FAITH AUSTIN-CASARES *v.* SAFECO INSURANCE COMPANY OF AMERICA
(SC 19081)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, McDonald and Vertefeuille, Js.*

Argued February 14—officially released December 3, 2013

Geoffrey K. Milne, with whom, on the brief, was *Nicole L. Barber*, for the appellant (prospective intervenor BSI Financial Services, Inc.).

Philip T. Newbury, Jr., for the appellee (defendant).

Opinion

PALMER, J. The prospective intervenor, BSI Financial Services, Inc. (BSI), appeals from the trial court's denial of its motion to intervene in a breach of contract action brought by the plaintiff, Faith Austin-Casares, against the defendant, Safeco Insurance Company of America. In her complaint, the plaintiff alleged that the defendant improperly had denied her claim for insurance coverage after a fire damaged her home, and BSI, as the holder of the note and mortgage on the plaintiff's home, filed a motion to intervene in the underlying action. The trial court denied the motion as untimely on the ground that the homeowner's insurance policy issued to the plaintiff by the defendant required that any action against the defendant be commenced within one year of the alleged loss or damage, and BSI did not file its motion within that one year limitation period. Although BSI claimed that the motion to intervene did not constitute a new, separate action but, rather, related back to the plaintiff's original complaint, the trial court did not address that claim. On appeal, BSI contends that the trial court should have allowed it to intervene in the action as a matter of right, or in the alternative, permissively. We conclude that the trial court improperly denied the motion to intervene as untimely on the basis of the policy's one year limitation period without first determining whether the motion to intervene related back to the original complaint. We further conclude that the motion does indeed relate back to the original complaint, and, accordingly, we reverse the trial court's decision and remand the matter to that court so that it may reconsider BSI's motion to intervene in light of the relevant factors.

The record reveals the following relevant facts and procedural history. In a complaint dated October 12, 2009, the plaintiff alleged that her home in the town of Andover had been damaged by a fire that occurred on or about October 26, 2008. The home was covered for fire loss by a homeowner's insurance policy (policy) that the defendant had issued to the plaintiff. After the fire, the plaintiff submitted a claim for damages under the policy, but the defendant denied the claim despite the plaintiff's alleged compliance with all of the policy provisions and obligations. In response to the plaintiff's complaint, the defendant filed an answer and special defenses, asserting, inter alia, that the policy was void because the plaintiff had concealed or misrepresented material facts or circumstances and that there was no coverage under the policy for the claimed loss because the plaintiff never had resided at the subject property.

On March 22, 2011, BSI filed a motion to intervene as a plaintiff in the action pursuant to General Statutes §§ 52-102[1] and 52-107,[2] and Practice Book §§ 9-3,[3] 9-18[4] and 9-19.[5] BSI claimed that, because it was the successor in interest to EquiFirst Corporation, which was named

in the policy as the mortgagee, it was entitled to intervene as of right, or in the alternative, permissively. Specifically, BSI claimed that it had a direct and substantial interest in the litigation, its interest was not adequately represented by any other party to the litigation, its interest would be impaired by the disposition of the litigation without its involvement, and its motion to intervene was timely.

With respect to the timeliness of the motion to intervene, BSI contended that the court must consider "the totality of the circumstances . . . ." (Internal quotation marks omitted.) BSI further argued that its intervention in the action was not barred by the " '[s]uit [a]gainst [u]s' " provision of the policy, which provides: "No action shall be brought against [the defendant] unless there has been compliance with the policy provisions and the action is started within one year after the loss or damage."[6] According to BSI, this limitation period did not bar BSI's intervention in the action because the plaintiff had commenced the action in which BSI sought to intervene within one year of the loss. In support of its claim, BSI relied on *Georgia Mutual Ins. Co.* v. *Glennville Bank & Trust Co.*, 229 Ga. App. 402, 494 S.E.2d 103 (1997), in which the Georgia Court of Appeals concluded that a similar policy provision was "susceptible of two meanings" because "the policy provision [did] not state that the mortgagee's claim [was] barred unless *the mortgagee* file[d] suit within one year of the loss. It [was] silent as to the pivotal question of whether the mortgagee [was] required to bring a *separate*, *second* action even if 'the action' of the insured was timely filed and is pending." (Emphasis in original.) Id., 404. BSI further claimed that its motion to intervene was timely because it was "akin to the 'relation back' of amended claims to the original complaint under [rule 15 (c) of the Federal Rules of Civil Procedure],[7] and not the institution of a new, unrelated cause of action." (Footnote added.) Moreover, BSI argued that the defendant would not be prejudiced by BSI's intervention in the underlying action because the plaintiff's timely initiation of that action put the defendant on notice of potential exposure to liability.

The defendant objected to the motion to intervene, arguing that BSI's intervention was time barred by the policy's limitation period and by a provision in the policy specifying that "[p]olicy conditions relating to [a]ppraisal, [s]uit [a]gainst [u]s and [l]oss [p]ayment apply to the mortgagee." Because BSI concededly did not file the motion to intervene until after the limitation period had expired, the defendant contended that intervention was barred by the express terms of the policy. The defendant further claimed that, because BSI sought benefits pursuant to its contractual relationship with the defendant,[8] "it must comply with the applicable policy conditions," including the limitation period. Finally, the defendant contended that, even if the court

declined to enforce the limitation period, the motion to intervene was untimely because BSI, or its predecessor in interest, had been aware of the loss for more than two years before the motion to intervene was filed.

On May 6, 2011, the trial court, *Robaina*, *J.*, denied the motion to intervene. Thereafter, in response to BSI's motion for articulation, the trial court noted that the policy's limitation period unambiguously applied to BSI. Because the defendant had not waived the limitation period and BSI had not filed the motion to intervene until after the expiration of the limitation period, the trial court determined that the motion to intervene was untimely. Accordingly, the trial court concluded that BSI could not intervene as of right and that there was "no basis for permissive intervention . . . ." The trial court, *Miller*, *J.*, subsequently granted BSI's motion to stay the proceedings pending BSI's appeal from the trial court's denial of its motion to intervene. On appeal, BSI claims that the trial court improperly denied its motion to intervene as of right and failed to adequately analyze BSI's alternative request for permissive intervention.[9] We agree that the trial court improperly failed to address and apply the relation back doctrine to the present case, and, as a result, its analysis and conclusion with respect to the plaintiff's motion to intervene were flawed.[10]

I

INTERVENTION AS OF RIGHT

It is well established that a party seeking to intervene in a matter as of right must satisfy a four part test: (1) "[t]he motion to intervene must be timely"; (2) the proposed intervenor "must have a direct and substantial interest in the subject matter of the litigation"; (3) the proposed intervenor's "interest must be impaired by disposition of the litigation without the [proposed intervenor's] involvement"; and (4) the proposed intervenor's "interest must not be represented adequately by any other party to the litigation." *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, 302 Conn. 386, 397–98, 28 A.3d 288 (2011).

"For purposes of judging the satisfaction of [the] conditions [for intervention] we look to the pleadings, that is, to the motion . . . to intervene and to the proposed complaint or defense in intervention, and . . . we accept the allegations in those pleadings as true. The question on a [motion] to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on [a] motion to intervene, at least in the absence of sham, frivolity, and other similar objections. . . . Thus, neither testimony nor other evidence is required to justify intervention, and [a prospective] intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make

a showing of his or her right to intervene. The inquiry is whether the claims contained in the motion, if true, establish that the [prospective] intervenor has a direct and immediate interest that will be affected by the judgment." (Internal quotation marks omitted.) Id., 398.

Whether a motion to intervene is timely "involves a determination of how long the intervenor was aware of an interest before he or she tried to intervene, any prejudicial effect of intervention on the existing parties, any prejudicial effect of a denial on the applicant and consideration of any unusual circumstances either for or against timeliness. . . . Factors to consider also include the nature of the interest and the purpose for which the intervenor is seeking to be brought into the action. . . . [T]here are no absolute ways to measure timeliness . . . ." (Citations omitted; internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 208–209, 990 A.2d 853 (2010).

In the present case, the trial court denied the motion to intervene as of right solely on the ground that it was untimely because BSI had filed it after the expiration of the policy's limitation period. On appeal, BSI contends that the trial court, in considering the timeliness of the motion, improperly considered the merits of the underlying action in determining that the limitation period unambiguously applied to BSI. Alternatively, BSI argues that it is unclear whether the limitation period prohibits intervention by a mortgagee in an action that was timely filed by the insured. BSI further contends that the motion to intervene was not barred by the limitation period because the motion did not constitute a new, separate action but related back to the original, timely complaint. The defendant claims, to the contrary, that it was appropriate for the trial court to consider the policy's limitation period in deciding the timeliness of the motion to intervene and that the trial court properly concluded that the motion was untimely because it was not filed until more than two years after the date of the fire that damaged the plaintiff's home.

A

Standard of Review

Before addressing the merits of BSI's claims, we first must consider the standard of review that applies to the trial court's determination of timeliness with respect to a motion to intervene as a matter of right. In *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 454–55, 904 A.2d 137 (2006), this court concluded that a trial court's determination of the nature and extent of the rights at issue in a motion to intervene as of right is subject to de novo review. Because the timeliness of the motion to intervene was not at issue in *Kerrigan*, however, "we specifically declined to reconsider the standard of review applicable to the trial court's initial determination of timeliness . . . and reserved for the

future any possible reconsideration of that standard." (Citation omitted; internal quotation marks omitted.) *Hudson Valley Bank* v. *Kissel*, 303 Conn. 614, 622 n.5, 35 A.3d 260 (2012). In the present case, BSI argues that the trial court's decision is subject to plenary review, whereas the defendant asserts that the trial court's decision should be reviewed for an abuse of discretion. For the following reasons, we conclude that a trial court's decision concerning the timeliness of a motion to intervene must be reviewed for an abuse of discretion.

In *National Assn. for the Advancement of Colored People* v. *New York*, 413 U.S. 345, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973), the United States Supreme Court emphasized that "[w]hether intervention [is] claimed [to be] of right or as permissive . . . the application must be timely. If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." (Footnotes omitted; internal quotation marks omitted.) Id., 365–66. The federal courts of appeals, recognizing the myriad factors involved in a determination of timeliness, also have uniformly applied the abuse of discretion standard in reviewing decisions concerning the timeliness of a motion to intervene as a matter of right. See *United States* v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 991 (2d Cir. 1984) ("the great variety of factual circumstances . . . the necessity of having the 'feel of the case' in deciding . . . motions [to intervene], and other considerations . . . are precisely those [that] support an abuse of discretion standard of review" of decisions on such motions); see also *United States* v. *California*, United States Circuit Court of Appeals, Docket No. 11-57098 (9th Cir. August 16, 2013) (District Court's decision concerning timeliness of motion to intervene as of right reviewed for abuse of discretion); *United States* v. *Detroit*, 712 F.3d 925, 930 (6th Cir. 2013) ("timeliness is a matter within the sound discretion of the court, [and] the ruling will be reviewed under an abuse of discretion standard"); *Planned Parenthood of the Heartland* v. *Heineman*, 664 F.3d 716, 718 (8th Cir. 2011) (District Court's timeliness determination reviewed for abuse of discretion), cert. denied sub nom. *Nebraskans United for Life* v. *Planned Parenthood of the Heartland*, U.S. , 133 S. Ct. 198, 184 L. Ed. 2d 235 (2012); *R & G Mortgage Corp.* v. *Federal Home Loan Mortgage Corp.*, 584 F.3d 1, 7 (1st Cir. 2009) (same); *Zbaraz* v. *Madigan*, 572 F.3d 370, 377 (7th Cir. 2009) (same); *Houston General Ins. Co.* v. *Moore*, 193 F.3d 838, 839 (4th Cir. 1999) (same); *United States* v. *Alcan Aluminum, Inc.*, 25 F.3d 1174, 1179,

1181 (3d Cir. 1994) (same); *Jones* v. *Caddo Parish School Board*, 735 F.2d 923, 926 (5th Cir. 1984) (same); *Lumbermens Mutual Casualty Co*. v. *Rhodes*, 403 F.2d 2, 5 (10th Cir. 1968) (same), cert. denied, 394 U.S. 965, 89 S. Ct. 1319, 22 L. Ed. 2d 567 (1969).[11]

Although this court previously has not established the standard for reviewing a trial court's determination of timeliness with respect to a motion to intervene as of right, we consistently have recognized that determinations of timeliness require the exercise of judicial discretion. See *BNY Western Trust* v. *Roman*, supra, 295 Conn. 209 ("[f]actors to consider . . . include the nature of the interest and the purpose for which the intervenor is seeking to be brought into the action . . . [but] there are no absolute ways to measure timeliness" [citations omitted; internal quotation marks omitted]); *Washington Trust Co*. v. *Smith*, 241 Conn. 734, 744–45, 699 A.2d 73 (1997) ("[i]n making [the] determination of timeliness with respect to motions to intervene as a matter of right, courts must take into consideration the nature of the interest and for what purpose the intervenor is seeking to be brought into the action"), overruled in part on other grounds by *Kerrigan* v. *Commissioner of Public Health*, supra, 279 Conn. 447. In view of this court's recognition of the discretionary nature of a determination of timeliness, the federal courts' uniform application of the abuse of discretion standard when reviewing decisions concerning the timeliness of a motion to intervene as of right, and the sound reasoning behind the application of that standard, we conclude that a trial court's decision concerning the timeliness of a motion to intervene as of right should be reviewed for abuse of discretion.

B

Determination of Timeliness

Applying these principles, we turn to the question of whether the trial court properly exercised its discretion in denying BSI's motion to intervene as of right as untimely on the sole ground that it was time barred by the policy's limitation period. In its articulation, the trial court observed that the limitation period applied to BSI and concluded that, because the defendant had not waived the limitation period and the motion to intervene had been filed after the expiration of the limitation period, the motion to intervene was untimely. There is no indication that the trial court considered any additional factors. In particular, the record does not reflect any consideration of BSI's argument that the motion to intervene related back to the original complaint or any assessment of potential prejudice to either party that might stem from a decision to grant or deny the motion to intervene.

Although "it is normally true that this court will refrain from interfering with a trial court's exercise of

discretion . . . this presupposes that the trial court did in fact exercise its discretion. [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Internal quotation marks omitted.) *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 239, 654 A.2d 342 (1995). Similarly, this court "cannot interfere with the exercise of [the trial court's] discretion in the absence of a showing that it involves the violation of some legal principle or right or that the court's discretion has been abused." *Adamsen* v. *Adamsen*, 151 Conn. 172, 180, 195 A.2d 418 (1963). The trial court in the present case denied the motion to intervene as untimely solely on the basis of its legal determination that it was time barred by the policy's limitation period, without considering additional factors related to timeliness. For the reasons set forth more fully hereinafter; see part I C of this opinion; the plaintiff's motion is not barred by the limitation period. Consequently, the trial court's decision was predicated on a misapplication of the law rather than a reasoned exercise of discretion. As a result, that decision cannot stand.[12] See *Cummings* v. *United States*, 704 F.2d 437, 441 (9th Cir. 1983) (reversing District Court's denial of motion to intervene as of right as untimely when denial "seems to have been primarily based not on timeliness but on the erroneous interpretation of the statute of limitations").

C

Application of Relation Back Doctrine

With respect to the trial court's legal determination that the policy's limitation period rendered BSI's motion to intervene untimely, we conclude that the trial court improperly made that determination without first considering BSI's claim that the motion to intervene related back to the original complaint. We commence our analysis with the language of the limitation period in the policy, which provides in relevant part that "[n]o action shall be brought against [the defendant] unless . . . the action is started within one year after the loss or damage." In light of this language, the threshold question before the trial court was whether the motion to intervene itself constituted an "action" or whether, as BSI contends, the claims in the motion to intervene related back to the original complaint and are tantamount to an amendment to that complaint. Although BSI raised this claim in its memorandum in support of the motion to intervene, the record is devoid of any indication that the trial court considered this threshold issue. Upon consideration of BSI's claim, we conclude, as a matter of law, that the motion to intervene does relate back to the original complaint and is not a separate action for purposes of intervention. Contrary to the determination of the trial court, therefore, the motion to

intervene was not time barred by the limitation period in the policy.[13]

Under the relation back doctrine, "a party properly may amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same. . . . If a new cause of action is alleged in an amended complaint . . . it will [speak] as of the date when it was filed. . . . A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief. . . . It is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but [when] an entirely new and different factual situation is presented, a new and different cause of action is started." (Internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 140, 998 A.2d 730 (2010).

"We have previously recognized that our relation back doctrine is akin to rule 15 (c) of the Federal Rules of Civil Procedure, which provides in [relevant] part . . . [that] [w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . . The policy behind rule 15 (c) is that a party, once notified of litigation based [on] a particular transaction or occurrence, has been provided with all the notice that statutes of [limitation] are intended to afford." (Internal quotation marks omitted.) *Sherman* v. *Ronco*, 294 Conn. 548, 555–56, 985 A.2d 1042 (2010). "[I]f a party seeks to add new allegations to a complaint and a statute of limitations applicable to those allegations has run since the filing of the complaint, the party must successfully invoke the relation back doctrine before amendment will be permitted." *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 483 n.38, 970 A.2d 592 (2009).

"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.) Id. "[I]n 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 [on] previous allegations." *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 560, 51 A.3d 367 (2012).

Although this court has applied the relation back doctrine in a variety of circumstances,[14] it has not considered the specific issue of whether the doctrine applies in the context of a motion to intervene as of right. Courts in other jurisdictions, however, have concluded that the relation back doctrine does apply in this context. For example, in *Cummings* v. *United States*, supra, 704 F.2d 437, the Ninth Circuit Court of Appeals concluded that the District Court improperly denied an insurance company's motion to intervene as of right in an action that was timely filed by its insured against the United States, even though the motion to intervene was filed after the expiration of the statute of limitations. See id., 439–40. Emphasizing that the insurance company, as the prospective intervenor, "sought a lesser amount for the same damages" sought in the original complaint; id., 439; and that the insurance company, as subrogee, was the real party in interest; id.; the court concluded that the insurance company's claim related back to the original complaint. Id., 439–40. The court also noted that the purposes of the statute of limitations, namely, to prevent stale claims, delay or the late presentation of issues, had been served by the timely filing of the original complaint. Id., 439; see also *State* v. *Gutierrez*, United States District Court, Docket No. 08-CV-2503 (CPS) (RLM) (E.D.N.Y. November 19, 2008) (intervenor's claim, which was barred by statute of limitations, "relate[d] back to the date of the original complaint [when] [1] the proposed intervenor [was] the real party in interest, or there [was] a community of interest between [the] proposed intervenor's and [the] plaintiff's claims; [2] [the proposed] intervenor's motion [was] timely within the meaning of [r]ule 24 [of the Federal Rules of Civil Procedure]; and [3] no prejudice to [the] defendants would result" [internal quotation marks omitted]); *Ross* v. *Patrusky, Mintz & Semel*, United States District Court, Docket No. 90 Civ. 1356 (SWK) (S.D.N.Y. April 29, 1997) (intervenor's claim "barred by the statute of limitations relates back to the date the original complaint was filed where no prejudice to the defendant would result"). Similarly, in *Likover* v. *Cleveland*, 60 Ohio App. 2d 154, 396 N.E.2d 491 (1978), the Court of Appeals of Ohio explained that "[t]he proper analysis appears to be that a person who claims an independent cause of action cannot be brought into the original action after the expiration of the statutory period, but [when] the cause of action is the same, a suit commenced within the statutory period inures to the benefit of the person who is brought in after the statute of limitations has run." Id., 157; see also *In re MAXXAM, Inc./Federated Development Shareholders Litigation*, 698 A.2d 949, 958 (Del. Ch. 1996) (motion to intervene not barred by statute of limitations because claims related back to original complaint when defendants had notice of claims and were not prejudiced by intervention); annot., "Change in Party After Statute of

Limitations Has Run," 8 A.L.R.2d 90, § 42 (1949) ("The general rule seems to be that [when] a community of interest or a privity of estate exists between an [intervenor] and other plaintiffs, a suit commenced before the expiration of the statutory period inures to the benefit of the person who intervenes therein after the time when an action would be barred. The reason for this holding is that an intervention does not constitute a new cause of action."). But cf. *Police & Fire Retirement System* v. *IndyMac MBS, Inc.*, 721 F.3d 95, 111–12 (2d Cir. 2013) (relation back doctrine does not permit members of putative class, who are not named parties, to intervene in class action after passage of statute of repose as named parties in order to revive claims that were dismissed from class complaint for want of jurisdiction).

On the basis of the foregoing authority, we are persuaded that a motion to intervene may relate back to an original complaint when, as in the present case, the identity of the cause of action remains substantially the same and arises out of a single group of facts, and when the prospective intervenor is the real party in interest. Under these circumstances, "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.) *Grenier* v. *Commissioner of Transportation*, supra, 306 Conn. 559; see also *Federal Deposit Ins. Corp.* v. *Retirement Management Group, Inc.*, 31 Conn. App. 80, 84–85, 623 A.2d 517 ("As long as [the] defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense. . . . Thus, an amendment substituting a new plaintiff [will] relate back if the added plaintiff is the real party in interest." [Internal quotation marks omitted.]), cert. denied, 226 Conn. 908, 625 A.2d 1378 (1993).

In the present case, BSI's motion to intervene clearly relates back to the original complaint.[15] BSI, in its capacity as mortgagee, seeks the precise relief sought in the original complaint, that is, payment under the policy for the property damage resulting from the fire that occurred on or about October 26, 2008. We therefore agree with BSI's assertion that its claim is "for all intents and purposes, identical to that of the [plaintiff's claim because BSI] . . . seeks payment under the same insurance policy for the same fire loss." (Emphasis omitted.) BSI's motion to intervene does not assert any new or different facts, theories or claims; rather, it alleges only that BSI, as mortgagee, is "entitled to be paid first from any payment under the policy . . . ." As a result, BSI's motion to intervene does not state a

new or independent cause of action but relates back to the original complaint.

We are not persuaded by the defendant's claim, made at oral argument, that the motion to intervene must be considered a new and separate action because BSI, as an "innocent" mortgagee, might not be subject to the same defenses as the plaintiff. The defendant contends that it would be prejudiced if it could be held liable to BSI for a claim for which it could not be held liable to the plaintiff. The primary concern when applying the relation back doctrine, however, is whether the original complaint gave the defendant fair notice of the claims asserted. See *Grenier* v. *Commissioner of Transportation*, supra, 306 Conn. 562–63; see also *Alswanger* v. *Smego*, 257 Conn. 58, 64, 776 A.2d 444 (2001) ("[i]n the event that a new and different factual situation is presented, any amendment will not relate back to the initial commencement of the lawsuit unless the original pleading had given . . . fair notice to the adverse party that a claim is being asserted against him for some particular transaction or occurrence" [internal quotation marks omitted]). In the present case, the defendant acknowledges that both the original complaint and the motion to intervene arise from the same group of operative facts, thus giving the defendant fair notice of the claim. In addition, there is no question that the defendant was aware of its potential liability to BSI because the standard or union clause in the policy specifically provided that "any loss payable under [the policy] shall be paid to the mortgagee" and that the denial of an insured's claim "shall not apply to a valid claim of the mortgagee . . . ."[16]

Because the trial court denied the motion to intervene as of right on the basis of its improper legal determination that the motion was time barred by the policy's limitation period, without weighing any additional factors relevant to the determination of whether the motion was timely, the trial court's denial of that motion must be reversed. Moreover, the case must be remanded so that the trial court may exercise its discretion with respect to all factors relevant to a determination of timeliness, such as whether the defendant would be prejudiced by BSI's intervention, the extent to which BSI would be prejudiced if it were not permitted to intervene, and whether intervention would cause undue delay of the underlying proceedings. See *Likover* v. *Cleveland*, supra, 60 Ohio App. 2d 158 (after determining that statute of limitations did not bar intervention, court still obliged to consider timeliness in context of trial proceedings); see also *BNY Western Trust* v. *Roman*, supra, 295 Conn. 208–209 (discussing factors involved in timeliness determination). If the trial court, after such consideration, determines that the motion to intervene as of right is timely, the trial court must then assess the remaining relevant factors in determining whether to grant the motion to intervene as a matter

of right. See *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, supra, 302 Conn. 397–98 (discussing factors involved in determination of whether to grant motion to intervene as of right).[17]

II

PERMISSIVE INTERVENTION

BSI's final contention is that the trial court failed to fully analyze BSI's request for permissive intervention. In its articulation concerning the denial of BSI's motion to intervene, the trial court concluded that "BSI may not intervene, as a matter of right, in the present case. The court finds no basis for permissive intervention in this case."

In *BNY Western Trust* v. *Roman*, supra, 295 Conn. 194, this court discussed the two types of intervention, noting that "[i]ntervention as of right provides a legal right to be a party to the proceeding that may not be properly denied by the exercise of judicial discretion. Permissive intervention means that, although the person may not have the legal right to intervene, the court may, in its discretion, permit him or her to intervene, depending on the circumstances. *Palmer* v. *Friendly Ice Cream Corp.*, 285 Conn. 462, 479, 940 A.2d 742 (2008) ([p]ermissive intervention . . . is entrusted to the trial court's discretion . . . [and] depends on a balancing of factors . . .). In deciding whether to grant a request for permissive intervention, a trial court should consider: the timeliness of the intervention; the [prospective] intervenor's interest in the controversy; the adequacy of representation of such interests by other parties; the delay in the proceedings or other prejudice to the existing parties the intervention may cause; and the necessity for or value of the intervention in resolving the controversy. . . . With respect to the propriety of the trial court's balancing of these factors, we have stated that [a] ruling on a motion for permissive intervention would be erroneous only in the rare case [in which] such factors weigh so heavily against the ruling that it would amount to an abuse of the trial court's discretion. . . . A party challenging a ruling on permissive intervention bear[s] the heavy burden of demonstrating an abuse of . . . discretion . . . ." (Citations omitted; internal quotation marks omitted.) Id., 204 n.8.

Because of the discretionary nature of the decision to grant or deny permissive intervention and the absence of any indication in the record that the trial court considered or balanced any of the factors relevant to determining whether to permit intervention, it is apparent that the trial court improperly failed to apply its reasoned judgment in denying BSI's request for permissive intervention. Cf. *Gateway Co.* v. *DiNoia*, supra, 232 Conn. 239. Indeed, it is very likely that the trial court saw no reason to do so in light of its erroneous determination that the motion to intervene was categor-

ically barred by the policy's limitation period. Accordingly, in reversing the trial court's denial of the motion to intervene and remanding the case for further consideration of that motion, we direct the trial court, on remand, to exercise its discretion with respect to BSI's request for permissive intervention in the event that it denies BSI's request to intervene as a matter of right.

The trial court's denial of the motion to intervene is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

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

[1] General Statutes § 52-102 provides: "Upon motion made by any party or nonparty to a civil action, the person named in the party's motion or the nonparty so moving, as the case may be, (1) may be made a party by the court if that person has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff, or (2) shall be made a party by the court if that person is necessary for a complete determination or settlement of any question involved therein; provided no person who is immune from liability shall be made a defendant in the controversy."

[2] General Statutes § 52-107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

[3] Practice Book § 9-3 provides in relevant part: "All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly provided . . . ."

[4] Practice Book § 9-18 contains materially identical provisions to those of General Statutes § 52-107. See footnote 2 of this opinion.

[5] Practice Book § 9-19 provides in relevant part: "Except as provided in Sections 10-44 and 11-3 no action shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the judicial authority, at any stage of the cause, as it deems the interests of justice require. . . ."

[6] General Statutes § 38a-307, which prescribes a standard form for fire insurance policies in Connecticut, mandates a provision specifying that "[n]o . . . action on this policy . . . shall be sustainable in any court of law . . . unless commenced within eighteen months next after inception of the loss." Prior to October 1, 2009, § 38a-307 required that any action must be commenced within twelve months of the claimed loss. See General Statutes (Rev. to 2009) § 38a-307; see also General Statutes (2010 Supp.) § 38a-307 (incorporating 2009 amendment changing required limitation period from twelve months to eighteen months). There is no dispute that BSI filed its motion to intervene more than one year after the loss or damage within the meaning of the policy.

[7] Rule 15 of the Federal Rules of Civil Procedure provides in relevant part: "(c) RELATION BACK OF AMENDMENTS.

"(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

"(A) the law that provides the applicable statute of limitations allows relation back;

"(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

"(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15 (c) (1) (B) is satisfied and if, within the period provided by Rule 4 (m) for serving the summons and complaint, the party to be brought in by amendment:

"(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

"(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. . . ."

[8] In a memorandum in support of its motion to intervene, BSI noted that

the policy contained a " 'standard' " or " 'union' " mortgage clause providing that any loss under the policy would be paid to the mortgagee and that the denial of the insured's claim would not affect a valid claim by the mortgagee. A copy of the policy was attached to BSI's memorandum as an exhibit. Citing *Burritt Mutual Savings Bank* v. *Transamerica Ins. Co.*, 180 Conn. 71, 76, 428 A.2d 333 (1980), BSI emphasized that this type of clause "create[s] a direct contractual interest in the policy between the insurer and the mortgagee."

[9] BSI appealed to the Appellate Court from the trial court's denial of its motion to intervene. Upon the Appellate Court's request, we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. The Appellate Court sought to transfer the appeal to this court on the ground that Connecticut case law is not clear with respect to the standard of review that applies to a trial court's decision regarding the timeliness of a motion to intervene as a matter of right.

We also note that, when the appeal was pending in the Appellate Court, that court denied the defendant's motion to dismiss the appeal for lack of a final judgment. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 449 n.3, 904 A.2d 137 (2006) ("an unsuccessful applicant for intervention in the trial court does not have a final judgment from which to appeal unless he can make a colorable claim to intervention as a matter of right" [internal quotation marks omitted]). We are satisfied that BSI "has made a colorable claim to intervention as a matter of right, and that we, therefore, properly have jurisdiction over the interlocutory appeal." (Internal quotation marks omitted.) Id.

[10] We note that BSI's motion to intervene made no mention of the applicability of the relation back doctrine. BSI did raise the doctrine, however, in its memorandum in support of the motion to intervene.

[11] The Second Circuit Court of Appeals employs an abuse of discretion standard in reviewing all elements of the denial of a motion to intervene as a matter of right. See *Police & Fire Retirement System* v. *IndyMac MBS, Inc.*, 721 F.3d 95, 104 (2d Cir. 2013). Other federal courts of appeals generally employ a de novo standard in reviewing a district court's denial of a motion to intervene as of right, and an abuse of discretion standard only when reviewing a decision concerning the timeliness of a motion to intervene as of right. See, e.g., *United States* v. *California*, supra, Docket No. 11-57098 ("[w]e review de novo the denial of a party's motion to intervene as a matter of right, except for the issue of timeliness, which we review for an abuse of discretion"); *Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary* v. *Regents of the University of Michigan*, 701 F.3d 466, 490 (6th Cir. 2012) ("[w]e . . . review de novo district court decisions on motions to intervene as of right, except for the element of timeliness, which is reviewed for an abuse of discretion"), cert. denied sub nom. *Schuette* v. *Coalition to Defend Affirmative Action*, U.S. , 133 S. Ct. 1633, 185 L. Ed. 2d 615 (2013). In addition, certain courts have determined that, although decisions concerning the timeliness of a motion to intervene as of right generally are reviewed for abuse of discretion, de novo review is appropriate when the court fails to exercise its discretion or fails to articulate the basis for its decision. See, e.g., *Edwards* v. *Houston*, 78 F.3d 983, 999–1000 (5th Cir. 1996); *Nelson* v. *Allegheny*, 60 F.3d 1010, 1012 (3d Cir. 1995), cert. denied sub nom. *Beddingfield* v. *Allegheny County*, 516 U.S. 1173, 116 S. Ct. 1266, 134 L. Ed. 2d 213 (1996). These exceptions are consistent with prior cases of this court holding that a trial court abuses its discretion when it fails to exercise its discretion; see *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986); or when it predicates its decision on a misapplication of the law. See *Francis* v. *Fonfara*, 303 Conn. 292, 301, 33 A.3d 185 (2012) (trial court's interpretation of statute was misapplication of law and thereby constituted abuse of discretion); cf. *Adamsen* v. *Adamsen*, 151 Conn. 172, 180, 195 A.2d 418 (1963) (reviewing court cannot interfere with trial court's exercise of discretion unless it appears that it involved violation of some legal principle or right or involved clear abuse of discretion).

[12] To the extent that BSI contends that the trial court improperly considered the policy's limitation period and that trial courts should be precluded entirely from considering contractual or statutory limitation periods in assessing the timeliness of a motion to intervene, we are not persuaded. As we explained previously in this opinion, the timeliness determination is a threshold consideration predicated on all of the circumstances of the case. In light of the broad scope and discretionary nature of this determination, we are reluctant to adopt a blanket rule preventing a trial court from consid-

ering a relevant contractual or statutory limitation provision. The more sensible approach is for the court to consider all relevant factors, including any contractual or statutory limitation periods, in evaluating the timeliness of a motion to intervene as a matter of right. See *Storti* v. *Crystal Mall Associates Ltd. Partnership*, Superior Court, judicial district of New London, Docket No. 52-41-91 (August 10, 1993) (considering statute of limitations in determining whether to grant or deny motion to "cite in" parties); see also *Likover* v. *Cleveland*, 60 Ohio App. 2d 154, 157–59, 396 N.E.2d 491 (1978) (in determining whether motion to intervene was timely filed, court considered statute of limitations as well as timing of trial proceedings, potential prejudice to parties and whether other remedies were available to proposed intervenor).

[13] In view of our conclusion that the motion to intervene relates back to the original complaint and, therefore, was not time barred by the limitation period, we need not address BSI's claim that the trial court improperly considered the language of the limitation period and determined that it was unambiguous.

[14] See, e.g., *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 143 (counts of negligence added after expiration of statute of limitations did not allege different fact pattern or theory of negligence and thus related back to timely filed complaint); id., 151 ("As long as [the] defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added . . . . Thus, an amendment substituting a new plaintiff [will] relate back if the added plaintiff is the real party in interest." [Internal quotation marks omitted.]); *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 776–78, 905 A.2d 623 (2006) (although allegations of fifth amended complaint were specific and artfully drafted, they related back to more broadly worded fourth amended complaint); *Gurliacci* v. *Mayer*, 218 Conn. 531, 549, 590 A.2d 914 (1991) (allegations of negligence added after expiration of statute of limitations related back to timely filed complaint when they "did not inject two different sets of circumstances and depend on different facts . . . but rather amplified and expanded [on] the previous allegations by setting forth [alternative] theories of liability" [citation omitted; internal quotation marks omitted]).

[15] This court previously has not determined whether, on appeal, the trial court's application of the relation back doctrine is subject to an abuse of discretion standard or de novo review. See *Grenier* v. *Commissioner of Transportation*, supra, 306 Conn. 559 (unnecessary to decide appropriate standard of review for determining whether amendment to complaint relates back for purposes of statute of limitations because party seeking benefit of relation back doctrine "[could] not prevail even under de novo [standard of] review"); *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 798–800, 945 A.2d 955 (2008) (same). Ordinarily, if an abuse of discretion standard is applicable, it would be inappropriate for this court to decide, in the first instance, whether the motion to intervene relates back to the original complaint. In the present case, however, a review of the motion to intervene and the original complaint leads to only one reasonable conclusion, that is, that the motion to intervene relates back to that complaint. Consequently, even if an abuse of discretion standard were to apply, we would not need to remand the case to the trial court for its resolution of the issue because that court would be required to conclude that the motion to intervene does, indeed, relate back to the original complaint.

[16] See footnote 8 of this opinion.

[17] In light of our conclusion that the case must be remanded to the trial court for further consideration, we do not address BSI's claims that the defendant would not be prejudiced by BSI's intervention in the underlying matter and that BSI has a direct and immediate interest in that litigation. Of course, BSI may renew these claims in the trial court upon remand.