



STATE OF CONNECTICUT CONSTRUCTION LAW COMPENDIUM

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The following is a synopsis of construction law in Connecticut. Connecticut construction law is based generally in contract law, and shares many attributes with other states. This synopsis is designed to provide an overview of basic legal principles and for use as a research tool. It is not intended to provide an exhaustive or comprehensive description of all relevant Connecticut law, and it should not be construed as providing legal advice to the reader.

I. Breach of Contract

In order for parties to recover on breach of contract claims, they must first perform their own obligations under the contract or otherwise have a legal excuse for not rendering such performance. Argentinis v. Gould, 23 Conn. App. 9, 14 (1990) rev'd in part on other grounds, 219 Conn. 151 (1991). Relating specifically to construction contracts, “[s]ubstantial performance contemplates the performance of all items of a building contract except for minor details, those easily remedied by minor expenditures. Whether a building contractor has met this standard is ordinarily a question of fact for the trier.” Id.

In addition to traditional contract principles, commercial construction contracts in Connecticut are governed by Conn. Gen. Stat. § 42-158i et seq. These statutes enumerate various requirements and characteristics of commercial contracts, including an identification of specific terms which must be included, a prohibition against a term which purports to waive the right to claim a mechanic's lien, a regulation regarding certain required job site postings, and a provision compelling adjudication in Connecticut.

Conn. Gen. Stat. § 20-417a et seq. and Conn. Gen. Stat. § 20-418 et seq. also govern the actions of contractors performing new home constructions and home improvements, respectively. The former, the “New Home Construction Contractors Act,” requires a contractor to obtain a certificate of registration before he may engage in the construction of a new home. Conn. Gen. Stat. § 20-417b. Additionally, it provides for three distinct penalties for noncompliance: (1) a civil penalty, (2) a criminal penalty, and (3) a penalty pursuant to unfair or deceptive trade practices. Conn. Gen. Stats. §§ 20-417e-g. The latter, the “Home Improvement Act,” also provides regulation relating to the licensing of contractors, but it additionally provides the required terms of a home improvement contract as well as “a provision explicitly invalidating and declaring unenforceable contracts entered into by an unregistered contractor.” D’Angelo Dev. & Constr. Co. v. Cordovano, 278 Conn. 237, 246 (2006). The D’Angelo court held that, while the Home Improvement Act expressly provided for contractual unenforceability for statutory violation, the New Home Construction Contractors Act contained no such similar language, and therefore, the legislature did not intend for the New Home Construction Contractors Act to have the same effect. Id.

II. Negligence

Defective construction suits may involve negligence claims. In order to receive damages for negligence, a plaintiff must show, “by a fair preponderance of the evidence that the actor owed a duty of care to the victim, which was breached by the actor’s failure to meet the standard of care

arising therefrom and that the breach was the proximate cause of actual harm suffered by the victim.” Coburn v. Lenox Homes, Inc., 186 Conn. 370, 372 (1982).

Within the specific context of a negligent construction claim, the plaintiff must show “that the defendant knew or should have known of the circumstances that would foreseeably result in the harm suffered.” Id.; see also Greene v. Perry, 62 Conn. App. 338, 341 (2001). A builder is held to be “under a duty to exercise that degree of care which a skilled builder of ordinary prudence would have exercised under the same or similar circumstances.” Coburn, 186 Conn. at 381.

The same principal applies to a claim of professional negligence against a design professional. The extent of an architect’s duty can be limited by the scope of work identified in the contract. AIU Ins. Co. v. O’Brien, CV095012427, 2010 Conn. Super. LEXIS 620, at *2-3 (Conn Sup. Ct. Mar. 12, 2010) (Architect’s contract specifically provided that the architect was not to be responsible for construction means, methods, procedures, sequencing, or safety precautions since these were solely the responsibility of the contractor, thus architect had no duty to design, work, prevent, or protect in relation to the water pipes within the modular home that allegedly burst resulting in severe damage to the home).

Note, however, that recovery on certain negligent construction claims may be barred by the economic loss doctrine (see Section VIII below). The doctrine holds that a plaintiff may not recover in tort where “the relationships between the parties is a contractual one [sic] and the only losses alleged are economic.” Morganti Nat’l, Inc. v. Greenwich Hosp. Assoc., No. X06CV990160125, 2001 Conn. Super. LEXIS 2837, at *3 (Conn. Super. Ct., Sept. 27, 2001). While no Connecticut appellate court has employed this doctrine in the context of a construction case, various Connecticut trial courts have. See Morganti, 2001 Conn. Super. LEXIS, at *2 (holding that “[a]llowing a party to a broken contract to proceed in tort where only economic losses are alleged would eviscerate the most cherished virtue of contract law, the power of parties to allocate the risks of their own transactions”); Worldwide Pres. Servs., LLC v. The IVth Shea, LLC, No. X05CV980167154S, 2001 Conn. Super. LEXIS 308 (Conn. Super. Ct. Feb. 1, 2001). See §VIII, infra.

III. Breach of Warranty

Construction defect claims may involve both express and implied warranty breach claims. Statutorily recognized express warranties may be specifically created within construction contracts between a vendor and a purchaser in one of three different ways: (1) by a written affirmation of fact or promise about the construction improvement which shall be completed and which is part of the agreement between the vendor and the purchaser; (2) by any written description of the improvement which is to be completed and which is part of the agreement between the vendor and the purchaser; and (3) by a sample or a model which is put forth as part of the agreement between the vendor and the purchaser. Conn. Gen. Stat. § 47-117(a). These statutory express warranties apply only where there is the purchase of real estate in fee simple.

Under this same statute, it is not necessary that any formal words (e.g., “warranty” or “guarantee”) be used to create an express warranty. See Conn. Gen. Stat. § 47-117(b). Express warranties may thus be breached even if not written specifically into the contract between the vendor and the purchaser. See, e.g., White v. Towantic Woods Ass’ns, No. CV044001446S, 2007 Conn. Super. LEXIS 666, at *3 (Conn. Super. Ct. Mar. 6, 2007) (noting that because the defendant contractors failed to construct the building in question in a workmanlike manner, they breached their express agreement within the construction contract requiring the same). Where construction contracts exist outside of a purchase of real estate in fee, express warranties may still exist within contracts and may still be breached. See, e.g., Sellner v. Beechwood Constr. Co., 176 Conn. 432, 433 (1979) (upholding the lower court’s finding that defendant construction company breached the express warranty contained within the construction contract to remedy the defects in the plaintiffs’ home).

Construction contracts also create a number of implied warranties which may be breached. There are four statutorily-created implied warranties in Connecticut. They are: (1) an implied warranty that the construction improvement is free from faulty materials; (2) an implied warranty that the construction improvement was constructed “according to sound engineering standards;” (3) an implied warranty to construct in a workmanlike manner; and (4) an implied warranty of habitability at the time of delivery or the time of completion of an improvement if not completed when deed is delivered. See Conn. Gen. Stat. § 47-118(a). Outside of the statutory context, Connecticut courts are unclear as to whether these specific warranties continue to exist. However, most situations in which issues arise regarding alleged breaches of implied warranties occur where purchasers of a new home or business development contract with construction contractors for the improvements to the real estate in question, where these statutorily-created warranties are applicable and enforceable.

Finally, Connecticut courts recognize the “Spearin Doctrine” from the seminal Supreme Court case United States v. Spearin, 248 U.S. 132 (1918). Under Spearin and its progeny, there is an implied warranty that plans and specifications produced by the owner’s design team are adequate and constructible provided the contractor relying on the plans and specifications constructs the project in accordance with the plans and specifications. D’Esopo and Co. v. Bleiler, 13 Conn. App. 621, 623-24 (1988) (contractor not liable for failure to install additional subflooring where contractor followed plans and specifications provided by the owner’s architect). A contractor cannot, however, rely on the Spearin Doctrine where the contractor knew or should have known there were errors in the plans and specifications. See Southern New England Contracting Co. v. State, 165 Conn. 644, 656-57 (1974) (rejecting state’s argument that contractor knew or should have known errors in plans and specifications where contractor had limited time to review plans and specifications during bidding period).

IV. Misrepresentation and Fraud

Under Connecticut law an action for fraud can arise in any circumstance where all the following elements are present: 1) a false representation made as a statement of fact, 2) ...known to be untrue by the party making it, 3) that the statement was made to induce the other party to act upon it, and

4) the other party did act upon it, to his or her detriment. Citino v. Redevelopment Agency, 51 Conn. App. 262, 275 (1998), citing Bradley v. Oviatt, 86 Conn. 63, 67 (1912), overruled on other grounds by Kaczynski v. Kaczynski, 294 Conn. 121, 130 n.10 (2009). Furthermore, the specific acts relied upon must be set forth in the complaint. Gates v. Steele, 58 Conn. 316, 318 (1890); Bradley v. Reynolds, 61 Conn. 271 (1892).

A plaintiff in a fraud action is entitled to recover “any consequential damages resulting directly from the fraud.” Kilduff v. Adams, 219 Conn. 314, 323–24 (1991). The formula for calculating damages in a fraud action depends on whether the claimant was a fraudulently induced buyer or seller. If the claimant was a buyer then the “benefit of the bargain” formula will be applied: “the difference in value between the property actually conveyed and the value of the property as it would have been if there had been no false representation.” Miller v. Appleby, 183 Conn. 51, 57 (1991). Thus, a buyer, induced to purchase a home by the builder’s fraudulent misrepresentations as to its structural quality, is entitled to damages equivalent to the diminution in value between the property had it been as represented and the property as it actually was. Johnson v. Healy, 176 Conn. 97, 106 (1978). Where appropriate, such diminution in value may be determined by the cost of repairing the damage or defect. Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp., 245 Conn. 1, 59 (1998); see also Belanger v. Maffucci, No. CV054013892, 2007 Conn. Super. LEXIS 244 (Conn. Super. Ct. Jan. 26, 2007) (cost of refurbishing leaking and moldy basement was the proper measure of damages where the seller had misrepresented the condition of the drainage system). The repair costs, however, must not exceed the former value of the property, nor represent an enhancement in the value of the property over what it was before it was damaged. See Willow Springs, supra, 245 Conn. at 59.

Furthermore, while a simple breach of a construction contract does not violate the Connecticut Unfair Trade Practices Act (CUTPA) See Emlee Equip. Leasing Corp. v. Waterbury Transmission, Inc. 41 Conn. Supp. 575 (1991), the presence of fraud or misrepresentation may be a “substantially aggravating” factor creating such a violation. See Conn. Gen. Stat. § 42-110a, et seq.; see also, CNF Constructors, Inc. v. Culligan Water Conditioning Co., No. CV92-0242302S, 1993 Conn. Super. LEXIS 2302, at *3 (denying defendant’s motion to strike a CUTPA claim because allegations of misrepresentation, including the supply of used materials under the guise of new ones, were allegations of “more than a simple breach of [a] contract” to supply a water purification system for a construction project); cf. Naples v. Keystone Bldg. & Dev. Corp., 295 Conn. 214 (2010) (The trial court properly found a lack of unethical behavior or other aggravating factors necessary to establish a CUTPA violation. It properly declined to pierce the corporate veil to allow plaintiffs to hold the principal individually liable for his negligence, as there was no evidence that he used that control to commit fraud or other injustice, or that declining to pierce the corporate veil would leave plaintiffs without compensation for defendants’ breach of contract.)

V. Strict Liability Claims

In Connecticut, the doctrine of strict liability is not generally applicable to construction. The Connecticut Supreme Court has consistently followed the rule of strict liability set forth in

Restatement (Second) of Torts § 402A, finding strict liability applies only to “products.” K-Mart Corp. v. Midcon Realty Group, Ltd., 489 F. Supp. 813, 816 (D. Conn. 1980). The relevant statute in Connecticut is the Connecticut Product Liability Act. Conn. Gen. Stat. 52-572m. The Connecticut Product Liability Act (“CPLA”) excludes, from the definition of “product sellers,” entities that are in the business of installation and entities that are in the business of repairs and service. Leahey v. Lawrence D. Coon & Sons, Inc., No. CV044002738, 2006 Conn. Super. LEXIS 2157 (Conn. Super. Ct. 2006). When the contract is essentially for the rendition of services, and the materials are only incidental to the main purpose of the agreement, the contract is not one for the sale of goods. Id. In Leahey v. Lawrence D. Coon & Sons, Inc., the plaintiff filed a claim under the CPLA against a contractor when the plaintiff’s husband was injured when a board in the shed built by the defendant gave way, causing him to fall. The court denied the claim ruling because the contract was for the service of constructing a tobacco shed, the defendant was not a “product seller”. Id. Contractors are in the business of constructing homes and not in the business of selling or leasing the materials. Lang v. Brom Builders, No. CV950369766S, 1998 Conn. Super. LEXIS 280 (Conn. Super. Ct. 1998). Construction of a fireplace and chimney does not fall within the confines of the definition of a product. Std. Fire Ins. Co. v. Sauli, No. CV044000282S, 2005 Conn. Super. LEXIS 2707 (Conn. Super. Ct. 2005). In Std. Fire Ins. Co. v. Sauli, the court found a contractor could not be found strictly liable because they rendered a service for an end user rather than an assembled product for introduction into the stream of commerce.

There is no appellate authority that addresses whether the construction of a building constitutes a sale of a product. Leahey v. Lawrence D. Coon & Sons, Inc., supra, 2006 Conn. Super. LEXIS 2157. However there is appellate authority concerning the construction of sidewalks and the installation of light fixtures. In Paul v. McPhee Elec. Contrs., the court held that the defendant, who installed light fixtures, could not be held strictly liable because he was not in the business of selling or leasing light fixtures, or engaged in the bailment of such light fixtures, or involved in placing light fixtures into the stream of commerce, and thus did not fall within the definition of a “product seller”. Paul v. McPhee Elec. Contrs., 46 Conn. App. 18, 23 (1997). In Truglio v. Hayes Constr. Co., the court held that the construction of a sidewalk could not result in strict liability because the essence of the relationship between the construction company and the buyer was the furnishing of a service, not the sale of a product. Truglio v. Hayes Constr. Co., 66 Conn. App. 681, 685 (2001).

However, if the builder sells a building that contains a variety of appliances and other manufactured equipment or when the building itself has been prefabricated, and thus manufactured and later assembled on or off the site, a court may be less reluctant to impose liability. Leahey v. Lawrence D. Coon & Sons, Inc., supra, 2006 Conn. Super. LEXIS 2157.

VI. Indemnity Claims

Connecticut courts generally disfavor contractual provisions that relieve an individual from liability for his own negligence. See, Griffin v. Nationwide Moving & Storage Co., Inc., 187 Conn. 405, 413 (1982) (citing Restatement (Second) of Contracts § 195, cmt. b). Connecticut statutory law echoes this disfavor regarding construction contracts in General Statutes § 52-572k, which provides, in

pertinent part, that “(a) Any covenant, promise, agreement or understanding entered into in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of any building, structure or appurtenances thereto . . . that purports to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of such promisee . . . is against public policy and void . . .”

Significantly, however, Connecticut courts have construed this statutory prohibition, specifically the “in connection with or collateral to” language, very narrowly. See, e.g., Sandella v. Dick Corp., 53 Conn. App. 213, 227–28 (1999) (affirming jury finding that Conn. Gen. Stat. § 52-572k did not apply to contract for construction and renovation services performed for town’s wastewater treatment plant because the agreement was not “entered into in connection with or collateral to a contract or agreement relative to the construction . . .”). The courts have upheld certain contracts when “the language clearly and unequivocally sets forth an intention of the parties to indemnify against liability due to one’s own negligence.” Kahl v. United Techs. Corp., No. CV010808238S, 2003 Conn. Super. LEXIS 2058, at *2 (Conn. Super. Ct. July 8, 2003). This very strict standard for construing the language of indemnity contracts requires the parties to express their intent to indemnify in “unmistakable language.” Id. at **3–4. Notably, the Supreme Court of Connecticut has also recognized that “[i]ndemnity clauses in contracts entered into by businesses, particularly in construction contracts, should be viewed realistically as methods of allocating the cost of the risk of accidents apt to arise from the performance of the contract.” Cirrito v. Turner Constr. Co., 189 Conn. 701, 704–05 (1983).

As between joint tortfeasors, there is ordinarily no right of indemnity. Kyrtatas v. Stop & Shop, Inc., 205 Conn. 694, 697 (1988). However, where “one of the defendants is in control of the situation and his negligence alone is the direct immediate cause of the injury and the other defendant does not know of the fault, has no reason to anticipate it and may reasonably rely upon the former not to commit a wrong, it is only justice that the former should bear the burden of damages due to the injury.” Id. at 697–98. In order to recover this common law indemnity from a codefendant, one must establish four elements: “(1) that the other tortfeasor was negligent; (2) that his negligence, rather than the plaintiff’s, was the direct, immediate cause of the accident and injuries; (3) that he was in control of the situation to the exclusion of the plaintiff; and (4) that the plaintiff did not know of such negligence, had no reason to anticipate it, and could reasonably rely on the other tortfeasor not to be negligent.” Id. at 698 (citing Kaplan v. Merberg Wrecking Corp., 152 Conn. 405, 416 (1965)).

VII. Statute of Limitations

The statute of limitations for breach of contract claims is six years from breach and is found in Conn. Gen. Stat. § 52-576. The statute of limitations for negligence claims is two years from the date when the injury is first sustained, discovered or should have been discovered, but no more than three years from the date of the act or omission complained of, and is found in Conn. Gen. Stat. § 52-584.

The statute of repose on claims against any architect, professional engineer or land surveyor to recover damages for injuries arising out of construction or design defects is seven years and is found in Conn. Gen. Stat. § 52-584a. It provides, “(a) No action or arbitration, whether in contract, in tort, or otherwise, (1) to recover damages (A) for any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of, or land surveying in connection with, an improvement to real property; (B) for injury to property, real or personal, arising out of any such deficiency; (C) for injury to the person or for wrongful death arising out of any such deficiency, or (2) for contribution or indemnity which is brought as a result of any such claim for damages shall be brought against any architect, professional engineer or land surveyor performing or furnishing the design, planning, supervision, observation of construction or construction of, or land surveying in connection with, such improvement more than seven years after substantial completion of such improvement.” Conn. Gen. Stat. § 52-584a.

In State of Connecticut v. Lombardo Bros. Mason Contractors, Inc., et al., 307 Conn. 106 (2012), our Supreme Court held that claims by the State cannot be barred by statutes of limitation or repose due to the ancient doctrine of *nullum tempus occurrit regi*, which literally means “no time runs against the King.” Furthermore, the doctrine of *nullum tempus* was extended to claims by municipalities in a recent trial court decision by Judge Huddleston. City of Hartford v. Con-Way Freight, Inc., No. CV136046452S, 2014 Conn. Super. LEXIS 2721 (Conn. Super. Ct. Oct. 30, 2014).

The Connecticut legislature enacted legislation, Public Act 15-28, which abrogates the doctrine of *nullum tempus* creating a statute of limitations for construction professionals performing work on state projects. This law was passed in response to the Connecticut Supreme Court’s ruling in *State of Connecticut v. Lombardo Bros.* Effective October 1, 2017, Public Act 15-28 establishes a ten year statute of limitations for the state and its political subdivisions.

VIII. Economic Loss Doctrine

The economic loss doctrine is a common law doctrine which bars recovery in tort where the relationship between the parties is purely contractual, and the only losses are economic. See United Steel, Inc. v. Spiegel, Zamecnik & Shah, Inc., No. X09CV065001846, 2007 Conn. Super. LEXIS 1174, at *11 (Conn. Super. Ct. Mar. 27, 2007); see also Ulbrich v. Groth, 310 Conn. 375 (2013) (adopting economic loss doctrine outside of sales covered by article 2 of the UCC). In the context of alleged construction defects, the doctrine has been used to distinguish and maintain a separation between contract and tort law. See Dunleavy v. Paris Ceramics USA, Inc., No. CV020395709S, 2005 Conn. Super. LEXIS 970, at **15–16 (Conn. Super. Ct. Apr. 19, 2005) (“If tort law and contract law are to fulfill their distinctive purposes, they must be distinguished The economic loss doctrine serves as a basis for such a distinction.”).

While no Connecticut Appellate Court decisions have applied the doctrine specifically to construction defect cases, trial courts have. In fact, one trial court reasoned that use of the doctrine is most compelling “when the parties are sophisticated corporations who entered into a contract involving a major construction project.” Id. at *20 (quoting Morganti Nat’l, Inc. v. Greenwich Hosp.

Assoc., No. X06CV990160125, 2001 Conn. Super LEXIS 2837, at *3 (Conn. Super. Ct. Sept. 27, 2001)). The Morganti court recognized that to allow the parties to a construction contract to “avoid their bargain, by casting their economic loss claims in tort language, would defeat the legitimate expectations underlying contract law.” Morganti, No. X06CV990160125, 2001 Conn. Super LEXIS 2837, at **4–5. In other words, application of the economic loss doctrine in construction context would require parties to stick to the terms of their contracts, and to recover damages in accordance with contract law alone.

IX. Emotional Distress Claims

Connecticut allows, in limited circumstances, an aggrieved party to a construction contract to bring a claim for emotional distress. Bertozzi v. McCarthy, 164 Conn. 463, 469 (1973). The rationale that allows the recovery of tort damages for an action related to a breach of construction contract claim is that there is a duty owed by the defendant to the plaintiff that is an “outgrowth of a contractual relationship between the parties.” Id. Such claims for emotional distress may be either intentional or unintentional. See id. To bring an intentional infliction of emotional distress claim, the plaintiff must allege that the defendant “intentionally and unreasonably subjected the [plaintiff] to emotional distress which he should have recognized as likely to result in illness or other bodily harm.” Id. (citing Urban v. Hartford Gas Co., 139 Conn. 301, 306–07 (1952)). The parallel test for a claim of unintentional infliction of emotional distress requires the plaintiff to demonstrate “that the defendant should have realized that his conduct involved an unreasonable risk of causing emotional distress and that such distress, if it were caused, might result in bodily harm or illness.” Tang v. Bou-Fakhreddine, 75 Conn. App. 334, 340 (2003).

X. Economic Waste

Generally, the prevailing party in a breach of contract suit will receive damages that place him in the position he would have been in had the contract been performed correctly. Levesque v. D&M Builders, Inc., 170 Conn. 177, 180–81 (1976). In a breach of a construction contract suit that involves a defective or unfinished product, however, damages are computed in one of either two ways: “1) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or 2) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.” Id. See also Marron & Sipe Bldg. & Contracting Corp. v. Flor, 22 Conn. App. 689, 707 (1990); Barnicoat v. Edwards, 1 Conn. App. 652, 655 (1985).

XI. Recoverable Damages

A. Direct Damages

The general rule in contract law is that “in awarding damages upon a breach of contract, the prevailing party is entitled to compensation which will place him in the same position he would have

been in had the contract been properly performed.” Keppel v. BaRoss Builders, Inc., 7 Conn. App. 435, 437–38 (1986) (quoting Bertozzi v. McCarthy, 164 Conn. 463, 468 (1973)). In the construction context, damages are measured by computing either:

- (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

Id. at 438 (citing Restatement (First) of Contracts § 346).

The Connecticut Supreme Court has recognized that in the construction context, damages should be assessed differently where completion according to the contract requires substantial structural changes than where completion may be had without substantial interference with the structure of the building. See Levesque v. D & M Builders, Inc., 170 Conn. 177, 181 (1976). Where substantial changes will occur if the contract is completed and the defects remedied, the amount of damages “might be measured by the diminished value of the building to the owner by reason of the defects.” Id. Importantly, the Supreme Court tries to put the owner of the building in the same position he would have been in were the contract completely performed, whether physically (if possible without substantial interference to the building) or financially (if impossible without substantial interference to the building).

Finally, direct damages must be measured as of the date of the breach of the construction contract. Id. at 183. Expert testimony may be used to determine this date. Id.

B. Prejudgment Interest

In Connecticut, an award of prejudgment interest as an element of damages in a breach of contract case is an equitable one, lying within the discretion of the trial court. This general rule is applicable in the construction context. Bertozzi v. McCarthy, supra, 164 Conn. at 467; Keppel v. BaRoss Builders, Inc., supra, 7 Conn. App. at 439; see also Kovacs Constr. Corp. v. Water Pollution & Control Auth., 120 Conn. App. 646, cert. denied 297 Conn. 204 (2010) (court properly applied its discretion finding no bad faith or willfulness in withholding of liquidated damages).

C. Lost Profit

Connecticut appellate courts have upheld the recovery of lost profits for breach of contract claims arising out of construction-related disputes. See Ambrogio v. Beaver Rd. Ass’ns, 267 Conn. 148, 156–57 (2003) (describing various decisions of the Connecticut Appellate Court which upheld damage awards for lost profits in the construction context); Levesque v. D & M Builders, Inc., supra, 170 Conn. at 180 n.2 (recognizing that damage awards encompassing lost profits for breach of

contracts in the construction context may be warranted, depending on the facts of the case); Gordon v. Indusco Mgmt. Corp., 164 Conn. 262, 277 (1973) (finding that the defendant's breach of contract and failure to construct a restaurant outlet store pursuant to the terms of a lease agreement between the defendant and the plaintiff warranted the recovery of lost profits by the plaintiff); Tompkins, Inc. v. Bridgeport, 94 Conn. 659 (1920) (affirming the trial court's award of lost profits for a breach of contract claim stemming from a contractor's wrongful termination of a contract to build a bridge); see also Restatement (First) of Contracts § 346(1)(b) (1932) (supporting damage awards including lost profits for breach of contracts).

D. Punitive Damages

The general rule in Connecticut is that punitive damages are not recoverable for breach of contract. See Barry v. Posi-Seal Int'l, 40 Conn. App. 577, 584, 588 (1996). The few classes of cases in which such damages have been allowed contain elements which bring them within the field of tort. Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 127 (1966).

E. Attorney's Fees

In Connecticut, where a contract contains a clause which explicitly provides for the recovery of attorney's fees, such an award "requires an evidentiary showing of reasonableness . . ." Celentano v. Oaks Condo. Ass'n, 265 Conn. 579, 619 (2003) (quoting Rizzo Pool Co. v. Del Grosso, 240 Conn. 58, 77 (1997)). A trial court "may rely on its own general knowledge of the trial itself to supply evidence in support of an award of attorney's fees." Id.

F. Expert Fees & Costs

Connecticut General Statutes § 52-260 "sets forth the court's authority to award expert witness fees in civil litigation." Centimark Corp. v. Vill. Manor Assocs., No. CV030070166, 2007 Conn. Super. LEXIS 1732, at *109 n.54 (Conn. Super. Ct. June 21, 2007), aff'd in part and rev'd in part on other grounds, 113 Conn. App. 509 (2009). If the expert witness fees at issue do not fit into one of the enumerated categories within § 52-260, then they may not be awarded to the prevailing party. Id.

XII. **Delay Damages**

Despite a wealth of cases concerning delay damages in other jurisdictions, both federal and state, Connecticut case law on the subject is sparse. In S. New England Contracting Co. v. State, 165 Conn. 644 (1974), the seminal Connecticut case on delay damages, the court embraced the widely established principle that a contractor may recover damages for delays caused by the owner. Moreover, the court in S. New England Contracting Co. tacitly adopted the much-criticized Eichleay formula, developed in Eichleay Corp., ASBCA No. 5183, 60-2 ASBCA 2688 (1960), for calculating the proportion of unabsorbed home-office overhead costs attributable to a delay.

In Walter Kidde Constructors, Inc. v. State, 37 Conn. Supp. 50, 82 (1981), the court cited S. New England Contracting Co., for the proposition that damages due to disruption, loss of productivity, inefficiency, acceleration and escalation are compensable delay damages.

In order to recover damages, a contractor must first prove that the owner wrongfully caused the delay, and second, prove the amount of extra costs or damages proximately caused by the delay. Without an agreement to the contrary, a contractor assumes the cost of delays that are not caused by the owner, such as delays caused by labor disputes, material shortages and acts of God, including fires, floods and earthquakes.

In order to protect against recoveries for delays, owners often include “no damage for delay” (NDFD) clauses in contracts. In White Oak Corporation v. Department of Transportation, 217 Conn. 281 (1991), our Supreme Court held that NDFD clauses are valid and enforceable, but adopted four exceptions—namely, such clauses will not be enforced (1) if the delay is caused by the owner’s bad faith or its willful, malicious or grossly negligent conduct; (2) where the delay was not contemplated; (3) where the delay is so unreasonable as to constitute an abandonment of the contract by the owner; and (4) for delays resulting from the owner’s breach of a fundamental obligation of the contract. Id., at 289. More recently, in C&H Electric, Inc. v. Town of Bethel, 312 Conn. 843 (2014), the Court elaborated on the first and fourth exceptions, noting that “bad faith” requires misconduct that “smacks of intentional wrongdoing”; id., at 869; and that to constitute a “breach of a fundamental obligation,” the obligation must be “truly” fundamental. Id., at 870-71.

XIII. Recovery for Investigative Costs

There are no reported cases in Connecticut that specifically address the issue of whether investigative costs are recoverable in a construction defect case.

XIV. Stigma Damages

There is currently no law in Connecticut concerning the recovery of stigma damages, although one trial level ruling on a motion for summary judgment suggests that stigma damages are a potential measure of damages for breach of the New Home Warranty Act, Conn. Gen. Stat. § 47-118(e). Atkins v. Christina Props., CV040411920, 2007 Conn. Super. LEXIS 650 at *6-7 (Conn. Sup. Ct. Mar. 1, 2007). The basic measure of damages for injury to real property is the resultant diminution in its value. Willow Springs Condo. Ass'n v. Seventh BRT Dev. Corp., 245 Conn. 1, 59 (1998). The diminution in value may be determined by the cost of repairing the damage, provided that that cost does not exceed the former value of the property and that the repairs do not enhance the value of the property over what it was before it was damaged. Id.

XV. Insurance Coverage for Construction Claims

A. Builder's Risk Insurance

Builder's risk insurance protects a contractor against property loss during the construction of the project which they have contracted to construct. Stop & Shop Supermarket Co. v. ABCO Refrigeration Supply Corp., 48 Conn. Supp. 301, 307 (Conn. Super. Ct. 2003). In general, a builder's risk insurance policy provides coverage for the permanent structure of the building under construction. Bell Power Sys. v. Hartford Fire Ins. Co., 1995 Conn. Super. LEXIS 448, at **2-4 (Conn. Super. Ct. 1995); Baldwin v. St. Paul Fire & Marine Ins. Co., 129 Conn. 146, 148 (1942). However, the amount a contractor may recover under a policy depends on the language of the contract. Contractors may be entitled to recover the amount necessary to complete their contractual obligations; Baldwin v. St. Paul Fire & Marine Ins. Co., supra, 129 Conn. at 148; or the insurance contract may only cover a portion of the completed value of the project. Gorlo v. Maryland Casualty Co., 1991 Conn. Super. LEXIS 2128, at **2-3 (Conn. Super. Ct. 1991). The scope of the coverage also depends on the language of the policy. Some policies allow policy holders to recover the cost of cleaning up debris after damage to the covered property, if the debris is closely related to the property which is insured. Bell Power Sys., 1995 Conn. Super. LEXIS 448, at **2-4. In certain instances, builder's risk insurance even covers the materials and equipment to be installed in the building. Gorlo, 1991 Conn. Super. LEXIS 2128, at **2-3. While some policies limit coverage to materials and equipment constituting "performance parts" others allow for broad coverage including materials to be, but not yet, incorporated into the building. Bell Power Sys. v. Hartford Fire Ins. Co., supra, 1995 Conn. Super. LEXIS 448, at **2-4 (limiting coverage to the cost of material and labor); Stop & Shop Supermarket Co., supra, 48 Conn. Supp. at 307 (providing coverage for the "work" or "project").

B. Traditional All Risk Insurance

"All risk" insurance policies provide coverage for all risks of physical loss or damage to the property covered. Yale Univ. v. CIGNA Ins. Co., 224 F. Supp. 2d 402, 411 (D. Conn. 2002). These policies cover "risks not usually contemplated," and often contain express written exclusions and implied exceptions that have been developed by the courts over the years. Id. Recovery is available only if the loss is fortuitous and in the absence of fraud or other intentional misconduct of the insured. Id. In order to recover, the insured bears the burden of proving a fortuitous loss within the plan's coverage, but they do not need to prove the exact cause. Id. The fortuity doctrine holds that insurance is not available for losses that the policy holder knows of, planned, intended or is aware are substantially certain to occur. Id. at 414. Whether or not an occurrence is fortuitous is determined by standing in the shoes of the parties at the time the insurance contract was entered into. Id. Where no party could have foreseen the event, it may qualify as fortuitous. Standard Structural Steel Co. v. Bethlehem Steel Corp., 597 F. Supp. 164, 193 (D. Conn. 1984). An event is not fortuitous if it stems from (1) the natural behavior of the subject matter insured, (2) an intentional act on the part of the person insured, who exposes his goods to a loss purposely, (3) ordinary wear

and tear, (4) other natural deterioration, or (5) internal deficiencies which would inevitably cause damage. Id. Losses sustained due to a latent defect are also excluded. Id. at 196.

C. Commercial General Liability (CGL) Insurance

The standard CGL policy is designed to cover the insured's liability for bodily injury or property damages suffered by a third party. The insured will be able to recover the actual judgment or settlement amount incurred by the insured as a result of these claims and any legal fees and costs to defend any action against the insured. Schilberg Integrated Metals Corp. v. Cont'l Cas. Co., 263 Conn. 245 (2003). Under a CGL policy, the insured as well as any "additional insured" are covered. Great American Ins. Cos. v. Aetna Life & Casualty Co., 1990 Conn. Super. LEXIS 312, at **6-7 (Conn. Super. Ct. 1990). The policy typically insures the named business and some policies name, as an additional insured, individuals associated with the named business. Nationwide Mut. Ins. Co. v. Allen, 2003 Conn. Super. LEXIS 1040 (Conn. Super. Ct. 2003), *aff'd by* 83 Conn. App. 526 (2004). Coverage begins when the policy is triggered by an "occurrence," which has been defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." Imperial Cas. & Indem. Co. v. State, 246 Conn. 313, 325 (1998). An accident has been defined as an "unexpected" or "unintended" event. Buell Indus. v. Greater N.Y. Mut. Ins. Co., 259 Conn. 527, 541 (2002).

There are five typical exclusions to coverage. The first is the completed operations hazard exclusion, which precludes coverage for bodily injury and property damage occurring away from the contractor's premises, and arising out of the contractor's work or product. Flint v. Universal Mach. Co., Inc., 238 Conn. 637, 640-41 (1996). The second exclusion, the contract liability exclusion, precludes coverage for bodily injury or property damages for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement with another. Nationwide Mut. Ins. Co. v. Lydall Woods Colonial Vill., Inc., 2003 Conn. Super. LEXIS 1956 (Conn. Super. Ct. 2003). Third, CGL policies will often exclude coverage for faulty workmanship or defective materials and products. Yale University v. Cigna Ins. Co., *supra*, 224 F. Supp. 2d at 405. However, recently in Capstone Bldg. Corp. v. American Motorists Ins. Co., 308 Conn. 760 (2013), our Supreme Court ruled that a subcontractor exception exists to the "your work" exclusion. Specifically, damage to non-defective work that results from defective work performed by a subcontractor may qualify as "property damage" thus constituting an occurrence for purposes of coverage. Fourth, the owned or leased property exclusion precludes coverage for damage to property owned, occupied or rented by the insured. Jack A. Halprin, Inc. v. Hermitage Ins. Co., 58 Conn. App. 598, 599-600 (2000). And, fifth, coverage is precluded for bodily injury or property damage arising from the discharge of pollutants. Schilberg Integrated Metals Corp. v. Cont'l Cas. Co., *supra*, 263 Conn. at 266.

The Connecticut Supreme Court adopted the minority view of CGL coverage for defective construction claims in Capstone Bldg. Corp. v. Am. Motorists Inc. Co., 308 Conn. 760 (2013). The Court held that allegations of unintended defective construction work by a subcontractor that damages nondefective property may constitute an "occurrence" resulting in "property damage"

under a CGL policy. However, the Court limited CGL coverage holding that defective work standing alone or repairs to that defective work do not constitute property damage.

XVI. Mechanic's Liens

Under Connecticut law, any person who has a claim for more than ten dollars for materials furnished or services rendered in the construction, repair or improvement of any building appurtenances or any plot of land has the right to claim a lien on such land, building or appurtenances. This claim must be based "by virtue of an agreement with or by consent of the owner of land," or building, or by some person having authority from or acting on behalf of the owner. See Conn. Gen. Stat. § 49-33 et seq. It is important to note that under Connecticut law, the fact that an owner may have been aware that work was being performed, or perhaps may have granted permission to one of its tenants to perform some improvements on the demised premises, does not establish "consent." The term "consent" indicates either an agreement that the owner shall or may be liable for the contractor's labor and services, or circumstances indicating an implied contract by the land owner to pay for the contractor's services. Hall v. Peacock Fixtures & Electric Co., 193 Conn. 290 (1984). In the case of non-owners of land such as tenants, Connecticut's statutes allow a contractor to lien the tenant's leasehold, rather than the landlord's property. Conn. Gen. Stat. § 49-33(h).

A mechanic's lien can be foreclosed in the same manner as a mortgage. Conn. Gen. Stat. § 49-33(i). Although a mechanic's lien is a creature of a statute which creates a statutory right in derogation of common law; Camputaro v. Stuart Hardwood Corp., 180 Conn. 545 (1980); the provisions must be construed liberally so as to furnish security for one who provides services or materials. F.B. Mattson Co. v. Tarte, 247 Conn. 234 (1998).

In order to be valid and carry the force of law, the mechanic's lien must be recorded with the Town Clerk in the town where the property is located within 90 days after the work is completed or services are performed, and shall contain the following: (1) a description of the premises; (2) the amount being claimed as a lien; (3) the name(s) of the person(s) against whom the lien is filed; (4) the date the work commenced or services furnished; (5) a statement that the amount claimed "is justly due as nearly as the same can be ascertained"; and (6) the certificate is subscribed and sworn to by the claimant. Conn. Gen. Stat. § 49-34. Within 30 days of the filing of the certificate, a true and attested copy of the lien must be served on the property owner by "an indifferent person, state marshal or other proper officer" by leaving the notice at the owner's "usual place of abode." If the owner does not reside in the same town as where the property is located, then a copy of the notice shall be served upon the owner's agent—if known. Otherwise, an indifferent person, state marshal or proper officer shall mail a true and attested copy of the notice by registered or certified mail at the place where the owner resides. A returned or unclaimed notice shall be subject to notification by publication. Conn. Gen. Stat. § 49-35(a).

A mechanic's lien not foreclosed within one year after the lien was perfected, or within sixty days of the final disposition of an appeal shall be deemed invalid and discharged as a matter of law. Conn. Gen. Stat. § 49-39.

If no action to foreclose a lien is pending with a court, a lien may be discharged or reduced by an owner by means of an application or motion with the court. Conn. Gen. Stat. § 47-35a. At the hearing, the lienor has the burden of proving probable cause to maintain the validity of the lien. Conn. Gen. Stat. § 49-35b. After the hearing, the court may order: (1) that the lien be discharged or dissolved; (2) that the lien be sustained; or (3) that the lien be dissolved or reduced upon the payment of a bond with sufficient surety. Conn. Gen. Stat. § 49-35b(b). The court's order shall be deemed a "final judgment" for purposes of appeal. Conn. Gen. Stat. § 49-35c(a). No appeal from such order shall be taken "except within seven days" of the court's final judgment. Conn. Gen. Stat. § 49-35c(b).

Under Connecticut law, a construction contract which contains a provision waiving or releasing the right of a contractor, subcontractor or supplier to claim a mechanic's lien or make a claim against a payment bond "for services, labor or materials which have not yet been performed and paid for shall be void and of no effect." Conn. Gen. Stat. § 42-158l(a).

Connecticut law allows for reasonable attorney's fees and costs in an action of foreclosure of a mortgage, mechanic's lien or a bond substituted for a mechanic's lien. Conn. Gen. Stat. § 52-249(a).

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