BEACH, J., dissenting. I respectfully dissent. I have no disagreement with the majority's description of the proceedings in the trial court. The complaint was served and the return of service was filed in May, 2006. Various pleadings and motions were filed. The arbitration clause was never mentioned in the pleadings until December, 2008, when the defendants Anthony DeSimone and Charles DeSimone, Jr., in their personal capacities and as coexecutors of the estate of Charles E. DeSimone, filed a motion for a stay pending arbitration. The plaintiff, MSO, LLC, promptly objected to the motion and argued that the defendants had waived the ability to enforce the arbitration clause. A jury trial was reportedly scheduled to begin on December 11, 2008.[1] Apparently the trial was postponed, and the court did not rule on the motion for stay until March 10, 2009, after the jury had been selected and on the day on which evidence was to begin.

On March 10, 2009, immediately following the plaintiff's argument on the issue of waiver, the court ruled: "When individuals enter a contract fully aware of what the elements of the contract are, and enter an agreement, and . . . I have found in the past that if there is an arbitration clause, that the arbitration clause is going to control, and . . . I am being consistent with other decisions I have made since coming to New Haven." As noted by the majority, there was no express mention in the ruling of the question of waiver, and there was no finding or conclusion on the issue of waiver. In the context of just having heard arguments about waiver, however, the court unavoidably implied that it always enforced arbitration clauses, regardless of the circumstances in which they were asserted. In these circumstances, the record is adequate for review. The facts are found in the record; the court's ruling, although compact, was quite clear.

The majority states that the clearly erroneous standard is applicable to the issue of whether a party has waived enforcement of an arbitration clause. It is indeed true that this court has stated that such is the case; see *Mattie & O'Brien Contracting Co.* v. *Rizzo Construction Pool Co.*, 128 Conn. App. 537, 542–43, 17 A.3d 1083, cert. denied, 302 Conn. 906, 23 A.3d 1247 (2011); and I, of course, agree that we are bound by our prior holdings.[2]

The difficulty arises because the court did not decide whether the defendants had waived by their conduct their ability to enforce the arbitration clause; rather, the court implicitly held that the defense of waiver by conduct is immaterial whenever there is an arbitration clause in a contract. Because the rationale for the plaintiff's objection, i.e., a party may be deemed to have

waived enforcement of an arbitration clause by its conduct, was and is clearly recognized; see, e.g., *Mattie & O'Brien Contracting Co.* v. *Rizzo Construction Pool Co.*, supra, 128 Conn. App. 542–43; I would reverse the judgment and remand the case for consideration of the merits of the plaintiff's objection to the defendants' motion to stay the proceedings pending arbitration.[3]

I therefore respectfully dissent.

[1] The plaintiff has provided in its appendix copies of several postcard notices for "jury trial date-certain." One such notice indicated that trial was to begin on August 19, 2008, another ordered trial to begin on December 11, 2008, another for January 9, 2009, and finally the last for February 20, 2009. The motion for stay, then, was filed well after the first "firm" trial date and just after the second.

[2] The authority relied on can be tracked through a number of cases that state the standard of review for "waiver and estoppel" claims. See, e.g., *Hanover Ins. Co.* v. *Fireman's Fund Ins. Co.*, 217 Conn. 340, 350, 586 A.2d 567 (1991) ("because waiver and estoppel are questions of fact . . . we will not disturb the trial court's findings unless they are clearly erroneous" [citation omitted]). *Hanover Ins. Co.* cites *New York Annual Conference* v. *Fisher*, 182 Conn. 272, 300, 438 A.2d 62 (1980), for the proposition that "waiver and estoppel are questions of fact," but that case actually states an entirely different proposition: "Estoppel, waiver, unjust enrichment and unclean hands are all defenses which *depend upon* questions of fact that must be determined, in the first instance, by the trial court." (Emphasis added.) Id. *Hanover Ins. Co.* cites *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 221–22, 435 A.2d 24 (1980), for the proposition that "we will not disturb the trial court's findings unless they are clearly erroneous." The court in *Pandolphe's Auto Parts, Inc.*, however, states: "On appeal, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Citation omitted.) Id.

Findings of historical fact are, of course, reviewed by the clearly erroneous standard. But when the court is dealing not only with historical fact, but also with reaching conclusions or exercising judgment, the standard is plenary or abuse of discretion. See *State* v. *Boutilier*, 133 Conn. App. 493, 498–502, A.3d (2012) (discussing that "function performed by the trial court in issuing its ruling will dictate the scope of our review"). The facts underlying a court's ruling on waiver are appropriately reviewed by the clearly erroneous standard. The conclusion reached from those facts is one of law and is subject to plenary review. To the extent that consideration of a motion to stay involves the exercise of judgment, the standard is abuse of discretion.

[3] The defendants argued that they moved for a stay of the proceedings pending arbitration because the plaintiff had been derelict in complying with discovery requests. A stay so that the case can be arbitrated is not a standard sanction for violation of discovery requests. See, e.g., Practice Book § 13-14.