PALMER, J., dissenting. I disagree with the majority that the trial court properly declined to consider the issue raised by the named plaintiff, Richard Costantino,[1] in his request for a declaratory judgment pursuant to General Statutes § 52-29 (a),[2] concerning the liability of the defendant Medical Professional Mutual Insurance Company (ProMutual),[3] for offer of judgment interest under General Statutes (Rev. to 2005) § 52-192a[4] in an amount in excess of the limits of the medical malpractice insurance policy issued by ProMutual to its insured, the named defendant, Stanley Skolnick.[5] In support of its conclusion, the majority asserts that, because § 52-192a applies only to cases that have proceeded to trial, and because the present case was not tried, the trial court lacked the authority under § 52-192a to decide the issue posed by the plaintiff's declaratory judgment action. The majority reaches this erroneous conclusion because it confuses the authority of a trial court generally to order an award of such interest under § 52-192a, on the one hand, and the authority of the court *in the present case to render a declaratory judgment under § 52-29 (a)*, on the basis of the facts and representations contained in the parties' stipulation. In my view, it is clear that, under well established precedent governing requests for declaratory judgments, the trial court was required, first, to accept the parties' factual stipulation and, second, to render a decision in accordance with that stipulation on the plaintiff's request for a declaratory judgment. As a general matter, only if a dispute is nonjusticiable is a court permitted to decline to render a decision. The majority's contrary conclusion ignores the fact that, in the present case, the plaintiff is not seeking to have the court invoke its authority under § 52-192a to make an award of offer of judgment interest; rather, the plaintiff is asking the court to enforce the terms of the parties' stipulation, which *itself* authorizes the award of such interest if, as the plaintiff claims, ProMutual lawfully cannot shield itself contractually from paying that interest. Unfortunately, the failure of the trial court and the majority to address the issue posed by the parties deprives the plaintiff of his right to a judicial resolution of his claim that ProMutual is obligated to pay him $293,000 in offer of judgment interest under the parties' stipulation. I therefore respectfully dissent.

The facts, which are set forth in the majority opinion, are undisputed and straightforward, and need not be repeated in detail here. It is sufficient merely to underscore that the plaintiff filed an offer of judgment in the amount of $1 million, and approximately nineteen months later,[6] the plaintiff settled his malpractice claim against Skolnick for the $1 million limit of the ProMutual insurance policy. The plaintiff, however, did not

wish to give up his claim against ProMutual for offer of judgment interest in the amount of $293,000. Thus, the issue of whether ProMutual would have been liable for such interest if the case had been tried to conclusion remained in dispute between the parties. For the purpose of providing a vehicle for the resolution of that dispute, the plaintiff, without objection from ProMutual, amended his complaint to include a count seeking a judgment declaring that ProMutual was liable for such interest, over and above the policy limits, despite language in the policy to the contrary. To facilitate the court's resolution of the plaintiff's claim, the parties jointly agreed, by way of a stipulation, to treat the case as if it had proceeded to trial, with the plaintiff receiving an award of at least $1 million. Finally, the parties agreed to be bound by the court's decision as to whether ProMutual was liable for interest in accordance with the parties' stipulation.[7]

Despite the parties' joint request for a judicial resolution of their dispute, the trial court declined to decide the issue raised by the plaintiff's request for declaratory relief. Specifically, the court stated that, "[a]s clearly stated in [§ 52-192a (c)], the awarding of [offer of judgment] interest only occurs 'after trial.' . . . . No trial occurred in this case. Therefore, the court may not award interest per statute." (Citation omitted.) The court thereafter rendered judgment for ProMutual on the plaintiff's claim for declaratory relief.

In a joint motion to reargue, the parties explained that they "simply [were] asking the court to decide an issue of law based [on] agreement that all conditions for operation of the prejudgment remedy statute have . . . been met, including that there was a verdict [after trial] exceeding the offer of judgment amount." The parties further maintained that the court's refusal to decide the issue would frustrate the parties' settlement agreement and thwart the remedial purpose of the declaratory judgment statute because a decision on the question would have resolved "a bona fide and substantial issue in dispute between [them]" and rendered a trial on the merits of the plaintiff's malpractice claim unnecessary. It was the parties' contention that, by settling the plaintiff's malpractice claim against Skolnick, the parties had sought to conserve not only their own resources but also those of the court. If the case had proceeded to trial, they maintained, the plaintiff likely would have obtained a judgment that exceeded the policy limits, and the issue of whether ProMutual was responsible for the payment of the offer of judgment interest, to which the plaintiff was statutorily entitled, necessarily would have been litigated at that time. The trial court granted the parties' motion for reargument but denied the relief sought therein.

As the majority has explained, on appeal to this court, the parties claim that, in light of their stipulation, "the

only issue properly before the [trial] 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. . . . In support of . . . [this contention], 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 [§ 52-29 (a)] regarding a policy coverage dispute." (Emphasis in original.) The majority rejects the parties' claim, concluding that the trial court properly declined to render a decision on the issue raised in connection with the plaintiff's request for a declaratory judgment. Although the majority acknowledges that the trial court had jurisdiction over the plaintiff's request, the majority concludes that the court was not bound by the parties' agreement to treat the case as if it had proceeded to trial. The majority further concludes that, because the case had not been tried, and because § 52-192a applies only to cases that result in a trial, the court properly determined that it lacked authority to award offer of interest judgment under § 52-192a.

I fully agree with the majority that the trial court had jurisdiction to render a decision on the declaratory judgment count of the plaintiff's complaint. I disagree with the majority, however, that the trial court properly declined to do so because it lacked authority under § 52-192a to award offer of judgment interest. The majority reaches the wrong conclusion because it views the issue raised by this appeal through the wrong lens; instead of determining whether, in light of the parties' stipulation, the trial court has the authority *under § 52-29 (a)* to render a declaratory judgment resolving the parties' dispute, the majority treats the issue as implicating the court's authority to award offer of judgment interest under § 52-192a. Even if it is assumed that the majority is correct in concluding that § 52-192a applies only after a trial has occurred, there simply is no justification for the trial court to have rejected the stipulation filed by the parties for the purpose of obtaining a judgment declaring their rights in accordance with § 52-29 (a). Because the parties agreed both to treat the case as if it had proceeded to trial and to be bound by the trial court's resolution of the issue raised by the plaintiff's request for a declaratory judgment, the court clearly has the authority to answer the question reserved to it and, if the court agrees with the plaintiff's claim, to render a decision *in accordance with the parties' stipulation* that ProMutual is obligated to pay offer of judgment interest to the plaintiff. In other words, although the trial court in the present case would have lacked the authority to award offer of judgment interest *solely on the basis of § 52-192a*—this is so because no trial actually took place, and the court's authority to make an award under § 52-192a is limited to cases in which a trial has occurred—the decision that the plaintiff

seeks is not predicated on § 52-192a but, rather, on the parties' stipulation. Because the trial court had the authority to render a decision on the plaintiff's request for a declaratory judgment on the basis of the parties' stipulation, the trial court properly could not refuse to consider the plaintiff's declaratory relief claim for lack of such authority. As I explain hereinafter, only if the issue presented were nonjusticiable would the court have been free to decline to resolve the merits of the plaintiff's claim. That is not the case here, however.

"The principles that underlie justiciability are well established. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *Nielsen* v. *State*, 236 Conn. 1, 6–7, 670 A.2d 1288 (1996). "In deciding whether the plaintiff's complaint presents a justiciable claim, we make no determination regarding its merits. Rather, we consider only whether the matter in controversy [is] capable of being adjudicated by judicial power according to the aforestated well established principles." (Internal quotation marks omitted.) *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 626, 822 A.2d 196 (2003).

The plaintiff sought to invoke the trial court's jurisdiction over his claim for declaratory relief "pursuant to § 52-29, which, as we have recognized, provides a valuable tool by which litigants may resolve uncertainty of legal obligations. . . . The [declaratory judgment] procedure has the distinct advantage of affording to the court in granting any relief consequential to its determination of rights the opportunity of tailoring that relief to the particular circumstances. . . . A declaratory judgment action is not, however, a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies. . . . Invoking § 52-29 does not create jurisdiction where it would not otherwise exist. *Wilson* v. *Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992) (Implicit in [§ 52-29 and Practice Book § 17-54] is the notion that a declaratory judgment must rest on some cause of action that would be cognizable in a nondeclaratory suit. . . . To hold otherwise would convert our declaratory judgment statute and rules into a convenient route for procuring an advisory opinion on moot or abstract questions . . . and would mean that the declaratory judgment statute and rules created substantive rights that [do] not otherwise exist. . . .).

"As we noted in *Pamela B.* v. *Ment*, 244 Conn. 296, 323–24, 709 A.2d 1089 (1998), [w]hile the declaratory judgment procedure may not be utilized merely to secure advice on the law . . . or to establish abstract

principles of law . . . or to secure the construction of a statute if the effect of that construction will not affect a plaintiff's personal rights . . . it may be employed in a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement, and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof. . . . Finally, the determination of the controversy must be capable of resulting in practical relief to the complainant." (Citations omitted; internal quotation marks omitted.) *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 263 Conn. 625–26.

Applying these principles to the present case, I conclude that the declaratory judgment count of the plaintiff's complaint meets all of the criteria of the justiciability doctrine. First, the parties' interests were adverse. Second, an actual bona fide and substantial question over the effect of § 52-192a on ProMutual's obligations under the insurance policy prohibited the parties from reaching a final settlement of the plaintiff's claims against Skolnick. Third, a determination of the controversy in the plaintiff's favor would afford him practical relief because it would entitle him to an additional $293,000 above and beyond the $1 million that he already was entitled to receive under the terms of the settlement agreement. Moreover, the fact that the parties have entered into a partial settlement does not render the case nonjusticiable. Indeed, in that respect, this case is identical to *Connecticut Medical Ins. Co.* v. *Kulikowski*, 286 Conn. 1, 942 A.2d 334 (2008), a declaratory judgment action in which this court recently was required to determine, after a partial settlement had been reached between the parties, the extent of coverage under a medical malpractice insurance policy. Id., 3–4 and n.3; see also, e.g., *Guin* v. *Ha*, 591 P.2d 1281, 1282–83 (Alaska 1979) (plaintiff in medical malpractice action settled all claims against defendant physician, expressly reserving issue of insurer's liability for prejudgment interest in excess of policy limits, and, thereafter, parties filed stipulation reciting terms of settlement and request for declaration by court as to whether insurer was liable for prejudgment interest).

Indeed, the majority acknowledges that the question reserved to the trial court is a justiciable one. As I have indicated, however, the majority asserts that "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." The majority further concludes 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."

The majority cites to no authority, and I have found none, in which a court assumed jurisdiction over a declaratory judgment action, declined to answer the question presented therein, and then rendered judgment in favor of one of the parties on a claim that no party had raised. The majority argues, however, that the trial court in the present case properly did just that because a predicate event to an award of interest under § 52-192a, namely, a trial, had not occurred. Not one of the cases that the majority cites, however, supports the proposition that parties may not stipulate to facts—even essential predicate facts underlying a claimed entitlement—in the context of a *declaratory judgment action*. Indeed, not one of the cases on which the majority relies involves a claim for declaratory relief. The first such case, *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 403–404, 944 A.2d 925 (2008), simply stands for the proposition that, on appeal, parties may not bind the court with respect to the applicable *law*. The remaining cases that the majority cites also provide no support for its conclusion; they merely articulate the general rule that courts often must decide predicate *legal issues* before reaching the ultimate issue in a case. See *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 319–20 n.15, 968 A.2d 396 (2009); *Schiano* v. *Bliss Exterminating Co.*, 260 Conn. 21, 33, 792 A.2d 835 (2002); *State* v. *Miranda*, 245 Conn. 209, 214–15, 715 A.2d 680 (1998), rev'd on other grounds, 274 Conn. 727, 878 A.2d 1118 (2005). None of these cases, however, supports the conclusion that parties may be barred from stipulating to predicate *facts* in a declaratory judgment action. Thus, none of the foregoing cases supports the majority's determination that, because a trial court is not authorized to award offer of judgment interest in the absence of a trial, the trial court in the present case lacked the authority *under § 52-29 (a)* to determine the effect of § 52-192a on the parties' respective rights and obligations under Skolnick's malpractice insurance contract.

In fact, the only declaratory judgment case that is even mentioned in the majority opinion, namely, *Bania* v. *New Hartford*, 138 Conn. 172, 83 A.2d 165 (1951), manifestly does not support the proposition that parties may be prohibited from presenting their case to the court via a stipulation of facts. To the contrary, *Bania* itself, like most declaratory judgment actions, was submitted to the trial court upon a stipulation of facts. Id., 173. The majority, however, takes language from *Bania* out of context and then uses that language to support its conclusion that the trial court in the present case properly declined to answer the question presented to it. Specifically, the majority cites *Bania* for the principle that, "in an action for a declaratory judgment we are not limited by the issues joined or by the claims of

counsel." Id., 175. In *Bania*, however, this court relied on the foregoing principle as a basis for *deciding* the issue on which the plaintiff in that case had requested a declaratory judgment, even though certain predicate facts necessary to support the plaintiff's claim were not apparent in the record. See id., 175–76. Specifically, the court stated: "While the questions presented to the trial court under the plaintiff's claim for a declaratory judgment lack the clarity . . . which is desirable [when] such a judgment is sought, they suffice to warrant our passing [on] the fundamental and controlling inquiry . . . ." Id. We reached this determination in *Bania* because, as we further explained, "[a]n action for a declaratory judgment is a special statutory proceeding . . . implemented by the rules [of practice] . . . . The relief thus afforded *is highly remedial and the statute and rules should be accorded a liberal construction to carry out the purpose underlying such judgments*. . . . The object of the action is to secure an adjudication of rights which are uncertain or in dispute. . . . The complaint must allege such uncertainty or dispute and set forth the facts necessary for the determination of the question. It must also contain facts sufficient to show that the question is not moot and that the plaintiff is a proper party. However, in an action for a declaratory judgment we are not limited by the issues joined or by the claims of counsel. . . . Under [the rules of practice], a prerequisite to resort to the action is that there must be an issue in dispute or an uncertainty of legal relations which requires settlement between the parties. *This . . . means no more than that there must appear a sufficient practical need for the determination of the matter, and that need must be determined in the light of the particular circumstances involved in each case*." (Citations omitted; emphasis added.) Id., 175.

In the present case, the practical need for a determination of the question presented to the trial court stemmed from the parties' desire, on the eve of trial, to reach an equitable and fair settlement of the plaintiff's claims against Skolnick, which they were unable to accomplish completely because of a dispute over whether ProMutual would be obligated to pay the offer of judgment interest if the case proceeded to trial and, as the parties anticipated, the plaintiff obtained a verdict in excess of his offer of judgment. Thus, the parties stipulated to the fact that, if the case had been tried to conclusion, the plaintiff would have received a damages award of at least $1 million, thereby entitling him to offer of judgment interest in the amount of $293,000.

Finally, I am aware of no reason why the parties were not entitled to treat the case as if it were one that had proceeded to trial by entering into a stipulation to that effect. Unless such an agreement operates as a fraud on the court, purports to create a controversy when none actually exists, violates public policy or otherwise

is improper,[8] there simply was no basis for the court to reject the parties' agreement. Aside from the majority's reliance on the unexceptional proposition that a court is not bound to abide by the parties' agreement on the *law*—a principle that also has no applicability to the present case—the majority makes no attempt to explain why the court was entitled to refuse to decide the issue presented in accordance with the parties' stipulation. As the majority itself has explained, the parties settled their case in good faith, seeking to save the court and themselves the inconvenience of a lengthy trial, and they agreed to the likely outcome of any such trial. Moreover, by signing the stipulation, ProMutual effectively waived any objection that it otherwise would have been entitled to raise, because the case was resolved in advance of trial, with respect to an award of offer of judgment interest. Finally, as the majority concedes, the fact that no trial actually occurred is not a jurisdictional impediment to a resolution of the plaintiff's claim for a declaratory judgment. Thus, § 52-192a manifestly did *not* bar the court from rendering a decision, pursuant to § 52-29 (a), in accordance with and predicated on the parties' stipulation, concerning the question posed by the plaintiff's request for a declaratory judgment.[9] In sum, it is true that, ordinarily, when a plaintiff seeks offer of judgment interest under § 52-192a but no trial has occurred, the court lacks authority to award such interest because a condition precedent for that award has not been met. In the present case, however, the plaintiff filed an action for a declaratory judgment, and, for purposes of that action, the parties entered into a stipulation reflecting their agreement, first, to treat the case as one in which a trial had occurred and, second, to be bound by the court's decision concerning ProMutual's liability for offer of judgment interest. In such circumstances, the trial court clearly had the authority, under § 52-29 (a), to render a decision concerning ProMutual's obligation to pay interest to the plaintiff because the plaintiff's declaratory judgment action, predicated as it is on the parties' stipulation, provides a perfectly proper vehicle for the court's resolution of the parties' dispute. Put differently, the court did not lack the authority to award offer of judgment interest to the plaintiff in light of the parties' stipulated agreement that the plaintiff *is*, *in fact*, *entitled to such interest* if the court concludes, upon consideration of the claims underlying the plaintiff's declaratory judgment action, that ProMutual is liable for that interest, over and above the $1 million policy limit, notwithstanding the policy language to the contrary.[10]

For the foregoing reasons, I would address and resolve the plaintiff's claim that he is entitled to recover $293,000 in offer of judgment interest from ProMutual. Accordingly, I dissent.

[1] Richard Costantino's wife, Melissa Costantino, also was named as a plaintiff in the original complaint but no longer is a party to this action. In the interest of simplicity, I refer to Richard Costantino as the plaintiff

throughout this opinion.

[2] 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."

[3] This defendant's full name is Medical Professional Mutual Insurance Company doing business as ProMutual and ProSelect Insurance Company.

[4] See footnote 3 of the majority opinion for the relevant text of General Statutes (Rev. to 2005) § 52-192a. All references in this opinion to § 52-192a are to the 2005 revision.

[5] Darien Medical Group, Skolnick's medical practice, also was named as a defendant.

[6] See footnote 5 of the majority opinion and accompanying text.

[7] The parties framed the issue to be decided as follows: "[G]iven 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?" In addition to seeking an answer to the foregoing reserved question, the plaintiff, in the declaratory judgment count of his complaint, sought certain relief to which he necessarily would be entitled in the event that the court ruled in his favor on that count. Specifically, the plaintiff sought "[a] declaration that [ProMutual is] required to pay prejudgment interest above the policy limits of liability" and "[a]n order requiring [ProMutual] to pay said prejudgment interest in the amount agreed to by the parties following a ruling that [ProMutual is] required to pay prejudgment interest above the policy limits . . . ."

[8] None of these concerns is applicable in the present case.

[9] The majority insists, nevertheless, that it is not "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." Footnote 12 of the majority opinion. I do not agree. First, the majority cites no authority for its proposition, and I have found none. Moreover, if, as in the present case, the parties' dispute is a justiciable one and there is nothing about the parties' factual stipulation that violates public policy, I see no basis for the court to avoid deciding the dispute merely because the parties have agreed to certain facts solely for the purpose of invoking a particular statutory provision. This is so because the legal requirements of justiciability have proven to be perfectly adequate to root out controversies that are not genuine or for which no practical relief can be afforded. When, therefore, the requirements of justiciability are met, as the majority concedes they have been in the present case, I can think of no reason for this court to decline to render a decision on the merits.

Finally, even if the majority were correct that the trial court was not bound to accept the parties' factual stipulation, that does not also support the conclusion that the trial court *lacked the authority* to decide the issue presented by the plaintiff's claim for a declaratory judgment. Under the majority's reasoning, at the most, the stipulation would provide a basis for the court to have *elected* not to render a decision on that claim, presumably for prudential reasons. As I have explained, however, there is nothing about the stipulation that is against public policy or that otherwise would provide a basis for the court's refusal to resolve the parties' dispute.

[10] It is worth noting that the result that the majority and the trial court reach verges on the bizarre because, under the majority's holding, if the plaintiff, with the agreement of the defendants, had proceeded to an exceedingly brief, one witness trial at which all parties agreed to a $1 million judgment in favor of the plaintiff, then the parties would have been entitled to a resolution of the question that the trial court and the majority decline to address. For the reasons set forth in this opinion, there simply is no reason why the parties were required to engage in the pretense of a trial merely to resolve their dispute over the offer of judgment issue. Indeed, the majority suggests that the plaintiff's request for a declaratory judgment is defective because, in the parties' settlement agreement, they "concede that they are asking the court to assume [a fact, namely, that a trial occurred] that the court knows not only [has] not happened, but that never can happen by virtue of their choice to enter into the settlement agreement." Footnote 12 of the majority opinion. I take issue with this assertion. There is nothing to prevent the parties from voiding their settlement agreement and proceeding to "trial"—an event that will take all of a few minutes—following which, under the majority opinion, they then will be entitled to a resolution of the

issue presented by this appeal. Thus, contrary to the majority's contention, there is no reason why a trial cannot occur in the future. Requiring such a trial, however, results in a waste of time and resources because this court is fully authorized to resolve the parties' dispute in the context of the present appeal.