NNH CV17-6073811 S	: SUPERIOR COURT
ALEXANDER NIEVES, ADMINSTRATOR OF THE ESTATE OF MARIA L. OCASIO	: JUDICIAL DISTRICT OF : NEW HAVEN
V.	: AT NEW HAVEN
MERIDEN-WALLINGFORD ANESTHESIA GROUP, P.C., HARTFORD HEALTHCARE CORPORATION D/B/A MIDSTATE MEDICAL CENTER AND MIDSTATE MEDICAL CENTER; GUY J. ALIOTTA, M.D.	: MAY 21, 2024

MEMORANDUM OF DECISION ON MOTION TO DISMISS No. 280.00

The plaintiff, Alexander Nieves, Administrator of the Estate of Maria Ocasio, moves to dismiss filing no. 261.00 filed by defendants Meriden-Wallingford Anesthesia Group, P.C. and Guy J. Aliotta, M.D. (collectively "the anesthesia defendants") on the grounds that (1) it does not meet the requirements for an apportionment complaint, (2) the only way in which the defendants can obtain apportionment is through a complaint, and (3) it does not meet the requirements for an apportionment notice. The anesthesia defendants' filing purports to seek apportionment of any plaintiff's verdict against the anesthesia defendants to reduce that verdict by the amount of any damages proximately caused by the alleged negligence or malpractice of Dr. Housein M. Nawaz, a gastroenterologist. The anesthesia defendants oppose the motion. The court has considered this motion, the anesthesia defendants' objection no. 283.00, and filing no. 261.00. The court also has considered the arguments made at oral argument on May 17, 2024.

Preliminarily, the plaintiff filed a motion to dismiss because noncompliance with General Statutes § 52-102b implicates personal jurisdiction. *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 14, 31-33, 848 A.2d 418 (2004). The anesthesia defendants argue that the plaintiff does not have standing to move to dismiss because Practice Book § 10-

30(b) refers only to "any defendant" filing a motion to dismiss. This is the only reference in all of the Practice Book motion to dismiss rules to "defendant." Moreover, this subsection only restrains a defendant from filing a motion to dismiss later than 30 days after that defendant files its appearance. In the absence of any cited authority for the proposition that only a defendant may challenge the jurisdiction of the court over any court filing, the court rejects this argument. The court also rejects the anesthesia defendants' argument that the plaintiff did not timely file this motion. The plaintiff sought and obtained an extension of time to file the motion. Although the Practice Book requires that motions to dismiss based on lack of personal jurisdiction to be filed within 30 days of the defendant filing an appearance, the anesthesia defendants have not provided the court with any authority to support their argument that that limitation applies to plaintiffs when the challenged filing or event occurs more than 30 days after the appearances are filed. Therefore, the court will consider the merits of the motion to dismiss.

Filing no. 261.00 is entitled "apportionment complaint." It is structured like a complaint, with a caption, numbered paragraphs with allegations, and a final paragraph that requests a reduction of any verdict against the anesthesia defendants. The plaintiff argues that it does not meet the requirements for an apportionment complaint because (1) it was not served, (2) it was not served within the 120-day timeframe required by General Statutes § 52-102b(a), and (3) it does not include the good faith certificate and opinion letter required by General Statutes § 52-190a. The anesthesia defendants appear to concede that it is not an apportionment complaint. The court agrees with the plaintiff that the filing does not and cannot meet the requirements of an apportionment complaint.

The plaintiff next argues that there is no other mechanism besides an apportionment complaint by which the anesthesia defendants may seek apportionment based on any alleged

negligence or malpractice by Dr. Wazaz. He argues that (1) Dr. Wazaz is not and was not a party to this action, (2) General Statutes § 52-572h(c) provides that apportionment may only be had among parties, (3) General Statutes § 52-102b(f) provides that Section 52-102b is the "exclusive means by which a defendant may add a person who is or may be liable pursuant to section 52-572h for a proportionate share of the plaintiff's damages as a party to the action," and (4) the only mechanism in Section 52-102b to add a party is by serving an apportionment complaint under subsection (a).

The anesthesia defendants respond that (1) Dr. Wazaz is a party to this action, and (2) even if he is not a party, that is irrelevant because (a) Section 52-572h does not limit apportionment to parties, and (b) a notice pursuant to Section 52-102b(c) may be used to cause his liability to be apportioned, and (3) their filing no. 261.00 satisfies the requirements of Section 52-102b(c) for such a notice.

The first issue for the court to address is whether Dr. Wazaz is a party to this action. Unlike the anesthesia defendants, he was not named as a defendant in this action. Instead, Dr. Wazaz was served as a defendant in *Nieves* v. *Housein M. Wazaz, M.D. and Midstate Gastroenterology Specialists, P.C.*, Docket No. NNH-CV19-6094518-S. That action was later consolidated with this action. The plaintiff argues that that consolidation is not sufficient to make Dr. Wazaz a party to this action. The defendant argues that by virtue of the consolidation, Dr. Wazaz is a party to this action. The court agrees with the plaintiff.

Practice Book § 9-5 provides in subsection (a) that actions are consolidated for trial. Moreover, subsection (c) provides that "[t]he court files in any actions consolidated pursuant to this section shall be maintained as separate files and all documents submitted by counsel or the parties shall bear only the docket number and case title of the file in which it is to be filed." Our

Appellate Court has held that it was improper in consolidated actions for the jury to return only one verdict, and that instead, there should have been a separate verdict for each case to support a separate judgment in each case. *Suburban Sanitation Service, Inc.* v. *Millstein*, 19 Conn. App. 283, 290, 562 A.2d 551 (1989). The rule and this decision make it clear that even after consolidation for trial, the two actions remain separate.

At least three superior court decisions have addressed the issue in this case – whether defendants in two separate actions that have been consolidated for trial are parties to the same action for purposes of apportionment. Each of those decisions concluded that the defendants in the two separate actions were not parties to the same action. In *Abshire* v. *Beaver Coaches, Inc.*, Superior Court, Docket No. CV94-0539540 (December 15, 1997, *Wagner, J.T.R.*) 21 Conn. L. Rptr. 198), the court held that the defendant in one action could not file an apportionment crossclaim against a defendant and a third-party defendant in the consolidated action. The court specifically rejected the argument that "because the two cases were consolidated for trial, they have become one proceeding and because Cummins-Conn., Inc. is a properly served party in one, it is within the personal jurisdiction of the court so that it can be made defendant in a cross claim filed in the other case." The motion to dismiss was granted. In a more recent decision, *Rhodes* v. *JMS Restaurants, LLC*, Superior Court, judicial district of Danbury, Docket No. CV19-6031822-S (July 22, 2021, *D'Andrea, J.*), the court struck a special defense in which defendants in one of the consolidated actions attempted to apportion liability between those defendants and all of the defendants to both actions. That court also struck a crossclaim against a defendant in the other action on the grounds that apportionment can be had only among parties to the same action. Earlier in that same case, the court allowed defendants in one consolidated action to serve a timely apportionment complaint against defendants in the other action so as to make them parties

for apportionment. *Rhodes* v. *JMS Restaurants, LLC*, Superior Court, judicial district of Danbury, Docket No. CV19-6031822-S (February 4, 2020, *D'Andrea, J.*). This court agrees with the reasoning behind these decisions. Dr. Wazaz is not a defendant in the same action in which the anesthesia defendants are defendants.

The next issue raised by the parties is whether Section 52-572h limits apportionment to parties. The plaintiff relies on subsection (c). The relevant language of that subsection provides: "[i]n a negligence action to recover damages resulting from personal injury, wrongful death … if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable noneconomic damages …." Although the court agrees with the plaintiff that this subsection refers only to "parties," it is not the only controlling subsection. Subsection (d) explains how to calculate the proportionate share of damages attributable to "all parties whose negligent actions were a proximate cause of the injury, death or damage to property including settled or released persons under subsection (n) …." Subsection (f) provides: "[t]he jury … shall specify … (4) the percentage of negligence that proximately caused the injury, death … in relation to one hundred per cent, that is attributable to each party whose negligent actions were a proximate cause of the injury, death … including settled or released persons under subsection (n) of this section …." In turn, subsection (n) provides: "[a] release, settlement or similar agreement entered into by a claimant and a person discharges that person from all liability for contribution, but it does not discharge any other person liable upon the same claim unless it so provides. However, the total award of damages is reduced by the amount of the released person's percentage of negligence determined in accordance with subsection (f) of this section." All of these other subsections refer

not only to "parties" but to "released persons." See *Donner* v. *Kearse*, 234 Conn. 660, 668-69, 662 A.2d 1269 (1995) ("while Tort Reform I provided that the jury, in determining the percentage of responsibility of a particular defendant, could also consider the entire universe of negligent persons, Tort Reform II limited this universe to only those individuals who were parties to the legal action or who were specifically identified in § 52-572h(n)").

The court cannot ignore these statutory provisions that suggest that the negligence of settled or released persons may be considered. "I]nterpreting a statute to render some of its language superfluous violates cardinal principles of statutory interpretation." (Citation omitted.) *In re Annessa J.*, 343 Conn. 642, 674, 284 A.3d 562 (2022). Therefore, the fact that Dr. Wazaz is not a party to this action is not dispositive, and the anesthesia defendants need not use an apportionment complaint that complies with the requirements of Section 52-102b(a) to add him as a party to reduce their potential liability, if Dr. Wazaz is a "settled or released party."

The next issue the court must confront is whether the anesthesia defendants may use the notice procedure set forth in Section 52-102b(c) to obtain apportionment based on the alleged negligence of Dr. Wazaz. Because the court already has determined that Dr. Wazaz has not ever been a party to this action, the anesthesia defendants are not exempted by the last sentence of this subsection from using a notice. The relevant part of subsection (c) for this issue is: "[i]f a defendant claims that the negligence of any person, who was not made a party to the action, was a proximate cause of the plaintiff's injuries or damage and the plaintiff has previously settled or released the plaintiff's claims against such person, then a defendant may cause such person's liability to be apportioned by filing a notice …."

The focus is on whether "the plaintiff has previously settled or released the plaintiff's claims against" Dr. Wazaz. At oral argument on May 17, 2024, the plaintiff's counsel argued

that Dr. Wazaz did not fulfill this requirement. It has been reported to the court that Dr. Wazaz and other defendants in both actions have reached a settlement with the plaintiff, a probate court hearing has been held to approve that settlement, and the plaintiff's counsel has been told by Probate Court personnel that it will be approved. There is no evidence that the plaintiff has executed a release in favor of Dr. Wazaz, and no withdrawal has been filed as to Dr. Wazaz.

In *Donner* v. *Kearse*, supra, 234 Conn. 660, the plaintiff passenger never sued the driver, and although the driver previously had been a plaintiff, he withdrew his claim prior to trial. Id. at 663. Because the driver had withdrawn his complaint, the Supreme Court held that he was not a party. Id. at 672. Turning to the question of whether the driver was a "settled or released person," the court held that he was not, based on this reasoning:

> "Subsection (n) further defines the negligence of a settled or released person as "the released person's percentage of negligence." Under the plain language of subsections (f) and (n), therefore, in order for the negligence of [the driver] to be included in the calculus of apportioning responsibility, he must have been a "released person." A released person under subsection (n) must be a person, not necessarily a party, who *received* a release of liability. The defendant in this case makes no claim, nor is there any evidence on the record that would support a claim, that [the driver] received a release of liability from the defendant or from anyone else involved in the automobile collision."

Donner v. *Kearse*, supra, 234 Conn. at 672.

Our Supreme Court returned to the issue of the meaning of a "release, settlement or similar agreement entered into by the claimant" in Section 52-572h(n) twenty years later in *Viera v. Cohen*, 283 Conn. 412, 425-26, 927 A.2d 843 (2007). Like the present case, *Viera* was a medical malpractice case. After a judgment entered in favor of the plaintiff, the defendant obstetrician appealed, arguing that the trial court had improperly precluded him from pursuing an apportionment complaint against another obstetrician party against whom the plaintiff had filed a withdrawal. Id. at 416. During jury selection, the plaintiff withdrew his claims against several

defendants, including the other obstetrician. Id. at 419. The defendant promptly filed a notice of claim of apportionment. Id. The plaintiff then filed a motion in limine seeking to preclude the defendant from introducing evidence for the purpose of establishing fault against the withdrawn defendants. Id. The trial court granted that motion. Id.

On appeal, the defendant argued that pursuant to Section 52-572h(n), the withdrawal fit within the language "release, settlement or similar agreement." *Viera v. Cohen*, 283 Conn. at 426. The first of the defendant's two theories was similar to that advanced by the anesthesia defendants here. That theory was "to further the statutory goal of proportionality, the terms "release" and "settlement" in § 52-572h(n) must be read broadly to include the withdrawal of an action."[1] Id. Our Supreme Court rejected that argument.

First, the court held that because Section 52-572h abrogated the common law of joint and several liability, it must be strictly construed. *Viera v. Cohen*, supra, 283 Conn. at 426. It then defined the terms "settlement" and "release." It held that:

> "A settlement is a legally enforceable agreement in which a claimant agrees not to seek recovery outside the agreement for specified injuries or claims from some or all of the persons who might be liable for those injuries or claims. ... [T]o be a legally enforceable agreement, a settlement must be supported by consideration. ... [The] goal [of settlement] is to further finality and to avoid the costs and uncertainties of protracted litigation."

(Citations omitted.) Id. at 427.

The Supreme Court then turned to defining "release:"

> "A release is an agreement to give up or discharge a claim. ... It terminates litigation or a dispute and [is] meant to be a final expression of settlement. ... A release acts like a contract and, as with any contract, requires consideration,

---

[1] The defendant's second theory was that a withdrawal constitutes a "similar agreement" within the meaning of subsection (n). *Viera v. Cohen,* supra, 283 Conn. at 426. The Supreme Court rejected that theory as well, ultimately concluding that a "similar agreement" shares the characteristics of a release or settlement. Id. at 431-35.

> voluntariness and contractual capacity. ... The document ensures the released tortfeasor that he has bought his peace."

(Citations omitted; internal quotation marks omitted.) *Viera v. Cohen*, supra, 283 Conn. at 427-28. The court then turned to an analysis of a withdrawal and concluded that it "shares few of the essential characteristics of a settlement and release." Id. at 429.

The Supreme Court summarized the apportionment statutes and the "legislative gap" that the defendant before it and perhaps the defendant here fall into:

> "We recognize, however, the hardship to defendants similarly situated to the one in the present case. Section 52-102b(f) provides the "exclusive means by which a defendant may add a person who is or may be liable pursuant to section 52-572h for a proportionate share of the plaintiff's damages as a party to the action." Section 52-102b, however, provides a means to seek apportionment against persons who are not parties to the action only if an apportionment complaint is filed within 120 days after the return date in the plaintiff's original complaint; see General Statutes § 52-102b(a) or against "settled" or "released" persons. See General Statutes § 52-102b(c). Thus, under the procedural scheme prescribed by the legislature, the defendant could not file an apportionment complaint against Cohen while he was a party. For the reasons set forth in ... this opinion, the defendant also could not seek apportionment against Cohen under the procedures for released or settled persons. Thus, this legislative gap leaves the defendant without recourse to obtain apportionment."

Viera v. Cohen, supra, 283 Conn. at 442-43.

This court does not have sufficient evidence before it that Dr. Wazaz is a "settled or released person" such that any negligence on his part may be considered for apportionment based on the notice provision of Section 52-102b(c).

The plaintiff also challenges filing no. 261.00 as not being sufficient to meet the Section 52-102b(c) requirements for a notice. The plaintiff did not, however, identify which, if any, requirements that the filing did not fulfill. Those requirements are: "a notice specifically identifying such person by name and last-known address and the fact that the plaintiff's claims against such person have been settled or released. Such notice shall also set forth the factual basis

of the defendant's claim that the negligence of such person was a proximate cause of the plaintiff's injuries or damages." Filing no. 261.00 appears to allege all of these requirements except for the last known address.

Finally, the plaintiff argues that the anesthesia defendants have not disclosed an expert witness to support their assertion that Dr. Wazaz' s negligence was a proximate cause of the plaintiff's decedent's injuries and death. Since the motion to dismiss and opposition memorandum were filed, the anesthesia defendants have filed such a disclosure. No. 285.00. Even if that disclosure had not been filed, its absence would not have deprived the court of personal jurisdiction.

The motion to dismiss is granted on the grounds that (1) filing no. 261.00 does not meet the requirements for an apportionment complaint, (2) the anesthesia defendants have not established that Dr. Wazaz is a "settled or released person," and (3) filing no. 261.00 does not meet the requirements for a notice of apportionment.

BY THE COURT,

Stewart, J.

Hon. Elizabeth J. Stewart