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KATZ, J., with whom SULLIVAN, J., joins, concurring. I disagree with the majority's narrow reading of the special defense in this case and would conclude that the civil arson defense is indeed implicated. I do, however, agree that the trial court's instructions were not improper because I do not consider that motive is a necessary element of that defense. Accordingly, I concur in the result.

I

I begin with our jurisprudence regarding the law of pleadings, followed by our jurisprudence regarding insurance policies. "[T]he interpretation of pleadings is always a question of law for the court . . . . *Cahill* v. *Board of Education*, 198 Conn. 229, 236, 502 A.2d 410 (1985). The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . *Beaudoin* v. *Town Oil Co.*, 207 Conn. 575, 587–88, 542 A.2d 1124 (1988), and cases cited therein. Although essential allegations may not be supplied by conjecture or remote implication; *Cahill* v. *Board of Education*, supra, 236; 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. *Price* v. *Bouteiller*, 79 Conn. 255, 257, 64 A. 227 (1906). 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. *Tedesco* v. *Stamford*, 215 Conn. 450, 459, 576 A.2d 1273 (1990), on remand, 24 Conn. App. 377, 588 A.2d 656 (1991), rev'd, 222 Conn. 233, 610 A.2d 574 (1992); *Giulietti* v. *Connecticut Ins. Placement Facility*, 205 Conn. 424, 434, 534 A.2d 213 (1987) . . . . [I]f the parties at trial have adopted a certain construction of the pleadings; see, e.g., *Milardo* v. *Branciforte*, 109 Conn. 693, 695, 145 A. 573 (1929); we should give deference to that construction." (Citations omitted; internal quotation marks omitted.) *Dornfried* v. *October Twenty-Four, Inc.*, 230 Conn. 622, 629–30, 646 A.2d 772 (1994). Finally, the practice of reading pleadings broadly applies to special defenses as well. *Doe* v. *Yale University*, 252 Conn. 641, 683, 748 A.2d 834 (2000).

"Under our law, the terms of an insurance policy are to be construed according to the general rules of contract construction. . . . The determinative question is the intent of the parties, that is, what coverage the . . . [plaintiff] expected to receive and what the defendant was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . However, [w]hen the words of an insurance contract are, without violence, susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted." (Citations omitted; internal quotation marks omitted.) *Hertz Corp.* v. *Federal Ins. Co.*, 245 Conn. 374, 381–82, 713 A.2d 820 (1998). "[T]his rule of construction favorable to the insured extends to exclusion clauses." (Internal quotation marks omitted.) *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, 231 Conn. 756, 770, 653 A.2d 122 (1995).

Applying these principles to the facts of this case, I would conclude that the civil arson defense was implicated in this case. First, I believe that the plaintiff Travelers Insurance Company's complaint in the first action specifically raises arson as the basis for its claim to recover the cash advances paid to the defendants, Robert Namerow and Barbara Namerow, under the policy issued to them. As the majority notes, this case is a consolidated action.[1] Both actions involve the *same issue* and the *same parties*. Accordingly, I believe that we must consider the plaintiff's complaint in the first action in determining whether the plaintiff raised arson in the second action as a means for denying recovery under the policy. *Beaudoin* v. *Town Oil Co.*, supra, 207

Conn. 587–88 (pleadings should be read broadly and realistically, rather than narrowly and technically); *Price* v. *Bouteiller*, supra, 79 Conn. 257 (complaint must be read in its entirety to give effect to pleading with reference to general theory upon which it proceeded and do substantial justice between parties).

In examining the plaintiff's complaint to determine whether the plaintiff did, in fact, raise "civil arson," I believe that the language employed by the plaintiff cannot be distinguished from that used by the insurance companies in *Verrastro* v. *Middlesex Ins. Co.*, 207 Conn. 179, 540 A.2d 693 (1988), *Corosa Realty* v. *Covenant Ins. Co.*, 16 Conn. App. 684, 548 A.2d 473 (1988), and *Souper Spud, Inc.* v. *Aetna Casualty & Surety Co.*, 5 Conn. App. 579, 501 A.2d 1214 (1985), cert. denied, 198 Conn. 803, 503 A.2d 172 (1986).[2] Accordingly, in line with those cases, I believe that we must conclude that the plaintiff in this case raised civil arson as a means for avoiding liability under the policy.

In the present case, the plaintiff's complaint provides: "The [p]olicy excluded from coverage any loss arising out of any act committed by or at the direction of the insured with the intent to cause a loss. . . . Subsequent to making . . . payments to the defendants, the plaintiff's investigation revealed that the *fire was incendiary in origin* and that the losses claimed by the defendants, and for which the plaintiff paid a total of Fifty Thousand ($50,000.00) Dollars in advance payments on the defendants' claims, [were] caused by acts either committed by the defendants or at their direction, with the *intent to cause a loss*." (Emphasis added.) By comparison, in *Verrastro*, the insurance company's analogous special defense alleged: "[T]he plaintiffs independently or through their partnership relationship or through agency or through other means committed acts either directly or indirectly which caused the destruction of the property in question by fire. Those acts were included but not limited to either themselves or a third party entering the premises and with the use of gas and fire, attempted to destroy the property located therein." *Verrastro* v. *Middlesex Ins. Co.*, Conn. Supreme Court Records & Briefs, December Term, 1997, Pt. 6, Record p. 12; see footnote 8 of the majority opinion. In *Verrastro*, there was no mention of "arson" in the special defense. Despite that fact, this court noted that "the defendant sought to bar the plaintiffs' claim because of arson." *Verrastro* v. *Middlesex Ins. Co.*, supra, 207 Conn. 181. Throughout the opinion in that case, this court repeatedly referred to the insurance company's special defense as its "arson special defense." See id., 182, 183, 184.

Similarly, in *Corosa Realty*, the defendant insurer alleged that the plaintiff insured had "set or caused to be set the fire at the insured property . . . *in violation of the terms and conditions of the policy*."[3] (Emphasis

added.) *Corosa Realty* v. *Covenant Ins. Co.*, Conn. Appellate Court Records & Briefs, September Term, 1988, Record pp. 12–13; see footnote 8 of the majority opinion. The pleadings in that case did not couch the insurer's claim as one sounding precisely in the civil arson defense. Rather, the insurer alleged that the insured had violated the terms of the insurance policy. *Corosa Realty* v. *Covenant Ins. Co.*, supra, 16 Conn. App. 685. Despite the insurer's choice of language, the Appellate Court recognized its claim as the "arson defense." Id., 686–87.

Finally, in *Souper Spud, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 5 Conn. App. 584–85, the Appellate Court specifically noted that the defendant's special defenses "***mirrored certain exclusionary provisions contained in the insurance policy.***" (Emphasis added.) The Appellate Court, nevertheless, recognized that the defendant had raised the civil arson defense. Id.[4]

Second, turning to the plaintiff's second special defense, I believe that it also implicates civil arson. Specifically, the second special defense alleges an exclusion from coverage contained within the terms of the policy—namely, that the policy excludes from coverage the defendants' intentional acts that result in property damage. The exclusion in the policy is not act or crime specific, but is meant to encompass, or rather, exclude *all* intentional conduct performed by, or at the direction of, the insured. Put another way, the general language of the policy applies to all sorts of intentionally caused losses that are presented. When the facts of a particular case present a fire loss, as in the present case, the general language of the exclusion necessarily must connote civil arson. Because the special defense of civil arson represents a vehicle, constructed on sound public policy, for avoiding a contractual obligation premised on proof sufficient in a civil action that an exclusion in the policy is applicable to the claim, the defense and the policy exclusion are not conceptually distinct. By not reading the exclusion to include the civil arson defense, the majority opinion, in essence, reads the defense out of the policy. Moreover, the majority's narrow construction of the general language of the exclusion in favor of the insurer directly contravenes the aforementioned tenet that an insurance policy must be construed in favor of the insured.

In summary, I recognize that the plaintiff did not use the term "arson" in its second special defense. The plaintiff did, however, note in its complaint that "its investigation revealed that the fire was incendiary in origin" and that the loss at issue was the result of the defendants' intentional act. Arson is defined under both General Statutes §§ 53a-111 (a) and 53a-112 (a) as starting a fire or causing an explosion "with intent to destroy or damage a building . . . ." See also Merriam-Webster's Collegiate Dictionary (10th Ed. 1995) (defining

arson as "the willful or malicious burning of property [as a building]"). By comparison, "incendiary" is defined as "one who maliciously and willfully sets another person's building on fire." Black's Law Dictionary (6th Ed. 1990); see also Black's Law Dictionary (7th Ed. 1999) (defining "incendiary" as "one who deliberately and unlawfully sets fire to property"). Accordingly, I believe that the plaintiff explicitly raised "civil arson" in its complaint. Moreover, when an "intentional loss," as used in the policy, is committed by the burning of a building, the intentional loss exclusion is the very definition of arson, i.e., the intentional burning of a building. Accordingly, I believe that the plaintiff's second special defense implicated the civil arson defense.

II

Because I would conclude that the civil arson defense was implicated in this case, I therefore must next determine whether motive properly plays a role. I would conclude that motive is not an essential element of the defense and that, accordingly, the trial court was not required to instruct the jury on motive.

The case from which Connecticut courts have drawn the principle that motive is a required element of proof when insurance coverage is denied because of civil arson is *Souper Spud, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 5 Conn. App. 585; see also *Verrastro* v. *Middlesex Ins. Co.*, supra, 207 Conn. 180; *Aetna Casualty & Surety Co.* v. *Pizza Connection, Inc.*, 55 Conn. App. 488, 493–95, 740 A.2d 408 (1999); *Corosa Realty* v. *Covenant Ins. Co.*, supra, 16 Conn. App. 687. In *Souper Spud, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 585, the Appellate Court explained that "in order to establish a prima facie case of arson for purposes of denying coverage under an insurance policy, the insurer must establish that the fire was incendiary, that the insured, its agents or officers had an opportunity to cause the fire, and that such individuals had a motive for setting the fire." These elements are in accord with the leading treatises on insurance. See 21B J. Appleman & J. Appleman, Insurance Law and Practice (1980) § 12682, p. 91 ("to establish a prima facie case of incendiarism for the purpose of denying coverage under a fire policy it is sufficient to show: arson by someone; motive by the suspect; and unexplained surrounding circumstantial evidence implicating the suspect"); 10 G. Couch, Insurance (L. Russ & T. Segalla eds., 3d Ed. 1998) § 149:46, p. 149-55 ("[t]he affirmative defense of incendiarism or arson committed by the insured is composed of three elements: (1) incendiary nature of the fire, (2) motive on the part of the insured to set the fire, and (3) opportunity for the insured, or someone acting on his or her behalf, to have set the fire").

A closer review of Couch's treatise, however, reveals an inconsistency. Although the three elements of the arson defense are clearly articulated in § 149:46, the

treatise retreats from its stance regarding motive as an element in § 149:59. "In an action by an insured seeking compensation under a fire policy, where the insurer defends on the basis that the insured caused the fire, ***motive need not be proven as a separate element***, although it may form part of the circumstances from which it is inferred that the insured caused the fire." (Emphasis added.) 10 G. Couch, supra, § 149:59, pp. 149-85 through 149-86. As authority for this proposition, the treatise cites one case: *Giambra* v. *Aetna Casualty & Surety Co.*, 315 Pa. Super. 231, 232, 461 A.2d 1256 (1983) (rejecting notion that motive must be proved as separate element in civil case). 10 G. Couch, supra, § 149:59, p. 149-85. It seems that a minority of states follow this rule and do not require motive as a separate element of the civil arson defense. See, e.g., *O-So Detroit, Inc.* v. *Home Ins. Co.*, 973 F.2d 498 (6th Cir. 1992) (applying Michigan law).

Although I recognize that many jurisdictions, however, do require motive as a separate element; see 10 G. Couch, supra, § 149:46, p. 149-55 (reciting general rule including motive as element and relying upon authority from state and federal cases in fifteen jurisdictions); I do not agree that Connecticut should require motive as an element of the civil arson defense. Rather, its role is best served to bolster cases in which direct evidence of arson is lacking. *O-So Detroit, Inc.* v. *Home Ins. Co.*, supra, 973 F.2d 501–502 ("circumstantial proof of motive plus access or opportunity is adequate to establish arson," but these elements are not mandatory; can prove arson by showing insured "set fire to the building or caused it to be set on fire" [internal quotation marks omitted]); *Jamaica Time Petroleum, Inc.* v. *Federal Ins. Co.*, 366 F.2d 156, 157 (10th Cir. 1966), cert. denied, 385 U.S. 1024, 87 S. Ct. 753, 17 L. Ed. 2d 674 (1967) ("insurer has burden of establishing the defense of arson by either direct or circumstantial evidence"; "evidence of deliberate destruction is sufficient"); *Moore* v. *Farmers Ins. Exchange*, 111 Ill. App. 3d 401, 408, 444 N.E.2d 220 (1982) (motive and opportunity can be proven by circumstantial evidence but sufficient to show fire was of incendiary nature and that plaintiff caused or procured fire); *Johnson* v. *Auto-Owners Ins. Group*, 202 Mich. App. 525, 527, 509 N.W.2d 538 (1994) ("Where an arson defense is raised by an insurer, the dispositive determination is whether the plaintiff set the fire or caused it to be set. . . . Motive and opportunity are merely two factors to be considered in such a determination." [Citation omitted.]); *Freeman* v. *St. Paul Fire & Marine Ins. Co.*, 72 N.C. App. 292, 297–99, 324 S.E.2d 307 (1985) (ordinarily there is no direct evidence of cause of fire; motive and opportunity are merely circumstances to be considered, but are not essential elements of arson defense); *Giambra* v. *Aetna Casualty & Surety Co.*, supra, 315 Pa. Super. 234 (1983) (motive need not be proven as separate element in civil

arson cases, but may form part of circumstances from which it is inferred that subject party caused fire).

As a final point, I note that motive plays no role in arson cases in the criminal arena. See General Statutes § 53a-215.[5] Accordingly, it hardly seems an important enough consideration to warrant status as a required element in civil arson cases. Therefore, because I believe that motive is not an essential element in civil arson cases, the court's instructions were sufficient.

Accordingly, I concur with the majority that the judgment of the trial court should be affirmed.

[1] Travelers Insurance Company brought the action against the Namerows in the first case. In the second case, the Namerows brought the breach of contract action against Travelers Insurance Company. Like the majority; see footnote 1 of the majority opinion; we refer herein to Travelers Insurance Company as the plaintiff and to the Namerows as the defendants.

[2] It is important to note that in *Verrastro* v. *Middlesex Ins. Co.*, supra, 207 Conn. 179, *Corosa Realty* v. *Covenant Ins. Co.*, supra, 16 Conn. App. 684, and *Souper Spud, Inc.* v. *Aetna Casualty & Surety Co.*, supra, 5 Conn. App. 579, the insurance companies therein had refused to pay the insureds under the policies and, therefore, were sued by the policyholders on that basis. Accordingly, civil arson was referred to in those cases as a *defense* to recovery under the policies. As I have noted previously, however, the present case is a consolidated action in which the insurance company first brought a claim against the defendants to recover moneys already paid under the policy. See footnote 1 of this concurrence. Therefore, in order to prevail, the "civil arson defense" need not be raised as a "defense." The elements required to prove civil arson are the same no matter whether they are pleaded by a plaintiff in the complaint, or asserted by a defendant as a defense. See *Aetna Casualty & Surety Co.* v. *Pizza Connection, Inc.*, 55 Conn. App. 488, 492–93, 740 A.2d 408 (1999). Indeed, under either scenario, the insurance company is trying to avoid liability under the policy based on alleged arson on the part of the insured.

[3] I note that this language is nearly identical to the language in the plaintiff's complaint in this case. Again, I reiterate that the plaintiff in this case alleged in its complaint that "the *fire was incendiary in origin* and that the losses claimed by the defendants . . . [were] caused by acts either committed by the defendants or at their direction, with the *intent to cause a loss*." (Emphasis added.)

[4] "In many policies, arson is expressly stated to be an excluded cause of loss, and under others, it is deemed to fall within a clause excluding coverage for loss deliberately caused by the insured. Some policies do not specifically exclude loss caused by arson of the insured." 10 G. Couch, Insurance (L. Russ & T. Segalla eds., 3d Ed. 1998) § 149:45, p. 149-53. Accordingly, the differences in the precise language of the allegations in *Verrastro*, *Corosa Realty*, *Souper Spud, Inc.*, and the present case are likely due to the differences in the actual language of the exclusions.

[5] General Statutes § 53a-215 provides: "Insurance fraud: Class D felony. (a) A person is guilty of insurance fraud when the person, with the intent to injure, defraud or deceive any insurance company: (1) Presents or causes to be presented to any insurance company, any written or oral statement including computer-generated documents as part of, or in support of, any application for any policy of insurance or a claim for payment or other benefit pursuant to such policy of insurance, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such application or claim; or (2) assists, abets, solicits, or conspires with another to prepare or make any written or oral statement that is intended to be presented to any insurance company in connection with, or in support of, any application for any policy of insurance or any claim for payment or other benefit pursuant to such policy of insurance, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such application or claim for the purposes of defrauding such insurance company.

"(b) For the purposes of this section, 'statement' includes, but is not limited to, any notice, statement, invoice, account, estimate of property damages, bill for services, test result, or other evidence of loss, injury, or expense.

"(c) For the purposes of this section, 'insurance company' means 'insurance company' as defined in section 38a-1.
"(d) Insurance fraud is a class D felony."