MARC GRENIER, ADMINISTRATOR (ESTATE OF NICHOLAS GRASS) *v.* COMMISSIONER OF TRANSPORTATION ET AL.
(SC 18640)

Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.*

Argued March 20—officially released September 25, 2012

Steven D. Ecker, with whom were *M. Caitlin S. Anderson* and, on the brief, *Michael A. Stratton* and *Joel T. Faxon*, for the appellant (plaintiff).

Catherine L. Creager, with whom, on the brief, was *Kevin A. Coles*, for the appellees (defendant Delta Kappa Epsilon National Fraternity et al.).

Opinion

NORCOTT, J. In this appeal, we consider whether a national fraternity and one of its local Connecticut Chapters may be held liable in common-law negligence for the death of one of its members, which occurred while driving back to New Haven after a fraternity event held in New York City. On appeal,[1] the plaintiff, Marc Grenier, as administrator of the estate of Nicholas Grass, claims that the trial court improperly rendered summary judgment for the defendants Delta Kappa Epsilon National Fraternity (Delta National) and its Delta Kappa Epsilon Phi Chapter (Phi Chapter) (collectively, fraternity defendants),[2] because: (1) the complaint alleged a claim for common-law negligence rather than a negligence per se claim arising from a violation of General Statutes § 53-23a,[3] the Connecticut statute prohibiting hazing; (2) holding the fraternity defendants liable for negligence is appropriate because Grass' injuries were foreseeable and imposing a duty of care under these circumstances is consistent with public policy; and (3) Phi Chapter voluntarily assumed a duty of care by providing transportation for Grass from the fraternity event in New York City. The plaintiff also claims that the trial court improperly refused to allow him to replead his negligence claim to include § 53-23a or more specific duty allegations. Because we conclude that the plaintiff sufficiently alleged a claim of common-law negligence, Phi Chapter, as a matter of law, voluntarily assumed a duty of reasonable care in the circumstances, and that the plaintiff raised a material question of fact regarding Delta National's control over Phi Chapter, we reverse the judgment of the trial court.

The record, viewed in the light most favorable to the nonmoving party, the plaintiff in the present case, reveals the following relevant facts and procedural history. Beginning in the fall of 2002, Grass began pledging to become a member of Phi Chapter, Yale University's local chapter of Delta National. During the pledging process, Grass and the other pledges learned the history and traditions of the fraternity and participated in activities that required the pledges to submit to the control and authority of the fraternity members, and which were intended to prove their dedication to the organization and to create bonds with the fraternity members and their fellow pledges. At the beginning of the spring, 2003 semester, the pledging process culminated in what the fraternity members referred to as " 'Hell Week,' " a weeklong series of events designed to push the pledges to their " 'breaking point.' " Included in these events were ongoing efforts by the fraternity members to keep the pledges awake every night during the week. Every year, Hell Week concluded with an off-campus "search and rescue mission," during which a fraternity member would be "captured" by the pledges while the remaining members would try to locate their captured comrade,

after which the fraternity members and the pledges would spend the rest of the evening socializing.[4] Phi Chapter officers arranged for the search and rescue event in which Grass and his fellow pledges were expected to participate to take place in New York City beginning on the night of January 16, 2003. Some of the pledges traveled to New York City via train, while other pledges were transported by fraternity members who had volunteered to be designated drivers for the event.

According to Nicholas Sinatra, the president of Phi Chapter from 2002 to 2003, the pledges were supposed to take a train back to New Haven after the conclusion of the search and rescue event. At approximately 3:30 a.m. on January 17, 2003, however, as the event concluded, Sinatra directed that, rather than have all of the pledges take a train, the fraternity members who had driven to New York City should take as many pledges as would fit in the vehicles back with them to Yale University. Although there apparently was no formal assignment of which pledges would ride in which vehicles on the return trip to New Haven, Grass rode in a Chevrolet Tahoe driven by Sean Fenton, a member who had volunteered to be a designated driver at the start of the event.

On the drive back to New Haven, a series of unfortunate circumstances combined to cause Fenton to crash the Tahoe. First, prior to the group's departure from New York City, it began snowing, and Interstate 95 (I-95), the route Fenton traveled back to New Haven, was only partially plowed where the collision occurred. In addition to the inclement weather, during construction being performed on I-95 prior to Fenton's accident, a light pole had been knocked down, and the overhead lighting in the area of the collision had become disabled. Then, at approximately 4:50 a.m. that morning, a tractor trailer crashed into the concrete median barrier separating the northbound and southbound lanes of the highway. When the tractor trailer came to rest after it crashed, it blocked a portion of the northbound travel lanes. Finally, although Fenton had abstained from drinking alcohol during the course of that evening,[5] he had participated in the overnight activities designed to keep the pledges awake during two nights of Hell Week. As a result, Fenton had slept a total of only twenty-five to thirty hours during that week and was suffering from fatigue.

Thus, shortly after 5 a.m. on January 17, 2003, the slick, dark road conditions and Fenton's reduced reaction time due to his fatigue combined to create a situation in which Fenton was unable to avoid colliding with the disabled tractor trailer, which was blocking his travel lane. Four of the eight occupants of Fenton's vehicle, including Grass, died from injuries sustained in that collision, and the four other occupants suffered serious injuries.

Following the collision, the plaintiff filed several claims against the named defendant, the commissioner of transportation, and the companies responsible for the construction site on the highway (contractor defendants), grounded primarily on the safety hazards at the construction site that precipitated the accidents. See footnote 2 of this opinion. The contractor defendants, as apportionment plaintiffs, then filed apportionment complaints against the driver of the tractor trailer, his employer, Fenton and the fraternity defendants.[6] Thereafter, the plaintiff amended his complaint pursuant to General Statutes § 52-102b (d)[7] to include a claim against the fraternity defendants. In the fifth count of the amended complaint, the plaintiff alleged that, "the plaintiff does not believe that the [fraternity defendants] were in any way negligent, but brings this action in accordance with . . . § 52-102b (d), for purposes of apportionment," incorporated by reference the apportionment complaint allegations, and relied on the apportionment plaintiffs "to prove, if they can" the negligence claims against the fraternity defendants. The fraternity defendants subsequently filed a motion for summary judgment claiming that the plaintiff, in his amended complaint, had admitted that the fraternity defendants were not negligent. The plaintiff, with the trial court's permission, then filed a second amended complaint, stating that his basis for bringing a claim against the fraternity defendants was that the contractor defendants, as the apportionment plaintiffs, "believe[d] that the [f]raternity [d]efendants were negligent." He also again incorporated by reference the apportionment complaint and, further, set forth the specific allegations of negligence that the apportionment plaintiffs had alleged against the fraternity defendants in the apportionment complaint.

In response to the plaintiff's second amended complaint, the fraternity defendants denied that they were negligent, and by way of a special defense, claimed that the accident and the injuries complained of were the sole, direct, proximate and substantial result of the negligence of the contractor defendants. Subsequently, the fraternity defendants also moved to dismiss the second amended complaint, arguing that the trial court lacked subject matter jurisdiction over the plaintiff's negligence claim because it did not relate back to the original amended complaint, and thus was time barred by the statute of limitations. Specifically, the fraternity defendants claimed that the plaintiff did not allege a claim for negligence in the original amended complaint, which all parties agreed was timely, because, even though he had incorporated the negligence allegations brought by the apportionment plaintiffs by reference, he also had stated that he did not believe that the fraternity defendants were in any way negligent. Stating that pleadings should be construed liberally, however, the trial court, *Shay, J.*, concluded that the plaintiff had

pleaded sufficient facts in the original amended complaint and in the second amended complaint to put the fraternity defendants on notice that he was alleging that negligence was involved, and therefore denied the fraternity defendants' motion to dismiss the complaint.

Thereafter, the fraternity defendants again moved for summary judgment on both the apportionment complaint and the plaintiff's complaint, claiming that neither complaint sufficiently stated a claim for negligent entrustment and that the fraternity defendants did not have a duty to protect Grass from injuries inflicted by another person because there was no special relationship between the fraternity defendants and their members. Specifically, the fraternity defendants claimed that they owed no duty to Grass unless they had violated § 53-23a, and there was no evidence that the search and rescue mission constituted hazing or even that Grass was required to participate in that event. They also contended that any conduct by the fraternity defendants was not the proximate cause of Grass' injuries and that the fraternity defendants could not be held vicariously liable for any negligent conduct by Fenton.

In response, the apportionment plaintiffs and the plaintiff in the present case[8] first claimed that the fraternity defendants had misconstrued the allegations, and that, rather than claims of negligent entrustment and vicarious liability, the complaints alleged independent acts of negligence related to the supervision, organization and control of the activities of the fraternity defendants' members. Specifically, they claimed that the fraternity defendants had a duty to provide safe transportation to the mandatory fraternity event, that such a duty was foreseeable and within sound public policy, and that there was, at least, a genuine issue of material fact regarding whether Delta National exerted sufficient control over Phi Chapter and, therefore, also owed Grass a duty of care. The trial court, *Blawie*, *J.*, concluded that the fraternity defendants, as a matter of law, owed no duty to Grass unless so imposed by a statute, and that the complaints had failed to allege the statutory elements of hazing. The trial court, therefore, granted the fraternity defendants' motion for summary judgment. This appeal by the plaintiff followed.[9]

On appeal, the plaintiff claims that the trial court improperly rendered summary judgment for the fraternity defendants because he adequately alleged a claim of common-law negligence, rather than a negligence per se claim as the trial court believed, that recognizing a duty on the part of the Phi Chapter is foreseeable and within sound public policy, and that the Phi Chapter voluntarily assumed a duty of care by directing that the fraternity members transport the pledges back to New Haven. Furthermore, the plaintiff argues that Delta National exerted sufficient control over Phi Chapter to impose a duty to protect Grass from the negligent

actions of Phi Chapter's members.

The fraternity defendants, in response, argue that, in the absence of a violation of § 53-23a, they had no duty to protect Grass from injury because there was no special relationship to justify imposing such a duty, that the judgment of the trial court can be affirmed on the alternate ground that any actions by the fraternity defendants were not the proximate cause of Grass' injuries, and that the trial court improperly denied their motion to dismiss the second amended complaint for lack of jurisdiction. For the reasons set forth herein, we reverse the summary judgment rendered in favor of the fraternity defendants.

I

SUMMARY JUDGMENT CLAIMS

We begin by setting forth the applicable standard of review. "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."[10] (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). "Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Neuhaus* v. *DeCholnoky*, 280 Conn. 190, 199, 905 A.2d 1135 (2006).

A

Interpretation of the Pleadings

The plaintiff first argues that the trial court, *Blawie*, *J.*, improperly determined that the fifth count of the second amended complaint was deficient because the court misconstrued that count. We agree that the trial court improperly interpreted the plaintiff's complaint as alleging a claim of negligence per se, on the basis of a violation of § 53-23a; see *Gore* v. *People's Savings Bank*, 235 Conn. 360, 376, 665 A.2d 1341 (1995) ("[n]egligence per se operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles . . . [and if] the relevant statute or regulation has been violated . . . the defendant was negligent as a matter of law" [internal quotation marks omitted]); rather than a claim sounding in common-law negligence.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 559, 864 A.2d 1 (2005). Furthermore, "we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, 270 Conn. 133, 173–74, 851 A.2d 1113 (2004). "Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be 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." (Citation omitted; internal quotation marks omitted.) *Travelers Ins. Co.* v. *Namerow*, 261 Conn. 784, 795, 807 A.2d 467 (2002). "As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Internal quotation marks omitted.) Id.

In the present case, the plaintiff clearly alleged a claim for common-law negligence in the fifth count of his second amended complaint rather than a claim founded on allegations of negligence per se. That count specifically included allegations that Phi Chapter "organized, sponsored, arranged, sanctioned and/or approved" the search and rescue mission from which Grass was returning when he was involved in the fatal crash; that, as part of the organization of the event, Phi Chapter "selected, appointed, mandated, chose and/or approved of an individual to drive some of the attendees back from New York City to New Haven"; and that the accident was "due to the negligence and/or carelessness of [the fraternity defendants]" in various respects regarding the transportation arrangements. See footnote 6 of this opinion. In reviewing these allegations, we conclude that the trial court improperly determined that the plaintiff was attempting to allege a claim of negligence per se on the basis of a violation of § 53-23a. Reading the plaintiff's pleadings as an allegation of negligence per se based on a violation of § 53-23a while, at the same time, determining that the pleadings

did not adequately set forth the elements of that statute, however, improperly contorted the plaintiff's fifth count "in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, supra, 270 Conn. 174. Therefore, construing the plaintiff's pleadings broadly and realistically, as we must; see id., 173; we conclude that the plaintiff plainly alleged a claim of common-law negligence against the fraternity defendants for their conduct in providing return transportation from an official fraternity event, rather than a negligence per se claim premised on a violation of a statute that he did not even mention in the pleadings. Accordingly, we review the remaining issues in the present case within the context of the plaintiff's common-law negligence claim.

B

Phi Chapter—Public Policy

We next address the plaintiff's claim that Phi Chapter, independent of Delta National, owed Grass a general common-law duty to provide safe transportation for a mandatory fraternity event. The fraternity defendants, in response, argue that generally, there is no duty to act for the protection of others in the absence of a special relationship. They further claim that such a special relationship is generally established for fraternities only when they violate a state's statute that prohibits hazing, and the plaintiff did not allege such a violation in this case.

Because "[t]he 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); and "[t]he existence of a duty of care is a prerequisite to a finding of negligence"; *Gomes* v. *Commercial Union Ins. Co.*, 258 Conn. 603, 614, 783 A.2d 462 (2001); in order to prevail, the plaintiff must demonstrate that he adequately alleged that the fraternity defendants owed Grass a duty of care. "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Citation omitted; internal quotation marks omitted.) Id., 614–15. "Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action." (Internal quotation marks omitted.) *Lombard* v. *Edward J. Peters, Jr., P.C.*, 252 Conn. 623, 632, 749 A.2d 630 (2000). "We have stated that the test for the existence of a legal duty of care 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 suf-

fered 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." (Internal quotation marks omitted.) *Gomes* v. *Commercial Union Ins. Co.*, supra, 616. Additionally, "[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." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 139–40, 2 A.3d 859 (2010).

"[T]here generally is no duty that obligates one party to aid or to protect another party. . . . One exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or to protect another. . . . In delineating more precisely the parameters of this limited exception to the general rule, this court has concluded that, [in the absence of] a *special relationship of custody or control*, there is no duty to protect a third person . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Murdock* v. *Croughwell*, 268 Conn. 559, 566, 848 A.2d 363 (2004); see also 2 Restatement (Second), Torts § 314 (1965) ("[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action"); 2 Restatement (Second), supra, § 314A (enumerating special relationships giving rise to duty to aid or protect, including "[o]ne who . . . voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection"); 2 Restatement (Second), supra, § 315 ("[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the other which gives to the other a right to protection"). Importantly, the relationship between a fraternity and its members and pledges is not one recognized as imputing a duty to protect in all circumstances. Therefore, we conclude that in the absence of circumstances creating such a special relationship, Phi Chapter owed no general common-law duty to protect Grass, which would obligate the fraternity to provide him with safe transportation for fraternity events.

1

Section 53-23a

The plaintiff first argues, however, that the public policy of prohibiting hazing, as embodied in § 53-23a, supports the imposition of a general common-law duty of care in organizing and conducting fraternity events.

We disagree. We acknowledge that the legislature has criminalized "any action which recklessly or intentionally endangers the health or safety of a person for the purpose of initiation, admission into or affiliation with, or as a condition for continued membership in a student organization." General Statutes § 53-23a (a) (1). The public policy embodied in statutes prohibiting hazing has been described by other jurisdictions as "an understanding that youthful college students may be willing to submit to physical and psychological pain, ridicule and humiliation in exchange for social acceptance which comes with membership in a fraternity"; *Morrison* v. *Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1115 (La. App. 1999); and as designed to prevent "embarrassing or endangering our youth through thoughtless or meaningless activity." *Haben* v. *Anderson*, 232 Ill. App. 3d 260, 265–66, 597 N.E.2d 655 (1992). Nevertheless, the public policy of prohibiting hazing, as embodied in § 53-23a, is inapplicable to the circumstances of the present case, and is, therefore, insufficient to support imposing a general duty of care upon Phi Chapter.

None of the activities that the plaintiff alleged as having caused Grass' injuries involved conduct that falls within the scope of hazing activity as defined by § 53-23a.[11] Indeed, we are presented with no evidence of intentional or reckless conduct that led to Grass' injuries. Rather, we are merely considering Phi Chapter's alleged negligent conduct in providing return transportation from a social fraternity event. Indeed, because the plaintiff alleged only that Delta National should be held liable for organizing an off-campus fraternity social event and failing to ensure that the participants received safe return transportation, the negligent transportation issues presented herein would be the same whether the fraternity event from which Phi Chapter provided transportation was a reenactment of the movie Animal House[12] that involved serious hazing activities, or was a group trip to a Habitat for Humanity event at which the fraternity members assisted in building a house for a low income family. Accordingly, we conclude that the public policy considerations embodied in the legislation banning hazing are not implicated here.[13] We therefore need not consider whether imposing civil liability in common-law negligence for injuries resulting from hazing is consistent with the public policy attendant to criminalizing intentional or reckless hazing activities.[14]

2

Encouraging Participation while Promoting Safety

The plaintiff next argues that the public policy of encouraging participation in activities while promoting participant safety further supports the imposition of a duty on Phi Chapter given the circumstances of this case. We disagree.

First, the participation/safety inquiry is only one part of the test generally set forth for analyzing the public policy justifications for imposing a duty of care. We have stated that the four factors to be considered in determining the extent of any legal duty as matter of public policy include: "(1) the normal expectations of the participants in the activity under review; (2) *the public policy of encouraging participation in the activity, while weighing the safety of the participants*; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." (Emphasis added.) *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 480, 823 A.2d 1202 (2003).[15] Even if encouraging participation in fraternities while promoting participant safety is a sufficient independent public policy basis in and of itself, however, we conclude that it is not sufficient to impose a duty upon Phi Chapter under the circumstances of the present case. The argument for encouraging participation in an activity while ensuring safety contains two considerations—(1) encouraging participation, and (2) *promoting* safety—not just the objective of *ensuring* safety under any and all circumstances. See *Jaworski* v. *Kiernan*, 241 Conn. 399, 409, 696 A.2d 332 (1997).

Courts across the United States have determined that college students are adults capable of ensuring their own safety. See, e.g., *Coghlan* v. *Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300 (1999) ("the modern American college is not an insurer of its students . . . [and] Idaho universities [do not] have the kind of special relationship creating a duty to aid or protect adult students from the risks associated with the students' own voluntary [acts]" [citation omitted; internal quotation marks omitted]); *Beach* v. *University of Utah*, 726 P.2d 413, 419 (Utah 1986) (declining to impose on universities role of custodian over adult students to assure their safety and safety of others, because such measures would be inconsistent with "a proper goal of postsecondary education—the maturation of the students"). Thus, in the absence of a special relationship of custody or control between the voluntary association and its adult student members, the association owes no general duty to protect, and, in the present case, Grass' membership, or attempted membership, in Phi Chapter, without more, entitles him to no greater general duty of care from the fraternity.

Therefore, we conclude that the simple policy objective of encouraging participation in activities while promoting the safety of the participants is insufficient to overcome the proposition that, generally, there is no duty to protect, or ensure the safety of, another individual. Imposing liability for negligent conduct in all circumstances, especially those that are unrelated to hazing induced injuries, would simply set the bar too high for fraternities—and potentially other voluntary

associations as well. Cf. *Jaworski* v. *Kiernan*, supra, 241 Conn. 409 (concluding that balance of tension between encouraging participation in recreational sports while promoting participant safety is best achieved by allowing actions only for reckless or intentional conduct, not negligent conduct).

C

Voluntary Assumption of Duty

The plaintiff also argues that Phi Chapter owed a duty of care to Grass because it gratuitously undertook to provide transportation, and, therefore assumed a duty to do so safely. The fraternity defendants, in response, argue that, because the search and rescue event was nothing more than an undertaking in which a group of young adults met to play a game and socialize, such a voluntary activity by consenting adults creates no affirmative duty on the part of Phi Chapter to ensure the participants' safety. We conclude that, although Phi Chapter had no affirmative duty to provide transportation in the first place, once it undertook to provide transportation to Grass, it assumed a duty to do so safely.

"One who gratuitously undertakes a service that he has no duty to perform must act with reasonable care in completing the task assumed." *Coville* v. *Liberty Mutual Ins. Co.*, 57 Conn. App. 275, 282, 748 A.2d 875, cert. granted on other grounds, 253 Conn. 919, 755 A.2d 213 (2000) (appeal withdrawn March 30, 2001). "If one undertakes to perform an act and performs it negligently . . . it makes no difference whether . . . the act was performed gratuitously . . . ." *Zatkin* v. *Katz*, 126 Conn. 445, 450, 11 A.2d 843 (1940). "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." 2 Restatement (Second), supra, § 323; see also id., § 323, comment (b), p. 123 ("[A] contract to render services, or a gratuitous offer to render them, or even merely giving them at the other's request, may carry with it a profession or representation of some skill and competence; and if the actor realizes or should realize that his competence and skill are subnormal, he must exercise reasonable care to inform the other. If he does not do so, he is subject to liability for physical harm resulting from his deficiencies.").

Although whether a party may voluntarily assume a duty to provide safe transportation, and under what circumstances, has not yet been addressed by this court, the Appellate Court has concluded that a driver may

voluntarily assume a duty to provide safe transportation when he takes custody or control over his passenger. *Coville* v. *Liberty Mutual Ins. Co.*, supra, 57 Conn. App. 275. In *Coville*, the defendant driver forced his girlfriend to ride home from a bar with him and refused to let her out of the car despite several attempts on her part to exit the vehicle. Id., 277. The Appellate Court concluded that the jury should have been instructed regarding the driver's voluntary assumption of custody or control over his girlfriend, which would have imposed additional duties of care other than merely the traditional duty of care owed by a driver to his passenger.[16] Id., 283.

Furthermore, other jurisdictions recognize that a party who voluntarily undertakes to provide transportation for others must do so safely. For example, in *EMI Music Mexico, S.A.* v. *Rodriguez*, 97 S.W.3d 847 (Tex. App. 2003), the Texas Court of Appeals concluded that injured band members had stated a valid claim for negligence against the record company that undertook to transport the band by alleging that the record company had sent an allegedly reckless, unfit, and exhausted driver to pick up the band. The court noted: "Texas courts have recognized that a duty to use reasonable care may arise when a person undertakes to provide services to another, either gratuitously or for compensation . . . . One who owes no legal duty, but who gratuitously acts assumes a duty to act with reasonable care so as to prevent harm to that person or to others." (Citation omitted.) Id., 858.

In *Terrell* v. *LBJ Electronics*, 188 Mich. App. 717, 470 N.W.2d 98 (1991), appeal denied, 439 Mich. 1008, 485 N.W.2d 493 (1992), the Court of Appeals of Michigan considered the voluntary assumption of a duty to transport an individual safely in the context of a Boy Scout leader volunteering to drive his troop home after a troop meeting. The court noted that, "[w]hen a person entrusts himself to the control and protection of another and, consequently, loses control to protect himself, the duty to protect is imposed upon the person in control because he is best able to provide a place of safety. . . . Moreover, when a person voluntarily assumes the performance of a duty, he is required to perform that duty carefully." (Citation omitted.) Id., 720. The court concluded that the defendant's duty of care "primarily arose out of the relationship which was created when [the] defendant voluntarily assumed the duty of driving [the] plaintiff home in his vehicle. . . . [The defendant] had no duty . . . to transport or escort [the] plaintiff and the other scouts from the meeting place to their homes. However, when he voluntarily performed this function, he assumed a duty to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task. . . . When [the defendant] volunteered to drive the scouts home, he knew they were relying on him to see that they safely reached their destinations by his operating his vehicle in a care-

ful manner." (Citation omitted.) Id., 721.

In addition, the Supreme Court of Wisconsin has recognized the fact that one who gratuitously undertakes to drive an intoxicated individual home assumes a duty to do so safely, despite the fact that the driver may be immune from suit under other principles of Wisconsin law. See *Stephenson* v. *Universal Metrics, Inc.*, 251 Wis. 2d 171, 190–91, 641 N.W.2d 158 (2002). With regard to the assumption of a duty, the court noted that, "[a]lthough one may have no duty to perform an act, if he attempts to do something to another even although gratuitously he must exercise reasonable care. . . . [L]iability may be imposed on a person who has no duty to act when that person gratuitously undertakes to act, then acts negligently." (Citation omitted.) Id., 190. Similarly, the Supreme Court of Tennessee has determined that "[d]esignated drivers offer a valuable, but limited service to those who become intoxicated . . . [namely] a duty to exercise reasonable care in driving the vehicle and remaining sober while performing this service," but not a general duty to aid or protect. *Downs ex rel. Downs* v. *Bush*, 263 S.W.3d 812, 824 (Tenn. 2008).

Finally, the Supreme Court of Minnesota, in determining that an employer who directed that an employee travel to various job sites via transportation provided by the employer assumed a duty to provide safe transportation, recognized that, "where [one] undertakes [a] duty he at once assumes the burden of the proper performance. So here the defendant, having undertaken to transport the deceased from place to place, undertook to transport him safely. [The defendant], not [the deceased], selected the manner of such transportation, and undertook to make such manner safe. . . . [I]t was the . . . duty of the defendant to exercise due care to secure [the decedent's] safe transportation." *Headline* v. *Great Northern Railway Co.*, 113 Minn. 74, 82, 128 N.W. 1115 (1910).

In the present case, as discussed in part I A of this opinion, as a starting point, Phi Chapter owed no general duty to Grass regarding his transportation to or from New York City for the search and rescue event. Indeed, Sinatra testified at his deposition that, prior to the event, no arrangements had been made for the return transportation of the pledges who would participate in that event and that he expected them to take the train back to New Haven at the conclusion of the event. Once the decision was made that Phi Chapter would be coordinating and providing transportation back from the event, however, Phi Chapter voluntarily assumed a duty to do so safely. At that point, it was reasonable for Grass to rely on the fact that Phi Chapter had determined that Fenton had remained sufficiently sober and alert so that he could safely drive the participants home. It also was reasonable to rely on Phi Chap-

ter to take practical measures to ensure that those assigned to drive could do so safely.

Moreover, providing transportation to the pledges was a "[service] to another which [Phi Chapter] should [have] recognize[d] as necessary for the protection of the other's person or things"; 2 Restatement (Second), supra, § 323; because an ordinary person in Phi Chapter's position of coordinating an off-campus, late night event in January, when many of the participants, including those who had volunteered to drive other participants, were sleep deprived, should have been aware of the risk of an accident occurring if the designated drivers were unfit to drive safely. At the time Sinatra directed that the pledges would return in the fraternity members' vehicles, Phi Chapter selected the manner of Grass' transportation, and it became obligated to exercise due care to secure Grass' safe return. See *Headline* v. *Great Northern Railway Co.*, supra, 113 Minn. 82. Accordingly, we conclude that, as a matter of law, Phi Chapter voluntarily assumed a duty of care regarding Grass' safe transportation.

We note, however, that whether Phi Chapter's actions in assigning or approving Fenton to drive Grass to New Haven at the conclusion of the final event of Hell Week were reasonable under the circumstances, or whether such actions constituted a breach of its duty of care, presents a question of fact for the jury. See e.g., *Gomes* v. *Commercial Union Ins. Co.*, supra, 258 Conn. 614 ("the trier of fact . . . determine[s] whether the defendant [breached] that duty in the particular situation at hand" [internal quotation marks omitted]). Accordingly, we decline to express any opinion concerning the reasonableness of Phi Chapter's actions in assigning or approving Fenton as a driver, and conclude only that Phi Chapter voluntarily assumed a duty to provide reasonably safe transportation to Grass. Therefore, we conclude that the trial court improperly granted summary judgment in favor of Phi Chapter, and leave to the jury the determination of whether Phi Chapter breached its duty of care in assigning or approving Fenton as a driver for Grass.

D

Delta National

We next address the plaintiff's argument that Delta National also may be held liable for Grass' injuries for inadequately supervising and controlling the actions of the Phi Chapter members because Delta National maintained a significant level of control over Phi Chapter. Delta National contends, in response, that it had no duty to protect Grass from the Phi Chapter members' actions because Delta National had very little interaction with Phi Chapter, and therefore was not in a position of control over Phi Chapter or the organization of the search and rescue event.

Although the question of whether a national fraternity may be held liable for an injury to a fraternity pledge is a matter of first impression for this court, both the Superior Court for the judicial district of Fairfield, and courts in other jurisdictions have conditioned liability on the level of control that the national fraternity exerts over the relevant local chapter. A sufficient level of control is necessary in order to impose liability on the national chapter because there generally is no duty that obligates a party to aid or protect another party absent a relationship of custody or control. See part I B of this opinion; see also *Murdock* v. *Croughwell*, supra, 268 Conn. 566; 2 Restatement (Second), supra, §§ 314, 314A, 315.

For example, In *Morrison* v. *Kappa Alpha Psi Fraternity*, supra, 738 So. 2d 1118, the Court of Appeal of Louisiana determined that a national fraternity that was aware of prior hazing activities at a local chapter, and knew that the national measures designed to protect against and prevent hazing were ineffectual, owed a duty to protect a pledge from injuries caused by the local chapter's hazing activities. The court in *Morrison* stated that the national organization had conceded that it was "responsible for all that [went] on in its chapters, as it [had] the right to control intake, expel or suspend members, and revoke charters." Id. The national fraternity also assigned regional officers who were charged with auditing local chapters for compliance with fraternity, university and local criminal rules and regulations, approved faculty advisors for the local chapters, and conducted educational programs and workshops to address the problem of hazing. Id. On the basis of these circumstances, the court determined that the national fraternity "[had] assumed a duty to regulate, protect against and prevent hazing by its collegiate chapters, particularly an affiliate . . . which the national organization had specific knowledge of engaging in hazing activity." Id., 1119.

In contrast, in *Pawlowski* v. *Delta Sigma Phi Fraternity*, Superior Court, judicial district of New Haven, Docket No. CV-03-0484661 (July 28, 2010) (50 Conn. L. Rptr. 307), the trial court determined that a national fraternity owed no duty of care to a university student who was struck and killed by a motor vehicle while crossing the street after leaving a fraternity party because the national fraternity did not control the day-to-day activities of its local chapters, did not authorize or sponsor that party, and was unaware that alcohol would be served there. In rendering summary judgment for the national fraternity, the court stated that, "in the absence of control of the day-to-day activities of the local chapter, a national fraternity does not have the duty to supervise the activities of a local chapter in order to prevent harm to third parties." Id., 308.

Ultimately, whether a national fraternity may be held

liable for the actions of one of its local chapters depends both on its ability to exercise control over the local chapter as well as its knowledge either that risk management policies are not being followed or that the local chapter is engaging in inappropriate behavior. Compare *Butler* v. *Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477, 482, 445 S.E.2d 468 (1994) (national fraternity owed duty to injured guest in fraternity house because local chapter retained members who national fraternity was aware had violent tendencies, failed to train members in appropriate conduct toward guests, and failed to provide supervisory personnel necessary to prevent violent occurrences in fraternity housing) with *Coghlan* v. *Beta Theta Pi Fraternity*, supra, 133 Idaho 401 (evidence that national sorority had policy against underage drinking and exercised limited influence over local sorority members found insufficient to create affirmative duty to aid or protect new local member from injuries resulting from her voluntary intoxication) and *Walker* v. *Phi Beta Sigma Fraternity (Rho Chapter)*, 706 So. 2d 525, 529 (La. App. 1997) (national fraternity with no notice of hazing activities and no authority to control day-to-day actions of local chapter did not have duty to protect new local member from hazing injuries despite providing local members with manual and training that prohibited hazing because national fraternity was unaware that policies against hazing were ineffective).

Delta National contends that it had very little interaction with Phi Chapter. Specifically, it claims that any funding provided to Phi Chapter was devoted almost entirely to improvements to the fraternity house on campus. Delta National also contends that it had minimal involvement with the conduct of Phi Chapter members, stating that it did not approve new pledge applications, and received no documentation regarding membership or activities conducted by Phi Chapter. In addition, Delta National contends that, although it provided new fraternity members with a booklet containing fraternity policies, it never directed or restricted the activities or events that Phi Chapter conducted.

These factual arguments notwithstanding, we conclude that the plaintiff presented evidence sufficient to create a genuine issue of material fact that Delta National was sufficiently involved with the activities of Phi Chapter to owe Grass a duty of care. For example, the plaintiff presented evidence that Delta National supported Phi Chapter financially by owning and funding improvements to Phi Chapter's fraternity house. Furthermore, he presented testimony that alcohol, available at the fraternity house for consumption by both pledges and members, was paid for out of the members' dues, and documented as an "official frat expense." In addition, the plaintiff presented evidence that Delta National was a member of national organizations that promulgate industry standards for risk management

harm reduction in fraternal groups and, not only conducted training for Phi Chapter leadership regarding these policies, but also provided Phi Chapter members with policies and guidelines to regulate their conduct. These guidelines included regulations of alcohol use, hazing, and rush activities, which prohibited alcohol at any fraternity ritual, including Hell Week, and also prohibited the practice of "quests, treasure hunts, scavenger hunts, road trips or any other such activities carried on outside or inside the confines of the chapter house . . . ." Indeed, the plaintiff also presented the affidavit of Norman Pollard, an expert witness for the plaintiff, indicating that Delta National knew or should have known that Phi Chapter was not following these policies.

This failure was particularly glaring given that Delta National maintained supervisory authority over Phi Chapter, with the ability to review Phi Chapter's policies, revoke its charter if it failed to follow Delta National's risk management policies, and to make recommendations regarding Phi Chapter's activities. Indeed, Sinatra testified that, following the January 17, 2003 accident, a Delta National representative recommended that, if Phi Chapter intended to continue conducting the search and rescue mission as part of the pledging activities, only public transportation should be utilized for future events. Phi Chapter subsequently changed the policy regarding transportation to the event, requiring that only public transportation be used. Cf. *Smith* v. *Greenwich*, 278 Conn. 428, 446, 899 A.2d 563 (2006) (subsequent remedial measures are relevant to issue of control); *Hall* v. *Burns*, 213 Conn. 446, 458, 569 A.2d 10 (1990) (same); *Killian* v. *Logan*, 115 Conn. 437, 439, 162 A. 30 (1932) (same).

On the basis of the evidence presented, we conclude that the plaintiff raised a genuine issue of material fact regarding the extent of Delta National's control over Phi Chapter's actions. Accordingly, we conclude that the determination of the level of control that Delta National exerted and the extent to which it was aware that Phi Chapter was not following Delta National's risk management policies is a question of fact that was inappropriate for resolution on summary judgment.

E

Alternate Ground for Affirmance—Proximate Cause

We now turn to the fraternity defendants' argument that the summary judgment in their favor can be affirmed on the alternate ground that their conduct was not the proximate cause of Grass' injuries. Specifically, they contend that it was not reasonably foreseeable that: (1) the overhead lights would go out along the highway; (2) a tractor trailer would crash into the median barrier leaving a portion of the disabled tractor trailer blocking the travel portion of the highway; or

(3) Fenton would eventually collide with the disabled tractor trailer. Therefore, the fraternity defendants contend that the causal connection between any of their actions and Grass' injuries is too attenuated because the circumstances surrounding the accident were not reasonably foreseeable. The plaintiff, in response, claims that the complaint alleged that the crash and Grass' injuries were, in fact, proximately caused by the fraternity defendants' negligence in arranging for or approving a sleep deprived driver to transport Grass, and that a potentially fatal car accident is certainly a foreseeable risk when a sleep deprived driver operates a vehicle at 4 a.m. on a dark winter night. Furthermore, the plaintiff claims that the expert testimony, submitted to support the opposition to the fraternity defendants' motion for summary judgment, that Fenton's fatigue resulted in a reduced reaction time and thus rendered him an unsafe driver, creates at least a genuine issue of material fact as to whether the fraternity defendants' actions proximately caused Grass' injuries. We agree with the plaintiff.

On the record before us, we cannot conclude that the trial court would have been forced to rule in favor of the fraternity defendants regarding the proximate cause of Grass' injuries. Indeed, "[t]he issue of proximate causation is ordinarily a question of fact for the trier. . . . Conclusions of proximate cause are to be drawn by the jury and not by the court. . . . It becomes a conclusion of law only when the mind of a fair and reasonable man 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." (Citations omitted; internal quotation marks omitted.) *Trzcinski* v. *Richey*, 190 Conn. 285, 295, 460 A.2d 1269 (1983). Although this is not a case where the facts dictate that a jury must find that the fraternity defendants' acts were the sole proximate cause of Grass' injuries, it is also not a case where the fraternity defendants' actions "were so far removed from the actual occurrence producing the injury that they become mere incidents of the operating cause." (Internal quotation marks omitted.) Id., 296. Ultimately, the issue of whether any acts of the fraternity defendants were the proximate cause of Grass' injuries is fundamentally one of fact and inference that would be inappropriate for resolution on summary judgment. See id.

II

THE FRATERNITY DEFENDANTS' MOTION TO DISMISS

Finally, because we reverse the trial court's summary judgment in favor of the fraternity defendants, we must address their argument that the trial court improperly denied their motion to dismiss the plaintiff's second amended complaint. The fraternity defendants argue that, because the plaintiff specifically stated that he did

not believe that the fraternity defendants were in any way negligent in his original amended complaint, but included that claim solely for purposes of apportionment, the second amended complaint, which did allege a negligence claim, did not relate back to the original amended complaint. Accordingly, the fraternity defendants claim that the second amended complaint, in asserting a new cause of action based in negligence, was filed beyond the sixty day limitations period provided by § 52-102b (d). We disagree.

Before examining the pertinent allegations of the operative complaint, we note that this court has yet to determine the appropriate standard of review when determining whether amendments to a complaint relate back for purposes of a statute of limitations. We have noted that a few of our cases have indicated that an abuse of discretion standard applies, but the majority of cases simply compare the pleadings to determine whether the new allegations relate back to the operative complaint, suggesting de novo review. See *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 799–800, 945 A.2d 955 (2008). In the present case, we conclude that the fraternity defendants cannot prevail even under de novo review, and we, therefore, leave the determination of the applicable standard of review until another day. See id., 800.

"Our relation back doctrine provides that an amendment relates back when the original complaint has given the party fair notice that a claim is being asserted stemming from a particular transaction or occurrence, thereby serving the objectives of our statute of limitations, namely, to protect parties from having to defend against stale claims." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 775, 905 A.2d 623 (2006). To relate back to an earlier complaint, "the amendment must arise from a single group of facts." *Keenan* v. *Yale New Haven Hospital*, 167 Conn. 284, 285, 355 A.2d 253 (1974). 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 be 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. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Broadnax* v. *New Haven*, supra, 270 Conn. 173–74. Finally, in the cases in which we have determined that an amendment does not relate back to an earlier pleading, the amendment presented different issues or depended on different factual circumstances rather

than merely amplifying or expanding upon previous allegations. See, e.g., *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, supra, 286 Conn. 808–809 (allegation of negligence related to failure to inform plaintiff of surgical options did not relate back to allegation of negligence related to failure to ensure sterile surgical environment and failure to diagnose and treat plaintiff's resulting infection); *Alswanger* v. *Smego*, 257 Conn. 58, 61, 776 A.2d 444 (2001) (allegation of lack of informed consent regarding resident's participation in surgery did not relate back to allegation that defendants had failed to disclose all material risks in connection with plaintiff's surgery, care and treatment).

In comparing the fifth count of the original amended complaint with that of the second amended complaint, we conclude that the second amended complaint clearly related back to the original amended complaint. The fifth count of the original amended complaint set forth the following allegations in relevant part: "1. The plaintiff . . . brings the cause of action alleged herein . . . as an alternate theory of liability and recovery, however, the plaintiff does not believe that the [fraternity defendants] were in any way negligent, but brings this action in accordance with . . . § 52-102b (d), for purposes of apportionment. 2. The plaintiff *incorporates herein by reference the allegations made by the apportionment plaintiffs*, and relies on those apportionment plaintiffs to prove, if they can, paragraphs 1 [through] 8 of their [a]pportionment [c]omplaint." (Emphasis added.) The plaintiff's second amended complaint set forth the following allegations in relevant part: "1. . . . The plaintiff . . . brings the cause of action alleged herein . . . as an alternate theory of liability and recovery, against the [fraternity defendants] in accordance with . . . § 52-102b (d), for purposes of apportionment on the basis that the [c]ontractor defendants believe that the [f]raternity [d]efendants were negligent. 2. The plaintiff *incorporates herein by reference the allegations made by the apportionment plaintiffs*, and relies on those apportionment plaintiffs to prove, if they can, paragraphs 1 [through] 8 of their [a]pportionment [c]omplaint." (Emphasis added.) The second amended complaint also set forth the specific allegations of negligence included in the apportionment complaint.

The fraternity defendants' argument centers on the fact that the plaintiff stated, in the first paragraph of count five of the original amended complaint, that he did not believe that the fraternity defendants were in any way negligent. Essentially, the fraternity defendants argue that this statement negated any claim of negligence incorporated by reference to the apportionment complaint, and, therefore, that count five simply contained a claim for apportionment, which is not a valid claim. Accordingly, they argue that, because the original amended complaint contained no viable allegations of negligence, the second amended complaint, alleging a

claim for negligence, could not relate back to the original amended complaint because that negligence claim was a new cause of action. We disagree.

Reading the original amended complaint "broadly and realistically, rather than narrowly and technically . . . in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded"; (internal quotation marks omitted) *Broadnax* v. *New Haven*, supra, 270 Conn. 173–74; it is clear that the plaintiff intended to incorporate the allegations of negligence against the defendants therein. The apportionment complaint, which the plaintiff wholly incorporated in count five of his original amended complaint by reference, clearly set forth allegations that the fraternity defendants negligently caused Grass' injuries. See footnote 6 of this opinion. Count five of the second amended complaint, while deleting the statement that the plaintiff did not believe that the fraternity defendants were in any way negligent, and including the specific allegations of negligence that the apportionment plaintiffs had set forth, also wholly incorporated the apportionment complaint by reference. The second amended complaint, therefore, "did not inject two different sets of circumstances and depend on different facts"; (internal quotation marks omitted) *Alswanger* v. *Smego*, supra 257 Conn. 66; which would preclude the second amended complaint from relating back to the original amended complaint. See id.

To the contrary, the allegations of negligence contained in both complaints are identical in that they both wholly incorporated by reference the negligence allegations made in the apportionment complaint. Therefore, the fraternity defendants were on notice, as of the time of the original amended complaint, that the plaintiff was asserting, or at least attempting to assert, a claim of negligence stemming from the car accident on the morning of January 17, 2003, notwithstanding the plaintiff's prefatory statement that he did not believe that they were negligent. Fair notice of the plaintiff's claim is all that is required to satisfy the objectives of the statute of limitations. See *Deming* v. *Nationwide Mutual Ins. Co.*, supra, 279 Conn. 775. Accordingly, we conclude that, because the second amended complaint related back to the original amended complaint, the trial court appropriately denied the fraternity defendants' motion to dismiss count five.

The judgment is reversed and the case is remanded with direction to deny the fraternity defendants' motion for summary judgment and for further proceedings according to law.

In this opinion PALMER, ZARELLA, McLACHLAN and HARPER, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General

Statutes § 51-199 (c) and Practice Book § 65-1.

[2] The plaintiff originally brought this action against: (1) Stephen Korta, the commissioner of transportation and his predecessor, James F. Byrnes, Jr., alleging a violation of General Statutes § 13a-144, the defective highway statute; and (2) M. DeMatteo Construction Company and Brunalli Construction Company (collectively, contractor defendants), alleging claims of common-law negligence. The contractor defendants as apportionment plaintiffs, in turn, filed an apportionment complaint against the fraternity defendants alleging negligence regarding the organization of the fraternity event on the evening of the accident and the designation of an unsafe driver to transport Grass. Thereafter, the plaintiff filed an amended complaint pursuant to General Statutes § 52-102b (d), against the fraternity defendants, including, by reference, the contractor defendants' allegations of negligence. All of the claims against the commissioner of transportation, his predecessor and the contractor defendants have been withdrawn or otherwise resolved. Accordingly, the fraternity defendants are the only remaining defendants in this case.

[3] General Statutes § 53-23a provides in relevant part: "(a) For purposes of this section:

"(1) 'Hazing' means any action which *recklessly or intentionally* endangers the health or safety of a person for the purpose of initiation, admission into or affiliation with, or as a condition for continued membership in a student organization. The term shall include, but not be limited to:

"(A) Requiring indecent exposure of the body;

"(B) Requiring any activity that would subject the person to extreme mental stress, such as sleep deprivation or extended isolation from social contact;

"(C) Confinement of the person to unreasonably small, unventilated, unsanitary or unlighted areas;

"(D) Any assault upon the person; or

"(E) Requiring the ingestion of any substance or any other physical activity which could adversely affect the health or safety of the individual. . . .

"(2) 'Student organization' means a fraternity, sorority or any other organization organized or operating at an institution of higher education.

"(b) No student organization or member of a student organization shall engage in hazing any member or person pledged to become a member of the organization. The implied or express consent of the victim shall not be a defense in any action brought under this section.

"(c) A student organization which violates subsection (b) of this section (1) shall be subject to a fine of not more than one thousand five hundred dollars and (2) shall forfeit for a period of not less than one year all of the rights and privileges of being an organization organized or operating at an institution of higher education.

"(d) A member of a student organization who violates subsection (b) of this section shall be subject to a fine of not more than one thousand dollars.

"(e) This section shall not in any manner limit or exclude prosecution or punishment for any crime or any civil remedy." (Emphasis added.)

[4] There are no allegations that the purpose of the search and rescue event was to continue to keep the pledges awake or to haze them in any other respect. Rather, the complaint and the evidence in the record indicate that the purpose of this Hell Week finale event was to provide an opportunity for the fraternity members and the pledges who completed the pledging process to socialize off campus.

[5] During the event in New York City, although Fenton had been observed drinking a single "social beer," the toxicology report indicated that he had a zero blood alcohol level at the time of the accident.

[6] The apportionment complaint against the fraternity defendants alleged in relevant part: "At the date, time and place of the motor vehicle accident . . . Grass was returning from a fraternity social event in New York City that was organized, sponsored, arranged, sanctioned and/or approved by the Phi Chapter . . . [and] [a]s part of its organization, sponsorship, arrangement, sanction and/or approval of the social event, the Phi Chapter . . . selected, appointed, mandated, chose and/or approved of an individual to drive some of the attendees back from New York City to New Haven . . . ." The complaint further alleged that the "motor vehicle accident involving [Fenton's vehicle] in which . . . Grass was a passenger was due to the negligence and/or carelessness of [the fraternity defendants] in one or more of the following respects:

"a. in that they failed to ensure that the driver of the [Chevrolet] Tahoe was able to operate the motor vehicle safely;

"b. in that they failed to ensure that the driver of the [Chevrolet] Tahoe was not excessively fatigued;

"c. in that they failed to provide a safe means and/or mode of travel for the event attendees on their return from New York City;

"d. in that they knew or should have known that the driver of the [Chevrolet] Tahoe was incapable of safely operating the motor vehicle;

"e. in that they failed to exercise reasonable care in selecting and/or approving an individual to operate the [Chevrolet] Tahoe on the return from New York City;

"f. in that they failed to act in a reasonably prudent manner in that they did not ensure the safe return from New York City of the individuals attending the event organized, sponsored, arranged, sanctioned and/or approved by the Phi Chapter . . . and;

"g. in that they failed to properly supervise the transportation to and from the event in New York City."

[7] General Statutes § 52-102b (d) provides: "Notwithstanding any applicable statute of limitation or repose, the plaintiff may, within sixty days of the return date of the apportionment complaint served pursuant to subsection (a) of this section, assert any claim against the apportionment defendant arising out of the transaction or occurrence that is the subject matter of the original complaint."

[8] The memorandum of law in opposition to the fraternity defendants' motion for summary judgment was filed by the apportionment plaintiffs. The plaintiff in the present case "adopt[ed] and incorporat[ed] . . . the legal argument asserted and filed by the contractor defendants in opposition to the motions for summary judgment on the apportionment claims as the basis for opposing the fraternity defendants' motion for summary judgment filed in this matter."

[9] The apportionment plaintiffs did not appeal from the summary judgment rendered on the apportionment complaint.

[10] In the present case, the defendants filed a motion for summary judgment challenging the sufficiency of the plaintiff's second amended complaint. We note that, although, generally, the device used to challenge the sufficiency of the pleadings is a motion to strike; see Practice Book § 10-39; "our case law [has] sanctioned the use of a motion for summary judgment to test the legal sufficiency of a pleading [if a party has waived its right to file a motion to strike by filing a responsive pleading]." *American Progressive Life & Health Ins. Co. of New York* v. *Better Benefits, LLC*, 292 Conn. 111, 120, 971 A.2d 17 (2009). Under these circumstances, we have acknowledged that, "[i]f it is clear on the face of the complaint that it is legally insufficient and that an opportunity to amend it would not help the plaintiff, we can perceive no reason why the defendant should be prohibited from claiming that he is entitled to judgment as a matter of law and from invoking the only available procedure for raising such a claim after the pleadings are closed. . . . Thus, failure by the defendants to [strike] any portion of the . . . . complaint does not prevent them from claiming that the [plaintiff] had no cause of action and that a judgment [in favor of the defendants was] warranted. . . . [Indeed], this court repeatedly has recognized that the desire for judicial efficiency inherent in the summary judgment procedure would be frustrated if parties were forced to try a case where there was no real issue to be tried. . . . [Therefore], [t]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading." (Citations omitted; internal quotation marks omitted.) Id., 120–21.

[11] The dissent would interpret the events that unfolded beginning on the night of January 16, 2003, as hazing, or the direct result of hazing. Such an interpretation is not only a mischaracterization of the facts of the present case, but also is contrary to the plaintiff's own allegations. First, although the dissent correctly notes that the search and rescue mission was a mandatory fraternity function, it mischaracterizes the event as designed or intended to produce sleep deprivation. Although there was evidence that *some* of the Hell Week events were designed to deprive the pledges of adequate sleep, there were no allegations that the search and rescue event itself was designed to cause sleep deprivation. Indeed, the testimony from Sinatra's deposition indicates that the event was merely an opportunity for the pledges and fraternity members to socialize at the end of the weeklong series of pledging events.

Second, although the dissent argues that "[h]azing did, in fact, occur because sleep deprivation was involved," Fenton's sleep deprivation was not the result of him being hazed. Indeed, there is evidence that Fenton was involved in the sleep deprivation activities on two particular days earlier

in Hell Week, but *not* as the subject of hazing. Furthermore, the evidence indicates that Fenton, who already was a member of Phi Chapter, was not required to participate in any of the Hell Week events, including those that caused sleep deprivation in the pledges, which would take him out of the ambit of § 53-23a. In fact, when asked what Fenton's job was during Hell Week, Sinatra testified that Fenton "[did not] have a specific role. He was just there to be involved in activities and to hang out with friends." Therefore, the statutory prohibition of sleep deprivation as a requirement of admission to or continued membership in a fraternity embodied in § 53-23a (a) (1) (B) does not apply to Fenton's voluntary participation in some of the Hell Week activities wherein he may have deprived the pledges of sleep.

Finally, in his brief to this court, the plaintiff painted a vivid picture by including an extensive discussion of pervasive underage drinking and hazing activities that occurred during the week leading up to January 16, 2003. It is important to note, however, that he did not allege, in his second amended complaint, that *any* of those activities caused, or even contributed to, Grass' death. Indeed, the plaintiff's complaint limits his negligence claim to the fraternity defendants' failure to ensure that Grass had safe transportation back to New Haven at the conclusion of the fraternity social event. In this context, how Fenton became sleep deprived is irrelevant to the disposition of the plaintiff's claims except to the extent that the fraternity defendants knew or reasonably should have known of his sleep deprived state when they assigned or approved him as a driver for Grass. Indeed, the issues we must resolve in the present case would be the same had Fenton been sleep deprived because he had worked through the night to complete his school work on several occasions during the week leading up to January 16, 2003, rather than staying awake to haze the incoming pledges. Given the facts of the present case, however, we need not decide whether Phi Chapter would owe a common-law duty supported by the public policy embodied in § 53-23a had Fenton been an unsafe driver because he had been the subject of hazing, and was therefore sleep deprived. The only question that we must answer is whether Phi Chapter knew or should have known that Fenton was an unsafe driver because he lacked adequate sleep—for whatever reason—when they assigned or approved him as a driver for Grass.

Because there were no allegations that the purpose of the search and rescue event was to haze the fraternity pledges, that Grass' injuries were caused by hazing activity, or that Fenton's sleep deprivation was the result of his being hazed, none of the conduct we must consider to determine whether Delta National owed a general common-law duty of care to Grass falls within the scope of hazing activity prohibited by § 53-23a, and, accordingly, that statute does not provide a sufficient public policy basis to impose upon Delta National a general duty to protect Grass.

[12] National Lampoon's Animal House (Universal Pictures 1978).

[13] We acknowledge, as the dissent notes, that had the purpose of the search and rescue event been to haze the pledges, and had Grass' death been directly related to those hazing activities, we would be dealing with a very different scenario, wherein the fraternity defendants might well owe Grass an additional common-law duty to provide safe transportation grounded in the public policy considerations that underlie § 53-23a. Nevertheless, the plaintiff did not allege that the purpose of the search and rescue event was to haze the pledges, and there is no evidence to establish that hazing was the intended purpose of that event. Accordingly, we need not decide what common-law duty of care may be required should a fraternity mandate that pledges travel to an event at which they will be hazed, or when a plaintiff asserts a common-law negligence claim for injuries caused by hazing activities. Our only concern, based on the facts and allegations presented in the present case, is whether Phi Chapter owed a duty to provide safe transportation to this "fraternity social event . . . ."

[14] Given that § 53-23a is inapplicable to the conduct at issue in the present case, we agree with the fraternity defendants that the trial court properly declined to allow the plaintiff to replead his negligence claim to add the statute or any other more specific duty allegations once the trial court had granted the fraternity defendants' motion for summary judgment. "The application of a statute to a particular set of facts is a question of law to which [the court will] apply a plenary standard of review." *In re T.K.*, 105 Conn. App. 502, 506, 939 A.2d 9, cert. denied, 286 Conn. 914, 945 A.2d 976 (2008). The conduct at issue is the alleged negligent provision of transportation, rather than any alleged hazing activities. Although we acknowledge that § 53-23a, a criminal statute, specifically does "not in any manner limit or exclude . . . any civil remedy," it, likewise, does not create a civil cause

of action where one does not exist.

[15] In the present case, the remaining three factors weigh in favor of not imposing a general duty of care upon fraternities. For example, as we discuss in part I C of this opinion, because, in the absence of circumstances creating a special relationship between Phi Chapter and its members, Phi Chapter had no obligation to ensure the members' safety by providing any transportation to or from the search and rescue event, an expectation that Phi Chapter would provide safe transportation for the fraternity members, under the circumstances of the present case, is reasonable only because Phi Chapter voluntarily undertook to provide return transportation in the first place.

Furthermore, the plaintiff's argument that imposing a duty under these circumstances will not increase litigation because the duty here is simply an application of "age-old common-law principles" that "a social organization that has *undertaken the responsibility* for organizing, arranging and conducting an off-site social event"; (emphasis added); has a duty to do so safely, actually highlights the fact that imposing a *general* duty of care for the safety of fraternity members in all fraternity activities certainly might increase litigation not only for injuries sustained in connection with all fraternity events, but also with members of all manner of voluntary associations. Indeed, if a voluntary association such as a fraternity has a general duty of care regarding the safety of the participants in all events, even those not designed to haze any of the participants, one could imagine that organizing and conducting any event on a wintry evening might lead to liability should participants encounter hazardous road conditions on the way to or from such an event. Moreover, imposing such a general duty upon the fraternity under the circumstances of the present case, where there are no allegations that the purpose of the event was to haze the participants, and no allegations that the injuries were caused by hazing, could also open up avenues of litigation for members of other voluntary associations who are injured while traveling to and from, or participating in, any variety of association events.

Finally, the cases that the plaintiff cites to support this claim that other jurisdictions would recognize a duty under these circumstances are inapposite because they all strictly involve injuries arising from *hazing* activities. See, e.g., *Haben* v. *Anderson*, supra, 232 Ill. App. 3d 263 (hazing practice of requiring consumption of dangerous amounts of alcohol was contrary to public policy against activities that embarrass or endanger youth embodied in statute prohibiting hazing); *Nisbet* v. *Bucher*, 949 S.W.2d 111, 117 (Mo. App. 1997) (state's anti-hazing statute evinced public policy against embarrassing or endangering conduct); *Oja* v. *Grand Chapter of Theta Chi Fraternity, Inc.*, 174 Misc. 2d 966, 969, 667 N.Y.S.2d 650 (1997) (hazing at least raises questions regarding duty of fraternity). Given that the conduct we must analyze in the present case is providing transportation—*not* hazing—these decisions from other jurisdictions do not support the imposition of a duty in this case.

[16] In addition, this court has recognized the voluntary assumption of duty in other contexts. For example, in *Chipman* v. *National Savings Bank*, 128 Conn. 493, 495–96, 23 A.2d 922 (1942), this court concluded that a landlord who voluntarily undertakes to make repairs can be held liable if he negligently conducts the repairs and leaves the premises in a defective condition that ultimately injures his tenant. This court also concluded, in *Zatkin* v. *Katz*, supra, 126 Conn. 450, that a construction company that sold steel girders to the defendant, and that, under the sales contract, had no duty to load the girders onto the defendant's vehicle, nevertheless voluntarily assumed a duty to load the girders safely when it undertook the task of placing the girders on the defendant's truck. Therefore, this court concluded that, if the jury found that the manner in which the construction company had loaded the girders upon the defendant's truck was negligent, the company could be held liable for injuries sustained by the operator of another vehicle when the girders on the defendant's truck subsequently struck the other vehicle. Id.