

NO. HHB CV 15 6029045 S : SUPERIOR COURT
GEORGER, ANTHONY : J.D. OF NEW BRITAIN
V. : AT NEW BRITAIN
CROSBY, SHELDON B., ET AL. : OCTOBER 28, 2016

**PLAINTIFF'S OBJECTION TO
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Practice Book §§ 17-44 *et seq.* and the order of this Court, dated October 12, 2016 (Morgan, J.), the plaintiff, Anthony Georger, hereby objects to the motion for summary judgment filed by defendants Sheldon B. Crosby and Hilary W. Donald only [the "movants"] on the grounds that they have failed to establish that there exists no genuine issue of material fact and/or that they are entitled to judgment as a matter of law. In fact, as set forth below, their sparse motion and memorandum address a theory of liability which is not part of the case; even if such theory were properly before the Court, they have failed to present authority or evidence to support their assertions. Thus, the plaintiff respectfully asks that the Court decline consider the motion as inadequately briefed or, in the alternative, that it deny the motion on the merits and sustain this objection thereto.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Material facts in dispute.

1. Whether the movants had "left [defendant James Donald] responsible for the

**ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED**

subject premises while the rest of the family was vacationing in Rhode Island”¹ and, if so, whether defendant James Donald [“James”] was thereby authorized to invite guests to the premises;

2. Whether the movants knew or should have known that James was likely to invite guests to their home when they were away since he had done so in the past;

3. Whether the movants knew or should have known that James, who was under the age of twenty-one, was likely to engage in the consumption of alcohol and/or marijuana with his peers who were also under the age of twenty-one, and some of whom were under the age of eighteen, since he had done so in the past;

4. Whether movants knew or should have known that James had a propensity for lying to them and to his biological father about where he was spending the night when they were away since he had done so in the past;

5. Whether the movants knew or should have known that James allowed, encouraged, and participated in consumption of alcohol and/or marijuana in their home, despite the fact that he also owned and/or had access to at least one BB gun kept in the home;

6. Whether James had authority to invite the plaintiff to the premises as a social guest at any time, including on the night of the subject incident;

¹See excerpt from Case/Incident Report of Farmington Police Department, dated September 9, 2013, attached as Ex. 1 to Ex. A., Affidavit of Brian Rogers, dated October 27, 2016 [“Police Report”], at p.2. To the extent that the excerpts from the Police Report contain personal identifying information as that term is defined in Practice Book § 4-7(a), such personal identifying information has been redacted. In addition, the plaintiff has redacted telephone numbers and residence addresses for all minors identified in the excerpts.

7. The plaintiff's status as an entrant onto the premises on the night of the subject incident;²

8. Whether the plaintiff was a trespasser by virtue of having been invited to the premises by someone other than the movants;

9. Whether the movants had forbidden James from inviting the plaintiff and/or any social guests to the premises on the night of the subject incident;

10. Whether the movants had ever told James that he was forbidden from inviting social guests to the premises when they were not at home.

B. Material facts which are not in dispute.

1. As of August 20, 2013, the plaintiff was seventeen (17) years old. *See* Ex. B, Affidavit of Anthony Georger, at ¶ 8; Ex. 1 at p.1. The plaintiff and James have known each other since approximately 2006. Ex. B at ¶ 2.

2. As of August 20, 2013, the assailant, defendant Eric Strom, was under the age of eighteen. Ex. 1 at p.1.

3. As of August 20, 2013, James was over the age of majority. Ex. 1 at p.1.

²The plaintiff does not agree with the movants that his status is material to the matter since this is not a premises liability case; however, because the movants have elected to raise this issue, the plaintiff includes it since “[o]rdinarily, the status of one who sustains injury while upon the property of another is a question of fact.” *Roberts v. Rosenblatt*, 146 Conn. 110, 112 (1959). In this case, the movants apparently dispute his status as a social invitee on the premises, thus presenting another issue for the jury.

4. As of August 20, 2013, the movants were the owners of the premises located at 14 Colton Street, Farmington, Connecticut. *See* Answer and Special Defenses, dated December 15, 2015, at ¶ 7 (Counts One, Two, Three, Four, Five, Six, Seven, Eight).³

5. As of August 20, 2013, James's biological father resided in Farmington within walking distance of the movants' premises. Def. Memo. at 2; Ex. B at ¶ 5.

6. On an occasion prior to August 20, 2013, when the movants were going to be away from home overnight, James told his mother that he was staying at his biological father's house, and he told his biological father that he was staying at the movants' home. The movants left the premises, and James invited social guests over to the premises, including the plaintiff, two girls, and another boy. On that occasion, while the plaintiff was present at the premises, defendant Hilary W. Donald telephoned James. Upon learning that James was not at his father's home, she required him to go to his father's home. James left the premises, but the plaintiff remained at the movants' premises for the remainder of the night. This incident occurred during the plaintiff's senior year in high school. Ex. B at ¶ 6.

7. The plaintiff observed James consuming alcohol regularly. Ex. B at ¶ 3.

8. On or about the evening of August 19, 2013, James held a party at the movants' premises which was attended by several social guests, including the plaintiff, the assailant, and other boys aged seventeen or eighteen. Ex. B at ¶¶ 7-9.

³All pleadings referenced herein are part of the Court's file and have not been superseded or amended since filing. A statement in an operative pleading constitutes a judicial admission on the part of the party making the statement. Jones Destruction, Inc. v. Upjohn, 161 Conn. 191, 199 (1971).

9. On or about August 19, 2013, James invited the plaintiff to the party at the movants' premises. Ex. B at ¶ 7.

10. During the course of the party, James and several of the guests consumed beer, vodka, and/or marijuana. Ex. B at ¶ 8.

11. The party continued into the early hours of August 20, 2013, and was ongoing at the time the assailant attacked the plaintiff with a lacrosse stick and James shot the plaintiff with a BB gun. Ex. B at ¶ 9.

12. At no time in connection with the August 19-20 party did the plaintiff ever hear James tell anyone that his mother, his father, or his stepfather had called to check on him or to confirm that he was where he'd said he would be. The plaintiff also never heard him say anything about having to leave the party to go to his father's the way he had during the prior incident. The plaintiff also never heard him say that his mother, his father, or his stepfather were requiring him to shut the party down. Ex. B at ¶ 10.

II. ARGUMENT

In Barrow v. Walsh, 2011 WL 4716283 at *2-3 (Shaban, J.), the Court reviewed the well-settled principles to be considered when a party moves for summary judgment:

“Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried.” (Citations omitted.) Wilson v. New Haven, 213 Conn. 277, 279, 567 A.2d 829 (1989). “However, **since litigants ordinarily have a constitutional right to have issues of fact decided by a jury . . . the moving party for summary judgment is held to a strict standard . . . of demonstrating his entitlement to summary**

judgment." (Citation omitted; internal quotation marks omitted.) Kakadelis v. DeFabritis, 191 Conn. 276, 282, 464 A.2d 57 (1983). . . .

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact . . . **The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact . . .** As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent." (Internal quotation marks omitted.) Ramirez v. Health Net of the Northeast, Inc., 285 Conn. 1, 10–11, 938 A.2d 576 (2008). "[T]he [movant] is required to support its motion with supporting documentation . . ." Heyman Associates No. 1 v. Insurance Co. of Pennsylvania, 231 Conn. 756, 796, 653 A.2d 122 (1995). "[O]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment, and **the applicable provisions of our rules of practice contemplate that supporting [or opposing] documents be made under oath or be otherwise reliable.**" (Internal quotation marks omitted.) Rockwell v. Quintner, 96 Conn. App. 221, 233, n.10, 899 A.2d 738, *cert. denied*, 280 Conn. 917, 908 A.2d 538 (2006).

"[T]rial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established." (Internal quotation marks omitted.) Manufacturers Small Business Investment Co. of Connecticut, Inc. v. Empire Auto Body, Inc., 3 Conn.Cir.Ct. 613, 620, 222 A.2d 592 (1966). "[S]ummary judgment procedure was designed essentially to provide for the disposal of frivolous defenses and to prevent parties from using formal pleadings as instruments of delay . . . [T]he procedure was not intended as a substitute for the trial of issues at an evidentiary hearing, even though the parties insist that they are entitled to judgment as a matter of law." Pine Point Corp. v. Westport Bank and Trust Co., 164 Conn. 54, 55–56, 316 A.2d 765 (1972).

[emphasis added; brackets and some ellipses in original]

"A genuine issue has been variously described as a triable, substantial or real issue of fact . . . and has been defined as one which can be maintained by substantial evidence." United Oil

Co. v. Urban Redevelopment Commission, 158 Conn. 364, 378 (1969) [internal citations omitted]. “A material fact is one that makes a difference in the outcome of a case.” Union Trust Co. v. Jackson, 42 Conn. App. 413, 418 (1996). “In ruling on a motion for summary judgment, the trial court’s function is not to decide issues of material fact, but rather to determine whether any such issues exist.” Cortes v. Cotton, 31 Conn. App. 569, 575 (1993), quoting Telesco v. Telesco, 187 Conn. 715, 718 (1982) [internal quotation marks omitted].

Summary judgment, like a directed verdict, may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed. United Oil Co., 158 Conn. at 380. The test is whether a party would be entitled to a directed verdict on the same facts. Id. “A summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.” Batick v. Seymour, 186 Conn. 632, 647 (1982), quoting Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 624, 64 S.Ct. 724, 727, 88 L.Ed. 967 (1944) [ellipses in original; internal brackets and quotation marks omitted].

In seeking summary judgment, **it is the movant who has the burden of showing the nonexistence of any issue of fact.** The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of **any** genuine issue as to **all** material facts, which, under applicable principles of substantive law entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent.

D.H.R. Construction Co., Inc. v. Donnelly, 180 Conn. 430, 434 (1980) [internal quotation marks and citation omitted]; Yanow v. Teal Industries, Inc., 178 Conn. 262, 268 (1979); Dougherty v. Graham, 161 Conn. 248, 250 (1971). Where the movant fails to make such a showing, the non-moving party is under no obligation even to file opposing papers:

An important exception exists, however, to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition, and that exception has been articulated in our jurisprudence with less frequency than has the general rule. “On a motion by the defendant for summary judgment the burden is on the defendant to negate **each** claim as framed by the complaint. . . .” 49 C.J.S. 365, Judgments § 261(b) (1997). It necessarily follows that **it is only “once the defendant’s burden in establishing [its] entitlement to summary judgment is met that the burden shifts to the plaintiff to show that a genuine issue of fact exists justifying a trial.”** 49 C.J.S. 366, *supra*, § 261(b). Accordingly, **“when documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue.”** Allstate Ins. Co. v. Barron, *supra*, 269 Conn. at 405, 848 A.2d 1165; *see also* Harvey v. Boehringer Ingelheim Corp., *supra*, 52 Conn. App. at 8-9, 724 A.2d 1143 (where summary judgment movant’s affidavit did not dispense with factual issues raised by opponents’ counterclaim, burden of proof did not shift to opponents, and their “failure to file supporting affidavits was not a fatal flaw to their objection”); *cf.* 49 C.J.S. 379, *supra*, § 266 (“if the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in [her] pleadings”).

Rockwell v. Quintner, 96 Conn. App. 221, 229-30 (2006) [emphasis added; brackets in original deleted]. The movants have failed to submit any affidavits or authenticated evidence in support of their motion. Their sole “evidence” is an excerpt from an uncertified deposition transcript. As the Appellate Court recently reiterated:

“Supporting *and* opposing affidavits shall be made *on personal knowledge*, shall set forth such *facts as would be admissible in evidence*, and shall show *affirmatively that the affiant is competent to testify to the matters stated*

therein. . .” (Emphasis added.) Practice Book § 17-46. Where the affidavits of the moving party do not **affirmatively** show that there is no genuine issue of material fact as to **all** relevant issues in the case, summary judgment should be denied. Rompney v. Safeco Ins. Co. of America, *supra*, 310 Conn. at 320, 77 A.3d 726; Doty v. Shawmut Bank, 58 Conn. App. 427, 431, 755 A.2d 219 (2000); Walker v. Lombardo, 2 Conn. App. 266, 269, 477 A.2d 168 (1984).

Martin Franchises, Inc. v. Cooper U.S., Inc., 164 Conn. App. 486, 500-01 (2016) [bold print emphasis added; internal footnote omitted; italics, ellipses, and brackets in original]. Lest any confusion remain, this Court specifically addressed the requirements for evidence supporting or opposing the motion for summary judgment in the order setting the argument date:

Counsel are reminded that documents submitted in support of or opposition to a motion for summary judgment must be properly authenticated. Practice Book § 17-45. *See also* Gianetti v. Anthem Blue Cross & Blue Shield of Connecticut, 111 Conn. App. 68, 73 (2008), *cert. denied*, 290 Conn. 915 (2009); New Haven v. Pantani, 89 Conn. App. 675, 678-79 (2005) (where plaintiff failed to attach an affidavit attesting to the authenticity of the documentation). **The court will not consider unauthenticated exhibits in ruling on the motion for summary judgment.**

Order, dated October 12, 2016 [emphasis added]. As discussed below, the documents appended to the movants’ motion fall short of this standard and should thus be disregarded.

B. The motion for summary is so inadequate that the Court should either decline to consider it as inadequately briefed or deny it on its merits and sustain this objection.

The movants’ motion and the memorandum submitted in support thereof are remarkable for the dearth of legal authority and analysis. In addition, the motion is unsupported by **any** authenticated exhibit or affidavit. Perhaps even more significantly, the motion and memorandum fail to address the theories alleged in the complaint, focusing instead on a theory of liability that was not even pled, *i.e.*, that of premises liability. *See* Rockwell, 96 Conn. App. at 229 (“On a

motion by the defendant for summary judgment the burden is on the defendant to negate **each** claim as framed by the complaint. . . .” [emphasis added; internal citation omitted]). Since the movants’ motion fails even to address the claims set forth in the complaint, the plaintiff asks that the Court decline to consider the motion as inadequately briefed or, in the alternative, deny it on its merits and sustain this objection.

Although the issue of inadequate briefing is most commonly found in appellate decisions, the Superior Court has also imposed this requirement and has denied the requested relief where the briefing was inadequate. For example, in Amica Mutual Insurance Co. v. Giordano, 2013 WL 1943942 (Wilson, J.), the Court denied a party’s motion for summary judgment where the movant had failed to brief all necessary claims:

In the present case, High Caliber has failed to meet its burden as the movant of its summary judgment to show the nonexistence of any issue of fact as to these claims of breach of contract, breach of warranty and unjust enrichment because it has failed to negate each claim as framed by the relevant complaints. “[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.” (Internal quotation marks omitted.) State v. Carpenter, 275 Conn. 785, 826, 882 A.2d 604 (2005), *cert. denied*, 547 U.S. 1025, 126 S.Ct. 1578, 164 L.Ed.2d 309 (2006). Because High Caliber has failed to address or discuss why the court should grant its motion for summary judgment as to claims of breach of contract, breach of warranty and unjust enrichment, the court will deem that High Caliber has abandoned those claims. Therefore, as High Caliber has failed to meet its burden of showing the absence of any genuine issue as to all the material facts, its motion for summary judgment as to these claims is denied.

Id. at *7.

Likewise, in the instant matter, the movants have failed to brief **any** of the theories alleged in the complaint. The complaint sounds in negligence with respect to the movants’

failure to supervise the gathering (Counts One and Two) and social host liability (Counts Five and Six). Instead of addressing any of these theories, the movants have elected to pursue an entirely separate theory of liability that neither they nor the plaintiff has pled, that of premises liability. Even as to this theory, their motion, memorandum, and supporting documents are inadequate. The motion posits simply that the movants did not owe the plaintiff a duty. The memorandum in support thereof is barely more illuminating, consisting of the following:

1. **Two pages of “undisputed facts” which are purportedly drawn from the complaint and an uncertified excerpt from the transcript of James Donald’s deposition.**

The movants cite “Complaint, ¶¶ 1-9” as support for their claims three times. They fail to note, however, that they admitted only four of these paragraphs (¶¶ 2, 3, 4, 7). They pled insufficient knowledge as to ¶¶ 1, 5, 6, and 8, and they denied ¶ 9.⁴ Even in light of the principle that a statement in an operative pleading is constitutes a judicial admission; Jones Destruction, Inc., 161 Conn. at 199; it is unclear how they purport to rely for summary judgment purposes on allegations as to which they either claim to lack information or have flatly denied. In addition, they have elaborated on the allegations with other purported facts such as the size of the

⁴To add to the confusion, the plaintiff notes that ¶ 9 in Counts One and Two reads thusly: “At said time and place, the plaintiff was negligently and carelessly assaulted by the defendants, James Donald, Eric Strom and Joshua Schwartz, on the premises, causing the plaintiff to sustain and suffer personal injuries and losses.” Paragraph 9 of Count Five alleges: “At said time and place, the defendant, Sheldon B. Crosby, served as social host for and presided over the gathering.” Paragraph 9 of Count Six alleges: “At said time and place, the defendant, Hilary W. Donald, served as social host for and presided over the gathering.” The citations in the memorandum to “Complaint, ¶¶ 1-9” do not specify the ¶ 9 to which the movants refer.

gathering and the impetus therefor, claiming again to rely on the complaint at ¶¶ 1-9 even though these purported facts are not mentioned therein.

The statements that are supported only by the uncertified transcript obviously cannot meet the movants' burden. The Court's order of October 12, 2016, and the authority cited therein clearly precludes reliance on the uncertified transcript, rendering the unsupported statements mere surplusage.

2. **Slightly more than two pages of boilerplate law with nearly no analysis or application, followed by a page of unsupported summary statements.**

The movants' § II commences with slightly more than a page of basic summary judgment standards. It then moves without explanation into a brief reiteration of a case about premises liability⁵ even though the allegations in this matter do not sound in premises liability. The paragraph then presents the bold statement that "[t]here is no legal precedent to support the premise" that James could have extended an invitation on behalf of the movants, and it moves into more unsupported factual assertions about what they did or did not know or consent to, concluding with no authority or evidence that the plaintiff was a trespasser. On the basis of this curious and unsupported conclusion, they quote boilerplate language about trespassing, and this concludes § II. Section III reiterates unsupported factual assertions, and § IV concludes with the summary conclusion that the movants are entitled to summary judgment based on the plaintiff's status as a trespasser.

⁵The case cited by the movants is Corcoran v. Jacovino, 61 Conn. 462 (1971), which addressed the issue of whether the social guest of an employee was a licensee of the employer. The movants do not claim that the analysis of Corcoran is relevant to the instant case.

In Perez v. Cumba, 138 Conn. App. 351, 366-69 (2012), another case involving an assault at a teenager's party, the Appellate Court declined to read the complaint as a premises liability claim when the plaintiff had not pled that theory:

At the outset, we note that the parties dispute precisely what legal theories of recovery are contained in the plaintiff's one count complaint. The defendant asserts that the count sets forth either a negligence claim of defective premises liability or, alternatively, "separate legal theories" of "social invitee liability and [defective] premises liability." The defendant contends that, because the plaintiff couched the complaint in premises liability terms and specifically alleged, *inter alia*, that she "failed to warn the [d]ecedent of the dangerous condition," it was proper for the defendant to request, and for the court to provide, a defective premises instruction requiring actual or constructive notice of the specific defect that caused the decedent's injuries.

By contrast, the plaintiff claims that her complaint does not allege a defective premises theory of recovery. She argues instead that the complaint sets forth various allegations of social invitee liability arising from the intentional acts of a third party, which were predicated on the precedent of our Supreme Court in Merhi v. Becker, *supra*, 164 Conn. 516, 325 A.2d 270.

In Connecticut, "[p]leadings are intended to limit the issues to be decided at the trial of a case and [are] calculated to prevent surprise. . . . [The] purpose of pleadings is to frame, present, define, and narrow the issues and to form the foundation of, and to limit, the proof to be submitted on the trial. . . ." (Citations omitted; internal quotation marks omitted.) Birchard v. New Britain, 103 Conn. App. 79, 83, 927 A.2d 985, cert. denied, 284 Conn. 920, 933 A.2d 721 (2007). . . .

The complaint in the present case does not contain an allegation that the defendant's property was defective in any respect; indeed, it does not even contain the word "defect." Rather, it alleges that the defendant failed in various manners to exercise reasonable care and control to protect the decedent from dangers posed by other social invitees that could reasonably be anticipated to arise from the activities taking place on her premises. Unlike the standard premises liability case in which the actual condition of the property gave rise to a dangerous condition . . . the complaint in the present case alleges that it was the intentional conduct of third persons on the property, rather than the property itself, that created the dangerous condition. Accordingly, we agree with the plaintiff that her allegations do not advance a traditional defective premises theory of recovery,

but rather one predicated on social invitee liability arising from the intentional acts of a third party, as recognized in Merhi.

[internal citations omitted; brackets and some ellipses in original]. The same is true of the instant case.

As defendants seeking summary judgment, the movants must refute every claim the plaintiff has pled. Rockwell, 96 Conn. App. at 229. Instead of doing so, the movants have elected to rely on a theory of liability that is not even pertinent to this case. By misinterpreting the plaintiff's complaint and presenting bare statements of law of such erroneous theory – all with no analysis and no supporting affidavits or authenticated exhibits – the movants' motion for summary judgment falls so far short of what the law requires that this Court should either decline to consider it at all or should deny it on the merits and sustain this objection.

C. **Even if the movants' premises liability theory were appropriately before the Court, it is entirely unsupported by either law or evidence.**⁶

The movants argue that because they did not invite the plaintiff to the premises or “grant permission” for James to do so, he was a trespasser to whom they owed no duty.⁷ Def. Memo. at 2, 5. In addition to their failure to present affidavits or other appropriate evidence in support of

⁶The inclusion of this section is not intended as a waiver of the plaintiff's position that the Court should decline to consider the motion since the movants have failed in their obligation to brief their claim adequately. Rather, the plaintiff includes this section in an abundance of caution, recognizing that the Court may choose to entertain the motion despite its inadequacies.

⁷The movants raise this defense despite the fact that the complaint does not allege claims sounding in premises liability. The movants' special defenses are framed as sounding in contributory negligence or recklessness, alleging, *inter alia*, that the plaintiff was contributorily negligent or reckless in failing to leave the premises.

such claim,⁸ the movants overlook the significance of the fact that James was a member of the household, and they fail entirely to address whether and under what circumstances he was authorized to invite social guests such as the plaintiff to the premises.⁹ They likewise fail entirely to address the significance of his past conduct in inviting social guests, including the plaintiff, to the premises when the movants were away, and the level of supervision they exercised over James's activities in general and specifically over gatherings at the premises. They do not address at all such related issues as whether or to what extent they have acquiesced to or facilitated gatherings on the premises that included social guests invited by James, which guests may have included the plaintiff. Moreover, the defendants did not deny the allegation of ¶ 8 of the complaint (incorporated into all counts) that James invited the plaintiff to the premises; rather, both pled insufficient knowledge.

Factors such as these were deemed significant in Buttrick v. Wilson, 2012 WL 1624152 (Wilson, J.). In that case, as in this one, the plaintiff attended a party at the defendant movant's premises, which party was held by the movant's teenage sons while the movant was away. Id. at

⁸The sole evidence upon which the movants rely on this issue is an uncertified excerpt from the transcript of James's deposition. Def. Memo. at 2. As noted above, this excerpt is not properly before the Court. *See* § II.A, *supra*.

⁹The Police Report reflects that James "told [the investigating officer] that his step-father and mother left him responsible for the home while the rest of the family were vacationing in Rhode Island." Ex. 1 at p.2. To the extent that the movants or any other party wish to challenge such matters as whether the statement was in fact made and whether it was accurately recorded, they are free to cross-examine the officer at trial. If it is conceded that James made the statement as reported, further issues remain as to what was meant by "responsible," including whether James and the movants had the same understanding of what this enabled James to do in their absence. The plaintiff also notes that since the statement contradicts the movants' position, it is necessary for the jury to assess the parties' credibility on this issue, thereby precluding summary judgment.

*2. The plaintiff was a “schoolmate” of one of the sons. Id. As in the instant case, alcohol was served and consumed at that party, including by underage minors, and the plaintiff “socialized and consumed alcohol.” Id. Unlike the instant case, the evidence supporting the movant’s motion provided that “[t]he [movant], prior to leaving, had instructed her children not to have any guests at the house while she was away” and that one son had “[e]lect[ed] not to heed his mother’s instruction . . . [and] threw a party.” Id. The plaintiff was injured when the police arrived and she fell in a wooded area while attempting to flee the party with other partygoers. Id.

As in the instant case, the movant in Buttrick sought summary judgment on the grounds that, *inter alia*, “the plaintiff entered her property without her consent or knowledge and, therefore, the plaintiff was a trespasser to whom the defendant is not liable for negligence.” Id. at

*3. Since the plaintiff in that case actually had pled that the premises were dangerous and defective, the Court reviewed the principles of duty in the context of premises liability:

“Ordinarily, the status of one who sustains injury while upon the property of another is a question of fact.” Roberts v. Rosenblatt, 146 Conn. 110, 112, 148 A.2d 142 (1959); Morin v. Bell Court Condominium Association, 25 Conn. App. 112-15, 593 A.2d 147 (1991), *aff’d* 223 Conn. 323, 612 A.2d 1197 (1992). “Where, however, the facts essential to the determination of plaintiff’s status are not in dispute, a legal question is presented.” Morin v. Bell Court Condominium Association, *supra*, 25 Conn. App. at 115.

“In general, there is an ascending duty owed by the possessor of land to persons on the land based on their entrant status, i.e., trespasser, licensee or invitee.” (Internal quotation marks omitted.) Considine v. Waterbury, 279 Conn. 830, 859, 905 A.2d 70 (2006). . . .

Id. at *3-4 [brackets in original]. The Court analyzed, *inter alia*, the “three distinct types of invitee” recognized under Connecticut law: the public invitee, the business invitee, and the social

invitee. With respect to the social invitee, the Court acknowledged that Conn. Gen. Stat. § 52-557a provides that the same standard of care extended to a business invitee is owed to a social invitee. *Id.* at *4. The Court then addressed the specific evidence presented by the moving party and the plaintiff opposing the motion. While the details differ from the instant case, the Court's recitation reveals a number of significant points which bear consideration in this case:

[T]he plaintiff's allegation carries the necessary implication that she was a social invitee who was on the defendant's premises for the defendant's pleasure and who, therefore, was owed the highest standard of care. . . . Contending that the plaintiff was, in contrast, a trespasser who was on the defendant's premises without the defendant's knowledge or consent, the defendant submits her affidavit, wherein she attests that: (1) she does not know the plaintiff and has never invited the plaintiff to her house; (2) she was out of town on the night of the party; (3) she had forbidden her children to invite guests to the house while she was away; and (4) she had no knowledge that they had nonetheless planned to do so. . . . The defendant also relies on the affidavit of her son, Tyler, who testifies that (1) his father and the defendant are divorced and his father did not reside at 22 Alex Drive on the evening in question; (2) prior to leaving town, the defendant specifically instructed him to not invite any guests to the house while she was away; and (3) although he disregarded the defendant's instruction by "invit[ing] friends over," he did not invite the plaintiff to the party and, in fact, he "did not know [the plaintiff] more than in passing and had never socialized with her outside of school." . . . Consistent with these facts, the plaintiff testified that she has never met the defendant and had never been to her house prior to the night of the party. . . . The plaintiff testified, however, that while Tyler did not expressly say to her that she was invited to the party, she nevertheless believed that she had been invited because her friend, "Sara," who was also a friend of Tyler, told the plaintiff during a football game prior to the party that "[they] were invited over to his house." . . .

The foregoing evidence establishes that, on the evening in question, the defendant had no desire to receive the plaintiff as a guest at her home and Tyler did not directly invite the plaintiff to the party. **These facts, however, do not conclusively establish the plaintiff's entry status.** The defendant's own evidence reveals that the plaintiff and Tyler were acquaintances from school who had friends in common, that the plaintiff was at Tyler's party for a prolonged period of time and that she actively participated in various social aspects of the

party. These facts suggest that Tyler had invited the plaintiff to the party even if he did not directly inform her of an invitation. Furthermore, the salient inquiry here is whether *the defendant* had invited the plaintiff. In this vein, the defendant's subjective wishes are irrelevant. "In determining whether a particular person is an invitee, the important thing is the desire or willingness to receive that person which a reasonable man would understand as expressed by the words or other conduct of the possessor. *It is immaterial that the person is one whom the possessor is not willing to receive as an invitee if the possessor's words or other conduct are understood, and would be understood by a reasonable man, as indicating the possessor's willingness.* The nature of the use to which the possessor puts his land is often sufficient to express to the reasonable understanding of the public, or classes or members of it, a willingness or unwillingness to receive them." (Emphasis added.) 2 Restatement (Second), *supra*, § at 332, comment (c). "An invitation may be implied from dedication, customary use, or enticement, allurement, or inducement to enter, or manifested by an arrangement of the premises or the conduct of the owner or occupant." 62 Am.Jur.2d, Premises Liability § 94 (2005). Consistent with these principles, our Supreme Court has stated that "[t]o constitute [the plaintiff] an invitee, it must appear that she was **expressly or impliedly** invited to use the defendant's premises . . . [I]n determining whether there was an implied invitation the question is what could . . . [be] reasonably conclude[d] from the defendant's conduct of its premises."³ Dym v. Merit Oil Corp., 130 Conn. 585, 588, 36 A.2d 276 (1944). . . .

³Although in Connecticut the implied invitation doctrine has generally been applied in cases involving business or public invitees, Justice O'Sullivan aptly wrote that "[r]egardless of the purpose which may prompt the owner of realty, he should be required to exercise reasonable care towards those who have come upon his property by virtue of either his express or implied invitation. *This rule should apply to all so invited, whether they be milkmen, grocers, or social guests.* The rule is sound and conforms with common sense." (Emphases added.) Laube v. Stevenson, 137 Conn. 469, 477-78, 78 A.2d 693 (1951) (O'Sullivan, J., dissenting), majority opinion superseded by § 52-557a. Justice O'Sullivan's dissent contributed to the enactment of the superseding statute, § 52-557a, which elevated social guests to the status of business invitees. Furstein v. Hill, *supra*, 218 Conn. at 621. In this court's view, his pronouncement is sensible and consistent with the express purpose of that statute. *See id.*, at 622.

Several aspects of the plaintiff's deposition testimony cast doubt on whether she could have reasonably concluded, based on the defendant's conduct, that the

defendant had invited her to the party. The plaintiff has never met the defendant and had never been to her house prior to the incident in question. . . . Before going to the defendant's house that evening, the plaintiff had received no information as to whether the defendant knew about the party. . . . The plaintiff attended the party because she was informed by a friend that Tyler had invited them over. . . . While at the defendant's home, the plaintiff did not see any adults at any time. . . . The plaintiff did not ask where the adults were and did not hear any information about why there were no adults present. . . . The plaintiff understood that the party was "illegal" because underage people were drinking alcohol. . . . Furthermore, the plaintiff responded to the arrival of the police by attempting to escape into the woods in order to "get away from the cops." . . .

Viewing the evidence in the light most favorable to the plaintiff, however, the defendant's evidence nevertheless falls short of her heavy summary judgment burden. The plaintiff's deposition included testimony that Tyler had hosted many parties at the defendant's residence in the past and that the defendant had approved of them. . . . **The defendant has not submitted any evidence shedding light on whether similar parties involving teenagers had been hosted at her home, whether the defendant acquiesced to or even facilitated them, whether those parties involved alcohol and occurred with any regularity or notoriety within the community** such that the plaintiff could have reasonably believed that she had been invited by the defendant in this case. Moreover, there is a dearth of factual detail in the evidence regarding the party itself and what the plaintiff experienced there. These factors bear on the plaintiff's status because an entrant's status can change even while he or she is on the premises. . . . **In view of the paucity of factual detail in the defendant's evidence, she has not demonstrated "that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact."** (Internal quotation marks omitted.) *Zielinski v. Kotsoris*, *supra*, 279 Conn. at 318. Because genuine issues remain as to whether the defendant impliedly invited the plaintiff to the party, summary judgment is denied with respect to the claim that the plaintiff was a trespasser on the defendant's premises.

Id. at *3-6 [italic emphasis in original; bold print emphasis added; brackets and some ellipses in original; some citations omitted, including citations to the record].

In the instant case, the plaintiff was invited to the premises by James, who resided there. The movants have presented no evidence which, if credited, would require the trier of fact to

conclude that James lacked authority to invite a social guest to the premises on the night of the subject incident. They have not averred, for example, that they ever instructed James that he was not permitted to invite guests to the premises when they were not present, nor have they presented evidence about any parties or gatherings held at the premises which “involved alcohol and occurred with any regularity or notoriety within the community. . . .” *Id.* at *6. The movants have also not denied the plaintiff’s statement that James regularly consumed alcohol. Ex. B at ¶ 3.

Perhaps more importantly, the movants have not denied knowledge of the incident to which the plaintiff refers in ¶ 6 of his affidavit wherein James invited guests to the residence and – at least at the time – lied to the movants and his biological father about his whereabouts. Although Hilary W. Donald discovered on that night that James was not at his biological father’s home and required him to go there – a circumstance which would lead a reasonable person to question whether James was reliable when they were away – they have provided no evidence that on or before the night of the incident which is the subject of this lawsuit, they had any contact with James’s biological father to ensure that he would also have been aware of where James was supposed to be on that night while the movants were out of town. They have not indicated how often they caught James in a lie or whether James regularly lied to them or to others¹⁰ – both circumstances which could lead a trier of fact to conclude that the movants knew or should have known that James was not trustworthy and that if they left James behind on a

¹⁰See Ex. 1 at p.2 (James’s statement to the officer that the movants had “left him responsible for the home. . . .”), as contrasted with the movants’ assertions.

summer night shortly before his friends left for college, there existed a reasonable possibility that instead of staying with his biological father as he claimed, James would instead invite guests to the premises and that he and such guests would consume beer, vodka, and/or marijuana.

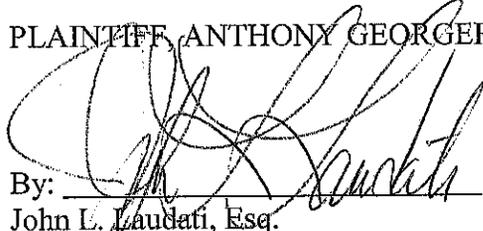
“The existence of a duty is a question of law . . . but the existence of a duty and what it is depends upon the facts of each situation.” Cahill v. Carella, 43 Conn. Supp. 168, 171 (1994) [internal citation omitted]. In this case, the jury could easily find facts sufficient to establish a duty on the part of the movants to the guests, including the plaintiff.

The movants are required to present evidence and authority that will make it “quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.” Zielinski v. Kotsoris, 279 Conn. 312, 318 (2006) [internal quotation marks and citation omitted]. By failing to present any evidence whatsoever on a number of material issues, they have failed to satisfy this burden. Accordingly, the plaintiff, Anthony Georger, respectfully asks that the Court sustain this objection and deny the movants’ motion for summary judgment.

III. CONCLUSION

For the reasons set forth above, the plaintiff, Anthony Georger, respectfully asks that the Court either decline to address the motion for summary judgment at all or, in the alternative, deny the motion on its merits and sustain this objection thereto.

PLAINTIFF ANTHONY GEORGER



By: _____
John L. Laudati, Esq.
Murphy, Laudati, Kiel, Buttler & Rattigan
10 Talcott Notch Road, Suite 210
Farmington, CT 06032
(860) 674-8296
Juris No. 104060

CERTIFICATION

This is to certify that a copy of the foregoing was sent via first class mail or electronically on this 28th day of October, 2016, to the following parties of record:

Peter John Ponziani, Esq.
Litchfield Cavo
82 Hopmeadow Street, Suite 210
Simsbury, CT 06089

Rebecca A. Hartley, Esq.
Regnier, Taylor, Curran & Eddy
100 Pearl Street, 10th Floor
Hartford, CT 06103



John L. Laudati,
Commissioner of the Superior Court

EXHIBIT 1

Farmington Police Department
319 New Britain Avenue, Farmington CT 06030-1224
(860) 575-2400

CASE/INCIDENT REPORT

SUPPLEMENTARY

CFS NO 1300015082	DAY/INCIDENT DATE 08/20/2013 Thru 08/20/2013	TIME 08:20	DATE OF RPT 08/23/2013	TIME OF RPT 15:11	TYPE OF INCIDENT ASSAULT - OTHER WEAPON	INCIDENT CD 043	INVESTIGATING OFFICER Detective Erms, TracyL	BADGE NO 0653
DIVISION	DIVISION NO	REFERENCE DIVISION Detective	REFERENCE DIVISION NO	CASE X-REFERENCE	UNIT ID 23	TYPST TLE0653	DATE TYPED 08/23/2013	TIME TYPED 15:11
STREET NO 00074		STREET NAME AND TYPE COLTON ST Farmington		APARTMENT NO/LOCATION	INTERSECTING STREET NAME AND TYPE			

OFFENSE Assault-Aggravated	LOCAL X-REF CODE 13A	IBR CODE 13A	ATT/COMP Completed	OFFENSE DESCRIPTION Residence/home
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STATUS	NAME	SEX	RACE	DOB	TELEPHONE	ADDRESS	OFF STATE & NO.
H	Donald, Hillary	F	W		Home (860) 677-1903	14 Colton St Farmington CT	
W	Ousefotte, Andrew Jefe	M	W		Cell (860) 838-7535	3 Lilac La Farmington CT	
H	Strom, Michael H	M	W		Cell (413) 221-8453	89 Scott Swamp Rd Farmington CT	
H	Herrera, Juan Nicholas	M	W		Cell (860) 371-5901	43 Brian Hill Unionville CT	
O V J	Georgen, Anthony John	M	W		Home (860) 676-7008		
O	Donald, James Alexander	M	W		Cell (860) 778-8993	14 Colton St Farmington CT	
H	Cenniffi, Eric Thomas	M	W		Home (860) 673-9448	16 Mals Way Unionville CT	
H	Cenniffi, Stephanie	F	W		Home (860) 673-9448	16 Mals Way Unionville CT	
V	Schwartz, Joshua Robert	M	W		Home (860) 521-8099	8 Inwood La Farmington CT	
H	Yancey, Mason Dalton	M	B		Home (860) 930-2235		
O V J	Strom, Eric Michael	M	W		Cell (860) 502-8468	76 Oakridge Unionville CT	
H	Schwartz, Russell	M			Home (860) 490-8855	6 Inwood Ln Farmington CT	
H	Logart, Brian Tucker	M	W		Car (860) 299-6891	26 Westview Terrace Unionville CT	
H					Home () 673-3127		
					Bus (860) 243-8558		

THE UNDERSIGNED, AN INVESTIGATOR HAVING BEEN DULY SWORN, DEPOSES AND SAYS THAT I AM THE WRITER OF THE ATTACHED POLICE REPORT PERTAINING TO THIS INCIDENT NUMBER. THAT THE INFORMATION CONTAINED THEREIN WAS SECURED AS A RESULT OF (1) MY PERSONAL OBSERVATION AND KNOWLEDGE OR (2) INFORMATION RELAYED TO ME BY OTHER MEMBERS OF MY POLICE DEPARTMENT OR OF ANOTHER POLICE DEPARTMENT OR (3) INFORMATION SECURED BY MYSELF OR ANOTHER MEMBER OF A POLICE DEPARTMENT FROM THE PERSON OR PERSONS NAMED OR IDENTIFIED THEREIN, AS INDICATED IN THE ATTACHED REPORT. THAT THE REPORT IS AN ACCURATE STATEMENT OF THE INFORMATION SO RECEIVED BY ME.

INVESTIGATOR SIGNATURE <i>DET. TRACY ERMS</i>	INVESTIGATOR I.D.# 0653	REPORT DATE 11/7/2013	SUPERVISOR SIGNATURE <i>Erms</i>	SUPERVISOR I.D.# 0184
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CASE/INCIDENT REPORT

SUPPLEMENTARY

CFS NO 1300015092	DAY INCIDENT DATE 3 08/20/2013 Thu 08/20/2013	TIME 08:20	DATE OF RPT 08/20/2013	TIME OF RPT 14:09	TYPE OF INCIDENT ASSAULT - OTHER WEAPON	INCIDENT CD 04S	INVESTIGATING OFFICER Detective Divenare, Susan L.	BADGE NO 0508
DIVISION	DIVISION NO	REFERENCE DIVISION Detective	REFERENCE DIVISION NO	CASE X-REFERENCE	UNIT ID 23	TIPIST SLDMS08	DATE TYPED 08/20/2013	TIME TYPED 14:09
STREET NO 90014	STREET NAME AND TYPE COLTON ST Farmington		APARTMENT NO/LOCATION	INTERSECTING STREET NAME AND TYPE		STATUS		TOWN CD 052

On 08/20/2013, Detective Killiany and I were assigned to respond to 14 Colton Street in Farmington for crime scene processing.

Upon our arrival, I spoke with James Donald in the kitchen of the residence. James was identified to me as the person who drove Anthony Georger to the hospital. James had told officers, prior to my arrival, the details of the incident. James had stated that the pellet gun belonged to him and it was upstairs in his bedroom. James reported that he had already cleaned the blood out of his vehicle (CT 1AAKL4) and cleaned up the remaining evidence of the gathering with his friends.

James verified that he is eighteen-years-old and lives at this residence along with his younger brother, mother and step-father. He told me that his step-father and mother left him responsible for the home while the rest of the family was vacationing in Rhode Island. I asked James if he would consent to our searching the home for the purpose of locating items that were connected to the assault. James agreed to give us limited consent, to include his bedroom closet to seize the BB gun, the kitchen and any and all outside areas of the home. James stated that he did not feel comfortable if the police searched any areas of the home that his parents or brother would expect privacy, and/or were not connected to his friends or this incident. James did not want to consent with us searching his entire bedroom. We agreed that when we entered his bedroom to seize the BB gun and any other area of the home, that James would accompany us and be able to withdraw consent at any time.

A Consent to Search form was completed and signed by James at 1112 hours, witnessed by me and Officer Augustyn.

Sgt. Buckley called and spoke with James' mother, Hilliary Donald. He explained the reason for the call and for being at her home with James. She was told that James had consented to officers entering and searching the home. Hilliary stated that she supported his decision.

THE UNDERSIGNED, AN INVESTIGATOR HAVING BEEN DULY SWORN, DEPOSES AND SAYS THAT: I AM THE WRITER OF THE ATTACHED POLICE REPORT PERTAINING TO THIS INCIDENT NUMBER. THAT THE INFORMATION CONTAINED THEREIN WAS SECURED AS A RESULT OF MY PERSONAL OBSERVATION AND KNOWLEDGE; OR INFORMATION RELAYED TO ME BY OTHER MEMBERS OF MY POLICE DEPARTMENT OR OF ANOTHER POLICE DEPARTMENT OR INFORMATION SECURED BY MYSELF OR ANOTHER MEMBER OF A POLICE DEPARTMENT FROM THE PERSON OR PERSONS NAMED OR IDENTIFIED THEREIN, AS INDICATED IN THE ATTACHED REPORT. THAT THE REPORT IS AN ACCURATE STATEMENT OF THE INFORMATION SO RECEIVED BY ME.

INVESTIGATOR SIGNATURE: <i>Susan L. Divenare</i>	INVESTIGATOR I.D.#: 0508	REPORT DATE: 08/08/2013	SUPERVISOR SIGNATURE: <i>Sgt. Augustyn</i>	SUPERVISOR I.D.#: <i>0184</i>
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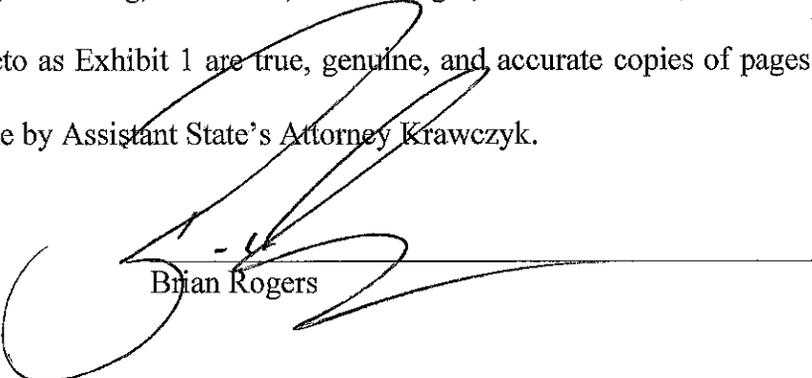
EXHIBIT A

NO. HHB CV 15 6029045 S : SUPERIOR COURT
GEORGER, ANTHONY : J.D. OF NEW BRITAIN
V. : AT NEW BRITAIN
CROSBY, SHELDON B., ET AL. : OCTOBER 28, 2016

AFFIDAVIT OF BRIAN ROGERS

I, Brian Rogers, being duly sworn, do hereby depose and say:

1. I am over the age of eighteen, and I believe in the obligation of an oath.
2. At all times relevant hereto, I have been employed as a paralegal by the law firm of Murphy, Laudati, Kiel, Buttler & Rattigan, LLC, which represents the plaintiff, Anthony Georger, in this lawsuit.
3. In connection with the firm's representation of Mr. Georger, I received from Assistant State's Attorney Robin Krawczyk a copy of the report of the Farmington Police Department in connection with that certain incident occurring on August 20, 2013, at 14 Colton Street, Farmington, Connecticut, involving, *inter alia*, Mr. Georger, James Donald, and Eric Strom. The pages appended hereto as Exhibit 1 are true, genuine, and accurate copies of pages from that report as provided to me by Assistant State's Attorney Krawczyk.


Brian Rogers

STATE OF CONNECTICUT

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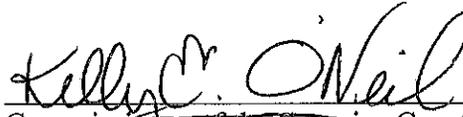
ss: Farmington

)

COUNTY OF HARTFORD

)

Subscribed and sworn to before me, the undersigned officer, this 28th day of October, 2016.



~~Commissioner of the Superior Court~~

Notary Public

My commission expires: _____

KELLY E. O'NEIL
NOTARY PUBLIC
MY COMMISSION EXPIRES DEC. 31, 2020

EXHIBIT B

NO. HHB CV 15 6029045 S : SUPERIOR COURT
GEORGER, ANTHONY : J.D. OF NEW BRITAIN
V. : AT NEW BRITAIN
CROSBY, SHELDON B., ET AL. : OCTOBER 28, 2016

AFFIDAVIT OF ANTHONY GEORGER

I, Anthony Georger, being duly sworn, do hereby depose and say:

1. I am over the age of eighteen, and I believe in the obligation of an oath.
2. I have known James Donald since approximately 2006.
3. I have observed James Donald consuming alcohol regularly.
4. James Donald lives with his mother and stepfather at 14 Colton Street, Farmington, Connecticut.
5. James Donald's parents are divorced. His father lives within walking distance of the Colton Street residence, on or around Main Street in Farmington, Connecticut.
6. On an occasion prior to August 19, 2016, James Donald invited me, another boy, and two girls to the Colton Street residence when his mother and stepfather were out of town. He told me that he had told his mother he would be with his father, and he told his father he would be with his mother. At some point during the evening, James's mother telephoned him and discovered that he was not at his father's house, and she sent him to his father's house. I remained at the Colton Street residence overnight. This incident occurred during my senior year of high school.

7. On or about August 19, 2016, James invited several people, including Eric Strom and me, to the Colton Street residence for a party. His mother and stepfather were not there. I learned at some point that, just like the incident referred to in ¶ 6, his mother and stepfather thought he was spending the night at his father's house, and his father thought he was spending the night at his mother's house.

8. During the course of the party, which commenced on August 19 and ran well into the early hours of August 20, a number of people present, including James, consumed beer, vodka, and/or marijuana. Although I was only seventeen years old at the time, I consumed alcohol during the party.

9. The party was still going on at the time Eric Strom assaulted me with a lacross stick and James Donald shot me with a BB gun.

10. At no time before or during the party did I ever hear James tell anyone that his mother, his father, or his stepfather had called to check on him or to confirm that he was where he'd said he would be. I also never heard him say anything about having to leave the party to go to his father's the way he had during the incident described in ¶ 6. I also never heard him say that his mother, his father, or his stepfather were requiring him to shut the party down.



Anthony Georger

STATE OF CONNECTICUT

)

COUNTY OF HARTFORD

)

ss: Farmington

)

Subscribed and sworn to before me, the undersigned officer, this 28th day of October, 2016.



Commissioner of the Superior Court

Notary Public

My commission expires: _____

KELLY E. O'NEIL
NOTARY PUBLIC
MY COMMISSION EXPIRES DEC. 31, 2020

2013 WL 1943942

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

AMICA MUTUAL INSURANCE CO.

v.

Anthony GIORDANO.
No. CV085023550S.

April 23, 2013.

WILSON, J.

FACTS

*1 This is a subrogation action brought by Amica Mutual Insurance Company (the insurance company) against Anthony Giordano and Stanley Piurkowski of Equity Builders by way of a September 8, 2008 complaint. The insurance company alleged that its insured, Hillard Einbinder, owner of a residence at 115 Merwin Avenue, Milford, Connecticut decided to raise the residence, and therefore, hired Giordano and Piurkowski for the project. It is alleged further that the residence was raised and placed on pillars in October 2006, and that on April 24, 2007, it fell off of the pillars, causing property damage for which the insurance company seeks reimbursement. On December 18, 2008, Piurkowski brought an action against High Caliber Contracting, LLC (High Caliber) for apportionment of liability. In that complaint, Piurkowski alleged that Einbinder hired High Caliber to raise the residence and place it on pillars and that High Caliber's negligence caused the residence to fall off of the pillars. The insurance company then filed an amended complaint on March 13, 2009 and asserted three counts against High Caliber. In counts seven, eight and nine, the insurance company alleged that High Caliber breached its contract with Einbinder, breached its warranty and was negligent because the residence fell off of the pillars.

On May 12, 2010, Einbinder filed an amended complaint, in which he asserted four counts against High Caliber. In counts seven, eight and nine, Einbinder also alleged that

High Caliber breached its contract, its warranty and was negligent, respectively, because the house fell off of the pillars on or about April 24, 2007. Also, in count ten, he alleged that High Caliber was unjustly enriched because it did not adequately perform its services.

On January 31, 2012, High Caliber filed a motion for summary judgment as to Piurkowski's December 18, 2008 apportionment complaint, counts seven, eight and nine of the insurance company's March 13, 2009 amended complaint and counts seven, eight, nine and ten of the May 12, 2010 first amended complaint brought by Einbinder on the grounds that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. The motion was accompanied by a supporting memorandum of law, affidavits and deposition excerpts.

On April 5, 2012, the insurance company filed an opposition to the motion for summary judgment on the grounds that there are material questions of fact as to what duties High Caliber undertook in this project, and whether it performed those tasks negligently. Attached to the opposing memorandum of law were deposition excerpts.

Also on April 5, 2012, Piurkowski filed a memorandum of law in opposition to the summary judgment on the ground that there are genuine issues of material fact regarding whether High Caliber lowered Einbinder's house onto its support beams improperly or prematurely and failed to attach the house to the support system.

On April 17, 2012, Einbinder also filed an opposing memorandum of law to High Caliber's motion for summary judgment arguing that there is a genuine issue of material fact as to whether High Caliber was negligent. Einbinder attached deposition excerpts as well. The matter was heard at short calendar on January 22, 2013.

DISCUSSION

*2 "Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ... The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted.) *Wilson v. New Haven*, 213 Conn. 277, 279, 567 A.2d 829 (1989). "However, since litigants ordinarily have a constitutional right to have issues of fact decided

by a jury ... the moving party for summary judgment is held to a strict standard ... of demonstrating his entitlement to summary judgment.” (Citation omitted; internal quotation marks omitted.) *Kakadelis v. DeFabritis*, 191 Conn. 276, 282, 464 A.2d 57 (1983). “In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party .” (Internal quotation marks omitted.) *Provencher v. Enfield*, 284 Conn. 772, 791, 936 A.2d 625 (2007).

“[T]he ‘genuine issue’ aspect of summary judgment requires the parties to bring forward before the trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred ... A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case.” (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002). “In ruling on a motion for summary judgment, the court’s function is not to decide issues of material fact, but rather to determine whether any such issues exist.” *Nolan v. Borkowski*, 206 Conn. 495, 500, 538 A.2d 1031 (1988).

“In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law ... To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact ... When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue ... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue ... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17–45].” (Internal quotation marks omitted.) *Zielinski v. Kotsoris*, 279 Conn. 312, 318–19, 901 A.2d 1207 (2006). “While [a party’s] deposition testimony is not conclusive as a judicial admission; General Statutes § 52–200; it is sufficient to support entry of summary judgment in the absence of

contradictory competent affidavits that establish a genuine issue as to a material fact.” *Collum v. Chapin*, 40 Conn.App. 449, 450 n. 2, 671 A.2d 1329 (1996).

I

High Caliber’s Motion for Summary Judgment

*3 In the present case, High Caliber argues that it was not responsible for the residence falling off of the pillars because its duties for the project consisted of raising the residence, placing it on temporary cribbing in October of 2006 and then lowering the residence onto the wood floor structures and beam work in December of 2006. High Caliber contends that once these steps were done, it had completed the work it was hired to perform, for which it was paid in full. Thus, it argues that it had no further responsibilities to Einbinder or the residence. Also, it argues that it was never asked by anyone, including Einbinder, to return to the residence to complete additional work after it lowered the residence in December 2006. Additionally, it argues that “the work and materials used to uphold the residence” were not its work or materials.

In particular, High Caliber points to excerpts of Einbinder’s deposition testimony in support of its arguments. Among them is Einbinder’s testimony that Mr. Raymond, Giordano’s employee, informed Einbinder that “there were problems” with the house around December of 2006, which was after the house had gone up. He testified that this was after High Caliber had been off the project. Then, Einbinder called Piurkowski and informed him of the problem and asked him to take care of it. Raymond testified that he was concerned that in case of a hurricane, “the house was going to fly away.” He also testified that he communicated this concern to Einbinder many times. High Caliber argues that such evidence goes to show that it had completed its work four months before the incident occurred, which left plenty of time for Einbinder and other parties to act on a solution to fix the problem. It argues further that there is no evidence that its work was defective in light of Einbinder’s testimony that High Caliber’s work was completed, for which he paid in full. Additionally, it argues that it owed no ongoing duty to Einbinder or the residence because it had no possession and/or control of the residence after the work was completed, including the time of its fall.

The insurance company, however, argues that there is

conflicting evidence as to whether High Caliber constructed a part of the floor system, and whether it directed Piurkowski's work. The insurance company argues that although Markham, the owner of High Caliber, testified that the wood floor structure and beam work were installed by Einbinder or his subcontractors, there is contradicting testimony by Piurkowski. During his deposition, Piurkowski testified that Markham "physically told me that he also put the plate on himself secondarily. Not only Hilly, but High Caliber told me he put the plate on to set the house down." (Piurkowski Dep. Tr. 176:24-177:3 .) In light of such testimony, the insurance company argues that if High Caliber constructed or directed the construction of the floor system and was negligent in doing so, then it is liable for its negligence. It also argues that a material fact remains as to whether High Caliber knew the house was unstable on the pillars since testimony on this point is contradictory. In particular, it points to Einbinder's deposition testimony in which he testified that he received a phone call from Markham regarding how "he wasn't happy with the way that—the way the house had been set down; I think it was on an LVL and it was set down on a single LVL, he mentioned to me, and he said, 'It can't be left like that. It's not—you can't do that.'" (Einbinder Dep. Tr. 32:9-14.) On the other hand, Markham testified that he was "under an understanding that they [not he] were going to complete the support system of the house." (Markham Dep. Tr. 37:18-19.) Also, he testified that he did not have any concerns of whether the new foundation may not support the weight of the house in lowering the house. (Markham Dep. Tr. 36:13-16.) In light of this evidence, the insurance company argues that High Caliber failed to meet its burden of showing that it is entitled to judgment as a matter of law and that summary judgment should be denied.

*4 Piurkowski also opposes High Caliber's motion for summary judgment as he argues there are genuine issues of material fact as to whether High Caliber improperly or prematurely lowered the residence and failed to attach the house to the support system, causing the residence to blow over and sustain severe damage. In particular, he argues that the fact High Caliber lowered the residence back onto its support beams prematurely knowing that there were a number of issues that had to be addressed before the house could be lowered safely, is sufficient to create a genuine issue of material fact regarding its negligence. He argues that his testimony, coupled with that of Einbinder, in which he testified that Markham was not happy with the way the house had been set down, "tends to support the allegations that Einbinder's house ultimately fell off its pillars because High Caliber failed to properly direct and supervise the installation of LVL

beams ... failed to properly ensure that the LVL beams were sitting directly on the [support] pillars before lowering the subject dwelling and negligently continued to lower the subject dwelling despite knowing, or negligently failing to comprehend, that the main LVL's were not sitting on the [support] pillars." Furthermore, he argues that despite High Caliber's conclusory assertion that because its work was completed and was paid for, it no longer had obligations to either Einbinder or the residence, fails because it should be held liable if it completed its work in a faulty and negligent manner and ultimately caused the residence to fall. He also contends that High Caliber failed to offer any evidence establishing that it was not negligent in failing to ensure that the LVL beams were lined up properly and ready to support the residence at the time that High Caliber decided to lower the house back onto the beams. Furthermore, he argues that High Caliber's alleged lack of possession or control of the residence is irrelevant to the negligence analysis.

Einbinder also argues that there is a genuine issue of material fact as to whether High Caliber was negligent. In particular, he contends that despite High Caliber's argument that it is not responsible for the falling of the residence, there are contradicting statements made under oath by Einbinder, Giordano and Piurkowski during their depositions. He further argues that there is a dispute as to whether High Caliber knew of the problems. Also, Einbinder argues that High Caliber's argument that it is relieved from any liability because it neither had possession nor control of the residence after December 2006 lacks any merit because he hired High Caliber as an independent contractor who should remain on the hook for any losses resulting from negligence in the performance of its work.

A

High Caliber's Motion for Summary Judgment as to Negligence Claims

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury ... [T]he existence of a duty of care is an essential element of negligence ... A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act ... There is no

question that a duty of care may arise out of a contract ...” (Citations omitted; internal quotation marks omitted.) *Sturm v. Harb Development, LLC*, 298 Conn. 124, 139–40, 2 A.3d 859 (2010). “An essential element of any negligence action is the establishment of the defendant’s conduct as a proximate cause of the plaintiff’s injury ... The causal relation between the defendant’s wrongful conduct and the plaintiff’s injuries must be established in order for the plaintiff to recover damages ... In Connecticut, the test of proximate cause is whether the defendant’s conduct is a substantial factor in bringing about the plaintiff’s injuries ... Further, it is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendants’ conduct] ... The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection ... This causal connection must be based upon more than conjecture and surmise.” (Citations omitted; internal quotation marks omitted.) *Wu v. Fairfield*, 204 Conn. 435, 438–39, 528 A.2d 364 (1987). “[T]he question of proximate causation generally belongs to the trier of fact because causation is essentially a factual issue ... It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact.” (Internal quotation marks omitted.) *Levesque v. Bristol Hospital, Inc.*, 286 Conn. 234, 249, 943 A.2d 430 (2008).

*5 In light of contradicting deposition testimonies, there is a genuine dispute as to whether High Caliber had any knowledge regarding issues with the residence. In particular, Einbinder’s testimony that he received a phone call from Markham informing him that the house could not be left the way it had been initially put down, is in direct conflict with Markham’s testimony that he was not aware that the house could not be fastened to the foundation in the way it was originally planned. Markham described the process of lowering the residence “smooth,” and that he had no concerns that the foundation would support the weight of the house. (Markham Depo. Tr. 35:15–20.) He was also informed that the residence was ready to be lowered, and he told Einbinder that he should be present during the lowering of the residence in order to ensure that he was happy with the way it lined up. (Markham Depo. Tr. 35:10–14.) Also, in reference to any contact after the lowering of the residence, Markham testified to driving by the residence sometime during the winter and calling Einbinder in order to inquire as to why not much work had been done on the residence. Markham testified further that Einbinder told him that he “had been talking to the engineer, and a few things had to be

corrected, and that he was waiting on a permit to start work again.” (Markham Depo. Tr. 40:1–6.) Markham then testified that he believed Einbinder was talking about “some form of attachment, that the house wasn’t attached to—the new framing work wasn’t attached to the concrete piers.” (Markham Depo. Tr. 40:9–11.) According to Markham’s deposition testimony, Einbinder indicated that he was happy with Markham’s work. He also emphasized that his phone call was out of curiosity only, and not out of any concern about the project. (Markham Depo. Tr. 40:14–19.)

Markham, however, also testified that on the day before lowering of the house, he “pointed out to [Piurkowski] that, which is typically in a house lowering, that the house didn’t meet, didn’t exactly match the frame of what he had built, and I asked him what side [Piurkowski] wanted me to line the house up with.” (Markham Dep. Tr. 62:22–25.) When asked if there was an issue with the house, Markham testified further that he did not say there was an issue. Instead, he said “it was very typical when you go to lower a house that the foundation isn’t exactly aligned with the house, and you move the house a quarter inch, an eighth inch in one direction or the other to get the best possible result.” (Markham Dep. Tr. 63:15–21.) Markham testified that he did not believe Piurkowski had done anything wrong as far as the house being lined up, and the alignment was off by “under three quarters of an inch, or something like that.” (Markham Dep. Tr. 64:11–21.)

In Piurkowski’s deposition, he testified that “the house was supposed to sit up on the cribbing until all this stuff was corrected, and then I get a phone call from Hilly somewhere around November or somewhere around there stating that we sat the house down, that High Caliber wanted his equipment out of there and they needed his stuff, and they sat the house down knowing that all these issues and all this stuff was terrible and they sat it down and took the cribbing out.” (Piurkowski Dep. Tr. 63:2–10.) Piurkowski testified further that “[i]t was suicide” for the house to be lowered in its unstable condition. (Piurkowski Dep. Tr. 64:18.) Einbinder testified that he remembered Markham having had “a problem with the plan [lift design].” (Einbinder Dep. Tr. 99:9–23; 101:19.)

*6 In light of these contradicting testimonies, High Caliber has failed to meet its burden of showing the nonexistence of any issue of material fact. An essential element of any negligence action is the establishment of the defendant’s conduct as a proximate cause of the plaintiff’s injury, and in Connecticut, the test of proximate cause is whether the defendant’s conduct is a substantial factor in bringing about the plaintiff’s injuries. Because the parties’ testimonies are in conflict with respect to

whether High Caliber knew of any issues with lowering the residence, a genuine issue of material fact exists regarding proximate causation. Accordingly, High Caliber's motion for summary judgment as to the negligence claims is denied.

Additionally, High Caliber maintains that because it lacked possession or control over the residence, it should not be held liable for the damages Einbinder sustained as a result of the falling of the residence. As other the parties correctly point out, however, possession or control of the premises is not an element of a negligence cause of action. Therefore, High Caliber's motion for summary judgment based on that ground fails as well.

B

High Caliber's Motion for Summary Judgment as to Einbinder, Piurkowski and the Insurance Company's Breach of Contract and Breach of Warranty Claims and Einbinder's Unjust Enrichment Claim

The insurance company alleged that the damage sustained by the Einbinder's residence was a result of High Caliber's breach of contract in that it: (a) failed to properly and directly ensure that the building was lifted and placed on the pillars in a safe manner; (b) failed to properly direct and supervise the installation of LVL beams; (c) failed to properly ensure that the LVL beams were sitting directly on the pillars before lowering the subject dwelling; and (d) negligently continued to lower the subject dwelling despite knowing or negligently failing to comprehend that the main LVL beams were not sitting on the pillars in a safe manner. Einbinder's breach of contract claim against High Caliber sets forth essentially the same allegations as those of the insurance company. Although Piurkowski did not explicitly bring a breach of contract claim against High Caliber, his apportionment complaint against High Caliber sets forth the same allegations as those listed above.

In count ten of Einbinder's first amended complaint, he alleged that High Caliber was unjustly enriched in one or more of the following ways: (a) High Caliber benefited from payments received from Einbinder; (b) High Caliber unjustly did not perform the services that Einbinder contracted and paid High Caliber for; and (c) that the failure of High Caliber to perform its services was to Einbinder's detriment.

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Rosato v. Mascardo*, 82 Conn.App. 396, 411, 844 A.2d 893 (2004).

*7 "It is an implied condition of every service contract that the service will be performed in a workmanlike manner." *Ferrigno v. Pep-Boys-Manny, Joe & Jack of Delaware, Inc.*, 47 Conn.Sup. 580, 582, 818 A.2d 903 (2003). "No authority has been found in which an implied warranty to perform the services in a workmanlike manner has been given status as an independent cause of action; rather, such a claim has been viewed as a breach of contract. Moreover, where breach of service contract claims and negligence claims have been asserted in the same action, our courts have combined such claims into one negligence claim." *New Hampshire Insurance v. Hartford Sprinkler*, Superior Court, judicial district of Hartford, Docket No. CV 054007221 (March 10, 2008, Wagner, J.T.R.) (45 Conn. L. Rptr. 177).

"Unjust enrichment applies wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract ... A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another ... With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard ... Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy ... Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) *Hospital of Central Connecticut v. Neurosurgical Associates, P.C.*, 139 Conn.App. 778, 784, 57 A.3d 794 (2012).

"An important exception exists ... to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition, and that exception has been articulated in our jurisprudence with less frequency than has the general rule. On a motion by [the] defendant for summary judgment the burden is on [the] defendant to negate each claim as framed by the complaint ... It necessarily follows that it is only [o]nce

[the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial." (Internal quotation marks omitted.) *Mott v. Wal-Mart Stores, East, LP*, 139 Conn.App. 618, 626, 57 A.3d 391 (2012).

In the present case, High Caliber has failed to meet its burden as the movant of its summary judgment to show the nonexistence of any issue of fact as to these claims of breach of contract, breach of warranty and unjust enrichment because it has failed to negate each claim as framed by the relevant complaints. "[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief ... Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *State v. Carpenter*, 275 Conn. 785, 826, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S.Ct. 1578, 164 L.Ed.2d 309 (2006). Because High Caliber has failed to address or discuss why the court should grant its motion for summary judgment as to claims of breach of contract, breach of warranty and unjust enrichment, the court will deem that High Caliber has abandoned those claims. Therefore, as High Caliber has failed to meet its burden of showing the absence of any genuine issue as to all the material facts, its motion for summary judgment as to these claims is denied.

II

Piurkowski's Motion for Summary Judgment

*8 Piurkowski moves for summary judgment as to counts two, four, six and twelve of Einbinder's intervening complaint on the grounds that these claims are barred by the applicable statutes of limitations. Einbinder filed his intervening complaint on January 13, 2010. In counts two, four, six and twelve, he brought claims of negligence, breach of warranty, breach of contract and unjust enrichment, respectively, against Piurkowski as a result of damages he sustained with the falling of his residence.

On April 30, 2012, Piurkowski filed his motion for summary judgment with a memorandum of law and exhibits on the grounds that these claims against him are barred by relevant statutes of limitations. On July 27, 2012, Einbinder filed his opposition to the summary judgment. On January 8, 2013, Piurkowski filed his reply

brief in further support of his motion for summary judgment.

In his memorandum of law in support of his summary judgment, Piurkowski argues that he only performed work on Einbinder's property in September and October of 2006. He performed remodeling and construction work on the property's front porch, shed and fencing in September and on the property's sub-framing on two days in October of 2006. Markham testified that Piurkowski performed additional work the day before the residence was lowered back onto its foundation during the "first week of December." Piurkowski argues, therefore, that even if Markham's testimony is accepted as true, Einbinder's claims against Piurkowski are barred by relevant statutes of limitations for the following reasons.

First and foremost, Piurkowski argues that he and Einbinder acknowledged through their testimonies and pleadings that the construction agreement between them was an oral contract and that there was no written contract between themselves. Secondly, he argues that Einbinder brought his negligence claim more than two years since the injury was first sustained and discovered because pursuant to General Statutes § 52-584, a negligence action shall be brought within two years from the date when the injury was first sustained or discovered or in the exercise of reasonable care should have been discovered. Piurkowski argues that the negligence claim is barred by the statute of limitations since Einbinder's intervening complaint alleges that the residence fell off of the pillars on April 24, 2007, and he testified in his deposition that he became aware of this injury within a few days but waited over two years and seven months to file such complaint.

Next, he argues that the breach of contract claim is also barred by the three-year statute of limitations since it is an oral contract between Piurkowski and Einbinder because, at the latest, Einbinder's breach of contract claim accrued during the first week of December of 2006. Accordingly, he argues further that the breach of warranty claim in count four is barred by the three-year statute of limitations as well because the breach of warranty claim at issue is based on the oral contract, and therefore, the statute of limitations for oral contracts applies. Lastly, he argues that the unjust enrichment claim is barred by its three-year statute of limitations as well because the claim is based upon an oral contract and breach of oral warranties.

*9 Einbinder counters that because his insurance company brought the original subrogation action against the defendants on September 24, 2008, his claims are well within the applicable statutes of limitations. He further

argues that because equitable principles apply to subrogation, and the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tortfeasor, he needs to be compensated for his losses before the claims of his insurer can be reached. Also, he argues that regardless of whether the six-year statute of limitations or three-year statute of limitations applies to his breach of contract claim, since his insurance company brought the claim on his behalf in the original action, his claim was timely as well. With respect to the breach of warranty claim, he argues that the six-year statute of limitations should apply, and for the same reasons as stated above, this claim was timely as well. Lastly, he argues that his claim of unjust enrichment was filed within the six-year statute of limitations. He also argues that even if the court applies the three-year statute of limitations to his unjust enrichment claim, his intervening complaint was timely filed within such period.

In his reply memorandum, Piurkowski argues that Einbinder's negligence claim is time-barred because his intervening complaint was filed more than two years after he discovered his claim, which was when he learned that his house had fallen off on April 24, 2007. He argues that Einbinder's argument that his intervening complaint relates back to September 24, 2008, the date when the insurance company allegedly filed the negligence claim on his behalf, fails. He argues that the relation back doctrine only applies to amended pleadings, not an intervening complaint, and that Einbinder failed to provide any legal authority in support of his proposition. Next, he argues that the breach of contract claim accrued when Piurkowski last worked on the site, which, at the latest, should be the first week of December in 2006—not when the house fell off of its foundation—and therefore, Einbinder's breach of contract claim is barred by the three-year statute of limitations applicable to actions based on an oral contract. He also argues that because Einbinder's memorandum of law in opposition to Piurkowski's motion for summary judgment did not contain any argument that the six-year statute of limitations for actions based on a written contract applies, Einbinder seems to have conceded that the three-year statute of limitations applies to his breach of contract claim.

Piurkowski argues that Einbinder's breach of warranty claim is time-barred by the applicable three-year statute of limitations as well for the same reasons he stated for the breach of contract claim. Lastly, Piurkowski argues that because the plaintiff brought an unjust enrichment claim based on an oral contract, the three-year statute of limitations applicable to oral contracts should apply here.

He maintains that although Einbinder may not have become aware of Piurkowski's alleged unjust enrichment until the residence fell off the pillars in April of 2007, Einbinder could have brought an unjust enrichment action as early as November 30, 2006, when Piurkowski had allegedly been paid for the incomplete work. Therefore, he argues that Einbinder's unjust enrichment claim is barred by the pertinent three-year statute of limitations.

*10 "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 statutes of limitations, namely, to protect parties from having to defend against stale claims ..." (Internal quotation marks omitted.) *Alswanger v. Smego*, 257 Conn. 58, 65, 776 A.2d 444 (2001). "To relate back to an earlier complaint, the amendment must arise from a single group of facts ... In determining whether an amendment relates back to an earlier pleading, we construe pleadings broadly and realistically, rather than narrowly and technically ... [T]he complaint must read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties ... [I]n 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 upon previous allegations." (Citation omitted; internal quotation marks omitted.) *Grenier v. Commissioner of Transportation*, 306 Conn. 523, 560, 51 A.3d 367 (2012).

"[W]hile an amendment that corrects a minor defect relates back to the date of the original complaint, one stating a separate cause of action is barred by the statute of limitations. Further, if the amendment is deemed to be a substitution or entire change of a party, it will not be permitted ... If the amendment does not affect the identity of the party sought to be described in the complaint, but merely corrects the description of that party, the amendment will be allowed ... The test applied in order to determine whether an amendment in correcting a misnomer as opposed to substituting a new party or claim requires consideration of the following: (1) whether the defendant had notice of institution of the action; (2) whether the defendant knew he was a proper party; and (3) whether the defendant was prejudiced or misled in any way." (Internal quotation marks omitted.) *Palazzo v. Delrose*, 91 Conn. App. 222, 226, 880 A.2d 169, cert. denied, 276 Conn. 912, 886 A.2d 426 (2005).

In the present case, Einbinder filed an intervening

complaint and not an amendment. Furthermore, the insurance company, in its amended complaint, alleged claims of breach of contract, breach of warranty and negligence against Piurkowski. Einbinder, however, in addition to bringing the claims of breach of contract, breach of warranty and negligence, brings a claim of unjust enrichment against Piurkowski. The insurance company filed the amended complaint seeking money for payments it made for its insured's damages. Also, and more importantly, Einbinder is a different party, and his intervening complaint was not filed with the intention to correct a misnomer in the insurance company's amended complaint. Therefore, even aside from the fact that Einbinder brought an additional claim of unjust enrichment against Piurkowski, Einbinder's argument that his claims should relate back to the date of the insurance company's amended complaint fails because the relation back doctrine does not apply to his intervening complaint.

*11 "General Statutes § 52-584 is the statute of limitations applicable in an action to recover damages for injury to the person or property caused by negligence ...: That statute imposes two specific time requirements on prospective plaintiffs. The first requires a plaintiff to bring an action within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered ... The second provides that in no event shall a plaintiff bring an action more than three years from the date of the act or omission complained of.

The statutory clock on this three-year time limit begins running when the negligent conduct of the defendant occurs." (Internal quotation marks omitted.) *Johnson v. North Branford*, 64 Conn.App. 643, 648, 781 A.2d 346, cert. denied, 783 A.2d 1028 (2001).

Therefore, because Einbinder did not file his intervening complaint until January 13, 2010 even though he learned that the residence fell off of its pillars on April 24, 2007, his negligence claim is barred by the statute of limitations. Furthermore, because the first week of December of 2006, at the latest, was the last time Piurkowski worked on the site—when the negligent conduct took place—the intervening complaint was filed more than three years from the date of act or omission complained of. Hence, Piurkowski's motion for summary judgment as to count two is granted.

With respect to the breach of contract claim, Piurkowski argues that the appropriate statute of limitations is three years pursuant to General Statutes § 52-581(a), which provides that the claim should be brought within three years after the right of action accrues. The parties also

dispute as to when the breach of contract claim began to accrue. Piurkowski argues that Einbinder's breach of oral contract claim accrued during the first week of December 2006, at the latest. Aside from Einbinder's assertion that his claims should relate back to when his insurance company filed the amended complaint, he also argues that the first date that he could have successfully maintained an action against Piurkowski is when the house fell off on April 27, 2007. Therefore, he argues, that even if the three-year statute of limitations applies to his breach of contract claim, his claim is timely.

"The mere fact that the agreement was oral ... does not conclude the inquiry because the three-year limitation period of § 52-581 only applies to executory contracts." *Martinez v. Maturana*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV 950473382S (August 12, 1998, Lager, J.) (22 Conn. L. Rptr. 516). "An executory contract is one where some performance remains to be rendered by each party and neither party has, at the time of the breach, performed completely." (Internal quotation marks omitted.) *Id.*

In the present case, both parties agree that the contract between them was an oral agreement. Also, it is undisputed that Piurkowski had completed his work by the first week of December in 2006, at the latest. The invoice reflecting the work completed by Equity Builders was dated November 28, 2006 in the amount of \$10,827.70. Einbinder's check was dated November 30, 2006 in said amount payable to Equity Builders. Therefore, because Einbinder's cause of action for breach of contract accrued when Piurkowski last worked on the site, at which point, the scheduled work was completed and paid for, the contract between Piurkowski and Einbinder is not an executory contract. Accordingly, the appropriate statute of limitations for the breach of contract claim is six years, pursuant to § 52-576. General Statutes § 52-576 provides in relevant part: "(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section." "The law concerning the time when a breach of contract action accrues is well settled. [I]n an action for breach of contract ... the cause of action is complete at the time the breach of contract occurs, that is, when the injury has been inflicted." (Internal quotation marks omitted.) *Torrington Farms Ass'n, Inc. v. Torrington*, 75 Conn. App. 570, 577, 816 A.2d 736, cert. denied, 263 Conn. 924, 823 A.2d 1217 (2003). Since January 13, 2010 falls within the six-year period from the first week of December in 2006 (or October of 2006, when Piurkowski argues was the last time he worked on the site), or when the residence fell on

April 27, 2007, the breach of contract claim was timely filed.

*12 As to the breach of warranty claims, “[i]t has been expressly held that § 52–576 is the appropriate statute of limitations for a claim of failure to perform a completed home improvement contract in a workmanlike manner.”¹ *Cacace v. Morcaldi*, 37 Conn.Sup. 735, 741, 435 A.2d 1035 (1981). The intervening complaint was brought within the six-year period, and thus, is not barred by the statute of limitations of § 52–576.

¹ The court notes that this claim of breach of warranty was not brought under the New Home Warranties Act, which has the three-year statute of limitations pursuant to § 47–121.

Lastly, “[b]ecause unjust enrichment is a form of contract action, often called ‘quasi-contract,’ the court concludes that the most applicable statute ... is the six-year contract statute. See *Fischer Co. v. Morrison*, 137 Conn. 399, 404, 78 A.2d 242 (1951).” *Gianetti v. Greater Bridgeport Individual Practice Association*, Superior Court, complex litigation docket at Waterbury, Docket No. X02 CV024001685 (July 21, 2005, Schuman, J.) (39 Conn. L. Rptr. 745). Therefore, regardless of whether the unjust enrichment claim began to accrue when Piurkowski last worked on the site in the first week of December 2006 or when the residence fell off on April 27, 2007, given the

six-year statute of limitations, Einbinder timely filed his claim of unjust enrichment.

CONCLUSION

For the foregoing reasons, High Caliber’s motion for summary judgment (# 173) is denied because genuine issues of material facts remain as to claims of negligence, breach of contract, breach of warranty and unjust enrichment brought by Einbinder, Piurkowski and the insurance company.

Additionally, Piurkowski’s motion for summary judgment (# 185) as to count two is granted, as the negligence claim is barred by the statute of limitations. The court denies Piurkowski’s motion for summary judgment as to counts four, six and twelve as the claims of breach of contract, breach of warranty and unjust enrichment were timely filed.

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BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Waterbury.

Charles BARROW et al.

v.

Thomas WALSH et al.

No. Xo2UWYCV095015180.

|
Sept. 16, 2011.

SHABAN, J.

FACTS AND PROCEDURAL HISTORY

*1 The plaintiffs, Charles Barrow ("Barrow") and Harbor Marketing, Inc. ("Harbor"), a business owned and operated by Barrow, commenced the present action by service of process against the defendants, Thomas Walsh and Brody Wilkinson, P.C., on December 1, 2008. The operative complaint is the first amended version filed on November 2, 2010. It alleges the following facts. Barrow was approached by Douglas Newman and Scott Holmes on September 11, 2005 about replacing John Kinney as a member in two new business entities, a car wash and a related real estate venture. According to the resulting agreement, which was closed on December 1, 2005, Harbor would invest in the two entities in exchange for a 15 percent share in both of them; Harbor would provide loans to the two entities; and both Barrow and Harbor would guarantee notes from the two entities to Citizens Bank. The defendants acted as counsel to the plaintiffs and had previously represented them in other matters. The defendants had also previously represented Newman, Holmes, the two entities and certain of Newman's other business entities. At all times relevant to the present action, they represented the plaintiffs, Newman, Holmes and the two entities until the plaintiffs retained other counsel in March 2007.

Plaintiffs allege that contrary to the representations made to them by the defendants, the two entities were not viable, and they were therefore damaged by their

participation in the investment and loan transaction. Their complaint sounds in two counts against both defendants. The first count is for legal malpractice and alleges that the defendants were negligent in their representation of the plaintiffs because they failed, in part, to disclose certain information and provide certain advice. The second count alleges negligent misrepresentation by virtue of an October 7, 2005 letter of understanding from the defendants to the plaintiffs in which the defendants specifically represented to the plaintiffs that they could not advise any of the parties involved in the investment and loan transaction if their interests ever became adverse. The plaintiffs allege that representation was false and negligent because the parties' interests were adverse at all times relevant to the present action.

The defendants filed the present motion for summary judgment, a memorandum of law in support thereof and exhibits on April 18, 2011. The plaintiffs in turn filed an opposition to the motion, a memorandum of law in support thereof and exhibits on May 25, 2011. The defendants then filed a reply memorandum and exhibits on June 8, 2011. The court heard the matter on June 13, 2011.

DISCUSSION

The defendants move for summary judgment on the following grounds. First, they are entitled to a judgment as a matter of law on the entirety of the complaint because there is no genuine issue of material fact about whether they breached the applicable standard of care or caused the plaintiffs' alleged damages. A plaintiff in a legal malpractice action must provide expert witness testimony in order to establish the applicable standard of care and whether the defendant caused the plaintiffs' alleged damages. The defendants contend the plaintiffs in the present action are unable to provide such testimony because David Erdos, their disclosed expert for their legal malpractice allegations, is unqualified, cannot articulate the applicable standard of care or causation and lacks an adequate factual foundation for his opinions. They claim this is evident in the opinions that he rendered during his deposition, and that because of this his expert witness testimony is inadmissible, and this in turn entitles defendants to a judgment as a matter of law because the plaintiffs lack the expert witness testimony required to support their legal malpractice action.¹

¹ In support of the present motion, the defendants have

submitted transcript pages from Erdos' deposition (Def.'s Ex. H); correspondence among the parties involved in the investment and loan transaction (Def.'s Ex. 1, 2, 3); transcript pages from Barrow's deposition (Def.'s Ex. 1, 2, 3, 4, C); the North Branford Car Care, LLC operating agreement (Def.'s Ex. 4); an affidavit in which defense counsel attests to the improper and irregular conduct of the plaintiffs, their counsel and Erdos in preparing for and conducting days three and four of Erdos' deposition (Def.'s Ex. 5); transcript pages from Walsh's deposition (Def.'s Ex. A); transcript pages from Newman's deposition (Def.'s Ex. B, D); transcript pages from Holmes' deposition (Def.'s Ex. E); transcript pages from the deposition of Walter Leask, Barrow's accountant (Def.'s Ex. F); and transcript pages from the deposition of Christopher Neubert, Barrow's financial advisor (Def.'s Ex. G).

*2 Furthermore, the defendants are entitled to a judgment as a matter of law on both counts of the complaint because the testimony that Erdos gave on days three and four of his deposition is irrevocably tainted and would be extremely prejudicial to the defendants if admitted into evidence. This testimony, in which Erdos expressed opinions that were completely different from those he had expressed on days one and two of his deposition, is tainted because it is the product of improper coaching and improper preparation.² Defendants ask that in the event the court denies the present motion, it should nonetheless enter an order limiting Erdos' testimony to the opinions he expressed on days one and two of his deposition.

² According to defense counsel's affidavit, plaintiffs' counsel refused to immediately proceed with his cross-examination of Erdos after defense counsel completed his direct examination on February 8, 2011, day two of Erdos' deposition. Def.'s Ex. 5. Plaintiffs' counsel did not begin his cross-examination of Erdos until more than three weeks later. *Id.* During the interim, Erdos had lengthy meetings with both the plaintiffs and their counsel and reviewed materials that he had not reviewed before either his disclosure as an expert or days one and two of his deposition. *Id.* He subsequently rendered opinions during days three and four of his deposition that were very different from those he had rendered on days one and two. *Id.* Neither Barrow nor Erdos would provide any details of their meetings when they were asked to do so during their respective depositions. *Id.*

The final ground on which the defendants move for summary judgment is that they are entitled to a judgment as a matter of law on count two, even if the court denies the present motion with respect to the entirety of the complaint, because there is no genuine issue of material

fact about whether the representation at issue was false and therefore a negligent misrepresentation.

The plaintiffs oppose the present motion by arguing first that it is procedurally improper because it seeks to resolve evidentiary issues that should instead be raised by a motion to preclude. Second, they contend Erdos is qualified, has sufficiently articulated both the applicable standard of care and causation and has based his opinions upon an adequate factual foundation. Third, the defendants lack legal support for their argument that the testimony given by Erdos on days three and four of his deposition is irrevocably tainted and would therefore be extremely prejudicial to the defendants if admitted into evidence. Plaintiffs also argue that Erdos, the plaintiffs and their counsel prepared for days three and four of Erdos' deposition in standard fashion, and the defendants could have requested the court to order that Erdos be sequestered or prevented from engaging in additional preparation. Finally, the negligent misrepresentation count (count two) should survive the present motion because "[t]he Defendant after putting his representation in writing in a letter to the Plaintiffs did not act as he represented he would and the plaintiff is entitled to establish the elements of negligent misrepresentation at trial through his evidence."³

³ In support of their opposition to the present motion, the plaintiffs submit the following exhibits: transcript pages from Barrow's deposition (Pl.'s Ex. A); transcript pages from Walsh's deposition (Pl.'s Ex. B); the October 7, 2005 letter of understanding from Walsh to Barrow (Pl.'s Ex. C); a subordination agreement between Barrow and Citizens Bank (Pl.'s Ex. E); an affidavit of plaintiffs' counsel (Pl.'s Ex. H); and transcript pages from Erdos' deposition (Pl.'s Ex. I).

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law ... The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Citations omitted.) *Wilson v. New Haven*, 213 Conn. 277, 279, 567 A.2d 829 (1989). "However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury ... the moving party for summary judgment is held to a strict standard ... of demonstrating his entitlement to summary judgment." (Citation omitted; internal quotation marks omitted.) *Kakadelis v. DeFabritis*, 191 Conn. 276, 282, 464 A.2d 57 (1983). "Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in

the ordinary manner.” (Internal quotation marks omitted.) *Fogarty v. Rashaw*, 193 Conn. 442, 446, 476 A.2d 582 (1984).

*3 “In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact ... The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact ... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent.” (Internal quotation marks omitted.) *Ramirez v. Health Net of the Northeast, Inc.*, 285 Conn. 1, 10–11, 938 A.2d 576 (2008). “[T]he [movant] is required to support its motion with supporting documentation ...” *Heyman Associates No. 1 v. Insurance Co. of Pennsylvania*, 231 Conn. 756, 796, 653 A.2d 122 (1995). “[O]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment, and the applicable provisions of our rules of practice contemplate that supporting [or opposing] documents ... be made under oath or be otherwise reliable.” (Internal quotation marks omitted.) *Rockwell v. Quintner*, 96 Conn.App. 221, 233, n. 10, 899 A.2d 738, cert. denied, 280 Conn. 917, 908 A.2d 538 (2006).

“[T]rial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established.” (Internal quotation marks omitted.) *Manufacturers Small Business Investment Co. of Connecticut, Inc. v. Empire Auto Body, Inc.*, 3 Conn.Cir.Ct. 613, 620, 222 A.2d 592 (1966). “[S]ummary judgment procedure was designed essentially to provide for the disposal of frivolous defenses and to prevent parties from using formal pleadings as instruments of delay ... [T]he procedure was not intended as a substitute for the trial of issues at an evidentiary hearing, even though the parties insist that they are entitled to judgment as a matter of law.” *Pine Point Corp. v. Westport Bank and Trust Co.*, 164 Conn. 54, 55–56, 316 A.2d 765 (1972).

According to the defendants, they are not moving for summary judgment on the ground “that there are no issues of disputed fact with respect to the underlying merits of this case. Rather, this motion is predicated on ... two specific bases ... first, summary judgment is proper

because Plaintiffs are unable to offer sufficient expert testimony to sustain their burden of proof, as is required in a legal malpractice action in Connecticut; and second, there can be no negligent misrepresentation in the absence of a false statement. If Plaintiffs cannot get past these two preliminary hurdles ... then there is no need to address any of the underlying issues of fact.”

*4 As noted above, count one alleges legal malpractice. “[P]rofessional negligence or malpractice ... [is] defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services.” (Internal quotation marks omitted.) *Vona v. Lerner*, 72 Conn.App. 179, 187, 804 A.2d 1018 (2002), cert. denied, 262 Conn. 938, 815 A.2d 138 (2003). “[A] plaintiff in an attorney malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney’s wrongful act or omission; (3) causation; and (4) damages.” *Mayer v. Biafore, Florek & O’Neill*, 245 Conn. 88, 92, 713 A.2d 1267 (1998). Furthermore, “the plaintiff must produce expert testimony (1) that a breach of the professional standard of care has occurred, and (2) that the breach was the proximate cause of the injuries suffered by the plaintiff.” *Somma v. Gracey*, 15 Conn.App. 371, 374–75, 544 A.2d 668 (1988). “The requirement of expert testimony in legal malpractice cases serves to assist lay people, such as members of the jury and the presiding judge, to understand the applicable standard of care and then evaluate the defendant’s actions in light of that standard.” *Vona v. Lerner*, *supra*, 72 Conn.App. at 188, 804 A.2d 1018.

“To be qualified as an expert witness in a legal malpractice matter, an attorney must be found to possess special knowledge beyond that exhibited by every attorney simply as a result of membership in the legal profession ... The test is whether the proposed expert knows the applicable standard of care and can evaluate the defendant’s conduct against that standard ... Our Supreme Court has held that an expert must show more than a casual familiarity with the standards of the specialty in question ... It is the knowledge that the witness possesses, not the source of that knowledge, that determines eligibility to provide expert testimony ... In order to render an expert opinion, the witness must be qualified to do so, and there must be a factual basis for the opinion.” (Citations omitted; internal quotation marks omitted.) *Glaser v. Pullman & Comley, LLC*, 88 Conn.App. 615, 623, 871 A.2d 392 (2005).

The defendants cite to several cases to demonstrate that a motion for summary judgment may be granted in a legal malpractice action when the plaintiff has not provided sufficient expert witness testimony. The cases to which the defendants cite, however, are distinguishable. See, e.g., *Marciano v. Kraner*, 126 Conn.App. 171, 10 A.3d 572, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011) (motion for directed verdict granted where plaintiff failed to introduce admissible expert witness testimony); *Dixon v. Bromson & Reiner*, 95 Conn.App. 294, 898 A.2d 193 (2006) (motion for summary judgment granted where plaintiff presented no expert witness testimony); *Anderson v. Schoenhorn*, 89 Conn.App. 666, 874 A.2d 798 (2005) (motion for summary judgment granted where plaintiff disclosed five expert witnesses, three of whom refused to testify and two of whom were defendants, whose ability to serve in such capacity remained undecided and whose opinions did not support plaintiff's position); *Celentano v. Grundberg*, 76 Conn.App. 119, 818 A.2d 841, cert. denied, 264 Conn. 904, 823 A.2d 1220 (2003) (motion for directed verdict granted where plaintiff presented no expert witness testimony); *Vona v. Lerner*, *supra*, 72 Conn.App. at 179, 804 A.2d 1018 (motion for directed verdict granted where plaintiffs provided insufficient expert witness testimony during trial on issue of causation); *Solomon v. Levett*, 30 Conn.App. 125, 618 A.2d 1389 (1993) (motion for directed verdict granted where plaintiff presented no expert witness testimony); *Fortin v. Hartford Underwriters Ins. Co.*, Superior Court, complex litigation docket at Hartford, Docket No. X04 CV 03 4034596, 2009 WL 659260 (February 19, 2009, Shapiro, J.) (motion for summary judgment granted where plaintiff could not establish elements of legal malpractice claim after court granted concurrently filed motion to preclude plaintiff's expert witness); *Demoraes v. Nakian*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 06 5002049, 2008 WL 4249794 (August 19, 2008, Tobin, J.) (judgment entered for defendant because plaintiff's evidence, which included expert witness testimony, was insufficient to establish causation); *Rachstein, Norman & Buchman, LLP v. Sakon*, Superior Court, judicial district of New Britain, Docket No. CV 02 0515919, 2005 WL 3664827 (December 19, 2005, Shapiro, J.) (motion for summary judgment granted where plaintiff disclosed expert in conclusory fashion, without reference to qualifications and proposed testimony on standard of care and causation, and where plaintiff provided no evidence of expert's opinion in opposing motion).

*5 The defendants in the present action are not moving for a directed verdict on the ground that the plaintiffs' trial evidence, including Erdos' expert witness testimony,

cannot support the plaintiffs' legal malpractice claim. Nor have the defendants filed any evidentiary motions to preclude the admission of Erdos' expert witness testimony. The defendants instead ask the court, on a motion for summary judgment, to determine the admissibility of any expert witness testimony that Erdos has given and may later give, not only with respect to the present motion but also with respect to all future proceedings in the present action. A court's function on a motion for summary judgment is limited to "determin[ing] whether there is a genuine issue as to any material fact, but not to decide that issue if it does exist until the parties are afforded a full hearing." *Town Bank and Trust Co. v. Benson*, 176 Conn. 304, 306, 407 A.2d 971 (1978).⁴ Determining whether Erdos is able, properly prepared and qualified to render expert opinions on, among other things, the duty and causation elements of the plaintiffs' legal malpractice claim is not akin to determining whether there are any genuine issues regarding any material facts underlying the claim. Furthermore, the cases upon which the defendants rely for the proposition that they may seek summary judgment on the ground of insufficient expert witness testimony are inapposite, because they involve plaintiffs who, either affirmatively or by virtue of a motion to preclude, failed to offer any expert witness testimony. See, e.g., *Fortin v. Hartford Underwriters Ins. Co.*, *supra*, Superior Court, Docket No. X04 CV 03 4034596; *Rachstein, Norman & Buchman, LLP v. Sakon*, *supra*, Superior Court, Docket No. CV 02 0515919. The court thus declines to consider the admissibility of Erdos' expert witness testimony on the present motion, given the lack of precedent for doing so and the well established summary judgment standards that limit the scope of the court's consideration.

⁴ In contrast, "[t]he purpose of a motion in limine is to exclude irrelevant, inadmissible and prejudicial evidence from trial ... A trial court should exclude evidence if it would create undue prejudice and threaten an injustice if admitted." (Citation omitted; internal quotation marks omitted.) *State v. La Sacco*, 26 Conn.App. 439, 444, 602 A.2d 589 (1992).

The court likewise will not address the defendants' argument that they are entitled to a judgment as a matter of law on both counts of the complaint due to the impropriety of Erdos' testimony from days three and four of his deposition. The question of whether the subject deposition testimony is irrevocably tainted is different than the question of whether genuine issues of material fact exist with respect to both counts of the complaint. Answering it on the present motion would thus be procedurally inappropriate. The defendants rely on

Practice Book § 13-4 in arguing their entitlement to summary judgment due to the impropriety of the subject deposition testimony. Practice Book § 13-4(h) provides, however, that “[a] judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that (1) the sanction of preclusion, including any consequence thereof on the sanctioned party’s ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions.” Therefore, the proper procedural vehicle for seeking sanctions against the plaintiffs with respect to the subject deposition testimony would have been an evidentiary motion, such as a motion to preclude or a motion for sanctions.⁵

⁵ The court’s analysis here should not be considered as its acceptance of the plaintiffs’ argument that Erdos’ testimony on days three and four of his deposition and the circumstances surrounding it are unobjectionable.

*6 The defendants have represented to the court that the proximity between the delayed completion of Erdos’ deposition and the scheduling order deadline for the filing of dispositive motions necessitated the filing of a motion for summary judgment instead of an evidentiary motion. Their position is unavailing. Procedural impropriety is not excused by strategic decision making. Furthermore, the defendants could have filed the present motion with a related motion to preclude, as did the defendant in *Fortin v. Hartford Underwriters Ins. Co.*, *supra*, Superior Court, Docket No. X04 CV 03 4034596.

The court will now address the motion with respect to count two of the complaint, which sounds in negligent misrepresentation.⁶ “Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result.” *Nazami v. Patrons Mutual Ins. Co.*, 280 Conn. 619, 626, 910 A.2d 209 (2006). “The test of negligent misrepresentation involves the breach of a duty to exercise reasonable care in communicating information upon which another may reasonably be expected to rely in conducting their affairs. Under this principle, one making a representation or communication may even believe [the] representation or communication to be true, but because of his lack of reasonable care in making that representation or communication it is in fact false.”

Martineau v. LaRosa, Superior Court, judicial district of New Haven, Docket No. FA 89 0279189 (August 23, 2005, Frazzini, J.). “[F]alsity is an essential element of a negligent misrepresentation claim ...” *Daley v. Aetna Life and Casualty Co.*, 249 Conn. 766, 792, 734 A.2d 112 (1999).

⁶ Implicit in the defendants’ first ground for summary judgment is the argument that count two properly sounds in legal malpractice, not negligent misrepresentation, and therefore requires the plaintiff to offer expert witness testimony on the issues of duty and causation. “A fundamental tenet in our law is that the plaintiff’s complaint defines the dimensions of the issues to be litigated.” *Pergament v. Green*, 32 Conn.App. 644, 650, 630 A.2d 615, cert. denied, 228 Conn. 903, 634 A.2d 296 (1993). The court concludes, based on its examination of the complaint, that count two properly sounds in negligent misrepresentation, not legal malpractice, given that the plaintiffs base their theory of liability upon how they were injured by the falsity of the subject representation, not by how the defendants failed to exercise due care in providing legal services to the plaintiffs.

“Although the general rule is that a misrepresentation must relate to an existing or past fact, there are exceptions to this rule, one of which is that a promise to do an act in the future, when coupled with a present intent not to fulfill the promise, is a false representation.” *Paiva v. Vanech Heights Construction Co.*, 159 Conn. 512, 515, 271 A.2d 69 (1970). “The law is well established that a representation of one’s intent to do an act which is false at the time it was made constitutes a misrepresentation. *Meyers v. Cornwell Quality Tools, Inc.*, 41 Conn.App. 19, 29, 674 A.2d 444 (1996). See also Restatement (Second), Torts § 525, comment (c).” *Crist v. O’Keefe & Associates*, Superior Court, complex litigation docket at Waterbury, Docket No. X06 CV 01 0176326 (August 31, 2005, Alander, J.). “Whether evidence supports a claim of ... negligent misrepresentation is a question of fact ...” (Internal quotation marks omitted.) *Sovereign Bank v. Licata*, 116 Conn.App. 483, 502, 977 A.2d 228, cert. granted in part, 116 Conn.App. 483, 977 A.2d 228 (2009).

*7 The specific representation at issue is contained in a letter from Walsh to Barrow and his wife dated October 7, 2005, in which Walsh wrote: “You have requested that I represent North Branford Car Care, L.L.C. and 2381 Foxon Road, L.L.C. (the ‘Company’) with respect to a loan by you to the Company as well as your potential investment in the Company. As we are both aware, this firm has acted as your personal legal counsel as well as having served as legal counsel to the Company and to one

of its owners, Doug Newman. *As such, to the extent your interests in this transaction should later become adversarial to those of the Company and its owners, this firm can neither advise you, the Company nor Mr. Newman with respect to any such disagreements.*" (Emphasis added.) Def.'s Ex. 2; Pl.'s Ex. C. The plaintiffs allege that they were injured by their reliance upon the representation because they believed that they would not need to seek independent counsel until the defendants ended their involvement in the investment and loan transaction.

The defendants argue that there is no genuine issue of material fact about whether the representation was false because the parties were never engaged in litigation, (i.e., an "adversarial," setting) at any time relevant to the present action. They also argue that there is no genuine issue of material fact about whether the plaintiffs reasonably relied upon the alleged misrepresentation to their detriment, because Barrow was repeatedly told that he should have another lawyer review the documentation for the investment and loan transaction. The plaintiffs in turn argue that the defendants are not entitled to summary judgment on count two because "adversarial" can be understood to mean "adverse," the parties' interests were adverse at all times relevant to the present action and genuine issues of material fact therefore remain with respect to the falsity of the subject representation.

⁷ In support of this argument, the plaintiffs cite to *Kuhns v. Jacobson, Brown, Tillinghast, Lahan & King, P.C.*, Superior Court, judicial district of Litchfield, Docket No. CV 94 0064249 (February 8, 1995, Pickett, J.) (13 Conn. L. Rptr. 442, 445), in which the court challenged the plaintiffs' description of their alleged transactions as "non-adversarial," for the reason that "at least one commentator has noted that [t]ransactions involving contractual negotiations do involve parties with adverse interests." (Internal quotation marks omitted.)

In *Murray v. Santa Fuel, Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV 97 0342601 (April 1, 1999, Skolnick, J.), the court denied the defendant's motion for summary judgment on the plaintiff's negligent misrepresentation claim where the plaintiff alleged that he was fraudulently induced to accept the defendant's employment offer by the subject representations. The defendant moved for summary judgment on the ground that there was "no evidence that any of the statements ... were false and known to be false when made," given that the subject representations were "inspirational or cheerleading comments rather than factual statements." *Id.* The court concluded that it "need not decide whether the allegations ... state a claim for ... negligent

misrepresentation. Whether evidence supports a claim of ... negligent misrepresentation is a question of fact ... The court cannot make factual rulings in favor of the defendant as a matter of law unless the alleged misrepresentations are so obviously deficient that no reasonable person would find in favor of the plaintiff. See *Miller v. United Technologies Corp.*, [233 Conn. 732, 751, 660 A.2d 810 (1995)]. Because reasonable minds can differ over the import of the alleged misrepresentations here, the defendant's motion for summary judgment ... is denied." (Citation omitted; internal quotation marks omitted.) *Id.*

*8 The court in the present action similarly concludes that reasonable minds could differ over the import of the subject representation, given the competing interpretations offered by the parties on the present motion, and the reasonableness of the plaintiffs' alleged reliance upon it. "Whether or not ... representations contained false information is a question of fact ... Furthermore, questions of motive, intent and subjective feelings and reactions are particularly inappropriate for resolution in a motion for summary judgment. See, e.g., *Nolan v. Borkowski*, 206 Conn. 495, 504-05, 538 A.2d 1031 (1988)." *Pesce v. Connecticut National Bank*, Superior Court, judicial district of Litchfield, Docket No. 0054542 (July 21, 1992, Dranginis, J.). The present motion must therefore be denied with respect to count two because the defendants have not met their initial burden of "making a showing that it is quite clear what the truth is" with respect to the falsity of the subject representation and whether the plaintiffs reasonably relied upon it, to their detriment.

CONCLUSION

The defendants have not met their initial burden because they have not established that no genuine issues of material fact exist and that they thus are entitled to a judgment as a matter of law. Accordingly, their motion for summary judgment on the entirety of the complaint is denied. Also, the relief requested by the defendants to limit the expert's opinion testimony to days one and two of his deposition is denied without prejudice as this motion is not the appropriate vehicle for granting such relief.

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

Alyssa BUTTRICK

v.

Nancy WILSON.

No. CV095026936.

April 17, 2012.

WILSON, J.

FACTS

*1 This premises liability action arises from injuries allegedly sustained during a house party attended by teenagers. On May 20, 2009, the plaintiff, Alyssa Buttrick, filed a revised complaint alleging that on November 21, 2007, she was an "invitee" at a party hosted by the defendant, Nancy Wilson, on premises that the defendant owned and controlled, and that while walking through the backyard of the property, she was cut by "a bayonet type slashing blade" that was "likely to lacerate persons walking by." The plaintiff further alleges that her injuries were caused by the defendant's negligence in that the defendant (1) maintained a dangerous, defective and unsafe condition on her property; (2) failed to inspect or monitor her property for possibly dangerous conditions; (3) failed to remove the dangerous condition; and (4) failed to exercise the care of a reasonably prudent person under the circumstances. The defendant, in turn, filed an answer on January 13, 2010, admitting that she owned and controlled the property in question but denying the remaining allegations or leaving them to the plaintiff's proof. The defendant also asserted in a special defense that if the plaintiff did in fact suffer injuries in the manner alleged, it was caused by the plaintiff's own carelessness and not by the defendant's negligence.

The defendant thereafter moved for summary judgment on December 12, 2011, on the grounds that there are no

genuine issues of material fact in regard to whether (1) the plaintiff was a trespasser upon the defendant's land; (2) the defendant did not have actual or constructive notice of the dangerous condition that allegedly caused the plaintiff's injuries; or (3) the proximate cause of the plaintiff's injuries was her own intervening criminal act; and, based on any of the foregoing, the defendant is entitled to judgment as a matter of law. In support of her motion, the defendant filed a memorandum of law, her own affidavit and excerpts from a certified transcript of the plaintiff's August 21, 2009 deposition.¹ On February 7, 2012, the plaintiff filed a memorandum in opposition. The defendant then filed a reply on February 24, 2012, to which an affidavit of her son, Tyler Wilson, was attached.

¹ Our Appellate Court has noted that "the Superior Court has been split as to whether deposition testimony, either uncertified or certified, may be considered for the purposes of a motion for summary judgment ... Since our decision in *Esposito [v. Wethered]*, 4 Conn.App. 641, 496 A.2d 222 (1985)], we have not determined it to be improper for a trial court to consider deposition testimony in ruling on a motion for summary judgment." *Schratwieser v. Hartford Casualty Ins. Co.*, 44 Conn.App. 754, 756 n. 1, 692 A.2d 1283, cert. denied, 241 Conn. 915, 696 A.2d 340 (1997).

DISCUSSION

"[M]otion[s] for summary judgment [are] designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." *Wilson v. New Haven*, 213 Conn. 277, 279, 567 A.2d 829 (1989). "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Mazurek v. Great American Ins. Co.*, 284 Conn. 16, 26, 930 A.2d 682 (2007). "[T]he 'genuine issue' aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred ... A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

*2 “The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact ... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent ... When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue ... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue.” (Internal quotation marks omitted.) *Zielinski v. Kotsoris*, 279 Conn. 312, 318–19, 901 A.2d 1207 (2006). “[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way.” (Internal quotation marks omitted.) *Dugan v. Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003).

The evidence submitted by the defendant in this proceeding, which is unopposed by the plaintiff, sets forth the following facts in regard to the event that gave rise to this lawsuit. On November 21, 2007, the defendant was the owner of 22 Alex Drive in Madison, the premises in question. (Defendant’s Affidavit, ¶ 3.) That evening the defendant was out of town and had left her teenage children, Tyler and John, alone at home. (Defendant’s Affidavit, ¶¶ 4–5; Tyler Wilson’s Affidavit, ¶¶ 3–4.) The defendant, prior to leaving, had instructed her children not to have any guests at the house while she was away. (Defendant’s Affidavit, ¶ 6; Tyler Wilson’s Affidavit, ¶¶ 6–7.) Electing not to heed his mother’s instruction, Tyler threw a party. (Plaintiff Deposition Transcript, pp. 41–42; Tyler Wilson’s Affidavit, ¶ 8.) Alcohol was served and consumed at this party. (Plaintiff’s Deposition Transcript, p. 42.) Underage minors were in attendance. (Plaintiff’s Deposition Transcript, p. 46.) Among the attendees was the plaintiff, who arrived at the premises around 8:30 p.m. (Plaintiff’s Deposition Transcript, p. 41.) The plaintiff and Tyler were schoolmates who had a “friendly” but not a close relationship. (Plaintiff’s Deposition Transcript, pp. 18–19; Tyler Wilson’s Affidavit, ¶ 10.) While at the party, the plaintiff socialized and consumed alcohol. (Plaintiff’s Deposition Transcript, pp. 44–45.) Between 9:30 p.m. and 10:00 p.m., the plaintiff was on the deck drinking a beer and talking to a friend when she heard

people from inside the house say that the police were on the premises. (Plaintiff’s Deposition Transcript, pp. 41, 44–45.) Although the plaintiff subsequently heard police officers ordering people not to run, the plaintiff either ran or “walk[ed] fast” toward a poorly-lit wooded area behind the house along with “a lot” of other partygoers. (Plaintiff’s Deposition Transcript, pp. 43–49, 72.) The plaintiff headed towards the woods because she knew that there were houses on the other side. (Plaintiff Deposition Transcript, p. 47.) As described by the plaintiff: “I was running; and then as soon as I went to enter the woods I tripped over a log, and I landed on the piece that went into my leg.” (Plaintiff’s Deposition Transcript, p. 50.) The object that allegedly injured the plaintiff’s leg was located on the defendant’s property. (Defendant’s Affidavit, ¶ 11.) Additional facts will be set forth as necessary.

I

*3 The defendant first argues that she is entitled to summary judgment because the plaintiff entered her property without her consent or knowledge and, therefore, the plaintiff was a trespasser to whom the defendant is not liable for negligence. The plaintiff denies that she was a trespasser. The plaintiff claims that Tyler was acting as the defendant’s “agent in effect” when he invited guests over and, moreover, it was expected that he would disregard the defendant’s prohibition against guests because “it is the way teenagers all too often behave ...”

“In a negligence action, the plaintiff must meet all of the essential elements of the tort in order to prevail.” *LaFlamme v. Dallessio*, 261 Conn. 247, 251, 802 A.2d 63 (2002). “The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury .” *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994). “Contained within the first element, duty, there are two distinct considerations ... First, it is necessary to determine the existence of a duty, and [second], if one is found, it is necessary to evaluate the scope of that duty.” (Internal quotation marks omitted.) *Baptiste v. Better Val-U Supermarket, Inc.*, 262 Conn. 135, 138, 811 A.2d 687 (2002).

Our Supreme Court has routinely expressed that “the test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant’s position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the

defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case ... The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Citations omitted; internal quotation marks omitted.) *Mendillo v. Board of Education*, 246 Conn. 456, 483–84, 717 A.2d 1177 (1998). Notwithstanding this general test for duty, Connecticut's premises liability law has long provided that "[t]he status of an entrant on another's land, be it trespasser, licensee or invitee, determines the duty that is owed to the entrant while he or she is on a landowner's property." *Salaman v. Waterbury*, 246 Conn. 298, 304–05, 717 A.2d 161 (1998); see *Morin v. Bell Court Condominium Assn., Inc.*, 223 Conn. 323, 330–31, 612 A.2d 1197 (1992) (Connecticut "continue[s] to adhere to the proposition that the defendant's duty is based on the entry status of the particular person in question"). "Ordinarily, the status of one who sustains injury while upon the property of another is a question of fact." *Roberts v. Rosenblatt*, 146 Conn. 110, 112, 148 A.2d 142 (1959); *Morin v. Bell Court Condominium Association*, 25 Conn. App. 112–15, 593 A.2d 147 (1991), aff'd 223 Conn. 323, 612 A.2d 1197 (1992). "Where, however, the facts essential to the determination of plaintiff's status are not in dispute, a legal question is presented." *Morin v. Bell Court Condominium Association, supra*, 25 Conn.App. at 115.

*4 "In general, there is an ascending duty owed by the possessor of land to persons on the land based on their entrant status, i.e., trespasser, licensee or invitee." (Internal quotation marks omitted.) *Considine v. Waterbury*, 279 Conn. 830, 859, 905 A.2d 70 (2006). A trespasser "is one who enters upon land without the consent of the possessor to do so." *Shaprio v. Hillside Village Condominium Assn.*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV 00 0274597 (March 7, 2003, Wiese, J.) (34 Conn. L. Rptr. 262, 264); see also 2 Restatement (Second), Torts § 329 (1965).² "One in possession of property ordinarily owes no duty to trespassers, either infant or adult, to keep the property in a reasonably safe condition for their use, since he may properly assume that they will not be there." *Greene v. DiFazio*, 148 Conn. 419, 422, 171 A.2d 411 (1961). An intermediate duty is owed by a possessor of land to a licensee, "a person who is privileged to enter to remain upon land by virtue of the possessor's consent ... The duty that a landowner owes to a licensee does not ordinarily encompass the responsibility to keep the property in a reasonably safe condition, because the licensee must take the premises as he [or she] finds them ... If the licensor actually or constructively knows of the licensee's presence on the premises, however, the licensor must use reasonable care both to refrain from actively

subjecting him [or her] to danger and to warn him [or her] of dangerous conditions which the possessor knows of but which he [or she] cannot reasonably assume that the licensee knows of or by reasonable use of his [or her] faculties would observe." (Citation omitted; internal quotation marks omitted.) *Salaman v. Waterbury, supra*, 246 Conn. at 305.

² Section 329 of the Restatement (Second) of Torts provides: "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise."

A possessor of land owes the highest duty to an invitee. "A possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe ... In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover." (Citations omitted; internal quotation marks omitted.) *McDermott v. Calvary Baptist Church*, 68 Conn.App. 284, 294, 791 A.2d 602 (2002), aff'd, 263 Conn. 378, 819 A.2d 795 (2003). Connecticut recognizes three distinct types of invitee: "Invitees fall into certain general categories. A public invitee 'is a person who is invited to enter and remain on land as a member of the public for a purpose for which the land is held open to the public.' Restatement (Second), 2 Torts § 332. A business invitee 'is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land.' Restatement (Second), 2 Torts § 332. Section 52–557a of the General Statutes, which provides that '[t]he standard of care owed to a social invitee shall be the same as the standard of care owed to a business invitee,' in effect, recognizes a third kind of invitee, namely, the social invitee." *Corcoran v. Jacovino*, 161 Conn. 462, 465, 290 A.2d 225 (1971). While at common law social guests were generally considered licensees; see 2 Restatement (Second), *supra*, § at 330, comment (h); "[t]he language of § 52–557a indicates rather that the legislature intended to require a landowner to exercise the same standard of care toward every person whom he 'invited' onto his premises, whether the owner extended such an invitation for business or for pleasure." *Furstein v. Hill*, 218 Conn. 610, 622, 590 A.2d 939 (1991).

*5 The plaintiff alleges that she was on the defendant's property "as an invitee at a party, being hosted by [the] defendant and her family" and that the defendant "failed to remove the dangerous condition" at issue. (Complaint, ¶¶ 2, 6.) Reading the revised complaint "broadly and

realistically” and “in such a way as to give effect to the pleading with reference to the general theory [on] which it proceeded”; (internal quotation marks omitted) *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 140, 998 A.2d 730 (2010); the plaintiff’s allegation carries the necessary implication that she was a social invitee who was on the defendant’s premises for the defendant’s pleasure and who, therefore, was owed the highest standard of care. See *Doublewal Corp. v. Toffolon*, 195 Conn. 384, 390, 488 A.2d 444 (1985) (“[t]he proposition that the pleadings frame the issues before a trial court is well established in our case law”). Contending that the plaintiff was, in contrast, a trespasser who was on the defendant’s premises without the defendant’s knowledge or consent, the defendant submits her affidavit, wherein she attests that: (1) she does not know the plaintiff and has never invited the plaintiff to her house; (2) she was out of town on the night of the party; (3) she had forbidden her children to invite guests to the house while she was away; and (4) she had no knowledge that they had nonetheless planned to do so. (Defendant’s Affidavit, ¶¶ 4–9.) The defendant also relies on the affidavit of her son, Tyler, who testifies that (1) his father and the defendant are divorced and his father did not reside at 22 Alex Drive on the evening in question; (2) prior to leaving town, the defendant specifically instructed him to not invite any guests to the house while she was away; and (3) although he disregarded the defendant’s instruction by “invit[ing] friends over,” he did not invite the plaintiff to the party and, in fact, he “did not know [the plaintiff] more than in passing and had never socialized with her outside of school.” (Tyler Wilson’s Affidavit, ¶¶ 3–10.) Consistent with these facts, the plaintiff testified that she has never met the defendant and had never been to her house prior to the night of the party. (Plaintiff’s Deposition Transcript, p. 19.) The plaintiff testified, however, that while Tyler did not expressly say to her that she was invited to the party, she nevertheless believed that she had been invited because her friend, “Sara,” who was also a friend of Tyler, told the plaintiff during a football game prior to the party that “[they] were invited over to his house.” (Plaintiff’s Deposition Transcript, pp. 31–32.)

The foregoing evidence establishes that, on the evening in question, the defendant had no desire to receive the plaintiff as a guest at her home and Tyler did not directly invite the plaintiff to the party. These facts, however, do not conclusively establish the plaintiff’s entry status. The defendant’s own evidence reveals that the plaintiff and Tyler were acquaintances from school who had friends in common, that the plaintiff was at Tyler’s party for a prolonged period of time and that she actively participated in various social aspects of the party. These facts suggest

that Tyler had invited the plaintiff to the party even if he did not directly inform her of an invitation. Furthermore, the salient inquiry here is whether *the defendant* had invited the plaintiff. In this vein, the defendant’s subjective wishes are irrelevant. “In determining whether a particular person is an invitee, the important thing is the desire or willingness to receive that person which a reasonable man would understand as expressed by the words or other conduct of the possessor. *It is immaterial that the person is one whom the possessor is not willing to receive as an invitee if the possessor’s words or other conduct are understood, and would be understood by a reasonable man, as indicating the possessor’s willingness.* The nature of the use to which the possessor puts his land is often sufficient to express to the reasonable understanding of the public, or classes or members of it, a willingness or unwillingness to receive them.” (Emphasis added.) 2 Restatement (Second), *supra*, § at 332, comment (c). “An invitation may be implied from dedication, customary use, or enticement, allurements, or inducement to enter, or manifested by an arrangement of the premises or the conduct of the owner or occupant.” 62 Am.Jur.2d, Premises Liability § 94 (2005). Consistent with these principles, our Supreme Court has stated that “[t]o constitute [the plaintiff] an invitee, it must appear that she was expressly or impliedly invited to use the defendant’s premises ... [I]n determining whether there was an implied invitation the question is what could ... [be] reasonably conclude[d] from the defendant’s conduct of its premises.” *Dym v. Merit Oil Corp.*, 130 Conn. 585, 588, 36 A.2d 276 (1944); see also *Guilford v. Yale University*, 128 Conn. 449, 453–54, 23 A.2d 917 (1942); *Skelly v. Pleasure Beach Park Corp.*, 115 Conn. 92, 97, 160 A. 309 (1932).

3 Although in Connecticut the implied invitation doctrine has generally been applied in cases involving business or public invitees, Justice O’Sullivan aptly wrote that “[r]egardless of the purpose which may prompt the owner of realty, he should be required to exercise reasonable care towards those who have come upon his property by virtue of either his express or implied invitation. *This rule should apply to all so invited, whether they be milkmen, grocers, or social guests.* The rule is sound and conforms with common sense.” (Emphases added.) *Laube v. Stevenson*, 137 Conn. 469, 477–78, 78 A.2d 693 (1951) (O’Sullivan, J., dissenting), majority opinion superseded by § 52–557a. Justice O’Sullivan’s dissent contributed to the enactment of the superseding statute, § 52–557a, which elevated social guests to the status of business invitees. *Furstein v. Hill*, *supra*, 218 Conn. at 621. In this court’s view, his pronouncement is sensible and consistent with the express purpose of that statute. See *id.*, at 622.

*6 Several aspects of the plaintiff's deposition testimony cast doubt on whether she could have reasonably concluded, based on the defendant's conduct, that the defendant had invited her to the party. The plaintiff has never met the defendant and had never been to her house prior to the incident in question. (Plaintiff's Deposition Transcript, p. 19.) Before going to the defendant's house that evening, the plaintiff had received no information as to whether the defendant knew about the party. (Plaintiff's Deposition Transcript, p. 32.) The plaintiff attended the party because she was informed by a friend that Tyler had invited them over. (Plaintiff's Deposition Transcript, pp. 31-32.) While at the defendant's home, the plaintiff did not see any adults at any time. (Plaintiff's Deposition Transcript, p. 41.) The plaintiff did not ask where the adults were and did not hear any information about why there were no adults present. (Plaintiff's Deposition Transcript, p. 41.) The plaintiff understood that the party was "illegal" because underage people were drinking alcohol. (Plaintiff's Deposition Transcript, p. 46.) Furthermore, the plaintiff responded to the arrival of the police by attempting to escape into the woods in order to "get away from the cops." (Plaintiff's Deposition Transcript, pp. 46-47, 102.)

Viewing the evidence in the light most favorable to the plaintiff, however, the defendant's evidence nevertheless falls short of her heavy summary judgment burden. The plaintiff's deposition included testimony that Tyler had hosted many parties at the defendant's residence in the past and that the defendant had approved of them. (Plaintiff's Deposition Transcript, p. 44.) The defendant has not submitted any evidence shedding light on whether similar parties involving teenagers had been hosted at her home, whether the defendant acquiesced to or even facilitated them, whether those parties involved alcohol and occurred with any regularity or notoriety within the community such that the plaintiff could have reasonably believed that she had been invited by the defendant in this case. Moreover, there is a dearth of factual detail in the evidence regarding the party itself and what the plaintiff experienced there. These factors bear on the plaintiff's status because an entrant's status can change even while he or she is on the premises. See *Byers v. Radiant Group, LLC*, 966 So.2d 506, 509 ("[t]he status of a visitor to land possessed by another may change from one of the three categories to another"); see also *Rider v. McCammet*, 938 N.E.2d 262, 268 (Ind.App.2010) (stating same principle); *Worthy v. Ivy Community Center, Inc.*, 198 N.C.App. 513, 518, 679 S.E.2d 885 (same), cert. denied, 363 N.C. 748, 689 S.E.2d 874 (2009). In view of the paucity of factual detail in the defendant's evidence, she has not demonstrated "that it is quite clear what the truth is, and that excludes any real doubt as to the existence of

any genuine issue of material fact." (Internal quotation marks omitted.) *Zielinski v. Kotsoris*, *supra*, 279 Conn. at 318. Because genuine issues remain as to whether the defendant impliedly invited the plaintiff to the party, summary judgment is denied with respect to the claim that the plaintiff was a trespasser on the defendant's premises.

II

*7 The defendant next argues that even if the plaintiff was an invitee and not a trespasser, summary judgment should still be granted because the defendant had neither actual nor constructive notice of the object that allegedly caused the plaintiff's injuries. The plaintiff responds that the "sharp object" on which she fell "clearly could be seen" and it should have been evident to the defendant if in fact she was unaware of it. The plaintiff asserts in her memorandum in opposition that she has attached photographs substantiating her claims, however, no such photographs were actually appended.⁴

⁴ During short calendar, both parties gave to the court copies of photographs depicting the area of the defendant's premises where the plaintiff allegedly fell. These copies are not evidence. They were never filed as exhibits. Rather, they were informally handed to the court by the parties, apparently to provide a frame of reference regarding the plaintiff's action. Consequently, these documents will play no part in the court's adjudication of the present motion.

"A possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe." *Morin v. Bell Court Condominium Assn.*, *supra*, 223 Conn. at 327. Our Supreme Court has defined the legal standard to be applied to premises liability claims brought by business invitees, which, in accordance with § 52-557a, applies with equal force to claims brought by social invitees. "Typically, [for [a] plaintiff to recover for the breach of a duty owed to [him] as [a business] invitee, it [is] incumbent upon [him] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice ... [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it ... In the absence of allegations and proof of any facts that would give rise to

an enhanced duty ... [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers." (Internal quotation marks omitted.) *Kelly v. Stop & Shop, Inc.*, 281 Conn. 768, 776, 918 A.2d 249 (2007); see also *Kurti v. Becker*, 54 Conn.App. 335, 733 A.2d 916 (stating that possessor of land is chargeable with constructive notice of defects when dealing with social invitees), cert. denied, 251 Conn. 909, 739 A.2d 1248 (1999).

The defendant attests that "prior to the events giving rise to this lawsuit" she was not aware of the existence of the object that allegedly harmed the plaintiff. (Defendant's Affidavit, ¶ 10.) Having shown that she did not have actual notice of the dangerous condition, the defendant must establish that she also did not have constructive notice of it. "The controlling question in deciding whether the defendants had constructive notice of the defective condition is whether the condition existed for such a length of time that the defendants should, in the exercise of reasonable care, have discovered it in time to remedy it." (Internal quotation marks omitted.) *Riccio v. Harbour Village Condominium Assn., Inc.*, 281 Conn. 160, 163, 914 A.2d 529 (2007).

The defendant does not offer any proof as to how long the object was on her land and does not claim that it was of such an ephemeral nature that she could not be charged with notice of it. The defendant claims, rather, that regardless of how long the condition was actually in existence "no reasonable jury could conclude that the defendant should have discovered the object after conducting a reasonable inspection of the premises." To support her contention, the defendant testifies that (1) the object is located in a wooded portion of her property that serves as a buffer between properties; (2) the wooded area is outside of the area that the defendant maintains and mows, and it is neither used nor intended to be used as a walkway or access way; (3) the defendant purchased the property less than one year before the plaintiff's injury and she never had reason to inspect or access this wooded area; and (4) when the defendant inspected the object after the plaintiff's injury, she observed that "[i]t had a large boulder sitting on most of it and the remainder was obscured by leaves that had fallen in the wooded area over time. The object was not readily visible." (Defendant's Affidavit, ¶¶ 11-14.) Tyler also attests that he did not know about the object and never saw it when he worked on the lawn or performed home maintenance activities. (Tyler Wilson's Affidavit, ¶ 13.)

*8 The foregoing evidence, when viewed in the light most favorable to the plaintiff, does not demonstrate that the defendant, in exercising reasonable care to inspect her

premises and keep it safe for an invitee, should not have discovered the object. The plaintiff's deposition testimony provides a conflicting account of the location of the object. The plaintiff testified that although she headed towards the woods when the police arrived, she "didn't really make it into the woods" and "got hurt right at the start of it." (Plaintiff's Deposition Testimony, p. 50.) This account suggests that the object is actually located in the nonwooded portion of the defendant's property. The defendant does not address in her evidence whether this area is one where the plaintiff, as an invitee at Tyler's party, might be expected to venture. In addition, the defendant's statement in her affidavit that the object was "obscured by leaves that had fallen" over time suggests that the object would be visible in the absence of foliage, and begs the question of why the leaves were not cleared and whether, before the leaves had gathered, it should have been visible to the defendant. Although photographic evidence of the object or testimony regarding its length, shape, color, material and how, if at all, it was attached to the land, would be highly probative as to constructive notice, the defendant does not provide any of the foregoing. Finally, the defendant's vague assertion that she purchased the property "less than a year" before the incident does not establish that she lacked sufficient time to discover the object in the course of a reasonable inspection. Therefore, the evidence does not provide a basis for a fair and reasonable person to conclude only one way as to whether the defendant should have discovered the object that allegedly harmed the plaintiff.

Our Supreme Court has observed that "[s]ummary judgment procedure is especially ill-adapted to negligence cases, where ... the ultimate issue in contention involves a mixed question of fact and law, and requires the trier of fact to determine whether the standard of care was met in a specific situation." (Internal quotation marks omitted.) *Michaud v. Gurney*, 168 Conn. 431, 434, 362 A.2d 857 (1975); see also *Spencer v. Good Earth Restaurant Corp.*, 164 Conn. 194, 199, 319 A.2d 403 (1972) ("[i]ssues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial"). This principle is no less true in the present case and, consequently, the defendant's motion is denied with respect to the claim that she lacked constructive notice of the dangerous condition in contention.

III

The defendant finally argues that even if she was aware of the existence of the object that allegedly injured the

plaintiff, the proximate cause of the injuries was not the breach of any duty owed to the plaintiff by the defendant. Rather, relying on the principle of law expounded in § 442B of the Restatement (Second) of Torts,⁵ the defendant asserts that the plaintiff's own intervening criminal act, namely, her attempt to evade the police, was a superseding and unforeseeable cause of harm that completely exonerates the defendant from liability. Therefore, claims the defendant, summary judgment should be granted on this ground, as well.

⁵ Section 442B of the Restatement (Second) of Torts provides: "Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct."

*9 "Legal cause is a hybrid construct, the result of balancing philosophic, pragmatic and moral approaches to causation." *Kowal v. Hofner*, 181 Conn. 355, 359, 436 A.2d 1 (1980). "In order to prevail on a negligence claim, a plaintiff must establish that the defendant's conduct 'legally caused' the injuries, that is, that the conduct both caused the injury in fact and proximately caused the injury." *Craig v. Driscoll*, 262 Conn. 312, 330, 813 A.2d 1003 (2003).

"The test for cause in fact is, simply, would the injury have occurred were it not for the actor's conduct ... The test of proximate cause is whether the defendant's conduct is a 'substantial factor' in producing the plaintiff's injury. The substantial factor test asks, whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence ... This requirement tempers the expansive view of causation [in fact] ... by the pragmatic ... shaping [of] rules which are feasible to administer, and yield a workable degree of certainty ... Remote or trivial [actual] causes are generally rejected because the determination of the responsibility for another's injury is much too important to be distracted by explorations for obscured consequences of inconsequential causes ...

"The scope of the risk analysis of proximate cause similarly applies where ... the risk of harm created by the defendant's negligence allegedly extends to an intervening criminal act by a third party ... [We have] consistently adhered to the standard of 2 Restatement (Second), Torts § 442B (1965) that a negligent defendant, whose conduct creates or increases the risk of a particular

harm and is a substantial factor in causing that harm, is not relieved from liability by the intervention of another person, except where the harm is intentionally caused by the third person and is not within the scope of the risk created by the defendant's conduct ... The reason [for the general rule precluding liability where the intervening act is intentional or criminal] is that in such a case the third person has deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him." (Citations omitted; internal quotation marks omitted.) *Id.*, at 331–33.

"Although the issue of causation generally is a question for the trier of fact ... the issue becomes one of law when the mind of a fair and reasonable person could reach only one conclusion, and summary judgment may be granted based on a failure to establish causation." (Internal quotation marks omitted.) *Abrahams v. Young & Rubicam, Inc.*, 240 Conn. 300, 307, 692 A.2d 709 (1997).

The defendant clearly misapplies § 442B. That section absolves a negligently defendant from liability where the harm is *intentionally caused by an intervening third person* and is not within the scope of the risk created by the defendant's conduct. The harm allegedly sustained by the plaintiff in this case was neither intentional nor caused by a third person. Even overlooking this misapplication of law and interpreting the defendant's argument as stating, in essence, that the plaintiff's conduct was the sole proximate cause of her injuries, the defendant would still not be entitled to summary judgment. If the plaintiff proved at trial that she was indeed an invitee of the defendant at a house party where minors were served alcohol, and further, that the defendant had constructive notice of a dangerous condition on a portion of her property where party invitees might be expected to venture, a fair and reasonable juror would be entitled to conclude that the defendant's negligence was a "substantial factor" in producing the plaintiff's injuries since, under these circumstances, that juror could conclude that the injuries were "of the same general nature as the foreseeable risk created by the defendant's negligence." Although the plaintiff, admittedly, was trying to evade the police at the time she was injured, any negligence on her part does not legally bar her claims, although it may diminish her recovery in accordance with Connecticut's comparative negligence scheme. See General Statutes § 52–572o.⁶ Therefore, summary judgment is denied with respect to the claim that the plaintiff's injuries were not proximately caused by the defendant's negligence.

⁶ Section 52–572o, Connecticut's comparative negligence statute, provides in subsection (a), in

relevant part, that “the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according to the measure of responsibility attributed to the claimant.”

*10 Based on the foregoing, the defendant’s motion for summary judgment is denied.

All Citations

Not Reported in A.3d, 2012 WL 1624152

CONCLUSION

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