Part 1

Common Law Causes of Action

1A-1 ABUSE OF PROCESS

An action for abuse of process lies against any person who:

1) Uses a legal process against another;
2) in an improper manner or to accomplish a purpose for which it was not designed.

Mozzochi v. Beck, 204 Conn. 490, 494 (1987).

Statute of Limitations
Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577; *see Timbers v. Updike, Kelly & Spellacy, P.C.*, 83 Conn. App. 442, 446, *cert. denied*, 271 Conn. 927 (2004).

Notes
"Abuse of process differs from [vexatious litigation] in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance." (Internal quotation marks omitted.) *Lewis Truck & Trailer, Inc. v. Jandreau*, 11 Conn. App. 168, 170-71 (1987). As a result, unlike actions for malicious prosecution or vexatious litigation, the action for abuse of process does not require proof of 1) the termination of the original proceeding; 2) the lack of probable cause, or; 3) malice. *Id.; see also Shaeffer v. O.K. Tool Co.*, 110 Conn. 528 (1930). Nonetheless, courts have stricken abuse of process claims as premature because the original proceeding was still pending. *See Cokic v. Fiore Powersports, LLC*, 2017 WL 5244195, at *2-3 (Conn. Super. Ct. Oct. 11, 2017) (citing *Wes-Garde Components Grp., Inc. v. Carling Techs., Inc.*, 2010 WL 1497553 (Conn. Super. Ct. Mar. 10, 2010)). Moreover, an ulterior motive, by itself, is not enough to establish abuse of process. *See McCloskey v. Angelina*, 2017 WL 7053897, at *3 (Conn. Super. Ct. Dec. 22, 2017) (granting

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motion to strike because "an ulterior primary motive will not expose an actor to liability if the process is used for its intended purpose") (citing *Ventres v. Goodspeed Airport, LLC*, 301 Conn. 194, 214 (2011)).

In addition, there is a heightened burden of proof for an abuse of process claim against an attorney in order to balance the attorney's primary duty of robust representation of the interests of the client. Thus, a lawyer's ethical duty not to pursue groundless litigation "does not give rise to a third party action for abuse of process unless the third party can point to specific misconduct intended to cause specific injury outside of the normal contemplation of private litigation." *Rieffel v. Johnston-Foote*, 165 Conn. App. 391, 395 (2016) (quoting *Mozzochi*, 204 Conn. at 497; *see Suffield Development Assocs. Ltd. Partnership v. Nat'l Loan Investors, L.P.*, 260 Conn. 766, 776 (2002) (defendants' wrongful, excessive and extortionate conduct in execution of judgment supported action for abuse of process). Courts take the specificity requirement seriously. *See Mario v. Stratton*, 2018 WL 1631439, at *2 (Conn. Super. Ct. Feb. 28, 2018) (granting motion to strike abuse of process complaint against attorney because allegations of "utterly baseless" litigation, and desire to "avoid and/or recoup repayment of earned fees" and "force plaintiff to incur costs associated with defending a lawsuit" are insufficiently specific).

In *Larobina v. McDonald*, 274 Conn. 394, 406 (2005), the Supreme Court assumed without deciding that an abuse of process claim may be predicated on conduct other than the institution and prosecution of a legal action. The court also held that, although success in the underlying action is not a prerequisite to an abuse of process claim, the abuse of process claim is nevertheless premature until the underlying action is completed, since the evidence in the underlying claim will be relevant to the abuse of process action and allowing the abuse of process action to proceed could chill vigorous representation of clients by their counsel in the underlying action. *Id.* at 407-08; *see MacDermid, Inc. v. Leonetti*, 158 Conn. App. 176 (2015) (claim of discriminatory retaliation against workers' compensation claimant premised solely on litigation misconduct may not be brought prior to termination of underlying litigation).

1A-2 ACCOUNTANT MALPRACTICE

To prevail on a claim of accountant malpractice, a plaintiff must establish the following elements:

(1) a duty to conform to a professional standard of care for the plaintiff's protection;

(2) a deviation from that standard of care;

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(3) injury; and

(4) a causal connection between the deviation and the claimed injury.

Stuart v. Freiberg, 316 Conn. 809, 833 (2015).

Statute of Limitations

The statute of limitations for an action for accountant malpractice is three years from the date of the alleged malpractice. Conn. Gen. Stat. § 52-577; *see Seeman v. Arthur Anderson & Co.*, 896 F. Supp. 250, 255 (D. Conn. 1995). The *Seeman* court did not specifically decide, but suggested, that the "continuing duty" doctrine would toll the running of the statute of limitations. *Id.* at 256. Though the *Seeman* case did not decide the issue, logic suggests that the "continuous representation" or "continuing duty" doctrines, applicable for example in the context of legal malpractice claims, also should apply to accountant malpractice. In *Iacurci v. Sax*, 313 Conn. 786, 807 (2014), the Supreme Court held that the fraudulent concealment statute may toll the three-year statute of limitations (but found that the plaintiff had failed to demonstrate the statute's applicability). *See LEGAL MALPRACTICE*, *infra*.

Notes

An accountant who merely prepares tax returns owes his client a professional duty, not a fiduciary duty. *See Iacurci v. Sax*, 139 Conn. App. 386, 406-07 (2012), *aff'd*, 313 Conn. 786 (2014). The former "implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty." *Id.* at 402 (quoting *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 56-57 (1998)). However, whether a fiduciary relationship exists depends in large measure on the specific nature of the accounting services provided. *See Iacurci v. Sax*, 139 Conn. App. 386, 409-11 (2012) (discussing numerous cases from other jurisdictions). Whether a fiduciary duty exists is a question of law, subject to plenary review on appeal. *Iacurci v. Sax*, 313 Conn. 786, 796 (2014).

As with other types of malpractice actions, unless a plaintiff offers proof "that the defendant . . . assured or warranted a specific result," then the claim sounds only in tort and not in contract. *Arnold v. Weinstein, Schwartz & Pinkus*, 1996 WL 93602, at *2 (Conn. Super. Ct. Feb. 13, 1996). *Arnold* is the only case that discusses this question with regard to accountant malpractice, but there appears to be a split of authority among the trial courts in Connecticut with regard to medical malpractice. *See MEDICAL MALPRACTICE (STANDARD)*, *infra*. As with other species of malpractice, a plaintiff must provide expert testimony to establish the relevant standard of care and the breach thereof, unless there "is such an obvious and gross lack of care and skill that it is clear even to

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a layperson." *Mukon v. Gollnick*, 2013 WL 951328, at *2 (Conn. Super. Ct. Feb. 15, 2013). Likewise, a claim of accounting malpractice does not require privity between the parties; in the absence of privity, the plaintiff must be "the intended or foreseeable beneficiary of the professional's undertaking." *Stuart v. Freiburg*, 2011 WL 3671904, at *9 (Conn. Super. Ct. July 15, 2011) (quoting *Mozzochi v. Beck*, 204 Conn. 490, 499 (1987)) (granting summary judgment on a malpractice claim because plaintiffs were not intended beneficiaries of reports created by defendant during the review of their deceased father's estate). In addition, several courts have held that accountants are exempt from suit under the judicially created professional services exemption to the Connecticut Unfair Trade Practices Act, but there is no appellate authority on the issue. *See Baker v. Brodeur*, 2012 WL 4040334, at *2 (Conn. Super. Ct. Aug. 21, 2012); *see also Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17 (1997) (professional services exemption bars CUTPA claims against health care providers).

1A-3 ADVERSE POSSESSION OF REAL PROPERTY

To acquire title to real property by adverse possession, a plaintiff must:

1) Oust an owner from possession of the property and possess the property himself in a way that is:
2) actual;
3) open or visible;
4) hostile to the rights of the owner;
5) exclusive;
6) made under a claim of right; and
7) made without the consent of the owner;
8) for an uninterrupted 15-year period.

Alexson v. Foss, 276 Conn. 599, 614 n.13 (2006).

Statute of Limitations

There is, strictly speaking, no limitations period for adverse possession because an adverse possessor acquires title by satisfying the above elements without legal action. However, if the land owner ousted from possession wishes to challenge the adverse possession, he must give notice of entry within the 15-year period and must bring a quiet title action within one year of giving such notice. Conn. Gen. Stat. § 52-575(a); *see Gemmell v. Lee*, 59 Conn. App. 572, 578-79, *cert. denied*, 254 Conn. 951 (2000). The 15-year period is tolled for any person who acquires title or a right of entry to any disputed piece of property while "a minor, non compos mentis or imprisoned," and

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such person has five years "after full age, coming of sound mind or release from prison" in which to give record notice of his right or title. Conn. Gen. Stat. § 52-575(b).

Notes

The burden of proof for adverse possession is "clear and positive proof." *Smith v. Muellner*, 283 Conn. 510, 536 (2007). There is a presumption against adverse possession for claims between cotenants "based on a recognition that one cotenant's possession is not necessarily inconsistent with the title of the others." *O'Connor v. Larocque*, 302 Conn. 562, 581-82 (2011). Consequently, "possession taken by one is ordinarily considered to be the possession by all and not adverse to any cotenant." *Id.* at 581 (citing *Ruick v. Twarkins*, 171 Conn. 149, 157 (1976)) (additional citations omitted); *see also* 3 Am. Jur. 2d 243-44, Adverse Possession § 201 (2002). It is a substantial task to overcome this presumption. "A cotenant claiming adversely to other cotenants must show actions of such an unequivocal nature and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. Not only must an actual intent to exclude others be demonstrated; but there also must be proof of an ouster and exclusive possession so openly and notoriously hostile that the cotenant will have notice of the adverse claim." *O'Connor*, 302 Conn. at 582 (internal quotation and citation omitted); *see also Hill v. Jones*, 118 Conn. 12, 16 (1934) ("[o]uster will not be presumed from mere exclusive possession of the common property by one cotenant"). Similarly, any interruption in the hostility of the possession is fatal to the adverse possessor's claim. *See Brander v. Stoddard*, 173 Conn. App. 730, 748-49, *cert. denied*, 327 Conn. 928 (2017) (plaintiff's reconciliation with owner and "gift of lamb meat in appreciation for being able to use the disputed property" negated claim of uninterrupted hostility for statutory period).

Property held by the state or a municipality is immune from a claim of adverse possession, as long as the property in question is held for public use; there is a rebuttable presumption of public use for any publicly-held property. *See American Trading Real Estate Properties, Inc. v. Town of Trumbull*, 215 Conn. 68, 77 (1990); *Benjamin v. City of Norwalk*, 170 Conn. App. 1, 18 (2016) (requiring a clear and positive proof that the land is not held for public use). A party cannot defend a summary process action—seeking to eject him from a parcel of real property—by claiming he had permission to occupy the property, and then seek title to the property in a separate action for adverse possession. Under those circumstances, the party is collaterally estopped from making the adverse possession claim by his concession in the summary process action that his possession of the property was not "hostile." (Note, however, that the party *could* allege adverse possession as a counterclaim to the original summary

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process action; it is only after the conclusion of that action that collateral estoppel attaches). *See Pollansky v. Pollansky*, 162 Conn. App. 635, 655 (2016).

1A-4 AIDING A TORT

A person is liable to a third party for harm from the tortuous conduct of another if the person:

1) Knows that the other's conduct constitutes a breach of duty;
2) gives substantial assistance or encouragement to the other person; and
3) the encouragement or assistance is a substantial factor in causing the resulting tort.

Krawshuk v. Hollaway, 2017 WL 715585, at *2 (Conn. Super. Ct. Jan. 2, 2017) (citing *Connecticut Nat'l Bank v. Giacomi*, 233 Conn. 304, 329 (1995)); *Carney v. DeWees*, 136 Conn. 256, 262 (1949).

Statute of Limitations
Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

Notes
"In Connecticut cases, the tort of aiding and abetting is often used interchangeably with the principles outlined in § 876 of 4 Restatement (Second), Torts." *Stein v. Gipstein*, 2012 WL 4901093, at *1 (Conn. Super. Ct. Sept. 20, 2012); *see also Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 63 n.42 (1997) (discussing principles of Restatement § 876). *See also Katcher v. 3V Capital Partners, LP*, 2011 WL 1105724, at *13 (Conn. Super. Ct. Feb. 1, 2011) (citing *Palmieri v. Lee, Judicial District of New Haven*, 1999 WL 1126317 (Conn. Super. Ct. Nov. 24, 1999) (Levin, J.)). Be aware, though, that not all torts are created equal: The Supreme Court twice has declined "to decide whether aiding and abetting a breach of a fiduciary duty is a viable cause of action in Connecticut[.]" *Flannery v. Singer Asset Fin. Co., LLC*, 312 Conn. 286, 296 (2014) (citing *Efthimiou v. Smith*, 268 Conn. 499, 504-07 (2004)).

Also, aiding a tort claim cannot stand alone; there must be a valid underlying tort claim. Consequently, rules limiting the underlying tort claims, such as litigation privilege, also limit aiding a tort claim. *Peterson v. Laurelhart Condo. Ass'n, Inc.*, 2018 WL 4865946, at *5 (Conn. Super. Ct. Sept. 25, 2018).

1A-5 ANTICIPATORY BREACH OF CONTRACT

An action for anticipatory breach of contract requires proof that:

1) One party to a contract has repudiated his duty under the terms of the contract;

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2) before the time for performance has arrived;
3) causing damages to the non-repudiating party.

Seligson v. Brower, 109 Conn. App. 749, 755 n.5 (2008).

Statute of Limitations
See BREACH OF CONTRACT, *infra*.

Notes
An action for anticipatory breach "allow[s] the nonbreaching party to discharge his remaining duties of performance, and to initiate an action without having to await the time for performance." *Pullman, Comley, Bradley & Reeves v. Tuck-It-Away Bridgeport, Inc.*, 28 Conn. App. 460, 465, *cert. denied*, 223 Conn. 926 (1992). Such an action requires proof of a breach similar to an ordinary breach of contract action. *Id.* The repudiation element of an action for anticipatory breach "may be either verbal or nonverbal . . . and can occur either by a statement that the promisor will not perform or by a voluntary, affirmative act that indicates inability, or apparent inability, substantially to perform." *Cottman Transmission Systems, Inc. v. Hocap Corp.*, 71 Conn. App. 632, 639 (2002). Whether verbal or non-verbal, express or implied, an "[a]nticipatory breach of contract occurs when a party communicates a definite and unequivocal manifestation of intent not to render the promised performance at the contractually agreed upon time." *Andy's Oil Service, Inc. v. Hobbs*, 125 Conn. App. 708, 722 (2010), *cert. denied*, 300 Conn. 928 (2011). However, an anticipatory breach may be excused if the other party could not possibly have performed its own contractual obligations notwithstanding the breach. *See Land Group, Inc. v. Palmieri*, 123 Conn. App. 84, 92 (2010) (quoting 2 Restatement (Second), Contracts § 254, p. 290 (1981)) ("a party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise"). In other words, he who breaches last sometimes breaches best.

1B-1 BAILMENT—LOSS OF OR DAMAGE TO GOODS OF BAILOR

An action by a plaintiff for damage to goods entrusted to a defendant requires proof of the following:

1) The delivery of personal property to the defendant;
2) to which the plaintiff retained title;
3) upon an express or implied contract to return that property to the plaintiff when the contractual purpose has been fulfilled,

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or to otherwise treat the property according to the plaintiff's direction;

4) followed by damage to, or loss of, the delivered property;

5) resulting from the defendant's negligence.

B.A. Ballou & Co., Inc. v. Citytrust, 218 Conn. 749, 753 (1991) [1, 2, 3]; *Barnett Motor Transp. Co. v. Cummins Diesel Engines of Connecticut, Inc.*, 162 Conn. 59, 63 (1971) [4, 5].

Statute of Limitations

The statute of limitations for an action for damage to goods of a bailer is unclear.

Separate documents do not need to reference one another in order to form an integrated, express contract for a bailment. *See Abele Tractor & Equip. Co. v. Sono Stone & Gravel, LLC*, 151 Conn. App. 486, 510-11 (2014) (rental agreements and delivery tickets for construction equipment constituted integrated contract between parties). A 2014 case has held that the action, while based in negligence, constitutes a breach of contract. Therefore, the court held that the six-year statute of limitation period in Conn. Gen. Stat. § 52-576(a) applies to the claim. An older case, however, held that the statute of limitations for an action for damage to goods of a bailor is two years from the date the damage is, or reasonably, should have been discovered.

Notes

A bailment is "a relationship . . . that arises when the owner, while retaining general title, delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the goods when the purpose has been fulfilled, or to otherwise deal with the goods according to the bailor's directions . . . . In a bailment, the owner or bailor has a general property interest in the goods bailed . . . . The bailee, on the other hand, has mere possession of items left in its care pursuant to the bailment." *State v. Smith*, 148 Conn. App. 684, 707-08 (2014), *aff'd*, 317 Conn. 338 (2015) (ellipses in original). An express or implied contract between the bailor and bailee often creates a bailment. However, "[i]n the care of property, the bailee's contractual obligation is to exercise due care for the safekeeping of the bailed property, and, so, essentially, when loss or damage occurs, liability is based on negligence, even though negligence constitutes a breach of contract." *Barnett*, 162 Conn. at 63; *see also Rizzuto v. Baltrush*, 2012 WL 5992701, at *3 (Conn. Super. Ct. Nov. 13, 2012) ("a bailment does not necessarily depend upon a contractual relation; it is the element of lawful possession, however created, and the duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not"). In this regard, courts (and

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litigants) sometimes gloss over the distinction between a strict bailment and a constructive one. *See CONSTRUCTIVE BAILMENT*, *infra*.

A bailment gives rise to a fiduciary relationship between the bailee and the bailor. *See Striegel v. Antiques at Pompey Hollow, LLC*, 2012 WL 3264218, at *2 (Conn. Super. Ct. July 18, 2012). The burden of proving the existence of a bailment is on the party claiming title to the property. *B.A. Ballou*, 218 Conn. at 752. However, "once a bailment has been established and the bailee is unable to redeliver the subject of the bailment in an undamaged condition a presumption arises that the damage to or loss of the bailed property was the result of the bailee's negligence." *Barnett*, 162 Conn. at 63. The presumption remains in effect "unless and until the bailee proves the actual circumstances involved in the damaging of the property," at which point the burden of proof shifts back to the bailor to prove negligence by the bailee. *National Broadcasting Co. v. Rose*, 153 Conn. 219, 225 (1965). Such proof by a bailee requires "substantial contravening evidence . . . [including] the precautions taken to prevent damage, destruction or loss . . . ." *Pacelli v. Butte*, 1999 WL 1212227, at *4 (Conn. Super. Ct. Dec. 3, 1999).

The measure of damages for loss of, or damage to, property entrusted to a bailor "is the value of the property at the time of its [damage] or loss, with interest from that time . . . ." *Griffin v. Nationwide Moving & Storage Co., Inc.*, 187 Conn. 405, 419 (1982).

1B-2 BATTERY

To prevail on a claim of battery, a plaintiff must establish the following elements:

1) Another person;
2) acts with the intent to cause harmful or offensive contact, or to create the imminent apprehension of harmful or offensive contact;
3) to the plaintiff, or to a third person; and
4) a harmful contact with the plaintiff is the direct or indirect result of that intentional act.

Simms v. Chiasson, 277 Conn. 319, 331 (2006) (citing Restatement (Second) of Torts, § 13).

Statute of Limitations

The statute of limitations for a claim of battery is three years. Conn. Gen. Stat. § 52-577.

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Notes

The failure to allege a "physical contact" is grounds to strike a complaint for battery. *See Texeira v. Curren*, 2014 WL 4814722, at *2 (Conn. Super. Ct. Aug. 21, 2014) (granting motion to strike). Moreover, the contact must be with the plaintiff himself; indirect harmful contact is insufficient as a matter of law. *See Meade v. Briarwood Acquisitions, LLC*, 2014 WL 7271955, at *1 n.1 & *3 (Conn. Super. Ct. Nov. 12, 2014) (striking claim of battery by tenant based on allegations that landlord's agents "entered the dwelling unit on a false pretext and, employing chain saws, cut holes in an exterior wall of the unit thus exposing its occupant to harsh winter conditions" and that tenant's "protests eventually resulted in his being arrested for breach of the peace").

So, too, is the failure to allege facts from which a jury could find intent. *See Forsyth v. Richardson*, 2015 WL 5134350, at *3 (Conn. Super. Ct. July 29, 2015) (striking battery count based on allegation that defendant's drunk driving caused car accident). However, the degree of harmful contact that must result from an intentional touching for it to constitute battery is unclear. *See Telkamp v. Vitas Healthcare Corp. Atl.*, 2016 WL 777906, at *9 (D. Conn. Feb. 29, 2016) ("[a]lthough battery requires physical contact, actual or substantial harm need not result from the contact for a defendant to be liable").

In the context of medical care, battery requires "an absence of consent," *Gallinari v. Kloth*, 148 F. Supp. 3d 202, 212 (D. Conn. 2015), not merely a lack of informed consent. Thus, "[t]he theory of battery as a basis for recovery against a physician has generally been limited to situations where he fails to obtain *any* consent to the particular treatment or performs a different procedure from the one for which consent has been given, or where he realizes that the patient does not understand what the operation entails." *Lambert v. Stovell*, 205 Conn. 1, 4 (1987) (emphasis in original). As a consequence, a patient does not have to comply with the statutory requirements for a medical malpractice action to sue her doctor for battery. *See Wood v. Rutherford*, 187 Conn. App. 61, 74-78 (2019) (trial court improperly struck battery claim for failure to comply with statute); Conn. Gen. Stat. § 52-190a.

1B-3 BREACH OF CONTRACT

The elements of a breach of contract action are:

1) Formation of an agreement;
2) performance by one of the parties to that agreement;
3) breach of a material term or terms of the agreement by another party; and
4) damages resulting from that breach.

Seligson v. Brower, 109 Conn. App. 749, 753 (2008).

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Statute of Limitations

There are two statutes of limitations applicable to breach of contract actions: Conn. Gen. Stat. §§ 52-576(a) & 52-581(a). The former has a limitations period of six years; the latter, three years. Section 52-576(a) clearly governs the limitations period for written contracts. While, at first blush, § 52-581(a) likewise appears to govern oral contracts, there is some unfortunately broad language in § 52-576(a) ("on *any* simple or implied contract") that might make it applicable to oral contracts as well. The Supreme Court "has distinguished the statutes, however, by construing § 52-581, the three-year statute of limitations, as applying only to *executory* contracts . . . . A contract is *executory* when neither party has fully performed its contractual obligations and is *executed* when one party has fully performed its contractual obligations." *Bagoly v. Riccio*, 102 Conn. App. 792, 799, *cert. denied*, 284 Conn. 931 (2007) (emphasis in original). The cause of action accrues "at the time the breach of contract occurs, that is, when the injury has been inflicted." *Bracken v. Town of Windsor Locks*, 182 Conn. App. 312, 322 (2018).

Notes

The dispositive issue in any contract dispute is the intent of the parties. If the language of a contract is ambiguous, then construction of that contract is a question of fact. *O'Connor v. Waterbury*, 286 Conn. 732, 743 (2008). "In order for an enforceable contract to exist, the court must find that the parties' minds had truly met . . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, no contract has been entered into by them and the court will not make for them a contract which they themselves did not make." *Summerhill, LLC v. City of Meriden*, 162 Conn. App. 469, 474-75 (2016) (ellipsis in original). However, "[i]f a contract is unambiguous within its four corners, intent of the parties is a question of law . . . ." *Montoya v. Montoya*, 280 Conn. 605, 612 (2006). The same is true for a contract between sophisticated commercial parties made with the advice of counsel. *See Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 252 Conn. 479, 496-97 (2000).

To state a *prima facie* case for breach of contract, there must be "an allegation of legal consideration, which consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made . . . ." *Sharp Elecs. Corp. v. Solaire Dev., LLC*, 156 Conn. App. 17, 36 (2015) (citation omitted). Likewise, if a contract requires a party to comply with a condition precedent, then the failure to allege such compliance is fatal. *See U.S. Bank Nat'l Ass'n v. Eichten*, 184 Conn. App. 727, 761 (2018).

"[C]ausation . . . is . . . part and parcel of a party's claim for breach of contract damages." *Meadowbrook Ctr., Inc. v. Buchman*, 149 Conn. App. 177,

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186, 90 A.3d 219, 226 (2014). "[U]nder Connecticut law, the causation standard . . . asks not whether a defendant's conduct was a proximate cause of the plaintiff's injuries, but rather whether those injuries were foreseeable to the defendant and naturally and directly resulted from the defendant's conduct." *Id*. at 188-89. Thus, any loss must "aris[e] naturally, i.e., according to the usual course of things, from such breach of contract itself." *Theodore v. Lifeline Sys. Co.*, 173 Conn. App. 291, 306 n.5 (2017).

Damages, too, are a necessary element and "are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty . . . Thus, [t]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount." *Valley Nat'l Bank v. Marcano*, 174 Conn. App. 206, 217 (2017). A promisee's lost profits are one proper measure of its damages; *RBC Nice Bearings, Inc. v. SKF USA, Inc.*, 146 Conn. App. 288, 312, *cert. granted in part*, 310 Conn. 962 (2013); as are "punitive damages for attorney's fees . . . [if] [e]lements of tort such as wanton or malicious injury or reckless indifference to the interests of others giv[e] a tortious overtone to a breach of contract action." *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760, 802 n.40 (2013). However, a plaintiff does not have to prove actual damages to prevail on a breach of contract claim. Even "[i]f a party has suffered no demonstrable harm . . . that party may be entitled . . . to nominal damages for breach of contract[.]" *Lydall, Inc. v. Ruschmeyer*, 282 Conn. 209, 254 (2007) (ellipses in original).

An allegation that an "attorney violated the specific instructions of his client sound[s] in breach of contract[,]" as does an allegation of "an attorney's failure to comply with the specific provisions of a contract . . . ." *Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 292 (2014). However, "claims alleging that the defendant attorney had performed the required tasks but in a deficient manner sound[s] in tort . . . ." *Id*. at 294; *see LEGAL MALPRACTICE*, *infra*. In addition, a "simple breach of contract[,]" by itself, does not form the basis for a violation of CUTPA. *Milford Paintball, LLC v. Wampus Milford Associates, LLC*, 156 Conn. App. 750, 764, *cert denied*, 317 Conn. 912 (2015). *See UNFAIR TRADE PRACTICES*, *infra*.

1B-4 BREACH OF FIDUCIARY DUTY

To prevail on a claim of breach of fiduciary duty, a plaintiff must establish:

1) The existence of a relationship between the parties;
2) characterized by a unique degree of trust and confidence;

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3) in which one party has superior knowledge, skill or expertise, and is under a duty thereby to represent the interests of the other party; and

4) a breach of that duty causing harm to the plaintiff.

See Biller Assocs. v. Peterkin, 269 Conn. 716, 723 (2004).

Statute of Limitations

The statute of limitations for a claim of breach of fiduciary duty is three years. *Krondes v. Norwalk Savings Society*, 53 Conn. App. 102, 117 (1999).

Notes

Beyond a few "per se categories . . . a flexible approach determines the existence of a fiduciary duty, which allows the law to adapt to evolving situations wherein recognizing a fiduciary duty might be appropriate." *Iacurci v. Sax*, 313 Conn. 786, 800 (2014). The *sine qua non* of a fiduciary relationship is the duty of loyalty—the obligation to act in the best interests of the person to whom the duty is owed and to act in good faith with respect to any matter within the scope of that duty. *See Godina v. Resinall International, Inc.*, 677 F. Supp. 2d 560, 575 (D. Conn. 2009). There is no bright line rule for the existence of a fiduciary relationship. However, it often arises when "the fiduciary was either in a dominant position, thereby creating a relationship of dependency, or was under a specific duty to act for the benefit of another." *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 38 (2000). On the other hand, no such relationship exists when "the parties were either dealing at arm's length, thereby lacking a relationship of dominance and dependence, or the parties were not engaged in a relationship of special trust and confidence." *Id*. at 38-39. "Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary." *Konover Development Corp. v. Zeller*, 228 Conn. 206, 219 (1994). The burden of proof in such circumstances has been alternately described as "clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence . . . ." *Cadle Co. v. D'Addario*, 268 Conn. 441, 455 (2004).

The existence of a fiduciary duty is a question of fact, and the duty does not exist simply because one or the other party is in a position of trust. However, the possibility of a fiduciary relationship is inherent in certain professions; a state marshal, for example, may owe a fiduciary duty to an ejectee under certain circumstances. *See McLoughlin v. Martin*, 2016 WL 1371255, at *13 (Conn. Super. Ct. Mar. 23, 2016) (denying marshal's motion for summary judgment in suit over failure to properly store ejectee's personal property); *see also* Conn. Gen. Stat. § 49-22. Similarly, a private boarding school may owe a fiduciary duty to students who are minors. *See Roe v. Hotchkiss Sch.*, 2019 WL 2912512, at *7 (D. Conn. July 8, 2019).

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"The fact that one party trusts another is not dispositive of whether a fiduciary relationship exists . . . rather, proof of a fiduciary duty requires an evidentiary showing of a unique degree of trust and confidence between the parties such that the [defendant] undertook to act primarily for the benefit of the plaintiff." *Golek v. St. Mary's Hospital, Inc.*, 133 Conn. App. 182, 197 (2012) (citation omitted; internal quotation marks omitted). Even in the context of a professional relationship, professional negligence alone does not automatically support a claim for breach of fiduciary duty. "Although an attorney-client relationship imposes a fiduciary duty on the attorney . . . not every instance of professional negligence results in a breach of that fiduciary duty . . . . Professional negligence implicates a duty of care, while breach of a fiduciary duty implicates a duty of loyalty and honesty." *Iacurci v. Sax*, 139 Conn. App. 386, 402 (2012), *aff'd*, 313 Conn. 786 (2014) (citations omitted; internal quotation marks omitted) (citing *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 56-57 (1998)).

Under Connecticut law, an intentional tort does not require proof of actual damages, but a negligent tort does. *See Right v. Breen*, 277 Conn. 364, 376-77 (2006). In keeping with this distinction, a plaintiff may recover nominal damages for an intentional breach of fiduciary duty, but must prove actual harm for a negligent breach of the same duty. *See Learning Care Grp., Inc. v. Armetta*, 2016 WL 953212, at *12 (D. Conn. Mar. 11, 2016) (citing *Connecticut Student Loan Found. v. Enter. Recovery Sys., Inc.*, 2011 WL 1363772, at *3 n.6 (D. Conn. Apr. 11, 2011), and *Fazzone, Baillie, Ryan & Seadale, LLC v. Baillie, Hall & Hershman, P.C.*, 2007 WL 155161, at *6 (Conn. Super. Ct. Jan. 2, 2007)). Moreover, an award of punitive damages is not a fig leaf if the jury awards no actual damages because "a demand for punitive damages is not a freestanding claim; rather, it is parasitic and possesses no viability absent its attachment to a substantive cause of action." *Rendahl v. Peluso*, 173 Conn. App. 66, 100 (2017) (jury's failure to award damages after finding for plaintiff on liability made verdict ambiguous despite award of punitive damages).

1B-5 BYSTANDER EMOTIONAL DISTRESS

A cause of action for bystander emotional distress requires proof of:

1) The death of, or serious physical injury to;
2) a close relative of the plaintiff;
3) where the plaintiff witnesses either the event, or conduct that causes the harm, or its immediate aftermath; and
4) the plaintiff suffers serious emotional injury as a result.

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Clohessy v. Bachelor, 237 Conn. 31, 56 (1996).

Statute of Limitations

The statute of limitations for bystander emotional distress depends on the nature of the alleged conduct by the defendant that gave rise to the distress. If the defendant allegedly was negligent or reckless, then the limitations period is two years; if the defendant allegedly acted intentionally, then the limitations period is three years. *See Schwartz v. Town of Plainville*, 483 F. Supp. 2d 192, 197 n.3 (D. Conn. 2007); *see also* Conn. Gen. Stat. §§ 52-577 & 52-584.

Notes

Connecticut first adopted a cause of action for bystander emotional distress in *Clohessy*, and its basic parameters have not changed since. First, "the injury to the victim must be substantial," i.e., either death, or serious physical injury, because "[a]ny injury to one who is closely related to the bystander has an emotional impact. To a sensitive parent, witnessing a minor injury to his or her child could produce an emotional response and result in serious injury." *Clohessy v. Bachelor*, 237 Conn. 31, 53-54 (1996). Second, the plaintiff and victim must be "closely related." *Id.* at 52. So far, the Supreme Court has held only that parents and siblings qualify, but neither the Supreme nor Appellate Court has discussed whether other relations—e.g., grandparents—qualify as well. *Cf. Yovino v. Big Bubba's BBQ, LLC*, 49 Conn. Supp. 555, 565 (2006) (noting split of authority among Connecticut trial courts as to whether fiancée is "closely related" within meaning of *Clohessy*). Third, "the bystander's emotional injury must be caused by the contemporaneous sensory perception of the event or conduct that causes the injury . . . or by viewing the victim immediately after the injury causing the event if no material change has occurred with respect to the victim's location and condition." *Clohessy v. Bachelor*, 237 Conn. 31, 52 (1996). Finally, the plaintiff "must have sustained a serious emotional injury—that is, a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstance." *Id.* at 54.

A bystander emotional distress claim is derivative and, therefore, "is not viable in the absence of a predicate . . . . action brought by the [injured party]." *Gilman v. Shames*, 189 Conn. App. 736, 752 (2019) (affirming motion to dismiss bystander emotional distress claim not brought in conjunction with wrongful death claim). Likewise, several Superior Court decisions hold that bystander emotional distress is derivative of the predicate cause of action—and so, a settlement of the latter extinguishes the former. *See Pascola-Milton v. Millard*, 2018 WL 7709953, at *2 (Conn. Super. Ct. Nov. 6, 2018); *Boyd v. New London Hous. Auth.*, 2018 WL 3967618, at *4 (Conn.

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Super. Ct. Aug. 7, 2018); *Austin v. Safeco Ins. Co. of Ill.*, 2016 WL 6237633, at *3 (Conn. Super. Ct. Sept. 22, 2016). Note that the derivative nature of bystander emotional distress is not jurisdictional; a defendant must raise the issue properly, i.e., by a timely motion to dismiss for lack of personal jurisdiction, or a motion for summary judgment. *See Pascola-Milton*, 2018 WL 7709953 at *2 (denying untimely motion to dismiss).

Though Connecticut courts have not weighed in on whether other relations can make a bystander emotional distress claim, at least one Superior Court has refused to strike a claim for bystander emotional distress resulting from the death of a pet. The court in *Vaneck v. Drew*, 2009 WL 1333918 (Conn. Super. Ct. Apr. 20, 2009) held that a pet owner could meet all of the established criteria for a bystander emotional distress claim and noted that the legislature had acknowledged the intrinsic value of the relationship between an individual and his or her pet by passing Public Act No. 07-78, now codified as Conn. Gen. Stat. § 46b-15(b), explicitly providing that Superior Court judges may issue family protective orders with respect to family pets.

In *Squeo v. Norwalk Hosp. Ass'n*, 316 Conn. 558 (2015), the Supreme Court overruled *Maloney v. Conroy*, 208 Conn. 392 (1988), and held that, "subject to the four conditions we established in *Clohessy* . . . a bystander to medical malpractice may recover for the severe emotional distress that he or she suffers as a direct result of contemporaneously observing gross professional negligence such that the bystander is aware, at the time, not only that the defendant's conduct is improper but also that it will likely result in the death of or serious injury to the primary victim." *Squeo*, 316 Conn. at 580-81. However, *Squeo* only opens the door a crack: The opinion opens with the admonition "that bystander claims should be available in the medical malpractice context only under extremely limited circumstances[,]" *id*. at 560, and "emphasize[s] . . . that the contemporaneous perception requirement is an important limitation on any claim for bystander emotional distress." *Id*. at 581 n.13. The Appellate Court has heeded this admonition. *See Marsala v. Yale-New Haven Hosp., Inc.*, 166 Conn. App. 432, 456 (2016) (affirming summary judgment because family members did not "contemporaneously observe" hospital's removal of patient's ventilator).

1C-1 CIVIL CONSPIRACY

The elements of a civil action for conspiracy are:

1) A combination between two or more persons;
2) to do a criminal or an unlawful act or a lawful act by criminal or unlawful means;

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3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object;

4) which act results in damage to the plaintiff.

American Diamond Exchange, Inc. v. Alpert, 101 Conn. App. 83, 99-100 (2007); *Pellet v. Keller Williams Realty Corp.*, 177 Conn. App. 42, 59 (2017).

Statute of Limitations

Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577; *Labow v. Rubin*, 95 Conn. App. 454, 469-70 (2006).

Notes

The existence of a conspiracy, by itself, is not actionable because a conspiracy causes no harm by the mere fact of it. *See Charter Oak Lending Group, LLC v. August*, 127 Conn. App. 428, 446 (2011). Rather, "[t]he action is for damages caused by acts committed pursuant to a formed conspiracy . . . ." *Id*. As such, "to state a cause of action, a claim of civil conspiracy must be joined with an allegation of a substantive tort." *Macomber v. Travelers Prop. & Cas. Corp.*, 277 Conn. 617, 636 (2006). If the substantive tort fails to pass muster, the civil conspiracy claim dies along with it. *See McClancy v. Bank of Am., N.A.*, 2016 WL 785409, at *8-9 (Conn. Super. Ct. Jan. 28, 2016); *Stradinger v. Griffin Hosp.*, 2015 WL 9694334, at *7 (Conn. Super. Ct. Dec. 11, 2015) (dismissing civil conspiracy claim because absolute immunity barred statutory theft claim that formed basis for conspiracy allegation). In addition, the conspirators must agree "to do a criminal or unlawful act[,]" and merely filing an "untruthful" lawsuit does not satisfy this element. *Bozelko v. Cote*, 2014 WL 7714341, at *2 (Conn. Super. Ct. Dec. 18, 2014) (granting motion to strike conspiracy count). However, under the intracorporate conspiracy doctrine, "[e]mployees of a corporation acting in the scope of their employment cannot conspire *with one another* or with the corporation that employs them; each acts for the corporation and the corporation cannot conspire with itself." *Harp v. King*, 266 Conn. 747, 781 (2003) (emphasis in original).

As in a criminal conspiracy, proof of agreement does not require the plaintiff "to establish that the defendant and his coconspirators signed papers, shook hands, or uttered the words we have an agreement . . . . The requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts." *American Diamond Exchange, Inc. v. Alpert*, 101 Conn. App. 83, 100 (2007) (ellipses in original) (quoting *State v. Patterson*, 276 Conn. 452, 462 (2005)).

1C-2 CLUB OR ASSOCIATION—WRONGFUL EXPULSION FROM

Although courts generally will not interfere in the activities of private clubs or associations, a member wrongfully expelled in violation of the association's by laws will have a cause of action for mandamus or for damages. *See Sterner v. Saugatuck Harbor Yacht Club, Inc.*, 188 Conn. 531 (1982); *Davenport v. Society of Cincinnati in State of Connecticut*, 46 Conn. Supp. 411 (1999). *See also Marcinszyk v. Miamogue Yacht Club*, 2008 WL 5540475 (Conn. Super. Ct. Dec. 19, 2008).

1C-3 CONCEALMENT OF DEFECT BY SELLER OF REAL PROPERTY

In order to prevail on a claim that a seller of real property has concealed a defect in that property, a plaintiff must establish the following elements:

1) A material defect in a piece of real property sold to the plaintiff;
2) concealed by the defendant, or not disclosed by him at the time of the sale; and
3) the defect was not reasonably discoverable by the plaintiff prior to the sale.

Siudyla v. ChemExec Relocation Systems, Inc., 23 Conn. App. 180, 185 (1990) [3]; *American Home Assurance Co. v. Briem*, 1992 WL 79830, at *2 (Conn. Super. Ct. Apr. 10, 1992) [1, 2].

Statute of Limitations

Because such an action sounds in breach of contract, and because—pursuant to Connecticut's Statute of Frauds—contracts for the purchase of real property must be in writing, the limitations period for a claim of concealment of a defect in real property by the seller is likely six years. *See* Conn. Gen. Stat. § 52-576(a). However, both *Siudyla* and *American Home Assurance* describe this cause of action as a species of common-law fraud. *See Siudyla v. ChemExec Relocation Systems, Inc.*, 23 Conn. App. 180, 185 (1990); *American Home Assurance Co. v. Briem*, 1992 WL 79830, at *2 (Conn. Super. Ct. Apr. 10, 1992). As such, the limitations period potentially is three years and not six. *See FRAUD, infra*.

Notes

Many contracts for the purchase of real estate contain an "as is" clause, which state that the buyer has examined the property, is satisfied with its condition and accepts it "as is." However, those clauses usually contain an exception for concealed/hidden defects and the breach of that exception often gives rise to an action by the plaintiff-buyer once he learns of a previously

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unknown defect. *See, e.g., Sosin v. Scinto*, 1998 WL165056, at *5 (Conn. Super. Ct. Apr. 2, 1998).

1C-4 CONSTRUCTIVE BAILMENT

A cause of action for constructive bailment requires proof of the following elements:

1) Lawful possession of personal property belonging to the plaintiff by the defendant;
2) in the absence of a bailment contract;
3) under such circumstances that the law requires the defendant to keep that property safe and redeliver it to the plaintiff.

H.J. Kelly & Assocs. v. City of Meriden, 2008 WL 496688, at *7 (Conn. Super. Ct. Jan. 17, 2008).

Statute of Limitations

If a plaintiff seeks to impose a constructive bailment to recover for damage to his property caused by the constructive bailor, the statute of limitations likely is two years from the date the damage is, or reasonably should have been discovered. *See BAILMENT*, *supra*; *Davis v. McDermott Chevrolet, Inc.*, 2005 WL 525558, at *1 (Conn. Super. Ct. Jan. 14, 2005). However, given the equitable nature of a constructive bailment, it may be possible to argue that, as with other equitable remedies, no limitations period applies (but, if that argument is made, beware the doctrine of laches).

Notes

Although a legal cause of action, constructive bailment has an equitable character. As with equitable remedies such as unjust enrichment, the law often imposes a constructive bailment, in the absence of any contractual relationship between the parties, when the facts and circumstances make that the just result. *See H.J. Kelly & Assocs. v. City of Meriden*, 2008 WL 496688, at *7 (Conn. Super. Ct. Jan. 17, 2008). Indeed, "[a] constructive bailment may occur even in the absence of the voluntary delivery and acceptance of the property which is usually necessary to create a bailment relationship. For example, a constructive bailment arises when possession of personal property passes from one person to another by mistake or accident." *H.J. Kelly & Assocs. v. City of Meriden*, 2008 WL 496688, at *7 (Conn. Super. Ct. Jan. 17, 2008) (citing 8A Am. Jur. 2d 476 Bailments § 12 (1997)). "The fulfillment of the bailor's duty generally requires it to inspect the premises to ensure they are appropriate for storing the bailed items . . . and storing bailed items in a location that exposes them to a risk that was not known to the bailee can be a violation of that duty"; *Martin, Lucas & Chioffi, LLP v. Bank of Am., N.A.*, 714 F. Supp. 2d 303, 314 (D. Conn.

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2010) (internal citation omitted), *but see Cichon v. Walsh*, 2010 WL 797161, at *2 (Conn. Super. Ct. Feb. 5, 2010) (no actual or constructive bailment over car belonging to nightclub's audiovisual technician because he "never gave his car keys to anyone connected to the club").

1C-5 CONSTRUCTIVE DISCHARGE

A cause of action for constructive discharge requires proof of the following elements:

1) An employer intentionally created an intolerable work atmosphere;
2) that forced an employee to quit involuntarily. *Karagozian v. USV Optical, Inc.*, 186 Conn. App. 857, 866-67, *cert. granted*, 331 Conn. 904 (2019); *see Brittell v. Dep't of Corr.*, 247 Conn. 148, 178 (1998).

Statute of Limitations
No case specifically addresses the limitations period for a constructive discharge action.

Notes
Constructive discharge requires "[w]orking conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Karagozian*, 186 Conn. App. at 867. However, unlike wrongful discharge, an employer may be held liable without violating the public policy. *See WRONGFUL DISCHARGE*, *infra*.

1C-6 CONSTRUCTIVE EVICTION

A cause of action for constructive eviction requires proof of the following elements:

1) An act or omission by a landlord rendered a rented premises untenantable; and
2) the tenant vacated the premises after giving the landlord reasonable time to correct the problem.

Heritage Square, LLC v. Eoanou, 61 Conn. App. 329, 332 (2001); *Welsch v. Groat*, 95 Conn. App. 658, 662 (2006).

Statute of Limitations
The statute of limitations for a constructive eviction is three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

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Notes

Whether a constructive eviction has occurred is a question of fact on which an appellate court shows the customary deference to the factfinder. *See Fernwood Realty, LLC v. Aerocision, LLC*, 166 Conn. App. 345, 382-84 (2016) (rejecting defendant's claim for plenary review). Myriad circumstances can give rise to an action for constructive eviction. *See, e.g., Conference Center, Ltd. v. TRC*, 189 Conn. 212, 220-21 (1983) (tenant compelled to yield premises to third party with title paramount to that of landlord). However, there must be a landlord-tenant relationship. *See Mendez v. JP Morgan Chase Bank, N.A.*, 2015 WL 897253, at *4 (Conn. Super. Ct. Feb. 10, 2015) (striking constructive eviction claim by property owner against mortgagee). The relevant considerations are "the situation of the parties to the lease, the character of the premises, the use to which the tenant intends to put them, and the nature and extent by which the tenant's use of the premises is interfered with by the injury claimed." *Welsch v. Groat*, 95 Conn. App. 658, 662 (2006). The common and necessary factor is that the "problem or interference is so severe as to render the premises unusable as a result." *Ginsberg v. Lathrop*, 2007 WL 613656, at *1 (Conn. Super. Ct. Feb. 8, 2007). A recurring lacuna in proof of constructive eviction is the failure of the plaintiff to have vacated the premises, or to have given the landlord reasonable time to correct the problem prior to vacating. *See, e.g., Lamar Central Outdoor, LLC v. Joyce*, 2009 WL 2603121 (Conn. Super. Ct. July 30, 2009) (commercial lessee failed to establish constructive eviction, in spite of numerous environmental problems with building, due to failure to allege vacation of premises or reasonable time to correct problems). However, a landlord's actual notice of a problem that renders the premises unusable suffices even if the tenant's lease requires written notice. *See 31 Tobey Rd., LTD. v. Wright*, 2016 WL 5798712, at *4-5 (Conn. Super. Ct. Aug. 16, 2016) (refusing to "exalt form over substance" because tenant repeatedly complained to landlord about leaky roof). Even though whether a premises is untenantable is a question of fact; *see Welsch*, 95 Conn. App. at 662, several Superior Court judges have stricken constructive eviction claims because the plaintiffs did not clearly and expressly allege that element. *See, e.g., Haven Skate Park, LLC v. G.J. Zurolo Real Estate, LLC*, 2013 WL 6989496, at *3 (Conn. Super. Ct. Dec. 18, 2013) (failure to allege that tenant vacated premises due to problem).

1C-7 CONSTRUCTIVE FRAUD

The breach of a confidential or special relationship forms the basis of an action for constructive fraud. To prove constructive fraud, a plaintiff must establish:

1) The existence of a confidential or special relationship; and

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2) the breach of that relationship.

Once a confidential or special relationship is found to exist, the burden shifts to the defendant fiduciary to prove fair dealing by clear and convincing evidence.

Mitchell v. Mitchell, 31 Conn. App. 331, 334-35 (1993).

Statute of Limitations
See FRAUD.

Notes
Constructive fraud and breach of fiduciary duty are different names for the same thing. *See Iacurci v. Sax*, 313 Conn. 786 (2014); *St. Bernard School of Montville, Inc. v. Bank of America*, 312 Conn. 811 (2014). The confidential or special relationship required for a claim of constructive fraud generally is a fiduciary one. *See, e.g., Iacurci v. Sax*, 139 Conn. App. 386, 400-02 (2012), *aff'd*, 313 Conn. 786 (2014); *Golek v. St. Mary's Hosp., Inc.*, 133 Conn. App. 182, 197 (2012). However, it does not have to be. *See Mitchell*, 31 Conn. App. at 333-34 (special relationship between family members). Thus, while "equity has carefully refrained from defining a fiduciary relationship in precise detail and in such a manner as to exclude new situations[,]" *Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 109 (2007) (citations omitted), the crucial question is whether "relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Id.* at 108; *see BREACH OF FIDUCIARY DUTY*, *supra*.

1C-8 CONSTRUCTIVE TRUST

In order for a constructive trust to be imposed, the plaintiff must establish that the defendant:

1) Obtained or holds the legal right to property;
2) which he ought not, in equity and good conscience, hold;
3) which he obtained through actual or constructive fraud, duress, abuse of confidence, or another form of unconscionable conduct; and
4) that he has an equitable duty to convey the property to another because he would be unjustly enriched if he were permitted to retain it.

Stornawaye Properties, Inc. v. O'Brien, 94 Conn. App. 170, 175-76 (2006); *Mitchell v. Redvers*, 130 Conn. App. 100, 112-13 (2011).

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Statute of Limitations

A constructive trust is an equitable remedy. Consequently, there is no statute of limitations, but laches might act as a time bar in certain circumstances.

Notes

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Town of New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 433, 466 (2009). The central issue in a constructive trust claim "is, in essence, whether a party has committed actual or constructive fraud *or whether he or she has been unjustly enriched*." *Trevorrow v. Maruccio*, 125 Conn. App. 141, 147 (2010) (emphasis in original). A constructive trust "arises by operation of law at the time of a conveyance when the purchase money for property is paid by one party and the legal title is taken in the name of another . . . . The presumption of the existence of such a trust, however, is one of the facts rather than law and may be rebutted by proof of contrary intent." *Friedman v. Gomez*, 172 Conn. App. 254, 264 (2017). Nonetheless, specificity is crucial: A plaintiff "who cannot identify [the] property in the hands of the defendant, is not entitled to the remedy of constructive trust." *Wall Sys., Inc. v. Pompa*, 324 Conn. 718, 742 (2017). Though a constructive trust is a remedy, the common practice appears to be to plead it as a separate count, or even as an independent cause of action. *See Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 623 n.3 (2002) (separate count in plaintiff's complaint); *Scalise v. E. Greyrock, LLC*, 148 Conn. App. 176, 179, n.1, *cert. denied*, 311 Conn. 946 (2014).

1C-9 CONVERSION

To establish a cause of action for conversion, a plaintiff must demonstrate that:

1) The defendant, without authorization;
2) assumed and exercised ownership over property belonging to another;
3) to the exclusion of the owner's rights.

News America Marketing In-Store, Inc. v. Marquis, 86 Conn. App. 527 (2004), *aff'd*, 276 Conn. 310 (2005).

Statute of Limitations

Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

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Notes

Conversion requires “a legal right or possessory interest in the property at issue[,]” *Stamatopoulos v. ECS North America, LLC*, 172 Conn. App. 92, 96 (2017), and falls into two “general classes . . . (1) that in which possession of the allegedly converted goods is wrongful from the onset; and (2) that in which the conversion arises subsequent to an initial rightful possession.” *Luciani v. Stop & Shop Cos., Inc.*, 15 Conn. App. 407, 410, *cert. denied*, 209 Conn. 809 (1988). “The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm.” *Label Systems Corp. v. Aghamohammadi,* 270 Conn. 291, 329 (2004). Civil theft and conversion are identical, with two exceptions: The former requires proof of intent, while the latter requires proof that the owner of the property suffered harm from the defendant’s conduct. *See Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745, 771 (2006). While “an essential element of conversion is proof of an immediate right to possession at the time of conversion”; *Gager v. Sanger*, 95 Conn. App. 632, 642, *cert. denied*, 280 Conn. 905 (2006); “[c]onversion may arise subsequent to an initial rightful possession.” *Howard v. MacDonald*, 270 Conn. 111, 129 n.8 (2004). This may be due to wrongful detention, wrongful use, or continued exercise of unauthorized dominion. *See Luciani*, 15 Conn. App. at 410. This concept represents the flip side of the principle of “equitable conversion,” whereby the purchaser of land under an executory contract is regarded as the owner, subject to the seller’s lien for the unpaid purchase price. *Micek-Holt v. Papageorge*, 180 Conn. App. 540, 552 (2018) (citing *Southport Congregational Church-United Church of Christ v. Hadley*, 320 Conn. 103, 111 (2016)).

1D-1 DECLARATORY JUDGMENT

A plaintiff may maintain a declaratory judgment action if all of the following conditions are met:

1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party’s rights or other jural relations;
2) there is an actual bona fide and substantial question or issue in a dispute or substantial uncertainty of legal relations that requires settlement between the parties; and
3) in the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is of the opinion that such a party should be allowed to proceed with the claim for the declaratory judgment despite the existence of such an alternate procedure.

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Conn. Practice Book § 17-55.

Statute of Limitations
A declaratory judgment action must be based on a cause of action that would be cognizable outside of the declaratory context. *Wilson v. Kelley*, 224 Conn. 110, 116 (1992). The statute of limitations for the underlying cause of action on which the claim for a declaratory judgment is based controls the limitations period. *Id.*

Notes
Connecticut has an "unusually liberal" declaratory judgment statute, Conn. Gen. Stat. § 52-29, which is broader in scope than the statutes in "most, if not all, other jurisdictions." *Travelers Cas. & Sur. Co. of Am. v. The Netherlands Ins. Co.*, 312 Conn. 714, 727 (2014). Section 52-29 authorizes "[t]he Superior Court in any action or proceeding [to] declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment."
The procedural rules for declaratory judgment actions—which are quite complex—are set forth in Practice Book §§ 17-54, *et seq.* However, a party must exhaust any available administrative remedies before it brings a declaratory judgment action. *See Metropolitan Dist. v. Comm'n on Human Rights & Opportunities*, 180 Conn. App. 478, 496-97, *cert. denied*, 328 Conn. 937 (2018) (plaintiff's failure to file petition for declaratory ruling by defendant barred court action for declaratory judgment).

A court is "not limited by the issues joined or by the claims of counsel" in a declaratory judgment action, *Stueck v. The G.C. Murphy Co.*, 107 Conn. 656, 661 (1928), but the pleadings still constrain its authority. *See Prime Locations of CT, LLC v. Rocky Hill Dev., LLC,* 167 Conn. App. 786, *cert. denied*, 323 Conn. 935 (2016). A court may outpace the parties' claims only if there is a jurisdictional issue, or a question about a necessary predicate to the parties' actual claims. *Id.* at 805-07. Otherwise, "despite the broad and remedial nature of a declaratory judgment action," *id.* at 808, a party cannot prevail on a ground that it has not pleaded, briefed or argued. *Id.* However, a "court may, in determining the rights of the parties, properly consider equitable principles in rendering its judgment." *21st Century N. Am. Ins. Co. v. Perez*, 177 Conn. App. 802, 814 n.8 (2017), *cert. denied*, 327 Conn. 995 (2018).

Though declaratory judgment actions are relatively broad in scope, the underlying claim must still be justiciable. *Mendillo v. Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 524 (2018) ("The declaratory judgment procedure . . . does not relieve the plaintiff from justiciability requirements."). In *Mendillo*, an attorney's declaratory judgment action,

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seeking a judgment declaring that the Appellate Court's decision finding that the attorney had violated the Rules of Professional Conduct unconstitutional, was dismissed because he did not have a justiciable claim.

A claim for declaratory relief can be made against the state or state officers acting in their official capacities, in spite of the state's sovereign immunity, but only where the claim is based on "a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights." In order to plead such a claim, the allegations of the declaratory judgment complaint "must *clearly demonstrate* an incursion upon constitutionally protected interests." (Emphasis in original.) *Braham v. Newbould*, 160 Conn. App. 294, 311-12 (2015) (citing *Columbia Air Services, Inc. v. Dep't of Transp.*, 293 Conn. 342, 350 (2009)).

The superior court lacks jurisdiction over a declaratory judgment claim made in a probate appeal because, in that procedural context, the superior court sits as a court of probate. *See Southport Congregational Church—United Church of Christ v. Hadley*, 152 Conn. App. 282, 293 & n.8 (2014), *rev'd on other grounds*, 323 Conn. 103 (2016).

1D-2 DECLARATORY JUDGMENT ACTION—INSURANCE

The elements for a declaratory judgment action based on a policy of insurance are:

1) The existence of an insurance policy; and
2) a dispute concerning the meaning of that policy.

See Colony Ins. Co. v. Oracle Lounge, Inc., 2008 WL 2068270, at *2 (Conn. Super. Ct. May 1, 2008), and cases cited therein; *see generally* Conn. Gen. Stat. § 52-29.

Statute of Limitations

"[I]n analyzing whether a declaratory judgment action is barred by a particular statutory period of limitations, a court must examine the underlying claim or right on which the declaratory action is based." *Wilson v. Kelley*, 224 Conn. 110, 116 (1992). Consequently, the appropriate limitations period for a declaratory judgment action concerning the interpretation of an insurance policy is the six-year statute for written contracts. *See* Conn. Gen. Stat. § 52-576(a).

Notes

Declaratory judgment actions are a common staple of insurance coverage practice. Insurers and insureds routinely file such actions to obtain a judicial determination of the existence and scope of coverage under an insurance policy, whether an insurer has a duty to defend or indemnify its

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insured, and to resolve myriad other issues. *See Colony*, 2008 WL 2068270; *New London County Mut. Ins. Co. v. Nantes*, 303 Conn. 737, 748 (2012), and cases cited therein. While it is more common for the action to be between the insurer and its insured, there is no bar to one insurer bringing a declaratory judgment action against another insurer in order to have the court determine the scope of that insurer's contractual obligations to its insured. *See Travelers Cas. & Sur. Co. of Am. v. The Netherlands Ins. Co.*, 312 Conn. 714, 730 (2014) (prior insurer had standing to bring declaratory judgment action against current insurer, even though underlying claim was one for breach of contract and prior insurer was not a party to current insurer's contract with insured).

Collateral estoppel does not bar an insurer from "litigat[ing] coverage issues previously litigated [in the underlying action] on which it had a conflict of interest with its insured or coverage issues on which material facts were not litigated and necessary to the underlying judgment." *Nationwide Mut. Ins. Co. v. Pasiak*, 327 Conn. 225, 267-68 (2017) (insurer entitled to trial de novo on business pursuits exclusion because parties in underlying action had no incentive to litigate scope of exclusion). Moreover, an insurer may introduce evidence that was not a part of the underlying trial as long as coverage "was not litigated or insufficient factual findings were made to make a determination on the coverage issue." *Id.* at 268.

1D-3 DEFAMATION

To establish a claim of defamation, a plaintiff must prove:

1) The defendant published a defamatory statement;
2) the defamatory statement identified the plaintiff to a third person;
3) the defamatory statement was published to a third person; and
4) the plaintiff's reputation suffered injury as a result of the statement.

Hopkins v. O'Connor, 282 Conn. 821, 838 (2007).

Statute of Limitations
Two years from the date of the act complained of. *See* Conn. Gen. Stat § 52-597.

Notes
"A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. To be actionable, the

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statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion." *Rafalko v. Univ. of New Haven*, 129 Conn. App. 44, 54 (2011). In addition, "the statement must be false and truth is an affirmative defense." *Nodoushani v. S. Conn. State Univ.*, 152 Conn. App. 84, 96 (2014). *Id.* Written defamation is libel; oral defamation is slander. *Gambardella v. Apple Health Care, Inc.*, 86 Conn. App. 842, 850 (2005). An appellate court reviews any "underlying findings of historical fact for clear error, but also . . . engage[s] in an independent review of those determinations by the trial court that carry constitutional significance, such as whether those facts constituted clear and convincing evidence of actual malice justifying an award of punitive damages." *Gleason v. Smolinski*, 319 Conn. 394, 436 (2015). This fact-specific fence-straddling has many permutations. *See id.* at 437-38 (independent review of actual malice, but not "for example, the falsity of the factual statement that constitutes the alleged defamation").

"A claim of defamation must be pleaded with specificity, as the precise meaning and choice of words employed is a crucial factor in any evaluation of falsity . . . . [It] must, on its face, specifically identify what allegedly defamatory statements were made, by whom, and to whom." *Stevens v. Helming*, 163 Conn. App. 241, 247 n.3 (2016). Thus, a plaintiff may not recover for a defendant's "[o]ther actionable words not pleaded, although published at the same time . . . ." *Id.* at 247 n.4. Certain statements require no proof beyond their occurrence; they are slander *per se* and entitle the plaintiff to damages. *See Guerrera v. Cunningham*, 2015 WL 1727584, at *2 (Conn. Super. Ct. Mar. 17, 2015) (slander *per se* includes false statements of "(a) incompetence or dishonesty in the workplace; (b) general incompetence in a trade, business or profession; or (c) theft or a crime punishable with imprisonment"). On the other hand, proof of actual malice—i.e., "that a statement was made with knowledge that it was false or with reckless disregard for its truth[,]" *Gleason*, 319 Conn. at 447—entitles a plaintiff to punitive damages. *Id.* at 432. *Gleason* leaves for another day whether a plaintiff must prove actual malice by clear and convincing evidence because "neither the trial court nor the Appellate Court ever expressly considered whether the plaintiff proved the falsity of the defamatory statements under any standard of proof." *Id.* at 446 & n.44.

Statements published in the course of judicial proceedings are subject to an absolute privilege, and thus may not form the basis of a claim for damages for libel or slander. *Simms v. Seaman*, 308 Conn. 523, 548 (2013) (citing *Gallo v. Barile*, 284 Conn. 459, 465-66 (2007), and *Hopkins v. O'Connor*, 282 Conn. 821, 830-31 (2007)). This absolute privilege extends to statements made during administrative proceedings that "are quasi-judicial in nature." *Villages, LLC v. Longhi*, 166 Conn. App. 685, 700, *cert. denied*, 323 Conn. 915 (2016).

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Absolute privilege also extends to statements made by non-parties, such as an expert. *Ravalese v. Lertora*, 186 Conn. App. 722 (2018) (holding plaintiff's defamation claim against psychologist, who submitted a report in a prior child custody case, was barred by absolute immunity). However, the "strong medicine" of absolute privilege does not apply to members of local zoning boards; *id.*; who enjoy only qualified immunity under Conn. Gen. Stat. § 52-557n(c). *Id.* at 703.

In other circumstances, a qualified privilege may protect the speaker, i.e., protection from liability, but not from being sued. *See Gambardella v. Apple Health Care, Inc.*, 291 Conn. 620, 628-29 (2009). For example, there is "a qualified privilege for the employment references of current or former employers that were solicited *with the employee's consent*." *Nelson v. Tradewind Aviation, LLC*, 155 Conn. App. 519, 537, *cert. denied*, 316 Conn. 918 (2015) (emphasis in original); *see Kruger v. Grauer*, 173 Conn. App. 539, 541, *cert. denied*, 327 Conn. 901 (2017) (individuals "who report abuse or neglect pursuant to General Statutes § 17a-101e(b)"); *Gallo*, 284 Conn. at 463 ("statements that a complaining witness makes to the police"); *Hopkins*, 282 Conn. at 846 (statements made by persons acting under psychiatric commitment statute); *Chadha v. Charlotte Hungerford Hosp.*, 272 Conn. 776, 789 (2005) (statements made to professional licensing board or peer review panel). However, a communication sheds its qualifiedly privileged skin if made with actual malice, or "malice in fact" (bad faith or improper motive). *Nelson*, 155 Conn. App. at 538.

The amount of proof necessary to satisfy the injury element of defamation depends on whether the defamatory words are actionable *per se* or actionable *per quod*. *Urban v. Hartford Gas Co.*, 139 Conn. 301 (1952). Defamatory statements that are actionable *per se* do not require a showing of special damages because the law presumes general damages. "Our state has generally recognized two classes of defamation per se: (1) statements that accuse a party of a crime involving moral turpitude or to which an infamous penalty is attached, and (2) statements that accuse a party of improper conduct or lack of skill or integrity in his or her profession or business and the statement is calculated to cause injury to that party in such profession or business." *Silano v. Cooney*, 189 Conn. App. 235, 242 (2019) (holding that trial court erred by requiring plaintiff to prove that the crime the defendant alleged was both a crime involving moral turpitude and one imposing an infamous penalty, because the law only requires either). Defamatory statements that are actionable *per quod* do require a showing of special damages. *Urban*, 139 Conn. at 308.

1D-4 DOG-BITE ACTION (COMMON LAW)

To prevail in a common-law dog bite action, a plaintiff must prove that:

1) The defendant was the owner or keeper of a dog;
2) the defendant had knowledge of the dog's ferocity or mischievous propensity;
3) the plaintiff was bitten by that dog; and
4) damages resulted from the bite.

Griffin v. Flegert, 2007 WL 2593793, at * 3 (Conn. Super. Ct. Aug. 28, 2007) [1, 2]; *see Verrilli v. Damilowski*, 140 Conn. 358, 360-62 (1953) [3, 4].

Statute of Limitations
The statute of limitations for a common-law dog bite action is two years. Conn. Gen. Stat. § 52-584; *see Gretkowski v. Coppola*, 26 Conn. Supp. 294, 296 (1966).

Notes
"A person injured by a dog has for election one of two causes of action to pursue. One such action is in negligence at common law, and the other is under the statute which is presently [Conn. Gen. Stat. § 22-357]." *Id.* The principal distinction between the two is the common-law scienter requirement for the owner—i.e., knowledge of the dog's vicious nature. *Verrilli v. Damilowski*, 140 Conn. 358, 360-62 (1953). A landlord that knows of the dangerous propensities of a dog owned by one of its tenants and kept on common premises owned by the landlord may be held liable for injuries to another of its tenants who was bitten by the dog, even though the landlord did not have direct care of, or control over, the dog. *Giacalone v. Hous. Auth. of Town of Wallingford*, 306 Conn. 399, 401 (2012).

Where city official's acts or omissions were discretionary in nature, city official and the city are immune from liability for common-law dog bite claim. *Thivierge v. Witham*, 150 Conn. App. 769, 778 (2014).

1E-1 EASEMENT BY IMPLICATION

The elements for an easement by implication are:

1) The imposition of an apparently permanent and obvious servitude on one part of an estate in favor of another part of that estate;
2) which, when the estate is severed, is in use and is reasonably necessary for the use and normal enjoyment of the dominant estate.

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Deane v. Kahn, 179 Conn. App. 58, 71 (2018) (quoting *Rischall v. Bauchmann*, 132 Conn. 637, 642-43 (1946)).

Statute of Limitations

There is, strictly speaking, no statute of limitations period for an easement by implication, which arises by operation of law if the above elements are satisfied. However, if the owner of the dominant estate wishes to confirm the legal existence of his easement, he must give notice of entry within 15 years and must bring an action to quiet his title thereto within one year of that notice. *See* Conn. Gen. Stat. § 52-575(a).

Notes

An easement by implication entitles the dominant estate to continue its use of an easement following a split in ownership with the servient estate. *See Deane*, 179 Conn. App. at 70-71. Further, "in so far as necessity is significant it is sufficient if the easement is highly convenient and beneficial for the enjoyment of the portion granted . . . . The reason that absolute necessity is not essential is because fundamentally such a grant by implication depends on the intention of the parties as shown by the instrument and the situation with reference to the instrument, and it is not strictly the necessity for a right of way that creates it." (Citation omitted; internal quotation marks omitted.) *D'Amato v. Weiss*, 141 Conn. 713, 717 (1954); *see Utay v. G.C.S. Realty, LLC*, 72 Conn. App. 630, 636-37 (2002).

"The extent of an easement created by implication generally is determined by the circumstances which existed at the time of conveyance and gave rise to the implication. Among these circumstances is the use being made of the dominant tenement at that time." *McBurney v. Paquin*, 302 Conn. 359, 380 (2011) (quoting *Bovi v. Murray*, 601 A.2d 960, 962 (R.I. 1992)). Where the easement was created long ago, "[e]vidence of present, or relatively recent, actual use of the easement bears little relation to what was considered reasonably necessary for its use and normal enjoyment more than one hundred years ago." *McBurney*, 302 Conn. at 380 (citing 25 Am. Jur. 2d, Easements & Licenses § 79, pp. 577-78 (2004)).

The parcels in question no longer have to share a unity of interest to find an easement by implication. *See Bolan v. Avalon Farms Property Owners Ass'n, Inc.*, 250 Conn. 135 (1999). A map may create an implied easement to the extent that it establishes the intent of the grantor to convey one. *See Murphy v. EAPWJP, LLC*, 123 Conn. App. 316, 334 (2010), *appeal dismissed*, 306 Conn. 391 (2012). Moreover, "[a] description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit, implies creation of a servitude

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restricting the use of the land shown on the map to the indicated uses." *McBurney v. Cirillo*, 276 Conn. 782, 802-03 (2006).

1E-2 EASEMENT BY NECESSITY

An action to impose an easement by necessity arises in two distinct, but interrelated circumstances. Either:

1) Property is conveyed to the plaintiff;
2) that is inaccessible except over the property retained by the defendant grantor.

Or:

1) The plaintiff conveys property to the defendant;
2) but retains an adjoining parcel that is inaccessible except over the property so conveyed.

First Union National Bank v. Eppoliti Realty Co., Inc., 99 Conn. App. 603, 608 (2007); *see Deane v. Kahn*, 317 Conn. 157, 178 (2015) (claim of easement by necessity may be based on either limited access to portion of plaintiff's property (if remainder of property has access), or limited waterfront access (if an integral part of property's value), but neither claim established).

Statute of Limitations
See EASEMENT BY IMPLICATION, *supra*.

Notes
An easement by necessity flows from the "public policy that no land should be left inaccessible or incapable of being put to profitable use." *Hollywyle Ass'n, Inc. v. Hollister*, 164 Conn. 389, 400 (1973). In either of the two above scenarios, the need for access "need only be a reasonable one." *First Union National Bank v. Eppoliti Realty Co., Inc.*, 99 Conn. App. 603, 608 (2007). Unity of ownership is no longer a requirement for the imposition of an easement by necessity. *See Bolan v. Avalon Farms Property Owners Ass'n, Inc.*, 250 Conn. 135, 144 (1999). An easement by necessity is distinct from an easement by implication by virtue of the fact that the former "requires the party's parcel to be landlocked[,]" *Sanders v. Dias*, 108 Conn. App. 283, 289 (2008), but does not require proof that the parties intended to create an easement. *See Thomas v. Primus*, 148 Conn. App. 28, 36 (2014) (court need not consider intent in establishing an easement by necessity). Note, however, that "a common-law right-of-way based on necessity expires when the owner of a dominant estate acquires access to a public or private road through another means." *Montanaro v. Aspetuck Land Trust, Inc.*, 137 Conn. App. 1, 28, *cert. denied*, 307 Conn. 932 (2012); *Thurlow v. Hulten*, 173 Conn. App. 694, 718 (2017).

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A plaintiff whose property is cut off from access to commercial utilities may claim an easement by necessity to access utility services, even if there is physical access to the property. *Francini v. Goodspeed Airport, LLC,* 164 Conn. App. 279, 287 (2016), *aff'd*, 327 Conn. 431 (2018).

1E-3 EASEMENT USE DAMAGING SERVIENT ESTATE

The owner of an easement may be held liable for damages caused by his negligent use of the easement, and this liability extends to damages to the servient estate. *Center Drive-In Theatre, Inc. v. City of Derby*, 166 Conn. 460, 464 (1974) (citing *Gager v. Carlson*, 146 Conn. 288, 293 (1959)); *Schwab v. Charles Parker Co.*, 55 Conn. 370, 372 (1887). *See generally NEGLIGENCE.*

Statute of Limitations
Consult applicable limitation for underlying action upon which damage claim is based (negligence, intentional tort, etc.)

Notes
While the cases discuss the possibility of negligent use of an easement causing damage to the servient estate, intentional damage also would be actionable. Note also that damage to the servient estate could constitute an unreasonable use, and thus a violation of the easement. *See, e.g., Zhang v. Omnipotent Enterprises, Inc.,* 272 Conn. 627, 636-37 (2005).

1E-4 EJECTMENT

The elements of a cause of action for ejectment are:

1) A defendant has wrongfully entered onto land owned by the plaintiff;
2) dispossessed the plaintiff of that land;
3) deprived the plaintiff of the use of that land and rents or profits therefrom;
4) the defendant remained in possession of the land; and
5) the plaintiff suffered damages as a result.

Mitchell Trust, LLC v. Birmingham, 2004 WL 1326078, at *2 (Conn. Super. Ct. May 25, 2004).

Statute of Limitations
The statute of limitations for an ejectment action is 15 years from the date when the plaintiff "was ousted from possession." Conn. Gen. Stat. § 52-575.

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Notes

An ejectment action seeks to oust an unlawful possessor from land owned by another. Proof of legal title by the plaintiff is a requirement of an ejectment action. *Waterbury Trust Co. v. G.L.D. Realty Co.*, 121 Conn. 50, 51 (1936). A defendant in an ejectment action "who has, in good faith, believing his title to the land in question absolute, made improvements on the land before the commencement of the action, or whose grantors or ancestors have made the improvements" may be entitled to the excess value of those improvements over the amount due to the plaintiff for the defendant's use and occupation of the land. Conn. Gen. Stat. § 47-30. Under § 47-30, a court may not enter final judgment until it has ascertained the present value of those improvements in order to determine if that value exceeds the value of the defendant's use and occupancy.

Note also that "the title to property and possession of that property are separate questions and that title to property may be obtained via a foreclosure action without acquiring the right to possession. A foreclosing mortgagee has two options to obtain possession of the property from a tenant: the mortgagee may name the tenant as a party in the foreclosure action and obtain a judgment of ejectment; or, the mortgagee separately may pursue a summary process action after obtaining title." (Citation omitted.) *Housing Dev. Fund, Inc. v. Burke Real Estate Mgmt., LLC*, 155 Conn. App. 451, 461-62 (2015). In other words, while proof of title is a prerequisite to a successful ejectment action, ejectment is not a necessary result of a quiet title action. At least one Superior Court judge has held that mortgagees are required under the Protecting Tenants at Foreclosure Act of 2009 and Conn. Gen. Stat. § 49-31p, to provide 90-day notice prior to the ejectment of bona fide tenants, regardless of whether the tenants were made parties in the foreclosure action. *Nutmeg Fin. Holdings, LLC v. 249 River St., LLC*, 2018 WL 4656028, at *3 (Conn. Super. Ct. Sept. 11, 2018). A bona fide tenant is one who makes periodic monetary payments or periodic payments of something of value to the landlord in satisfaction of the tenant's obligation. *Id.* at *4 (citing *Customers Bank v. Boxer*, 148 Conn. App. 479, 486 (2014)).

A writ of error is the proper mechanism for a tenant to challenge an ejectment if the tenant was not made a party to the underlying foreclosure action. *See Tappin v. Homecomings Financial Network, Inc.*, 265 Conn. 741, 745-46 (2003). However, a writ of error is not available if the tenant was a party to the underlying action. *See Micek-Holt v. Papageorge*, 326 Conn. 915, 919 (2017).

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1E-5 EQUITABLE SUBROGATION

A plaintiff may recover under a theory of equitable subrogation if the plaintiff:

1) Not acting as a mere volunteer or intruder;
2) pays a debt for which another is primarily liable;
3) which in equity and good conscience should have been discharged by the latter.

Warning Lights & Scaffold Service, Inc. v. O&G Industries, Inc., 102 Conn. App. 267, 272 (2007).

Statute of Limitations

"Statute of limitations do not apply in a strict fashion to causes of action arising in equity." *Government Emps. Ins. Co. v. Barros*, 184 Conn. App. 395, 399 (2018) (holding that equitable subrogation claim was not barred by statues of limitations applicable to underlying tort claims). There is thus no clearly controlling statute of limitations for equitable subrogation. *See Great American Ins. Companies v. Hartford Acc. & Indemnity Co.*, 1999 WL 195950, at *2 (Conn. Super. Ct. Mar. 12, 1999) ("the doctrine of equitable subrogation is not subject to a statute of limitations"); *see also Dunham v. Dunham*, 204 Conn. 303, 326-27 (1987), *overruled in part on other grounds, Santopietro v. New Haven*, 239 Conn. 207 (1996) ("in an equitable proceeding, a court *may* provide a remedy even though the governing statute of limitations has expired"). However, courts sometimes impose the statute of limitations applicable to the equivalent legal cause of action in an equitable case if the plaintiff also could have requested legal relief. *See Certain Underwriters at Lloyd's, London v. Cooperman*, 289 Conn. 383, 407 (2008) (constructive trust). Under that theory, it is not clear whether the six-year limitations period for contract actions, *see* Conn. Gen. Stat. § 52-576(a), or the three-year period for indemnification actions, *see* Conn. Gen. Stat. § 52-598a, would apply to equitable subrogation. *See Alfred Chiulli & Sons, Inc. v. Hanover Ins. Co.*, 2007 WL 4239788 (Conn. Super. Ct. Nov. 14, 2007) (discussing three-year limitations period for other claims in which plaintiff also pled equitable subrogation); *Great American*, 1999 WL 195950, at *3 (assuming *arguendo* that six-year limitations period would apply). In a similar vein, if the underlying theory of liability is negligence—e.g., in an uninsured motorist case—several courts have applied the two-year limitations period for negligence actions. *See GEICO v. Planz,* 2017 WL 4508753, at *5 (Conn. Super. Ct. Aug. 28, 2017) (citing cases); *see also* Conn. Gen. Stat. § 52-584.

Notes

The right of equitable subrogation is not a matter of contract and does not arise from any contractual relationship between the parties. It is a matter of equity,

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designed to prevent injustice. *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, 236 Conn. 362, 371 (1996). While a claim for equitable subrogation traditionally had to be brought in the name of the injured party (sometimes referred to as the subrogor, or nominal party in interest), Connecticut has moved away from overly strict pleading requirements in equitable subrogation cases. In ruling that the claim may be made in the name of the real party in interest (the subrogee), the Supreme Court referenced an ancient case that applied the old rule and stated that "[w]hat might have been procedurally true in 1856 is not necessarily true today." *Pacific Ins. Co., Ltd. v. Champion Steel, LLC,* 323 Conn. 254, 263 n.4 (2016).

Practice Book § 10-27 requires that a party seeking equitable relief specifically demand it as such, unless the nature of the demand itself indicates that the relief sought is equitable. "[S]ubrogation is a highly favored doctrine . . . which courts should be inclined to extend rather than restrict." *Allstate Ins. Co. v. Palumbo*, 296 Conn. 253, 260 (2010) (ellipses in original). However, there is no bright-line rule to determine whether a right of subrogation exists; it depends on the balance of equities under the facts and circumstances of each case. *See id*. The *Allstate* case illustrates the delicate nature of this equitable balancing act: The Supreme Court split 5-1-1, with the majority and dissent reaching opposite conclusions as a matter of law as to what the balance of equities required—an odd juxtaposition noted by the concurring justice, who would have remanded the case so that the trial court could consider the issue. *See id.* at 277 (Rogers, C.J., concurring) ("[t]he majority and the dissent both claim there is no need to remand this case to the trial court because the equities are so one-sided that there is only one proper conclusion for the trial court to reach. Yet, after weighing the equities, the majority and the dissent reach opposite conclusions regarding the direction in which the equities tip.").

Equitable subrogation frequently arises in the context of insurance claims. A life insurance carrier has no contractual right to bring a claim against the party who caused the death for which the insurer contracted to pay, but the insurer may bring a claim for equitable subrogation. (Internal citation omitted.) *Lawrence v. O & G Indus., Inc.*, 319 Conn. 641, 654 n.11 (2015). Though the "default rule" is that a landowner's property insurer may not bring an equitable subrogation action against a tenant who causes damage to the entire building, *DiLullo v. Joseph*, 259 Conn. 847, 854 (2002), the exception nearly swallows it whole: A landlord's property insurer may sue a tenant, even if the tenant's lease does not mention equitable subrogation, so long as the lease states that the tenant (1) is responsible for his negligence and (2) should get his own insurance to cover that responsibility. *See Amica Mut. Ins. Co. v. Muldowney*, 328 Conn. 428, 441-42 (2018).

In the context of property foreclosure law and the determination of which creditor holds priority, the doctrine of equitable subrogation can "provide an exception to the first in time, first in right rule and has been applied in certain limited circumstances to rearrange the priorities of parties in a case . . . . The object of [equitable] subrogation is the prevention of injustice . . . . Where fairness and justice require, one who advances money to discharge a prior lien on real or personal property and takes a new mortgage as security is entitled to be subrogated to the rights under the prior lien against the holder of an intervening lien of which he was ignorant." *Deutsche Bank Nat'l Trust Co. v. DelMastro*, 133 Conn. App. 669, 675 (2012) (citations omitted); *see Rathbun v. Health Net of the Ne., Inc.*, 315 Conn. 674 (2015).

1F-1 FAILURE TO RENDER AID/EMERGENCY ASSISTANCE

Notes

Connecticut adheres to the traditional concept that, absent a special relationship of custody or control, the common law imposes no obligation to render emergency assistance or protect a stranger from the conduct of a third person. *See Bohan v. Last*, 236 Conn. 670, 679 (1996). The principal "exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or to protect another." *Cannizzaro v. Marinyak*, 312 Conn. 361, 366-67 (2014). However, it is a "limited exception[,]" *id*. at 367, and our courts have treated it as such. *See id*. at 371 (upholding summary judgment for defendant property owner; no duty to protect driver injured in auto accident with worker who drank on defendant's property); *see Roe No. 1 v. Boy Scouts of Am. Corp.*, 147 Conn. App. 622 (2014) (no duty to protect Boy Scout from sexual assault by troop leader). The emphasis is on the conduct of the party in question, not on the relationship between that party and other individuals involved in a given incident. Thus, in *Bohan,* the court noted that Conn. Gen. Stat. § 30-86 imposes liability on a person who provides alcoholic beverages to a minor, but that it does so where the individual has provided or otherwise facilitated consumption of alcohol, *not* because of some relationship between the individual and the minor. *Bohan*, 236 Conn. at 679. Following this logic, the court in *Rangel v. Parkhurst*, 64 Conn App. 372, 380 (2001), held that parents were not responsible for injuries caused by intoxicated minors where they had not provided alcohol or otherwise assisted in the negligent conduct.

A person who has no duty to render aid or assistance may create such a duty, however, if he "gratuitously or for consideration . . . render[s] services to another which he should recognize as necessary for the protection of the other's person or things . . . ." *Grenier v. Comm'r of Transp.*, 306 Conn. 523, 547 (2012) (once fraternity offered to drive student to mandatory event,

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fraternity assumed duty to protect him and transport him safely). To be liable, the person's actions must increase the risk of harm, or cause harm due to the other person's reliance on those actions. *See id.*

In *Biron v. G.E.M. Manufacturing*, 2009 WL 1707480 (Conn. Super. Ct. May 28, 2009), a superior court held that the plaintiff had pleaded a legally sufficient claim by alleging that the defendants assumed a duty to the plaintiff by taking the keys away from a drunk driver but then subsequently allowing the same driver to operate a motor vehicle.

Conn. Gen. Stat. § 52-557b exempts certain classes of emergency and school personnel from civil liability for negligence in rendering emergency assistance.

1F-2 FALSE ARREST/IMPRISONMENT

In order to prevail on a claim of false arrest/imprisonment, a plaintiff must prove that the defendant:

1) Unlawfully restrained the physical liberty of the plaintiff;
2) with the intent to impose a confinement, or with the knowledge that a confinement was the substantially certain result of his conduct;
3) against the plaintiff's will and without his consent;
4) causing damages to the plaintiff.

Berry v. Loiseau, 223 Conn. 786, 820 (1992) [1, 3, 4]; *Green v. Donroe*, 186 Conn. 265, 268 (1982) [2].

Statute of Limitations

If the plaintiff alleges intentional conduct by the defendant, the limitations period is three years; if not, it is two years. *See* Conn. Gen. Stat. §§ 52-577 & 52-584; *Rivera v. Double A Transportation, Inc.*, 248 Conn. 21, 31-34 (1999) (noting distinction between claims of intentional false imprisonment and claims of non-intentional false imprisonment for limitations purposes).

Notes

Connecticut courts appear to use the terms "false arrest" and "false imprisonment" interchangeably to refer to a single tort cause of action. *See, e.g., Green*, 186 Conn. at 267; *LoSacco v. Young*, 20 Conn. App. 6, 19, *cert. denied*, 213 Conn. 808 (1989). "Any period of such [unlawful] restraint, however brief in duration, is sufficient to constitute a basis for liability." *Berry*, 223 Conn. at 820 (quoting *Green*, 186 Conn. at 267). The willing acquiescence of a plaintiff is fatal to an action for false arrest/imprisonment. *LoSacco*, 20 Conn. App. at 19. A cause of action for false arrest/imprisonment

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will not lie if "the plaintiff's arrest results from the . . . institution of and compliance with proper legal authority . . . ." *Id.* A plaintiff must prove "that the arresting officer did not have probable cause to arrest [him][,]" *Beinhom v. Saraceno*, 23 Conn. App. 487, 491 (1990), *cert. denied*, 217 Conn. 809 (1991), in order to prevail.

Thus, if "the defendant has attempted to comply with legal requirements, and has failed to do so through no fault of his own, false imprisonment will not lie . . . . The policy is to give the defendant the privilege of making reasonable efforts to bring his case properly before the court, without liability unless his ultimate purpose is an improper one." *Nodoushani v. S. Conn. State Univ.*, 152 Conn. App. 84, 93 (2014). In addition, judges enjoy absolute immunity "from an action for false imprisonment when the imprisonment was ordered (however erroneously) by a judgment in a proceeding in which he had jurisdiction over the person, the process, and the subject-matter." *McVeigh v. Ripley*, 77 Conn. 136, 139 (1904).

In addition, "[a] false arrest claim is defeated by the plaintiff's conviction for the offense for which he was arrested." *Phelan v. Sullivan*, 541 F. App'x 21, 23 (2d Cir. 2013) (summary order). It is not clear whether Connecticut law makes "favorable termination" of any subsequent prosecution an element of false arrest. *See Roesch v. Otarola*, 980 F.2d 850, 852-53 (2d Cir. 1992) (holding that it is); *but see Weyant v. Okst,* 101 F.3d 845, 853 (2d Cir. 1996) (questioning *Roesch*, albeit in a case under the New York law). However, the Second Circuit and the District Court both have held that participation in accelerated rehabilitation is not a "favorable termination" for purposes of a suit for false arrest. *See Miles v. City of Hartford*, 445 F. App'x 379, 383 (2d Cir. 2011) (summary order); *Murphy v. Kearney*, 2010 WL 2640041, at *4 (D. Conn. June 28, 2010).

1F-3 FRAUD

The elements of a cause of action for fraud are:

1) A false representation was made as a statement of fact;
2) the statement was untrue and known to be untrue by the party making it;
3) the statement was made to induce the other party to act upon it; and
4) the other party did so act upon that false representation to his injury.

Capp Industries, Inc. v. Schoenberg, 104 Conn. App. 101, 116, *cert. denied*, 284 Conn. 941 (2007).

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Statute of Limitations
Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577; *see Szynkowicz v. Bonauito-O'Hara*, 170 Conn. App. 213, 228 (2017). (Note the distinction between the elements of an action for *fraud* and the elements of *fraudulent concealment*, which will toll the running of the statute of limitations in some cases. The original fraudulent conduct may not be sufficient to establish fraudulent concealment. *See World Wrestling Entertainment, Inc v. THQ, Inc.*, 2008 WL 4307568 (Conn. Super. Ct. Aug. 29, 2008)).

Notes
Courts sometimes use the terms "fraud" and "misrepresentation" interchangeably. Fraud is *intentional* misrepresentation; unlike negligent or innocent misrepresentation, it requires the intent to induce the deceived party to act. *See Warner v. Brochendorff*, 136 Conn. App. 24, 33 n.9, *cert. denied*, 306 Conn. 902 (2012). Generally, fraud concerns present or past facts; however, "a promise to do an act in the future, when coupled with a present intent not to fulfill the promise, is a false representation." *Brown v. Otake*, 164 Conn. App. 686, 706 (2016). Specific intent to induce the defrauded party to act is an essential element of fraud. *See Villages, LLC v. Longhi*, 187 Conn. App. 132, 146 (2019).

Though mere silence is not fraud, "[a] party who assumes to speak must make a full and fair disclosure as to the matters about which he assumes to speak." *Saggese v. Beazley Co. Realtors*, 155 Conn. App. 734, 753 (2015). So-called "[f]raud by non-disclosure" requires a "request or an occasion or a circumstance" to speak, *id*. at 753, and, as the objective of a half-hearted disclosure, "an intent or expectation that the other party will make or will continue in a mistake . . . ." *Reville v. Reville*, 312 Conn. 428, 441 (2014). In addition, fraud requires proof by clear and convincing evidence (even if our courts have been a little less than clear when stating the plaintiff's burden of proof). *See Saggese*, 155 Conn. App. at 753 ("which higher standard we have described as clear and satisfactory or clear, precise and unequivocal"). The litigation privilege provides an attorney with absolute immunity from a claim of fraud for his conduct during judicial proceedings. *See Simms v. Seaman*, 308 Conn. 523, 545 (2013).

A successful fraud action entitles the plaintiff to recover punitive damages because the perpetrator of a fraud necessarily has "show[n] a reckless indifference to the rights of others or an intentional and wanton violation of those rights." *Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 455 n.12 (2017).

In addition to providing a claim for damages, fraud also is a basis for opening a prior judgment. *See Chapman Lumber, Inc. v. Tager*, 288 Conn. 69, 107 (2008).

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1F-4 FRAUDULENT CONVEYANCE

A party alleging a fraudulent transfer or conveyance bears the burden of proving either:

1) That the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations; or
2) that the conveyance was made with a fraudulent intent in which the grantee participated.

Litchfield Asset Management Corp. v. Howell, 70 Conn. App. 133, 140-41, *cert. denied*, 261 Conn. 911 (2002), *overruled on other grounds by Robinson v. Coughlin*, 266 Conn. 1, 9 (2003).

Statute of Limitations

Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577; *see Einbinder & Young, P.C. v. Soiltesting, Inc.*, 36 Conn. Supp. 277, 279-80 (1980).

Notes

The two elements are alternative grounds to set aside a fraudulent conveyance; a party "need not satisfy both of these tests." *Kosiorek v. Smigelski*, 138 Conn. App. 695, 724 (2012), *cert. denied*, 308 Conn. 901 (2013). As with other claims of fraud, the elements of a claim for fraudulent conveyance, including whether the defendants acted with a fraudulent intent, must be proven by "clear, precise and unequivocal" evidence. *Tyers v. Coma*, 214 Conn. 8, 11 (1990). This "requires a reasonable belief that the facts asserted are highly probably true or that the probability that they are true . . . is substantially greater than the probability that they are false." *19th Hole Rest., Inc. v. Steiber Realty, LLC*, 2015 WL 5893834, at *3 (Conn. Super. Ct. Sept. 4, 2015) (ellipsis in original) (quoting *Patrocinio v. Yalanis*, 4 Conn. App. 33, 35-36 (1985)). A successful fraudulent conveyance action entitles the plaintiff to the wrongly-conveyed property, or to money damages for the property's value. *See Crepeau v. Gronager*, 41 Conn. App. 302, 316-17 (1996); *Foisie v. Foisie*, 2017 WL 3011555, at *5 (Conn. Super. Ct. June 12, 2017).

The legislature has codified the common law of fraudulent conveyances in order to "provide[ ] relief to unsecured creditors when there has been a transfer of a debtor's assets and the circumstances establish that the transfer was fraudulent." *Geriatrics, Inc. v. McGee*, 332 Conn. 1, 3 (2019). The Connecticut Uniform Fraudulent Transfer Act expressly shares power with pre-existing common-law principles and defenses. *See* Conn. Gen. Stat. § 52-552k. Indeed, "CUFTA is largely an adoption and clarification of the standards of the common law of fraudulent conveyances, except that the act's remedies are broader than those available under the common law." *Geriatrics,*

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Inc., 332 Conn. at 13. This includes common-law agency principles; *id.*; as a consequence, a transfer by an authorized agent qualifies as a potentially fraudulent transfer "made by a debtor" under CUFTA. *Id.* at 23-24.

CUFTA lists eleven factors that a court "may" consider when deciding whether a transfer was made with actual intent to defraud. *See* Conn. Gen. Stat. § 52-552e(b). The existence of actual intent is question of fact subject to the clearly erroneous standard. *See McKay v. Longman*, 332 Conn. 394, 417 (2019).

1I-1 IMPLIED CONTRACT, BREACH OF

The elements of an action for breach of an implied contract are:

1) Formation of an implied agreement;
2) performance by one of the parties to that agreement;
3) breach of a material term or terms of the agreement by another party;
4) damages resulting from that breach; and
5) the lack of an express contract governing the same subject matter.

Pelletier v. Galske, 105 Conn. App. 77, 81 (2007), *cert. denied*, 285 Conn. 921 (2008); *see also Janusauskas v. Fichman*, 264 Conn. 796, 804 (2003) ("[w]hether a contract is styled express or implied involves no difference in legal effect, but lies merely in the mode of manifesting assent").

Statute of Limitations

Six years after the right of action accrues. Conn. Gen. Stat. § 52-576(a); *see Amoco Oil Co. v. Liberty Auto & Electric Co.*, 262 Conn. 142, 153 (2002) (action accrues "at the time the breach of contract occurs . . . when the injury has been inflicted.")

Notes

The elements of an action for breach of an implied contract are the same as for breach of an express contract. Courts also refer to such agreements as constructive contracts. A cause of action for breach of an implied contract merely is one of several methods of obtaining restitution in the absence of an express contract. *See QUANTUM MERUIT*, *infra*; *UNJUST ENRICHMENT*, *infra*.

Although the underlying rationale is essentially the same, Connecticut law describes implied contracts in two different ways, depending on whether the contract arises in the employment context.

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Outside the employment context, the Supreme Court has said the following:

> A true implied [in fact] contract can only exist where there is no express one. It is one which is inferred from the conduct of the parties though not expressed in words. Such a contract arises where a plaintiff, without being requested to do so, renders services under circumstances indicating that he expects to be paid therefore, and the defendant, knowing such circumstances, avails himself of the benefit of those services. In such a case, the law implies from the circumstances, a promise by the defendant to pay the plaintiff what those services are reasonably worth.

Janusauskas, 264 Conn. at 805 (internal quotation marks omitted; internal citations omitted).

With respect to implied contracts of employment, the Appellate Court has stated that a plaintiff must show "that the defendants had agreed, either by words or action or conduct, to undertake any form of actual contract commitment to the plaintiff under which she could not be terminated without just cause." *Reynolds v. Chrysler First Commercial Corp.*, 40 Conn. App. 725, 730, *cert. denied*, 237 Conn. 913 (1996) (internal quotation omitted); *Morrissey-Manter v. Saint Francis Hosp. & Med. Ctr.*, 166 Conn. App. 510, 520, *cert. denied*, 323 Conn. 924 (2016).

1I-2 IMPLIED INDEMNIFICATION

The elements of a cause of action for implied indemnification are:

1) The plaintiff and defendant were joint tortfeasors in an underlying civil action;
2) in which the defendant's active negligence was the direct, immediate cause of the injuries suffered in that underlying action;
3) that active negligence superseded the plaintiff's passive negligence;
4) the defendant was in control of the situation to the exclusion of the plaintiff; and
5) the plaintiff had no reason to know of, or anticipate, that the defendant would act in a negligent fashion and could reasonably rely on the defendant not to be negligent.

ATC Partnership v. Coats North America Consolidated, Inc., 284 Conn. 537, 551-52 (2007).

Statute of Limitations

The statute of limitations for an implied indemnification action is three years "from the date of the determination of the action against the party which is seeking indemnification by either judgment or settlement." Conn. Gen. Stat. § 52-598a.

Notes

There is "[o]rdinarily . . . no right of indemnity or contribution between joint tort-feasors." *Crotta v. Home Depot, Inc.*, 249 Conn. 634, 642 (1999). An action for implied indemnification—also called "common-law," or "tortious" indemnification—thus arises only in the narrow circumstances set forth in *ATC Partnership* and *Smith v. New Haven*, 258 Conn. 56, 66 (2001), namely, "[t]he presence of two tortfeasors . . . one, whose passive negligence resulted in a monetary recovery by the plaintiff; and a second, whose active negligence renders him liable to the first by way of reimbursement." *Id.* Implied indemnification is distinct from a cause of action based on an express contractual indemnification provision. The payment of money damages, and/or the incursion of legal costs, are a prerequisite to an action for implied indemnification. *ATC Partnership*, 284 Conn. at 552; *see Chicago Title Ins. Co. v. Accurate Title Searches, Inc.*, 173 Conn. App. 463, 480-82 (2017). Because of its limited scope, a party claiming implied indemnification "may bring an action for such indemnity only with regard to liability it incurred through tortious conduct, not for any liability arising from contract." *Horace Mann Ins. Co. v. Nationwide Mut. Ins. Co.*, 337 Fed. Appx. 13, 14 (2d Cir. Conn. 2009).

The "situation" in a claim for common-law indemnification is the dangerous condition that allegedly exposed the plaintiff to harm and not the allegedly negligent conduct of the defendant. *See Pellecchia v. Conn. Light & Power Co.*, 139 Conn. App. 767, 775 (2012), *cert. denied*, 308 Conn. 911 (2013) ("the dangerous condition, or 'situation,' that allegedly caused such harm by virtue of the defendant's negligence was plainly the downed power line, not the negligent conduct itself"). In addition, it "is possible to have common-law indemnification between unrelated parties whose separate and independent streams of negligence, one active and the other passive, give rise to a foreseeable risk of harm from the same condition of danger." *Id.* at 777. If one party is in exclusive control of a situation, it does not bar an indemnification claim if another party with an independent duty of care to the plaintiff separately breached that duty—so long as that breach and the breach by the active tortfeasor exposed the plaintiff to the same dangerous condition. *Id.* at 777-78 (independent failure of company hired to provide emergency communication services to notify town or power company of downed power

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line did not preclude claim for indemnification against power company for failing to de-energize line).

There is no common law right to indemnification against municipal defendants in an action brought pursuant to the highway defect statute (Conn. Gen. Stat. § 13a-149). In such an action, "as a matter of law, the allegations regarding the actions of the town defendants legally can only be construed as allegations that the town defendants breached their statutory duty pursuant to § 13a-149 and not as allegations of negligence . . ." *Pellecchia v. Conn. Light & Power Co.*, 147 Conn. App. 650, 659 (2014). As a result, the plaintiff cannot demonstrate that the defendant was negligent and thus cannot prove the elements of an indemnification claim.

1I-3 INJURIOUS FALSEHOOD

The elements of a cause of action for injurious falsehood are:

1) Publication by the defendant;
2) of a statement harmful to interests of the plaintiff having pecuniary value;
3) if the defendant intends for publication of the statement to result in harm to those interests, or either recognizes, or should recognize, that publication of the statement is likely to result in such harm; and
4) the defendant either knows the statement is false, or acts with reckless disregard for its truth or falsity.

National Distributor Systems, Inc. v. Steinis, 1999 WL 476686, at *3 (Conn. Super. Ct. June 25, 1999) (citing Restatement (Second) of Torts § 623A).

Statute of Limitations

Although no Connecticut court has addressed the issue, the statute of limitations for injurious falsehood likely comes under the two-year limitations period for libel or slander actions. Conn. Gen. Stat. § 52-597.

Notes

It is not clear whether injurious falsehood is a "distinct tort" under Connecticut law, *National Distributor Systems, Inc. v. Steinis*, 1999 WL 476686 at *3 (Conn. Super. Ct. June 25, 1999), or merely a broad category of tort actions that includes such species as slander of title and commercial disparagement. *See Elm St. Builders, Inc. v. Enter. Park Condo. Ass'n, Inc.*, 63 Conn. App. 657, 670 (2001). Quite a few trial courts, however, have discussed injurious falsehood as its own tort cause of action—e.g., in the context of the proper measure of damages for slander of title. *See Peterken v. Epright*, 2002 WL 2005698, at *3

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(Conn. Super. Ct. July 29, 2002) ("[l]iability for the publication of an injurious falsehood is limited to pecuniary loss"). Moreover, injurious falsehood imposes three more stringent proof requirements than does defamation: (1) falsity of the statement, whereas in a defamation action, falsity is presumed and truth is an affirmative defense; (2) fault, whereas defamation is, in essence, a strict liability tort; and (3) proof of pecuniary loss. *See Time Was Garage, LLC v. Giant Steps, Inc.*, 2011 WL 1888096, at *7 (Conn. Super. Ct. Apr. 29, 2011) (citing Restatement (Second), Torts § 623A, p. 334 (1977)).

1I-4 INJURY ON OWNER'S LAND

See LANDOWNER LIABILITY FOR INJURIES ON PROPERTY.

1I-5 INNOCENT MISREPRESENTATION

To prevail on a claim of innocent misrepresentation, a plaintiff must establish:

1) A representation of material fact;
2) made for the purpose of inducing the plaintiff to act:
3) which representation is untrue, and as to which the declarant has the means of knowing, ought to know, or has the duty to know the truth;
4) justifiable reliance by the plaintiff on the representation by the defendant; and
5) damages.

Johnnycake Mountain Associates v. Ochs, 104 Conn. App. 194, 204 n.13 (2007), *cert. denied*, 286 Conn. 906 (2008) [3]; *Matyas v. Minck*, 37 Conn. App. 321, 333 (1995) [1, 2, 4, 5].

Statute of Limitations

The statute of limitations for innocent misrepresentation is three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

Notes

Innocent misrepresentation, "in contrast to the tort of negligent misrepresentation, is predicated on principles of warranty." *Kramer v. Petisi*, 285 Conn. 674, 686 n.10 (2008). Indeed, innocent misrepresentation comes close to imposing strict liability on a defendant. It requires no showing of intent, fault, or a failure of reasonable care, *see Sturm v. Harb Development, LLC*, 298 Conn. 124, 144 (2010), although courts have tended to apply the doctrine in a few, relatively narrow contexts—e.g., the sale of goods and construction. *See Johnson v. Healy*, 176 Conn. 97, 101 (1978) (discussing

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history of innocent misrepresentation in Connecticut); *see also United Concrete Prods., Inc. v. NJR Constr., LLC*, 2017 WL 6888843, at *4 (Conn. Super. Ct. Dec. 13, 2017) (CUTPA proscribes a broader range of conduct than common-law action for innocent misrepresentation) (citing *Hinchliffe v. Am. Motors Corp.*, 184 Conn. 617 (1981)). As of the 2019 update to this book, the Appellate Court has rendered a decision relying on authorities that limit innocent misrepresentation claims to business transactions. *Farrell v. Johnson & Johnson*, 184 Conn. App. 685 (2018). As the Appellate Court also pointed out, however, these authorities conflict with decisional law stating that innocent misrepresentation is not limited to contracts for the sale of goods. *Id*. at 704 (citing to *Johnson v. Healy*, 176 Conn. 97, 102 (1978)). The Supreme Court has granted certification to review this decision and has asked the parties to brief whether "the Appellate Court correctly conclude[d] that the theory of innocent misrepresentation is not applicable in the present case . . . ?" *Farrell v. Johnson & Johnson*, 330 Conn. 944 (2018). The briefings have been completed, but the matter has not yet been scheduled for argument.

The proper measure of damages for an innocent misrepresentation claim involving damage to property is not the cost of repair. Damages are measured by the difference between the value of the property as warranted and the value of the property as it actually is (at least where the cost of repair is substantially greater). *Little Mountains Enters. v. Groom*, 141 Conn. App. 804, 810 (2013) (citing *Johnson v. Healy*, 176 Conn. 97 (1978)).

1I-6 INSURANCE AGENT/BROKER MALPRACTICE

To prevail on a malpractice claim against an insurance agent or broker, a plaintiff must prove the following elements:

1) The requisite standard of care for a reasonable insurance agent or broker under the circumstances;
2) a deviation from that standard of care;
3) a causal connection between the deviation and the claimed injury; and
4) damages.

See Byrd v. Ortiz, 136 Conn. App. 246, 253 (2012) (citing *Dimeo v. Burns, Brooks & McNeil, Inc.*, 6 Conn. App. 241, *cert. denied*, 199 Conn. 805 (1986) and *Ursini v. Goldman*, 118 Conn. 554, 559-60 (1934)) [1, 2, 4]; *Erickson Metals Corp. v. McManus*, 2008 WL 1734880, at *2-3 (Conn. Super. Ct. Mar. 27, 2008) [3]; *Pine Orchard Yacht & Country Club, Inc. v. Sinclair Ins. Grp., Inc.*, 2017 WL 3080801, at *2 (Conn. Super. Ct. June 12, 2017).

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Statute of Limitations

The statute of limitations for an insurance broker/agent malpractice action is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. *See* Conn. Gen. Stat. § 52-584. However, if a plaintiff sues under a breach of contract theory, then the limitations period is six years. *See* Conn. Gen. Stat. § 52-576(a).

Notes

A plaintiff is not required to allege or prove that the insurance broker engaged in fraud or inequitable conduct in order to prevail on a claim for agent or broker malpractice. *Byrd*, 136 Conn. App. at 252. As with other types of malpractice, "Connecticut recognizes a cause of action against an insurance agent for failure to obtain insurance under a theory of either professional malpractice or breach of contract." *Erickson*, 2008 WL 1734880, at *2 (citing *Ursini*, 118 Conn. at 559-60). The latter theory likely requires proof that the agent violated the client's specific instructions, or failed to perform specific tasks set forth in the contract. *See Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 292-94 (2014) (distinguishing between tort and contract theories of liability for legal malpractice). Although *Ursini* involved the outright failure to obtain any insurance for a client, at least one superior court decision has expanded the scope of an insurance agent's duty potentially to include a duty to advise a client of the proper insurance coverage that he should purchase. *See Berlin Corp. v. Continental Cas. Co.*, 2006 WL 3360298, at *1-2 (Conn. Super. Ct. Nov. 2, 2006) (denying motion to strike count of plaintiff's malpractice claim alleging that the defendant "negligently failed to provide adequate insurance coverage to the plaintiffs, to advise the plaintiffs to purchase liquor liability coverage, and to review and explain the terms of the plaintiffs' policy").

A claim that an insurance agent or broker breached a fiduciary duty to the plaintiff is insufficient to support an action for violation of the Connecticut Unfair Insurance Practices Act ("CUIPA"). Such a claim also cannot establish a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), since an insurance-related CUTPA claim must allege a violation of CUIPA. *State v. Acordia, Inc.*, 310 Conn. 1, 37 (2013) ("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."). Thus, as with other types of professional malpractice, an allegation of insurance agent/broker malpractice does not form the basis for a valid unfair trade practices claim. *See Silk, LLC v. Cowles & Connell*, 2004 WL 1245915, at *2-4 (Conn.

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Super. Ct. May 25, 2004). Assignment of the right to bring such an action is not against public policy. *Scacca v. Todd & Cassanelli, Inc.*, 2008 WL 2169159, at *2-3 (Conn. Super. Ct. May 6, 2008).

1I-7 INSURANCE—BAD FAITH BY INSURER

The elements of a cause of action against an insurer for bad faith are:

1) The existence of an insurance policy;
2) under which the plaintiff was entitled to recover benefits;
3) a refusal to pay by the insurer that had no reasonable basis; and
4) the insurer knew, or recklessly disregarded, the fact that it had no reasonable basis to withhold payment.

Bergen v. Standard Fire Ins. Co., 1997 WL 809957, at *16 (Conn. Super. Ct. Dec. 31, 1997) [1, 2, 3, 4]; *see Grand Sheet Metal v. Protection Mut. Ins. Co.*, 34 Conn. Supp. 46, 51 (1977) [1, 2].

Statute of Limitations

The statute of limitations for a bad faith claim against an insurer is six years. Conn. Gen. Stat. § 52-576(a).

Notes

The foundation of a claim for bad faith against an insurer is the "implied covenant of good faith and fair dealing [that] has been applied by this court in a variety of contractual relationships, including . . . insurance contracts . . . ." *Buckman v. People Express, Inc.*, 205 Conn. 166, 170 (1987). A plaintiff must prove that he is entitled to recover under the subject policy before an insurer can be shown to have acted in bad faith. *Id.*

An insurer has the right to fairly dispute a claim made under one of its policies. *McCauley Enterprises v. New Hampshire Ins. Co.*, 716 F. Supp. 718, 721 (D. Conn. 1989). Therefore, a plaintiff must show that the insurer's refusal to pay was "egregious," and done with "reckless indifference to the rights of the insured." *Bergen*, 1997 WL 809957, at *15. Mere breach of contract will not suffice. *Id.* (citing *Buckman*, 205 Conn. at 170-71). Moreover, "[b]ad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive . . . . Bad faith means more than mere negligence; it involves a dishonest purpose." *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424, 432-33 (2004) (internal citations and quotation marks omitted). Do not overlook the motive element of bad faith; several trial

courts have struck bad faith claims for failure to allege a dishonest purpose by the insurer. *See, e.g., Family Garage, Inc. v. Liberty Mut. Fire Ins. Co.*, 2017 WL 5202841, at *4 (Conn. Super. Ct. Oct. 2, 2017) (no allegation "that the defendant acted with a furtive design . . . from a sinister motive or with malice toward the plaintiff"); *Chestnut Inv., LLC v. Nautilus Ins. Co.*, 2012 WL 310761, at *4 (Conn. Super. Ct. Jan. 6, 2012); *Mauro v. Cashman*, 2010 WL 5573758, at *2 (Conn. Super. Ct. Dec. 14, 2010).

1I-8 INSURANCE—BREACH OF CONTRACT

As with any contract claim, a plaintiff seeking to prevail on a claim for breach of an insurance contract must prove:

1) The formation of an agreement;
2) performance by one party;
3) breach of the agreement (failure to perform) by the other party; and
4) damages.

Chiulli v. Zola, 97 Conn. App. 699, 706-07 (2006).

Statute of Limitations
Six years. Conn. Gen. Stat. § 52-576(a).

Notes
In the liability context, claims of breach of contract against insurers generally fall under two categories: breach of the duty to defend and breach of the duty to indemnify. Under property and uninsured/underinsured motorist policies, the claim generally is simply for failure to pay a covered claim.

Note also that breach of contract claims are not limited to claims against insurers. Insureds also will be liable for claims of failure to pay premiums, breach of notice/cooperation clauses, breach of conditions, etc. Breaches by the insured that may result in the forfeiture of coverage will be subject to an analysis of the prejudice to the insurer, in order to avoid "disproportionate forfeiture." *See Aetna Cas. & Sur. Co. v. Murphy*, 206 Conn. 409, 419 (1988), *overruled in part by Arrowood Indem. Co. v. King*, 304 Conn. 179, 201 (2012) (holding that insurer must prove it was prejudiced by insured's breach).

In addition, insurance breach of contract claims may be brought by third-party beneficiaries. *Hilario's Truck Ctr., LLC v. Rinaldi*, 183 Conn. App. 597, 604 (2018). A third-party beneficiary is someone to whom the contracting parties intended to confer enforceable rights under the terms of the contract. *Id*. at 605. Simply being a *foreseeable* beneficiary of a contract is not sufficient to confer standing. *Id*. at 604.

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1I-9 INSURANCE—BREACH OF DUTY TO DEFEND

To prevail on a claim that an insurer breached its duty to defend, a plaintiff must establish the following elements:

1) The existence of an insurance policy;
2) an underlying civil action against the plaintiff that alleges facts which bring the injury possibly within the coverage of that policy; and
3) a denial of coverage and refusal to defend the underlying civil action by the insurer.

Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co., 274 Conn. 457, 463-64 (2005).

Statute of Limitations
The statute of limitations for a breach of the duty to defend is six years. Conn. Gen. Stat. § 52-576(a).

Notes
The duty to defend is extremely broad and is measured not by the insured's ultimate liability, but by the allegations of the underlying complaint. *Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co.*, 274 Conn. 457, 463 (2005). Thus, "[i]f an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured." *Moore v. Continental Cas. Co.*, 252 Conn. 405, 409 (2000). However, an insurer has a duty to defend "only if the underlying complaint reasonably alleges an injury that is covered by the policy." *Misiti, LLC v. Travelers Prop. Cas. Co. of Am.*, 308 Conn. 146, 156 (2013) (emphasis in original). Thus, a court will not predicate the duty to defend on "a reading of the complaint that is . . . conceivable but tortured and unreasonable." *Id.* at 156. In addition, a court may consider facts extrinsic to the underlying complaint only if they support the duty to defend. *Id.* at 161 (it may not consider them if they support a denial of coverage).

1I-10 INTENTIONAL ASSAULT

To prevail on a claim of intentional assault, a plaintiff must establish the following elements:

1) The defendant;
2) intentionally;
3) caused the plaintiff;
4) imminent apprehension of harmful or offensive contact; and

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5) that apprehension is one which would be normally aroused in the mind of a reasonable person under similar circumstances.

Dewitt v. John Hancock Mut. Life Ins. Co., 5 Conn. App. 590, 594 (1985) (citing Restatement (Second) of Torts, § 21).

Statute of Limitations
The statute of limitations for a claim of intentional assault is three years. Conn. Gen. Stat. § 52-577.

Notes
The feared contact in question must be bodily contact; "[a]n assault cannot be accomplished by words alone. There must be an overt act evidencing some corporal threat." *Kindschi v. City of Meriden*, 2006 WL 3755299 (Conn. Super. Ct. Nov. 28, 2006). As in the criminal context, justification is a viable defense to a civil assault claim. *See Burke v. Mesniaeff*, 177 Conn. App. 824, 844-46 (2017), *cert. granted*, 328 Conn. 901 (2018) (upholding finding that defendant was protecting house guests when he "took the plaintiff by the arm to escort her from the house"). Note that the Supreme Court granted certification in *Burke* on the sufficiency of the evidence to prove justification, not its viability as a defense in a civil assault action. In the civil context, the burden to prove justification is on the defendant. *See id.*; *Housing Auth. of City of Stamford v. Morrow*, 1995 WL 348025, at *10 (Conn. Super. Ct. May 16, 1995).

1I-11 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To prevail on a claim of intentional infliction of emotional distress, a plaintiff must prove four elements:

1) That the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct;
2) that the conduct was extreme and outrageous;
3) that the defendant's conduct was the cause of the plaintiff's distress; and
4) that the emotional distress sustained by the plaintiff was severe.

Marsala v. Yale-New Haven Hosp., Inc., 166 Conn. App. 432, 451 (2016) (citing *Perez–Dickson v. City of Bridgeport*, 304 Conn. 483, 526-27 (2012)).

Statute of Limitations
The statute of limitations for a claim of intentional infliction of emotional distress is three years from the date of the act complained of. Conn. Gen. Stat. § 52-577; *see DeCorso v. Watchtower Bible & Tract Society of New York, Inc.*, 78 Conn. App. 865, 873, *cert. denied*, 266 Conn. 931 (2003). The continuing course

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of conduct doctrine may be applied to toll the limitations period for a claim of intentional infliction of emotional distress. *Watts v. Chittenden*, 301 Conn. 575, 587 (2011).

Notes

Liability for intentional infliction of emotional distress requires conduct that exceeds "all bounds usually tolerated by decent society . . . ." *Petyan v. Ellis*, 200 Conn. 243, 254 n.5 (1986). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous." *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 443 (2003). Thus, behavior "that merely is insulting or displays bad manners or results in hurt feelings" does not give rise to a viable claim. *Perez-Dickson v. City of Bridgeport*, 304 Conn. 483, 527 (2012). Of course, one man's joke may be another man's insult; as long as "reasonable minds" could disagree on whether a defendant's conduct is the former or the latter, it is a question of fact for a jury to decide. *See id.* Given this formulation, the Supreme Court has suggested that inherently stressful professions make poor breeding grounds for emotional distress claims. *See Sepega v. Delaura*, 326 Conn. 788, 800 n.6 (2017) ("[i]t is therefore doubtful that, under Connecticut law, a policeman or firefighter would be able to present a claim for negligent or intentional infliction of emotional distress"). Nor can mere cooperation with a criminal investigation give rise to a claim of intentional infliction of emotional distress. *Parnoff v. Aquarion Water Co. of Conn.*, 188 Conn. App. 153, 179 (2019). Without more, the failure to remedy a difficult environment, at least where some effort is made to do so, is rarely, if ever, the kind of behavior that can give rise to this type of claim. *Strano v. Azzinaro*, 188 Conn. App. 183, 192 (2019).

A plaintiff may allege intentional and negligent infliction of emotional distress based on the same conduct, but the two causes of action are "mutually exclusive, such that establishing the elements of one precludes liability on the other . . . intentional conduct and negligent conduct, although differing only by a matter of degree . . . are separate and mutually exclusive." *Meribear Prods., Inc. v. Frank*, 328 Conn. 709, 721 (2018) (brackets omitted).

A claim for intentional infliction of emotional distress generally may not be premised on conduct that constitutes protected speech under the first amendment. *Gleason v. Smolinski*, 319 Conn. 394, 406 (2015). In order for the protection to apply, the speech in question must be of public concern and not of a purely private nature. Speech will not be protected, however, even if it

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relates to a matter of public concern, if it is uttered merely to harass, with no intent to persuade, inform or communicate. *Id.* at 421 (citing *State v. Carpenter*, 171 P.3d 41, 59 (Alaska 2007)). Thus, a plaintiff making an intentional infliction claim based on conduct that potentially constitutes protected free speech should, in addition to the elements above, allege that the speech was purely private in nature or, if of a public nature, was uttered with no intent to persuade, inform or communicate. An intentional infliction claim similarly cannot be based upon the conduct of an attorney during the course of litigation, as that conduct is protected by the absolute immunity of the litigation privilege. *Simms v. Seaman*, 308 Conn. 523, 570 (2013). Nor can an arrest, if made on probable cause, give rise to a claim of intentional infliction of emotional distress. *Lamar v. Brevetti*, 173 Conn. App. 284, 290 (2017) (citing *Brooks v. Sweeney*, 299 Conn. 196, 209 (2010)).

The "existence of an original duty is not necessary to apply the continuing course of conduct doctrine to a claim for intentional infliction of emotional distress." *Watts*, 301 Conn. at 586. However, at least one additional act must occur during the three-year limitations period for a plaintiff to recover—under the continuing course of conduct doctrine—for the defendant's prior conduct. *See id*. at 596-97. In other words, if a defendant inflicts no further emotional distress on a plaintiff during the three years that follow his prior tortious conduct, then the slate is wiped clean, but only with respect to the prior conduct.

Where family members make a claim for intentional infliction of emotional distress against a hospital that terminated a patient's life, but do not allege that any of the hospital's conduct was directed toward them, they properly allege a claim for bystander emotional distress, not a direct claim for intentional infliction of emotional distress. *Marsala v. Yale-New Haven Hosp., Inc.*, 166 Conn. App. 432, 453 (2016). *See BYSTANDER EMOTIONAL DISTRESS, supra*.

1I-12 INTENTIONAL INTERFERENCE WITH A BUSINESS RELATIONSHIP

In order to prevail on a claim for intentional interference with a business relationship, a plaintiff must prove the following elements:

1) A business relationship between the plaintiff and another party;
2) that the defendant intentionally interfered with that relationship while knowing of the relationship's existence; and
3) actual loss as a result of the defendant's interference.

Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 27 (2000); *Landmark Inv. Grp., LLC v. CALCO Const. & Dev. Co.*, 318 Conn. 847, 873 (2015).

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Statute of Limitations

The statute of limitations for a claim of intentional interference with a business relationship is three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

Notes

A business relationship involves prospective profits. *Villages, LLC v. Longhi*, 187 Conn. App. 132, 148 (2019). In order to satisfy the first element, the plaintiff must show that the defendant interfered with a contractual relationship or a relationship involving the reasonable probability that it would have entered into a contract or made a profit. *Id.*

Courts sometimes refer to this cause of action as "tortious interference with business expectancies." *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 27 (2000). The elements are the same, however, regardless of the label. If a plaintiff claims lost profits as a result of the defendant's alleged interference, the plaintiff must prove the amount of damages with reasonable certainty. The amount of profit the tortfeasor made from the endeavor, for example, will not necessarily establish the amount of lost profits by the plaintiff. *American Diamond Exch., Inc. v. Alpert*, 302 Conn. 494 (2011). An "actual loss" is synonymous with an "ascertainable loss" under CUTPA, which has "a broader meaning than the term damage, and has been held synonymous with deprivation, detriment and injury . . . . A loss is ascertainable if it is measurable, even though the precise amount of the loss is not known." *Wellswood Columbia, LLC v. Town of Hebron*, 327 Conn. 53, 83-84 (2017) (ellipsis in original) (applying CUTPA definition of "loss" to claim for interference with business expectancies).

1I-13 INTENTIONAL INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP

The elements of intentional interference with a contract are:

1) The existence of a contractual or beneficial relationship;
2) the defendants' knowledge of that relationship;
3) the defendants' intentional interference with the relationship;
4) the interference was tortious; and
5) a loss suffered by the plaintiff that was caused by the defendants' tortious conduct.

Appleton v. Bd. of Educ. of the Town of Stonington, 254 Conn. 205, 212-13 (2000). *See Blakeman v. Knollbrook Condo. Ass'n, Inc.*, 2018 WL 5884525 (Conn. Super. Ct. Oct. 19, 2018).

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Statute of Limitations

Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577. The limitations period may be tolled under the continuing course of conduct doctrine. *PMG Land Assocs., L.P. v. Harbour Landing Condo. Ass'n, Inc.*, 172 Conn. App. 688, 695 (2017) (though the court in that case found that tolling had not been proved).

Notes

An action for tortious "interference with contractual relations only lies when a third party adversely affects the contractual relations of two *other* parties . . . . There can be no intentional interference with contractual relations by someone who is directly or indirectly a party to the contract." *Metcoff v. Lebovics*, 123 Conn. App. 512, 520 (2010) (emphasis in original; citation omitted). This includes an agent who interferes with the performance of a contract to which its principal is a party "because to hold him liable would be, in effect, to hold the [principal] liable for breaching its own contract." *Id.* at 520-21 (quoting *Wellington Sys., Inc. v. Redding Grp., Inc.*, 49 Conn. App. 152, 168, *cert. denied*, 247 Conn. 905 (1998)).

A plaintiff must prove that the defendant's conduct was in fact tortious. *Varley v. First Student, Inc.*, 158 Conn. App. 482, 506 (2015) (citing *Daley v. Aetna Life & Cas. Co.*, 249 Conn. 766, 805-06 (1999)). "This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously." *1000 Silas Deane Highway v. Elite Beverage, Inc.*, 2001 WL 175645 (Conn. Super. Ct. Feb. 8, 2001). The Supreme Court has acknowledged that the cases have not focused with particularity on what acts of interference are tortuous. Importantly, not every act that disturbs a contract or business expectancy is actionable. A plaintiff can prove that the defendant's conduct was in fact tortuous by showing "that the defendant was guilty of fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously." *Blake*, 191 Conn. at 260-61. However, a defendant is absolutely immune from liability for tortious interference for statements made in the course of a judicial or quasi-judicial proceeding. *See Rioux v. Barry*, 283 Conn. 338, 351 (2007). Finally, "[u]nlike other torts in which liability gives rise to nominal damages even in the absence of proof of actual loss . . . it is an essential element of the tort of unlawful interference with business relations that the plaintiff suffers actual loss . . . resulting from the improper interference with her contract." *Appleton*, 254 Conn. at 213 (first ellipses in original; citation omitted).

Courts have described causes of action for *negligent* interference with contractual relations and *intentional* interference with business relations. Often, the terms "contractual relations" and "business relations" are seemingly used interchangeably. Note, however, that at least one trial court has suggested that

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an independent action for intentional interference with contractual relations does not exist under Connecticut law. In either instance, an "improper motive or improper means" on the part of the defendant is a required element of the cause of action. *See Metcoff v. Lebovics*, 123 Conn. App. 512, 520 (2010).

Given the Supreme Court's application of the ministerial exception to subject matter jurisdiction for certain employment-related claims against the Archdiocese of Hartford in *Dayner v. Archdiocese of Hartford*, 301 Conn. 759 (2011), it is likely that an employment-based claim for intentional interference with contract against a church or other religious organization would be barred. *But see Trinity Christian Sch. v. CHRO*, 2016 WL 5339514 (Conn. Super. Ct. Aug. 22, 2016) (suggesting *Dayner* may be undermined by the subsequent decision of the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012)).

1I-14 INTENTIONAL SPOLIATION OF EVIDENCE

The elements of a cause of action for intentional spoliation of evidence are:

1) Knowledge of a pending or impending civil action involving the plaintiff;
2) destruction of evidence relevant to that action that is;
3) in bad faith, that is, done with the intent to deprive the plaintiff of his cause of action;
4) an inability to establish the elements of that cause of action in the absence of the spoliated evidence; and
5) damages.

Rizzuto v. Davidson Ladders, Inc., 280 Conn. 225, 244-45 (2006).

Statute of Limitations

Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

Notes

Rizzuto was the first Connecticut decision to recognize a separate cause of action for intentional spoliation of evidence. It borrows liberally from the numerous out-of-state decisions that previously had recognized such a cause of action, *Rizzuto*, 280 Conn. at 234-51, but does not adopt any one state's law wholesale. (Prior to *Rizzuto*, Connecticut recognized that the trier of fact in a civil action could draw an inference from the intentional spoliation of evidence that the destroyed evidence would be unfavorable to the party that destroyed it. *Beers v. Bayliner Marine Corp.*, 236 Conn. 769, 775 (1996)).

Under the *Rizzuto* formulation, once a plaintiff satisfies his burden to prove that the defendant's "intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a *prima facie* case in the underlying litigation . . . there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation . . . ." *Rizzuto*, 280 Conn. at 246-47. However, the defendant "may rebut this presumption by producing evidence showing that the plaintiff would not have prevailed in the underlying action even if the lost or destroyed evidence had been available." *Id.* at 248. The measure of damages in a spoliation action is "the full amount of compensatory damages that he or she would have received if the underlying action had been pursued successfully." *Id.*

1I-15 INTERFERENCE WITH AN EASEMENT

To prevail on a claim for interference with an easement, the plaintiff must prove that:

1) The owner of the servient estate;
2) has engaged in conduct that results in an unreasonable impairment to the easement rights of the dominant estate.

See Kelly v. Ivler, 187 Conn. 31, 45 (1982).

Statute of Limitations
Three years from the date of the act complained of. *See* Conn. Gen. Stat. § 52-577.

Notes
The right to "prevent obstruction or interference" with the use of an easement is an equitable one. *Crescent Beach Ass'n v. Town of East Lyme*, 170 Conn. 66, 70 (1976). As a result, in many cases, a claim of interference with an easement will entitle the plaintiff to injunctive relief. *See, e.g., Wambeck v. Lovetri*, 141 Conn. 558, 564 (1954). Normally, the existence of vegetation on an easement, both cultivated and natural, will not constitute interference with the easement. *Smith v. Muellner*, 283 Conn. 510, 525 (2007) (citations omitted). Likewise, Connecticut law does not recognize a cause of action "based upon any alleged interference with a plaintiff's easement of light, air, or scenic vistas." *Schiavone v. Urban*, 2012 WL 1624031, at *5 (Conn. Super. Ct. Apr. 12, 2012).

1I-16 INTERFERENCE WITH EXPECTED INHERITANCE

To prevail on a claim for interference with an expected inheritance, a plaintiff must plead and prove:

1) the existence of an expected inheritance;

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2) the defendant's knowledge of the expectancy;
3) intentional, tortious conduct by the defendant that prevents another from receiving an inheritance she otherwise would have received; and
4) actual damages to the plaintiff resulting from the defendant's tortious conduct.

Hart v. Hart, 2015 WL 3555366, at *12 (Conn. Super. Ct. May 11, 2015); Restatement (Second), Torts § 774B.

Statute of Limitations
Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

Notes
Neither the Appellate Court nor the Supreme Court has expressly considered the existence of this cause of action. The trial courts are split on whether the action is valid, but the better reasoned and more thorough discussion supports its existence within the body of Connecticut law. *See* Judge Calmar's thorough and well-reasoned opinion in *Hart v. Hart*, 2015 WL 3555366 (Conn. Super. Ct. May 11, 2015) for a comprehensive discussion of the elements of the cause of action and the arguments for and against it. *See also* Restatement (Second), Torts § 774B, for a discussion of the cause of action as applied in other jurisdictions.

1I-17 INVASION OF PRIVACY

The Connecticut Supreme Court has recognized that "the law of privacy has not developed as a single tort, but as a complex of four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff to be let alone." *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 127-28 (1982) (citation omitted). *See Parnoff v. Aquarion Water Co. of Conn.*, 188 Conn. App. 153, 172-73 (2019).

The four categories of invasion of privacy are set forth in 3 Restatement (Second), Torts § 652A [1977] as follows:

a) Unreasonable intrusion upon the seclusion of another.
b) Appropriation of another's name or likeness.
c) Unreasonable publicity given to another's private life.
d) Publicity that unreasonably places another in a false light before the public.

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Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 128 (1982); *see Foncello v. Amorossi*, 284 Conn. 225, 234 (2007).

The Connecticut courts that have addressed these various types of claims for invasion of privacy generally have applied the Restatement (Second) criteria in determining the elements of those claims. The Restatement elements for each claim are as follows:

1) Unreasonable intrusion upon the seclusion of another

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

3 Restatement (Second), Torts § 652B. *Parnoff v. Aquarion Water Co. of Conn.*, 188 Conn. App. 153, 172-73 (2019). *See Bonanno v. Dan Perkins Chevrolet*, 26 Conn. L. Rptr. 368 (Feb. 4, 2000) (Nadeau, J.); *Kindschi v. City of Meriden*, 2006 WL 3755299 (Conn. Super. Ct. Nov. 28, 2006).

2) Appropriation of another's name or likeness

"One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."

3 Restatement (Second), Torts § 652C. *See Venturi v. Savitt, Inc.,* 191 Conn. 588, 592 (1983).

3) Unreasonable publicity given to another's private life

"One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."

3 Restatement (Second), Torts § 652D.

4) Publicity that unreasonably places another in a false light before the public.

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

(a) The false light in which the other was placed would be highly offensive to a reasonable person; and

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(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

3 Restatement (Second), Torts § 652E. *See Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 131 (1982).

Statute of Limitations

Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577. *See Daoust v. McWilliams*, 49 Conn. App. 715, 720 (1998).

Notes

"Privacy actions involve injuries to emotions and mental suffering, while defamation actions involve injury to reputation." *Davidson v. City of Bridgeport*, 180 Conn. App. 18, 29 (2018). The Connecticut Supreme Court approved the Restatement's definition of the cause of action for giving unreasonable publicity to another's private life in *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 170-72 (1993). The disclosure of private information must be "highly offensive to a reasonable person" and "not of legitimate concern to the public." *Pane v. City of Danbury*, 267 Conn. 669, 676-77, (2004), *rev'd on other grounds*, 294 Conn. 324 (2009). However, "there is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus, there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record." *Doe v. Town of Madison*, 2011 WL 3278530, at *4 (Conn. Super. Ct. July 6, 2011).

"The essence of a false light privacy claim is that the matter published concerning the plaintiff (1) is not true; . . . and (2) is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position." *Jonap v. Silver*, 1 Conn. App. 550, 557-58 (1984) (citations omitted; internal quotation marks omitted).

The Supreme Court has held that the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d, *et seq.*, does not preempt a state law cause of action against a medical provider for negligently disclosing a patient's medical information. *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 435 (2014). For a discussion of the immunity from invasion of privacy claims provided to website operators by the federal Communications Decency Act of 1996 (CDA), 47 U.S.C. §§ 230, *et seq.*, *see Vazquez v. Buhl*, 150 Conn. App. 117, 120 (2014).

1I-18 INVERSE CONDEMNATION

A cause of action for inverse condemnation requires proof of the following elements:

1) A government regulation or order;
2) that permanently restricts the plaintiff's use of his property for any reasonable purpose; or
3) impermissibly infringes on the owner's reasonable investment-backed expectations for the use and enjoyment of his property.

Rural Water Co., Inc. v. Zoning Bd. of Appeals of Ridgefield, 287 Conn. 282, 298-99 (2008).

Statute of Limitations

Three years from the date of accrual of the condemnation action. Conn. Gen. Stat. § 52-577; *see LeStrange v. Town of Oxford*, 1997 WL 707106, at *2 (Conn. Super. Ct. Nov. 4, 1997). An inverse condemnation claim accrues "when the regulatory action that is alleged to have effectuated a taking becomes final[,]" *Wellswood Columbia, LLC v. Town of Hebron*, 327 Conn. 53, 69 (2017), even if the property owner does not know the extent of his damages, or whether the taking is temporary or permanent. *Id.* (citing *Chapman Lumber, Inc. v. Tager*, 288 Conn. 69 (2008)).

Notes

"[A]n inverse condemnation action has been aptly described as an eminent domain proceeding initiated by the property owner rather than the condemnor." *Barton v. City of Norwalk*, 326 Conn. 139, 147 (2017). As a general matter, a claim for inverse condemnation arises "when the purpose of government regulation and its economic effect on the property owner render the regulation substantially equivalent to an eminent domain proceeding." *Rural Water*, 287 Conn. at 298. "Thus, an inverse condemnation occurs when either: (1) application of the regulation amounted to a practical confiscation because the property cannot be used for any reasonable purpose; or (2) under a balancing test, the regulation's application impermissibly has infringed upon the owner's reasonable investment-backed expectations of use and enjoyment of the property so as to constitute a taking." *Id.* at 299. In short, because "[t]he word taken in article first, § 11 of our state constitution means the exclusion of the owner from his private use and possession . . . inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property." *Barton*, 326 Conn. at 147. Under the latter prong, "the determination of whether a taking has occurred must be made on the facts of each case with consideration being given not only to the degree of diminution in the value of the land but also to

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the nature and degree of public harm to be prevented and to the alternatives available to the landowner." *Chevron Oil Co. v. Zoning Bd. of Appeals*¸ 170 Conn. 146 (1976). Reasonable expectations must, of course, be reasonable to be compensable. *See Santos v. Zoning Bd. of Appeals of Stratford*, 174 Conn. App. 531, 535, *cert. denied*, 327 Conn. 926 (2017) (parties' agreement that regulatory obstacle to building house was "readily correctible" made plaintiff's claim "that a reasonable investment-backed expectation had been thwarted . . . obviously untenable").

Note that the "condemnation" of a dilapidated building by city officials will not necessarily constitute an "inverse condemnation" (i.e., a taking). Courts have recognized that the police power must be distinguished from the power of eminent domain; the former being exercised in the interests of public safety and requiring no compensation, and the latter requiring both a public use and compensation. Thus, in *Edgewood St. Garden Apartments, LLC v. City of Hartford,* 163 Conn. App. 219, 237, *cert. denied,* 321 Conn. 903 (2016), the Appellate Court affirmed a trial court's decision that the city's order requiring that the plaintiff's building be demolished for safety reasons did not amount to an inverse condemnation, since the evidence did not establish the requisite destruction of the property's value.

An administrative appeal is not a prerequisite for bringing an inverse condemnation action because the former "serves the remedial purpose of reviewing the propriety" of a zoning decision, while the latter is concerned only with whether a compensable regulatory taking has occurred. *Miller v. Town of Westport*, 268 Conn. 207, 216 (2004). However, a property owner must establish the finality of the administrative determination alleged to constitute an inverse condemnation prior to bringing suit. *Hayes Family Ltd. Partnership v. Town of Glastonbury*, 166 Conn. App. 585, 590 (2016); *A&F Constr. Co., Inc. v. Zoning Bd. of Appeals of West Haven*, 60 Conn. App. 273, 279 (2000). In addition, if a property owner knows enough to sue for injunctive relief, he likely knows enough to sue for damages, too; the limitations clock on the latter typically tics in time with the former. *Wellswood*, 327 Conn. at 69-71.

Whether private property has been taken by inverse condemnation is a question of law subject to plenary review on appeal. *City of Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 83 (2007) (citing *Textron, Inc. v. Wood*, 167 Conn. 334, 345 (1974)).

1L-1 LANDLORD/TENANT—PREMISES LIABILITY

A landlord has "a duty to maintain the common areas of an apartment building in a reasonably safe condition for the benefit of the tenants who

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reside in the building." *Ruiz v. Victory Properties, LLC*, 315 Conn. 320, 329 (2015). This duty encompasses any parts of the property over which a landlord retains control. *See id.*; *LaFlamme v. Dallessio*, 261 Conn. 247, 256 (2002). A tenant may hold a landlord liable for failing "to take reasonable measures to ensure that the space over which it exercises dominion is safe from dangers . . . ." *Ruiz*, 315 Conn. at 330 (quoting *Giacalone v. Housing Authority*, 306 Conn. 399, 408 (2012)).

Statute of Limitations

Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

A plaintiff sufficiently pleads a cause of action against a landlord for premises liability if he alleges a landlord/tenant relationship and the failure to keep the premises under the landlord's control in a safe condition. *See Giacalone*, 306 Conn. at 408-09 (affirming Appellate Court's reversal of striking of plaintiff's complaint). This is so even if a plaintiff is imprecise about the exact location where she was injured; *see id*. ("at or near" defendant's property); or does not specifically allege that the landlord had exclusive possession or control of that precise portion of the property. *See Stein v. Tong*, 117 Conn. App. 19, 27-28 (2009). However, a landlord generally is not liable for harm that occurs on abutting property, e.g., a public sidewalk near his building. *See Stokes v. Lyddy*, 75 Conn. App. 252, 260 (2003) (no liability for tenant's dog that bit passerby on sidewalk near apartment building because landlord's "duty does not, however, extend to uncontrolled land such as neighboring property or public lands").

1L-2 LANDOWNER LIABILITY FOR INJURIES ON PROPERTY

To prevail in a cause of action against a landowner for injuries sustained on that landowner's property, a plaintiff must prove:

IF THE PLAINTIFF IS A TRESSPASSER:

1) The landowner was aware of the trespasser's presence, or aware that the presence of trespassers was to be expected;

   and

2) the landowner failed to take reasonable care or implement reasonable precautions to avoid injury to the trespasser.

See McPheters v. Loomis, 125 Conn. 526, 531 (1939); *Maffucci v. Royal Park Ltd. P'ship,* 243 Conn. 552, 559 (1998).

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IF THE PLAINTIFF IS AN INVITEE:

1) The landowner failed to reasonably inspect and maintain the premises to make them reasonably safe; or
2) the landowner failed to warn of dangers that the plaintiff could not reasonably be expected to discover; and
3) that the landowner had actual or constructive notice of the specific danger that was the proximate cause of the plaintiff's injuries.

See Gargano v. Azpiri, 110 Conn. App. 502, 508 (2008).

IF THE PLAINTIFF IS A LICENSEE:

1) The landowner engaged in some active operation on his land;
2) in a negligent manner; and
3) that negligent operation was the proximate cause of the plaintiff's injuries.

See Morin v. Bell Court Condo. Ass'n, 223 Conn. 323, 327-28 (1992).

Statute of Limitations
The statute of limitations for an action against a landowner for injuries sustained on that landowner's property is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes
For a thorough discussion of the differences between a medical malpractice claim and a claim against a doctor sounding in ordinary negligence, *see Doe v. Cochran*, 332 Conn. 325 (2019). The Court held, for the first time, that a doctor may be liable in ordinary negligence to a foreseeable third party who alleges harm due to the doctor's failure to provide accurate test results.

Generally, "there is an ascending degree of duty owed by the possessor of land to persons on the land based on their entrant status, i.e., trespasser, licensee or invitee." *Morin v. Bell Court Condo. Ass'n*, 223 Conn. 323, 327 (1992). The principal distinction between invitees and licensees "turns largely on whether the visitor has received an invitation, as opposed to permission, from the possessor of the land, to enter the land or remain on the land." *Gargano*, 110 Conn. App. at 506. Sometimes, though, an invitation is in the eye of the beholder: Under the "misled invitee" doctrine, "if an area appears to a reasonable traveler to be a safe public highway, the person who created that misleading impression should assume the risk of injury rather than the innocent traveler." *Lin v. Nat'l R.R. Passenger Corp.*, 277 Conn. 1, 9 (2006).

However, the traveler must have been "lured or misled by the appearance that he was traveling on a highway, and was not on private property." *Stovall v. Holzner*, 2013 WL 2132118, at *2 (Conn. Super. Ct. Apr. 26, 2013).

For licensees, a landowner generally has no duty "to keep the property in a reasonably safe condition, because the licensee must take the premises as he finds them." *Morin v. Bell Court Condo. Ass'n*, 223 Conn. 323, 327 (1992). A licensee's only complaint is if some negligent activity on the property harms him. *Id.* For invitees, however, a landowner has the obligation to keep the land/premises itself reasonably safe from dangerous defects and is charged with constructive notice of defects. *See Kurti v. Becker*, 54 Conn. App. 335, 338, *cert. denied*, 251 Conn. 909 (1999). In addition, there are two classes of invitees—public and business. "Invitees fall into certain general categories. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public . . . . A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.* In general, a landowner owes no duty of care whatsoever to a trespasser. *See Lin*, 277 Conn. at 19; *McPheters v. Loomis*, 125 Conn. 526, 531 (1939). However, once a landowner becomes aware of the presence of a trespasser on his land, the landowner must exercise ordinary, reasonable care to avoid injuring the trespasser. *See id.* Further, if a landowner "knows that the presence of trespassers is to be expected, then the common obligation of exercising reasonable care gives rise to the correlative duty of taking such precautions against injuring trespassers as a reasonable foresight of harm ought to suggest." *Maffucci v. Royal Park Ltd. P'ship*, 243 Conn. 552, 559 (1998).

In *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768 (2007), the Supreme Court adopted the "mode of operation" rule for certain self-service commercial establishments. Under that rule, a plaintiff invitee does not have to prove notice of the defect at issue if a store's "self service mode of operation business gave rise to a foreseeable risk of injury to customers and that the plaintiff's injury was proximately caused by an accident within the zone of risk." *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 810 (2007). However, in 2010, the Supreme Court limited the mode of operation rule to "those accidents that result from particular hazards that occur regularly, or are inherently foreseeable, due to some specific method of operation employed on the premises[,]" and excluded from the rule "accidents caused by transitory hazards in self-service retail establishments . . . ." *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 423 (2010). Fisher, which involved a slip-and-fall on a puddle of fruit cocktail syrup at a supermarket, fell into the "transitory hazards" category because the plaintiff established only that the defendant was a general self-service establishment,

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not that some specific aspect of its operating procedure caused the spill. *Id.* at 440-41. The mode of operation rule does not apply only to self-service establishments because "[t]he dispositive issue is not the presence of self-service, but whether the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable." *Konesky v. Post Rd. Entm't*, 144 Conn. App. 128, 140, *cert. denied*, 310 Conn. 915 (2013) (applying rule to nightclub, but reversing jury verdict for plaintiff based solely on service of beer to patrons from ice-filled tub propped on audio speaker).

Although liability for dog bite claims traditionally has been limited to the owner or keeper of the dog, under common law theories of premises liability based on the foreseeability of harm, a landlord may be liable for injuries caused to a tenant by a dangerous dog kept by another tenant—even where the landlord has no involvement in the everyday care and keeping of the dog. *Giacalone v. Hous. Auth.*, 306 Conn. 399, 403 (2012) (citing *Auster v. Norwalk United Methodist Church*, 286 Conn. 152, 165 (2008)).

1L-3 LEGAL MALPRACTICE (TORT)

To prevail on a claim of legal malpractice sounding in tort, a plaintiff must establish the following elements:

1) The existence of an attorney-client relationship;
2) the requisite standard of professional care (via expert testimony);
3) the attorney's wrongful act or omission;
4) causation;
5) damages flowing from the wrongful act or omission.

Dixon v. Bromson & Reiner, 95 Conn. App. 294, 297 (2006).

Statute of Limitations

The statute of limitations for a legal malpractice claim sounding in tort is three years from the date of the alleged malpractice. Conn. Gen. Stat. § 52-577; *see Pelletier v. Galske*, 105 Conn. App. 77, 83 (2007). However, the limitations period may be tolled under the "continuous representation" doctrine, if the plaintiff can establish: "(1) that the defendant continued to represent him with regard to the same underlying matter; and (2) either that the plaintiff did not know of the alleged malpractice or that the attorney could still mitigate the harm allegedly caused by that malpractice during the continued representation period." *DeLeo v. Nusbaum,* 263 Conn. 588, 597 (2003). However, the filing of an *in lieu* of appearance by successor counsel "preclud[es] the tolling of the statute of limitations through

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the doctrine of continuous representation after that date." *Manzo-Ill v. Schoonmaker*, 188 Conn. App. 343, 362, *cert. denied*, 331 Conn. 925 (2019).

Notes

Generally, to prevail on a legal malpractice claim, "a plaintiff must present expert testimony to establish the standard of proper professional skill or care . . . . Not only must the plaintiffs establish the standard of care, but they must also establish that the defendant's conduct legally caused the injury of which they complaint." *Moore v. Crone*, 114 Conn. App. 443, 446-47 (2009) (citing *DiStefano v. Milardo*, 82 Conn. App. 838, 842 (2004), *aff'd*, 276 Conn. 416 (2005)). There is a narrow exception for cases in which "there is present such an obvious and gross want of care and skill that the neglect to meet the standard of care is clear even to a lay person." *Moore v. Crone*, 114 Conn. App. 443, 447 (2009) (internal quotation and citation omitted) (the so-called "gross negligence" exception). It is possible (though perhaps not advisable) to prove the standard of care and a breach thereof through the testimony of the defendant attorney. *See O'Connell, Flaherty & Attmore, LLC v. Richter*, 130 Conn. App. 816, 822-23 (2011) (testimony of attorney accused of malpractice constituted expert opinion on standard of care, but testimony failed to establish breach of standard of care). In addition, a jury must hear expert testimony "of the standard of care itself[,]" not merely that the defendant attorney breached that standard. *Jing Hong Song v. Collins*, 152 Conn. App. 373, 379 (2014) (affirming judgment for defendant because no "expert witness expressly testified as to what an average prudent attorney would have done under the circumstances").

Except for those rare instances of gross negligence, "expert testimony also is a general requirement for establishing the element of causation in legal malpractice cases." *Bozelko v. Papastavros*, 323 Conn. 275, 285 (2016). The usual method of proving causation is the so-called "case-within-a-case[,]" i.e., "evidence of what would have happened in the underlying action had the defendant not been negligent." *Baruno v. Slane*, 151 Conn. App. 386, 396, *cert. denied*, 314 Conn. 920 (2014). *See Kuehl v. Koskoff*, 182 Conn. App. 505 (2018) (judgment for the plaintiff reversed on appeal because the plaintiff failed to present expert testimony to demonstrate that she would have prevailed in the underlying action).

In general, "attorneys are not liable to persons other than their clients for the negligent rendering of services." *Goodyear v. Discala*, 269 Conn. 507, 517 (2004). It would invade the sanctity of the attorney-client relationship and undermine the ethical obligation of zealous advocacy to hold an attorney liable for malpractice to someone other than his client. *See Stone v. Pattis*, 144 Conn. App. 79, 90-91 (2013) (granting motion to strike non-client's complaint).

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Legal malpractice is a tort if a plaintiff alleges that his attorney performed the tasks for which the plaintiff hired him, but did so "in a deficient manner." *Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 294 (2014). If, however, a plaintiff claims that "the defendant attorney violated [his] specific instructions[,]" or the specific tasks set forth in the retainer agreement, then the suit is for breach of contract. *See id.* at 292-93. The distinction is significant with respect to the limitations period. *See id.* at 301 (plaintiff's claims barred by three-year tort statute of limitations).

A disgruntled client who files a grievance against her attorney, and who is dissatisfied with the dismissal of that grievance, does not have a cause of action for a mandamus or injunction requiring the grievance panel to revoke its dismissal. *D'Attilo v. Statewide Grievance Comm.*, 329 Conn. 624 (2018) (holding that the disgruntled client is neither statutorily nor classically aggrieved and thus has no standing to seek a trial court order directed to the grievance panel).

1L-4 LIBEL

See DEFAMATION, *supra*.

1L-5 LOSS OF CONSORTIUM

A claim for loss of spousal consortium is derivative and dependent for its viability on the existence of an underlying claim by the injured spouse. *Cavallaro v. Hosp. of Saint Raphael*, 92 Conn. App. 59, 62 n.5 (2005). Under Connecticut law, "[t]he term consortium is usually defined as encompassing the services of the [spouse], the financial support of the [spouse], and the variety of intangible relations which exist between spouses living together in marriage . . . These intangible elements are generally described in terms of affection, society, companionship and sexual relations . . . These intangibles have also been defined as the constellation of companionship, dependence, reliance, affection, sharing and aid which are legally recognizable, protected rights arising out of the civil contract of marriage." *Berry v. Zanauskas*, 81 Conn. App. 586, 592-93 (2004) (internal quotation marks omitted).

Statute of Limitations

The statute of limitations for a claim of loss of consortium will be the same as the limitation period for the underlying claim. *See* Conn. Gen. Stat. § 52-555c with respect to claims involving wrongful death.

Notes

Since it is derivative in nature, a loss of consortium claim is barred when the injured spouse cannot succeed on the underlying claim. In a similar

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fashion, the settlement of the predicate claim for injury extinguishes a loss of consortium claim. *See Voris v. Molinaro*, 302 Conn. 791, 792-93 (2011). *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 199 (1991). The spouse of an injured plaintiff has the right to bring a claim for loss of consortium under Connecticut's Product Liability Act. *Lynn v. Haybuster Mfg., Inc.*, 226 Conn. 282 (1993).

When a jury awards damages to the directly injured spouse and the spouse claiming loss of consortium, the former is a "natural and meaningful benchmark" for the reasonableness of the latter. *Ashmore v. Hartford Hosp.*, 331 Conn. 777, 798 (2019). Moreover, there is "a presumption that a direct injury to one spouse is no less harmful, everything considered, than the concomitant loss of consortium suffered by the deprived spouse[.]" *Id.* at 797. A plaintiff may rebut this presumption with proof "that the marriage was an unequal one, in which the deprived spouse relied more heavily on the support of or *derived* far more satisfaction than the impaired spouse, or that the impaired spouse somehow had less to lose." *Id.* However, a reviewing court will view such a disparity with a jaundiced eye. *Id.* at 798-99.

Connecticut recognizes a cause of action for loss of parental consortium. *See Campos v. Coleman*, 319 Conn. 36 (2015) (overruling *Mendillo v. Bd. of Educ.*, 246 Conn. 456 (1998)). *Campos* breaks with precedent based on "the unique emotional attachment between parents and children, the importance of ensuring the continuity of the critically important services that parents provide to their children, society's interest in the continued development of children as contributing members of society, and the public policies in favor of compensating innocent parties and deterring wrongdoing . . . ." *Campos*, 319 Conn. at 43. Cognizant, perhaps, that those "compelling reasons" were just as compelling when the Court decided *Mendillo*, *Campos* imposes five "restrictions" on an action for loss of parental consortium: (1) the child must join his claim with the parent's "whenever possible"; (2) the trial court must charge the jury that "only the child raising the claim" may recover damages; (3) like spousal consortium, parental consortium does not survive the settlement or adverse outcome of the parent's claim; (4) only a child who is a minor on the date of the parent's injury may bring a claim; and (5) the child may recover damages only for the loss of pecuniary services from the date of the parent's injury to the date the child turns 18. *Id.* at 58-60.

In addition, a same-sex domestic partner may assert a loss of consortium claim, even if unmarried "when the tortious conduct occurred," if he or she "would have been married if the marriage had not been barred by state law." *Mueller v. Tepler*, 312 Conn. 631, 649 (2014). Given that Connecticut legalized same-sex marriage in 2008, the holding of *Mueller* is likely to affect a small number of cases.

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1M-1 MALICIOUS PROSECUTION

An action for malicious prosecution against a private person requires a plaintiff to prove that:

1) The defendant initiated or procured the institution of criminal proceedings against the plaintiff;
2) the criminal proceedings have terminated in favor of the plaintiff;
3) the defendant acted without probable cause; and
4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice.

McHale v. W.B.S. Corp., 187 Conn. 444, 447 (1982).

Statute of Limitations

If the plaintiff's action for malicious prosecution is based on 42 U.S.C. § 1983, three years from the date the underlying charges are dismissed, or otherwise resolved favorably for the plaintiff. Conn. Gen. Stat. § 52-577; *Lopes v. Farmer*, 286 Conn. 384, 390 (2008). If the action is based solely on the common law, the accrual date likely is the date when the malicious prosecution began, i.e., the date when charges were filed. *See generally Certain Underwriters at Lloyd's, London v. Cooperman*, 289 Conn. 383, 408 (2008). As far as the authors are aware, no Connecticut court has yet to address this dichotomy.

Notes

It is important to remember that the "distinction between malicious prosecution or vexatious suit and abuse of process as tort actions is that in the former the wrongful act is the commencement of an action without legal justification, and in the latter it is in the subsequent proceedings, not in the issue of process but in its abuse." (Internal quotation marks omitted.) *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 256 Conn. 343, 360 n.16 (2001); *see also Lewis Truck & Trailer, Inc. v. Jandreau*, 11 Conn. App. 168, 170-71 (1987).

So long as a private individual makes "a full and truthful disclosure" of incriminating information and brings no "pressure of any kind to bear upon the public officer's decision to commence the prosecution[,]" that private individual is immune from suit. *Bhatia v. Debek*, 287 Conn. 397, 407 (2008). Likewise, the existence of probable cause is "absolute protection" against a suit for malicious prosecution. In spite of the logical impossibility of proving a negative, "the burden is upon the plaintiff to prove affirmatively, by circumstances or otherwise, that the defendant had no reasonable ground for instituting the criminal proceeding." *Id.* at 410-11. Whether the allegedly malicious action is criminal or civil, the *sine qua non* of probable cause "is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence

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and judgment, under the circumstances, in entertaining it." *Byrne v. Burke*, 112 Conn. App. 262, 274, *cert. denied*, 290 Conn. 923 (2009). However, "belief alone, no matter how sincere it may be, is not enough, since it must be based on circumstances which make it reasonable." *Dubinsky v. Black*, 185 Conn. App. 53, 61 (2018).

1M-2 MEDICAL MALPRACTICE (INFORMED CONSENT)

An action for lack of informed consent requires the plaintiff to prove that a physician:

1) Failed to obtain any consent to the particular treatment,
2) performed a different procedure from the one for which consent has been given, or
3) realized that the patient does not understand what the procedure entails, but performed it anyway.

Logan v. Greenwich Hosp. Ass'n, 191 Conn. 282, 288-89 (1983).

Statute of Limitations
Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes
"The informed consent doctrine derives from the principle that [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." *Sherwood v. Danbury Hosp.*, 278 Conn. 163, 180 (2006) (internal quotation marks omitted). In *Logan*, the Supreme Court "adopted a 'lay' standard and stated that under the doctrine of informed consent, a physician is obligated 'to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy.'" *Lambert v. Stovell*, 205 Conn. 1, 5 n.3 (1987) (citation omitted).

Whether a physician has obtained a valid informed consent turns on four factors:

1) The nature of the procedure;
2) the risks and hazards of the procedure;
3) the alternatives to the procedure; and
4) the anticipated benefits of the procedure.

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Janusauskas v. Fichman, 264 Conn. 796, 810 n.12 (2003) (internal quotation marks omitted). The standard of disclosure for informed consent is an objective standard that does not vary from patient to patient based on what the patient asks or what the patient would do with the information if it were disclosed. *Logan*, 191 Conn. at 292-93. Moreover, informed consent "require[s] something less than a full disclosure of all information which may have some bearing, however remote, upon the patient's decision." *Pedersen v. Vahidy*, 209 Conn. 510, 522 (1989). The consent necessary to preclude a claim for assault and battery is different from the consent at issue on a claim of lack of informed consent, where the issue is whether a sufficient disclosure was made. *Godwin v. Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 137 n.3 (2000). In addition, whether a patient was informed of the risks of a procedure is irrelevant in a medical malpractice action where the plaintiff has not alleged lack of informed consent. *Hayes v. Camel*, 283 Conn. 475, 485-88 (2007). Because a lay standard governs informed consent claims, a plaintiff does not have to comply with the statute requiring medical negligence claims to be supported by a good faith certificate and written opinion letter from a similar health care provider. *Shortell v. Cavanagh*, 300 Conn. 383, 386 (2011) (holding informed consent plaintiff exempt from Conn. Gen. Stat. § 52-190a).

1M-3 MEDICAL MALPRACTICE (LOSS OF CHANCE)

In order to recover in a medical malpractice case based upon lost chance, a plaintiff must prove that, more probably than not, the defendant's negligence was the direct and proximate cause of a decrease in the chance of successful treatment of the plaintiff's injury. "In Connecticut, such cases follow a traditional approach in the determination of proximate cause." *Poulin v. Yasner*, 64 Conn. App. 730, 744 (2001).

In order to prevail, the plaintiff must show:

1) That the plaintiff (or the plaintiff's decedent) had in fact been deprived of a chance for successful treatment; and
2) that the decreased chance for successful treatment more likely than not resulted from the defendant's negligence . . .

LaBieniec v. Baker, 11 Conn. App. 199, 207 (1987).

Statute of Limitations

The statute of limitations for a loss of chance claim is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

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Notes

For example, in order to satisfy the elements of a lost chance claim involving a death, the plaintiff must first prove that *prior to* the defendant's alleged negligence, the decedent had a chance of survival of at least 51 percent. Once this threshold has been met, the plaintiff must then demonstrate that the decedent had a decreased chance for successful treatment and that this decreased chance more likely than not resulted from the defendant's negligence. *See Drew v. William W. Backus Hosp.*, 77 Conn. App. 645, 655 (2003). "Accordingly, it is not sufficient for a lost chance plaintiff to prove merely that a defendant's negligent conduct has deprived him or her of some chance; in Connecticut, such plaintiff must prove that the negligent conduct *more likely than not* affected the actual outcome." *Boone v. William W. Backus Hosp.*, 272 Conn. 551, 573-74 (2005) (citations omitted; emphasis in original; internal quotation marks omitted). In *Boone*, the Supreme Court construed the plaintiff's complaint as alleging loss of chance, even though it did not use the words "lost chance" or "lost opportunity," because it was "predicated on the defendant's alleged acts of omission rather than commission." *Boone v. William W. Backus Hosp.*, 272 Conn. 551, 573 n.12 (2005). The authors advise against relying on a similarly generous construction in the future; just plead loss of chance expressly.

Traditional malpractice claims and loss of chance claims are not interchangeable. "[T]he use of the lost chance doctrine for deciding an ordinary medical malpractice action would not be appropriate. *Sargis v. Donahue*, 142 Conn. App. 505, 512 (2013)."All medical malpractice claims, whether involving acts or inactions of a defendant physician, require that a defendant physician's conduct proximately cause the plaintiff's injuries. *Id.* (emphasis added, internal quotation marks omitted) (quoting *Weaver v. McKnight*, 134 Conn. App. 652, 658, *cert. granted on other grounds*, 305 Conn. 907 (2012)). "To prove proximate cause under the lost chance doctrine, a specialized subset of ordinary medical malpractice dealing with a particular kind of omission that both parties agree does not apply in this case, the plaintiff must prove, in essence, that what was done . . . probably would have affected the outcome." *Sargis*, 142 Conn. App. at 512 (quotation omitted). Proximate cause determinations under ordinary medical malpractice actions, however, do not focus on the outcome. Rather, a plaintiff need only prove that "the conduct of the defendant was a substantial factor in causing the plaintiff's injury." *Id.* (quoting *Weaver*, 134 Conn. App. at 658) (internal quotation marks omitted).

1M-4 MEDICAL MALPRACTICE (STANDARD)

To prevail in a standard medical malpractice action, a plaintiff must prove:

1) The requisite standard of care for treatment;

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2) a deviation from that standard of care;
3) a causal connection between the deviation and the claimed injury; and
4) damages.

Boone v. William W. Backus Hosp., 272 Conn. 551, 567 (2005).

Statute of Limitations

The statute of limitations for a medical malpractice action is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

"Generally, the plaintiff must present expert testimony in support of a medical malpractice claim because the requirements for proper medical diagnosis and treatment are not within the common knowledge of laypersons . . . An exception to the general rule requiring expert medical opinion evidence . . . is when the medical condition is obvious or common in everyday life . . . Similarly, expert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief." *Boone*, 272 Conn. at 567. However, Conn. Gen. Stat. § 52-190a requires a medical malpractice plaintiff, or his attorney, to attach a certificate attesting that he "has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." *See* Conn. Gen. Stat § 52-190a. A plaintiff must support that certificate with a "written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." *Id*. The similar health care provider must opine only as to a breach of the standard of care, not all of the elements of malpractice (e.g., causation). *See Dias v. Grady*, 292 Conn. 350, 359 (2009). Furthermore, "the plaintiff's good faith belief regarding causation may be based on consultation with nonsimilar health care providers or on other reasonable grounds." *Id*. at 363. It does not have to be "based solely on the written opinion of the similar health care provider." *Id.*

If the standard of reasonable medical care in a given situation includes a duty to monitor a patient to prevent him from inflicting harm on himself—e.g., a patient receiving psychiatric treatment—then the failure to properly monitor that patient may give rise to a malpractice claim, so long as the failure to properly monitor was a substantial factor in causing the self-inflicted harm. *See Vinchiarello v. Kathuria*, 18 Conn. App. 377, 380-81 (1989).

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An allegation of medical malpractice does not form the basis for a valid unfair trade practices claim. *Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17, 34 (1997). Evidence of informed consent (or a lack of informed consent) is both irrelevant and potentially prejudicial in a medical malpractice action where the plaintiff has not alleged a lack of informed consent. *Hayes v. Camel*, 283 Conn. 475, 485-88 (2007). In addition, it is important to remember that hospital rules, regulations and policies do not in themselves establish a medical standard of care for purposes of a malpractice action. *Petriello v. Kalman*, 215 Conn. 377, 386 (1990).

Under the doctrine of apparent agency, a hospital may be vicariously liable for the actions of a doctor who is not the hospital's employee if a plaintiff proves either of two alternative theories: The first theory requires proof that "(1) the [hospital] held itself out as providing certain services; (2) the plaintiff selected the [hospital] on the basis of its representations; and (3) the plaintiff relied on the [hospital] to select the specific person who performed the services that resulted in the harm complained of by the plaintiff." *Cefaratti v. Aranow*, 321 Conn. 593, 624 (2016). The second theory is a transplant from traditional contract actions: "(1) the [hospital] held the apparent agent or employee out to the public as possessing the authority to engage in the conduct at issue, or knowingly permitted the apparent agent or employee to act as having such authority; (2) the plaintiff knew of these acts by the [hospital], and actually and reasonably believed that the agent or employee or apparent agent or employee possessed the necessary authority . . . and (3) the plaintiff detrimentally relied on the [hospital's] acts, i.e., the plaintiff would not have dealt with the tortfeasor if the plaintiff had known that the tortfeasor was not the [hospital's] agent or employee." *Cefaratti v. Aranow*, 321 Conn. 593, 624-25 (2016).

1N-1 NEGLIGENCE

The essential elements of a cause of action in negligence are well established:

1) Duty;
2) breach of that duty;
3) causation; and
4) actual injury.

RK Constructors, Inc. v. Fusco Corp., 231 Conn. 381, 384 (1994).

Statute of Limitations
Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

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Notes

Violation of a statute or regulation is negligence *per se*, which "establishes a breach of duty when (1) the plaintiff is within the class of persons intended to be protected by the statute, and (2) the injury is the type of harm that the statute was intended to prevent." *Vermont Mut. Ins. Co. v. Fern*, 165 Conn. App. 665, 672 (2016) (quoting *Duncan v. Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 24 (2013)). An allegation of negligence *per se* does not relieve a plaintiff of his burden to prove breach, causation and actual injury. 165 Conn. App. at 672. However, "the jury . . . need not decide whether the defendant acted as an ordinarily prudent person . . . only whether the relevant statute or regulation has been violated. If it has, the defendant was negligent as a matter of law." *Id.* at 672-73.

Duty is a legal conclusion about relationships between individuals, made after the fact, and is imperative to a negligence cause of action. The test for the existence of a legal duty entails:

1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result; and

2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case.

Mazurek v. Great American Ins. Co., 284 Conn. 16, 29 (2007). The measure of duty and its breach is the "reasonable care standard, which is the care that a reasonably prudent person would use under the circumstances." *Rawls v. Progressive N. Ins. Co.*, 310 Conn. 768, 776 (2014). Reasonable care "does not require that one must guard against eventualities which, at best, are too remote to be reasonably foreseeable[,]" *Pelletier v. Sordoni/Skanska Const. Co.*, 286 Conn. 563, 595 (2008), but reasonable care pays no heed to a defendant's good intentions (or lack thereof). *See Logan v. Greenwich Hosp. Ass'n*, 191 Conn. 282, 299 (1983) ("[e]rrors in judgment which occur with the best intentions constitute negligence if they result from a failure to use reasonable care"). *See Munn v. Hotchkiss Sch.*, 326 Conn. 540 (2017) for a thorough discussion on the concept of duty under the scope of Connecticut law.

A duty of care may arise from a contract. However, contracting parties have a duty to prevent harm to third parties greater than that imposed by the common law only if (1) the contract expressly says that they do, or (2) they unambiguously intend to protect third parties from foreseeable,

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physical harm within the scope of the contractual services. S*ee Demond v. Project Serv., LLC*, 331 Conn. 816, 847-48 (2019). This rule also applies to assumed obligations without an express contract, though *Demond* does not elaborate on what evidence might satisfy the first half of the test in that circumstance. *Id*.

Connecticut recognizes a cause of action for negligence and negligent infliction of emotional against health care providers for the unauthorized disclosure of confidential patient information. *See Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 327 Conn. 540 (2018); *see also Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 314 Conn. 433 (2014) (federal law does not preempt claims). Similarly, a doctor who mistakenly informs a patient that he does not have a sexually transmitted disease may be held liable in ordinary negligence to the patient's exclusive sexual partner for her resulting injuries if the doctor knows that the patient sought testing and treatment for the express benefit of that partner. *See Doe v. Cochran*, 332 Conn. 325, 327-28 (2019).

Despite extensive federal regulation of railroads, federal law does not preempt a claim for negligent selection of the station track on which to run a through train. *See Murphy v. Town of Darien*, 332 Conn. 244, 265-66 (2019) (reversing summary judgment for defendant in suit by widow of deceased commuter who slipped and fell onto track).

The Supreme Court has yet to settle whether Connecticut recognizes—or, at least, assigns any importance to—the concept of gross negligence. *Compare Hanks v. Powder Ridge Rest. Corp.*, 276 Conn. 314, 337 (2005) ("Connecticut does not recognize degrees of negligence and, consequently, does not recognize the tort of gross negligence as a separate basis of liability"), *with 19 Perry St., LLC v. Unionville Water Co.*, 294 Conn. 611, 631 (2010) ("[w]e have defined gross negligence as very great or excessive negligence, or as the want of, or failure to exercise, even slight or scant care or slight diligence"). *Hanks* and *19 Perry St.*, though seemingly matter and anti-matter, exist in the same legal universe for a simple reason: The author of the dissent in *Hanks*, former Justice Flemming Norcott, wrote the majority in *19 Perry St.* (and cited his *Hanks* dissent to boot!) and *Hanks* has history on its side; *see Decker v. Roberts*, 125 Conn. 150, 157, 3 A.2d 855 (1939) ("gross negligence has never been recognized in this state as a separate basis of liability"); but *19 Perry St.* has numbers—most other jurisdictions recognize gross negligence.

Even if a defendant admits liability, a plaintiff still must prove an actual injury because "conduct that is merely negligent . . . is not considered to be a significant interference with the public interest such that there is any right to complain of it,

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or to be free from it." *Right v. Breen*, 277 Conn. 364, 377 (2006). Likewise, "[t]he economic loss doctrine bars negligence claims for commercial losses arising out of the defective performance of contracts." *Ulbrich v. Groth*, 310 Conn. 375, 391 n.14 (2013). This doctrine "limits a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property[,]" but does not prevent a contracting party from "agree[ing] to be liable for loss, damage or expense attributable to that party's negligence, gross negligence or willful misconduct." *State v. Lombardo Bros. Mason Contractors*, 307 Conn. 412, 469 n.41 (2012).

The "firefighter's rule" prohibits claims for premises liability against a property owner by firefighters or police, etc., who are injured while responding to an emergency. In 2017, the Supreme Court held, however, that the firefighter's rule does not bar claims sounding in ordinary negligence. *Sepega v. Delaura*, 326 Conn. 788, 814-15 (2017). In light of the thorough and thoughtful analyses offered by both the majority and the dissent in *Sepega*, and the similar analysis in *Lund v. Milford Hosp., Inc.*, 326 Conn 846 (2017), which released the same day, it is likely that the scope and substance of the firefighter's rule will again be considered by the Court in the not-too-distant future.

1N-2 NEGLIGENT ENTRUSTMENT

The elements of a cause of action for negligent entrustment are:

1) A defendant who owns a dangerous instrumentality;
2) entrusts that dangerous instrumentality;
3) to one whom the owner knows, or reasonably ought to know, is so incompetent to operate it in a safe manner that the owner reasonably should to anticipate likely harm to others; and
4) the person to whom the instrumentality is entrusted injures another by his use of that instrumentality.

Greeley v. Cunningham, 116 Conn. 515, 520 (1933); *see* Restatement (Second) of Torts, § 390.

Statute of Limitations

The statute of limitations for negligent entrustment is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

Most reported Connecticut decisions involving negligent entrustment involve an automobile as the dangerous instrumentality. *See, e.g., Otis v. Montesi*,

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2008 WL 4779847 (Conn. Super. Ct. Oct. 10, 2008); *Kaminsky v. Scoopo*, 2008 WL 3854000 (Conn. Super. Ct. July 30, 2008); *see also NEGLIGENT ENTRUSTMENT OF MOTOR VEHICLE*, *infra*. However, one decision permits a negligent entrustment claim with respect to a freight train because a supervisor "knew of a long list of reasons why [the driver] couldn't be trusted with the locomotive without creating an unreasonable risk of harm to others." *Wilson v. Hopkins*, 2018 WL 3579160, at *2 (Conn. Super. Ct. July 9, 2018). Other cases do discuss the broader concept of the negligent entrustment of any dangerous instrumentality (albeit in the context of an automobile claim). *See Bryda v. McLeod*, 2004 WL 1786822 (Conn. Super. Ct. July 12, 2004). The most obvious example of such an instrumentality is a handgun. *See Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *12-13 (Conn. Super. Ct. May 26, 2011) (plaintiff failed to allege that defendants negligently entrusted Glock 21 handgun to the individual who assaulted plaintiff because complaint stated only that individual was left alone in store and "took" gun and ammunition). However, negligent entrustment applies only to chattel, not real property. *See Lewis v. Burke*, 2014 WL 7497472, at *3 (Conn. Super. Ct. Nov. 28, 2014) (rejecting claim that parents negligently entrusted home to their son). Whatever the instrumentality, "an entrustment can be considered negligent only if (1) there is actual or constructive knowledge that the entrustee is incompetent or has a dangerous propensity, and (2) the injury resulted from that incompetence or propensity." *Soto v. Bushmaster Firearms Int'l, LLC*, 2016 WL 8115354, at *6 (Conn. Super. Ct. Oct. 14, 2016) (citing a half-dozen Superior Court decisions).

Several superior courts have declined to recognize a cause of action for reckless entrustment. *See Delaney-Ridolfi v. Rodriguez*, 2018 WL 6015780, at *5 (Conn. Super. Ct. Oct. 25, 2018) (citing cases).

1N-3 NEGLIGENT ENTRUSTMENT OF MOTOR VEHICLE

The essential elements of the tort of negligent entrustment of an automobile are:

1) that the entrustor knows or ought reasonably to know that one to whom he entrusts the vehicle is so incompetent to operate it upon the highways that the former ought to reasonably anticipate the likelihood of injury to others by reason of that incompetence; and

2) such incompetence does result in injury.

Kaminsky v. Scoopo, 2008 WL 3854000 (Conn. Super. Ct. July 30, 2008).

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Statute of Limitations

Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

Liability cannot be imposed on a defendant under a theory of negligent entrustment, simply because the defendant permitted another person to operate the motor vehicle. Liability can only be imposed if:

(1) there is actual or constructive knowledge that the person to whom the automobile is loaned is incompetent to operate the motor vehicle; and

(2) the injury resulted from that incompetence.

Kaminsky v. Scoopo, 2008 WL 3854000 (Conn. Super. Ct. July 30, 2008) (citing *Greeley v. Cunningham*, 116 Conn. 515, 520 (1933)). It is unclear what level of knowledge must be alleged. In *Morin v. Machrone*, 2011 WL 2418460 (Conn. Super. Ct. May 20, 2011), a superior court struck a claim for negligent entrustment as insufficiently pleaded where the plaintiff had alleged that the defendant knew or ought reasonably to have known that the individual to whom the defendant entrusted her vehicle was "incompetent to operate said vehicle by reason of inexperience and/or reckless behavior." It appears that the *Morin* court was looking for specific allegations of past reckless conduct of which the defendant had actual or constructive knowledge. It is not clear, however, that the cause of action described in *Kaminsky v. Scoopo* requires that level of knowledge. *See also Marron v. Grala*, 2013 WL 388169, at *5 (Conn. Super. Ct. Jan. 2, 2013) (striking negligent entrustment claim for failure to allege "any facts suggesting that Colossale had actual or constructive knowledge of [the defendant's] past history of incompetent driving or dangerous propensities"). Nonetheless, one who rents or lends an automobile has no duty "to affirmatively inquire as to the renter or borrower's driving history." *Hall v. CAMRAC, LLC*, 2013 WL 6925959, at *6 (Conn. Super. Ct. Dec. 10, 2013); *see Chapman v. Herren*, 2010 WL 2927377, at *7-8 (Conn. Super. Ct. June 24, 2010) (same).

Greeley is the only reported appellate decision in Connecticut that discusses negligent entrustment of a motor vehicle. However, a 2013 Superior Court decision broadly defined the concept of "incompetence" to mean not only "a mere lack of driving skill but . . . other cause by which an entrustor knows or ought reasonably to know that a vehicle should not be entrusted to the entrustee." *Short v. Ross*, 2013 WL 1111820, at *7-8 (Conn. Super. Ct. Feb. 26, 2013) (plaintiff who alleged that rental company should not have rented

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box truck to defendant that "would be used to haul and dispense alcohol in a college tailgating environment" adequately pleaded claim for negligent entrustment of motor vehicle); *accord Ellis v. Jarmin*, 2009 WL 5511268 (Conn. Super. Ct. Dec. 17, 2009) (allegation that driver of rental car was subject to outstanding warrants constituted *prima facie* proof of incompetence).

1N-4 NEGLIGENT HIRING/RETENTION/SUPERVISION

To prevail on a claim for negligent hiring/retention/supervision, a plaintiff must prove that:

1) The defendant employer was negligent;
2) in hiring, retaining, or failing to properly supervise;
3) an employee whom the defendant knew, or should have known;
4) would cause harm to the plaintiff; and
5) the plaintiff was injured as a result of that employee's conduct.

Seda v. Maxim Healthcare Servs., 2008 WL 1868412 (Conn. Super. Ct. Apr. 8, 2008); *see also Seguro v. Cummiskey*, 82 Conn. App. 186, 196 (2004).

Statute of Limitations

The statute of limitations for negligent hiring/retention/supervision is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

This three-headed cause of action involves the same basic negligent conduct for each category: actual or constructive knowledge by an employer of his employee's "propensity for tortious conduct." *Seda*, 2008 WL 1868412, at *3. For all three, "a plaintiff must allege facts supporting the element of foreseeability." *Cisneros v. Team Stamford, LLC*, 2015 WL 5982514, at *2 (Conn. Super. Ct. Sept. 17, 2015). The principal distinction between the three sub-causes is the context/point in time at which the employer gains such awareness; i.e., prior to the start of the employment (negligent hiring), or during the course of the employment (negligent retention/supervision). *Id.* In addition, negligent retention requires proof that after the employer acquired actual or constructive knowledge of the employee's tortious propensity, the employer "failed to take further action." *Id.* Proper supervision of an employee can require an employer to proactively warn other employees about his dangerous propensities. In *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357 (2015), for example, it was not enough for the defendant to monitor the sobriety of an alcoholic priest who served as director of its

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private elementary school and who molested children when he drank. The defendant's failure to advise anyone at the school to take precautions with the priest made the defendant liable. *Id.* at 378-81.

Because the underlying facts alleged, rather than the labels the plaintiff chooses to use, determine the true nature of a plaintiff's complaint, a plaintiff's claim for injuries sustained while undergoing a blood test sounded in medical malpractice, even though the plaintiff purportedly alleged a failure to "train or supervise" the technician taking the blood. As a result, the plaintiff's claim was dismissed for failing to meet the statutory requirements for bringing a medical malpractice claim. *Nichols v. Milford Pediatric Group, P.C.*, 141 Conn. App. 707, 715 (2013).

1N-5 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

To prevail on a claim of negligent infliction of emotional distress, a plaintiff must prove the following elements:

1) The defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress;
2) the plaintiff's distress was foreseeable;
3) the emotional distress was severe enough that it might result in illness or bodily harm; and
4) the defendant's conduct was the cause of the plaintiff's distress.

Carrol v. Allstate Ins. Co., 262 Conn. 433, 444 (2003).

Statute of Limitations

The statute of limitations for negligent infliction of emotional distress is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584. *See Martin v. University of New Haven, Inc.*, 2006 WL 3289773 (Conn. Super. Ct. Oct. 24, 2006).

Notes

Negligent infliction of emotional distress safeguards "one's peace of mind." *Montinieri v. Southern New England Telephone Co.*, 175 Conn. 337, 345 (1978) (recognizing existence of cause of action). The subjective and sometimes amorphous nature of peace of mind, however, has made this tort a hotly-contested one in the nearly four decades since *Montinieri*. The Connecticut Supreme Court has held that in order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove both:

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a) That the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm; and

b) that the fear or distress experienced by the plaintiffs was reasonable in light of the conduct of the defendants.

Carrol, 262 Conn. at 447. This differs from "the standard negligence requirement that an actor should have foreseen that his tortious conduct was likely to cause harm[,]" in that negligent infliction of emotional distress requires proof "that the actor should have foreseen that her behavior would likely cause harm of a specific nature, i.e., emotional distress likely to lead to illness or bodily harm." *Stancuna v. Schaffer*, 122 Conn. App. 484, 490 (2010). Moreover, some of the unpleasant parts of life—e.g., litigation— are so "inherently distressing" that another person's conduct during those events "does not create an unreasonable risk of causing [a litigant] emotional distress." *Id*. at 491 (affirming motion to strike negligent infliction claim based on guardian ad litem's *ex parte* conversation that caused judge to recuse himself). Mind you, "[t]he only requirement is that the distress *might* result in illness or bodily harm[,]" *Riley v. Travelers Home & Marine Insurance Co.*, 173 Conn. App. 422, 443 (2017) (emphasis in original), not that the plaintiff actually suffered illness or bodily harm.

A claim for negligent infliction of emotional distress can arise from a health care provider's unauthorized disclosure of confidential patient information. *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 327 Conn. 540 (2018) (considering the validity of such a claim for the first time).

Unlike a claim for intentional infliction of emotional distress, negligent infliction of emotional distress does not require a plaintiff to allege that the defendant's conduct was unreasonable, outrageous or egregious. *Davis v. Davis*, 112 Conn. App. 56, 68 (2009) (citing *Murphy v. Lord Thompson Manor Inc.*, 105 Conn. App. 546, 553, *cert. denied*, 286 Conn. 914 (2008)). Likewise, "negligent infliction of emotional distress do[es] not require proof of any particular level of intent. In fact, intent need not be proven at all to establish [it]." *Geiger v. Carey*, 170 Conn. App. 459, 498 (2017). However, a defendant must owe the allegedly distressed plaintiff a direct duty of care. *See Demattia v. Bank of Am., N.A.*, 2016 WL 4150169, at *6 (Conn. Super. Ct. June 29, 2016) ("the existence of a duty is key component of a negligent infliction of emotional distress claim") (citing cases).

"Negligent infliction of emotional distress in the employment context arises only when it is based upon unreasonable conduct of the defendant in the termination process . . . . An individual may not be found liable for negligent

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infliction of emotional distress arising out of conduct occurring within a continuing employment context, as distinguished from conduct occurring in the termination of employment." *Grasso v. Connecticut Hospice, Inc.*, 138 Conn. App. 759, 771 (2012). However, an allegation of constructive termination, if proved, can satisfy this requirement. *See Perodeau v. Hartford*, 259 Conn. 729 (2002).

1N-6 NEGLIGENT MISREPRESENTATION

In order to prove negligent misrepresentation, a plaintiff must prove:

1) That the defendant made a misrepresentation of fact;
2) that the defendant knew or should have known was false;
3) that the plaintiff reasonably relied on the misrepresentation; and
4) that the plaintiff suffered pecuniary harm as a result.

Nazami v. Patrons Mutual, 280 Conn. 619, 626 (2006).

Statute of Limitations

The statute of limitations for negligent misrepresentation is three years from the date of the act complained of. Conn. Gen. Stat. § 52-577.

Notes

As with its intentional sibling; *see FRAUD*, *supra*; negligent misrepresentation generally concerns present or past facts. However, "a promise to do an act in the future, when coupled with a present intent not to fulfill the promise, is a false representation." *Brown v. Otake*, 164 Conn. App. 686, 706 (2016). The defendant's failure "to exercise reasonable care or competence in obtaining or communicating the information" distinguishes negligent misrepresentation from innocent misrepresentation. *Sturm v. Harb Development, LLC*, 298 Conn. 124, 144 (2010); *see INNOCENT MISREPRESENTATION*, *supra.* In general, "the reasonableness of the plaintiff's reliance will be a question of fact for the trier." *Coppola Const. Co. v. Hoffman Enterprises Ltd. P'ship*, 309 Conn. 342, 353 n.6 (2013).

It is an open question whether Connecticut recognizes a cause of action for third-party negligent misrepresentation against attorneys, accountants, auditors, or medical professionals. *See Doe v. Cochran*, 332 Conn. 325, 333 n.3 & 344 n.8 (2019).

Because a negligent misrepresentation claim sounds in tort rather than in contract, it will not be barred by the statute of frauds, even where the negligent misrepresentations in question are related to an oral contract that *would be* barred by the statute of frauds. *Sovereign Bank v. Licata*, 116 Conn.

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App. 483, 501-02 (2009). "A negligent misrepresentation action does not seek to enforce the underlying contract; rather, it seeks damages for reliance on misrepresentations that may have been made in relation to that contract. This critical distinction sets the tort action apart from a contract action and makes the claim worthy of independent review. We conclude, therefore, that because the defendant's claim for negligent misrepresentation sounds in tort and not in contract, the statute of frauds does not bar such a claim." *Id.*

However, the economic loss doctrine, which "limits a contracting party to contractual remedies for the recovery of economic losses unaccompanied by physical injury to persons or other property[,]" bars negligent misrepresentation claims for "for commercial losses arising out of the defective performance of contracts." *Ulbrich v. Groth*, 310 Conn. 375, 391 n.14 & 399 (2013).

1N-7 NEGLIGENT SERVICE OF ALCOHOL TO AN INTOXICATED PERSON

At one time, the Supreme Court recognized a common law cause of action for negligent service of alcohol to an intoxicated person. *Craig v. Driscoll*, 262 Conn. 312, 339-40 (2003). Shortly after the *Craig* decision was released, however, the General Assembly passed Public Act No. 03-91, barring any common law cause of action in negligence against a seller of alcohol to an intoxicated person 21 years of age or older. *See* Conn. Gen. Stat. § 30-102; *Poulin v. Laboy*, 2011 WL 1565930, at *2 (Conn. Super. Ct. Mar. 31, 2011). As a result, while a claim for reckless service of alcohol to an intoxicated person may remain, and a claim for negligent service of alcohol to a minor does remain, the Connecticut legislature has abrogated any claim for negligent service of alcohol to an intoxicated adult. *See DRAM SHOP ACT (Conn. Gen. Stat. § 30-102), supra*.

1N-8 NEGLIGENT SERVICE OF ALCOHOL TO A MINOR

The elements of a common-law cause of action for negligent service of alcohol to a minor are:

1) Sale or service of alcohol to a minor;
2) by a social host or other purveyor of alcohol; and
3) injury or damage to that minor or an innocent third party proximately caused by the minor's consumption of alcohol.

Bohan v. Last, 236 Conn. 670, 677 (1996).

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Statute of Limitations

The statute of limitations for negligent service of alcohol to a minor is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

Contributory negligence is a valid defense to a claim of negligent service of alcohol to a minor. *See Stafford v. Roadway*, 312 Conn. 184, 185-86 (2014).

In the absence of evidence that parents supplied alcohol to their minor son, they were not liable for injuries caused by the minor's subsequent drunk driving, even if they were aware and acquiesced in minor's purchase and storage of alcohol in their home. *Rangel v. Parkhurst*, 64 Conn. App. 372, 381 (2001).

1P-1 PARENTAL RECOVERY OF CONSEQUENTIAL DAMAGES FOR INJURY TO MINOR CHILD

In order to prevail on a claim for consequential damages for injury to a minor child, a plaintiff-parent must establish:

1) An injury to his or her child;
2) caused by the negligent act of a third party;
3) resulting in loss of services from the child, or expenses, as a consequence of that injury.

Dzenutis v. Dzenutis, 200 Conn. 290, 308 (1986); *Ruiz v. Victory Properties, LLC*, 315 Conn. 320, 334 n.6 (2015).

Statute of Limitations

Two years from the date the injury to the minor child is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

At first blush, Conn. Gen. Stat. § 52-204 appears to permit only the minor child to recover consequential damages arising out of injuries to that child—but *Dzenutis* holds otherwise. "Although [Conn. Gen. Stat. § 52-204] authorizes the recovery of medical expenses in an action solely in behalf of the injured child and makes the recovery in such action a bar to any claim by the parent for such expenses, the statute does not mandate that procedure."

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Dzenutis v. Dzenutis, 200 Conn. 290, 308 (1986). A parent therefore may bring an action in his or her own right to recover such consequential damages. *Id.*

1P-2 PIERCING THE CORPORATE VEIL

In order to prevail on a claim to pierce the corporate veil, a plaintiff must prove one of two sets of elements:

EITHER THE INSTRUMENTALITY RULE:

1) Complete domination over the policy and business practices of a corporate entity;
2) with respect to the transaction in question;
3) which domination was employed to commit a fraud or wrong, perpetrate a dishonest or unjust act, or violate a legal or statutory duty; and
4) which proximately caused the injury or unjust loss complained of;

OR THE IDENTITY RULE:

1) there was such unity of interest and ownership between two corporate entities;
2) that the independence of such entities had ceased, or never had begun; and
3) that adherence to the fiction of separate identities would be contrary to justice and equity.

See Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc., 187 Conn. 544, 552-54 (1982); *Mountview Plaza, Inc. v. World Wide Pet Supply, Inc.*, 76 Conn. App. 627, 632-33 (2003).

Statute of Limitations

Because piercing the corporate veil is an equitable remedy, and not a cause of action at law, there is no governing statute of limitations.

Notes

Strictly speaking, there is no such thing as a "cause of action" to pierce the corporate veil. Rather, piercing the corporate veil is an equitable remedy that permits recovery of damages, in spite of the apparent shield of corporate immunity, when the interests of justice so require. *See Angelo Tomasso, Inc.*, 187 Conn. at 552-54. Nonetheless, it is common practice in Connecticut to plead piercing the corporate veil as a separate count in a complaint when the plaintiff seeks to pierce the shield of corporate immunity and recover from an entity not apparently liable.

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Connecticut recognizes two distinct theories under which the corporate veil may be pierced: the instrumentality rule and the identity rule:

> The instrumentality rules requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of . . . . The second theory is the identity rule. If plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.

Morris v. Cee Dee, LLC, 90 Conn. App. 403, 414-15, *cert. granted on other grounds*, 275 Conn. 929 (2005).

While the instrumentality rule generally is used to pierce the veil as to individuals, and the identity rule as to other corporate entities, that is not an express requirement. *Klopp v. Thermal-Sash, Inc.*, 13 Conn. App. 87, 89 n.3 (1987). Both theories apply to piercing the veil for a limited liability company as well as a corporation. *See Sturm v. Harb Development, LLC*, 298 Conn. 124, 131-32 (2010).

While a traditional veil-piercing claim seeks to impose liability on an individual for a judgment rendered against a corporate entity, **reverse veil piercing** seeks to impose liability on a corporation for a judgment rendered against an individual. The Connecticut Appellate Court recognized the doctrine of reverse veil piercing as a viable claim in *Litchfield Asset Management Corp. v. Howell*, 70 Conn. App. 133, *cert. denied*, 261 Conn. 911 (2002), *overruled on other grounds by Robinson v. Coughlin*, 266 Conn. 1, 9 (2003), which is to date the only appellate level case in Connecticut to have so held. The *Howell* decision was subsequently called into question by the Supreme Court in *Commissioner of Environmental Protection v. State Five Indus. Park, Inc.*, 304 Conn. 128 (2012). There, the Supreme Court assumed

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without deciding that the doctrine of reverse veil piercing could be viable in Connecticut but found that the facts of the case did not support the trial court's decision to pierce the corporate veil. Notably, the concurrence in the *State Five* case criticized the majority for refusing to decide the continuing viability of the *Howell* decision and the reverse veil piercing doctrine. The dissent would have overruled *Howell* and declared that a claim of reverse veil piercing is not available under Connecticut law. *See generally State Five*, 304 Conn. at 151-61 (Zarella, J., concurring).

In considering the application of a reverse veil piercing claim, the *State Five* majority explained that the claim raises issues that are substantially different from those presented by a traditional veil piercing claim: "Although some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because the two share the same equitable goals, others wisely have recognized important differences between them and have either limited, or disallowed entirely, reverse veil piercing." *State Five*, 304 Conn. at 140 (citations omitted).

"First, reverse piercing bypasses normal judgment-collection procedures, whereby judgment creditors of an individual judgment debtor attach the judgment debtor's shares in the corporation and not the corporation's assets." *Id*. at 140-41 (citation and internal quotation marks omitted). "When corporate assets are attached directly for the benefit of the creditors of an individual, it prejudices rightful creditors of the corporation, who relied on the entity's separate corporate existence when extending it credit and understood their loans to be secured—expressly or otherwise—by corporate assets." (Citation and quotation omitted) *Id*. "Second, if a corporation has other non-culpable shareholders, they too obviously will be prejudiced if the corporation's assets can be attached directly. In contrast, in ordinary piercing cases, only the assets of the particular shareholder or other insider who is determined to be the corporation's alter ego are subject to the attachment." *Id*. at 141-42. "Finally, because corporate veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law." *Id*. at 142 (citation and internal quotation marks omitted.). "To summarize, a court considering reverse veil piercing must weigh the impact of such action upon innocent investors . . . . A court considering reverse veil piercing must also consider the impact of such an act upon innocent secured and unsecured creditors. The court must also consider the availability of other remedies the creditor may pursue." *Id*. at 142 (quotation omitted).

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1P-3 PHYSICIAN/PATIENT CONFIDENTIALITY

An action for breach of physician/patient confidentiality requires proof of four elements:

1) The existence of a physician/patient relationship;
2) the unauthorized disclosure by the physician of confidential information;
3) obtained in the course of the relationship for the purpose of treatment; and
4) damages caused by the unauthorized disclosure.

Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C., 327 Conn. 540, 567-68 (2018).

Statute of Limitations

Byrne announces a new cause of action, but not how long a patient has to sue under it. However, as the basis is breach of a common law duty of care, *id.* at 567, likely two years from the date the injury to the minor child is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

Byrne follows the lead of most other states that have considered the issue. *Byrne*, 327 Conn. at 575 n.1 (Robinson, J., concurring) (noting "extremely broad support for the recognition of a cause of action in the case law of our sister states"). Though there is no private right of action under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d, *et seq.*, HIPAA regulations "inform" the standard of care for a common-law suit. *Byrne*, 327 Conn. at 557. If the law allows disclosure without a patient's consent, it is "authorized." *Id.* at 568.

In the wake of *Byrne*, one trial court has extended its reach to a non-physician sexual abuse counselor. *See Doe I v. St. Francis Hosp. & Med. Ctr.*, 2018 WL 1177460, at *1, 5 (Conn. Super. Ct. Feb. 5, 2018) (denying motion to strike *Byrne* claim for unauthorized disclosure that plaintiff had been "a victim of sexual abuse, the circumstances surrounding her sexual abuse, and that she was receiving sexual abuse counseling").

1P-4 PRINCIPAL LIABILITY FOR CORPORATE DEBT

See PIERCING THE CORPORATE VEIL, supra.

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1P-5 PRIVATE NUISANCE

To prevail in an action for a private nuisance, a plaintiff must establish the following elements:

1) Conduct by the defendant that proximately causes;
2) an unreasonable interference with the plaintiff's use and enjoyment of his own property.

Pestey v. Cushman, 259 Conn. 345, 361 (2002).

Statute of Limitations

Three years from the date of the act complained of; *see* Conn. Gen. Stat. § 52-577; unless based solely on negligent conduct by the defendant, in which case two years; *see* Conn. Gen. Stat. § 52-584.

The Appellate Court has recognized, however, that the "nature of a nuisance as permanent or temporary has an important bearing on the running of the statute of limitations . . . . For limitations purposes, a permanent nuisance claim accrues when injury first occurs or is discovered while a temporary nuisance claim accrues anew upon each injury." (Citation omitted) *Rickel v. Komaromi*, 144 Conn. App. 775, 787 (2013).

Notes

The distinction between a private nuisance and a public nuisance formerly had been a subject of some confusion in Connecticut. *Pestey*, however, laid most of that confusion to rest. As the Court explained,

> [p]ublic nuisance law is concerned with the interference with a public right, and cases in this realm typically involve conduct that allegedly interferes with the public health and safety . . . .
>
> Private nuisance law, on the other hand, is concerned with conduct that interferes with an individual's private right to the use and enjoyment of his or her land. Showing the existence of a condition detrimental to the public safety, or, as the first two elements of the four factor analysis discussed previously require, showing that the condition complained of had a natural tendency to create a continuing danger, is often irrelevant to a private nuisance claim.

Pestey v. Cushman, 259 Conn. 345, 357 (2002).

Though some treatises use "sweeping terms, our cases involving nuisances almost uniformly have involved physical encroachments or disturbances that were alleged to have interfered with the use and enjoyment of land, such as runoff, odors, and noise." *Wellswood Columbia, LLC v. Town of Hebron*, 327 Conn. 53, 80 (2017) (assuming *arguendo* that a road closure by a town

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could constitute a private nuisance, but rejecting claim for other reasons). However, by statute, "[a]ll gambling premises are common nuisances and shall be subject to abatement by injunction or as otherwise provided by law. In any action brought under this subsection the plaintiff need not show damage and may, in the discretion of the court, be relieved of all requirements as to giving security." Conn. Gen. Stat. § 53-278e(a).

A defendant does not have to own, control, or make use of the subject property for a plaintiff to state a viable cause of action for private nuisance. *See Ugrin v. Town of Cheshire*, 307 Conn. 364, 375 (2012). The *Ugrin* Court "recognize[d] that the defendants in most private nuisance actions to date have owned, controlled or used property from which the alleged nuisance originated and that the court in *Pestey* observed that the proper focus of a private nuisance claim for damages . . . is whether a defendant's conduct, i.e., his or her use of . . . property, causes an unreasonable interference with the plaintiff's use and enjoyment of his or her property." *Ugrin*, 307 Conn. at 376 (brackets and quotation marks omitted; ellipses in original). Nonetheless, the proper focus of a *private* nuisance action—as opposed to a claim of public nuisance—is "interference with the use and enjoyment of the plaintiff's property[,]" regardless of whether the defendant owned or controlled the land. *Id.* at 377 (2012). However, "*the interference must be substantial to be unreasonable.*" *Argentinis v. Fortuna*, 134 Conn. App. 538, 558 (2012) (emphasis in original).

Rickel holds that "[i]f a nuisance is not abatable, it is considered permanent." 144 Conn. App. at 788. Moreover, a "nuisance is deemed not abatable, even if possible to abate, if it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely . . . ." Thus,

> [i]f a nuisance is not abatable, it is considered permanent, and a plaintiff is allowed only one cause of action to recover damages for past and future harm. The statute of limitations begins to run against such a claim upon the creation of the nuisance once some portion of the harm becomes observable. *See* . . . Restatement (Second) of Torts § 899, [comment] d. A nuisance is deemed not abatable, even if possible to abate, if it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely . . . . However, a nuisance is not considered permanent if it is one which can and should be abated . . . . In this situation, every continuance of the nuisance is a fresh nuisance for which a fresh action will

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> lie, and the statute of limitation will begin to run at the time of each continuance of the harm.

Id.

On the other hand, a "nuisance is not considered permanent if it is one which can and should be abated . . . . In this situation, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie . . . ." (Citation omitted) *Id.*

Some conditions constitute nuisances *per se*; others become so only in respect to the time, place or manner of their performance. *Day v. Perkins Props., LLC*, 190 Conn. App. 33, 38 (2019) (citing to *Whitney v. Bartholomew*, 21 Conn. 213, 217 (1851)). A nuisance *per se* exists where the condition is a nuisance in any locality and under any conditions. *Id*. at 37. Alleging that the condition complained of is a violation of local zoning ordinances alone is insufficient to prove nuisance *per se*; however, the trial court may take the local zoning ordinance in consideration in determining if the condition is a nuisance based on the time, place or manner. *Id*. at 39.

1P-6 PRODUCTS LIABILITY

Products liability claims, including claims for manufacturing defect, design defect and failure to warn, are now exclusively statutory in nature. *See Allard v. Liberty Oil Equipment Co.,* 253 Conn. 787, 800 (2000) ("It is now beyond dispute that [the products liability statute, Conn. Gen. Stat. § 52-572m, *et. seq*.] provides the exclusive remedy for a claim falling within its scope, thereby denying a claimant the option of bringing common law causes of action for the same claim.").

See PRODUCTS LIABILITY (DESIGN DEFECT) (Conn. Gen. Stat. §§ 52-572m, et seq.), infra; PRODUCTS LIABILITY (MANUFACTURING DEFECT) (Conn. Gen. Stat. §§ 52-572m, et seq.), infra.

1P-7 PROFESSIONAL MALPRACTICE

Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. *Pelletier v. Galske,* 105 Conn. App. 77, 81 (2007). While the professional's degree of skill determines the nature of the duty owed, a plaintiff still must prove a breach of that duty, causation and damages in order to recover.

Statute of Limitations

Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

At least with respect to a claim for malpractice against an insurance broker, a plaintiff is not required to allege or prove fraud or inequitable conduct in order to establish a claim for professional malpractice. *Byrd v. Ortiz*, 136 Conn. App. 246, 252 (2012).

If a claim sounds in professional malpractice but does not allege negligence in the rendering of professional services, it is a claim for ordinary negligence, not malpractice. Thus, in a medical malpractice action the Appellate Court has held that "the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." *Trimel v. Lawrence & Memorial Hospital Rehabilitation Center*, 61 Conn. App. 353, 357-58, *appeal dismissed*, 258 Conn. 711 (2001). *See Perry v. Valerio*, 167 Conn. App. 734, 738-39 (2016).

Connecticut does not recognize a claim for medical malpractice made by a non-patient. *Levin v. State*, 329 Conn. 701 (2018).

1P-8 PROMISSORY ESTOPPEL

To prevail on a claim of promissory estoppel, a plaintiff must prove the following elements:

1) A clear and definite promise by the defendant;
2) reasonable reliance on that promise by the plaintiff;
3) the defendant's promise induced the action taken by the plaintiff in reliance; and
4) injustice can be avoided only by enforcement of the defendant's promise.

Stewart v. Cendant Mobility Servs. Corp., 267 Conn. 96, 104-05 (2003).

Statute of Limitations

The statute of limitations applicable to a promissory estoppel action is determined by the limitations period that would have governed a breach of contract action based on the same facts. *See Torringford Farms Ass'n,*

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Inc. v. City of Torrington, 75 Conn. App. 570, 576-78 (2003). For discussion of the two limitations statutes applicable to breach of contract actions, Conn. Gen. Stat. §§ 52-576(a) & 52-581(a), *see BREACH OF CONTRACT*, *supra*.

Notes

Promissory estoppel is a "mutually exclusive" alternative to a breach of contract claim "such that establishing the elements of one precludes liability on the other . . . ." *Meribear Prods., Inc. v. Frank*, 328 Conn. 709, 721 (2018); *see Harley v. Indian Spring Land Co.*, 123 Conn. App. 800, 831 (2010) (court rendered inconsistent judgment by finding in favor of plaintiff on both breach of contract and promissory estoppel). In order for a promise to be enforceable under the doctrine of promissory estoppel, there must be "a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all." *D'Ulisse-Cupo v. Bd. of Directors of Notre Dame High School*, 202 Conn. 206, 213 (1987). Consequently, "[a] mere expression of intention, hope, desire, or opinion, which shows no real commitment, cannot be expected to induce reliance." *TD Bank, N.A. v. Salce*, 175 Conn. App. 757, 767 (2017) (statement of "intent to contract in the future" not clear and definite promise).

It is not clear whether the defendant's subjective intent is an essential element of promissory estoppel. Some cases seem to hold that it is; others mention only an objective standard. *Compare Chotkowski v. State*, 240 Conn. 246, 268 (1997) (defendant "must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief") (emphasis added), *with Stewart*, 267 Conn. at 104 ("a promise which the promisor should reasonably expect to induce action or forbearance") (emphasis added). The Appellate Court cases likewise go in both directions. *Compare Abbot Terrace Health Center, Inc. v. Parawich*, 120 Conn. App. 78, 86-87 (2010) ("calculated or intended"), *with Thibodeau v. American Baptist Churches of Connecticut*, 120 Conn. App. 666, 676-77, *cert. denied*, 298 Conn. 901 (2010) ("should reasonably expect").

Connecticut courts have not yet decided whether a plaintiff may pursue a promissory estoppel claim if the related contract claim would be barred by the statute of frauds. *McClancy v. Bank of Am., N.A.*, 176 Conn. App. 408, 414-15, *cert. denied*, 327 Conn. 975 (2017) (citing *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 89-90 n.38 (2005)). However, "[t]he doctrine of equitable estoppel accompanied by the doctrine of part performance on the contract . . . bars the assertion of the statute of frauds as a defense." *McClancy*, 176 Conn. App. at 415.

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1P-9 PSYCHOTHERAPIST—FAILURE TO WARN OF DANGEROUS PATIENT

A psychotherapist may have a "limited duty" to warn a third party of a dangerous patient in order to prevent the patient from harming the third party if:

1) There is a special relationship of custody and control between therapist and patient;
2) the patient has made specific threats of serious harm to an identifiable individual;
3) the therapist has knowledge of these threats; and
4) it is foreseeable that the third party will be harmed if the therapist does not take action to prevent such harm.

Fraser v. U.S., 236 Conn. 625, 632-34, *cert. denied*, 519 U.S. 872 (1996) (citing *Kaminski v. Fairfield*, 216 Conn. 29, 33-34 (1990)).

Statute of Limitations
Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes
Fraser holds that there was no duty to warn under its facts, but leaves the door open to the possibility that the right set of facts might create such a duty. *See Fraser*, 236 Conn. at 627 (psychotherapists had no duty to exercise control to prevent outpatient who was not known to have been dangerous from inflicting bodily harm on victim who was neither readily identifiable nor within the foreseeable class of victims). The Supreme Court cited *Fraser* in a decision holding that a medical provider owes no duty to the plaintiff to advise or warn the physician's patient of the latent driving impairment associated with her medical condition. *Jarmie v. Troncale*, 306 Conn. 578, 625 (2012).

In attempting to plead this cause of action, consideration should be given to the Supreme Court's decisions in *Levin v. State*, 329 Conn. 701 (2018) (holding that the estate of a State psychiatric patient's mother, killed by the patient, does not have a cause of action against the State for failure to warn of the patient's violent tendencies, because the mother had no physician/patient relationship), and *Doe v. Cochran*, 332 Conn. 325 (2019) (holding that an identifiable third party may sue in common law negligence for alleged harm caused by a doctor's failure to provide accurate medical test reports to his patient).

1P-10 PUBLIC NUISANCE

To prevail in an action for a public nuisance, a plaintiff must establish the following elements:

1) A condition on the defendant's property with the natural tendency to create danger and inflict injury upon person or property;
2) that is of a continuing nature;
3) resulting from an unreasonable or unlawful use of the land; and
4) the existence of the nuisance proximately caused the plaintiff's damages.

Pestey v. Cushman, 259 Conn. 345, 355 (2002).

Statute of Limitations

While there is no appellate authority on point, most trial courts have held that the limitations period for a public nuisance claim is three years from the date of the act complained of. *See Bourque v. Town of Enfield*, 1994 WL 9967, at *2 (Conn. Super. Ct. Jan. 4, 1994) (citing Conn. Gen. Stat. § 52-577). However, the court in *Bourque* notes that if the alleged nuisance is based solely on a defendant's negligent—i.e., unreasonable—use of his land, then the shorter, two-year limitations period of Conn. Gen. Stat. § 52-584 might control. *Id.* at *1-2.

Note, however, that in the context of a private nuisance claim, the Appellate Court has recognized that the "nature of a nuisance as permanent or temporary has an important bearing on the running of the statute of limitations . . . . For limitations purposes, a permanent nuisance claim accrues when injury first occurs or is discovered while a temporary nuisance claim accrues anew upon each injury." (Citation omitted) *Rickel v. Komaromi*, 144 Conn. App. 775, 787 (2013).

> Generally, whether a nuisance is deemed to be continuing or permanent in nature determines the manner in which the statute of limitations will be applied . . . . If a nuisance is not abatable, it is considered permanent, and a plaintiff is allowed only one cause of action to recover damages for past and future harm. The statute of limitations begins to run against such a claim upon the creation of the nuisance once some portion of the harm becomes observable. *See* . . . Restatement (Second) of Torts § 899, [comment] d. A nuisance is deemed not abatable, even if possible to abate, if it is one whose character is such that, from its nature and under the circumstances of its existence, it presumably will continue indefinitely . . . . However, a nuisance

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> is not considered permanent if it is one which can and should be abated . . . . In this situation, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie, and the statute of limitation will begin to run at the time of each continuance of the harm."

Id. at 788.

Notes

A nuisance is a condition, "not the act or failure to act that creates it." *Fisk v. Town of Redding*, 164 Conn. App. 647, 653 (2016). Though "[a] public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence[,]" *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 369 (2001), an injury must flow from the existence of the nuisance to be causally connected to it. *Id.* at 370-71 (a public nuisance claim cannot stand if "harms are nonetheless too remote"). Creation of an absolute public nuisance makes the creator strictly liable, *Fisk*, 164 Conn. App. at 653, but it requires proof "that the condition or conduct complained of interfered with a right common to the general public[,]" and "that the defendants' intentional conduct, rather than their negligence, caused the condition deemed to be a nuisance." *Smith v. Town of Redding*, 177 Conn. App. 283, 287 (2017), *cert. denied*, 327 Conn. 996 (2018).

A plaintiff claiming absolute public nuisance, rather than negligent public nuisance, must prove in addition to the elements mentioned above: "(1) that the condition or conduct complained of interfered with a right common to the general public . . . and (2) that the alleged nuisance was absolute, that is, that the defendants' intentional conduct, rather than their negligence, caused the condition deemed to be a nuisance." *Fisk v. Town of Redding*, 190 Conn. App. 99, 107 (2019) (citing to *State v. Tippetts-McCarthy-Stratton*, 204 Conn. 177, 183 (1987)).

See also PRIVATE NUISANCE, *supra*.

1P-11 PUBLIC SIDEWALK—LIABILITY OF ABUTTING OWNER

Absent a specific statute or municipal ordinance imposing liability on the landowner, a landowner will not be liable for injuries to a third person caused by the defective condition of a sidewalk abutting the landowner's property. *Dreher v. Joseph*, 60 Conn. App. 257, 261 (2000) (citing *Willoughby v. New Haven*, 123 Conn. 446, 454 (1937)).

Several trial court decisions, however, have acknowledged the possibility of liability on the part of the abutting landowner, even in the absence of an

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authorizing statute or ordinance. These cases contemplate such liability where the property owner specifically invites persons to enter or exit the premises by using a sidewalk that it knows or should know is defective (where, for example, the only entrance to a business requires an invitee to cross the defective sidewalk). *See Rosadini v. Sullivan,* 2002 WL 318281 (Conn. Super. Ct. Feb. 11, 2002); *Major v. City of New London*, 2000 WL 728872 (Conn. Super. Ct. May 19, 2000). *See Goldstein v. Cornell Brooklawn, LLC*, 2014 WL 570458, at *4 (Conn. Super. Ct. Jan. 15, 2014) (citing numerous superior court decisions on the subject).

1Q-1 QUANTUM MERUIT

In order to establish a claim for quantum meruit, a plaintiff must allege that:

1) The defendant knowingly accepted the services of the plaintiff;
2) the defendant represented to the plaintiff that she would be compensated in the future;
3) that by such representation the defendant impliedly promised to pay the plaintiff for the services rendered;
4) that the services were performed; and
5) that payment was not made.

Pollansky v. Pollansky, 162 Conn. App. 635, 658 (2016).

Statute of Limitations

Generally, six years after the right of action accrues. Conn. Gen. Stat. § 52-576. *But see Maurer & Sheperd Joyners, Inc. v. Doherty*, 2002 WL 1331882 (Conn. Super. Ct. May 13, 2002), applying a four-year limitation period under the theory that "[w]here a party seeks equitable relief pursuant to a cause of action that would also allow that party to seek legal relief, concurrent legal and equitable jurisdiction exists, and the statute of limitations that would be applicable to bar the legal claim also applies to bar the equitable claim." *Maurer & Sheperd Joyners, Inc. v. Doherty*, 2002 WL 1331882, at *2 (Conn. Super. Ct. May 13, 2002) (citing *Dowling v. Finley Assocs., Inc.*, 49 Conn. App. 330, 335 (1998), *rev'd on other grounds*, 248 Conn. 364 (1999)).

Notes

"Literally translated, the phrase quantum meruit means as much as he deserved." *Gianetti v. Rutkin*, 142 Conn. App. 641, 647 (2013). "Quantum meruit is the remedy available to a party when the trier of fact determines that an implied contract for services existed between the parties, and that, therefore, the plaintiff is entitled to the reasonable value of services rendered." *Schreiber v. Conn. Surgical Grp., P.C.*, 96 Conn. App. 731,

737-38 (2006). Quantum meruit is "closely related" to unjust enrichment: Both "are noncontractual means of recovery in restitution. Quantum meruit is a theory of recovery permitting restitution in the context of an otherwise unenforceable contract. In contrast, recovery under a theory of unjust enrichment applies in the absence of a quasi-contractual relationship . . . . Because both doctrines are restitutionary, the same equitable considerations apply to cases under either theory. The terms of an unenforceable contract will often be the best evidence for restitution of the reasonable value of services rendered in quantum meruit, although sometimes the equities may call for a more restrictive measure." *Walpole Woodworkers, Inc. v. Manning*, 307 Conn. 582, 587 n.9 (2012). Thus, "[w]hile unjust enrichment focuses on the propriety of a payee or beneficiary retaining funds or a benefit, quantum meruit's primary focus is on the value of services rendered." *Parnoff v. Yuille*, 139 Conn. App. 147, 155 n.7 (2012), *cert. denied*, 307 Conn. 956 (2013).

See also UNJUST ENRICHMENT, *infra.*

Because "lack of a remedy under a contract is a precondition to recovery based on unjust enrichment or quantum meruit[,]" an express contract that governs the actions for which a party seeks relief is a bar a claim of quantum meruit. *Ed Lally & Associates, Inc. v. DSBNC, LLC*, 145 Conn. App. 718, 735-36, *cert. denied*, 310 Conn. 958 (2013) (citation omitted). Nonetheless, although "a party cannot be held liable simultaneously for breach of an express contract and an implied in law contract governing the same subject matter[,]" a judgment for a plaintiff on both breach of contract and quantum meruit is harmless if he "produced sufficient evidence to support the judgment under either count." *300 State, LLC v. Hanafin*, 140 Conn. App. 327, 331-32 (2013). On the other hand, the Supreme Court has held that the failure of a trial court to rule on each of several available alternative theories may present a final judgment problem. In *Meribear Prods., Inc. v. Frank*, 328 Conn. 709 (2018), the court held that claims of breach of contract and quantum meruit were legally inconsistent, so that a judgment on one established the trial court's decision on the other, resulting in a final judgment. But a claim for enforcement of a foreign judgment is not inconsistent with a quantum meruit claim, even where the foreign judgment and the quantum meruit claim stem from an alleged breach of the same contract. As a result, the trial court's failure to rule on each of those claims means that the judgment is not final.

The fact that res judicata and collateral estoppel bar a plaintiff's breach of contract claim does not also doom his quantum meruit claim. *See Pollansky*, 162 Conn. App. at 657. However, if the statutory cap on attorney's fees, *see* Conn. Gen. Stat. § 51-251c, bars an attorney's recovery for breach of contract, he also is barred from recovery in quantum meruit. *See Parnoff*, 163 Conn. App. at 277.

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1R-1 REPOSSESSION OF REAL PROPERTY

The elements of an action for repossession of real property are:

1) An ownership interest in real property by the plaintiff;
2) a contract leasing that property to the defendant;
3) a clause in the lease that requires the property to be used and occupied for some specific purpose; and
4) a violation of that clause entitling the plaintiff to take back possession of the property.

See World Properties, Inc. v. First National Supermarkets, Inc., 1998 WL 292973, at *3-4 (Conn. Super. Ct. June 3, 1998).

Statute of Limitations
See BREACH OF CONTRACT, supra.

Notes
"[U]se and occupancy clauses have usually been held to be restrictive rather than mandatory, at least in the absence of circumstances indicating a contrary intention." *World Properties, Inc. v. First National Supermarkets, Inc.*, 1998 WL 292973, at *3 (Conn. Super. Ct. June 3, 1998). Therefore, the success of claim for repossession by the owner-lessor generally will hinge on the particular language of the lease clause at issue and the intent of the parties in drafting that clause.

1R-2 RESCISSION

To prevail in an action for rescission of a contract, a plaintiff must establish:

1) A legal or equitable basis for rescinding the contract; and
2) that the plaintiff restored, or offered to restore, the defendant to his former condition as nearly as possible.

See Leisure Resort Technology, Inc. v. Trading Cove Assocs., 277 Conn. 21, 32 (2006) [1]; *Wallenta v. Moscowtiz*, 81 Conn. App. 213, 223, *cert. denied*, 268 Conn. 909 (2004) [1]; *Keyes v. Brown*, 155 Conn. 469, 476 (1967) [2].

Statute of Limitations
The statute of limitations for a rescission action depends on the claimed basis for the rescission. Many statutes that provide for rescission of a contract contain their own, specified limitations periods.

Notes
Rescission "is an alternative to damages in an action for breach of contract . . . . Rescission, simply stated, is the unmaking of a contract." *Little Mountains Enters., Inc. v. Groom*, 141 Conn. App. 804, 812 (2013) (ellipses

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in original). Though rescission is a remedy, not a cause of action, parties often plead it as the latter. *See, e.g., Da Silva v. Ortiz*, 2017 WL 2452990, at *3 (Conn. Super. Ct. May 9, 2017). However, there must be an independent basis to unmake the contract. *Little Mountains*, 141 Conn. App. at 812. Thus, "[f]raud in the inducement of a contract ordinarily renders the contract merely voidable at the option of the defrauded party, who also has the choice of affirming the contract and suing for damages . . . . If he pursues the latter alternative, the contract remains in force." *Whitney v. J.M. Scott Associates, Inc.*, 164 Conn. App. 420, 432 (2016) (ellipsis in original). Rescission requires the plaintiff to "restore or offer to restore the other party to his former condition as nearly as possible." *Leisure*, 277 Conn. at 41. There are numerous potential grounds for rescission of a contract, including mutual mistake, fraud, unconscionability, or certain statutory grounds. *See id.* at 32 (2006); *Wallenta*, 81 Conn. App. at 223; *Bainer v. Citicorp Mortgage, Inc.*, 236 Conn. 212, 213 (1996) (federal Truth in Lending Act).

If the basis is economic duress; *see Traystman, Coric & Keramidas v. Daigle*, 84 Conn. App. 843, 846 (2004); the would-be rescissioner must disavow the contract "with reasonable promptness once the duress has ceased." *Ace Equip. Sales, Inc. v. H.O. Penn Mach. Co.*, 88 Conn. App. 687, 698, *cert. denied*, 274 Conn. 909 (2005) (noting that courts have found waiver of rescission based on duress for delays of six months to two years).

1R-3 RESPONDEAT SUPERIOR

In order to plead a cause of action sounding in respondeat superior, the plaintiff must allege:

1) That the employee was acting within the scope of his employment;
2) that the employee was acting in furtherance of his employer's business; and
3) that the plaintiff suffered damage as a result.

Statute of Limitations

The Supreme Court has not specifically decided whether the limitation period applicable to the claim against the employee will also be applicable to bar the vicarious claim against the employer. Although a number of decisions from other jurisdictions apply that rule, the Supreme Court assumed without deciding in *Zielinski v. Kotsoris*, 279 Conn. 312, 319 n.9 (2006) that a vicarious liability claim could proceed even though the claim against the employee was time barred.

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Notes

Under the doctrine of respondeat superior, an employer is vicariously liable for the willful torts of his employee committed within the scope of the employment and in the furtherance of the employer's business. *Mullen v. Horton,* 46 Conn. App. 759, 764 (1997); *Pelletier v. Bilbiles,* 154 Conn. 544, 547 (1967). It must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered in order for the doctrine of respondeat superior to apply. *A-G Foods, Inc. v. Pepperidge Farm, Inc.*, 216 Conn. 200, 208 (1990). "Unless the employee was activated at least in part by a purpose to serve the principal, the principal is not liable." *Id.* at 209-10. For liability under 42 U.S.C. § 1983, "local governments are responsible only for their own illegal acts . . . . They are not vicariously liable under § 1983 for their employees' actions . . . . Plaintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury." *Edgewood St. Garden Apartments, LLC v. City of Hartford*, 163 Conn. App. 219, 231, *cert. denied*, 321 Conn. 903 (2016) (ellipses in original) (quoting *Connick v. Thompson*, 563 U.S. 51, 60 (2011)). Courts look to three factors to decide whether an employee's conduct was within the scope of his employment: whether it "(1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer." *Harp v. King*, 266 Conn. 747, 782-83 (2003). However, "[t]hat the servant disobeyed the orders of the master is never a sufficient defense. It must be shown further that he ceased to act for the master and in the course of his employment." *Son v. Hartford Ice Cream Co.*, 102 Conn. 696, 701 (1925). Moreover, acting in the course of one's employment "means while engaged in the service of the master, and it is not synonymous with the phrase 'during the period covered by his employment.'" *2 Nat. Place, LLC v. Reiner*, 152 Conn. App. 544, 560, *cert. denied*, 314 Conn. 939 (2014).

In 2016, the Supreme Court held that hospitals may be "vicariously liable under the doctrine of apparent agency" for the malpractice of nonemployee doctors. *Cefaratti v. Aranow*, 321 Conn. 593, 611 (2016). After clarifying the distinction between apparent agency and apparent authority, *see id.* at 605-09 (the former creates a principal-agent relationship, while the latter expands the scope of an agent's power), the Court adopt[ed] the following alternative standards for establishing apparent agency in tort cases. First, the plaintiff may establish apparent agency by proving that: (1) the principal held itself out as providing certain services; (2) the plaintiff selected the principal on the basis of its representations; and (3) the plaintiff relied on the principal to select the specific person who performed the services that resulted in the harm complained of by the plaintiff. Second, the plaintiff may establish

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apparent agency in a tort action by proving the traditional elements of the doctrine of apparent agency, as set forth in our cases involving contract claims, plus detrimental reliance. Specifically, the plaintiff may prevail by establishing that: (1) the principal held the apparent agent or employee out to the public as possessing the authority to engage in the conduct at issue, or knowingly permitted the apparent agent or employee to act as having such authority; (2) the plaintiff knew of these acts by the principal, and actually and reasonably believed that the agent or employee or apparent agent or employee possessed the necessary authority . . . and (3) the plaintiff detrimentally relied on the principal's acts, i.e., the plaintiff would not have dealt with the tortfeasor if the plaintiff had known that the tortfeasor was not the principal's agent or employee. *Id.* at 624-25. Though the Court "emphasize[d] that this standard is narrow, and we anticipate that it will be only in the rare tort action that the plaintiff will be able to establish the elements of apparent agency by proving detrimental reliance[,]" *id.* at 625, the Court did not limit its holding to hospitals, or to medical malpractice actions.

1R-4 RETURN OF STOLEN PROPERTY

See CONVERSION, *supra.*

1S-1 SEXUAL HARASSMENT

Claims for sexual harassment generally are covered under Connecticut's Fair Employment Practices Act, Conn. Gen. Stat. § 46a-60. Several trial court decisions have suggested, however, that the Act did not abrogate all common law rights and that a plaintiff could make common law sexual harassment claims, particularly where those claims are couched in traditional forms like negligence, recklessness and breach of contract. *See Stavena v. Sun Intern. Hotels, Ltd.*, 2000 WL 994884 (Conn. Super. Ct. July 3, 2000), and cases cited therein.

1S-2 SLANDER

See LIBEL, *supra.*

1S-3 SLANDER OF TITLE

To prove a claim for slander of title, a plaintiff must establish:

1) The publication of a false statement by the defendant that;
2) is derogatory to the plaintiff's title;

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3) was published with malice; and
4) caused special damages as a result of diminished value of the plaintiff's property in the eyes of third parties.

Gilbert v. Beaver Dam, 85 Conn. App. 663, 672-73 (2004), *cert. denied*, 272 Conn. 912 (2005).

Statute of Limitations
Three years from the date of the act complained of. Conn. Gen. Stat. § 52-577. *Chamerda v. Opie*, 185 Conn. App. 627, 650 (2018).

Notes
Slander of title is an intentional tort. *Bellemare v. Wachovia Mortg. Corp.*, 284 Conn. 193, 202-03 (2007). The publication *must* be false. *Id.* A refusal to speak where there may be a contractual obligation to do so cannot form the basis of a slander of title action because the "publication" element of a slander of title claim is unsatisfied. *Elm St. Builders, Inc. v. Enter. Park Condo. Ass'n, Inc.*, 63 Conn. App. 657, 670 (2001). *Bellemare* also notes that the titleholder must demand that the slanderer withdraw his impugnation on the title. *Bellemare*, 284 Conn. at 202. Thus, "[a]n allegation that one who was slandered demanded that the attachment be released, and the slanderer refused to do so, is a necessary element for a slander of title claim." *GMAC Mortg., LLC v. Tornheim*, 2011 WL 5084226, at *5 (Conn. Super. Ct. Oct. 6, 2011).

In addition, "the plaintiff must have an estate or interest in the property slandered. Pecuniary damages must be shown in order to prevail on such a claim." *Gilbert*, 85 Conn. App. at 672-73. By itself, "a clouded title" does not establish harm; there must be evidence that the cloud caused a pecuniary loss. *Jepsen v. Camassar*, 181 Conn. App. 492, 532, *cert. denied*, 329 Conn. 909 (2018).

Although there is no appellate authority on point, several superior court decisions differentiate between a common-law action for slander of title and a statutory action for slander of title under Conn. Gen. Stat. § 47-33j. *See, e.g., Fountain Pointe, LLC v. Calpitano*, 2012 WL 1435170, at *1-2 (Conn. Super. Ct. Apr. 2, 2012); *Marks v. Matuelvich*, 2005 WL 531724, at *13 (Conn. Super. Ct. Jan. 31, 2005). An action under § 47-33j has narrow parameters, *see ACTION FOR SLANDER OF TITLE*, *infra*, and entitles the prevailing party to costs and attorney's fees.

1S-4 SPOLIATION

See INTENTIONAL SPOLIATION OF EVIDENCE, *supra*.

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1S-5 STATE ACTION IN VIOLATION OF CONSTITUTIONAL RIGHTS OR IN EXCESS OF STATUTORY AUTHORITY

To prevail in a cause of action against the state for an action in violation of constitutional rights or in excess of statutory authority, a plaintiff must prove:

1) An action by the state through one of its officers or officials;
2) that violated the plaintiff's federal or state constitutional rights; or
3) that was in excess of statutory authority; and
4) that entitles the plaintiff to declaratory or injunctive relief.

Horton v. Meskill, 172 Conn. 615, 624 (1977) [1, 2, 3]; *Tuchman v. State*, 89 Conn. App. 745, 753, *cert. denied*, 275 Conn. 920 (2005) [1, 2, 3, 4]; *Braham v. Newbould*, 160 Conn. App. 294, 310 (2015).

Statute of Limitations

"[I]n analyzing whether a declaratory judgment action is barred by a particular statutory period of limitations, a court must examine the underlying claim or right on which the declaratory action is based." *Wilson v. Kelley*, 224 Conn. 110, 116 (1992). Most actions in this class are tort-based. Therefore, the appropriate limitations period is three years from the date of the act complained of. *See* Conn. Gen. Stat. § 52-577.

Notes

As a general matter, "the state cannot be sued without its consent . . . . We have also recognized that because the state can act only through its officers and agents, a suit against a state officer [or agent] concerning a matter in which the officer [or agent] represents the state is, in effect, against the state . . . . Therefore, we have dealt with such suits as if they were solely against the state and have referred to the state as the defendant." *Tuchman v. State*, 89 Conn. App. 745, 751, *cert. denied*, 275 Conn. 920 (2005) (quoting *Bloom v. Gershon*, 271 Conn. 96, 107 (2004)).

By statute, actions against the state seeking money damages must proceed through the office of the Claims Commissioner; "[o]therwise, the action must be dismissed for lack of subject matter jurisdiction under the doctrine of sovereign immunity." *Prigge v. Ragaglia*, 265 Conn. 338, 349 (2003); *see* Conn. Gen. Stat. §§ 4-141 to 4-165. Actions seeking declaratory or injunctive relief, on the other hand, constitute a "limited exception" to sovereign immunity, so long as one of two circumstances are present: (1) a clear "incursion upon constitutionally protected interests"; or (2) facts that show action(s) in excess of statutory authority. *Tuchman v. State*, 89 Conn. App. 745, 753-54, *cert. denied*, 275 Conn. 920 (2005).

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1S-6 STOLEN VEHICLE—LIABILITY OF OWNER FOR INJURIES TO THIRD PARTIES

The owner of a stolen motor vehicle will be liable to a third party who is injured by the vehicle while operated by the thief if:

1) The owner leaves his vehicle unattended or in such other condition;
2) that it is reasonably foreseeable that the vehicle will be stolen;
3) and that injury of the kind suffered by the plaintiff is likely to occur; and
4) the plaintiff is injured by such vehicle.

See Suglia v. National Credit System, Inc., 4 Conn. Cir. 133, 137 (1966) [1, 2]; *Consiglio v. Ahern,* 5 Conn. Cir. 304, 309-10 (1968) [3, 4].

Statute of Limitations
Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes
The Supreme Court discussed this cause of action, but did not identify specific elements, in *Smith v. Leuthner*, 156 Conn. 422, 425 (1968). Among the factors that are relevant to (though not necessarily dispositive of) the determination of a duty of care in this context are: (1) where and when the car was parked, (2) the proximity of that location to the defendant's business, (3) whether the motor was left running, (4) whether the defendant had a basis to know that a potential thief was in the area, and (5) any notable past history of automobile thefts or criminal activity in the area. *Id.; see Ramsay v. Camrac, Inc.*, 71 Conn. App. 314, 319, *cert. denied*, 261 Conn. 936 (2002) (issue of fact as to defendant's liability because lessee "left the . . . vehicle with the keys in the ignition, out of her sight, running, open and unattended in a crime-infested area of Waterbury"); *Osso v. MARC Auto.*, Inc., 2015 WL 7941151, at *6 (Conn. Super. Ct. Nov. 10, 2015); *Dontfraid v. Colony*, 2008 WL 5481695, at *1 (Conn. Super. Ct. Dec. 8, 2008) (granting summary judgment based on police report that vehicle was stolen and defendant reported it before accident).

1S-7 STRICT LIABILITY FOR ULTRAHAZARDOUS ACTIVITY

To prevail in a cause of action for strict liability due to an ultrahazardous activity, a plaintiff must prove:

1) The defendant engaged in an ultrahazardous activity;
2) that was the proximate cause of the plaintiff's injuries.

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Green v. Ensign-Bickford Co., 25 Conn. App. 479, 482-83, *cert. denied*, 220 Conn. 919 (1991).

Statute of Limitations

The statute of limitations for strict liability based on ultrahazardous activity is three years from the date of the act complained of. *See* Conn. Gen. Stat. § 52-577.

Notes

Imposition of liability without fault requires:

> an instrumentality capable of producing harm; circumstances and conditions in its use which, irrespective of a lawful purpose or due care, involve a risk of probable injury to such a degree that the activity fairly can be said to be intrinsically dangerous to the person or property of others; and a causal relation between the activity and the injury for which damages are claimed.

Caporale v. C.W. Blakeslee & Sons, Inc., 149 Conn. 79, 85 (1961). Connecticut categorizes a very limited class of activities as "ultrahazardous": blasting/explosive demolition; pile-driving; and working with high-tension electrical wires. *See Reboni v. Case Bros.*, 137 Conn. 501, 503 (1951); *Liss v. Milford Partners, Inc.*, 2008 WL 4635981, at *4 (Conn. Super. Ct. Sept. 29, 2008). However, there is nothing to prevent a court from expanding that class under the right circumstances. In that regard, many Connecticut cases cite the Restatement test for ultrahazardousness:

> The factors for a court to consider in determining whether an activity is abnormally dangerous are listed in § 520 of the Restatement as: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

Green, 25 Conn. App. at 485-86 (citing 3 Restatement (Second) of Torts, § 520).

"The rule of strict liability for engaging in ultrahazardous activities does not apply where the person harmed has reason to know of the risk that makes the activity ultrahazardous and takes part in it or brings himself within the area which will be endangered by its miscarriage." *Anchundia v. Northeast Utilities Service Co.* 2010 WL 2400154, at *4 (E.D. New York, June 11, 2010) (citing *Heaslip v. Mota's Sewer Service, LLC*, 2007 WL 3121763, at *4 (Conn. Super.

Ct. Oct. 15, 2007)). Operating a shooting range is not an ultrahazardous activity. *See Rokicki v. Putnam Fish & Game Club, Inc.*, 2012 WL 2334786, at *3-5 (Conn. Super. Ct. May 21, 2012). Likewise, "there is no strict liability for injuries caused by domestic animals under the common law of this state, even if the animal had known mischievous propensities." *Vendrella v. Astriab Family Ltd. P'ship*, 311 Conn. 301, 315 (2014) (citing *Bischoff v. Cheney*, 89 Conn. 1, 4 (1914)); *see Baca v. Ferriolo*, 2016 WL 3202534, at *4 (Conn. Super. Ct. May 18, 2016). Electric utility company activity connected with providing electric service is not ultrahazardous activity for the purposes of finding strict liability. *Rodriguez Feitosa v. K.T.I. Util. Constr. & Maint., LLC*, 2019 WL 994318 (Conn. Super. Ct. Jan. 24, 2019).

1S-8 STUDENTS—LIABILITY OF TEACHERS OR ADMINISTRATORS FOR HARM

While a teacher or administrator theoretically will be liable for harm caused by a student to a third party or another student under a simple negligence theory—i.e., where it is reasonably foreseeable that harm will result (*see Negligence*)—teachers and administrative personnel at public schools generally are protected by a limited governmental immunity. Connecticut law recognizes three exceptions to such immunity:

> The immunity from liability for the performance of discretionary acts by a municipal employee is subject to three exceptions or circumstances under which liability may attach even though the act was discretionary: first, where the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . second, where a statute specifically provides for a cause of action against a municipality or municipal official for failure to enforce certain laws . . . and third, where the alleged acts involve malice, wantonness or intent to injure, rather than negligence.

Colon v. Board of Education, 60 Conn. App. 178, 180-81, *cert. denied*, 255 Conn. 908 (2000) (citations omitted; internal quotation marks omitted).

The first exception, the "identifiable person—imminent harm" exception, has been the basis for several negligence claims. *See Doe v. Board of Educ. of City of New Haven*, 76 Conn. App. 296 (2003); *Purzycki v. Fairfield*, 244 Conn. 101, 108-09 (1998).

In the absence of an immunity claim, the Supreme Court has held that "it is beyond dispute that, as a general matter, a school having custody of

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minor children has an obligation to use reasonable care to protect those children from foreseeable harms during school sponsored activities . . ." *Munn v. Hotchkiss Sch.*, 326 Conn. 540, 555 (2017). In *Munn*, the Court responded to a question certified by the United States Court of Appeals for the Second Circuit by concluding that the public policy of Connecticut supports imposing a duty on a school to warn or protect students against the risk of a serious insect-borne disease when it organizes a trip abroad.

Statute of Limitations

Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

For an in-depth discussion of the potential liability of a school to its students, *see Munn v. Hotchkiss Sch.*, 326 Conn. 540 (2017). The Supreme Court "has construed the identifiable person-imminent harm exception to apply not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims . . . . Moreover, [the court has] established specifically that schoolchildren who are statutorily compelled to attend school, during school hours on school days, can be an identifiable class of victims." *Doe v. Board of Educ. of City of New Haven*, 76 Conn. App. 296, 301 (2003) (citing *Purzycki v. Fairfield*, 244 Conn. 101, 108-09 (1998)). For a discussion of the meaning of the term "imminent," *see Haynes v. City of Middletown*, 314 Conn. 303, 305 (2014).

1T-1 TENANT—UNLAWFUL POSSESSION (SUMMARY PROCESS)

In a summary process action based upon nonpayment of rent (or the passage of time), a landlord must prove:

1) On or about a certain date, the landlord and the tenant entered into an oral or written lease/rental agreement for a weekly/monthly/yearly term for use and occupancy of a certain premises;
2) the tenant agreed to pay an agreed-upon rent by a certain date;
3) the tenant took possession of the premises pursuant to the lease;
4) the tenant failed to pay the rent due under the lease by a certain date (or the lease has expired due to the passage of time);

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5) the landlord caused a proper notice to quit possession to be served on the tenant to vacate the premises on or before a certain termination date; and

6) although the time given in the notice to quit possession of the premises has passed, the tenant remains in possession of the premises.

Notes

See also Conn. Gen. Stat. § 47a-23(a)(1)(D).

1T-2 TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

"[I]n order to recover for a claim of tortious interference with business expectancies, the claimant must plead and prove that:

1) A business relationship existed between the plaintiff and another party;

2) the defendant intentionally interfered with the business relationship while knowing of the relationship; and

3) as a result of the interference, the plaintiff suffered actual loss."

Lawton v. Weiner, 91 Conn. App. 698, 706 (2005).

Statute of Limitations

The statute of limitations for tortious interference with business relationships is three years from the date of the act complained of. Conn. Gen. Stat. § 52-577. *See Maderia v. Northeast Utilities Service Co.,* 2004 WL 2943473, 38 Conn. L. Rptr. 286 (Conn. Super. Ct. 2004) (Quinn, J.).

Notes

"Not every act that disturbs a contract or business expectancy is actionable . . . . An action for intentional interference with business relations requires the plaintiff to plead and prove at least some improper motive or improper means . . . . The plaintiff . . . must demonstrate malice on the part of the defendant, not in the sense of ill will, but intentional interference without justification." *Daley v. Aetna Life & Cas. Co.*, 249 Conn. 766, 805-06 (1999) (citations and internal quotation marks omitted). A defendant does not have to prove that its actions were justified; under Connecticut law, "the employee bears the burden of alleging and proving lack of justification" on the part of the defendant." *Varley v. First Student, Inc.*, 158 Conn. App. 482, 503 (2015). However, a series of acts that are individually innocuous may form the basis for a tortious interference claim if, collectively, those acts further a tortious scheme. *See American Diamond Exchange, Inc. v. Alpert*, 101 Conn. App. 83, 92-93, *cert. denied*, 284 Conn. 901 (2007). For a useful discussion of the causation

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element of tortious interference in the context of the recording industry, *see Robinson v. Robinson*, 103 Conn. App. 69 (2007). Examples of improper conduct include "fraud, misrepresentation, intimidation or molestation . . . or that the defendant acted maliciously." *Reyes v. Chetta*, 143 Conn. App. 758, 764 (2013). Section 767 of the Restatement (Second) of Torts lists seven factors that are relevant to the impropriety of a defendant's motive or means: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." *Id.* (quoting 4 Restatement (Second), Torts § 767 (1979)).

"[A]n award of compensatory damages is not necessary to establish a cause of action for tortious interference as long as there is a finding of actual loss, and a finding of actual loss may support an award of punitive damages." *Rendahl v. Peluso*, 173 Conn. App. 66, 98 (2017) (quoting *Hi-Ho Tower, Inc. v. Com–Tronics, Inc.*, 255 Conn. 20, 34 (2000)). If a plaintiff claims lost profits as a result of the defendant's alleged interference, the plaintiff must prove the amount of damages with reasonable certainty. The amount of profit the tortfeasor made from the endeavor, for example, will not necessarily establish the amount of lost profits by the plaintiff. *American Diamond Exch., Inc. v. Alpert*, 302 Conn. 494 (2011). *See TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS*, *infra.* Likewise, the "mere possibility of . . . making a profit" is insufficient. *Villages, LLC v. Longhi*, 187 Conn. App. 132, 147 (2019) (requiring "a reasonable probability that the plaintiff would have entered into a contract or made a profit").

1T-3 TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Like its fraternal twin, *see TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS*, *supra*, tortious interference with contractual relations requires proof of:

1) A contractual or beneficial relationship;
2) the defendant's knowledge of that relationship;
3) intentional interference with the relationship that is tortious in nature; and
4) that the interference caused the plaintiff to suffer an actual loss.

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Loiselle v. Browning & Browning Real Estate, LLC, 147 Conn. App. 246, 259 (2013) (quoting *Appleton v. Bd. of Educ. of the Town of Stonington*, 254 Conn. 205, 212-13 (2000)).

Statute of Limitations
Three years from the date of the act complained of. *See* Conn. Gen. Stat. § 52-577.

Notes
Tortious interference with contractual relations is so nearly identical to tortious interference with business relationships that they may simply be different iterations of the same cause of action. For both, interference alone will not suffice; a plaintiff must prove "at least some improper motives or improper means . . . [such that the] interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself." *Loiselle*, 147 Conn. App. at 260. Likewise, for both, actual loss demands proof "that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit." *Coppola Const. Co. v. Hoffman Enterprises Ltd. P'ship*, 157 Conn. App. 139, 188, *cert. denied*, 318 Conn. 902 (2015).

A plaintiff does not have to "prove that a contract was in fact breached in order to recover on a claim of tortious interference." *Landmark Inv. Grp., LLC v. CALCO Const. & Dev. Co.*, 318 Conn. 847, 866 (2015). Indeed, "even a total repudiation of a contract may not terminate contractual relations when the nonbreaching party elects to insist on specific performance of the agreement, and specific performance is so ordered." *Id.*

1T-4 TREES—DAMAGE TO NEIGHBORING PROPERTY

1) One who maintains a tree on his property;
2) in such condition as to pose a danger to persons on neighboring land;
3) who knows or reasonably should know of such condition;
4) is liable for damages if a portion of the tree falls onto the adjoining property.

Cordeiro v. Rockville General Hosp., Inc., 2007 WL 2570406 (Conn. Super. Ct. Aug. 21, 2007).

Statute of Limitations
Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

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Notes

Conn. Gen. Stat. §§ 23-59 and 23-65(b), vesting exclusive control in a town tree warden over trees located in whole or in part in public roadways, precludes the liability of a private landowner for injuries resulting from such a tree falling in the roadway. *Muratori v. Stiles & Reynolds Brick Co.*, 128 Conn. 674-75 (1942). Where the town has timely notice of the unsafe condition of the tree, liability of the private landowner will be precluded even where the landowner previously took action which directly caused the deterioration of the tree. *Kondrat v. Town of Brookfield*, 97 Conn. App. 31, 39 (2006) (citing *Muratori*, 128 Conn. at 674). Although older cases only imposed liability for trees intentionally planted and maintained by the landowner, as opposed to trees naturally occurring on the property, modern law makes no such distinction.

1T-5 TRESPASS

The elements for a claim of trespass are:

1) Ownership or possessory interest in land by the plaintiff;
2) an intentional invasion, intrusion, or entry by the defendant affecting the plaintiff's exclusive possessory interest; and
3) direct injury to the plaintiff's land, or possessory interest therein.

Boyne v. Town of Glastonbury, 110 Conn. App. 591, 601, *cert. denied*, 289 Conn. 947 (2008).

Statute of Limitations

The statute of limitations for a claim of trespass is three years. Conn. Gen. Stat. § 52-577; *see Connecticut Light & Power Co. v. Tilcon Connecticut, Inc.*, 2009 WL 242356, at *3 (Conn. Super. Ct. Jan. 7, 2009). For a permanent trespass, a cause of action accrues from the date of the trespass, but for a continuing trespass, "each day a trespass of this type continues, a new cause of action arises," so the statute of limitations runs from each new instance. *Rickel v. Komaromi*, 144 Conn. App. 775, 788-89 (2013).

Notes

The same act, or series of acts, may form the basis for both a trespass claim and a nuisance claim. The primary distinction between the two is that a trespass involves an interference with a plaintiff's exclusive possessory interest in real property, while a nuisance involves an interference with a plaintiff's use or enjoyment of real property. *Boyne*, 110 Conn. App. at 599-600 (citing 4 Restatement (Second) of Torts, § 821D). However, the trespasser must act; in general, a mere failure to "remedy a situation, when under a duty to do so, that

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resulted in a property invasion[,]" does not trigger liability. *JMS Newberry, LLC v. Kaman Aerospace Corp.*, 149 Conn. App. 630, 641, *cert. denied*, 312 Conn. 915 (2014) (alleged failure to "remedy" grading of land that caused water to flow onto neighbor's property insufficient to establish a trespass). A "continuing trespass" is an exception because if a "defendant erects a structure or places something on or underneath the plaintiff's land, the defendant's invasion continues if he fails to stop the invasion and to remove the harmful condition." *Rickel*, 144 Conn. App. at 788.

Proof of an "exclusive possessory interest" requires proof of either actual, or constructive, possession of the real property subject to the trespass. *See Lin v. National Railroad Passenger Corp.*, 277 Conn. 1, 20 (2006) (actual possession requires proof of exclusive possession and control; constructive possession requires proof of ownership and that no one else had possession). An "entry upon property with permission of the owner, absent subsequent acts of abuse, is a defense to a claim of trespass[,]" *Geiger v. Carey*, 170 Conn. App. 459, 482 (2017), but does not have to be pled as a special defense. *See* Practice Book § 10-50. At least one trial court has held that "no action in trespass can be maintained against a tenant who was in lawful possession of the premises at the time when the conduct at issue occurred." *Caron v. URS Se., Inc.*, 2015 WL 5136074, at *4 (Conn. Super. Ct. July 30, 2015); *but see SVS II P'ship v. Patel*, 2010 WL 625801, at *3-4 (Conn. Super. Ct. Jan. 14, 2010) (holding commercial tenant liable for trespass). Both *Caron* and *SVS* are environmental contamination cases. The distinction between them—according to *Caron*, at any rate—is whether the contaminant migrates from the leasehold to the landowner's property. *See Caron*, 2015 WL 5136074, at *3. If only monetary damages are sought, then possession is measured at the time of the trespass; however, injunctive relief requires proof of continuing possession at the time when the injunction is to be entered. *Boyne*, 110 Conn. App. at 601-02. In addition, "the intrusion of the property [must] be physical and accomplished by a tangible matter. Thus, in order to be liable for trespass, one must intentionally cause some substance or thing to enter upon another's land." *Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 88 (2007). However, "[a] trespass may be committed on, beneath or above the surface of the earth, which includes soil, water, trees, and other growths . . . . A trespass need not be inflicted directly on another's realty, but may be committed by discharging foreign polluting matter at a point beyond the boundary of such realty." *Id.* (internal citation and quotation marks omitted).

1T-6 TRESPASS TO PERSONAL PROPERTY

Early common law referred to torts dealing with personal property as "trespass" to the property. Modern actions for damage resulting from such

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trespass are covered in Connecticut by the statutory right of Replevin (Conn. Gen. Stat. § 52-515) and by the common law action for Conversion. *See REPLEVIN OF GOODS, infra; CONVERSION, supra.*

1U-1 UNJUST ENRICHMENT

To establish a claim of unjust enrichment, a plaintiff must prove:

1) The defendant received a benefit from the plaintiff;
2) for which the defendant unjustly did not pay; and
3) the defendant's failure to pay for that benefit was to the plaintiff's detriment.

Weisman v. Kaspar, 233 Conn. 531, 550 (1995).

Statute of Limitations

There is a split of authority as to the governing statute of limitations for unjust enrichment. Some courts have held that because unjust enrichment is a "quasi-contract" action, the limitations period is six years. However, other courts have refused to apply any limitations period because of unjust enrichment's equitable character. *See Flaherty v. Borough of Naugatuck*, 2007 WL 586788, at *3 (Conn. Super. Ct. Feb. 2, 2007) (describing split and lack of controlling appellate authority). However, the special defense of laches might serve as a substitute for a statute of limitations defense.

Notes

Unjust enrichment, like quantum meruit, is a common-law principle of restitution that permits recovery in the absence of a valid contract between the parties. *See Marlin Broadcasting, LLC v. Law Office of Kent Avery, LLC*, 101 Conn. App. 638, 648 (2007). Because unjust enrichment is an equitable remedy, the existence of an adequate legal remedy for the same conduct—such as breach of contract—will bar an unjust enrichment claim. *See Russell v. Russell*, 91 Conn. App. 619, 637, *cert. denied*, 276 Conn. 924 (2005). Whether a defendant has unjustly enriched itself ordinarily is a question of fact on which a trial court has wide latitude. *See Horner v. Bagnell*, 324 Conn. 695, 708 (2017) ("we ordinarily engage in a deferential review of the trial court's conclusion that the defendant was unjustly enriched").

The crux of an unjust enrichment claim is that "in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." *Meaney v. Connecticut Hosp. Ass'n, Inc.*, 250 Conn. 500, 511 (1999). However, the "broad and flexible" nature of this remedy, *id.*, lends itself to abuse. As a result, a court must examine the circumstances and conduct of the parties in a given situation to determine a just result. *Id.* This is a "highly fact-intensive inquiry . . . ." *Gagne v. Vaccaro*,

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255 Conn. 390, 409 (2001). The enrichment does not have to be intentional; a benefit conferred on a defendant due to an error may support a claim for unjust enrichment. *See Hospital of Central Connecticut v. Neurosurgical Assocs., P.C.*, 139 Conn. App. 778, 788 (2012) (genuine issue of material fact whether defendant was unjustly enriched due to erroneous "payments to the defendant totaling $66,666.64 following the termination of the parties' contract"). In general, however, "for the benefit to be unjust, the defendant must have solicited it." *Levinson v. Lawrence*, 162 Conn. App. 548, 559 (2016). In addition, the fact that res judicata and collateral estoppel bar a plaintiff's breach of contract claim does not also doom his unjust enrichment claim. *See Pollansky v. Pollansky*, 162 Conn. App. 635, 657 (2016).

Nonetheless, it must be unjust for the defendant to retain the benefit and not merely detrimental for the plaintiff to have conferred it. *See Town of Stratford v. Wilson*, 151 Conn. App. 39, 50, *cert. denied*, 314 Conn. 911 (2014) (assuming *arguendo* that former employee's "'cash-out' was a detriment to the town, the town's claim on appeal founders because the town failed to prove that the defendant was unjustly benefited"). In the construction context, it is not unjust enrichment for a property owner to benefit from a subcontractor's labor and materials "absent fraud and provided that the property owner pays the general contractor in full for the subcontractor's services." *Nation Elec. Contracting, LLC v. St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 817 (2013).

1U-2 USE OF LAND CAUSING DAMAGE OR INTERFERENCE

A landowner who makes use of his land in such a way as to damage or interfere with the land of another will be liable under traditional theories of Negligence, Recklessness, Intentional Tort, Trespass and Nuisance, among others. For a discussion of the modern application of Trespass and Nuisance with respect to the flow of water from the property of one landowner causing damage to the property of another [a circumstance unique to land claims], *see Boyne v. Glastonbury*, 110 Conn. App. 591, 600-01 (2008); *Day v. Gabriele,* 101 Conn. App. 335, 345, *cert. denied*, 284 Conn. 902 (2007).

Notes

A plaintiff is required only to prove that the defendant's conduct was a proximate cause of the plaintiff's damages, the plaintiff need not allege or prove that the defendant in any given case owned or controlled the land that gave rise to an interference with the use and enjoyment of the plaintiff's property. *Ugrin v. Town of Cheshire*, 307 Conn. 364, 377 (2012).

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1V-1 VENEREAL DISEASE—NEGLIGENT TRANSMISSION

1) A person who knows or reasonably should know that he has a sexually transmittable disease;
2) has a duty to warn or to take steps to avoid contact with others;
3) and if such person fails to warn or to take reasonable steps to prevent contact;
4) he will be liable for damage resulting from such contact.

Cerniglia v. Levasseur, 1995 WL 500673 (Conn. Super. Ct. Aug. 15, 1995).

Statute of Limitations

Two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584; *see Burke v. Klevan*, 130 Conn. App. 376, 379, *cert. denied*, 302 Conn. 936 (2011), *cert. denied*, 132 S. Ct. 1637 (2012) (plaintiff's claims against ex-girlfriend for infecting him with HPV and genital herpes "accrued no later than the day that he was informed of her infections").

Notes

A cause of action will also flow from intentional or reckless exposure, and may be made against a person who indirectly exposed the plaintiff to the disease, if it was reasonably foreseeable that such exposure would result from the defendant's action. *See Cerniglia*, 1995 WL 500673, and cases cited therein. At least one superior court has held that the failure of an individual with a venereal disease to warn or take steps to avoid contact with his spouse is a relevant factor with respect to the cause for the breakdown of a marriage in a dissolution action. *Craig v. Craig*, 2006 WL 3860828 (Conn. Super. Ct. Dec. 14, 2006).

1V-2 VEXATIOUS LITIGATION (COMMON-LAW)

To prevail on a claim of common-law vexatious litigation, a plaintiff must establish:

1) That a civil action was commenced against him;
2) without probable cause;
3) with malice; and
4) that the action was terminated in the plaintiff's favor.

Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, 281 Conn. 84, 94 (2007).

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Statute of Limitations
The statute of limitations for a claim of common-law vexatious litigation is three years. Conn. Gen. Stat. § 52-577; *see Gianetti v. Greater Bridgeport Individual Practice Ass'n*, 2005 WL 2078546 (Conn. Super. Ct. July 21, 2005).

Notes
Though vexatious litigation requires commencement of a civil action, the defendant does not have to be the commencer. *See Diamond 67, LLC v. Oatis*, 167 Conn. App. 659, 681-82, *cert. denied*, 323 Conn. 927 (2016) (citing *Bhatia v. Debek*, 287 Conn. 397 (2008)). It is enough if the defendant vexatiously began, continued, or procured civil proceedings before a tribunal "that has power to take action adversely affecting the legally protected interests of the other." *Diamond 67*, 167 Conn. App. at 681.

The *sine qua non* of probable cause "is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." *Byrne v. Burke*, 112 Conn. App. 262, 274, *cert. denied*, 290 Conn. 923 (2009). The standard for probable cause is the same if the defendant is an attorney or law firm or a lay person. *See Enbalmers' Supply Co. v. Giannitti*, 103 Conn. App. 20, 34, *cert. denied*, 284 Conn. 931 (2007). While "[m]alice may be inferred from lack of probable cause . . . [t]he want of probable cause, however, cannot be inferred from the fact that malice was proven." *Falls Church*, 281 Conn. at 94. The existence of probable cause constitutes "absolute protection" against a vexatious litigation claim, *id.*, but the absolute immunity for statements made during litigation does not bar a subsequent vexatious litigation suit. *See Villages, LLC v. Longhi*, 166 Conn. App. 685, 695 n.7, *cert. denied*, 323 Conn. 915 (2016).

A claim for vexatious litigation does not accrue until the entire underlying suit has terminated in the plaintiff's favor. *See Scalise v. E. Greyrock, LLC*, 148 Conn. App. 176, 184, *cert. denied*, 311 Conn. 946 (2014). Even if a plaintiff has triumphed on some counts in the underlying suit, he cannot commence a vexatious litigation action piecemeal. *See id*. In addition, "[a]dvice of counsel is a complete defense to an action of malicious prosecution or vexatious suit[.]" *Diamond* 67, 167 Conn. App. at 689. To establish this defense, a defendant must prove that he "instituted his civil action relying in good faith on such advice, given after a full and fair statement of all facts within his knowledge, or which he was charged with knowing. The fact that the attorney's advice was unsound or erroneous will not affect the result." *Id.* at 690; *see Verspyck v. Franco*, 274 Conn. 105, 112 (2005) (defendant has burden of proof).

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A plaintiff may recover attorney's fees in a common-law vexatious litigation action, but only if there is a finding "*both* [1] that the litigant's claims were entirely without color *and* [2] that the litigant acted in bad faith." *Lederle v. Spivey*, 174 Conn. App. 592, 602 (2017) (emphasis in original).

1V-3 VICARIOUS LIABILITY

A claim for vicarious liability requires proof that:

1) An agent of the defendant;
2) committed a tortious act; and
3) that harmed the plaintiff.

See Cefaratti v. Aranow, 321 Conn. 593, 607-10 (2016).

Statute of Limitations

The Supreme Court has not specifically decided whether the limitation period applicable to the underlying claim will also be applicable to bar the vicarious claim against the employer. Although a number of decisions from other jurisdictions apply that rule, the Supreme Court assumed, without deciding in *Zielinski v. Kotsoris*, 279 Conn. 312, 319 n.9 (2006), that a vicarious liability claim could proceed even though the claim against the employee was time barred.

Notes

Under Connecticut law, the vicarious liability of one party for the tortuous conduct of another party may arise under several common law and statutory theories; most involve an agency relationship between the parties. Though actual agency is the most common basis for vicarious liability, "both the doctrine of apparent authority and the doctrine of apparent agency may be applied in tort actions." *Cerfaratti*, 321 Conn. at 609. "The doctrine of apparent authority expands the authority of an actual agent, while the doctrine of apparent agency creates an agency relationship that would not otherwise exist." *Id.* at 601 n.6.

The most common application of the vicarious liability doctrine is in the employment context. *See RESPONDEAT SUPERIOR*, *supra*. However, vicarious liability also arises in the context of the family car doctrine, *see* Conn. Gen. Stat. § 52-182; in a presumption of agency against the owner of a motor vehicle, *see* Conn. Gen. Stat. § 52-183, and in certain situations involving independent contractors, where the work being performed is inherently dangerous or the general contractor has specifically reserved control over a certain portion of the work, *see generally Gazo v. City of Stamford*, 255 Conn. 245, 256-57 (2001); *Pelletier v. Sordoni/Skanska Constr. Co.*, 286 Conn. 563, 591-92 (2008).

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There is a quirky exception for intermediary non-liability under the family car doctrine: If a family member with general authority to use the family car lends it to a third party, and that third party injures someone while driving it, the owner may be liable under the family car doctrine. *See Cima v. Sciaretta*, 140 Conn. App. 167, 176, *cert. denied*, 308 Conn. 912 (2013). Nonetheless, the trial court does *not* have to direct a verdict for the owner of the car merely because it directs a verdict for the family member who lent it to the third party. *See id*. at 177-78.

The federal Graves Amendment, 49 U.S.C. § 30106, pre-empts Connecticut law and prohibits claims of vicarious liability against car rental companies for injuries resulting from the operation of their vehicles by lessees. *Rodriguez v. Testa*, 296 Conn. 1 (2010). As a result, insurers issuing automobile liability policies in Connecticut may no longer exclude uninsured and underinsured motorist coverage where the uninsured/underinsured vehicle is owned by a car rental company. *Tannone v. Amica Mut. Ins. Co.*, 329 Conn 665 (2018).

1V-4 VOLUNTEERS

A person who has no duty but nevertheless voluntarily undertakes to provide assistance to another will be responsible for negligently providing the assistance. *See Bohan v. Last*, 236 Conn. 670, 679 (1996); 2 Restatement (Second) Torts § 442B (1965).

It is not clear whether Connecticut recognizes a cause of action against a party creating an emergency situation for injuries caused to volunteers whose involvement could reasonably be foreseen.

Notes
Conn. Gen. Stat. § 52-557b exempts certain classes of emergency and school personnel from civil liability for negligence in rendering emergency medical assistance.

The "firefighter's rule" prohibits claims for premises liability against a property owner by firefighters or police, etc., who are injured while responding to an emergency. In 2017, the Supreme Court held, however, that the firefighter's rule does not bar claims sounding in ordinary negligence. *Sepega v. Delaura*, 326 Conn. 788, 814-15 (2017). In light of the thorough and thoughtful analyses offered by both the majority and the dissent in *Sepega*, and the similar analysis in *Lund v. Milford Hosp., Inc.*, 326 Conn 846 (2017), released the same day, it is likely that the scope and substance of the firefighter's rule will again be considered by the Court in the not-too-distant future.

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1W-1 WARRANTY OF HABITABILITY

A landlord may be held liable for defects in a rented property that:

1) Are the result of faulty design or disrepair;
2) existed at the beginning of the tenancy;
3) were not discoverable by the tenant on reasonable inspection; and
4) were known, either actually or constructively, to the landlord.

Johnson v. Fuller, 190 Conn. 552, 558 (1983).

Statute of Limitations
Six years after the right of action accrues. Conn. Gen. Stat. § 52-576(a). *See Amoco Oil Co. v. Liberty Auto & Electric Co.*, 262 Conn. 142, 153 (2002) for a discussion of when the right of action accrues. (Action accrues "at the time the breach of contract occurs . . . when the injury has been inflicted.")

Notes
A warranty of habitability generally relates to issues of whether rented premises are untenantable so that the obligation to pay rent is suspended. *Johnson v. Fuller*, 190 Conn. 552 (1983); *Thomas v. Roper*, 162 Conn. 343 (1972). "In general, there is no implied warranty of habitability given to a tenant, but rather, he takes the premises as he finds them and bears the risk of any defective conditions which are within the area under his exclusive possession and control." *Johnson v. Fuller*, 190 Conn. 552, 558 (1983) (quotation marks omitted).

1W-2 WASTE OF ESTATE

The elements of the ancient action for waste of estate are:

1) Damage to a reversionary estate;
2) by a tenant;
3) while the tenant possessed and occupied the estate.

See Randall v. Cleaveland, 6 Conn. 328 (1827).

Statute of Limitations
The statute of limitations for a claim of waste of estate is three years. Conn. Gen. Stat. § 52-577.

Notes
Only a person with a reversionary interest in the allegedly damaged estate may bring an action for waste of that estate; a remainderman may not. *See Wilford v. Rose*, 2 Root 20 (Conn. 1793).

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1W-3 WRIT OF ERROR

The writ of error is a common law action that provides for review of a trial court decision by the Supreme Court, generally on matters that would not be reviewable by appeal. *See* Conn. Practice Book § 72-1. The writ specifically applies to:

1) A decision binding on an aggrieved nonparty;
2) a summary decision of criminal contempt;
3) a denial of transfer of a small claims matter to the regular docket; and
4) as otherwise necessary or appropriate in aid of the court's jurisdiction and agreeable to the usages and principles of law.

Statute of Limitations

Although not subject to a traditional limitations period, the writ of error must be filed within 20 days of the date of notice of the order for which review is sought. Conn. Practice Book § 72-3.

Notes

The most important modern use of the writ of error is to review trial court orders against non-parties, for example, with respect to discovery orders. *See Woodbury Knoll, LLC v. Shipman & Goodwin, LLP*, 305 Conn. 750 (2012) (writ of error proper method to obtain review of clear and definite discovery order against non-party law firm). Where the question can be reviewed on appeal, the writ of error generally is not appropriate. *See State v. One or More Persons Over Whom Courts Jurisdiction Has Not Yet Been Invoked*, 107 Conn. App. 760 (2008). The same rule applies where the question can be reviewed by writ of habeas corpus. *State v. Alegrand*, 130 Conn. App. 652 (2011) (citing *State v. Das*, 291 Conn. 356, 371 (2009)).

1W-4 WRONGFUL BIRTH

The elements for a claim of wrongful birth are:

1) The requisite standard of medical care for the defendant in treating a pregnant plaintiff;
2) a breach of that standard of care;
3) a causal relationship between that breach and the birth of a child to the plaintiff; and
4) damages to the plaintiff as a result of that birth.

See Quinn v. Blau, 1997 WL 781874, at *2 (Conn. Super. Ct. Dec. 12, 1997).

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Statute of Limitations
Because an action wrongful birth is sub-class of medical malpractice, the statute of limitations is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes
A wrongful birth action is one brought by the parents of a born child in their own right, as distinct from a wrongful life action, which is brought on behalf of the child. *Quinn v. Blau*, 1997 WL 781874 at *2 (Conn. Super. Ct. Dec. 12, 1997). In essence, wrongful birth is a species of a lost chance malpractice claim. The usual factual scenario in which such a claim arises is when a doctor fails to perform proper/required tests on a pregnant plaintiff that would have revealed potential problems with the fetus, or to inform the plaintiff of the results of those tests, and thereby negligently denies the plaintiff the opportunity to make an informed decision as to whether to end the pregnancy. *Quinn v. Blau*, 1997 WL 781874, at *3 (Conn. Super. Ct. Dec. 12, 1997).

The usual measure of damages for such a claim is the resultant "ordinary costs of raising a child until maturity," along with any increased cost of care for the child due to the physical deficiencies that proper testing would have revealed. *Ochs v. Borrelli*, 187 Conn 253, 258 (1982). Damages for emotional distress also are recoverable in a wrongful birth action. *See Bujak v. State*, 2014 WL 6804595, at *4 (Conn. Super. Ct. Oct. 24, 2014); *Rich v. Foye*, 2007 WL 2702809 (Conn. Super. Ct. Aug. 28, 2007).

1W-5 WRONGFUL DISCHARGE/TERMINATION

In order to establish a claim for wrongful discharge/termination, a plaintiff must prove the following elements:

1) Termination from at-will employment;
2) that violates public policy.

Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 475, 479-80 (1980).

Statute of Limitations
The statute of limitations for a claim of common-law wrongful discharge/termination is three years. Conn. Gen. Stat. § 52-577

Notes
A *Sheets*-based cause of action stands as a very narrow exception to Connecticut's general rule of employment at-will (in the absence of an express or implied contract requiring just cause for the discharge). *See generally Coehlo v. Posi-Seal Int'l, Inc.*, 208 Conn. 106 (1988). The Supreme Court has held

that a wrongful termination claim against an Archdiocese is barred by the ministerial exception to the court's subject matter jurisdiction. *Dayner v. Archdiocese of Hartford*, 301 Conn. 759, 787 (2011). If the legislature has provided a remedy, "[a] common-law approach to a claim of wrongful discharge is barred as long as [that] remedy . . . address[es] the particular public policy concerns." *Campbell v. Town of Plymouth*, 74 Conn. App. 67, 76 (2002).

For example, the legislature has provided a statutory remedy for nonpayment of earned wages. *See* Conn. Gen. Stat. §§ 31-71a, *et seq.*; *WAGE COLLECTION ACTION*, *infra*. Therefore, "an employee cannot use the nonpayment of wages that have not accrued as the basis for a wrongful discharge claim." *Geysen v. Securitas Sec. Servs. USA, Inc.*, 322 Conn. 385, 409 (2016) (affirming judgment striking wrongful discharge claim based on refusal to pay commissions).

1W-6 WRONGFUL LIFE

The elements for a claim of wrongful life are:

1) The requisite standard of medical care for the defendant in treating a pregnant plaintiff;
2) a breach of that standard of care;
3) a causal relationship between that breach and the birth of a child to the plaintiff; and
4) damages to the child as a result of being born.

Statute of Limitations

Because an action wrongful life is sub-class of medical malpractice, the statute of limitations is two years from the date the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and in no event more than three years from the date of the act complained of. Conn. Gen. Stat. § 52-584.

Notes

"Wrongful life denotes a cause of action brought by the infant itself on allegations that its very existence is wrongful and that 'but for' the defendant's misfeasance it would not exist." *Kyle & Donnelly v. Candlewood Obstetric-Gynecological Assocs., P.C.*, 1992 WL 134448, at *1 (Conn. Super. Ct. June 8, 1992). Unlike wrongful birth, which provides a potential remedy for the parents of a child born with physical or other problems, wrongful life provides a potential remedy for the child herself.

Aside from its inherent philosophical and moral complexities, extreme caution is warranted with regard to wrongful life as a legal cause of action.

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There is currently no appellate authority in Connecticut discussing the viability of wrongful life claims; and while there are two trial court decisions allowing wrongful life actions to proceed, the more recent trial court decisions are hostile. *Bujak v. State*, 2010 WL 625836, at *1 (Conn. Super. Ct. Jan. 15, 2010) (action for wrongful life "is not permissible under Connecticut law"); *See Rich v. Foye*, 2007 WL 2702809, at *13 (Conn. Super. Ct. Aug. 28, 2007) (striking wrongful life count and discussing split of trial court authority). Moreover, a substantial majority of courts of other states that have considered wrongful life have refused to recognize it. *See Rich v. Foye*, 2007 WL 2702809, at *12 (Conn. Super. Ct. Aug. 28, 2007). As such, any such claim will rest on very thin ice in any Connecticut court.

In *Vasquez v. Roy*, 2018 WL 3403410 (Conn. Super. Ct. June 18, 2018), defendants moved for summary judgment on the plaintiff's wrongful life claim stemming from the defendants' unsuccessful attempt to terminate a pregnancy by using unauthorized drugs. Defendants claimed that wrongful life was not a cognizable action. In denying summary judgment, the court ruled that the claim was not one for wrongful life, but instead sounded in "prenatal tort." The difference, according to the court, was that the infant was seeking damages because defendants' actions prevented him from having a life free from disability, not because they caused the pregnancy to proceed rather than be terminated. Connecticut clearly recognizes that "[a]n infant who has sustained injuries prior to birth, whether the infant is viable or not at that time, has a cause of action in negligence against the alleged wrongdoer." *In re Valerie D.*, 25 Conn. App. 586, 590 (1991), *rev'd on other grounds*, 223 Conn. 492 (1992).

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