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Elizabeth Baruno et al. v. John F. Slane, Jr. et al.

FSTCV085008010S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

2013 Conn. Super. LEXIS 1300

June 6, 2013, Decided
June 6, 2013, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] A. WILLIAM MOTTOLESE, Judge Trial Referee.

OPINION BY: A. WILLIAM MOTTOLESE

OPINION

MEMORANDUM OF DECISION

The co-plaintiffs (hereinafter "the plaintiffs" or "Barunos"), Elizabeth (hereinafter "Elizabeth") and Gerald A. (hereinafter "Gerald") Baruno allege in their complaint that the defendants John F. Slane (hereinafter "Slane") and his law firm, Heagney, Lennon & Slane, engaged in legal malpractice when Slane represented them in connection with certain activities that occurred on property at 36 Montgomery Lane, Greenwich adjacent to their home at 38 Montgomery Lane. Such legal representation required Slane to institute legal proceedings "concerning the adverse possession claim which my neighbors have made against me."[1] The retainer agreement memorializing the engagement was signed by Gerald Baruno on February 1, 2006 although Gerald had conveyed his interest in the property to Elizabeth in 1997.

1 Language taken from the retainer agreement between the parties.

On February 6, 2006, 36 Montgomery Lane was owned and occupied by Jianhua Cai Tsoi and Yvonne Chan Tsoi (hereinafter "Tsois").[2] The Tsoi property was conveyed to them subject to the following. "Provisions and conditions set forth in a warranty deed [*2] from Unique Holdings, Inc., to Carlo J. Scarpelli and Patricia B. Scarpelli dated July 6, 1984 and recorded in Book 1407 at Page 223 of the Greenwich Land Records." The "provisions and conditions" referred to in this deed read as follows:

2 On May 16, 2006 the Tsois transferred ownership of the property to 36 Montgomery Lane, LLC which transfer has no relevance to the present case.

"8. This deed is given and accepted subject to the following provisions and conditions, which are imposed for the benefit of the Grantor and its successors and assigns as the owners of its retained premises on Montgomery Lane, shown as Lot No. 1 on the aforesaid

map, and which shall bind and be enforceable against the Grantees and their heirs, executors, administrators, and assigns as the owners of Lot No. 2 and Lot No. 3 as shown on said map (since Parcel Y is being incorporated into said Lot No. 2, and said Parcel X is being incorporated into said Lot No. 3).

No dwelling, outbuilding, pool, court, or other structure or driveway or other man made improvements or plantings shall be placed upon either Parcel X or Parcel Y, nor shall either parcel be used for driveway or accessway purposes, provided, however, [*3] that the Grantees may clear dead trees, shrubs and may place natural plantings upon the northerly portion of Parcel Y (as distinguished from the southerly portion of Parcel Y, which is the 20-foot-wide strip running generally northeast of Montgomery Lane). The Grantor reserves the right to mow, plant and otherwise maintain the said southerly portion of parcel Y, but shall have no obligation to do so, and the Grantor further reserves the right to mow and maintain such portion, if any, of Parcel X as lies generally westerly of the dividing line between Parcel X and Lot No. 1 as shown on said map, and generally easterly of the brook which runs generally between Lot No. 1 and the shared driveway located upon Lot No. 3 as shown on said map.

The Grantee covenants and agrees that Parcel X will henceforth form a part of Lot No. 3 as shown on said map, and will not be sold or conveyed except as a portion of said Lot No. 3, and that Parcel Y will henceforth form a part of Lot No. 2 as shown on said map, and will not be sold or conveyed except as a portion of Lot No. 2.

These provisions shall run with the land in perpetuity, and shall be enforceable by the Grantor, its successors and assigns as [*4] the owners of Lot No. 1 as shown on said map, and the Grantor, its successors and assigns shall have the right to maintain an action at law or in equity to enjoin or remove any prescribed activity or structure within said parcel X and/or parcel Y, and the legal fees and other expenses associated with enforcing these restrictions shall be borne and paid by the Grantees, their heirs, administrators, executors and assigns as the owner or owners of the restricted Parcels X and Y, or either of them with respect to which enforcement is sought.

These restrictions as to X and Y are not to be deemed to create any adverse use in Unique Holdings, Inc., its successors and assigns."

The deed into the Barunos contains the following provision:

"Together with the right to enforce provisions and conditions set forth as Item #8 in said deed from Unique Holdings, Inc., to Carlo J. Scarpelli and Patricia B. Scarpelli dated July 6, 1984 and recorded in the Greenwich Land Records in Book 1407 at Page 223.

SUBJECT to Covenants, Restrictions and Easements of Record."

The Tsoi property consists of a 1.1560-acre lot improved with a dwelling and shed outbuilding that as of February 1, 2006 was served by a common [*5] driveway which ran along the westerly side of the Baruno property and formed a fork, with the easternmost tine going on to serve the Tsoi dwelling house. The southerly portion of the property consists of parcel Y as shown on Map 6068 on file in the Greenwich Land Records (Exhibit 5). Parcel Y itself consists of 12,622.11 square feet and is shaped in the form of a scythe with the blade head comprising 7,222 square feet and the handle comprising 4,630 square feet. The Baruno property is identified as Lot No. 1 and the Tsoi property as Lot No. 2 on that map.

At or about February 1, 2006 the plaintiffs learned that the Tsois planned to construct a driveway on parcel Y to serve a new dwelling which would be located on the blade head portion of Parcel Y and thereupon observed machinery beginning to remove trees and brush preparatory to excavation for the construction of a driveway. Up to that point the plaintiffs had for many years utilized the handle portion of parcel Y as a dumping ground for leaves and grass clippings. Believing that the plaintiffs may have acquired some rights to parcel Y from the Tsois by long-term use, Gerald consulted Slane to ascertain what legal action could be taken [*6] to stop these activities. Not knowing what rights the plaintiff had in parcel Y Gerald suggested to Slane that perhaps the driveway construction could be stopped if Slane were able to prove that Elizabeth had acquired "squatters' rights" to the parcel. Gerald did not recall whether he actually used the words "adverse possession" in addition to squatters' rights. He also told Slane that "he was under the impression" that nothing could be built on parcel Y. Slane advised him that he thought that he could prevent such a use on the basis of an adverse possession claim. Neither Gerald nor Elizabeth mentioned the restrictive covenant to him at that time. The next day, Gerald

delivered to Slane's office, Exhibit H which is a survey map which the plaintiffs had prepared in connection with a swimming pool which they planned to install on their property. That survey contained the following note #2 which reads in pertinent part:

"Reference is made to Deed Book 2990 page 0014 and record Map number 6068, including any and all easements, common accessways, restrictive covenants, maintenance agreements or restrictions on file at the Greenwich Land Records Office." The plaintiffs did not provide Slane [*7] with a copy of their deed or title insurance policy. This survey also contained a note referring to the handle portion of parcel Y, as "parcel 'A' maintained and claimed by Elizabeth Baruno." Shortly thereafter Gerald advised Slane to contact Patricia Scarpelli who with her husband Carlo was one of the developers of the three-lot subdivision shown on Map 6068 and a predecessor in title to both Baruno and Tsoi. In a conversation with Scarpelli, Slane was told that "there are permissions in the deed." This prompted Slane to visit the Greenwich land records in search of "some sort of license" to use parcel Y. He found no such license in the land records. He did not remember whether he looked at any of the relevant deeds but in any event believes that it was not necessary to do so because he was proceeding solely on the basis of an adverse possession claim.

On February 17, 2006, Slane commenced an action against the Tsois in Superior Court on behalf of Elizabeth seeking a temporary and permanent injunction against construction of the driveway and related improvements on Parcel Y and a judgment determining that Elizabeth was sole and exclusive owner of the handle portion of parcel Y. The [*8] sole legal basis for the action was a claim of adverse possession. No mention was made in the complaint of the above restrictive covenant. The court denied the application for temporary injunction and the case proceeded to the discovery phase. At Elizabeth's deposition both she and Slane discovered the existence of the restrictive covenant and on that basis Slane sought to amend the complaint on May 15, 2007 by adding a count seeking enforcement of the restrictive covenant. Before that motion could be acted upon, Attorney Fred Rickles of the firm of Gilbride, Tusa, Last & Spellane entered an in-lieu-of appearance for Slane and proceeded to file his own amended complaint which alleged violation of the restrictive covenant, followed by a new application for temporary injunction and other relief including acquisition of title by adverse possession.

On May 28, 2008 the Barunos and Tsois entered into a settlement agreement which ultimately obligated the Tsois to pay the Barunos the sum of $250,000 by May 30, 2010 and to perform certain corrective and restorative work on parcel Y. The work requirements were specified in a mandatory injunction issued by the court on that date which ordered [*9] completion of all work by August 30, 2008 (Karazin, J.) To date, the Tsois have paid only $17,000 of that sum and have performed none of the corrective/restorative work.[3] The parties have stipulated that thereafter the Tsois petitioned for bankruptcy and thereafter no further effort was made to enforce the contempt order. Eventually the bankruptcy petition was dismissed.

3 On November 28, 2008 the Tsois were found in contempt of court (Karazin, J.) for willful violation of that order. The court directed that all previously ordered work be completed by December 31, 2008 under penalty of $500 per day.

Liability

The plaintiff complains that Slane was negligent when he failed to ascertain the existence of the restrictive covenant by examining the interrelated deeds in the Greenwich Land Records and as a result, failed to predicate his application for injunctive relief thereon. The plaintiff further alleges that had Slane taken such action in a timely fashion he would have obtained injunctive relief against the improvements which were made in pacel Y, with or without monetary damages, and the plaintiff's property would have avoided the substantial injury which it has suffered as a result. The [*10] defendants deny that Slane's conduct was negligent and assert a special defense of comparative negligence.

"'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 . . .' (Internal quotation marks omitted.) *Dixon v. Bromson & Reiner, 95 Conn.App. 294, 297, 898 A.2d 193 (2006)*; see also *Davis v. Margolis, 215 Conn. 408, 415, 576 A.2d 489 (1990)* (alternate citations omitted). The elements of a legal malpractice action are (1) the

existence of an attorney-client relationship, (2) the attorney's wrongful act or omission; (3) causation; and (4) damages. *Vona v. Lerner, 72 Conn.App. 179, 187-88, 804 A.2d 1018 (2002)*, cert. denied, *262 Conn. 938, 815 A.2d 138(2003)*." *Ackerly and Brown, LLP v. Smithies, 109 Conn.App. 584, 586 n.2, 952 A.2d 110 (2008)* Only elements 2, 3 and 4 are involved in the present case.

"It is axiomatic in our jurisprudence that "[g]enerally, to prevail on a legal malpractice claim . . . a [party] must present expert testimony to establish the standard of [*11] proper professional skill or care . . . Not only must the [party] establish the standard of care, but [she] must also establish that the [attorney's] conduct legally caused the injury of which [she] complain[s]." (Internal quotation marks omitted.) *DiStefano v. Milardo, 82 Conn.App. 838, 842, 847 A.2d 1034 (2004)*, aff'd *276 Conn. 416, 886 A.2d 415 (2005)*; see also *Davis v. Margolis, 215 Conn. 408, 416, 576 A.2d 489 (1990)*; *Glaser v. Pullman & Comley, LLC, 88 Conn.App. 615, 619, 871 A.2d 392 (2005)* ("[p]roving allegations of legal malpractice usually requires expert testimony"); *Dunn v. Peter L. Leepson, P.C., 79 Conn.App. 366, 369, 830 A.2d 325* cert. denied, *266 Conn. 923, 835 A.2d 472 (2003)* (alternate citations omitted); *Ackerly and Brown, LLP v. Smithies, 109 Conn.App. at 588, supra*.

"Malpractice cases and collection cases raise important overlapping issues. In both situations, the fact finder must assess legal strategy and outcomes in order to evaluate the choices made by the attorney whose performance of professional services is at issue." *St. Onge, Stewart, Johnson and Reens, LLC. v. Media Group, Inc., 84 Conn.App. 88, 96, 851 A.2d 1242 (2004)*. When "the underlying action was never tried, the client essentially has a double burden of proof. First, the client must show that the [*12] attorney was negligent. Second, the client must establish that the underlying claim was recoverable and collectible." *Hartford Casualties Ins. v. Farrish-LeDuc, 627 Conn. 748, 759 (2005)*.

Both parties offered expert testimony. The plaintiff's chief expert was attorney Jeffrey Hecht who has been in general practice in Connecticut for forty-two years which includes both transactional and litigation matters in the field of real estate law. Mr. Hecht opined that the applicable standard of care did not require Slane to perform a full title search but it did require Slane to examine the deeds into both the Barunos and the Tsois and any related maps on file in the Greenwich Land Records before he started the lawsuit against the Tsois. He noted in particular that had he done so he would have discovered that the restrictive covenant included the following provision. "These restrictions as to X and Y are not to be deemed to create any adverse use in Unique Holdings, Inc. (the grantor who retained ownership of what is now the Baruno property) its successors and assigns." Hecht further opined that had Slane read this provision he would not have predicated the lawsuit on a theory of adverse possession [*13] but rather on enforcement of the restrictive covenant. Finally, Hecht concluded that it was "more likely than not" that the court would have enforced the restrictive covenant by injunctive relief, would have ordered cessation of construction on parcel Y, removal of the improvements made to date and would have awarded damages for loss of use of parcel Y and diminution of value of the Baruno property. Thus, in his view Slane departed from the standard of care in his preparation and handling of the lawsuit for the Barunos. The plaintiff's other disclosed expert was Attorney Fred Rickles who expressed the same opinion. The court has taken into consideration the fact that Attorney Rickles has an interest as well as an investment in the outcome of this action and therefore accepts his opinion only as corroborative of Attorney Hecht's opinion.

Slane's expert was Attorney Barry Hawkins who has impressive credentials after many years of practice in the field of real estate law, including acting as an expert in several legal malpractice cases, two of which involved restrictive covenants. Mr. Hawkins rendered an opinion that the applicable standard of care requires an attorney who has been engaged [*14] to commence a lawsuit to have a "good faith belief that the client has a viable cause of action" and that Slane did not deviate from the standard of care by not bringing a cause of action against the Tsois on the basis of the restrictive covenant. It is notable that the expert did not state a standard of care which delineates a practice or procedure which Slane should have followed in preparing the lawsuit. Nevertheless, Hawkins opined that Slane did not violate the applicable standard of care by not examining the interrelated deeds and map at the Greenwich Land Records, first because he did not have the luxury of time in view of the need for prompt action, and second, the fact that the Barunos asked him to bring an action based on adverse possession obviated the need to consider alternative theories. In the final analysis, it was his belief that because Slane could amend his complaint after

commencement of the suit to assert violation of the restrictive covenant he did not commit malpractice. The court notes here that Slane sought to amend the complaint on May 15, 2008, which, when acted upon by the court, would have been almost four months after construction began. Finally, Hawkins [*15] opined that he believed it unlikely that the court would have granted injunctive relief on the basis of the restrictive covenant because the "Tsois owned the property."[4]

> 4 The court is at a loss to understand this reasoning and is left to infer that what was meant was that because the Tsois owned the property they could do whatever they wanted with it. This conclusion ignores the highly restrictive terms of the covenant.

"The sifting and weighing of evidence is peculiarly the function of the trier. '[N]othing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony.' *Steinman v. Maier, 179 Conn. 574, 576, 427 A.2d 828 (1980)*, quoting *Toffolon v. Avon, 173 Conn. 525, 530, 378 A.2d 580 (1977)*; *Morgan v. Hill, 139 Conn. 159, 161, 90 A.2d 641 (1952)*. The trier has the witnesses before it and is in the position to analyze all the evidence. The trier is free to accept or reject, in whole or in part, the testimony offered by either party." *Smith v. Smith, 183 Conn. 121, 123, 438 A.2d 842 (1981)*. "As to the conflicting expert testimony, the jury (the trier) is free to reject each expert's opinion in whole or in part." *Shelnitz v. Greenberg, 200 Conn. 58, 68, 509 A.2d 1023 (1986)*.

As [*16] an initial matter the court is puzzled by Attorney Hawkins' opinion on the standard of care which applies here. He stated that all that was necessary to satisfy the standard was for Slane to have had a "good faith belief that Baruno had a viable cause of action." The concept of "good faith belief" has been given statutory recognition in medical malpractice cases where *G.S. §52-190a* requires that the attorney filing the action must have determined that there is "good faith belief" that there has been negligence by a health care provider after the attorney has made "reasonable inquiry." It is noted that the statute imposes a duty on the attorney to make a "reasonable inquiry as permitted by the circumstances." Since this statute does not apply to legal malpractice claims it is appropriate to assign to the concept of "good faith belief" the meaning given it in the context of a suit for vexatious litigation.

"For purposes of a vexatious suit action, '[t]he legal idea of probable cause is *bona fide belief* in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances in entertaining [*17] it.' *Wall v. Toomey, 52 Conn. 35, 36 (1884)*; accord *Ledgebrook Condominium Assn., Inc. v. Lusk Corporation, 172 Conn. 577, 584, 376 A.2d 60 (1977)*. 'Probable cause is the knowledge of facts, actual or apparent, strong enough to justify *a reasonable man in the belief* that he has lawful grounds for prosecuting the defendant in the manner complained of.' (Emphasis added.) *Shea v. Berry, 93 Conn. 475, 477, 106 A. 761 (1919)*. Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he lacks a reasonable, *good faith belief* in the facts alleged and the validity of the claim asserted. See *Albertson v. Raboff, 46 Cal.2d 375, 382, 295 P.2d 405 (1956)*; 3 *Restatement (Second), Torts §662 comment (c), §675*, comment (d); cf. *Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)* (proof that an affiant included a false or reckless statement on a warrant affidavit may void the warrant); compare *State v. Hamilton, 214 Conn. 692, 707 n.6, 573 A.2d 1197*, vacated on other grounds, *U.S. (sic), 111 S. Ct. 334, 112 L. Ed. 2d 299* (the test for probable cause is objective; an arresting or investigating officer's good faith is insufficient.)" (Alternate citations omitted.) (Emphasis added.) *Delaurentis v. New Haven, 220 Conn. 225, 256, 257, 597 A.2d 807 (1991)*. As applied to an [*18] attorney, our Supreme Court has approved of the substitution of "reasonable attorney familiar with Connecticut law" for the reasonable man standard. *Falls Church Group, Ltd., v. Tyler, Cooper & Alcorn, 281 Conn. 84, 104-05, 912 A.2d 1019 (2007)*.

The court notes that the "bona fide belief" component is also an essential part of the meaning of probable cause in the context of a prejudgment remedy. *Solomon v. Aberman, 196 Conn. 359, 363, 493 A.2d 193 (1985)*. This court does not believe that such a standard of conduct, whether derived from vexatious litigation or prejudgment remedy jurisprudence, can be equated with an attorney's standard of care in malpractice cases because the latter refers to attorney practices and mode of proceeding which should be performed before the attorney reaches the threshold level of a "bona fide belief." In other words, an attorney does not gain a "bona fide belief" unless and until he has acted in accordance

with the standard of care.

Moreover, the Hawkins standard of care eliminates the need for reasonable inquiry by the attorney prior to commencement of the action which even *§52-190a* requires in medical malpractice setting. Our courts have spoken forcefully concerning the duty of an [*19] attorney engaged for the purpose of initiating a lawsuit to make reasonable inquiry before commencing the suit. *Practice Book §4-2* requires that an attorney who signs a pleading must have "good ground to support it." In a legal malpractice case alleging attorney negligence in a prior dissolution action our Supreme Court stated:

"[T]he court's inquiry does not serve as a substitute for the diligent investigation and preparation for which counsel is responsible. See *Monroe v. Monroe, 177 Conn. 173, 183, 413 A.2d 819*; appeal dismissed, *444 U.S. 801, 100 S. Ct. 20, 62 L. Ed. 2d 14 (1979)* ('lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all the facts that materially affect the client's rights and interests'). Indeed, the dissolution court may be unable to elicit the information necessary to make a fully informed evaluation of the settlement agreement if counsel for either of the parties has failed properly to discover and analyze the facts that are relevant to a fair and equitable settlement." (Alternate citations omitted.) *Grayson v. Wofsey, Rosen Kweskin & Kuriansky, 231 Conn. 168, 176, 646 A.2d 195 (1994).* This court sees no reason why an attorney's [*20] duty to engage in "searching dialogue" about all the facts in a matrimonial case should be less applicable in a property rights case.

"To be sure, an attorney has the obligation to act with reasonable diligence; *Rules of Professional Conduct 1.3*; to communicate with the client to the extent reasonably necessary to allow the client to make informed decisions; *Rules of Professional Conduct, 1.4*; and to provide advice on such legal and nonlegal matters that are relevant to the client's situation. *Rules of Professional Conduct 2.1*." *Wooten v. Heisler, 82 Conn.App. 815, 822, 847 A.2d 1040 (2004).*

Claims of malpractice are analogous to claims of ineffective assistance of counsel in our criminal law. See *Evans v. Warden, 29 Conn.App. 274, 613 A.2d 327 (1992).* In *Summerville v. Warden, 29 Conn.App. 162, 171, 614 A.2d 842 (1992)*, where the claim was based on failure to investigate facts adequately in order to prepare a proper defense the court stated: "Our cases recognize that the effective assistance of counsel includes counsel's obligation to investigate the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case." On the other hand "counsel need not track down each and every lead or [*21] personally investigate every evidentiary possibility before choosing a defense and developing it." *Walton v. Commissioner of Correction, 57 Conn.App. 511, 522, 749 A.2d 666 (2000).*

And finally, in finding ineffective assistance of counsel our Supreme Court observed:

"An adequate factual investigation may well have enabled counsel to cast reasonable doubt on the state's evidence. We do not purport to second guess trial counsel on a matter of trial tactics; failure to conduct an adequate investigation is not a matter of trial tactics. Counsel must make his decisions on an informed basis. That was not done." *Siemon v. Stoughton, 184 Conn. 547, 557, 440 A.2d 210 (1981).* This court agrees with New York case law which holds that a party in possession of certain information will be charged with a knowledge of all the facts which an inquiry suggested by such information, prosecuted with due diligence, would have divulged to him. *Cassia Corp. v. North Hills Holding Corp., 278 AD 960, 105 N.Y.S.2d 631 (1951).*

Slane's reliance on *Lee v. Duncan, 88 Conn.App. 319, 326, 870 A.2d 1 (2005)*, is unjustified for three reasons. First, the principle which binds an owner of real property to knowledge of the "facts which are apparent upon the land records concerning [*22] the chain of title of the property described in the conveyance" applies only to bona fide purchasers and third parties who may seek to assert rights to the property. Second, the principle has never been applied so as to impose a duty on a property owner to disclose those facts to his attorney when engaging that attorney for representation in a matter in which one or more of those facts may be involved. Finally, such presumed knowledge does not excuse the attorney from performing an adequate investigation of these facts himself in the course of his representation. To elevate the client's duty to disclose such facts over the attorney's obligation to conduct a reasonable inquiry into the client's deed or adequate investigation of the land records would place too great a burden on the lay client to make certain that he gains a conversant familiarity with the legal ramifications of an unconventional and somewhat complex restrictive covenant so that he can

communicate that information to the attorney. Moreover, such a requirement would unfairly relieve the attorney of his correlative duty to make due inquiry of all of the facts essential to a full understanding of the client's rights. *FDIC v. Clark, 978 F.2d 1541 (10th Cir. 1992)* [*23] (attorney not justified in assuming that the facts presented by the client were true since the attorney had a duty independently to verify facts on which an opinion is based).

The court does not accept the clear implication of Hawkins' testimony that Slane did not have "the luxury of time" to make due inquiry into the relevant deeds. If Slane had time to seek an amendment to his complaint after commencing the action, he certainly had time to spend a few moments examining these deeds while he was at the land records searching for some sort of "license" which he interpreted might exist as a result of his conversation with Patricia Scarpelli.

As a second component to his opinion, Hawkins opined that it was "more likely than not" that the court would not have issued an injunction halting construction on parcel Y because (i) the Tsois owned the property, and (ii) there was an adequate remedy at law in the form of damages. In attempting to prognosticate a judicial result the expert has entered an area where his knowledge and experience is at least coequal with that of an experienced trial judge. "There may be no expert who knows more about the practice of law before the Superior Court than [*24] a judge of that court. Judges routinely rule on motions, preside at pretrial settlement conferences, conduct jury trials and sit as the trier of fact, among other things . . . negligence and breach of contract actions routinely come before the Superior Court. A judge, therefore, is aware of the standard of care that applies to attorneys practicing in the Superior Court." *Dubreuil v. Witt, 80 Conn. App. 410, 421, 835 A.2d 477 (2003)*. This court concludes that although the *Dubreuil* court limited its holding to the circumstances of the case, see *Dixon v. Bromson and Reiner, 95 Conn.App. 294, 299, 898 A.2d 193 (2006)*, such awareness includes the likelihood or not that the Superior Court would grant injunctive relief or specific performance upon a given set of facts.[5]

> 5 It is unrealistic to require that a trial judge be limited in his/her consideration of the standard of care in a legal malpractice case to the testimony of an expert when that testimony covers a field that the judge himself has dealt with on numerous occasions. See *Standard of Care in Legal Malpractice*, 43 Indiana Law Journal, Issue 3, Art. 12 at 776-78 (1968). Indeed every pretrial settlement conference requires the presiding judge to suggest to the [*25] participants a likely range of outcomes.

The plaintiff's expert witness, Attorney Hecht who is not quite as highly credentialed as attorney Hawkins, testified that Slane violated the standard of care by not examining the related deeds and map before commencing the lawsuit. He opined that had he done so he would have clearly seen the caveat contained in the Tsoi deed which explicitly precludes the acquisition of any rights to "adverse use in the owner of the Baruno property." He further opined that had Slane done so he would have based the Barunos' cause of action not on a theory of adverse possession but on violation of the restrictive covenant which expressly prohibited placement of a "structure or driveway or other manmade improvement on parcel 'Y.'" Finally, Attorney Hecht concluded that it was more likely than not that the court would have enforced the restrictive covenant by granting equitable relief, including removal of the driveway improvements. Contrary to Attorney Hawkins' opinion was this expert's belief that the plaintiff's failure to inform Slane of the restrictive covenant did not excuse Slane from examining the relevant deeds and map.

The court evaluates the opinions of [*26] the experts within the framework of our well established Connecticut case law. "There is a long line of authority supporting the proposition that, as a general rule, irreparable and substantial injury must threaten before an injunction is warranted. A few of the many cases so holding are: *Jones v. Foote, 165 Conn. 516, 338 A.2d 467*; *Crouchley v. Pambianchi, 152 Conn. 224, 205 A.2d 492*; *Point O'Woods Assn., Inc. v. Busher, 117 Conn. 247, 167 A. 546*; *Bigelow v. Hartford Bridge Co., 14 Conn. 565*. These and many other similar cases have been examined, and in none of them was an injunction which was sought to enforce a restrictive covenant refused for the lack of a threat of substantial irreparable injury. Cases involving enforcement of restrictive covenants show that in those actions a different standard is applied to the request for an injunction.

"In *Armstrong v. Leverone, supra*, this court found no error in the granting of an injunction against violation of a restrictive covenant against business use of certain

property. It stated (p. 472) that [p]roof of special damage is not necessary, and if the act of the defendant transgresses the restriction it is a violation of the rights of the plaintiffs which is not dependent upon [*27] the existence or amount of damage. Berry on Restrictions on Use of Real Property, §413; *Morrow v. Hasselman, 69 N.J.Eq. 612, 61 A. 369*; *Peck v. Conway, 119 Mass. 546*. The court also held that the defendant's substantial expenditures did not make injunctive relief inequitable, because they were made with knowledge that he was violating the restrictions.

"In *Hooker v. Alexander, 129 Conn. 433, 29 A.2d 308*, an injunction was granted restraining the defendant from violating a covenant against rooming houses. The opinion stated that the rooming house reduced neighborhood property values, but in answer to the defendant's claim that his operation of the rooming house did not damage his neighbors, the court stated (p. 437): 'The question of damage is immaterial as far as the right of the plaintiffs to enforce the restrictions is concerned. *Armstrong v. Leverone, 105 Conn. 464, 472, 136 A. 71*. It is sufficient for the plaintiff to have a legal or equitable right which he is entitled to enforce. *New England R. Co. v. Central Ry. & Electric Co., 69 Conn. 47, 56, 36 A. 1061*.' *Accord, Lampson Lumber Co. v. Caporale, supra, 685*; *Bickell v. Moraio, 117 Conn. 176, 167 A. 722*.

"These holdings do not require issuing an injunction whenever enforcement of a restrictive [*28] covenant is sought. An injunction is an equitable remedy, and may be denied if the balance of the equities favors the defendant. Thus in *Bauby v. Krasow, 107 Conn. 109, 139 A. 508*, this court ruled that an injunction should not be issued to require taking down a house when construction had been commenced in good faith, although in violation of a restrictive covenant. The court held that under those circumstances money damages would be adequate. It stated (pp. 115-16): Whether such an injunction should issue depends upon all the equities between the parties. 32 Corpus Juris, 147. When one has gone on wrongfully in a wilful invasion of another's rights in real property, the latter is entitled to have his property restored to its original condition even though the wrongdoer would thereby suffer great loss. It has been said that the result of denying a mandatory injunction in such a case would be to 'allow the wrongdoer to compel innocent persons to sell their rights at a valuation.' *Tucker v. Howard, 128 Mass. 361, 363*. Where, however, there has been an innocent mistake or a bona fide claim of right on the part of the defendant or laches on the part of the plaintiff, or where the conduct of the defendant [*29] was not wilful and inexcusable, and where the granting of the injunction would cause damage to the defendant greatly disproportionate to the injury of which plaintiff complains and it appears that damages will adequately compensate the latter, in such cases it has been held that it would be inequitable to grant a mandatory injunction and the plaintiff has been remitted to his remedy by way of damages [citations omitted]. Although this distinction is not explicit in *Moore v. Serafin, 163 Conn. 1, 301 A.2d 238*; that case stands for the same proposition. It held that it was proper to refuse an injunction requiring the owner of a mausoleum, built on a burial plot in violation of a restriction against aboveground structures, to remove the mausoleum, but error to deny an injunction restraining the cemetery from granting permission for future aboveground structures.

"The case law thus shows that the general rule requiring that substantial irreparable injury must threaten before an injunction will issue is subject to an exception. A restrictive covenant may be enforced by injunction without a showing that violation of the covenant will cause harm to the plaintiff, so long as such relief is not inequitable. [*30] According to this rule, the injunction in this case was properly granted." (Alternate citations omitted.) (Internal quotations marks omitted.) *Hartford Electric Light Co. v. Levitz, 173 Conn. 15, 19-22, 376 A.2d 381 (1977)*; *Accord, City of Waterbury v. Phoenix Soil, LLC, 128 Conn.App. 619, 628-29, 20 A.3d 1 (2011)*.

While in the final analysis, such injunctive relief in the present case could have been denied on equitable grounds, as compared to establishing ownership by adverse possession (clear and convincing proof required) *Clark v. Drska, 1 Conn.App. 481, 484, 473 A.2d 325 (1984)*, the course of action which was more likely to have obtained relief for the Barunos was to have sought enforcement of the restrictive covenant which requires proof by a preponderance of the evidence, a lesser standard.

The likelihood of obtaining injunctive relief from a violation or specific performance of the restrictive covenant depended upon whether, in the words of the *Levitz* court, the activity in which the Tsois engaged was "wrongful and a wilful invasion of rights" conferred upon the plaintiff by the restrictive covenant. To establish that Tsois' activity within parcel Y was wilful and wrongful

only requires reference to the judgment of [*31] mandatory injunction issued by this court (Karazin, J.) on May 28, 2008 enforcing the restrictive covenant and the judgment of contempt of November 28, 2008 (Karazin, J.) for wilful failure to comply with the terms of the injunction.

The court concludes that the defendant Slane departed from the applicable standard of care when he failed to examine the relevant deeds and map and base the plaintiff's cause of action on the violation of the restrictive covenant rather than on a theory of adverse possession. The court further concludes that had he done so, it is more likely than not that the court would have granted equitable relief requiring that parcel Y, in so far as possible, be restored to its former condition and would have awarded compensatory damages to reflect the injury to the plaintiff's property rights arising from his failure to do so. *Hart, Nininger & Campbell Assoc., Inc. v. Rogers, 16 Conn.App. 619, 634, 548 A.2d 758 (1988).*

Slane's reliance on *Schlichting v. Cotter, 109 Conn. App. 361, 952 A.2d 73 (2008),* is misplaced simply because the case did not involve enforcement of a restrictive covenant which, as stated above, requires application of a different rule. Thus, Hawkins' opinion simply fails to [*32] recognize this rule which makes it unnecessary to prove irreparable harm and therefore, lack of an adequate remedy at law. Slane emphasizes the fact that in several of the pleadings which Attorney Fred Rickles filed on behalf of the plaintiffs, Elizabeth continued to assert title by adverse possession. He further points to Rickles' testimony that he would not have included such a cause of action if he did not believe that it was based on allegations that were true. The obvious inference which the defendants seek to have the court draw is that Rickles' adoption of the same legal theory that Slane used somehow legitimized Slane's sole reliance on that theory. Such an inference is unwarranted because it misses the point and begs the question. The fact is that the cause of action based on the restrictive covenant was Rickles' primary theory and adverse possession was pled alternatively. *P.B. §10-25*. No amount of claims of title by adverse possession can excuse Slane's failure to apprehend the existence and importance of the restrictive covenant.

"To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries . . . As [our Supreme Court] [*33] observed . . . [l]egal cause is a hybrid construct, the result of balancing philosophic, pragmatic and moral approaches to causation. The first component of legal cause is causation in fact. Causation in fact is the purest legal application of . . . legal cause. The test for cause in fact is, simply would the injury have occurred were it not for the actor's conduct . . .

'"The second component of legal cause is proximate cause, which [our Supreme Court has] defined as [a]n actual cause that is a substantial factor in the resulting harm . . . The proximate cause requirement tempers the expansive view of causation [in fact] . . . by the pragmatic . . . shaping [of] rules which are feasible to administer, and yield a workable degree of certainty.' (Internal quotation marks omitted.) *Vona v. Lerner, supra, 72 Conn.App. 189*." *Dubreuil v. Witt, 80 Conn.App. at 427, supra*.

Proof of causation must be established through expert testimony. *DiStefano v. Milardo, 82 Conn. App. 838, 842, 847 A.2d 1034 (2004)*. While Attorney Hawkins opined that because Slane's conduct did not violate the applicable standard of care and therefore could not have been the cause of the plaintiff's injury, Attorney Hecht concluded that Slane's [*34] negligence was the "producing cause" of the injury which plaintiff suffered and quantified that injury as the loss in value to the plaintiff's property. The court is amply persuaded by Hecht's testimony that had Slane brought the action based upon the restrictive covenant and not solely based on a claim of adverse possession the plaintiff would not have suffered the injury that the evidence revealed. The existence of proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. *DiStefano v. Milardo, 82 Conn.App. at 843, supra*. The court accepts the Hecht opinion as stating a logical, foreseeable, consequence of Slane's omission.

Slane argues further that causation depends upon the timeliness of the efforts exerted to obtain injunctive relief. He refers to the fact that at the time the court issued the injunction on May 28, 2008 the Tsois had already removed trees and laid a roadbed for the driveway and therefore Slane's claimed negligence could not have been the proximate cause of the plaintiffs' damages. This position totally ignores the fact that the injunction when issued was predominantly mandatory in [*35] nature, designed to achieve restoration of the

property to its former condition. Again, Slane misses the point. Timing is not the issue here. Failure to discover the express prohibition contained in the plaintiffs' deed against acquisition of the parcel by adverse possession *is* the issue along with the other prohibitory aspects of the restrictive covenant.

Collectibility

The defendants contend further that plaintiffs have offered no evidence that had they obtained judgment against the Tsois they would have been able to collect anything from them. In *Alexandru v. Strong, 81 Conn. App. 68, 76, 837 A.2d 875 (2004),* the Appellate Court offered some insight into the meaning of "collectible." The court stated: "In other words, to succeed on her claim of malpractice for the defendant's alleged failure to assert her . . . claim . . . in a timely manner, the plaintiff must establish that she would have been successful in pursuing that claim but for the defendant's omission."

The requirement in a legal malpractice case that had the offending attorney obtained a judgment for the plaintiff in the underlying case it would have been collectible appears to be unique in the law of negligent torts. Nevertheless, it seems [*36] to be a universal requirement. Where jurisdictions differ is on where the burden of proof lies.

"The majority of jurisdictions require the plaintiff to prove collectibility. See *McKenna v. Forsyth & Forsyth, 280 A.D.2d 79, 720 N.Y.S.2d 654, 657-58 (2001)* (citing cases). The policy basis for this approach is to avoid awarding the aggrieved more than he or she would have recovered had the attorney not been negligent. *Id. at 657*. As one of these courts reasoned, 'In a malpractice action, a plaintiff's 'actual injury' is measured by the amount of money she would have actually *collected* had her attorney not been negligent.' *Klump v. Duffus, 71 F.3d 1368, 1374 (7th Cir. 1995)* (emphasis in original). Hypothetical damages beyond what the plaintiff would have genuinely collected from the judgment creditor 'are not a legitimate portion of her 'actual injury;' awarding her those damages would result in a windfall.' *Klump, 71 F.3d at 1374*. Stated another way, these jurisdictions tend to view collectibility as a component of the plaintiff's prima facie case. See, e.g., *Klump, 71 F.3d at 1374* (reasoning majority position on collectibility is consistent with burden of proof in negligence actions generally).

"However, [*37] a growing minority of jurisdictions holds uncollectibility to be an affirmative defense that must be pleaded and proved by the negligent attorney. See, e.g., *Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20, 31-32 (Alaska 1998)*; *Jourdain v. Dineen, 527 A.2d 1304, 1306 (Me. 1987)*; *Jernigan v. Giard, 398 Mass. 721, 500 N.E.2d 806, 807 (Mass. 1986)*; *Hoppe v. Ranzini, 158 N.J. Super. 158, 385 A.2d 913, 920 (N.J. 1978)*; *Ridenour v. Lewis, 121 Ore. App. 416, 854 P.2d 1005, 1006 (Or. 1993)*; *Smith v. Haden, 868 F.Sup. 1, 2 (D.D.C. 1994)*. These minority jurisdictions reason generally that collectibility is a problem precisely because of the attorney's malpractice, therefore, the attorney should bear the burden and risk of proving uncollectibility. See *Power Constructors, 960 P.2d at 31-32*; *Jernigan, 500 N.E.2d at 807*; *Kituskie, 714 A.2d at 1032*." (Alternate citations omitted.) *Lavigne v. Chase, Haskel, Hayes and Kilman, P.C., 112 Wn. App. 677, 50 P.3d 306, 310 (Wash. 2002).*

Connecticut courts have not yet announced their position on this disputed issue. Consequently, this court is writing on a clean slate. In undertaking this task the court finds instructive the opinion of the court in *Klump v. Duffus, 71 Fed.3d at 1374, supra*.

"While we are mindful that a [*38] minority of courts have placed the burden on the defendant to prove the uncollectibility of the underlying judgment, we conclude that the burden is more properly placed on the plaintiff to prove the amount she would have actually collected from the original tortfeasor as an element of her malpractice claim. This is the position taken by the majority of courts and is more consistent with a plaintiff's burden of proof in negligence actions generally."

The court believes that because Connecticut places the burden of proof on a plaintiff to prove the necessary elements of a tort, see, e.g. *Palombizio v. Murphy, 146 Conn. 352, 358, 150 A.2d 825 (1959),* our appellate courts would adopt the majority rule. Thus, in the present case, the plaintiff bore the burden of establishing collectibility of the underlying judgment by a preponderance of the evidence. See *Viola v. O'Dell, 108 Conn.App. 760, 950 A.2d 539 (2008)*.

This court must now determine whether the plaintiff has met that burden.

"A party satisfies his or her burden of persuasion if the evidence, considered fairly and impartially, induces in the mind of the trier a reasonable belief that it is more

probable than otherwise that the fact or issue is true. *Busker v. United Illuminating Co.., 156 Conn. 456, 458, 242 A.2d 708 (1968)*. [*39] It is not necessary that the proof negate all other possibilities or that it reach the degree of certainty that excludes every other reasonable conclusion. *Terminal Taxi Co. v. Flynn, 156 Conn. 313, 318, 240 A.2d 881 (1968)*. But such preponderance does not refer to the number of witnesses but rather the evidence that is superior and more likely to be in accord with facts, *Verdi v. Donahue, 91 Conn. 448, 450, 99 A. 1041 (1917)*. The quality of the evidence controls, not the quantity. *State v. Williams, 195 Conn. 1, 13, 485 A.2d 570 (1985)*. When the evidence is equally balanced or in equipoise, then the proponent has not met his or her burden of persuasion. *Brodie v. Connecticut Co., 87 Conn. 363, 364, 87 A. 798 (1913)*. A party has not met the burden of persuasion merely because the evidence is uncontested or uncontroverted because the trier, as the judge of credibility may disbelieve such evidence. *Mercer v. Mercer, 131 Conn. 352, 353, 39 A.2d 879 (1944)*.

"The burden of persuasion can be satisfied by circumstantial evidence if the trier finds that the facts from which the trier is asked to draw the inference are proved and that the inference is not only logical and reasonable but also strong enough so that it can be found to be more probable than [*40] not. *Terminal Taxi Co. v. Flynn, 156 Conn. at 316*." (Alternate citations omitted.) Tait's Handbook of Connecticut Evidence, 3rd Ed. at 3.5.1, p. 140.

It is not one fact but the cumulative impact of a multitude of facts which establishes liability in a case involving substantial circumstantial evidence. *State v. Rodgers, 198 Conn. 53, 58, 502 A.2d 360 (1985)*. The trier of fact is not permitted to resort to speculation or conjecture. *State v. Stankowski, 184 Conn. 121, 136, 439 A.2d 918 (1981)*. "There is no legal distinction between direct and circumstantial evidence as far as probative force is concerned." *State v. Haddad, 189 Conn. 383, 390, 456 A.2d 316 (1983)*.

The term "collectibility" normally is applied to a money judgment. In the present case, the relief sought in the underlying case was injunctive, both prohibitory and mandatory in nature. Although Slane requested a judgment of adverse possession at the outset, the relief that was needed and to which the plaintiff was entitled was a cessation of further violation of the restrictive covenant and restoration of Tsois' property to the condition which existed before the violation. Such a judgment is not enforced by levying execution on Tsois' assets but by use of the sanction [*41] of contempt. The court does not believe that the mandatory components of Judge Karazin's contempt order converts the essentially equitable remedy of injunction into a monetary remedy. The essential nature of collectibility cannot be equated with enforceability because an injunction can be enforced without the need for the plaintiff to collect any money. "Money judgment" means "a judgment, order or decree calling in whole or in part for the payment of a sum of money." *G.S. §52-350a*. The fact that the court's contempt judgment of November 28, 2008 contained monetary awards does not transform the original cause of action which should have sought an equitable decree to one seeking a monetary judgment.

"The court's authority to impose civil contempt penalties arises not from statutory provisions but from the common law. *Potter v. Board of Selectmen, supra, 197*; *Welch v. Barber, 52 Conn. 147, 156 (1884)*; *Huntington v. McMahon, 48 Conn. 174, 196 (1880)*. The penalties which may be imposed, therefore, arise from the inherent power of the court to coerce compliance with its orders. In Connecticut, the court has the authority in civil contempt to impose on the contemnor either incarceration or [*42] a fine or both. *Rogers Manufacturing Co. v. Rogers, 38 Conn. 121, 123-24 (1871)*; see *Board of Education v. Shelton Education Ass'n, supra.*" *Papa v. New Haven Federation of Teachers, 186 Conn. 725, 738-39, 444 A.2d 196 (1982)*.

To the extent that a money judgment may have been recoverable in the underlying action as partial or even full relief for the plaintiff the court finds informative the Supreme Court's decision in *Margolin v. Kleban & Samor, P.C., 275 Conn. 765, 775, 882 A.2d 653 (2005)*. In *Margolin*, the plaintiff proved the existence of an investment account which contained sufficient assets to fund a prejudgment remedy which the plaintiff alleged that the defendant attorney negligently failed to identify.

The court found that evidence of the existence of the value of the account was sufficient to prove that the defendant in the underlying action had sufficient attachable assets at the time of the prejudgment remedy that could have satisfied any judgment. This was so even though the defendant became insolvent three years latter. The defendant argued that the financial statement which

listed the investment account spoke as of June 1992 and did not prove that it was available for attachment when the underlying [*43] action was brought in July 1993.

In affirming the judgment below the court held that proof of the existence of an account containing sufficient funds to satisfy the attachment in 1992 constituted sufficient evidence of collectibility of any judgment obtained pursuant to that attachment even though there was evidence that the debtor became impoverished four to five years later. In rejecting the defendant's argument that proof of the existence of sufficient assets in 1992 was not proof of the existence of the asset four years later, the court stated: "We will not find evidence insufficient merely because other evidence, not introduced might have proved the fact in question with greater specificity." *Id. at 775*.

With this guidance, the court will now examine and vet the evidence of collectibility in the present case. The following evidence supports this court's finding that had the plaintiff recovered a monetary judgment as either partial or full relief in the underlying action, it is more probable than not that the judgment would have been collectible. The court identifies the following pieces of evidence to support this conclusion. 1.) The Tsois were willing to enter into a settlement [*44] agreement which obligated them to pay $250,000. Although the Tsois ultimately defaulted on this obligation there was no evidence that they did so because of insolvency. 2.) The Tsois actually paid $17,000 on account of this settlement agreement. 3.) At the commencement of the action, the Tsois owned three houses: (a) lot number 2 as shown on exhibit 5 and known as 36 Montgomery Lane; (b) 39 Boulder Brook Road, Greenwich, Connecticut; (c) 101 Dingletown Road, Greenwich, Connecticut. While there was no testimony describing these properties, the court having lived nearby for many years, is familiar with the neighborhoods and would describe the houses as substantial in size and value. 4.) There was no evidence that the Tsois lacked equity in these properties or that they were in a state of disrepair. 5.) The Tsois invested substantial sums during the period in question to construct the driveway, stonewall and new home on parcel Y. 6.) The remaining amount due under the settlement agreement was secured by a promissory note and mortgage on Tsois' Boulder Brook Road property. As stated above, there was no evidence of any prior encumbrances on this property. Moreover, it can reasonably be [*45] inferred that the plaintiffs would not have accepted the mortgage on 39 Boulder Brook Road if they did not believe that the Tsois had sufficient equity in the property. (Requirement of collectibility satisfied by evidence of acceptance of beneficial settlement.) *Mallen & Smith, Legal Malpractice* §33:8, at 201 (2013 Ed.)

Comparative Negligence

For a special defense, Slane has alleged that if he was negligent, the plaintiffs were negligent in their own right and that this was a substantial factor in causing plaintiffs' injuries and damages. These allegations read as follows:

"(a) they failed to act reasonably and failed to follow the advice of the professionals they retained to represent them in connection with their dispute with the Tsois;

(b) they knew or should have known about any rights conferred upon them by the deed restrictions and covenants, but they failed to provide this information to Slane and the Slane Law Firm prior to or during the course of the litigation between Elizabeth Baruno and the Tsois; and

(c) they failed to provide copies of the deeds to Slane and the Slane Law Firm prior to or during the course of the litigation between Elizabeth Baruno and the Tsois."

Initially, [*46] the court observes that only (b) and (c) have been briefed and therefore (a) is deemed to have been abandoned for failure to offer any analysis. *Connecticut Light and Power Co. v. Dept. of Public Utility Control, 266 Conn. 108, 120, 830 A.2d 1121 (2003)*.

Connecticut recognizes the defense of comparative negligence in legal malpractice cases. *Somma v. Gracey, 15 Conn.App. 371, 377-78, 544 A.2d 668 (1988)*. The defendants have offered no affirmative evidence in support of their claim. On the other hand, the evidence is uncontroverted that the Barunos failed to provide Slane with a copy of the deed or title policy because they were lost or misplaced and that they failed to inform Slane that they had learned from a surveyor that "no one could do anything on the strip" (handle of parcel Y) although Gerald did tell him that he "was under the impression" that nothing could be built on parcel Y. However, he did deliver the survey (Ex. H) which contained the notation recited in full at page 4, *supra*.

The assertion that the Barunos had or should have had knowledge of the restrictive covenant and therefore were duty bound to have disclosed that knowledge to Slane is irrelevant to the transcendent responsibility which Slane [*47] had from the facts before him to conduct due inquiry and make an adequate investigation of the existence of all of the property rights held by the opposing party. The court finds that the plaintiff supplied Slane enough information to induce him to conduct a simple investigation of the relevant deeds and map. Therefore, the plaintiffs committed no negligence on their part.

Damages

"'In legal malpractice actions, the plaintiff typically proves that the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent. This traditional method of presenting the merits of the underlying action is often called the 'case-within-a-case' 5 R. Mallen & J. Smith, Legal Malpractice (5th Ed. 2000) §33.8, pp. 69-70.' *Margolin v. Kleban & Samor, P.C., 275 Conn. 765, 775 n.9, 882 A.2d 653 (2005)*"; *Lee v. Harlow, Adams & Friedman, 116 Conn.App. 289, 297, 975 A.2d 715 (2009)* (alternate citation omitted).

In order to recover damages the Barunos must establish that they would have been successful in pursuing their "case" but for Slane's negligence, *Alexandru v. Strong, 81 Conn.App. 68, 76, 837 A.2d 875 (2004)*. In this significant [*48] respect a legal malpractice case differs from other professional malpractice cases in particular, and personal injury cases in general.

"When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty. *Simone Corporation v. Connecticut Light & Power Co., 187 Conn. 487, 495, 446 A.2d 1071 (1982)*; *Bianco v. Floatex, Inc., 145 Conn. 523, 525, 144 A.2d 310 (1958)*. Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty." (alternate citations omitted.) *Gaudio v. Griffin Health Services, 249 Conn. 523, 554, 733 A.2d 197 (1999)*.

"'To authorize a recovery . . . facts must exist and be shown by the evidence which affords a reasonable basis for measuring the [plaintiff's] loss. The [plaintiff has] the burden of proving the nature and extent of the loss . . . Mathematical exactitude in the proof of damages is often impossible, but the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate.' (Citation omitted; internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp., 245 Conn. 1, 58-59, 717 A.2d 77 (1998)*. [*49] 'Proof of damages should be established with reasonable certainty and not speculatively and problematically . . . Damages may not be calculated based on a contingency or conjecture.' (Citations omitted; internal quotation marks omitted.) *Leisure Resort Technology, Inc. v. Trading Cove Associates, 277 Conn. 21, 35, 889 A.2d 785 (2006)*." (Alternative citations omitted.) *Carrano v. Yale New Haven Hospital, 279 Conn. 622, 650, 904 A.2d 149 (2006)*.

The general rule is that the damages recoverable in a legal malpractice case are what would have been recovered had the defendant properly pursued the plaintiff's claim. In this case the recovery is complicated somewhat by the fact that the underlying claim was primarily one for injunctive relief and not for damages. However, the fact that the plaintiffs may have been entitled to injunctive relief did not preclude them from recovering monetary damages. *Hart, Nininger & Campbell Associates, Inc. v. Rogers, 16 Conn. App. 619, 633, 548 A.2d 758 (1988)*.

The plaintiff seeks damages for the following: (1) diminution of property value; (2) cost of remediation and repair of the physical injury to the property resulting from activities on the Tsois' property; (3) "hedonic" damages resulting from [*50] the plaintiff's inability to benefit from and enjoy the use of her property; (4) the cost to restore the Tsois' property to its former condition; (5) the legal fees incurred for the services rendered by the law firms, of Gilbride, Tusa, Last & Spellane and Greenspan and Greenspan; (7) legal fees paid to the defendants; (8) contempt fees levied against the Tsois; (9) prejudgment interest; (10) costs and expenses. These will be considered in order.

Diminution of Property Value

In an action for damages to real property, "[t]he basic measure of damages . . . is the resultant diminution in value . . . in order to assess the diminution in value, however, the trial court must first determine the value of

the property, both before and after the injury has occurred . . . In actions requiring such a valuation of property, the trial court is charged with the duty of making an independent valuation of the property involved . . . [N]o one method of valuation is controlling and . . . the [court] may select the one most appropriate in the case before [it] . . . Moreover, a variety of factors may be considered by the trial court in assessing the value of such property. [T]he trier arrives at his own [*51] conclusions by weighing the opinions of the appraisers, the claims of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation . . . The trial court has broad discretion in reaching such conclusion, and [its] determination is reviewable only if [it] misapplies or gives an improper effect to any test or consideration which it was [its] duty to regard." *Franc v. Bethel Holding Co., 73 Conn.App. 114, 120, 807 A.2d 519 (2000).*

In the present case there is evidence of both loss of value to the plaintiff's property and the cost of repairs necessitated by the Tsois' construction activities. Ordinarily, however, a plaintiff who has suffered injury to his property may be compensated only for the diminution in its value or the cost of repair or restoration to its former condition but not both. *Argentinis v. Fortuna, 134 Conn.App. 538, 554, 39 A.3d 1207 (2012).*

The plaintiffs presented an expert witness, Charles Magyar who testified concerning loss of value in accordance with his written appraisal report which was placed in evidence. The defendant offered no countervailing testimony. "The credibility of expert witnesses and the [*52] weight to be accorded their testimony are within the province of the trier of facts who is privileged to adopt whatever testimony he reasonably believes is credible." *Transportation Plaza Associates v. Powers, 203 Conn. 364, 378, 525 A.2d 68 (1987).* Mr. Magyar performed a before and after analysis and concluded that the property had a value of $1,350,000 before any activity took place on the Tsois' property and $1,100,000 after the construction activities were completed or ceased. Thus, he opined that the property value suffered to the extent of $250,000.

The defendants point out however, that Magyar's opinion related to a period of six to twelve months from the date of his testimony, July 25, 2012 thus placing the period covered by his opinion at July 25, 2011 to July 25, 2012. The defendants argue on the basis of this timeline that Magyar's testimony must be disregarded because it does not speak as of the time that the plaintiff's property suffered injury, namely, February-May 2006. The court rejects that argument and notes that Magyar's appraisal report explicitly states that it: "deals with an estimate of value for the subject property *prior* to the construction activities." So it is clear that [*53] the assigned value of $1,350,000 relates to the time prior to the activities complained of in early 2006.

Moreover, Magyar's appraisal report states on its face page that the appraisal is "As of April 28, 2011." Both a reading of the report and consideration of Magyar's testimony on the whole leads this court to the conclusion that notwithstanding that later date, Magyar's point was that the property loss $250,000 in value regardless of whether the loss occurred in 2006 or 2011. This is a fair inference for at least three reasons. First, the physical characteristics of the offending property remained basically unchanged from 2006 to 2011. Second, drawing upon the court's "own knowledge of the elements which go to establish value" (*Franc v. Bethel Holding Co., supra*), real estate values in Greenwich have generally decreased between 2006 and 2011, but Magyar did not attribute any of the loss in value to this phenomenon. Next, Magyar refers to the loss of value as an "external appeal adjustment." Thus, if the construction activities had a negative effect on the "external appeal" of the plaintiff's property, that condition existed to the same extent in 2006 as it did in 2011 because physical [*54] conditions on the Tsois property remained the same. Finally, whereas here there was a court order extant which mandated remediation and restoration of the Tsoi property which remained in noncompliance, it is proper to fix the "after" value at a date later than the cessation of Tsois' construction activities.

Cost of Remediation and Repair of Plaintiffs' Property

It was clear from Charles Magyar's testimony and appraisal report that his estimate of diminution of value was based entirely on the "negative impact" which Tsois' construction activities had on the market value of the plaintiff's property without taking into consideration the estimated costs of repairing the physical damage which was inflicted on the property. He stated the following in his report. "It's your appraiser's opinion that the construction performed by the developer of 35 (sic) Montgomery Lane has created a negative impact on the

subject property by clear cutting existing bushes and trees and the construction of multiple retaining walls, new driveway and stone walls running along the southeastern property line of the subject and within the deed restricted land parcel Y (See Photo 2) entitled "Retaining walls along [*55] the 60 foot long line denoted as 'S 55 degrees 13' 30" E on Survey of Property for Jianhua Cia Tsoi (shown as Exhibit B within the body of this report) (Photo 2) depicting the retaining wall clearly within the deed restricted area and (Photo 3) showing the south side of driveway within Parcel Y and (Photo 4) showing the north side of driveway Therefore the 20% *external appeal adjustment* was warranted to support the market value as of April 28, 2011." (Emphasis added.)

Thus Magyar's entire appraisal report was based not on the cost of repairing the physical damage done to the plaintiff's property but rather on the damage caused the property's "external appeal." Because of this intentional omission, limiting damages to diminution of the value of the property would preclude compensation to the owner for all of the damages that are a foreseeable consequence of the harmful acts. Mindful of the principle that a plaintiff may be compensated only once for his just damages for the same injury, *Argentinis v. Fortuna, 144 Conn.App. at 554, supra*, the court concludes that the cost of repair and remediation would be left uncompensated if not included as an element of the plaintiff's damages. It must [*56] therefore be compensated.

The plaintiff produced a "civil engineer and surveyor," John Giancola to describe the damage which Tsois' activities produced on the plaintiffs' property. This consisted mainly of surface water runoff from Tsois' property to the plaintiffs which caused "ponding, sink holes, cracking and breaking of their driveway surface" as well as "damage to their basketball court."

This element of damages was created not so much by the activities which took place in parcel Y (although Giancola describes similar drainage problems along parcel Y) but rather the construction of a new house on the Tsois' property served by a new driveway located on parcel Y. These "improvements" changed the grade of the Tsois' property and produced the harmful runoff. (See Exhibit 54.) Mr. Giancola testified further that it would cost $120,000 to repair this damage. The defendants offered no testimony to challenge this figure. Defendants argue that by Gerald's own admission the ponding condition was corrected for $10,000 and the resurfacing of the driveway is estimated to cost $17,250. It is apparent from the testimony that these repairs did not resolve the drainage problem.

Restoration of Tsois' [*57] Property

The plaintiffs also seeks recovery of the cost to restore the Tsoi property to its condition prior to construction of the new house in violation of the restrictive covenant. At trial the plaintiffs attempted to offer testimony of the cost of such restoration through John Giancola but in response to the defendants' objection the court ruled that the disclosure of this expert was not broad enough to permit Giancola's opinion concerning the cost of moving the new Tsoi dwelling back on the lot sufficiently to avoid having any part of it located on parcel Y and the costs associated with that. The court did however allow testimony concerning remedial measures needed "on the ground" and nothing more. While Giancola ultimately testified that it would cost $100,000 to restore parcel Y to its former condition, these damages are already accounted for in Charles Magyar's analysis of the loss in value to the plaintiffs' property as impacting "external appeal." Such an award would constitute dual compensation for the same injury.

Hedonic Damages

During the trial and now in their brief, the plaintiffs claim so called "hedonic damages." While the element of hedonic damages normally refers to [*58] loss of enjoyment or value of life, it seeks to recover for the intangible value of life as distinct from the human capital value or lost earnings value. *Sherrod v. Berry, 827 F.2d 195 (7th Cir. 1987)*. While no Connecticut appellate decision could be found in which the court recognized the principle of hedonic damages, the Tennessee case of *Spencer v. A-1 Crane Services, 880 S.W.2d 938 (1994)*, interprets the Connecticut case of *Katsetos v. Nolan, 170 Conn. 637, 657, 368 A.2d 172 (1976)*, as permitting the inclusion of such damages in a wrongful death damages award. Such a reading undoubtedly was inspired by the Connecticut court's approval of an award for loss of the plaintiff's "capacity to carry on and enjoy life's activities in a way she would have done had she lived." This court is aware that damages for "loss of the ability to perform life's activities" has historically and regularly been included in personal injury damages awards. See *Johnson v. Pike, 136 Conn.App. 224, 232, 46 A.3d 191 (2012)*. No decision reported or unreported, supports the award of such damages in a legal malpractice case where the

gravamen of the action is injury to real property. Plaintiff's reliance on *Johnson v. Flammia, 169 Conn. 491, 363 A.2d 1048 (1975),* [*59] is misplaced. In that case the court stated the rule of damages which applies to negligent installation of a swimming pool, to wit, the value of the loss of the use of the pool. In different words, this is essentially the same rule of damages which applies to injury to real property, namely, its loss of value. *World Springs Condominium Association, Inc. v. Seventh BRT Development, Corp., 245 Conn. 1, 59, 717 A.2d 77 (1998).* In Connecticut therefore, hedonic damages do not constitute a separate element of damages to real property but are subsumed within the loss of value caused the property by the injury.

Legal Fees Paid

To the Defendants

The plaintiffs have paid the defendants $10,386 in attorneys fees for the services the defendants performed in the failed attempt to obtain relief for them. The plaintiffs seek to have them disgorge these fees. The defendants first contend that the plaintiff has not pled recovery of these fees. The court disagrees. Paragraph 84D alleges that the plaintiffs were paid for the services in full but negligently performed these services (Par. 86) and in their prayer for relief they request compensatory damages. Compensatory damages include the plaintiff's actual losses. [*60] *Hi-Ho Tower, Inc. v. Com-Tronics, Inc., 255 Conn. 20, 34, 761 A.2d 1268 (2000).* It has been said that "recovery for compensatory damages is commensurate with the harm incurred." *Gionfriddo v. Gartenhaus Cafe, 15 Conn. App. 392, 399, 546 A.2d 284 (1988).* Ballentine's Law Dictionary defines compensatory damages as "the damages recoverable in satisfaction of or in recompense for loss or injury sustained including all damages except nominal damages, punitive damages or exemplary damages." *Ballentine's Law Dictionary* 3rd. Ed. at 233. Clearly the fees paid the defendant were part of the losses which the plaintiff suffered as a result of Slane's negligence which they are now entitled to regain. Indeed, in some jurisdictions it has been held that a negligent attorney is precluded from collecting any fee at all, *Campagnola v. Mulholland, 76 N.Y.2d 38, 42, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990),* and that the litigation costs in the malpractice action "cancel out" any attorneys fees that might have been owed had the negligent attorney successfully prosecuted the underlying case. *Winter v. Brown, 365 A.2d 381, 386 (1976, D.C.).*

To Gilbride, Tusa

The claim for recovery of the attorneys fees paid or incurred to the law firm that took over the case from the [*61] defendants stands on unusual footing. In Connecticut, the general rule is well settled that ordinarily parties are responsible for their own attorneys fees. *Mangiante v. Niemiec, 98 Conn. App. 567, 570, 910 A.2d 235 (2006).* A well recognized exception to this rule is where a contractual provision obligates an offending party to pay attorneys fees to the offended party. *Storm Associates, Inc. v. Baumgold, 186 Conn. 237, 245-46, 440 A.2d 306 (1982).* Here, the plaintiff argues that the express terms of the restrictive covenant entitle them to recover such fees. The plaintiff relies on the following language of the covenant.

"The Grantor, its successors and assigns shall have the right to maintain an action at law or in equity to enjoin or remove any prescribed (sic) activity or structure within said parcel X and/or parcel Y, and the *legal fees and other expenses associated with enforcing these restrictions* shall be borne and paid by the Grantees, their heirs, administrators, executors and assigns as the owner or owners of the restricted Parcels X and Y, or either of them with respect to which enforcement is sought." (Emphasis added.)

Plaintiff contends that this language creates a contractual obligation which is binding [*62] on the defendants by virtue of their negligence. In addressing this issue the court must first determine if this component of the covenant creates a contractual right in the plaintiff to recover, and if so, whether such sums can be recovered in this malpractice action.

A covenant is defined as "an agreement in writing and duly executed whereby one or more of the parties named therein engages that a named act is to be performed." *Ballantine's Law Dictionary,* 3rd Ed. at 385. The deed in which a covenant is contained has been considered a contract by our courts. *Cohen v. Holloways', Inc.., 158 Conn. 395, 410, 260 A.2d 573 (1969).* Thus, the covenant created a contractual obligation on the part of the owners of parcels X and Y to pay legal fees and other expenses in any action brought to enforce its terms. Gilbride, Tusa presented billings which totaled $226,059.50 which represented attorneys fees and $13,437.85 which represented expenses for a total of

$239,497.35. Attorney Rickles testified that the hourly rates upon which the time charges are based range from $100 to $125 for paralegals and $250 to $475 for attorneys. The defendant objects to these fees, because there was no proof offered of any effort [*63] to collect these fees and expenses from the Tsois. While failure to pursue the Tsois may be viewed by the defendants as an intervening act of negligence by omission on the part of Gilbride, Tusa if such were the case, such an intervening act does not excuse the negligence of the defendants. In fact, the doctrine of superseding cause in our tort jurisprudence has been abrogated by our case law. *Barry v. Quality, Inc., 263 Conn. 424, 436, 820 A.2d 258 (2003).*

As discussed above in the analysis of the rule of proximate cause, the defendants are responsible for all damages which are a reasonably foreseeable as consequence of their acts.

"We have consistently adhered to the standard of 2 *Restatement (Second), Torts §442B* (1965) that a negligent defendant, whose conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, is not relieved from liability by the intervention of another person, except where the harm is intentionally caused by the third person and is not, within the scope of the risk created by the defendant's conduct. *Kiniry v. Danbury Hospital, 183 Conn. 448, 455, 439 A.2d 408 (1981)*; *Merhi v. Becker, [supra, 522*]; *Miranti v. Brookside Shopping Center, Inc., 159 Conn. 24, 28, 266 A.2d 370 (1969)*; [*64] (alternate citations omitted) *Doe v. Manheimer, 212 Conn. 748, 759, 563 A.2d 699 (1989)*. The commentators agree. "The client's injury may be the expense of retaining another attorney. Such damages can result from an attempt to avoid or minimize the consequences of the former attorney's negligence." *Mallen & Smith, Legal Malpractice* §21:6 at 24 (2013 Ed.).

Whether the omission of Gilbride, Tusa to pursue the Tsois for the fees was negligent or intentional, it clearly was within the scope of the risk created by the defendants' conduct. "The substantial factor test, in truth, reflects the inquiry fundamental to all proximate cause questions: that is, 'whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendants' negligence.'" *Dow v. Manheimer, 212 Conn. at 758*. In the present case the court finds that Gilbride Tusa's failure to pursue the Tsois was within the scope of the risk as reasonably foreseeable and was of the same general nature as the foreseeable risk created by the defendants' malpractice.

The defendants further object to these fees and expenses because there was no proof of reasonableness. *St. Onge, Stewart, Johnson, Reens, LLC v. Media Group, Inc., 84 Conn.App. 88, 97, 851 A.2d 1242 (2004).* [*65] Having held that the duty to pay attorneys fees and expenses arises by virtue of the contractual nature of the covenant, the claim is not an element of negligence damages. The court believes that this issue is controlled by *Storm Associates, Inc. v. Baumgold, supra.*

"It is to be noted that the plaintiff derives its right to recover an attorneys fee in this case from its contract and not from a claim for damages. See *Litton Industries Credit Corporation v. Catanuto, 175 Conn. 69, 76, 394 A.2d 191 (1978)*. The defendant's reliance on cases assigning to a plaintiff the burden of proof with respect to damages; *Slattery v. Maykut, 176 Conn. 147, 151, 405 A.2d 76 (1978)*; *Bertozzi v. McCarthy, 164 Conn. 463, 468, 323 A.2d 553 (1973)*; is therefore inapposite. Under the terms of this contract, the plaintiff was entitled to an attorneys fee which it had 'incurred' without express regard to its reasonableness. Cases interpreting contract clauses which require the payment of 'reasonable attorneys fees,' where we have required an evidentiary showing of reasonableness, are therefore equally inapposite. *Stelco Industries, v. Cohen, 182 Conn. 561, 567-68, 438 A.2d 759 (1980)*; *Lebowitz v. McPike, 151 Conn. 566, 568, 201 A.2d 469 (1964)*. We are persuaded [*66] that a contract clause calling for the reimbursement of fees 'incurred' by the plaintiff permits the recovery of such fees upon the presentation of an appropriate bill, whether such fees are payable to an attorney or to a physician. In the latter case, we have long held that 'proof of the expenses paid or incurred affords some evidence of the value of the services, and if unreasonableness in amount does not appear from other evidence or through application of the trier's general knowledge of the subject-matter, its reasonableness will be presumed.' *Carangelo v. Nutmeg Farm, Inc., 115 Conn. 457, 462, 162 A. 4 (1932)*; *Flynn v. First National Bank & Trust Co., 131 Conn. 430, 40 A.2d 770 (1944)*. Similarly, a contract clause providing for reimbursement of 'incurred' fees permits recovery upon the presentation of an attorney's bill, so long as that bill is not unreasonable upon its face and has not been shown to be unreasonable by countervailing evidence or by the exercise of the trier's

own expert judgment." *Storm Associates, Inc. v. Baumgold, 186 Conn. 237, 246, 440 A.2d 306 (1982)*.

The specific contractual language which was involved in *Storm Associates* was as follows: "[t]he undersigned owner(s) covenant(s) and agree(s) [*67] to pay and be responsible for all costs, disbursements and attorneys fees incurred in any action to collect any commission earned pursuant to the above." *Id. at 245*.

The language of the covenant in this case is substantially similar. This court perceives no functional difference in meaning between "incurred" and "associated with." Not only was no evidence offered of the unreasonableness of these fees but the court's familiarity with going rates at the time as well as its general knowledge of the level of competence of Gilbride Tusa lead to the conclusion that the fees are not unreasonable. *Bizzoco v. Chinitz, 193 Conn. 304, 310, 476 A.2d 572 (1984)*. The general rule is that "a client may incur attorneys fees and litigation expenses in attempting to avoid, minimize or reduce the damage caused by the attorney's wrongful conduct." *Mallen & Smith, Legal Malpractice*, §21:10 at 35 (2013 Ed.); *Sorenson v. Fiorito, 90 Ill. App. 3d 368, 413 N.E.2d 47, 45 Ill. Dec. 714 (1980, Ill.)*.

To Greenspan and Greenspan

As the court stated at the conclusion of the trial, the issue of whether the plaintiffs are entitled to attorneys fees in the prosecution of this action should await the court's decision on liability-related issues in the case. The parties are [*68] directed to file supplemental briefs within two weeks limited to the issue of whether such attorneys fees recoverable in this action.

Contempt Fines Levied Against Tsois

In the court's decision of November 28, 2008 on the plaintiff's motion for contempt, the court distinguished between coercive and remedial fines. As the court pointed out, a coercive fine is imposed to coerce compliance with a court order, is conditional and continues until the disobedient party complies with the mandate of the court. *Board of Education v. Shelton Education Association, 173 Conn. 81, 376 A.2d 1080 (1977)*. A remedial fine on the other hand is intended to compensate the complainant for losses sustained. If a fine is imposed it is payable to the plaintiff. *DeMartino v. Monroe Little League, Inc., 192 Conn. 271, 278-79, 471 A.2d 638 (1984)*. In its order, the court awarded the plaintiff attorneys fees and costs in the amount of $7,916.50. Since Gilbride Tusa was awarded this sum it is presumed that this amount is included in its billing which is in evidence (Ex. 45) although it does not appear as a separate entry, and none of the entries are dated. Because the court has already awarded damages in the full amount of the billing, a separate [*69] award for this portion of the contempt judgment would constitute an impermissable double compensation. If the fee is not so included but remains unpaid separately, then it is recoverable. The second part of the judgment is for engineering costs of $2,392 which unlike the attorneys fees are not accounted for elsewhere and which are clearly remedial in nature. The last component part of the judgment was a fine of $500 per day for every day that the work is not completed commencing on December 31, 2008. The court made this payable to the plaintiff. It would appear therefore that the court intended to make this clearly coercive fine both remedial and punitive. On the other hand, "such a compensatory fine must be limited to the actual damages suffered by the injured party as a result of the violation of the injunction." *DeMartino v. Monroe Little League, Inc., supra at 279*. Because the $500 per day fine will necessarily exceed the amount of the actual losses incurred by the plaintiff and already awarded by this court they are not a proper element of damages which the plaintiffs may recover.

Prejudgment Interest

Plaintiff seeks to recover prejudgment interest pursuant *G.S. §37-3a* arguing that [*70] the losses which the plaintiff suffered constitute monies of which the plaintiff was deprived. While a plausible argument can be made that a $250,000 reduction in the value of the plaintiffs' property after the Tsois completed their construction activities is tantamount to a wrongful detention of money, similar to a diminution in property value which occurs after a partial taking by eminent domain (see *G.S. §37-3c*), recovery of interest in this case is governed by *G.S. §37-3b*. The statute provides in pertinent part as follows:

Sec. 37-3b. Rate of interest recoverable in negligence actions. (a) For a cause of action arising on or after May 27, 1997, interest at the rate of ten per cent a year, and no more, shall be recovered and allowed in any action to recover damages for injury to the person, or to real or personal property, caused by negligence, computed from

the date that is twenty days after the date of judgment or the date that is ninety days after the date of verdict, whichever is earlier, upon the amount of the judgment.

As stated earlier, a legal malpractice case is a negligence case and the present case is an action to recover injury to real property based on the negligence [*71] of an attorney. As the court reads the statute, by enacting a special statute to govern interest in negligence cases and by limiting interest to the postjudgment period the legislature has precluded the award of prejudgment interest in all negligence cases, irrespective of the particular type. *Misiurka v. Maple Hill Farms, Inc., 15 Conn.App. 381, 386-87, 544 A.2d 673 (1988)*.

The plaintiff's theory that the retainer agreement between Bruno and Slane is a consumer contract under *G.S. §42-150bb* is without merit. Even if the retainer agreement were a consumer contract within the meaning of that statute, the statute deals only with attorneys fees and not prejudgment interest. It is difficult to imagine any circumstances under which one may be equated with the other.

The plaintiffs also contend that they are entitled to prejudgment interest under a theory of mutuality of remedy. Without offering any authority for or analysis of the claim,[6] the plaintiffs argue that because the retainer agreement between the parties provides that Slane may collect interest from the plaintiff at the rate of 12% per annum on "any amounts unpaid," that the doctrine of mutuality of remedy dictates that the plaintiff should be [*72] permitted reciprocally to recover prejudgment interest from the defendant. The plaintiffs characterize the situation as a lack of mutuality of remedies rather than a lack mutuality of obligation but offer no discussion of why the retainer agreement presents one but not the other. Our Supreme Court has applied the doctrine of mutuality of obligation in evaluating remedies accorded each party to a contract.

> 6 We repeatedly have stated that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Citations omitted; internal quotation marks omitted.) *Merchant v. State Ethics Commission, 53 Conn.App. 808, 818, 733 A.2d 287 (1999). These same principles apply to claims raised in the trial court.* (Emphasis added.) (Alternate citation omitted.) *Connecticut Light & Power Co. v. Department Utility Control, 266 Conn. at 120,* [*73] *supra*.

". . . the alleged inadequacy of one untested remedy neither deprives a contract of mutuality of obligation nor establishes inadequacy of consideration. The doctrine of consideration does not require or imply an equal exchange between the contracting parties. That which is bargained-for by the promisor and given in exchange for the promise by the promisee is not made insufficient as a consideration by the fact that its value in the market is not equal to that which is promised. Consideration in fact bargained for is not required to be adequate in the sense of equality in value . . . The general rule is that, in the absence of fraud or other unconscionable circumstances, a contract will not be rendered unenforceable at the behest of one of the contracting parties merely because of an inadequacy on consideration. (Citations omitted; internal quotation marks omitted.) *Osborne v. Locke Steel Chain Co., 153 Conn. 527, 532-33, 218 A.2d 526 (1966)*; see 1 *Restatement (Second), Contracts §79*, p. 200 (1981) ("[i]f the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation'"; see also 1 A. Corbin, Contracts (1963) §127; 3 S. Williston, Contracts (4th [*74] Ed. 1992) §7:21, p. 383." (Alternate citation omitted.) *State v. Lex Associates, 248 Conn. 612, 619, 730 A.2d 38 (1999)*.

"It has sometimes been said that there is a requirement of 'mutuality of remedy.' However, the law does not require that the parties have similar remedies in case of breach, and the fact that specific performance or any injunction is not available to one party is not a sufficient reason for refusing it to the other party. The rationale of the supposed requirements of 'mutuality of remedy' is to make sure that the party in breach will not be compelled to perform without being assured that he will receive any remaining part of the agreed exchange from the injured party." *Restatement of the Law of Contracts*, 2d Ed., §363, comment c. Thus, the existence of an obligation imposed on Baruno to pay interest to Slane on any unpaid fees does not mandate that a reciprocal obligation be imposed on Slane to pay a similar sum.

Costs and Expenses

The plaintiff argues that by the terms of the restrictive covenant she is entitled to recover all "expenses associated with enforcing these restrictions" and therefore she is not limited to those fees and costs which are allowed under *G.S. §§52-257* and [*75] *52-260*. Plaintiff makes this point with particular reference to the fees charged by the expert, Attorney Hecht. The difficulty with this argument is that it ignores the difference in the nature of the two proceedings. In other words, Attorney Hecht's expert witness fee for which recovery is sought was not incurred in the process of seeking enforcement of the restrictive covenant, it rather was incurred in an effort to seek compensatory damages resulting from an attorney's negligence. As such, recoverability is controlled by *G.S. §§52-257*, *52-260(f)* and ultimately by P.B. 18-5. Clearly, Attorney Hecht's testimony was directed to events which occurred subsequent to the need for enforcement action.

As for expert Giancola, it is noted in Judge Karazin's order of November 28, 2008, $2,392 was awarded for engineering fees. The court notes further that by the terms of the covenant recoverable fees and expenses are limited to those which are incurred to secure an injunction to prevent or remove the prohibited "activities" but do not include such charges when they are incurred to further a claim for monetary damages in a later legal malpractice suit. All of Mr. Giancola's testimony in the present [*76] case is tailored to support the plaintiff's claim for monetary damages. To put it another way, Mr. Giancola's testimony in the present case was given not in an effort to obtain a restoration of the property to its former condition but rather to support the plaintiff's cause of action for malpractice.

The court awards the following damages:

$250,000--diminution of property value

120,000--remediation costs to plaintiff's property

238,034--legal fees to Gilbride Tusa

10,386--legal fees to the defendants

2,397--engineering costs as per contempt order of 11/28/2008

$620,817--Total damages

$7,916.50--contingent legal fees/costs to Gilbride Tusa

BY THE COURT

A. WILLIAM MOTTOLESE, J.T.R.