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MIHALAKOS, J., dissenting. I respectfully disagree with the majority and would reverse the judgment of the trial court. I believe that the majority incorrectly concludes that the court's jury instruction was correct in law and that the plaintiff was not prejudiced by the charge.[1]

As the majority has already stated, when a party claims that a jury charge was incorrect, we review the charge in its entirety to determine whether the charge fairly presents the case to the jury under the established rules of law such that no injustice will result to either party. After reviewing the charge in its entirety, the majority concludes that "the plaintiff was not prejudiced by the omission of the precise language that she requested and that the charge, as given, was sufficient to guide the jury in reaching a correct verdict." I believe that she was prejudiced because without instruction about the law of agency, the jury did not have the opportunity to determine whether the defendants' agents had actual or constructive knowledge of the dangerous condition, and, therefore, did not have the opportunity to decide if any such knowledge should be imputed to the defendants.[2]

"Agency normally is a question of fact. . . . [T]he three elements required to show the existence of an agency relationship include: (1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking. . . . *A principal is generally liable for the authorized acts of his agent. . . .*" (Citation omitted; emphasis added; internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Mutual Communications Associates, Inc.*, 66 Conn. App. 397, 402, 784 A.2d 970, cert. granted on other grounds, 258 Conn. 909, 782 A.2d 1250 (2001). Furthermore, "[t]he acts of an agent are imputed to his principal, and a principal may not use his agent as a shield when the agent acts within the bounds of his authority. See *Son* v. *Hartford Ice Cream Co.*, 102 Conn. 696, 700–701, 129 A. 778 (1925); *Mullen* v. *Horton*, 46 Conn. App. 759, 764, 700 A.2d 1377 (1997)." *Kallas* v. *Harnen*, 48 Conn. App. 253, 260 n.5, 709 A.2d 586, cert. denied, 244 Conn. 935, 717 A.2d 232 (1998). "The general rule . . . is that the principal is chargeable with, and bound by, the knowledge of or notice to his agent received while the

agent is acting as such within the scope of his authority and in reference to a matter over which his authority extends. The fact that the knowledge or notice of the agent was not actually communicated will not prevent the operation of the general rule, since the knowledge or notice of the agent is imputed to the principal and is therefore constructive notice . . . .'' 3 Am. Jur. 2d, Agency § 281 (1986). ''The knowledge of his agent with respect to defects in a building may be imputed to a landlord.'' Id. ''The rule charging the principal with his agent's knowledge is not necessarily restricted to matters of which the agent has actual knowledge, and . . . the principal is charged with the knowledge of that which his agent, by ordinary care, could have known, especially where the agent has received sufficient information to awaken inquiry.'' Id., § 285.

With respect to the town, the majority reasons that by reading the text of General Statutes § 52-557n, the court ''provided the jury with clear guidance on the issue of agency with respect to the town's potential liability.''[3] This reasoning is, however, flawed. First, the court referred to § 52-557n to explain the concept of governmental immunity.[4] Section 52-557n abrogates the doctrine of governmental immunity only in certain delineated circumstances. In addition, the court read the text of the tree warden statute, General Statutes § 23-59.[5] Because § 23-59 contains discretionary language and the court instructed that the town was not liable for the discretionary acts of its agents, I do not believe that merely reading the text of § 52-557n fairly presents the issue of agency to the jury. While I am aware that a charge to the jury is be read as a whole and that individual instructions are not to be evaluated in isolation from the overall charge, I believe that the concept of agency was not properly before the jury because of the flawed instruction.

With respect to the church, the majority reasons that the charge was adequate for the jury ''to evaluate the actions of the church's agents in considering whether the church was liable or the plaintiff's injuries.'' I do not agree. The portion of the charge to which the majority cites is limited to the duty of a landowner. See footnote 5. The court instructed that ''[t]he duty of a *landowner*, controller, to invitees on the land *includes the duty to reasonably examine his property*. . . . Now, it is not claimed here that as a basic threshold, initial response as a landowner, that you have a climb up arborist examining the tree. It may have been something that might have been warranted later on if other evi-

dence would have suggested it to the reasonably prudent landowner or not.'' (Emphasis added.) This charge allows the jury to find that the church was not negligent because it had an arborist maintaining and examining the property regardless of whether the arborist was negligent in his maintenance. Hence, the charge provides no guidance to the jury in its evaluation of the actions of the agent in the consideration of liability. Rather, the practical effect of the charge is to allow the church to use its agent as a shield, which the law of agency does not condone.

Furthermore, the court's charge regarding notice was also deficient.[6] The court instructed the jury regarding actual and constructive notice of the *defendants*. The court did not instruct the jury regarding actual or constructive knowledge of the agent. Moreover, the court did not instruct the jury that if it found that the agent had knowledge of the defect, such knowledge could be imputed to the defendant and thereby fulfill the notice requirement. Although I agree with the majority that ''[t]he absence of the express term 'agent' from the court's instructions did not alter the inquiry'' for the jury, I believe that the complete omission of the entire law of agency did alter the inquiry, and, therefore, the jury was not properly charged.

In part II of its opinion, the majority notes that the ''jury in this case found that the defendants were not negligent,'' and ''heard substantial testimony that could have supported a finding that the defendants lacked both actual and constructive knowledge of any defective condition of the tree limb that injured the plaintiff.'' The jury did hear such testimony, but only in the light of the flawed charge. The testimony, however, also supported a finding that the defendant's agents may have been negligent and, without a proper charge on the law of agency, the jury could not find that the agents had actual or constructive knowledge, nor could it find that the agents' knowledge should be imputed to the defendants.

First, Brian M. Maher, a parishioner and licensed arborist, testified that he never actively inspected the tree for any signs of defect.[7] Jeffrey O'Brien, a professional arborist, testified that an arborist should be looking for defects when pruning a tree.[8] Next, Marshall Cotta, the tree warden for the town, testified that his only observations of the tree were limited to when he used the parking lot and walked by the tree to go to a market. Finally, the experts for both parties testified that ailanthus trees are characteristically brittle and

generally should not placed near roadways or parking lots for this reason.

The jury must make the threshold determination of whether these men, in their capacity as agents, had actual or constructive knowledge of a defect in the tree. If so, the jury must determine whether that knowledge should be imputed to the respective defendants. Because I believe that the charge was deficient and the case was not properly presented to the jury, I respectfully dissent.

[1] At the outset, I would like to note that the "overhanging branch" that fell and struck the plaintiff was one of two stems of a coterminous tree, and the stem was thirty to forty feet in length.

[2] The majority notes that both defendants concede that a principal-agent relationship existed. Although the existence of a principal-agent relationship is a threshold question that must be addressed, the inquiry does not stop there. Once the relationship has been established, the jury must determine whether the agent was negligent and, if so, whether his negligence should be imputed to the principal.

[3] The court's charge to the jury states in relevant part: "[General Statutes § 52-557n] says [that] a town shall be liable for damage caused by negligent acts or omissions of any employee acting within the scope of his employment or official duties. Negligence in the pro forma functions from which the town derives a special corporate profit or benefit. *The town shall not be liable for damages caused by negligent acts or omissions which require the exercise of judgment or discretion*." (Emphasis added.)

[4] By answer dated December 31, 1998, the town asserted governmental immunity as a special defense. The jury never decided the issue of governmental immunity because it found that the town was not negligent.

[5] The court's charge to the jury states in relevant part: "I'm going to give [the tree warden statute] to you for two reasons. You will be able to weigh or consider this tree warden statute as you weigh . . . whether the negligence or reasonable care issues have been established. And it may also help you to see or to consider that the town would not have been . . . without the ability . . . to move against the tree that they thought was hazardous. . . . [General Statutes § 23-59] says the town tree warden shall have the care and control of all trees and shrubs, in whole or in part, within the limits of any public road or grounds. Such care and control shall extend to such limbs, roots or parts of trees and shrubs as extend or overhang the limits of any such public road or grounds. And another provision in the statute says [that] whenever, *in the opinion of the tree warden*, the public safety demands the removal or pruning of any tree or shrub under his control, he may cause such tree or shrub to be removed or pruned at the expense of the town." (Emphasis added.)

[6] The court's instruction to the jury states in relevant part: "If you were to determine in this case against either defendant that there was no condition that was known or should have been known to be hazardous or dangerous, then there would have to be a verdict for the defendant or defendants, on that issue or in this case. Now, there's two kinds of notice here. You recall, I've mentioned a couple of times now, that a defendant can only be held liable if you conclude that he had notice of the problem, or a problem, in advance. . . . There's actual notice. . . . Or you might find that . . . there is constructive notice. . . . Constructive notice is the kind of notice that means the information you should have had if you were exercising reasonable care. . . . And a plaintiff needs to illustrate to you, to prove to a jury that the . . . defendant had actual or, at least, constructive notice in the trial of a premises liability case. So, if neither kind of notice existed or should be deemed to have existed in the mind of the defendant, then it has to be a defendant's verdict."

[7] Maher, in his video deposition, testified in relevant part:

"[Plaintiff's Attorney]: Do you recall doing work specifically on the ailanthus trees?

"[The Witness]: Yeah. Like I said before, if there was a broken branch, and every one had small broken branches one time or another, and I know I had been up in just about every ailanthus tree to flush the broken stubs and to cut deadwood while I was up there.

"Q. How often did you work on these trees?

"A. A couple of times a year. . . .

"Q. When you climbed these trees, did you notice evidence of broken branches?

"A. Yeah.

"Q. Did you notice any trunk cracks or cracks running along the trunks of these ailanthus trees?

"A. I can't say that I remember.

"Q. On this particular tree . . . do you recall any cracks in the trunk of that particular tree?

"A. I can't recall.

"Q. When you went and did work on these trees, were you looking for cracks?

"A. No, I wasn't. If I'm up in a tree and I see something I'll go after it, but I'm not putting a magnifying glass [to it]. . . . I'm really not looking that detailed around. I'm going after a limb, and it takes physical exertion to do this and that so I'm not really—Well, I would say I'm not fine-tooth combing the trees while I'm up there."

[8] O'Brien testified in relevant part:

"[Defendant Town's Attorney]: And when you climb up a tree to do that you're going to prune it, but, in the business do you also, as an arborist, would you be looking around for any other of these conditions or indications of any problems that might be apparent to you?

"[The Witness]: Absolutely."