# ELANA GERSHON *v.* RONALD BACK
## (SC 20599)

McDonald, D'Auria, Mullins, Ecker and Alexander, Js.

*Syllabus*

The plaintiff, whose marriage to the defendant previously had been dissolved by a New York court, appealed to the Appellate Court from the judgment of the trial court, which dismissed her motion to open and set aside the final New York judgment of divorce for lack of subject matter jurisdiction. Before their marriage, the parties entered into a prenuptial agreement, pursuant to which the plaintiff waived her interest in certain of the defendant's business interests. During the divorce proceedings, the plaintiff challenged the enforceability of the prenuptial agreement, but the New York court rejected the claim, finding no evidence of fraud or overreaching by the defendant. The parties eventually settled their dispute by way of a separation agreement, which superseded the prenuptial agreement and resolved the parties' respective financial and property rights. The separation agreement also included a choice of law provision, which designated New York law as governing the agreement, and a provision incorporating New York's plenary action rule, which requires a party seeking to modify or vacate a separation agreement that survives a final judgment of divorce to file a plenary action on the contract instead of a motion to open, modify or vacate the divorce judgment. The final judgment of divorce incorporated the separation agreement by reference but provided that the separation agreement would survive and not be merged into the judgment. The parties both later moved to Connecticut, where the plaintiff registered the New York divorce judgment pursuant to statute (§ 46b-71 (a)). Thereafter, the plaintiff moved to open and set aside the divorce judgment in the Superior

Court, claiming that it was obtained through the defendant's fraudulent conduct. The plaintiff requested that the Connecticut court open the New York divorce judgment and vacate the settlement agreement. Applying New York law, the trial court concluded that, because the separation agreement was incorporated but not merged into the divorce judgment, the plaintiff could not challenge the enforceability of the agreement by way of a motion but, rather, was required to do so by commencing a plenary action. The trial court then dismissed the plaintiff's motion for lack of subject matter jurisdiction and rendered judgment for the defendant. The Appellate Court agreed with the trial court that New York's plenary action rule was substantive for choice of law purposes but disagreed with the trial court's conclusion that the trial court lacked subject matter jurisdiction, relying on, among other things, the jurisdiction conferred by § 46b-71 (b). Accordingly, the Appellate Court concluded that the trial court should have denied, rather than dismissed, the plaintiff's motion to open and set aside the divorce judgment. On the granting of certification, the plaintiff appealed to this court from the Appellate Court's judgment.

*Held* that the Appellate Court correctly concluded that the New York plenary action rule is substantive, and not procedural, for choice of law purposes and that the trial court should have denied, rather than dismissed, the plaintiff's motion to open and set aside the divorce judgment:

Under the conflict of law rules governing foreign matrimonial judgments registered in Connecticut, as codified in § 46b-71 (b), the plaintiff's motion to open and set aside the divorce judgment was governed by New York substantive law and Connecticut procedural law, and that approach was consistent with the well established principle that, in a choice of law situation, the forum state will apply its own rules to issues of procedure and matters of judicial administration, even if the substantive law of another jurisdiction applies, because it would often be disruptive or difficult to apply the local rules of another state.

Although New York's plenary action rule, which is principally concerned with preserving the parties' vested contractual rights to enforce the separation agreement in a separate civil action, fell into a gray area between issues relating primarily to judicial administration and those concerned primarily with the rights and liabilities of the parties, this court concluded that the plenary action rule was so interwoven with the plaintiff's cause of action as to be deemed substantive for choice of law purposes.

The fact that the parties explicitly incorporated the New York plenary action rule into the separation agreement, which provided that their contractual rights could not be invalidated or otherwise affected by any final judgment of divorce, was a weighty reason for applying that law

rather than the local law of the forum, insofar as it demonstrated that the issue was one to which the parties had likely given thought.

Moreover, the application of the New York plenary action rule would affect the ultimate substantive outcome of the case because the parties had contractual rights that could not be undone by modifying the divorce judgment, there was, to this court's knowledge, no settled precedent classifying the plenary action rule as procedural or substantive for choice of law purposes, and the application of that rule would not impose an undue burden on Connecticut courts, which have recognized that separation agreements are contracts that may be litigated independently of a divorce judgment in a civil action sounding in contract.

Argued October 13, 2022—officially released February 21, 2023

*Procedural History*

Motion by the plaintiff to open a foreign judgment of dissolution, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Michael E. Shay*, judge trial referee, dismissed the plaintiff's motion, and the plaintiff appealed to the Appellate Court, *Lavine*, *Bright* and *Beach*, *Js.*, which reversed the judgment of the trial court and remanded the case with direction to deny the motion, from which the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

*James P. Sexton*, with whom were *Julia K. Conlin* and, on the brief, *John R. Weikart*, for the appellant (plaintiff).

*Kenneth J. Bartschi*, with whom were *Karen L. Dowd* and, on the brief, *Wesley W. Horton* and *Joseph T. O'Connor*, for the appellees (defendants).

*Opinion*

ECKER, J. New York's so-called "plenary action rule" requires a party seeking to modify or vacate a separation agreement that survives a final judgment of divorce to file a plenary action on the contract instead of a motion to open, modify or vacate the divorce judgment. This certified appeal requires us to determine whether New

York's plenary action rule is procedural or substantive for choice of law purposes. The trial court concluded that the rule was substantive and dismissed for lack of subject matter jurisdiction the motion, filed by the plaintiff, Elana Gerson, to open and set aside the final judgment of divorce. The Appellate Court agreed that the New York rule was substantive but disagreed that the trial court lacked subject matter jurisdiction and, therefore, concluded that the plaintiff's motion should have been denied instead of dismissed. *Gershon* v. *Back*, 201 Conn. App. 225, 253–54, 242 A.3d 481 (2020). We affirm the judgment of the Appellate Court.

This case has a long and contentious history. The plaintiff and the defendant, Ronald Back,[1] were married on August 16, 1997. Prior to their marriage, the parties entered into a prenuptial agreement, pursuant to which the plaintiff waived her interest in the defendant's separate property, including his business interest in Flavormatic Industries (Flavormatic). During their marriage, the parties resided in New York and had two children. In February, 2009, the parties separated, and the plaintiff commenced a divorce action in the New York Supreme Court (New York court). The plaintiff challenged the enforceability of the prenuptial agreement, but the New York court rejected the plaintiff's claim, finding that she "had presented no evidence establishing that the prenuptial agreement was procured by the defendant's fraud or overreaching." (Emphasis omitted; internal quotation marks omitted.)

In April, 2011, during their divorce trial, the parties settled their dispute by entering into a "[s]tipulation of [s]ettlement and [a]greement" (separation agreement), which superseded the prenuptial agreement and resolved

[1] The defendant died on December 18, 2020, and the coexecutors of his estate, Adam Cotumaccio and Pamela Chupka, were substituted as defendants. All references to the defendant in this opinion are to Back.

the parties' "respective financial and property rights, support, and all other respective rights, remedies, privileges and obligations to each other, arising out of the marriage . . . ." Pursuant to the separation agreement, the parties agreed to keep their own separate property and the income and appreciation thereof "free from any claim whatsoever from the other party." Additionally, the parties agreed to waive their respective rights to each other's retirement accounts and to divide the proceeds of the sale of the marital residence. The defendant also agreed to pay the plaintiff $400,000 "[a]s further equitable distribution of the parties' assets . . . ." The separation agreement contains a choice of law provision, which provides that "[a]ll matters affecting the execution, interpretation, performance and enforcement of this [a]greement and the rights of the parties hereto shall be governed by the laws of the [s]tate of New York."

The separation agreement incorporates New York's plenary action rule by explicitly providing that it "shall not be invalidated or otherwise affected by any decree or judgment of separation or divorce made by any court in any action [that] may presently exist or may hereafter be instituted by either party against the other for a separation or divorce, and the obligations and covenants of this [a]greement shall survive any decree or judgment of separation or divorce and shall not merge therein, and this [a]greement may be enforced independently of such decree or judgment." The separation agreement also states that "[b]oth parties agree, stipulate and consent that no judgment, order or decree in any action for divorce or separation, whether brought in the [s]tate of New York, or in any other state or country having jurisdiction [over] the parties hereto, shall make any provisions for alimony or child support or affect the property rights of either party in a manner inconsistent with the provisions of this [a]greement, but if any provi-

sion is made in any judgment, order or decree which is inconsistent with the provisions of this [a]greement, or imposes a different or greater obligation on either of the parties hereto than provided in this [a]greement, the provisions of this [a]greement shall take precedence and shall be the primary obligation of both of the parties hereto. It is further agreed that upon the trial of any action [that] may hereafter be instituted by either of the parties against the other for an absolute divorce in any court of competent jurisdiction, the party instituting such action shall read the provisions of this [a]greement relating to maintenance and support into the record of such action as a stipulation between the parties as to the questions of maintenance and support. Such party shall further request that the decree shall contain a provision specifically reciting, in words or substance, 'said [a]greement is not merged in, but survives this decree, and the parties thereof are hereby ordered to comply with it on its terms at all times and places.' "

On May 11, 2011, the New York court dissolved the parties' marriage in a final judgment of divorce, which incorporated the separation agreement by reference but provided that the separation agreement "shall survive and shall not be merged in this judgment . . . ." The judgment of divorce further stated that "jurisdiction over all matters affecting the execution, interpretation, performance and enforcement of this judgment [and/or] the [separation agreement] . . . shall be as specifically provided by the parties' [separation agreement]."

The plaintiff remarried three days later and moved to Greenwich with her new husband and the parties' children. The defendant later remarried and moved to Connecticut, as well. On October 27, 2014, the plaintiff registered the final judgment of divorce in the Superior Court in the judicial district of Stamford-Norwalk pursuant to General Statutes § 46b-71.[2]

[2] General Statutes § 46b-71 provides: "(a) Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified

Extensive litigation in the Superior Court followed. In November, 2014, the plaintiff moved to modify the judgment to increase the defendant's child support obligations, arguing that "there has been a substantial change in circumstances since the date of judgment in that three years have passed since the order was entered . . . and the defendant's income has increased by at least [15] percent . . . ."[3] In connection with this

copy of the foreign matrimonial judgment, in the court in this state in which enforcement of such judgment is sought, a certification that such judgment is final, has not been modified, altered, amended, set aside or vacated and that the enforcement of such judgment has not been stayed or suspended, and such certificate shall set forth the full name and last-known address of the other party to such judgment and the name and address of the court in the foreign state which rendered such judgment.

"(b) Such foreign matrimonial judgment shall become a judgment of the court of this state where it is filed and shall be enforced and otherwise treated in the same manner as a judgment of a court in this state; provided such foreign matrimonial judgment does not contravene the public policy of the state of Connecticut. A foreign matrimonial judgment so filed shall have the same effect and may be enforced or satisfied in the same manner as any like judgment of a court of this state and is subject to the same procedures for modifying, altering, amending, vacating, setting aside, staying or suspending said judgment as a judgment of a court of this state; provided, in modifying, altering, amending, setting aside, vacating, staying or suspending any such foreign matrimonial judgment in this state the substantive law of the foreign jurisdiction shall be controlling."

[3] Under the final judgment of divorce, "[e]ach party has a right to seek a modification of the child support order upon a showing of: (i) a substantial change in circumstances; or (ii) that three years have passed since the order was entered, last modified or adjusted; or (iii) there has been a change in either party's gross income by [15] percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out [of] subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply." (Emphasis omitted.) See N.Y. Dom. Rel. Law § 236 (9) (b) (2) (i) (McKinney Cum. Supp. 2021) ("[t]he court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances"); N.Y. Dom. Rel. Law § 236 (9) (b) (2) (ii) (A) and (B) (McKinney Cum. Supp. 2021) ("[i]n addition, unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where . . . three years have passed since the order was entered, last modified or adjusted; or . . . there has been a change in either party's gross income by fifteen percent or more since the order was

motion, the plaintiff obtained discovery regarding the defendant's finances for the three years preceding the filing of the motion. Following full disclosure of the parties' respective finances, the trial court granted the plaintiff's motion, increased the defendant's child support obligation, and awarded the plaintiff attorney's fees.

After the trial court's order issued, there was a flurry of further litigation, including motions for reargument filed by both parties, the defendant's motion to offset his child support obligation with a credit for college room and board expenses, and the plaintiff's motions for contempt due to the defendant's failure to pay the retroactive amount of his increased child support obligation and the plaintiff's attorney's fees. The trial court denied the motions for reargument, granted the defendant's motion for a credit, and denied the plaintiff's motions for contempt.

The plaintiff then filed a motion to open and set aside the divorce judgment, which is the operative motion at issue in this appeal. In her motion, the plaintiff claimed that she had learned during the modification proceeding that the divorce judgment "was obtained through the fraudulent conduct of the defendant" in that he "made material misrepresentations of fact to the court and to the plaintiff in his sworn financial statement provided at the time of the settlement." Specifically, referring to the defendant's "[a]ttached 2010 [i]ncome [i]nformation," the plaintiff alleged that the defendant's sworn statement of net worth dated April 1, 2011, listed his gross income for the year 2011 as "0.00," even though his W-2 form reported wages from Flavormatic in the

entered, last modified or adjusted"). In its memorandum of decision on the plaintiff's motion for modification, the trial court found that the parties clearly had not opted out of subparagraphs (ii) or (iii) in the separation agreement.

amount of $1,900,000 in 2011.[4] (Emphasis omitted; internal quotation marks omitted.) The plaintiff further alleged that the defendant "stockpiled money in his corporation in order to avoid equitable distribution of marital assets and to avoid paying alimony and child support." (Emphasis omitted.) According to the plaintiff, "there is a reasonable probability that the result of the settlement would have been different had the defendant not made material misrepresentations of fact . . . ." The plaintiff's motion asked the court to open the final judgment of divorce, to vacate the settlement agreement, to order a new trial, and to award the plaintiff attorney's fees. In an accompanying memorandum of law, the plaintiff requested postjudgment discovery, arguing that she had met her burden under *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 540 A.2d 713 (1988), of demonstrating sufficient indicia of fraud to justify opening the judgment and conducting further discovery. See id., 270 (plaintiff was permitted to conduct postjudgment discovery if she "was able to substantiate her allegations of fraud beyond mere suspicion").

The defendant opposed the plaintiff's motion to open, arguing that the plaintiff had failed to state a claim for fraud or misrepresentation under New York law because the defendant's 2011 statement of net worth was not inaccurate. The defendant explained that his "income for 2011 could not be listed in March of 2011, [because] over 75 percent of the year remained," and, instead, "[a]s properly and plainly stated in the statement of net worth, [the defendant] listed his total income for 2010 [because] that was the last full year of income avail able." (Emphasis omitted.) The defendant further claimed that (1) the plaintiff was collaterally estopped from litigating the issue of the defendant's net worth because she "was provided with substantial discovery regarding

[4] The defendant's attached 2010 income information included his W-2 form from Flavormatic, which listed his wages and earnings as $150,000.

[the defendant's] businesses during the divorce action" and previously had claimed in that action, prior to its settlement, that the defendant was stockpiling income in Flavormatic, (2) the plaintiff ratified the separation agreement by accepting the benefits of the agreement for more than seven years, and (3) the plaintiff's motion was untimely under the New York statute of limitations governing claims of fraud.

The trial court conducted a three day evidentiary hearing pursuant to *Oneglia* to determine whether the plaintiff could substantiate her allegations of fraud to a sufficient degree to allow postjudgment discovery. At the hearing, the trial court heard testimony from the defendant, the plaintiff, and the plaintiff's expert witness in forensic accounting, who testified regarding the defendant's income and retained earnings in Flavormatic for the year 2011.

Following the hearing, the trial court issued a memorandum of decision, denying the plaintiff's request for postjudgment discovery. The trial court concluded that the choice of law provision in the separation agreement "was arrived at without any fraud or duress, and with the advice of counsel, [that] it should be given effect," and, therefore, that New York law "relating to postjudgment discovery in matrimonial cases . . . should ultimately control and not *Oneglia* . . . ." The court observed that, in New York, postjudgment discovery is not permitted unless there is "an affirmative, factual showing, at least prima facie, that the agreement was unfair or unreasonable when executed or unconscionable at the time of the [rendering] of final judgment." (Emphasis omitted; internal quotation marks omitted.) Applying this standard, the court concluded that the plaintiff had "failed to meet her burden, with at least a prima facie showing, either that the [separation agreement] was unfair or unreasonable when negotiated, or unconscionable when the [divorce] judgment was [ren-

dered], or that the defendant's actions amounted to wilful fraud or fraudulent concealment. Moreover, she has not established that, even if the judgment were to be opened and the [separation agreement] were to be set aside . . . that the resulting judgment would likely be substantially different," reasoning that (1) the New York court had sustained the validity of the parties' prenuptial agreement, finding no evidence of fraud or overreaching, (2) under the prenuptial agreement, the " 'operative event' " for purposes of the division of marital property was the filing of the complaint for divorce in February, 2009, and, therefore, "the relevant income [was] not the defendant's income for 2011 but, rather, that of the years 2004 through 2008," (3) the large increase in the defendant's income following the rendering of the final judgment of divorce in 2011 was not the product of "fraud or fraudulent intent on the part of the defendant" but plausible business decisions, and (4) "the plaintiff has accepted the benefit of the agreement for more than three years and, by so doing, 'effectively ratified' it, and she should be estopped from challenging it on the basis of fraud."

Having determined that the plaintiff was not entitled to postjudgment discovery, the trial court addressed New York law regarding the finality of judgments "in family relations matters, [when] the judgment is based [on] an agreement of the parties." The trial court considered it critically important that the separation agreement was incorporated but not merged into the final judgment of divorce, pointing out that, in New York, "[i]t is well settled that a party to a stipulation that is incorporated but not merged into a judgment of divorce cannot challenge the enforceability of the stipulation by way of a motion but, rather, must do so by commencement of a plenary action." The trial court ordered the parties to show cause why the plaintiff's motion to

open and set aside the judgment "should not be denied consistent with New York law."

The trial court entertained oral argument on its order to show cause, after which it dismissed the plaintiff's motion for lack of subject matter jurisdiction. The court explained that, under New York law, a final judgment of divorce "cannot [be] attack[ed] . . . based on a motion to open. It must be done by a plenary action, a contract action . . . ." Accordingly, the court rendered judgment in favor of the defendant.

The plaintiff appealed from the judgment of the trial court to the Appellate Court, claiming, among other things, that the trial court improperly had applied "New York procedural rules, rather than Connecticut procedural rules, when it dismissed [her] motion."[5] *Gershon* v. *Back*, supra, 201 Conn. App. 227. The Appellate Court disagreed, holding that "the New York rule requiring a plenary action to challenge the terms of a settlement agreement, incorporated but not merged into the judgment of dissolution, is substantive [for choice of law purposes]." Id., 249. The Appellate Court reasoned that, under New York law, "[a] stipulation of settlement not merged into the judgment is independently binding on the parties, and New York courts may not impair the parties' contractual rights under the agreement by modifying the divorce judgment." Id., 251. Because New York's plenary action rule "affects the very existence of the cause

[5] The plaintiff also claimed that the trial court "(1) improperly addressed the merits of the motion to open after determining that it lacked subject matter jurisdiction, (2) abused its discretion by failing to grant her motion for a continuance after her counsel disclosed that she intended to withdraw her appearance, and (3) erred in finding that the plaintiff had failed to demonstrate probable cause for postjudgment discovery under *Oneglia* . . . or comparable New York law." *Gershon* v. *Back*, supra, 201 Conn. App. 227 n.1. The Appellate Court did not address the plaintiff's additional claims in light of its conclusion that "the plaintiff was required to raise her claims with respect to the parties' [separation agreement] by means of a plenary action." Id.

of action," the Appellate Court concluded that it was "substantive and not procedural." Id., 253.

Although the Appellate Court agreed "with the [trial] court's conclusion that, under New York substantive law, the plaintiff was required to bring a plenary action"; id.; it disagreed "with the [trial] court's conclusion that it lacked subject matter jurisdiction." Id., 254. The Appellate Court observed that the trial "court had jurisdiction to consider the motion to open pursuant to [General Statutes] §§ 46b-1 and 46b-71 (b)" and, therefore, concluded that the trial court "should have denied, rather than dismissed, the motion to open." Id. We subsequently granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly determine that a New York law is substantive rather than procedural for choice of law purposes when that law would require a litigant in the parties' circumstances who is seeking to obtain post-judgment relief in a marital dissolution case to file a plenary action rather than a motion to open the dissolution judgment?" *Gershon* v. *Back*, 337 Conn. 901, 901–902, 252 A.3d 364 (2021).

On appeal to this court, the plaintiff claims that New York's plenary action rule is procedural for choice of law purposes and, therefore, inapplicable to this Connecticut action because it merely designates the means by which to vindicate her common-law contractual rights. The defendant responds that New York's plenary action rule is substantive because the parties' common-law contractual rights under the separation agreement are independent of the divorce judgment, and an order opening, modifying, or vacating the divorce judgment cannot affect those rights.[6] For the reasons that follow, we agree with the defendant.

[6] The defendant also claims that this certified appeal is moot because the trial court's judgment may be affirmed on the alternative ground that the plaintiff ratified the separation agreement and, therefore, is estopped from challenging it on the basis of fraud. "Undoubtedly, if there exists an unchal-

"It is well settled that [c]hoice of law questions are subject to de novo review." (Internal quotation marks omitted.) *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 599, 211 A.3d 976 (2019). To determine whether New York or Connecticut law governs a motion to open and vacate a New York judgment of divorce registered pursuant to § 46b-71, we apply Connecticut's conflict of law rules. See id. Subsection (b) of § 46b-71 codifies the conflict of law rules governing a foreign matrimonial judgment registered in this state and provides in relevant part that such a judgment "shall have the same effect and may be enforced or satisfied in the same manner as any like judgment of a court of this state and is subject to the same procedures for modifying, altering, amending, vacating, setting aside, staying or suspending said judgment as a judgment of a court of

lenged, independent ground to support a decision, an appeal from that decision would be moot, as this court could not afford practical relief even if the appellant were to prevail on the issue raised on appeal." *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018). To render an appeal moot, however, the unchallenged ground must be independent of the issue on appeal, meaning that resolution of the issue on appeal would not and could not affect a separate unchallenged basis on which to affirm the underlying judgment. See id., 211–12 (appeal was not moot because trial court's factual finding regarding valuation of property was not independent of issue on appeal). In the present case, the trial court's resolution of the ratification issue was not independent of its resolution of the choice of law question because the trial court's application of New York law to the plaintiff's request for postjudgment discovery led it to conclude that the plaintiff had produced insufficient evidence of fraud and, therefore, was estopped from challenging the agreement. See, e.g., *Brennan* v. *Brennan*, 305 App. Div. 2d 524, 525, 759 N.Y.S.2d 744 (2003) (concluding that separation agreement had been ratified in absence of evidence of fraud); *Wilson* v. *Neppell*, 253 App. Div. 2d 493, 494, 677 N.Y.S.2d 144 (same), appeal denied, 92 N.Y.2d 816, 706 N.E.2d 747, 683 N.Y.S.2d 759 (1998); *Shalmoni* v. *Shalmoni*, 141 App. Div. 2d 628, 629, 529 N.Y.S.2d 538 (same), appeal dismissed, 73 N.Y.2d 851, 534 N.E.2d 333, 537 N.Y.S.2d 495 (1988); see also *Ronson* v. *Ronson*, 58 App. Div. 2d 987, 988, 396 N.Y.S.2d 939 (1977) ("In order to vitiate the support agreement, [a party] is required to show facts in evidentiary form. Conclusory assertions of fraud are insufficient . . . ." (Citations omitted.)). Because the choice of law and ratification issues are related, we conclude that the plaintiff's appeal is not moot.

this state; provided, in modifying, altering, amending, setting aside, vacating, staying or suspending any such foreign matrimonial judgment in this state the substantive law of the foreign jurisdiction shall be controlling." The plaintiff's motion to open and set aside the judgment is governed by New York substantive law and Connecticut procedural law.

This approach is consistent with the Restatement (Second) of Conflict of Laws and the well established principle that, "in a choice of law situation the forum state will apply its own procedure . . . ." (Internal quotation marks omitted.) *Reclaimant Corp.* v. *Deutsch*, supra, 332 Conn. 603. As we explained in *Reclaimant Corp.*, under § 122 of the Restatement (Second), " '[t]he forum has compelling reasons for applying its own rules' to procedural issues, even if the substantive law of another jurisdiction applies, because, 'in matters of judicial administration, it would often be disruptive or difficult . . . to apply the local rules of another state. The difficulties involved in doing so would not be repaid by a furtherance of the values that the application of another state's local law is designed to promote.' " Id., 604, quoting 1 Restatement (Second), Conflict of Laws § 122, comment (a), p. 350 (1971).

The line between substance and procedure is not always easily drawn. "[Although] there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights [whereas] a procedural law prescribes the methods of enforcing such rights or obtaining redress." (Internal quotation marks omitted.) *Weber* v. *U.S. Sterling Securities, Inc.*, 282 Conn. 722, 739, 924 A.2d 816 (2007). Although procedural rules generally "relate to the remedy as distinguished from the right," we have recognized that some rules are "so interwoven with . . . the cause of action as to become one of the congeries of elements necessary to establish

the right . . . .'' (Internal quotation marks omitted.) *Reclaimant Corp.* v. *Deutsch*, supra, 332 Conn. 604–605; see *Thomas Iron Co.* v. *Ensign-Bickford Co.*, 131 Conn. 665, 669, 42 A.2d 145 (1945) (foreign law is substantive when ''the foreign remedy is so inseparable from the cause of action that it must be enforced to preserve the integrity and character of the cause [of action]'' (internal quotation marks omitted)). Section 122 of the Restatement (Second) eschews ''unthinking adherence'' to formal labels such as '' 'procedural' '' and '' 'substantive,' '' and, instead, suggests that courts ''face directly the question whether the forum's rule should be applied.'' 1 Restatement (Second), supra, § 122, comment (b), p. 352. To determine whether the forum's rule should be applied to rules that ''fall into a gray area between issues relating primarily to judicial administration and those concerned primarily with the rights and liabilities of the parties,'' § 122 instructs courts to consider the following factors: (1) ''whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction''; (2) ''whether the issue is one [the] resolution [of which] would be likely to affect the ultimate result of the case''; (3) ''whether the precedents have tended consistently to classify the issue as 'procedural' or 'substantive' for [choice of law] purposes''; and (4) ''whether an effort to apply the rules of the judicial administration of another state would impose an undue burden [on] the forum.'' Id., comment (a), pp. 351–52.

With these principles in mind, we turn to New York's plenary action rule and the principles on which it is based. Unlike Connecticut courts, New York courts do not review the provisions of a separation agreement to ensure that the agreement is fair and equitable to the parties prior to rendering a final judgment of divorce. Compare N.Y. Dom. Rel. Law § 236 (3) (McKinney Cum. Supp. 2021) (''[a]n agreement by the parties, made

before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded"), with General Statutes § 46b-66 (a) (court presented with separation agreement "shall inquire into the financial resources and actual needs of the parties . . . in order to determine whether the agreement of the parties is fair and equitable under all the circumstances"). Whereas, in Connecticut, separation agreements typically are merged into the final judgment of divorce after they have been approved by the court, in New York, separation agreements typically are not merged but, instead, survive the judgment.

One reason why separation agreements typically are not merged into the final judgment of divorce in New York is to avoid placing the imprimatur of the court on the agreement and "misleading spouses into believing [that] such [agreements have been determined] to be valid . . . ." (Citation omitted.) *Jaslow* v. *Jaslow*, 75 App. Div. 2d 876, 878, 427 N.Y.S.2d 292 (1980). The principal reason for this practice, however, is to preserve the contractual rights of the parties to enforce the separation agreement in a separate civil action. An unmerged "separation agreement continues in effect as a separate and independent contractual arrangement between the parties . . . . Thus, a change in the divorce decree cannot modify the separation agreement absent a clear expression by the parties of such an intent." (Citations omitted.) *Kleila* v. *Kleila*, 50 N.Y.2d 277, 283, 406 N.E.2d 753, 428 N.Y.S.2d 896 (1980). The unmerged separation agreement "survives as a separate contract to which the parties are bound. Consequently, [although] a judgment of divorce can be attacked [by a postjudgment motion], the separation agreement will remain unimpeached unless challenged in a plenary action . . . ." (Citation omitted.) *Lambert* v. *Lambert*, 142

App. Div. 2d 557, 558, 530 N.Y.S.2d 223 (1988); see *Fine* v. *Fine*, 191 App. Div. 2d 410, 411, 594 N.Y.S.2d 309 (1993) ("The stipulation of settlement is an independent contract binding on the parties . . . and the court may not impair the plaintiff's contractual rights under the agreement by modifying the divorce judgment . . . . The proper manner for the defendant to challenge the terms of the stipulation of settlement is in a plenary action . . . ." (Citations omitted.)). In a plenary contract action, the separation agreement is "subject to principles of contract construction and interpretation"; (internal quotation marks omitted) *In re Blonder* v. *Blonder*, 171 App. Div. 3d 1043, 1045, 98 N.Y.S.3d 329 (2019); instead of the principles governing divorce actions. See N.Y. Dom. Rel. Law § 236 (3) (McKinney Cum. Supp. 2021); see also *Fine* v. *Fine*, 26 App. Div. 3d 406, 407, 810 N.Y.S.2d 211 (2006) ("[a] plenary action to vacate a stipulation of settlement on the basis of fraud . . . is not a matrimonial action" under New York Domestic Relations Law). Stated simply, the parties to an unmerged separation agreement have "vested contractual rights" that generally cannot be disturbed by a postjudgment motion in a divorce action.[7] *Kleila* v. *Kleila*, supra, 284.

[7] There are some exceptions to the plenary action rule, none of which is applicable to the present appeal. See, e.g., N.Y. Dom. Rel. Law § 236 (9) (b) (1) (McKinney Cum. Supp. 2021) ("[w]here, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines"); N.Y. Gen. Oblig. Law § 5-311 (McKinney 2022) ("Except as provided in section two hundred thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the pro-

The plenary action rule is predicated, at least in significant part, on New York's strong public interest in the finality of judgments; see, e.g., *Teitelbaum Holdings, Ltd.* v. *Gold*, 48 N.Y.2d 51, 55–56, 396 N.E.2d 1029, 421 N.Y.S.2d 556 (1979); and in encouraging parties to resolve their own interests through contractual arrangements. See, e.g., *Bloomfield* v. *Bloomfield*, 97 N.Y.2d 188, 193, 764 N.E.2d 950, 738 N.Y.S.2d 650 (2001) ("there is a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements" (internal quotation marks omitted)); *Christian* v. *Christian*, 42 N.Y.2d 63, 71–72, 365 N.E.2d 849, 396 N.Y.S.2d 817 (1977) ("Generally, separation agreements [that] are regular on their face are binding on the parties, unless and until they are put aside . . . . Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties [to settle] their own differences in connection with the negotiation of property settlement provisions." (Citations omitted.)); *Galusha* v. *Galusha*, 116 N.Y. 635, 645–46, 22 N.E. 1114 (1889) ("the separation agreement was not affected by the decree granting an absolute divorce," in part because "[t]he law looks favorably [on] and encourages settlements made outside of [the] courts between parties to a controversy"). As the New York Court of Appeals has observed, "[t]o rewrite a judgment of divorce [that] has been relied on by both parties . . . would defeat the [parties'] reasonable expectation that the judgment was valid as [rendered], and would subvert the policy of upholding settled domestic relations that underlies the doctrine of equitable estoppel in divorce cases . . . ." (Citations omitted.) *Rainbow* v. *Swisher*, 72 N.Y.2d 106, 110–111, 527 N.E.2d 258, 531

curement of grounds of divorce."); N.Y. Jud. Ct. Acts § 463 (McKinney 2008) ("[a] separation agreement does not preclude the filing of a petition and the making of an order under section four hundred forty-five of this article for support of a spouse who is likely to become in need of public assistance or care"); see also footnote 3 of this opinion.

N.Y.S.2d 775 (1988). Because "the provisions of a divorce judgment are considered final and binding on the parties . . . absent unusual circumstances or explicit statutory authorization"; (internal quotation marks omitted) *Sass* v. *Sass*, 276 App. Div. 2d 42, 46, 716 N.Y.S.2d 686 (2000); see footnote 7 of this opinion; an unmerged separation agreement cannot be rescinded, vacated, or set aside by a postjudgment motion in a divorce action.

Application of the four factors enumerated in comment (a) to § 122 of the Restatement (Second) leads us to conclude that New York's plenary action rule is so interwoven with the plaintiff's cause of action as to be deemed substantive. To begin, the unequivocal language employed by the parties in their separation agreement adopted in plain and forceful terms the very essence of New York's plenary action rule. In addition to the choice of law provision's adoption of New York law for "[a]ll matters affecting the execution, interpretation, performance and enforcement of [the separation] [a]greement and the rights of the parties hereto," the separation agreement expressly provides that it "*shall not be invalidated or otherwise affected by any decree or judgment of separation or divorce made by any court in any action which may presently exist or may hereafter be instituted by either party against the other for a separation or divorce*," and adds—if that were not clear enough—that "the obligations and covenants of this [a]greement *shall survive any decree or judgment of separation or divorce and shall not merge therein, and this* [*a*]*greement may be enforced independently of such decree or judgment*." (Emphasis added.) The separation agreement further provides that "*no judgment, order or decree in any action for divorce* or separation, whether brought in the [s]tate of New York, or in any other state or country having jurisdiction [over] the parties hereto, *shall make any provisions*

*for alimony or child support or affect the property rights of either party in a manner inconsistent with the provisions of this* [*a*]*greement* . . . ." (Emphasis added.)

The fact that the parties explicitly incorporated New York's plenary action rule into their separation agreement by providing that their contractual rights could not be invalidated or affected by any final judgment of divorce "is a weighty reason for applying that law rather than the local law of the forum . . . ." 1 Restatement (Second), supra, § 122, comment (a), p. 351; see *Boyd Rosene & Associates, Inc.* v. *Kansas Municipal Gas Agency*, 174 F.3d 1115, 1126 (10th Cir. 1999) ("[b]ecause parties are empowered to make contractual [choice of law] provisions, their expectations about the applicability of those [choice of law] provisions are a significant factor in the determination of whether an issue is substantive or procedural for [choice of law] purposes").

The remaining Restatement (Second) factors also weigh in favor of our conclusion that New York's plenary action rule is substantive under these circumstances. Application of New York's plenary action rule will affect the ultimate substantive outcome of this case because, as the Appellate Court correctly determined, the parties "have contractual rights that . . . cannot be undone by modifying the judgment of dissolution." *Gershon* v. *Back*, supra, 201 Conn. App. 251–52; see, e.g., *Goldman* v. *Goldman*, 282 N.Y. 296, 305, 26 N.E.2d 265 (1940) (modification of divorce judgment "[did] not relieve the defendant of any contractual obligation" under separation agreement, and "the plaintiff [could] still resort to the usual remedies for breach of a contractual obligation"). Additionally, to our knowledge, there is no settled precedent classifying New York's plenary action rule as procedural or substantive for choice of law purposes; the parties, at least, have not brought any such precedent to our attention, and we have found

nothing of assistance in this regard. Nor will the application of the rule impose an undue burden on the courts of this state. Indeed, Connecticut courts have recognized that separation agreements are contracts that may be litigated independently of the divorce judgment in a civil contract action. See, e.g., *Friedlander* v. *Friedlander*, 5 Conn. App. 1, 4, 496 A.2d 964 ("a separation agreement is enforceable in a civil suit on the contract"), cert. denied, 197 Conn. 812, 499 A.2d 58 (1985); *Freeman* v. *Freeman*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-6001789-S (April 6, 2010) (49 Conn. L. Rptr. 578, 580) ("multiple Superior Court judges have determined that it is appropriate to litigate a breach of a separation agreement in a civil action for breach of contract" (internal quotation marks omitted)); *Lord* v. *Lord*, Superior Court, judicial district of Fairfield, Docket No. CV-01-0380279 (August 20, 2002) (33 Conn. L. Rptr. 88, 89) (separation agreements are "contracts . . . enforced by actions brought [on] the contracts themselves and the remedies are no other or different than the remedies provided by law for the breach of any other contract" (internal quotation marks omitted)). We therefore conclude that New York's plenary action rule is substantive and that the Appellate Court correctly determined that the plaintiff's motion to open and vacate the divorce judgment should have been denied.

The plaintiff contends that New York's plenary action rule is procedural under *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 644 A.2d 1297 (1994), and its progeny because the right to challenge a contract on the basis of fraud existed at common law.[8] This argument miscon-

[8] The plaintiff also contends that the plenary action rule is procedural because the failure to commence a plenary action is not always treated as a fatal defect in New York. In support of this contention, the plaintiff relies on cases from the Appellate Division of the New York Supreme Court that recognized the plenary action rule but, in the interest of judicial economy, nonetheless addressed the merits of a postjudgment motion challenging an unmerged separation agreement when the lower court had conducted "a

strues our reasoning in the *Baxter* line of cases. In *Baxter*, we addressed whether Connecticut law treats another state's statute of repose as substantive or procedural for choice of law purposes. Id., 336. We determined that a statute of repose, like a statute of limitations, "is considered one of the congeries of elements necessary to establish the right, and therefore characterized as substantive, only when it applies to a new right created by statute. . . . In such circumstances, [t]he time within which the suit must be brought operates as a limitation of the liability itself *as created* [by the statute], and not of the remedy alone." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 340. "If the right existed at common law, then the statute of repose is properly characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right. If, however, the right is newly created by the statute, then the statute of repose is properly characterized as substantive because the period of repose is so integral a part of the cause of action as to warrant saying that it qualifie[s]

full hearing tantamount to a plenary trial . . . ." *Gaines* v. *Gaines*, 188 App. Div. 2d 1048, 1048, 592 N.Y.S.2d 204 (1992); accord *Verna* v. *Verna*, 134 App. Div. 3d 1438, 1438, 23 N.Y.S.3d 500 (2015); *Dunham* v. *Dunham*, 214 App. Div. 2d 961, 961, 626 N.Y.S.2d 932 (1995); *Culp* v. *Culp*, 117 App. Div. 2d 700, 702, 498 N.Y.S.2d 846 (1986). The plaintiff argues that these cases stand for the proposition that the plenary action rule is procedural because, "[if] the rule [was] substantive, the court would have [had] no authority" to adjudicate the postjudgment motion. We reject the plaintiff's claim because there is a fundamental distinction between the authority of a court to adjudicate a cause of action and the court's determination of the substantive law governing that cause of action. See *Lacks* v. *Lacks*, 41 N.Y.2d 71, 74, 77, 359 N.E.2d 384, 390 N.Y.S.2d 875 (1976). As the New York Court of Appeals explained in *Lacks*, the "[subject matter] jurisdiction-competence" of the courts should not be confused with the "substantive elements of a cause for relief" because "[t]o do so would be to undermine significantly the doctrine of res judicata, and to eliminate the certainty and finality in the law and in litigation which the doctrine is designed to protect." Id., 77. Thus, the nonjurisdictional nature of the plenary action rule does not resolve the issue of whether the rule is substantive or procedural for choice of law purposes.

the right." (Internal quotation marks omitted.) Id., 347; see *Reclaimant Corp.* v. *Deutsch*, supra, 332 Conn. 608 ("[u]nder Connecticut's choice of law rules, the dispositive inquiry is not whether the statute at issue properly is characterized as a statute of repose or a statute of limitations, but whether the nature of the underlying right that forms the basis of the lawsuit existed at common law" (internal quotation marks omitted)).

*Baxter* and its progeny are inapposite for the simple reason that New York's plenary action rule is not a statute of limitations or a statute of repose, and the distinction employed to distinguish between procedure and substance in that context has no application in the present case. In fact, the plenary action rule is not a creature of statute at all but, instead, an entrenched feature of New York's common law for the past 100 years. See *Yonkers Fur Dressing Co.* v. *Royal Ins. Co., Ltd.*, 247 N.Y. 435, 446, 160 N.E. 778 (1928) ("Defendants may be able in an independent suit to upset the settlement for reasons that would invalidate a contract, such as fraud or [overreaching]. But when a compromise results in the termination of an action and the execution of a new agreement giving effect to the settlement, it cannot be undone in the discretion of the court, *on motion in the action* and on conflicting affidavits raising anew the same dispute once settled . . . ." (Emphasis added.)). The plenary action rule draws "its justification from the practical notion that there must ultimately be an end to litigation" and requires "a plenary suit . . . [in which] the stipulation [of settlement] relates to an action [that] has previously terminated." *Teitelbaum Holdings, Ltd.* v. *Gold*, supra, 48 N.Y.2d 55. It is properly characterized as a limitation on the right to challenge a separation agreement that is incorporated but not merged into a final judgment of divorce, rather than a mere limitation on the remedy, particularly because the parties explicitly incorporated the plenary

action rule into the terms of their separation agreement and, by doing so, bargained for vested contractual rights that survive the final judgment of divorce.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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## STRAZZA BUILDING & CONSTRUCTION, INC. *v.* JENNIFER G. HARRIS, TRUSTEE, ET AL.
## (SC 20660)

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

*Syllabus*

The defendants H and T appealed from the trial court's denial of their motion for summary judgment, which was based on that court's determination that the doctrine of res judicata did not preclude the present lien foreclosure action brought by the plaintiff, S Co. The defendants had hired S Co. as a general contractor for renovations to a home on property owned by T, a trust for which H served as trustee. After the defendants terminated their contractual relationship with S Co. as a result of a dispute, S Co. and one of its subcontractors, R Co., filed mechanic's liens, claiming that the defendants owed them for the renovation work. H then brought an action against R Co. in which H sought to reduce or discharge R Co.'s mechanic's lien. The trial court in H's action against R Co. concluded that the lienable fund for S Co.'s contract with H and T was entirely exhausted and that, as a result, R Co.'s lien was invalid. Meanwhile, S Co. brought the present action, seeking to foreclose its mechanic's liens. In their motion for summary judgment in the present action, the defendants claimed that the trial court was required to give res judicata effect to the court's prior decision in H's action against R Co. that no lienable fund existed in light of the rebuttable presumption of privity between general contractors and subcontractors recognized by this court in *Girolametti* v. *Michael Horton Associates, Inc.* (332 Conn. 67). In denying the defendants' motion for summary judgment, the trial court concluded, inter alia, that a genuine issue of material fact existed as to whether there was sufficient privity between R Co. and S Co. to preclude S Co. from pursuing the present action. The defendants thereafter appealed to the Appellate Court, which upheld the trial court's denial of the motion for summary judgment. The Appellate Court determined, inter alia, that the presumption of privity recognized in *Girolametti* was inapplicable in a case such as the present one, in which the

property owner sought to bind the general contractor to a ruling in a prior action between the property owner and a subcontractor. The Appellate Court specifically determined that it would have been inequitable to bind S Co., the general contractor, to a ruling in the prior action brought by H against R Co., a subcontractor, as a clear discrepancy existed between S Co.'s and R Co.'s interests, and, therefore, it could not be said that R Co. had adequately represented S Co.'s interests in the prior action. On the granting of certification, the defendants appealed from the Appellate Court's judgment to this court.

*Held* that the Appellate Court correctly concluded that the presumption of privity recognized in *Girolametti* was inapplicable in the present case, and, accordingly, this court affirmed the Appellate Court's judgment:

The Appellate Court properly declined to apply the presumption that this court recognized in *Girolametti*, namely, that, when a property owner and a general contractor enter into a binding agreement to resolve a dispute arising from a construction project, subcontractors are presumptively in privity with the general contractor with respect to the preclusive effect of such agreement on subsequent litigation arising from the project, as that presumption arises from the flow down obligation that a general contractor owes to a subcontractor, and there is no corresponding obligation owed by a subcontractor to the general contractor.

An evaluation of the factors courts consider in determining whether privity exists for res judicata purposes led to the conclusion that it would have been inequitable to bind S Co. to the prior decision against R Co., as there was a discrepancy of interests, insofar as R Co.'s monetary interest in the litigation against R Co. was less than 12 percent of the amount constituting S Co.'s claim against the defendants, S Co.'s counsel was unable to cross-examine witnesses in H's action against R Co. or to participate beyond representing a principal of S Co. when that principal testified in the litigation against R Co., and a general contractor should not reasonably expect to be bound by a judgment that involves consideration of only a portion of the work completed in connection with the entire project.

Argued November 15, 2022—officially released February 21, 2023

*Procedural History*

Action to foreclose mechanic's liens, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant et al. filed a counterclaim; thereafter, the court, *Genuario*, *J.*, denied the motion for summary judgment filed by the named defendant et al., and the named defendant et al.

appealed to the Appellate Court, *Moll*, *Alexander* and *Vertefeuille*, *Js.*, which upheld the trial court's decision, and the named defendant et al., on the granting of certification, appealed to this court. *Affirmed.*

*Bruce L. Elstein*, for the appellants (named defendant et al.).

*Anthony J. LaBella*, with whom, on the brief, was *Deborah M. Garskof*, for the appellee (plaintiff).

*Opinion*

D'AURIA, J. In *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 87, 208 A.3d 1223 (2019), this court held that, when a property owner and a general contractor have resolved disputes arising from a construction project by way of binding arbitration, there arises a rebuttable presumption that the general contractor and its subcontractors are in privity for purposes of res judicata in any subsequent litigation. In this certified appeal, we must determine whether the Appellate Court correctly applied *Girolametti* to the facts of the present case, in which a general contractor had sued the property owner to foreclose two mechanic's liens it served on the owner, claiming unpaid balances for labor and materials stemming from renovations it began on the owner's home. In particular, we consider whether the Appellate Court properly upheld the trial court's denial of the property owner's motion for summary judgment, declining to give preclusive effect to the findings of the trial court in a prior action between the owner and one of the general contractor's subcontractors. We agree with the Appellate Court that the presumption of privity that we held to apply in *Girolametti* does not apply in the present case, in which a property owner seeks to bind a general contractor to a prior judgment against a subcontractor. We also agree that the trial court correctly denied the defendants' motion for summary judgment because there remains an issue of material fact as to

whether the doctrine of res judicata applies to the facts of this case.

We assume familiarity with the Appellate Court's opinion, which contains a full recitation of the factual and procedural history in this case. See *Strazza Building & Construction, Inc.* v. *Harris*, 207 Conn. App. 649, 652–57, 262 A.3d 996 (2021). We briefly summarize that history as follows.

The defendant Jennifer G. Harris (Harris) serves as trustee of the Jennifer G. Harris Revocable Trust (trust), which owns real property located in Greenwich. The defendants[1] hired the plaintiff, Strazza Building & Construction, Inc. (Strazza), to serve as a general contractor for substantial renovations to a home located on the property. After a dispute arose over the cost and quality of the work that had been completed and the estimated time remaining to complete the project, the defendants terminated their contractual relationship with Strazza. Strazza and two subcontractors, Robert Rozmus Plumbing & Heating, Inc. (Rozmus), and Interstate & Lakeland Lumber Corporation, then filed and served mechanic's liens on the defendants, claiming unpaid balances. Strazza then brought this action to foreclose its liens, totaling $561,155.88, alleging claims for breach of contract and unjust enrichment. Id., 652.

The preclusion issue presently before us arises because Harris, as trustee for the trust, previously initiated a separate proceeding against Rozmus (Rozmus action), pursuant to General Statutes § 49-35a, seeking to reduce or discharge the mechanic's lien filed by Rozmus. See

[1] This action originally was brought against Harris, both in her individual capacity and as the trustee of the Jennifer G. Harris Revocable Trust, which owns the real property at issue, as well as two junior lienholders to the property. The junior lienholders are not participating in this appeal. See *Strazza Building & Construction, Inc.* v. *Harris*, supra, 207 Conn. 651 n.1.

We hereinafter refer to Harris, in her individual capacity and as trustee, as the defendants.

*Harris* v. *Rozmus Plumbing & Heating, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-17-6033512-S. A trial was held in the Rozmus action to resolve the validity of the mechanic's lien. "Rozmus' mechanic's lien claimed $97,469.86 as the amount due to Rozmus for plumbing services and materials," which the court reduced to $62,040.36. *Strazza Building & Construction, Inc.* v. *Harris*, supra, 207 Conn. App. 653. "The court [then] determined whether Strazza was appropriately owed funds, because Rozmus could recover the sum it claimed to be owed only to the extent that Strazza, as the general contractor, was still owed money. . . . The court in the Rozmus action, therefore, reviewed the charges that were included in the liens held by Strazza and Rozmus and found that Harris was entitled to credits against the liens for many of the charges. . . . [T]he court ultimately concluded that the total adjusted lienable fund was negative $109,605.29. Thus, because the lienable fund for Strazza's contract was entirely exhausted, the lien held by Rozmus was invalid and ordered discharged." (Citations omitted.) Id., 653–54.

The central finding of the *Rozmus* action was that no lienable fund existed. The defendants in the present case therefore moved for summary judgment, arguing that this court's decision in *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 67, required the trial court to give res judicata effect to the trial court's decision in the *Rozmus* action that no lienable fund existed. Strazza opposed the motion, arguing that the doctrine of res judicata did not apply because it was not a party to the *Rozmus* action and that there was insufficient privity between it and Rozmus to preclude it from suing to enforce its liens in the present action. *Strazza Building & Construction, Inc.* v. *Harris*, supra, 207 Conn. App. 655.

The trial court denied the defendants' summary judgment motion, determining that, although three of the four required elements of res judicata were met, a genuine issue of material fact existed regarding whether there was sufficient privity between Strazza and Rozmus to preclude Strazza from pursuing its claims against the defendants. Id., 655–56. In addressing the privity issue, the trial court considered, among other things, that Strazza's mechanic's liens were for a substantially greater sum than Rozmus' lien, that Strazza was not a party to the prior proceeding, and that Rozmus, as a subcontractor, may not have been in a position to defend the defendants' allegations against Strazza, the general contractor. Id., 656–57. After considering the functional relationship between the parties, the trial court ultimately concluded that a genuine issue of material fact existed as to whether Strazza's interests were "sufficiently represented in the Rozmus action." Id., 663.

The defendants appealed[2] to the Appellate Court, which affirmed the trial court's decision. The Appellate

[2] After the defendants appealed to the Appellate Court, Strazza moved to dismiss the appeal for lack of a final judgment. The Appellate Court denied that motion, which was the proper ruling under our existing precedents. Specifically, this court has held that a denial of a motion based on res judicata and/or collateral estoppel grounds is immediately appealable. See *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011). We have justified appeals of these interlocutory rulings under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983), explaining that the defense of res judicata, as well as the defense of collateral estoppel, "is a civil law analogue to the criminal law's defense of double jeopardy, because both invoke the right not to have to go to trial on the merits." *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 194–95, 544 A.2d 604 (1988); see also *State* v. *Curcio*, supra, 31 (second prong of *Curcio* permits appeal of otherwise interlocutory order that "so concludes the rights of the parties that further proceedings cannot affect them"). In other words, this court has held that the defenses of res judicata and collateral estoppel provide immunity from suit. See, e.g., *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 746–47, 150 A.3d 1109 (2016); see also id., 746 ("the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation" (internal quotation marks omitted)).

Court first held that the presumption of privity that we held to apply in *Girolametti* did not apply in the case at hand because the facts "are clearly distinguishable . . . ." Id., 660. Second, the Appellate Court concluded that the trial court "correctly determined that [without the presumption of privity] there was a genuine issue of fact as to whether [Strazza] was in privity with Rozmus for the purpose of res judicata." Id., 664.

We agree fully with the Appellate Court's holding in this case and have nothing further to add to its cogent rationale and conclusion on the second issue. The remainder of this opinion addresses the first issue and

Strazza does not challenge the Appellate Court's final judgment ruling or argue that we should reconsider any of our precedents; therefore, we have no occasion to do so. Nevertheless, we note that federal case law, applying the "collateral order doctrine"—a test similar to *Curcio* for determining the appealability of interlocutory orders—does not treat the denial of a motion to dismiss or a motion for summary judgment on res judicata grounds as an appealable ruling. See *Will* v. *Hallock*, 546 U.S. 345, 354–55, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006); see also id., 355 ("[t]he judgment bar at issue in this case [which functions in the same way as res judicata, and which is a defense of claim preclusion and not a defense of immunity] has no claim to greater importance than the typical defense of claim preclusion . . . [and] an order rejecting th[is] defense . . . cries for no immediate appeal of right as a collateral order"); *SmileDirectClub, LLC* v. *Battle*, 4 F.4th 1274, 1283 (11th Cir. 2021) (denial of res judicata-claim preclusion defense would not merit immediate appeal under collateral order doctrine).

Recently, our appellate courts have seen their share of interlocutory appeals on these grounds, including many in which the judgments at issue ultimately have been affirmed. See, e.g., *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 331 Conn. 379, 384, 204 A.3d 664 (2019); *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 354, 358, 63 A.3d 940 (2013); *Fairlake Capital, LLC* v. *Lathouris*, 210 Conn. App. 801, 808, 818, 271 A.3d 689, cert. denied, 343 Conn. 928, 281 A.3d 1186 (2022); *Peterson* v. *iCare Management, LLC*, 203 Conn. App. 777, 780, 794, 250 A.3d 720 (2021); *State* v. *Bacon Construction Co.*, 160 Conn. App. 75, 77, 91, 124 A.3d 941, cert. denied, 319 Conn. 953, 125 A.3d 532 (2015); *In re Probate Appeal of Cadle Co.*, 152 Conn. App. 427, 429, 445, 100 A.3d 30 (2014); *Barton* v. *Norwalk*, 131 Conn. App. 719, 733, 27 A.3d 513, cert. denied, 303 Conn. 906, 31 A.3d 1181 (2011). In an appropriate case, in which the parties have joined issue on this question, we might have an opportunity to consider whether res judicata and collateral estoppel defenses properly should provide the basis for an interlocutory appeal when a trial court has denied those defenses pretrial.

provides us with the opportunity to clarify our holding in *Girolametti* and to expand on the Appellate Court's application of that case to the present case.

This court held in *Girolametti* that, "when a property owner and a general contractor enter into a 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." (Emphasis added.) *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 87. Although the dispute between Rozmus and Harris was litigated in court, rather than through arbitration, if res judicata were to apply in the present case, the preclusive effect would of course be the same. See, e.g., *DKN Holdings, LLC* v. *Faerber*, 61 Cal. 4th 813, 828, 352 P.3d 378, 189 Cal. Rptr. 3d 809 (2015); *CDJ Builders Corp.* v. *Hudson Group Construction Corp.*, 67 App. Div. 3d 720, 722, 889 N.Y.S.2d 64 (2009). The Appellate Court properly declined to apply the presumption of privity in the present case. It reasoned that *Girolametti* concluded that "the presumption of privity arises from the 'flow down' obligation that a general contractor owes to a subcontractor." *Strazza Building & Construction, Inc.* v. *Harris*, supra, 207 Conn. App. 662. The Appellate Court determined that there was no basis for concluding that the presumption of privity also arises in the opposite situation, that is, when the prior adjudication is between the owner and the subcontractor, because there is no corresponding obligation owed by the subcontractor to the contractor. Id. ("there is no corresponding 'flow up' obligation that extends from a subcontractor to a general contractor"). We agree.

In *Girolametti*, we cited decisions from several jurisdictions that had similarly adopted a rebuttable presumption that subcontractors are in privity with general

contractors for purposes of res judicata. See *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 79. We reasoned further that, without this presumption, "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." Id., 81.

Our analysis in *Girolametti* focused on the fairness of applying the doctrine of res judicata to bind subcontractors to "postconstruction arbitration in which the subcontractors did not participate." Id., 82. We did not discuss at all the effect of the opposite situation, which the Appellate Court described as a " 'flow up' " obligation: the fairness of binding a general contractor to a previous award against its subcontractor when the general contractor was not a party to the prior proceeding.[3]

Establishing a presumption of privity between two parties requires that we consider the factors courts look to when establishing the element of privity for res judicata purposes. "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 inconsis-

[3] In response to a subpoena duces tecum, a principal of Strazza testified at the trial of the *Rozmus* action with Strazza's counsel present. However, the trial court did not permit counsel to object to the questions posed to the principal. In fact, the court ruled specifically that the principal was merely a witness and that Strazza was not a party to the proceedings. Although Rozmus' counsel had no objections to Strazza's counsel's representing the principal of his client, the court ruled that any objections to the principal's testimony must be "made by counsel who represent parties in [the] case."

tent judgments—would be served. . . . [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." (Citations omitted; internal quotation marks omitted.) Id., 76–77.

As the Appellate Court concluded, an evaluation of the factors that courts consider when determining whether privity exists for res judicata purposes leads to the inescapable conclusion that it would be inequitable in the present case to bind the general contractor to a judgment against its subcontractor. First, a clear discrepancy exists between the two parties' interests. Common sense tells us that a subcontractor's monetary interest in construction disputes normally will be less than that of the general contractor. In this case, Rozmus' monetary interest in the litigation between itself and the defendants "was less than 12 percent of the value of the claim of [Strazza] . . . ." (Internal quotation marks omitted.) *Strazza Building & Construction, Inc.* v. *Harris*, supra, 207 Conn. App. 664. Therefore, it cannot be said that Rozmus adequately represented Strazza's interests in the prior litigation.

Additionally, as the Appellate Court emphasized, when litigating the amount of the lienable fund in the prior action between Rozmus and Harris, the trial court decided issues related to many portions of the renovations in which Rozmus, as a plumbing subcontractor, was not involved. See id., 663. Compare *Lathan Construction Corp.* v. *McDaniel Grading, Inc.*, 695 So. 2d 354, 355 (Fla. App. 1996) (it is improper for court to collaterally estop general contractor from litigating claims against his subcontractor without allowing him to participate directly in underlying action between his bonding surety and subcontractor), with *Associated Construction Co.* v. *Camp, Dresser & McKee, Inc.*, 646 F. Supp. 1574, 1578 (D. Conn. 1986) (subcontractors

deemed to be in privity with general contractor, in part because general contractor asserted claims in which subcontractors had an interest and from which they received payment). The trial court in the Rozmus action decided these issues without Strazza's counsel being able to cross-examine witnesses or participate in the trial beyond representing a principal of Strazza when he testified during the proceeding. We cannot hold that a finding of privity under these circumstances would promote an equitable result, as "[a subcontractor] would not have firsthand knowledge [of] or significant involvement [in] many aspects of the required performance of other areas of necessary performance under the general contract." (Internal quotation marks omitted.) *Strazza Building & Construction, Inc.* v. *Harris*, supra, 207 Conn. App. 664. Without an opportunity to properly defend the entirety of a general contractor's work, the contractor's interests are not sufficiently represented in a proceeding between the subcontractor and the property owner.

Furthermore, when considering the parties' reasonable expectations, we cannot say that a general contractor should reasonably expect to be bound by a judgment that considered only a portion of the work completed on a project. As the amicus in *Girolametti* explained, and we took note of, although "standard form contracts used in the construction industry . . . make the general contractor responsible for the work of all subcontractors," the opposite is not necessarily true. *Girolametti* v. *Michael Horton Associates, Inc.*, supra, 332 Conn. 78. These considerations will likely be true in many cases in which a party attempts to bind a general contractor to a judgment for or against a subcontractor. Therefore, it would be inappropriate to apply a presumption of privity in these cases.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

# NATIONWIDE MUTUAL INSURANCE COMPANY ET AL. *v.* JEFFREY S. PASIAK ET AL. (SC 20617)

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

*Syllabus*

The plaintiff insurance companies sought a judgment declaring that they were not obligated to defend and indemnify the named defendant, J, a business owner, under J's homeowners and umbrella insurance policies for damages awarded in a tort action brought against him by the defendants S and S's husband. The tort action stemmed from an incident that occurred when S, who was employed by J's construction company, P Co., was working alone in P Co.'s office, which was located in J's home. A masked individual, K, entered J's home and bound, gagged, and blindfolded S. K put a gun to S's head and told S that he would kill her and her family if she did not open the safe, of which S claimed to have no knowledge. K continued to threaten S for approximately forty-five minutes. J then returned home and was attacked by K. J was eventually able to unmask K, revealing his identity as J's longtime friend. After S was untied, she asked to leave, but J prevented her from leaving or calling the police, even after S informed him of the extent of K's threats to her and her family. S returned to her own home hours later, and the police subsequently were contacted. At the time of the incident, J was covered under a personal homeowners policy and an umbrella policy, both of which were issued by the plaintiffs, but he did not hold a separate commercial liability policy. The plaintiffs provided J with an attorney to defend him in the tort action but indicated that they were reserving their right to contest liability coverage. In the tort action against J, which included a claim of false imprisonment, the jury returned a verdict for S and her husband and awarded damages. Subsequently, in the present declaratory judgment action, the trial court denied in part the plaintiffs' motion for summary judgment as to the plaintiffs' duty to indemnify J, concluding, inter alia, that the plaintiffs were not entitled to summary judgment under the umbrella insurance policy, which covered "personal injury," which, in turn, was defined to include false imprisonment. The declaratory judgment action proceeded to trial, and the trial court subsequently rendered judgment for J, concluding that the plaintiffs were required to indemnify him for his liability in the tort action. The plaintiffs appealed to the Appellate Court, which reversed the trial court's judgment, concluding, inter alia, that the trial court incorrectly had determined that the business pursuits exclusion in the umbrella policy did not apply. On the granting of certification, J appealed to this court, which concluded that both the trial court and the Appellate Court applied

incorrect standards for determining whether the business pursuits exclusion barred coverage. In reversing the Appellate Court's judgment, this court ordered that the case be remanded to the trial court for a trial de novo on the business pursuits exclusion issue. On remand, the trial court concluded that the plaintiffs had satisfied their burden of proving that S's false imprisonment or injury was connected with, had its origins in, grew out of, flowed from, or was incident to J's business pursuits and, accordingly, that the business pursuits exclusion barred coverage for J's liability in the tort action and that the plaintiffs were not obligated to indemnify J. On appeal to this court, J claimed, inter alia, that the trial court had applied an incorrect standard when it determined that the plaintiffs satisfied their burden of proving, by a preponderance of the evidence, that the business pursuits exclusion barred coverage. *Held*:

1. The trial court properly applied the preponderance of the evidence standard to determine the factual question of whether the plaintiffs had established that the business pursuits exclusion in the umbrella policy barred coverage for J's liability in the tort action:

The preponderance of the evidence standard governs factual determinations required by a civil statute that is silent with respect to the applicable standard of proof, and neither the statute (§ 52-29) nor any other legal authorities governing claims for declaratory relief contain a heightened standard of proof.

J could not prevail on his claim that, rather than applying the preponderance of the evidence standard, the trial court should have construed the business pursuits exclusion in favor of J, as the insured, unless it had a "high degree of certainty" that the insurance policy language clearly and unambiguously excluded J's claim, as J improperly conflated the tasks of construing the umbrella insurance policy, which this court did in the prior appeal in this case, with the making of factual determinations necessary to ascertain whether the exclusion unambiguously applied under the circumstances, which the trial court properly did on remand.

In light of the unusual procedural posture of this case, there was no need for the trial court, on remand, to apply the "high degree of certainty" standard or other principles of insurance contract interpretation, insofar as this court, in the prior appeal in this case, had previously interpreted the business pursuits exclusion and specified the factual situations in which that exclusion would clearly and unambiguously apply; rather, the trial court's task on remand from that prior appeal was to engage in a fact-specific inquiry to determine whether the plaintiffs had satisfied their burden of proving, by a preponderance of the evidence, that S's false imprisonment or injury was connected with, had its origins in, grew out of, flowed from, or was incident to J's business pursuits.

2. J could not prevail on his claims relating to whether the trial court correctly determined that the plaintiffs had carried their burden of proof with respect to whether the business pursuits exclusion applied:

The trial court did not incorrectly find in the plaintiffs' favor on the ground that they had failed to produce new, credible evidence that was not raised during the first trial.

Moreover, the trial court did not improperly fail to find that J's evidence, in the form of contemporaneous witness statements made on the day of the incident, was the most credible and reliable form of evidence in the record, and that the trial court's conclusion that K's actions constituted an attack on P Co. was unsupported by evidence in the record, as the record, viewed as a whole, contained evidence to support the factual findings of the trial court.

Furthermore, the trial court did not improperly find in the plaintiffs' favor on public policy grounds, as the public policy discussion in the trial court's memorandum of decision was not essential to the trial court's determination of the case and, therefore, was dictum.

Argued October 20, 2022—officially released February 21, 2023

*Procedural History*

Action for a declaratory judgment to determine whether the plaintiffs were obligated to defend and indemnify the named defendant under certain insurance policies for damages awarded against the named defendant in a separate action, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Complex Litigation Docket, where the court, *Brazzel-Massaro*, *J.*, denied the plaintiffs' motion for summary judgment and granted the motion for summary judgment filed by the named defendant et al. as to the duty to defend under the policies; thereafter, the court granted in part the plaintiffs' motion for summary judgment as to the duty to indemnify under the homeowners insurance policy; subsequently, the case was tried to the court, *Brazzel-Massaro*, *J.*; judgment for the named defendant et al. with respect to the plaintiffs' duty to indemnify under the umbrella insurance policy, from which the plaintiffs appealed to the Appellate Court, *Keller*, *Prescott* and *West*, *Js.*, which reversed

the trial court's judgment and remanded the case with direction to render judgment for the plaintiffs with respect to the duty to indemnify under the umbrella policy and dismissed as moot that portion of their appeal regarding their duty to defend under the umbrella policy; thereafter, the named defendant et al., on the granting of certification, appealed to this court, which reversed the judgment of the Appellate Court with respect to the duty to indemnify under the umbrella policy and remanded the case to the Appellate Court with direction to remand the case to the trial court for further proceedings; subsequently, the case was tried to the court, *Hon. Charles T. Lee*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiffs, from which the named defendant et al. appealed. *Affirmed.*

*David J. Robertson*, with whom was *Keith M. Blumenstock* and, on the brief, *Justin R. Bengtson*, for the appellants (named defendant et al.).

*Robert D. Laurie*, with whom, on the brief, were *Andrew P. Barsom* and *Heather L. McCoy*, for the appellees (plaintiffs).

*Opinion*

McDONALD, J. This case comes to us for the second time following lengthy litigation of a declaratory judgment action brought by the plaintiffs, Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, against the defendant Jeffrey S. Pasiak.[1] The action concerned whether the plaintiffs were obli-

[1] The complaint in the declaratory judgment action also named Pasiak Construction Services, LLC, the company owned and operated by Pasiak, and Sara Socci and her husband, the plaintiffs in the underlying tort action, as defendants. The claims in the present action arise under an insurance policy issued to Pasiak as the sole policyholder, and Socci and her husband have not participated in this appeal. Accordingly, in the interest of simplicity, we refer to Pasiak throughout this opinion as the defendant.

gated to indemnify the defendant, a business owner, under a personal umbrella insurance policy for liability arising from his false imprisonment of his company's employee at her workplace. Following a trial to the court in 2012, the trial court issued a memorandum of decision, concluding that the plaintiffs had a duty to indemnify the defendant. The plaintiffs appealed the decision to the Appellate Court, which reversed the judgment of the trial court on the basis that the claim fell within the business pursuits exclusion of the insurance policy. See *Nationwide Mutual Ins. Co.* v. *Pasiak*, 161 Conn. App. 86, 89, 101–102, 127 A.3d 346 (2015). This court subsequently reversed the judgment of the Appellate Court and concluded that the case must be remanded to the trial court to allow the plaintiffs to conduct appropriate discovery and for a trial de novo to determine whether the plaintiffs met their burden of proving that the business pursuits exclusion bars coverage as a matter of fact. See *Nationwide Mutual Ins. Co.* v. *Pasiak*, 327 Conn. 225, 229–30, 270, 173 A.3d 888 (2017) (*Pasiak I*). Following a trial de novo, the trial court found that the plaintiffs satisfied their burden of establishing, by a preponderance of the evidence, that the false imprisonment arose out of the defendant's business pursuits and that the business pursuits exclusion bars coverage. The trial court rendered judgment for the plaintiffs, concluding that they have no obligation to indemnify the defendant. The defendant now appeals from that judgment, claiming, among other things, that the trial court applied an incorrect standard on remand.

Our decision in *Pasiak I*, as supplemented by the facts found by the trial court in the trial de novo, sets forth the following relevant facts and procedural history. See id., 230–37. The defendant owned Pasiak Construction Services, LLC (Pasiak Construction), which had its sole office in the defendant's home in Stamford. The Pasiak Construction office was a room on the sec-

ond floor of the home, across the hall from the defendant's bedroom and next to a bathroom. The office had three desks, including a computer workstation. The defendant maintained a homeowners insurance policy and an umbrella insurance policy through the plaintiffs at the time of the incident. He did not hold any commercial liability insurance for his business. Pasiak Construction employed Sara Socci as a part-time office manager with working hours of 9:30 a.m. to 2:30 p.m., four days per week. Socci worked out of the office in the defendant's home and would help with both the defendant's business tasks and personal tasks. Socci worked exclusively for the defendant, whom she considered to be her boss. The defendant would regularly stop by the office to work with Socci in the morning. One day in May, 2006, Socci was working at her desk when an individual entered the office wearing a mask and carrying a gun. The individual demanded that Socci show him to the defendant's safe and open it. Socci had no knowledge of the safe or its combination. The individual became enraged, and he bound, gagged, and blindfolded Socci and forced her down on the floor of the bedroom. He put a gun to her head and told her he would kill her and her family if she did not open the safe.

After the individual made approximately forty-five minutes of continuous threats, the defendant returned home and was attacked by the individual at the top of the stairs. The defendant was eventually able to unmask the individual, revealing his identity to be Richard Kotulsky, a longtime friend of the defendant. When the defendant asked about Socci's whereabouts, Kotulsky led him to the bedroom, where the defendant made Kotulsky untie Socci. Kotulsky and the defendant went into the office, and the defendant insisted that Socci join them, notwithstanding her reluctance because of Kotulsky's threats. Socci joined them in the office, where a discussion revealed that Kotulsky was motivated to rob

the defendant because he was upset with the defendant for his purported affair with Kotulsky's girlfriend and because he needed money to cover his debts. The defendant was upset that Kotulsky tried to rob him and, in his words, "tried to ruin his business." The defendant and Kotulsky reached some degree of resolution of their dispute and spoke amicably.

Despite Socci's requests to leave, the defendant prevented her from leaving. Kotulsky begged Socci and the defendant not to call the police. The defendant asked Kotulsky to leave the room, and Socci informed the defendant of the extent of Kotulsky's threats to her and her family. The defendant continued to refuse to let Socci leave or to call the police. The defendant brought Kotulsky back into the room, where Kotulsky apologized to Socci, and Socci then assured him she would not tell the police about the incident. Kotulsky then left. Following Kotulsky's exit, Socci resigned from Pasiak Construction and informed the defendant that she could no longer work for him because she was terrified that Kotulsky would return. The defendant remained fearful that Socci would call the police and that Kotulsky would be harmed by his arrest. Socci testified that she remembered the defendant having been worried about her ruining his business. Socci testified that she did not try to leave because she was afraid that the defendant would tell Kotulsky and that Kotulsky would harm her and her family. The trial court also noted that she felt intimidated because the defendant and Kotulsky were each twice as large as she was.

The defendant and Socci eventually decided to talk to Denise Taranto, who was a former coworker of Socci and a close friend of the defendant. Socci left her belongings in the defendant's home, and the two traveled in the defendant's car to meet with Taranto in Greenwich. Along the way to Greenwich, Socci and the defendant stopped at a donut shop and a material supply

yard. At the supply yard, the defendant spoke with several of the yard's employees for a few minutes. The two also drove by several construction sites that Pasiak Construction was serving. Upon their arrival in Greenwich, Taranto came out to the defendant's car and spoke with Socci and the defendant. After learning of the events that transpired, Taranto advised the defendant and Socci to call the police. The defendant and Socci then returned to the defendant's home, where Socci gathered her belongings and returned home. Socci's experience, from arrival at work to departure, approximated her regular work schedule, and she was paid in full by Pasiak Construction for that pay period. Socci, her husband, and a friend later returned to the defendant's home, at which point the defendant called the police.

After being charged with kidnapping in the second degree and witness tampering, the defendant pleaded guilty under the *Alford* doctrine[2] to charges of interfering with an officer and threatening in the second degree. Socci and her husband subsequently commenced a tort action against the defendant, alleging false imprisonment, negligence, intentional, reckless and negligent infliction of emotional distress, and loss of consortium. The plaintiffs provided the defendant with an attorney to defend him in the Socci action but notified him that they were reserving their right to contest coverage.

The plaintiffs then commenced the present action, seeking a declaration that they had no duty to defend or indemnify the defendant in the Socci action. The trial court concluded, by way of summary judgment, that the allegations of the complaint were sufficiently broad to obligate the plaintiffs to provide the defendant with a defense under his homeowners and umbrella

[2] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

insurance policies, but the court deemed it improper, at that juncture, to determine the plaintiffs' duty to indemnify.

Socci and the defendant proceeded to trial in the tort action, in which the jury awarded Socci $628,200 in compensatory damages and $175,000 in punitive damages. The jury also awarded Socci's husband $32,500 in compensatory damages. The plaintiffs then filed a second motion for summary judgment in the declaratory judgment action regarding their duty to indemnify the defendant. The plaintiffs argued, among other things, that the defendant's policies did not cover his liability for the Socci action because coverage was barred under the policy exclusion for business pursuits. The plaintiffs also claimed that indemnification for the punitive damages contravened public policy.

The trial court thereafter issued its memorandum of decision. Relevant to this appeal, the court concluded that the plaintiffs were entitled to summary judgment under the homeowners insurance policy—which did not cover injury for emotional distress unless caused by a physical injury—but not under the umbrella insurance policy—which covered "personal injury," defined to include false imprisonment. It also rejected the plaintiffs' public policy argument.

After the trial court clarified that its decision on the motion for summary judgment was not a final judgment for purposes of appeal, a dispute arose over the scope of the evidence and discovery that would be allowed in the declaratory judgment trial. The plaintiffs claimed that they were entitled to a trial de novo regarding the issue of indemnification, with no limitation as to the evidence that could be proffered, and the defendant contended that the trial must be limited to evidence from the underlying Socci action. The court disagreed

with the plaintiffs and denied their request to permit unrestricted evidence.[3]

The declaratory judgment action proceeded to trial with documentary evidence submitted to the court, largely originating from the Socci action, with some additional matters related to workers' compensation. The trial court issued a decision and rendered judgment for the defendant, requiring the plaintiffs to indemnify the defendant for his liability in the Socci action. The decision rested on the same reasoning as the trial court's previous denial of the plaintiffs' motion for summary judgment on the issue. The plaintiffs appealed from the trial court's judgment to the Appellate Court, challenging, among other things, the trial court's determinations regarding the policy exclusions. See *Nationwide Mutual Ins. Co.* v. *Pasiak*, supra, 161 Conn. App. 88–89, 95. The Appellate Court reversed the judgment of the trial court and concluded that the court incorrectly had determined that the business pursuits exclusion of the umbrella insurance policy did not apply. See id., 89, 101–102. The defendant thereafter appealed to this court, which concluded that both the trial court and the Appellate Court applied incorrect standards for determining whether the business pursuits exclusion barred coverage. *Pasiak I*, supra, 327 Conn. 252. We also concluded that the plaintiffs were not limited to the evidentiary record of the underlying tort action to establish that the business pursuits exclusion barred coverage. Id., 230, 270. Accordingly, we reversed the judgment of the Appellate Court with direction to remand the case to the trial court for a trial de novo on the business pursuits exclusion issue. Id.

On remand, the parties engaged in discovery, and the trial court conducted a trial de novo with an expanded

[3] The trial court did, however, permit the parties to obtain limited discovery related to the workers' compensation exclusion in the policy but concluded that the remaining evidence would be limited to that from the Socci action.

evidentiary record.[4] In its memorandum of decision, the trial court explained that, in light of this court's decision in *Pasiak I*, its task was "to engage in a flexible fact-specific inquiry to determine if the [plaintiffs] satisfied [their] burden of [proving] that the false imprisonment or Socci's injury in this case was connected with, had its origins in, grew out of, flowed from, or was incident to [the defendant's] business pursuits." (Internal quotation marks omitted.) See *Pasiak I*, supra, 327 Conn. 243–44. The trial court concluded that the plaintiffs satisfied their burden by a preponderance of the evidence. This appeal followed.

I

We begin with the defendant's principal contention that the trial court applied an incorrect standard when it determined that the plaintiffs satisfied their burden of proving, by a preponderance of the evidence, that the business pursuits exclusion barred coverage. Rather than applying the preponderance of the evidence standard, the defendant contends, the trial court should have construed the business pursuits exclusion in favor of the insured unless it had "a high degree of certainty that the policy language clearly and unambiguously

[4] Specifically, at the trial de novo, the parties entered the following exhibits into evidence: exhibit A—the defendant's umbrella insurance policy; exhibit B—pleadings from the underlying action; exhibit C—transcripts of the 2010 trial in the underlying action; exhibit D—the transcript of the defendant's May 12, 2009 deposition; exhibit E—the transcript of the defendant's November 19, 2009 deposition; exhibit F—the transcript of the defendant's August 29, 2012 deposition; exhibit G—the transcript of the defendant's January 15, 2019 deposition; exhibit H—the transcript of the June 16 and 17, 2008 prejudgment remedy hearing; exhibit I—the transcript of Socci's October 19, 2009 deposition; exhibit J—the transcript of Socci's December 3, 2009 deposition; exhibit K—the transcript of Taranto's July 28, 2009 deposition; exhibit L—the defendant's May 9, 2006 voluntary statement to the Stamford Police Department; exhibit M—Socci's May 9, 2006 voluntary statement to the Stamford Police Department; exhibit N—Socci's May 31, 2006 voluntary statement to the Stamford Police Department; and exhibit O—Socci's April 23, 2008 affidavit in support of her application for a prejudgment remedy.

excludes the claim." The plaintiffs disagree and argue that the defendant misconstrues this court's holding in *Pasiak I* and what this court directed the trial court to do on remand. The plaintiffs contend that, in *Pasiak I*, this court construed the language of the policy and clarified the applicable standard for determining whether Socci's injuries arose out of the defendant's business pursuits. The plaintiffs further contend that we then directed the trial court to make factual determinations on remand as to whether Socci's injuries met this standard. In short, the plaintiffs argue that the defendant conflates the tasks of construing the policy, which this court did in *Pasiak I*, with making the factual determinations necessary to ascertain whether the exclusion unambiguously applied under the circumstances of this case, which the trial court did on remand. We agree with the plaintiffs.

"[The] analysis of whether the [trial] court applied the correct legal standard is a question of law subject to plenary review." (Internal quotation marks omitted.) *United Public Service Employees Union, Cops Local 062* v. *Hamden*, 209 Conn. App. 116, 123, 267 A.3d 239 (2021); see also, e.g., *Adams* v. *State*, 259 Conn. 831, 837, 792 A.2d 809 (2002). When an incorrect legal standard is applied, the appropriate remedy is to reverse the judgment of the trial court and to remand the case for further proceedings. See, e.g., *In re Zakai F.*, 336 Conn. 272, 306–307, 255 A.3d 767 (2020); *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 765, 966 A.2d 188 (2009) (*Schaller, J.*, concurring in part and dissenting in part).

We begin by emphasizing the distinction between the standard of proof in a civil trial and the interpretive presumptions we apply to insurance contracts. The standard of proof ordinarily refers to "the degree of certainty by which the [fact finder] must be persuaded of a factual conclusion to find in favor of the party bearing the

burden of persuasion." *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U.S. 91, 100 n.4, 131 S. Ct. 2238, 180 L. Ed. 2d 131 (2011). An interpretive presumption, by contrast, is a rule we apply to help determine what a text—in this case, an insurance contract—means. The interpretation of an insurance contract is "a question of law," not a matter of fact. (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 364, 216 A.3d 629 (2019). The interpretive presumption at issue requires the court to construe any ambiguity in the language of an insurance policy against the insurance company, as the drafter of the contract. See, e.g., *Israel* v. *State Farm Mutual Automobile Ins. Co.*, 259 Conn. 503, 508, 789 A.2d 974 (2002). This rule is also known as contra proferentem. See, e.g., id., 509; see also, e.g., *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, supra, 365. As we will explain, an exclusion will generally be interpreted against the insurance company unless the court has a "high degree of certainty that the policy language clearly and unambiguously excludes the claim." (Internal quotation marks omitted.) *Connecticut Ins. Guaranty Assn.* v. *Drown*, 314 Conn. 161, 188, 101 A.3d 200 (2014). The defendant has conflated these two distinct concepts.

With this distinction in mind, we turn to our decision in *Pasiak I*. In parts II and III of our opinion, titled "Insurance Policy and Its Construction" and "Business Pursuits Exclusion," respectively, we construed the business pursuits exclusion contained in the defendant's umbrella insurance policy. *Pasiak I*, supra, 327 Conn. 237–54. We began by noting that "no one questions that the activities of [Pasiak Construction] meet the two elements of a business pursuit. Nor does anyone contend that false imprisonment constitutes a business pursuit. Therefore, the question is not whether the false imprisonment itself satisfied the continuity/profit elements of a business pursuit, as the trial court's rationale

suggested, but, rather, whether the defendant's false imprisonment of Socci 'arose out of' his business pursuits in operating [Pasiak Construction]." Id., 243.

We went on to state that the general meaning of "arising out of" is well established and explained that, in *Hogle* v. *Hogle*, 167 Conn. 572, 577, 356 A.2d 172 (1975), this court concluded that "it is sufficient to show only that the accident or injury was connected with, had its origins in, grew out of, flowed from, or was incident to the [specified subject] in order to meet the requirement that there be a causal relationship between the accident or injury and the [subject]." (Internal quotation marks omitted.) *Pasiak I*, supra, 327 Conn. 244. We also noted that this definition of "arising out of" is "expansive," and it underscores "that it is less demanding than the standard for proximate cause." (Internal quotation marks omitted.) Id. Finally, we also recognized that this expansive definition applies both to provisions that afford coverage and those that exclude coverage, including the business pursuits exclusion. Id., 245.

Of course, as we noted in *Pasiak I*, "[o]ur case law construing the phrase 'arising out of' offers useful, but limited, guidance" for determining whether the exclusion applies in a particular case. Id., 246. We therefore went on to discuss the kind of facts that would need to be found for the exclusion to clearly and unambiguously apply in the specific context of this case. See id., 246–52. We observed that "the question of whether the defendant's false imprisonment of Socci was connected with, had its origins in, grew out of, flowed from, or was incident to his business pursuits would . . . be a factual matter." Id., 245; see also, e.g., *Kolomiets* v. *Syncor International Corp.*, 252 Conn. 261, 265, 746 A.2d 743 (2000) (in context of workers' compensation claim, whether injury arose out of employment considered as matter of fact); *Whitney Frocks, Inc.* v. *Jobrack*, 135 Conn. 529, 534, 66 A.2d 607 (1949) ("the question [of]

whether . . . the transaction arose out of the business for which the corporation was organized was a question of fact for the jury to decide").

In light of the foregoing, we concluded that it was "clear that neither the trial court nor the Appellate Court applied the proper standard for 'arising out of' a business pursuit." *Pasiak I*, supra, 327 Conn. 252. We explained that "*further factual findings would be necessary* to determine whether this exception applies under the correct standard." (Emphasis added.) Id., 229–30. With respect to the trial court's analysis, we explained that its "continuity and profit motive test conflated the test for determining whether a business pursuit exists with the one for determining whether the act giving rise to the injury arose out of such a pursuit." Id., 252. Although the trial court's approach was too restrictive, we explained that "the Appellate Court's was too expansive. The Appellate Court's 'but for' approach relied too heavily on Socci's employment status and the work based location at which she sustained the injury. We agree with the Appellate Court that the requisite standard could be met if, in addition to these facts, the false imprisonment was a function of, or facilitated by, the employer-employee relationship. . . . However, this is a factual finding on which the trial court expressed no view." (Citation omitted.) Id., 254.

In footnote 12 of *Pasiak I*, we enumerated certain evidence that may be probative of whether Socci's injury "arose out of" the defendant's business pursuits. We stated: "Socci's testimony reflects numerous additional facts on which the trial court's decision is silent. For example, Kotulsky was targeting Socci's 'boss.' Because Socci was a new employee, the defendant periodically stopped by the office to see whether Socci had any questions. After the incident, the defendant anxiously and repeatedly expressed a concern to Socci that Kotulsky's actions would 'ruin' his business, and did so

as part of a two-pronged argument as to why she should not report the incident to the police. When she told the defendant that she wanted to leave the office, he told her, '[i]t's business as usual.' Although Socci was too distraught to perform any of her usual tasks, she viewed her presence in acquiescence to the defendant's demands as having 'worked all day.' When [the defendant] and Socci left the office to meet with Taranto to discuss the incident, the defendant directed Socci to leave her personal effects at the office. The defendant stopped at a construction site on the way to the meeting with Taranto and spoke with two workers there. Socci announced to the defendant that she could no longer work for him, and he relayed that concern to Taranto when the three met. Taranto was instrumental in Socci's hiring and training, and she was intimately involved in the defendant's business affairs. Socci and Taranto knew each other from having previously worked for the same employer for several years, but [they] never had any relationship outside of work. The defendant allowed Socci to leave close to the time that her normal workday was scheduled to end."[5] Id., 253 n.12.

[5] We also provided the trial court additional guidance regarding our construction of the business pursuits exclusion, noting that, "[a]lthough broadly construed, this court's application of ['arising out of'] indicates that the requisite causal nexus would not be met merely by a sequential relationship between the injury and the business pursuit. . . . Accordingly, this case law makes clear that the mere fact that the false imprisonment occurred after Socci arrived at her workplace would not, in and of itself, establish the requisite nexus." (Citations omitted.) *Pasiak I*, supra, 327 Conn. 246–47. We noted, however, that "the purpose of the activity or action giving rise to the liability, in connection with other employment related facts, may support the requisite causal nexus. Altercations causing bodily injury and even death have been deemed to arise from a business pursuit when the dispute giving rise to the action was business related." Id., 248. "The mere fact that a dual social and business purpose exists will not, in and of itself, take the activity outside the scope of the exclusion." Id., 250. Additionally, we explained that, "even when no business purpose reasonably could motivate or be furthered by the action, use of the employment relationship or status to effectuate the harmful act may provide the requisite causal connection." Id.

Accordingly, we concluded that "we [could not] say on the basis of the limited facts found by the trial court or the evidentiary record whether the business pursuits exclusion applies as a matter of law. There was additional evidence in the Socci action relating to the matter raised by the Appellate Court on which the trial court made no findings, which that court may consider on remand. . . . We express no view as to whether the [trial] court must credit this evidence or the weight that such evidence should be given if the court elects to credit it." (Citation omitted.) Id., 254. Therefore, we remanded the case and directed that "the plaintiffs are entitled to appropriate discovery and a trial de novo to determine whether they have met their burden of proving that the business pursuits exclusion bars coverage." Id., 270.

In sum, in *Pasiak I*, we construed the relevant policy language in the defendant's umbrella insurance policy, explained the specific factual circumstances in which the language would or would not unambiguously apply, and directed the trial court on remand to conduct a trial de novo to determine, as a factual matter, whether the plaintiffs satisfied their burden of proving that this policy language bars coverage.

Recognizing that this court had construed the relevant policy language in *Pasiak I*, the trial court correctly noted that its task on remand was "to engage in a flexible fact-specific inquiry to determine if the [plaintiffs] satisfied [their] burden of [proving] that the false imprisonment or Socci's injury in this case was connected with, had its origins in, grew out of, flowed from, or was incident to [the defendant's] business pursuits." (Internal quotation marks omitted.) As a result, the trial court rejected the defendant's contention that a heightened standard should apply, explaining that it was "not called [on] to construe the exclusion. The Supreme Court has already done so. Rather, the court is applying

the high court's construction to the facts of the case. Accordingly, the court finds that [the plaintiffs] must satisfy [their] burden of proof by a preponderance of the evidence."

It is well settled that "the general rule [is] that when a civil statute is silent as to the applicable standard of proof, the preponderance of the evidence standard governs factual determinations required by that statute." (Internal quotation marks omitted.) *Stuart* v. *Stuart*, 297 Conn. 26, 38, 996 A.2d 259 (2010); see also, e.g., *State* v. *Davis*, 229 Conn. 285, 295–96, 641 A.2d 370 (1994). General Statutes § 52-29 governs claims for declaratory relief. See General Statutes § 52-29 (a); see also Practice Book §§ 17-54 and 17-55. Neither § 52-29 nor any of the other authorities governing declaratory judgment actions contain a heightened standard of proof. Because a declaratory judgment action is an ordinary civil action, without a heightened standard of proof required by the statute, it is subject to the preponderance of the evidence standard. See, e.g., *State* v. *Davis*, supra, 295–96. Accordingly, we conclude that the trial court properly applied the preponderance of the evidence standard to determine the factual question of whether the plaintiffs established that the business pursuits exclusion barred coverage.

The defendant nevertheless contends that a heightened standard is appropriate given our statement in *Pasiak I* that, "[w]hen construing exclusion clauses, the language should be construed in favor of the insured unless [the court] has a high degree of certainty that the policy language clearly and unambiguously excludes the claim." (Internal quotation marks omitted.) *Pasiak I*, supra, 327 Conn. 239, quoting *Connecticut Ins. Guaranty Assn.* v. *Drown*, supra, 314 Conn. 188. This "high degree of certainty" language, however, has its origins in decisions from this court construing language contained in insurance policies. See, e.g., *Kelly* v. *Figueiredo*,

223 Conn. 31, 37, 610 A.2d 1296 (1992) ("The exclusion clause [in the insurance policy] is not ambiguous. . . . We can say with a high degree of certainty that the exclusion clause was intended to exclude all assaults and batteries from coverage." (Citation omitted.)); *Griswold* v. *Union Labor Life Ins. Co.*, 186 Conn. 507, 514, 442 A.2d 920 (1982) ("We cannot say that the clause in question is clear and unambiguous. Upon reading the anti-duplication clause as it has been written by the authors of the contract, we cannot say with any degree of certainty whether it was intended to exclude not only [money] or benefits actually received but also those capable of being received under any coverage required or provided by any statute or no-fault insurance policy."). The "high degree of certainty" standard applies only when construing language in a policy; it does not apply when a trial court is determining, as a factual matter, whether a party has met its burden of establishing that the policy exclusion unambiguously applies. Indeed, the defendant has not cited a single case that requires the application of a "high degree of certainty" standard when a court makes a factual determination as to whether the facts of a case satisfy language in an insurance policy. Because, as we explained, this court has construed the relevant policy language in *Pasiak I*,[6] the trial court correctly determined that the application of a heightened standard on remand was not appropriate. The defendant's argument conflates the legal standard for construction of a policy exclusion and the burden of proof to be applied in a declaratory judgment action to determine whether, as a factual matter, a policy exclusion applies.

[6] We emphasize that this court did not conclude that the business pursuits exclusion or the "arising out of" language was ambiguous. Rather, we explained that the meaning of "arising out of" is "well established . . . ." (Internal quotation marks omitted.) *Pasiak I*, supra, 327 Conn. 244; see also *Hogle* v. *Hogle*, supra, 167 Conn. 577.

We emphasize the unusual procedural posture of this case. There was no need for the trial court, on remand, to apply the "high degree of certainty" standard or other principles of insurance contract interpretation, such as contra proferentem. This court had already interpreted the business pursuits exclusion in *Pasiak I* and specified the factual situations in which that exclusion would clearly and unambiguously apply. Normally, there will not be a prior adjudication, as in this case, that has determined whether an insurance contract is ambiguous or how it should be interpreted in a particular factual setting. We have held that "[c]ontext is often central to the way in which policy language is applied; the same language may be found [to be] both ambiguous and unambiguous as applied to different facts. . . . Language in an insurance contract, therefore, must be construed in the circumstances of [a particular] case . . . and cannot be found to be ambiguous [or unambiguous] in the abstract." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 41–42, 84 A.3d 1167 (2014). This case is unusual in the sense that we have already interpreted the relevant policy language in the specific factual context that defines the dispute between the parties. This distinctive procedural posture meant that the trial court, on remand, was not required to reinterpret the contract and, therefore, had no need to apply the usual interpretive presumptions. Indeed, the history of this case illustrates the point. Before this case reached this court in *Pasiak I*, the trial court had construed the relevant policy language in the first instance. On appeal, the Appellate Court disagreed with the trial court's interpretation. See *Nationwide Mutual Ins. Co.* v. *Pasiak*, supra, 161 Conn. App. 100–101. Finally, when the case reached this court, we explained that neither the trial court's nor the Appellate Court's interpretation was correct.

See *Pasiak I*, supra, 327 Conn. 252. Although we disagreed with its construction, it was nevertheless proper for the trial court in *Pasiak I* to have engaged in interpreting the insurance policy in the specific factual context of the case, applying all interpretive principles applicable to insurance contracts, including, when appropriate, contra proferentem.

II

The defendant also raises a number of claims relating to whether the trial court correctly determined that the plaintiffs had carried their burden of proof. Specifically, the defendant claims that (1) the trial court erred when it found in the plaintiffs' favor after they failed to produce new, credible evidence that was not raised during the first trial, (2) the trial court erred in failing to find the defendant's evidence, in the form of contemporaneous witness statements made on the day of the incident, to be the most credible and reliable form of evidence in the record, (3) the trial court's conclusion that Kotulsky's actions constituted an attack on Pasiak Construction is unsupported by any evidence in the record, and (4) the trial court improperly found in the plaintiffs' favor on public policy grounds.

On the basis of our examination of the record and the briefs, and our consideration of the arguments of the parties, we conclude that the defendant's remaining claims are without merit, and the judgment of the trial court should be affirmed. Specifically, we conclude that (1) the trial court did not err when it found in the plaintiffs' favor on the basis that they failed to produce new, credible evidence that was not raised during the first trial, (2) with respect to the second and third claims, the record, viewed as a whole, contains evidence that supports the factual findings of the trial court, and (3) the public policy discussion in the trial court's memorandum of decision was not essential to

the trial court's determination of the case and is, therefore, dictum.[7] Because these claims are particular to the facts of this case and do not raise significant legal questions, extensive discussion of these claims would serve no useful purpose. Cf. *Office of Chief Disciplinary Counsel* v. *Miller*, 335 Conn. 474, 479–80, 239 A.3d 288 (2020) (because trial court properly resolved remaining claims, "[i]t would serve no useful purpose . . . to repeat the discussion contained [in the trial court's memorandum of decision]").

## CONCLUSION

The trial court properly applied the preponderance of the evidence standard at the trial de novo to deter-

[7] Although we conclude that the trial court's public policy discussion was dictum, we take this opportunity to emphasize the purpose of the business pursuits exclusion as it relates to different lines of insurance coverage. "As a means of limiting the coverage afforded by the liability insurance policies they sell, many insurance companies include in such policies a provision known as the 'business pursuits' exclusion." G. Locke, "Avoiding the 'Business Pursuits' Exclusion—Insured's Activity as Not Business Pursuit," 15 Am. Jur. Proof of Facts 3d 515, 521, § 1 (1992). "The purpose of a 'business pursuits' exclusion is to help the insurer keep premiums at a reasonable level by eliminating a type of coverage that (1) normally requires specialized underwriting and rating, (2) is not essential to most purchasers of the policy, and (3) is provided by other insurance contracts a business owner is likely to have. The need for insurance companies to keep business liability coverage separate from personal liability coverage, and to maintain separate underwriting and rating for each, arose in part from the vastly different premises liability exposures that historically existed in the home and business settings. Traditionally, a homeowner was required only to refrain from intentionally injuring social guests and to warn such guests of any hidden dangers he or she might reasonably expect them to encounter. By contrast, a business owner owed his or her invitees a duty to maintain the premises in [a] safe condition and to protect the invitees from injury by reason of any defects that were known or, in the exercise of reasonable care, should have been known. Even with the common-law distinctions between social guests and business invitees now blurred or eliminated in many jurisdictions, insurers remain interested in excluding from their general liability coverage the increased risk attendant on the traffic that a place of business normally generates, and a 'business pursuits' provision allows them to accomplish this." (Footnotes omitted.) Id., p. 522. Accordingly, although the language of the particular insurance policy and the facts of the situation will always govern the coverage question, it is important to remember that personal liability insurance policies and commercial insurance policies contemplate

mine the factual question of whether the plaintiffs established that the business pursuits exclusion of the umbrella insurance policy barred coverage. The defendant's argument to the contrary conflates the legal standard for construction of a policy exclusion and the burden of proof to be applied in a declaratory judgment action to determine whether, as a factual matter, a policy exclusion applies.

The judgment is affirmed.

In this opinion the other justices concurred.

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different risks and, therefore, afford different coverage at difference premiums.