SHIRLEY P. *v.* NORMAN P.*
(SC 19870)

Palmer, McDonald, D'Auria, Mullins, Kahn and Vertefeuille, Js.

Syllabus

The defendant appealed from the trial court's property division award following the dissolution of his marriage to the plaintiff. The trial court had entered a property division award that heavily favored the plaintiff, concluding that the defendant was solely responsible for the marital breakdown on the basis of his conviction of several criminal offenses that resulted from his alleged sexual assault of the plaintiff. The trial court ruled that the judgment of conviction in the defendant's criminal case had a preclusive effect in the present dissolution action under the doctrine of collateral estoppel. While the present appeal from the property distribution award was pending, the defendant's criminal conviction was reversed. On appeal, the defendant claimed that the reversal of his conviction required reversal of the property distribution award. *Held* that, because the defendant's conviction was the sole basis for the property division award and because the reversal of the judgement of conviction deprived that judgment of any preclusive effect in the present dissolution action, this court reversed the property division award and remanded the case for a new trial with respect to that award; a judgment that has been reversed on appeal does not have preclusive effect, and, even if the trial court properly applied the doctrine of collateral estoppel to the defendant's criminal conviction on the basis of the record before it when it made the property division award, that award must be reversed on appeal because the defendant's criminal conviction was subsequently reversed.

Argued January 16—officially released August 7, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the trial court, *Albis*, *J.*, denied the defendant's motions for a stay and to preclude certain evidence; thereafter, the case was tried to the court, *Albis*, *J.*; judgment dissolving the marriage and granting

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

certain other relief, from which the defendant appealed. *Reversed in part*; *new trial.*

Frank W. Russo, with whom, on the brief, was *Jon D. Berman*, for the appellant (defendant).

Adam J. Teller, with whom, on the brief, was *Brandy N. Thomas*, for the appellee (plaintiff).

Opinion

MULLINS, J. The plaintiff, Shirley P., brought the present action, seeking the dissolution of her marriage to the defendant, Norman P., after the defendant allegedly sexually assaulted her. While this dissolution action was pending, the defendant was convicted of several criminal offenses arising from the alleged assault. The defendant appealed from the judgment of conviction in that case to the Appellate Court. Thereafter, while the criminal appeal was pending, the dissolution trial commenced. At that trial, the court allowed the plaintiff to present evidence of the criminal conviction. More specifically, the court ruled that the defendant's conviction had preclusive effect in this dissolution action under the doctrine of collateral estoppel. Consequently, following the trial in the present case, the court concluded, solely on the basis of the evidence of the criminal conviction, that the defendant exclusively was responsible for the marital breakdown. Accordingly, the court entered a property division award that heavily favored the plaintiff. The defendant then filed the present appeal.[1]

In this appeal, the defendant claims that, because the judgment of conviction was subject to a pending appeal at the time of the dissolution trial, that judgment was not final. The defendant contends that, therefore, the

[1] The defendant appealed from the judgment to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

trial court improperly gave the criminal judgment collateral estoppel effect in the present dissolution action.

Subsequently, the Appellate Court reversed the judgment of conviction in the criminal case. See *State* v. *Norman P.*, 169 Conn. App. 616, 151 A.3d 877 (2016), aff'd, 329 Conn. 440, A.3d (2018). As a result, the parties were ordered to submit supplemental briefs on the effect, if any, of the reversal of the defendant's criminal conviction on the defendant's claim in the present appeal from the dissolution judgment. See footnote 3 of this opinion. Thus, given the reversal of the defendant's criminal conviction, which this court has recently upheld; see *State* v. *Norman P.*, 329 Conn. 440, 465, A.3d (2018); the precise issue now before us is whether the property award, which was based on that conviction, must also be reversed. To answer that question, we are guided by the principles established in *Butler* v. *Eaton*, 141 U.S. 240, 242–44, 11 S. Ct. 985, 35 L. Ed. 713 (1891), which held that a second judgment based upon the preclusive effect of the first judgment should be reversed if the first judgment is reversed. Therefore, under the circumstances presented, we conclude that the reversal of the defendant's criminal conviction strips that judgment of any collateral estoppel effect that it may have had in this dissolution action. Because the fact of the criminal conviction was the sole basis for the property division award, we also conclude that the award must be reversed.

The record reveals the following procedural history and facts that were either found by the trial court or are undisputed. On August 10, 2012, the defendant was arrested and charged with sexual assault of the plaintiff and other felony offenses in connection with an incident that took place at the parties' residence on August 2, 2012. On October 20, 2012, the plaintiff commenced the present action seeking dissolution of her marriage to the defendant. The plaintiff consented to the defendant's

request to delay the divorce trial until the completion of his criminal trial.

The defendant ultimately was convicted of several criminal charges and, on February 26, 2015, was sentenced to a lengthy term of incarceration. He filed an appeal from the judgment of conviction on May 14, 2015. See *State* v. *Norman P.*, supra, 169 Conn. App. 616.

On May 21, 2015, the day before the dissolution trial was scheduled to commence, the defendant filed three motions: a motion to stay the trial until the appeal from his criminal conviction was resolved; a motion to preclude the admission of evidence of his criminal conviction; and a motion for a pretrial hearing to present evidence concerning the unfairness of the criminal proceeding. In his motion for a pretrial hearing, the defendant contended that it would be unfair to give collateral estoppel effect to his criminal conviction in the dissolution action because the conviction was the result of "numerous erroneous trial court rulings." Attached to his motion for a pretrial hearing were copies of the appeal from his conviction as well as his motion for a new trial in the criminal proceeding. In those filings, the defendant set forth, at length, claims that the trial court in his criminal case had made numerous erroneous rulings that affected the validity of the verdict.

On May 22, 2015, just before the trial began, the trial court conducted a hearing on the defendant's three motions. The court denied the defendant's motion for a stay on the ground that the dissolution action had been pending since November 6, 2012, and any further delay would prejudice the plaintiff. With respect to the motions to preclude evidence of the criminal conviction and for a pretrial hearing on the fairness of that conviction, the court concluded that, "[i]n any dissolution action, the [c]ourt is called upon to evaluate the situation as it exists at the time of trial. And there are appar-

ently facts that will be offered as to a conviction that would be relevant to the issues in this case; the court is not going to preclude evidence of that."

The court further concluded that, "as to the issues that were apparently concluded by the conviction that has been described in an offer of proof . . . the court is bound to respect that judgment. And we will not relitigate here the criminal trial." Accordingly, the court denied the defendant's motions to preclude evidence of the conviction and for a pretrial hearing to present evidence that the conviction was unfair. The court noted, however, that "the existence of [a pending] appeal [from the criminal conviction] is something that can be demonstrated and may well enter into the court's deliberations on the overall outcome of the matter . . . ."

At trial, the plaintiff called the defendant as a witness, and he testified that he had been convicted of sexually assaulting the plaintiff and of other criminal offenses arising from the events on August 2, 2012. Thereafter, the trial court issued a memorandum of decision in which it found that "the conduct of the [defendant] in August, 2012, which resulted in his arrest for and conviction of offenses including the sexual assault of the [plaintiff], was the cause of the breakdown of the marriage." As a result, the court found that the defendant "bears sole responsibility for the marriage breakdown." The court concluded that the factors enumerated in General Statutes § 46b-81[2] "clearly call for a

[2] General Statutes § 46b-81 (c) provides: "In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

property division which heavily favors the plaintiff," and it rendered a property division award accordingly. The court rendered no alimony award. The reasons the court gave for declining to award alimony were that the plaintiff had not requested alimony, the defendant would have no opportunity to earn income while he was incarcerated, and the defendant would require income after his release.

In support of its conclusion that it could give preclusive effect to the defendant's criminal conviction despite the pending appeal, the court noted that it was required to "make its decision based on circumstances as they now exist, not as the defendant hopes they might be in the future." The court responded to the defendant's complaint that, if the plaintiff received a favorable property award and the defendant's conviction were later reversed on appeal, he would "be left with a disproportionately small share of the marital property" by noting that, if that occurred, the defendant "would have the opportunity to resume gainful employment and retain all of his earnings . . . ."

Following the court's ruling, the defendant filed a motion to reargue. In that motion, he contended that the trial court improperly had determined that the conduct that resulted in his criminal conviction was the cause of the marital breakdown without allowing him to present evidence relating to the validity and reliability of the conviction. He also contended that the dissolution action should have been stayed pending resolution of his appeal in the criminal proceeding. The trial court denied the motion. The defendant then filed the present appeal.

In this appeal, the defendant claims that the trial court improperly gave collateral estoppel effect to the criminal judgment of conviction because that judgment was subject to a pending appeal and, therefore, was

not final. After filing his appeal in the present case, the Appellate Court released its decision reversing the defendant's criminal conviction and remanding the criminal case to the trial court for a new trial. See *State* v. *Norman. P.*, supra, 169 Conn. App. 644. As a result, the parties to this appeal were ordered to file supplemental briefs addressing the effect of the reversal of the defendant's criminal conviction on his claims in the present case.[3]

In his supplemental brief, the defendant contends that the reversal of his criminal conviction deprives that judgment of preclusive effect and requires the reversal of the property division award. The plaintiff contends that, to the contrary, because the trial court properly rendered the property division award on the basis of the record as it existed at the time, this court has no authority to set aside the award. In the alternative, she claims that, even if this court has such authority, reversal of the property division award is not warranted under the circumstances of this case. We agree with the defendant that the reversal of his criminal conviction deprives the conviction of any preclusive effect and, therefore, warrants the reversal of the trial court's property division award in the present case.

We begin our analysis with the standard of review and relevant legal principles. "The applicability of the doctrine of collateral estoppel, like the applicability of the closely related doctrine of res judicata, presents a question of law that we review de novo." (Footnote omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 57–58, 808 A.2d 1107 (2002). In *Butler*, the United States Supreme Court explained that a judgment should not be allowed to stand on appeal when it is based on

[3] This order was issued by the Appellate Court on December 6, 2016. Simultaneous briefs were subsequently filed by both parties on January 18, 2017. On February 7, 2017, we transferred the appeal to this court. See footnote 1 of this opinion.

a previous judgment that has itself been overturned. See *Butler* v. *Eaton*, supra, 141 U.S. 243–44. *Butler* further explained that, notwithstanding the fact that the trial court's decision to apply collateral estoppel to a prior judgment was appropriate at the time the trial court made its decision, the fact that the prior judgment subsequently had been reversed renders the prior judgment "without any validity, force or effect . . . ." Id., 244.

With these legal principles in mind, we turn now to the issue before the court. We acknowledge that this appeal initially presented the issue of whether a judgment that was pending on appeal should be given preclusive effect in a second action. Given the reversal of the criminal judgment, however; see *State* v. *Norman P.*, supra, 329 Conn. 465; *State* v. *Norman P.*, supra, 169 Conn. App. 616; the issue in the present appeal now has evolved into whether the reversal of the criminal conviction requires reversal of the property division award that was based solely on that conviction.[4] With respect to that question, the law is clear that a judgment that has been reversed does not have preclusive effect. See *State* v. *Brundage*, 320 Conn. 740, 753–54, 135 A.3d 697 (2016) ("[b]ecause the defendant's judgments of conviction for sexual assault and risk of injury have been vacated, those judgments have no preclusive effect" [internal quotation marks omitted]); *Salem Park, Inc.* v. *Salem*, 149 Conn. 141, 144, 176 A.2d 571 (1961) (judgment in first action had preclusive effect "so long as it was not set aside on appeal").[5] When a

[4] As we have explained, the defendant originally appealed from the judgment of the trial court on the ground that a judgment subject to a pending appeal has no preclusive effect. Because the defendant's criminal conviction was subsequently reversed, the parties were ordered to submit supplemental briefs addressing the effect of that reversal on the defendant's claims in the present case. See footnote 3 of this opinion.

[5] See also *Deposit Bank* v. *Frankfort*, 191 U.S. 499, 514, 24 S. Ct. 154, 48 L. Ed. 276 (1903) (judgment is binding in later proceeding until it is modified or reversed); *Harris Trust & Savings Bank* v. *John Hancock Mutual Life*

judgment loses preclusive effect because it is reversed, the great weight of authority holds that the court in a later action in which the first judgment was given preclusive effect "should then normally set aside the later judgment." 1 Restatement (Second), Judgments § 16, comment (c), pp. 146–47 (1982); see also *Disher* v. *Citigroup Global Markets, Inc.*, 486 F. Supp. 2d 790, 798 (S.D. Ill. 2007) ("[a]s a corollary of the rule that reversal of a judgment leaves the parties in the same position as if the judgment had never been entered, any judgment that is dependent upon the reversed judgment is reversed as well"); 1 Restatement, (Second), supra, § 16, p. 145 ("[a] judgment based on an earlier judgment is not nullified automatically by reason of the setting

Ins. Co., 970 F.2d 1138, 1146 (2d Cir. 1992) (vacated judgment had no preclusive effect in later proceeding involving same parties when parties entered agreement to that effect), aff'd, 510 U.S. 86, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993); *Pontarelli Limousine, Inc.* v. *Chicago*, 929 F.2d 339, 340 (7th Cir. 1991) ("[a] vacated judgment has no collateral estoppel or res judicata effect under Illinois law"); *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985) ("the general rule is that a judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel"); *Pride* v. *Harris*, 882 P.2d 381, 383 (Alaska 1994) (judgment that has been vacated does not have res judicata effect because it is not final judgment); *Campbell* v. *SZL Properties, Ltd.*, 204 Ariz. 221, 224, 62 P.3d 966 (App. 2003) (citing authorities); *Woodrick* v. *Jack J. Burke Real Estate, Inc.*, 306 N.J. Super. 61, 80, 703 A.2d 306 (App. Div. 1997) ("[a] vacated judgment bears no conclusive effect on the underlying action; therefore . . . it has no status as a final judgment for purposes of other actions"), appeal dismissed, 157 N.J. 537, 724 A.2d 799 (1998); *Mercantile & General Reinsurance Co.* v. *Colonial Assurance Co.*, 147 Misc. 2d 804, 806, 556 N.Y.S.2d 183 (1989) ("[o]rdinarily, a judgment that has been vacated will not provide a basis for collateral estoppel"); *Shaffer* v. *Smith*, 543 Pa. 526, 530, 673 A.2d 872 (1996) ("[a] judgment is deemed final for purposes of res judicata or collateral estoppel . . . until it is reversed on appeal"); *State* v. *Harrison*, 148 Wn. 2d 550, 561, 61 P.3d 1104 (2003) ("an appeal does not suspend or negate . . . collateral estoppel aspects of a judgment . . . but collateral estoppel can be defeated by later rulings on appeal" [internal quotation marks omitted]); but see *Bates* v. *Union Oil Co. of California*, 944 F.2d 647, 650 (9th Cir. 1991) (judgment that was vacated at request of parties did not lose preclusive effect), cert. denied, 503 U.S. 1005, 112 S. Ct. 1761, 118 L. Ed. 2d 424 (1992).

aside, or reversal on appeal, or other nullification of that earlier judgment; but the later judgment may be set aside, in appropriate proceedings, with provision for any suitable restitution of benefits received under it").[6]

In addition, contrary to the plaintiff's contention, there is authority for the proposition that, when the trial court gives preclusive effect to a prior judgment

[6] See also *Levi Strauss & Co.* v. *Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1372 (Fed. Cir. 2013) ("a bedrock principle of preclusion law has been that a reversed judgment cannot support preclusion . . . indeed, a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed" [internal quotation marks omitted]); *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 527 F.2d 1162, 1163 (4th Cir. 1975) (vacating orders of District Court that were based on prior judgment that was ultimately reversed); *Michigan Surety Co.* v. *Service Machinery Corp.*, 277 F.2d 531, 533 (5th Cir. 1960) (federal rules of practice authorize reviewing court to "relieve a party . . . from a final judgment [when] a prior judgment upon which it is based has been reversed or otherwise vacated" [internal quotation marks omitted]); *Jackson* v. *Jackson*, 276 F.2d 501, 504 (D.C. Cir.) (same), cert. denied, 364 U.S. 849, 81 S. Ct. 94, 5 L. Ed. 2d 73 (1960); *E.I. Du Pont de Nemours & Co.* v. *Richmond Guano Co.*, 297 F. 580, 585 (4th Cir. 1924) (reversing decision of District Court because it was based on prior judgment that was subsequently reversed); *State Farm Fire & Casualty Co.* v. *Bellina*, 264 F. Supp. 2d 198, 207 (E.D. Pa. 2003) (under Pennsylvania law, "a remedy could be fashioned should an appellate court reverse a criminal conviction, which, in turn, would work to nullify the evidentiary foundation upon which a civil judgment is predicated," namely, setting aside of civil judgment and restitution of benefits); *Sylvester* v. *J.I. Case Threshing Machine Co.*, 21 Colo. App. 464, 467, 122 P. 62 (1912) (reversing judgment that was based on prior judgment that subsequently was reversed); *Fennelly* v. *A-1 Machine & Tool Co.*, 728 N.W.2d 181, 185 (Iowa 2007) ("when an appeal from the second judgment is pending when the first judgment [on which the second judgment was based] is reversed, [t]he court should then normally set aside the later judgment" [internal quotation marks omitted]); *Williams Production Mid-Continent Co.* v. *Patton Productions Corp.*, 277 P.3d 499, 501 (Okla. Civ. App. 2012) ("a second judgment predicated on a prior judgment later reversed cannot stand [on appeal]"); *Dallas City Limits Property Co., L.P.* v. *Austin Jockey Club, Ltd.*, 418 S.W.3d 727, 736 (Tex. App. 2013) (reversing grant of summary judgment because it was based on prior judgment that was subsequently reversed); *McDonald* v. *McDonald*, 53 Wis. 2d 371, 388, 192 N.W.2d 903 (1972) ("[t]he reversal of a judgment which is a basis of a claim of res judicata in a later action warrants reversal of the finding of res judicata in the later action [on appeal]").

from which an appeal is pending, and that prior judgment is reversed while the second case is on appeal, the *reviewing court* in the second case may set aside the second judgment. That specific issue was addressed by the United States Supreme Court in *Butler* v. *Eaton*, supra, 141 U.S. 240.

In *Butler*, the court was reviewing a judgment of the Circuit Court of the United States for the District of Massachusetts, which had given preclusive effect to a prior judgment of the Supreme Judicial Court of Massachusetts (state court). Id., 242. The judgment of the state court also had been appealed to the United States Supreme Court, and it was reversed. Id. The United States Supreme Court concluded that, although the Circuit Court properly had given the judgment of the state court preclusive effect, "its effectiveness in that regard [was] entirely annulled" as the result of the Supreme Court's reversal of that judgment. Id., 243. Because "the whole foundation of that part of the judgment . . . in favor of the defendant [in the Circuit Court was] without any validity, force or effect, and ought never to have existed," the court concluded that it should reverse the judgment on appeal "and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object." Id., 244; see *Williams Production Mid-Continent Co.* v. *Patton Production Corp.*, 277 P.3d 499, 501 (Okla. Civ. App. 2012) ("[n]otwithstanding the correctness of the trial court's judgment [giving preclusive effect to a prior judgment that was subject to a pending appeal] at the time it was rendered, we believe the judgment must be reversed" on appeal because prior judgment was later reversed); annot., 9 A.L.R.2d 984, § 10 (1950) ("A question may arise as to how to dispose of an appeal in a second action, where the decision of the court below admitting in evidence a former judgment on or subject to appeal was correct at the time it was rendered, but the former

judgment had afterward been reversed. In this situation it seems the better practice, followed in a number of cases, to reverse the judgment in the second case, even though it was correct when rendered."); see also footnote 6 of this opinion.[7] Accordingly, even if we were to assume that the trial court properly applied collateral estoppel to the defendant's criminal conviction on the basis of the record before the court at that time, we nevertheless conclude that the judgment in the present case must be reversed on appeal because the criminal conviction has been reversed.

To the extent that the plaintiff claims that we have no authority to reverse a judgment based on an event that is not part of the record on appeal, we note that this court regularly disposes of appeals on the basis of events that occurred after the judgment that is on appeal was rendered. For example, the court may dismiss a case as moot when the issues on appeal have lost their significance as the result of intervening circumstances. See, e.g., *Waterbury Hospital* v. *Connecticut Health Care Associates*, 186 Conn. 247, 249–52, 440 A.2d 310 (1982) (court dismissed as moot plaintiff's request for injunctive relief to restrain picketing during strike because strike and picketing had ended while appeal was pending). In addition, changes in the law that occur after an appeal has been filed ordinarily apply retroactively to the case on appeal. See *State* v. *Thompson*, 118 Conn. App. 140, 154, 983 A.2d 20 (2009) (decision of

[7] But see *Parkhurst* v. *Berdell*, 110 N.Y. 386, 392–93, 18 N.E. 123 (1888) ("If the judgment [in the first action] was competent evidence when received [in the second action], its reception was not rendered erroneous by the subsequent reversal of the judgment [in the first action]. Notwithstanding its reversal, it continued in [the second] action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have is to move on that fact in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require.").

this court changing interpretation of kidnapping statute applied to criminal case in which appeal was filed before decision changing law was released), cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010). We further note that this court may take judicial notice of the files of the Superior Court in any case. See *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question . . . concerning our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise"). Because there is no dispute that the defendant's criminal conviction has been reversed, and because this court certainly may determine the purely legal consequences of that reversal in the present case, we cannot perceive what would be gained by requiring the defendant to go through "the delay and expense of taking ulterior proceedings in the court below" to achieve this same result. See *Butler* v. *Eaton*, supra, 141 U.S. 244.

The plaintiff contends, however, that, even if this court has the authority to reverse a judgment because it was based on a prior judgment that now has been reversed, such reversal is not automatic, but there must be a showing that it is warranted. See Restatement, (Second), supra, § 16, comment (c), p. 146 ("[t]he current doctrine . . . is that the later judgment remains valid, but a party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is *warranted*, may by appropriate proceedings secure such relief" [emphasis added]). The plaintiff claims that reversal is not warranted in the present case for two reasons. First, she claims that the defendant made a strategic choice to delay the dissolution trial until his criminal trial was completed, and he therefore should be bound by the result of the criminal trial. Second, she claims that the trial court expressly considered the possibility that his criminal conviction might

be reversed on appeal and that he might ultimately be acquitted. We disagree.

We reject the plaintiff's first claim. We note that both parties agreed to delay the dissolution trial until the criminal trial was completed; however, the agreement to delay the dissolution trial is not dispositive under the circumstances of the present case. The overriding issue is that the criminal conviction has been reversed. Although the Appellate Court has held that a judgment that is subject to appeal is final for purposes of collateral estoppel; see *Carnemolla* v. *Walsh*, 75 Conn. App. 319, 326–27, 815 A.2d 1251, cert. denied, 263 Conn. 913, 821 A.2d 768 (2003); the law in this state is clear that a *reversed* judgment does not have preclusive effect. See *State* v. *Brundage*, supra, 320 Conn. 753–54; *Salem Park, Inc.* v. *Salem*, supra, 149 Conn. 144. Accordingly, even if we were to assume that the defendant would be bound by the judgment in the criminal case while the appeal was pending, that judgment lost any preclusive effect when it was reversed.

We also are not persuaded by the plaintiff's claim that the trial court considered the possibility of the defendant's acquittal. Although the trial court briefly noted that the defendant would be able to retain all of his earnings if he were acquitted because the court was rendering no alimony award, the *reasons* that the court gave for the decision not to award alimony were that the plaintiff never requested alimony, the defendant would have no income while he was incarcerated, and that he would require an income after serving his sentence. Accordingly, the record does not reflect that the possibility of the defendant's acquittal had any bearing on the court's disposition of the present case.

The plaintiff further contends that the defendant has failed to show that he was prejudiced by the trial court's order precluding him from presenting evidence that

casted doubt on the validity and reliability of his criminal conviction. Specifically, she argues that the defendant has not shown that, if he had been permitted to present such evidence, there would have been no finding of fault against him. The very reason for the rule that a reversed judgment has no preclusive effect, however, is that the reversal of the subsequent judgment puts the parties in the same position as they would have been in if the previous judgment had *never existed*. See *Butler* v. *Eaton*, supra, 141 U.S. 244 (reversed judgment is "without any validity, force or effect, and ought never to have existed"); *Disher* v. *Citigroup Global Markets, Inc.*, supra, 486 F. Supp. 2d 798 ("[a]s a corollary of the rule that reversal of a judgment leaves the parties in the same position as if the judgment had never been entered, any judgment that is dependent upon the reversed judgment is reversed as well"). The only evidence that was before the trial court regarding the reason for the breakdown of the marriage and the trial court's division of property was the bare fact of the defendant's conviction. Thus, the effect of the reversal of that conviction was to eliminate retroactively the *only* basis for the property division award in the present case. Accordingly, we conclude that the defendant does not bear a burden, at this stage, of showing that he was not solely responsible for the marital breakdown in order to warrant the reversal of the trial court's property division award.

The plaintiff also contends that a reversal of the property award would violate her rights under article first, § 8, of the constitution of Connecticut, as amended by articles seventeen and twenty-nine of the amendments.[8]

[8] Article first, § 8, of the constitution of Connecticut, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "In all criminal prosecutions, a victim, as the general assembly may define by law, shall have . . . (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law . . . ."

Specifically, she claims that "[t]o permit the defendant, after a criminal trial at which the plaintiff testified and [the defendant's] conduct was proven beyond a reasonable doubt, to relitigate that conduct in the dissolution action" would undermine her state constitutional right to restitution. See Conn. Const., amend. XXIX (b) (9) ("a victim . . . shall have . . . the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law").

It is not entirely clear to us how her constitutional rights under article first, § 8, of the Connecticut constitution, as amended by article twenty-nine of the amendments, are implicated in the present case, and she has cited no authority for the proposition that a dissolution action is the equivalent of an action for restitution for purposes of this constitutional provision. Perhaps more fundamentally, the reversal of the defendant's criminal conviction has placed the parties in the same position that they were in before the defendant's conviction, and the plaintiff has failed to explain why she is entitled to restitution under this constitutional provision in the absence of a determination of guilt. Accordingly, we reject this claim.

Finally, the plaintiff contends that none of the factors that this court considers when determining whether it should create an exception to the doctrine of collateral estoppel weighs in favor of creating an exception here. See *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 603, 922 A.2d 1073 (2007) ("[i]n establishing exceptions to the general application of the preclusion doctrines, we have identified several factors to consider, including: [1] whether another public policy interest outweighs the interest of finality served by the preclusion doctrines . . . [2] whether the incentive to litigate a claim or issue

differs as between the two forums . . . [3] whether the opportunity to litigate the claim or issue differs as between the two forums . . . and [4] whether the legislature has evinced an intent that the doctrine should not apply" [citations omitted]). We have not, however, created an *exception* to the doctrine of collateral estoppel in the present case. Rather, we have concluded that the reversal of a judgment prevents that judgment from having preclusive effect under the doctrine in the first instance because that judgment no longer exists. See *Butler* v. *Eaton*, supra, 141 U.S. 244 (reversed judgment is "without any validity, force or effect, and ought never to have existed"); *Disher* v. *Citigroup Global Markets, Inc.*, supra, 486 F. Supp. 2d 798 (for purposes of collateral estoppel, "reversal of a judgment leaves the parties in the same position as if the judgment had never been entered").

In sum, we conclude that the reversal of the defendant's criminal conviction deprives that judgment of any preclusive effect that it may have had in the present dissolution action. The trial court's property division award, which was premised exclusively on the fact of the defendant's conviction, must therefore be reversed.[9]

The judgment is reversed with respect to the property division award and the case is remanded for a new trial with respect to that issue; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

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[9] Although the plaintiff did not cross appeal from the judgment of the trial court challenging the financial orders as a whole, we take no position on whether the trial court can reconsider all of the financial orders in light of our decision to reverse the property division award.

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Palmer, D'Auria, Mullins, Kahn and Vertefeuille, Js.

Syllabus

The plaintiffs appealed from the trial court's judgments in favor of the defendant insurance company in consolidated actions brought by the plaintiffs to recover underinsured motorist benefits under automobile insurance policies issued by the defendant. The plaintiffs were injured when they were struck by a motor vehicle that was owned by E Co., a rental car company that had leased the vehicle to the lessee. The plaintiffs settled their claims against the driver of the vehicle and the lessee for the full amount of the coverage available under the lessee's automobile insurance policy. The plaintiffs then commenced these actions, claiming that their damages exceeded the amount that they had recovered from the lessee's policy and seeking to recover underinsured motorist benefits under their policies. The defendant moved for summary judgment, claiming that the policies excluded from the definition of an underinsured motor vehicle those vehicles owned by a self-insurer under any motor vehicle law and that E Co. had been designated as a self-insurer by the Insurance Commissioner, which designation required E Co. to demonstrate its financial security was substantially equivalent to an insurance policy such that it would be able to pay judgments against it. The defendant also claimed that this exclusion was permitted by this court's decision in *Orkney* v. *Hanover Ins. Co.* (248 Conn. 195), which upheld the validity of the state insurance regulation (§ 38a-334-6 [c] [2] [B]) that authorizes the exclusion for vehicles owned by self-insurers despite the statutory (§ 38a-336 [a] [1] [A]) requirement that automobile insurance policies provide underinsured motorist coverage. This court reasoned in *Orkney* that there was nothing inconsistent between the public policy underlying the underinsured motorist statute and a regulation that permits a coverage exclusion for vehicles owned by self-insurers because the injured party was able to seek a remedy from the self-insurer for the negligence of its lessees. In opposition to the defendant's motions for summary judgment, the plaintiffs claimed that § 38a-334-6 (c) (2) (B) of the regulations was invalid as applied to E Co. in light of certain federal legislation (49 U.S.C. § 30106 [a] [2012]) that was enacted in 2005, after *Orkney* was decided, and that provided immunity to rental car companies for claims of vicarious liability due to injuries caused by

the negligence of their lessees. The trial court granted the defendant's summary judgment motions and rendered judgments for the defendant. On appeal, the plaintiffs contended that the immunity conferred on rental car companies by the federal legislation resulted in an inconsistency between the public policy underlying the underinsured motorist statute, namely, providing those injured by underinsured motorists with a remedy, and § 38a-334-6 (c) (2) (B) of the regulations, which authorizes the coverage exclusion for vehicles owned by self-insureds, and that the exclusion left the plaintiffs without a remedy insofar as E Co. could not be held vicariously liable for the plaintiffs' injuries in light of the federal legislation. *Held* that the trial court improperly granted the defendant's motions for summary judgment on the ground that E Co.'s vehicle was excluded from the plaintiffs' underinsured motorist coverage: the federal legislation affording rental car companies immunity from vicarious liability for the negligence of their lessees resulted in an impermissible contradiction between the underinsured motorist statute and § 38a-334-6 (c) (2) (B) of the regulations, as the plaintiffs' inability in this context to obtain a remedy from E Co. rendered the policy exclusion authorized by § 38a-334-6 (c) (2) (B) inconsistent with the public policy behind the underinsured motorist statute, and, therefore, § 38a-334-6 (c) (2) (B) was invalid as applied; moreover, E Co. could not be considered a self-insurer, for purposes of the self-insurer exclusion in the plaintiffs' policies, as to the risks created by the negligence of its lessees, as E Co. was statutorily immune from liability for such risks and had no obligation to satisfy a judgment rendered in an action to recover for such damages, and, therefore, construing E Co. as a self-insurer in this context would contravene public policy; furthermore, the defendant could not prevail on its claim that legislative and administrative acquiescence despite the opportunity and ability to respond to the passage of the federal legislation meant that there was no intent to disturb the self-insurer exclusion authorized by § 38a-334-6 (c) (2) (B) of the regulations, this court having declined to assume tacit acceptance by the legislature in a case, such as the present one, in which divergent relationships between state and federal statutes, regulations, and public policies were complex and nuanced.

Argued February 27—officially released August 7, 2018

Procedural History

Action, in each case, to recover underinsured motorist benefits allegedly due under automobile insurance policies issued by the defendant, brought to the Superior Court in the judicial district of Danbury, where the cases were consolidated; thereafter, the court, *Truglia*, *J.*, granted the defendant's motions for summary judg-

ment in each case and rendered judgments thereon, from which the plaintiff in each case filed separate appeals. *Reversed*; *further proceedings.*

James Wu, with whom were *Cynthia C. Bott* and, on the brief, *James D. Horwitz*, for the appellants (plaintiffs).

Sean R. Caruthers for the appellee (defendant).

Opinion

D'AURIA, J. In these appeals, we again consider whether an automobile insurance policy containing underinsured motorist coverage, as required by state law, can validly exclude benefits to the insured when the owner of the underinsured vehicle is a rental car company designated as a "self-insurer" by the Insurance Commissioner (commissioner) pursuant to General Statutes § 38a-371 (c). We first addressed this issue in *Orkney* v. *Hanover Ins. Co.*, 248 Conn. 195, 202–206, 727 A.2d 700 (1999), and upheld the validity of § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies, which authorizes an exclusion from the underinsured motorist coverage requirement for "uninsured or underinsured vehicle[s] . . . owned by . . . a self-insurer under any motor vehicle law . . . ."[1] We

[1] *Orkney* interpreted § 38a-334-6 of the 1999 revision of the Regulations of Connecticut State Agencies, which excluded only "uninsured motor vehicle[s]" owned by self-insurers. In response to a claim in that case that the regulation did not permit the exclusion of underinsured motor vehicles, this court stated that "the statutes and regulations applicable to uninsured motorist coverage also apply to underinsured motorist coverage. . . . [T]herefore . . . § 38a-334-6 (c) (2) (B) [of the 1999 revision of the Regulations of Connecticut State Agencies] authorizes the exclusion of vehicles owned by self-insurers from the scope of the underinsured motorist coverage provided by an automobile liability insurance policy." (Citations omitted.) *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 202. Subsequently, § 38a-334-6 of the 1999 revision of the Regulations of Connecticut State Agencies was amended in 2000 to refer to "uninsured or underinsured motor vehicle[s]," which is the current language of the regulation. 62 Conn. L.J., No. 12, p. 6C (September 19, 2000) (final regulation); see also 61 Conn. L.J., No. 23, pp. 5B–6B (December 7, 1999) (proposed regulation). For purposes of simplicity, in this opinion we refer and cite to the current version of the regulation.

came to this conclusion because self-insurers are statutorily required to prove their ability to pay judgments when liable, rendering underinsurance coverage unnecessary in those situations. *Orkney* v. *Hanover Ins. Co.*, supra, 204–206; see General Statutes §§ 14-129 (b) and 38a-371 (c). Therefore, we decided in *Orkney* that there was "nothing inconsistent between the public policy underlying underinsured motorist coverage and a regulation that permits a coverage exclusion" for vehicles owned by self-insurers. *Orkney* v. *Hanover Ins. Co.*, supra, 206.

The factual setting in the present case is similar to that in *Orkney*, but the legislative landscape has changed. In both the present case and in *Orkney*, the plaintiff insureds were injured by an underinsured lessee driving a rental car owned by a self-insured rental car company. See id., 197–99. The insureds were denied underinsured motorist benefits under their policies because those policies contained a self-insurer exclusion. Id., 199–200.

Since our decision in *Orkney*, however, Congress passed legislation prohibiting rental car companies from being held vicariously liable for the negligence of their lessees. Specifically, Title 49 of the 2012 edition of the United States Code, § 30106 (a), commonly known as the Graves Amendment; see *Rodriguez* v. *Testa*, 296 Conn. 1, 4 n.2, 993 A.2d 955 (2010); makes rental car companies immune from vicarious liability for injuries caused by their underinsured lessees—even if a state has designated that company as a self-insurer capable of providing a remedy. Thus, under current law, when the plaintiffs in the present case were denied underinsured motorist benefits pursuant to their policies because of the self-insurer exclusion, they were effectively left without a remedy because they are precluded under the Graves Amendment from recovering from the self-insured rental car company.

We are therefore asked in these appeals to reassess, in light of this development in federal law, whether § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies, which authorizes the self-insurer exclusions in these insurance policies, remains valid as applied to rental car companies. We conclude that, in this scenario, the state regulation conflicts with the public policy manifested in General Statutes § 38a-336 (a) (1) that requires insurance policies to provide underinsured motorist coverage, and, thus, § 38a-334-6 (c) (2) (B) of the regulations is invalid as applied.

I

The following undisputed facts and procedural history are relevant to this appeal. The plaintiffs, Sandra and Patrick Tannone, were lawfully crossing the street when they were struck and seriously injured by an automobile. That automobile was a rental car owned by EAN Holdings, LLC, more commonly known as Enterprise Rent-A-Car (Enterprise). Enterprise had leased the vehicle to Barbara Wasilesky, but she was not driving at the time of the collision. The vehicle was instead operated by a permitted user named Arthur Huffman.

Wasilesky, the lessee, was the named insured on an automobile insurance liability policy that provided bodily injury coverage in the amounts of $20,000 per person and $40,000 per occurrence—the minimum allowable in Connecticut at the time. General Statutes §§ 38a-336 (a) (1) and 14-112 (a).[2] The plaintiffs made a claim against Wasilesky, as the lessee, and Huffman, as the vehicle operator, and the parties settled for the full amount of coverage from Wasilesky's policy,

[2] In 2017, the General Assembly increased the minimum coverage amounts to $25,000 per person and $50,000 per occurrence, effective January 1, 2018. General Statutes (Supp. 2018) § 14-112 (a).

namely, $20,000 each.[3] Wasilesky and Huffman have no other insurance coverage, and the plaintiffs claim that their damages exceed what they recovered under Wasilesky's insurance policy.

At the time of the collision, the defendant, Amica Mutual Insurance Company (Amica), insured the plaintiffs through separate policies. Each of their policies carried $500,000 of coverage for personal injuries sustained due to the negligence of an underinsured driver.[4] This underinsured motorist coverage, however, excluded from the term " 'underinsured motor vehicle' " any vehicle "[o]wned . . . by a *self-insurer* under any applicable motor vehicle law." (Emphasis added.) Enterprise was designated a self-insurer by the commissioner, making it eligible for the exclusion.

After settling with Wasilesky and Huffman, the plaintiffs commenced this consolidated action to recover underinsured motorist benefits from their own insurance policies issued by the defendant. In response, the defendant asserted special defenses, including that the policies do not afford underinsured motorist benefits

[3] We note there is an inconsistency in the record about the factual circumstances surrounding this settlement. The plaintiffs' brief states that the settlement was with Huffman and Wasilesky for the total limits of Wasilesky's policy: $20,000 per person and $40,000 per occurrence. The plaintiffs' amended complaints allege that they settled with only Huffman's insurer for the full amount of his coverage. Meanwhile, the trial court's memorandum of decision appears to indicate that the plaintiffs received the full amount of coverage from Wasilesky's policy. Nothing about the terms of this settlement affects our disposition of these appeals. Upon remand, if material to any dispute, the trial court can sort out the amount and source of available coverage.

[4] Patrick Tannone was also insured for underinsured motorist conversion coverage, which means that any underinsured motorist benefits he is entitled to from the defendant will not be reduced by the amount recovered from the legally responsible parties. Although Patrick Tannone's conversion coverage, and Sandra Tannone's lack thereof, may make a difference in their potential recovery if they prevail in the trial court on remand, it does not affect our present analysis, and we therefore will not address it in this opinion.

when the tortfeasor's vehicle is owned by a self-insurer. The defendant moved for summary judgment, arguing that it was entitled to judgment as a matter of law because the vehicle driven by Huffman was owned by a self-insurer, Enterprise, and because the plaintiffs did not demonstrate that they had exhausted their remedy from Enterprise. In support of the validity of the exclusion, the defendant pointed to § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies, which expressly authorizes such exclusions, and to *Orkney* v. *Hanover Inc. Co.*, supra, 248 Conn. 195, 202–206, in which this court confirmed the validity of that regulation and a similar coverage exclusion. The plaintiffs asserted in response that the defendant's reliance on *Orkney* is misplaced because it predated the Graves Amendment, which eliminated the possibility that the plaintiffs could recover from Enterprise. The trial court nevertheless agreed with the defendant and granted its motions for summary judgment. The plaintiffs moved for reargument, and the trial court denied their motions.

The plaintiffs then appealed from the judgments of the trial court to the Appellate Court, and this court transferred the appeals to itself. See General Statutes § 51-199 (c); Practice Book § 65-1. Because a trial court's decision granting a motion for summary judgment and issues of statutory construction present questions of law, our review on appeal is plenary. See, e.g., *Rodriguez* v. *Testa*, supra, 296 Conn. 6–7 (setting forth standard for granting motion for summary judgment); see also General Statutes § 1-2z (setting forth plain meaning rule governing statutory interpretation).

The plaintiffs claim that the self-insured exclusion in their underinsured motorist coverage does not apply to Enterprise due to the fact that the regulation authorizing that exclusion, § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies, is invalid as applied to Enterprise because Enterprise cannot be held liable

following the Graves Amendment. See *Giglio* v. *American Economy Ins. Co.*, 278 Conn. 794, 804 and n.9, 900 A.2d 27 (2006) (determining validity of coverage exclusion based on validity of insurance regulation authorizing exclusion). "[I]t is well established that an administrative agency's regulations are presumed valid and, unless they are shown to be inconsistent with the authorizing statute, they have the force and effect of a statute . . . . Moreover, [a] person claiming the invalidity of a regulation has the burden of proving that it is inconsistent with or beyond the legislative grant." (Citation omitted; internal quotation marks omitted.) Id., 806–807; see *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 203. We agree with the plaintiffs that, under these circumstances, the regulation giving rise to the self-insurance exclusion in the plaintiffs' policies is inconsistent with the authorizing statutes and, therefore, is invalid as applied to Enterprise. Accordingly, we reverse the judgments of the trial court and remand the cases to that court for further proceedings.

II

We first consider the interconnected legislative, regulatory, and public policy backdrop confronting us in this appeal, including how that backdrop has changed. Our state law requires all motor vehicle owners to maintain a minimum amount of automobile liability insurance coverage. General Statutes § 38a-335 (a). The legislature understood that some motorists will not comply with this law, however. Thus, to protect properly insured motorists from the negligence of financially irresponsible motorists, our state law expressly provides that every automobile insurance policy must provide its insured with a minimum amount of uninsured and underinsured motorist coverage as provided for in § 14-112 (a). General Statutes § 38a-336 (a) (1) (A) ("[e]ach automobile liability insurance policy shall provide insurance, herein called uninsured and underin-

sured motorist coverage . . . for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles"). Our state has consistently maintained a "strong public policy favoring uninsured motorist coverage . . . since 1967 . . . ." *Streitweiser* v. *Middlesex Mutual Assurance Co.*, 219 Conn. 371, 377, 593 A.2d 498 (1991). Specifically, that public policy dictates that "every insured is entitled to recover for the damages he or she would have been able to recover if the uninsured motorist [responsible for the insured's injury] had maintained a policy of liability insurance." (Internal quotation marks omitted.) *Gormbard* v. *Zurich Ins. Co.*, 279 Conn. 808, 817, 904 A.2d 198 (2006). In short, the legislature and this court have a well established and deliberate policy in favor of insuring the risk of loss resulting from the negligence of uninsured and underinsured motorists.

The rationale behind this policy is "to reward those who obtain insurance coverage for the benefit of those they might injure." (Internal quotation marks omitted.) Id., 824. We have supported coverage arrangements that have "*furthered* the important public policy goals of the uninsured motorist statute." (Emphasis in original.) Id.; see General Statutes § 38a-336 (a) (1) (A). And in support of the "broad, remedial purpose of the uninsured motorist statute"; *Gormband* v. *Zurich Ins. Co.*, supra, 279 Conn. 814; we have stated "that an insurer may [not] circumvent th[at] public policy . . . ." Id., 823.

As stated previously, Wasilesky maintained only the minimum required amount of coverage at the time of the collision: $20,000 per person and $40,000 per collision. The plaintiffs' policies grant underinsured motorist benefits when the tortfeasor "does carry [l]iability

insurance but the amount of insurance available under that motorist's policy is less than the amount of [u]ninsured [m]otorists coverage you have selected." They allege entitlement to underinsured motorist benefits in this instance because their damages exceed the amount of the recovery from Wasilesky's policy.

The manner in which an insurer provides underinsured motorist coverage to its policyholders is regulated by §§ 38a-334 (a) and 38a-336 (a) (1) (A), which authorize the commissioner to adopt regulations that "relate to," among other things, "insuring agreements, exclusions . . . and [under]insured motorists coverages under such policies . . . ." General Statutes § 38a-334 (a). Ordinarily, "an insurer may not, by contract, reduce its liability for . . . uninsured or underinsured motorist coverage," unless authorized by § 38a-334-6 of the Regulations of Connecticut State Agencies. (Internal quotation marks omitted.) *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 201; see *Gormbard* v. *Zurich Ins. Co.*, supra, 279 Conn. 817 ("[i]nsurance companies are powerless to restrict the broad coverage mandated by the statute" [internal quotation marks omitted]).

One authorized exclusion under the regulations to the requirement for underinsured motorist coverage is when "the uninsured or underinsured motor vehicle is owned by . . . a *self insurer* under any motor vehicle law . . . ." (Emphasis added.) Regs., Conn. State Agencies § 38a-334-6 (c) (2) (B). The defendant has included such an exclusion in the policies it issued to the plaintiffs. Specifically, those policies exclude from the term " 'uninsured motor vehicle' " any vehicle "owned . . . by a *self-insurer* under any applicable motor vehicle law . . . ." (Emphasis added.) A person may qualify as a self-insurer if "more than twenty-five motor vehicles are registered" in his name and he has obtained "a certificate of self-insurance issued by the commissioner . . . ." General Statutes § 14-129 (a). The commissioner

has "discretion" to grant self-insurer applications and issue a certificate of self-insurance "when he is satisfied that such person is possessed and will continue to be possessed of *ability to pay* judgments obtained against such person." (Emphasis added.) General Statutes § 14-129 (b). To prove this ability, self-insurers must file evidence with the commissioner that their financial security is substantially equivalent to an insurance policy. General Statutes § 38a-371 (c). In short, the key to obtaining self-insurer status is to "demonstrate . . . the ability to pay judgments rendered . . . as a result of the operation of the motor vehicle." *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 206.

There is no dispute that the commissioner has designated Enterprise as a self-insurer. But now, after Congress passed the Graves Amendment, Enterprise cannot be held vicariously liable for the negligence of its customers. The relevant legislative landscape has thus changed since our decision in *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 195, which upheld the self-insurer exclusion, requiring us now to consider whether that case remains controlling.

In *Orkney*, the case the defendant principally relies upon, we addressed the question of whether § 38a-334-6 of the Regulations of Connecticut State Agencies validly permitted an insurer to exclude underinsured motorist coverage from a policy when the tortfeasor's vehicle was owned by a self-insurer. *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 202–203. *Orkney* involved facts similar to this case: the plaintiff, a passenger in a motor vehicle, was injured by the alleged negligence of another motorist driving a rental car owned by a self-insurer. Id., 197. Because the negligent motorist was underinsured, the plaintiff in *Orkney* sought compensation from the defendant, her insurance company. See id., 198–99. Arguing that the plaintiff "had failed to exhaust the liability coverage available to [the rental

car company] as the owner of the rental car"; id., 199; the defendant insurance company in *Orkney*, like the defendant in the present case, pointed to its explicit exclusion of "vehicles owned by self-insurers from the policy definition of underinsured motor vehicles." Id., 200.

We concluded in *Orkney* that § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies validly authorized "the exclusion of vehicles owned by self-insurers from the scope of the underinsured motorist coverage provided by an automobile liability insurance policy." Id., 202. We further concluded that there is "nothing inconsistent between the public policy underlying underinsured motorist coverage and a regulation that permits a coverage exclusion [for self-insurers]." Id., 206.

We recognized in *Orkney*, however, that the underinsured motorist statute, § 38a-336, "does not require that [under]insured motorist coverage be made available when the insured *has been otherwise protected* . . . ." (Emphasis added; internal quotation marks omitted.) Id., 205. Thus, central to our decision in *Orkney* was the injured party's ability to "seek compensation from the [self-insurer]" for the negligence of its lessees. Id., 206. This avenue of recourse was assured by the statutory requirements that self-insurers prove their "ability to pay judgments [rendered] against [them]." General Statutes § 14-129 (b); see General Statutes § 38a-371 (c) (3) (self-insurer must provide "evidence that reliable financial arrangements . . . exist providing assurance for payment of all obligations"). Recourse was also assured by the statute requiring financial security "substantially equivalent to those afforded by a policy of insurance . . . ." General Statutes § 38a-371 (c). In other words, at the time of our decision in *Orkney*, the self-insurer exclusion did not foreclose the insured from a remedy. Instead, the exclusion essentially directed

the insured to seek another source of compensation for her injuries: the self-insurer. See *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 206.

Six years after *Orkney*, however, Congress passed the Graves Amendment, which provides in relevant part that a rental car company that owns a vehicle "shall not be liable under the law of any [s]tate . . . for harm to persons or property that . . . arises out of the use, operation, or possession of the vehicle during the period of the rental or lease," unless there is "negligence or criminal wrongdoing on the part of the owner . . . ." 49 U.S.C. § 30106 (a) (2012). Under federal law, therefore, a rental car company cannot be held vicariously liable for the negligence of its lessees. As we recognized in *Rodriguez* v. *Testa*, supra, 296 Conn. 3–5, the Graves Amendment preempted General Statutes § 14-154a (a), which imposed vicarious liability on rental car companies for damage caused by their lessees.

The Graves Amendment has therefore fundamentally changed our legislative and regulatory landscape. Now, injured parties are precluded by federal statute from seeking compensation from rental car companies as self-insurers, undercutting the primary rationale on which *Orkney* was decided. And now, the injured party's inability to seek compensation from the self-insurer has created an "inconsisten[cy] between the public policy underlying underinsured motorist coverage and [the] regulation that permits a coverage exclusion" for self-insurers that did not exist at the time we decided *Orkney*. *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 206. The exclusion of vehicles owned by a self-insurer from the underinsured motorist coverage requirement, without also providing recourse against that self-insurer, contravenes the "strong public policy favoring uninsured motorist coverage" deliberately articulated in § 38a-336 (a) (1) (A). *Streitweiser* v. *Middlesex Mutual Assurance Co.*, supra, 219 Conn. 377. Specifi-

cally, the effect of the defendant's self-insurer exclusion with respect to rental car companies upends the well-established public policy that "every insured is entitled to recover for the damages he or she would have been able to recover if the uninsured motorist had maintained a policy of liability insurance." (Internal quotation marks omitted.) *Gormbard* v. *Zurich Ins. Co.*, supra, 279 Conn. 817. Instead of "reward[ing] those who obtain insurance coverage," like the plaintiffs in the present case; (internal quotation marks omitted) id., 824; permitting this policy exclusion under the current circumstances defeats the legislative purpose of requiring underinsured motorist coverage in the first place—to protect against harm caused by financially irresponsible motorists.

The federal legislation that upset our state regulatory structure regarding underinsured motorist coverage therefore results in an impermissible contradiction between our state statutes and regulations. On the one hand, § 38a-336 (a) (1) (A) requires underinsured motorist coverage while, on the other hand, § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies permits the exclusion of underinsured motorist coverage as to vehicles owned by self-insurers—now without a substitute remedy. Although the defendant is correct that state regulations are ordinarily given "great deference" and are generally presumed to accurately reflect legislative intent; (internal quotation marks omitted) *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 203–204; that deference is lost when the regulations "are shown to be inconsistent with the authorizing statute . . . ." (Internal quotation marks omitted.) *Velez* v. *Commissioner of Labor*, 306 Conn. 475, 485, 50 A.3d 869 (2012). In light of the Graves Amendment, § 38a-334-6 of the regulations now contradicts the public policy behind the underinsured motorist statute, § 38a-336 (a) (1) (A), in contexts such as the one presented in this case

because, as a matter of law, the regulation's exclusionary provision forecloses the possibility of the plaintiffs' recovery—instead of directing them to an alternative recourse. Under these circumstances, *Orkney* can therefore no longer bind our interpretation of § 38a-334-6 of the regulations[5] without entirely precluding insureds from a remedy for an accident with an underinsured motorist in contravention of the public policy behind § 38a-336 (a) (1) (A).

In the present case, the plaintiffs made every effort to insure against the risk of the very injuries they sustained. Their insurance policies contain the mandatory underinsured motorist coverage. They did not know—and could not control—that the underinsured motorist who collided with them would be the lessee of a rental car, the owner of which enjoys federal immunity from vicarious liability and, yet, whose status as a self-insurer under state law triggered an exclusion in the plaintiffs' policies that would foreclose their recovery from the defendant. Taking into account the Graves Amendment, the uninsured and underinsured motorist statutes, related state regulations, and the underlying public policy of providing those injured by underinsured motorists with a remedy, we conclude that § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies now is inconsistent with the public policy of § 38a-336 and, thus, is invalid as applied. *Giglio* v. *American Economy Ins. Co.*, supra, 278 Conn. 806–807 (administrative agency's regulations are invalid if inconsistent with authorizing statute); see *Orkney* v. *Hanover Ins. Co.*, supra, 248 Conn. 203.

[5] We note that we are not overruling *Orkney*. Rather, because the Graves Amendment has preempted state law, the rationale in *Orkney* perforce has limited applicability. *Orkney* still applies, however, to other types of underinsured motorist claims where the self-insurer exclusion is unaffected by the Graves Amendment, such as when a plaintiff alleges direct negligence or criminal wrongdoing on the part of a self-insured owner or when the self-insured owner is not a rental car company. See 49 U.S.C. § 30106 (a) (2012).

III

The plaintiffs advance other public policy arguments that dovetail with or bolster our conclusion that, as applied in this case, § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies conflicts with the underinsured motorist statute. Specifically, they argue that, after the Graves Amendment, "Enterprise cannot be considered a self-insurer . . . [and] [t]herefore, the self-insurer exclusion [contained in the defendant's policies] does not apply." If it did, they claim, the exclusion would violate the public policy of this state. We agree.

A recent decision of the Tennessee Supreme Court is instructive. *Martin* v. *Powers*, 505 S.W.3d 512, 515, 518 (Tenn. 2016), involved facts similar to the present case, including that Enterprise was the rental car company that owned the alleged " 'underinsured motor vehicle' " that collided with the plaintiff. That court addressed whether, after the Graves Amendment, an insurance policy can validly exclude uninsured motorist benefits when the insured is injured by a rental car owned by a " 'self-insurer.' " Id., 515–16. That court concluded that the rental car company was not a self-insurer as to the negligence of its lessees because "one cannot insure against a [nonexistent] risk"; id., 520; and there is "no legitimate reason to require proof of financial security for potential liabilities that are, in fact, [nonexistent]." Id., 525 (citing Graves Amendment). The court also reasoned that applying the exclusion contravenes "the underlying [public policy] purpose of uninsured motorist coverage, which is to pay compensation to the insured policy owner when the liable third party is unable to do so." Id., 520. "Indeed, the designation of 'self-insurer' is nonsensical when applied to a class of risks from which Enterprise is statutorily [immune]." Id., 525. The Tennessee Supreme Court went on to declare that "[w]e are confident that our [l]egislature did not intend that rental cars operated in Tennessee

could be simultaneously uninsured, yet not meet the statutory definition of uninsured, all while considered self-insured by the rental company's assets to which the injured victim would have no recourse." Id., 525 n.7.

We are similarly confident. Enterprise, as a matter of law, could not be a self-insurer as to the class of risks in the present case because it is statutorily immune from liability for such risks. See id., 525; J. Berk & M. Jainchill, Connecticut Law of Uninsured and Underinsured Motorist Coverage (4d Ed. 2010) § 3.14, p. 373 n.102 ("In order to trigger [underinsured motorist] coverage in the first instance, there must be a finding that the plaintiff is legally entitled to recover damages from the self-insured tortfeasor. . . . Applying the 'owned by a self-insurer' exclusion when the self-insured entity has no legal liability is counter-intuitive." [Citation omitted.]). We have established that, "[i]n an insurance policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed." (Internal quotation marks omitted.) *Hammer* v. *Lumberman's Mutual Casualty Co.*, 214 Conn. 573, 588, 573 A.2d 699 (1990). Because Enterprise cannot, as a matter of federal law, be held responsible for the negligence of its lessees, it cannot be considered as a self-insurer for the purposes of that exclusion in the plaintiffs' policies. See *Martin* v. *Powers*, supra, 505 S.W.3d 525. Enterprise is not obligated to compensate parties' injured by the conduct of its lessees, and, therefore, it has no obligation to satisfy a judgment rendered in such an action—the hallmark of self-insurer status. See id., 520; see generally *Garcia* v. *Bridgeport*, 306 Conn. 340, 365–66, 51 A.3d 1089 (2012) (stating that "critical substantive" feature of self-insurers is that they are "presumed to have the ability to pay, and indeed . . . the obligation to pay in full any judgment against it").

In light of the Graves Amendment, construing Enterprise as a self-insurer in this context would contravene our public policy. If we were to interpret Enterprise's self-insurer status to exist as to damages caused by its lessees, it would demand that we honor the coexistence of § 38a-336 (a) (1) (A) and § 38a-334-6 (c) (2) (B) of the Regulations of Connecticut State Agencies. We have concluded previously in this opinion that § 38a-334-6 (c) (2) (B) of the regulations contravenes the public policy articulated in § 38a-336 (a) (1) (A), the underinsured motorist statute, under the present circumstances. Similarly, to enforce the contract of insurance as the defendant would have us construe it would lead to an unworkable outcome and would itself violate public policy. See *Geysen* v. *Securitas Security Services USA, Inc.*, 322 Conn. 385, 392–93, 142 A.3d 227 (2016) ("[i]f a contract violates public policy, this would be a ground to not enforce the contract" [internal quotation marks omitted]). If we agreed with the defendant's argument, we would have to accept that our legislature and the commissioner intended that rental cars could be simultaneously underinsured, yet not meet the definition of underinsured under most automobile insurance policies, all while being considered self-insured by the rental car company's assets, to which the injured victim would have no recourse. See *Martin* v. *Powers*, supra, 505 S.W.3d 525 n.7. We cannot accept such illogicial results, as "common sense must be used" when examining and applying statutory provisions and regulations. (Internal quotation marks omitted.) *Connelly* v. *Commissioner of Correction*, 258 Conn. 394, 407, 780 A.2d 903 (2001).[6]

[6] Although Enterprise is not a self-insurer as to the risk in the present case, we do not conclude, as the defendant suggests, that Enterprise and other rental car companies are altogether not self-insurers. Enterprise would be a self-insurer when there is a claim of direct liability—as opposed to vicarious liability—brought against it. For example, in cases of "negligence or criminal wrongdoing," self-insurance still applies to rental car companies because those claims are exempt from the Graves Amendment. 49 U.S.C. § 30106 (a) (2) (2012).

Enterprise is simply not a self-insurer as to the negligence of its lessees, rendering § 14-129 (a), the self-insurer eligibility statute, inapplicable in this context. Accordingly, the rental car was not owned by a self-insurer, and, therefore, the plaintiffs are not precluded from underinsured motorist benefits under their policies.

IV

The defendant nevertheless argues that legislative and administrative acquiescence dictates that the legislature intended not to disturb the self-insurer exclusion despite the opportunity and ability to do so after the Graves Amendment took effect in 2005. It is true that there have been amendments to § 38a-336 after the enactment of the Graves Amendment and that the legislature has not taken action to address the self-insurer exclusion. In another case in which we discussed the public policy behind uninsured motorist coverage, however, we were "unpersuaded that legislative inaction invariably warrants recognition as a reliable indicator of legislative intent." *Streitweiser* v. *Middlesex Mutual Assurance Co.*, supra, 219 Conn. 379. Particularly in a case where, as here, the divergent relationships between state and federal statutes, regulations, and public policies are complex and nuanced, we decline to assume tacit acceptance by the legislature.

Taking into account the Graves Amendment, the uninsured and underinsured motorist statutes, related state regulations, and underlying public policy, we therefore conclude that rental car companies may not be deemed self-insurers as to the negligence of their lessees. Accordingly, Enterprise was not self-insured as to the present risk, and the application of the underinsured motorist exclusions in the plaintiffs' policies would contravene the public policy articulated in § 38a-

336 (a) (1) (A).[7] The trial court therefore improperly granted the defendant's motions for summary judgment on the ground that Enterprise's vehicle was excluded from underinsured motorist coverage pursuant to the plaintiffs' policies.

The judgment of the trial court is reversed and the case is remanded to that court with direction to deny the defendant's motions for summary judgment and for further proceedings.

In this opinion the other justices concurred.

TRINITY CHRISTIAN SCHOOL *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL. (SC 19884)

Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn, Js.*

Syllabus

Pursuant to statute (§ 52-571b), the state may burden the exercise of religion only if it demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest, and a person whose exercise of religion has been burdened in violation of § 52-571b may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

Pursuant further to statute (§ 52-571b [d]), "[n]othing in [§ 52-571b] shall be construed to authorize the state . . . to burden any religious belief."

A former employee of the plaintiff religious school filed an employment discrimination complaint with the defendant commission, alleging that the plaintiff had terminated her employment in violation of state and

[7] The defendant asserts that by reaching this conclusion we are usurping the legislature's authority to either amend or repeal our statutory framework in light of the Graves Amendment, or the commissioner's authority to determine who may be a self-insurer under the state regulations. To the contrary, we are neither legislating from the bench nor striking down the regulation. Rather, we are appropriately undertaking the judicial responsibility of *vindicating* our legislature's public policy, articulated in state statute, to which both a regulation and a contract must give way when they are in conflict with that statute.

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

federal employment discrimination laws. The plaintiff moved to dismiss the employee's complaint, claiming that religious institutions are immune from employment discrimination actions under § 52-571b (d) and that the commission therefore lacked jurisdiction over the employee's complaint. The commission denied the plaintiff's motion to dismiss, and the plaintiff appealed to the trial court. The commission then moved to dismiss the plaintiff's appeal, claiming that § 52-571b (d) is not an immunity statute and, therefore, that the commission's denial of the plaintiff's motion to dismiss the employment discrimination complaint was not an immediately appealable interlocutory order under the statute (§ 4-183 [b]) authorizing certain interlocutory administrative appeals. The trial court granted the commission's motion to dismiss the plaintiff's appeal, and the plaintiff appealed, claiming that the trial court improperly granted the commission's motion to dismiss because § 52-571b (d) immunizes religious institutions, such as the plaintiff, from employment discrimination actions, and, therefore, the plaintiff's appeal was proper under the immunity exception to the general prohibition against such interlocutory appeals. *Held* that the trial court correctly concluded that § 52-571b (d) did not purport to confer on religious institutions immunity from employment discrimination actions, and, because that statute did not operate as a jurisdictional bar to employment discrimination claims against religious institutions such as the plaintiff, this court upheld the trial court's decision to grant the commission's motion to dismiss the plaintiff's interlocutory administrative appeal: § 52-571b (d) was intended to operate as a rule of construction for § 52-571b as a whole rather than a grant of immunity, as § 52-571b (d) was merely intended to clarify that the compelling government interest test that is applied to governmental burdens on the free exercise of religion does not apply to governmental burdens on religious beliefs, which are strictly prohibited under § 52-571b (d), and the effect of § 52-571b (d) was to retain the determination of the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *Equal Employment Opportunity Commission* (565 U.S. 171) that the ministerial exception to employment discrimination laws, which requires secular institutions to defer to the decisions of religious institutions concerning their employment of religious employees, serves as an affirmative defense to an otherwise cognizable employment discrimination claim rather than a jurisdictional bar to such a claim; moreover, there was nothing in the language of § 52-571b (d) to indicate that it serves as a grant of immunity from suit, as there was a dissimilarity between the language used in § 52-571b (d) and the language of statutes that do confer immunity, which typically use distinctive and unmistakable terms to grant immunity, such as "shall not be liable," "no action may be brought," or "shall be immune from civil liability."

Argued November 17, 2017—officially released August 7, 2018

Procedural History

Appeal from the decision of the named defendant denying the plaintiff's motion to dismiss an employment discrimination complaint, brought to the Superior Court in the judicial district of New Britain, where the court, *Schuman, J.*, granted the named defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

Matthew S. Carlone, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, for the appellee (named defendant).

Opinion

PALMER, J. The plaintiff, Trinity Christian School, appeals from the judgment of the trial court, which dismissed the plaintiff's administrative appeal from the decision of the named defendant, the Commission on Human Rights and Opportunities (commission), for lack of subject matter jurisdiction. The commission had denied the plaintiff's motion to dismiss an employment discrimination complaint brought by a former female employee,[1] who claims that the plaintiff unlawfully terminated her employment on the basis of her sex, marital status and pregnancy, in violation of state and federal employment discrimination laws. The plaintiff appealed from that decision to the Superior Court, claiming that court had jurisdiction to entertain the plaintiff's interlocutory appeal because General Statutes § 52-571b (d),[2] which bars the state from burdening any religious

[1] The employee was also named as a defendant in the plaintiff's administrative appeal.

[2] General Statutes § 52–571b, which is modeled after the federal Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb through 2000bb-4 (2012), provides: "(a) The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

"(b) The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the

belief, immunizes religious institutions, such as the plaintiff, from employment discrimination actions, and, therefore, the plaintiff was entitled to appeal from that decision under the immunity exception to the general prohibition against such interlocutory appeals. The trial court disagreed, concluding that § 52-571b (d) is not an immunity provision, and, as a consequence, the commission's denial of the plaintiff's motion to dismiss is not an immediately appealable order. The trial court therefore granted the commission's motion to dismiss the plaintiff's administrative appeal. On appeal to this court,[3] the plaintiff raises the same jurisdictional claim that it asserted in the trial court. We agree with the reasoning and conclusion of the trial court, and, therefore, we affirm its judgment dismissing the plaintiff's appeal.

burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

"(c) A person whose exercise of religion has been burdened in violation of the provisions of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state or any political subdivision of the state.

"(d) Nothing in this section shall be construed to authorize the state or any political subdivision of the state to burden any religious belief.

"(e) Nothing in this section shall be construed to affect, interpret or in any way address that portion of article seventh of the Constitution of the state that prohibits any law giving a preference to any religious society or denomination in the state. The granting of government funding, benefits or exemptions, to the extent permissible under the Constitution of the state, shall not constitute a violation of this section. As used in this subsection, the term 'granting' does not include the denial of government funding, benefits or exemptions.

"(f) For the purposes of this section, 'state or any political subdivision of the state' includes any agency, board, commission, department, officer or employee of the state or any political subdivision of the state, and 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion."

[3] The plaintiff appealed to the Appellate Court from the judgment of the trial court in accordance with General Statutes § 4-184, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The plaintiff is a religious school located in the town of Windsor. On April 19, 2011, a former female employee filed a complaint with the commission, alleging that the plaintiff had terminated her employment on the basis of her sex, marital status and pregnancy, in violation of the Connecticut Fair Employment Practices Act, General Statutes §§ 46a-58 and 46a-60 (a) (1) and (7), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (2012). The plaintiff subsequently moved to dismiss the complaint on the ground that it was immune from employment discrimination actions under the ministerial exception to employment discrimination laws, which is grounded in the first amendment to the United States constitution and "requires secular institutions to defer to the decisions of religious institutions in their employment relations with their religious employees" because "administrative and judicial intervention in religious employment relationships would violate the constitutional prohibition against civil entanglement in ecclesiastic disputes." (Internal quotation marks omitted.) *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 777, 23 A.3d 1192 (2011).

The commission denied the plaintiff's motion to dismiss the complaint, and the plaintiff appealed to the Superior Court. The commission moved to dismiss the plaintiff's appeal on the ground that the commission's denial of the plaintiff's motion to dismiss was not an immediately appealable order under *Hosanna-Tabor Evangelical Lutheran Church & School* v. *Equal Employment Opportunity Commission*, 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012) (*Hosanna-Tabor*), a then recent decision of the United States Supreme Court in which the court held that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar

[to such a claim] . . . because the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has [the] power to hear [the] case," and trial courts "have power to consider [employment discrimination] claims . . . and to decide whether [such] claim[s] can proceed or [are] instead barred by the ministerial exception."[4] (Internal quotation marks omitted.) Id., 195 n.4. The trial court agreed that *Hosanna-Tabor* was controlling of the plaintiff's appeal and granted the commission's motion to dismiss for lack of a final judgment.

[4] The ministerial exception was first recognized by the United States Supreme Court in *Hosanna-Tabor*, in which the court explained the rationale underlying the exception as follows: "The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes [on] more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the [f]ree [e]xercise [c]lause [of the first amendment to the United States constitution], which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the [e]stablishment [c]lause [of the first amendment], which prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor Evangelical Lutheran Church & School* v. *Equal Employment Opportunity Commission*, supra, 565 U.S. 188–89.

We note that the court's decision in *Hosanna-Tabor* resolved a split among the federal circuit courts of appeals as to whether the ministerial exception operated as a jurisdictional bar to employment related claims against religious institutions or was merely an affirmative defense to such claims. See id., 195 n.4. Several months before *Hosanna-Tabor* was decided, this court followed the lead of the Second Circuit Court of Appeals in *Rweyemamu* v. *Cote*, 520 F.3d 198, 208–209 (2d Cir. 2008), and held that the exception was a jurisdictional bar to suit. See *Dayner* v. *Archdiocese of Hartford*, supra, 301 Conn. 774, 784. That decision, of course, was short-lived in light of the United States Supreme Court's holding in *Hosanna-Tabor* that the exception operates as an affirmative defense to an otherwise cognizable employment discrimination claim rather than a jurisdictional bar. *Hosanna-Tabor Evangelical Lutheran Church & School* v. *Equal Employment Opportunity Commission*, supra, 565 U.S. 195 n.4; see, e.g., *State* v. *Dukes*, 209 Conn. 98, 113, 547 A.2d 10 (1988) (recognizing United States Supreme Court's "full and complete" authority on issues of federal constitutional law).

Upon returning to the commission, the plaintiff filed a second motion to dismiss, this time asserting that religious institutions are immune from employment discrimination complaints under § 52-571b (d) and that, as a consequence, the commission lacked jurisdiction over the former employee's complaint. The commission disagreed and denied the plaintiff's motion to dismiss the complaint, and the plaintiff again appealed to the Superior Court. The commission once again moved to dismiss the plaintiff's appeal, claiming that § 52-571b (d) is not an immunity statute and, therefore, that the commission's denial of the plaintiff's motion to dismiss the employment discrimination complaint was not an immediately appealable interlocutory order under General Statutes § 4-183 (b).[5] The trial court agreed with the commission and granted its motion to dismiss the plaintiff's appeal. In so doing, the trial court explained that § 52-571b was enacted in 1993 in response to *Employment Division, Dept. of Human Resources* v. *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), in which the United States Supreme Court held that the compelling governmental interest test that previously had been applied to governmental burdens on the free exercise of religion; see, e.g., *Sherbert* v. *Verner*, 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); did not apply to burdens that result from the enforcement of generally applicable laws.[6] See *Employment Division, Dept. of Human Resources* v. *Smith*, supra, 882–89. The court in *Smith* reasoned, rather, that "the sounder approach, and the approach in accord with the vast majority of [United States Supreme Court] prece-

[5] General Statutes § 4-183 (b) provides: "A person may appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under . . . chapter [54] to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy."

[6] Although *Smith* was decided in the context of a generally applicable criminal law, its holding pertains equally in the civil law context.

dents, is to hold the [compelling governmental interest] test inapplicable to such challenges. . . . To make an individual's obligation to obey . . . a law contingent [on] the law's coincidence with his religious beliefs, except [when] the [s]tate's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself . . . contradicts both constitutional tradition and common sense." (Citations omitted; internal quotation marks omitted.) Id., 885.

The trial court further explained that, following *Smith*, the legislature enacted § 52-571b to ensure greater protection for the free exercise of religion under state law than is provided under the federal constitution in the aftermath of *Smith*. To that end, the court explained that "subsections (a) and (b) [of § 52-571b provide] that, even in the case of a rule of general applicability, the compelling state interest test applies before the state can burden the exercise of religion. Subsection (c) essentially provides that, unless the state can meet the compelling state interest test, a person may assert a violation of his or her exercise of religion in a 'claim or defense' against the state." The trial court further explained, however, that subsection (d) of § 52-571b, which provides that "[n]othing in this section shall be construed to authorize the state or any political subdivision of the state to burden any religious belief," was merely intended to clarify that the compelling governmental interest test applied to governmental burdens on the free exercise of religion was not intended to apply to governmental burdens on religious beliefs such that, "in theory, even a compelling state interest such as the prevention of discrimination in employment cannot overcome [a religious institution's] reliance on the ministerial exception [as an affirmative defense to an employment discrimination action brought by one of its ministers or clergy]."

The trial court therefore concluded that § 52-571b (d), as evidenced by its plain and unambiguous terms, operates as a rule of construction rather than a grant of immunity—the effect of which was to retain "the ministerial exception [as] an affirmative defense, as provided by *Hosanna-Tabor*, but one . . . not subject to offset by a compelling governmental interest." In reaching its conclusion, the trial court emphasized that statutes purporting to confer immunity from suit must be strictly construed. In this regard, the court observed that there was nothing in the language of subsection (d) that reasonably could be construed as conferring immunity on the plaintiff. On the contrary, the court explained, "[t]he language of [subsection] (d) stands in stark contrast to the [language of] many other statutes in the same title . . . that do confer statutory immunity. This language usually takes the form of 'shall not be liable,' 'no action may be brought,' or 'shall be immune from civil liability.' " Accordingly, the trial court concluded that the plaintiff had failed to make a colorable claim of immunity under § 52-571b (d), and, as a result, the commission's denial of the plaintiff's motion to dismiss the employment discrimination complaint was not an immediately appealable order. On appeal to this court from the judgment of the trial court dismissing its appeal, the plaintiff renews its claim that § 52-571b (d) confers on religious institutions immunity from employment discrimination actions. We reject the plaintiff's claim for the reasons set forth by the trial court.

"As a threshold matter, we address our standard of review. We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . A brief overview of the statutory scheme that governs administrative appeals . . . is necessary to our resolution of this issue. There is no absolute right of appeal to the

courts from a decision of an administrative agency. . . . Appeals to the courts from administrative [agencies] exist only under statutory authority . . . . Appellate jurisdiction is derived from the . . . statutory provisions by which it is created, and can be acquired and exercised only in the manner prescribed. . . . In the absence of statutory authority, therefore, there is no right of appeal from [an agency's] decision . . . ." (Citation omitted; internal quotation marks omitted.) *Nine State Street, LLC* v. *Planning & Zoning Commission*, 270 Conn. 42, 45–46, 850 A.2d 1032 (2004).

The right to appeal from an agency decision to the Superior Court is generally limited to final decisions of the agency. See General Statutes § 4-183 (a) ("[a] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section"); see also *State* v. *State Employees' Review Board*, 231 Conn. 391, 402, 650 A.2d 158 (1994) ("a trial court has subject matter jurisdiction over an administrative appeal only if the administrative agency has rendered a final decision"). When the agency has not yet issued a final decision, § 4-183 (b) permits a party to "appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under . . . chapter [54] to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy." It is settled law that "a colorable claim to a right to be free from an action is protected from the immediate and irrevocable loss that would be occasioned by having to defend an action through the availability of an immediate interlocutory appeal from the denial of a motion to dismiss." *Dayner* v. *Archdiocese of Hartford*, supra, 301 Conn. 771; see id. ("the essence of the protection of immunity from suit is an entitlement not to stand trial or face the

other burdens of litigation" [internal quotation marks omitted]); see also *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 194, 544 A.2d 604 (1988) ("[w]e have held an interlocutory order to be final for purposes of appeal if it involves a claimed right the legal and practical value of which would be destroyed if it were not vindicated before trial" [internal quotation marks omitted]).

Finally, whether § 52-571b (d) confers on religious institutions immunity from employment discrimination actions presents a question of statutory interpretation over which we exercise plenary review. See, e.g., *State* v. *Lima*, 325 Conn. 623, 629 n.4, 159 A.3d 651 (2017). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006).

Applying these principles to the statutory language at issue, we conclude that the trial court correctly determined that § 52-571b (d) does not purport to confer on religious institutions immunity from employment discrimination actions but, rather, operates as a rule of construction for the whole of § 52-571b, the purpose of which is to clarify that the compelling governmental interest test applied under subsections (a) and (b) does

not apply to governmental burdens on religious *beliefs*, which, in this state, remain strictly prohibited even after *Smith*.[7] See *Employment Division, Dept. of Human Resources* v. *Smith*, supra, 494 U.S. 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the [f]irst [a]mendment obviously excludes all governmental regulation of religious beliefs as such. . . . The government may not compel affirmation of religious belief . . . ." [Citation omitted; emphasis omitted; internal quotation marks omitted.]). Most significantly, there is simply nothing in the language of § 52-571b (d) to indicate that it serves as a grant of immunity from suit. Indeed, as the trial court observed, the language of subsection (d) is typical of internal rules of construction appearing throughout the General Statutes and title 52. See, e.g., General Statutes § 52-146t (j);[8] General Statutes § 52-190b;[9] General Statutes

[7] The United States Supreme Court explained the basis for the disparate treatment afforded religious beliefs and religious practices in *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940): "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the [first] [a]mendment embraces two concepts—freedom to believe and freedom to act. *The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.*" (Emphasis added.) Id., 303–304.

[8] General Statutes § 52-146t (j) provides: "Nothing in subsections (a) to (i), inclusive, of this section shall be construed to deny or infringe the rights of an accused in a criminal prosecution guaranteed under the sixth amendment to the Constitution of the United States and article twenty-ninth of the amendments to the Constitution of the state of Connecticut."

[9] General Statutes § 52-190b provides in relevant part: "Nothing in this section shall be construed to preclude any party or a judge from, at any time, requesting the Chief Court Administrator, or the Chief Court Administrator's designee, to designate such action as a complex litigation case and transfer such action to the complex litigation docket."

§ 52-225d (g);[10] General Statutes § 52-225*l* (e);[11] General Statutes § 52-292;[12] General Statutes § 52-557q.[13]

That subsection (d) was intended to operate as a rule of construction rather than a grant of immunity is further evidenced by the dissimilarity between its language and the language of statutes that do confer immunity. As the trial court observed, a cursory review of title 52 makes clear that when the legislature intends to confer immunity from liability or from suit, it does so in distinctive and unmistakable terms, such as "shall not be liable,"[14] "no action may be brought,"[15] "shall be

[10] General Statutes § 52-225d (g) provides: "Nothing in this section shall be construed to limit the right of a claimant, defendant or defendants and insurers to settle claims as they consider appropriate and in their complete discretion at any time."

[11] General Statutes § 52-225*l* (e) provides: "Nothing contained in sections 52-225g to 52-225*l*, inclusive, shall be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into prior to October 1, 2003, is valid or invalid."

[12] General Statutes § 52-292 provides in relevant part: "Nothing herein contained shall be construed as prohibiting the plaintiff in any action of tort from satisfying such judgment out of the real estate of such association."

[13] General Statutes § 52-557q provides in relevant part: "Nothing in this section shall be construed to (1) limit or restrict in any way any legal protection a broadcaster or outdoor advertising establishment may have under any other law for broadcasting, outdoor advertising or otherwise disseminating any information, or (2) relieve a law enforcement agency from acting reasonably in providing information to the broadcaster or outdoor advertising establishment."

[14] See, e.g., General Statutes § 52-557b (a) (qualified medical personnel who voluntarily render first aid "shall not be liable" for ordinary negligence); General Statutes § 52-557*l* (a) (persons who donate food and nonprofit organizations or corporations that distribute donated food "shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition or packaging of the food"); General Statutes § 52-557n (b) (municipalities and their officers and agents "shall not be liable for damages to person or property resulting from [ten enumerated situations or conditions]"); General Statutes § 52-557r (b) ("[a] fire department that delivers to, or installs at, residential premises a device or batteries for such a device shall not be liable for civil damages for personal injury, wrongful death, property damage or other loss").

[15] See, e.g., General Statutes § 52-557e ("[n]o action may be brought to recover damages against any licensed physician for any decision or action taken by him as a member of a hospital utilization review committee").

immune from civil liability,"[16] or by using other similar language.[17] Under well established rules of statutory construction, we must assume that, if the legislature had intended to confer immunity under § 52-571b (d), it would have done so in the same explicit manner that it has granted immunity in other statutes. See *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003) ("[When] a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [inaction] will have [on] any one of them." [Internal quotation marks omitted.]). Indeed, it is a "bedrock principle [of statutory construction] that the legislature is fully capable of enacting legislation consistent with its intent"; *State* v. *Lima*, supra, 325 Conn. 631; particularly when the legislation involves the granting or curtailment of statutory or common-law immunity. "It is not the province of this court, under the guise of statutory interpretation, to legislate . . . a [particular] policy, even if we were to agree . . . that it is a better policy than the one endorsed by the legislature as reflected in its statutory

[16] See, e.g., General Statutes § 52-557m (directors, officers, and trustees of nonprofit, tax-exempt organizations "shall be immune from civil liability for damage or injury . . . resulting from any act, error or omission made in the exercise of such person's policy or decision-making responsibilities").

[17] See, e.g., General Statutes § 52-557j ("[n]o landowner may be held liable for any injury sustained by any person operating a snowmobile, all-terrain vehicle . . . motorcycle or minibike or minicycle . . . upon the landowner's property"); General Statutes § 52-557o ("[n]o action for trespass shall lie against any surveyor licensed under chapter 391 . . . who enters upon land other than the land being surveyed without causing any damage to such other land in order to perform a survey"); General Statutes § 52-557q ("[n]o claim for damages shall be made against a broadcaster . . . or an outdoor advertising establishment . . . that, pursuant to a voluntary program . . . broadcasts or disseminates an emergency alert").

language."[18] *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 316 Conn. 790, 803–804, 114 A.3d 1181 (2015); see also *State* v. *Whiteman*, 204 Conn. 98, 103, 526 A.2d 869 (1987) ("[i]t is not the function of courts to read into clearly expressed legislation provisions [that] do not find expression in its words" [internal quotation marks omitted]).

The plaintiff maintains, nevertheless, that § 52-571b (d) is ambiguous as to whether it confers immunity, and, therefore, this court may consult the statute's legislative history to ascertain its meaning. The plaintiff further contends that the legislative history "strongly supports" the view "that the legislature did not intend for the statute to serve [merely] as an affirmative defense but, rather, intended [it] to shield the employment practices of religious institutions with immunity." This intention, the plaintiff argues, although not explicit in the legislative history, inheres in the legislature's decision, as explained in *Rweyemamu* v. *Commission on Human Rights & Opportunities*, 98 Conn. App. 646, 911 A.2d 319 (2006), cert. denied, 281 Conn. 911, 916 A.2d 51, cert. denied, 552 U.S. 886, 128 S. Ct. 206, 169 L. Ed. 2d 144 (2007), to exempt religious beliefs from the purview of the statute.

Even if we agreed with the plaintiff that § 52-571b (d) is ambiguous—and we do not—we disagree that the Appellate Court's discussion of the relevant legislative history in *Rweyemamu* supports the plaintiff's statutory interpretation. In that case, the Appellate Court rejected a claim by a Roman Catholic priest that § 52-571b was intended to overrule the ministerial exception and subject the employment decisions of religious institutions

[18] Of course, as in all cases involving the construction of a statute, if the legislature disagrees with our interpretation of § 52-571b (d), or otherwise believes that religious institutions should be entitled to immunity from employment discrimination actions, it is free to enact legislation conferring such immunity.

to the compelling governmental interest test. See id., 655–56, 664–65. As the plaintiff acknowledges, in addressing the priest's claim in *Rweyemamu*, the Appellate Court had no occasion to consider whether § 52-571b (d) operates as a jurisdictional bar to employment discrimination claims involving religious institutions. The issue before the Appellate Court in *Rweyemamu*, rather, was whether such claims are subject to the compelling governmental interest test set forth in subsection (b) of the statute. See id., 665.

In concluding that they are not, the Appellate Court noted that the legislative history made clear that the purpose underlying the statute was to reverse the effects of *Smith* by restoring the strict scrutiny test for governmental burdens on religious practices. Id., 660–61. The court further noted, however, that, "[i]n protecting the religious practices of individuals, the legislature made the distinction between the 'exercise of religion,' which it protected with the strict scrutiny test found in [subsection] . . . (b) of § 52-571b, and 'religious beliefs,' which [it] prevented from being burdened by subsection (d)." Id., 662. The court then explained that, prior to the enactment of § 52-571b, federal law had long treated governmental burdens on religious practices and religious beliefs differently, applying strict scrutiny to the former while completely forbidding the latter. See id., 663–64. The court also explained that, prior to the enactment of the statute, the United States Supreme Court had consistently treated the employment decisions of religious institutions as a form of religious belief. See id., 662. The Appellate Court concluded that, because the legislature is assumed to know the status of the law when it enacts legislation, the legislature clearly had intended, by exempting religious beliefs from the purview of § 52-571b, to maintain the legal distinction between religious practices and religious beliefs that always had existed and continued to

exist after the United States Supreme Court decided *Smith*. See id., 664.

The plaintiff argues, however, that, because § 52-571b provides greater protection for religious beliefs than for religious practices, the only reasonable conclusion to be drawn is that the legislature intended for § 52-571b (d) to operate as a jurisdictional bar to employment discrimination actions. This is so, the plaintiff maintains, because only a jurisdictional bar could provide more protection than strict scrutiny review. As we have explained, however, the text of the statute belies the intention that the plaintiff would have us attribute to the legislature, a conclusion that is reinforced by the language of the numerous statutes that do confer immunity. Nor is there any indication in the legislative history that the legislature contemplated that § 52-571b (d) would operate as a jurisdictional bar. As the Appellate Court explained in *Rweyemamu*, although the legislative history reveals "that the legislature was, in general, mindful of the impact that *Smith* might have had on employment discrimination laws," its primary focus "[was on] protecting individual religious practices through [the application of] the strict scrutiny test."[19] Id., 661–62. We note, moreover, that it was not until more than fifteen years after the passage of the statute that this court, in *Dayner* v. *Archdiocese of Hartford*, supra, 301 Conn. 774, recognized the ministerial exception as a jurisdictional bar to employment discrimination actions. As we previously noted, however; see

[19] See, e.g., 36 H.R. Proc., Pt. 14, 1993 Sess., pp. 4922–23, remarks of Representative Richard D. Tulisano ("Let me make it clear. There was a case a few years back called the *Smith* case, which . . . reduced the requirements [on] a state when it tried to limit the free exercise of religion. . . . All we're talking about here is that in fact when the [s]tate tries to limit activities, such as candles in a church, receiving wine at Holy Communion, wearing a yarmulke in court, in order to restrict that activity, which is otherwise religiously allowed . . . there must be a compelling [s]tate reason in order to do it.").

footnote 4 of this opinion; that decision was short-lived in light of *Hosanna-Tabor*, which followed soon thereafter. Thus, to the extent the plaintiff contends that § 52-571b was intended to codify the ministerial exception, even if this were true, there is still no reason to conclude that the legislature intended the exception to operate as a jurisdictional bar rather than as an affirmative defense.[20]

The judgment is affirmed.

In this opinion the other justices concurred.

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[20] The commission claims that we lack appellate jurisdiction to entertain the plaintiff's appeal from the trial court's judgment for the same reason that the trial court dismissed the plaintiff's appeal: the commission's order was interlocutory and not final for purposes of appeal. The commission, however, confuses the jurisdiction of the Superior Court, which, in the present case, is governed by General Statutes § 4-183, with the jurisdiction of the Appellate Court, which is governed by General Statutes § 4-184. The trial court's dismissal of the plaintiff's administrative appeal was not interlocutory, whereas the commission's ruling declining to dismiss the complaint was interlocutory. Thus, the trial court's dismissal was final and therefore appealable. See General Statutes § 4-184; *Doe* v. *Dept. of Public Health*, 52 Conn. App. 513, 517, 727 A.2d 260, cert. denied, 249 Conn. 908, 733 A.2d 225 (1999).