FREDERICK C. ULBRICH ET AL. *v.* KELLY J. GROTH ET AL.
(SC 18815)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, Harper and Vertefeuille, Js.*

Argued November 27, 2012—officially released November 12, 2013

Allan B. Taylor, with whom was *Jeffrey P. Mueller*, for the appellants-appellees (defendant TD Banknorth, N.A., et al.).

Richard P. Weinstein, with whom was *Nathan A. Schatz*, for the appellee-appellant (named plaintiff).

Donald E. Frechette and *Tara L. Trifon* filed a brief for the American Bankers Association as amicus curiae.

Martin J. Newhouse, *John Pagliaro* and *Margaret A. Little* filed a brief for the New England Legal Foundation as amicus curiae.

Opinion

VERTEFEUILLE, J. The defendant TD Banknorth, N.A. (bank), held mortgage and security interests in real and personal property located in Wallingford and Meriden and owned by the defendants Groth Family Limited Partnership, the Mountainside Corporation and/or James A. Groth (collectively, debtors). The real property was operated as a commercial special events facility and the personal property consisted of items used to operate the facility. The named plaintiff, Frederick C. Ulbrich, was the successful bidder at a combined foreclosure sale of the real estate and secured party auction of the personal property conducted pursuant to article 9 of the Connecticut Uniform Commercial Code (UCC), General Statutes § 42a-9-101 et seq. (article 9). The plaintiff Ulbrich Properties, LLC (Ulbrich Properties), is the current owner of the real and personal property.[1] The defendant Tranzon Auction Properties (Tranzon) conducted the auction.[2] After Ulbrich purchased the property, the plaintiffs discovered that there were conflicting claims as to the ownership of the personal property auctioned and that, as a result, the plaintiffs would not receive many of the items that Ulbrich had believed were included in the sale. Thereafter, the plaintiffs brought this action against the defendants alleging, inter alia, that their failure to inform the plaintiffs that there were conflicting claims to the property constituted negligence and negligent misrepresentation, breach of the warranty of title, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The jury returned a verdict for the plaintiffs on four of their counts and awarded compensatory damages of $462,000, which the trial court reduced to $417,000. The trial court also awarded attorney's fees of $274,128 and punitive damages of $1,251,000 pursuant to CUTPA, as well as postjudgment interest pursuant to General Statutes § 37-3a. The defendants then filed this appeal[3] in which they raise numerous challenges to the judgment of the trial court. Ulbrich cross appealed from a number of the court's adverse rulings. We conclude that the trial court improperly determined that: (1) the defendants had a common-law duty to the plaintiffs to properly identify the personal property that was subject to the secured party sale; and (2) it lacked the authority to grant the plaintiffs' request for nontaxable costs pursuant to CUTPA. We affirm the judgment in all other respects.

The jury reasonably could have found the following facts. The bank made a loan to the debtors that was secured by certain real and personal property that they owned in Meriden, including the special events facility and the personal property used to operate the facility. When the debtors defaulted on the loan, the bank initiated a foreclosure action against them in which it sought to foreclose both the real and personal property. Thereafter, the bank sought the trial court's permission to sell the real and personal property together, "as a whole . . . so as to achieve the highest total price at the auction sale," which the court ordered.[4]

The trial court in the foreclosure action also authorized Bruno Morasutti, who had been appointed as the committee of sale, to hire an auctioneer to conduct the auction sale of the real and personal property. Ultimately, Tranzon was retained to conduct the auction.[5] Before the auction, Tranzon provided prospective bidders with an auction brochure that contained a list of the types of personal property that were to be sold.[6] The list was prefaced by the statement: "Personal [p]roperty to be sold, as an entirety, with the special events facility." The following disclaimer was set forth at the bottom of the list: "DISCLAIMER: While descriptions of the personal property listed above are believed to be accurate, no warranties or guarantees are being made, expressed or implied, regarding the quality, quantity, or usefulness for any purpose of those items. All items are being sold on an 'AS IS, WHERE IS' basis with no warranty of merchantability. Item(s) may have been removed or added since the preparation of this list."[7] The brochure also stated that the personal property had been assessed at $16,988 for property tax purposes.

Before the auction, the defendants learned that the debtors did not own many of the items of personal property that were used to operate the special events facility, but had leased them, and, therefore, it was possible that the items were not subject to the bank's security interest.[8] On October 25, 2006, the attorney for the debtors sent a letter to Morasutti stating that the auction brochure made "no mention of the fact that a substantial portion of the personal property is subject to leases. Since we have not reviewed these documents, we cannot advise you whether it is our conclusion that these are 'true' leases or 'finance' leases." In addition, Morasutti wrote that "Mountainside [Corporation] does own the critical personal property although [t]he Groth Family Limited Partnership owns some of the larger equipment and the leases are in the name of a third entity, Festivals, [Incorporated]." On October 31, 2006, the bank's attorney sent an e-mail to the debtors' attorney and Morasutti stating that "[t]he buyers will of course inquire as to what personal property is being conveyed. The only property at the site that is not subject to the [b]ank's security interest would be property that is not owned by [the debtors], including any property subject to a true lease. I would kindly suggest that the [debtors] identify any property that they claim is not owned by [them]. The committee would then have to alert buyers of the property that is not included in the auction." The defendants did not inform potential bidders that some of the personal property on the site did not belong to the debtors and was not being conveyed at the auction.

Also before the auction, Ulbrich walked through the property with James A. Groth, whom he had known for many years. Ulbrich had reached an informal agreement with Groth and the other debtors that they would continue to operate the special events facility if he was the successful bidder at the auction. Groth led Ulbrich to believe that virtually all of the personal property at the site was included in the auction sale.

The auction took place on November 9, 2006. Before the bids were placed, the auctioneer informed the bidders verbally that the personal property list "is for informational purpose[s] to give you some sense [of] what has been used in the operation of this business and again we are not making representations as to any one item or the quality and quantity of any one item." Ulbrich successfully bid $1.65 million for the real and personal property.[9] At the sale closing, which took place in January, 2007, the bank provided two bills of sale for the personal property, each of which stated that the bank "hereby sells and transfers to [Ulbrich] . . . all of the [bank's] right, title and interest, as such [bank] has or may have in and to the personal property described on [e]xhibit 'A' attached hereto . . . ."[10] In addition, the bills of sale provided: "THE SECURED PARTY MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO THE COLLATERAL. THE ASSETS ARE SOLD 'AS IS' AND 'WHERE IS' AND THE SECURED PARTY SPECIFICALLY DISCLAIMS ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PURPOSE WHATSOEVER."

After the auction, the plaintiffs discovered that much of the personal property at the site was not included in the sale because it was not owned by the debtors. As a result, the plaintiffs were required to engage in extensive litigation to determine who was entitled to possession and ownership of the items of personal property.

In December, 2007, the plaintiffs commenced this action alleging, among other claims, negligence and negligent misrepresentation against the bank and Tranzon, breach of the warranty of title against the bank, and violation of CUTPA against the bank. In addition, the plaintiffs raised a breach of contract claim against the bank for its alleged failure to pay the plaintiffs the proceeds from a life insurance policy belonging to the debtors that the plaintiffs claimed was included in the sale. During the trial, the trial court rendered a directed verdict for the defendants on the breach of contract claim. The court denied the defendants' motion for a directed verdict on the negligence and negligent misrepresentation claims and the CUTPA claim against the bank based on the economic loss doctrine. Thereafter, the jury returned a verdict in favor of the plaintiffs on the negligence and negligent misrepresentation claims against both the bank and Tranzon and the breach of warranty and CUTPA claims against the bank, and awarded $462,000 in compensatory damages. The trial court subsequently denied the defendants' motion for judgment notwithstanding the verdict and their motion to set aside the verdict. The court also denied the defendants' motion for remittitur in part, but granted a $45,000 remittitur to reflect payments that the plaintiffs' had received from settling parties, resulting in a compensatory damages award of $417,000.[11] After conducting a postverdict evidentiary hearing, the trial court awarded $273,128 in attorney's fees and $1,251,000 in punitive damages on the plaintiffs' CUTPA claim, but denied the plaintiffs' request for nontaxable costs. In addition, the court awarded postjudgment interest to the plaintiffs on the full amount of damages at the rate of 7.5 percent. This appeal and cross appeal followed.[12]

The defendants claim that the trial court improperly: (1) determined that the economic loss doctrine did not bar the plaintiffs' tort and CUTPA claims; (2) determined that a secured party seller and an auctioneer at a secured party sale owe a common-law duty of care to the buyer; (3) upheld the jury verdict in favor of the plaintiffs on the breach of the warranty of title claim when the bank had disclaimed any warranty of title; (4) determined that the written warranty disclaimers did not bar the plaintiffs' negligent misrepresentations claims; (5) upheld the jury verdict in favor of the plaintiffs on the CUTPA claim when it was not supported by sufficient evidence; (6) upheld the jury's compensatory damages award when it was not supported by sufficient evidence; (7) awarded punitive damages to the plaintiffs pursuant to CUTPA; and (8) awarded postjudgment interest to the plaintiffs. On cross appeal, Ulbrich claims that the trial court improperly rendered a directed verdict for the defendants on the breach of contract claim and denied the plaintiffs' request for nontaxable costs pursuant to CUTPA.

I

The defendants claim that the trial court improperly determined that: (1) a secured party seller and an auctioneer at a secured party sale pursuant to article 9 of the UCC owe a common-law duty of care to the buyer;[13] and (2) that the plaintiffs' negligence and negligent misrepresentation claims are not barred by the economic loss doctrine.[14] Because these claims are intertwined, we address them together.[15] See *Princess Cruises, Inc.* v. *General Electric Co.*, 950 F. Supp. 151, 154–55 (E.D. Va. 1996) (applying economic loss doctrine to determine whether common-law duty exists independent of contractual duty), rev'd on other grounds, 143 F.3d 828, cert. denied, 525 U.S. 982, 119 S. Ct. 444, 142 L. Ed. 2d 399 (1998). We conclude that the plaintiffs' tort claims against the bank and Tranzon were barred.

The following additional procedural history is relevant to our resolution of this claim. Before trial, the defendants filed a motion for summary judgment in which they argued that the plaintiffs' claims were governed exclusively by article 9 and, therefore, their negligence and negligent misrepresentation claims were barred under the economic loss doctrine. The trial court denied the motion. After trial, the defendants filed a motion to set aside the jury verdict in which they argued that the trial court improperly instructed the jury that a secured party seller at an article 9 sale owes a common-law duty of care to the buyer of the goods.[16] In addition, they filed a motion for judgment notwithstanding the verdict in which they argued that the plaintiffs' negligence and negligent misrepresentation claims were barred by the economic loss doctrine. Relying on this court's decision in *Lombard* v. *Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 634, 749 A.2d 630 (2000), the trial court denied the defendants' motions on the ground that "a person who sells property has a duty to exercise reasonable care to properly identify the property being sold and not to misidentify property as being part of the sale when it is not." The court also concluded that the plaintiffs' claims were not barred by the economic loss doctrine.

As a preliminary matter, we set forth the applicable standard of review. Although we generally review a trial court's denial of a motion to set aside a verdict for an abuse of discretion; *Hall* v. *Bergman*, 296 Conn. 169, 179, 994 A.2d 666 (2010); whether a secured party and auctioneer owe a common-law duty of care to the buyer at a secured party sale is a question of law over which our review is plenary. See *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 687–88, 41 A.3d 1013 (2012); see also *Pelletier* v. *Sordoni/Skanska Construction Co.*, 286 Conn. 563, 593, 945 A.2d 388 (2008) ("[t]he existence of a duty is a question of law" [internal quotation marks omitted]).

The plaintiffs contend that the trial court's determination that the defendants owed them a common-law duty of care to identify accurately the personal property that was subject to the article 9 secured party sale is supported by *Lombard* v. *Edward J. Peters, Jr., P.C.*, supra, 252 Conn. 634 (committee of sale has duty not to misidentify property that was subject to foreclosure sale),[17] *Basiliko* v. *Pargo Corp.*, 532 A.2d 1346, 1348–49 (D.C. 1987) (foreclosing seller is liable to buyer for "benefit of the bargain" damages when seller was mistaken about its authority to sell property),[18] and *Tri-Professional Realty, Inc.* v. *Hillenburg*, 669 N.E.2d 1064, 1068 (Ind. App. 1996) ("[a] real estate agent has a basic professional duty to identify correctly the property it claims authority to sell").[19] These cases, however, involved real estate sales and are premised on the distinction, in that context, between claims involving an alleged breach of the warranty of title and claims involving an allegation that the seller lacked authority to sell the property. Compare *Lombard* v. *Edward J. Peters, Jr., P.C.*, supra, 625 (committee of sale was liable for negligence when it incorrectly identified garage unit that had been neither foreclosed nor subject to any foreclosure as part of property that had been sold), with *Water Pollution Control Authority* v. *Johnson*, 130 Conn. App. 692, 698, 26 A.3d 87 (2011) ("[General Statutes] § 49-30 categorically and unconditionally imposes the risk of undisclosed liens on the purchasers of property at foreclosure sales"); see also *Basiliko* v. *Pargo Corp.*, supra, 1349 (buyer at foreclosure sale is subject to rule of caveat emptor with respect to warranty of title, but rule has no applicability to mistake relating to authority of lender to conduct sale); *Tri-Professional Realty, Inc.* v. *Hillenburg*, supra, 1068 (seller of real estate is not required to insure title to real estate but has duty to correctly identify property that it claims to sell). It is reasonable to conclude that the reason for this distinction is that, unlike title issues, which can easily be discovered by a potential purchaser by searching the land records, the seller's lack of authority to sell a particular property is frequently a matter within the sole knowledge or control of the seller. See *Basiliko* v. *Pargo Corp.*, supra, 1349 (seller is liable for "benefit of the bargain" damages when "the cause of the seller's breach involves a matter within the seller's exclusive control, and not detectable by the buyer").

The plaintiffs have cited no cases, however, in which a court addressing a claim involving an article 9 secured party sale has made the distinction between warranty of title claims and authority to sell claims that courts have made in the context of real estate sales. Indeed, in the only case that we have been able to discover that addresses a claim that a secured party had sold property in the possession of the debtor that it had no right to sell because it did not belong to the debtor, the secured party's conduct was treated solely as a breach of the warranty of title under the UCC. See generally *Landmark Motors, Inc.* v. *Chrysler Credit Corp.*, 662 N.E.2d 971, 975 (Ind. App. 1996) (when secured party sold item in debtor's possession that debtor had leased from third party, court analyzed buyer's claim against secured party under UCC warranty of title principles). Subjecting all sales of personal property in the possession of the debtor to the same standard makes sense because the reasons for the distinction between warranty of title claims and authority to sell claims in the real estate context, i.e., the buyer's ability to determine from the land records who has title to the property, on the one hand, and the seller's exclusive ability to determine whether it has authority to sell the property, on the other hand, have far less force when applied to secured party sales of personal property in the possession of the debtor.[20] In light of the distinctive nature of secured party sales of personal property, we conclude that the reasoning of the cases holding that a seller in a real estate transaction has a common-law duty to ensure that it has authority to sell the property that is *separate and distinct* from its responsibilities with respect to warranting legal title does not extend to such sales. Rather, we conclude that the claim raised by the plaintiffs in the present case is precisely the type of claim that the legislature intended to be resolved by application of the warranty of title provisions of article 9 of the UCC.[21]

Indeed, the trial court in the present case instructed the jury that the rule of caveat emptor, the rule that a secured party seller has a duty to potential buyers "to properly identify the property being sold and not to misidentify property as being part of a sale when it is not," *and* the rule under article 9 that a secured party seller impliedly warrants title to the sold property all applied to *all* of the personal property that the plaintiffs believed they were purchasing, but which they ultimately did not receive. Moreover, although the plaintiffs presented evidence that some of the personal property that was not delivered to them did not belong to the debtors but had been leased from third parties, the plaintiffs made no effort to distinguish property that had not been delivered because it had been misidentified as belonging to the debtors and property, if any, that belonged to the debtors but was subject to security claims that were superior to the bank's. Rather, the plaintiffs appear to have assumed that the claim that a seller has a common-law duty not to misidentify property and a claim pursuant to article 9 that the property sold at a secured party sale is subject to an implied warranty of title may be raised as alternative claims with respect to one and the same transaction. As we have indicated, however, the cases that the plaintiffs rely on clearly apply the rule governing the authority to sell property and the rule governing the warranty of title to separate and distinct factual circumstances. We emphasize that we are not suggesting that it is required or even possible to make such a distinction when raising these types of claims with respect to secured party sales of personal property. Rather, the very fact that it is difficult to make the distinction in this context leads us to conclude that the cases applying the distinction in the real estate context should not be extended to sales of goods.

Although we recognize that the fact that article 9 of the UCC applies to the defendants' conduct does not *necessarily* mean that the plaintiffs are barred from raising common-law claims; see *Flagg Energy Development Corp.* v. *General Motors Corp.*, 244 Conn. 126, 154, 709 A.2d 1075 (1998) ("[General Statutes §] 42a-1-103 [b][22] preserves a broad range of common-law actions, including actions for fraud and misrepresentation, unless such actions are 'displaced by the particular provisions of this title' " [footnote added]); we conclude that any such claims are barred under the economic loss doctrine. In *Flagg Energy Development Corp.*, this court agreed "with the holdings of cases in other jurisdictions that commercial losses arising out of the defective performance of contracts for the sale of goods cannot be combined with negligent misrepresentation. See *Duquesne Light Co.* v. *Westinghouse Electric Corp.*, 66 F.3d 604, 618 (3d Cir. 1995); *Princess Cruises, Inc.* v. *General Electric Co.*, [supra, 950 F. Supp. 155] (The parties are sophisticated corporations familiar with the type of services rendered, and the consequences of a mechanical failure likely to result from a failure to perform the contract as promised. The parties were free to allocate the risks, insure against potential losses, and adjust the contract price as they deemed most wise. This [c]ourt sees no reason to extricate the parties from their bargain.); see also General Statutes § 52-572n (c);[23] 1 Restatement (Third), Torts, Products Liability (proposed final draft) § 6, p. 303 (1996).[24] These authorities are particularly persuasive in the circumstances of this case, in which the misrepresentation and CUTPA claims depend upon allegations of fact that are identical to those asserted in their claims. . . .

"Section 42a-1-103 preserves a broad range of common-law actions, including actions for fraud and misrepresentation, unless such actions are displaced by the particular provisions of this title. One such particular provision is [General Statutes] § 42a-2-721. Section 42a-2-721 provides that, in some circumstances, a claim for a remedy for material misrepresentation or fraud may be consistent with other claims arising under article 2 of the [UCC]. Such consistency may be found in the event of rescission or a claim for rescission of the contract for sale [or] rejection or return of the goods . . . . General Statutes § 42a-2-721. The official comment to that section emphasizes that, even in such cases, the circumstances may make the remedies inconsistent. [Conn. Gen. Stat. Ann. § 42a-2-721 (West 2009), commission comment]. By implication, the intent of § 42a-2-721 is to make actions for fraud or misrepresentation presumptively *inconsistent* with postacceptance claims for breach of warranty." (Emphasis in original; footnotes altered; internal quotation marks omitted.) *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 153–55.

In the present case, the trial court concluded that the economic loss doctrine, as set forth in *Flagg Energy Development Corp.*, did not bar the plaintiffs' negligence and negligent misrepresentation claims because, unlike the transaction at issue in that case, the transaction between the bank and the plaintiffs here was not controlled by the provisions of article 2 of the UCC, governing sales of goods, but by the provisions of article 9. The court reasoned that, "when parties to a contract are free to negotiate the terms of their bargain and allocate the risks, the law of contracts should be applied, rather than the law of torts, in order to determine the parties' respective responsibility for economic losses." In contrast, "[i]n an auction sale of collateral, there is no real bargaining opportunity for the parties to negotiate the terms of the contract or an adjustment of the sale price in order to allocate any risks for potential losses. A buyer at an auction sale must submit his bids based on the terms of the sale and the condition of the property as offered."

The fact that a buyer at an article 9 secured party sale may be unable to negotiate the timing of the sale, the place of the sale, the place of delivery, or the quality, condition or quantity of the goods, will be known by the buyer, however, *before* the sale. Accordingly, a buyer at such a sale can adjust his offer price to reflect the risks attendant to such a sale. In addition, as we discuss more fully in part II of this opinion, like article 2, article 9 expressly provides for an implied warranty of title for collateral that is sold at a secured party sale.[25] See General Statutes § 42a-9-610 (d).[26] Thus, in the absence of a disclaimer, the buyer knows that it will be compensated in the event that the secured party seller breaches the warranty of title. Accordingly, we are not persuaded that the purported differences between article 2 sales and article 9 sales cited by the trial court justify treating claims arising under article 9 differently for purposes of the economic loss doctrine.[27]

The plaintiffs contend that this conclusion is inconsistent with this court's decision in *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 579, 657 A.2d 212 (1995), in which this court concluded that the plaintiffs "were not barred from pursuing a negligence claim solely because they also might have had a breach of contract claim." The plaintiffs in *Williams Ford, Inc.*, were certain automobile dealerships that had entered into advertising contracts with the defendant, The Hartford Courant Company (Courant). Id., 560–61. The dealerships claimed that the Courant had negligently misrepresented to them that there were no less expensive advertising contracts available when, in fact, there were. Id., 565–67. The Courant contended that the negligent misrepresentation claim was barred because, "where the controversy concerns purely economic losses allegedly caused by statements made during the course of a contractual relationship between businesses, it is contract law, rather than tort law, that should apply." Id., 579. This court observed that it previously had held that, "[i]f the plaintiff's complaint otherwise contains the necessary elements of negligent misrepresentation, it survives a motion to strike even though the . . . counts grounded in promissory estoppel must fall." (Internal quotation marks omitted.) Id. We concluded, therefore, "that a remedy on the contract is independent of a remedy for negligent misrepresentation. The dealerships were not barred from pursuing a negligence claim solely because they also might have had a breach of contract claim." Id.

The plaintiffs in the present case contend that *Flagg Energy Development Corp.* applies only to the delivery of defective goods that have been sold pursuant to the UCC, while *Williams Ford, Inc.*, applies when, as in the present case, the defendants' conduct "undermined the ability of the plaintiffs to consider and approve the terms of the commercial arrangement free from misrepresentation." They further contend that the defendants' misrepresentations, "as in [*Williams Ford, Inc.*] were of a kind that undermined the ability of [the] plaintiffs to consider and enter into the commercial arrangement contemplated by the auction free from misrepresentation regarding the preliminary question of whether the defendants even had the authority to sell what they were purporting to sell. The economic loss doctrine does not apply where the asserted negligent conduct is independent of the claimed breach of contract."

To the extent that the plaintiffs contend that *Flagg Energy Development Corp.* applies only to sales covered by article 2 of the UCC, we disagree for the reasons that we have explained. To the extent, however, that they claim that the distinction between *Flagg Energy Development Corp.* and *Williams Ford, Inc.*, is that the former case applies to tort claims that arise out of and are dependent on the contractual relationship between the parties; *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 153 (economic loss doctrine bars negligent misrepresentation claim for "commercial losses *arising out of* the defective performance of contracts" [emphasis added]); while the latter case applies to tort claims that are "independent" of the plaintiff's contract claim, and that can survive even if the contract claim fails, we agree. See *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 232 Conn. 579. The plaintiffs' negligence and negligent misrepresentation claims in the present case are not "independent," however, from their article 9 breach of the implied warranty of title claim.[28] Rather, both the tort claims and the warranty claim are premised on the same alleged conduct with respect to the same personal property and rely on the same evidence. More fundamentally, the plaintiffs have pointed to no theory under which they could prevail on their negligence and negligent misrepresentation claims even if their breach of the implied warranty of title claim failed.

We recognize that this court stated broadly in *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 232 Conn. 579, "that a remedy on the contract is independent of a remedy for negligent misrepresentation." As the trial court in the present case observed, this broad statement "[has] caused much division and dispute among the trial courts." Specifically, the trial courts have been confused as to whether this statement was overruled by our decision in *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 126, or whether, instead, the court in that case adopted a narrow exception to *Williams Ford, Inc.*, for cases arising from the sale of goods pursuant to article 2. It is relatively clear, however, that what this court intended to say in *Williams Ford, Inc.*, was that a remedy on the contract and a remedy for negligent misrepresentation *may be* independent remedies. Specifically, as this court recognized in *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 154–55, a plaintiff that has a contractual relationship with the defendant can bring a negligent misrepresentation claim against the defendant when the negligent misrepresentations induced the plaintiff to enter into a contract. As this court also indicated in that case, when the contract involves a sale of goods covered by the UCC, the exclusive remedy for such a claim would be to reject the goods and to rescind the contract, a remedy that the plaintiffs in the present case do not seek. Id. Such a claim would not "arise out of" the breach of any contractual obligation because it would implicate contract formation. See *Budgetel Inns, Inc.* v. *Micros Systems, Inc.*, 8 F. Supp. 2d 1137, 1147 (E.D. Wis. 1998) ("fraud in the inducement by definition occurs prior to the formation of the contract itself, thus, it never constitutes a breach of contract"); *Abi-Najm* v. *Concord Condominium, LLC*, 280 Va. 350, 363, 699 S.E.2d 483 (2010) (economic loss doctrine does not bar fraudulent inducement claim because fraud "was perpetrated by [the defendant] *before* a contract between the two parties came into existence [and] therefore it cannot logically follow that the duty [that the defendant] allegedly breached was one that finds its source in the [c]ontracts" [emphasis in original]). Under this reading, *Flagg Energy Development Corp.* and *Williams Ford, Inc.*, are entirely consistent. Moreover, although this court stated in *Williams Ford, Inc.*, that "[t]he dealerships were not barred from pursuing a negligence claim solely because they also might have had a breach of contract claim"; *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 579; there was no indication as to what the breach of contract claim might have been. Thus, the dealerships' negligent misrepresentation claim was not barred because the Courant simply had failed to identify any contract claim that would entirely subsume the tort claim. We conclude, therefore, that our decision in *Williams Ford, Inc.*, does not govern the present case.[29] Accordingly, we conclude that the trial court improperly found that the defendants had a common-law duty to the plaintiffs and improperly denied the defendants' motions to set aside the verdict and for judgment notwithstanding the verdict with respect to the plaintiffs' negligence and negligent misrepresentation claims.

II

We next address the defendants' claim that the plaintiffs' CUTPA claim was barred by the economic loss doctrine. We disagree.

In support of their claim, the defendants again rely on *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 126. In that case, this court concluded that the economic loss doctrine barred the plaintiffs' CUTPA claim because, like the plaintiffs' negligence claims, the claim "depend[ed] upon allegations of fact that are identical to those asserted in their [breach of contract] claims." Id., 154. This court also concluded that, under the UCC, "actions for fraud or misrepresentation," which formed the basis for the plaintiffs' CUTPA claim, "[are] presumptively *inconsistent* with postacceptance claims for breach of warranty." (Emphasis in original.) Id., 155; see also *Werwinski* v. *Ford Motor Co.*, 286 F.3d 661, 681 (3d Cir. 2002) ("exempting [statutory fraud] claims from the effects of the economic loss doctrine would virtually nullify the doctrine since [the statute] is broad enough to encompass nearly every misrepresentation claim in the commercial sales context, and claims arising from product failure can readily be recast as misrepresentation claims" [internal quotation marks omitted]). For the following reasons, we conclude that we must overrule our decision in *Flagg Energy Development Corp.* to the extent that it held that the economic loss doctrine bars CUTPA claims arising from the breach of a contract for the sale of goods subject to the UCC.

At the outset, we set forth the legal standard that governs CUTPA claims.[30] "[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy. . . . In order to enforce this prohibition, CUTPA provides a private cause of action to [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice . . . .'' (Internal quotation marks omitted.) *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 350–51, 994 A.2d 153 (2010).

As we explained in part I of this opinion, the economic loss doctrine bars negligence claims that arise out of and are dependent on breach of contract claims that result only in economic loss. This court and the Appellate Court repeatedly have held, however, that a breach of contract may form the basis for a CUTPA claim. See *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 229–30, 990 A.2d 326 (2010) (citing cases). With the exception of our decision in *Flagg Energy Development Corp.*, we never have suggested that such CUTPA claims are barred if the plaintiff suffered only an economic loss and the loss arose *solely* from the breach of the contract. Rather, our focus in such cases has been on whether the defendant's breach of contract was merely negligent or incompetent, in which case the CUTPA claim was barred, or whether the defendant's actions would support a finding of intentional, reckless, unethical or unscrupulous conduct, in which case the contractual breach will support a CUTPA claim under the second prong of the cigarette rule.[31] Id., 228, 229. Thus, the reasoning of the court in *Werwinski* v. *Ford Motor Co.*, supra, 286 F.3d 679–80, that the economic loss doctrine bars tort claims arising out of a breach of contract because common-law contract principles and the UCC provide remedies for a breach of contract, regardless of the defendant's state of mind; see id. (''the mental state of the wrongdoer is irrelevant from the buyer's perspective'' because ''express warranties and state warranty statutes can provide for compensation to be awarded for the economic losses, regardless of whether the misrepresentation is innocent, negligent or intentional''); does not apply to CUTPA claims. As we have indicated, this court repeatedly has recognized that CUTPA was intended to provide a remedy that is separate and distinct from the remedies provided by contract law when the defendant's contractual breach was accompanied by aggravating circumstances.[32] See *Naples* v. *Keystone Building & Development Corp.*, supra, 228; see also *Omega Engineering, Inc.* v. *Eastman Kodak Co.*, 908 F. Supp. 1084, 1099 (D. Conn. 1995) (''CUTPA reflects a public policy in favor of remedying wrongs that may not be actionable under other bodies of law''); *Associated Investment Co. Ltd. Partnership* v. *Williams Associates IV*, 230 Conn. 148, 159, 645 A.2d 505 (1994) (''the private cause of action created by CUTPA reaches conduct well beyond that proscribed by any common law analogue''). Accordingly, we conclude that the economic loss doctrine does not bar claims arising from a breach of contract, including a breach of a contract for the sale of goods covered by the UCC, when the plaintiff has alleged that the breach was accompanied by intentional, reckless, unethical or unscrupulous conduct.[33] To the extent that this court concluded in *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 126, that the economic loss doctrine barred the plaintiffs' CUTPA claim in that case because the claim was premised entirely on allegations that the defendant negligently had breached the contract, with no claim of aggravating circumstances, we now recognize that there simply is no need to apply the economic loss doctrine to bar such CUTPA claims because CUTPA was not intended to provide a remedy for such claims in the first instance. See *Naples* v. *Keystone Building & Development Corp.*, supra, 228.

In the present case, the plaintiffs alleged that the bank's conduct "offended public policy; [and] was immoral, oppressive, unethical and unscrupulous . . . ." Accordingly, we conclude that the trial court properly concluded that the economic loss doctrine did not bar the plaintiffs' CUTPA claims and that the court did not abuse its discretion when it denied the defendants' motions for judgment notwithstanding the verdict and for a directed verdict on that ground.

III

We next address the defendants' claim that the trial court improperly rendered judgment for the plaintiffs on their breach of the warranty of title claim against the bank under article 9. The defendants contend that the trial court improperly denied their motions for judgment notwithstanding the verdict and to set aside the verdict on this claim because no reasonable juror could have found that the disclaimers set forth in the bills of sale were inadequate to inform the plaintiffs that the bank was providing no warranty of title with respect to the personal property. We disagree.

At the outset, we set forth the standard of review. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did. . . . In reviewing the action of the trial court in denying [or granting a motion] . . . to set aside the verdict, our primary concern is to determine whether the court abused its discretion . . . .

The trial court's decision is significant because the trial judge has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to [the] evidence. Moreover, the trial judge can gauge the tenor of the trial, as [this court], on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Citations omitted; internal quotation marks omitted.) *Hall* v. *Bergman*, supra, 296 Conn. 179. "A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Coughlin* v. *Anderson*, 270 Conn. 487, 498, 853 A.2d 460 (2004).

We next review the substantive law governing warranties of title at secured party sales. Section 42a-9-610 (d) provides: "A contract for sale, lease, license or other disposition includes the warranties relating to title, possession, quiet enjoyment and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract."[34] See also Conn. Gen. Stat. Ann. § 42a-9-610 (West 2009), comment 11 ("Subsection [d] affords the transferee in a disposition under this section the benefit of any title, possession, quiet enjoyment, and similar warranties that would have accompanied the disposition by operation of non-[a]rticle 9 law had the disposition been conducted under other circumstances. For example, the [a]rticle 2 warranty of title would apply to a sale of goods [pursuant to § 42a-9-610] . . . .").[35]

Section 42a-9-610 (e) provides: "A secured party may disclaim or modify warranties under subsection (d): (1) In a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition; or (2) By communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties." Thus, pursuant to § 42a-9-610 (e) (1), the provisions of General Statutes § 42a-2-312, governing the sale of goods, apply to goods sold at a secured party sale. Subsection (1) of § 42a-2-312 provides in relevant part: "Subject to subsection (2) there is in a contract for sale a warranty by the seller that (a) the title conveyed shall be good, and its transfer rightful . . . ." Subsection (2) of § 42a-2-312 provides: "A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have." Finally, with respect to the "record" authorized by § 42-9-610 (e) (2), § 42a-9-610 (f) provides: "A record is sufficient to disclaim warranties under subsection (e) if it indicates 'There is no warranty relating to title, possession, quiet enjoyment or the like in this disposition' or uses words of similar import." "When the language of a contract is ambiguous . . . the determination of the parties' intent is a question of fact . . . ."[36] (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 698, 711, 980 A.2d 880 (2009).

As we previously have set forth in this opinion, the bills of sale in the present case provided that the bank "hereby sells and transfers to [Ulbrich] . . . all of the [bank's] right, title and interest, as such [bank] has or may have in and to the personal property described on Exhibit 'A' attached hereto . . . ." They also provided that "THE SECURED PARTY MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO THE COLLATERAL. THE ASSETS ARE SOLD 'AS IS' AND 'WHERE IS' AND THE SECURED PARTY SPECIFICALLY DISCLAIMS ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PURPOSE WHATSOEVER."

We conclude that this language was inadequate to disclaim the implied warranty of title as a matter of law. With respect to the first disclaimer, a number of courts have concluded that, under statutory provisions analogous to § 42a-2-312 (2), disclaimer language must be specific, and quitclaim type language stating that the seller is selling only what interest the seller has in the property is not sufficient. See *Rockdale Cable T.V. Co.* v. *Spadora*, 97 Ill. App. 3d 754, 756–57, 423 N.E.2d 555 (1981) (under statutory provision analogous to § 42a-2-312, language in bill of sale transferring "only such 'right, title and interest' as [the seller] may possess" was not sufficiently specific to disclaim warranty of title); *Sunseri* v. *RKO-Stanley Warner Theatres, Inc.*, 248 Pa. Super. 111, 115, 374 A.2d 1342 (1977) (under statutory provision analogous to § 42a-2-312, bill of sale provision stating that seller was selling only " 'any right, title and interest [s]eller may have' [in property] . . . is clearly not a positive warning or exclusion in regard to the status of title, and would be unlikely to offend or even catch the eye of an unsophisticated buyer"); see also *Jones* v. *Linebaugh*, 34 Mich. App. 305, 308–309, 191 N.W.2d 142 (1971) (under statutory provision analogous to § 42a-2-312, language in bill of sale that seller was assigning seller's right, title and interest in property and knew of no existing title to property was insufficiently specific to disclaim warranty of title). In addition, the authors of one treatise have stated that, although some cases from the nineteenth century had found quitclaim type language to be sufficient under the common law, they preferred "the approach taken in [*Jones* v. *Linebaugh*, supra, 308–10], over the older view, which apparently was influenced by real property law." 1 J. White et al., Uniform Commercial Code (6th Ed. 2012) § 10:44, p. 949. Because there is no more important and fundamental warranty in any sale than the warranty of title, "very precise and unambiguous language must be used to exclude" that warranty.[37] *Jones* v. *Linebaugh*, supra, 309; id., 309–10 ("very precise and unambiguous language must be used to exclude a warranty so basic to the sale of goods as is title"). We agree with these authorities and, therefore, conclude that the first disclaimer was not sufficiently specific under § 42a-2-312.[38] We conclude for the same reasons that the disclaimer did not affirmatively communicate to the plaintiffs that the bank was making "no warranty relating to title," or use words of similarly clear and specific import, as required by § 42a-9-610 (f).

With respect to the second disclaimer, although the first sentence communicated to the plaintiffs that the bank was making no warranties of any kind, a number of courts have held that a general statement that property is being sold as is and that the seller is making no warranties of any kind is insufficient to disclaim an implied warranty of title. See *Brokke* v. *Williams*, 235 Mont. 305, 307–308, 766 P.2d 1311 (1989) (sign stating that property was being sold "as is" was not sufficient to disclaim implied warranty of title); *Moore* v. *ProTeam Corvette Sales, Inc.*, 152 Ohio App. 3d 71, 75, 786 N.E.2d 903 (provision of sales contract stating that " '[a]ll warranties . . . are hereby excluded from this transaction' " was insufficiently specific to disclaim warranty of title), appeal denied, 97 Ohio St. 3d 1485 (2002); *Sunseri* v. *RKO-Stanley Warner Theatres, Inc.*, supra, 248 Pa. Super. 116 (provision in bill of sale that "[s]eller shall in nowise be deemed or held to be obligated . . . under any guarant[ees] or warranties" was not sufficiently specific to disclaim warranty of title [internal quotation marks omitted]). Moreover, the second sentence reasonably can be read to be a clarification of the first sentence. Because the second sentence clearly relates to the location and quality of the personal property, not to title, the jury reasonably could have concluded that the disclaimer in the first sentence related solely to those matters.

For similar reasons, we conclude that the statements in the auction brochure were not sufficiently specific to disclaim the implied warranty of title under either § 42a-2-312 (2) or § 42a-9-610 (f). The brochure provided that "[n]o representations or warranties of any kind are made with respect to the property to be sold. All property will be sold 'as is, where is,' and 'with all defects.' " In addition, it stated that, "[w]hile descriptions of personal property listed [in the brochure] are believed to be accurate, no warranties or guarantees are being made, expressed or implied, regarding the quality, quantity, or usefulness for any purpose of those items." Thus, the brochure focused the potential buyers' attention primarily on the location and condition of the property and did not specifically refer to the warranty of title.

In support of their claim to the contrary, the defendants rely on *Landmark Motors*, *Inc.* v. *Chrysler Credit Corp.*, supra, 662 N.E.2d 971. In that case, the auctioneer at a secured party sale sent out fliers containing the following disclaimer: " 'Although information obtained from sources deemed reliable, [a]uctioneer makes no warranty or guarantee expressed or implied. Buyers should avail themselves of opportunity to make inspection prior to sale.' " Id., 975. In addition, at the auction, the auctioneer made an oral disclaimer that "no express or implied warranties or guarantees were being made regarding the items to be sold." Id. The trial court concluded that these disclaimers were adequate to disclaim a warranty of title. Id., 974. On appeal, the Court of Appeals of Indiana agreed. Id., 975.

Under the Kentucky law that applied in *Landmark Motors*, *Inc.*, however, a "sale by a foreclosing lienor . . . is out of the course of ordinary commercial [sales] and the [sale's] peculiar character is [deemed to be] immediately apparent to a [prospective] buyer . . . ." (Internal quotation marks omitted.) Id., 974. Thus, it would appear that, even without an express disclaimer, the presumption under Kentucky law was that "[t]he buyer [at a secured party sale] knew or should have known that the person selling did not claim title in himself and was selling only such a right as [the seller] may have had." (Internal quotation marks omitted.) Id. As we have indicated, that is not the law in Connecticut. See footnote 34 of this opinion. Rather, under § 42a-9-610 (d), the default rule in this state is that a secured party seller impliedly warrants that it is conveying good title to the property to a buyer at a secured party sale. Accordingly, we conclude that the defendants' reliance on *Landmark Motors*, *Inc.*, is misplaced. We conclude, therefore, that the trial court did not abuse its discretion when it denied the defendants' motion to set aside the verdict on the plaintiffs' breach of warranty claim against the bank and their motion for judgment notwithstanding the verdict.[39]

IV

We next address the defendants' claims that: (1) the trial court improperly instructed the jury that the "cigarette rule" provided the proper legal standard for the plaintiffs' CUTPA claim when the federal courts have abandoned that rule in favor of a different rule; and (2) even if the instruction was proper, the trial court improperly denied the defendants' motions for a directed verdict and for judgment notwithstanding the verdict because no reasonable jury could have found that the bank had engaged in an unfair trade practice. We conclude that the first claim was not preserved and we disagree with the second claim.

We first address the defendants' instructional claim. The defendants point out that this court previously has stated that, "[a]lthough we consistently have followed the cigarette rule in CUTPA cases, we also note that, when interpreting 'unfairness' under CUTPA, our decisions are to be guided by the interpretations of the Federal Trade Act by the Federal Trade Commission and the federal courts. See General Statutes § 42-110b [b].[40] Review of those authorities indicates that a serious question exists as to whether the cigarette rule remains the guiding rule utilized under federal law." (Footnote added.) *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 82 n.34, 873 A.2d 929 (2005). Accordingly, the defendants argued, the trial court improperly instructed the jury that the cigarette rule applied to the plaintiffs' CUTPA claim, and it should have instructed the jury in accordance with the standard applied by the federal courts.[41]

The following procedural history is relevant to our resolution of this claim. The defendants submitted a request to charge in which they asked the court to instruct the jury in accordance with the cigarette rule. They also requested that the trial court instruct the jury, consistent with federal law, that "[w]hether the [bank] caused substantial unjustified injury to consumers, competitors or other business persons, is the most important of the three criteria [under the cigarette rule]. Proof of an unjustified injury to consumers, competitors, or other business people is a necessary predicate for recovery under [CUTPA]."[42] The trial court instructed the jury on the cigarette rule but declined to give the second instruction to the jury. The defendants objected to the jury charge on the ground that there could be "no unjustified injury to the consumer" if the plaintiffs proved only that the defendants were negligent under the cigarette rule. Accordingly, the defendants argued, the trial court should have instructed the jury that, not only under the first prong of the cigarette rule, but also under the second prong, proof of negligence was not sufficient to establish a CUTPA violation.

"It is well settled . . . that a party may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; or (2) taking an exception to the charge as given. *State* v. *Ramos*, 261 Conn. 156, 170, 801 A.2d 788 (2002); see also Practice Book § 16-20. [T]he purpose of the [preservation requirement] is to alert the court to any claims of error while there is still an opportunity for correction in order to avoid the economic waste and increased court congestion caused by unnecessary retrials. . . . *State* v. *Ramos*, supra, 170; see also *Henderson* v. *Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977) ([o]rderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error). Thus, the essence of the preservation requirement is that *fair notice* be given to the trial court of the party's view of the governing law and of any disagreement that the party may have had with the charge actually given." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Ross*, 269 Conn. 213, 335–36, 849 A.2d 648 (2004).

In the present case, the defendants neither requested that the trial court instruct the jury in accordance with current federal law applicable to unfair trade practices *instead* of the cigarette rule, nor excepted to the instruction given by the trial court on that ground. Although the defendants requested that, in *addition* to the instruction on the cigarette rule, the trial court instruct the jury that, under federal law, "[w]hether the [d]efendants caused substantial unjustified injury to consumers, competitors or other business persons, is the most important of the three criteria" set forth in the cigarette rule, they did not contend that the "Federal Trade Commission . . . has *replaced* the cigarette rule with the substantial injury to consumers test" or that the trial court "should expressly *reject* the cigarette rule," which is the claim that they now raise on appeal.[43] (Emphasis added.)

The defendants claim, however, that it would have been futile to request the trial court to instruct the jury in accordance with current federal law instead of the cigarette rule because the trial court had no power to overrule this court's decisions holding that the cigarette rule applies to CUTPA claims. We disagree. Practice Book § 60-5 provides in relevant part: "The court [on appeal] shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . ." See also *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 498–99, 43 A.3d 69 (2012) ("[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court" [internal quotation marks omitted]). Although this court may, in the exercise of its supervisory powers, review an unpreserved claim; *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 507, 636 A.2d 1342 (1994) ("[i]n view of the adequate record, the public character of this case and the significance of the issue to both the parties and the surrounding community, we elect to invoke . . . our general power of supervision and control over proceedings on appeal" to review unpreserved claim); and although this court has indicated that the futility of asking the trial court to overrule a decision of this court may be a factor in determining whether to exercise that power; *State* v. *Ray*, 290 Conn. 602, 608 n.7, 966 A.2d 148 (2009) (when unpreserved claim was purely legal, claim was briefed by both parties, record was adequate for review, reviewing claim might avoid need for this court to decide constitutional issue, trial court would have had to overrule this court's decision to rule in defendant's favor and issue was significant to parties, court exercised supervisory power to review claim); we are aware of no authority from this court or elsewhere for the proposition that the futility of asking the trial court to overrule a decision of this court automatically excuses the failure to preserve the claim.[44] Moreover, we conclude that there are good reasons not to adopt such a rule. First, requiring the party to raise the claim would put the other parties on notice of the claim and allow them to properly evaluate their position at the time of trial. See *Perez-Dickson* v. *Bridgeport*, supra, 505. Second, a futility exception to preservation could lead to ambuscade of the trial court.[45]

In the present case, we see no exceptional circumstances that would militate in favor of reviewing the defendants' unpreserved claim that the cigarette rule should be abandoned in favor of the substantial unjustified injury test. Accordingly, we conclude that the claim is not reviewable.[46]

We next address the defendants' claim that the trial court improperly determined that the evidence was sufficient to support the jury's finding that the defendants had violated CUTPA.[47] The plaintiffs contend that, to the contrary, the jury reasonably could have concluded that the bank had engaged in "immoral, unethical, oppressive or unscrupulous" conduct under the second prong of the cigarette rule. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 350. We agree with the plaintiffs.

The following additional facts are relevant to our resolution of this claim. In an October 4, 2006 e-mail from Tranzon to the bank and to Thomas Farrell, the attorney representing the bank in the foreclosure action, Tranzon indicated that the assessed value of the personal property was low because much of the property was leased. See footnote 8 of this opinion. Tranzon also indicated that it hoped to obtain a list of the personal property that would be included in the sale from the debtors. In his responding e-mail, Farrell indicated that the bank was entitled to sell personal property owned by the debtors and that the debtors would be providing "a list of personal property on site." On October 10, 2006, Robert C. Reichert, the attorney representing the debtors in the foreclosure action, sent a letter to Morasutti stating that "there are nuances relating to the property that an auction buyer may be unlikely to discover given the usual due diligence in foreclosure sales" and that "[p]otential bidders . . . should understand that not everything on site will be conveyed by bill of sale at the foreclosure." Copies of Reichert's letter were sent to, inter alios, Lakeside Advisors Group, LLC (Lakeside), an entity that had been assisting the debtors in their attempt to obtain financing to continue to operate the special events facility, and to Farrell. On October 24, 2006, Lakeside sent an e-mail to Reichert stating that it hoped that Morasutti had been shown a copy of the October 10, 2006 letter to Tranzon. In his e-mail response, Reichert stated that Lakeside could provide a copy of the October 10, 2006 letter to Tranzon and that Lakeside should "[t]hen ask what their plan is with regard to disclosure of both positive and negative features of the property." On October 25, 2006, Tranzon sent an e-mail to Lakeside stating that "to date we have not received a comprehensive list of personal property and most definitely have not received a copy of what property is currently leased. . . . We would expect that list by this afternoon or at the latest before the preview tomorrow." A copy of the e-mail was sent to Farrell. Lakeside forwarded the e-mail to Reichert, who responded that he did not have such a list, but believed that James A. Groth's daughter, Kelly Groth, did. Reichert also stated that he was "surprised that Tranzon hasn't requested or obtained such a list until now." On the same date that Reichert sent the e-mail to Lakeside, he sent a letter to Morasutti stating that his clients had "pointed out certain errors or omissions in the property information packet prepared by Tranzon," including the fact that the packet contained "no mention of the fact that a substantial portion of the personal property is subject to leases." Reichert also suggested that Morasutti announce to potential bidders that he was making "no representation as to ownership of the assets, which assets may be subject to lease . . . ." On October 31, 2006, Farrell sent an e-mail to Reichert and Morasutti stating that "[t]he buyers will of course inquire as to what personal property is being conveyed. The only property at the site that is not subject to the [b]ank's security interest would be property that is not owned by [the debtors], including any property subject to a true lease. I would kindly suggest that the [debtors] identify any property that they claim is not owned by [them]. The [committee of sale (committee)] would then have to alert buyers of the property that is not included in the auction."

Farrell testified at trial that, if he had known what specific items of property were not subject to the bank's security interest because the debtors had leased them, he "would have insisted that the committee [inform the bidders] at the auction and if the committee did not [inform them], [he] would have made that announcement . . . ." Farrell also testified that he had practiced commercial law for twenty-five years and that he had handled "a fair amount of complex commercial foreclosures."

As we previously have indicated in this opinion, it is well established that a breach of contract may, but does not necessarily, rise to the level of a CUTPA violation. See *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 228 ("not every contractual breach rises to the level of a CUTPA violation" [internal quotation marks omitted]). In addition, "[i]n the absence of aggravating unscrupulous conduct, mere incompetence [in performing a contract] does not by itself mandate a trial court to find a CUTPA violation." Id., 229; see also id., 228 (citing cases where breach of contract was found not to have violated CUTPA because it was not unlawful, unethical, unscrupulous, wilful or reckless); id., 229 (citing cases where breach of contract was found to support CUTPA violation).[48] "It is well settled that whether a defendant's acts constitute . . . deceptive or unfair trade practices under CUTPA, is a question of fact for the trier, to which, on appellate review, we accord our customary deference." (Internal quotation marks omitted.) Id., 228.

We conclude that the evidence in the present case, viewed in the light most favorable to upholding the verdict, was sufficient to support a finding that the bank was not merely negligent or incompetent, but had engaged in unethical or unscrupulous conduct. Specifically, the evidence would support a finding that all parties involved in the auction of the personal property, including the bank, knew that some, perhaps much, of the personal property at the special events facility was not owned by the debtors, but was leased, and reasonably believed that the seller had an obligation to warn potential buyers of that fact. Indeed, Farrell, the attorney for the bank, testified that, if he had known *what specific items of property* were not subject to the sale because the debtors had leased them, he "would have insisted that the committee [inform the bidders] at the auction and if the committee did not [inform them], [he] would have made that announcement . . . ." In addition, he wrote to Reichert and Morasutti that, once the property that the debtors did not own was identified, "[t]he committee would then *have to alert buyers* of the property that is not included in the auction." (Emphasis added.) Although the bank might not have known which specific items of personal property were subject to leases, it knew that *some* of the items of property on the special events facility site did not belong to the debtors and would not be conveyed to the plaintiffs. We cannot perceive why, if Farrell believed that the bank would have had an obligation to inform potential buyers about specific leases that it was aware of, he would have believed that the bank was not required to advise buyers generally that it knew that some items of property were leased, but that it did not know which items.[49] Moreover, the jury reasonably could have concluded on the basis of Farrell's testimony that he would have "insisted" on disclosure of conflicting claims to specific items of personal property if he had known about them and that Farrell knew that the disclaimers in the bill of sale would not be adequate to put potential buyers on notice that some of the items of personal property at the special facilities site were not included in the sale. Accordingly, we conclude that the jury reasonably could have found that the bank's failure to inform potential buyers that some of the items of property were leased and would not be conveyed to the buyers was not the result of a mistaken but good faith belief that the burden was exclusively on the buyers to determine whether the debtors had good title to the personal property, but was the result of a conscious decision not to perform a known obligation.[50]

We emphasize that we do not conclude that a defendant's subjective belief that it has a particular obligation *necessarily* will support a jury finding that the failure to fulfill that obligation violates CUTPA. Rather, we conclude that, on the basis of Farrell's testimony, including his testimony that he had practiced commercial law for twenty-five years and that he had handled "a fair amount of complex commercial foreclosures," as well as the foregoing documentary evidence, the jury reasonably could have found that all parties involved in conducting the auction believed that a secured party seller has an obligation to ensure that known conflicting claims to the property are disclosed to potential buyers, and that such a belief was not unreasonable and would not be unusual among banks that conduct secured party sales. The defendants have pointed to no evidence to the contrary.[51] Moreover, that belief was consistent with the implied warranty of title and express disclaimer obligations imposed by § 42a-9-610. Accordingly, the jury reasonably could have found that the bank's failure to ensure that the plaintiffs were warned that some of the property was leased was not merely negligent or incompetent, but involved a conscious departure from known, standard business norms and was therefore unscrupulous, "within at least the penumbra of some . . . statutory, or other established concept of unfairness"; *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 350; and resulted in an ascertainable loss to the plaintiffs.[52] Id., 351; see also part V of this opinion. We therefore conclude that the trial court did not abuse its discretion when it denied the defendants' motions for judgment notwithstanding the verdict and to set aside the verdict with respect to the plaintiffs' CUTPA claims.

V

We next address the defendants' claim that the trial court improperly allowed the plaintiffs to argue to the jury that their evidence provided a sufficient basis to support their claim for compensatory damages and improperly denied the defendants' motion to set aside the damages award. We disagree.

The following additional facts that the jury reasonably could have found and procedural history are relevant to our resolution of this claim. At trial, Joseph Vrabely testified that he was a friend and business associate of Ulbrich. In 2005 and 2006, Vrabely and Ulbrich had discussions with members of the Groth family about the financial difficulties that the special events facility was experiencing and about the possibility that Ulbrich would invest in it. In October of 2006, Vrabely learned about the foreclosure sale of the facility and auction of the personal property, and talked with Ulbrich about the possibility that Ulbrich would purchase the facility and Vrabely would help him run it. At some point during those discussions, Ulbrich provided Vrabely with a copy of a "confidential financing memorandum" dated April, 2006, that, according to its preface, had "been prepared for use on a confidential basis to persons contemplating business or financing transactions with Mountainside . . . ." The financing memorandum contained a list of machinery and equipment located at the facility.[53] The total replacement value of the listed machinery and equipment was stated as $1,854,000.

Prior to the auction, Vrabely and Ulbrich discussed the amount that Ulbrich would bid for the facility and the personal property. Vrabely understood that Ulbrich would be bidding on "everything" located at the facility. Both Vrabely and Ulbrich attended the auction, and Vrabely actually placed the winning bid on behalf of Ulbrich.

Kelly Groth testified that the confidential financing memorandum had been prepared by Lakeside in an attempt to assist the debtors to find an investor or a bank to refinance their debt. She also testified that all of the categories of machinery and equipment listed on the memorandum were used on the site of the special events facility. She did not know, however, what specific items of machinery and equipment were included in each category on the list, or "where this list came from . . . or who created it."

Kelly Groth further testified about a business plan that the debtors had prepared to obtain assistance from the state of Connecticut to find financing for the special events facility. The business plan stated that the debtors owned "100 [percent] of the facility and all equipment which includes . . . all food service and kitchen equipment, tables, chairs, umbrellas, tents, china, [flatware], desks, computers, the telephone systems, office equipment, vehicles and machinery." Kelly Groth testified that all of these items were used in operating the facility. She also testified that the facility continued to operate while the auction sale was pending and until title was transferred to the plaintiffs in January, 2007. In addition, Ulbrich testified that the company that he ran held its annual Christmas party at the facility in December, 2006, and that the facility was fully functional and operational at that time.

After the conclusion of evidence, the defendants orally requested the trial court to preclude the plaintiffs from relying on the confidential financing memorandum to support their claim for damages. They argued that, because the document did not identify the specific items of personal property that were included in the listed categories of property, and because no one was able to testify as to that fact, any inference that all of the property included in the list was on the special events facility site on the day of the auction was purely speculative. The plaintiffs contended that, although it was "impossible" for them to refer the trial court to specific testimony that would allow the jury to conclude that all of the items of personal property included in the categories of property listed in the document were on the site at the time of the auction, the trial court should deny the defendants' motion because "counsel [for the defendants] can always make a motion to the court to have that portion of the award . . . deleted or removed or otherwise reduced" and to limit the award to damages that "are rather well-defined, [such as attorney's] fees . . . ." The trial court agreed with the defendants that the document was "weak" evidence, but noted that nothing in the document indicated that the listed property belonged to any entity other than the debtors. The court concluded that the defendants' claim went to the weight and credibility of the document, not its admissibility, and denied the defendants' request for a limiting instruction.

Counsel for the plaintiffs argued to the jury that, on the basis of the evidence presented at trial, the jury could find that the plaintiffs did not receive: twelve out of forty-two, or approximately one quarter, of the tents valued at $300,000 as listed in the confidential financing memorandum; any of the office equipment valued at $76,000; one quarter of the chairs valued at $98,000;[54] and four out of six, or two thirds, of the inflatables valued at $130,000.[55] On the basis of these percentages, counsel for the plaintiff argued that the jury could find damages of $75,000 for the missing tents, $76,000 for the missing office equipment, $25,000 for the missing chairs and $87,000 for the missing inflatables. In addition, he argued that the plaintiffs received no motor vehicles, which had been valued in the confidential financing memorandum at $150,000. The total damages for these missing items was $413,000.[56]

As we have indicated, the jury rendered a damages award of $462,000, which presumably was comprised of an award of $413,000 for the missing personal property and an award of $49,000 for legal fees, which the trial court ultimately reduced to $417,000. Thereafter, the defendants renewed their argument that the confidential financing memorandum lacked any probative value in their motion to set aside the verdict. The trial court again concluded that the evidence was not "so weak, disconnected or speculative that the jury should have been precluded from any consideration of it. In the absence of such a conclusion, the general rule is that after a document is admitted absent objection, the evidence may properly be considered by the jury for whatever value or weight the jury decides in determining the facts at issue."

We begin our analysis of the defendants' claim with the standard of review. As we have indicated, "[t]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did." (Internal quotation marks omitted.) *Hall* v. *Bergman*, supra, 296 Conn. 179. "It is axiomatic that the burden of proving damages is on the party claiming them. . . . When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . .

"Although damages often are not susceptible of exact pecuniary computation and must be left largely to the sound judgment of the trier . . . this situation does not invalidate a damage award as long as the evidence afforded a basis for a reasonable estimate by the [trier] of that amount. . . . 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." (Citations omitted; internal quotation marks omitted.) *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, 239 Conn. 284, 308–309, 685 A.2d 305 (1996).

"Evidence admitted without objection remains evidence in the case subject to any infirmities due to any inherent weaknesses. . . . The trier may not, however, rely only on hearsay evidence which is lacking in rational probative force. . . . If the evidence has no probative force, or insufficient probative value to sustain the proposition for which it is offered, the want of objection adds nothing to its worth and it will not support a finding." (Citations omitted; internal quotation marks omitted.) *Marshall* v. *Kleinman*, 186 Conn. 67, 72, 438 A.2d 1199 (1982).

The defendants claim on appeal that the trial court improperly concluded that the confidential financing memorandum supported the plaintiffs' claim for damages related to the items of personal property that they did not receive because the plaintiffs presented no evidence regarding the basis for the valuation of the personal property contained in the document. Specifically, they claim that the only evidence regarding the document was Kelly Groth's testimony that she did not know what specific items of personal property were included in the list of machines and equipment or who "created" the list, although the document itself had been prepared by Lakeside. The defendants further contend that the plaintiffs' damages calculation was based on the unsupported assumption that each item in each category of personal property had the same value when the evidence showed, for example, that the tents varied in size, the chairs were of different colors, construction and make, and that there were different kinds of inflatables.[57] In addition, they claim that, because the auction brochure indicated that the sale included a "1999 Dodge Ram," a "[g]arbage [t]ruck," a "1997 Chrysler LHS," and a "Mountaineer SUV," and because there was no evidence of the value of these vehicles, the jury could not reasonably have concluded that they were the vehicles valued at $150,000 in the confidential financing memorandum. The defendants also point out that there was evidence that James Groth had told Ulbrich that at least one of the vehicles on the property was not included in the sale.

We are not persuaded. On the basis of the evidence presented at trial, the jury reasonably could have concluded that, in April of 2006, the special events facility was fully functioning and, therefore, was fully equipped with the necessary machinery and equipment. In addition, the jury reasonably could have concluded that, because the facility was still fully functioning in November, 2006, when the auction took place, all the machinery and equipment, or at least a substantial portion of it, was still on the property. The defendants do not dispute that the jury reasonably could have found that machinery and equipment on the property at the time of the auction included forty-two tents, equipment sufficient to run a fully functional office, 3121 chairs, six inflatables and four motor vehicles, including a garbage truck. Although we agree with the defendants that the confidential financing memorandum was, as the trial court acknowledged, "weak" evidence of the value of that machinery and equipment, we conclude that it was sufficient to afford the "basis for a reasonable estimate by the [trier] of that amount." (Internal quotation marks omitted.) *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, supra, 239 Conn. 309. For example, the jury could have concluded on the basis of the evidence presented that, if there were forty-two tents on the site, and if the tents were worth $300,000, as indicated in the confidential financing memorandum, each tent was, on average, worth slightly more than $7000. The jury also could have concluded on the basis of its common knowledge and experience that $7000 was not outside the range of reasonable values for a commercial tent. *State* v. *Ceballos*, 266 Conn. 364, 402, 832 A.2d 14 (2003) ("[i]n deciding cases . . . [j]urors are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion" [internal quotation marks omitted]). Similarly, the jury could have concluded that, if the confidential financing memorandum was accurate, the chairs on the property were worth, on average, approximately $31 each ($98,000 divided by 3121); see footnote 54 of this opinion; and that this value was within the range of reasonable values for such items.

Moreover, although there was evidence that the tents varied in size and that there were a variety of types of chairs, we conclude that it was not unreasonable for the jury to calculate damages on the basis of the average value of the items. Finally, with respect to the motor vehicles, we conclude that the jury reasonably could have found that $150,000 was not outside the range of a reasonable estimate of the value of the four vehicles listed in the auction brochure, which included a sports utility vehicle and a garbage truck. Although there was evidence that James A. Groth had told Ulbrich that one of the vehicles on the property was not included in the sale, there was no evidence as to whether that vehicle was one of the vehicles listed in the auction brochure. Accordingly, we conclude that the trial court properly concluded that the evidence was sufficient to support the jury's damages award.

VI

We next address the defendants' claims that: (1) the trial court improperly concluded that an award of punitive damages against the bank was justified under CUTPA; and (2) even if punitive damages were justified, the trial court improperly determined the amount of punitive damages. We disagree.

The following additional procedural history is relevant to our resolution of these claims. On October 8, 2006, and January 28, 2011, after the jury had returned its verdict in favor of the plaintiffs on their CUTPA claim, the trial court conducted evidentiary hearings on their claims for attorney's fees and punitive damages. The court concluded that the plaintiffs had proved that the bank's decision not to disclose the conflicting claims to the personal property to the plaintiffs was "consciously or deliberately deceptive and unscrupulous" and was in reckless disregard of their rights. In addition, the court concluded that for the bank to have warned potential bidders that there were unresolved issues regarding the ownership of the personal property would have "involved relatively minuscule rather than insurmountable endeavors"; that the bank's conduct threatened "public confidence in the auction process," particularly because the bank had requested and obtained permission from the trial court in the foreclosure action to conduct the auction in conjunction with the foreclosure sale, without advising the court about the conflicting claims to the personal property; and that the bank was "a very large and profitable banking corporation . . . ."[58] The court awarded punitive damages of $1,251,000, or three times the compensatory damages award of $417,000.

We begin our analysis with the standard of review. "Awarding punitive damages and attorney's fees under CUTPA is discretionary; General Statutes § 42-110g (a) and (d)[59] . . . and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done. . . . In order to award punitive or exemplary damages, evidence must reveal a reckless indifference to the rights of others or an intentional and wanton violation of those rights. . . . In fact, the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence." (Citations omitted; internal quotation marks omitted.) *Gargano* v. *Heyman*, 203 Conn. 616, 622, 525 A.2d 1343 (1987).

The defendants in the present case claim that the trial court improperly concluded that this standard was met because there was no evidence that the bank had acted in reckless disregard of the plaintiffs' rights and negligence cannot form the basis of a punitive damages award. We have concluded, however, that the jury reasonably could have found that the bank's failure to inform the plaintiffs that much of the personal property located at the special events facility at the time of the auction was not included in the sale was not merely negligent, but involved a conscious decision to disregard acknowledged business norms. We further conclude that the trial court reasonably could have concluded that the bank knew that this decision would give rise to a substantial and unjustifiable risk that the plaintiffs would purchase the special events facility and personal property in the belief that the sale included all of the machinery and equipment required to run the facility when, in fact, much of the personal property on the site was not included in the sale because it was leased. Accordingly, the trial court reasonably could have found that the bank's conduct was reckless. *State* v. *Jones*, 289 Conn. 742, 756, 961 A.2d 322 (2008) ("[a] person acts recklessly with respect to a result . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur" [internal quotation marks omitted]). We therefore reject the defendants' claim that the trial court abused its discretion when it concluded that punitive damages were justified.

We next address the defendants' claim that the amount of punitive damages was unjustified. The defendants contend that, although this court and the Appellate Court have repeatedly upheld punitive damages awards under CUTPA that were based on multiples of the compensatory damages award (referred to hereinafter as multiple damages),[60] the court has never squarely addressed the question of whether punitive damages under CUTPA should be limited to common-law punitive damages, which include only "the expenses of bringing the legal action, including attorney's fees, less taxable costs." *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 517 n.38, 656 A.2d 1009 (1995); see also *Elliot* v. *Sears, Roebuck & Co.*, 229 Conn. 500, 515, 642 A.2d 709 (1994) ("[w]e will not interpret a statute to have the effect of altering prior statutory or common law unless the language of the statute clearly expresses an intent to have such an effect"). The defendants rely on this court's decision in *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 578 A.2d 1054 (1990), for the proposition that, even when punitive damages are statutorily authorized, the damages are measured by attorney's fees. Id., 59 n.4 (provision of General Statutes § 31-290a [b] [1] authorizing trial court to award punitive damages in addition to attorney's fees "appears to authorize the award of double attorney's fees by the court, since in Connecticut punitive damages are to be measured by reasonable attorney's fees and costs"). They further argue that limiting punitive damages under CUTPA to attorney's fees, or a multiple thereof, would reduce the standardless exercise of discretion in calculating punitive damages. See *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, 193 Conn. 208, 238, 477 A.2d 988 (1984) (limiting punitive damages to expenses of litigation less taxable costs fulfills dual salutary goals of providing "for some element of punishment and deterrence" and avoiding "injustice which may result from the exercise of unfettered discretion by a jury").

Whether a punitive damages award pursuant to § 42-110g (d) is limited to common-law punitive damages is a question of statutory interpretation over which our review is plenary. See, e.g., *State ex rel. Gregan* v. *Koczur*, 287 Conn. 145, 152, 947 A.2d 282 (2008). "In making such determinations, we are guided by fundamental principles of statutory construction." *In re Matthew F.*, 297 Conn. 673, 688, 4 A.3d 248 (2010); see General Statutes § 1-2z.[61] "[O]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008).

We conclude that the legislature did not intend to limit punitive damages awards pursuant to § 42-110g (d) to "the expenses of bringing the legal action, including attorney's fees, less taxable costs." *Larsen Chelsey Realty Co.* v. *Larsen*, supra, 232 Conn. 517 n.38. Section 42-110g (a) expressly authorizes the trial court to award punitive damages *in addition* to the award of attorney's fees authorized by § 42-110g (d). Nothing in the language of the statute suggests that punitive damages are *the same* as attorney's fees, consistent with the common-law rule. If the legislature had intended to impose such a limitation, it presumably would have done so either by authorizing the trial court to award double attorney's fees or by authorizing it to award double punitive damages. The fact that the legislature enacted two distinct provisions indicates that it contemplated two distinct types of awards.[62] See *Mead* v. *Burns*, 199 Conn. 651, 666 n.8, 509 A.2d 11 (1986) ("[w]here CUTPA applies, it permits a recovery of punitive damages and attorney's fees that the common law does not ordinarily permit"); *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 617, 440 A.2d 810 (1981) ("The plaintiff who establishes CUTPA liability has access to a remedy far more comprehensive than the simple damages recoverable under common law. The ability to recover both attorneys' fees . . . and punitive damages . . . enhances the private CUTPA remedy and serves to encourage private CUTPA litigation."). Moreover, as we have indicated, both this court and the Appellate Court have repeatedly, over the course of many years, upheld multiple damages under the punitive damages provision of CUTPA; see footnote 60 of this opinion; and the legislature has never amended the statute to provide otherwise. *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 440, 54 A.3d 1005 (2012) (noting "the principle of statutory interpretation that requires us to presume that the legislature is cognizant of our interpretation of a statute, and that its subsequent failure to enact corrective legislation is evidence of its agreement with that interpretation").

We also are not persuaded by the defendants' arguments that punitive damages under CUTPA must be limited to attorney's fees to avoid the "injustice which may result from the exercise of unfettered discretion by a jury"; *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, supra, 193 Conn. 238; because we conclude that the award of punitive damages under CUTPA is reserved to the discretion of the trial court, not the jury.[63] See General Statutes § 42-110g (a) ("[t]he court may, in its discretion, award punitive damages"); General Statutes § 42-110g (g) ("[i]n any action brought by a person under this section there shall be a right to a jury trial except with respect to the award of punitive damages under subsection [a] of this section or the award of costs [and] reasonable attorneys' fees"); *Thorsen* v. *Durkin Development, LLC*, 129 Conn. App. 68, 78 n.13, 20 A.3d 707 (2011) (when claim for punitive damages under CUTPA was submitted to jury, Appellate Court noted that § 42-110g [g] does not provide for jury trial on such claims but declined to address issue of whether claim was properly submitted to jury because issue was not raised on appeal); *Gill* v. *Petrazzuoli Bros., Inc.*, 10 Conn. App. 22, 35, 521 A.2d 212 (1987) ("[w]e hold, on the basis of the statutory language and legislative history of . . . § 42-110g [d], and the policy underlying CUTPA, that the court rather than the jury determines an award of attorney's fees"); cf. *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 61 (statute providing that " '[t]he court may . . . award punitive damages' . . . authorized the court, not the jury, to determine punitive damages"); see also *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, 273 Conn. 634, 673, 872 A.2d 423 (2005) (*Zarella, J.*, dissenting) ("the legislature vested the authority to make [punitive damages awards under CUTPA] in the court, rather than in the jury"), cert.

denied sub nom. *Vertrue, Inc.* v. *MedValUSA Health Programs, Inc.*, 546 U.S. 960, 126 S. Ct. 479, 163 L. Ed. 2d 363 (2005). It is reasonable to conclude that the legislature provided that a claim for punitive damages under CUTPA should be submitted to the trial court, and not the jury, because it believed that the court would be aware of the range of punitive damages that have been awarded for similar CUTPA violations, that it would be less likely to be swayed by appeals to emotion and prejudice, and, therefore, it would be less likely to render an award that was an outlier. Cf. *Gill* v. *Petrazzuoli Bros., Inc.*, supra, 34 ("[t]o foreclose the possibility of prejudice entering the decision-making process, the award of attorney's fees [under CUTPA] has been placed in the hands of the court" instead of jury); see also *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 673–74 (*Zarella, J.*, dissenting) (legislature vested authority to make punitive damages award under CUTPA in court instead of in jury to safeguard against risk of excessive awards). Accordingly, the concerns that underlie the common-law limitation on punitive damages have far less weight when the claim is submitted to the trial court instead of the jury.

The defendants also claim that, even if multiple damages are authorized by § 42-110g (a), the trial court's award in the present case was excessive. In support of this claim, the defendants rely on the United States Supreme Court's decision in *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008). In that case, the defendant challenged the size of a punitive damages award that the jury had rendered against it under maritime law. Id., 489. The court concluded that the limits on such awards fell "within a federal court's jurisdiction to decide in the manner of a common law court . . . ." Id., 489–90. After reviewing the history of punitive damages under the common law and the standards and limitations that various jurisdictions have applied to them, the court in *Exxon Shipping Co.* observed that several studies had been done to determine "the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards." Id., 512. "These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1 . . . meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that most of the unpredictable outlier cases that call the fairness of the system into question are above the median . . . . On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases." (Citations omitted; footnote omitted.) Id., 512–13.

To the extent that the defendants in the present case contend that *Exxon Shipping Co.* requires this court to adopt as an upper limit for punitive damages under CUTPA a one to one ratio of punitive damages to compensatory damages, we are not persuaded. Unlike the court in *Exxon Shipping Co.*, we are not called upon in the present case to exercise our authority to place limits on common-law punitive damages awards. As we have indicated, it is already well established under the common law of this state that such damages are limited to "the expenses of bringing the legal action, including attorney's fees, less taxable costs"; *Larsen Chelsey Realty Co.* v. *Larsen*, supra, 232 Conn. 517 n.38; a standard that is stricter than the standard adopted by the United States Supreme Court in *Exxon Shipping Co.* Rather, we are called upon to determine whether the legislature intended to place limits on punitive damages awards pursuant to § 42-110g (a). That statute clearly imposes no specific limit on the ratio of punitive damages to compensatory damages, and "we may not read into clearly expressed legislation provisions which do not find expression in its words . . . ." (Internal quotation marks omitted.) *Giaimo* v. *New Haven*, 257 Conn. 481, 494, 778 A.2d 33 (2001); see also *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 273 Conn. 662 ("CUTPA . . . does not, by its express terms, provide a cap on the amount of [punitive] damages awarded").

We are persuaded, however, that, in determining whether a punitive damages award pursuant to § 42-110g (a) is so excessive as to constitute an abuse of discretion, the court should consider the factors that the court in *Exxon Shipping Co.* discussed. These include the "degrees of relative blameworthiness," i.e., whether the defendant's conduct was reckless, intentional or malicious; *Exxon Shipping Co.* v. *Baker*, supra, 554 U.S. 493; whether the defendant's "[a]ction [was] taken or omitted in order to augment profit"; id., 494; see also id., 503 (some courts consider whether wrongful conduct was profitable to defendant); whether the wrongdoing was hard to detect; id., 494; whether the injury and compensatory damages were small, providing a low incentive to bring the action; id.; and whether the award will deter the defendant and others from similar conduct, without financially destroying the defendant.[64] Id., 504; see also *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (when determining whether punitive damages award comports with constitutional due process principles, courts should consider "[1] the degree of reprehensibility of the defendant's misconduct; [2] the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award;[65] and [3] the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases"); *Vasbinder* v. *Scott*, 976 F.2d 118, 121 (2d Cir. 1992) ("because neither compensation nor enrichment is a valid purpose of punitive damages, an award should not be so large as to constitute a windfall to the individual litigant" [internal quotation marks omitted]). Of these factors, the reprehensibility of a defendant's conduct is the most important. *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 419. Reprehensibility is determined by "considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." Id.

In the present case, the trial court concluded that "the best characterization of the bank's conduct . . . is that it proceeded with reckless or wilful ignorance and indifference" to the risks that its conduct posed to prospective bidders; that its conduct was "inherently deceptive to bidders"; that its "effort to maximize the bids by including the business property as part of the auction was beneficial to the bank's interests"; and that the bank had a high net worth. On the other hand, the court also recognized that the jury's compensatory damages award was not small, that the bank's conduct was not of a criminal nature and that the punitive damages award should not constitute a windfall to the plaintiffs. In addition, we note that there was no evidence that the bank's conduct constituted anything other than an isolated incident. See *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 538 U.S. 419.

Although the trial court's punitive damages award in the present case undoubtedly was a large one, especially in light of the large size of the compensatory damages award, we cannot conclude that the award constituted a manifest abuse of discretion or that an injustice was done. See *Gargano* v. *Heyman*, supra, 203 Conn. 622. Rather, we conclude that the trial court reasonably could have concluded that the bank's reckless and deceptive conduct, together with the fact that the motive for the conduct was to increase the profitability of the auction to the bank, the fact that the bank has a very high net worth and the fact that there is an established practice in this state of awarding multiple damages for CUTPA violations, warranted the amount of the award.[66] Accordingly, we conclude that the size of the trial court's punitive damages award did not constitute an abuse of discretion.

VII

We next address the defendants' claim that the trial court improperly awarded postjudgment interest to the plaintiffs pursuant to § 37-3a.[67] We disagree.

The following procedural history is relevant to our resolution of this claim. After the trial court rendered judgment in accordance with the jury verdict, the defendants filed a motion for postjudgment interest pursuant to § 37-3a at the rate of 10 percent. The defendants objected to the motion on the ground that they had a good faith basis for their appeals and the judgment already included an award of attorney's fees and punitive damages. The trial court observed that "this case presents legitimate and novel issues worthy of appellate review," but concluded that "the recovery of postjudgment interest is appropriate under the circumstances of this case to ensure that the money judgment is worth the same when it is actually received as when it was awarded." The court also concluded, however, that, in light of "the present economic climate [and] the particular facts of this case . . . the rate of 7.5 percent [was] sufficient to accomplish the compensatory purpose of § 37-3a."

"[T]he decision of whether to grant interest under § 37-3a is primarily an equitable determination and a matter lying within the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Sosin* v. *Sosin*, 300 Conn. 205, 227, 14 A.3d 307 (2011).

"[T]he court's determination [as to whether interest should be awarded under § 37-3a] should be made in view of the demands of justice rather than through the application of any arbitrary rule. . . . Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances." (Internal quotation marks omitted.) Id., 229. The detention of money may be wrongful even "if the liable party had a good faith basis for nonpayment." Id.; see also id., 230 ("[W]rongful is not synonymous with bad faith conduct. Rather, wrongful means simply that the act is performed without the legal right to do so." [Internal quotation marks omitted.]). This is because "the primary purpose of § 37-3a . . . is not to punish persons who have detained money owed to others in bad faith, but, rather, to compensate parties that have been deprived of the use of their money." Id., 230. An award of interest pursuant to § 37-3a "is limited to cases in which the damage is of a sort [that] could reasonably be ascertained by due inquiry and investigation on the date from which the interest is awarded." (Internal quotation marks omitted.) Id., 235. "In addition, when the money is not within the control of the party disputing the debt and that party has not benefited from possession of the money, an award of interest pursuant to § 37-3a is beyond the trial court's discretion." Id.

In the present case, the defendants contend that the trial court's award of postjudgment interest pursuant to § 37-3a was an abuse of discretion because the trial court recognized that this appeal "presents legitimate and novel issues worthy of appellate review" and the detention of money damages during the pendency of a good faith appeal is not wrongful. See *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 273 Conn. 666 (trial court's denial of interest was not abuse of discretion when defendant's opposition to application to confirm arbitration award was not frivolous); *Carrano* v. *Yale-New Haven Hospital*, 112 Conn. App. 767, 774, 963 A.2d 1117 (2009) (trial court's denial of postjudgment interest was not abuse of discretion when defendant's appeal was filed in good faith). The defendants further contend that postjudgment interest on a punitive damages award is an unjustified windfall to the plaintiffs and is inconsistent with the principle that interest pursuant to § 37-3a is intended to compensate parties who have been deprived of the use of their money, not to punish defendants. *Sosin* v. *Sosin*, supra, 300 Conn. 230. We are not persuaded.

Although it may not be an abuse of discretion for the trial court to deny a request for postjudgment interest pursuant to § 37-3a when the defendant has filed a good faith appeal; see *MedValUSA Health Programs, Inc.* v. *MemberWorks, Inc.*, supra, 273 Conn. 666; *Carrano* v. *Yale-New Haven Hospital*, supra, 112 Conn. App. 774; the defendants have cited no authority for the proposition that the granting of such a request necessarily constitutes an abuse of discretion. The trial court reasonably could have concluded that, although the defendants filed the appeal in good faith, the plaintiffs should be compensated for their inability to use the money during the appeal period if they prevailed on appeal. The fact that a portion of the damages were punitive does not affect this conclusion. The plaintiffs were no less entitled to the use of that money after the judgment.[68] See *Brown* v. *Petrolite Corp.*, 965 F.2d 38, 51 (5th Cir. 1992) ("awarding post-judgment interest on exemplary damages is consistent with the purpose of post-judgment interest—compensation to a successful plaintiff for the intervening time between entitlement to and actual payment of an award of damages"); *Life Ins. Co. of Georgia* v. *Johnson*, 725 So. 2d 934, 943 (Ala. 1998) (postjudgment interest on punitive damages is "just compensation to ensure that a money judgment will be worth the same when it is actually received as when it was awarded" [internal quotation marks omitted]); *Lively* v. *Flexible Packaging Assn.*, 930 A.2d 984, 996 (D.C. 2007) (citing cases in which courts have upheld postjudgment interest on punitive damages). Accordingly, we conclude that the trial court did not abuse its discretion by awarding postjudgment interest.

VIII

We next address Ulbrich's claim on cross appeal that the trial court improperly concluded that it had no authority to grant the plaintiffs' request for an award of "nontaxable" costs pursuant to § 42-110g (d). We conclude that we need not address the question of whether nontaxable costs may be awarded pursuant to § 42-110g (d) because they may be awarded as punitive damages under § 42-110g (a).

The following additional procedural history is relevant to our resolution of this claim. After trial, the plaintiffs filed a request for costs of $36,320.11 pursuant to § 42-110g (d), which included $5705.19 for trial equipment, $21,142.08 for transcripts, $839.45 for third party copying, $4170.10 for Westlaw research, $466.04 for delivery costs, $2672.25 for marshal fees, $350 for the jury fee and $975 for court fees. Relying on the Appellate Court's decision in *Miller* v. *Guimaraes*, 78 Conn. App. 760, 782–83, 829 A.2d 422 (2003), which held that § 42-110g (d) does not authorize an award of costs that are not taxable under General Statutes § 52-260, the trial court denied the plaintiffs' request. The court observed that numerous trial courts have questioned the reasoning of *Miller* and its progeny because nontaxable costs are recoverable as punitive damages under the common law and construing the term "costs" as used in § 42-110g (d) to be coextensive with the costs allowed by § 52-260 would render the costs provision of § 42-110g (d) superfluous. Nevertheless, the court recognized that it was bound by *Miller*.

As we have indicated herein, it is well established that nontaxable costs may be awarded as punitive damages under the common law. *Larsen Chelsey Realty Co.* v. *Larsen*, supra, 232 Conn. 517 n.38 (common-law punitive damages are comprised of "the expenses of bringing the legal action, including attorney's fees, less taxable costs"). Although we have concluded that a punitive damages award pursuant to § 42-110g (a) is not *limited* by the measure of punitive damages under the common law, we can perceive no reason why the legislature would have wanted to *exclude* nontaxable costs from the scope of such damages. Indeed, a trial court could conclude in a particular case that an award of nontaxable costs is sufficient to serve the punitive and deterrent function of the punitive damages provision of § 42-110g (a), and that multiple damages are unwarranted. We conclude, therefore, that we need not decide whether the holding of *Miller* that § 42-110g (d) does not authorize the trial court to award costs that are not authorized by § 52-260 should be overruled, because we conclude that the award of such costs is authorized by § 42-110g (a). Accordingly, the case must be remanded to the trial court so that the court may exercise its discretion to determine whether it should grant the plaintiffs' request for nontaxable costs pursuant to § 42-110g (a).

IX

Finally, we address Ulbrich's claim on cross appeal that the trial court improperly directed a verdict for the bank on the plaintiffs' claim that the bank breached the terms of one of the bills of sale when it refused to pay over certain life insurance proceeds to the plaintiffs. We disagree.

The following undisputed facts and procedural history are relevant to our resolution of this claim. As security for the loan that the bank made to the debtors, the debtors collaterally assigned to the bank certain life insurance polices that they owned on the life of James A. Groth. The assignments provided that the bank had "[t]he sole right to collect from the [i]nsurer the net proceeds of the [p]olicy when it becomes a claim by death or maturity . . . ." They also provided that "any balance of sums received from the [i]nsurer remaining after payment of the then existing liabilities, matured or unmatured shall be paid by the [a]ssignee to the persons entitled thereto under the terms of the [p]olicy had this assignment not been executed . . . ."

The property description attached as exhibit A to one of the bills of sale provided by the bank to the plaintiffs included "all general intangibles, as that term is defined in [a]rticle 9 of the UCC, now owned or hereafter acquired, and in any event, shall include all right, title and interest which the [d]ebtor may now or hereafter have in or under any contract [and] all . . . claims in or under insurance policies," and "all proceeds, as that term is defined in [a]rticle 9 of the UCC, now owned or hereafter acquired, and, in any event, shall include . . . proceeds payable to the [d]ebtor from time-to-time in respect of any of the foregoing collateral security [and] any and all proceeds of any insurance, indemnity, warranty or guaranty payable to the [d]ebtor from time-to-time with respect to any of the collateral security . . . ." After the foreclosure sale and auction, the bank acquired a deficiency judgment against the debtors in the amount of approximately $1.8 million. Some months later, James A. Groth died. Approximately $1.8 million of the $3 million payout from the life insurance policies was paid to the bank to satisfy the deficiency judgment and the remainder was distributed to the beneficiaries.

In their complaint, the plaintiffs alleged that the bank had breached its obligation under the bill of sale transferring the intangible property to cause the proceeds from the life insurance policies to be transferred to the plaintiffs. At trial, the defendants filed a motion for a directed verdict on the claim, which the trial court granted. The plaintiffs then filed a motion to set aside the directed verdict, which the trial court denied. In its memorandum of decision denying the motion to set aside the verdict, the court assumed, without deciding, that the language of the bill of sale was broad enough to cover the collateral assignments of the life insurance policies as security for the bank's loan to the debtors.[69] The court concluded, however, that, because the bank had a right to the proceeds of the life insurance policies only by virtue of its deficiency judgment against the debtors, and because the plaintiffs had conceded that they had no interest in the deficiency judgment or in the underlying debt that gave rise to that judgment, they could have no interest in the insurance proceeds.

"The standards for appellate review of a directed verdict are well settled. Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision to direct a verdict in favor of a defendant we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Citations omitted; internal quotation marks omitted.) *Janusauskas* v. *Fichman*, 264 Conn. 796, 803–804, 826 A.2d 1066 (2003).

As the defendants point out, the collateral assignments of the life insurance policies were not, in and of themselves, collateral for the bank's loan to the debtor. Rather, they were instruments that created a security interest in certain property, namely, the insurance proceeds, to the extent of the debt owed to the bank. Thus, they were analogous to mortgages. Cf. *Waterbury Trust Co.* v. *Weisman*, 94 Conn. 210, 218, 108 A. 550 (1919) ("[t]he analogy between notes secured by conditional bills of sale and notes secured by chattel mortgages, or notes secured by mortgages, is marked"). In support of its conclusion that the bill of sale for the intangible property did not confer the right to the insurance proceeds to the plaintiffs, the trial court relied on the principle that "[a]n assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." (Internal quotation marks omitted.) Id., 218–19; see also *Second National Bank of New Haven* v. *Dyer*, 121 Conn. 263, 269, 184 A. 386 (1936) ("as between the indebtedness and the mortgage securing it, the indebtedness is the principal thing and the security incidental; an assignment of the debt carries with it the right and benefit of the security, though that be not assigned; and an assignment of the security apart from the debt transfers the bare title, the beneficial interest in which remains with the owner of the debt"); *Pettus* v. *Gault*, 81 Conn. 415, 422, 71 A. 509 (1908) ("[t]he mortgage . . . was only an incident to the debt, from which it could not be detached and distinct from which it had no determinate value, and the holder or assignee of it must hold it at the will and disposal of the creditor"); *Fleet National Bank* v. *Nazareth*, 75 Conn. App. 791, 795, 818 A.2d 69 (2003) (when mortgage, but not underlying promissory note, had been assigned to plaintiff, plaintiff lacked standing to foreclose on mortgaged property).

Ulbrich contends that, contrary to these cases, a mortgage can be transferred separately from the obligation secured by the mortgage when the parties to the transfer expressly agree to do so. See Restatement (Third), Property, Mortgages § 5.4, comment (c), p. 384 (1996) ("[i]t is possible for a mortgagee to assign the mortgage while retaining full ownership of the obligation, but only if the parties so agree").[70] Consequently, he claims, the bank could transfer the collateral assignments of the life insurance policies to the plaintiffs while retaining its rights as a creditor.

As Ulbrich recognizes, however, "[t]he practical effect of [an assignment of a mortgage without the note] is to make it impossible to foreclose the mortgage . . . ." Id. The reason is that the assignee can never suffer a default because he does not own the debt; id., comment (e), p. 385; while the assignor cannot foreclose the mortgage upon default of the note because he no longer owns the mortgage.[71] Id. Accordingly, even if we were to assume that the plaintiffs in the present case are correct that the collateral assignments of the life insurance policies *could have* been transferred to them without the underlying debt obligation consistent with Connecticut law, doing so would have deprived the bank of the right to enforce the assignments. None of the parties disputes, however, that the bank took possession of the insurance proceeds pursuant to the collateral assignments and that it had a right to do so. Accordingly, it is clear that the parties could not have agreed to transfer the collateral assignments to the plaintiffs.

Ulbrich also claims, somewhat inconsistently, that these principles govern only the enforceability of a mortgage against the mortgagor and do not apply to the situation in the present case, in which the plaintiffs are seeking to recover, not from the debtors, but from the bank. Specifically, Ulbrich argues that the primary purpose of the rule barring an assignee of a mortgage who has not been assigned the underlying note from foreclosing on the mortgage is to forestall the possibility that a mortgagor will be subject to multiple enforcement actions, and that concern is not present when the assignee seeks recovery of the collateral from the assignor who has foreclosed the mortgage instead of the mortgagor.

We are not persuaded. The Restatement (Third) of Property indicates that there may be situations in which the assignee of a mortgage can enforce the mortgage even though the note has not been assigned. For example, when the assignee is the trustee or the agent of the assignor who holds the note, it may be able to enforce the mortgage on the assignor's behalf. Id.; cf. *Second National Bank of New Haven* v. *Dyer*, supra, 121 Conn. 269 ("an assignment of the security apart from the debt transfers the bare title, the beneficial interest in which remains with the owner of the debt"); *Pettus* v. *Gault*, supra, 81 Conn. 422 (assignee of mortgage without note holds it "at the will and disposal of the creditor" who holds note). There is no suggestion in the Restatement (Third) of Property, however, or in any other authority cited by Ulbrich, that the assignor of a mortgage who has retained the note is *obligated* to enforce the mortgage *on the assignee's behalf*. Indeed, if it is assumed that the mortgage may be assigned without the note, it would be conceptually impossible for the assignor to retain the right, much less the obligation, to take possession of the collateral secured by the note, because that is the very right that the mortgage confers. Consequently, an assignor of a mortgage who retained that right would have transferred nothing to the assignee. Conversely, when an assignor *has* transferred the right to take possession of the secured collateral, it can enforce the loan obligation only by bringing a legal action on the note, in which the assignee has no interest.[72] Restatement (Third), supra, § 5.4, comment (e), p. 385. Thus, contrary to Ulbrich's contention, the separation of the mortgage from the note is not disfavored under the Restatement (Third) of Property because it would allow double recoveries against the debtor, but because it generally renders the mortgage unenforceable, resulting in "a windfall for the mortgagor . . . ."[73] Id., p. 386.

We have concluded that the collateral assignments of the life insurance policies were not transferred to the plaintiffs under the bill of sale for the intangible property, and Ulbrich has not identified any other theory under which the plaintiffs are entitled to recover the life insurance proceeds from the bank. We conclude, therefore, that the trial court properly granted the defendants' motion for a directed verdict on this claim.

The judgment is reversed only with respect to the trial court's ruling denying the defendants' motions to set aside the verdict and for judgment notwithstanding the verdict on the plaintiffs' negligence and negligent misrepresentation claims, and the court's ruling that it lacked authority to award nontaxable costs under CUTPA, and the case is remanded to the trial court with direction to grant the defendants' motion to set aside the verdict on the negligence and negligent misrepresentation claims and to render judgment for the defendants on those counts, and for further proceedings on the plaintiffs' claim for nontaxable costs under CUTPA. The judgment is affirmed in all other respects.

In this opinion ROGERS, C. J., and NORCOTT, EVELEIGH and HARPER, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] References herein to Ulbrich and Ulbrich Properties jointly are to the plaintiffs and individual references are by name.

[2] In addition to the bank and Tranzon, Kelly J. Groth, James D. Groth, Festivals Incorporated, Groth Family Limited Partnership, JAG Associates, The Picnic Basket, LLC, Mountainside Corporation, the James A. Groth 1992 Irrevocable Life Insurance Trust and the Groth 1990 Irrevocable Trust (collectively, Groth entities) were named as defendants in the operative complaint. Those defendants are not participants in this appeal. The plaintiffs' original complaint named Reid and Riege, P.C., Bruno Morasutti (appointed by the trial court as the committee for sale for the real estate), Luby Olson, P.C., Robert S. Horton, Thomas A. Shernow, Guy R. DeFrances, and Whitten, Horton & Gibney, LLP, as defendants. The claims against those defendants were disposed of before trial and also are not at issue in this appeal. For convenience, all references to the defendants in this opinion are to the bank and Tranzon jointly. When necessary, we refer to those defendants individually by name.

[3] The defendants appealed from the judgment of the trial court to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[4] The bank's motion to amend the judgment of foreclosure by sale in the foreclosure action stated: "[The bank] hereby moves . . . for an order of [the] court . . . to provide that the property shall be offered for sale as a whole, as well as in parcels, with the property to be sold so as to achieve the highest total price at the auction sale.

"In support of the motion, [the bank] respectfully submits that there are three parcels subject to the mortgages being foreclosed herein, as well as personal property, fixtures and equipment to be sold as part of the foreclosure sale. . . . General Statutes [§ 49-25] provides that the court shall 'direct whether the property shall be sold as a whole or in parcels, and how the sale shall be made.' "

The trial court's order granting the motion provided in relevant part: "Property to be auctioned as follows: First, all [three] parcels in their entirety plus personal property; deposit amount $100,000. Second, the [two] commercial parcels plus personal property; deposit amount $100,000. Third, the residence; deposit $25,000."

[5] Morasutti testified at trial that the bank "independently" hired Tranzon. Alice Paxson, the vice president of the bank's workout division, testified that Tranzon sent the bank an "exclusive right to sell [the] auction contract" and that she signed it by mistake, without realizing that the committee of sale had the exclusive right to sell the property.

[6] The listed personal property included: office furniture and supplies; desks; chairs; file cabinets; computer and networking equipment; pool accessories; pool covers; pool cleaning equipment; filters; sporting equipment; ping pong tables; basketballs; bocce; kitchen equipment; walk-in refrigerators; ovens; stoves; utensils; dishes and flatware; prep tables; barware; storage containers; shelving; mowers; yard equipment; spreader; pressure washer; snowblower; event tents; chairs; tables; serving equipment; signage and decorations; a golf cart; a 1999 Dodge Ram truck; a garbage truck; a 1997 Chrysler LHS; and a Mountaineer SUV.

[7] In addition, the brochure contained a general notice to the prospective

bidders that provided in relevant part: "All materials and information contained and provided herein are made available for informational purposes only. The auctioneer and seller and/or mortgagee and their agents and attorneys cannot and do not warrant the accuracy or completeness of the information provided herein, nor do they have any obligation to update this information.

"Any terms relating to the sale are subject to change prior to or on the day of auction. Prior to the auction prospective bidders should make such investigation as they deem appropriate and shall rely entirely on their own information, judgment and inspection of the property.

"No representations or warranties of any kind are made with respect to the property to be sold. All property will be sold 'as is, where is,' and 'with all defects.'

"Auctioneer is acting solely as agent for the seller/mortgagee in marketing and negotiations of sale of this property, and as such has a fiduciary duty to disclose to the seller/mortgagee information, which is material to the sale, acquired from the buyer or any other source. The purchaser(s) agree that [the] seller/mortgagee and auctioneer have made no warranties of any kind regarding the value, condition, habitability, merchantability and fitness of the property for any purpose.

"Potential purchasers are encouraged to seek information from professionals regarding any specific issue or concern. . . ."

[8] Among the evidence that would support this finding is an October 4, 2006 e-mail from a Tranzon employee to the bank and the bank's attorney in which the employee stated that Tranzon had learned that the town of Meriden had assessed the personal property at $16,988 for tax purposes. The employee stated that "[t]he [t]own said the [personal property] assessment is low because the majority of the [personal property] is listed as leased . . . ." The employee then inquired whether Tranzon was entitled to sell the leased property and stated that Tranzon did not "know at this time exactly what the [personal property] is."

[9] The trial court in the foreclosure action had found that the fair market value of the special events facility was $3 million.

[10] "Exhibit A," which was attached to the first bill of sale, described the personal property as "[a]ll tangible personal property owned by [the debtors], including but not limited to inventory, equipment, machinery, furniture, fixtures, any and all attachments, components, parts, equipment and accessories installed thereon or affixed thereto."

"Schedule A," which was attached to the second bill of sale, described the personal property in part as "all equipment, as that term is defined in [a]rticle 9 of the UCC, and, in any event, shall include, without limitation, all machinery, tools, dyes, equipment, furnishings, fixtures, leasehold improvements, vehicles, (other than motor vehicles) and computers and other electronic data processing and other office equipment, now owned or hereafter acquired, including . . . any and all additions, substitutions and replacements of any of the foregoing, wherever located, together with all attachments, components, parts, equipment and accessories installed thereon or affixed thereto, and all contracts, contract rights and chattel paper arising out of any lease of any of the foregoing . . . ." In addition, "Schedule A" attached to the second bill of sale included "all accounts," "all chattel paper," "all documents," "all general intangibles," "all instruments," "all inventory," and "all proceeds" belonging to the debtors, among other items.

Alice Paxson, the vice president of the bank's workout division, testified at trial that the committee of sale refused to provide the bills of sale and "made the bank" issue them, even though, in her opinion, the committee was actually the seller of the personal property.

[11] The trial court rendered judgment against the bank on the breach of warranty and CUTPA claims for the entire $417,000 compensatory damages award.

The jury apportioned liability on the negligence and negligent misrepresentation claim against Tranzon as follows: 70 percent to Tranzon; 10 percent to Morasutti; 10 percent to the Groth entities; see footnote 1 of this opinion; and 10 percent to the plaintiffs. Accordingly, the trial court rendered judgment against Tranzon in the amount of $291,900, or 70 percent of $417,000, on this claim.

The jury apportioned liability on the negligence and negligent misrepresentation claim against the bank as follows: 80 percent to the bank; 10 percent to Morasutti; and 10 percent to the Groth entities. Accordingly, the trial court rendered judgment against the bank in the amount of $333,600, or 80 percent of $417,000, on this claim.

The trial court instructed the jury that the bank, as principal, could be held vicariously liable for the wrongful acts of Tranzon, as agent, if Tranzon was acting within the scope of its authority. It also instructed the jury that Tranzon could be held liable for its own wrongful conduct, regardless of whether its actions were in the scope of its authority as the bank's agent. Despite these instructions, the jury was not asked to render separate damages awards against Tranzon and against the bank, but only to find the total amount of damages. After trial, the trial court applied the jury's apportionment of liability to the full amount of damages for both Tranzon and the bank. Because the court instructed the jury on no theory under which *Tranzon* could be held liable for the *bank*'s wrongful conduct, however, it is unclear to us under what theory the jury could have found that both Tranzon and the bank were liable for the full amount of damages (less apportionment to other wrongdoers), unless the jury found that, as between Tranzon and the bank, the plaintiffs' damages were entirely the result of Tranzon's wrongful conduct within the scope of its authority as the bank's agent. Such a finding, however, seems inconsistent both with the evidence and with the fact that the jury apportioned a smaller percentage of overall liability to Tranzon than it did to the bank. We take note of these issues only because the damages award seems inconsistent on its face. Because these issues were not raised on appeal, and because we conclude that the plaintiffs' tort claims were barred under the economic loss doctrine, we need not resolve them.

[12] After the appeals were filed, we granted permission to the New England Legal Foundation and to the American Bankers Association to file amicus briefs in support of the defendants' position.

[13] As we have indicated, there is some confusion in the record as to whether the sale of the personal property was conducted pursuant to article 9 of the UCC or whether it was conducted as part of the court supervised foreclosure action. Indeed, in their complaint, the plaintiffs alleged both that the "bank proceeded with an article 9 secured party auction sale of the personal property" and that the committee for sale "consummated the sale of the property" to the plaintiffs. Because the parties have treated the sale as an article 9 sale in their briefs to this court, we treat it as such.

[14] The economic loss doctrine bars negligence claims for "commercial losses arising out of the defective performance of contracts . . . ." *Flagg Energy Development Corp.* v. *General Motors Corp.*, 244 Conn. 126, 153, 709 A.2d 1075 (1998). The rationale for the doctrine is that, because parties to a contract are "free to allocate the risks, insure against potential losses, and adjust the contract price as they [deem] most wise"; (internal quotation marks omitted) id., 153–54; courts will not extricate them from their bargain and substitute a common-law tort remedy. Id.

[15] The plaintiffs contend that Tranzon's claim regarding the economic loss doctrine was not preserved because, in their motions for judgment notwithstanding the verdict and to set aside the verdict, the defendants claimed only that the economic loss doctrine barred the common-law tort claims against the bank, not that it barred such claims against Tranzon. Although the defendants claim that the issue is preserved for review because they filed a motion for summary judgment in which they contended that the economic loss doctrine barred the common-law claims against Tranzon, this court has held that the denial of a motion for summary judgment is not appealable absent exceptional circumstances. *Gurliacci* v. *Mayer*, 218 Conn. 531, 541 n.7, 590 A.2d 914 (1991). Nevertheless, this court has concluded that it may review an unpreserved claim that is "interwoven" with a preserved claim. *State* v. *Chapman*, 227 Conn. 616, 618 n.3, 632 A.2d 674 (1993). Because the defendants' claim that the economic loss doctrine barred the tort claims against the bank involves the same legal principles as their claim that the doctrine barred the tort claims against Tranzon, we conclude that we may review that claim.

The plaintiffs also claim that "there was no contractual relationship between the plaintiffs and Tranzon, and [therefore] no basis on which the plaintiffs could assert contractual (or UCC) rights or remedies against Tranzon, the negligent misrepresentation claim against Tranzon . . . falls outside the reach of the economic loss rule." The trial court declined to address this question in its ruling on the defendants' motion for summary judgment, however, because it concluded that it had been inadequately addressed by the parties. The plaintiffs also have not briefed the issue on appeal. Accordingly, we conclude that it is not reviewable. We note, however, that, although we conclude in this opinion that the economic loss doctrine does not always bar negligent misrepresentation claims against a party to a contract, we also conclude that, when the contract involves a sale of goods under the UCC, the exclusive remedy for that tort is rescission of the contract. Because the plaintiffs did not seek this remedy, their tort claims against the bank are barred. It is not facially unreasonable to conclude that these principles would also bar the tort claims against Tranzon, as the bank's authorized agent.

[16] The trial court instructed the jury as follows: "The next matter that I want to mention is the rule of caveat emptor, meaning buyer beware. The rule of caveat emptor is applicable to all judicial sales of property. Consequently, judicial sales involve risks concerning the property being purchased. The bidders at judicial auctions have a duty to be aware of the terms, conditions and information about the sale and a duty to investigate the status and condition of the property being sold.

"Additionally, foreclosure sales are also governed by the rule that they are to be conducted with reasonable care. A person who conducts a foreclosure sale of property has a duty to identify . . . properly the property that is being sold."

In addition, the trial court instructed the jury that "[t]he law imposes legal duties on a person to exercise reasonable care for the safety of another person or to another person's property. Thus, negligence is defined generally as the violation of a legal duty that one person owes to another to exercise reasonable care for the safety of that other person or for the safety of that other person's property.

"Consequently, negligence may be defined as the failure to use reasonable care under the circumstances. Reasonable care, or as it is sometimes called, due care, is the care that a reasonably prudent person would use in the same or similar circumstances. Thus, the use of proper care in a given situation is the care that an ordinary prudent person would use in light of all the surrounding circumstances."

The trial court further instructed the jury that, "in regard to negligent misrepresentation, in order to prevail on a claim of negligent misrepresentation, a plaintiff must prove the following four elements by a preponderance of the evidence: One, that a defendant made a misrepresentation of fact; two, that the defendant knew or should have known that the representation was false; three, that the plaintiff reasonably relied on the misrepresentation; and four, that the plaintiff suffered pecuniary harm or financial harm as a result.

"As a general rule, a person who sells property has a duty to properly identify the property being sold and not to misidentify property as being part of a sale when it is not. Furthermore, one who, in the course of his business or profession or employment, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon information if he fails to exercise reasonable care or competence in obtaining or communicating the information.

"Liability for negligent misrepresentation may be placed on a defendant when there has been a failure to disclose known facts and, in addition, a request or an occasion or circumstance which imposes a duty to speak. Such a duty is imposed on a defendant insofar as he voluntarily makes disclosure. A party who assumes to speak must make full and fair disclosure as to the matters about which he assumes to speak.

"Additionally, a seller of property may not do anything to conceal from a buyer a material fact affecting the sale or say or do anything to divert or forestall an intended inquiry by the buyer or deliberately hide defects, for in doing so, he is not merely remaining silent, but is taking active steps to mislead.

"Thus, if a person makes representations as to title, he is to speak the truth or if he places himself in a position where his silence will convey a false impression of the truth, there may be as much fraud as in a false statement. . . .

"[T]he plaintiffs allege that the [bank] was negligent as follows . . . . The . . . bank was negligent and careless not to ascertain the true status of the ownership of personal property and failed to properly investigate same. Further, the bank was negligent in causing personal property to be sold, although not part of its security. The bank knew that buyers would rely on the description of property being sold at public auction and [the] plaintiffs did so rely, all to the special loss and damage of the plaintiffs herein.

"Still further, the [bank] and its agents, representatives and employees knew of conflicting claims to said personal property and, in fact, knew that it lacked a definite list of personal property, yet caused an auction to be held knowing [the] plaintiffs would rely and did so rely and failed to disclose the conflicting claims of personal property all to the plaintiffs' special loss and damages. . . .

"It is not necessary for the plaintiffs to prove all of the specific claims of negligence against [the bank] as alleged in the complaint. Negligence may be found against [the bank] if the plaintiffs prove by a preponderance of the evidence any one of the specific claims of negligence as have been alleged that I've just read to you. . . .

"[T]he plaintiffs allege . . . Tranzon was negligent as follows . . . . [Tranzon] acted as the auctioneer and prepared the auction marketing memorandum which was utilized by bidders in regard to the auction. . . . Tranzon was negligent and careless in preparing the auction marketing memorandum and conducting said auction by failing to identify the owners of said personal property, what personal property was included in the auction and misleading the prospective bidders, including the plaintiffs, who were damaged as a result of [Tranzon's] negligence and carelessness.

"Further . . . Tranzon knew it lacked sufficient information regarding the ownership of the personal property and conducted said auction without disclosing the full and complete information to bidders, all to the plaintiffs' special loss and damages. . . .

"Again, it's not necessary for the plaintiffs to prove all the specific claims of negligence against Tranzon as alleged in the complaint. Negligence may be found against Tranzon if the plaintiffs proved by a preponderance of the evidence any one of the specific claims of negligence as alleged in the complaint."

[17] In *Lombard* v. *Edward J. Peters, Jr., P.C.*, supra, 252 Conn. 625, the defendant committee of sale conveyed a foreclosed property to the purchaser by a committee deed that accurately described the foreclosed property. Thereafter, the defendant incorrectly identified a garage unit owned by the plaintiffs as being part of the property that had been foreclosed when, in fact, it was completely unrelated to the foreclosure action. Id. The purchaser entered the garage unit, took possession of and sold personal property belonging to the plaintiffs. The plaintiffs then brought a negligence action against the defendant. Id. The trial court granted the defendant's motion to strike the claim on the ground that the defendant had qualified immunity. Id., 626. On appeal, this court concluded that the defendant was not immune from the claim; id., 630; and that "the defendant owed the plaintiffs a duty not to misidentify their garage as having been" part of the foreclosed property. Id., 634. Accordingly, this court reversed the judgment of the trial court. Id.

[18] In *Basiliko* v. *Pargo Corp.*, supra, 532 A.2d 1347, the plaintiff in the underlying action, George Basiliko, entered a successful bid for real property at a trustee's sale when, unbeknownst to the parties to the sale, the owner of the property had cured the delinquency that had led to the sale. After the trustees discovered that they had had no authority to conduct the sale, they refused to convey the property to Basiliko. Id. In the ensuing litigation, Basiliko claimed that the trustees had breached the contract of sale and sought "benefit of the bargain" damages. Id., 1348. The trial court concluded that Basiliko was entitled only to be relieved of his obligation to pay the purchase price. Id. On appeal, the court concluded that because "the contractual breach was occasioned by a circumstance . . . that was within the sole knowledge and control of the seller/lender . . . it would be especially unfair for the buyer to be required to bear the risk of this mistake." Id., 1349. In addition, the court concluded that the rule of caveat emptor that generally applies to mortgage sales relates only to the seller's warranty of title and "has no applicability . . . to a mistake relating to the underlying authority of [the] lender or [the] trustee to conduct the sale. Hence, it does not preclude, for example, liability of the mortgagee for misrepresentations in the advertisement of sale or for failure to carry out the sale in accord with the terms of the mortgage." Id. Accordingly, the court concluded that Basiliko was entitled to damages. Id., 1350.

[19] In *Tri-Professional Realty, Inc.* v. *Hillenburg*, supra, 669 N.E.2d 1066, an employee of the defendant in the underlying action, Tri-Professional Realty, Inc. (Tri-Professional), a real estate brokerage firm, saw a homemade for sale sign on a property and called the indicated telephone number in order to procure a listing for the property. The owner of the property agreed to the listing and Tri-Professional placed a for sale sign on the property. Id. In fact, however, the owner owned a different property and, unbeknownst to any of the parties, the sign that Tri-Professional initially had seen had been

placed on the wrong lot. Id. Tri-Professional ultimately sold the property to the plaintiff in the underlying action, Tara Hillenburg, with both parties believing that Hillenburg had purchased the property on which the sign had been placed. Id. When the mistake was discovered, Hillenburg brought an action for negligence and various contract claims against Tri-Professional. Id. The trial court found for Hillenburg on the negligence claim. Id. On appeal, the court rejected the proposition that "imposing a duty on real estate agents to use reasonable care in representing their authority would, in effect, require that agents insure the title of all real estate they contract to sell. The issue in this case is not title but the agent's misrepresentation of the parcel offered for sale and of its authority to sell it." Id., 1068. The court concluded that "[a] real estate agent has a basic professional duty to identify correctly the property it claims authority to sell." Id. Accordingly, the court affirmed the trial court's finding that Tri-Professional had been negligent. Id., 1070.

[20] A secured party who has a security interest in a debtor's personal property may file a financing statement describing the property in which it has an interest at the Secretary of the State's Office. See General Statutes § 42a-9-501 (a) (2). The purpose of the financing statement is to "[provide] notice that a person *may* have a security interest in the collateral claimed." (Emphasis added.) Conn. Gen. Stat. Ann. § 42a-9-504 (West 2009), comment 2; see also Conn. Gen. Stat. Ann. § 42a-9-502 (West 2009), comment 2 ("The notice itself indicates merely that a person may have a security interest in the collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs."). The financing statement does not guarantee that the secured party has a security interest in all of the property in the debtor's possession that matches the description in the notice, that the debtor owns all property in its possession that matches the description, or that any of the described property is in the debtor's possession. Moreover, the fact that there are no financing statements on file does not mean that the debtor owns all of the property it its possession or that there are no security interests in the property that it does own.

[21] We emphasize that the present case is not a case in which the secured party completely misidentified the property in which it had a secured interest, as it might be, for example, if a secured party misidentified the warehouse in which its collateral was being stored. This also is not a case, like *Basiliko* v. *Pargo Corp.*, supra, 532 A.2d 1346, in which a claim is brought by a person who was not a party to the sale and who therefore could not bring a breach of the warranty of title claim. Rather, this is a case in which the debtors were in possession of some personal property that was subject to the bank's security interest and other, similar, personal property that was not, circumstances that would appear to be typical of secured party sales and that would lead to predictable problems that article 9 was presumably intended to address.

[22] General Statutes § 42a-1-103 (b) provides: "Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions."

[23] General Statutes § 52-572n (c) provides: "As between commercial parties, commercial loss caused by a product is not harm and may not be recovered by a commercial claimant in a product liability claim. An action for commercial loss caused by a product may be brought only under, and shall be governed by, title 42a, the Uniform Commercial Code."

[24] "The comment to § 6 of the proposed final draft of the Restatement (Third) of Torts provides: '[P]roducts liability law lies at the boundary between tort and contract. Some categories of loss, including those often referred to as "pure economic loss," are more appropriately assigned to contract law and the remedies set forth in [a]rticles 2 and 2A of the [UCC]. When the [UCC] governs a claim, its provisions regarding such issues as statutes of limitation, privity, notice of claim, and disclaimer ordinarily govern the litigation.' Restatement (Third) Torts, Products Liability (proposed final draft) § 6, p. 303 (1996). The proposed final draft was adopted, subject only to editorial revisions, at the May, 1997 annual meeting of the American Law Institute." *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 154 n.47.

[25] Moreover, unless disclaimed by the seller, a secured party sale pursuant to article 9 "may give rise to other statutory or implied warranties [in addition to the implied warranty of title], e.g., warranties of quality or fitness for

purpose. Law other than this [a]rticle determines whether such other warranties apply to a disposition under this section. Other law also determines issues relating to disclaimer of such warranties. For example, a foreclosure sale of a car by a car dealer could give rise to an implied warranty of merchantability (Section 2-314) unless effectively disclaimed or modified (Section 2-316)." Conn. Gen. Stat. Ann. § 42a-9-610 (West 2009), comment 11. Thus, to the extent that the trial court in the present case concluded that the economic loss doctrine does not bar negligence or negligent misrepresentation claims arising out of facts that would give rise to a breach of warranty claim under article 9 because, unlike article 2, "[a]rticle 9 fails to provide either extensive regulation of an agreement transferring collateral or specific remedies for a violation of such an agreement," we disagree. Although article 9 does not expressly provide for warranties other than the implied warranty of title, the drafters clearly contemplated that, unless disclaimed, warranty provisions in other articles of the UCC may apply to property sold at a secured party sale. If such warranties are disclaimed, as in the present case, the buyer can adjust his price accordingly.

[26] General Statutes § 42a-9-610 (d) provides: "A contract for sale, lease, license or other disposition includes the warranties relating to title, possession, quiet enjoyment and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract."

[27] We recognize that *Flagg Energy Development Corp.* relied heavily on § 42a-2-721, which provides that a claim for fraud or misrepresentation would be consistent with "rescission or a claim for rescission of the contract for sale [or] rejection or return of the goods" subject to an article 2 sale; see *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 154–55; and the case did not expressly address secured party sales pursuant to article 9. As we have indicated, however, article 9 sales are subject to many of the same protections under the UCC as article 2 sales. See footnote 25 of this opinion. It follows that the same remedies that are available for the violation of these protections pursuant to article 2 are available pursuant to article 9, and that the same limitations on the available remedies apply.

[28] *Dean* v. *Hershowitz*, 119 Conn. 398, 177 A. 262 (1935), on which the trial court in the present case relied, is not to the contrary. In *Dean*, the plaintiff entered into a lease agreement with respect to certain premises owned by the defendant. Id., 401. Pursuant to the agreement, the defendant agreed to make repairs to the premises before the plaintiff moved in. Id. The defendant failed to make the repairs. As a result, the plaintiff was injured and brought a negligence action against the defendant. Id., 402. The defendant then filed a motion to "expunge" the claim. Id. This court recognized that the mere fact that the parties had a precedent contractual relationship did not bar the negligence claim. Id., 409 ("[w]here there is a precedent relationship, all that is necessary to furnish a basis for an action of negligence is that there be present the elements necessary to establish such a cause of action, and if that is so, that that relationship is one of contract is no sound reason why the action should not lie"). This was so, however, because the plaintiff could have brought the negligence claim *even in the absence of the contractual relationship*. Id., 410 ("[W]e have held that where a landlord voluntarily assumes control of a portion of a building and a tenant is injured by his failure to keep it in proper repair, the former can be held liable in negligence. . . . If this be so, it would be strange if a similar liability would not rest upon the landlord where he has entered into a contract with the tenant to keep the leased premises or a part thereof in repair." [Citations omitted.]). In the present case, as in *Flagg Energy Development Corp.*, the defendants' duty to the plaintiffs arose exclusively out of the contractual relationship. If no contractual duty were found, the tort claims could not survive.

[29] In support of their claim to the contrary, the plaintiffs rely on *United International Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1227 (10th Cir. 2000) (because "[a] negligent misrepresentation claim is based not on a contractual duty but on an independent common law duty requiring a party, in the course of business, to exercise reasonable care or competence in obtaining or communicating information on which other parties may justifiably rely" when entering into contract, economic loss doctrine does not bar claim), aff'd, 532 U.S. 588, 121 S. Ct. 1776, 149 L. Ed. 2d 845 (2001); *Mobil Oil Corp.* v. *Dade County Esoil Management Co.*, 982 F. Supp. 873, 881 (S.D. Fla. 1997) ("where the ability of one party to negotiate fair terms is [allegedly] undermined by the other's [allegedly] fraudulent behavior," fraudulent misrepresentation claim is not barred by economic loss doctrine

[internal quotation marks omitted]); *Van Sickle Construction Co.* v. *Wachovia Commercial Mortgage, Inc.*, 783 N.W.2d 684, 693 (Iowa 2010) (economic loss doctrine does not apply to negligent misrepresentation claims because doing so would effectively eliminate tort); *Wyle* v. *Lees*, 162 N.H. 406, 410–12, 33 A.3d 1187 (2011) (discussing distinction between claims of fraudulent inducement to enter into contract, which are not barred by economic loss doctrine, from claims relating to breached promise to perform contract, which are barred); but see *Rich Products Corp.* v. *Kemutec, Inc.*, 66 F. Supp. 2d 937, 979 (E.D. Wis. 1999) (fraudulent inducement claims are barred by economic loss doctrine because, if "all claims for fraud in the inducement are extraneous or independent of the contract because they occur prior to the formation of the contract itself . . . every breach of warranty claim could be turned into a tort by a simple affidavit stating, in effect, that the warranty was spoken before it was written" [citation omitted; internal quotation marks omitted]), aff'd, 241 F.3d 915 (7th Cir. 2001). We recognize that these cases do not expressly hold that rescission is the exclusive remedy when the plaintiff has been induced to enter into a contract by the defendant's negligent or fraudulent misrepresentations. This court held in *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 155, however, that a buyer's acceptance of goods pursuant to a sale subject to the UCC is inconsistent with a claim for fraud or negligent misrepresentation. We disagree with the court's conclusion in *Rich Products Corp.* v. *Kemutec, Inc.*, supra, 979, that fraudulent inducement claims are barred by the economic loss doctrine because, even if that court were correct that "every breach of warranty claim could be turned into a tort" by claiming fraud in the inducement, it is not inconsistent with the economic loss doctrine to allow a plaintiff to *choose* between (1) pursuing a breach of warranty claim under the contract and (2) rescinding the contract and pursuing a tort claim.

[30] We conclude in part IV of this opinion that the defendants' claim that this standard no longer applies in light of developments in federal law was not preserved for review by this court.

[31] Accordingly, we are not persuaded by the reasoning of the court in *Werwinski* v. *Ford Motor Co.*, supra, 286 F.3d 681, that exempting statutory unfair trade practices claims from the economic loss doctrine "would virtually nullify the doctrine since [the statute] is broad enough to encompass nearly every misrepresentation claim in the commercial sales context . . . ." (Internal quotation marks omitted.) Under CUTPA, only intentional, reckless, unethical or unscrupulous conduct can form the basis for a claim.

We recognize that this court in *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 232 Conn. 591 n.25, stated that, because the plaintiffs' CUTPA claim in that case was barred because they had been contributorily negligent, it "need not decide whether negligence of the defendant alone, unaccompanied by contributory negligence of the plaintiff, will establish a CUTPA violation" under the second prong of the cigarette rule. The plaintiffs in the present case concede, and we agree, however, that this court in *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 228–29, recognized that mere negligence or incompetence in performing a contract will not support a CUTPA claim under the second prong of the cigarette rule *in the absence of proof of "immoral, unethical, oppressive, or unscrupulous" conduct.* (Emphasis added; internal quotation marks omitted.) Id., 227; see also *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, 216 Conn. 200, 217, 579 A.2d 69 (1990) (plaintiff's CUTPA claim failed because defendant's "negligence did not constitute an 'immoral, unethical, oppressive, or unscrupulous' practice" under second prong of cigarette rule and "the first prong [of the cigarette rule], standing alone, is insufficient to support a CUTPA violation, at least when the underlying claim is grounded solely in negligence").

[32] Thus, a CUTPA claim involving a breach of contract accompanied by aggravating circumstances is not "displaced by the particular provisions" of the UCC; General Statutes § 42a-1-103 (b); and is not inconsistent with the provisions of the UCC. Cf. *Flagg Energy Development Corp.* v. *General Motors Corp.*, supra, 244 Conn. 154–55 (in action arising from breach of provision of UCC, common-law remedy that is inconsistent with remedies provided by UCC is barred). Rather, CUTPA *supplements* the remedies provided by article 9.

Although the plaintiffs have not asked this court to overrule *Flagg Energy Development Corp.*, they contend that the case should be "limited to its facts, which involved a loss arising from a defective product in which the claimed 'unfairness' arose from a mere failure to deliver goods of the quality that was promised." As we have explained, however, the failure to deliver goods of the quality that was promised may form the basis for a CUTPA claim if the failure was accompanied by aggravating circumstances. Because our analysis of the economic loss doctrine in *Flagg Energy Development Corp.* did not address the precise allegations of the plaintiffs' CUTPA claim, but focused primarily on the plaintiffs' separate negligence claim, the decision in that case can be read as implying that *any* CUTPA claim that arises out of a contractual claim that the defendant had failed to deliver goods of the promised quality is barred by the economic loss doctrine. Accordingly, to the extent that our decision suggested that the economic loss doctrine bars a CUTPA claim arising from the breach of a promise to deliver goods even when the breach was accompanied by aggravating circumstances, we conclude that we must overrule it.

[33] Courts in a number of our sister states have reached similar conclusions. See *Comptech International, Inc.* v. *Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1222 (Fla. 1999) ("[c]ourts do not have the right to limit and, in essence, to abrogate . . . the expanded remedies granted to consumers under [a] legislatively created scheme by allowing the judicially favored economic loss rule to override a legislative policy pronouncement and to eliminate the enforcement of those remedies" [internal quotation marks omitted]); *Abi-Najm* v. *Concord Condominium, LLC*, supra, 280 Va. 362 (economic loss doctrine did not bar claim pursuant to Virginia consumer protection statute because duty imposed by statute existed independent of duty imposed by contract); *Stuart* v. *Weisflog's Showroom Gallery, Inc.*, 308 Wis. 2d 103, 126–27, 746 N.W.2d 762 (2008) (economic loss doctrine does not bar claim under Wisconsin's home improvement act because "[p]ublic policy concerns require consumer protection statutes and administrative regulations be read in pari materia to achieve the goals of providing consumers, as well as persons engaged in legitimate businesses, with necessary protections and appropriate remedies," and applying economic loss doctrine "would eliminate the consumer protection that the state legislature intended").

[34] This provision was added to the statutory provision governing the sale of collateral by a secured party in 2001 to conform to a revision to the UCC. See Public Acts 2001, No. 01-132, § 107; compare General Statutes (Rev. to 1999) § 42a-9-504. Before then, the UCC took the position that *all* "sales by sheriffs, executors, foreclosing lienors and persons similarly situated may be so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right." Conn. Gen. Stat. Ann. § 42a-2-312 (West 2009), comment 5. Article 9 now "rejects the baseline assumption that commercially reasonable dispositions under [§ 42a-9-610] are out of the ordinary commercial course or peculiar." Conn. Gen. Stat. Ann. § 42a-9-610 (West 2009), comment 11. Accordingly, the official comment to § 42a-2-312 has been revised to recognize that § 42a-9-610 "provides that a disposition of collateral under that section includes warranties such as those imposed by this section on a voluntary disposition of property of the kind involved. Consequently, unless properly excluded under subsection (2) or under the special provisions for exclusion in Section 9-610, a disposition under Section 9-610 of collateral consisting of goods includes the warranties imposed by subsection (1) and, if applicable, subsection (3)." Conn. Gen. Stat. Ann. § 42a-2-312 (West 2009), comment 5.

[35] The defendants in the present case do not dispute that § 42a-9-610 (d) provides the same warranty of title for the sale of collateral by a secured party that is provided for the sale of goods under article 2. Inexplicably, however, they appear to claim that the auction was *also* subject to the rule of caveat emptor, under which "the risk of undisclosed liens is imposed on the purchasers at foreclosure sales, and [secured party sellers] have no duty to provide warnings of such liens to prospective purchasers." Indeed, as we have indicated, the trial court instructed the jury that the auction was subject to the rule of caveat emptor, and it made no attempt to distinguish the standard that applied to the plaintiffs' common-law claims and the standard that applied to their claim pursuant to article 9. See footnote 16 of this opinion. It is clear, however, that these inconsistent rules cannot *both* apply to the same sale of the same property. It is also clear that, although the rule of caveat emptor applied at one time to sales by a secured party under article 9, the rule has now been abandoned in favor of an implied warranty of title. See footnote 34 of this opinion. We can perceive no reason why we should continue to apply the caveat emptor rule to a sale of personal property by a secured party merely because it has been combined with a

foreclosure sale of real property under the auspices of the trial court, a circumstance that in no way changes the fundamental nature of the sale. Accordingly, it is clear to us that the implied warranty of title provision set forth in § 42a-9-610 (d) applies to such sales. Although the trial court improperly instructed the jury that the principle of caveat emptor applied to the sale in the present case, the instruction was harmless because it favored the defendants.

[36] The trial court instructed the jury that, "[a]s the trier of fact, you are charged with the responsibility of determining whether [the bank] has proven its special defense that the disclaimers of the warranty of title under the circumstances of this case are sufficient to preclude [the plaintiffs'] claim that the bank breached the warranty of title as part of the sale of the personal property at issue.

"If you find that [the bank] has met its burden of proof as to its special defenses and if you find that . . . the [plaintiffs have] failed to meet [their] burden of proof regarding [their] claim of breach of warranty of title, then you should render a verdict in favor of [the bank] . . . ." The court did not instruct the jury on the provisions of § 42a-2-312 or § 42a-9-610. Because the defendants did not challenge this instruction, it would appear that their claim that the jury reasonably could not have found that the disclaimers were insufficient *under those statutes* was not preserved for review. Because the plaintiffs do not object to our review of the defendants' claim, which essentially is a claim that the disclaimers were sufficient under the governing statutes as a matter of law, and because the claim has been adequately briefed, the record is adequate for review and the defendants cannot prevail on the claim, we review it.

[37] "An example of this type of language, as found in 4 [R.] Henson & [W.] Davenport, Uniform Laws Annotated, Uniform Commercial Code Forms & Materials [(Master Edition, Forms Volume, 1968), p. 103]:

" '§ 2-312—FORM 1

" 'Disclaimer of Warranty of Title

" 'Disclaimer of Warranty of Title. Seller, as Trustee in bankruptcy of XYZ Solvents Company, transfers only his right, title and interest to the goods herein described. Since he is without knowledge as to what claims may or may not exist with respect to ownership of the goods, SELLER MAKES NO WARRANTY WHATEVER WITH RESPECT TO TITLE.' " *Jones* v. *Linebaugh*, supra, 34 Mich. App. 310 n.3.

[38] The dissenting and concurring justices would decline to adopt the reasoning of these authorities and conclude that the plain language of § 42a-2-312 indicates that quitclaim type language is sufficient to disclaim the warranty of title. In our view, the interest in uniform application of the provisions of the UCC militates in favor of adopting the same interpretation of the disclaimer provision that other jurisdictions have adopted. The value of the UCC as a *uniform* code would be greatly diminished if the meaning of its provisions varied from state to state.

[39] Because we have concluded in part I of this opinion that the plaintiffs' negligence and negligent misrepresentation claims are barred by the economic loss doctrine, we do not address the defendants' claim that the trial court improperly concluded that those claims were barred because the defendants had disclaimed the warranty of title.

[40] General Statutes § 42-110b (b) provides: "It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended."

[41] The trial court instructed the jury as follows: "[The plaintiffs claim] that [the bank] violated . . . CUTPA. The statute provides the following: It states that no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

"In this particular case, [the plaintiffs base their] CUTPA claim on [their] other claims against the bank, particularly the bank's conduct involving its sale of personal property as part of the auction. In order to prove a violation of CUTPA, the [plaintiffs] need only prove a single act in the conduct of trade or business that is an unfair method of competition or an unfair or deceptive practice.

"As the first step in deciding whether a defendant violated CUTPA under the statute, you must determine whether the plaintiff has proved by a preponderance of the evidence that [the bank's] actions were carried out in the course of its trade or commerce. An action is carried out in the defendant's trade or commerce if it's part of any sale of any property whether the property is either tangible or intangible or real or personal. The conduct at issue must occur in the defendant's primary trade or business. It must not be merely incidental to the defendant's trade or business. The evidence here indicates this case involves the sale of personal property and that [the bank's] business includes transactions involving the loaning of money.

"In regards to what is an unfair trade practice, certain guidelines have been established as to what constitutes an unfair trade practice. The plaintiff must establish by a preponderance of the evidence that a defendant's conduct meets at least one of the following three criteria in order to meet its burden of proof under its CUTPA claim: One, that an act offends public policy as it's been established by applicable common law, statute or some other established concept of fairness; [two] that the act is immoral, unethical or unscrupulous; or [three] that the act causes an injury to consumers or other businesses that is substantial, not outweighed by any countervailing benefits to consumers or competition and for which consumers or other businesses could not reasonably have avoided. All three of these criteria do not need to be satisfied to support a CUTPA violation. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.

"Specifically in regards to the first criteria involving an act that violates public policy, this particular criterion alone cannot be satisfied by mere negligence, but may be satisfied by negligent acts coupled with additional conduct that is aggravating or offensive.

"Next, I should discuss the issue of ascertainable loss. Even if the plaintiff proves that the defendant committed an unfair trade practice or engaged in unfair competition that violates CUTPA, the plaintiff cannot recover unless it sustained what is called an ascertainable loss. The plaintiff has the burden of proving that this ascertainable loss occurred as a result of the defendant's use of a method, act or practice prohibited by CUTPA. A loss is a deprivation, detriment or injury. A loss is ascertainable if it is capable of being discovered, observed or established, but need not be measured by any dollar amount. On its face, the loss of property having value is an ascertainable loss.

"Lastly, if the plaintiff proved it sustained an ascertainable loss as a result of a defendant's violation of CUTPA, it must further prove the amount of the actual damages, if any, that were proximately caused by such violation."

[42] In addition, the defendants requested that the trial court instruct the jury that, "in order for an act or practice to have caused substantial, unjustifiable injury to consumers, competitors or other business persons the following three criteria must be satisfied:

"First, the injury caused must have been substantial;

"Second, the injury caused must not have been outweighed by any countervailing benefits to consumers or competition that the practice produces; and

"Third, the injury caused must have been an injury that the consumer, competitor or other business person could not have reasonably avoided."

[43] The defendants contend on appeal that the substantial injury test "would reduce the vagueness and ambiguity associated with the cigarette rule, which permits liability to be imposed on a defendant . . . if a practice is considered 'immoral, unethical, oppressive, or unscrupulous.' " *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, supra, 296 Conn. 350. Because the defendants requested that the trial court instruct the jury on the cigarette rule, however, the jury necessarily would have found that the defendants violated CUTPA even if the trial court had instructed the jury that substantial unjustified injury to consumers is the most important of the three criteria. Specifically, because the jury found that the bank's conduct satisfied the cigarette rule, i.e., that it was unethical, unscrupulous or involved aggravating or offensive conduct that violated an established concept of fairness, and that it resulted in $462,000 in damages, it necessarily would have found that the conduct caused an unjustified and substantial injury to the plaintiffs. Thus, to the extent that the defendants claim that the trial court improperly failed to give an instruction on the substantial injury to consumers test *in addition* to the cigarette rule, we conclude that, even if the court's refusal to give an instruction on the substantial injury to consumers test was improper, it was harmless. See *Allison* v. *Manetta*, 284 Conn. 389, 400, 933 A.2d 1197 (2007) ("[a]n instructional impropriety is harmful [only] if it is likely that it affected the verdict" [internal quotation marks omitted]). The dissenting and concurring justices disagree with this conclusion because the jury could have found a CUTPA violation solely on the basis of a finding of immoral, unethical, oppressive or unscrupulous conduct and, under the rule that they would adopt, such conduct does not satisfy the requirement that conduct must be "unjustified" to violate CUTPA. The defendants, how-

ever, did not ask the trial court to instruct the jury that immoral, unethical, oppressive or unscrupulous conduct does not constitute "unjustified" conduct for purposes of CUTPA. In the absence of such an instruction, we find it highly unlikely that an instruction that the defendants' conduct must be "unjustified" would have affected the verdict.

The defendants also claim that the trial court improperly failed to instruct the jury that the plaintiffs were required to prove that they could not reasonably have avoided any injury from the bank's unscrupulous conduct. See *Williams Ford, Inc.* v. *Hartford Courant Co.*, supra, 232 Conn. 592 (to establish substantial injury requirement of CUTPA, plaintiff must prove "an injury that consumers themselves could not reasonably have avoided" [internal quotation marks omitted]; id., 593 (plaintiffs failed to prove that they could not reasonably have avoided injury when jury found that plaintiffs were 10 percent contributorily negligent). In addition, they contend that, because the jury concluded that the plaintiffs had been contributorily negligent with respect to the tort claims against Tranzon; see footnote 11 of this opinion; and because Tranzon was the bank's agent for purposes of the sale, the court's failure to give the instruction was harmful. As we have indicated, however, the import of the jury's allocation of liability is entirely unclear to us. See footnote 11 of this opinion. In any event, we have concluded that the tort claims against both Tranzon and the bank were barred, and apportionment of liability is not an available remedy for a breach of the implied warranty of title claim, which forms the basis of the plaintiffs' CUTPA claim. In other words, a buyer has no duty under § 42a-9-610 to avoid injury by investigating the title to goods sold at a secured party sale in the absence of "very precise and unambiguous language" disclaiming the implied warranty of title. *Jones* v. *Linebaugh*, supra, 34 Mich. App. 309. We have concluded that the defendants in the present case provided no such language. Accordingly, we conclude that the trial court's failure to give this instruction was harmless, even if we were to assume that it was improper.

The dissenting and concurring justices contend that, because the defendants "phrased their proposed jury instruction as a modification, rather than a wholesale abrogation, of the cigarette rule," and because the language of the requested charge finds some support in our case law, the defendants' claim on appeal was preserved. We first note that the dissent fails to acknowledge that the defendants specifically requested that the trial court charge the jury consistently with the cigarette rule, but with an additional proviso. In addition, the dissent misses the point that the defendants do not claim *on appeal* that the substantial injury to consumers test has modified the cigarette rule. Instead, despite the fact that they asked the trial court to instruct the jury on the cigarette rule, the defendants now claim that the substantial injury to consumers test has *replaced* the cigarette rule. Moreover, the fact that the jury instruction that the defendants requested finds some support in our case law is irrelevant to the question of whether the claim that they raise on appeal was preserved. In any event, even if we were to assume that the defendants are claiming on appeal that the trial court should have instructed the jury that the substantial injury to consumers test modified the cigarette rule, the dissenting and concurring justices have not explained how the defendants were prejudiced by the trial court's refusal to give the charge that they requested. As we have explained, because the jury necessarily would have found that the bank's conduct satisfied the cigarette rule as modified by the substantial injury rule, the failure to give the instruction was harmless.

[44] The defendants cite *State* v. *Higgs*, 143 Conn. 138, 120 A.2d 152 (1956), in support of their claim. In that case, the trial court repeatedly ordered the defendant's attorney, over his objection, not to ask the jury venirepersons during voir dire whether they would be biased against the defendant because of his race. Id., 140–41. After the defendant was convicted, he appealed to this court claiming that he was entitled to ask such questions. Id., 139. This court agreed and reversed the judgment of conviction. Id., 144–45. This court also rejected the state's claim that the defendant had waived any claim of error because, after the twelve jurors were selected but before they were sworn in, the court asked one of the defendant's attorneys, who had not been present during voir dire, whether he wanted to make "any motion," and the attorney responded that he was "satisfied with the jury . . . ." (Internal quotation marks omitted.) Id., 145. This court concluded that: (1) the attorney had no reason to object to any of the jurors after selection was complete because the defendant had been prevented by the trial court from discovering during voir dire whether they were racially biased; and (2) "[i]t was . . . perfectly clear from the attitude of the [trial] court that

a motion for a re-examination of all of the jurors in order to inquire as to any race prejudice would have been futile." Id. Thus, the defendant in *Higgs* had put both the trial court and the state on notice of his claim that he was entitled to ask the venirepersons about their racial biases and this court held only that he was not required to reiterate the claim at every stage of the proceedings when doing so clearly would have been futile. *Higgs* does not support the proposition that, whenever a party believes that raising a claim at the trial court level would be futile, the party is excused from preserving the claim and can raise it for the very first time on appeal.

[45] Indeed, the defendants' argument that futility excuses the failure to preserve a claim is undercut by the fact that they raised the instructional claim in their postverdict motions. If they believed that the futility of doing so excused them from asking for the instruction during trial, it is difficult to understand why they raised the claim after the verdict.

[46] The defendants point out that they raised the claim that they raise on appeal in their postverdict motions, and they rely on *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 135 n.37, 998 A.2d 730 (2010) (claim of instructional error was preserved when defendants had objected to jury instruction in postverdict motion for judgment notwithstanding verdict and motion to set aside verdict), and *Konover Development Corp.* v. *Zeller*, 228 Conn. 206, 215, 635 A.2d 798 (1994) (claim of instructional error was preserved when trial court addressed claim in memorandum of decision), to support their claim that doing so preserved the claim for review. In *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 135–36, however, the defendants claimed that the trial court improperly had instructed the jury on a number of claims because there was insufficient evidence to support them. Accordingly, unlike the present case, if the trial court in *DiLieto* had granted the defendants' motions for judgment notwithstanding the verdict and to set aside the verdict, the court would not have been required to conduct a new trial under the proper legal standard. Moreover, *DiLieto* appears to be in tension with this court's holding in *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 49, 717 A.2d 77 (1998), that a sufficiency of the evidence claim that was raised for the first time in a postverdict motion for judgment notwithstanding the verdict was not preserved for appellate review. In *Konover Development Corp.* v. *Zeller*, supra, 215, the defendant had presented arguments regarding his instructional claim in his request to charge and the issue had been discussed at the charging conference. We conclude, therefore, that these cases do not support the broad proposition that a claim of instructional error that is raised for the first time in a postverdict motion is preserved for review.

[47] The defendants appear to contend that this issue was preserved for appellate review because they objected to the trial court's jury instructions on the ground that they were inadequate to instruct the jury that a finding of negligence would not be sufficient to support a CUTPA violation under the second prong of the cigarette rule. The defendants do not claim on appeal, however, that the trial court's instruction that, under the second prong of the cigarette rule, the plaintiffs were required to prove "that the [defendants' conduct was] 'immoral, unethical, oppressive or unscrupulous' " was incorrect. Rather, the defendants appear to raise a sufficiency of the evidence claim, contending that "the trial court's findings do not reflect evidence of more than negligence" and that "[m]ere negligence on the part of the bank is insufficient to prove a CUTPA violation under the cigarette rule." The defendants do not indicate where in the record they raised this claim in the trial court. Because we conclude that the defendants cannot prevail on this claim, and because the plaintiffs do not contend that it is unreviewable, we assume that it is reviewable.

[48] "Cf. *Tessmann* v. *Tiger Lee Construction Co.*, [228 Conn. 42, 54–55, 634 A.2d 870 (1993)] (contractor's actions constituted reckless disregard of homeowners' rights justifying punitive damage award under CUTPA when it: [1] represented that it would perform all work with its own employees, but instead relied completely on subcontractors, and refused to try to fix leaks, claiming they were 'merely condensation'; [2] told homeowners to set traps to solve problem of rodents entering through hole in wall; and [3] buried paint cans and 'other noxious materials . . . in a wetland near [the home's] well'); *Centimark Corp.* v. *Village Manor Associates Ltd. Partnership*, 113 Conn. App. 509, 523–24, 967 A.2d 550 (upholding finding of CUTPA violation in case arising from faulty roofing work when general contractor represented that work would be done by 'Master Elite' roofing subcontractor, and then failed to inform owner that task would be delegated to another,

less qualified subcontractor), cert. denied, 292 Conn. 907, 973 A.2d 103 (2009); *Scrivani* v. *Vallombroso*, 99 Conn. App. 645, 649–50, 916 A.2d 827 (trial court properly found CUTPA violations, both per se under Home Improvement Act; General Statutes § 20-418 et seq.; and independently on basis of contractor's false representation of qualifications with respect to installation of siding, and also his 'pressur[ing of] the plaintiffs for payment in full before he had completed work so as to preclude them from raising the Home Improvement Act in defense of any suit for payment that he might bring' . . .), cert. denied, 282 Conn. 904, 920 A.2d 309 (2007); *Kronberg Bros., Inc.* v. *Steele*, 72 Conn. App. 53, 61–62, 804 A.2d 239 (trial court properly found CUTPA violations, both per se under Home Improvement Act, and independently on basis of contractor's failure to obtain building permits, despite billing customers for permits, and sealing live wires behind closed walls in multiple locations in house), cert. denied, 262 Conn. 912, 810 A.2d 277 (2002); but see *Krawiec* v. *Blake Manor Development Corp.*, 26 Conn. App. 601, 606, 602 A.2d 1062 (1992) (breach of 'implied statutory warranties that the drainage system would be installed according to sound engineering standards, and that the house would be constructed on the lot in a workmanlike manner and would be fit for habitation' also rendered trial court's finding of CUTPA violation not clearly erroneous)." *Naples* v. *Keystone Building & Development Corp.*, supra, 295 Conn. 229–30.

[49] We emphasize that we do not conclude that the bank had a duty to determine which specific items of personal property were subject to the sale. We conclude only that, in light of Farrell's testimony that the bank would have had a duty to inform potential buyers if it knew that specific items of property were not included in the sale, the jury reasonably could have believed that the bank had a duty to disclose that it knew that some of the items of property at the site were not included in the sale, even if the bank could not specifically identify those items.

[50] We recognize that there was also evidence that would support a reasonable inference that the bank believed in good faith that the burden was on potential buyers to determine what personal property was subject to the sale. In an October 24, 2006 e-mail from Reichert to Lakeside, Reichert indicated that Lakeside had the right, as the debtor's agent, to attend the walkthrough of the property by potential buyers, but that Lakeside "must act with discretion, and not directly contradict or offer [information] that could impair the sale. Foreclosure sales are 'as is' and 'buyer beware,' so you should not offer comments during the tour conducted by Tranzon. Farrell told me that he advised Tranzon to say as little as possible, in order to avoid misrepresentations." On October 25, 2006, Farrell sent an e-mail to Tranzon stating that "[f]oreclosures in [Connecticut] sell the property without representations or warranty of any kind. It is my experience that the more the committee says the more problems follow. Buyers must do their own due diligence, and are certainly free to contact the debtor to obtain information of any kind." It is axiomatic, however, that "it is the jury's role as the sole trier of the facts to weigh . . . conflicting evidence and to determine the credibility of witnesses." *State* v. *Morgan*, 274 Conn. 790, 802, 877 A.2d 739 (2005). As the trial court stated in its memorandum of decision on the defendants' motions to set aside the verdict and for judgment notwithstanding the verdict, the jury reasonably could have concluded that "[t]he bank was uninterested in postponing the auction to address or resolve these issues because it wanted to avoid the time and cost of any delay and it wanted an expeditious liquidation of the secured property," and not because it believed that it had no obligation to make full disclosure.

[51] The defendants also have pointed to no evidence or authority that would support the proposition that, when a secured party sale of personal property is being conducted jointly with a foreclosure sale of real estate, the obligation to ensure that known conflicting claims to the personal property are disclosed to potential buyers falls exclusively on the committee for sale, and not on the secured party seller. If the bank had no such obligation, then we are hard pressed to imagine why Farrell would testify that, if he had known of specific conflicting claims, he would have "insisted" on behalf of the bank that the committee for sale make such a disclosure.

[52] The bank claims that "[t]he trial court's conclusion that it was 'deceptive' and 'unscrupulous' for the bank to rely on caveat emptor is plainly inconsistent with its charge that the doctrine applied to the sale at issue in this case." We have concluded, however, that the trial court improperly instructed the jury that the principle of caveat emptor applied to the sale in the present case. See footnote 35 of this opinion.

[53] The list included major kitchen equipment, chairs, pipes and drapes, a dance floor, staging, divider walls, lawn furniture, sporting equipment, lawn and landscape equipment, vehicles, carpentry equipment, garage equipment, tents, inflatables, office equipment, props and decorations.

[54] The plaintiffs presented evidence that they received 2521 chairs and that 600 chairs had been removed from the property. We note that 600 is closer to one fifth of 3121 than to one quarter.

[55] The plaintiffs do not contend on appeal that the evidence was insufficient to support the plaintiffs' estimation of the number of items in each category of personal property that were on the site at the time of the auction or the percentage of the various categories of personal property that the plaintiffs did not receive.

[56] In addition, counsel for the plaintiffs argued to the jury that the evidence would support a damages award of $49,000 for legal fees incurred by the plaintiffs in the litigation to determine ownership of the personal property. The defendants make no claim on appeal that this item of damages was not supported by the evidence.

[57] The defendants point out in their brief that, during trial, the trial court stated that the plaintiffs' damages calculation " 'involves a lot of assumptions. For example, as to the inflatables, first we have to assume that the $76,000 figure is, in fact, related to all of those inflatables that are in issue that may be or may not be because we really don't know how many inflatables were on the property. [The plaintiffs are] also assuming for purposes of this calculation that all of the inflatables were the same or of the same value. And [the plaintiffs are] also assuming that whatever that value is, it's the same in April [2006, when the confidential financing statement was prepared] as it was in November [2006, when the auction sale took place]. And there's no evidence on any of that.' "

[58] The trial court found that the bank's annual profits from its United States operations exceeded $300,000,000 in 2006 and 2007, and its book value exceeded $24,700,000,000 as of June, 2010.

[59] General Statutes § 42-110g (a) provides in relevant part: "The court may, in its discretion, award punitive damages . . . ."

Section 42-110g (d) provides in relevant part: "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. . . ."

[60] See *Votto* v. *American Car Rental*, *Inc.*, 273 Conn. 478, 486, 871 A.2d 981 (2005) (trial court did not abuse discretion when it awarded punitive damages under CUTPA equal to three times compensatory damages); *Advanced Financial Services*, *Inc.* v. *Associated Appraisal Services*, *Inc.*, 79 Conn. App. 22, 34–39, 830 A.2d 240 (2003) (trial court did not abuse discretion when it awarded punitive damages under CUTPA equal to double compensatory damages); *Perkins* v. *Colonial Cemeteries*, *Inc.*, 53 Conn. App. 646, 649, 734 A.2d 1010 (1999) ("[the] courts generally award punitive damages [under CUTPA] in amounts equal to actual damages or multiples of the actual damages"); *Staehle* v. *Michael's Garage*, *Inc.*, 35 Conn. App. 455, 463, 646 A.2d 888 (1994) ("[i]t is not an abuse of discretion to award punitive damages based on a multiple of actual damages"); see also *Tingley Systems*, *Inc.* v. *Norse Systems*, *Inc.*, 49 F.3d 93, 97 (2d Cir. 1995) (punitive damages award under CUTPA not limited to attorney's fees).

[61] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[62] We recognize that the defendants' contrary position is supported by our suggestion in *Ford* v. *Blue Cross & Blue Shield of Connecticut*, *Inc.*, supra, 216 Conn. 59 n.4, that the statutory punitive damages provision at issue in that case "appear[ed]" to be limited to a second award of attorney's fees because that is the measure of damages under the common law. See General Statutes § 31-290a (b) ("[t]he court may also award punitive damages"). That suggestion was both tentative and dicta, however, and finds no support in the language of the statute at issue in that case. Accordingly, we hereby disavow it.

[63] The defendants do not dispute that the trial court, and not the jury, must decide whether an award of punitive damages is justified under CUTPA, but claim that the jury can decide the amount of the award. They cite no

authority, however, for that proposition.

[64] See also *Boulevard Associates* v. *Sovereign Hotels*, *Inc.*, 861 F. Supp. 1132, 1139 (D. Conn. 1994) ("[o]nce deterrence rather than compensation becomes the focus of CUTPA punitive damages . . . then the financial standing of the party against whom damages are sought becomes relevant and material" [internal quotation marks omitted]). We recognize that, under the common law of this state, compensation is the exclusive purpose of punitive damages. *Tedesco* v. *Maryland Casualty Co.*, 127 Conn. 533, 538, 18 A.2d 357 (1941) ("[u]nder our law the purpose of awarding so-called punitive damages is not to punish the defendant for his offense but to compensate the plaintiff for his injuries" [internal quotation marks omitted]). We have concluded, however, that the common-law rule does not apply to punitive damages awarded pursuant to § 42-110g (a). We conclude, therefore, that punishment and deterrence are proper purposes of an award of punitive damages under that statute. Cf. *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 97, 881 A.2d 139 (2005) (purpose of statute providing for double damages "extends beyond that afforded by common-law punitive damages, which are intended to do no more than make the litigant whole"); id., 98 ("the [double damages] statute serves *both* a remedial and punitive or deterrent purpose" [emphasis in original]).

[65] The court also acknowledged in *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 538 U.S. 425, however, that, a large ratio of punitive damages to compensatory damages may be justified when "a particularly egregious act has resulted in only a small amount of economic damages." (Internal quotation marks omitted.)

[66] In support of their claim to the contrary, the defendants rely on *Fabri* v. *United Technologies International*, *Inc.*, 387 F.3d 109, 127 (2d Cir. 2004), in which the United States Court of Appeals for the Second Circuit held that a punitive damages award pursuant to § 42-110g (a) of $500,000, in a case in which the jury had awarded $1 in nominal damages, violated the defendant's due process rights. Although the defendants in the present case do not raise a due process claim, a punitive damages award that violated due process principles necessarily would constitute an abuse of discretion. In support of its conclusion in *Fabri*, the court stated that "[t]he largest punitive damages award we have found for solely economic loss without allegations of pattern and practice is approximately $340,000. See [*Advanced Financial Services*, *Inc.* v. *Associated Appraisal Services*, *Inc.*, 79 Conn. App. 22, 33, 830 A.2d 240 (2003)]. However, [*Advanced Financial Services*, *Inc.*] differs from this case in two significant respects. First, the court awarded compensatory damages in the amount of half the punitive damages award. [Id.] Second, the Connecticut court found that [the] defendants committed actual fraud, rather than the aggravated sharp dealing the jury in this case permissibly could have found. [Id., 26.]" *Fabri* v. *United Technologies International*, *Inc.*, supra, 126–27. We conclude that *Fabri* does not support the proposition that a punitive damages award of three times the compensatory damages award violates due process principles or necessarily constitutes an abuse of discretion, even when the plaintiffs have engaged "only" in "aggravated sharp dealing . . . ." Id., 127; see *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 538 U.S. 425 ("[punitive damages] award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety"); *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 425 (noting that numerous statutes, dating back more than 700 years, have provided "for sanctions of double, treble, or quadruple damages to deter and punish" and concluding that "[s]ingle digit multipliers are more likely to comport with due process . . . than awards with ratios in [the] range of 500 to 1 . . . or, in this case, of 145 to 1" [citation omitted]); see also *MedValUSA Health Programs*, *Inc.* v. *MemberWorks*, *Inc.*, supra, 273 Conn. 662 n.15 (declining to address question of whether there is implied limit on punitive damages that may be awarded under CUTPA "based on previous court awards").

The court in *Fabri* also took note of the disparity between the $500,000 punitive damages award in that case and the "civil penalty of $5,000 for each willful CUTPA violation" pursuant to General Statutes § 42-110o (b). *Fabri* v. *United Technologies International*, *Inc.*, supra, 387 F.3d 126; see also *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 538 U.S. 418 (when determining whether punitive damages award comports with constitutional due process principles, courts may consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases"). We conclude, however, that this factor should be given relatively little weight in comparison with other factors that the trial court should consider in determining punitive damages under § 42-110g (a), such as the reprehensibility of the defendant's conduct and the size of the compensatory damages award. This court and the Appellate Court repeatedly have affirmed awards of punitive damages pursuant to § 42-110g (a) that greatly exceed the $5000 civil fine authorized by § 42-110o (b); see footnote 60 of this opinion; and the legislature has never expressed its disagreement with these cases by amending the statute.

[67] General Statutes § 37-3a (a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ."

[68] The defendants' reliance on *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 40–41, 664 A.2d 719 (1995) (because statute providing for treble damages for antitrust violation was exclusive remedy, trial court improperly awarded prejudgment interest on treble damages pursuant to § 37-3a), and *Nielsen* v. *Wisniewski*, 32 Conn. App. 133, 139, 628 A.2d 25 (1993) ("[s]ince punitive damages do not become payable before judgment . . . § 37-3a is inapplicable" to trial court's award of prejudgment interest on punitive damages award pursuant to § 42-110g [a]), in support of their claim to the contrary is misplaced. *Westport Taxi Service, Inc.* v. *Westport Transit District*, supra, 40, held only that the statute governing antitrust violations provides the exclusive remedy for such violations and *Nielsen* v. *Wisniewski*, supra, 140, held only that an award of *prejudgment* interest on punitive damages is improper.

[69] The court stated, however, that it had doubts as to whether the bank had transferred its interest in the insurance policies to the plaintiffs "because there is no dispute that the bill of sale did not transfer the underlying debt obligation. Because the 'security follows the obligation'; see *Fleet National Bank* v. *Nazareth*, 75 Conn. App. 791, [794–95] 818 A.2d 69 (2003); it is questionable whether a valid or enforceable transfer of the collateral assignment of the insurance policies could be effectuated under the circumstances presented in this case without a transfer of the underlying promissory note. Cf. *Waterbury Trust Co.* v. *Weisman*, 94 Conn. 210, [218–19], 108 A. 550 (1919) ('[a]n assignment of the note carries the mortgage with it, while [an] assignment of the latter alone is a nullity')."

[70] The Restatement (Third) of Property discusses the situations in which the separation of the mortgage and the note "may be sensible and desirable." Restatement (Third), supra, § 5.5, comment (b), illustration (4), p. 382. The present case does not represent one of those situations.

[71] In Connecticut, "General Statutes § 49-17 . . . provides an avenue for the holder of the note to foreclose on the property when the mortgage has not been assigned to him." *Fleet National Bank* v. *Nazareth*, supra, 75 Conn. App. 795. This statute embodies the common-law rule that "[t]he mortgage . . . [is] only an incident to the debt, from which it [cannot] be detached . . . ." *Pettus* v. *Gault*, supra, 81 Conn. 422. We are assuming solely for the purpose of argument, however, that the note and the mortgage can be separated by express agreement.

[72] Thus, if the bank in the present case *had* transferred the collateral assignments to the plaintiffs (again, assuming without deciding that it would be possible to transfer them without the underlying debt under Connecticut law), it could not have enforced them. Presumably, however, the bank could have attached the debtors' interests in the life insurance policies, as well as other property belonging to the debtors, to secure payment of the deficiency judgment. See *People's Bank* v. *Bilmor Building Corp.*, 28 Conn. App. 809, 818, 614 A.2d 456 (1992) (prejudgment attachment to secure payment of deficiency judgment is authorized under statutes governing prejudgment remedies). Once the deficiency judgment was satisfied, the collateral assignments would have been extinguished. *Carpenter* v. *Longan*, 83 U.S. (16 Wall.) 271, 275, 21 L. Ed. 313 (1873) ("When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents.").

Although they make no such claim expressly, it seems implicit in the plaintiffs' claim that they are entitled to the insurance proceeds that, if the bank transferred the collateral assignments to them, the bank would not have been entitled to execute the deficiency judgment because doing so would have interfered with their right to take possession of the proceeds under the collateral assignments. As we have explained, however, if the bank had transferred the collateral assignments to the plaintiffs, the plaintiffs would have had no enforceable rights with which the bank could have interfered. In short, there simply is no theory under which the bank would be entitled to take possession of the insurance proceeds and then be obligated to pay them over to the plaintiffs. Although we agree with the plaintiffs' contention that this conclusion would tend to render "wholly illusory" a transfer of the collateral assignments without the transfer of the underlying debt, at least from the plaintiffs' standpoint, parties are not without recourse if they want to transfer an enforceable security interest. Specifically, the parties can agree to the transfer of the underlying debt.

[73] In *In re Belize Airways, Ltd.*, 7 B.R. 604, 607 (Bankr. S.D. Fla. 1980), the court stated that "[t]o allow the assignee of a security interest to enforce the security agreement would expose the obligor to a double liability . . . ." In the very next sentence, however, the court stated that the very definition of a security interest under the UCC as "an interest in . . . property which secures payment of an obligation . . . indicates that a security interest cannot exist without a debt." Id. In our view, this is the fundamental reason that the assignment of a security interest without the debt is generally considered to be a nullity.