PALMER, J., with whom ZARELLA, J., joins, dissenting. I disagree with the majority's conclusion that the trial court properly construed General Statutes § 52-572h (n)[1] as precluding the defendant Thomas McNamee from raising an apportionment claim against Ian Cohen, who, for seven years, also was a defendant in this action[2] until, during jury selection, the plaintiff[3] withdrew his claim against him. In particular, I disagree with the majority that the plaintiff's voluntary withdrawal of his claim against Cohen—which operated as a release of liability because the statute of limitations had run on the plaintiff's claim against Cohen long before the filing of the withdrawal—does not constitute a "release, settlement or similar agreement" that triggers McNamee's right to seek apportionment against Cohen. In concluding that the withdrawal is not a "release, settlement or similar agreement" within the meaning of § 52-572h (n), the majority reaches a result that is both manifestly unfair to McNamee and fundamentally at odds with the purpose of Tort Reform I[4] and II.[5] The majority's holding is unfair because it allows the plaintiff, in his sole discretion, to bar McNamee from raising an apportionment claim against Cohen merely by withdrawing his claim against Cohen. By prohibiting McNamee from seeking apportionment against Cohen, the majority also contravenes the legislative intent underlying tort reform, namely, to abolish the common-law rule of joint and several liability and to replace it with a system based on principles of comparative fault. Because I do not believe that the legislature reasonably could have intended the result that the majority reaches, I respectfully dissent.[6]

The majority's conclusion is based on its construction of the term "release, settlement or similar agreement" as encompassing only bilateral agreements between the parties.[7] When that language is viewed in isolation from our statutory apportionment scheme as a whole, I agree that the majority's interpretation is perfectly reasonable. In my view, however, the majority's interpretation gives far too little weight to the purpose of our apportionment statutes, which we previously have identified as abolishing the common-law rule of joint and several liability; see, e.g., *Carlson* v. *Waterbury Hospital*, 280 Conn. 125, 141, 905 A.2d 654 (2006); so as to make "a defendant's liability to the plaintiff proportionate to the defendant's degree of fault." *Smith* v. *Greenwich*, 278 Conn. 428, 461, 899 A.2d 563 (2006).

Under § 52-572h (c), a defendant in a negligence action has a right of apportionment against any other person against whom the plaintiff seeks to recover at trial. Furthermore, under General Statutes § 52-102b, a defendant also has the right, within 120 days from the

commencement of the plaintiff's action, to bring into the action any person whom the plaintiff has not named in the action but who the defendant nonetheless believes is or may be liable for a proportionate share of the plaintiff's damages.[8] Finally, under § 52-572h (f), the defendant also has a right of apportionment against any "settled or released persons" within the meaning of § 52-572h (n), which, for purposes of contribution among liable tortfeasors, identifies the category of persons who have entered into a "release, settlement or similar agreement" with the plaintiff, irrespective of whether any such person previously has been named by the plaintiff as a defendant. See General Statutes § 52-102b (c) (defendant not required to file notice of intent to seek apportionment against released or settled person who formerly was party to action but must file notice of intent to seek apportionment against settled or released person who never was party). It is apparent that the legislature, in enacting these statutory provisions, sought to establish a scheme pursuant to which each tortfeasor pays *only* his proportionate share of the damages for which he is liable to the plaintiff. The means by which the legislature sought to achieve that end was to permit any defendant against whom the plaintiff seeks to recover at trial the right to have the finder of fact apportion damages among any and all other alleged tortfeasors.

Under the majority's construction of § 52-572h, however, a defendant is barred from seeking apportionment against a person who, like Cohen, was named as a defendant by the plaintiff but, after the expiration of the 120 day period for filing an apportionment complaint under § 52-102b, has all claims against him withdrawn by the plaintiff. Under the interpretation that the majority adopts, the defendant is barred from seeking apportionment in those circumstances because there is no mechanism to do so. Thus, in the present case, McNamee could not have filed an apportionment complaint against Cohen while Cohen was still a defendant because § 52-102b applies only to nonparties. See footnote 8 of this opinion. McNamee could not file an apportionment complaint against Cohen after the plaintiff had released Cohen from liability because the 120 day limitation period of § 52-102b had expired several years earlier. Finally, McNamee otherwise could not seek apportionment against Cohen because, according to the majority, a withdrawal is not a "release, settlement or similar agreement" for purposes of our apportionment scheme, even though the plaintiff's withdrawal of his claim against Cohen had *precisely* the same effect as a settlement or release inasmuch as the plaintiff's withdrawal occurred after the statute of limitations had run on his claim against Cohen. In other words, the majority concludes that, under the scheme that the legislature devised for implementing proportionality, McNamee had an absolute right to seek apportionment against

any person who the plaintiff *left out of the action* but did not have the same right to seek apportionment against those whom the plaintiff *himself* alleged *in the action* were responsible for the claimed injuries.

This result is patently illogical because the persons whom the plaintiff named in the action are the very persons against whom McNamee most likely would wish to exercise his right of apportionment. Under the majority's interpretation of the statutory scheme, however, a plaintiff, in his sole discretion, may deprive a defendant of the right of apportionment against any and all such persons simply by filing an action against them, waiting 120 days, and then withdrawing his claims against them. It is obvious that, in engaging in such a strategy, the plaintiff can deprive the defendant altogether of his apportionment rights. I do not believe that the legislature would have taken the steps that it had to abolish joint and several liability in favor of proportional liability, on the one hand, and then create a loophole that empowers any plaintiff to return to the former by depriving the defendant of any opportunity to invoke the latter, on the other.

In attempting to construct a rationale for its holding, the majority asserts that its statutory interpretation "is consistent with the legislative policies that § 52-572h was designed to implement, specifically, that the plaintiff be fully compensated and defendants pay their fair share, but, that when those rights conflict, the plaintiff's interests will prevail." In support of its assertion, the majority cites to General Statutes § 52-102b (c), which provides in relevant part that "[n]o person who is immune from liability shall be made an apportionment defendant nor shall such person's liability be considered for apportionment purposes pursuant to [§] 52-572h," and to § 52-572h (g), which establishes, inter alia, the right of a plaintiff in a negligence action "to reallocate damages awarded against an insolvent defendant to other parties to the action whose negligence caused the plaintiff's injuries." *Babes* v. *Bennett*, 247 Conn. 256, 271, 721 A.2d 511 (1998). Neither of these two statutory provisions, however, comes into play until *after* the defendant has been afforded the right *to seek* apportionment pursuant to §§ 52-102b and 52-572h (c). More importantly, construing the term "release, settlement or similar agreement" as encompassing a withdrawal—in particular, a withdrawal that is made after the applicable statute of limitations has run, as in the present case—creates no conflict between the rights of plaintiffs and the rights of defendants.[9]

The majority also asserts that the interpretation that McNamee advances would revive "[t]he unwanted practical effect [under Tort Reform I] . . . that plaintiffs [would be] required to pursue claims of weak liability against third parties, thereby fostering marginal and costly litigation in our courts." (Internal quotation

marks omitted.) Majority opinion, p. 423, quoting *Collins* v. *Colonial Penn Ins. Co.*, 257 Conn. 718, 730, 778 A.2d 899 (2001). I disagree. Under the statutory scheme, if a plaintiff believes that a claim against a particular named defendant is worth pursuing, then the plaintiff has every right and opportunity to do so; if not, the plaintiff may withdraw the claim, knowing that any remaining defendant may pursue an apportionment claim against the released defendant. I see no difference whatsoever between that decision and the decision whether to accept a settlement, be it for one dollar, for one million dollars or for any other monetary or nonmonetary consideration. In either case, the plaintiff must decide among competing considerations because, under our apportionment scheme, the defendant is entitled to seek apportionment against any person who has settled with the defendant. See General Statutes § 52-572h (f) (providing that fact finder shall specify "the percentage of negligence that proximately caused the injury, death or damage to property in relation to one hundred per cent, that is attributable to each party whose negligent actions were a proximate cause of the injury, death or damage to property *including settled or released persons under subsection* [*n*] *of this section*" [emphasis added]).

Furthermore, the "unwanted practical effect [under Tort Reform I]" to which the majority refers in its quote from *Collins* relates to a problem "under Tort Reform I . . . [whereby] the jury, in determining the percentage of negligence attributable to any defendant, could take into account the negligence of *any other person*, regardless of whether that person was a party to the action. Tort Reform I, however, did not provide the plaintiff with a means of securing payment of damages unless that person was also a party." (Emphasis added; internal quotation marks omitted.) *Collins* v. *Colonial Penn Ins. Co.*, supra, 257 Conn. 730. As a result, "[the] plaintiff was required to name as defendants all persons whose actions suggested even the slightest hint of negligence. The unwanted practical effect, therefore, was that plaintiffs were required to pursue claims of weak liability against third parties, thereby fostering marginal and costly litigation in our courts." (Internal quotation marks omitted.) Id. Tort Reform II, however, addressed this problem by limiting the universe of negligent persons whom the jury could consider in apportioning damages between parties to the action, and between those who have been released or who have settled. Contrary to the majority's assertion, therefore, under Tort Reform II, the plaintiff in a negligence action has no incentive to name every person whose actions suggest the slightest hint of negligence, nor is there any possible danger that our resolution of this case, one way or the other, would revive the problem.

If, however, as the majority asserts, Tort Reform II did reflect a desire on the part of the legislature to

avoid protracted litigation of weak claims, the majority fails to explain how permitting a plaintiff to withdraw an action against some but not all of the defendants,[10] many years into the proceedings, appreciably furthers a legislative policy of avoiding "marginal and costly litigation . . . ." (Internal quotation marks omitted.) More importantly, however, whatever marginal benefit arguably might flow from the majority's interpretation of our apportionment scheme cannot possibly justify the loss of the right of apportionment that those remaining defendants stand to suffer under the majority's statutory construction.[11]

Finally, the majority asserts that its interpretation "is consistent with the intent of Tort Reform II, as expressed in Public Acts 1987, No. 87-227, which was to limit the universe of negligent persons that a finder of fact may consider in apportioning damages to only those entities that are either parties to the suit or parties who have reached a settlement agreement with the plaintiff—a clear indication that the legislature intended that § 52-572h (c) permit the plaintiff to obtain, to the maximum extent possible, complete compensation for his injuries." (Internal quotation marks omitted.) Majority opinion, p. 435, quoting *Babes* v. *Bennett*, supra, 247 Conn. 270. When viewed in proper context, however, the quote from *Babes* lends no support to the proposition for which it is cited, namely, that the plaintiff's withdrawal of its claim against Cohen was not a "release, settlement or similar agreement" for apportionment purposes.

The issue in *Babes* was whether the state, when it is sued for negligence upon its waiver of sovereign immunity under General Statutes § 52-556,[12] is immune from a reallocation of damages under § 52-572h (g) in the event that it is found liable for a proportionate share of the plaintiff's damages and the plaintiff is unable to recover the portion of damages awarded against another defendant. See *Babes* v. *Bennett*, supra, 247 Conn. 257–59. We answered that question in the negative; id., 259; explaining that "when the legislature enacted § 52-556, it intended that the substantive rules governing negligence actions generally would apply to actions brought pursuant to § 52-556. Because, at that time, the rules of joint and several liability governed negligence actions, the state, in an action brought pursuant to § 52-556, could be held responsible for the entire amount of damages awarded, rather than simply its proportionate share of such damages . . . ." Id., 266. We further stated that "it would be illogical to allow the state to benefit from the apportionment provisions of § 52-572h (c) when there are multiple liable defendants, but not to subject the state to the reallocation provisions of § 52-572h (g) when a liable codefendant is insolvent." Id., 267.

In reaching our conclusion, we briefly summarized

the history of Tort Reform, explaining that, "under Tort Reform I, [the trier of fact] in determining the percentage of damages attributable to a particular defendant . . . was able to take into account the percentage of damages attributable to any other person, even if that person was not a party to the suit. A plaintiff was unable, however, to recover complete compensation for his injuries unless every person whose negligence proximately caused the injuries was a party to the suit. The share of damages attributable to nonparties was not recoverable.

"The legislature amended § 52-572h (c) just one year later when it enacted Public Acts 1987, No. 87-227, § 3 (P.A. 87-227) [which was part of Tort Reform II]. . . . [T]he intent of P.A. 87-227 was to limit the universe of negligent persons that a finder of fact may consider in apportioning damages to only those entities that are either parties to the suit or parties who have reached a settlement with the plaintiff—a clear indication that the legislature intended that § 52-572h (c) permit the plaintiff to obtain, to the maximum extent possible, complete compensation for his injuries." Id., 269–70.

It is apparent, therefore, that the passage from *Babes* on which the majority relies simply refers to the same problem that was addressed in the passage from *Collins* on which the majority also relies, namely, that, under Tort Reform I, a plaintiff often was unable to obtain complete compensation because of language in Tort Reform I that permitted the fact finder, in determining the percentage of negligence attributable to the defendant, to consider the negligence of a nonparty. Thus, we explained in *Babes* that, by limiting the universe of negligent persons whom the jury could consider in apportioning damages to persons against whom the plaintiff actually *could* recover, namely, parties and "settled or released persons"; General Statutes § 52-572h (f); the legislature merely had sought to remedy that aspect of Tort Reform I that had placed defendants at an unfair advantage by preventing plaintiffs from obtaining complete compensation.

There is nothing in *Babes*, however, or in any other case, to suggest that the legislature, in enacting Tort Reform II, sought any result other than to strike an equitable balance between the interests of plaintiffs and of defendants. Under the majority's interpretation of the statutory scheme, the balance that the legislature sought to achieve has been shifted dramatically in favor of the plaintiff, who now has the ability to erect an absolute bar to apportionment. Because that cannot be what the legislature sought to accomplish, I respectfully dissent.

[1] See footnote 2 of the majority opinion for the relevant text of § 52-572h.

[2] In their original complaint, the original plaintiffs, Leslie Aponte and Joseph Viera; see footnote 1 of the majority opinion (describing posture of parties); alleged, inter alia, that, "[b]eginning in or about November 1994 and continuously thereafter to in or about May 1995 and thereafter, the defendant, IAN COHEN, undertook the care, treatment, monitoring and

supervision of the infant plaintiff's mother . . . and the infant JODEE VIERA, then in utero, for pregnancy, labor and delivery. . . .

"While under the care, treatment, monitoring and supervision of the defendant, IAN COHEN, the infant plaintiff . . . suffered serious, painful and permanent injuries . . . .

"The injuries . . . were caused by the failure of the defendant, IAN COHEN, to exercise that degree of care and skill ordinarily and customarily used by physicians specializing in the field of obstetrics under all of the circumstances . . . in that he . . .

"failed to adequately and properly care for and treat the mother of the infant plaintiff during labor and delivery . . .

"failed to adequately and properly observe and monitor the mother of the infant plaintiff during labor and delivery . . .

"failed to recognize and properly treat the infant plaintiff and her mother for arrested descent . . .

"failed to properly recognize, treat and diagnose a cephalo-pelvic disproportionment . . .

"used excessive traction and/or force during the delivery of the infant plaintiff . . .

"failed to deliver the infant plaintiff by cesarean section . . .

"delayed delivery of the infant plaintiff by cesarean section beyond the point of ability to do so safely . . .

"failed to adequately consider all intrapartum and labor factors concerning the probability of shoulder dystocia . . .

"failed to anticipate or plan for a shoulder dystocia . . .

"failed to timely consult with other specialists in the field of obstetrics; and . . .

"failed to adequately and properly read and interpret fetal monitoring tapes."

[3] I, like the majority, refer to Fred Baker, the guardian of the estate of Jodee Viera, as the plaintiff. See footnote 1 of the majority opinion for a detailed explanation regarding the posture of the parties in the present case.

[4] Public Acts 1986, No. 86-338.

[5] Public Acts 1987, No. 87-227.

[6] Although I agree with the majority's conclusion that McNamee cannot prevail on his claim that the plaintiff's withdrawal of his claim against Cohen was a "settlement" or "similar agreement" based on consideration, I am unable to join the majority in its analysis of that claim. See part I C of the majority opinion. If McNamee had established, as a matter of fact, that the plaintiff's attorney, Joshua D. Koskoff, had conditioned the withdrawal of the plaintiff's claim against Cohen on Cohen's agreement to comply with the terms of the handwritten note that Koskoff had given to Cohen's attorney, Eugene Cooney, then that agreement clearly would have constituted consideration for the withdrawal and, in turn, clearly would have been a "settlement" or "similar agreement" within the meaning of § 52-572h (n). See footnote 12 of the majority opinion (detailing text of handwritten note). A careful review of the record, however, reveals that, although McNamee's counsel adverted to the plaintiff's claim against Cohen, she did not press it at trial—for example, she did not seek to present evidence to establish the claim and did not make an offer of proof—even though she generally was aware of the existence of the alleged agreement between the plaintiff and Cohen. Contrary to the majority's contention, however, the terms of the purported agreement are not insufficient as a matter of law to constitute consideration. In support of its conclusion, the majority asserts that Cohen already was obligated by statute to abide by the conditions contained in Koskoff's note. The majority further suggests that Cohen's adherence to those conditions otherwise would not constitute adequate consideration because they did not include a payment of money. With respect to the majority's first assertion, it is incorrect that the conditions set forth in Koskoff's note "merely memorialized the plaintiff's reminder to Cohen of the rules of confidentiality to which he otherwise was obligated [under General Statutes § 52-146o] once the case against him had been withdrawn." Even if those rules of confidentiality do bar Cohen from speaking with McNamee about his role as an attending physician during the delivery of Jodee Viera—a dubious proposition in view of the fact that Cohen and McNamee were partners at the time of Jodee Viera's delivery, they both participated in the delivery and, for many years, both were defendants in this action—Koskoff's note contains a condition that has nothing to do with § 52-146o, namely, that Cooney "will endeavor to arrange a meeting with Cohen with [Koskoff] or, failing that, will answer written questions truthfully

put to him by [Koskoff].'' Cohen's agreement to that condition, if established, alone would be sufficient to satisfy any requirement of consideration. With respect to whether only the payment of money will suffice as consideration for purposes of a ''settlement'' or ''similar agreement'' under § 52-572h (n), to the extent that, as the plaintiff claims, consideration is a requirement at all, there is nothing in the statutory scheme to suggest that only the payment of money, and not any other type or kind of consideration, will suffice. In this regard, I agree with Justice Borden's concurring opinion. Because, however, McNamee did not press this claim at trial, the trial court did not rule on it. McNamee's failure to obtain such a ruling is fatal to his contention on appeal that he was entitled to a favorable ruling on the claim. Moreover, under such circumstances, the trial court did not abuse its discretion in denying McNamee's motions to set aside the verdict.

[7] Although the majority does not expressly say so, it is apparent, in the majority's view, that the pertinent statutory language is not plain and unambiguous within the meaning of General Statutes § 1-2z because the majority, in construing that statutory language as applied to the facts of this case, explicitly relies on extratextual evidence, including the purpose of our statutory apportionment scheme. I agree that § 1-2z is inapplicable because, as the majority acknowledges, the statutory scheme, ''when read in context, is susceptible to more than one reasonable interpretation.'' (Internal quotation marks omitted.) In contrast to the majority, however, I believe that the more reasonable construction of the term ''release, settlement or similar agreement'' encompasses the plaintiff's withdrawal of his claim against Cohen.

[8] ''Section 52-102b was enacted in 1995 by No. 95-111 of the 1995 Public Acts, in order to address questions that had become apparent regarding how, procedurally, to implement the concept of proportional liability [*when*] *the plaintiff in a tort action had not brought an action against all the potential tortfeasors and the original defendant sought to apportion liability and, therefore, damages, among those other potential tortfeasors.* . . .

''[Section] 52-102b provides that, if a defendant in a tort action believes that another person [not named in the plaintiff's complaint] is or may be liable for a proportionate share of the plaintiff's damages, the defendant may serve an apportionment writ, summons and complaint on that other person and seek the relief of an apportionment of liability. This apportionment complaint must be filed within 120 days of the return day of the underlying tort complaint.'' (Emphasis added.) *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 42, 848 A.2d 418 (2004) (*Borden, J.*, concurring and dissenting).

[9] Of course, this court has recognized that, ''[a]s finally enacted, [Tort Reform I] represents a complex web of interdependent concessions and bargains struck by hostile interest groups and individuals of opposing philosophical positions.'' *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 185, 592 A.2d 912 (1991). Thus, although our apportionment scheme contains provisions, like those singled out by the majority, that favor plaintiffs, there are other provisions that favor defendants. See, e.g., General Statutes § 52-102b (a) (allowing defendant to bring any nonparty into negligence action for purposes of apportioning liability); General Statutes § 52-102b (g) (providing that ''[i]n no event shall any proportionate share of negligence determined pursuant to subsection [f] of section 52-572h attributable to an apportionment defendant against whom the plaintiff did not assert a claim be reallocated under subsection [g] of said section''); General Statutes § 52-572h (plaintiff who settles claim against party for substantially less than jury ultimately assigns as settled party's proportionate share of damages is precluded from recovering balance from remaining defendants).

[10] In such circumstances, the case still must be tried with respect to the remaining defendant or defendants.

[11] Moreover, as McNamee aptly maintains, even in a case in which discovery ultimately leads to a dead end as to one or more of the defendants, the plaintiff has nothing to fear from the remaining defendant's pursuit of an apportionment claim against his or her codefendant or codefendants. When, however, the withdrawal is motivated by trial strategy, as it apparently was in the present case, then the policy underlying our apportionment statutes strongly favors the right of the remaining defendant to pursue an apportionment claim.

[12] General Statutes § 52-556 provides: ''Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to

recover damages for such injury."