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ZARELLA, J., dissenting. Twice before, this court has considered the doctrine of equitable subrogation in determining tortfeasor liability under a property owner's insurance policy. In *DiLullo* v. *Joseph*, 259 Conn. 847, 848, 792 A.2d 819 (2002), we concluded that, in the absence of an express agreement between the landlord and the tenant, the insurance carrier could not recover against the tenant for negligently causing a fire that damaged the leased premises. Conversely, in *Wasko* v. *Manella*, 269 Conn. 527, 529, 849 A.2d 777 (2004), we permitted the insurance carrier to recover against a social guest for negligently causing a fire that damaged the personal residence of the host. The majority now relies on our reasoning in *DiLullo* and *Wasko* to preclude recovery by the plaintiff, Allstate Insurance Company, against the named defendant, Stephen Palumbo,[1] for the negligent installation of an electric water heater that resulted in a fire while he and the insured homeowner, Lisa Deveau, were living together and sharing housing expenses as an unmarried couple. The majority reasons that the defendant was neither a tenant nor a social guest while living with Deveau and that the equities "clearly weigh against allowing" the present subrogation action. I agree with the majority that the defendant was neither a tenant nor a social guest and that we must consider equitable principles of subrogation in resolving the issue of liability. I do not agree, however, with the majority's analysis. In focusing almost exclusively on the defendant's contribution to household expenses and his purported expectation of coverage under Deveau's insurance policy, the majority neglects to credit, or even to consider, that the defendant was not a named insured under the policy, that the policy included a special endorsement expressly assigning to the plaintiff Deveau's right of recovery against any third party responsible for fire damage to her property, that the doctrine of equitable subrogation almost always holds the tortfeasor liable for his or her negligent conduct, that the exception to tortfeasor liability carved out in *DiLullo* was based on Connecticut's strong public policy against economic waste and thus was intended to be narrow, and that precluding the plaintiff from pursuing this subrogation action against the defendant will have the effect of unfairly burdening insured property owners with higher premiums to offset uncompensated losses borne by their insurers. The majority thus fails not only to balance the equities among all of the parties in this case, but to recognize that the equities weigh so heavily in favor of the plaintiff that the trial court could have reached no other conclusion but that the subrogation action should proceed. Accordingly, although I agree with the majority that the case need not be remanded to the trial court, I

respectfully dissent from its conclusion that the Appellate Court's judgment should be reversed.

It is well established that "[s]ubrogation is an equitable doctrine that permits an [i]nsurance company to assert the rights and remedies of an insured against a third party tortfeasor." *Chandler* v. *State Farm Mutual Automobile Ins. Co.*, 596 F. Sup. 2d 1314, 1317 (C.D. Cal. 2008), aff'd mem., 598 F.3d 1115 (9th Cir. 2010). "The object of [equitable] subrogation is the prevention of injustice. It is designed to promote and to accomplish justice, and is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it. . . . As now applied, the doctrine of equitable subrogation is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. . . . Subrogation is a highly favored doctrine . . . which courts should be inclined to extend rather than restrict." (Citations omitted; internal quotation marks omitted.) *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, 236 Conn. 362, 371–72, 672 A.2d 939 (1996).

In seeking to impose ultimate responsibility for a wrong or loss on the party who, in equity, ought to bear it, the insurer, or paying party, "steps into the shoes of the party who suffered the loss . . . for purposes of enforcing the latter's rights . . . ." G. Veal, "Subrogation: The Duties and Obligations of the Insured and Rights of the Insurer Revisited," 28 Tort & Ins. L.J. 69, 70 (1992). The insurer's right to reimbursement, however, is qualified by the equitable principle of "superior equities," which holds that "an insurer may not be allowed to recover from any party whose equities are *equal or superior to* the insurer's. In comparing the relative positions of the subrogee [insurer] and the subrogation defendant, the court decides who ultimately should bear the loss. Sometimes called balancing the equities, the doctrine draws upon the court's concept of fairness and, where apposite, the perceived intent of the parties." (Emphasis added; internal quotation marks omitted.) Id., 70–71. In short, "[t]he right of subrogation is . . . a means of balancing the equities as between the insurer, the insured, and the third party tortfeasor." *Chandler* v. *State Farm Mutual Automobile Ins. Co.*, supra, 596 F. Sup. 2d 1320.

Although there is no clear formula for determining the superiority of the equities in any given case, the fact that the insured pays a premium for the sole purpose of transferring its risk means that it always has equities superior to those of the insurer. G. Veal, supra, 28 Tort & Ins. L.J. 71. Once the insured is fully compensated, however, the principle of unjust enrichment operates in two different ways to justify the insurer's recovery

against the tortfeasor. Subrogation first prevents the insured who has been fully compensated from becoming unjustly enriched by bringing an action against the tortfeasor and receiving a double recovery. E.g., *Chandler* v. *State Farm Mutual Automobile Ins. Co.*, supra, 596 F. Sup. 2d 1320; see also *Wasko* v. *Manella*, supra, 269 Conn. 548; *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, supra, 236 Conn. 367. Subrogation also prevents the tortfeasor from becoming unjustly enriched by the insurer's payment of a debt for damages truly owed by the one who caused the loss. See, e.g., *Wasko* v. *Manella*, supra, 548; *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, supra, 367. Consequently, the wrongdoer, being the culpable party and the ultimate cause of the loss, generally "loses to the superior equities of the insurer." G. Veal, supra, 71. Other factors that this court has considered in determining liability in subrogation actions are Connecticut's strong public policy disfavoring economic waste and the respective expectations of subrogation on the part of the insurer and the tortfeasor. See *Wasko* v. *Manella*, supra, 545–47; see also *DiLullo* v. *Joseph*, supra, 259 Conn. 851, 854. "The determination of what equity requires in a particular case . . . is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Wasko* v. *Manella*, supra, 542, quoting *Kakalik* v. *Bernardo*, 184 Conn. 386, 395, 439 A.2d 1016 (1981).

In the present case, I agree with the majority's preliminary conclusion that, because the trial court incorrectly characterized the relationship between Deveau and the defendant as that of a host and social guest, it improperly decided the case on that ground and failed to address the defendant's claim that it was inequitable, under the facts, to allow subrogation. I also agree with the majority that we need not remand the case to the trial court to address that claim. Unlike the majority, however, I believe that the reason why we need not remand the case is because the equities weighing in favor of the plaintiff are so clearly superior to those weighing in favor of the defendant that the trial court could have reached no other conclusion but to permit the subrogation action to proceed. Consequently, I would affirm the judgment of the Appellate Court.

To my knowledge, no other jurisdiction has considered the equities in a similar context involving a cohabiting unmarried couple. Accordingly, this court is plowing new legal ground and must approach the issue with care. The majority decides that the equities weigh against the subrogation action after conducting an analysis of economic waste and the expectations of the defendant and Deveau under *DiLullo*, *Wasko* and a Nebraska case in which the insured homeowner's niece caused a fire while she and her immediate family were living temporarily as the home's sole occupants. See *Reeder* v. *Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984). With respect to economic waste, the majority observes

that the only property on which the defendant could have obtained liability coverage for negligence was Deveau's home, but, because Deveau had fully insured the property, another policy necessarily would have been "to some extent . . . duplicative" of her coverage and economically wasteful. The majority then considers the expectations of Deveau and the defendant and concludes that neither would have expected Deveau to sue the defendant for his negligence, even if she had lacked insurance coverage, because (1) the two had a long-term, intimate relationship that they anticipated would lead to marriage, (2) the defendant had made substantial financial and in-kind contributions to the maintenance of, and building of equity in, Deveau's home, (3) the defendant consistently contributed to Deveau's insurance premiums, and (4) Deveau failed to inform the defendant that he was not covered under her insurance policy and should obtain his own policy. In reaching this conclusion, the majority relies in part on *Reeder*. In that case, the Supreme Court of Nebraska determined that, because the absentee homeowner had told his brother, whose family was temporarily occupying the home, that he had procured insurance coverage on the premises and that the coverage would be maintained during his brother's occupancy, the insurer was, in effect, insuring the property for the benefit of the brother as well as for the benefit of the owner. Id., 122, 128–29. Accordingly, a subrogation action would be tantamount to suing the insured. See id., 128. The majority therefore concludes, without considering the equitable factors weighing in favor of the plaintiff, that the plaintiff should not be allowed to bring the present subrogation action against the defendant. I disagree with the majority's narrow construction of *DiLullo*, its heavy reliance on the defendant's expectations, which never were communicated to the plaintiff, and its failure to consider the equitable factors weighing in favor of the plaintiff in balancing the equities in this case, and suggest, instead, that a more careful reading of our precedent and a full and fair consideration of the equities on *all* sides of the dispute compel a different result.

I

I begin with the concept of economic waste, which is a matter of policy rather than an equitable consideration. In *DiLullo*, which involved a landlord-tenant relationship, we determined that it would be "inappropriate to create a default rule that allocates to the tenant the responsibility of maintaining sufficient insurance to cover a claim for subrogation by his landlord's insurer. Such a rule would create a strong incentive for every tenant to carry liability insurance in an amount necessary to compensate for the value, or perhaps even the replacement cost, of the entire building, *irrespective of the portion of the building occupied by the tenant.* That is precisely the same value or replacement cost insured by the landlord under his fire insurance policy. Thus,

although the two forms of insurance would be different, the economic interest insured would be the same. This duplication of insurance would, in our view, constitute economic waste and, in a multiunit building, the waste would be compounded by the number of tenants." (Emphasis added.) *DiLullo* v. *Joseph*, supra, 259 Conn. 854.

We subsequently explained in *Wasko* that the same rationale did not apply to the relationship of a host and social guest and that we had no concern regarding economic waste in that context because a social guest could be expected to carry liability coverage under his or her homeowner's or renter's insurance policy. The guest thus would not need to purchase an additional or temporary first party fire insurance policy on the property of the host. *Wasko* v. *Manella*, supra, 269 Conn. 545–46. Furthermore, an insured host could be expected to bring an action directly against the guest. Id., 546. Consequently, we could see no reason why it was equitable to permit a property owner to recover for damages against a negligent guest, yet inequitable to permit the insurer to seek the same recovery after compensating the insured. Id.

Although the defendant in the present case was neither a tenant nor a social guest, the underlying rationale of *Wasko* is far more applicable in these circumstances than the rationale we articulated in *DiLullo*. I agree with the majority that we viewed the tenant's acquisition of liability coverage under the facts of *DiLullo* as economically wasteful because it would be duplicative of the landlord's coverage. Such coverage was deemed to be duplicative and wasteful in *DiLullo*, however, because every tenant would be required to insure "*the entire building, irrespective of the portion of the building occupied by the tenant.*" (Emphasis added.) *DiLullo* v. *Joseph*, supra, 259 Conn. 854; see also *Wasko* v. *Manella*, supra, 269 Conn. 545 (noting our conclusion in *DiLullo* that "forcing a tenant to carry insurance for the *full cost* of the building would create economic waste, as it would be duplicative of the insurance carried by the landlord" [emphasis added]). In other words, when we spoke in *DiLullo* of the problem being "compounded" by the number of tenants in a multiunit building, our concern was not that each unit would be separately insured by the tenant and the landlord, which would result in two policies for every unit, but that the *entire building* would be insured by the landlord and all of its occupants. In a 100 unit building, this could mean that there would be 100 policies covering each and every unit, which clearly would constitute economic waste because the cumulative cost of 100 duplicative policies would be extremely high. In contrast, the concept of economic waste is inapplicable in the present case because only a single residence is involved, and the defendant testified that he occupied the residence in its entirety. Accordingly, there can be no issue regarding

duplicative insurance on portions of the home that the defendant did not occupy.

The present case is more like *Wasko*, which involved a subrogation action brought against a social guest for negligently causing fire damage to the personal residence of the host. *Wasko* v. *Manella*, supra, 269 Conn. 529–30. In dismissing the idea that duplicative insurance would be required for every property visited by a social guest if the subrogation action was allowed, we applied the presumption that the negligent acts of a social guest are covered by his or her existing homeowner's or renter's insurance policy. See id., 546. We also applied the presumption that a host could be expected to proceed directly against a social guest. See id. I see no reason why the same presumptions should not apply to a person who is living with an insured homeowner as an unmarried couple and sharing housing expenses. As in the case of a social guest, we may presume that such a person would obtain renter's insurance[2] or seek to be added to the homeowner's policy. A separate policy carried by the nonowning occupant would be only partially duplicative of the owner's policy because a primary purpose of renter's insurance is to protect the renter's personal property, which would not be protected under the homeowner's policy.[3] See 10A G. Couch, Insurance (3d Ed. 2005) § 148:7, p. 148-14 ("[b]y definition, a policy of property insurance inures only to the benefit of the insured"). Any duplication arising from the fact that both members of the couple must carry insurance would occur principally with respect to liability and would be no different from the liability coverage obtained by a social guest under a renter's or homeowner's insurance policy. In addition, the ambiguous status of an unmarried couple allows for the presumption that the homeowner, instead of seeking compensation from the insurer, might proceed against the tortfeasor at some future time to recover for the loss. I therefore would conclude that Connecticut's strong public policy disfavoring economic waste does not preclude a subrogation action by the plaintiff.

II

With respect to the parties' expectations, which this court previously has considered in weighing and balancing the equities, we briefly noted in *DiLullo* that "neither landlords nor tenants ordinarily expect that the landlord's insurer would be proceeding against the tenant, unless expert counseling to that effect had forewarned them." *DiLullo* v. *Joseph*, supra, 259 Conn. 854. In *Wasko*, we further observed that "social houseguests do not proceed with the same lack of expectations regarding personal responsibility for negligent conduct as do tenants. . . . [M]ost social guests fully expect to be held liable for their negligent conduct in another's home—whether that conduct constitutes breaking the television, causing physical injury, or burning the house

down. Unlike tenants, social guests have not signed a contract with the host, they have not paid the host any set amount of money for rent, and, accordingly, they do not have the same expectations regarding insurance coverage for the property as do tenants." *Wasko* v. *Manella*, supra, 269 Conn. 547. We then considered the equities and concluded that there was "no logical reason for the defendant [in *Wasko*] to be unjustly enriched merely because he burned down the home of a party that had the foresight to purchase fire insurance, and subsequently chose to submit a claim to that insurance company rather than to proceed directly against him." Id., 549. We finally determined that "[p]recluding an insurer from bringing a subrogation action against a social [guest]" might "encourage insurers to attempt to deny coverage for losses to property they insure, given that the insured party would maintain the right to proceed against the responsible party, while the insurer would not." Id., 550.

The majority ignores what we described in *Wasko* as "the main principle behind equitable subrogation," namely, granting the insurer "the opportunity to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it"; (internal quotation marks omitted) id.; and turns what should be an analysis of the expectations of *all* of the interested parties—the insurer, the insured and the defendant—into a totality of the circumstances test that omits *any* consideration of the insurer's expectations. Accordingly, the majority's conclusion that the plaintiff is not entitled to bring a subrogation action against the defendant is based on an improper understanding of the law.

The defendant argues that he expected to be covered under Deveau's insurance policy because he contributed an equal share to the couple's living expenses, including payments on her insurance premiums, made improvements to the property, was living with Deveau and her daughter as a family when the fire occurred and did not believe that he could obtain renter's or homeowner's insurance, even though he apparently made no attempt to do so.[4] In my view, however, these expectations, when weighed against the plaintiff's expectations, are insufficient to preclude the plaintiff from pursuing a subrogation action against the defendant.

Because the defendant conceded that his negligence was the cause of the fire, the plaintiff reasonably could have expected under well established principles of equitable subrogation that the defendant in all good conscience should pay for the damages sustained by the insured. See, e.g., *Wasko* v. *Manella*, supra, 269 Conn. 550. The defendant was not the record title owner of the property, was not the named insured, never asserted an ownership interest in the property, never had an oral or written lease with Deveau and never informed

the plaintiff that he was living with Deveau. The plaintiff thus had no knowledge that the defendant was residing in the home before the fire occurred and had no opportunity to reassess and adjust the insurance premium, consider adding the defendant to the list of covered persons or advise the defendant to obtain renter's insurance because he was not covered under the policy.

Furthermore, the fire insurance endorsement included in Deveau's policy specifically provided that the insurer could "require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made . . . ." Although we determined in *Wasko* that such an endorsement, which, under General Statutes § 38a-308,[5] must be included in all fire insurance policies issued in Connecticut, does not grant the insurer "an inviolate statutory right of subrogation"; *Wasko* v. *Manella*, supra, 269 Conn. 536; the endorsement nonetheless instructed Deveau that she might be "require[d]" to assign the plaintiff her right of future recovery against a third party tortfeasor for fire damage caused by his or her negligence. The plaintiff and Deveau thus presumptively understood that the plaintiff could seek recovery against a third party tortfeasor, such as the defendant, under the terms of her policy.

The majority's decision produces a truly bizarre result because the plaintiff is now prohibited from bringing a subrogation action against the defendant on *equitable* grounds even though Deveau could have been required to assign her right of recovery to the plaintiff under an *express provision* in her insurance policy, a provision, it should be emphasized, that Deveau not only consented to but that is required by statute to be included in every homeowner's insurance policy in this state. This result could not have been what the legislature intended. To the contrary, if the legislature believed that it is fair to mandate the inclusion of such a provision in the insurance policies of all Connecticut homeowners and the provision has not been judicially challenged or qualified, then it would seem equally fair under the doctrine of equitable subrogation to allow the plaintiff to bring a subrogation action against the defendant for the exact same recovery. Indeed, we expressly recognized in *Wasko* the close connection between the legislative mandate and the underlying equitable right when we stated that, "while [a] right of true [equitable] subrogation may be provided for in a contract . . . the exercise of the right will . . . have its basis in general principles of equity rather than in the contract, which will be treated as being merely a declaration of principles of law already existing." (Internal quotation marks omitted.) Id., 533–34, quoting 83 C.J.S., Subrogation § 3 (b) (1953); see also *Hartford Accident & Indemnity Co.* v. *Chung*, 37 Conn. Sup. 587, 592, 429 A.2d 158 (1981) ("[t]he right of legal subrogation is not a matter of contract; it does not arise from any contractual rela-

tionship between the parties, but takes place as a matter of equity, with or without an agreement to that effect"); M. Quinn, Review Essay, "Subrogation, Restitution, and Indemnity," 74 Tex. L. Rev. 1361, 1389 (1996) ("It is puzzling why insurance contracts contain contractual subrogation clauses when subrogation is automatic . . . . [T]he subrogation agreement can express nothing more than what the law would automatically provide."); S. Kimball & D. Davis, "The Extension of Insurance Subrogation," 60 Mich. L. Rev. 841, 842 (1962) ("[a]lthough subrogation clauses are very common in insurance policies, on the whole they merely confirm rights that would exist without them, and at most they alter the incidents of legal subrogation in some particulars"); 73 Am. Jur. 2d 558, Subrogation § 15 (2001) ("[e]quitable subrogation is committed to the equitable powers of the court which, in the exercise of its discretion, may be awarded and although these powers may be confirmed by contractual provisions, they may not be expanded by them").[6]

The plaintiff also could have been expected to bring a subrogation action against the defendant for the same reason we concluded in *Wasko* that the insurer could bring a subrogation action against a social guest, namely, the insured's reluctance in some cases to proceed directly against a person with whom he or she may have more than a passing acquaintance. See *Wasko* v. *Manella*, supra, 269 Conn. 549 ("one of the benefits of purchasing [homeowner's] insurance is that the insureds need not sue their guests who negligently cause damage, even though they would be within their rights to do so" [internal quotation marks omitted]); see also *Reeder* v. *Reeder*, supra, 217 Neb. 129 ("[i]t may be presumed that the insured bought this policy so that he would not have to look to his guest for payment in the event of damage caused by the negligent act of the guest"). Thus, in *Wasko*, we viewed subrogation actions involving persons with close relationships in a positive light because they allow the host to be compensated for the loss without damaging his or her personal relationship with the guest, and we did not regard them as hindering the insured's ability to proceed against the tortfeasor. See *Wasko* v. *Manella*, supra, 549. Consequently, although Deveau testified that she would not have sued the defendant because she expected to marry him, her disinclination to proceed against him should not be regarded as a reason to preclude the plaintiff from doing so because it is no different from the disinclination of a host to proceed against a social guest.

To the extent the defendant claims that his contributions to the household expenses, including insurance premiums, caused him to assume before the fire occurred that he was covered under Deveau's policy, the record suggests that neither he nor Deveau gave the matter any thought and thus had no expectations

one way or the other. Deveau testified on more than one occasion that whether the defendant was covered under her policy was "not something [she] really thought about" and that she "never really gave it any thought." The defendant similarly testified, when asked if he "assumed" that he was covered under her policy, that he never had discussed the matter with Deveau and, therefore, "I guess my answer is yes." In fact, the defendant testified that he had never looked at the policy, never asked Deveau to show him a copy of the policy, never examined the fire insurance endorsement and did not know if he was insured under the policy "as far as the language of the policy [was] concerned." Regarding his contributions to the household expenses, he further testified that the only bill that he paid directly was the electric bill, that he usually gave varying amounts of money for household expenses to Deveau each month and that Deveau paid all of the household bills, initially from her own checking account and later from a joint checking account with the defendant. Accordingly, the defendant made no direct payments on the mortgage or insurance premium that would have indicated an awareness that he was paying for the policy. In addition, as previously discussed, there is nothing in the record indicating that the defendant informed the plaintiff that he was contributing to the household expenses, that he assumed that he was covered under Deveau's policy or that Deveau ever told him he was covered under the policy. In light of these facts, there is no tangible evidence that the defendant considered the matter of insurance before the fire occurred or that he had expectations of any kind as to whether he was covered.

Even if we fully credit the defendant's claim that he assumed that he was covered, equitable principles require, first, that we consider the issue from an objective standpoint and, second, that the expectations of the insurer be weighed in balancing the equities. With respect to an objective standard, we stated in *DiLullo* that the precise issue before the court was: "[W]hat should be the rule of law that governs in the typical default situation?" *DiLullo* v. *Joseph*, supra, 259 Conn. 851. Similarly, we stated in *Wasko* that the issue before the court was: "Did the Appellate Court properly . . . extend this court's opinion in *DiLullo* . . . in the context of landlord/tenant, by holding that a guest in a personal residence is immune from liability for negligently caused damages in a subrogation action brought by the homeowner's insurance carrier?" (Citation omitted; internal quotation marks omitted.) *Wasko* v. *Manella*, supra, 269 Conn. 531. Indeed, the court in *Wasko* never discussed whether the guest possessed renter's or homeowner's insurance or actually expected to be covered under the host's insurance policy. Thus, to remain consistent with our prior cases, this court must rely on reasonable presumptions, as we did in

DiLullo and *Wasko*, as to what an ordinary person in the defendant's situation, namely, a person living with the insured homeowner as an unmarried couple and contributing to the household expenses, should reasonably expect concerning liability for fire damage resulting from his or her negligence.

In my view, such persons should expect to be held liable for their negligence, in part because of the informal and possibly temporary nature of the relationship, which has no legal status, and in part because, when the nonowner is not a named insured under the owner's policy, the insurer has no knowledge as to the nonowner's residence in the dwelling or assumptions regarding coverage, which may vary according to the facts of each particular case. Moreover, this court having stated in *DiLullo* that a tenant should not be considered a coinsured under a landlord's fire insurance policy simply because the tenant "has an insurable interest in the premises and pays rent"; *DiLullo* v. *Joseph,* supra, 259 Conn. 853; I see no reason why the same logic would not apply in the present case. If tortfeasors who live with and are unrelated to the insured can be protected and absolved of all responsibility for their actions merely by alleging that they "expected" to be covered by policies in which they are not specifically named but for which they partially paid without the insurer's knowledge and consent, insurers will find it increasingly difficult to determine potential risk. The result will be a shifting of the financial burden away from those responsible for causing such losses onto the backs of the insured, because insurers will require higher premiums to compensate for the higher risk. This is an indefensible departure from the well established principles that inform the doctrine of equitable subrogation in this state. In light of the foregoing principles and considerations, I submit that a proper balancing of the equities compels the conclusion that the plaintiff has the superior equities and should be allowed to proceed with a subrogation action to prevent the defendant's unjust enrichment.

The majority asserts that the expectations of the plaintiff need not be considered because the court focused in *DiLullo* and *Wasko* solely on the relationship between the insured and the third party tortfeasor and did not consider whether their expectations had been communicated to the insurer. See footnote 17 of the majority opinion. The majority thus claims that considering the plaintiff's expectations in the present case would be "at odds" with our analysis in *DiLullo* and *Wasko*. Id. I disagree.

With respect to *Wasko*, the majority overlooks the fact that this court ultimately based its conclusion that the insurer was entitled to proceed with the subrogation action on an analysis of the expectations and interests of the insurer as well as those of the insured and the

third party tortfeasor. For example, we concluded our analysis of economic waste by observing that, "[i]f the insured property owner can bring an action to recover for negligently caused damages against the defendant, we see no reason why an insurer that pays for the property owner's loss cannot also bring an action against the defendant. Put another way, we see no reason why it is equitable to permit a property owner to proceed against a negligent houseguest's current insurance policy, yet it is inequitable to permit an insurance company that has paid out to its insured to proceed against that same policy." *Wasko* v. *Manella*, supra, 269 Conn. 546. With regard to the expectations of the parties, we first discussed why the expectations of a host and social guest would support a subrogation action and then stated that "[*a*] *more appropriate source of guidance on the equity involved in allowing subrogation* . . . [was] our decision in *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, supra, 236 Conn. 362"; (emphasis added) *Wasko* v. *Manella*, supra, 547; in which we invoked the principle of unjust enrichment to conclude that the insurer was entitled to bring a subrogation action against the third party tortfeasor because "[t]he tortfeasor, who was the party primarily liable for the losses sustained by the insured, benefited by the insurer's payment of a debt truly owned by the tortfeasor." (Internal quotation marks omitted.) Id., 548, quoting *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, supra, 372. After stating that "one of the benefits of purchasing [homeowner's] insurance is that the insureds need not sue their guests who negligently cause damage, even though they would be within their rights to do so"; (internal quotation marks omitted) *Wasko* v. *Manella*, supra, 549; we concluded that there was "no logical reason for the [social guest] to be unjustly enriched merely because he burned down the home of a party that had the foresight to purchase fire insurance, and subsequently chose to submit a claim to [the] insurance company rather than to proceed directly against him." Id. The court then repeated that "[p]recluding an insurer from bringing a subrogation action against a social houseguest who negligently caused a fire that damaged the insured's property could . . . lead to unjust results . . . [as it would be] contrary to the main principle behind equitable subrogation because it denies the [insurer] the opportunity to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it. . . . [I]t may also encourage insurers to attempt to deny coverage for losses to property they insure, given that the insured party would maintain the right to proceed against the responsible party, while the insurer would not." (Citation omitted; internal quotation marks omitted.) Id., 550.

In *DiLullo*, unlike *Wasko*, our reasoning was driven primarily by Connecticut's strong public policy against

economic waste, and not by equitable considerations relating to the expectations of the landlord and the tenant. See *DiLullo* v. *Joseph*, supra, 259 Conn. 853–54. ("Our decision is founded, in large part, upon the principle that subrogation . . . invokes matters of policy and fairness. . . . We think that our law would be better served by having the default rule of law embody [the strong public] policy against economic waste, and by leaving it to the specific agreement of the parties if they wish a different rule to apply to their, or their insurers', relationship." [Citations omitted.]). Only after discussing this dispositive policy consideration did the court in *DiLullo* refer briefly to the expectations of the landlord and the tenant as further support for its conclusion that the subrogation action should not proceed, stating that "neither landlords nor tenants ordinarily expect that the landlord's insurer would be proceeding against the tenant, unless expert counseling to that effect had forewarned them." Id., 854. As to the communication of the expectations of the landlord and the tenant to the insurer, there was no issue in *DiLullo* regarding the insurer's knowledge that tenants were residing on the landlord's property like the plaintiff's lack of knowledge in the present case that the defendant was living with Deveau because the landlord's insurance policy in *DiLullo* presumably reflected that the premises were being leased. In sum, the court in *DiLullo* paid very little attention to the expectations of the parties, basing its decision primarily on public policy concerns. See id. In contrast, the court in *Wasko* considered the expectations of the insured and the third party tortfeasor but devoted far more of its attention to the inequities relating to the insurer and to the unjust enrichment of the tortfeasor that would be likely to occur if the subrogation action was not allowed to proceed. See generally *Wasko* v. *Manella*, supra, 269 Conn. 544–50. Accordingly, the analysis herein is entirely consistent with this court's reasoning in *DiLullo* and *Wasko*.

The majority also relies on *Reeder* v. *Reeder*, supra, 217 Neb. 120, in concluding that allowing the plaintiff to bring a subrogation action against the defendant would be like allowing the plaintiff to bring an action against Deveau. I disagree because the legal analysis in *Reeder* is inapposite, and the majority takes the language in *Reeder* out of context.

As noted earlier, *Reeder* involved circumstances in which the insured homeowner's brother and his family negligently caused a fire while living temporarily in the owner's home. Id., 121–22. Thereafter, upon compensating the owner for the damage, the insurer commenced a subrogation action against the brother. Id., 122. At trial, the brothers testified that, although they had entered into no formal agreement and had had little discussion regarding the terms of the brother's temporary occupancy, they had agreed informally that the brother would pay the utility bills, maintain the home

and not pay any rent but that the owner would continue paying the taxes. Id. The owner also told his brother that he would leave his insurance policy in place. Id. In deciding whether to allow the subrogation action, the court stated that the relationship between the owner and his brother did not resemble that of a landlord and a tenant or a licensor and a licensee; id., 124; but was of a "separate and unique kind" more akin to that of a host and social guest. Id., 124, 125–26. The court then emphasized that the question before the court was whether the insurance carrier was, "in effect, seeking to recover from the insured himself for the very risk that the carrier insured and for which it received premiums." Id., 126. The court ultimately concluded that this was the case because *the owner testified that he expressly told his brother that he would leave his insurance policy in place* during the brother's occupancy. Id., 128. The court added that, in light of this testimony, it was "difficult to see how the insurance was not for the benefit of the [brother] to the same extent as it was for the [owner]." Id.

In its analysis, the court quoted from a Washington case, in which the court stated that "a tenant stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim." (Internal quotation marks omitted.) Id., 129, quoting *Rizzuto* v. *Morris*, 22 Wash. App. 951, 956, 592 P.2d 688, review denied, 92 Wash. 2d 1021 (1979). The Nebraska court then observed: "It occurs to us that if the reasoning underlying the denial of a subrogation claim applies between a landlord and a tenant, then we conclude that this reason is even more compelling when the relationship is that of host and guest, particularly when the host has assured the guest that there is insurance coverage. It may be presumed that the insured bought this policy so that he would not have to look to his guest for payment in the event of damage caused by the negligent act of the guest. We are persuaded that the relationship which existed between the brothers in this case was such that, regardless of how their relationship is characterized, a right of subrogation in the insurer against the insured's niece should not lie as a matter of law." *Reeder* v. *Reeder*, supra, 217 Neb. 129.

In my view, *Reeder* is inapposite on both the facts and the law. From a factual standpoint, it is clearly distinguishable from the present case because the court's conclusion that bringing an action against the tortfeasor would be like bringing an action against the insured was based on the fact that the owner had specifically told his brother that he would maintain insurance on the property during the brother's occupancy, which led the brother to believe that he was covered under the policy. In contrast, the record indicates that Deveau and the defendant not only failed to discuss whether he was covered under her policy, but that neither gave any thought to the matter before the fire occurred.

From a legal standpoint, *Reeder* also is distinguishable because it involved what the Nebraska court characterized as a relationship between a host and social guest, to which the court applied the presumption that a host would buy an insurance policy so that he would *not* have to seek payment from the guest in the event that the guest negligently caused damage to the property. See id., 126–28. In contrast, this court applied the opposite presumption in *Wasko* in determining that a social guest fully expects to pay for damages caused by his or her negligence to the home of the insured host. See *Wasko* v. *Manella*, supra, 269 Conn. 547. Indeed, when the court in *Wasko* examined *Reeder*, it also found the case distinguishable. Id., 549 n.18 (finding *Reeder* inapposite because it involved unique factual scenario, and there was undisputed evidence that owner had told his brother that he would leave his insurance policy in place). Accordingly, *Reeder* cannot serve as precedent in this case.

The majority loses sight of the principle that "[s]ubrogation is a highly favored doctrine . . . which courts should be inclined to extend rather than restrict." (Citation omitted.) *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, supra, 236 Conn. 372. In *DiLullo*, we carved out a very narrow exception to the doctrine in cases involving landlords and tenants in multiple unit buildings when there was no specific agreement regarding insurance on the premises for fire or other casualty arising from the tenants' negligence. See *DiLullo* v. *Joseph*, supra, 259 Conn. 848–49, 854. We noted that such an agreement generally may be evidenced by the parties' lease or by the tenant being named as an additional insured in the landlord's policy. Id., 851 n.4. The principal reason why we embraced this exception was because "subrogation, as an equitable doctrine, invokes matters of policy and fairness"; id., 853; and there would be unacceptable economic waste if every tenant was required to bear the cost of insuring the entire building even though he or she occupies only a portion thereof. Id., 854. We also observed that "neither landlords nor tenants ordinarily expect that the landlord's insurer would be proceeding against the tenant, unless expert counseling to that effect had forewarned them." Id., 854. In situations such as the present one, there would be no unacceptable economic waste if the nonowning partner living with the insured homeowner is required to obtain insurance or take steps to be included in the insured homeowner's policy. In addition, because all homeowners' insurance policies in Connecticut must contain a subrogation provision that the insured may be required to assign the right of recovery to the insurer, this court may apply the presumption that homeowners fully understand the insurer's potential subrogation rights under the policy and that similar rights very likely would exist under principles of equitable subrogation. See *Wasko* v. *Manella*, supra, 269 Conn. 539 n.10 ("[t]he legislative

history of the current standard form of fire insurance . . . provide[s] some evidence" that one of primary motivations behind adoption of form was "to provide consumers with a consistent and easily understandable form of insurance"). Accordingly, there was no reason why Deveau would have needed "expert counseling" to understand her insurance policy, which put her on notice that she might be required to assign to the plaintiff her right of recovery against the defendant for fire damage caused by his negligence. Likewise, we may apply the presumption that the defendant was put on notice regarding the consequences of his potential negligence by the statutory provision on assignment. Cf. *East Village Associates, Inc.* v. *Monroe*, 173 Conn. 328, 333, 377 A.2d 1092 (1977) (amendment to statutory provision constituted notice of new provision). In light of these considerations, the plaintiff reasonably would have *expected* that it could proceed with an equitable subrogation action, especially when neither the defendant nor Deveau had given the plaintiff notice as to the addition of a nonfamily resident to Deveau's household.

For all of the foregoing reasons, I respectfully dissent.

[1] We hereinafter refer to Palumbo as the defendant.

[2] "It is common business practice for tenants to obtain their own renter's insurance policy to cover their liability for losses they cause to third parties." *Hacker* v. *Shelter Ins. Co.*, 388 Ill. App. 3d 386, 393, 902 N.E.2d 188 (2009).

[3] In this regard, it should be noted that the trial court's last finding of fact was that the plaintiff was seeking reimbursement from Deveau for money improperly paid to her for the loss of certain personal property damaged by the fire but owned by the defendant.

[4] The defendant's arguments are confirmed in part by the trial court's limited findings that (1) Deveau purchased the property on or about June 15, 1999, and is the "sole record title owner" and "sole mortgagee," (2) no one has claimed a leasehold interest in the property, (3) the defendant moved into Deveau's home on or about February, 2001, as Deveau's "live-in boyfriend/fiance" and vacated the premises on or about October, 2005, (4) during the time that they were living together, the defendant and Deveau shared expenses for the residence, which varied from month to month, (5) Deveau was the "sole named insured" on the homeowner's insurance policy issued by the plaintiff, (6) the defendant never made a security deposit and never had an oral or written lease with Deveau, (7) Deveau and her daughter shared the entire house with the defendant, and no one had exclusive use of any particular area, (8) during his occupancy, the defendant performed many improvements and maintenance functions, as if he was an owner, (9) the defendant never asserted any ownership interest in the premises, (10) on January 31, 2002, the premises caught on fire, which caused damages to the premises and personal property therein, (11) the defendant conceded at trial that he was responsible for the fire due to his negligent installation of a heat pump, (12) as a result of the fire, the plaintiff was required under Deveau's insurance policy to pay her $62,615.25 for structural damages, damages to her personal property and relocation expenses, and (13) during closing argument, the plaintiff conceded that it had paid Deveau $1121.96 in error, a sum that reflected the value of the defendant's property and for which it was seeking reimbursement. Among the facts on which the defendant relies that the trial court did *not* find are that he made payments on Deveau's insurance premium and that both he and Deveau believed that he was insured under her policy.

[5] General Statutes § 38a-308 provides in relevant part: "(a) No policy or contract of fire insurance shall be made, issued or delivered by any insurer or any agent or representative thereof, on any property in this state, unless it conforms as to all provisions, stipulations, agreements and conditions with the form of policy set forth in section 38a-307. . . ."

General Statutes § 38a-307 provides in relevant part: "Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by

this Company."

Subsection (b) of § 38a-308 allows insurers to issue a nonconforming policy as long as "(1) such policy or contract shall afford coverage, with respect to the peril of fire, not less than the substantial equivalent of the coverage afforded by said standard fire insurance policy, (2) the provisions in relation to mortgagee interests and obligations in said standard fire insurance policy shall be incorporated therein without change, (3) such policy or contract is complete as to all of its terms without reference to any other document and (4) the [insurance] commissioner is satisfied that such policy or contract complies with the provisions hereof."

[6] The majority misunderstands my position. I do not believe that the subrogation provision in Deveau's policy should be given effect, as the majority declares; see footnote 17 of the majority opinion; rather, I acknowledge that the provision did *not* provide the plaintiff with "an inviolate statutory right of subrogation." *Wasko* v. *Manella*, supra, 269 Conn. 536. My point is simply that, because Deveau's policy contained the provision, she was on notice that the plaintiff *might* require that she assign her right of recovery against the defendant. The plaintiff did not require that she do so but proceeded instead to bring an equitable subrogation action outside the scope of the policy. Deveau could have expected this to happen, however, not only because she was on notice from her insurance policy that the plaintiff could have required an assignment of her right of subrogation but because we noted in *Wasko* that such a provision, which is required by statute, "ha[s] its basis in general principles of equity rather than in contract, which will be treated as being merely a declaration of principles of law already existing." (Internal quotation marks omitted.) Id., 534. I thus find bizarre the majority's view that the insurer could have proceeded with a subrogation action under Deveau's policy by requiring that she assign her right in this regard, but that the insurer cannot proceed to do the exact same thing under the equitable principles on which the statutorily required insurance provision is based.