JOHN GIROLAMETTI, JR., ET AL. *v.* MICHAEL HORTON ASSOCIATES, INC.
(SC 20032)
(SC 20033)
(SC 20036)

JOHN GIROLAMETTI, JR., ET AL. *v.* VP BUILDINGS, INC., ET AL.
(SC 20034)
(SC 20035)

Robinson, C. J., and Palmer, McDonald, D'Auria and Ecker, Js.

Syllabus

The plaintiff property owners sought to recover damages from the defendant contractor and subcontractors for, inter alia, their alleged negligence in connection with a commercial construction project. Prior to the commencement of the present actions, the plaintiffs and the general contractor, R Co., pursuant to a contract between them, entered into arbitration to resolve various disputes regarding the project, which resulted in an award in favor of R Co. R Co. and five of the defendant subcontractors thereafter moved for summary judgment in the plaintiffs' actions on the basis of res judicata, contending that all of the claims raised in the underlying actions had been or could have been raised

and resolved during the arbitration between the plaintiffs and R Co. The trial court granted R Co.'s motion for summary judgment but denied the defendant subcontractors' motions for summary judgment, concluding, with respect to the defendant subcontractors, that they were not parties to the arbitration and were not in privity with R Co. The defendant subcontractors thereafter appealed from the denial of their summary judgment motions to the Appellate Court. The Appellate Court reversed the trial court's denial of the summary judgment motions, concluding that the defendant subcontractors were in privity with R Co. for purposes of res judicata and, therefore, that the plaintiffs' claims were barred because they could have been raised during the arbitration. In so concluding, the Appellate Court adopted a rebuttable presumption that subcontractors are in privity with a general contractor on a construction project for purposes of res judicata. On the granting of certification, the plaintiffs appealed to this court. *Held*:

1. The Appellate Court correctly determined that, when a property owner and a general contractor enter into binding, unrestricted arbitration to resolve disputes arising from a construction project, the subcontractors are presumptively in privity with the general contractor for purposes of precluding subsequent litigation against the subcontractors concerning the project under the doctrine of res judicata: adopting a rebuttable presumption of privity under such circumstances, but allowing parties to contract around it if they so choose, fosters a fair and efficient system for resolving construction disputes, and the value of arbitration would be undermined if arbitration awards were not presumptively final as to all subcontractors, as owners would otherwise be able to bring subsequent actions against subcontractors in different forums, leading to the inefficient proliferation of proceedings and potentially inconsistent outcomes; moreover, there was no merit to the plaintiffs' claim that it would be unfair to adopt such a presumption because many of the potential sources of dispute between a property owner and a subcontractor either cannot be raised and resolved in an arbitration between the property owner and the general contractor or will not be apparent before the arbitration has concluded, as the plaintiffs failed to provide legal authority for the proposition that subcontractors typically owe property owners a duty independent of the general contractor that would provide the basis for a direct action against the subcontractors or that such claims could not be raised in arbitration between the owner and general contractor regardless of whether subcontractors could be compelled to participate in arbitration, and the record in the present case was devoid of any indication that the plaintiffs sought and were denied permission to raise such claims in their arbitration with R Co.; furthermore, the plaintiffs could not prevail on their claims that the Appellate Court improperly ignored this court's prior precedent in concluding, on the basis of the defendant subcontractors' contractual relationship with R Co., that they were in privity with R Co., and that a presumption of privity was ill suited for the complexities of the commercial construction industry.

2. The plaintiffs could not prevail on their claim that the presumption of privity should not apply in the present case because the parties did not intend to structure their legal relationships in such a manner, and, accordingly, the Appellate Court correctly concluded that the defendant subcontractors and R Co. were in privity and that the trial court improperly denied the defendant subcontractors' motions for summary judgment on the basis of res judicata: the record indicated that the plaintiffs anticipated, or reasonably should have anticipated, that their arbitration with R Co. would be the proper forum for addressing any claims that they may have had against the defendant subcontractors at that time, as the standard form construction contract that the plaintiffs chose to use provided that the general contractor would be responsible for all of the subcontractors' work and would be answerable to the owner for such work, the contract contained an arbitration clause that allowed for the unrestricted submission of virtually all claims and disputes, and the plaintiffs' conduct throughout the arbitration process indicated an expectation that R Co. could be held accountable for the conduct of its subcontractors; moreover, the arbitrator's finding that the construction contract did not obligate R Co. to perform or to be responsible for all design and engineering aspects of the project did not represent a finding that R Co. and the defendant subcontractors were not in privity with respect to the engineering work on the project, as that finding merely indicated that the plaintiffs had outsourced certain site, plumbing and electrical work and that R Co. was not responsible to the plaintiffs for the work of those contractors.

Argued December 14, 2018—officially released June 25, 2019

Procedural History

Action, in the first case, to recover damages from the defendant Michael Horton Associates, Inc., for alleged negligence, brought to the Superior Court in the judicial district of Danbury, where the defendant Michael Horton Associates, Inc., filed apportionment complaints against the defendant Rizzo Corporation et al., and action, in the second case, to recover damages for, inter alia, the defendants' alleged negligence, brought to the Superior Court in the judicial district of Danbury, where the cases were transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the plaintiffs in the first case filed an amended complaint asserting claims against the defendant Rizzo Corporation et al.; subsequently, in the first case, the court, *Agati*, *J.*, granted the motion for summary judgment

filed by the defendant Rizzo Corporation and denied the motions for summary judgment filed by the defendant Michael Horton Associates, Inc., et al.; thereafter, in the second case, the court, *Agati*, *J.*, denied the motion for summary judgment filed by the defendant BlueScope Buildings North America, Inc., et al.; subsequently, the plaintiffs and the defendant Michael Horton Associates, Inc., et al. in the first case, and the defendant BlueScope Buildings North America, Inc., et al. in the second case, filed separate appeals with the Appellate Court, *Sheldon*, *Mullins* and *Bishop*, *Js.*, which affirmed the decision of the trial court granting the motion for summary judgment filed by the defendant Rizzo Corporation in the first case, reversed the decisions of the trial court denying the motions for summary judgment filed by the defendant Michael Horton Associates, Inc., et al. in the first case, reversed the decision of the trial court denying the motion for summary judgment filed the defendant BlueScope Buildings North America, Inc., et al. in the second case, and remanded both cases with direction to grant those motions for summary judgment, from which the plaintiffs, in both cases, on the granting of certification, appealed. *Affirmed.*

Brian J. Donnell, with whom was *Michael G. Caldwell*, for the appellants (plaintiffs in both cases).

Anita C. Di Gioia, for the appellee in Docket No. SC 20032 (defendant Domenic Quaraglia Engineering, Inc.).

Kevin M. Godbout, with whom, on the brief, was *Alison H. Weinstein*, for the appellee in Docket No. SC 20033 (defendant Michael Horton Associates, Inc.).

Sean R. Caruthers, with whom, on the brief, was *Mark A. Milano*, for the appellee in Docket No. SC 20034 (defendant Pat Munger Construction Company, Inc.).

Curtis L. Brown, pro hac vice, with whom were *Damian K. Gunningsmith* and, on the brief, *David S. Hardy*, for the appellee in Docket No. SC 20035 (defendant BlueScope Buildings North America, Inc., et al.).

Deborah Etlinger, with whom, on the brief, was *Erin E. Canalia*, for the appellee in Docket No. SC 20036 (defendant Lindade Construction, Inc.).

Louis R. Pepe and *Douglas M. Poulin* filed a brief for Associated General Contractors of Connecticut as amicus curiae in Docket No. SC 20036.

Opinion

D'AURIA, J. This certified appeal poses the question of whether and under what circumstances arbitration of a construction dispute between a property owner and a general contractor is res judicata as to the claims of subcontractors[1] that did not participate in the arbitration. We agree with the Appellate Court that, in the absence of clear evidence of contrary intent by the parties, subcontractors are presumptively in privity with the general contractor on a construction project for purposes of res judicata. Accordingly, we affirm the judgment of the Appellate Court.

I

The relevant factual and procedural history is set forth in full in the decision of the Appellate Court. See *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 636–46, 164 A.3d 731 (2017). We briefly summarize that history as follows.

These five consolidated appeals arise from disputes regarding the construction of an expansion to a Party Depot Store located in Danbury. The plaintiffs are the

[1] For brevity, we use the term "subcontractors" to refer both to direct subcontractors of a general contractor and to sub-subcontractors who are hired by and/or answerable to direct subcontractors or other sub-subcontractors.

owners of the store, John Girolametti, Jr., and Cindy Girolametti. The defendant-appellees are five subcontractors on the project: Michael Horton Associates, Inc. (Horton), Domenic Quaraglia Engineering, Inc. (Quaraglia), Lindade Construction, Inc. (Lindade), BlueScope Buildings North America, Inc., and its employee, Steven Oakeson (BlueScope), and Pat Munger Construction Company, Inc. (Munger). Other original defendants, including the general contractor on the project, Rizzo Corporation (Rizzo), and other subcontractors, are not involved in the present appeals.[2]

In 2009, following the completion of the project and Danbury's issuance of a certificate of occupancy, the plaintiffs and Rizzo, pursuant to the contract between them (prime contract), entered arbitration to resolve various disputes regarding the project. Rizzo contended that the plaintiffs owed it further sums beyond the contract price for extra work performed and costs incurred in connection with the project. For their part, the plaintiffs sought to hold Rizzo liable for costs arising from, among other things, Rizzo's alleged failure to complete the project in a timely and proper manner. They claimed, for example, that Rizzo was responsible for multiple construction defects, had failed to provide a pre-engineered structure that complied with the intent of the original design, and had eliminated some important construction elements, jeopardizing the building's load carrying capacity. None of the other defendants was formally a party to the arbitration.

In December, 2010, on the thirty-third day of what would ultimately be a thirty-five day hearing, the plaintiffs decided to no longer participate in the arbitration hearings, despite the urging of the arbitrator that they proceed to present their damages claims. The arbitrator

[2] For this reason, in the remainder of this opinion we refer to the present appellees—Horton, Quaraglia, Lindade, BlueScope, Oakeson, and Munger—collectively as the defendants.

subsequently issued an award ordering the plaintiffs to pay $508,597 to Rizzo for sums due. Rizzo's subsequent application to confirm the award was granted by the trial court.

With respect to the plaintiffs' claims, the arbitrator found that the plaintiffs made a conscious and informed decision to no longer attend the hearing, and intentionally refused to present any evidence or expert witnesses to explain or justify any alleged damages. From this finding, the arbitrator concluded that either the plaintiffs did not incur any damages or were unable to prove their damages. The arbitrator also rejected the plaintiffs' claims that the second floor of the building remained unoccupied due to construction defects resulting in structural problems. The arbitrator instead concluded that the structure had passed inspection but that Danbury zoning regulations did not permit use of the second floor for any purpose.

The present appeals arise from two lawsuits, one filed during the arbitration proceedings and one filed subsequently, in which the plaintiffs sought to recover from Rizzo and from its subcontractors. At the heart of many of the plaintiffs' claims in these underlying cases are allegations of negligence in connection with the design and construction of the steel joists used to support the second floor of the building. In the actions underlying these appeals, each of the defendants—who were involved in various capacities in the design and construction of the second floor supports—moved for summary judgment against the plaintiffs on the basis of, among other grounds, res judicata. That is, they contended that all of the claims raised in the underlying actions either had been or could have been raised and resolved during the arbitration.

The trial court granted the motion filed by Rizzo but denied the motions for summary judgment filed by the other defendants. The court concluded that the plain-

tiffs' actions against the subcontractor defendants were not barred by res judicata because those defendants were not parties to the arbitration and were not in privity with Rizzo. Although it is unclear from the court's brief order, its conclusion that the defendants were not in privity with Rizzo appears to be founded on the premise that they could not have been compelled to participate in the arbitration process.

The defendants brought an interlocutory appeal from the court's denial of their motions for summary judgment. See, e.g., *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 346 n.7, 63 A.3d 940 (2013) (interlocutory appeal may be taken from denial of motion for summary judgment based on res judicata or collateral estoppel). The Appellate Court reversed the judgment of the trial court with respect to the res judicata issue as to all of the defendants. That court held that all of the defendants were in privity with Rizzo for purposes of res judicata and, therefore, that the plaintiffs' claims were barred because they could have been raised during the arbitration. See *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 630. These certified appeals followed.[3] Additional facts will be set forth as appropriate.

[3] We granted certification, limited to the following question: "Did the Appellate Court properly reverse the trial court's denial of summary judgment based on the doctrine of res judicata when it determined privity existed between the defendant subcontractors and the general contractor after the general contractor had arbitrated issues relating to the construction project with the project owner[s]?" *Girolametti* v. *Michael Horton Associates, Inc.*, 327 Conn. 980, 175 A.3d 42 (2017); accord *Girolametti* v. *Michael Horton Associates, Inc.*, 327 Conn. 981, 175 A.3d 564 (2017); *Girolametti* v. *Michael Horton Associates, Inc.*, 327 Conn. 981, 982, 175 A.3d 42 (2017); *Girolametti* v. *VP Buildings, Inc.*, 327 Conn. 982, 186 A.3d 12 (2017); *Girolametti* v. *VP Buildings, Inc.*, 327 Conn. 983, 175 A.3d 45 (2017). We note that the plaintiffs sought certification as to, and have briefed, various other issues that are peripheral to the certified question, including whether and how claims of fraud, latent defect, and unripe professional, statutory, and warranty obligations influence the res judicata analysis in a case such as this. We address those issues only to the extent that they are encompassed within the certified question.

We also granted permission to Associated General Contractors of Connecticut to file an amicus curiae brief.

II

"[T]he applicability of res judicata . . . presents a question of law over which we employ plenary review." *Weiss* v. *Weiss*, 297 Conn. 446, 458, 998 A.2d 766 (2010). The Appellate Court accurately set forth the well established legal principles that govern res judicata: "[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to *any other admissible matter which might have been offered for that purpose*. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 650. With respect to the first element, a judgment rendered on the merits, the Appellate Court also noted, and the parties do not dispute, that "[a]n arbitration award is accorded the benefits of the doctrine of res judicata in much the same manner as the judgment of a court." (Internal quotation marks omitted.) Id., 649; accord *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 21 n.5, 699 A.2d 964 (1997).

The following principles govern the second element of res judicata, privity, the only element at issue in the present appeal: "Privity is a difficult concept to define

precisely. . . . There is no prevailing definition of privity to be followed automatically in every case. It is not a matter of form or rigid labels; rather it is a matter of substance. In determining whether privity exists, we employ an analysis that focuses on the functional relationships of the parties. Privity is not established by the mere fact that persons may be interested in the same question or in proving or disproving the same set of facts. Rather it is, in essence, a shorthand statement for the principle that [preclusion] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion." (Citation omitted.) *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 813–14, 695 A.2d 1010 (1997).

"While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party against whom collateral estoppel [or res judicata] is being asserted have been adequately represented . . . . A key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Internal quotation marks omitted.) Id., 813.

Consistent with these principles, this court and other courts have found a variety of factors to be relevant to the privity question. These factors include the functional relationships between the parties, how closely their interests are aligned, whether they share the same legal rights, equitable considerations, the parties' reasonable expectations, and whether the policies and rationales that underlie res judicata—achieving finality and repose, promoting judicial economy, and preventing inconsistent judgments—would be served. See id., 812–16; see also *Wayne County Hospital, Inc.* v. *Jakobson*, 567 Fed. Appx. 314, 317 (6th Cir. 2014) (applying Kentucky law); *DKN Holdings, LLC* v. *Faerber*, 61 Cal. 4th 813, 826, 352 P.3d 378, 189 Cal. Rptr. 3d 809 (2015);

Foster v. *Plock*, 394 P.3d 1119, 1126 (Colo. 2017). "[T]he crowning consideration, [however, is] that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of [res judicata] is not inequitable." (Internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 167, 129 A.3d 677 (2016).

III

Applying these principles to the facts of the present case, the Appellate Court concluded that each of the defendants was in privity with Rizzo for purposes of res judicata. *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 685–86. On appeal, the plaintiffs contend that the Appellate Court improperly applied a presumption—they label it a "safe harbor" rule—that a general contractor is in privity with all of its subcontractors on a construction project, and, therefore, if an owner and a general contractor choose to arbitrate the typical postconstruction disputes at the end of a project, then the outcome of that arbitration will be res judicata as to all subcontractors (assuming that the other elements of res judicata are satisfied). The plaintiffs argue that such a rule conflicts with established Connecticut precedent and also that, for various reasons, adopting such a rule would be both unwise and unfair. Because we agree that a general contractor is presumptively in privity with its subcontractors for purposes of res judicata, and because we perceive no reason to depart from that presumption under the specific facts and circumstances of the present case, we affirm the judgment of the Appellate Court.

A

1

When applying the law to complex endeavors such as large-scale commercial construction, it often is desirable to adopt default rules, whether in the form of legal

presumptions or standardized contracts. See E. Zamir, "The Inverted Hierarchy of Contract Interpretation and Supplementation," 97 Colum. L. Rev. 1710, 1755–56, 1768 (1997); T. Rakoff, Comment, "Social Structure, Legal Structure, and Default Rules: A Comment," 3 S. Cal. Interdisc. L.J. 19, 20, 25–26 (1993). These default rules help to reduce transaction costs, increase efficiencies, and resolve contractual ambiguities. E. Zamir, supra, 1755–56, 1756 n.175. At the same time, to the extent that public policy is not offended, parties retain the flexibility and freedom to contract around default rules to better serve their unique interests and needs.[4] See id., 1769–70; see also I. Ayres & R. Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 Yale L.J. 87, 87–88 (1989).

The amicus explains why adopting a default presumption of privity between general contractors and subcontractors is an efficient approach that mirrors the choices that reasonable parties would have made had they expressly considered the question at the outset. See I. Ayres & R. Gertner, supra, 99 Yale L.J. 89–92 (default rules should reflect either what these particular parties actually would have chosen or what arrangements most reasonable bargainers would prefer). The amicus notes that the standard form contracts used in the construction industry typically make the general contractor responsible for the work of all subcontractors.[5]

[4] Although the question before us is not entirely one of contract law, the same contractual approach is suitable for application to noncontract matters. See I. Ayres & R. Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 Yale L.J. 87, 88 n.10, 129 (1989); T. Merrill & H. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle," 110 Yale L.J. 1, 31 (2000).

[5] This court has recognized as much, albeit in a different context, noting that "most . . . construction work is often subcontracted . . . by a general contractor who oversees the entire project and is responsible [to the owner] for the final result." (Internal quotation marks omitted.) *Meadows* v. *Higgins*, 249 Conn. 155, 167, 733 A.2d 172 (1999).

They explain that owners as well as contractors benefit from a presumption that all outstanding disputes involving work on a project can be resolved in the context of an owner-general contractor arbitration. Such a rule permits owners to bring and efficiently and finally resolve all of their claims arising from a project in a single forum, without having to pursue individual subcontractors and sub-subcontractors for satisfaction. The amicus also contends that the use and value of arbitration—particularly specialized construction industry arbitration—would be undermined if arbitration awards were not presumptively final as to all subcontractors. This is because owners who fail to prevail in arbitration could bring subsequent actions against various subcontractors in different forums, leading to the inefficient proliferation of proceedings and potentially inconsistent outcomes.

A number of other jurisdictions have adopted the rule advocated by the amicus by applying at least a rebuttable presumption that subcontractors are in privity with a general contractor for purposes of res judicata. See, e.g., *Columbia Steel Fabricators, Inc.* v. *Ahlstrom Recovery*, 44 F.3d 800, 802 (9th Cir.) (holding that arbitration award for general contractor was res judicata as to subcontractor, which was in privity with general contractor), cert. denied, 516 U.S. 864, 116 S. Ct. 178, 133 L. Ed. 2d 117 (1995); *United States ex rel. Paul* v. *Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370, 373 (S.D. Tex. 1994) (under Texas law, general contractor is in vicarious liability relationship with its subcontractor for purposes of res judicata), aff'd, 53 F.3d 1282 (5th Cir. 1995), cert. denied, 516 U.S. 1094, 116 S. Ct. 817, 133 L. Ed. 2d 762 (1996); *Chestnut Hill Development Corp.* v. *Otis Elevator Co.*, 739 F. Supp. 692, 698 (D. Mass. 1990) (subcontractor could bind developer with respect to issues litigated between developer and general contractor in prior arbitration); *Asso-*

ciated Construction Co. v. *Camp*, *Dresser & McKee*, *Inc.*, 646 F. Supp. 1574, 1578 (D. Conn. 1986) (applying Connecticut law, subcontractors were deemed to be in privity with general contractor with respect to res judicata effects of prior arbitration between general contractor and city because [1] claims were asserted under project contract and [2] subcontractors had received payment for work from which claims arose); *DKN Holdings*, *LLC* v. *Faerber*, supra, 61 Cal. 4th 828 ("[d]erivative liability supporting preclusion has been found between . . . a general contractor and subcontractors" [citations omitted]); *E.W. Audet & Sons*, *Inc.* v. *Fireman's Fund Ins. Co. of Newark*, *New Jersey*, 635 A.2d 1181, 1187 (R.I. 1994) (subcontractors and prime contractor were in privity for purposes of res judicata); cf. *Kansas City*, *Missouri ex rel. Lafarge North America*, *Inc.* v. *Ace Pipe Cleaning*, *Inc.*, 349 S.W.3d 399, 404–405 n.11 (Mo. App. 2011) (subcontractor is in direct privity of contract with general contractor and law adopts legal fiction that sub-subcontractor also is in privity of contract with general contractor, for purposes of recovery against statutory payment bond); *CDJ Builders Corp.* v. *Hudson Group Construction Corp.*, 67 App. Div. 3d 720, 722, 889 N.Y.S.2d 64 (2009) ("[a]s a general rule, a subcontractor is in privity with the general contractor on a construction project"). At least one Connecticut court also has applied this rule. See *Tierney* v. *Renaud Morin Siding*, *Inc.*, Superior Court, judicial district of Fairfield, Docket No. CV-08-5014179-S (October 29, 2008) (46 Conn. L. Rptr. 599) (homeowners who had arbitrated dispute with general contractor were precluded from bringing subsequent claim against subcontractor, who was deemed to be in contractual privity with general contractor).

Although this rule primarily has been justified on the theory that subcontractors are in privity of contract with a general contractor, some commentators and other legal authorities also have reasoned that the par-

ties share legal rights because general contractors are vicariously or derivatively liable for the work of their subcontractors. See 2 Restatement (Second), Judgments § 51, comment (a), pp. 48–49 (1982) (With respect to preclusion, "[m]any relationships between persons result in one of them being vicariously liable for the conduct of another, the primary obligor. Among these relationships are that of . . . principal contractor and sub-contractor to the extent the former is responsible for the conduct of the latter . . . ."); C. Ingwalson et al., "Arbitration and Nonsignatories: Bound or Not Bound?," 6 J. Am. C. Constr. Laws., No. 1 January, 2012, p. 3 (discussing various contract and noncontract theories according to which nonsignatories may be bound to arbitration agreements).

Adopting this default rule, but allowing parties to contract around it if they so choose, creates a system, both efficient and fair, for resolving complex construction disputes of this sort. Absent this sort of clear default rule, a property owner who fails to prevail in arbitration against a general contractor often will be able to relitigate its claims by simply recharacterizing what are essentially contract claims as violations of a subcontractor's allegedly independent, noncontractual duties. Such fact intensive claims will be difficult for courts to resolve on summary judgment, largely defeating the purpose and benefits of the unrestricted arbitration of disputes.[6]

2

The plaintiffs offer several arguments as to why the Appellate Court should not have adopted a default presumption that general contractors and subcontractors

[6] "A submission [of a dispute to arbitration] is unrestricted when . . . the parties' arbitration agreement contains no language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 89 n.3, 868 A.2d 47 (2005).

are in privity for purposes of res judicata with respect to a postconstruction arbitration in which the subcontractors did not participate. Their primary arguments are that (1) adoption of such a rule would be unfair, (2) any rule that grounds res judicata exclusively in contractual privity and fails to take into account other aspects of the functional relationship between the parties is inconsistent with this court's precedent, and (3) a presumption of privity is inconsistent with the realities of the construction industry. We consider each argument in turn.

The plaintiffs first argue that it would be unfair to adopt a presumption that a general contractor is in privity with all of its subcontractors on a project for purposes of applying res judicata rules in this context. The plaintiffs contend that adopting such a default rule would be unjust because many of the potential sources of dispute between a property owner and a subcontractor either (1) cannot be raised and resolved in an arbitration, participation in which is limited to the owner and the general contractor, or (2) will not be apparent and addressable at the time that the normal postconstruction disputes are arbitrated in the immediate aftermath of a project's completion. The plaintiffs offer, by way of example, claims involving extended warranties, latent defects, defects fraudulently concealed, and violations of professional and statutory obligations.

The plaintiffs have not provided any legal authority, however, for their assertion that subcontractors typically owe the property owner any independent statutory, professional, or common-law duties that (1) would provide the basis for a direct action against the subcontractor and (2) cannot be raised in the arbitration between the owner and the general contractor. When pressed at oral argument before this court, the plaintiffs' counsel ultimately conceded that an arbitrator would not be barred from entertaining any such

claims and holding a general contractor responsible for any such breach, regardless of whether the subcontractors themselves could be compelled to participate in the arbitration. Counsel speculated that, in practice, most arbitrators would be reluctant to pursue such tangentially related matters. The record is devoid of any indication, however, that the plaintiffs in the present case sought and were denied permission to raise claims of that sort in their arbitration with Rizzo. To the contrary, the arbitrator indicated that he would have preferred to be able to focus on the "forest" and address "the entire [p]roject as a whole" but was prevented from doing so by "the personal and juvenile manner" in which the plaintiffs and Rizzo approached the arbitration.

We recognize, of course, that a property owner cannot possibly raise in arbitration claims that have not yet arisen, such as latent defects, refusal to honor an extended warranty or ongoing service commitment, and the like. But for that very reason, such claims would fail to satisfy the third element of res judicata, which is that there must have been an adequate opportunity to litigate the matter fully. Accordingly, an owner would not be barred from raising claims of this sort in a subsequent action, regardless of the existence of privity.

In the present case, we do not understand the plaintiffs to allege that any failure of design or workmanship *manifested* subsequent to the arbitration. Rather, their primary claim is that, in early November, 2010, prior to the conclusion of the arbitration, Rizzo and certain of the defendants became aware of alleged defects in the project design but conspired to fraudulently conceal those defects from the plaintiffs so that they could not be raised in the arbitration. The Appellate Court concluded that any claim arising from that alleged fraud is now barred by General Statutes § 52-420 (b), which provides that a party seeking to vacate an arbitration

award on grounds of corruption, fraud, or undue means must do so within a thirty day limitation period. See *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 653; see also *Wu* v. *Chang*, 264 Conn. 307, 312, 823 A.2d 1197 (2003) (after thirty day limitation period prescribed by § 52-420 [b], court loses jurisdiction to entertain claim that arbitration award was obtained by fraud). Because we declined to certify the question of whether the Appellate Court properly applied § 52-420 (b) under the facts of the present case, that question is not before us, and we express no opinion as to whether the fraud exception to res judicata; see *Weiss* v. *Weiss*, supra, 297 Conn. 472; applies in the arbitration context.

We emphasize in this respect that the presumption of privity is merely a default rule. If, as the plaintiffs contend, some property owners are reluctant to agree to arbitrate their disputes with general contractors for fear that they will be barred subsequently from litigating related disputes with their subcontractors, nothing precludes the parties to a construction project from negotiating a contract that carves out certain issues or certain third parties from the scope of arbitration.

The plaintiffs next argue that the Appellate Court improperly ignored controlling authority by concluding, solely on the basis of contractual relationships, that the defendants were in privity with Rizzo. Specifically, the plaintiffs contend that our decision in *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 146, modified the transactional test that governs the privity analysis for purposes of res judicata and that, under *Wheeler*, there can be no privity when the claims at issue are factually distinct from those raised in the prior litigation or arbitration. The plaintiffs' reliance on *Wheeler* is misplaced.

As we explained in *Wheeler*, the question of whether the element of res judicata requiring that the prior adju-

dication involves the same underlying claim is distinct from the privity element. Id., 156–57. It is true that, under the unique facts and procedural history of *Wheeler*, there was substantial overlap between the privity analysis and the "same claim" element. Id., 165 n.20. *Wheeler* was a real property case, however, in which the plaintiffs held lots distinct from those of the parties with whom they were allegedly in privity. We emphasized that the parties did not share any common ownership interests with respect to each other's lots; there were no common chains of title, no mutual or successive prescriptive easement rights, and there was no privity of estate. Id., 169–70. Accordingly, the only way that the plaintiffs could have been in privity with prior litigants with respect to the claimed prescriptive rights was if their use of the disputed common lawn was so factually similar as to give rise to an identical legal right. Id., 158, 166–68. Thus, although commonality of use might, under different factual circumstances, have been *sufficient* to establish privity, we never suggested in *Wheeler* that factual commonality would have been *necessary* if, say, the parties had been in privity by virtue of contract or shared or successive ownership.

The present case, by contrast, is a contract matter in which a contractual theory of privity is alleged. Insofar as there is contractual privity, the question of factual commonality is simply irrelevant to the privity analysis.[7]

Finally, the plaintiffs contend that adopting a presumption of privity would be unwise because construction projects, contracts, and relationships are

[7] It also bears noting that, in *Wheeler*, the defendants asserted res judicata against lot owners who were not party to the prior proceedings and, therefore, had no prior opportunity to litigate their claims, a consideration that framed our preclusion analysis. See *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 166. In the present case, by contrast, res judicata is being asserted against the plaintiffs, who *were* parties to the arbitration and arguably had the opportunity to raise these issues therein.

complicated; subcontractors may have duties to and agreements with owners that are independent of and distinct from the duties that run through the general contractors. The plaintiffs warn that any preclusion rule that fails to account for this reality will sound the death knell of construction arbitration; property owners will be loath to agree to arbitration with their general contractors if doing so risks abandoning whatever independent rights and claims they may have against the subcontractors.

We doubt that a presumption of privity would create a disincentive for property owners to participate in arbitration. As the amicus explains, it is as much to the benefit of owners as it is to subcontractors to be able to expeditiously resolve all disputes arising from a construction project in a single forum. Moreover, the fact that other jurisdictions apply such a rule, and presumably have not encountered the negative experiences invoked by the plaintiffs, reassures us that to do so would not be unwise.

We also are skeptical of the plaintiffs' contention that the rule that the Appellate Court applied is ill suited for the complexities of many present day construction projects, which tend to feature multiple and divergent lines of authority running between a project owner and various contractors and subcontractors. We observe that the plaintiffs and Rizzo arbitrated their dispute pursuant to the construction industry arbitration rules of the American Arbitration Association, and that they selected as their arbitrator Arthur G. Folster, a general contractor and registered professional engineer with more than forty years of experience in contract administration and the design and construction of major building projects worth as much as $500 million. Folster had been trained as a construction industry arbitrator and had arbitrated a wide range of project disputes.

The award of this experienced construction arbitrator suggests that, although this particular project was indeed characterized by multiple, convoluted lines of authority and "complicate[d]" legal relationships, the type of arrangement that the plaintiffs orchestrated here is neither normal nor desirable. Rather, the arbitrator concluded that the administration of the prime contract was "unique," and that the administration and coordination of the project were performed in a "flawed manner . . . ."[8] Accordingly, the fact that a presumption of privity might not dovetail with the realities of this particular project does not count as a general strike against a default presumption of privity.

For these reasons, we conclude that the Appellate Court correctly determined that when a property owner and a general contractor enter into binding, unrestricted arbitration to resolve disputes arising from a construction project, subcontractors are presumptively in privity with the general contractor with respect to the preclusive effects of the arbitration on subsequent litigation arising from the project.

B

Having concluded that the Appellate Court properly adopted a rebuttable presumption that general contractors and subcontractors are in privity for purposes of res judicata, we now consider whether the record supports the plaintiffs' contention that the presumption should not apply in the present case because the parties did not intend to structure their legal relationships in

[8] For example, although the prime contract gave the plaintiffs' architect, Russell J. Larrabee, much of the responsibility for administering the contract, in practice, Larrabee either refused or was not allowed by the plaintiffs to perform that role. The plaintiffs also changed project engineers midstream. The arbitrator found that matters were further complicated by the fact that the plaintiffs contracted separately with various building and design professionals, and that the parties kept virtually no written records of their communications.

such a manner.[9] We conclude, to the contrary, that the record indicates that the plaintiffs anticipated, or reasonably should have anticipated, that the arbitration between themselves and Rizzo would be the proper forum for addressing any claims that existed against the defendants at that time.

1

The clearest evidence of the parties' intent in this regard is the prime contract. The plaintiffs chose to use a standard form owner-contractor construction contract published by the American Institute of Architects, and so presumably intended that their agreement would be governed by industry norms.

The prime contract includes the following relevant terms: (1) "Nothing contained in the Contract Documents shall create any contractual relationship between the Owner or the Architect and any Subcontractor or Sub-subcontractor"; (2) "[t]he Contractor . . . shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract"; (3) "[t]he Work comprises the completed construction required by the Contract Documents and includes all labor necessary to produce such construction"; (4) "[t]he Contractor shall be responsible to the Owner for the acts and omissions of his employees, Subcontractors and their agents and employees, and other persons performing any of the Work under a contract with the Contractor"; and (5) "[u]nless otherwise provided in the Contract Documents, the Contractor shall provide and pay for all labor . . . and other facilities and ser-

[9] See G. Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 UCLA L. Rev. 623, 663–65 (1988) ("[T]he court must ask itself what rational parties would have agreed to had the matter of preclusion been explicitly negotiated between them. . . . If a party clearly intended to arbitrate the transaction at issue, then that party should not later be permitted to circumvent the prior arbitration award by suing a person who was functionally central to the transaction but who was technically not a party to the arbitration.").

vices necessary for the proper execution and completion of the Work . . . .'' Accordingly, although other provisions of the prime contract reserve to the owner the right to perform work on the project with his own forces and to award separate contracts to other contractors in connection with portions of the project, absent such arrangements, the contract clearly provides that the general contractor will be responsible for all of the subcontractors' work on the project and will be answerable to the owner therefor.

Indeed, the prime contract requires the contractor to formalize these so-called ''flow down'' obligations with each subcontractor. Another provision provides: ''By an appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner . . . . Said agreement shall preserve and protect the rights of the Owner . . . under the Contract Documents with respect to the Work to be performed by the Subcontractor so that the subcontracting thereof will not prejudice such rights . . . . Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with his Sub-subcontractors.'' As noted in the opinion of the Appellate Court, although Rizzo's subcontract with Lindade includes the flow down provision required by the prime contract,[10] the other

[10] ''Section 1 (b) of the agreement provides: '[Lindade] assumes toward [Rizzo] all obligations, risks, and responsibilities for the Work, which [Rizzo] assumes toward [the plaintiffs] in the Contract Documents, and shall be bound to [Rizzo] in the same manner and to the same extent [Rizzo] is bound to [the plaintiffs] by the Contract Documents.' '' *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 639–40; see also C. Ingwalson et al., supra, 6 J. Am. C. Constr. Laws., no. 1, p. 3 (''[p]articularly for those in the construction industry, a clear and express incorporation by reference of one agreement into another is usually effective'').

defendants' subcontracts did not include such provisions. This fact might be relevant to assessing the *defendants'* expectations, but the question before us is whether the *plaintiffs*, in view of the provisions of the *prime* contract, reasonably could have expected that any claims that they had against Rizzo's subcontractors could have been raised against Rizzo in the arbitration. The answer to that question is unequivocally yes.

The arbitration provision contained in the prime contract confirms this conclusion. "When the arbitration agreement is broad . . . and there are no other limits on the scope of the arbitration, courts have applied res judicata based on a broad, transactional view of the arbitrated claim." G. Shell, "Res Judicata and Collateral Estoppel Effects of Commercial Arbitration," 35 UCLA L. Rev. 623, 643 (1988). In the present case, the prime contract includes a standard construction industry arbitration clause that allows the unrestricted submission of all claims and disputes to the arbitrator, with the exception of claims relating to the plaintiffs' project architect. In addition, the arbitration provision envisions and permits the joinder or other participation of third parties who are "substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration." That provision further undercuts the plaintiffs' argument that they could not have sought relief in the arbitration with respect to claims arising from the work of Rizzo's subcontractors. See C. Ingwalson et al., supra, 6 J. Am. C. Constr. Laws., no. 1, p. 3 ("[w]hen a contract providing for arbitration refers to the role to be played by nonsignatories, or when a pleading in a dispute between signatories refers to conduct of nonsignatories . . . there is an increased likelihood that nonsignatories can be bound by, or claim rights pursuant to, an arbitration clause").

We also think that the plaintiffs' conduct throughout the arbitration process further evidences an expectation that Rizzo could be held accountable for the conduct of its subcontractors, consistent with a finding of privity. See footnote 9 of this opinion. In their prehearing brief to the arbitrator, the plaintiffs contended that "[t]he structural issues on the project for the [p]re-[e]ngineered [b]uilding are Rizzo's and [Horton's] responsibility." During discovery, the plaintiffs requested that Rizzo provide all documents relating to its communications and agreements with its subcontractors. The plaintiffs then issued subpoenas and document requests to Quaraglia, Munger, Oakeson, Lindade, and Horton, among other subcontractors. Although most of the defendants ultimately were not called to testify, a representative of Horton, Douglas H. McCloskey, was called and testified at length over the course of several days of the arbitration hearing. Further, as the Appellate Court emphasized, during the arbitration, the plaintiffs adduced evidence of the alleged failure of several of the defendants to meet their obligations on the project. See *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 173 Conn. App. 672 (Quaraglia); id., 680 (Munger); id., 684 (BlueScope). In addition, while the arbitration was pending, the plaintiffs' structural engineer, Richard J. Marnicki, prepared a report reviewing the building's load bearing capacities. In preparing that report, Marnicki visited the offices of and requested engineering drawings and calculations from several of the defendants. It seems clear, then, that although the defendants never were formally made party to the arbitration, the plaintiffs viewed them as an integral part of the process, saw Rizzo as responsible for their conduct, and were not precluded from involving the defendants in the arbitration in various capacities.

2

In arguing for a contrary conclusion, the plaintiffs contend that the conclusion of the Appellate Court that Rizzo was in privity with all of its subcontractors is inconsistent with the arbitrator's factual findings. In this respect, the plaintiffs rely heavily on the following sentence in the arbitration award: "The [c]ontract, as drafted by [the project architect] and executed by [the plaintiffs], does not obligate [Rizzo] to perform or be responsible for all design and engineering aspects of the [p]roject." The plaintiffs interpret this finding to mean that, regardless of any default presumptions, Rizzo was not in privity with and could not be held responsible for the defendants' engineering work on the project.

The defendants respond, and we agree, that, when read in context, the arbitrator's statement does not represent a finding that Rizzo and its subcontractors were not in privity with respect to engineering work on the project. The paragraph of the award in which the sentence appears begins by noting that the contractual arrangements governing the project were complicated by virtue of the fact that the plaintiffs chose to contract independently with Danbury Septic for site work, with Rieve Plumbing & Mechanical for mechanical design and construction, and with Tucker Electrical for electrical design work, and that those contractors reported directly and exclusively to the plaintiffs. That arrangement was consistent with the prime contract, which permitted the plaintiffs to hire separate contractors and subcontractors to perform portions of the project. Considered in that context, the most reasonable reading of the sentence at issue is that the arbitrator was simply noting that the plaintiffs permissibly outsourced and supervised the referenced site work, and plumbing and electrical work, and, therefore, that Rizzo was not responsible to the plaintiffs for the work of those subcontractors. Our interpretation is supported by the fact

that site work represented one of the principal grounds for Rizzo's arbitration claims against the plaintiffs.[11]

To summarize, we find nothing in the record to rebut the presumption that the plaintiffs reasonably should have expected that any claims they had against Rizzo's subcontractors could have been raised in the context of the arbitration. Accordingly, we agree with the Appellate Court that the defendants and Rizzo were in privity for purposes of res judicata and, therefore, that the trial court improperly denied their motions for summary judgment on that basis.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

MICHAEL A. FIANO *v.* OLD SAYBROOK FIRE COMPANY NO. 1, INC., ET AL.
(SC 20135)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn and Vertefeuille, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, S, F Co., and the town of Old Saybrook, for personal injuries he sustained when his motorcycle collided with a motor vehicle operated by S as S was exiting

[11] This interpretation of the award also is consistent with the position that the plaintiffs took in the underlying litigation when responding to the defendants' interrogatories. For example, in response to BlueScope's request that the plaintiffs "identify each and every person with whom [they] contracted to procure labor, services, materials and/or equipment for the [p]roject," the plaintiffs responded that they had contracted directly with site work, sprinkler, and test/inspection contractors, but that, otherwise, they "contracted only with Rizzo . . . for the design and construction . . . on the [p]roject" and that, "[a]s part of its representations to the [plaintiffs], Rizzo assumed the responsibility to contract with the required design professionals. . . . Rizzo engaged multiple entities to provide structural engineering services, including . . . [Horton, Munger, VP Buildings, Inc., Lindade, and Quaraglia]." In other words, the plaintiffs themselves drew a clear distinction during the discovery process between subcontractors who were answerable directly to them and those, including all of the defendants, whose responsibility ran directly through Rizzo.

the driveway of F Co., a fire department in Old Saybrook, and entering a public roadway. The plaintiff alleged that the collision had occurred as a result of S's negligent operation of his motor vehicle when S, a junior volunteer firefighter with F Co., was acting within the scope of his employment with F Co. The plaintiff further alleged that, because S was an employee or agent of F Co. and the town, they were vicariously liable for S's negligence pursuant to the statutes (§§ 7-308 and 7-465) that indemnify volunteer firemen and municipal employees for liability imposed while acting within the scope of their employment. F Co. and the town filed a motion for summary judgment, claiming that, because S was leaving the fire department and on his way home to attend to personal matters when the collision occurred, there was no genuine issue of material fact as to whether S was acting within the scope of his employment with F Co. at that time. The trial court granted the motion and rendered judgment for F Co. and the town, from which the plaintiff appealed to the Appellate Court. The Appellate Court upheld the trial court's granting of the motion for summary judgment, and the plaintiff, on the granting of certification, appealed to this court. *Held* that the Appellate Court properly upheld the trial court's granting of summary judgment in favor of F Co. and the town on the ground that there was no genuine issue of material fact that S was not acting within the scope of his employment at the time of the accident and, therefore, that F Co. and the town could not be held vicariously liable for S's negligence as a matter of law: a reasonable jury, properly instructed in the legal principles governing the doctrine of respondeat superior, could conclude only that S was engaged in the pursuit of purely personal affairs and was not under the control of F Co. or acting in furtherance of its business when the accident occurred, and the fact that S was on or very close to F Co.'s premises at the time of the accident and would have been able to respond immediately if there had been an emergency call did not lead to the conclusion that F Co. actually exercised control over S or that S was performing some act for F Co.'s benefit at that time; moreover, although there was some overlap in the factors to be considered in determining whether an employee is acting within the scope of his employment for purposes of workers' compensation law and under the doctrine of respondeat superior, the public policies underlying that law and doctrine are very different, and, even if S was engaged in fire duties at the time of the accident within the meaning of the statute (§ 7-314 [a]) that defines fire duties with respect to volunteer firefighters for purposes of workers' compensation coverage, S was not acting within the scope of his employment for purposes of imposing vicarious liability on F Co. or the town.

Argued February 20—officially released June 25, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma*, *J.*, granted the motion for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Keller*, *Bright* and *Mihalakos*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed*.

James J. Healey, with whom was *Douglas P. Mahoney*, for the appellant (plaintiff).

Michael F. O'Connor, for the appellees (named defendant et al.).

Opinion

VERTEFEUILLE, J. The issue that we must resolve in this certified appeal is whether the trial court properly determined that there was no genuine issue of material fact as to whether the defendant James M. Smith, a junior volunteer firefighter with the named defendant, the Old Saybrook Fire Company No. 1, Inc. (fire company), was acting within the scope of his employment with the fire company at the time that the motor vehicle that he was driving collided with a motorcycle being driven by the plaintiff, Michael A. Fiano. The plaintiff brought this action alleging that he had been injured as the result of Smith's negligent operation of his motor vehicle and that the fire company and the defendant town of Old Saybrook (town) were vicariously liable for Smith's negligence pursuant to General Statutes

§§ 7-308[1] and 7-465.[2] The fire company and the town (collectively, municipal defendants) filed a motion for summary judgment, claiming that, because Smith had left the firehouse and was on his way home to attend to personal matters when the collision occurred, there was no genuine issue of material fact as to whether Smith was acting within the scope of his employment with the fire company at that time. The trial court ultimately granted that motion and rendered judgment in favor of the municipal defendants. Thereafter, the plaintiff appealed to the Appellate Court, which affirmed the judgment of the trial court. See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 180 Conn. App. 717, 744, 184 A.3d 1218 (2018). We then granted the plaintiff's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issue: "Did

[1] General Statutes § 7-308 (b) provides in relevant part: "Each municipality of this state, notwithstanding any inconsistent provision of law, general, special or local, or any limitation contained in the provisions of any charter, shall protect and save harmless any volunteer firefighter, volunteer ambulance member or volunteer fire police officer of such municipality from financial loss and expense, including legal fees and costs, if any, arising out of (1) any claim, demand, suit or judgment by reason of alleged negligence on the part of such volunteer firefighter, volunteer ambulance member or volunteer fire police officer while performing fire, volunteer ambulance or fire police duties . . . ."

[2] General Statutes § 7-465 (a) provides in relevant part: "Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality, except firemen covered under the provisions of section 7-308, and on behalf of any member from such municipality of a local emergency planning district, appointed pursuant to section 22a-601, all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment . . . ."

We note that § 7-465 has been amended by the legislature since the events underlying the present case; see, e.g., Public Acts 2015, No. 15-85, § 1; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

the Appellate Court properly uphold the trial court's granting of summary judgment on the ground that there is no genuine issue of material fact that an agency relationship did not exist between the [municipal] defendants and [Smith] at the time of his motor vehicle accident with the plaintiff?" *Fiano* v. *Old Saybrook Fire Co. No. 1*, *Inc.*, 329 Conn. 910, 186 A.3d 14 (2018). We affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts, which we have supplemented and viewed in the light most favorable to the plaintiff for purposes of reviewing the trial court's grant of summary judgment. "Smith became a junior member of the fire company in 2012.[3] As a junior member, he was authorized to fight exterior fires and respond to other emergency calls. Smith possessed an electronic key fob that enabled him to enter the firehouse during the day. Smith, along with the other members of the fire company, was encouraged [by the fire company's chiefs and other officers] to spend time at the firehouse monitoring the radio for emergency calls in order to quicken response times, perform training exercises, and to build comradery with one another. In order to entice members to spend time at the firehouse, the fire company provided televisions, computers, a weight room, laundry facilities, and showers." (Footnote added.) *Fiano* v. *Old Saybrook Fire Co. No. 1*, *Inc.*, supra, 180 Conn. App. 734.

John Dunn, the chief of the fire company at the time of the accident, testified at his deposition that, "[d]epending on the incident," it can be advantageous for firefighters to be at the firehouse so that they are available to respond immediately to any calls that come in. Dunn further testified that, if an adult firefighter who is

[3] Smith was a junior in high school when he joined the fire company as a junior member.

authorized to drive a fire truck were at the firehouse, it would be beneficial to the fire company for firefighters to be there when an emergency call came in because "the fire truck could leave the building quicker than if [the firefighters] came from their home[s] . . . ."

"The fire company utilized a 'points system' in order to track a firefighter's participation, and the firefighters were required to obtain a minimum number of points in order to maintain active membership. Firefighters earned points by responding to emergency calls, staffing the firehouse during emergencies, and, at the fire company's discretion, spending time at the firehouse waiting for a call. Additionally, although the fire company is a volunteer department, the town's firefighters received monetary compensation for their duties. Full members of the fire company are eligible for pensions and receive tax abatements from the town. Members are also paid in the event they respond to a brush fire. Prior to the accident, Smith personally received payment for his time spent staffing the firehouse during emergencies.

"As a junior member, Smith was not allowed to drive any of the fire company's vehicles. Thus, Smith used his personal vehicle to respond to emergency calls, [to] travel to and from the firehouse, and to attend training. Using this vehicle, Smith also would transport other members of the company to emergencies and other fire company related events. The fire company instructed how its members were to use their personal vehicles when responding to emergencies, such as how to properly park at the scene. In his personal vehicle, Smith kept his company issued firefighting equipment, which included a helmet, coat, bunker pants, and fire boots. His vehicle was adorned with a special license plate that identified him as a member of the fire company, which grants him access to closed roads during emergencies."

"On [October 26, 2013] the day of the accident, Smith went to the firehouse [on Main Street in Old Saybrook] because he had a 'couple [of] extra hours to spare.' Smith's girlfriend at the time, who also was a junior member of the fire company, and two other members of the fire company, were also present at the firehouse that day. Smith spent his time at the firehouse monitoring the radio for emergency calls. After spending approximately three and one-half hours at the firehouse, Smith left with the intention to go home to change his clothing in order to have his picture taken for his senior yearbook. Smith departed the firehouse in his personal vehicle, and, as Smith pulled out of the firehouse driveway onto Main Street, his vehicle and the plaintiff's vehicle collided." *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 180 Conn. App. 734–35.

Thereafter, the plaintiff, who was seriously injured in the collision, brought this action alleging that the collision was the result of Smith's negligent operation of his vehicle, and the municipal defendants were vicariously liable for Smith's negligence because he was their agent or employee and was performing duties within the scope of his employment at the time of the accident. The municipal defendants filed a motion for summary judgment, claiming that there was no genuine issue of material fact that Smith was not acting as the agent or employee of the fire company at the time of the accident because he had left the firehouse and was on his way home to attend to personal matters. Accordingly, they argued, there was no basis for vicarious liability. After the trial court summarily denied the motion, the municipal defendants filed a motion to reargue and for articulation. The trial court also denied that motion. On the day before jury selection was scheduled to commence, the municipal defendants filed a second motion to reargue and for reconsideration. The trial court granted that motion the same day. The next day, the trial court

vacated its prior decision denying the municipal defendants' motion for summary judgment, granted the motion and rendered judgment in favor of those defendants.[4]

The plaintiff then appealed to the Appellate Court. That court concluded that, because Smith was "in the process of leaving [the firehouse] to attend to his personal affairs" when the accident occurred, "he was no longer furthering the [municipal] defendants' interests at that time." Id., 739. Accordingly, the Appellate Court concluded that the trial court properly had determined that there was no genuine issue of material fact that Smith was not acting as the fire company's employee, and it affirmed the judgment of the trial court. See id., 744.

This certified appeal followed. The plaintiff contends that, contrary to the conclusions of the trial court and the Appellate Court, there is a genuine issue of material fact as to whether Smith was furthering the fire company's interests at the time of the accident and, therefore, was acting within the scope of his employment, because there was evidence that would support a finding that the fire company benefited from his presence in close proximity to the firehouse when he was "ready, willing and able" to respond immediately to any emergency calls that might come in. We disagree.

[4] In his appeal to the Appellate Court, the plaintiff claimed that the trial court improperly granted the municipal defendants' second motion to reargue and for reconsideration and then granted their motion for summary judgment without providing him with an opportunity to be heard on the issue. See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 180 Conn. App. 727. The Appellate Court concluded that the trial court improperly granted the motion for summary judgment without holding a hearing, as required by Practice Book § 11-12, but that the impropriety did not require reversal because it was harmless. See id., 730. That portion of the Appellate Court's opinion, concerning the trial court's failure to hold a hearing before granting the second motion to reargue and for reconsideration, is not at issue in this certified appeal because we limited certification to the issue of whether the ruling was correct on the merits.

We begin with the standard of review. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § 380 [now § 17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Allstate Ins. Co.* v. *Barron*, 269 Conn. 394, 405–406, 848 A.2d 1165 (2004).

We next review the legal principles governing an employer's vicarious liability for the acts of an employee. Under the doctrine of respondeat superior, "[a] master is liable for the wilful torts of his servant

committed within the scope of the servant's employment and in furtherance of his master's business." *Pelletier* v. *Bilbiles*, 154 Conn. 544, 547, 227 A.2d 251 (1967). "A servant acts within the scope of employment while engaged in the service of the master, and it is not synonymous with the phrase during the period covered by his employment. . . . While a servant may be acting within the scope of his employment when his conduct is negligent, disobedient and unfaithful . . . that does not end the inquiry. Rather, the vital inquiry in this type of case is whether the servant on the occasion in question was engaged in a disobedient or unfaithful conducting of the master's business, or was engaged in an abandonment of the master's business. . . . Unless [the employee] was actuated at least in part by a purpose to serve a principal, the principal is not liable." (Citations omitted; internal quotation marks omitted.) *A-G Foods*, *Inc.* v. *Pepperidge Farm*, *Inc.*, 216 Conn. 200, 209–10, 579 A.2d 69 (1990); see also *Harp* v. *King*, 266 Conn. 747, 782–83, 835 A.2d 953 (2003) ("[i]n determining whether an employee has acted within the scope of employment, courts look to whether the employee's conduct: [1] occurs primarily within the employer's authorized time and space limits; [2] is of the type that the employee is employed to perform; and [3] is motivated, at least in part, by a purpose to serve the employer").

The parties in the present case also rely on general agency principles. "Agency is defined as the fiduciary relationship [resulting] from [the] manifestation of consent by one person to another that the other shall act on his [or her] behalf and subject to his [or her] control, and consent by the other so to act . . . ." (Internal quotation marks omitted.) *Beckenstein* v. *Potter & Carrier*, *Inc.*, 191 Conn. 120, 132, 464 A.2d 6 (1983). "An essential ingredient of agency is that the agent is doing something at the behest and for the benefit of the princi-

pal." *Leary* v. *Johnson*, 159 Conn. 101, 105–106, 267 A.2d 658 (1970). "[I]t must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered in order for the doctrine [of respondeat superior] to apply." *Mitchell* v. *Resto*, 157 Conn. 258, 262, 253 A.2d 25 (1968).

"In most cases, it is the function of the jurors to determine from the facts before them whether . . . a servant was acting within the scope of his employment. . . . In some situations, however, the acts of the servant are so clearly without the scope of his authority that the question is one of law." (Citation omitted; internal quotation marks omitted.) *Brown* v. *Housing Authority*, 23 Conn. App. 624, 628, 583 A.2d 643 (1990), cert. denied, 217 Conn. 808, 585 A.2d 1233 (1991).

In the present case, the Appellate Court's conclusion that there was no genuine issue of material fact that Smith was not acting within the scope of his employment by the fire company at the time of the accident as a matter of law was based in large part on this court's decision in *Levitz* v. *Jewish Home for the Aged, Inc.*, 156 Conn. 193, 239 A.2d 490 (1968). See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, supra, 180 Conn. App. 743–44. In *Levitz*, the defendant Igors Blankenfeld was an employee of the defendant Jewish Home for the Aged, Inc. (Home), in New Haven. See *Levitz* v. *Jewish Home for the Aged, Inc.*, supra, 194. Blankenfeld also lived at the Home. See id., 195. On the date at issue, Blankenfeld left his room in the Home and went to the office, where he received his pay. Id., 196. He then left the Home and went to his vehicle, which was parked on a public road in front of the Home. Id., 195–96. He intended to drive the vehicle downtown to pay some of his own bills. See id., 196. When he started the vehicle, however, "it went out of control, mounted a curb and struck the plaintiff, [a resident of the Home] who was seated on the steps of the [Home's] premises." Id. The

plaintiff brought a negligence action against Blankenfeld and the Home, as Blankenfeld's employer. See id., 194. After the jury returned a verdict for the plaintiff against both defendants, the Home filed a motion to set aside the verdict and for judgment in its favor notwithstanding the verdict. See id. The trial court granted the motion on the ground that the evidence conclusively established that Blankenfeld was not acting on behalf of the Home at the time of the accident. See id. On appeal, this court affirmed the judgment of the trial court, concluding that "[t]he evidence is reasonably susceptible of but one conclusion, that is, that, at the time of the accident, Blankenfeld was not performing an act for the Home in furtherance of its business." Id., 197–98.

In the present case, Smith had left the firehouse, entered his own personal vehicle and driven the vehicle away from the premises with the intent of attending to his own personal affairs when the accident occurred. Thus, in the absence of any additional circumstances rendering the case meaningfully distinguishable, we would agree with the Appellate Court that *Levitz* is controlling here. The plaintiff contends that there are three such circumstances. First, the plaintiff contends that, unlike in the present case, there was no evidence in *Levitz* that Blankenfeld's off duty presence at the Home benefited his employer. Second, the plaintiff contends that Blankenfeld's presence at the Home "had nothing to do with his job and everything to do with his status as a resident," while Smith was present at the firehouse to be on call for emergencies. Third, he contends that Blankenfeld had left the Home's premises before entering his vehicle, whereas, in the present case, "Smith was still on [fire company] property when he negligently pulled into the plaintiff, and never successfully left the premises."

We can easily dispose of the plaintiff's second and third claims. With respect to the plaintiff's claim that *Levitz* is distinguishable because Blankenfeld had not been working at the Home before the accident occurred, this court expressly stated in *Levitz* that, "[e]ven if we were to assume that Blankenfeld had worked at his usual employment on the day of the accident, this fact, in the light of the other evidence, would not impose liability on the Home." *Levitz* v. *Jewish Home for the Aged, Inc.*, 156 Conn. 198. With respect to the plaintiff's claim that *Levitz* is distinguishable because Blankenfeld's car was not parked on the Home's premises, nothing in *Levitz* suggests that the result in that case turned on the precise location of Blankenfeld's vehicle when he entered it. Rather, the court's exclusive focus was on whether Blankenfeld was "performing an act for the Home in furtherance of its business" when he entered and drove the car. Id., 197–98.

Accordingly, we turn to the plaintiff's primary contention that this case is distinguishable from *Levitz* because Smith's presence in close proximity to the firehouse at the time of the accident benefited his employer. Specifically, the plaintiff contends that the evidence would support a finding that the fire company benefited from Smith's presence on the premises after he left the firehouse and entered his vehicle because he would have been available to respond immediately to an emergency call.

In support of this claim, the plaintiff relies on the Appellate Court's decision in *Glucksman* v. *Walters*, 38 Conn. App. 140, 659 A.2d 1217, cert. denied, 235 Conn. 914, 665 A.2d 608 (1995).[5] In *Glucksman*, the defendant,

[5] The plaintiff also relies on two Superior Court cases, *Ambrosio* v. *AWAC Services Co.*, Docket No. CV-12-6036172-S, 2014 WL 2854076 (Conn. Super. May 16, 2014), and *Sheftic* v. *Marecki*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-56764 (October 22, 1999) (25 Conn. L. Rptr. 584). Both of these cases are distinguishable. In *Ambrosio*, the court relied on the Appellate Court's decision in *Hodgate* v. *Ferraro*, 123 Conn. App. 443, 462, 3 A.3d 92 (2010)—a workers' compensation case—for the proposi-

Kris Walters, was a part-time employee of the defendant Young Men's Christian Association (YMCA) in Stamford. See id., 141, 142. During a pickup basketball game at the YMCA, Walters assaulted and seriously injured the plaintiff, Allen Glucksman, after Glucksman fouled Walters. See id., 142–43. Walters was not working his scheduled hours at the time, but evidence was presented that part-time employees of the YMCA "considered themselves to be on duty, ready to help maintain order in the facility, during work and off hours." Id., 143. The plaintiff brought a negligence action against both Walters and the YMCA, under the doctrine of respondeat superior. See id., 141. The trial court granted the YMCA's motion for a directed verdict in its favor. See id. The Appellate Court reversed that ruling on appeal; id., 148; concluding that the evidence would support findings that, "but for his position as an employee, Walters would not have been on the basketball court, that Walters had been responsible for helping to maintain order on the basketball court, that the YMCA benefited when Walters played basketball because it had an employee on the court to help keep

tion that "[t]he going and coming rule (which precludes recovery for injuries sustained in travel to and from the place of employment) has no application to employees who have no fixed place of employment. . . . Where injuries are incurred while an employee is traveling and it appears that it was the employment which impelled the employee to make the trip, the risk of the trip is a hazard of the employment." (Internal quotation marks omitted.) *Ambrosio* v. *AWAC Services Co.*, supra, *2. Thus, even if we were to assume that this principle of workers' compensation law applies when determining liability under the doctrine of respondeat superior, the case is distinguishable because the plaintiff has neither claimed nor cited any authority for the proposition that the firehouse was not Smith's fixed place of employment. In *Sheftic*, the court concluded that the so-called " 'going and coming rule' " that other jurisdictions have adopted in the context of vicarious liability claims does not apply in cases in which the employee has become intoxicated at a function hosted by the employer because, "[i]f the employer values the 'conviviality' it believes alcohol adds to the functions it sponsors, the employer should be expected to pay for any carnage on the highway resulting from intoxication." *Sheftic* v. *Marecki*, supra, 585–86. In the present case, the fire company did not provide any alcohol to Smith.

order, that the commission of fouls disrupts a basketball game, and that Walters attacked Glucksman in a misguided effort to prevent Glucksman from committing fouls and disrupting the game." Id., 145.

In the present case, the plaintiff contends that *Glucksman* supports his claim that Smith was acting within the scope of his employment when the accident occurred because, like Walters, Smith's presence at the firehouse was due to his employment there, and he was providing a benefit to the fire company by being ready, willing and able to respond immediately to emergency calls. The plaintiff fails to recognize, however, that, in *Glucksman*, Walters was not merely ready, willing and able to provide a benefit to the YMCA, *but he actually engaged in an effort to do so when he attempted to maintain order on the basketball court*. Thus, *Glucksman* does not support the proposition that an employee who is, in fact, attending to purely personal affairs, but who is ready, willing and able to provide a benefit to his employer if summoned to do so, may be deemed to be acting for the employer's benefit, even if the employee is not actually summoned and does not actually provide any beneficial services.

Cases from our sister jurisdictions addressing the question of whether on call employees are acting for the benefit of their employers merely by virtue of being on call are instructive on this issue. In *Wayman* v. *Accor North America, Inc.*, 45 Kan. App. 2d 526, 251 P.3d 640, review denied, 292 Kan. 969 (2011), Frederick Ristow was the general manager of a Motel 6, where he also lived. See id., 527–28. As part of his work duties, Ristow was "on call [twenty-four] hours per day to handle emergency situations." Id., 528. On the day in question, Ristow returned to the motel early in the afternoon after visiting out of state family members. See id. "After asking the manager on duty to stay so he could get something to eat, Ristow left the motel and went to [a nearby

tavern] where he stayed until approximately 8 p.m. drinking alcohol. . . . Although Ristow understood that he was on call if the manager on duty needed help at the motel, he did not receive any phone calls that day about problems at the motel." Id. Ristow left the tavern at approximately 8 p.m. and returned to the motel. See id. As he attempted to park his vehicle, he struck and injured the plaintiff, Donald Wayman, who was a guest at the motel and was standing near the doorway of his room. See id., 527–28. Wayman filed an action against both Ristow and, under a theory of vicarious liability, his employer. See id., 529. The trial court granted the employer's motion for summary judgment on the ground that Ristow had not been acting within the scope of his employment. See id., 530.

On appeal, the Court of Appeals of Kansas observed that "the modern rationale for vicarious liability is the enterprise justification concept . . . . Under such a justification, the losses caused by an employee's tort are placed on the enterprise as a cost of doing business and on the employer for having engaged in the enterprise." (Internal quotation marks omitted.) Id., 538. The court concluded that "[i]mposing vicarious liability on an employer for the negligent acts of an employee merely because the employee is on call does not serve this justification." Id. Because Ristow had been returning from a "purely personal . . . excursion" when the accident occurred, and had not been called to respond to any emergency at the motel, the court concluded that "he was not performing any work-related activity," despite the fact that the accident occurred in the motel parking lot. Id., 539; see also *Le Elder* v. *Rice*, 21 Cal. App. 4th 1604, 1608–1609, 26 Cal. Rptr. 2d 749 (1994) (when employee was on personal errand, fact that he was on call twenty-four hours per day seven days per week and had ability to respond to calls at any hour from any location did not mean that

his activities were within scope of employment, even though his being on call benefited employer); *Le Elder* v. *Rice*, supra, 1609 ("[p]ublic policy would be ill-served by a rule establishing [twenty-four] hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident"); *Le Elder* v. *Rice*, supra, 1610 ("[on call] accessibility or availability of an employee does not transform his or her private activity into company business"); *Migliore* v. *Gill*, 81 So. 3d 900, 903, 904 (La. App. 2011) (fact that employee was on call and expected to report to employer's premises within thirty minutes of being summoned did not give rise to vicarious liability when employee was driving personal vehicle and was engaged in strictly personal activity at time of accident, and employer had exercised no control over him), review denied, 84 So. 3d 555 (La. 2012); *Clickner* v. *Lowell*, 422 Mass. 539, 543–44, 663 N.E.2d 852 (1996) (for purposes of determining whether municipal employer was required to indemnify employee, fact that employee was on call and was attempting to call employer in response to page at time of accident did not mean that employee was acting within scope of employment duties); *Johnson* v. *Daily News, Inc.*, 34 N.Y.2d 33, 35–36, 312 N.E.2d 148, 356 N.Y.S.2d 1 (1974) (employer is not vicariously liable for acts of on call employee unless employee is "performing some act in furtherance of a duty he owes the employer and . . . the employer is, or could be, exercising some control, directly or indirectly, over his activity"); *Thurmon* v. *Sellers*, 62 S.W.3d 145, 155 (Tenn. App. 2001) (in determining whether on call employee is acting within scope of employment, court should consider whether employee's use of vehicle benefited employer, whether employee was subject to employer's control at time of accident, whether employee's activities were restricted while on call, whether employee's use of vehicle was authorized by employer and employee's primary reason for using vehicle at time of accident).

We recognize that the plaintiff in the present case has expressly denied making any claim that the fire company would be vicariously liable for any tort committed by Smith at any time that he was on call to respond to emergencies. Rather, he claims that the fire company is liable here only because Smith was still on or very close to the firehouse premises when the accident occurred and, therefore, that he would have been able to respond immediately if there had been an emergency call. We are aware of no authority, however, for the proposition that the test for determining whether an employee was acting within the scope of his employment or, instead, was merely on call, is *how long* it would have taken the employee to respond to the employer's call to return to duty *if* such a call had occurred. Rather, the test is whether, at the relevant time, the employer had actually exercised control over the employee and the employee was actually performing some act for the employer's benefit—*other* than the benefit inherent in merely being on call. Although we acknowledge that it may be difficult in some situations to determine the precise line between being on duty and being on call, we conclude in the present case that a reasonable jury could conclude only that, by the time that Smith entered his vehicle, at the very latest, he had embarked on the pursuit of purely personal affairs, and nothing that occurred after that point and before the accident brought him back under the control of the fire company.

The plaintiff, however, raises two additional claims to support his position that there is a genuine issue of material fact as to whether Smith was on duty when the accident occurred. First, he points to Dunn's testimony that he believed that a firefighter who had been involved in an accident while driving home after a call was still "on duty" at that time for purposes of workers' compensation law. See General Statutes § 31-275 (1) (A) (i)

("[f]or a police officer or firefighter, 'in the course of his employment' encompasses such individual's departure from such individual's place of abode to duty, such individual's duty, and the return to such individual's place of abode after duty"). Second, he contends that a jury reasonably could find that, as a *volunteer* firefighter, Smith was on duty for workers' compensation purposes because he testified that "he was following the orders of superior officers in being present at the firehouse on a weekend . . . ." See General Statutes § 7-314 (a) (with respect to volunteer firefighters, the term fire duties includes "duties performed while at fires, while answering alarms of fire, while answering calls for mutual aid assistance, while returning from calls for mutual aid assistance, while directly returning from fires, while at fire drills or parades, while going directly to or returning directly from fire drills or parades, while at tests or trials of any apparatus or equipment normally used by the fire department, while going directly to or returning directly from such tests or trials, while instructing or being instructed in fire duties, while answering or returning from ambulance calls where the ambulance service is part of the fire service, while answering or returning from fire department emergency calls and any other duty ordered to be performed by a superior or commanding officer in the fire department"); see also *Evanuska* v. *Danbury*, 285 Conn. 348, 352, 939 A.2d 1174 (2008) (proof that injury was sustained during performance of "fire duties" within meaning of § 7-314 [a] is predicate to filing workers' compensation claim pursuant to General Statutes § 7-314a [a]); *Evanuska* v. *Danbury*, supra, 357–58 ("General Statutes §§ 7-314a and 7-314b are the only procedural vehicles available for volunteer firefighters to obtain workers' compensation benefits for injuries

sustained while performing fire duties" [footnote omitted]).[6]

We are not persuaded. Even if we were to assume that Smith was acting within the scope of his employment for purposes of workers' compensation law—an issue on which we express no opinion—that would not necessarily mean that he was acting within the scope of his employment for purposes of imposing vicarious liability on his employer. The public policies underlying workers' compensation and the doctrine of respondeat superior are very different.[7] Specifically, "[t]he purpose

[6] The municipal defendants appear to contend that the definition of "fire duties" set forth in § 7-314b (b) is the exclusive definition for workers' compensation purposes. See General Statutes § 7-314b (b) (defining " 'fire duties' " as "duties performed while at fires, answering alarms of fire, answering calls for mutual aid assistance, returning from calls for mutual aid assistance, at fire drills or training exercise, and directly returning from fires"). In *Evanuska*, however, this court applied the definition of "fire duties" set forth in § 7-314 (a) to a workers' compensation claim brought pursuant to § 7-314a (a). See *Evanuska* v. *Danbury*, supra, 285 Conn. 352.

[7] Indeed, "courts have repeatedly noted the distinction between [workers'] compensation law and the theory of vicarious liability." *Wayman* v. *Accor North America, Inc.*, supra, 45 Kan. App. 2d 537, citing *O'Shea* v. *Welch*, 350 F.3d 1101, 1106 (10th Cir. 2003) ("[w]e also agree that the public policies behind [workers'] compensation and third party liability cases are different"), *Garcia* v. *Estate of Arribas*, 363 F. Supp. 2d 1309, 1318 (D. Kan. 2005) ("[workers'] compensation laws . . . are quite different, in many respects, from the laws pertaining to the liability of employers to third parties"), *Stokes* v. *Denver Newspaper Agency, LLP*, 159 P.3d 691, 693–95 (Colo. App. 2006) (discussing differences between respondeat superior and workers' compensation theories of recovery), cert. denied, Colorado Supreme Court, Docket No. 06SC697 (April 23, 2007), and *Salt Lake City Corp.* v. *Labor Commission*, 153 P.3d 179, 182 (Utah 2007) ("[w]ith very different presumptions governing [workers'] compensation and negligence cases, it would not be wise to hold that the rules governing scope of employment questions in one area are wholly applicable to the other" [internal quotation marks omitted]).

In support of his claim that this court should be guided by principles of workers' compensation law in the present case, the plaintiff relies on this court's statement that "a charge relating to principles of law enunciated in workers' compensation cases is equally applicable to cases brought under the common law." *Cirrito* v. *Turner Construction Co.*, 189 Conn. 701, 705, 458 A.2d 678 (1983); see also id. (for purpose of construing scope of indemnification clause in construction contract that was intended to protect general contractor from potential liability as principal employer under workers' compensation statutes by requiring reimbursement from subcontractors for compensation payments for which it might be obligated, court considered principles of workers' compensation law); *D'Addario* v. *American Automo-*

of the [workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . The Workers' Compensation Act compromise[s] an employee's right to a [common-law] tort action for work related injuries in return for relatively quick and certain compensation." (Citation omitted; internal quotation marks omitted.) *Panaro* v. *Electrolux Corp.*, 208 Conn. 589, 598–99, 545 A.2d 1086 (1988). In contrast, the public policy underlying the doctrine of respondeat superior is that "substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit." (Internal quotation marks omitted.) *Chase* v. *New Haven Waste Material Corp.*, 111 Conn. 377, 380, 150 A. 107 (1930). Accordingly, although there may be some overlap in the factors to be considered in determining whether an employee is acting within the scope of his employment for purposes of workers' compensation law—many of which are established by statute—and the factors to be considered under the doctrine of respondeat superior, there is no reason to expect that those factors will be identical in all respects. We conclude, therefore, that, even if the plaintiff were correct that Smith was acting within the scope of his employment for purposes of workers' compensation law at the time of the accident because he was in close proximity to the firehouse, where he had been engaged in fire duties for purposes of § 7-314,

bile Ins. Co., 142 Conn. 251, 254, 113 A.2d 361 (1955) (for purpose of construing scope of exclusion from insurance policy for any obligation for which insured could be held liable under workers' compensation law, court considered workers' compensation principles). We are not persuaded. In *Cirrito* and *D'Addario*, this court merely recognized that principles of workers' compensation law governing the scope of employment are relevant when construing a contract that was intended to incorporate those principles. The cases do not support the proposition that this court is *bound* by principles of workers' compensation law whenever it is required to determine whether activities were within the scope of employment for any other purpose.

Smith was not acting within the scope of his employment for purposes of establishing vicarious liability because he was engaged in the pursuit of purely personal affairs and was not acting for the benefit of or under the control of the fire department when the accident occurred.

For the foregoing reasons, we conclude that a reasonable jury, properly instructed in the legal principles governing the doctrine of respondeat superior, could conclude only that Smith was engaged in the pursuit of personal affairs when the accident occurred, and he was not acting for the benefit of the fire company or in furtherance of its interests. Accordingly, we conclude that the Appellate Court properly upheld the trial court's grant of summary judgment in favor of the municipal defendants on the ground that there is no genuine issue of material fact that Smith was not acting within the scope of his employment at the time of the accident and, therefore, that the municipal defendants could not be held vicariously liable for his negligence as a matter of law. We therefore affirm the judgment of the Appellate Court.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.