315 Conn. 821
Supreme Court of Connecticut.

Jennie FINKLE, Administratrix
(Estate of Barbara A. Eckert)
v.
John F. CARROLL III et al.

No. 18976.
|
Argued Sept. 23, 2014.
|
Decided March 24, 2015.

Synopsis

Background: Administratrix of murder victim's estate filed negligence suit against town and ranking police office, alleging officer negligently exercised duty of care he owed to victim by improperly charging her former boyfriend, who shot and killed her, releasing former boyfriend without proper condition and restrictions, and violating town's family violence policy. The Superior Court, Judicial District of Waterbury, Ozalis, J., granted summary judgment to town and officer. Administratrix appealed. The Appellate Court, DiPentima, C.J., 134 Conn.App. 278, 37 A.3d 851, affirmed. Administratrix petitioned for certification to appeal.

The Supreme Court, Robinson, J., held that administratrix's failure to name officer who allegedly made decision to release victim's former boyfriend from jail was not a failure to name the "right person" as a defendant within under "wrongful defendant" statute. which allows a plaintiff to bring a new action despite bar of statute of limitations if plaintiff has failed to obtain judgment by reason of failure to name right person as defendant.

Affirmed.

Rogers, C.J., filed a dissenting opinion, joined by Palmer and Eveleigh, JJ.

Attorneys and Law Firms

****389** James J. Healy, Hartford, with whom, on the brief, was M. Caitlin S. Anderson, for the appellant (plaintiff).

Scott M. Karsten, with whom, on the brief, was Kateryna Lagun, West Hartford, for the appellees (defendants).

ROGERS, C.J., and PALMER, ZARELLA, EVELEIGH, McDONALD, ESPINOSA and ROBINSON, Js.

Opinion

ROBINSON, J.

***823** This certified appeal requires us to consider the application of General Statutes § 52–593,[1] the "wrong defendant" statute, in the context of municipal liability under, inter alia, General Statutes § 52–557n.[2] The plaintiff, Jennie Finkle, administratrix of the estate of Barbara A. Eckert (decedent), appeals, upon our grant of her petition for certification,[3] from the judgment of the Appellate Court affirming the trial court's award of summary judgment in favor of the defendants, the town of Watertown (town) and John F. Carroll III, a police officer employed by the town. *Finkle v. Carroll,* 134 Conn.App. 278, 279–80, 37 A.3d 851 (2012). On appeal, the plaintiff contends that the Appellate Court improperly concluded that § 52–593 did not save the present case from the applicable statute of limitations. Specifically, the plaintiff contends that § 52–593 applies to the present case because she failed to name Carroll as a defendant in her original action ***824** against the town and various other police officers and, therefore, would have ultimately "failed to obtain [a] judgment" in that original action insofar as Carroll was the factually correct defendant for the causes of action alleged therein. Guided by, inter alia, *Cogan v. Chase Manhattan Auto Financial Corp.,* 276 Conn. 1, 882 A.2d 597 (2005), we agree with the defendants' contention that, given the theories of municipal liability raised by the plaintiff, in particular § 52–557n, the complaint in the original action contained the essential factual and legal components necessary for her to obtain full relief against one of the defendants therein, namely, the town. Accordingly, the plaintiff's failure to name Carroll as a party to the original action, or even to plead his specific involvement in the events leading to the decedent's death, would not have precluded her from obtaining a judgment

therein, thus depriving her of shelter under § 52–593 in the present case. We, therefore, affirm the judgment of the Appellate Court.

****390** The opinion of the Appellate Court sets forth the following relevant undisputed facts and procedural history. "This action arose out of the killing of the decedent by her former boyfriend, Mark Tannenbaum. On the evening of September 28, 2002, Tannenbaum was called by the decedent's thirteen year old son, who told him that the decedent was not at home and that he needed relief from taking care of the decedent's and Tannenbaum's one year old child. When the decedent and a male individual drove up to the decedent's home, Tannenbaum approached the vehicle and began punching the windows of the vehicle. The decedent and the male friend then drove to the town's police department to file a complaint against Tannenbaum. While the decedent was speaking with Officer Christopher Marciano at the police department, her cell phone rang several times and Marciano heard a male voice yelling through the phone. The third time the decedent's phone rang, ***825** Marciano answered it and Tannenbaum stated, 'I'll kill you.' Marciano identified himself as a police officer and asked Tannenbaum for his location. Tannenbaum told him he was at the decedent's residence.

"Three officers, including Marciano, traveled to the decedent's residence and found Tannenbaum there. Marciano smelled alcohol on Tannenbaum's breath at that time and found him angry. Tannenbaum told the police that he wanted the decedent arrested for leaving the children in the residence alone. Tannenbaum was arrested and taken to the police station where he was processed. Later that evening, Carroll made the decision to release Tannenbaum on a promise to appear. Subsequent to his release from police custody, on the morning of September 29, 2002, Tannenbaum shot and killed the decedent at her home ... and then at another location committed suicide.

"On October 21, 2003, the plaintiff filed her initial action pursuant to General Statutes § 52–555 against the town and three police officers, Marciano, Officer David McDonnell and Sergeant David Bromley, alleging that they were negligent in charging Tannenbaum with one misdemeanor and releasing him from their custody without bond. On April 10, 2008, the plaintiff withdrew her initial action and commenced the present action on November 20, 2008, against the town and Carroll, pursuant to §§ 52–593 and 52–555. In her complaint, the plaintiff alleged that Carroll, the ranking officer at the time of Tannenbaum's release from police custody, negligently exercised the duty of care he owed to the decedent by charging Tannenbaum improperly, releasing Tannenbaum without proper conditions and restrictions, and violating the town's family violence policy, which requires protection for identifiable victims like the decedent. This negligence allegedly resulted in Tannenbaum's killing of the decedent a short time after his release.

***826** "The defendants filed a motion to dismiss, asserting that the plaintiff's claims were barred by the statute of limitations found in § 52–555, and that the action was not saved by the provisions of § 52–593, the 'wrong defendant' statute. The court denied the motion. The defendants then filed a motion for summary judgment arguing, among other things, that the plaintiff's claims were barred by the applicable statute of limitations. The plaintiff filed an objection to that motion. Thereafter, the court rendered summary judgment in favor of the defendants on the ground that the plaintiff's claims were not saved by § 52–593. In its memorandum of decision, the [trial] court stated that '[i]n the original action, the plaintiff failed to name the very party, the defendant Carroll, who was responsible for releasing Tannenbaum on September 29, 2002.' The court noted that ****391** '[t]he present case is not a situation where the plaintiff failed to name all of the potentially liable defendants.' Nevertheless, the court, citing *Billerback v. Cerminara,* 72 Conn.App. 302, 308–309, 805 A.2d 757 (2002), concluded that the plaintiff's 'failure to obtain a judgment of dismissal in her original action is fatal to satisfying all of the criteria set forth in ... § 52–593.' " (Footnotes omitted.) *Finkle v. Carroll,* supra, 134 Conn.App. at 280–82, 37 A.3d 851.

The plaintiff appealed from the judgment of the trial court to the Appellate Court. In a unanimous opinion, the Appellate Court concluded that the trial court properly granted the defendants' motion for summary judgment, agreeing with their alternative ground for affirmance that " § 52–593 does not apply to the present action because the plaintiff did not fail to name a proper party in the original action."[4] Id., at 283, 37 A.3d 851. Relying on our ***827** decision in *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 1, 882 A.2d 597, and its decision in *Iello v. Weiner,* 129 Conn.App. 359, 20 A.3d 81 (2011), the Appellate Court disagreed

with "the [trial] court's conclusion to the contrary," and held that "the present case *is* a situation in which the plaintiff named some, but not all, of the potentially liable defendants. In both actions, the plaintiff alleged the legal theory of negligence—specifically, negligence in charging Tannenbaum with a misdemeanor and releasing him on a promise to appear." (Emphasis in original; footnote omitted.) *Finkle v. Carroll,* supra, 134 Conn.App. at 284–85, 37 A.3d 851. The Appellate Court determined that Carroll's decision, as the ranking officer, "to release Tannenbaum ... was made ostensibly on the basis of information provided to him by Marciano, McDonnell and Bromley," thus rendering those "original officers ... proper defendants under the legal theory of negligence due to their involvement in the process that led to Tannenbaum's release." [5] (Footnote omitted.) Id., at 285–86, 37 A.3d 851. Finally, the Appellate Court emphasized that, although "§ 52–593, a remedial statute, is construed liberally, it should not be construed so liberally as to render statutes of limitation[s] virtually meaningless," and warned against the risk, which we observed in *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, at 11, 882 A.2d 597, that an overly broad reading of § 52–593 permitting "successive complaints ... naming different defendants, *all of whom were proper* ... could lead to unrestrained filings in cases with multiple defendants and open the ***828** door to endless litigation." [6] (Emphasis in original; ****392** internal quotation marks omitted.) *Finkle v. Carroll,* supra, at 288, 37 A.3d 851. Accordingly, the Appellate Court affirmed the judgment of the trial court. Id. This certified appeal followed. See footnote 3 of this opinion.

On appeal, the plaintiff claims that, in concluding that this action was not saved by § 52–593, the Appellate Court improperly failed to apply the terms of that statute "liberally to embrace the facts of this case within the statute's remedial scope" to permit the plaintiff to correct her "innocent, reasonable, and good faith mistake." The plaintiff contends that from the moment she filed the original action, she "intended to state a negligence claim against the officer with the ultimate authority to charge and release Tannenbaum," and that claim "only comes into existence based on the acts and omissions of ... Carroll, the defendant missing" from the original action, particularly given her legal conclusion that none of the other officers named in the original action would be liable for Tannenbaum's release. The plaintiff emphasizes that, under *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 1, 882 A.2d 597, the "wrong defendant" analysis is "factually intensive and case specific," with its outcome turning on "how the true facts at issue relate to the cause of action alleged." She argues that this case stands in "stark contrast" to the facts of *Cogan* and the decisions of the Appellate Court in *Isidro v. State,* 62 Conn.App. 545, 550, 771 A.2d 257 (2001), and *Iello v. Weiner,* supra, 129 Conn.App. at 364, 20 A.3d 81 wherein § 52–593 was held not to apply because the plaintiff's mistake in those cases had been legal in nature or one of simply omitting *a* proper defendant, rather than a product of naming *the* factually ***829** wrong defendant. The plaintiff further contends that the "reasonable and honest mistake of fact" gloss that *Isidro* imposed on § 52–593 will mitigate the floodgates effect discussed by the Appellate Court.

In response, the defendants rely on *Cogan, Isidro,* and *Iello,* and characterize this case as a "paradigmatic misuse of the wrong defendant statute." The defendants contend, inter alia, that the Appellate Court properly determined that "some or all of the defendants named in the [original action] were in fact 'proper defendants' for the legal theories alleged" therein, in particular, the town, which is also named as a defendant in the present case. The defendants argue that the plaintiff's § 52–557n claim against the town in the original action rendered it an "an absolutely 'proper defendant' " therein. Citing *Spears v. Garcia,* 263 Conn. 22, 818 A.2d 37 (2003), and *Grady v. Somers,* 294 Conn. 324, 984 A.2d 684 (2009), the defendants emphasize that the "town could have been held liable for the conduct of ... Carroll, had his conduct been found tortious, even without his being named as a defendant in that [original] action," and therefore, the "plaintiff did not require any individual defendant in [the original action] to establish the liability of the town." [7] We agree ****393** with the defendants, and conclude that § 52–593 did not save this untimely action because the plaintiff could have recovered from the defendants in the original action, particularly the town, ***830** based on the factual allegations and causes of action in the original complaint. [8]

The plaintiff's claim in this certified appeal, founded on a challenge to the trial court's grant of the defendants' motion for summary judgment on the ground that it improperly construed § 52–593, presents a question of law over which our review is plenary. See, e.g., *Cogan v. Chase Manhattan Auto Financial Corp.,* supra,

276 Conn. at 7, 882 A.2d 597. "In making such determinations, we are guided by fundamental principles of statutory construction." (Internal quotation marks omitted.) *Ulbrich v. Groth,* 310 Conn. 375, 448, 78 A.3d 76 (2013); see General Statutes § 1–2z (statutory interpretation process).

By way of background, § 52–593, also known as the "wrong defendant" statute, provides a one year "savings provision [that] applies if the plaintiff has 'failed to obtain judgment' in the original action on the basis of her 'failure to name the right person as defendant....' " [9] *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 8, 882 A.2d 597. In its simplest application, the wrong defendant statute contemplates the "situation in which a plaintiff erroneously sues A under the mistaken belief that A negligently operated or owned a vehicle, when in fact B operated or owned the vehicle." *Isidro v. State,* supra, 62 Conn.App. at 550, 771 A.2d 257. "This language contemplates that, so long as the second action is brought within the one year time limitation, the defendant in that action may not avail itself of the statute of limitations. ***831** The general remedial purpose of this statute is to relieve a plaintiff of the statute of limitations consequences where the plaintiff made a factual mistake in selecting her original defendant for the legal theory of the action, so long as the plaintiff brings the second action against the 'right person' within the one year period. Because the statute is remedial in nature, it should be construed broadly to accomplish its remedial purpose.... In addition, any ambiguities should be resolved in a manner that furthers, rather than thwarts, the [statute's] remedial purposes." (Citation omitted; internal quotation marks omitted.) *DiPietro v. Farmington Sports Arena, LLC,* 123 Conn.App. 583, 594, 2 A.3d 963 (2010), rev'd on other grounds, 306 Conn. 107, 49 A.3d 951 (2012). Nevertheless, as the Appellate Court has aptly observed, an excessively broad reading of § 52–593 "would undermine the statute of limitations because a plaintiff could unilaterally extend the limitation period simply by filing an action against a defendant who could not be liable based on a legal theory. To allow [such an] action to continue at this time would defeat the basic purpose of the public policy that is inherent in statutes of limitation[s], i.e., to promote finality in the litigation process." (Internal quotation ****394** marks omitted.) *Isidro v. State,* supra, at 550–51, 771 A.2d 257.

"Under Connecticut law, a right person, as that term is used in § 52–593, is one who, as a matter of fact, is a proper defendant for the legal theory alleged." (Internal quotation marks omitted.) *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 8, 882 A.2d 597, citing *Kronberg v. Peacock,* 67 Conn.App. 668, 673, 789 A.2d 510, cert. denied, 260 Conn. 902, 793 A.2d 1089 (2002); see *DiPietro v. Farmington Sports Arena, LLC,* supra, 123 Conn.App. at 594–95, 2 A.3d 963 (§ 52–593 saved action when prior negligence action was brought against corporate defendant that "was not the factually 'right person' to be sued because [it] did not exist at the time of the injury ***832** and, therefore, could not have been in control or possession of the soccer facility; the 'right person' for that theory was in fact ... the lessee of the soccer facility"); see also *Perzanowski v. New Britain,* 183 Conn. 504, 507, 440 A.2d 763 (1981) (Relief is unavailable under § 52–593 when the plaintiff "failed to obtain judgment in federal court [1] because the city could not be liable for the civil rights violations alleged and [2] because the jury rendered a general verdict in favor of the remaining defendants who were sued in their individual capacity. Neither result arises from a mistake in naming a defendant."); *Isidro v. State,* supra, 62 Conn.App. at 550, 771 A.2d 257 (§ 52–593 did not save action brought against state after original action against individual police officer was dismissed on immunity grounds, particularly because plaintiff acknowledged in original action that state owned police car at issue, and was "free to pursue the state in the original action but did not to do so for some reason, whether a tactical choice or technical deficiency").

As this court has previously stated, "failure to name *all* of the defendants from whom [the plaintiff] could have recovered in [the] original action does not constitute a 'failure to name the right person as defendant' within the meaning of § 52–593." (Emphasis in original.) *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 11, 882 A.2d 597; see also id., at 8 n. 6, 882 A.2d 597 (noting court was resolving statutory ambiguity as to "whether the term 'right person' means *any* right person or *all* right persons from whom the plaintiff can recover" [emphasis in original]). Applying this rule, this court concluded in *Cogan* that § 52–593 did not save an untimely second action that the plaintiff brought against a leasing company as the owner of a vehicle involved in an accident, which she had filed following her settlement and withdrawal of the original action. Id., at 3, 882 A.2d 597. The plaintiff in *Cogan* had brought

the original action against a defendant ***833** who was properly named under the pleaded theory of liability, namely, the family car doctrine, which does not legally depend on the ownership of the vehicle. Id., at 10–11, 882 A.2d 597; see also *Iello v. Weiner,* supra, 129 Conn.App. at 364, 20 A.3d 81 ("[T]he fact that the specific allegations of negligence directed [against the original defendant] were more appropriately pleaded against the defendant does not alter our resolution of the plaintiff's claim on appeal. Because the plaintiff's first action, premised on a theory of negligence, was brought against a 'right person,' § 52–593 is inapplicable and cannot save the plaintiff's second action from being time barred...."); *Kronberg v. Peacock,* supra, 67 Conn.App. at 673–74, 789 A.2d 510 (§ 52–593 does not "save this negligence action against the owner and the operator of the vehicle from being time barred by claiming that he named the wrong party in [the previous action] because the insurer ****395** was the proper defendant in that uninsured motorist action"); cf. *DiPietro v. Farmington Sports Arena, LLC,* supra, 123 Conn.App. at 597, 2 A.3d 963 (subsequent naming of additional "presumptively factually correct defendants" does not deprive plaintiff of entitlement to § 52–593 when she had failed "to name the factually correct defendant in the original action").

Our review of the operative complaint in the original action reveals that the plaintiff's failure to name Carroll as a defendant would not have caused her to fail to obtain judgment therein. Specifically, the plaintiff named the town as a defendant in the original action and pleaded a theory of liability, namely, a direct action under § 52–557n; see footnote 2 of this opinion; the viability of which did not depend on Carroll being discussed specifically in the complaint, either as a named party or tortfeasor. With respect to the decision to release Tannenbaum on a promise to appear, which provides the factual basis for the plaintiff's claims in this case, the third count of the original complaint seeks indemnification from the town pursuant to ***834** General Statutes § 7–465(a) [10] for the negligence of the individual defendants in the original action, town police officers Marciano, Bromley, and McDonnell. That third count incorporates by reference the detailed factual allegations in the negligence claim, contained in count one, which the plaintiff brought directly against those officers individually. Finally, the fourth count in the original action is pleaded directly against the town pursuant to § 52–557n, [11] and alleges that the "failure of [its] police department to institute and implement proper guidelines ***835** [for operations in family violence incidents] constitutes negligence per se [under General Statutes § 46b–38b] in the conduct of the duties owed by the [town] to [its] residents ... ****396** and to the public in general." [12] Notably, this same general body of factual allegations, updated to include Carroll's ultimate role in the release decision, supports the two count operative complaint in the case giving rise to this certified appeal, the first count of which is brought against Carroll directly, and the second count seeks indemnification from the town pursuant to § 7–465(a).

These factual allegations and legal causes of action, together with the fact that the town was a defendant in the original action, both via an indemnification theory under § 7–465(a) and directly under § 52–557n, demonstrate that the plaintiff would not have been precluded from obtaining a judgment in the original action by virtue of having named the "wrong" defendant—despite the fact that she was not aware of Carroll's role in Tannenbaum's release until after discovery had taken place in the original action. It is well settled that the plaintiff did not need to name Carroll or any other town employee as a defendant —or even identify their specific roles as tortfeasors— in order to maintain a direct action against the town pursuant to § 52–557n. See *Spears v. Garcia,* supra, 263 Conn. at 37, 818 A.2d 37; see also id., at 38 n. 8, 818 A.2d 37 (" § 52–557n does not require a plaintiff to identify the tortfeasor"). The plaintiff could have sought relief from the town with respect to the release decision itself, both in the original action and in the current case, under § 52–557n, rather than citing § 7–465(a) as the sole legal ***836** basis, because those two statutes are coextensive "parallel vehicles for municipal liability," and the relief available to the plaintiff is the same whether she proceeds directly against the town under § 52–557n, or indirectly against it via an indemnification theory under § 7–465(a). *Grady v. Somers,* supra, 294 Conn. at 339, 984 A.2d 684; see also id., at 348, 984 A.2d 684 (rejecting need to assert separate claims under §§ 52–557n and 7–465[a] as embodying " 'hypertechnical' " triumph of " 'form over substance,' " and at odds with "the legislature's intent, when it enacted § 52–557n, to create a harmonious body of law governing municipal liability"); *Spears v. Garcia,* supra, at 34, 818 A.2d 37 ("we conclude that the statutes can coexist and that a party may choose to rely on either statute").

The plaintiff argues in her reply brief, however, that the fact that the town was a defendant in the original action does not preclude application of § 52–593 in the present case because her original claims were "doomed to fail" insofar as count three against the town was an indemnification claim under § 7–465(a) that was derived from a factually defective count one against the individual officers directly. We disagree. If the plaintiff took no further action in the original action, her claims as pleaded might well have failed. Under our rules of practice, namely, Practice Book § 10–60 et seq., [13] those ***837** claims ****397** were not, however, pleaded in stone. Even before ascertaining Carroll's role in the events leading to the decedent's death, the plaintiff could have amended her complaint to incorporate the factual allegations from the first and third counts relating to the release decisions into a § 52–557n count against the town, and to omit the names of any specific officer's involvement. Moreover, after learning during discovery of Carroll's role, the plaintiff could have amended her complaint further to conform the allegations in the § 52–557n claim to that specific proof adduced during discovery. [14]

Such an amendment to state a legally and factually correct claim against the town—which was already a party to that case as a proper defendant—would have been without apparent legal obstacle given the " 'liberality' " with which trial courts are to grant motions to amend when no injustice will result; see, e.g., *Rizzuto v. Davidson Ladders, Inc.,* 280 Conn. 225, 255, 905 A.2d 1165 (2006); given our "well settled" body of case law holding that "a party properly may amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same.... If a new cause of action is alleged in an amended complaint ... it will [speak] as of the date when it was filed.... A cause ***838** of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief.... *A change in, or an addition to, a ground of negligence or an act of negligence arising out of the single group of facts which was originally claimed to have brought about the unlawful injury to the plaintiff does not change the cause of action....* It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but [when] an entirely new and different factual situation is presented, anew and different cause of action is stated." [15] (Emphasis added; internal quotation ****398** marks omitted.) *DiLieto v. County Obstetrics & Gynecology Group, P.C.,* 297 Conn. 105, 140, 998 A.2d 730 (2010). An amendment of the § 52–557n claim to incorporate allegations concerning Carroll's role in the release decision fits well within ***839** the original complaint's existing factual and legal nucleus. [16] Compare, e.g., ****399** id., at 142–43, 998 A.2d 730 (additional allegations that physician improperly failed to ensure that colleague participated in surgery related back to original theory that physician negligently caused patient to ***840** undergo three unnecessary procedures by failing to obtain and communicate test results, along with claim that other surgeon had failed to properly supervise junior physician), *Deming v. Nationwide Mutual Ins. Co.,* 279 Conn. 745, 776–77, 905 A.2d 623 (2006) (narrower and more "artful" allegations related back to earlier complaint when directed to same general claims of misappropriation of book of business, which caused "identical" harm), and *Franc v. Bethel Holding Co.,* 73 Conn.App. 114, 133, 807 A.2d 519 (proper to permit amendment to amend pleading to conform with proof by adding recklessness allegations to negligence claim because recklessness "stems from the same factual situation as the plaintiffs' earlier claims, i.e., the wrongful excavation, and amplifies those claims only as to the egregiousness of the defendant's actions"), cert. granted, 262 Conn. 923, 812 A.2d 864 (2002) (appeal withdrawn October 21, 2003), with *Alswanger v. Smego,* 257 Conn. 58, 66–67, 776 A.2d 444 (2001) (complaint alleging act of negligence based on "different set of facts from that alleged in the original complaint" did not relate back because "focus of the original complaint was on the informed consent as it related to the surgical procedure itself, the amended complaint shifted the focus to consent by the patient to the participation of the individuals involved in the surgery," which was change that "would have forced the defendants to gather different facts, evidence and witnesses to defend the amended claim" [internal quotation marks omitted]).

Under these principles of municipal liability, the plaintiff named a legally and factually correct cast of defendants to play the plot of the original action, with the town as lead actor, and that plot and cast remained generally the same between the original action and the second action, meaning that she was not entitled to ***841** introduce additional actors by bringing this second action under

§ 52–593.[17] The plaintiff readily could have altered the script in the original action by amending the allegations in her complaint—which had named the town as a correct defendant with respect to the basic relevant factual allegations—to conform to the proof adduced during discovery, thereby averting the need to sustain an adverse judgment, voluntarily or involuntarily.[18] ****400** Carroll's presence as a party would, then, have not been necessary for a judgment in the plaintiff's favor in the original action, which means that, under *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 10, 882 A.2d 597, his absence from that action does not entitle the plaintiff to use § 52–593 to save this case.

Finally, we note that the plaintiff's interpretation of § 52–593 is inconsistent with public policy, notwithstanding ***842** the remedial purpose of the statute. In addition to its negative consequences for judicial economy, by permitting an entirely new action to be litigated in lieu of the relatively simple step of amending the complaint in the original action, the plaintiff's view of § 52–593 also raises the improper specter of a plaintiff filing "successive complaints ... naming different defendants, all of whom were proper, thereby permitting the plaintiff to take the proverbial second, third or even fourth bite of the apple, [which] could lead to unrestrained filings in cases with multiple defendants and open the door to endless litigation."[19] ****401** Id., at 11, 882 A.2d 597. Accordingly, ***843** like the Appellate Court, we conclude that this time barred action was not saved by § 52–593.

The judgment of the Appellate Court is affirmed.

In this opinion ZARELLA, McDONALD and ESPINOSA, Js., concurred.

ROGERS, C.J., with whom PALMER and EVELEIGH, Js., join, dissenting.

The plaintiff, Jennie Finkle, administratrix of the estate of Barbara A. Eckert (decedent), contends in this certified appeal that the Appellate Court improperly concluded that the defendants, the town of Watertown (town) and John F. Carroll III, a police officer employed by the town, are entitled to judgment as a matter of law because the plaintiff's action is barred by the statute of limitations and does not come within the protection of General Statutes § 52–593.[1] The majority concludes that the Appellate Court properly affirmed the trial court's grant of summary judgment in favor of the defendants. For the following reasons, I disagree.

The factual background and procedural history of this case, as set forth in the majority opinion, can be ***844** briefly summarized as follows. On the evening of September 28, 2002, the decedent's former boyfriend, Mark Tannenbaum, went to the decedent's home in Watertown and became embroiled in a dispute with the decedent and a male friend of hers. Tannenbaum ultimately was arrested by Watertown police and brought to the police station where he was processed. Later that evening, Carroll released Tannenbaum on a promise to appear. Tannenbaum went to the decedent's home, where he shot and killed her. He then went to another location and killed himself.

Thereafter, the plaintiff brought an action against the town and three of its police officers, Christopher Marciano, David McDonnell and David Bromley, who had had dealings with Tannenbaum on the night of the murder, alleging, among other things, that the individual officers had been negligent in charging Tannenbaum and releasing him from custody. After discovering that Carroll had been solely responsible for releasing Tannenbaum, the plaintiff withdrew her complaint and brought a second action against Carroll and the town alleging that Carroll's negligence had resulted in the decedent's death. The defendants filed a motion to dismiss the second complaint, claiming that the plaintiff's claims were barred by the applicable statute of limitations and were not saved by the application of § 52–593. The trial court, *Brunetti, J.,* denied the motion. The defendants then filed a motion for summary judgment raising essentially the same claim. The trial court, *Ozalis, J.,* granted that motion. The plaintiff then appealed to the Appellate Court, which affirmed the judgment of the trial court. *Finkle v. Carroll,* 134 Conn.App. 278, 288, 37 A.3d 851 (2012). This certified appeal followed. See *Finkle v. Carroll,* 305 Conn. 907, 44 A.3d 184 (2012).

I begin my analysis with the standard of review. "The party moving for summary ****402** judgment has the burden of ***845** showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Cogan v. Chase Manhattan Auto Financial Corp.,*

276 Conn. 1, 6, 882 A.2d 597 (2005). In addition, the proper interpretation of § 52–593 is a question of statutory construction that is subject to plenary review. Id., at 7, 882 A.2d 597. "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. [2] "[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). "Because [§ 52–593] is remedial in nature, it should be construed broadly to accomplish its remedial purpose.... In addition, any ambiguities should be resolved in a manner that furthers, rather than thwarts, the [statute's] remedial purposes." (Citation omitted; internal quotation marks omitted.) *DiPietro v. Farmington Sports Arena, LLC,* 123 Conn.App. 583, 594, 2 A.3d 963 (2010), rev'd on other grounds, 306 Conn. 107, 49 A.3d 951 (2012).

Section 52–593 provides in relevant part: "When a plaintiff in any civil action has failed to obtain judgment by reason of failure to name the right person as defendant therein, the plaintiff may bring a new action and the statute of limitations shall not be a bar thereto if service of process in the new action is made within one year after the termination of the original action...." This court previously has concluded that "a 'right person,' as that term is used in § 52–593, is one who, as a ***846** matter of *fact,* is a 'proper defendant for the legal theory alleged.' " (Emphasis in original.) *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 8, 882 A.2d 597. Thus, when the original action has failed as the result of a mistake as to legal theory, rather than a factual mistake in identifying the defendant, the second action does not come within the protection of § 52–593. *DiPietro v. Farmington Sports Arena, LLC,* supra, 123 Conn.App. at 596, 2 A.3d 963. Moreover, when a plaintiff has brought an action against a proper defendant, the plaintiff's failure to name *all* potentially liable defendants does not trigger the protection of the statute in a second action brought against additional defendants. *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, at 10–11, 882 A.2d 597 ("[t]he fact that the complaint in the plaintiff's original action failed to name *all* potentially liable defendants" does not bring second action naming additional right defendant within protection of § 52–593 [emphasis added]); *Iello v. Weiner,* 129 Conn.App. 359, 363, 20 A.3d 81 (2011) (same).

In the present case, the defendants claim that, because, according to the allegations made by the plaintiff in the original action, which were supported by the documents and affidavits that the defendants submitted in support of their motion for summary judgment, the conduct of the individual defendants in that action contributed to the decedent's death, the Appellate Court properly concluded that those defendants were proper defendants for purposes of § 52–593. Therefore, the ****403** defendants contend, the statute does not operate to save the present action. The plaintiff contends, to the contrary, that the cases on which the defendants and the Appellate Court rely are distinguishable from the present case because in none of them had the plaintiff failed to obtain a judgment in the original action on the ground that the plaintiff had mistakenly believed that the defendants in that action had engaged in specific ***847** negligent conduct that was in fact attributable to the defendant in the second action. I agree with the plaintiff. Specifically, I would conclude that, when there are multiple specifications of negligence in a particular count, and the plaintiff has mistakenly identified the wrong person as the party who engaged in one of the specifications, the plaintiff has "failed ... to name the right person as [a] defendant" in that count pursuant to § 52–593, entitling the plaintiff to invoke the protection of that statute in a second action against the right defendant.

I note preliminarily that the defendants do not claim that the plaintiff did not make a mistake as to the identity of the person who released Tannenbaum from custody. [3] Instead, the defendants contend that whether the plaintiff made a mistake in failing to identify Carroll as that person is "beside the point" because, even if she did, the defendants in that action were still potentially liable defendants for purposes of § 52–593 on the basis of the *other* allegations of negligence, including their alleged failure to provide immediate assistant to the decedent, their failure to inform her of her right to seek the arrest and pretrial detention of Tannenbaum, and their failure to remain with the decedent until the threat of violence was eliminated. See footnote 5 of this dissenting opinion. I further note that both trial judges who addressed the issue agreed that the plaintiff had made a mistake of fact when she alleged that the individual defendants in the original action had released Tannenbaum ***848** from custody. [4] Thus, there is no dispute that this is not a case in which the plaintiff was "free to pursue [Carroll] in the original action but [failed] to do so for some reason, whether a

tactical choice or technical deficiency." *Isidro v. State,* 62 Conn.App. 545, 550, 771 A.2d 257 (2001). The defendants also do not dispute that, if the *only* allegation of negligence in the original complaint had been that the defendants had negligently released Tannenbaum, § 52–593 would operate to save the second action. *Kronberg v. Peacock,* 67 Conn.App. 668, 673, 789 A.2d 510 ("§ 52–593 would apply in a situation in which a plaintiff erroneously sues A under the mistaken belief that A negligently operated or ****404** owned a vehicle, when in fact B operated or owned the vehicle"), cert. denied, 260 Conn. 902, 793 A.2d 1089 (2002). Rather, the defendants' sole claim is that § 52–593 does not apply because the plaintiff's claims in the original action "went far beyond simpl[e] negligence in the 'release' of Tannenbaum, as [the] plaintiff now attempts to make it appear," [5] and the claims that were ***849** made against the defendants in the original action, but that have not been raised against Carroll, would support a finding of negligence against those defendants. Accordingly, the defendants contend that the plaintiff did not "[fail] to obtain [a] judgment by reason of [her] failure to name the right person[s] as defendant[s]" in the original action, as required by § 52–593. Instead, the defendants contend, the plaintiff unilaterally withdrew the action for no apparent reason. The plaintiff disputes this claim and contends that, because the "core theory of liability" in her original action was the allegation that the defendants had negligently released Tannenbaum from police custody, she would have been unable to prove negligence without being able to prove that allegation. [6] Thus, she claims that the original action "was hopeless without Carroll in the case...." Accordingly, she contends that she failed to obtain a judgment in the original action because of her factual mistake.

I agree with the plaintiff. I recognize that the plaintiff made allegations of negligent conduct against the individual defendants in the original action that she does not make against Carroll in the present case. See footnote 5 of this opinion. For purposes of § 52–593, however, the critical point is *not* that some allegations of negligent conduct that the plaintiff made in the original case were made against the *right* persons. Rather, the critical point is that, because an allegation of negligent conduct ***850** that the plaintiff raised against Marciano, Bromley and McDonnell in the original action, namely, that they negligently released Tannenbaum, had been made against the *wrong* person, the plaintiff failed to obtain a judgment against the right defendant, which is all that § 52–593 requires. [7] Thus, this case is distinguishable ****405** from all of the cases on which the defendants and the Appellate Court rely because, in none of them, had the plaintiff made a factual mistake in the original complaint as to the person who engaged in a specific type of negligent conduct. See *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 10, 882 A.2d 597; *Iello v. Weiner,* supra, 129 Conn.App. at 363, 20 A.3d 81; *Kronberg v. Peacock,* supra, 67 Conn.App. at 673, 789 A.2d 510; *Isidro v. State,* supra, 62 Conn.App. at 550, 771 A.2d 257.

Moreover, even the defendants recognize that, if the plaintiff could have obtained a judgment against the defendants named in the original action, there would have been no reason for the plaintiff to withdraw that ***851** action and bring this action against Carroll and the town. Certainly, the plaintiff could not have gained any tactical advantage by withdrawing her claims against the *more culpable* parties. In any event, as long as the plaintiff can show that she made a factual mistake regarding the identity of the person or persons who engaged in specific allegedly negligent conduct and she determined that, as a result of the mistake, the action could not be sustained, I do not believe that it is the function of the courts to second-guess her judgment as to the strength of her case against the various defendants for purposes of determining the applicability of § 52–593. If the plaintiff has made a misjudgment as to Carroll's relative culpability, she has taken the risk that the defendants will obtain summary judgment in their favor or successfully persuade the jury that Carroll cannot be held responsible for the decedent's death. Indeed, I can perceive no reason why the plaintiff should be forced to pursue claims that, as the result of a factual mistake in identifying the primary wrongdoer, she has determined to be so weak and marginal that she cannot prevail on them, any more than a plaintiff should be bound by the factual allegations of a complaint in which the plaintiff has mistakenly named a defendant who has *no* connection to the underlying events. Cf. *Viera v. Cohen,* 283 Conn. 412, 435–36, 927 A.2d 843 (2007) (rejecting construction of statutory apportionment scheme that would require plaintiffs "to pursue claims of weak liability against third parties, thereby fostering marginal and costly litigation in our courts" [internal quotation marks omitted]).

I recognize, of course, that, in order to invoke the protection of § 52–593, a plaintiff must establish that he or she *mistakenly identified* the defendants named in the

original action as the persons who engaged in specified negligent conduct that, in fact, the newly named defendant in **406 the second action engaged in. Thus, *852 under my interpretation, the statute would not apply when the plaintiff named defendants in the original action who had a minimal connection to the alleged injury and then attempted to bring a second action against another wrongdoer who had greater potential liability, but who had not engaged in any of the specific negligent conduct attributed to the defendants in the original action.

The defendants also contend that § 52–593 does not apply here because the plaintiff brought the original action pursuant to General Statutes § 52–557n, and the town was a proper defendant in that action, from whom the plaintiff could have recovered the full amount of damages for the decedent's injuries and death regardless of whether Carroll was named as a defendant. In paragraph 29 of count three of the operative complaint in the original action, the plaintiff alleged that the town was liable "pursuant to ... § 52–557n." The defendants point out that, under § 52–557n, a plaintiff may bring an action directly against a municipality for the negligence of its employees, without any requirement that the plaintiff name a negligent employee as a defendant. *Spears v. Garcia,* 263 Conn. 22, 37, 818 A.2d 37 (2003) (direct cause of action against municipality is authorized by § 52–557n, without requirement that negligent employee be named as defendant); see also *Grady v. Somers,* 294 Conn. 324, 335, 984 A.2d 684 (2009) (same). The plaintiff contends that, to the contrary, count three of the operative complaint in the original action was an indemnification action brought pursuant to General Statutes § 7–465 [8] and that, to prevail on that *853 count, she was required to prove that the individual defendants had been negligent. Accordingly, the plaintiff contends, her factual mistake as to the identity of the person who released Tannenbaum from custody fatally undermined the claim.

I would conclude, and the majority agrees, that the plaintiff intended to raise an indemnification claim against the defendants pursuant § 7–465 in the original action, not a claim pursuant to § 52–557n. See *Boone v. William W. Backus Hospital,* 272 Conn. 551, 559, 864 A.2d 1 (2005) ("[t]he interpretation of pleadings is always a question of law for the court" [internal quotation marks omitted]). First and foremost, if the plaintiff had intended to bring a claim directly against the town pursuant to § 52–557n in the original action, there would have been no reason for her to withdraw the complaint upon learning of her factual mistake and to bring a second action against Carroll. The defendants have pointed to no conceivable tactical advantage that the plaintiff could have gained by following that course if she had intended to bring an action against the town pursuant to § 52–557n. Second, and relatedly, there would have been no need for the plaintiff to name Marciano, Bromley and McDonnell as defendants in the first instance if she had intended to bring an action pursuant to § 52–557n. As between §§ 52–557n and 7–465, only § 7–465 requires a plaintiff to establish the liability of municipal *employees. Kostyal v. Cass,* 163 Conn. 92, 97, 302 A.2d 121 (1972) ("[w]hatever may be the full scope and effect of [§ 7–465], in no event may the **407 municipality be held liable under it unless the municipal employee himself becomes obligated to pay [sums] by reason of the liability imposed upon ... [him] by law for physical damages to person or property" [internal quotation marks omitted]); compare *Spears v. Garcia,* supra, 263 Conn. at 37, 818 A.2d 37 (plaintiff is not required to name individual employees as defendants in action pursuant *854 to § 52–557n). Third, the plaintiff's reference to § 52–557n was contained in paragraph 29 of count three of the operative complaint, which count was expressly captioned, "Indemnification as to Defendant Town of Waterbury." Section 7–465, not § 52–557n, is the statute that authorizes an indemnification action against municipalities and their employees. See *Gaudino v. Hartford,* 87 Conn.App. 353, 356, 865 A.2d 470 (2005) ("Section 52–557n allows an action to be brought directly against a municipality for the negligent actions of its agents. Section 7–465 allows an action for indemnification against a municipality in conjunction with a common-law action against a municipal employee."). Fourth, in paragraph 28 of count three, the plaintiff expressly alleged that, "[*p*]*ursuant to ... § 7–465* ... all municipalities must indemnify and pay on behalf of their employees, all sums their employees become obligated for by reason of liability imposed by laws." (Emphasis added.) Finally, in the concluding paragraph of count three, paragraph 31, the plaintiff stated, "[*t*]*herefore,*" i.e., for all of the reasons set forth in the foregoing paragraphs of the count, including paragraph 29 referring to § 52–557n, "*pursuant to ... § 7–465,* the plaintiff claims, and is entitled to, indemnity from the [t]own ... for all sums awarded to the plaintiff against the defendants for the claims set forth in this complaint." (Emphasis added.)

I would also conclude that the fact that the town was a proper defendant in the original indemnification action pursuant to § 7–465 does not bar the plaintiff from bringing the second action pursuant to § 52–593. Section 7–465 effectively imposes vicarious liability on municipalities for the negligence of their employees. See *Sanzone v. Board of Police Commissioners,* 219 Conn. 179, 193, 592 A.2d 912 (1991) ("[§] 7–465[a] effectively circumvented the general common law immunity of municipalities from vicarious liability for their ***855** employees' acts"); see also *Kostyal v. Cass,* supra, 163 Conn. at 97, 302 A.2d 121 ("in no event may the municipality be held liable under [§ 7–465] unless the municipal employee himself becomes obligated" [internal quotation marks omitted]). Thus, if a plaintiff raising a claim pursuant to § 7–465 were unable to obtain a judgment against the individual employee named as the defendant because the plaintiff had identified the wrong employee as the active wrongdoer, the plaintiff would also be unable to obtain a judgment against the town. The defendants have cited no authority for the proposition that, when a plaintiff has claimed that an entity that is vicariously liable for the negligence of a person who was mistakenly identified as the active tortfeasor, a second action against the actual active tortfeasor and the vicariously liable defendant does not come within the protection of § 52–593.

To the extent that the defendants claim that the present action is barred because, in the original action, the plaintiff brought a separate claim directly against the town pursuant to § 52–557n [9] for its alleged negligence in failing to adopt guidelines for ****408** arrests in incidents of family violence, as required by General Statutes § 46b–38b (e), I also disagree. This claim against the town was not premised on the town's vicarious liability for the alleged negligence of Marciano, Bromley and McDonnell, but was directly against the town and was based on entirely separate and distinct conduct, namely, the town's alleged negligence in failing to adopt operational guidelines for arrests involving family violence. Again, the defendants in the present case have cited no authority for the proposition that, when a plaintiff has filed a multicount complaint in the original action and, ***856** in one of the counts, the plaintiff has made a factual mistake as to the identity of the actual tortfeasor, the plaintiff is barred from invoking the protection of § 52–593 in a second action making the same allegations against the right defendant because, in the original action, the plaintiff named a proper defendant in an entirely independent count involving a different active wrongdoer and different conduct. [10]

Accordingly, I would conclude that, because the plaintiff made a factual mistake when she identified the individual defendants in the original action as the persons who were responsible for releasing Tannenbaum from custody, the present action comes squarely within the protection of § 52–593. Indeed, § 52–593 is remedial in nature and must be construed broadly to accomplish its purpose of alleviating the harsh consequences of enforcing a statute of limitations when the ***857** plaintiff has failed to obtain a judgment in the original action because he or she made a factual mistake as to the identity of the person who engaged in the allegedly negligent conduct. See *DiPietro v. Farmington Sports Arena, LLC,* supra, 123 Conn.App. at 594, 2 A.3d 963. Moreover, my conclusion is "consistent with the legislative [policy] that ... the plaintiff be fully compensated and [the] defendants pay their fair share...." *Viera v. Cohen,* supra, 283 Conn. at 436, 927 A.2d 843; see also *Hanks v. Powder Ridge Restaurant Corp.,* 276 Conn. 314, 327, 885 A.2d 734 (2005) ("[t]he fundamental policy purposes of the tort compensation system [are] compensation of innocent parties, shifting the loss to responsible parties or distributing it among appropriate entities, and deterrence of wrongful conduct" [internal quotation marks omitted]). Accordingly, I ****409** would conclude that the Appellate Court improperly determined that the plaintiff was barred from invoking the protection of § 52–593 on this ground.

The majority does not appear to disagree with my conclusion that the plaintiff made a mistake of fact that prevented her from obtaining a judgment against Carroll under her original complaint as it was actually drafted. Nevertheless, it contends that § 52–593 does not apply here because the plaintiff could have obtained a judgment in her favor in the original action if she had *amended* the fourth count of the operative complaint alleging negligence directly against the town pursuant to § 52–557n to include an allegation that Carroll was negligent. I disagree with this analysis. First, because the defendants did not raise this claim on appeal and the parties have not had an opportunity to brief it, it is not properly before the court. *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.,* 311 Conn. 123, 162, 84 A.3d 840 (2014) ("if the reviewing court would have the discretion to review [an issue not involving

subject matter jurisdiction, plain error or constitutional error that was not preserved in ***858** the trial court or raised on appeal] because important considerations of justice outweigh the interest in enforcing procedural rules governing the preservation of claims and adversarial principles, the court may raise the claim sua sponte, *as long as it provides an opportunity for all parties to be heard on the issue* " [emphasis added]). Indeed, all of the arguments raised by the parties address the question of whether the plaintiff made a mistake of fact in her original complaint that would entitle her to invoke § 52–593. The defendants have not remotely suggested that, even if the plaintiff did make a mistake of fact of a type that would ordinarily allow a plaintiff to invoke the protection of § 52–593, the plaintiff cannot invoke the statute because she could have prevailed under a legal theory that she did not allege.

Second, even if I were to assume that the majority is correct that the plaintiff would have been *permitted* to amend her complaint in the manner that it suggests, I see no reason why she should be *required* to do so. The plaintiff had the unconditional right to bring an action against the individual defendants on the basis of their negligent conduct pursuant to § 7–465 or to bring an action against the town on the basis of that conduct pursuant to § 52–557n, the election of remedy being in her sole discretion. Section 52–593 unconditionally allows a plaintiff who is unable to obtain a judgment on a *claim that has been properly raised* because he or she named the wrong defendant to bring a second action against the right defendant after the statute of limitations has expired. The statute does not require a plaintiff to *change* an otherwise proper complaint in whatever manner might be required to obtain a judgment despite the fact that the plaintiff failed to name the right defendants. Significantly, the majority does not contend that the plaintiff would be able to obtain a judgment in her favor on the basis of the individual ***859** defendants' allegedly negligent conduct under the existing allegations of the operative complaint.

The majority does claim, however, that allowing the plaintiff to invoke § 52–593 in the present case would have "negative consequences for judicial economy, by permitting an entirely new action to be litigated in lieu of the relatively simple step of amending the complaint in the original action ... [and] also raises the improper specter of a plaintiff filing 'successive complaints ... naming different defendants, all of whom were proper, thereby permitting the plaintiff to take the proverbial second, third or even fourth bite of the apple, [which] could lead to unrestrained ****410** filings in cases with multiple defendants and open the door to endless litigation.' [*Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 11, 882 A.2d 597]." (Footnote omitted.) This ritual incantation of boilerplate language does nothing to bolster the majority's conclusion, however, because the plaintiff did not "successive complaints ... naming different defendants, all of whom were proper...." (Internal quotation marks omitted.) *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, at 11, 882 A.2d 597. Rather, she filed a complaint in which she mistakenly attributed specific negligent conduct to the *wrong* defendants, and she then withdrew that complaint and filed a second complaint in which she attributed the same negligent conduct to the *right* defendants. This is precisely the situation to which § 52–593 was intended to apply. Thus, any "negative consequences for judicial economy" as referenced by the majority that might arise from allowing the plaintiff and similarly situated plaintiffs to invoke § 52–593 are contemplated by the statute and cannot constitute a reason for barring its application. Moreover, there is no reason to believe that allowing the plaintiff to invoke the protection of § 52–593 will result in "unrestrained filings" and "endless litigation"; see *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, at 11, 882 A.2d 597; because there is no reason to ***860** believe that large numbers of plaintiffs mistakenly attribute specific negligent conduct to the wrong defendant.

Finally, even if I agreed with the majority's analysis, I would not agree that the plaintiff reasonably could have anticipated on the basis of the plain language of § 52–593 or of this court's precedents that she would be barred from invoking that statute and, instead, would be required to abandon her legitimate claim directly against the individual or individuals who were responsible for releasing Tannenbaum from custody pursuant to § 7–465 and amend her complaint to bring a claim of vicarious liability against the town pursuant to § 52–557n. Accordingly, I believe that, rather than affirming the judgment in favor of the defendants, fairness requires the majority to remand the case to the trial court with direction to reinstate the withdrawn action and to afford the plaintiff an opportunity to amend her complaint. See *Lusas v. St. Patrick's Roman Catholic Church Corp. of Waterbury,* 123 Conn. 166, 169, 193 A. 204 (1937) ("[w]here a case is withdrawn ... the order of the court granting permission to withdraw is essential to prevent

further action in the case, and that order, like any other, can of course be vacated or modified"); cf. *Galland v. Bronson,* 16 Conn.App. 54, 57, 546 A.2d 935 (Appellate Court has "power over the control of its own docket" and has authority to reinstate withdrawn appeal), cert. denied, 209 Conn. 820, 551 A.2d 755 (1988).

For the foregoing reasons, I would reverse the judgment of the Appellate Court upholding the trial court's grant of the defendants' motion for summary judgment. Accordingly, I dissent.

All Citations

315 Conn. 821, 110 A.3d 387

Footnotes

1 General Statutes § 52–593 provides in relevant part: "When a plaintiff in any civil action has failed to obtain judgment by reason of failure to name the right person as defendant therein, the plaintiff may bring a new action and the statute of limitations shall not be a bar thereto if service of process in the new action is made within one year after the termination of the original action...."

2 General Statutes § 52–557n (a) provides in relevant part: "(1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties.... (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

3 We granted the plaintiff's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the plaintiff's action was not saved by ... § 52–593?" *Finkle v. Carroll,* 305 Conn. 907, 908, 44 A.3d 184 (2012).

4 Because of its conclusion that the "original defendants were the 'right person[s]' for purposes of § 52–593," the Appellate Court declined to address whether the trial court had properly determined that a voluntary withdrawal of an action qualifies as a " 'failure to obtain judgment' " under that statute. *Finkle v. Carroll,* supra, 134 Conn.App. at 284 n. 6, 37 A.3d 851.

5 The Appellate Court observed some conflicting evidence in the record on this point, but concluded that it did not matter for purposes of § 52–593. See *Finkle v. Carroll,* supra, 134 Conn.App. at 285 n. 7, 37 A.3d 851 ("Although Marciano testified during his deposition that the decision to release Tannenbaum was between Carroll and Bromley, Bromley testified during his deposition that, to the contrary, the decision was Carroll's alone. Even assuming that only Carroll made the final decision to release Tannenbaum, this does not make the original officers 'wrong defendants....' ").

6 Because of its conclusion that "the original officers were proper defendants for the legal theory of negligence," the Appellate Court did not address the defendants' argument that the "town was a proper defendant in the original action" as well. *Finkle v. Carroll,* supra, 134 Conn.App. at 286 n. 9, 37 A.3d 851.

7 The plaintiff contends that the defendants' argument that § 52–593 is inapplicable because the town was a defendant in the original action constitutes an alternative ground for affirmance that was not properly raised under Practice Book § 84–11(c). Nevertheless, the plaintiff, who prudently and extensively responded to the merits of this claim in her reply brief, does not claim any prejudice from that procedural defect. Accordingly, we address the merits of the defendant's argument, which raises a pure question of law based on the pleadings in the original and present actions. See, e.g., *Olson v. Mohammadu,* 310 Conn. 665, 684–85 n. 15, 81 A.3d 215 (2013); *Dickinson v. Mullaney,* 284 Conn. 673, 682 n. 4, 937 A.2d 667 (2007); *Russell v. Mystic Seaport Museum, Inc.,* 252 Conn. 596, 600 n. 3, 748 A.2d 278 (2000).

8 The defendant also argues that the Appellate Court properly determined that Marciano, McDonnell and Bromley were proper defendants in this case, citing their participation in the events leading to the ultimate release decision and contending that there is no legal principle exempting them from exercising a duty of care, despite Carroll's ultimate decision-making role. Because of our conclusion with respect to the town, we need not address this argument.

9 As the Appellate Court noted, the "parties do not dispute that the present action was brought within one year after the termination of the original action." (Internal quotation marks omitted.) *Finkle v. Carroll,* supra, 134 Conn.App. at 281 n. 3, 37 A.3d 851.

10 General Statutes § 7–465(a) provides in relevant part: "Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality ... all sums which

such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty.... No action for personal physical injuries or damages to real or personal property shall be maintained against such municipality and employee jointly unless such action is commenced within two years after the cause of action therefor arose and written notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued. Governmental immunity shall not be a defense in any action brought under this section. In any such action the municipality and the employee may be represented by the same attorney if the municipality, at the time such attorney enters his appearance, files a statement with the court, which shall not become part of the pleadings or judgment file, that it will pay any final judgment rendered in such action against such employee. No mention of any kind shall be made of such statement by any counsel during the trial of such action....”

Although § 7–465 has recently been amended by our legislature; see Public Acts 2013, No. 13–247, § 273; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

11 The original complaint cites “General Statutes § 52–577n,” but this appears to be a scrivener's error because there is no such statute, and the context plainly refers to the subject matter of § 52–557n.

12 The second count of the operative complaint in the original action claims that the actions of Marciano, Bromley, and McDonnell constituted negligence per se in violation of § 46b–38b.

We note that § 46b–38b has been amended on several occasions since the events underlying the present appeal. See, e.g., Public Acts 2013, No. 13–3, § 37. These amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

13 Practice Book § 10–60 provides in relevant part: “(a) Except as provided in Section 10–66, a party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in the preceding section in the following manner:

“(1) By order of judicial authority; or

“(2) By written consent of the adverse party; or

“(3) By filing a request for leave to file such amendment, with the amendment appended, after service upon each party as provided by Sections 1012 through 10–17, and with proof of service endorsed thereon. If no objection thereto has been filed by any party within fifteen days from the date of the filing of said request, the amendment shall be deemed to have been filed by consent of the adverse party....

“(b) The judicial authority may restrain such amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial....”

Practice Book § 10–62 provides in relevant part: “In all cases of any material variance between allegation and proof, an amendment may be permitted at any stage of the trial....”

14 The dissent appears to consider our amendment related points to be a surprise *Blumberg*-ing of the parties. See *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.,* 311 Conn. 123, 162, 84 A.3d 840 (2014); C. Ray & M. Weiner, “*Mueller v. Tepler,* 312 Conn. 631 [95 A.3d 1011] (2014): The Appellate Court Gets ‘*Blumberg*-ed,’ ” Connecticut Lawyer, Vol. 25, No. 3 (October 2014), p. 30. Specifically, the dissent posits that the defendants have not “raise[d] this claim on appeal and the parties have not had an opportunity to brief it....” We respectfully disagree with the dissent's expansive reading of *Blumberg Associates Worldwide, Inc.* Our reliance on the availability of the frequently utilized amendment procedure is an amplification and logical extension of the defendants' argument that the original complaint did in fact name a proper defendant for the facts alleged, namely, the town.

15 We recognize that, by the time she learned of Carroll's specific role during discovery, the plaintiff's direct claims against Carroll—and any derivative claims against the town seeking indemnification of Carroll under § 7–465(a)—might well have been time barred and, therefore, an improper subject for addition by amendment. See *Kaye v. Manchester,* 20 Conn.App. 439, 445, 568 A.2d 459 (1990) (improper to add claims against school board chairman in his individual capacity for purposes of indemnification under § 7–465[a] when “the original complaint in the present case contained only allegations of negligence by the town and board. It contained no reference to ... § 7–465 nor did it contain any claim that the town or board was liable as an indemnitor for any individual defendant's negligence.”). Nevertheless, we disagree with the plaintiff's contention that the loss of these direct claims against Carroll and the associated § 7–465(a) indemnification

claims means that she could not obtain a judgment on the ground that she had named the wrong party in the original action, thus entitling her to the protection of § 52–593. As a matter of the substantive law governing municipal liability, the continued viability of the plaintiff's claim under § 52–557n, brought against a "right defendant," namely the town, means that she was not deprived of the opportunity to obtain a judgment, despite the loss of her direct and indemnification claims against Carroll. Sections 7–465(a) and 52–557n are coextensive "parallel vehicles for municipal liability," and the plaintiff does not lose anything by proceeding directly against the town under § 52–557n, as opposed to under an indemnification theory under § 7–465(a). *Grady v. Somers,* supra, 294 Conn. at 339, 984 A.2d 684.

16 The statute of limitations would not have posed any obstacle to this amendment with respect to the town, despite the fact that the plaintiff's original § 52–557n claims were not specifically founded on the decision to release Tannenbaum, but rather, were focused on the town's failure to implement policies in accordance with § 46b–38b (e). Given the plaintiff's detailed pleading in counts one and three of the facts concerning the release of Tannenbaum, all of which comprised her cause of action, it would have been an appropriate use of the relation back doctrine to permit the amendment of the complaint to assert a claim under § 52–557n arising from those facts because the policy underlying that doctrine "is that a party, once notified of litigation based [on] a particular transaction or occurrence, has been provided with all the notice that statutes of [limitations] are intended to afford.... [I]f a party seeks to add new allegations to a complaint and a statute of limitations applicable to those allegations has run since the filing of the complaint, the party must successfully invoke the relation back doctrine before amendment will be permitted....

"Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims.... [I]n the cases in which we have determined that an amendment does not relate back to an earlier pleading, the amendment presented different issues or depended on different factual circumstances rather than merely amplifying or expanding [on] previous allegations." (Citations omitted; internal quotation marks omitted.) *Austin–Casares v. Safeco Ins. Co. of America,* 310 Conn. 640, 657, 81 A.3d 200 (2013).

Further, "[w]hen comparing [later] pleadings [to timely filed pleadings to determine whether the former relate back to the latter], we are mindful that, [i]n Connecticut, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically.... [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded, and do substantial justice between the parties.... Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *DiLieto v. County Obstetrics & Gynecology Group, P.C.,* supra, 297 Conn. at 140–41, 998 A.2d 730.

17 The dissent questions why, given our conclusion that the plaintiff could have "obtain[ed] a judgment against the town pursuant to § 52–557n for its alleged negligence in failing to adopt operational guidelines for arrests involving family violence," we "[devote] the bulk of [our] opinion to establishing that the plaintiff cannot invoke § 52–593 because she could have amended her complaint to include that negligence allegations against Carroll in her claim against the town pursuant to § 52–557n." See footnote 10 of the dissenting opinion. The need for this analysis is explained by the difference between the words "could" and "would," as well as the plaintiff's tactical decision to withdraw the original complaint in order to file a new pleading naming Carroll as the party who had released Tannenbaum on a promise to appear. That the plaintiff "could" have obtained a judgment on her § 52–557n family violence policy claim in the original action does not mean that she "would" have done so, but that determination pertains to the merits of the claim, rather than whether the town was the appropriate defendant for it. Put differently, that the town was already properly in the original action meant that the plaintiff could have amended her complaint therein to assert a potentially more successful § 52–557n claim against the town arising from Carroll's decision to release Tannenbaum on a promise to appear.

18 Because of the manner in which the parties briefed and argued this certified appeal, we, like the Appellate Court; see *Finkle v. Carroll,* supra, 134 Conn.App. at 284 n. 6, 37 A.3d 851; need not consider whether the trial court properly determined that the plaintiff's withdrawal of the original action, as opposed to obtaining a judgment of dismissal, meant that she "failed to obtain judgment" within the meaning of § 52–593. See also *Iello v. Weiner,* supra, 129 Conn.App. at 364 n. 6, 20 A.3d 81.

19 To this end, the plaintiff contends that, consistent with the remedial purpose of the statute, we should not interpret § 52–593 as requiring a complete inability to obtain judgment in the original action as a result of naming the wrong defendant, and allow its use whenever a plaintiff "fails to obtain judgment on any count in a complaint as a result of a factual error

in naming the defendant to replead with the proper defendant." She contends that § 52–593 "does not require a 'failure to obtain judgment on all counts' or a 'failure to obtain judgment on all theories of liability alleged.' " We disagree. The plaintiff's interpretation of § 52–593 is inconsistent with the plain language of the statute, which refers to the "fail[ure] to obtain judgment" in "any civil action" in a global sense, and does not contemplate a failure to obtain judgment with respect to any particular defendant or claim when other viable claims exist within the plaintiff's original civil action. It also is inconsistent with *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 10–11, 882 A.2d 597, *Iello v. Weiner,* supra, 129 Conn.App. at 361–62, 20 A.3d 81 and *Kronberg v. Peacock,* supra, 67 Conn.App. at 673–74, 789 A.2d 510, wherein the inclusion of properly named parties in an earlier action was held to bar the use of § 52–593 to save later actions against different defendants under different legal theories, along with our admonition in *Cogan* against allowing multiple "bites at the apple." *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, at 11, 882 A.2d 597. For purposes of § 52–593, the plaintiff has not described, and we do not see, a meaningful distinction between an original action with a complaint alleging a proper cause of action against a single correctly named defendant—as existed in *Cogan, Iello,* and *Kronberg*—and an original complaint with multiple causes of action against multiple defendants, at least some of whom are properly named.

We also note that the plaintiff relies on the "reasonable and honest mistake of fact" gloss that the Appellate Court imposed on § 52–593 in *Isidro v. State,* supra, 62 Conn.App. at 549–50, 771 A.2d 257, to mitigate the floodgates effect of her construction of the wrong defendant statute. We believe that the plaintiff's reliance on this gloss is misplaced. First, as the plaintiff herself acknowledges, the "reasonable and honest mistake" gloss contained in *Isidro* may well be of questionable vitality, as the Appellate Court has recently described it as "dictum [that] is not controlling, because it is inconsistent with the language and purpose of the statute, and neither case on which it relied, namely, [*Perzanowski v. New Britain,* supra, 183 Conn. at 507, 440 A.2d 763 and *Vessichio v. Hollenbeck,* 18 Conn.App. 515, 520, 558 A.2d 686 (1989)], contains either the language or the reasoning reflecting such a limitation." *DiPietro v. Farmington Sports Arena, LLC,* supra, 123 Conn.App. at 596 n. 6, 2 A.3d 963. Second, the judicial economy considerations we rely upon are not affected by the motivations—however good faith they might have been—behind the plaintiff's decision to suffer an adverse judgment in the original action, rather than amend the complaint therein to render it viable against the town.

1 General Statutes § 52–593 provides in relevant part: "When a plaintiff in any civil action has failed to obtain judgment by reason of failure to name the right person as defendant therein, the plaintiff may bring a new action and the statute of limitations shall not be a bar thereto if service of process in the new action is made within one year after the termination of the original action...."

2 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."

3 The defendants contend that "the plaintiff in this case *was not mistaken* about the identity of the proper defendants when she commenced [the original action]." (Emphasis in original.) Because they never disputed the plaintiff's claim that she did not learn about Carroll's involvement until she conducted discovery, however, it is apparent that the defendants are claiming only that the plaintiff correctly believed that the defendants in the original action were proper defendants because a reasonable jury could conclude that their conduct contributed to the decedent's death even if they did not release Tannenbaum.

4 In his memorandum of decision on the defendants' motion to dismiss, Judge Brunetti stated that "the plaintiff erroneously sued Marciano, Bromley and McDonnell under the mistaken belief that they had negligently released Tannenbaum, when in fact Carroll was the individual who had done so...." In her memorandum of decision on the defendants' motion for summary judgment, Judge Ozalis stated that this was not a case "where the plaintiff failed to name all of the potentially liable defendants" in the original action, but "the plaintiff made a reasonable and honest mistake of fact in naming the original [defendants]...."

5 Specifically, the defendants rely on the following allegations in count two of the operative complaint in the original action, dated October 8, 2004, alleging negligence per se against the individual defendants: "The defendants violated the provisions of ... General Statutes § 46b–38b (a), (b) and (d) in that they failed to properly evaluate [the] plaintiff's decedent's complaint to determine the appropriate charges and bond conditions to impose on Tannenbaum; and the defendants violated the provisions of ... § 46–38b (d) by: (1) failing to provide immediate and adequate assistance to the plaintiff's decedent; (2) failing to adequately inform the plaintiff's decedent of her right to seek the arrest and pretrial detention of Tannenbaum; (3) failing to adequately inform the plaintiff's decedent of services available at the Office of Victim Services; (4) failing to remain with the plaintiff's decedent for a reasonable time until, in their reasonable judgment,

the likelihood of further imminent violence was eliminated; and (5) failing unreasonably to take appropriate steps to prevent further contact between Tannenbaum and the plaintiff's decedent."

6 Specifically, the plaintiff alleged in the original action that the individual defendants "charged Tannenbaum with only one misdemeanor, disorderly conduct, and, rather than setting a high bond on Tannenbaum with heavy restrictions, released him on a promise to appear in court with no bond or special restrictions at all." The plaintiff further alleged that, despite Tannenbaum's known history of domestic disputes with the decedent, "the defendants did nothing more than charge Tannenbaum with one misdemeanor and release him from their custody without bond."

7 The following examples illustrate this point. If a plaintiff brought a complaint identifying A, B and C as the negligent parties, and then discovered that D had actually engaged in the negligent conduct that the plaintiff had mistakenly attributed to C, I can perceive no reason why, if the plaintiff failed to obtain judgment against C, the plaintiff would be barred from bringing a claim against D under the wrong defendant statute, even though A and B continued to be proper defendants. This would not be a case in which the plaintiff brought an action against A, B and C and then discovered that, *in addition* to A, B and C, D had engaged in negligent conduct. Compare *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 10, 882 A.2d 597 ("[t]he fact that the complaint in the plaintiff's original action failed to name *all* potentially liable defendants" did not bring second action within protection of § 52–593 [emphasis added]); *Iello v. Weiner,* supra, 129 Conn.App. at 363, 20 A.3d 81 (same). Similarly, I can perceive no reason why, if a plaintiff identified A, B and C as the negligent parties when only D had actually engaged in one of the acts of specific negligent conduct that the plaintiff had mistakenly attributed to A, B and C, and, as a result, the plaintiff failed to obtain a judgment against A, B and C, the plaintiff should be barred from bringing an action against D for his negligent conduct, even though A, B and C engaged in separate conduct that might subject them to weak or marginal negligence claims.

8 General Statutes § 7–465(a) provides in relevant part: "Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality ... all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property...."

9 The operative complaint in the original action refers to General Statutes § 52–577n. Because no such statute exists, however, it is reasonable to conclude that the complaint contains a typographical error, and the plaintiff intended to refer to § 52–557n.

10 The majority contends that my interpretation of § 52–593 "is inconsistent with the plain language of the statute, which refers to the 'fail[ure] to obtain judgment' 'in any civil action' in a global sense, and does not contemplate a failure to obtain judgment with respect to any particular defendant or claim when other viable claims exist within the plaintiff's original civil action. It also is inconsistent with *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, 276 Conn. at 10–11, 882 A.2d 597, *Iello v. Weiner,* supra, 129 Conn.App. at 361–62, 20 A.3d 81 and *Kronberg v. Peacock,* supra, 67 Conn.App. at 673–74, 789 A.2d 510, wherein the inclusion of properly named parties in an earlier action was held to bar the use of § 52–593 to save later actions against different defendants under different legal theories, along with [this court's] admonition in *Cogan* against allowing multiple 'bites at the apple.' *Cogan v. Chase Manhattan Auto Financial Corp.,* supra, at 11, 882 A.2d 597." See footnote 19 of the majority opinion. Thus, the majority appears to conclude that, even if the plaintiff was prevented from obtaining a judgment against the individual defendants as the result of a factual mistake, § 52–593 does not apply because the plaintiff was not prevented by any factual mistake from obtaining a judgment against the town pursuant to § 52–557n for its alleged negligence in failing to adopt operational guidelines for arrests involving family violence. This conclusion—with which I disagree—would appear to be dispositive of the appeal. Accordingly, it is unclear to me why the majority devotes the bulk of its opinion to establishing that the plaintiff cannot invoke § 52–593 because she could have amended her complaint to include that negligence allegation against Carroll in her claim against the town pursuant to § 52–557n.