VIKING CONSTRUCTION, INC. *v.* 777 RESIDENTIAL, LLC, ET AL.
(AC 41450)

Alvord, Keller and Eveleigh, Js.

Syllabus

The cross claim defendant insurance company, L Co., appealed to this court from the summary judgment rendered by the trial court against it in favor of the cross claim plaintiffs, who had alleged breach of contract against L Co. on the basis of its refusal to cover a claimed loss under a builder's risk insurance policy. The cross claim plaintiffs hired V Co., a general contractor, for the renovation of a high-rise building that they owned. The subcontractor, A Co., cleaned the building's concrete facade and inadvertently damaged the building's windows, which had to be replaced. Thereafter, V Co. brought an action for breach of contract

against the cross claim plaintiffs, which in turn filed their cross claim after L Co. denied their claim for coverage of the loss under the policy. L Co. filed a motion for summary judgment on the cross claim, which the trial court denied, explaining that its conclusion was based on a reading of the policy's defects, errors, and omissions exclusion in conjunction with the resulting loss clause in the policy, which was an exception to that exclusion. The cross claim plaintiffs then filed a motion for summary judgment on their cross claim, which the court granted. On appeal, L Co. claimed that because the policy's defects, errors, and omissions exclusion barred coverage and the resulting loss clause did not reinstate coverage, the trial court erred in granting the motion for summary judgment filed by the cross claim plaintiffs and in denying L Co.'s motion for summary judgment. *Held*:

1. The trial court erred in rendering summary judgment in favor of the cross claim plaintiffs on their cross claim because the defects, errors and omissions exclusion of the policy unambiguously barred coverage: although the cross claim plaintiffs claimed that the defects, errors and omissions exclusion did not bar recovery because the windows were not part of the renovation, the plain meaning of the policy's exclusion, which provided, inter alia, that L Co. would not pay for loss or damage caused by an act, defect, error, or omission relating to renovation, indicated that the cleaning of the building's facade was part of the renovation and, thus, the damage to the windows, which was a direct result of that cleaning, was related to the renovation, and that conclusion was further supported by the fact that A Co.'s contractual obligations in the performance of its renovation work included avoiding harm to the windows; moreover, the claim of the cross claim plaintiffs that the defects, errors and omissions exclusion applied only to the finished product, not to the process implemented by A Co., was unavailing, as that reading of the exclusion would have rendered most of the exclusion's language superfluous by giving effect only to the portion of the exclusion that addressed the quality of the finished product and by ignoring certain other language in the exclusion; furthermore, there was no merit to the claim of the cross claim plaintiffs that the renovation endorsement would have been rendered meaningless if the exclusion applied, as the main policy form expressly limited coverage to new construction and, therefore, if the cross claim plaintiffs failed to purchase the endorsement, they would have been unable to recover for damage caused by a covered peril to the existing building they were renovating, and because the renovation endorsement was incorporated by reference into the main policy, all of the provisions of the main policy applied with equal effect.
2. The trial court incorrectly interpreted the resulting loss clause as entitling the cross claim plaintiffs to coverage: on the basis of the plain language of the resulting loss clause, which provided that, if an act, defect, error, or omission in the exclusion resulted in a covered peril, then L Co. must cover the loss or damage caused by that covered peril, a loss caused by an act during a renovation was covered if the act caused a covered

peril and that latter peril damaged the building, but, in the present case, there was only one cause of the cross claim plaintiffs' loss—A Co.'s spraying of the building, which caused damage to the windows—and that was not a covered peril; accordingly, the resulting loss clause did not apply.

Argued February 14—officially released May 28, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket, where the court, *Moukawsher*, *J.*, granted the plaintiff's motion to cite in 777 Main Street, LLC, et al. as defendants; thereafter, the named defendant et al. filed a counterclaim and filed a cross claim against the defendant Liberty Mutual Fire Insurance Company et al.; subsequently, the named defendant et al. withdrew the counterclaim and withdrew the cross claim in part; thereafter, the plaintiff withdrew the complaint; subsequently, the court denied the motion for summary judgment on the cross claim filed by the defendant Liberty Mutual Fire Insurance Company; thereafter, the court granted the motion for summary judgment on the cross claim as to liability filed by the named defendant et al.; subsequently, the court granted the motion for judgment in accordance with the parties' stipulation filed by the named defendant et al. and rendered judgment for the named defendant et al., from which the defendant Liberty Mutual Fire Insurance Company appealed to this court. *Reversed*; *judgment directed*.

Stephen E. Goldman, with whom was *Wystan M. Ackerman*, for the appellant (defendant Liberty Mutual Fire Insurance Company).

Jeffrey J. Vita, with whom was *Theresa A. Guertin*, for the appellees (named defendant et al.).

Opinion

EVELEIGH, J. The cross claim defendant, Liberty Mutual Fire Insurance Company (Liberty Mutual),[1] appeals from the summary judgment rendered against it in favor of the cross claim plaintiffs, 777 Main Street, LLC (777 Main) and 777 Residential, LLC (777 Residential).[2] On appeal, Liberty Mutual argues that the trial court erred in granting the 777 entities' motion for summary judgment on their cross claim and in denying Liberty Mutual's motion for summary judgment, on the basis of its interpretation of the insurance policy issued by Liberty Mutual to the 777 entities. Specifically, Liberty Mutual argues that (1) the defects, errors, and omissions exclusion in the insurance policy bars coverage, and (2) the resulting loss clause in the policy does not reinstate coverage. We agree with Liberty Mutual and reverse the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. The 777 entities are the owners of a high-rise building at 777 Main Street in Hartford (building), which they planned to renovate and convert from an office building into a 285 unit apartment complex. On March 27, 2014, the 777 entities hired Viking Construction, Inc. (Viking), as the general contractor for the renovation. Viking's work on the renovation included cleaning the concrete facade of the building. On October 2, 2014, Viking subcontracted with Armani Restoration, Inc. (Armani), to clean the concrete facade of the building.

From September to December, 2014, Armani cleaned the building's facade using a crushed glass cleaner

[1] Although the complaint in the underlying action was filed by Viking Construction, Inc., against Liberty Mutual and 777 Residential, LLC, Viking Construction, Inc., withdrew from the case and is not a party to this appeal. This appeal arises out of a cross claim filed by 777 Main Street, LLC, and 777 Residential, LLC, against their insurer, Liberty Mutual, and other entities which are not parties to this appeal.

[2] Hereinafter, we refer to 777 Main and 777 Residential collectively as the 777 entities, and individually by name where appropriate.

that was sprayed onto the building using power washers. The cleaning inadvertently damaged the building's approximately 1800 windows, all of which had to be replaced at a cost of over $4 million.

In July, 2015, the 777 entities claimed coverage of the loss under a builder's risk insurance policy (policy) that they had purchased from Liberty Mutual. This policy, which was in effect when the damage occurred, provides: "[Liberty Mutual] cover[s] direct physical loss or damage caused by a covered peril[3] to 'buildings or structures' while in the course of construction, erection, or fabrication." (Footnote added.) The policy contains several exclusions, including a "Defects, Errors, And Omissions" exclusion, which provides that Liberty Mutual is not responsible for "loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to: a) design, specifications, construction, materials, or workmanship; b) planning, zoning, development, siting, surveying, grading, or compaction; or c) maintenance, installation, renovation, remodeling, or repair." The exclusion, however, contains an exception, also known as a "resulting loss" clause, which provides: "[I]f an act, defect, error, or omission as described [in the exclusion] results in a covered peril, [Liberty Mutual] do[es] cover the loss or damage caused by that covered peril."

The policy also includes an optional renovation endorsement, which the 777 entities added to the policy because the project involved the renovation of an

[3] The policy does not expressly define "covered peril," however, under the heading "PERILS COVERED," it provides: "[Liberty Mutual] cover[s] risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded." For specific examples of the kinds of "covered perils" contemplated by the policy, it is helpful to look to the definition section of the policy, which provides in relevant part: "Specified perils means aircraft; civil commotion; explosion; falling objects; fire; hail; leakage from fire extinguishing equipment; lightning; riot; sinkhole collapse; smoke; sonic boom; vandalism; vehicles; volcanic action; water damage; weight of ice, snow, or sleet; and windstorm." (Internal quotation marks omitted.)

existing building rather than the construction of a new structure. The renovation endorsement provides: "[Liberty Mutual] cover[s] direct physical loss or damage caused by a covered peril to 'building materials' and 'existing buildings' that are part of [the 777 entities'] 'rehabilitation or renovation project.' "

On August 12, 2015, after investigating the 777 entities' claimed loss under the policy, Liberty Mutual denied coverage. On December 24, 2015, Viking filed an action against 777 Residential, alleging breach of contract on the basis of 777 Residential's alleged refusal "to remit the outstanding contract balance . . . for work Viking performed on the [renovation]." On May 12, 2016, Viking filed a motion to cite in as defendants, inter alia, 777 Main, Liberty Mutual, and Armani, which the court subsequently granted. On August 19, 2016, the 777 entities filed a cross claim, alleging a breach of contract on the basis of Liberty Mutual's refusal to cover the claimed loss under the policy. In March, 2017, the 777 entities settled their case with Viking and Armani for $1.6 million. The 777 entities continue to seek the remaining balance of the cost to replace the windows from Liberty Mutual.

On November 6, 2017, after the close of discovery, Liberty Mutual filed a motion for summary judgment on the cross claim. On January 11, 2018, following oral argument on the motion, the trial court denied Liberty Mutual's motion for summary judgment. In its memorandum of decision on the motion, the court explained that its conclusion was based on a reading of the policy's exclusion in conjunction with the loss peril clause.[4]

[4] Specifically, in its January 11, 2018 memorandum of decision denying Liberty Mutual's motion for summary judgment, the trial court stated: "The decisive question for this summary judgment motion is what it means when a builder's risk insurance policy with a renovation endorsement excludes damage 'resulting from an act . . . relating to . . . construction, workmanship, [or] renovation.' . . .

"Everyone agrees that the 'renovations' exclusion . . . excludes insurance coverage for things done to the building that amount to nothing more

On January 31, 2018, the 777 entities filed a motion for summary judgment on their cross claim, which the court subsequently granted on February 14, 2018 "[f]or the reasons stated in the court's memorandum of decision on Liberty Mutual's motion for summary judgment . . . ." On February 16, 2018, the parties filed a stipulation as to the amount of damages. On February 20, 2018, the 777 entities filed a motion for judgment in accordance with the stipulation and Liberty Mutual filed an objection to the motion. On February 22, 2018, the court granted the motion for judgment and rendered judgment on the cross claim in the amount of $1,950,000 in favor of the 777 entities "for the reasons set forth in the court's January 11, 2018, February 14, 2018, and February 22, 2018 memoranda of decision."[5]

than a bad job of renovating the thing intended to be renovated. But it's less clear whether there is coverage when a careless worker renovating one part of the building damages another part of the building.

"The answer lies in the policy's additional language. It says that if an act of renovation 'results in a covered peril,' damage from that covered peril is covered. . . . In this context, the language reasonably appears to mean that if the renovation 'results' in damage that isn't a renovation, the latter damage is covered despite being triggered by the former. The [777 entities] reasonably [take] this to mean that damage to a part of the building not being renovated by the worker—a window—is covered. . . .

"But Liberty Mutual says the language is intended to provide coverage only where there are two independent perils: one excluded peril causing an independent peril that causes the damage. A contractor cleaning the facade drops a wrench that breaks a wire that ultimately causes a fire that damages the building. The second peril—the covered one—is the fire. A facade cleaner leaves open a window that lets in rain that damages a carpet. The second peril—the covered one—is the rain. . . .

"The important thing for the special clause here—often called a 'resulting loss' clause—is that the worker wasn't renovating the window but damaged it. The only point of getting this extra renovations policy would be to protect against collateral damage to the building during the renovations. It doesn't cover any other kind of damage—to people or other property, for instance." (Emphasis omitted; footnotes omitted.)

[5] The court's January 11, 2018 memorandum of decision denying Liberty Mutual's motion for summary judgment, which the court referenced in its subsequent memoranda of decision, provides the only detailed explanation of the court's rationale for its decision to render summary judgment in favor of the 777 entities.

Thereafter, Liberty Mutual filed the present appeal. Additional facts and procedural history will be set forth as necessary.

"We begin our analysis with the standard of review applicable to a trial court's decision to grant a motion for summary judgment. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy [its] burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Anderson* v. *Dike*, 187 Conn. App. 405, 409–10, 202 A.3d 448, cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019).

"The general principles that guide our review of insurance contract interpretations are well settled. . . . An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract. . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result . . . .

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *New London County Mutual Ins. Co.* v. *Zachem*, 145 Conn. App. 160, 164–65, 74 A.3d 525 (2013).

"[I]n the event that an insurance policy term is deemed to be ambiguous, the parties are entitled to present extrinsic evidence regarding the mutual intent

of the insured and the insurer as to the scope of coverage, and the trial court must consider that evidence before applying the rule of contra proferentem to resolve the ambiguity in favor of the insured. In other words, the rule should be applied as a tie breaker only when all other avenues to determining the parties' intent have been exhausted. See *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 107–108, 84 A.3d 828 (2014); see, e.g., *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 59 n.20, 84 A.3d 1167 (2014); *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 788–89, 900 A.2d 18 (2006); *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 255 Conn. 295, 306, 765 A.2d 891 (2001) . . . ." (Citations omitted; footnote omitted.) *Connecticut Ins. Guaranty Assn.* v. *Drown*, 314 Conn. 161, 195–96, 101 A.3d 200 (2014) (*Rogers, C. J.*, concurring).

I

On appeal, Liberty Mutual first claims that the court erred in rendering summary judgment in favor of the 777 entities on their cross claim because the policy's "Defects, Errors, And Omissions" exclusion (exclusion) unambiguously bars coverage.[6] The 777 entities claim that the court did not err because Liberty Mutual failed to satisfy "its heavy burden of proving that [the exclusion] bars coverage for the losses."[7] We agree with Liberty Mutual.

[6] In its January 11, 2018 memorandum of decision denying Liberty Mutual's motion for summary judgment, the trial court did not indicate whether coverage was barred by the exclusion; instead, it based its conclusion that the 777 entities were entitled to coverage upon its reading of the exclusion in conjunction with the resulting loss clause. The resulting loss clause, however, only may be considered when coverage is barred by the exclusion. For the purposes of our analysis, therefore, we must infer that the court found that the exclusion barred coverage.

[7] Specifically, the 777 entities argue that the exclusion does not apply because (1) the windows were not part of the renovation; (2) the exclusion only applies to workmanship; (3) the application of the exclusion would obviate the renovation endorsement; (4) the exclusion is not incorporated into the renovation endorsement; and (5) the exclusion is ambiguous and

"In an insurance policy, an exclusion is a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed." (Internal quotation marks omitted.) *Hammer* v. *Lumberman's Mutual Casualty Co.*, 214 Conn. 573, 588, 573 A.2d 699 (1990). "The burden of proving that an exclusion applies is on the insurer . . . ." *Capstone Building Corp.* v. *American Motorists Ins. Co.*, 308 Conn. 760, 788 n.24, 67 A.3d 961 (2013). When policy exclusions are ambiguous, they "are strictly construed in favor of the insured . . . ." (Internal quotation marks omitted.) *Connecticut Ins. Guaranty Assn.* v. *Drown*, supra, 314 Conn. 188.

The 777 entities first argue that the exclusion does not bar recovery because the windows were not part of the renovation. On the basis of a close reading of the exclusion and its terms, we are unpersuaded.

The exclusion at issue in the present case provides: "[Liberty Mutual] do[es] not pay for loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to: a) design, specifications, construction, materials, or workmanship; b) planning, zoning, development, siting, surveying, grading, or compaction; or c) maintenance, installation, renovation, remodeling, or repair."

Although the policy contains a definition section, many of the terms used in the provision at issue are undefined. We, therefore, look to the dictionary definition of these words to ascertain their meaning. *New London County Mutual Ins. Co.* v. *Zachem*, supra, 145 Conn. App. 166 ("[t]o determine the common, natural, and ordinary meaning of an undefined term, it is proper to turn to the definition found in a dictionary"). One such undefined word is "renovate." The verb "renovate" is defined as "to restore to a former better state (as

should be construed in their favor. We address each of these arguments in turn.

by cleaning, repairing, or rebuilding) . . . .'' Merriam-Webster's Collegiate Dictionary (11th Ed. 2003). In the present case, the purpose of Armani's work was to restore the building to a better state by cleaning its facade. In fact, the 777 entities admitted as much in their brief, stating: ''Armani was working on the facade (the *renovation* work) . . . .'' (Emphasis added.) On the basis of the plain meaning of the policy, therefore, the cleaning of the building's facade was part of the renovation.

Having concluded that the cleaning of the building's facade was part of the renovation, we must next determine whether the damage to the windows, which was a direct result of this cleaning, was related to the renovation, thereby triggering the exclusion. The policy also fails to define ''relating to''; therefore, we must again turn to available dictionary definitions to determine the meaning of the term. ''Related'' is defined as ''connected by reason of an established or discoverable relation . . . .'' Merriam-Webster's Collegiate Dictionary, supra. Additionally, our courts have consistently given the term ''relating to'' a broad meaning that comports with the dictionary definition of the term. See, e.g., *Brennan* v. *Brennan Associates*, 293 Conn. 60, 79 n.12, 977 A.2d 107 (2009) (defining ''relating to'' as ''to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with'' [internal quotation marks omitted]). In the present case, the damage to the windows was not merely connected to the cleaning of the building's facade, it was a direct result of the cleaning. The 777 entities admitted this fact when they stated that ''there simply are not two concurrent causes [of the loss]: Armani accidentally sprayed the cleaning media onto the windows, causing damage.'' Thus, the damage to the windows was related to the renovation, as is required for the exclusion to apply.

Additionally, the parties' actions support our conclusion that the windows were part of the renovation. In their renovation plans, the 777 entities contemplated avoiding harm to the windows because the windows were not to be replaced or removed. The specifications of the contract between Viking and the 777 entities set forth Viking's and Armani's obligation to protect adjacent surfaces, which would include the windows, providing that Viking was to "[p]rotect . . . surrounding surfaces of building being restored . . . from harm resulting from concrete restoration work." Although these specifications were drafted in contemplation of the use of a chemical cleaning media, Armani had a general obligation to avoid damage to adjacent surfaces, as set forth in the "General Conditions" provision of Viking's contract with the 777 entities, which provided: "[Viking] . . . shall provide reasonable protection to prevent damage, injury or loss to . . . other property at the site or adjacent thereto, such as . . . structures and utilities not designated for removal, relocation or replacement . . . ." Because Armani's obligations in the performance of its renovation work included avoiding harm to the windows, structures not designated for removal, relocation or replacement, it is difficult to see how the windows and the damage to them is not connected or related to the renovation.

In support of its argument, Liberty Mutual cites extensively to cases from other jurisdictions. Although the majority of these cases are unpersuasive, one case, *Golan Management, LLC* v. *Hartford Ins. Co.*, United States District Court, Docket No. CIV-11-0036-C (RJC) (W.D. Okla. May 3, 2012), is instructive because it is factually similar to the present case. In *Golan Management, LLC*, the owner of a commercial building filed an insurance claim when the windows of the building were damaged as a result of exterior cleaning. Id. The insurance company denied the claim, and the building

owner sued for, inter alia, breach of contract. Id. The policy in *Golan Management, LLC*, contained an exclusion that is similar to the exclusion at issue in the present case. The exclusion in *Golan Management, LLC*, provided: "[The insurer] will not pay for the cost of correcting defects in Covered Property, or loss or damage to Covered Property that was caused by, resulting from, or arising out of work done on Covered Property by [the insured], [the insured's] employees, or others working on [the insured's] behalf." (Internal quotation marks omitted.) Id. Like the 777 entities, the building owner in *Golan Management, LLC*, argued that the exclusion did not apply because "the damage was not caused by work being done to the glass, but by work being done to the building . . . ." Id. The court, however, rejected this argument and granted the insurance company's motion for summary judgment. Id. Like the court in *Golan Management, LLC*, we are unpersuaded by the 777 entities' argument to the effect that the exclusion is applicable to the cleaning of the building's facade but not to the windows. We conclude that the ordinary meaning of the terms in the policy indicates that the exclusion applies to the windows.

The 777 entities next argue that the damage to the windows is not barred by the exclusion because the exclusion only applies to the finished product, not to the process implemented by Armani. This reading of the exclusion would render most of the exclusion's language utterly superfluous, contrary to the principle that "[an insurance] policy should not be interpreted so as to render any part of it superfluous." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 468, 870 A.2d 1048 (2005). This interpretation of the exclusion would ignore subsections (b) and (c) of the exclusion and only give effect to subsection (a) of the exclusion, which addresses the quality of the finished product, stating:

"[Liberty Mutual] do[es] not pay for loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to . . . design, specifications, construction, materials, or workmanship . . . ." Subsections (b) and (c) of the exclusion provide: "[Liberty Mutual] do[es] not pay for loss or damage consisting of, caused by, or resulting from an act, defect, error, or omission (negligent or not) relating to . . . b) planning, zoning, development, siting, surveying, grading, or compaction; or c) maintenance, installation, renovation, remodeling, or repair." We conclude, therefore, that the 777 entities' argument to the effect that the exclusion applies only to the finished product of Armani's work is untenable.

The 777 entities also argue that the exclusion does not bar coverage because such a reading would render the renovation endorsement meaningless. Liberty Mutual counters that, even if coverage is excluded for the damage to the windows, the endorsement has meaning because the main policy that the 777 entities purchased covered only new construction and, therefore, "without the renovation endorsement the policy wouldn't have covered *any* damage to the existing building . . . ." (Emphasis added.) Indeed, at oral argument before this court, the 777 entities stated that they purchased the endorsement to extend coverage to the existing building because the policy only covered new construction.

Although some jurisdictions assume that builder's risk policies exclusively apply to new construction; see, e.g., *Ajax Building Corp.* v. *Hartford Fire Ins. Co.*, 358 F.3d 795, 799 (11th Cir. 2004) ("The very purpose of a builder's risk policy is to provide protection for the building under construction. . . . Just as there are standard forms of property insurance used to insure existing buildings, builder's risk policies are used to insure the building while it is in the process of being

built." [Citations omitted; internal quotation marks omitted.]); in Connecticut, "[t]he scope of coverage depends on the language of the policy." D. Rosengren, 13 Connecticut Practice Series: Construction Law (2005) § 12:3, p. 245. In the present case, the main policy form expressly limits coverage to new construction. The main policy form provides: "[Liberty Mutual] cover[s] direct physical loss or damage caused by a covered peril to 'buildings or structures' while *in the course of construction*, erection, or fabrication." (Emphasis added.) It then goes on to state: "[Liberty Mutual] only cover[s] . . . 'buildings or structures' *in the course of construction* . . . ." (Emphasis added.) Thus, the 777 entities' argument that the endorsement would be rendered meaningless if the exclusion applies is without merit because, if they had failed to purchase the endorsement, they would have been unable to recover for damage caused by a covered peril to the existing building they were renovating, such as fire.

Relatedly, the 777 entities argue that the exclusion is not applicable in the present case because the renovation endorsement does not contain a copy of the exclusion. "A rider or endorsement is a writing added to or attached to a policy or certificate of insurance that expands or restricts its benefits or excludes certain conditions from coverage. . . . When properly incorporated into the policy, the policy and the rider together constitute the contract of insurance and are to be read together to determine the contract actually intended by the parties." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 806, 967 A.2d 1 (2009); see also *Schultz* v. *Hartford Fire Ins. Co.*, 213 Conn. 696, 705, 569 A.2d 1131 (1990) ("[i]n construing an endorsement to an insurance policy, the endorsement and policy must be read together, and the policy remains in full force and effect except as altered by the words of the endorsement" [internal quotation marks omitted]).

The 777 entities point out that "typically, endorsements to insurance policies include language incorporating the terms and conditions of the endorsement into the main policy form (or vice versa)"; however, contrary to the 777 entities' argument that the endorsement does not incorporate the terms of the main policy, the endorsement, in fact, contains the following language: "This endorsement changes the Builders' Risk Coverage." Because the renovation endorsement in the present case is incorporated by reference into the main policy, all of the provisions of the main policy apply to the endorsement with equal effect.[8] We, therefore, conclude that the exclusion unambiguously bars coverage.

II

Liberty Mutual also claims that the trial court incorrectly interpreted the resulting loss clause as entitling the 777 entities to coverage. Specifically, Liberty Mutual claims that the clause does not apply because the "cause of the loss (Armani's negligent spraying) did not result in any second cause of loss . . . ." The 777 entities claim that, even if the exclusion applies, the court correctly interpreted the resulting loss clause as restoring coverage. Specifically, the 777 entities argue that "if Armani's acts related to facade cleaning are considered excluded, but resulted in damage to the windows, then [Liberty Mutual] should be obligated to provide coverage." We agree with Liberty Mutual.

[8] Finally, the 777 entities argue that, at a minimum, the exclusion is ambiguous and, therefore, must be construed in their favor. Because we conclude that the exclusion unambiguously bars coverage, we need not address this argument. See, e.g., *Amica Mutual Ins. Co.* v. *Piquette*, 176 Conn. App. 559, 565, 168 A.3d 623 (2017) ("[A]ny ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. . . . This rule of construction may not be applied, however, unless the policy terms are indeed ambiguous." [Internal quotation marks omitted.]).

A resulting loss clause, also known as an ensuing loss clause,[9] is an exception to a policy exclusion that "ensure[s] that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the property insurance policy will remain covered; the uncovered event itself, however, is never covered." 11 S. Plitt et al., Couch on Insurance (3d Ed. Rev. 2017) § 153:2, p. 153-11 n.8. "[T]he insured has the burden of proving that an exception to an exclusion reinstates coverage." *Capstone Building Corp.* v. *American Motorists Ins. Co.*, supra, 308 Conn. 788 n.24.

In order to analyze whether the resulting loss clause reinstates coverage, we must again closely examine the language of the policy. The resulting loss clause in this contract immediately follows the exclusion and provides: "But if an act, defect, error, or omission as described above results in a covered peril, [Liberty Mutual] do[es] cover the loss or damage caused by that covered peril."

Although the term "covered peril" is not defined in the policy, the provision titled "PERILS COVERED" provides: "[Liberty Mutual] cover[s] risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded." As this provision indicates, perils, in the context of insurance, are "[t]he *cause* of a risk of loss to person or property; [especially], the cause of a risk such as fire, accident, theft, forgery, earthquake, flood, or illness . . . ." (Emphasis added.) Black's Law Dictionary (9th Ed. 2009); see also 11 S. Plitt et al., supra, p. 153-11 n.8 ("[i]n property insurance

[9] Although the exception at issue in the present case does not use the term "ensuing loss," courts in other jurisdictions have stated that resulting loss clauses and ensuing loss clauses are one and the same. See, e.g., *Erie Ins. Property & Casualty Co.* v. *Chaber*, 239 W. Va. 329, 337 n.8, 801 S.E.2d 207 (2017) ("Whether an insurance policy uses the term ensuing loss or resulting loss is of no moment. Resulting loss clauses are sometimes denominated ensuing loss clauses. The distinction is simply a matter of different wording among insurance policies. There is no legal significance to using one phrase over the other." [Internal quotation marks omitted.]).

parlance, 'perils' refers to fortuitous, active, physical forces such as lightning, wind, and explosion, which bring about the loss"). On the basis of the plain language of the resulting loss clause in the present case, a loss caused by an act during a renovation will be covered if the act causes a covered peril, such as a fire, and that latter peril damages the building. In the present case, there was only one cause of the 777 entities' loss—the spraying of the building, which caused damage to the windows—and because that was not a covered peril, the resulting loss clause does not apply.

Our reading of the policy comports with this court's interpretation of ensuing loss clauses in *Sansone* v. *Nationwide Mutual Fire Ins. Co.*, 62 Conn. App. 526, 771 A.2d 243 (2001), and *New London County Mutual Ins. Co.* v. *Zachem*, supra, 145 Conn. App. 160. In those cases, this court concluded that ensuing loss clauses apply only when there is more than one peril.

In *Sansone*, this court affirmed the judgment of the trial court and adopted its decision granting an insurer's motion for summary judgment on the basis of its conclusion that an ensuing loss clause in the insured's homeowners policy did not reinstate coverage for a loss caused by an insect infestation. *Sansone* v. *Nationwide Mutual Fire Ins. Co.*, supra, 62 Conn. App. 527–28. The policy at issue provided: "[The insurer] cover[s] direct physical loss to property . . . except that caused by . . . deterioration . . . wet or dry rot . . . birds, vermin, rodents, insects or domestic animals. . . . [A]ny ensuing loss not excluded is covered." (Internal quotation marks omitted.) *Sansone* v. *Nationwide Mutual Fire Ins. Co.*, 47 Conn. Supp. 35, 38, 770 A.2d 500 (1999), aff'd, 62 Conn. App. 526, 771 A.2d 243 (2001). The trial court concluded that the ensuing loss clause in the policy did not apply because the loss was caused by a single, excluded peril—insect infestation—and "[t]here was . . . *no aggravating activity* or event that caused

[the insured's] additional losses . . . ." (Emphasis added.) Id., 39.

In *New London County Mutual Ins. Co.* v. *Zachem*, supra, 145 Conn. App. 161–63, this court was asked to interpret an ensuing loss clause in a homeowners insurance policy when the insureds claimed coverage for a loss proximately caused by vandalism. The homeowners policy at issue in *Zachem* contained a vandalism exclusion and an ensuing loss clause that limited the exclusion. Id., 162. Specifically, the ensuing loss clause provided in relevant part: "[A]ny ensuing loss to property . . . not excluded or excepted in this policy is covered." (Internal quotation marks omitted.) Id. In *Zachem*, this court concluded that the ensuing loss clause did not apply because the loss was proximately caused by an excluded peril—vandalism—and there was not a "separate and independent hazard . . . ." (Internal quotation marks omitted.) Id., 173.

Indeed, the approach to ensuing loss clauses adopted by this court is in line with the rulings of many other courts throughout the country, which hold that ensuing loss clauses apply only when a loss is caused by a separate and independent peril. See *Taja Investments, LLC* v. *Peerless Ins. Co.*, 717 Fed. Appx. 190, 192 (4th Cir. 2017) ("an ensuing loss provision . . . applies only to distinct, separable, and ensuing losses" [internal quotation marks omitted]); *Travelers Indemnity Co.* v. *Board of County Commissioners*, 508 Fed. Appx. 733, 734–35 (10th Cir. 2013) ("exception provides for coverage only when the excluded cause . . . becomes a new causal agent that itself causes resultant property damage" [internal quotation marks omitted]); *Sapiro* v. *Encompass Ins.*, 221 F.R.D. 513, 522 (N.D. Cal. 2004) ("courts have long defined an ensuing loss as a loss separate and independent from [an] original peril" [internal quotation marks omitted]); *H.P. Hood, LLC* v. *Allianz Global Risks US Ins. Co.*, 88 Mass. App. 613, 619,

39 N.E.3d 769 (2015) (resulting loss clause inapplicable because cause of loss was "not one where an excluded occurrence involving initial property damage led to other property damage of a different kind"), review denied, 473 Mass. 1111, 44 N.E.3d 862 (2016); *Weeks* v. *Co-Operative Ins. Cos.*, 149 N.H. 174, 177, 817 A.2d 292 (2003) (concluding that cause of loss separate and independent from initial excluded loss is required for ensuing loss clause to apply); see also *Acme Galvanizing Co.* v. *Fireman's Fund Ins. Co.*, 221 Cal. App. 3d 170, 179–80, 270 Cal. Rptr. 405 (1990) (same), review denied, California Supreme Court, Docket No. S016534 (Cal. October 11, 1990).

The New Hampshire Supreme Court's decision in *Weeks* v. *Co-Operative Ins. Cos.*, supra, 149 N.H. 174, and the decision of the California Court of Appeal in *Acme Galvanizing Co.* v. *Fireman's Fund Ins. Co.*, supra, 221 Cal. App. 3d 170, are illustrative of the circumstances in which, as here, ensuing loss clauses are inapplicable. In *Weeks*, a brick veneer wall was damaged when it separated from an asphalt shingle wall because of faulty workmanship. *Weeks* v. *Co-Operative Ins. Cos.*, supra, 174. The insurance policy that covered the building excluded losses that were a result of faulty workmanship, but contained a resulting loss clause under which the building owner sought coverage. Id., 174–75. The court in *Weeks* concluded that the resulting loss clause did not apply because "there was no subsequent ensuing cause of loss separate and independent" from the faulty workmanship. Id., 177–78. In reaching this conclusion, the court in *Weeks* cited the decision of the California Court of Appeal in *Acme Galvanizing Co.* Id., 177.

In *Acme Galvanizing Co.* v. *Fireman's Fund Ins. Co.*, supra, 221 Cal. App. 3d 173, an improperly welded steel kettle filled with several tons of molten zinc ruptured, thereby spilling the zinc onto nearby equipment

in the plaintiff's galvanizing plant. The rupture was a result of a latent defect in the kettle, and the plaintiff's insurance policy excluded from coverage losses caused by such defects. Id., 179. The plaintiff argued, however, that the damage caused by the welding failure should be covered under the policy's ensuing loss clause. Id. The court disagreed and concluded: "[T]here was no peril separate from and in addition to the initial excluded peril of the welding failure and kettle rupture. The spillage of molten zinc was part of the loss directly caused by such peril, not a new hazard or phenomenon. If the molten zinc had ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a new covered peril with the ensuing loss covered. That did not occur." Id., 180. Just as in *Weeks* and *Acme Galvanizing Co.*, the loss in the present case was caused by a single, excluded peril, and, therefore, the ensuing loss clause similarly does not reinstate coverage.

The 777 entities argue, however, that *Sansone* and *Zachem* are distinguishable and that, therefore, the independent peril approach to ensuing loss clauses that they set forth is inapplicable to the present case. In an effort to distinguish these cases, the 777 entities rely on the fact that the ensuing loss clause provisions in those cases contained different language than the resulting loss clause in the present case. Although the policies in *Sansone* and *Zachem* use the term "ensuing loss," while the policy in the present case uses the language "results in a covered peril," this difference is immaterial. It is undisputed that the clause in the present case is a "resulting loss" provision and, as discussed previously in this opinion; see footnote 9 of this opinion; ensuing loss and resulting loss clauses are substantively indistinguishable. The clauses in *Sansone* and *Zachem* and the clause in the present case all serve

the same purpose—reinstating coverage if an excluded peril causes a covered peril, which, in turn, results in a loss.

The 777 entities also attempt to distinguish *Sansone* and *Zachem* by pointing out that those cases involved multiple, concurrent causes of the claimed loss, while the present case only involves one peril. Contrary to the 777 entities' argument, the fact that the loss in the present case was the result of a single, uncovered peril does not make the reasoning of *Sansone* and *Zachem* inapplicable. In both of those cases, the court made clear that an ensuing loss clause will only reinstate coverage when a hazard *other* than the excluded peril causes the loss. These cases clearly indicate that, as in the present case, where an excluded peril—the cleaning of the building's facade as part of the renovation—was the sole and direct cause of the damage to the windows, the ensuing loss clause does not reinstate coverage.[10]

The judgment is reversed and the case is remanded with direction to deny the 777 entities' motion for summary judgment on the cross claim, to grant Liberty Mutual's motion for summary judgment and to render judgment on the cross claim for Liberty Mutual.

In this opinion the other judges concurred.

[10] Alternatively, the 777 entities argue that, even if this court does not interpret the ensuing loss clause as reinstating coverage, "it should deny Liberty Mutual's motion [for summary judgment] and leave it to the trier of fact to determine whether the ensuing loss provision applies in this case [because wind, which would be considered a covered peril, might have caused the loss]." In support of their argument, the 777 entities cite the self-serving deposition testimony of employees of Viking and Armani that the damage to the windows *might* have been caused by wind because they sometimes noticed that it seemed windy while they were cleaning the building. The 777 entities, however, admitted that there was only one cause of the damage—the faulty spraying of the building's facade. Thus, we conclude that this argument is without merit.

MICHAEL D. REINER ET AL. *v.* JEFFREY A. REINER ET AL.

(AC 41010)

DiPentima, C. J., and Prescott and Bright, Js.

Syllabus

The plaintiff, who was a beneficiary of certain irrevocable trusts, sought to recover damages from the defendant, the sole trustee to and another beneficiary of the trusts, for his alleged tortious mismanagement of certain real properties owned by the trusts, which were encumbered by mortgages. Prior to trial, the parties, in an effort to settle the tort action, signed a release and settlement agreement, which included a provision that provided that following the death of the settlor of the trusts, E, the plaintiff would buy out the defendant's interests in certain of the trust properties, and the buyout amount of each property was to be calculated on the basis of the fair market value of the property, multiplied by the plaintiff's interests in the property and reduced by 10 percent. That provision did not refer to the mortgages associated with the properties. The agreement also provided that E would immediately transfer by warranty deed two properties to the plaintiff and the defendant, and upon E's death, the defendant would purchase the plaintiff's interests in those two properties under the same fair market valuation, but reduced by 4 percent rather than 10 percent. In accordance with the settlement agreement, the plaintiff withdrew the tort action in 2012. The buyout provisions of the settlement agreement were triggered in 2017 following E's death. After the case was restored to the docket, the defendant filed a motion to enforce the settlement agreement. Thereafter, the trial court held an evidentiary hearing on the motion pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.* (225 Conn. 804). At the hearing, the defendant maintained that the settlement agreement was clear and unambiguous that the buyout amount of the properties was to be calculated as the plaintiff's proportionate interest in the equity in the properties, after deducting the debt secured by any mortgages, less the percentage discounts, while the plaintiff insisted that the settlement agreement was clear and unambiguous that the buyout amount was to be based solely on the fair market value of the properties, without regard to the mortgages on the properties. The trial court accepted the plaintiff's interpretation and concluded that the agreement was clear and unambiguous that the buyout amount was to be calculated as the fair market value of the properties regardless of any debt associated with the properties. The trial court then denied the defendant's motion to enforce the settlement agreement, and the defendant appealed to this court. *Held* that although the trial court incorrectly concluded that the settlement agreement was clear and

unambiguous with respect to the method for calculating the buyout price of the plaintiff's interests in the properties, as the language of the agreement was susceptible to more than one reasonable interpretation, the court properly denied the defendant's motion to enforce the settlement agreement: the agreement did not define the term interest, which was used inconsistently therein, the common meaning of the term interest did not provide certainty, and the buyout provision reasonably could have been interpreted as meaning either that the plaintiff's interest in the properties was the fair market value without consideration of the mortgages on the properties, as found by the trial court, or that the plaintiff's interests in the properties were to be limited to his equitable share of the value of the properties after deducting the underlying debt as secured by any mortgages, as argued by the defendant; nevertheless, although the trial court incorrectly concluded that the buyout provisions of the settlement agreement were clear and unambiguous, this court affirmed the trial court's denial of the motion to enforce the settlement agreement on the alternative ground that the agreement was not clear and unambiguous and, therefore, could not be enforced summarily pursuant to *Audubon Parking Associates Ltd. Partnership*.

Argued February 14–officially released May 28, 2019

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Hartford; thereafter, the plaintiffs withdrew the action in accordance with the parties' settlement agreement; subsequently, the trial court, *Robaina*, *J.*, granted the named defendant's motion to restore the case to the docket; thereafter, the court denied the named defendant's motion to enforce the parties' settlement agreement, and the named defendant appealed to this court. *Affirmed.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant (named defendant).

Gary J. Greene, for the appellee (named plaintiff).

Opinion

BRIGHT, J. The present appeal stems from a dispute over the interpretation of a settlement agreement

between, among others, the plaintiff Michael D. Reiner[1] and the defendant Jeffrey A. Reiner.[2] The defendant appeals from the judgment of the trial court, rendered after a hearing pursuant to *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 811–12, 626 A.2d 288 (2010) (*Audubon*),[3] denying his motion to enforce the agreement. On appeal, the defendant claims that the court improperly concluded that the settlement agreement is clear and unambiguous, as construed by the plaintiff.[4] We conclude that the contested sections of the agreement are not clear and unambiguous and, accordingly, we affirm the judgment of the trial court denying the defendant's motion to enforce the agreement on the alternative ground that a settlement agreement that is not clear and unambiguous cannot be enforced through an *Audubon* hearing.[5]

The following procedural history and undisputed facts are relevant to this appeal. The plaintiff and the

[1] The Sheila Reiner Trust for Her Children, The Michael D. Reiner Trust for His Children, and Connecticut LLC Irrevocable Trust also were named as plaintiffs in this action. For clarity, we refer to Michael D. Reiner individually as the plaintiff.

[2] Although Jeffrey A. Reiner is one of twenty-two defendants in this action, he is the only defendant who appealed; therefore, we refer to him individually as the defendant.

[3] "A hearing pursuant to *Audubon* [supra, 225 Conn. 811–12], is conducted to decide whether the terms of a settlement agreement are sufficiently clear and unambiguous so as to be enforceable as a matter of law." *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 499 n.5, 4 A.3d 288 (2010).

[4] The defendant also claims on appeal that the court improperly considered extrinsic evidence in connection with the *Audubon* hearing. In light of our conclusion that it was improper for the court to have concluded that the language of the settlement agreement was clear and unambiguous, we need not reach the defendant's other claim.

[5] "Where the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record." (Internal quotation marks omitted.) *Heisinger* v. *Cleary*, 323 Conn. 765, 776 n.12, 150 A.3d 1136 (2016).

defendant are brothers who were two of the three primary beneficiaries of four irrevocable trusts (Reiner Trusts) that were established by their parents, Eleanore Reiner and Leo P. Reiner.[6] The defendant was the sole trustee of the Reiner Trusts. The Reiner Trusts owned several parcels of real property (Reiner Trusts properties) that had a substantial value; however, a majority of the properties were encumbered by mortgages. Eleanore Reiner also was the sole member of 711 Farmington, LLC, and Canton Gateway, LLC. 711 Farmington, LLC, and Canton Gateway, LLC, each owned a single parcel of real property, both of which were encumbered by a mortgage. After a dispute arose regarding the Reiner Trusts properties, the plaintiff, in 2011, commenced the present action and several other parallel actions against the defendant alleging that he tortiously had mismanaged the Reiner Trusts properties. On July 5, 2012, the plaintiff, the defendant, and several other individuals and entities associated with the Reiner Trusts executed a settlement agreement to resolve the present action, the parallel actions, and other disputes. In the agreement, the plaintiff agreed to withdraw with prejudice the then pending actions, and all parties to the agreement agreed to a comprehensive mutual release. The agreement contained several provisions in which the defendant agreed to buy out the plaintiff's interests in certain properties after the death of Eleanore Reiner. The following buyout provisions are directly at issue in this appeal.

Section 1 (a) of the agreement provides: "[The defendant] shall buyout [the plaintiff's] interests in the Reiner Trusts and the Reiner Trusts Properties by paying cash to [the plaintiff] in proportion to his interests therein no later than 280 days following Eleanore Reiner's death. The buy-out amount payable to [the plaintiff] for

[6] Nancy Brooks, the sister of the plaintiff and the defendant, was the third primary beneficiary of the trusts.

his interests in the Reiner Trusts will be based on the fair market value of each of the Reiner Trusts Properties at the time of Eleanore Reiner's death, multiplied by [the plaintiff's] interests in each Trust Property with a deduction of ten (10%) percent to compensate for a minority discount and for the fact that there is no real estate brokerage commission." Section 1 (b) of the agreement detailed the manner in which the fair market value for each of the Reiner Trusts properties was to be determined. The parties also agreed that the parties' "interests" in the Reiner Trusts properties accurately were set forth in the " 'Trust Property Schedule,' " which was attached to the agreement. That attachment, prepared on June 27, 2012, individually detailed the percentage of the Reiner Trusts properties owned by each party, but not the then-existing value of the properties or the amount of any equity in the properties in light of any mortgages on them.

Section 2 of the agreement provides in relevant part: "In connection with the execution and delivery of this Agreement, Eleanore Reiner will immediately transfer, by Warranty Deeds (i) her interests (as sole member of 711 Farmington, LLC) in 711 Farmington as follows: two thirds (2/3) to [the defendant] and one-third (1/3) to [the plaintiff] in the form of warranty deed attached to this Agreement . . . and (ii) her interests (as sole member of Canton Gateway, LLC) in Canton Gateway as follows: three fourths (3/4) to [the defendant] and one-fourth (1/4) to [the plaintiff] in the form of warranty deed attached to this Agreement . . . . Such transfers are being made upon the following conditions . . . .

"[The defendant] shall buy out [the plaintiff's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the plaintiff] no later than 280 days following Eleanore Reiner's death. The determination of the fair market value of 711 Farmington and Canton Gateway will be based on the same formula and terms

used to determine the fair market value of the Reiner Trust Properties provided for in [§] 1 (a) of this Agreement above except that the valuation shall be subject only to a four percent (4%) discount, not ten percent (10%). [The defendant] will have 280 days from the date of Eleanore Reiner's death, to obtain financing and consummate the buyout."

On July 11 and 13, 2012, the plaintiff withdrew the present action with prejudice in accordance with the agreement. Nevertheless, on July 25, 2012, the defendant filed a motion in which he requested that the court set aside the withdrawal and reinstate the action on the ground that the plaintiff had violated the agreement by soliciting a "side deal" with Eleanore Reiner to permit him to lease a property owned by her in Florida, which property was governed by § 10 of the agreement. On July 27, 2012, the plaintiff also filed a motion to restore the case to the docket. On September 10, 2012, the court restored the case to the docket. Over the course of the next four and one-half years, the parties engaged in litigation concerning the Florida property and other collateral issues stemming from the agreement. None of those issues are the subject of this appeal.

On April 7, 2017, the defendant filed the motion to enforce the agreement that is the subject of this appeal. Therein, he argued that certain buyout provisions of the agreement had been triggered as a result of the recent death of Eleanore Reiner, and that a dispute existed between himself and the plaintiff as to the interpretation of those provisions. In particular, Eleanore Reiner's death triggered the defendant's obligation, under § 2 of the agreement, to buy out the plaintiff's one-third interest in 711 Farmington and his one-quarter interest in Canton Gateway. Her death also triggered the defendant's obligation, under § 1 of the agreement, to buy out the plaintiff's interest in the Reiner Trusts

properties, including 603 Farmington Avenue in Hartford.[7] The plaintiff and the defendant were unable to reach an agreement on how to determine the price that the defendant was to pay the plaintiff for his interests in the properties. The defendant claimed that the buyout price of the plaintiff's interests is intended to be calculated as the plaintiff's proportionate interest in the equity in the properties, after deducting the debt secured by any mortgages, less the percentage discounts. The defendant requested that the court adjudicate the dispute by enforcing the agreement in accordance with his interpretation.

On April 17, 2017, the plaintiff filed an objection to the defendant's motion to enforce the agreement.[8] Therein, the plaintiff disagreed with the defendant's interpretation and advanced his own contrary interpretation of the agreement. The plaintiff maintained that the settlement agreement clearly and unambiguously provides that the buyout amount is to be " 'based on the fair market value' of each of the properties," which amount did not include consideration of the existing mortgages on the properties.

On August 10, 2017, the defendant filed a supplemental memorandum in support of his motion to enforce the agreement. In his supplemental memorandum, the

[7] Although the defendant's initial appellate brief does not mention 603 Farmington Avenue, he subsequently filed an errata sheet in which he maintains that 603 Farmington Avenue is the only property at issue under § 1. The plaintiff does not dispute that the buyout of 603 Farmington Avenue also is at issue in this appeal.

[8] In that filing, the plaintiff principally requested that the court deny the defendant's motion, but also sought enforcement of the agreement in accordance with his own interpretation. Despite the contradictory language used in the plaintiff's April 17, 2017 filing, we treat it as an objection. See *Briere* v. *Greater Hartford Orthopedic Group, P.C.*, 325 Conn. 198, 217, 157 A.3d 70 (2017) (*Robinson, J.*, concurring) (interpretation of pleadings is question of law); see also *Farren* v. *Farren*, 142 Conn. App. 145, 156, 64 A.3d 352 (substance of relief sought by motion, not form, is controlling), cert. denied, 309 Conn. 903, 68 A.3d 658 (2013).

defendant argued that the agreement clearly and unambiguously provides that the amount of the buyout must take into consideration the mortgages on the properties. The defendant argued that a contrary interpretation would be in conflict with Connecticut mortgage jurisprudence, and would result in an absurd result in the form of a substantial unintended windfall for the plaintiff.[9]

On October 23, 2017, following an *Audubon* hearing, the court issued a memorandum of decision in which it denied the defendant's motion to enforce the agreement and concluded that the agreement was clear and unambiguous in conformance with the plaintiff's interpretation.[10] In particular, even though it heard extrinsic evidence regarding what the parties intended by the buyout provisions, the court expressly constrained its analysis to the four corners of the agreement and reasoned that "the terms of the agreement are clear and unambiguous and that the parties did enter into a valid agreement. The agreement, negotiated extensively by and between sophisticated parties, does not refer to

[9] For instance, if the parties equally shared a property that had a fair market value of $1 million and that was encumbered by $900,000 of underlying debt, the buyout amount, pursuant to the plaintiff's construction, would be $500,000. As a result, the defendant would be obligated to pay the plaintiff five times the amount of the actual equity in the property.

[10] The judgment file is inconsistent with the court's memorandum of decision. The judgment file states "that the parties' settlement agreement [is to] be enforced as set forth in the memorandum of decision [regarding the defendant's] motion to enforce settlement agreement issued on October 23, 2017." In the memorandum of decision, the court denied the defendant's motion to enforce the agreement and, despite its conclusion that the agreement was clear and unambiguous in accordance with the plaintiff's interpretation, the court did not enforce the agreement. The court's memorandum of decision is controlling. See *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 529 n.1, 893 A.2d 389 (2006) ("[w]hen there is an inconsistency between the judgment file and the oral or written decision of the trial court, it is the order of the court that controls because the judgment file is merely a clerical document, and the pronouncement by the court . . . is the judgment" [internal quotation marks omitted]).

'equity' as a basis for valuation. The agreement clearly and unambiguously states that the buyout amount will be based on the fair market value of each property and the proportionate interests of the parties being taken into consideration refer to the agreed upon percentage interests [as] listed in the Trust Property Schedule. . . .

"The contract provision as to buying out the plaintiff's interest requires determining the fair market value of the property by the method described in the contract itself. By comparison, [§] 3 of the agreement (160 Farmington) makes specific reference to mortgages and prohibits financing or modification of existing mortgages without the consent of the plaintiff. Similarly, references to mortgages are found in [§] 9 (White Pine), and [§] 10 (Florida property). Further, the listing of the trust properties, which is entitled 'Trust Property Schedule–Date Prepared 6/27/2012,' lists the properties with the percentage of ownership in each the plaintiff, the defendant, and their sibling, without reference to mortgages. Finally, the term 'equity,' commonly understood to mean the difference between the fair market value and the encumbrances on a property, does not appear in any relevant portion of the agreement." (Citation omitted.) This appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the relevant standard of review and legal principles that govern our review. "A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit." (Citations omitted; internal quotation marks omitted.) *Audubon*, supra, 225 Conn. 811. "Summary enforcement is not only essential to the efficient use of judicial resources, but also preserves the integrity

of settlement as a meaningful way to resolve legal disputes. When parties agree to settle a case, they are effectively contracting for the right to avoid a trial." (Emphasis omitted.) Id., 812. Nevertheless, the right to enforce summarily a settlement agreement is not unbounded. "The key element with regard to the settlement agreement in *Audubon* . . . [was] that there [was] no factual dispute as to the terms of the accord. Generally, [a] trial court has the inherent power to enforce summarily a settlement agreement as a matter of law [only] when the terms of the agreement are clear and unambiguous . . . and when the parties do not dispute the terms of the agreement." (Internal quotation marks omitted.) *Reid & Riege, P.C.* v. *Bulakites*, 132 Conn. App. 209, 216, 31 A.3d 406 (2011), cert. denied, 303 Conn. 926, 35 A.3d 1076 (2012). "The rule of *Audubon* effects a delicate balance between concerns of judicial economy on the one hand and a party's constitutional rights to a jury and to a trial on the other hand. See [*Audubon*], supra, [810–12]; see also *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 534–35, 4 A.3d 288 (2010). To use the *Audubon* power outside of its proper context is to deny a party these fundamental rights and would work a manifest injustice." *Matos* v. *Ortiz*, 166 Conn. App. 775, 792, 144 A.3d 425 (2016); see *DAP Financial Management Co.* v. *Mor-Fam Electric, Inc.*, 59 Conn. App. 92, 97–98, 755 A.2d 925 (2000) ("The test of disputation . . . must be applied to the parties at the time they entered into the alleged settlement. To hold otherwise would prevent any motion to enforce a settlement from ever being granted.").

"A settlement agreement, or accord, is a contract among the parties." *Ackerman* v. *Sobol Family Partnership, LLP*, supra, 298 Conn. 532. "When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected

with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract." (Internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 341, 152 A.3d 1230 (2016).

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) Id., 341–42. "[T]he determination as to whether contractual language is plain and unambiguous is . . . a question of law subject to plenary review." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 325 Conn. 146, 157–58, 156 A.3d 477 (2017).[11]

On appeal, there is no dispute between the parties that the agreement is valid and enforceable, and that

[11] We emphasize that the scope of our review is narrow and requires us to determine only whether the language of the buyout provision is ambiguous. We do not decide which party has the better interpretation, only whether there is more than one reasonable interpretation of the contract language at issue. See *Salce* v. *Wolczek*, 314 Conn. 675, 683, 104 A.3d 694 (2014).

§§ 1 and 2 of the agreement mandate that the defendant buy out the plaintiff's interests in certain properties. Instead, the parties' views diverge as to the method by which the buyout amount is to be calculated. The defendant claims that the court improperly concluded that the agreement clearly and unambiguously provides that the buyout amount is the fair market value of the properties. He argues that the clear and unambiguous language of the agreement specifies that the buyout amount is the plaintiff's equitable interest in the properties, namely, the fair market value of the properties less the amount of any mortgage encumbrances. In response, the plaintiff argues that the court properly determined that the agreement clearly and unambiguously provides that the buyout amount is the fair market value of the properties without regard to any debt associated with the properties. We disagree with both parties and conclude that the agreement is ambiguous with respect to the calculation of the buyout of the plaintiff's interests in the properties.

As noted previously, § 1 (a) of the agreement provides: "[The defendant] shall buyout [the plaintiff's] interests in the Reiner Trusts and the Reiner Trusts Properties by paying cash to [the plaintiff] in proportion to his interests therein no later than 280 days following Eleanore Reiner's death. The buy-out amount payable to [the plaintiff] for his interests in the Reiner Trusts will be based on the fair market value of each of the Reiner Trusts Properties at the time of Eleanore Reiner's death, multiplied by [the plaintiff's] interests in each Trust Property with a deduction of ten (10%) percent to compensate for a minority discount and for the fact that there is no real estate brokerage commission." Section 2 (b) of the agreement provides in relevant part that "[the defendant] shall buy out [the plaintiff's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the plaintiff] no later than 280 days following Eleanore Reiner's death. The determination of the fair market value of 711 Farmington and

Canton Gateway will be based on the same formula and terms used to determine the fair market value of the Reiner Trust Properties provided for in [§] 1 (a) of this Agreement above except that the valuation shall be subject only to a four percent (4%) discount, not ten percent (10%). . . .''

Section 1 applies to the defendant's buyout of the plaintiff's interests in the Reiner Trusts properties, including 603 Farmington Avenue. With respect to 603 Farmington Avenue, the language of § 1 provides that the buyout amount will be determined on the basis of the fair market value multiplied by the plaintiff's *interest*, less a percentage discount. For the following reasons, we conclude that it is neither clear nor certain whether the word ''interest'' was intended, as the defendant contends, to mean the plaintiff's percentage interest in the equity in the properties, or, as the plaintiff contends, to mean the plaintiff's ownership percentage of the fair market value of the properties.

First, the agreement does not define ''interest,'' and that term has no talismanic meaning as utilized throughout the agreement. For example, the parties agreed that the Trust Property Schedule attached to the agreement set forth their and Nancy Brooks' interests in the Reiner Trusts properties. That attachment lists the parties' respective percentage ownership in each of the Reiner Trusts properties and is devoid of the then-existing mortgage valuation for each property. Conversely, § 1, upon which the plaintiff and the court relied, provides that, if the defendant refinances one or more of the Reiner Trusts properties to fund his buyout of the plaintiff's interests in other properties, the interest of the third beneficiary of the Reiner Trusts, Nancy Brooks, in the refinanced properties cannot be diminished. The defendant is required to provide her with value in other properties or cash sufficient to offset any reduction in the value of her interest as a result of the refinancing.

This language suggests that the parties agreed that a beneficiary's interest in a property is determined by taking into account any outstanding debt associated with the property. Accordingly, the inconsistent use of the term "interest" makes it unclear whether that term was intended to include or to exclude outstanding debt on the properties.

Second, the common meaning of the term "interest" provides no certainty. As applicable here, interest is defined as "[a] legal share in something; all or part of a legal or equitable claim to or right in property . . . ." Black's Law Dictionary (10th Ed. 2014); see Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) (defining "interest" to mean "right, title, or legal share in something"). In real estate transactions, interest could be intended to mean, among other things, equitable or legal ownership. See generally *Salce* v. *Wolczek*, 314 Conn. 675, 683–96, 104 A.3d 694 (2014) (determining that phrase "any ownership interest . . . is transferred" encompassed transfers of both legal and equitable interests). As the defendant properly emphasizes, "Connecticut follows the title theory of mortgages, which provides that on the execution of a mortgage on real property, the mortgagee holds legal title and the mortgagor holds equitable title to the property." (Internal quotation marks omitted.) *Mortgage Electronic Registration Systems, Inc.* v. *White*, 278 Conn. 219, 231, 896 A.2d 797 (2006). Accordingly, because the plaintiff did not have legal title to certain properties as they were still encumbered by mortgages, it is a reasonable interpretation that his interest was equitable, and the buyout amount was limited to his share of the worth of the properties after deducting the underlying debt on the properties as secured by any mortgages. Furthermore, such an interpretation would avoid what might be viewed as an absurd result of the buyout amount being substantially greater than the entire net value of

the property. See footnote 9 of this opinion; see also *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 198–99, 118 A.3d 675 (recognizing principle that "[w]e will not construe a contract's language in such a way that it would lead to an absurd result" and that "contractual documents are to be read as a whole and bizarre results are to be avoided" [internal quotation marks omitted]), cert. denied, 318 Conn. 905, 122 A.3d 634 (2015).

In contrast, as the plaintiff and the court recognize, the agreement does not specify that the plaintiff's interest was equal to his equity, and § 1 does not make reference to mortgages.[12] On the basis of the foregoing, we conclude that § 1 is subject to two reasonable interpretations as it relates to the defendant's obligation to purchase the plaintiff's interest in the Reiner Trusts properties, including 603 Farmington Avenue.

[12] The plaintiff and the court also rely on the references to mortgages in §§ 3, 9, and 10 of the agreement to conclude that the parties intentionally omitted consideration of the mortgages from § 1. We are unpersuaded that these collateral references establish that § 1 is clear and unambiguous. In § 3, the defendant agreed to buy out Connecticut LLC Trust's interest in another parcel of real property "by paying . . . the sum equal to (i) $700,000 plus (ii) forty-nine [percent] (49%) of any principal pay down on the mortgage on" that property. This language sets forth a precise mathematical formula to produce a number "*equal to*" the buyout price for the property at issue. (Emphasis added.) By contrast, § 1 states that the buyout of the plaintiff's interests in the Reiner Trusts properties "will be *based on*" the fair market value of each of the properties. (Emphasis added.) "Based on" and "equal to" may have been intended by the parties to have the same meaning, but that is not necessarily so. As the defendant points out in his brief, " 'based on' typically notes that something is a first step and more will be done in addition. . . . [The] [d]efendant argues that this additional step was calculating the equity in the properties to determine the value of the plaintiff's interest in them." We do not express a view as to which argument regarding the impact of § 3 on the interpretation of § 1 is more reasonable. See footnote 11 of this opinion. We simply note that the court's reliance on § 3 to support its conclusion that § 1 is clear and unambiguous was misplaced. Further, we do not view §§ 9 and 10 as in anyway helpful to a determination of the meaning of § 1. Sections 9 and 10 are not buyout provisions but, rather, govern the transfer of properties through Eleanore Reiner's will. The fact that the sole beneficiary of §§ 9 and 10 received the property as encumbered upon Eleanore Reiner's death provides no insight as to how the plaintiff and the defendant intended the buyout provisions between them to work.

We, therefore, disagree with the court's conclusion that the language is clear and unambiguous.

We reach the same conclusion as to the defendant's obligation under § 2 to purchase the plaintiff's interests in 711 Farmington and Canton Gateway. Section 2 applies to the defendant's buyout of the plaintiff's interests in 711 Farmington and Canton Gateway. As noted previously, § 2 (b) incorporates the formula for determining fair market value from § 1 (a). Nevertheless, § 2 (b), unlike § 1 (a), does not state that the purchase of the plaintiff's interests in the two properties is to be based on fair market value. Instead, § 2 (b) merely provides, in relevant part, that "[the defendant] shall buy out [the plaintiff's] interests in each [of] 711 Farmington and Canton Gateway by paying cash to [the plaintiff] . . . . The determination of the fair market value of 711 Farmington and Canton Gateway will be based on the same formula and terms used to determine the fair market value of the Reiner Trust Properties provided for in [§] 1 (a) of this Agreement above . . . ." Although it can be argued that the reference to fair market value in § 2 (b) implies that it must be the basis for valuing the plaintiff's interests, the language is certainly not clear and unambiguous. The language of § 2 (b) simply does not state how the price for the plaintiff's interests in the two properties is to be determined. Furthermore, to the extent that this language is understood to adopt the buyout amount formula in § 1 (a), it does not clarify the ambiguity in that section as to whether the plaintiff's interest is to be determined after consideration of the debt associated with the properties.

In sum, each party has set forth a reasonable interpretation of the buyout provisions, with both interpretations having bases in the language used in the agreement. We conclude, therefore, that the agreement is ambiguous with respect to the method of calculation of the buyout amounts because the intent of the parties is not clear and certain from the language of the agreement. As noted previously, settlement agreements can

be enforced summarily pursuant to *Audubon* only when they are clear and unambiguous. That is not the case here. Consequently, although the court properly denied the defendant's motion to enforce the agreement, it incorrectly determined that the agreement is clear and unambiguous, and, thus, the court's declaration of the meaning of the contract has no legal effect. We affirm the court's denial of the defendant's motion on the alternative ground that the buyout provisions of the agreement at issue are not clear and unambiguous.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

ROSENTHAL LAW FIRM, LLC *v.* JAMES COHEN (AC 41028)

Lavine, Elgo and Bear, Js.

Syllabus

The plaintiff law firm sought to recover damages from the defendant, its former client, for breach of a retainer agreement for legal services in connection with a fee dispute with the defendant that had been resolved in the plaintiff's favor during arbitration proceedings. The plaintiff had filed an application to confirm the arbitration award with the trial court, which rendered judgment granting the application. Thereafter, this court affirmed the trial court's judgment, and our Supreme Court denied the defendant's petition for certification to appeal. R, the sole member of the plaintiff, represented the plaintiff throughout the arbitration proceedings and in the trial and appellate courts. The plaintiff subsequently brought the present action, claiming that the defendant, by refusing to pay for the legal services that it had rendered, had breached the parties' retainer agreement, pursuant to which the parties had agreed that if the defendant failed to pay the plaintiff its agreed on fee or expenses, he would be

[13] Although we conclude that this aspect of the agreement cannot be enforced pursuant to *Audubon*, this does not foreclose the parties' ability, if they are unable to reach an extrajudicial resolution of their dispute, to seek other avenues of recovery on the basis of the agreement. See *Matos* v. *Ortiz*, supra, 166 Conn. App. 809 ("while [a settlement agreement] may still be enforceable through ordinary procedural channels, these are hardly the circumstances that give rise to a right to summary enforcement under *Audubon*").

liable for all costs related to a collection action, including the plaintiff's attorney's fees and interest. The plaintiff claimed that it had incurred $59,600 in legal fees in connection with R's representation of it in the arbitration and related court proceedings. The trial court rendered judgment in favor of the defendant, concluding that the plaintiff was not entitled to recover attorney's fees under the retainer agreement because it had effectively represented itself throughout the subject proceedings. In reaching its decision, the court relied on *Jones* v. *Ippoliti* (52 Conn. App. 199), in which this court extended to self-represented attorney litigants the rule adopted in *Lev* v. *Lev* (10 Conn. App. 570) barring self-represented litigants generally from recovering attorney's fees. On appeal to this court, the plaintiff claimed that the trial court erred in concluding that the plaintiff, as a self-represented law firm, was precluded from recovering attorney's fees, which was based on its claim that because the portion of *Jones* on which the court relied was dictum, the court improperly treated it as binding precedent. *Held* that the trial court did not err in determining that the law barring self-represented nonattorney litigants from recovering statutory attorney's fees also precludes a self-represented law firm from recovering contractual attorney's fees; this court's conclusion in *Jones* that self-represented attorney litigants cannot recover attorney's fees constituted an alternative holding and not dictum, as that conclusion could not reasonably be characterized as a merely casual, passing comment made without analysis or due consideration of conflicting authorities, and it was clear that this court made a deliberate decision to resolve the issue and that it undeniably decided it, and this court declined the plaintiff's request to overrule the portion of *Jones* at issue, which the plaintiff claimed was based on a misinterpretation of *Lev*, as this court was not at liberty to do so because it is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding.

Argued January 2—officially released May 28, 2019

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Shapiro*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Edward Rosenthal, with whom, on the brief, was *Daniel J. Klau*, for the appellant (plaintiff).

James D. Cohen, self-represented, the appellee (defendant).

Opinion

BEAR, J. This action between the plaintiff, Rosenthal Law Firm, LLC, and its former client, the defendant,

James Cohen, arises out of a fee dispute that had been resolved in the plaintiff's favor during a prior arbitration proceeding. Following the confirmation of the arbitration award, the plaintiff commenced the present action seeking attorney's fees, pursuant to a contract between it and the defendant, for its prosecution of the fee dispute. After a trial to the court, the trial court rendered judgment in the defendant's favor, from which the plaintiff now appeals. The plaintiff claims on appeal that the court erred in concluding that it was not entitled to attorney's fees because it had represented itself, through its sole member, in the arbitration and award confirmation proceedings. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's claim. On December 1, 2011, the parties entered into an agreement for legal services (retainer agreement) whereby they agreed, in paragraph 12, that in the event the defendant failed to pay the plaintiff its agreed on fee or expenses, he would be liable for "all costs related to a collection action including [the plaintiff's] attorney's fees and interest at the annual rate of ten percent . . . ." On March 3, 2014, the plaintiff petitioned the legal fee resolution board of the Connecticut Bar Association (board) to resolve a fee dispute that had arisen between the parties. On December 24, 2014, a panel of three arbitrators found that the plaintiff was owed $109,683 in fees for its representation of the defendant. The plaintiff subsequently filed an application to confirm the arbitration award in the Superior Court, which the court, *Scholl*, *J.*, granted on March 17, 2015. The defendant appealed to this court, which affirmed the trial court's judgment confirming the arbitration award, and our Supreme Court denied the defendant's petition for certification to appeal. See *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 473, 139 A.3d 774, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016). Attorney

Edward Rosenthal, the sole member of the plaintiff, represented the plaintiff throughout the proceedings before the board and in the trial and appellate courts.

On April 1, 2016, the plaintiff commenced the present action alleging, inter alia, that the defendant breached the retainer agreement by failing and refusing to pay for the legal services it had rendered and that, as a result, it suffered damages in the form of "considerable time [spent] in collecting its fees from the defendant" in arbitration and the related court proceedings. As clarified in its trial brief, the plaintiff sought to recover the attorney's fees and interest prescribed by paragraph 12 of the retainer agreement. More specifically, the plaintiff claimed that it had incurred $59,600 in "legal fees" in connection with the arbitration and related court proceedings, which reflected the time spent by Rosenthal on these matters.

On October 18, 2017, following a trial to the court, the trial court, *Shapiro*, *J.*, issued a memorandum of decision in which it concluded that the plaintiff was not entitled to recover attorney's fees under paragraph 12 of the retainer agreement because it had effectively represented itself throughout the proceedings at issue, and "[t]he law of this state is that pro se litigants are not entitled to attorney's fees." (Internal quotation marks omitted.) In so concluding, the trial court relied on *Jones* v. *Ippoliti*, 52 Conn. App. 199, 212, 727 A.2d 713 (1999), in which this court extended the rule adopted in *Lev* v. *Lev*, 10 Conn. App. 570, 575, 524 A.2d 674 (1987)—barring self-represented litigants generally from recovering attorney's fees—to self-represented *attorney* litigants. Accordingly, the trial court rendered judgment in favor of the defendant. This appeal followed.

The plaintiff's sole claim on appeal is that the trial court erred in determining that the law barring self-represented nonattorney litigants from recovering statutory attorney's fees also precludes a self-represented

law firm from recovering contractual attorney's fees. The plaintiff argues that the portion of *Jones* relied on by the trial court is mere dictum. The plaintiff alternatively argues that we should overrule this portion of *Jones* because it is based on a "serious misinterpretation" of *Lev*.[1] We disagree that the statement in *Jones* concerning self-represented attorney litigants is dictum and decline the plaintiff's invitation to revisit the issue.

Preliminarily, we note that, because the plaintiff's appeal concerns the trial court's interpretation and application of the law to the undisputed facts of this case, our standard of review is plenary. See *Thompson* v. *Orcutt*, 257 Conn. 301, 308–309, 777 A.2d 670 (2001); *Steroco, Inc.* v. *Szymanski*, 166 Conn. App. 75, 87, 140 A.3d 1014 (2016). We now turn to an examination of this court's decision in *Jones*.

Jones involved an action by the partners of a law firm against former clients to collect unpaid fees for services previously rendered. *Jones* v. *Ippoliti*, supra, 52 Conn. App. 200 n.2, 203. The plaintiffs alleged, inter alia, failure to pay a promissory note, and they sought attorney's fees for the prosecution of the collection action pursuant to a provision in the note that provided for "any costs and expenses, including reasonable attorney's . . . fees incurred in the collection of [the note] or in any litigation or controversy arising from or connected with [the note]." (Internal quotation marks

[1] The plaintiff also appears to argue that it is entitled to attorney's fees under the plain language of paragraph 12 of the retainer agreement. The plaintiff's discussion of this issue, however, is limited to a single conclusory statement in its appellate brief without any citation to authority. Accordingly, to the extent the plaintiff claims that the contract language is dispositive of this appeal, we conclude that such claim is inadequately briefed and, therefore, decline to review it. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." [Internal quotation marks omitted.]).

omitted.) Id., 202 n.5, 203. The trial court rendered judgment in favor of the plaintiffs on their complaint and awarded them attorney's fees pursuant to the promissory note for the services of their trial counsel, who had been retained by the plaintiffs. Id., 203 and n.7, 208. The court, however, denied their claim for attorney's fees based on the services rendered by the attorneys and paralegals employed by the plaintiffs' law firm in assisting their trial counsel in the prosecution of the collection action. Id., 208.

On appeal, the plaintiffs in *Jones* claimed that they were entitled "to recover 'in-house' counsel fees for the services they performed to assist their trial counsel." Id. In support of this claim, "[t]he plaintiffs urge[d] [this court] to adopt what they claim[ed] to be a trend in other jurisdictions to award reasonable attorney's fees for both outside counsel, as well as in-house counsel, who participate in the prosecution of a claim in which attorney's fees can be awarded." (Footnote omitted.) Id. According to the plaintiffs, "an award to the successful litigant of reasonable attorney's fees for the services [the plaintiffs' law firm] provided [was] appropriate because the time devoted to this case was time not available for other work." Id., 210.

Citing a number of out-of-state cases in which courts denied an award of attorney's fees to attorney litigants appearing on their own behalf,[2] the defendants countered that, "if plaintiff-attorneys representing themselves are not entitled to an award of attorney's fees, then, a fortiori, plaintiff-attorneys who merely assist their trial counsel, for whose services they have received an award of attorney's fees, are not entitled to an award of attorney's fees for their own services." Id. The court deemed this distinction to be significant. Id.

[2] See *Connor* v. *Cal-Az Properties, Inc.*, 137 Ariz. 53, 55–56, 668 P.2d 896 (App. 1983); *O'Connell* v. *Zimmerman*, 157 Cal. App. 2d 330, 336–37, 321 P.2d 161 (1958); *Sessions, Fishman, Rosenson, Boisfontaine & Nathan* v. *Taddonio*, 490 So. 2d 526, 527 (La. App. 1986).

The court in *Jones* began its analysis of the plaintiffs' claim by first considering "whether [the plaintiffs' law firm] and in-house counsel [were] synonymous." Id. The court determined that, "[b]y definition, the plaintiffs [were] not in-house counsel because they [were] not employees of a business whose function is to advise the business on day-to-day matters." Id., 211. The court therefore concluded that "the cases cited by the plaintiffs in support of their claim that the trial court should have awarded them attorney's fees for the services performed by [the plaintiffs' law firm were] factually distinguishable in that attorney's fees in those cases [had been] awarded for the work done by in-house counsel in businesses such as insurance companies." Id.[3]

The court next considered "whether [the plaintiffs' law firm had] functioned as an attorney in [the collection action]."[4] Id. "To begin with, [the court] note[d] that [the plaintiffs' law firm had] not enter[ed] an appearance on behalf of the plaintiffs" and that, accordingly, "it did not represent them in this action." Id., 211–12; see Practice Book § 3-7 (a) ("[e]xcept by leave of the judicial authority, no attorney shall be permitted to appear in court or to be heard on behalf of a party until the attorney's appearance has been entered"). The court further determined that "[e]ven if

[3] The court left for another day the issue of whether, in the appropriate circumstances, a plaintiff may be entitled to attorney's fees for the services that in-house counsel provides to outside counsel during the course of litigation. *Jones* v. *Ippoliti*, supra, 52 Conn. App. 211 n.17.

[4] It would appear at first blush that the court's determination in *Jones* that the plaintiffs did not constitute "in-house counsel" entirely disposed of the plaintiffs' claim on appeal. A review of the plaintiffs' principal appellate brief, however, reveals that they had argued more generally that they should have been awarded attorney's fees for the reasonable value of their time because "[t]here is no meaningful distinction between the time spent by [outside counsel] and the time spent by attorneys and paralegals at [the plaintiffs' law firm]." In support of this argument, the plaintiffs cited to a number of decisions from other jurisdictions holding that self-represented attorney litigants and law firm litigants represented by their own attorneys may recover attorney's fees. See, e.g., *Winer* v. *Jonal Corp.*, 169 Mont. 247, 251, 545 P.2d 1094 (1976); *Hinkle, Cox, Eaton, Coffield & Hensley* v. *Cadle Co. of Ohio, Inc.*, 115 N.M. 152, 158, 848 P.2d 1079 (1993). Consequently, the court's conclusion in *Jones* that the plaintiffs were not in-house counsel did not fully dispose of the appeal.

[it] were to conclude otherwise, i.e., that [the plaintiffs' law firm had] represented the plaintiffs, such representation would have been of a pro se nature. The law of this state is that pro se litigants are not entitled to attorney's fees." *Jones* v. *Ippoliti*, supra, 52 Conn. 212, citing *Lev* v. *Lev*, supra, 10 Conn. App. 575. The court therefore held that "the plaintiffs [had] not [been] entitled to attorney's fees for the services provided by [the plaintiffs' law firm] and the trial court [had] properly denied the plaintiffs' request for them." Id.

The plaintiff in the present case appears to contend that, because the court in *Jones* determined that the plaintiffs had not been represented by their law firm, it was unnecessary for the court to consider whether the pro se nature of such representation would have precluded an award of attorney's fees pursuant to the general rule adopted in *Lev*. Thus, the plaintiff argues that this portion of *Jones* is dictum, and the trial court, therefore, erred in treating it as binding precedent. We disagree.

"[D]ictum is an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . . Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case . . . are obiter dicta, and lack the force of an adjudication." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Morawska*, 165 Conn. App. 421, 427 n.4, 139 A.3d 747 (2016). The overwhelming weight of authority, however, recognizes a distinction between dicta and alternative holdings in an opinion. As the United States Supreme Court has explained, "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter [dictum], but each is the judgment of the court, and of equal validity with the

other." (Internal quotation marks omitted.) *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486, 44 S. Ct. 621, 68 L. Ed. 1110 (1924).[5] Cf. *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 420–21, 35 A.3d 188 (2012) ("Once it becomes clear that the trial court lacked subject matter jurisdiction to hear the plaintiffs' complaint, any further discussion of the merits is pure dict[um]. . . . When the trial court concluded . . . that subject matter jurisdiction was missing, the remainder of its [ruling was] merely advisory . . . ." [Internal quotation marks omitted.]).

Although an alternative holding, by its very nature, is not strictly necessary to the disposition of the case, this does not render it dictum. On this point, we find the Utah Supreme Court's opinion in *State* v. *Robertson*, 438 P.3d. 491 (Utah 2017), persuasive. "When we say that a holding is binding only when it is necessary, we do not mean that the holding must be the singular basis for our ultimate decision. Courts often confront cases

[5] See, e.g., *Boogaard* v. *National Hockey League*, 891 F.3d 289, 295 (7th Cir. 2008) ("[i]t is blackletter law that where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum" [internal quotation marks omitted]), cert. denied, U.S. , 139 S. Ct. 601, 202 L. Ed. 2d 430 (2018); *Gestamp South Carolina, L.L.C.* v. *National Labor Relations Board*, 769 F.3d 254, 263 n.4 (4th Cir. 2014) ("alternative holdings are not dicta"); *Pyett* v. *Pennsylvania Building Co.*, 498 F.3d 88, 93 (2d Cir. 2007) ("[a]n alternative conclusion in an earlier case that is directly relevant to a later case is not dicta; it is an entirely appropriate basis for a holding in the later case"), rev'd on other grounds, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009); *Sturdivant* v. *State*, 84 So. 3d 1053, 1060 (Fla. App. 2010) ("A ruling in a case fully considered and decided by an appellate court is not dictum merely because it was not necessary, on account of one conclusion reached upon one question, to consider another question the decision of which would have controlled the judgment. Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would dispose of the entire case upon its merits, and neither holding is a dictum, so long as it is properly raised, considered, and determined." [Internal quotation marks omitted.]); *QOS Networks Ltd.* v. *Warburg, Pincus & Co.*, 294 Ga. App. 528, 532–33, 669 S.E.2d 536 (2008) ("A ruling is not dictum merely because the disposition of the case is or might have been made on some other ground. Where a case presents two or more points, any one of which is sufficient to determine the ultimate issue, but the court actually decides all such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of a dictum." [Internal quotation marks omitted.]).

raising multiple issues that could be dispositive, yet they find it appropriate to resolve several, in order to avoid repetition of errors on remand or provide guidance for future cases. Or, [courts] will occasionally find it appropriate to offer alternative rationales for the results they reach. Were we to require that a holding must be necessary in some strict, logical sense before it becomes binding precedent, then every time we articulated alternative bases for a decision we would convert our opinion into dicta, for none of the alternative bases are strictly necessary for the outcome. . . . Instead, necessary means only that the court undeniably decided the issue, not that it was unavoidable for it [to] do so. . . .

"Of course, not every statement of law in every opinion is binding . . . . Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the [court's] full attention, it may be appropriate to re-visit the issue in a later case. . . . Where, on the other hand, it is clear that a majority of the [court] has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law . . . ." (Footnotes omitted; internal quotation marks omitted.) Id., 502–503, quoting *United States* v. *Johnson*, 256 F.3d 895, 914–16 (9th Cir. 2001).

We now turn to the statement at issue in the present case. In *Jones*, both parties had raised and discussed in their appellate briefs the question of whether self-represented attorneys may recover attorney's fees for the time spent litigating their own causes and had directed the court's attention to the conflicting authorities on the subject. See footnotes 2 and 4 of this opinion. The court intentionally took up and analyzed the issue and concluded that the general rule announced in *Lev* would bar the plaintiff attorneys in *Jones* from recovering attorney's fees. Although the court discussed the

issue only briefly, there is nothing in its opinion or the record to suggest that its conclusion was less carefully reasoned than it might otherwise have been. In sum, the court's conclusion cannot reasonably be characterized as a merely casual, passing comment made without analysis or due consideration of conflicting authorities. It is clear that the court made a deliberate decision to resolve this issue and that it undeniably decided it. Accordingly, the court's conclusion that self-represented attorney litigants cannot recover attorney's fees constitutes an alternative holding, not dictum.

We, therefore, disagree with the plaintiff that the trial court in the present case improperly treated this portion of *Jones* as binding precedent. Furthermore, although the plaintiff requests, in the alternative, that this panel revisit such precedent, we are not at liberty to do so.[6] See *In re Zoey H.*, 183 Conn. App. 327, 340 n.5, 192 A.3d 522 ("[I]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . This court often has stated that this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." [Internal quotation marks omitted.]), cert. denied, 330 Conn. 906, 192 A.3d 426 (2018).[7]

The plaintiff does not otherwise challenge the application of *Jones* to the present case, and, therefore, we need not address the propriety of the trial court's characterization of the plaintiff law firm—a legal entity distinct from Rosenthal—as a self-represented party. Indeed, when asked during oral argument before this court whether the plaintiff's status as a limited liability company affects the analysis of the issue raised in this

[6] The plaintiff also appears to contend that *Jones* is inapplicable to the present case because the present case involves a claim for contractual, rather than statutory, attorney's fees. In addition to being inadequately briefed, this claim clearly lacks merit given that the plaintiffs in *Jones* had likewise sought attorney's fees pursuant to a contractual provision. See *Jones* v. *Ippoliti*, supra, 52 Conn. App. 202 n.5.

[7] Moreover, the plaintiff has not presented to this court any persuasive reason for revisiting *Jones*.

appeal, Rosenthal replied, "I don't think so." Similarly, we need not determine whether the plaintiff's status as a *law firm* litigant renders this case materially distinguishable from *Jones*, which involved *attorney* litigants. We note, however, that among the courts that have considered these issues in jurisdictions in which self-represented attorney litigants are barred from recovering attorney's fees, the majority agree that there is no meaningful distinction between solo practitioners who represent themselves and law firms that are represented by their own attorneys.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

[8] See, e.g., *Munger Chadwick, P.L.C.* v. *Farwest Development & Construction of the Southwest, LLC*, 235 Ariz. 125, 128, 329 P.3d 229 (App. 2014) ("We . . . can find no logical reason to draw any distinction between a law firm that represents itself and a sole practitioner that does so. . . . In applying the rule [against awarding attorney's fees to self-represented attorneys], our courts have expressed a core concern that all parties to litigation be treated equally in their ability to secure compensation for attorney fees. . . . This court has specifically reasoned that an attorney ought not be entitled to compensation for her time in representing herself when a lay person would not be able to do so. . . . We likewise conclude it would be inequitable for a law firm to be able to obtain its fees through an arrangement that amounts to self-representation when a sole practitioner would be unable to do so." [Citations omitted.]); *Witte* v. *Kaufman*, 141 Cal. App. 4th 1201, 1211, 46 Cal. Rptr. 3d 845 (2006) (Court held that prevailing law firm litigant was not entitled to attorney's fees where it was represented by its own members; "[t]he attorneys of [the firm] are the law firm's product. When they represent the law firm, they are representing their own interests. As such, they are comparable to a sole practitioner representing himself or herself."); *Swanson & Setzke, Chtd.* v. *Henning*, 116 Idaho 199, 203 n.3, 774 P.2d 909 (App. 1989) ("When a rule of law is enunciated on whether pro se lawyer litigants are entitled to attorney fee awards, that rule should be applied consistently. It should not turn on distinctions among proprietorships, partnerships, corporations or other modes of law practice."); *State ex rel. Schad, Diamond & Shedden, P.C.* v. *My Pillow, Inc.*, 115 N.E.3d 923, 930–31 (Ill. 2018) (holding that, "[t]o the extent that [the plaintiff law firm] prosecuted its own claim using its own lawyers, the law firm was proceeding pro se," and, therefore, "the same considerations were at work here as with any other pro se litigant, and Illinois's long-standing bar against awards of attorney fees to lawyers who represent themselves was fully applicable"); *Fraser Trebilcock Davis & Dunlap PC* v. *Boyce Trust 2350*, 497 Mich. 265, 275–76, 870 N.W.2d 494 (2015) (holding that plaintiff law firm that used its own member lawyers to litigate firm's interests could not recover attorney's fees; "while we acknowledge that [the plaintiff] is a legally distinct corporate entity, we do not find that status sufficient to distinguish the representation it provided to itself through its member lawyers from the self-representation [of an individual attorney litigant], such that [the plaintiff] may recover a reasonable attorney fee" [internal quotation marks omitted]).