found that only $366,000 of work had been performed. Contractor returned to the jobsite,

removed $33,000 of custom cabinetry, and $60,000 of windows that had been removed and were to be reinstalled, and never returned.

Plaintiffs first asserted violations of CUTPA based on violations of the HIA (a violation of the HIA is a *per se* violation of CUTPA), the court found was violated because the contract (1) was not signed by both homeowners; (2) was not signed by the actual contractors, only the individual defendant; (3) did not recite the entire agreement between the parties; (4) did not contain the notice of the homeowners' cancellation rights; and (5) did not contain a full disclosure of all legal entities in which the owners of the contractor had been affiliated with in the last five years. The court awarded punitive damages based on these violations.

Plaintiffs, in *separate* counts, asserted substantive violations of CUTPA based on the conduct of defendants. The court analyzed these counts by applying the cigarette rule, and found that the homeowners had sustained a CUTPA claim because "[t]he very inception of the transaction was one of concealment; the defendants actively, knowingly and falsely misrepresented the terms of any agreement and the cost of the project; much of the work was not planned or performed in a skilled, workmanlike manner; the defendants removed items that belonged to the plaintiffs, and; the plaintiffs were finally compelled to bring in a new contractor to correct deficiencies and to finish the job." The court then awarded additional punitive damages based on these violations.

Silva v. Betolatti, No. DBD-CV-22-6043014-S, 2023 WL 6307319 (Conn.Super. Sept. 18, 2023)

[On default judgment, the Court found that violations of the HIA, and therefore per se violations of CUTPA, were sufficient to warrant an award of attorney's fees under CUTPA, but declined to issue punitive damages after finding a lack of intent to do wanton and malicious injury to the plaintiff]

Plaintiffs, homeowners, filed suit against defendant, contractor, in connection with a home improvement contract. The contract plus a change order totaled $25,850; the court found, based on evidence presented after defendant failed to appear for trial, that neither the contract nor the change order complied with the HIA because it did not contain (1) the full name and address of the contractor; (2) the contractor's registration number; (3) a notice of cancellation rights; (4) a start date and completion date; or (5) a provision disclosing each entity that the contractor had been a shareholder, member, partner, or owner of during the previous five years. Further, the work completed by the contractor was deficient and incomplete, and failed to comply with applicable codes.

Without analysis of whether any ascertainable loss under CUTPA was a result of these violations of the HIA, the court found in favor of plaintiffs on the CUTPA count and awarded attorney's fees totaling $4,200. The court further declined to award punitive damages because, while the work "was deficient, unprofessional and incomplete, there is little in the record to indicate an intention on the part of the defendant to do wanton and malicious injury to the plaintiff."

Korytoski v. Michael Ricci & Ricci's, LLC, No. HHB-CV-21-6068609, 2023 WL 3840431 (Conn.Super. June 1, 2023) and Korytoski v. Michael Ricci & Ricci's, LLC, No. HHB-CV-21-6068609, 2023 WL 5696970 (Conn. Super. Ct. Aug. 28, 2023)

[Superior Court found a per se violation of CUTPA based on a violation of the HIA, and awarded attorney's fees based on that violation]

Defendant-contractor was hired by plaintiff-homeowner for a home improvement job without a written contract signed by the homeowner, thereby violating the HIA. The contractor failed to complete the job. Contractor claimed that it would have had the job finished if the homeowner had simply "waited a little longer." The court found that the failure to provide a contract with a start and end date "proximately caused plaintiff's damages from [the contractor's] failure to complete the job properly and in a timely fashion." Because the contractor violated the

HIA, the court found that it had also violated CUTPA, and awarded attorney's fees after a separate hearing on attorney's fees.

Coomes v. Langrock, No. UWY-CV21-6062515-S, 2023 WL 5363784 (Conn.Super. Aug. 16, 2023)

[Superior Court denied summary judgment on plaintiff's CUTPA count, which was based on HIA violations, because plaintiff could not establish that her damages were as a result of the defendant's HIA violations]

Plaintiff-homeowner brought suit against defendant-contractor in connection with an agreement to perform home improvements, alleging that the contractor failed to complete the work or return the deposit paid by homeowner.

On summary judgment, the court found that it was undisputed that the contractor violated the HIA by failing to include several required elements in the contract between him and the homeowner, including, but not limited to, a start date and completion date. The court acknowledged that violation of the HIA is a *per se* violation of CUTPA, but denied homeowner's motion for **summary** judgment because she failed to establish that her damages were a result of the contractor's HIA violations. Specifically, the court found: "[t]he plaintiff is alleging poor workmanship in her claim, not that the deficient contract was the cause of her injuries."

HM Constr. & Painting, LLC v. McEnery, No. DBD-CV-21-6039856-S, 2023 WL 4882643 (Conn.Super. July 26, 2023)

[Superior Court summarily granted summary judgment on defendant's CUTPA counterclaim after finding a violation of the HIA]

Plaintiff-contractor filed suit in connection with a home improvement project to be done on the defendant-homeowners' property, sounding in foreclosure of mechanic's lien, breach of contract, quantum meruit, and unjust enrichment. Homeowners countersued, asserting claims

including failure to comply with the HIA and CUTPA. After finding that the contractor was not a registered home improvement contractor at the time it contracted with the homeowners, the court granted summary judgment in favor of the homeowners on the HIA claim, and then, with limited additional discussion, found a *per se* violation of CUTPA and granted summary judgment in favor of the defendants on that count as well.

Titan Painting, LLC v. Klimm, No. DBD-CV-21-6039988-S, 2023 WL 4574533 (Conn.Super. July 11, 2023)

[Superior Court concluded that homeowners failed to establish a CUTPA violation where the homeowners were dissatisfied with the work performed but the contractor had been in constant communication with the homeowners and the homeowners never expressed dissatisfaction with the work]

Plaintiff, a painting contractor, filed a mechanic's lien after defendant-homeowners failed to pay the remaining contract sum in connection with a contract to paint the home. Homeowners filed counterclaims, including a CUTPA claim based on violations of the HIA and the conduct of the contractor. The contract was for the painting of homeowners' approximately 8-10,000 square foot home, and totaled $34,901.04. The contractor completed approximately two-thirds of the work but was unable to finish because the homeowners failed to select a paint color. Contractor was on site daily and spoke with the homeowners daily to outline the work that was done. The crew left the site after not having a paint color to move forward with, but contractor continued to follow up to get a paint color so that he could complete the job. Homeowners never selected a paint color. There was also work regarding the trim that was not completed because it was to be done at the same time as the painting for which the color had not been selected.

Homeowners filed several counterclaims, including a CUTPA claim based on violations of the HIA and based on the conduct of the contractor. The court found that the contracts complied with the HIA, thereby declining to sustain a CUTPA claim on those grounds. The court further

found that, while clear that the homeowners were dissatisfied with the work, the alleged failures of the contractor were due to the homeowners' failure to select a paint color, which established that the *homeowners* breached the contract. The court concluded there was "no testimony supporting unlawful, immoral, unethical or unscrupulous conduct on the part of the plaintiff[]" because there was consistent communication from the contractor and homeowners never express dissatisfaction with the work, and entered judgment for the contractor on all counterclaims, including the CUTPA count.

Chen v. Chen, No. FST-CV 18-6036769-S, 2023 WL 3597448 (Conn.Super. May 17, 2023)

[Superior Court found that filling out a blank check for twice the authorized amount constituted a violation of CUTPA and awarded actual damages in the amount of the check plus punitive damages equal to actual damages]

Plaintiffs, a restaurant and its owner, filed suit against two contractors and their principals in connection with a contract to remodel the restaurant. Defendant J&R Management Group, Inc. and its principal failed to appear, and default judgment was entered against them. A trial was held with participation from the remaining defendants, KBM Sales & Construction, LLC and its principal.

At trial, the evidence established that plaintiffs had given the defendants a blank, signed check to pay for the purchase of a grease trap and hot water tank, which the contractor had assured plaintiffs would not be greater than $10,000. KBM's principal filled out and cashed the check for the amount of $20,000 because "the funds were needed to pay wages to his laborers and for additional equipment." The court found that this action constituted a violation of CUTPA, thereby entering judgment in favor of plaintiffs as to KBM and its principal on the merits. Because J&R and its principal failed to appear, the court likewise presumed liability as to them as well and entered judgment in favor of plaintiffs based on that default.

The court further found that, as to the CUTPA violation, plaintiffs were entitled to an award of $20,000 in actual damages plus $20,000 in punitive damages.

Materas v. Parker, No. KNL-CV21-6049644S, 2023 WL 3477078 (Conn.Super. May 9, 2023)

[Superior Court found, after trial, that the homeowners would not have entered into or would have terminated the contract if the contractor had complied with the HIA, thereby warranting a judgement in favor of the homeowners on their CUTPA claim]

Plaintiffs, homeowners, filed suit against defendant, contractor, in connection with a contract for improvements to homeowners' home. The parties entered into a verbal agreement to build and install kitchen cabinets and lighting, bathroom sink vanity, and laundry room cabinets. The homeowners made clear to the contractor that they were anxious to move forward and needed the job done by early July due to the impending arrival of their child, and agreed to pay a deposit of $18,000 on a job quoted at $22,319 so the contractor could obtain the materials and get started quickly. The job remained uncompleted until the homeowners hired another contractor, who completed the installation around in October.

The court found, after trial, that the verbal agreement did not comply with the HIA. The court then applied a two-prong test to determine whether the contractor violated CUTPA. First, the court found that the contractor's failure to comply with the HIA was a *per se* violation of CUTPA. Second, the court considered whether the HIA violation caused the homeowners' damages, and concluded that it did after making an express finding that, if the contractor had utilized a "properly drawn home improvement contract that comported with the requirements and made the disclosures required under the [HIA] in an honest fashion, including especially the start date and completion date under § 20-429(a)(1)(A)(vii), [the homeowners] would have cancelled any prior agreement or declined to enter into the contract and pay the deposit." The court further

found that the homeowners suffered a cognizable loss because it lost "use of the funds represented by the deposit of $18,000 paid to [the contractor] from the date of payment to date, and the time in which a more scrupulous cabinet maker would have performed, which is difficult to quantify, but also the attorney's fees, costs, and inconvenience of pursuing this action." Accordingly, the court entered judgment in favor of the homeowners on their CUTPA claim, and awarded damages of $18,000, representing the deposit, plus interest and attorney's fees.

Coastal Luxury Homes, LLC v. Concrete Superstructures, Inc., No. FST-CV-226057139-S, 2023 WL 2134431 (Conn.Super. Feb. 17, 2023)

[Superior Court found that failure to return overpaid funds was sufficient to establish a violation of CUTPA and award punitive damages]

Contractor issued a duplicate check to subcontractor, who cashed the check, thereby resulting in an overpayment of the amount due by $38,000. The court found, on default judgment, that the subcontractor had made repeated assurances it would return the funds but never did. Based on the "retention of the funds, coupled with the acknowledgement that the funds should be (should have been) repaid to the plaintiff" were aggravating circumstances such that punitive damages under CUTPA were warranted, and awarded punitive damages in the amount of $5,000.

Advanced Window Sys., LLC v. Turnquist, No. KNL-CV22-6054976S, 2023 WL 2134414 (Conn.Super. Feb. 15, 2023)

[Superior Court found that allegations of misrepresentation combined with failure to repair damage that occurred during the performance of the contract were sufficient to allege a violation of CUTPA]

Plaintiff, contractor, filed suit against defendants, homeowners, based on an unpaid amount associated with a contract to provide siding, roofing, gutter, window and door installation services at the homeowners' property. Homeowners asserted counterclaims, including for violations of CUTPA.

Defendants allege that, during the performance of the contract, a leak appeared in the defendants' home, which defendants asked the contractor to come fix. Contractor failed to the leak for several days, and came back to remediate the damage that was caused by the unrepaired leak. Defendants refused to sign off on the repairs and did not make final payment to the contractor. Defendants were forced to hire a new contractor to come back and reinstall the gutters that the plaintiff had improperly secured.

The court found that these allegations were sufficient to withstand a motion to strike the CUTPA claim because the multiple days where the contractor failed to fix the damage, combined with alleged misrepresentations that deceived the defendants, were sufficient to allege unethical, immoral, or oppressive behavior sufficient to sustain a claim for CUTPA.

IX. STATUTE OF LIMITATIONS

Hockenberry v. Wapping Cemetery Ass'n, No. HHD-CV-20-6127670-S, 2023 WL 8432034 (Conn.Super. Nov. 30, 2023)

[Seven-year statute of limitation under § 52-584a applies to action against engineer whose plans were not utilized within the seven-year period following the creation of the plans]

The Hockenberry case succinctly addressed an issue of first impression in Connecticut: When does Connecticut General Statute § 52-584a begin to run when an engineer creates plans for improvements, but the plans are not used to construct the planned improvements within the seven-year time limitation found in § 52-584a? In this instance, the Court held that the seven-year statute of limitations found in § 52-584a precluded the claims against the engineer.

The Plaintiffs were landowners suing the Defendant Wapping Cemetery Association, Inc., claiming that improvements to the cemetery next to their property caused flooding and other damages on their property. Specifically, the Plaintiffs claimed that in 2019, the Defendant constructed new roadways, re-graded the property and installed drywells on its property, which

caused water to run off the Defendant's property and onto their property. The Defendant, in turn, filed an apportionment complaint and a complaint sounding in indemnification against their engineer, Grever & Ward, Inc. The Defendant alleged that Grever & Ward provided them with plans for the improvements at issue in August 2003 and that Grever & Ward was negligent in the preparation of those plans. Grever & Ward, Inc. moved for summary judgment arguing that § 52-584a precluded the Defendant's claims.

The Court began its analysis by reviewing previous case law that had examined when § 52-584a begins to run. The Court noted that "[i]n the ordinary case . . . the seven-year statute of limitations begins to run from the date of the substantial completion of the improvement for which the architect or engineer performed the services ... However, where the improvement to real property contemplated by the architect's or engineer's plan is not completed, [Grigerik v. Sharpe, 247 Conn. 293, 307 (1998)] establishes that the seven year statute of limitations begins to run when the alleged negligence occurs, at least where the improvement is not completed because the negligence of the architect or engineer created a defect in the plan that prevented completion." Hockenberry at * 5-6. The Defendant argued that in light of Grigerik, its claims fell within the seven-year statute of limitations because it brought the claims within seven years from the date of substantial completion of the 2019 project. To this, the Court stated:

> The necessary implication of [Defendant's] argument is that, once an engineer or architect provides plans for an improvement to real property, and even though the property owner decides not to proceed with the subject improvement, the statute of limitations applicable to claims against the architect or engineer would never begin to run so long as the improvement might be made at some indefinite time, even years or decades into the future.

Id. at * 6. The Court continued its analysis and noted that none of the cases, including Grigerik, addressed the precise question presented in the case before it. For example, in Grigerik, the very reason the improvements were not constructed was because of the alleged defects in the engineer's

plans which prevented the owner from obtaining necessary permits to perform the work. Moreover, the Grigerik court itself recognized that a situation like the Hockenberry situation could happen but "left the determination of precisely when the seven-year limitations period would begin to run to a case that presents that question." Id. at * 8 (citations omitted).

In light of the lack of on-point jurisprudence and the Court's determination that § 52-584a was not clear and unambiguous in the context of the case before it, the Court examined the legislative history of § 52-584a to determine the legislative intent of the statute. Based on the legislative history, the Court determined that the purpose for enacting the statute was to relieve architects and engineers from the burden of carrying liability insurance indefinitely and provide them with a workable statute of limitations to put an end date on their potential liability. The Court held: "[W]here a property owner waits more than seven years to make improvements in accordance with the plans provided by an architect or engineer, the statute of limitations in § 52-584a should run from the completion of the plans." Id. at * 13. The Court therefore granted Grever & Ward, Inc.'s motion for summary judgment and entered judgment on the Defendant's apportionment complaint. Notably, there was no discussion of Conn. Gen. Stat. § 52-102b or § 52-572h and their time limitations, or the lack thereof, as they relate to apportionment complaints.

The Court also answered the question of whether the statute of limitations found in § 52-584a related to indemnification or the general indemnity statute of limitations, § 52-598a, applied to the Defendant's claim for indemnification against Grever & Ward, Inc. The Court again looked to the language of § 52-584a and stated that when reviewing statutes, "we presume there is a purpose behind every sentence, clause, or phrase…" Id. at * 16. The Court found that "Construing § 52-598a, which applies to indemnification claims generally, to override § 52-584a's specific application to indemnification claims against architects, engineers and land surveyors would

violate that tenet of statutory construction." Id. at * 15. The Court therefore granted Grever & Ward, Inc.'s motion for summary judgment and entered judgment on the Defendant's indemnification complaint.

Village at Black Rock Condominium Ass'n v. DCBuilds, LLC, No. FBT-CV-21-6106152-S, 2023 WL 2769700 (Conn.Super. March 27, 2023)

[Superior Court upheld a third-party apportionment claim under §§ 52-572h and 52-102b, focusing on whether the damages were proximately caused by third-party defendant's actions and finding that the original construction and renovations were the same occurrence despite a ten-year gap between the two events]

Though not addressing a statute of limitations claim, and in light of Hockenberry, the DCBuilds case is worth noting. The case involved a motion to strike an apportionment complaint and complaint filed against an architect, Gary Tierney and his firm, Design Two Architecture (hereinafter, "Architect"). The plaintiff was a condominium association and the defendants were designers and builders the plaintiff hired to perform design and renovation work related to elevated walkways at the condominium complex. The plaintiff alleged that in 2016, it determined that the walkways had defects and engaged the defendants to design and construct improvements to fix the defects. The plaintiff further alleged that the defendants failed in this endeavor and the lawsuit ensued. In 2005, the Architect designed the walkways at issue. The defendants, in their apportionment complaints, alleged that the Architect was negligent in its original design and that the original negligence of the Architect contributed to the plaintiff's alleged damages. The plaintiff pleaded over against the Architect.

The Architect moved to strike the plaintiff's complaint on the grounds that (1) the plaintiff's alleged damages are solely attributable to the defendants' work and cannot be attributable to the 2005 work it performed; and (2) the harm does not arise out of the same

transaction or occurrence that is the subject of the complaint, and is therefore improper under Conn. Gen. Stat. § 52-102b(d). The court resoundingly rejected both of these arguments, and, in a footnote stated:

> In their motion and accompanying memorandum, [Architect] emphasizes that the Original Construction took place more than ten years ago and that the plaintiff did not bring direct claims against them prior to this action. The passage of time between the Original Construction and this action is immaterial. Section 52-102b(d) permits the plaintiff to 'assert any claim . . . arising out of the transaction or occurrence that is the subject matter of the original complaint" against an apportionment defendant "*notwithstanding any applicable statute of limitation or repose,*" provided it does so 'within sixty days of the return date of the apportionment complaint . . . (emphasis added). Similarly, the passage of time does not, on its own, demonstrate that the plaintiff's damages were not proximately caused by both the [Architect] and [defendants]…

The Court allowed the complaint to stand despite the fact that the Original Design occurred more than fifteen years prior to the plaintiff commencing the lawsuit related to the new work on the walkways at the complex.

X. LEGISLATION

As it concerns attorneys practicing in the state's construction industry, one of the most monumental (and problematic) legislative measures taken by the General Assembly during its 2023 legislative session was its passage of the legislation expanding the scope of Connecticut's False Claims Act. Although it remains to be seen as to how this law will affect the industry, it is safe to say that its effect will be felt by many section members and their clients. This legislation passed despite opposition from the CBA's Construction Law Section.

Other noteworthy legislative enactments from the 2023 session are summarized below.

House Bill 6826 [Public Act (P.A.) 23-129]: An Act Concerning (AAC) Liability for False and Fraudulent Claims

Connecticut's False Claims Act, Conn. Gen. Stat. §§ 4-274 through 4-289, previously had been restricted to state-administered health and human services programs, but as a result of this

legislation, that restriction is no longer in place. Pursuant to the new legislation, the Attorney General and private citizens are now both generally permitted to bring whistleblower claims against any participants in the bidding, procurement, and building processes of contracts with the state.

As under the prior version of the False Claims Act, violators involved in health and human services-related state projects had been liable to the state for: (1) a civil penalty that is adjusted for inflation in accordance with federal law; (2) treble damages; and (3) prosecution and investigation costs. Although the legislation removed the liability for investigation costs, it kept many of the prior provisions of the Act in place—including the above-mentioned penalties—in place, making state contractors in the construction industry now potentially liable for these penalties. For any violation committed by two or more individuals or entities, liability is joint and several. As was the case under the previous legislation, whistleblowers share any recovery with the state—provided they meet certain conditions—and any information they provide to investigative officials is exempt from FOIA. That said, one of the new components of the legislation now explicitly provides that if the state is a defendant in any civil or arbitration proceeding, it is prohibited from asserting a counterclaim, set-off, or defense alleging a violation of the Act. The Act is also now excluded from any claim made under any tax law administered by the state or its political subdivisions.

This legislation passed despite the Section's opposition from the Section and many other organizations in Connecticut's construction industry. There are many concerning aspects to the legislation as it relates to the construction industry, but perhaps one of the gravest and most obvious concerns expressed by those in the industry is that the Act's scope now exposes a large array of participants in the public contracting industry to potential liability. Many of the prior False Claims

Act's provisions—which only applied to the limited scope of participants in the health and human services industries—now apply to a large swath of entities that provide goods or services involving state funds, including those in the construction industry. When this blunderbuss exposure to liability under the Act is coupled with the facts that, among other things, it fails to provide for any real robust control measures to protect contractors against questionable whistleblower claims, it maintains the preponderance evidentiary standard for plaintiffs, and it immunizes and rewards whistleblowers in the same manner as the prior, more industry-specific Act, it is obvious that this legislation may warrant further attention in future legislative sessions. The legislation became effective on October 1, 2023.

House Bill 6798 [P.A. 23-185]: AAC Certain Producers of Concrete Aggregate

Existing law requires concrete aggregate quarry operators to have a third party test their aggregate and report to the state on the aggregate's total sulfur content. The legislation imposes new restrictions and standards on aggregates that contains high sulfur content. In some cases, the legislation will now require quarry operators to have third parties perform additional testing of the material in order to detect pyrrhotite, which is the sulfide mineral that has caused many concrete foundations across the state to deteriorate.

Existing law also requires quarries to submit a geological source report (GSR) to the state in which the quarry outlines certain production details such as quality control methods and its mining methods. The legislation now requires aggregate producers to comply with additional GSR submission requirements.

Finally, the legislation requires concrete producers—which are entities that mix coarse aggregate with other component ingredients to create concrete for use in residential or commercial foundations—that do not use coarse aggregate from their own quarries to confirm with the provider

of the aggregate that (1) it complies with both existing laws and the act's requirements for total sulfur and pyrrhotite content and (2) that its source is a quarry or other producer that has filed a current GSR with the state. The act requires them to confirm this information by July 1, 2024, and thereafter they must confirm annually. This legislation became effective when it was passed, on June 27, 2023.

Senate Bill 1035 [P.A. 23-162]: AAC Stop Work Orders

This legislation generally enhances the investigative and policing powers of the State Department of Labor (DOL) with respect to alleged violations of prevailing wage requirements. Under prior legislation, the DOL only was permitted to issue stop work orders against contractors and subcontractors in instances where the nature of the violation was that a GC or a sub had failed to provide workers' compensation insurance coverage for employees. The new act expands the DOL's authority to issue stop work orders to GCs or subs not only for these violations, but also now for violations concerning knowing or willful failure to pay employees prevailing wages.

The procedural requirements for issuing stop work orders that were previously in place still apply to this new legislative regime, meaning that stop worker orders, among other things:

- must be issued within 72 hours after investigating and determining that a violation has occurred;
- only apply to the violating employer and the specific place of business where the violation exists;
- are effective when served on the employer or at that place of business or employment;
- may be served by posting a copy in a conspicuous location at the place of business;
- remain in effect until the labor commissioner either finds that the employer complies with prevailing wage requirements or, at the employer's request, holds a hearing; and
- are effective against the employer's successor entity if it has at least one of the same principals or officers as the entity subject to the original order and they are engaged in the same or equivalent trade or activity.

The legislation also increases the civil penalty for violating a stop work order from $1,000 per day for each day the violation continues to $5,000 per day. Finally, the legislation gives additional teeth to the DOL in connection with investigating violations insofar as any party hindering an investigation concerning alleged violations of prevailing wage requirements will now be fined. Although the fine for hindering investigations under the prior law only ranged from $100 to $250, the act increases this fine to at least $1,000. The law became effective on October 1, 2023.

Substitute Senate Bill 1123 [P.A. 23-175]: An Act Amending Codification of Prevailing Wage Contract Rates

Under prior law, DOL set residential construction rates for prevailing wage projects by adopting the federal labor secretary's wage rates. This legislation now requires that, for public works projects that meet prevailing wage cost thresholds, residential construction rates must be determined from CBAs or understandings covering the same work in the same trade or occupation classification in the town where the project is being done. Residential projects are defined with reference to federal guidelines, which define such projects as construction of single- or multi-family houses or dormitories of no more than four stories. Note that this mirrors the existing prevailing wage legislative method that is used for determining prevailing wage rates in non-residential public works projects; namely, for public building, heavy, and highway projects. The act became effective on July 1, 2023.

Substitute House Bill 6903 [P.A. 23-91]: AAC Oversight of and Requirements for Certain Contracts of the Connecticut Port Authority

This act makes several changes affecting the Connecticut Port Authority's (CPA) contracting procedures. The legislation requires public bidding for certain state-funded projects to construct, renovate, or alter buildings or facilities that the CPA owns or leases (i.e., those that

are overseen by a construction manager and financed in whole or in part by the state (including matching expenditures, grants, loans, insurance, or guarantees)). In this context, "projects" includes all related planning, feasibility, environmental testing and assessment, permitting, engineering, technical assessment, site acquisition, site preparation, and infrastructure improvements.

The act prohibits the construction manager overseeing the CPA project from bidding on any of the project's elements. The legislation also implements new procedural requirements for the bidding process on CPA projects. Specifically, the construction manager must invite bids post notice of them on the State Contracting Portal. Bids must remain sealed until the public opening. The construction manager is required to consult with, and receive approval from, CPA before awarding a contract, and the contract must be awarded to the lowest responsible qualified bidder that responds to the invitation to bid. Pursuant to the act, any contract that the CPA enters into with a construction manager requires the construction manager to keep detailed accounting records for all state funds that are spent, including detailed support for cost allocations. The accounting records are also subject to audit by the Auditors of Public Accounts under the legislation. This legislation became effective on July 1, 2023. Additionally, note that other legislation that passed in the 2023 legislative session; *see below* discussion about Section 113 of P.A. 23-204; implemented new protocols for the issuance of building permits for CPA projects.

<u>Substitute House Bill 5001 [P.A. 23-137] (*Select Section*)</u>: AAC Resources and Support Services for Persons with an Intellectual or Developmental Disability

- ***Section 22*** **(Modernizing and Maintaining Bus Stops and Shelters):** The sweeping legislation contained in this public act primarily expands the scope and quality of services for people with intellectual or developmental disabilities (IDD) in Connecticut. That said, this particular provision in the bill may be of interest to those in the construction industry

that work on DOT projects. Existing law had previously required that the state building code—which generally regulates the design, construction, use, and alteration of buildings and structures including bus stops and shelters—be in "substantial compliance" with the federal Americans with Disabilities' Act (ADA). Pursuant to section 22 of this bill, the DOT and transit districts must jointly develop plans to modernize and maintain bus stops and shelters in the state by requiring them to:

1. Ensure that stops and shelters are built and maintained such that they comply with the ADA's physical accessibility guidelines;
2. Include sidewalks, appropriate curb cuts and ramps, shelter from weather, lighting, and other accommodations;
3. Consider installing solar photovoltaic systems at bus stops and shelters to operate lights and to allow for the charging of mobile devices; and
4. Include ways to ensure that stops and shelters are adequately maintained once built.

The legislation requires the DOT to submit to the General Assembly's Transportation Committee a plan on bus stops and shelters owned by DOT, and another for those owned by transit districts, by no later than July 1, 2024. The legislation became effective on the date of passage, June 27, 2023.

House Bill 6941 [P.A. 23-204] (*Select Sections*): AAC The State Budget for the Biennium Ending June 30, 2025, and Making Appropriations Therefor, and Provisions Related to Revenue and Other Items Implementing the State Budget.

- ***Section 68*** **(Set-Aside Program Goal Report):** This provision in the bill delays—from August 30th to September 30th—the annual deadline by which state agencies and political subdivisions of the state, other than municipalities, must submit to DAS their SBE/MBE contracting set-aside goals for the current fiscal year. The act also requires DAS annually to give awarding agencies a preliminary set-aside goal report for the upcoming fiscal year, by June 30th. This legislation becomes effective on July 1, 2024.

- ***Section 113*** **(Connecticut Port Authority Building Permitting Process):** Under prior existing law, certain state entities—namely, state agencies and the Connecticut Airport Authority—are responsible for substantial compliance with the State Building Code and Fire Safety Code when constructing new buildings or altering their existing buildings. Also under prior existing law, these state entities, unlike other applicants, are not required to obtain building permits or certificates of occupancy from local building officials before commencing construction. Existing law requires these state entities to apply for and receive a building permit from the state building inspector before starting construction on buildings, structures, or additions that include residential occupancies for at least 25 people, or for buildings/structures/additions that exceed: (i) four stories; (ii) 60 feet in height; (iii) a clear span of 150 feet wide; (iv) 150,00 square feet of floor space; or (v) occupancy by 1,000 or more people. Pursuant to this section of the bill, the CPA is now included in this group of state entities that are covered by this building permit process.
- ***Sections 328 & 329*** **(HVAC and Outdoor Athletic Facility Minimum Reimbursement Rates for Certain Towns):** These sections of the bill apply to school construction projects in municipalities with a population of 80,000 or more (Bridgeport, Danbury, Hartford, New Haven, Norwalk, Stamford, Waterbury, and Cheshire). More specifically, the legislation creates minimum reimbursement rates for projects involving HVAC systems and outdoor athletic facilities. Under existing law, the DAS must administer a reimbursement grant program for school project costs. DAS ranks each town based on its property wealth (using adjusted equalized net grand list per capita), and uses the rankings to determine the reimbursement grant for each town. Based on their ranking as set in this process, towns may receive a standard HVAC reimbursement grant that ranges from 20-

80% of their eligible costs. Under this new legislation, minimum reimbursement grants now apply to HVAC school projects as follows: (i) for Cheshire, at least 50% of eligible costs must be reimbursed; and (ii) for the other aforementioned towns, at least 60% of eligible costs must be reimbursed. If any of these towns have a standard HVAC reimbursement rate that exceeds the 50% or 60% minimum rate described, then it receives the state standard reimbursement rate calculated by DAS for HVAC projects, as mentioned above.

For outdoor athletic facility projects, the same DAS ranking process described for HVAC projects applies. existing law provides for a state reimbursement rate of 50% of the school district's standard school construction project reimbursement rate. This legislation became effective on July 1, 2023.

- ***Section 387*** **(Task Force on Building Inspection Timeliness):** This section of the act establishes a seven-member task force that is charged with studying the timeliness of building inspections required for work performed under building permits. At a minimum, the study must: (1) review the average time that it takes to complete inspections once the work is ready for them; (2) examine the frequency with which scheduled inspections are cancelled or rescheduled and, if possible, which party did so; (3) determine whether inspectors are municipal employees or independent contractors and whether there are any regional arrangements; (4) recommend initiatives to incentivize or attract additional inspectors to Connecticut and increase inspection timeliness; and (5) recommend statutory changes to implement these initiatives. The task force consists of the OPM secretary or a designee, and six legislative appointees that were made by July 12, 2023. Also pursuant to the act, the task force was required to submit a report to the General

Assembly's Finance, Revenue and Bonding and Planning and Development committees by January 1, 2024. The legislation became effective on the date of passage.

- ***Sections 393-395*** **(XL Center):** In relevant part, this section of the bill allows the Capital Region Development Authority (CRDA) to enter into two separate agreements concerning Hartford's XL Center and, in particular, the center's (1) management and operation, and (2) reconstruction and renovation. Not only does the act require the contractor managing and operating the XL Center as of July 1, 2023 to invest in its renovation, but the act also paves the way for the CRDA to enter into at least one agreement to renovate and/or reconstruct the event center, subject to additional requirements. Under the act, any agreement must provide that CRDA, the state, or both, must contribute no more than $80 million toward the reconstruction or renovation project, and the contractor must contribute at least $20 million toward any construction occurring after January 1, 2023. In both cases, any agreement must be entered into by no later than December 31, 2025, but it may be amended thereafter. The act also requires that OPM must approve the agreements and any amendments thereto. The legislation became effective on July 1, 2023.
- ***Section 427*** **(Nondiscrimination Affirmation):** This provision makes certain changes to the nondiscrimination affirmation requirements set forth in section 4a-60a of the General Statutes. Under prior law, a state contractor's authorized signatory was required to show his or her understanding of the state's requirement that the contractor must not discriminate on the basis of sexual orientation by either (1) providing an affirmative response to a question about the provision in the required online bid or RFP, or (2) initialing the affirmation provision in the contract. Under the act, contractors now are

allowed to affirm their understanding of this nondiscrimination requirement with respect to sexual orientation by signing the contract. Note that a parallel nondiscrimination statute, C.G.S. § 4a-60a (which relates to nondiscrimination on the basis of race, religion, and other grounds), has allowed signature as affirmation of nondiscrimination. This act now makes that apply to nondiscrimination on the basis of sexual orientation. The legislation became effective on the date of passage.

- ***Section 430*** **(UCONN Capital Projects):** This section of the bill allows, for UConn construction manager at-risk (CMR) projects that involve renovating existing buildings or facilities, (1) certain work to begin prior to the project's guaranteed maximum price (GMP) is set and (2) a separate GMP to be set for each phase of a multi-phase project. In essence, the act implements the same CMR requirements in place for DAS projects to UConn projects. *See* C.G.S. § 4a-60. In particular, the act now allows construction of public utility installation and connections, as well as building envelope components, on UConn projects to commence before a GMP is set. However, the act also requires that certain conditions must be met for work to proceed: (1) the work must have been bid and awarded; and (2) the early work's total cost (including site preparation and demolition work) must not be more than 25% of the entire project's estimated construction cost. Finally, although prior law required that one GMP be set for the entirety of a multi-phase project, the act now allows multiple GMPs to be set for each phase. This legislation became effective on the date of passage.
- ***Sections 431 & 432*** **(UCONN Contractor Prequalification Requirements):** Prior law required UConn to separately prequalify contractors for each capital project whose cost exceeded $500,000. The act: (1) increases the threshold for separate prequalification to

$1 million and (2) allows the university to prequalify contractors for one year (rather than for each separate project) and to renew the prequalification for up to two or more years. As was the case under the prior law, contractors seeking prequalification must show UConn that they generally (1) meet certain performance-based financial and technical expertise standards; (2) have experience with similar projects; and (3) do not have a conflict of interest. The act also applies the no-conflict-of-interest requirement to projects costing between $500,000 and $ 1 million, but not the other two requirements. UConn is also permitted to impose other requirements for prequalification at its discretion under the act, but another clarification that the act makes is that although prior law required that any contractor seeking UConn prequalification must also have been prequalified by DAS, the act now provides that this requirement only applies when contractors are *subject to* DAS prequalification. The act also makes a parallel change to UConn projects awarded using the design-build method. Prior law required that D-B bidders for UConn projects had to be prequalified by DAS, but under the act, this requirement only applies if the project cost exceeds the $ 1 million threshold for DAS prequalification. The legislation became effective on October 1, 2023.

- ***Sections 433-437*** **(DAS Contractor Prequalification & Related Thresholds):** In conjunction with Sections 431 and 432 of this bill, these sections increase several thresholds for DAS contractor prequalification—from the previous threshold of $500,000 or more to the new threshold of $1 million or more. Under the act, the cost threshold is increased from $500,000 to $ 1 million—and additional requirements are imposed—for the following types of projects, for purposes of the requirement to hire a prequalified contractor: (i) state and municipal projects involving subcontracts costing $1 million or

more (so-called "substantial subcontractors"); (ii) state agencies, quasi-public agencies, and municipalities must complete and submit to DAS a contractor evaluation form for contractors involved in state or municipal projects exceeding the threshold; and (iii) the awarding authority for projects meeting the threshold—but not those that cost $1.5 million or less—must advertise the contract on the State Contracting Portal and, using competitive bidding, must award the contract to the lowest responsible and qualified bidder that is prequalified. Section 437 of the act requires contractors and substantial subcontractors to include specified information in response to bid invitations issued by DAS for certain public works projects, including, but not limited to: (1) information re: the bidder's form of organization; (2) information re: any legal or administrative proceedings settled or concluded adversely against the bidder within the past 5 years; (3) a statement about whether the bidder has previously been disqualified for specific reasons such as state wage law violations; and (4) other information that may be required by DAS. Although these information requirements mirror those for DAS prequalification applications, unlike those applications, the information required under this legislation does not include information about a bidder's financial, personal, or familial relationship with the construction project owner. If a bidder fails to disclose the required information, it may be disqualified. The act requires employers performing work under one of these contracts to participate in a workforce development program that gives new and existing employees the opportunity to develop skills. Finally, beginning October 1, 2023, DAS is required to hold an annual training session to discuss state contracting requirements. The legislation became effective on October 1, 2023.

<u>House Bill 6942 [P.A. 23-205] (*Select Sections*)</u>: An Act Authorizing And Adjusting Bonds of The State and Concerning Certain Grant and Financing Programs, State Construction

Related Thresholds, School Construction Projects, The Failure to File for Certain Grand List Exemptions, The Validation of Certain Actions Taken by Certain Municipalities, Capital City Projects, Certain Consumer Agreements, Certain Modifications to Municipal Charters and Petitions for Certain Town Referenda, Elections Administration and Campaign Finance, Certain Cases Before The Commission on Human Rights And Opportunities and Other Items Implementing The State Budget.

- ***Section 60*** **(Construction Grants to Public Libraries):** Prior law authorized the State Library Board to award grants for public library construction for up to 50% of a project's total construction costs, subject to a $1 million per project cap. Under the act, for project applications submitted on or after July 1, 2023, the grant amount allowed for projects in distressed municipalities has been increased to allow for up to 80% of the project's total construction costs. The act also increases the per project cap for these projects to $ 2 million. Grants are still subject to board approval and availability of funding. The legislation became effective on July 1, 2023.
- ***Sections 105-111*** **(Capital Project Thresholds):** These sections of the bond bill increase several caps relating to state capital projects: (1) the act increases, from $2 million to $3 million, the maximum allowable cost of an individual capital project that CSCU, the Military Department, and the Judicial Department may each administer for themselves and (2) requires that these caps be adjusted annually for inflation beginning July 1, 2028. The act also increases the cost of a capital project that state agencies generally may administer from $500,000 to $1 million. The act also increases the cost of a construction consultant services contract for which DAS must select a consultant using a selection panel process from $500,000 to $700,000. The act also requires that this threshold be adjusted annually for inflation beginning July 1, 2024. The legislation became effective on July 1, 2023.
- ***Section 114*** **(School Construction Grant Commitments):** This section of the act authorizes 22 school construction state grant commitments—totaling $736.45 million—to

the following school districts: ACES, Bristol, Cheshire, Cromwell, Darien, Hartford, Madison, Norwalk, Norwich, Regional District 18, Stamford, and Stratford. The act also reauthorizes two projects, the Farmington High School project and the Westhill High School (Stamford) project, which have changed materially in scope, and which resulted in an additional state grant commitment of $37.6 million. Effective upon passage.

- ***Section 115*** **(School Building Projects Advisory Council Membership):** This section of the bill added two ex-officio members to the School Building Project Advisory Council, increasing membership from 9 to 11 members. These two members consist of the emergency services commissioner and the chairperson of the Connecticut Technical Education and Career System (or their designees). This legislation became effective on July 1, 2023.
- ***Section 116*** **(Reimbursement Grant Rate for New School Construction):** Existing law provides that for approved grant applications for new school construction projects made on or after June 1, 2022, the state reimbursement rate ranges from 10-70%. Under the act, beginning with approved grant applications made on or after July 1, 2024, the act increases the state reimbursement rate ceiling from 70% to 80%. As was the case under prior existing law, the act still provides that if an applicant district demonstrates that new construction is less expensive than renovation, extension, or major alteration, then the minimum reimbursement rate increases from 10% to 20%. The legislation became effective on July 1, 2023.
- ***Sections 117-119*** **(Federal Funding for School Building and HVAC Projects):** The act eliminates—beginning July 1, 2023—the requirement that the state subtract federal funds received by a town from the project costs before calculating the state reimbursement grant

for school building projects. Notwithstanding, the act still imposes the prior existing requirement that other state funds received by the town must be subtracted from the project costs. Further, although prior law restricted the ability to do so to a town that is a priority school district with the largest student enrollment as of October 2003 (Bridgeport), the act now allows all towns to use federal funds to finance all or party of the town's local share of a school construction project. Finally, section 119 of the act now allows local and regional BOEs and regional education service centers that receive a state grant for certain HVAC or indoor air quality projects to use any federal funds received for the project to cover all or part of the board's or center's local share. Prior law prohibited them from using state grant funds for HVAC or indoor air quality projects to replace local matching requirements for other federal or state funding received for such projects. This legislation became effective on July 1, 2023.

- ***Sections 120-139 & 194*** **(School Construction Project Exemptions, Waivers, Modifications and A Repeal):** This legislation exempts 28 school construction projects—located in 14 towns and in one university-operated magnet school—from statutory and regulatory requirements to allow these projects to, among other things, qualify for state reimbursement grants, receive higher grant reimbursement percentages, or have their projects reauthorized due to a change in scope or cost. Effective upon passage.

Substitute House Bill 5317 [P.A. 23-114]: AAC Online Building Permit Applications

This legislation explicitly authorizes—in accord with the Connecticut Uniform Electronic Transactions Act (C.G.S. §§ 1-266 to 1-286)—municipalities to accept electronically submitted building permit applications from contractors, aligning the law's building permit signature requirements with current practice. The act became effective on October 1, 2023.

XI. MECHANIC'S LIENS

Macre v. East Haven Builders Supply-US LBM, LLC, No. NNH-CV-19-6096339, 2023 WL 196044 (Conn.Super. Jan 13, 2023).

[Trial court entered judgment in plaintiff's favor on unjust enrichment claim seeking return of payment for release of mechanic's lien.]

The plaintiffs had entered into a residential construction contract with a general contractor (GC) for $449,950.23. The plaintiff paid the GC a total of $236,266.72 which included $22,178.65 in invoices for materials provided by the defendant. The GC defaulted on its obligations to the plaintiffs and the contract was terminated. The defendant had recorded a mechanic's lien against the plaintiff's property for $22,178.65, the amount of the invoices for materials. Plaintiff's lender would not release any construction funds to continue the project until the defendant's mechanic's lien was released. The plaintiffs were not represented by counsel and did not know they had no obligation to pay the defendant and contacted defendant's attorney to negotiate the release of the lien. Plaintiffs paid $27,318.15 to release the $22,178.65 mechanic's lien plus interest and attorney's fees. The plaintiffs finished the project with a new contractor and spent more to finish the project than the amount agreed to under the original contract. Thereafter, plaintiffs obtained a judgment against the GC in the amount of $135,198.60, which included the amount paid to defendant to release the lien, however the judgment was not satisfied.

Plaintiffs brought suit for unjust enrichment against defendant for the return of the payment for a release of an invalid mechanic's lien. The Court reasoned that pursuant to Conn. Gen. Stat. § 49-33(f), the defendant was not entitled to record a mechanic's lien against plaintiffs' property as "[A] subcontractor's right to a mechanic's lien is said to flow from his equitable entitlement to the lien which would otherwise attach in favor of the general contractor ... Subrogation is consistent

with and an integral part of or statutory provisions (referring to § 49-33f) limiting the totality of mechanic's lien to the unpaid contract debt owed by the owner to the general contractor," *ProBuild East, LLC v. Poffenberger*, 2010 WL 3025178* 5 (*Corradino*, J.T.R.)(J.D. New Haven 2010), aff'd, 136 Conn. App. 184, 191-92 (2012) *quoting Seaman v. Climate Control Corp.*, 181 Conn. 592, 595-96 (1980). Here the court found that the plaintiffs had paid the GC for the materials provided by the defendant and that the plaintiffs were entitled to a credit from defendant for those payments per Conn. Gen. Stat. § 49-36. The court further found that the defendant improperly added interest and attorney's fees to the lien which is not authorized by Conn. Gen. Stat. § 49-33(a). The court held that the plaintiffs paid the defendant $27,318.15 to obtain a release of an invalid mechanic's lien and as a result the defendant received payment for the release of a lien to which it was not entitled. Accordingly, the court found that the elements of unjust enrichment were established as the defendant received a benefit for which it did not pay, to the detriment of the plaintiffs under circumstances in which it would be inequitable for the defendant to retain that benefit.

Although the defendant argued that a claim of unjust enrichment could not be brought because the plaintiffs waived their right to contest the lien by voluntarily entering into the "settlement agreement" to release the lien, the court held that the issue was not whether there was a settlement of a mechanic's lien, but rather, whether the defendant was unjustly enriched as a result of its receipt of a payment to release a wrongful lien.

<u>Huribal v. Tunali Properties, LLC, et al,</u> No. AAN-CV-22-6048858, 2023 WL 5031025 (Conn.Super. Jul 26, 2023).

[Trial court denied motion for discharge of mechanic's lien finding that the work and materials were provided per agreement with a person with authority from or rightfully acting for the owner and that the lien was timely filed.]

In this case, the plaintiff had entered into a contract for the construction and completion of improvements to a restaurant that was signed by Mr. Tunali in his individual capacity and not as the managing member of the property owner, defendant Tunali Properties, LLC. Mr. Tunali also worked for defendant's tenant, Four Brothers Milford Pizzeria, LLC, which required the renovations. The plaintiff completed the renovation work at the property and made sure everything was installed correctly, however, defendants did not pay the $192,366.00 owed and plaintiff filed a mechanic's lien.

In filing the motion for discharge, the defendants argued that any construction contract was between the plaintiff and Tunali in his individual capacity and did not involve an agreement with or the consent of the owner of the subject property as required by statute and therefore, the defendants claimed that the lien was invalid. The plaintiff countered that because Mr. Tunali was the sole principal and sole managing member of Tunali Properties, LLC, which owned the property, Tunali had the authority to bind Tunali Properties, LLC and therefore, the lien was valid.

In denying the discharge, the court cited Conn. Gen. Stat. § 49-33 (a) noting that any person who has a claim for more than ten dollars for materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its appurtenances ... and the claim is by virtue... *of some person having authority from or rightfully acting for the owner* in procuring the labor or materials, the building, with the land on which it stands ... is subject to the payment of the claim." (Emphasis added.)

The court further provided that "[T]he three elements required to show the existence of an agency relationship [are]: (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking." (Internal quotation marks omitted.) *Hall* v. *Peacock Fixture & Electric Co.*, 193 Conn. 290, 294, 475 A.2d 1100 (1984).

The court found that all of the work performed by the plaintiff was for the benefit of the property owner, Tunali Properties, LLC and its tenant, Four Brothers Milford Pizzeria, LLC, who Tunali worked for and that Tunali, the managing director of Tunali Properties, LLC signed the agreement to pay for the project. Based on the foregoing the court held that the plaintiff's claim supporting the mechanic's lien was by virtue of an agreement with Tunali, a person having authority from or rightfully acting for the owner, Tunali Properties, LLC, and that the mechanic's lien was valid pursuant to § 49-33.

In addition, the defendant claimed that the lien was invalid because it was not filed within 90 days from when the restaurant opened and any work done after that time was a separate contract. In finding that the lien was timely filed, the court reiterated the exception to the general rule that a lien must be filed within 90 days of substantial completion per Conn. Gen. Stat. § 49-34 except where trivial services or materials provided at the request of the owner, rather than at the initiative of the contractor for the purpose of saving a lien, will extend the commencement of the period for filing a certificate of mechanic's lien. The court found that after the restaurant opened, pursuant to the owner's request substantial, not de minimis work, was required to be done by the plaintiff, through his hired subcontractor to relocate the stove/grill venting system or hood with the necessary hinged roof cap which extended the time period to the file the lien.

HM Construction & Painting, LLC v 203 CMO Zone Fund, LLC, et al, Superior Court DBD-CV-23-6045208S, 2023 WL 5031044 (Conn. Super. 2023) (Shaban, J.)

[Trial court denied summary judgment motion that mechanic's liens were unenforceable because plaintiff was not a home improvement contractor where releases of the mechanic's liens were allegedly forged.]

The plaintiff filed a 28 count complaint against defendants, which included claims of fraud, fraudulent transfer of property, forgery and CUTPA stemming from the defendants allegedly forged release of the plaintiff's mechanic's lien. The defendants filed a motion for summary judgment with respect to all of the plaintiff's claims on the grounds that the plaintiff's mechanic's liens were unenforceable because the plaintiff was not a registered home improvement contractor for the purposes of the Home Improvement Act and that therefore plaintiff suffered no compensable loss by the allegedly forged releases because the mechanic's liens were invalid in the first place. The plaintiff claimed that it has been damaged by the fraudulent discharge of the liens.

In denying the motion for summary judgment, the court noted that while there was case law holding that a mechanic's lien based on a home improvement contract which is unenforceable under the provisions of the [HIA] must be discharged, the proper procedure for discharging a mechanic's lien is found within Conn. Gen. Stat. § 49-35a. The court stated that the method upon which the defendants were alleged to have discharged the mechanic's liens were effectively one of self-help through forgery which is not legally permitted and would wreak havoc on the state's recording system and go against public policy. Further, as a result there were genuine issues of material fact as to whether the mechanic's liens were properly released and as to whether the plaintiff suffered damages as a result of the releases being filed and the motion was denied.

<u>One Evergreen Properties, LLC. V. New England Masonry & Roofing Company</u>, No. CV-22-6119795-S, 2023 WL 5216822 (Conn.Super. Aug. 8, 2023)

[Trial court granted motion to strike abuse of process claim based on an alleged invalid mechanic's lien as premature.]

The defendant filed a mechanic's lien on plaintiff's property for work performed and plaintiff filed a complaint alleging breach of contract, negligence, quiet title and CUTPA. Thereafter, the defendant filed an action to foreclose the mechanic's lien and the plaintiff consolidated the two actions. The plaintiff then filed a Second Amended Complaint which added an abuse of process claim against defendant based on the alleged invalid mechanic's lien. Defendant moved to strike the abuse of process count as premature, arguing that the claims which formed the basis of the abuse of process claim were still pending and unresolved. The plaintiff objected that the count was premature and further argued that because the abuse of process claim was based on an improper mechanic's lien, which is a statutory creation per Conn. Gen. Stat. § 49-33, this was a statutory violation and prematurity should not apply. The plaintiff reasoned that because a mechanic's lien is a statutory procedure that has immediate legal impact on someone's rights by limiting an owner's ability to sell or refinance property without any action of the court, there was an abuse of that statutory procedure, and the court should find an exception and deny the motion to dismiss the count as premature.

The court granted the motion to strike the abuse of process count as premature holding that it found no case law where Connecticut courts have created exceptions for abuse of process claims brought under a statutory framework and that therefore abuse of statutory process claims are subject to the same restraints as common law abuse of process claims. The court also relied on the principles regarding prematurity discussed in *Wes-Garde Components Group, Inc.* v. *Carling Technologies, Inc.*, Superior Court, judicial district of Hartford, Docket No CV-09-5028121-S

(March 10, 2010, *Sheldon, J.*). In *Wes Garde*, the plaintiff brought a breach of contract action against the defendant and the defendant filed a counterclaim alleging a violation of CUTPA based on litigation misconduct by the plaintiff. The plaintiff argued that the defendant's counterclaim was essentially a claim of vexatious litigation, and that the defendant's claim was premature because the underlying action brought by the plaintiff for breach of contract had not yet been resolved. The court agreed that the defendant's counterclaim for vexatious litigation was premature because the plaintiff's claim of breach of contract was not yet completed. The court held that the principle that a claim for vexatious litigation "may not be brought in the same action as that which the defendant claims is vexatious;" *Somers* v. *Chan*, 110 Conn. App. 511, 542, 955 A.2d 667 (2008); "applies *regardless of whether the action is brought under statute or at common law*."

Pittu v. T&J Custom Woodworking, LLC, No. CV-22-6118478-S, 2023 WL 7147529 (Conn.Super. Oct. 24, 2023)

[Trial court granted motion for discharge of mechanic's lien finding that lienor failed to show probable cause to sustain the validity of the lien.]

The plaintiff entered into a home improvement contract with a general contractor ("GC") which had subcontracted with the defendant to install cabinetry in the home for a cost of $45,600, which was subsequently adjusted to $41,550. The subcontract provided that the defendant would be paid "50% deposit upon signing, 40% upon delivery of the cabinets, 10% upon completion." The GC told the defendant to stop work because it was having a disagreement with the plaintiffs. The defendant never delivered the cabinets to plaintiffs. The defendant was paid a total of $27,312 by the GC under the subcontract, $22,800 when the work began and $4,512.50 after the work stopped. The defendant filed a mechanic's lien for $13,537.50.

The court granted the discharge of the mechanic's lien finding that the defendant had not shown probable cause to sustain the validity of the lien for the following reasons: 1) the defendant had not delivered all the cabinets and had not explained why it was entitled to receive any more payments under the terms of the subcontract which indicated that 40% of payment was due upon delivery, 2) the defendant had charged for work performed on items that were never installed in the property or actually used in the construction or improvement of the property which cannot be the subject of a mechanic's lien and 3) the defendant had not sent invoices for its work to the plaintiffs and did not ask the plaintiffs for payment. The defendant indicated that it had a subcontract with the GC and looked to the GC for payment as the GC also filed a mechanic's lien which included the defendant's invoices.