SCHALLER, J., concurring. I agree that the plaintiff homeowners, Gerald Hees and Beatrice Hees, are not entitled to recover damages for their costs to complete and repair the work performed by the defendant, Burke Construction, Inc. I disagree, however, with the decision to reverse the judgment on the basis of an interpretation of the Home Improvement Act (act), General Statutes § 20-418 et seq. I would reach the same result by a more direct route that does not involve any statutory interpretation of General Statutes § 20-429 (a), which provides in relevant part that "[n]o home improvement contract shall be valid or enforceable against an owner unless it . . . (6) contains a notice of the owner's cancellation rights . . . ." My approach avoids determining whether the use of the statute is "affirmative" or not, a concept that is not found in the statute. I believe that the act, the language of which is unambiguous, is compatible with the law of contract damages and that, in light of the procedural history of this case, it is appropriate to use the contract price as a reference point to calculate the plaintiffs' damages irrespective of the act's application to certain aspects of this case.

Central to my approach is a precise recognition of the parties' claims and the application of § 20-429 (a) by the attorney trial referee, David Albert (referee). As the majority opinion indicates, the plaintiffs brought a breach of contract action, thereby treating the contract as valid and enforceable against the defendant. In recommending judgment for the plaintiffs on their breach of contract claim, the referee, whose report was accepted by the trial court, recognized the viability of the contract for this purpose, and repeatedly cited the contract in his various findings. In short, the contract was valid and enforceable with respect to the plaintiffs' breach of contract claim.

The defendant, in addition to contesting the plaintiffs' breach of contract claim, also filed various counterclaims. In response, the plaintiffs filed a motion for summary judgment, claiming that § 20-429 (a) barred the defendant's counterclaims. The referee agreed that § 20-429 (a) barred the counterclaims and recommended summary judgment in favor of the plaintiffs.

The plaintiffs, in other words, simultaneously claimed that the contract was enforceable to support their breach of contract claim but unenforceable, pursuant to § 20-429 (a), with respect to the contractor's counterclaims. This is a valid *dual* argument. See *New England Custom Concrete, LLC* v. *Carbone*, 102 Conn. App. 652, 666, 927 A.2d 333 (2007) (trial court improperly held that homeowner cannot claim both breach of contract and, at same time, invalid contract by way of defense).

The problem in this case arose when, in calculating the plaintiffs' damages, the referee conflated the application of § 20-429 (a) to the defendant's counterclaims with the application of § 20-429 (a) to the plaintiffs' burden of proof as to damages on the breach of contract claim. In short, the referee took the concept that the contractor could not prevail on his counterclaims and applied it to the calculation of the plaintiffs' damages. The referee stated: "Because of [the] defendant's . . . [statutory] violations[1] the defendant is not entitled to any of its claim for damages *nor is it entitled to offset any of its damage claims against* [*the*] *plaintiffs' damages*." (Emphasis added.)

I agree with the majority that "§ 20-429 (a) does not preclude the damages award from being reduced by an amount equal to the unpaid balance remaining on the contract." I reach that conclusion, however, on the ground that § 20-429 is inapplicable to the present case, rather than by relying on an analysis of the statute's legislative history.

Simply put, the road to calculating the plaintiffs' damages never detours with a stop at § 20-429 (a). In the present case, calculating the plaintiffs' damages necessarily requires reference to the applicable contract. With respect to proving damages, our case law requires reference to the contract on which the breach is based. "For a breach of a construction contract involving defective or unfinished construction, damages are measured by computing either (i) *the reasonable cost of construction and completion in accordance with the contract* . . . or (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste."[2] (Emphasis added; internal quotation marks omitted.) *Levesque* v. *D & M Builders, Inc.*, 170 Conn. 177, 181, 365 A.2d 1216 (1976), quoting 1 Restatement, Contracts § 346 (1) (a), p. 573 (1932).

Under the facts of the present case, the appropriate calculation of compensatory damages, with reference to the contract, would be as follows: The contract price of $349,500, after various change orders, totaled $391,854. The defendant charged the plaintiffs $347,003[3] for work that it had performed, and the plaintiffs paid the defendant $330,531 of that amount, leaving an unpaid balance of $16,472. The reasonable cost of completion was $16,085.17. Accordingly, because the $16,085.17 for the reasonable cost of completion and the payments of $330,531 were less than the contract price; see footnote 8 of the majority opinion; the plaintiffs were not entitled to damages. See *Levesque* v. *D & M Builders, Inc.*, supra, 170 Conn. 180–81 ("[a]s a general rule, in awarding damages upon a breach of contract, the prevailing party is entitled to compensation

which will place him in the same position he would have been in had the contract been properly performed").

In short, this case presents nothing more than an ordinary breach of contract claim that requires the plaintiffs to prove damages.[4] Section 20-429 (a) was relevant solely as a defense to bar the contractor's counterclaims—a wholly uncontroversial use of the statute. It is not necessary to *interpret* § 20-429 (a) with respect to the plaintiffs' breach of contract claim.

The majority opinion, at the outset, seems to agree with the proposition that § 20-429 (a) does not apply in calculating the plaintiffs' damages. In analyzing various cases that were based on violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., the majority concludes that "if § 20-429 (a) does not affect the damages calculation in actions brought under CUTPA, we do not see why it should alter such a calculation in an action for breach of contract."

Significantly, in order to reach the conclusion that § 20-429 (a) does not affect the damages calculation in an action brought under CUTPA, the majority does not rely on *any* statutory interpretation. Under CUTPA, a plaintiff must first "establish that the conduct at issue constitutes an unfair or deceptive trade practice. Second, [a plaintiff] *must present evidence* providing a basis for a court to make a reasonable estimate of the damages that they have suffered. . . . There is no automatic entitlement to damages." (Citation omitted; emphasis added.) *New England Custom Concrete, LLC* v. *Carbone*, supra, 102 Conn. App. 666. By analogy, the evidence in the present case, if raised under CUTPA, would be the contract price and related payments, paid and unpaid. See *MacMillan* v. *Higgins*, 76 Conn. App. 261, 276–79, 822 A.2d 246 (damages calculated with reference to contract price, payments made, and costs of completion in CUTPA action based on violation of § 20-429 [a]), cert. denied, 264 Conn. 907, 826 A.2d 177 (2003).

Moreover, § 20-429 (a) would be relevant to calculating damages only if our case law took account of a defendant's legal entitlement to collect an unpaid balance. As the majority observes, however, a court, in calculating a *plaintiff's* damages, need not consider whether a *defendant* legally would be entitled to recover an unpaid balance in a cause of action brought by the defendant.[5] See footnote 12 of the majority opinion.

The majority's analysis with respect to the CUTPA cases, and the insignificance of a defendant's legal authority to collect an unpaid sum, makes the majority's foray into statutory interpretation all the more unnecessary. In my view, the majority's analysis goes astray when it asks whether "the legislature intended § 20-429 (a) to prohibit a contractor from in any way using the

contract against the interests of the homeowner, even in the procedural context of an action brought by the homeowner against the contractor." It is no wonder, given the potential breadth of that query, that the majority concludes that the statute is ambiguous.

The question actually presented by the facts of this case is far narrower. The more appropriate question to be asked is whether § 20-429 (a) abrogates the usual method of calculating damages when a homeowner has brought a successful breach of contract claim. I conclude that it does not. The effect of § 20-429 (a) is to render a contract *invalid* and *unenforceable*. The plaintiffs, however, prevailed on their breach of contract claim, a claim based on a *valid* and *enforceable* contract.[6] The plaintiffs' damages, which must be calculated in reference to that contract, are necessarily based on a valid and enforceable contract. Simply put, the provisions of § 20-429 (a), and the act in general, do not serve as both a basis for liability or defense to a counterclaim, *and* also as a method of calculating damages. See *Scrivani* v. *Vallombroso*, 99 Conn. App. 645, 654, 916 A.2d 827 ("[t]o recover damages under CUTPA . . . the defendant must prove more than a violation of the statute" [internal quotation marks omitted]), cert. denied, 282 Conn. 904, 920 A.2d 309, aff'd after remand, 102 Conn. App. 668, 927 A.2d 920 (2007).[7]

Accordingly, because I conclude that the referee properly considered the contract to be valid for purposes of the plaintiffs' complaint, I see no obstacle to relying on the contract to assess damages, as the case law requires. Doing so does not run afoul of the act in any respect. This approach would avoid interpreting the act in a way that, to my mind, relies on concepts, such as *affirmative* uses of the statute as opposed, presumably, to *nonaffirmative* uses of the statute, that do not appear in the statute and are likely to prove troublesome in the future. It is also unnecessary to engage in any discussion of whether the plaintiffs would benefit from a windfall.

For the foregoing reasons, I respectfully concur in the judgment reached by the majority.

[1] The referee stated "CUTPA violations"; see Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.; but it is clear that the referee was referring to § 20-429 (a) and not to CUTPA violations, because, as the majority opinion notes, the plaintiffs did not raise any CUTPA claims. See footnote 7 of the majority opinion.

[2] The referee did not make any findings with respect to the value of the home in its unfinished and finished state. Accordingly, the proper calculation of damages consists of the reasonable cost of completion in accordance with the contract.

[3] The $347,003 owed by the plaintiffs consisted of $346,378 that had been billed by the defendant and $625 that had not been billed.

[4] To illustrate this point, it is clear that if the defendant had never raised any of his counterclaims, and thus had never given the plaintiffs cause to invoke § 20-429 (a), the calculation of damages on the plaintiffs' breach of contract claim would have proceeded in the same fashion as I have outlined today. That is, if the defendant had been silent during the trial and had left the plaintiffs to their proof, the plaintiffs still would not have been entitled to damages under our case law. In that posture, it could not reasonably be

said that the contract was being used "against" the plaintiffs because the plaintiffs would need to rely on the contract to attempt to prove their damages.

[5] The plaintiffs have not cited any authority that suggests that a court should take into account a defendant's legal ability to collect an unpaid balance when the court calculates a plaintiff's damages.

[6] Again, it is a fine line to walk, but the contract was invalid and unenforceable with respect to the defendant's counterclaims only; it was valid and enforceable with respect to the plaintiffs' breach of contract claim. As noted previously in this concurring opinion, this is a permissible dual view of the contract. *New England Custom Concrete, LLC* v. *Carbone*, supra, 102 Conn. App. 666.

[7] Although we consider the failure to comply with the act, which includes § 20-429 (a), to be a per se violation of CUTPA; *Woronecki* v. *Trappe*, 228 Conn. 574, 579, 637 A.2d 783 (1994); we still require a plaintiff to prove damages. *A. Secondino & Son, Inc.* v. *LoRicco*, 215 Conn. 336, 343–44, 576 A.2d 464 (1990). Nothing within those cases suggests that the act should also be considered in calculating a plaintiff's damages.