ALLSTATE INSURANCE COMPANY *v.* STEPHEN PALUMBO ET AL.
(SC 18276)

Rogers, C. J., and Norcott, Katz, Palmer, Vertefeuille, Zarella and McLachlan, Js.

Argued October 21, 2009—officially released May 18, 2010

Neil Johnson, for the appellant (named defendant).

Jeremiah J. O'Connor, for the appellee (plaintiff).

Opinion

KATZ, J. The issue in this certified appeal is whether the Appellate Court properly affirmed the judgment of the trial court concluding that the plaintiff, Allstate Insurance Company, could hold the named defendant, Stephen Palumbo (defendant),[1] liable under the doctrine of equitable subrogation to recover damages the plaintiff had paid under a homeowner's insurance policy issued to its insured, the defendant's fiancée, with whom he lived. See *Allstate Ins. Co.* v. *Palumbo*, 109 Conn. App. 731, 952 A.2d 819 (2008). The defendant contends that, in light of the particular facts of the relationship between himself and the plaintiff's insured: (1) he was a tenant of the insured and thus was not subject to equitable subrogation by the plaintiff; and (2) the public policy against economic waste, as well the expectations of the defendant and the plaintiff's insured, prohibit an action for equitable subrogation. We conclude that the equities clearly weigh against allowing the plaintiff to recover from the defendant under this doctrine and, therefore, we reverse the Appellate Court's judgment.

The record reveals the following facts, as found by the trial court, and procedural history. On January 31, 2002, a fire occurred at the single-family home owned by the plaintiff's insured, Lisa Deveau, the defendant's fiancée, a residence that she shared with her daughter and the defendant. The cause of the fire was a water heater that the defendant had installed improperly. After the fire, Deveau filed a claim under her homeowner's policy with the plaintiff, on which she was the sole named insured. The plaintiff ultimately paid Deveau $62,615.25 to cover damages and expenses she had incurred as a result of the fire.

In January, 2004, the plaintiff commenced an action for equitable subrogation against the defendant, alleging that his negligence had caused the fire and that the plaintiff was entitled to recover from him the sum that it had paid to Deveau under her homeowner's policy. In his amended answer, the defendant conceded that he negligently had installed the water heater that caused the fire, but asserted the following special defenses to preclude the action against him: (1) that he was an insured under the policy; (2) that he and Deveau were in a landlord-tenant relationship; (3) that he was a lodger; and (4) that subrogation was not equitable. In light of the defendant's concession of negligence, the trial to the court was limited to the special defenses and issues relating to damages.

The trial court rendered judgment in favor of the plaintiff.[2] The trial court concluded that the defendant's status as the fiancé of Deveau, the named insured, did not fall within the definition of covered persons under the policy.[3] In rejecting the remaining special defenses,

the trial court reasoned: "The defendant argues that by virtue of their having resided together for five and [one-half] years, and by their sharing of expenses, a landlord-tenant relationship was created between [Deveau and himself]. General Statutes § 47a-1 (*l*) defines tenant as 'the lessee, sublessee or person entitled under a rental agreement to occupy a dwelling unit or premises to the exclusion of others . . . .' By his own admission, [the defendant] conceded that he did not occupy any part of the premises to the exclusion of others nor did he have a fixed amount of rent or a fixed period of occupancy. Based on the testimony, the court must conclude that it was never intended by the parties, either expressly or impliedly, that a landlord-tenant relationship would arise. . . . Black's Law Dictionary [3d Ed. (1933)] defines a houseguest as 'a traveler who lodges at an inn or tavern with the consent [of] the keeper. A guest, as distinguished from a boarder, is bound for no stipulated time. He stops at the inn for as short or as long as he pleases, paying, while he remains, the customary charge.' Just as . . . Deveau could have brought an action in negligence against [the defendant], so too can [the plaintiff] by virtue of equitable subrogation. This was the analysis utilized by the court in *Wasko* v. *Manella*, 269 Conn. 527 [849 A.2d 777] (2004), which determined that a social houseguest who negligently caused a fire was liable to the insurer [that] paid the claim for the insured loss." In light of its conclusion that the status of the defendant was dispositive, the trial court did not address the defendant's claim that it was inequitable, under the particular facts of this case, to allow a subrogation claim.

The defendant appealed from the trial court's judgment to the Appellate Court, which rejected the defendant's contention that he was not subject to equitable subrogation and affirmed the judgment. *Allstate Ins. Co.* v. *Palumbo*, supra, 109 Conn. 733. In so doing, the court relied on *DiLullo* v. *Joseph*, 259 Conn. 847, 792 A.2d 819 (2002), and *Wasko* v. *Manella*, supra, 269 Conn. 527, as setting forth the controlling principles. *Allstate Ins. Co.* v. *Palumbo*, supra, 737. The Appellate Court noted that, in *DiLullo*, this court had held that, in the absence of an express agreement, there was no right of equitable subrogation against a tenant by a landlord's fire insurer. Id. By contrast, the Appellate Court noted that, in *Wasko*, this court had held that there was a right of equitable subrogation against a social guest by the homeowner's fire insurer. Id. In concluding that *DiLullo* did not control in the present case, the Appellate Court cited to definitions in the General Statutes applicable to landlord-tenant law, specifically, those for the terms "landlord," "tenant," "rental agreement" and "rent." Id., 738 (citing to subsections of § 47a-1).[4] In light of those definitions, the defendant's failure to pay a security deposit, and the absence of a fixed rent, a fixed period of occupancy or an area of the house over

which he had exclusive possession, the Appellate Court concluded that the trial court properly had found that there was no express or implied landlord-tenant relationship. Id., 739. Instead, the Appellate Court determined that "[t]his case is but an extension of *Wasko* . . . . The defendant was more like a social houseguest of [Deveau] because he could remain as an occupant of [her] house for only as long as she chose to allow him to do so and because he had few characteristics of a tenant." Id., 741. This certified appeal followed.[5]

We begin with the general principles of equitable subrogation. "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." (Internal quotation marks omitted.) *Wasko* v. *Manella*, supra, 269 Conn. 532–33.

Under the doctrine of equitable subrogation, "[a] subrogee has no rights against a third person beyond what the subrogor had." *Continental Ins. Co.* v. *Connecticut Natural Gas Corp.*, 5 Conn. App. 53, 60, 497 A.2d 54 (1985); accord 16 L. Russ & T. Segalla, Couch on Insurance (3d Ed. 2005) § 222:5, p. 222-19 ("a subrogated insurer stands in the shoes of an insured, and has no greater rights than the insured, for one cannot acquire by subrogation what another, whose rights he or she claims, did not have"). Similarly, "[t]he insurer . . . is subject to any defenses the third party would have had against the insured." 16 L. Russ & T. Segalla, supra, p. 222-21.

Although "[s]ubrogation is a highly favored doctrine . . . which courts should be inclined to extend rather than restrict"; (internal quotation marks omitted) *Wasko* v. *Manella*, supra, 269 Conn. 543; "[t]here is no general rule to determine whether a right of subrogation exists. Thus, ordering subrogation depends on the equities and attending facts and circumstances of each case." 73 Am. Jur. 2d 552, Subrogation § 10 (2001). "The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. *Kakalik* v. *Bernardo*, 184 Conn. 386, 395, 439 A.2d 1016 (1981); *Robert Lawrence Associates, Inc.* v. *Del Vecchio*, 178 Conn. 1, 18–19, 420 A.2d 1142 (1979); *Gager* v. *Gager & Peterson, LLP*, 76 Conn. App. 552, 560, 820 A.2d 1063 (2003). . . . When the trial court draws conclusions of law from its balancing of the equities, however, our review is plenary. *Torres* v. *Waterbury*, 249 Conn. 110, 118, 733 A.2d 817

(1999)." (Citations omitted; internal quotation marks omitted.) *Wasko* v. *Manella*, supra, 542–43.

Turning to the case at hand, we agree with the Appellate Court that our decisions in *Wasko* and *DiLullo* provide the controlling principles to be applied in the present case. We disagree with the Appellate Court, however, insofar as it determined that those cases required the trial court to categorize the relationship between the parties as either landlord-tenant or host-social guest and to decide whether an action in equitable subrogation could be brought on the basis of that characterization.

In *DiLullo*, the issue before this court was whether, in the absence of a specific agreement between the landlord and the tenant covering the matter, the landlord's fire insurer had a right of equitable subrogation against the tenant for negligently having caused a fire that damaged the landlord's property. *DiLullo* v. *Joseph*, supra, 259 Conn. 848. This court answered that question in the negative, relying on two equitable considerations relating to policy and fairness. Id., 851, 853–54. First, this court cited the strong public policy against economic waste, reasoning that "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 . . . 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." Id., 854. Second, this court cited "the likely lack of expectations regarding a tenant's obligation to subrogate his landlord's insurer." Id., 851. We concluded that, "in most instances, 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.

Thereafter, in *Wasko* v. *Manella*, supra, 269 Conn. 545, this court concluded that neither of the two concerns cited in *DiLullo* were implicated in a situation in which a social houseguest negligently had caused a fire that damaged the hosts' property. In regard to the first consideration in *DiLullo*, economic waste, this court noted that the insureds in *Wasko* had a fire insurance policy covering their home, whereas "the negligent acts of a social houseguest would already be covered by his or her existing third party liability coverage, such as provided by a homeowner's or renter's insurance policy. Therefore, there is no need for a social houseguest to purchase an additional traveling or temporary first party fire insurance policy on the host's property. The social

guest will be covered in the same manner as he or she would be in any other situation where he or she negligently caused injury to another—through traditional third party liability coverage. . . . [W]e 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. . . . In either situation, the houseguest's current third party liability insurance coverage will protect against liability, and there is no need for houseguests to obtain . . . additional policies . . . ." (Citations omitted.) Id., 545–47. With respect to the second consideration in *DiLullo*, expectations of the parties, the court in *Wasko* reasoned "that most 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.[6] 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. In sum, the equitable concerns that led this court to preclude subrogation in the context of landlord and tenant simply are not present in the context of houseguest and host." Id., 547.

With the framework applied in *DiLullo* and *Wasko* in mind, we note the following additional uncontested facts reflected in the record that the trial court apparently credited, but did not deem relevant in their particulars.[7] The defendant moved in with Deveau shortly after she purchased the subject property. Deveau's house was the defendant's sole residence, and the defendant did not have insurance covering any other property. The defendant had been cohabiting with Deveau for approximately two and one-half years before the fire occurred and more than four years at the time the plaintiff commenced this action against him.

After the defendant moved into Deveau's house, he and Deveau informally agreed that they would share equally *all* of the expenses for the house, including all of the bills, repairs and upgrades to the house. Deveau paid the bills after the defendant gave her cash or checks to cover his share.

Among the expenses that the defendant shared was the cost of the homeowner's insurance policy, which was included in the mortgage payment. Deveau never informed the defendant that he should obtain his own liability coverage. The defendant and Deveau both mistakenly assumed, without verifying, that the defendant's status as Deveau's fiancé and cohabitant rendered him a covered person under Deveau's policy.

The defendant also made numerous, substantial improvements to Deveau's property. He took down a

wall in the house to make two rooms into one larger room. He installed hardwood floors, ceiling fans, a pellet stove, an emergency generator and a home security system. He added a wraparound porch to the house, raised the driveway fourteen inches, installed a pond in the front yard, built a shed and laid granite steps and a paver walkway. As the trial court properly noted, the defendant "performed many improvements and maintenance functions *as if he was an owner* . . . ." (Emphasis added.)

Deveau testified that she did not want the plaintiff to bring an action against the defendant because "it would be like suing me." In an affidavit submitted to the court, Deveau stated that holding the defendant, her future husband, liable would defeat the purpose for which they had obtained the homeowner's insurance because, in effect, it would mean that, even though they had paid for the coverage, they would have to pay back any money the plaintiff had paid to Deveau under the policy.

At the outset, we note that these facts demonstrate that the relationship between Deveau and the defendant reasonably cannot be deemed to be that of host-social houseguest. We also note that, although their arrangement did not evidence all of the formal legal elements of a landlord-tenant relationship, they did have an oral agreement under which the defendant made monthly payments to Deveau as long as he lived there. The defendant's improvements to the property, however, clearly exceeded a tenant's legal obligations. Thus, it is clear that the defendant is neither a social houseguest nor a tenant in the strict legal sense. Contrary to the view of the Appellate Court and the trial court, however, in such a case, we do not assign the relationship to whichever category is the closest fit to determine whether subrogation is proper. In *DiLullo* and *Wasko*, the analysis did not turn on the *legal* elements of the status of the third party or the characterization of the relationship at issue. Rather, those cases turned on *equitable* considerations.[8]

Indeed, although there is a dearth of case law in this or other jurisdictions addressing subrogation under facts similar to the present case, we agree with the reasoning of the Nebraska Supreme Court that not every relationship will fit squarely into a category that will be determinative of whether a subrogation action may be brought. See *Reeder* v. *Reeder*, 217 Neb. 120, 124, 348 N.W.2d 832 (1984). In addressing similar competing arguments by the parties in the case before it, the Nebraska court reasoned that attempting to categorize the relationship at issue as either landlord-tenant or licensor-licensee, as the parties had argued, was "[n]either material [n]or helpful. One of the difficulties we too often encounter in the law is our effort to attempt to force every situation into a known and recognized

relationship, hoping that by doing so the answer to our question may of necessity automatically follow. In the instant case, we believe the facts would disclose that the relationship created between [the insured] and [the third party] . . . was neither landlord/tenant nor licensor/licensee in the full legal sense. To be sure, the relationship has characteristics of both landlord/tenant and licensor/licensee, but of a separate and unique kind, and in this instance meriting a different treatment." Id.

In the present case, because it determined that the status of the defendant was dispositive, the trial court did not address the defendant's claim that it was inequitable, under the facts, to allow subrogation. Therefore, the court failed to balance the equities to determine whether the particular facts of this case make subrogation proper. Accordingly, its failure to exercise its discretion to make that determination was improper. See *Higgins* v. *Karp*, 243 Conn. 495, 504, 706 A.2d 1 (1998) ("[w]here, as here, the trial court is properly called upon to exercise its discretion, its failure to do so is error" [internal quotation marks omitted]); *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion"). Nonetheless, because the material underlying facts are undisputed and, for the reasons set forth below, the equities so clearly weigh against the plaintiff prevailing in the present subrogation action, we conclude that the proper exercise of the trial court's discretion could have yielded only one result, namely, a determination that the plaintiff cannot prevail because subrogation would not be equitable under the facts and circumstances of the present case. See *Wichers* v. *Hatch*, 252 Conn. 174, 181–82, 745 A.2d 789 (2000) ("Generally, we review a decision of the trial court setting aside the verdict and ordering an additur to determine whether the trial court properly exercised its discretion. . . . When, however, the trial court concludes, as a matter of law, that it is compelled to act in a particular fashion, plenary review is appropriate." [Citations omitted.]). Under these unusual circumstances, the reviewing court need not remand the case for further proceedings. See *State* v. *Lee*, 229 Conn. 60, 74–75, 640 A.2d 553 (1994) ("Ordinarily it is improper for the trial court to fail to exercise discretion if discretion is required. Nonetheless, we sustain the trial court's ruling in this case because had the trial court exercised its discretion, it could only have concluded, based upon the record in this case, that the proffered testimony was inadmissible. . . . In sum, although the trial court failed to exercise its discretion, the record makes clear that, had it done so, it could have come to only one conclusion . . . ." [Citation omitted.]); see also *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 309–10, 788 A.2d 1199 (2002) ("[W]e conclude that it is unnecessary to remand the case for a determination as to whether the plaintiff acted

wilfully, as we have defined that term in the context of [General Statutes] § 20-102cc [a]. . . . We conclude [in light of certain unchallenged evidence] that the wilfulness element of the term 'resident abuse' contained in § 20-102cc [a] was satisfied as a matter of law, thus vitiating the need for a remand."); *Doe* v. *Doe*, 244 Conn. 403, 456, 710 A.2d 1297 (1998) ("[I]t is clear to us that, based on the undisputed facts of this case, the presumption has been sufficiently rebutted. Put another way, were the trial court upon our remand to fail to determine that the presumption was sufficiently rebutted, the undisputed facts of this case would compel us to conclude that its determination would be clearly erroneous."); *Adriani* v. *Commission on Human Rights & Opportunities*, 220 Conn. 307, 329 n.21, 596 A.2d 426 (1991) ("The form of our remand is governed by the principle that when a trial court concludes that an administrative agency has made invalid or insufficient findings, the court must remand the case to the agency for further proceedings if the evidence does not support only one conclusion as a matter of law."), on appeal after remand, 228 Conn. 545, 636 A.2d 1360 (1994); *Chevron Oil Co.* v. *Zoning Board of Appeals*, 170 Conn. 146, 153, 365 A.2d 387 (1976) ("Generally, when the court finds the action of an administrative agency to be illegal, it should go no further than to sustain the appeal. . . . For the court to go further and direct what action should be taken by the zoning authority would be an impermissible judicial usurpation of the administrative functions of the authority. . . . When it appears, however, that the zoning authority could reasonably reach only one conclusion, the court may direct the authority to do that which the conclusion requires." [Citations omitted; internal quotation marks omitted.]); *Karantonis* v. *East Hartford*, 71 Conn. App. 859, 863, 804 A.2d 861 ("[t]here are times . . . when the undisputed facts or uncontroverted evidence and testimony in the record make a factual conclusion inevitable so that a remand to the trial court for a determination would be unnecessary" [internal quotation marks omitted]), cert. denied, 261 Conn. 944, 808 A.2d 1137 (2002).

To explain our conclusion, we turn to the particular facts of the present case in light of the equitable considerations cited in *DiLullo* and subsequently applied in *Wasko*. Turning to the first consideration, economic waste, we note that, unlike the social houseguest whom the court in *Wasko* presumed to be covered by the guest's existing third party liability coverage, which follows the houseguest as he ventures outside his own home; *Wasko* v. *Manella*, supra, 269 Conn. 546; it is undisputed that, in the present case, the defendant had no other property on which he could have taken out insurance, whether renter's or homeowner's. Therefore, the *only* property on which the defendant possibly could have obtained coverage to protect himself against liability for his negligent conduct was Deveau's home,

which she already fully had insured. Had the defendant been able to obtain a separate policy on the subject premises, such a policy necessarily would have to some extent been duplicative of Deveau's coverage.[9] Therefore, these facts demonstrate some economic waste that weighs against subrogation,[10] although not to the same degree as was present in *DiLullo*.[11]

Turning to the expectations of the parties, there are several factors that, when viewed in their totality, convince us that neither Deveau nor the defendant would have expected Deveau to bring an action against the defendant for his negligent act even if she had lacked insurance coverage. Those factors include: the long-term, intimate relationship between the engaged, cohabiting couple; the defendant's substantial financial and in-kind contributions to the maintenance of, and building of equity in, the insured property; the defendant's consistent contributions to the payment of Deveau's insurance premiums; and Deveau's failure to inform the defendant that he was not covered under her insurance policy and should obtain his own. These facts bear on the expectations of the parties in several ways.

The Nebraska Supreme Court's decision in *Reeder* v. *Reeder*, supra, 217 Neb. 120, is instructive. In that case, the plaintiff homeowner, Theodore Reeder (Theodore), had moved out of state and permitted his brother, Bernard Reeder (Bernard), and his family to move temporarily into Theodore's home while Bernard was constructing a new home nearby. Id., 121. Bernard's family moved their belongings into Theodore's home. Id., 122. There was no lease and Bernard paid no rent, but he paid the utility bills and performed general maintenance. Theodore paid the taxes. Id. With respect to insurance, Theodore testified that he specifically had told Bernard " 'that I would leave my insurance policy that I had on it on it while he was in there, and I didn't really discuss any part of his homeowner's or anything else. I just assumed he would take care of that.' " Id. Bernard's daughter accidentally started a fire that caused substantial damage to the home. After paying damages to Theodore on his homeowner's insurance, the insurer brought a subrogation action against, inter alios, Bernard's daughter. Id. The Nebraska Supreme Court affirmed the trial court's summary judgment in favor of the daughter, in effect denying subrogation. Id., 121, 123. As we previously have noted, the court first concluded that the relationship between Theodore and Bernard "has characteristics of both landlord/tenant and licensor/licensee, but of a separate and unique kind, and in this instance meriting a different treatment." Id., 124. The court then concluded that, "in this case, the issue is not whether, absent insurance, [Theodore] *could* sue his brother or his niece, but whether the relationship between [Theodore] and his brother was such, however characterized, that by permitting

the [insurer] to sue [Bernard], *in effect* the [insurer] is suing [its] insured. This we believe the [insurer] may not do." (Emphasis added.) Id., 127. In light of Theodore's assurance to his brother that he would maintain his homeowner's policy during the brother's stay, the court concluded that "[i]t is difficult to see how the insurance was not for the benefit of [Bernard's family] to the same extent as it was for [Theodore's family]." Id., 128. Because the insurer's action was tantamount to suing Theodore, the insured brother, the court concluded that subrogation was not appropriate.[12] Id., 129; see also *Jindra* v. *Clayton*, 247 Neb. 597, 606, 529 N.W.2d 523 (1995) ("relationship between the [parents] and the [daughter's family] is such that if [the parents' insurer] were permitted to maintain this subrogation action it would be, in effect, suing its own insured").

Similarly, in the present case, the relationship between the defendant and Deveau defies precise categorization under property law and weighs against allowing equitable subrogation.[13] Although Deveau did not make an *express* representation to the defendant that she was maintaining the coverage for both of their benefit, as the brother did in *Reeder*, equity compels us to conclude that her actions in reaching an agreement with him whereby she regularly accepted his substantial contribution to her homeowner's policy premiums without informing him that this payment would not protect him from liability were tantamount to such an expression. "Courts have long recognized that where one party has agreed with another to obtain insurance for their mutual protection, the insurer will not be allowed to recover its losses from the noninsured party by means of subrogation or indemnity." *United States Fidelity & Guaranty Co.* v. *Aetna Casualty & Surety Co.*, 418 F.2d 953, 955 (8th Cir. 1969); compare *Page* v. *Scott*, 263 Ark. 684, 687, 567 S.W.2d 101 (1978) (allowing subrogation in absence of express or implied agreement "that insurance would be provided for the mutual protection of the parties") with *Anchor Casualty Co.* v. *Robertson Transport Co.*, 389 S.W.2d 135, 139 (Tex. App. 1965) (precluding subrogation when there was "ample evidence that [the insured] led [the third party] to believe that the [insured truck] in question was covered by collision insurance," including testimony by insured that he never intended to hold third party liable for insured truck, and "[the third party] relied upon these representations").[14] Certainly, the defendant in the present case reasonably would not have expected to be sued for causing damage to the very property for which he partially paid for insurance coverage. Cf. *Foster Estates, Inc.* v. *Wolek*, 105 N.J. Super. 339, 342, 252 A.2d 219 (1969) (concluding that subrogation action could not be brought against tenant who paid for policy even though landlord, and not tenant, was only named insured).

The fact that Deveau and the defendant were mutu-

ally economically dependent also likely affected their reasonable expectations regarding liability. The effect of an action against the defendant necessarily would be the depletion of his resources and, in turn, the shift of part of his financial burden vis--vis the home the parties shared back to Deveau.[15] Deveau therefore reasonably viewed the plaintiff's action against the defendant as tantamount to a recovery of those funds from her and a deprivation of the intended value of her homeowner's policy. As *Reeder* instructs, subrogation is not favored when the effect is as if the action were brought against the insurer's own insured. See generally *Home Ins. Co.* v. *Pinski Bros., Inc.*, 160 Mont. 219, 226, 500 P.2d 945 (1972) ("No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. . . . To allow subrogation under such circumstances would permit an insurer, in effect, to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased." [Citations omitted.]); see *Continental Divide Ins. Co.* v. *Western Skies Management, Inc.*, 107 P.3d 1145, 1148 (Colo. App. 2004) (citing this general antisubrogation rule); *American Family Mutual Ins. Co.* v. *Auto-Owners Ins. Co.*, 757 N.W.2d 584, 589 (S.D. 2008) (same). Indeed, the effect on Deveau implicates the principle that "relief by way of subrogation will not be granted where it would work an injustice or where innocent persons would suffer, or where the result would be inimical to public policy." 73 Am. Jur. 2d, supra, 554, § 11.

Accordingly, we conclude that the totality of the circumstances in the present case convinces us that the equities clearly weigh against subrogation. In so concluding, we are not unmindful that precluding subrogation may cause some injustice to the plaintiff. After all, Deveau did not notify the plaintiff that the defendant had become a permanent resident of the insured premises. As this court previously has noted, however, "[w]e think that our law would be better served . . . by leaving it to the specific agreement of the parties if they wish a different rule to apply to their, or their insurers', relationship." *DiLullo* v. *Joseph*, supra, 259 Conn. 854. In the present case, the policy at issue permitted the plaintiff to adjust Deveau's premium or coverage, with appropriate notice and within a specified period, if she failed to inform the plaintiff "of any change in title, use or occupancy of the residence premises."[16] The policy also permitted the plaintiff to void the policy if Deveau "intentionally conceal[ed] or misrepresent[ed] any material fact or circumstance . . . before or after a loss." Presumably, because the plaintiff paid Deveau for her loss despite her failure to notify it that the defendant was living on the insured premises, the defendant's residency was not deemed a misrepresentation

or intentional concealment of a material fact.[17]

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court with direction to render judgment for the defendant.

In this opinion NORCOTT, PALMER, VERTEFEUILLE and McLACHLAN, Js., concurred.

[1] The plaintiff also had asserted a claim against the defendant Rock-Vern Electric, Inc. (Rock-Vern), alleging that the defendant was an employee and principal of Rock-Vern and that, under the theory of respondeat superior, Rock-Vern was liable for the defendant's alleged negligent act. The defendant filed an answer denying that he was working for Rock-Vern at the time that he engaged in the alleged negligent act, and the president of Rock-Vern subsequently submitted an affidavit consistent with that denial. Thereafter, the plaintiff withdrew its claim against Rock-Vern. References herein to the defendant, therefore, are to Stephen Palumbo only.

[2] Although the trial court initially awarded the plaintiff damages in the amount of $62,615.25, in light of the plaintiff's concession in closing argument to the trial court that it had paid Deveau $1121.96 in error for the value of the defendant's personal property, the trial court ordered the defendant to pay damages in the amount of $61,493.29

[3] Covered persons under the policy included the named insured and residents of the household if they were a relative or a dependent person in the care of the insured. The trial court noted that the defendant had produced no legal authority that a fiancé is a relative. That legal determination is not at issue in this certified appeal.

[4] General Statutes § 47a-1 provides in relevant part: "(d) 'Landlord' means the owner, lessor or sublessor of the dwelling unit, the building of which it is a part or the premises. . . .

"(h) 'Rent' means all periodic payments to be made to the landlord under the rental agreement.

"(i) 'Rental agreement' means all agreements, written or oral, and valid rules and regulations adopted under section 47a-9 or subsection (d) of section 21-70 embodying the terms and conditions concerning the use and occupancy of a dwelling unit or premises. . . .

"(*l*) 'Tenant' means the lessee, sublessee or person entitled under a rental agreement to occupy a dwelling unit or premises to the exclusion of others or as is otherwise defined by law. . . ."

[5] Although the defendant also had raised several claims in the Appellate Court relating to damages, we granted his petition for certification to appeal limited to the following issue: "Did the Appellate Court properly affirm the trial court's determination that the [defendant], who resided in an apartment and caused damage to the premises, was liable under the doctrine of equitable subrogation to the insurer of the tenant?" *Allstate Ins. Co.* v. *Palumbo*, 289 Conn. 954, 961 A.2d 419 (2008). We note that this court incorrectly framed the certified question by referring to the premises at issue as an apartment and to Deveau as a tenant. The record clearly demonstrates that the premises is a single-family, two bedroom house and that Deveau is the owner of the house. We therefore consider the appeal consistent with the actual facts. See *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 287 Conn. 664, 665 n.1, 949 A.2d 1203 (2008) (rephrasing certified question containing typographical error); see also *Stamford Hospital* v. *Vega*, 236 Conn. 646, 648 n.1, 674 A.2d 821 (1996) (noting that this court may rephrase certified questions in order to render them more accurate in framing issues presented).

[6] Indeed, in *Wasko* v. *Manella*, supra, 269 Conn. 529, the hosts had initiated the action against the guest, and the insurer later was substituted as the real party in interest.

[7] The facts on which we rely were adduced through the testimony of the defendant and Deveau, as well as an affidavit from Deveau that was submitted, without objection, as a full exhibit. The plaintiff did not introduce any evidence to discredit these factual assertions. The plaintiff also does not challenge any of these facts on appeal and, indeed, has conceded the material facts, including the defendant's contributions toward payment of the insurance premiums, in its brief and at oral argument before this court. Moreover, the trial court expressly made the following broad findings of fact, evidencing

that it had credited the testimony of the defendant and Deveau regarding their living arrangement: "Deveau and [the defendant] shared expenses for said residence [during the entire period he lived there] . . . . They shared expenses of the home which varied month to month . . . . During [the defendant's] occupancy of the subject premises, he performed many improvements and maintenance functions as if he was an owner . . . ."

We do note, however, that, although the trial court found that the defendant had moved into the subject premises on or about February, 2001, and had moved out on or about October, 2005, after the couple terminated their engagement, the undisputed evidence indicates that the defendant moved into the premises more than one year prior to February, 2001.

[8] We note that the parties agree both that the trial court and the Appellate Court improperly characterized the relationship between Deveau and the defendant as host-social houseguest and that the relationship more properly is characterized as a nonmarried cohabiting couple. They each suggest that this court could adopt a bright line rule allowing or barring subrogation when the insured and the third party are such a couple. In support of his contention, the defendant points to the ever growing number of nonmarried couples living together. Because the status of the defendant and Deveau as a nonmarried, cohabiting couple is only one of many facts relevant to the balancing of the equities in the present case, we decline the parties' invitation to consider such a bright line rule, which could have a significant impact either on insurers or such couples, until we are presented with a case in which that status is the sole or principal factor.

[9] We note that there is no evidence in the record as to what type of coverage, if any, the defendant would have been able to obtain had he sought his own insurance policy.

[10] We note that, at oral argument, a member of this court raised an issue that previously had not been raised by either party, namely, whether the defendant could have been added as an insured to Deveau's insurance policy. The defendant admitted that this was a possibility, one which neither he nor Deveau had thought of because they believed that the defendant already was covered under that policy. The plaintiff also acknowledged that adding the defendant to the policy would have been an option, but asserted that it would have had the discretion to allow the defendant to be added or to require him to obtain his own policy. See *DiLullo* v. *Joseph*, supra, 259 Conn. 853 (citing principle that "[an] insurer has a right to choose whom it will insure" [internal quotation marks omitted]).

For several reasons, we are not inclined to conclude that there is no economic waste on the basis of the possibility that the defendant might have been added as an insured on Deveau's policy. First, the defendant would have had no control over whether he could obtain that coverage, as only Deveau could have requested the defendant's addition to her policy and the plaintiff would have had the sole discretion whether to add him as an insured. With a separate policy of his own, the defendant would be able to turn to other insurers even if the plaintiff had refused to insure him. Second, if the defendant had been added to Deveau's policy, the plaintiff would not have been able to bring an action against him, as he would be the plaintiff's own insured. See *Home Ins. Co.* v. *Pinski Bros., Inc.*, 160 Mont. 219, 226, 500 P.2d 945 (1972). Finally, even if we were inclined to consider the defendant's ability to be added to Deveau's policy as weighing against a conclusion that allowing subrogation would encourage economic waste, the evidence regarding the expectation of Deveau and the defendant that he would not be held liable is so overwhelmingly in his favor that the equities still clearly would compel the conclusion that subrogation should not be permitted.

[11] We disagree with the Appellate Court's limited reading of *DiLullo* in *Hartford Fire Ins. Co.* v. *Warner*, 91 Conn. App. 685, 691, 881 A.2d 1065, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005), on which the plaintiff relies, as resting on the fact that there was a multitenant building at issue in that case. In *DiLullo* v. *Joseph*, supra, 259 Conn. 854, this court concluded that economic waste would occur if the defendant tenant had been required to obtain a policy for the premises and then further noted that this waste would be multiplied because of the additional tenants in the mutlitenant building. See id. ("[t]his 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").

[12] We note that the court in *Reeder* concluded that the relationship at issue was more akin to "that of a host and a guest," but did not conclude that such a categorization was dispositive. *Reeder* v. *Reeder*, supra, 217 Neb.

125–26. In *Wasko* v. *Manella*, supra, 269 Conn. 549 n.18, we had rejected the Appellate Court's reliance on the reasoning in *Reeder* because the case before this court "involved a more distant relationship between the parties, a much shorter stay at the home and no explicit reference by the hosts that the guest's actions would be covered under their insurance policy." In the present case, as we already have recognized, there is a close relationship between the parties, there was a considerably longer period of residence by the defendant on the insured premises than in *Reeder*, the defendant's residency was expected to be permanent and Deveau's actions reasonably can be interpreted to indicate that she considered her policy to be for the defendant's benefit as well as her own.

[13] Although the mere *status* of Deveau and the defendant as a nonmarried cohabiting couple does not give rise to property rights; see *Loughlin* v. *Loughlin*, 280 Conn. 632, 643, 910 A.2d 963 (2006) ("cohabitation in and of itself does not create any legal or support obligations"); we note that this court has recognized that, under various equitable and legal theories, the *conduct* of such cohabiting couples can create a right to property distribution in the cohabitant without legal title or create a right to repayment for goods and services. See *Boland* v. *Catalano*, 202 Conn. 333, 340–41, 521 A.2d 142 (1987) ("[C]ourts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. . . . In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case." [Internal quotation marks omitted.]); *Salzman* v. *Bachrach*, 996 P.2d 1263, 1267–68 (Colo. 2000) (citing and relying on case law from majority of jurisdictions recognizing equitable and legal basis of claims between nonmarried cohabiting couples); see generally note, "The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey," 37 Brandeis L.J. 245 (1998).

We note that, in the present case, testimony from the defendant and Deveau reflect that they viewed the insured property as belonging to them both because of the defendant's status as fiancé, his cohabitation and his substantial contributions to the property. Indeed, in its posttrial brief, the plaintiff conceded that the defendant and Deveau "were living together as husband and wife" and acknowledged the implied contract theory applicable to such arrangements under *Boland* v. *Catalano*, supra, 202 Conn. 340–41. Nonetheless, the defendant has not advanced a claim in the present case that he has a legal or equitable right to the insured property, nor has he contended that such rights affected the expectations he and Deveau had with regard to liability for that property and, in turn, impact whether subrogation is proper in this case. Therefore, we do not consider, and indeed need not consider, whether a third party cohabitant's legal or equitable claims vis–vis the insured property impacts the expectations of the parties for purposes of subrogation or otherwise impacts the subrogation rights of the insured cohabitant's insurer. Nonetheless, in light of the aforementioned case law and the defendant's substantial contributions to the insured property in the present case, we reject the dissent's view that the status of the relationship between Deveau and the defendant was so ambiguous and uncertain that it could not, as a matter of law, give rise to any expectations regarding insurance coverage.

[14] We note that this line of cases, as well as the Nebraska Supreme Court's decision in *Reeder*, is based in part on the premise that the third party is an implied coinsured. See *Aetna Ins. Co.* v. *Craftwall of Idaho, Inc.*, 757 F.2d 1030, 1031–32 (9th Cir. 1985); *Tri-Par Investments, LLC* v. *Sousa*, 268 Neb. 119, 129–30, 680 N.W.2d 190 (2004). In *DiLullo* v. *Joseph*, supra, 259 Conn. 853, this court rejected the implied coinsured rationale in the context of the landlord-tenant relationship. See id. ("a tenant is not a coinsured on his landlord's fire insurance policy simply because he has an insurable interest in the premises and pays rent"). We do not depart from that view in the present case and simply rely on these decisions to the extent that they address the expectations of the parties and the effect of those expectations. We do not view the defendant as a coinsured who would have been entitled to recover under Deveau's contract.

[15] We are mindful that, prior to the trial court's judgment in the present case, the defendant and Deveau ended their engagement. Nonetheless, we

consider the facts as they existed at the time that the potential liability arose.

[16] Under the section entitled "Coverage Changes," the policy provided in relevant part: "The coverage provided and the premium for the policy is based on information you have given us. You agree to cooperate with us in determining if this information is correct and complete and to inform us of any change in title, use or occupancy of the residence premises. You agree that if this information changes, is incorrect or incomplete, we may adjust your coverage and premium accordingly by giving you notice within [sixty] days of the policy effective date. . . ."

[17] The dissent contends that it is unfair to deny equitable subrogation in the present case because the plaintiff had no knowledge of the expectations of Deveau and the defendant regarding the insured property. It further contends that denying subrogation would create a "bizarre" result because such a result would not give effect to a provision in Deveau's policy, which is statutorily mandated, under which she has agreed to assign claims that she has against third parties to the plaintiff. These contentions, however, are at odds with our analysis in *DiLullo* and *Wasko*.

Our discussions of the expectations of the parties in both cases focused solely on the relationship between the insured and the third party. See *Wasko* v. *Manella*, supra, 269 Conn. 547 ("[u]nlike 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"); *DiLullo* v. *Joseph*, supra, 259 Conn. 851 ("[W]e recognize that tenants and landlords are always free to allocate their risks and coverages by specific agreements, in their leases or otherwise. The question posed by this appeal, however, is what the appropriate default rule of law should be where, as here, th[ose] parties have not made such an agreement."); *DiLullo* v. *Joseph*, supra, 854 ("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"). In neither *Wasko* nor *DiLullo* did we consider whether the parties had communicated their expectations to the insurer.

This court has, however, recognized the principle that an insurer should be allowed to choose whom it insures. See *DiLullo* v. *Joseph*, supra, 259 Conn. 853. Therefore, as we previously have noted; see footnote 14 of this opinion; this court has declined to treat a party who is not a named insured as having the rights of a coinsured simply because of that party's expectations. *DiLullo* v. *Joseph*, supra, 853. Consistent with that view, in the present case, the defendant never has claimed that he is entitled to recover for damage to his personal effects under the policy simply because he contributed to the premiums. Therefore the holding in this case imposes no greater liability on the insurer than it had agreed to insure under the terms of Deveau's policy.

Finally, the dissent's position that the subrogation provision in Deveau's policy must be given effect in the present case is contradicted by the very case law it cites, wherein we expressly have rejected such a per se rule in favor of a fact-specific consideration of the equities. See *Wasko* v. *Manella*, supra, 269 Conn. 533–34 ("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., 535 ("The Connecticut legislature has enacted a standard form of fire insurance, with which all fire insurance policies issued in this state must conform. . . . We conclude that [the subrogation] provision, when incorporated into a contract for fire insurance issued in this state, does not provide the insurer with an inviolate statutory right of subrogation." [Citations omitted.]); id., 539 ("rather than interpret the standard form of fire insurance as providing statutory rights, we consistently have interpreted it as merely setting forth legislatively mandated contractual terms, which, once incorporated into an insurance policy, are contractual terms that may be 'trumped' by principles of equity"). There is no substantive difference between the assignment provision at issue in *Wasko* and the one in Deveau's policy.