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KATZ, J., with whom, NORCOTT, J., joins, concurring. I agree with the majority opinion's conclusion that, based on our prior case law, General Statutes § 52-114 does not provide the named plaintiff, Richard Juchniewicz, the executor of the estate of his deceased wife, Patricia Juchniewicz (decedent),<sup>1</sup> with the substantive right to a jury instruction that his decedent was presumed to have acted in the exercise of reasonable care, and that "the statutory presumption applies only to cases in which the defendant has pleaded contributory negligence . . . ." Additionally, I recognize that the defendant Frank Spano (defendant) never pleaded contributory negligence. The plaintiff, however, had asked the trial court to require the defendant to plead contributory negligence in light of the evidence, but the trial court refused to instruct the defendant to amend his pleadings, and the Appellate Court affirmed the judgment, concluding that the trial court's decision was not an abuse of discretion. *Juchniewicz v. Bridgeport Hospital*, 86 Conn. App. 310, 321, 860 A.2d 1275 (2004). We thereafter granted the plaintiff's petition for certification to appeal limited to the issue addressed in the majority opinion, that is, whether the plaintiff was entitled to a jury charge that the plaintiff's decedent was presumed to have acted in the exercise of reasonable care, pursuant to § 52-114. *Juchniewicz v. Bridgeport Hospital*, 272 Conn. 917, 866 A.2d 1287 (2005). We declined, however, to grant the plaintiff's petition for certification as to its second question, that is, whether the Appellate Court improperly concluded that the trial court had acted properly when it refused to require the defendant to formally plead the defense of contributory negligence. I am now convinced that we made a mistake by failing to certify the second issue, because I do not think the issues are divisible from one another under the facts of this case.

During the course of the trial, the defendant refuted the allegations of his negligence by relying on the limited information that he had been given by the decedent. That information, however, could have demonstrated not simply that the defendant had acted reasonably based on the information the decedent had given him, but, if credited, also suggested that the plaintiff had acted negligently, thus contributing to her own demise, by failing to convey information or conveying inaccurate information. In fact, in his memorandum in opposition to the plaintiff's petition for certification, although the defendant claimed that his defense at trial was, in large part, that some of the plaintiff's evidence regarding the decedent's symptoms, such as chills and shoulder pain, had not been truthful, the defendant acknowledged that such evidence could have had some bearing on the issue of the decedent's own negligence.

Specifically, at trial, the plaintiff presented evidence that his decedent had experienced severe chills, which the plaintiff's experts characterized as "rigors" and relied on in determining that the defendant negligently had failed to take certain measures. Although the defendant contended at trial that the decedent never had chills of such a serious nature, he also asserted that she had failed to communicate to him that she had chills of such a serious nature, or more specifically, "that they were rigors, if she [knew] what the word 'rigors' meant." Mindful that the decedent was an emergency room nurse, the jury could have considered negligent the decedent's failure to recognize her symptoms as a sign of something dangerous. Indeed, in his opposition to the plaintiff's petition for certification, the defendant asserted that "it may arguably have been negligent to fail to mention rigors i[f] they had occurred . . . ."

Additionally, there was evidence that the decedent had thought that her shoulder pain was due to an injury that predated the illness for which she had contacted the defendant. Again, the defendant notes in his opposition to the plaintiff's petition for certification that, "whether [the] plaintiff's decedent thought that the illness was separate from the shoulder injury could not be construed as contributory negligence *unless the decedent herself was a physician.*" (Emphasis added.) As we know, however, the decedent was an emergency room nurse, someone who had medical training and who consequently could have been held to a higher standard by the jury.

The defendant further claimed in his opposition to the plaintiff's petition for certification that, because the only evidence of the decedent's chills had come from the plaintiff, the jury, as evidenced by its verdict, must have found the evidence to be not credible. That is arguably one scenario that the jury could have accepted; it also, however, could have believed the plaintiff's testimony that the decedent had had these symptoms, but also believed the defendant's testimony that the decedent had failed to relate these symptoms to him. Had that been the case, the jury would have been left with the clear impression that the decedent's own negligence had contributed to her death. Therein lies the problem; because the defendant had not been required to plead contributory negligence, the statutory presumption of due care under § 52-114 did not apply, and the jury was not given an instruction that the decedent's negligence would not bar her recovery provided that her negligence was not greater than the defendant's negligence. See General Statutes § 52-572h (b) (contributory negligence rule).

Accordingly, I would reconsider our denial of the plaintiff's petition for certification as to the question of whether the Appellate Court properly concluded that the trial court had not abused its discretion in declining

to require the defendant to amend his pleadings to include a defense of contributory negligence and would allow the parties to file supplemental briefs on that issue. In the absence of briefs on the additional issue we did not certify, I must concur separately.

<sup>1</sup> See footnote 2 of the majority opinion for a listing of the parties originally involved in this action. Hereafter, references in this opinion to the plaintiff are to Richard Juchniewicz.