RICHARD COSTANTINO ET AL. *v.* STANLEY SKOLNICK ET AL.
(SC 18327)

Rogers, C. J., and Norcott, Katz, Palmer, Vertefeuille, Zarella and McLachlan, Js.

Argued September 8, 2009—officially released February 16, 2010

David A. Slossberg, with whom, on the brief, was *Brian J. Wheelin*, for the appellant (named plaintiff).

John B. Farley, with whom were *Daniel P. Scapellati* and, on the brief, *Brian J. Gedicks*, for the appellees (defendant Medical Professional Mutual Insurance Company et al.).

Opinion

KATZ, J. The named plaintiff, Richard Costantino,[1] appeals from the trial court's decision[2] denying his request for a declaratory judgment that the defendant Medical Professional Mutual Insurance Company doing business as ProMutual and ProSelect Insurance Company (ProMutual), the medical malpractice insurer for the named defendant, Stanley Skolnick, is required to pay the plaintiff offer of judgment interest that exceeds the limits of liability in Skolnick's policy. The plaintiff sought the declaration after the parties had entered into a settlement agreement (agreement) that required ProMutual to pay Skolnick's $1 million policy limit to the plaintiff and under which they stipulated that: (1) the agreement was to be considered a verdict and judgment in favor of the plaintiff for purposes of the offer of judgment statute, General Statutes (Rev. to 2005) § 52-192a;[3] and (2) the plaintiff would have been entitled to offer of judgment interest had the case been tried to conclusion. On appeal, the parties are aligned in their position that the trial court improperly declined to resolve the matter on the basis of the issue presented to it, in light of the stipulations in their agreement and the declaratory posture of the action. They disagree, however, as to whether the pertinent policy provision, which defined damages to include prejudgment interest, can be given effect so as to bar an award of such interest when the total recovery would exceed the policy limit. We conclude that the parties' stipulations did not satisfy the necessary predicate to an award of offer of judgment interest under § 52-192a, namely, a judgment in the plaintiff's favor after a trial. Accordingly, we conclude that the trial court properly declined to reach the issue on which the plaintiff had sought a declaration. Therefore, we affirm the trial court's decision.

The record reveals the following undisputed facts and procedural history. In August, 2004, the plaintiff commenced a malpractice action against Skolnick, a general internist, and Skolnick's medical practice, the defendant Darien Medical Group, alleging that Skolnick's negligent failure to properly diagnose and treat the plaintiff had caused him to suffer severe hypertension and end stage renal failure, which ultimately required him to undergo a kidney transplant. The plaintiff, who had been a senior vice president with The Bank of New York, further alleged that these injuries had resulted in his reassignment to a position at substantially reduced compensation and had derailed his promising career. On September 30, 2005, the plaintiff filed an offer of judgment in the amount of $1 million, the limit of liability under Skolnick's malpractice policy with ProMutual. That offer was not accepted within the thirty day period mandated under § 52-192a (a) and, therefore, was deemed rejected as a matter of law.[4] See

footnote 3 of this opinion.

Approximately nineteen months after the filing of the offer of judgment, the plaintiff, Skolnick and ProMutual executed the agreement to settle the case.[5] Under the agreement, ProMutual was to pay Skolnick's $1 million policy limit to the plaintiff in exchange for the plaintiff's release of all claims against the defendants under the pending action except for a claim against ProMutual for offer of judgment interest. With respect to offer of judgment interest, the agreement provided in relevant part: "The [plaintiff] and [Skolnick and ProMutual] agree that the issue of whether or not [ProMutual is] obligated, under the terms of the policy of insurance that [ProMutual] issued to [Skolnick], for the payment of offer of judgment interest is an issue that needs to be decided by a court of law.

"The [plaintiff] and [Skolnick and ProMutual] have agreed to reserve to the court the question on offer of judgment interest as set forth . . . below in the interests of judicial efficiency, in order to avoid a full trial that the parties agree would result in a judgment of at least [$1 million] representing the underlying policy limits in this action. . . .

"[I]t is agreed that if the action were tried to conclusion, the [plaintiff] would become entitled to recover from [ProMutual] the sum certain of [$1 million] plus offer of judgment interest in the amount of $293,000.00. For all purposes under the prejudgment [interest] statute,[6] this [a]greement shall be considered to be a verdict and judgment in favor of the plaintiff, it being both parties' desire to promote a fair and efficient resolution of the prejudgment . . . interest issue without the time and expense to the parties and the judicial system of a long and protracted trial. . . .

"The question reserved to the court is whether, given that a valid offer of judgment was filed by the plaintiff in the amount of [$1 million], and assuming a verdict entered after trial of at least [$1 million] such that offer of judgment interest would be due on the [$1 million] verdict, is [ProMutual] required to pay said offer of judgment interest where, as here, it exceeds the [$1 million] policy limits?"

The agreement further acknowledged that, if the court ruled in the plaintiff's favor, such a decision would obligate ProMutual to pay $293,000 in offer of judgment interest, and, conversely, if the court ruled in ProMutual's favor, such a decision would obligate the plaintiff to release all further claims against ProMutual beyond the $1 million policy payment. The agreement provided that in no event would Skolnick incur any obligation.

In accordance with their agreement, the plaintiff thereafter filed a motion to cite in ProMutual as a party defendant, which the court, *Karazin*, *J.*, granted. The plaintiff concurrently filed an amended complaint,

along with a copy of the agreement, in which he added to his original medical malpractice count against Skolnick a count against ProMutual for a declaratory judgment as to the question reserved in the agreement regarding offer of judgment interest. ProMutual thereafter filed an answer and asserted as a special defense that it was not liable for offer of judgment interest because the policy defines damages to include prejudgment interest[7] and its agreement to pay the $1 million policy limit had exhausted its obligation under the policy. ProMutual subsequently filed a motion for summary judgment on the declaratory judgment count, and the plaintiff simultaneously filed a motion for a declaratory ruling.

After argument on the motions, the trial court, *J. R. Downey, J.*, issued a memorandum of decision addressing both motions, making dispositive determinations in favor of ProMutual, but on a different ground than the one raised by the parties. Specifically, the court pointed to the fact that § 52-192a permits an award of offer of judgment interest only " '[a]fter trial' . . . ." The court therefore reasoned that, because the matter had been settled *before* trial by way of a settlement, § 52-192a did not authorize offer of judgment interest. Although the court recognized that the parties had sought a determination as to the effect of the policy limit on offer of judgment interest, the court concluded that its construction of the statute rendered that determination unnecessary. The parties thereafter unsuccessfully invoked several procedural mechanisms in an attempt to obtain a ruling on the issue not addressed by the trial court. First, the parties filed a joint motion for reargument, specifically directing the trial court to the language in the agreement wherein the parties had stipulated that the agreement was to be treated as a verdict and judgment for purposes of the motions before the court. Judge Downey granted the motion for reargument, but denied the relief requested. Next, after the plaintiff had appealed from the trial court's judgment, ProMutual filed a motion for articulation in the trial court as to the following question: "Are insurance companies and policyholders free to enter into liability insurance contracts that limit the amount the insurer must pay as damages on behalf of the policyholder, including any prejudgment interest that may be assessed against the policyholder?" Judge Downey thereafter issued an articulation stating that he had considered, but not decided, the hypothetical question posed because "the necessary predicate, a trial, had not occurred." The court further explained that reaching this question would have been rendering an advisory opinion, which courts are not inclined to do.

On appeal to this court; see footnote 2 of this opinion; the plaintiff contends, and ProMutual agrees, that the trial court improperly declined to answer the question that the parties had presented to it because that ques-

tion properly was before the court and did not require it to render an advisory opinion. With respect to the merits of this question, the plaintiff contends that the policy provision defining the limit on damages to include prejudgment interest cannot be given effect because: (1) the offer of judgment statute is mandatory and punitive; and (2) the policy's definition of damages as including prejudgment interest is unenforceable because it is an attempt to circumvent the legislative directive under § 52-192a and the policy's characterization cannot change the actual nature of the interest. As to its view of the merits, ProMutual contends that it cannot be obligated to pay offer of judgment interest because, under the unambiguous terms of Skolnick's policy, it had paid the policy limit to the plaintiff and public policy does not weigh in favor of superseding such unambiguous contract language. We affirm the trial court's decision.

I

Our analysis begins with the question of whether the trial court properly based its decision on the dictates of § 52-192a or whether, as the parties claim, the trial court's decision should have been determined solely by the effect of the policy's limit on damages.[8] The parties contend that this issue properly was before the court in light of the express terms of their agreement that: (1) the agreement would constitute a verdict and judgment in the plaintiff's favor for all purposes of the offer of judgment statute; and (2) the plaintiff was entitled to interest under that statute. Therefore, they contend that the *only* issue properly before the court was whether ProMutual is obligated to pay offer of judgment interest when that interest, coupled with the $1 million settlement, would exceed the policy limit on damages. The parties also contend that, because a decision on the issue presented would have resulted in the payment or nonpayment of interest, the trial court improperly concluded that a decision on this question would have been merely advisory. In support of all of these contentions, ProMutual specifically contends that the trial court mistakenly treated the claim as one for an award of interest under § 52-192a, rather than a claim for a declaratory judgment under General Statutes § 52-29[9] regarding a policy coverage dispute.[10]

We note that, because the parties' claim centers on whether the trial court applied the proper legal standard, our review is plenary. *Archambault* v. *Soneco/Northeastern, Inc.*, 287 Conn. 20, 32, 946 A.2d 839 (2008); *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002). Upon such review, we conclude that the trial court properly declined to decide whether the policy limitation on damages barred payment of offer of judgment interest because it properly concluded that a necessary predicate to reaching this question had not

been satisfied.

We first point out that, although the parties have attempted to characterize their dispute as arising wholly out of contract—the agreement and the policy—the terms of the parties' agreement and their respective positions regarding the declaratory judgment action belie that characterization. The agreement provides in relevant part: "*For all purposes under the prejudgment* [*interest*] *statute*, this [a]greement shall be considered to be a verdict and judgment in favor of the plaintiff, it being both parties' desire to promote a fair and efficient resolution of the prejudgment . . . interest issue without the time and expense to the parties and the judicial system of a long and protracted trial." (Emphasis added.) The agreement expressly instructed the trial court to "*assum*[*e*] *a verdict was entered after trial* of at least [$1 million] such that offer of judgment interest would be due on the [$1 million] verdict . . . ." (Emphasis added.) In the first statement, the parties acknowledge that § 52-192a is the source of the obligation of offer of judgment interest.[11] In both statements, the parties implicitly acknowledge that the plaintiff would not be entitled to interest unless he had satisfied a predicate to recovery under that statute, namely, a trial upon which judgment was rendered in the plaintiff's favor.

The nature of the disagreement between the parties as to the question raised in the declaratory judgment count further underscores that § 52-192a was the necessary starting point for the trial court's analysis. The parties did not dispute the meaning of the policy. Rather, their dispute centered on whether it would be consistent with the legislature's intent in enacting § 52-192a to give effect to a contract provision that unambiguously defined its limitation on damages to include prejudgment interest. See footnote 8 of this opinion. Specifically, the plaintiff focused on the mandatory nature and punitive intent of the statute and contended that the policy's characterization of such interest as damages could not change the essential nature of the interest. Thus, it is clear that § 52-192a is the source of the obligation that the plaintiff invokes and that ProMutual seeks to avoid in this case. Therefore, despite their attempt to characterize the issue before the trial court as one arising solely out of contract, the record is to the contrary.

It also is evident that, by deeming their agreement tantamount to a judgment in the plaintiff's favor and directing the court to assume as much, the parties proceeded from the presumption that the requirements of § 52-192a had been met, such that the only question left to the court was whether the policy limit could bar the award of § 52-192a interest. The mere fact, however, that parties assume that a necessary predicate to their claim has been satisfied does not preclude the court

from considering that predicate issue. See, e.g., *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 403–404, 944 A.2d 925 (2008) (addressing question of whether provision of Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq., imposes same duty on employers to provide reasonable accommodation to disabled individuals that is required under federal Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., despite fact that parties were in agreement for purposes of appeal that same duty applied, "[b]ecause this question is an essential predicate to our analysis of the plaintiff's claim in the present case"); *Schiano* v. *Bliss Exterminating Co.*, 260 Conn. 21, 33, 792 A.2d 835 (2002) (deciding that, before court could reach issue raised as to whether attorney's fees fell within *exclusion* to General Statutes § 31-303, statute assessing interest on late payments due under workers' compensation award, it must decide threshold issue as to whether such fees constituted " 'payment due under an award' " under that statute, which was issue that neither party had disputed); *State* v. *Miranda*, 245 Conn. 209, 214–15, 715 A.2d 680 (1998) ("[b]efore addressing the certified issue of whether the facts and circumstances of this case were sufficient to create a legal duty to protect the victim from parental abuse pursuant to [General Statutes] § 53a-59 [a] [3], we turn our attention to the question of whether, even if we assume such a duty exists, the failure to act can create liability under that statute"), rev'd, 274 Conn. 727, 878 A.2d 1118 (2005); see also *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 331–32, 968 A.2d 396 (2009) (addressing predicate assumption before addressing plaintiffs' ultimate claim on appeal). Therefore, the trial court properly considered the predicate issue of whether a settlement agreement deemed by the parties to be a verdict and judgment in the plaintiff's favor for purposes of § 52-192a could invoke the court's authority under that statute prior to addressing the parties' dependent claim as to whether the policy limit barred offer of judgment interest under § 52-192a.[12] See *Bania* v. *New Hartford*, 138 Conn. 172, 175, 83 A.2d 165 (1951) ("in an action for a declaratory judgment we are not limited by the issues joined or by the claims of counsel").

Accordingly, we turn to the merits of the trial court's decision, which turns on the proper construction of § 52-192a. Well settled rules guide our inquiry. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the

statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ."[13] (Internal quotation marks omitted.) *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 547, 970 A.2d 630 (2009).

General Statutes (Rev. to 2005) § 52-192a (b) provides in relevant part: "*After trial* the court shall examine the record to determine whether the plaintiff made an 'offer of judgment' which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's 'offer of judgment', the court shall add to the amount so recovered twelve per cent annual interest on said amount . . . ." (Emphasis added.) As this language makes clear, the trial court is authorized to award offer of judgment interest only after a trial. A settlement clearly is not a trial. Indeed, "[w]hen parties agree to settle a case, they are effectively contracting for the right to *avoid* a trial." (Emphasis in original.) *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs*, 225 Conn. 804, 812, 626 A.2d 729 (1993). A settlement bears none of "the distinctive hallmarks of a trial." *Nunno* v. *Wixner*, 257 Conn. 671, 679, 778 A.2d 145 (2001); see id., 678–82 (concluding that award rendered pursuant to court mandated arbitration proceeding does not constitute trial within meaning of § 52-192a and explaining substantive and procedural distinctions between proceedings). A trial and a settlement achieve different purposes and have different legal consequences. See *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 168, 681 A.2d 293 (1996) ("[w]hen an award is made pursuant to a settlement . . . the underlying issues have not been fully and fairly litigated, and, therefore, the earlier award can have no preclusive effect on a subsequent action"); *Hill* v. *State Employees Retirement Commission*, 83 Conn. App. 599, 613, 851 A.2d 320 ("[a]n issue that has been resolved by virtue of a settlement agreement has not actually been litigated"), cert. denied, 271 Conn. 909, 859 A.2d 561 (2004); see also *Janus Films, Inc.* v. *Miller*, 801 F.2d 578, 582 (2d Cir. 1986) ("[i]n determining the details of relief [pursuant to a settlement agreement], the judge may not award whatever relief would have been appropriate after an adjudication on the merits, but only those precise forms of relief that are either agreed to by the parties . . . or fairly implied by their agreement" [citations omitted]). Indeed, as in the present case, in a settlement, the defendant may deny or refuse to concede the factual predicate for liability.

Although we have no doubt that the parties were acting in good faith to resolve the matter expeditiously

and properly, just as "putting a contract tag on a tort claim will not change its essential character"; *Gazo* v. *Stamford*, 255 Conn. 245, 263, 765 A.2d 505 (2001); calling a settlement a verdict after trial does not make it so. See also id. ("[p]utting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender" [internal quotation marks omitted]). Therefore, the legislative grant of authority to the courts in § 52-192a to award offer of judgment interest "[a]fter trial" reasonably cannot be construed to mean "after a settlement," even if the parties agree to treat the settlement as a verdict and judgment in the plaintiff's favor. The plaintiff in the present case sought an order from the court requiring ProMutual to pay offer of judgment interest. Although the parties could have agreed as part of their *settlement* to the payment or nonpayment of offer of judgment interest, they have provided no case law, and we are aware of none, that holds that a court may award relief conferred solely by statute under terms that are inconsistent with those under which the legislature conferred such authority. See *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 790, 855 A.2d 174 (2004) ("authority to act refers to the way in which that power [to hear and to determine the controversy] must be exercised in order to comply with the terms of the statute" [internal quotation marks omitted]).

We are mindful that the stated purpose of the parties' settlement is consistent with the purpose of the offer of judgment statute, which is "to encourage pretrial settlements and, consequently, to conserve judicial resources." (Internal quotation marks omitted.) *Stiffler* v. *Continental Ins. Co.*, 288 Conn. 38, 43, 950 A.2d 1270 (2008). The statute also, however, is intended to provide an incentive to accept a reasonable offer of judgment within thirty days after the offer is made. In the present case, the defendants continued to litigate this issue for nineteen months after the offer of judgment was made for the same amount agreed to upon settlement, the policy limit. Nonetheless, even if the position advanced by the parties was entirely consistent with the policy underlying the statute, "[w]here there is no ambiguity in the legislative commandment, this court cannot, in the interest of public policy, engraft amendments onto the statutory language." *Burnham* v. *Administrator, Unemployment Compensation Act*, 184 Conn. 317, 325, 439 A.2d 1008 (1981); accord *Hotarek* v. *Benson*, 211 Conn. 121, 129, 557 A.2d 1259 (1989) ("[t]he statutes cannot be changed by the court to make them conform to the court's conception of right and justice in a particular case"); *Local 218 Steamfitters Welfare Fund* v. *Cobra Pipe Supply & Coil Co.*, 207 Conn. 639, 645, 541 A.2d 869 (1988) ("We are bound to interpret legislative intent by referring to what the legislative text contains, not by what it might have contained. . . . Nor can we

engraft language not clearly intended by its enactment onto legislation." [Citation omitted; internal quotation marks omitted.]). If the legislature concludes that it is consistent with the purpose of the offer of judgment statute to allow parties to stipulate to treating their settlement as a judgment in the plaintiff's favor for purposes of that statute, it has the sole authority to add such language to the statute. "It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.) *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 216, 901 A.2d 673 (2006).

II

The parties also claim that the trial court improperly concluded that a decision on the issue presented as to the effect of the policy limit would be an improper advisory opinion. Our analysis in part I of this opinion demonstrates that the court properly declined to address the question as framed in the declaratory judgment count, not because to do so would have been to render an advisory opinion, but because a necessary predicate to reaching the issue raised had not been met. See, e.g., *State* v. *Mullins*, 288 Conn. 345, 377, 952 A.2d 784 (2008) (concluding that, because defendant did not establish necessary predicate to application of particular test, trial court properly declined to apply test); *Gelinas* v. *West Hartford*, 225 Conn. 575, 587, 626 A.2d 259 (1993) (concluding that, because plaintiffs' site plan application did not comply with zoning statutes' requirements, which was necessary predicate to claimed entitlement to writ of mandamus, court need not consider whether defendants had mandatory duty under statutes that warranted extraordinary remedy of mandamus relief).

The issue as framed by ProMutual in its motion for articulation, however, called on the trial court to render an advisory opinion. For purposes of raising an alternate ground for affirmance, ProMutual sought a broad declaration as to whether "insurance companies and policyholders [are] free to enter into liability insurance contracts that limit the amount the insurer must pay as damages on behalf of the policyholder, including any prejudgment interest that may be assessed against the policyholder . . . ."[14] In light of the trial court's determination that prejudgment interest could not be awarded under § 52-192a under the facts of the present case, the answer to such a question could not have determined any rights or obligations of the parties. Thus, as framed, ProMutual impermissibly "sought a declaratory judgment, not to settle a present controversy, but rather to avoid one in the future." *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 629, 822 A.2d 196 (2003). Indeed, at oral argument before this court, ProMutual acknowledged that it actu-

ally was seeking a "black letter" ruling, applicable to all insurance companies and policyholders. Such a determination, however, is too abstract to be determined properly by a court. See *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 625–26 ("declaratory judgment procedure may not be utilized merely to secure advice on the law . . . or to establish abstract principles of law [citation omitted; internal quotation marks omitted]"); see also *Singh* v. *Singh*, 213 Conn. 637, 654, 569 A.2d 1112 (1990) ("[l]aw suits are not determined by a consideration of philosophy in the abstract, but by the application of legal principles to the facts of a particular case" [internal quotation marks omitted]). Numerous considerations might bear on such an issue, none of which are evident in this record and none of which necessarily would be uniform in every case, such as, for example, whether, for a greater premium, the policyholder had the ability to purchase a policy that would not bar such interest, whether the policyholder precluded the insurer from accepting the offer of judgment or whether the insurer acted in bad faith in declining to accept an offer of judgment. Therefore, we conclude that the trial court properly declined to grant the plaintiff's request for a declaratory judgment on the ground that the predicates for an award of offer of judgment interest under § 52-192a had not been met.

The decision is affirmed.

In this opinion ROGERS, C. J., and NORCOTT, VERTEFEUILLE, ZARELLA and McLACHLAN, Js., concurred.

[1] Melissa Costantino, Richard Costantino's wife, also was included as a plaintiff in the original complaint in this action, which included a claim for loss of consortium. Because that claim was not realleged in the amended complaint and his wife no longer is involved in this case, we refer to Richard Costantino as the plaintiff.

[2] The plaintiff appealed from the trial court's decision to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] General Statutes (Rev. to 2005) § 52-192a provides in relevant part: "(a) After commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not relief is sought, the plaintiff may, not later that thirty days before trial, file with the clerk of the court a written 'offer of judgment' signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action and to stipulate to a judgment for a sum certain. . . . Within sixty days after being notified of the filing of the 'offer of judgment' and prior to the rendering of a verdict by the jury or an award by the court, the defendant or the defendant's attorney may file with the clerk of the court a written 'acceptance of offer of judgment' agreeing to a stipulation for judgment as contained in plaintiff's 'offer of judgment'. Upon such filing, the clerk shall enter judgment immediately on the stipulation. If the 'offer of judgment' is not accepted within sixty days and prior to the rendering of a verdict by the jury or an award by the court, the 'offer of judgment' shall be considered rejected and not subject to acceptance unless refiled. Any such 'offer of judgment' and any 'acceptance of offer of judgment' shall be included by the clerk in the record of the case.

"(b) After trial the court shall examine the record to determine whether the plaintiff made an 'offer of judgment' which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in the plaintiff's 'offer of judgment', the court shall add to the amount so recovered twelve per cent annual interest on said amount, computed from the date such offer

was filed in actions in actions commenced before October 1, 1981. In those actions commenced on or after October 1, 1981, the interest shall be computed from the date the complaint in the civil action was filed with the court if the 'offer of judgment' was filed not later than eighteen months from the filing of such complaint. If such offer was filed later than eighteen months from the date of filing of the complaint, the interest shall be computed from the date the 'offer of judgment' was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

[4] There is nothing in the record to indicate whether the decision not to accept the offer was made by Skolnick or ProMutual or both of those defendants.

[5] There is a two month discrepancy, which is not material to the issues on appeal, between the date cited by the trial court as to when the agreement was executed and the various dates on which the parties signed the agreement. We rely on the date on which the last party to the agreement signed it, May 2, 2007, as the date of execution.

[6] Although the parties' agreement refers to the "prejudgment remedy statute," it is undisputed that this reference is to the offer of judgment statute, § 52-192a.

[7] Section IX (3) of the policy provides: "DAMAGES means all monetary sums which the INSURED is legally obligated to pay as damages including judgments, awards and settlements entered into with OUR prior written consent. DAMAGES also includes pre-judgment interest awarded against an INSURED.

"DAMAGES does not include CLAIM EXPENSES, fines, penalties or taxes, punitive, exemplary, doubled, trebled or multiplied DAMAGES, or the refund, restitution or disgorgement of sums paid to or earned by the INSURED."

We note that the parties are in agreement, for purposes of this appeal, that this provision unambiguously bars payment of offer of judgment interest to the extent that such interest would bring the total payment under the policy above the $1 million policy limit. Therefore, their dispute centers not on what this provision means but rather on whether its enforcement is barred by § 52-192a when payment would be in excess of the policy limit.

[8] Although we generally would begin with the question of whether the declaratory judgment count sought an advisory opinion, our resolution of the question of whether the trial court properly based its decision on the requirements of § 52-192a makes evident why the declaratory judgment count did not call on the court to issue an advisory opinion. See part II of this opinion.

[9] General Statutes § 52-29 (a) provides: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment."

[10] We note that ProMutual also asserts that the trial court improperly concluded that it lacked subject matter jurisdiction. We do not address this claim because the trial court did not conclude that it lacked jurisdiction, but, rather, that it lacked *authority* under § 52-192a to award offer of judgment interest because the statutory predicate of a trial had not occurred. See *Tele Tech of Connecticut Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 790, 855 A.2d 174 (2004) ("Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute. . . . Whereas [s]ubject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it . . . the authority to act refers to the way in which that power [to hear and to determine the controversy] must be exercised in order to comply with the terms of the statute." [Citations omitted; internal quotation marks omitted.]). Undoubtedly, the trial court had jurisdiction to consider a declaratory judgment count brought pursuant to § 52-29.

[11] Indeed, the amount of interest is fixed in the agreement by reference to the percentage mandated by § 52-192a.

[12] We disagree with the parties' view, however well-intentioned, that it is proper for parties to stipulate to facts that are false in order to bring their conduct within the ambit of a statute and in turn obtain a declaratory

judgment that rests on those facts. The declaratory judgment claim and the parties' agreement concede that they are asking the court to assume facts that the court knows not only have not happened, but that never can happen by virtue of their choice to enter into the settlement agreement.

[13] We note that neither party contends that the term trial is ambiguous, nor have they implicitly made such an argument by bringing any legislative history to the court's attention that would indicate an intent to include settlements in that term.

[14] The declaratory judgment count referred to the facts of the case specifically and provided: "The question reserved to the court is whether, given that a valid offer of judgment was filed by the plaintiff in the amount of [$1 million], and assuming a verdict was entered after trial of at least [$1 million] such that offer of judgment interest would be due on the [$1 million] verdict, is [ProMutual] required to pay said offer of judgment interest where, as here, it exceeds the [$1 million] policy limits?"