DOLLY ROMPREY ET AL. *v.* SAFECO INSURANCE COMPANY OF AMERICA
(SC 18858)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, McDonald and Espinosa, Js.*

Argued March 20—officially released October 29, 2013

Lisa J. Mainolfi, for the appellants (plaintiffs).

Andrew S. Turret, for the appellee (defendant).

Opinion

ROGERS, C. J. This certified appeal addresses whether summary judgment was properly rendered in a matter involving the timeliness provisions set forth in the underinsured motorist statute, General Statutes § 38a-336 (g) (1).[1] The plaintiffs, Dolly Romprey and Peter Romprey, appeal from the Appellate Court's affirmance of the trial court's summary judgment in favor of the defendant, Safeco Insurance Company of America. See *Romprey* v. *Safeco Ins. Co. of America*, 129 Conn. App. 481, 499, 21 A.3d 889 (2011). The plaintiffs contend that the trial court improperly rendered summary judgment for the defendant on the basis of the plaintiffs' failure to satisfy the threshold requirement that their claim involved an underinsured vehicle. Additionally, the plaintiffs argue that by requiring them to submit evidence that they had met the requirements of the statutory tolling provision contained in § 38a-336 (g) (1), the trial court improperly shifted to them the burden of proving an issue regarding which the defendant, in its motion for summary judgment, had not demonstrated the absence of a genuine issue of material fact. We agree with the plaintiffs and reverse the judgment of the Appellate Court.

The following facts and procedural history, as summarized by the Appellate Court, are relevant to the resolution of this appeal. "The plaintiffs commenced this action on February 26, 2008.[2] The plaintiffs' complaint alleges the following. On November 16, 2004, Dolly Romprey was involved in a motor vehicle accident in which the vehicle she was driving collided with a vehicle driven by Donna Kempton. The collision was caused by Kempton's negligence. At the time of the accident, Dolly Romprey was insured under an automobile insurance policy issued by the defendant.

"The plaintiffs sought to recover from the defendant under the uninsured/underinsured motorist provisions of the automobile insurance policy issued by the defendant to the plaintiffs. In count one of the complaint, Dolly Romprey sought compensation for her own alleged injuries, and, in count two of the complaint, Peter Romprey sought compensation for loss of spousal consortium.

"The defendant filed an answer and special defenses in which it asserted, inter alia, that the plaintiffs' cause of action was time barred pursuant to § 38a-336 (g) (1). On September 24, 2008, the defendant filed a motion for summary judgment. The plaintiffs responded by objecting to the motion for summary judgment but, in the alternative, requested that the court compel arbitration in accordance with the policy of insurance. In support of their objection, the plaintiffs submitted two unauthenticated copies of letters to the defendant, which were signed by a paralegal from the office of

the plaintiffs' attorney. The first letter, which is dated December 12, 2005, states: 'In connection with the above referenced file, enclosed please find all reports and medical bills thus far. Please be advised that [Dolly] Romprey is having surgery and all other medical documentation will be forwarded upon receipt. Also, enclosed please find the Declaration page for . . . Kempton. Please be advised that we have exhausted . . . Kempton's policy.' The second letter, dated February 24, 2006, states: 'Pursuant to . . . [§] 38a-336 (g) (1), if applicable, consider this a formal demand for arbitration in the above-referenced matter. Furthermore, kindly provide this office with a copy of [Dolly] Romprey's automobile policy, which was in effect on the date of [the] accident.' The plaintiffs also submitted an unauthenticated document entitled 'SETTLEMENT STATEMENT,' which indicates that the plaintiffs received a $25,000 settlement from Kempton.

"On December 4, 2009, the court granted the defendant's motion for summary judgment. . . . With respect to the three year limitations period, the court determined that there was no genuine issue of fact that the plaintiffs commenced their action more than three years after the date of the accident. It found that the defendant was entitled to judgment as a matter of law unless there was evidence to support the application of the tolling provision. The court then stated that, under the plain language of the policy, the tolling provision applied only in the case of a claim involving an underinsured, as opposed to an uninsured, motor vehicle. It determined that for the plaintiffs to come within the policy's tolling provision, they must establish that the sum of the limits of all bodily injury liability policies applicable to Kempton's vehicle at the time of the accident was less than the limit of liability for the underinsured motorist coverage under their policy. The court noted that '[t]he plaintiffs have submitted an unauthenticated copy of a document entitled "SETTLEMENT STATEMENT," which appears to indicate that the plaintiffs received a $25,000 settlement from Kempton. There is no indication, however, whether this amount was paid by an insurer or, if it was, whether it represents the full amount of Kempton's liability policy limits. Without any evidence indicating whether Kempton was insured and, if so, whether her bodily injury liability limits were less than $500,000, it is impossible for the court to determine that the present claim is one "involving an underinsured motor vehicle" and, in turn, that the policy's tolling provision applies.' In a footnote, the court stated that '[t]he plaintiffs have submitted as their exhibit A an unauthenticated letter from a paralegal in their attorney's office indicating that "we have exhausted . . . Kempton's policy." As an out-of-court statement, however, this constitutes hearsay inadmissible to prove that Kempton had an insurance policy [and], if so, whether it was exhausted.'

"Although the court determined that the plaintiffs had not proven that their claim involved an underinsured vehicle, and therefore summary judgment in favor of the defendant should be granted, the court then 'assume[d] that the present claim involve[d] an underinsured motor vehicle' and determined 'that the plaintiff[s] ha[d] failed to submit evidence to establish that the two prongs of the tolling provision [had] been satisfied. As the language [of the plaintiffs' insurance policy] quoted [previously] indicates, in order to toll the three year limitations period, the plaintiffs would first have to have notified the defendant "prior to expiration of the three year period, in writing, of any claim the [plaintiffs] may have for [u]nderinsured [m]otorists [c]overage."' . . . [T]he trial court concluded as to the first prong of the tolling statute that 'none of the documents submitted by the plaintiffs [made] any reference to an underinsured motorist claim, or any other information indicating what type of claim the claim number refers to. . . . [T]herefore, the plaintiffs in the present action have failed to produce any evidence indicating that, within three years of the accident, they provided notice in writing of any claim for underinsured motorist coverage.'

"With respect to the second prong of the tolling provision, the court found that the documents offered by the plaintiffs did not establish that the settlement with Kempton exhausted the limits of her policy. 'Accordingly, the plaintiffs have provided no evidentiary basis from which the court could conclude that a demand for arbitration was made within 180 days of exhaustion. Because the plaintiffs have failed to submit evidence indicating that they satisfied either prong of the policy's tolling provision or that Kempton's vehicle was underinsured, there is no basis for the court to conclude that the three year contractual limitations period was tolled.' " (Citation omitted; footnotes altered.) *Romprey* v. *Safeco Ins. Co. of America*, supra, 129 Conn. App. 484–88.

The insurance policy, which the Appellate Court concluded complied with the requirements of § 38a-336 (g) (1); id., 495; provides in relevant part: "All claims or suits under [the uninsured and underinsured motorist provisions] of this policy must be brought within three years of the date of the accident. However, in the case of a claim involving an *underinsured motor vehicle*, the insured may toll any applicable limitation period by:

"1. Notifying us prior to expiration of the three year period, in writing, of any claim *the insured* may have for [u]nderinsured [m]otorists [c]overage; and

"2. Commencing suit or arbitration proceedings not more than 180 days from the date of exhaustion of the limits of liability under all automobile bodily injury bonds or policies applicable at the time of the accident

by settlements or final judgments after any appeals."[3] (Emphasis in original; internal quotation marks omitted.) Id., 490.

We begin by setting forth the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. 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. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 115–16, 49 A.3d 951 (2012). "Summary judgment may be granted where the claim is barred by the statute of limitations." *Doty* v. *Mucci*, 238 Conn. 800, 806, 679 A.2d 945 (1996). Summary judgment is appropriate on statute of limitations grounds when the "material facts concerning the statute of limitations [are] not in dispute . . . ." *Burns* v. *Hartford Hospital*, 192 Conn. 451, 452, 472 A.2d 1257 (1984).

I

We begin our analysis with the first certified question: "Did the Appellate Court properly conclude that the trial court properly ruled that there was no genuine issue of material fact as to whether [Kempton] was underinsured when the [defendant] conceded in its motion for summary judgment that this issue was in dispute?" *Romprey* v. *Safeco Ins. Co. of America*, 302 Conn. 934, 28 A.3d 991 (2011).

The plaintiffs commenced this action in February, 2008, more than three years after the date of the accident. See footnote 2 of this opinion. Under the plain language of the policy and § 38a-336 (g) (1), any action for underinsured motorist benefits commenced more than three years after the underlying accident is untimely, unless the plaintiff notifies the insurer of the claim within three years of the accident and commences an action or demands arbitration within 180 days of the exhaustion of the limits of liability.

In affirming the trial court's summary judgment for the defendant, however, the Appellate Court primarily focused on whether the plaintiffs had met the "threshold requirement" of establishing that Kempton, the tortfeasor in the present case, was underinsured. The Appellate Court stated that, "in order for the policy's tolling provision to apply, the plaintiffs must first demonstrate that Kempton had an insurance policy with certain coverage and that the limits of Kempton's coverage were exhausted by payment to the plaintiffs." *Romprey* v. *Safeco Ins. Co. of America*, supra, 129 Conn. App. 491. Noting that the trial court had determined that the plaintiffs had failed to submit any competent evidence to establish that Kempton's policy had been exhausted, the Appellate Court held that "the [trial] court properly concluded that it was impossible to determine that the plaintiffs' claims involved an 'underinsured motor vehicle' and, consequently, that the provision concerning notification of an underinsured motorist claim was tolled." Id., 494.[4]

On the basis of our review of the pleadings and motions in this matter, we conclude that the threshold question of whether the plaintiffs had exhausted the limits of Kempton's insurance policy was disputed. Accordingly, the defendant's motion for summary judgment should not have been granted on this ground. As relevant to this issue, the plaintiffs' complaint alleged the following: (1) they were covered under the policy issued by the defendant; (2) they had complied with each and every obligation set forth in the policy; (3) the collision and resulting injuries were caused by the negligence and carelessness of Kempton; and (4) Kempton "did not have sufficient automobile insurance coverage on her vehicle." In its answer, the defendant denied that the plaintiffs had complied with all the obligations of the policy. The defendant, however, left the plaintiffs to their proof as to whether Kempton was underinsured.

The defendant subsequently moved for summary judgment solely on the basis of the statute of limitations special defense pursuant to § 38a-336 (g) (1). In its memorandum of law in support of its motion, the defendant stated: "By its very nature the [underinsured motorist] coverage comes into play if [Kempton] has insufficient coverage to fairly compensate the plaintiffs. *That is in dispute but that issue is not relevant to this motion.* Even assuming [that Kempton] did not have enough insurance, the plaintiffs cannot prevail here." (Emphasis added.) Accordingly, the defendant conceded, in its memorandum of law, that whether Kempton was underinsured was disputed. In light of these contested facts, the trial court's rendering of summary judgment for the defendant was clearly improper, as the defendant did not demonstrate the absence of a genuine issue of material fact. *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 306 Conn. 116 ("[t]he party

seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law" [internal quotation marks omitted]).

II

We turn to the statute of limitations and tolling provisions of § 38a-336 (g) (1). In addition to the three year limitation period, § 38a-336 (g) (1) provides a compulsory mechanism under which plaintiffs may toll the limitation period by giving the insurer written notice of a claim for underinsured motorist benefits within three years of the accident and commencing an action or demanding arbitration within 180 after exhaustion of the limits of liability. Because the Appellate Court affirmed the summary judgment rendered in favor of the defendant on the basis of the plaintiffs' purported failure to establish the threshold requirement that the underinsured motorist statute applied to their claim, the Appellate Court did not clearly address the trial court's alternate basis for rendering summary judgment: whether the plaintiffs demonstrated that a genuine issue of material fact existed regarding the statute's tolling provision.[5] After the parties filed their briefs, however, we ordered, sua sponte, supplemental briefing limited to the following question: "Did the trial court properly determine that there was no disputed issue of material fact regarding whether the tolling provision, if applicable, was satisfied?" Furthermore, subsequent to oral argument, we ordered the parties to submit additional supplemental briefing addressing the tolling issue.[6] Consequently, the parties had an adequate opportunity to brief the issues relating to the tolling provisions, which were also addressed in oral argument before this court. We conclude that, in granting the defendant's motion for summary judgment, the trial court improperly placed the burden of demonstrating a genuine issue of material fact with regard to the tolling provisions in § 38a-336 (g) (1) on the plaintiffs. Accordingly, we reverse the judgment of the Appellate Court affirming the trial court's summary judgment in favor of the defendant.

The following undisputed facts and procedural history are relevant to our analysis of this issue. The accident in question occurred on November 16, 2004. The plaintiffs commenced this action in February, 2008, more than three years later. In their complaint, the plaintiffs alleged, inter alia, that they had complied with each and every obligation as set forth in the insurance policy. In its answer, the defendant denied this portion of the plaintiffs' complaint, and asserted, as a special defense, the statute of limitations *and* tolling provisions set forth in § 38a-336 (g) (1) and the insurance policy.[7] The plaintiffs denied all the allegations in the defendant's special defenses.[8] Thereafter, the defendant

moved for summary judgment based solely on the plaintiffs' failure to bring the present action within three years of the date of the accident pursuant to § 38a-336 (g) (1).[9] The defendant, however, did not address the compulsory tolling provisions contained in the language of the same sentence in the statute or the analogous tolling provisions in the policy. In their objection to the defendant's motion, the plaintiffs contended, inter alia, that they had tolled the statute of limitations by providing notice to the defendant and making a demand for arbitration pursuant to § 38a-336 (g) (1) and the insurance policy.

As we discussed previously in this opinion, the trial court rendered summary judgment for the defendant primarily on the basis of the plaintiffs' purported failure to satisfy the threshold requirement that their claim involved an underinsured vehicle. Both the trial court and the Appellate Court, however, also concluded that the plaintiffs failed to submit evidence to show that they had satisfied the two prongs of the tolling provision in § 38a-336 (g) (1) and the insurance policy. Although the Appellate Court did not analyze this issue directly, in a footnote it noted that, "the plaintiffs did not demonstrate the existence of any genuine issue of material fact about whether suit or arbitration proceedings were commenced not more than 180 days after the alleged exhaustion of Kempton's coverage and that they had satisfied the second tolling provision." *Romprey* v. *Safeco Ins. Co. of America*, supra, 129 Conn. App. 494 n.8.

The plaintiffs contend that, by affirming the ruling of the trial court granting the motion for summary judgment on this alternate ground, the Appellate Court improperly shifted the burden of establishing a disputed issue with respect to the statute's tolling provision to the nonmoving party. Under the specific facts of this case, we agree and conclude that the plaintiffs did not have the burden of demonstrating the existence of a disputed issue of material fact regarding the statutory tolling provisions, when the defendant had failed to introduce any evidence demonstrating that there was no genuine issue of material fact that the plaintiffs failed to comply with the tolling provisions in its motion for summary judgment.

We reiterate the relevant standard of review applicable to this question. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his 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." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Allstate Ins. Co.* v. *Barron*, 269 Conn. 394, 405–406, 848 A.2d 1165 (2004).

As an initial matter, we note that "it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial." (Internal quotation marks omitted.) *Rockwell* v. *Quinter*, 96 Conn. App. 221, 229, 889 A.2d 738, cert. denied, 280 Conn. 917, 908 A.2d 538 (2006), quoting 49 C.J.S. 366, Judgments § 261 (b) (1997). "Summary judgment should be denied where the affidavits of the moving party do not affirmatively show that there is no genuine issue of fact as to all of the relevant issues of the case." *Walker* v. *Lombardo*, 2 Conn. App. 266, 269, 477 A.2d 168 (1984). Accordingly, the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment. *Allstate Ins. Co.* v. *Barron*, supra, 269 Conn. 405. "[I]f the party moving for summary judgment fails to show that there are no genuine issues of material fact, the nonmoving party may rest on mere allegations or denials contained in his pleadings . . . ." (Internal quotation marks omitted.) *Maltas* v. *Maltas*, 298 Conn. 354, 366–67, 2 A.3d 902 (2010), quoting 49 C.J.S., supra, § 266, p. 379; see, e.g., *Fogarty* v. *Rashaw*, 193 Conn. 442, 445, 476 A.2d 582 (1984) (reversing summary judgment in favor of defendant on basis of affidavits addressing only one of five allegations in plaintiff's complaint); *D.H.R. Construction Co.* v. *Donnelly*, 180 Conn. 430, 434, 429 A.2d 908 (1980) (reversing summary judgment in favor of defendant whose supporting affidavits denied only one of two theories under which plaintiff could prevail).

We acknowledge that, in the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. *Doty* v. *Mucci*, supra, 238 Conn. 806. When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the

burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute. See, e.g., *Zielinski* v. *Kotsoris*, 279 Conn. 312, 330, 901 A.2d 1207 (2006) (no genuine issue of material fact as to whether statute of limitations was tolled under continuing course of treatment or continuing course of conduct doctrine); *Witt* v. *St. Vincent's Medical Center*, 252 Conn. 363, 369–70, 746 A.2d 753 (2000) (genuine issue of material fact as to whether continuous course of conduct doctrine tolled statute of limitations in medical malpractice claim); *Bartha* v. *Waterbury House Wrecking Co.*, 190 Conn. 8, 13, 459 A.2d 115 (1983) (summary judgment for defendant on negligence claim when plaintiff presented no facts supporting continuing breach of duty); *Targonski* v. *Clebowicz*, 142 Conn. App. 97, 113, 63 A.3d 1001 (2013) (competent evidence regarding continuing course of conduct submitted by plaintiffs in negligence claim brought after running of limitations period created genuine issue of material fact precluding summary judgment).

We never have addressed, however, the question of whether the burden should remain on the moving party to establish that a party did not act in a timely manner when the statute they are relying on specifically provides for tolling as an alternative method of timeliness.

Unlike common-law exceptions to the statutes of limitations, the tolling provision contained in § 38a-336 (g) (1) is expressly provided for as an alternate way for the plaintiff to proceed in a timely manner.[10] We previously have noted that, in addition to the three year limitation period, § 38a-336 (g) (1) includes a "compulsory tolling mechanism" which "further restricts insurers' freedom to contract . . . ." *Voris* v. *Middlesex Mutual Assurance Co.*, 297 Conn. 589, 606, 999 A.2d 741 (2010). The statute's tolling provisions, which were incorporated into the insurance policy, also provide that actions for underinsured motorist benefits are timely if filed within the limitation period of at least three years from the date of the accident, *or* if the defendant tolls that period by notifying the insurer of the claim within the limitation period and commences an action or demands arbitration within 180 days from the exhaustion of the limits of liability. *Coelho* v. *ITT Hartford*, 251 Conn. 106, 115, 752 A.2d 1063 (1999). Consequently, the party moving for summary judgment should not be able to prevail by showing the absence of a genuine issue of fact solely with respect to one part of the statute upon which it relies, while ignoring the statutory tolling provisions which provide an alternate means of commencing a timely action. Accordingly, defendants moving for summary judgment pursuant to § 38a-336 (g) (1) should have the initial burden of demonstrating the nonexistence of a genuine issue of material fact with respect to *both* the three year limitation period *and* the statute's compulsory tolling provision.[11]

We turn to the motion for summary judgment in the present case. To be entitled to summary judgment on timeliness grounds based on § 38a-336 (g) (1), the defendant, through its memorandum of law and supporting affidavits, needed to establish that there was no genuine issue of material fact concerning whether the plaintiffs had brought their action within three years, or met the tolling provisions provided for in the statute.[12] In the present case, however, the defendant's motion and memorandum of law in support thereof failed to present any evidence establishing the nonexistence of a genuine issue of material fact regarding the tolling provisions integral to the statute pursuant to which the defendant sought summary judgment.[13] Because the defendant submitted no evidence that the plaintiffs did not meet the tolling provisions contained in the statute and the insurance policy, the burden never shifted to the plaintiffs on this issue.[14]

The present case is clearly distinguishable from *Dorchinsky* v. *Windsor Ins. Co.*, 90 Conn. App. 557, 563, 877 A.2d 821 (2005), in which the Appellate Court affirmed a summary judgment rendered in favor of the defendant on the basis of noncompliance with the tolling provisions of § 38a-336 (g) (1). In that case, the defendant's memorandum in support of its motion for summary judgment alleged that "the plaintiff failed to bring [the] suit within three years *and* failed to toll that limitation period . . . ." (Emphasis added.) Id., 560.[15] By asserting that there was no genuine issue of material fact that the plaintiff had not tolled the statute of limitations by notifying the defendant pursuant to § 38a-336 (g) (1), the defendant shifted the burden to the plaintiff to establish an evidentiary basis for its compliance with the tolling provisions of the policy. Accordingly, *Dorchinsky* does not stand for the proposition that, in a motion for summary judgment, the defendant shifts the burden of proving compliance with the statutory tolling provisions in § 38a-336 (g) (1) to the plaintiff by moving for summary judgment solely on the basis of the part of the statute that provides for the running of the limitation period.

Because the defendant failed to negate a genuine issue of material fact concerning whether the plaintiffs had met the statutory tolling provisions of § 38a-336 (g) (1), the plaintiffs had "no obligation to submit documents establishing the existence of such an issue." *Allstate Ins. Co.* v. *Barron*, supra, 269 Conn. 405. Consequently, the trial court should never have reached the question of the adequacy of the plaintiffs' evidence.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court with direction to deny the defendant's motion for summary judgment and for further proceedings in accordance with the law.

In this opinion NORCOTT, PALMER, EVELEIGH and ESPINOSA, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 38a-336 (g) (1) provides: "No insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured or underinsured motorist provisions of an automobile liability insurance policy to a period of less than three years from the date of accident, provided, in the case of an underinsured motorist claim the insured may toll any applicable limitation period (A) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (B) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all automobile bodily injury liability bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals."

We note that in 2010, minor technical changes were made to § 38a-336 (a) (2); see Public Acts 2010, No. 10-5, § 9; however, subsection (g) has remained unchanged. References herein to § 38a-336 are to the current revision.

[2] "The plaintiffs claim that the action was commenced on February 15, 2008 [the date noted on their complaint]. The trial court found that the marshal's return indicates that process was served on the defendant on February 26, 2008, but 'because the result of the present motion [for summary judgment] is the same regardless of which of the two dates is correct, the court need not resolve the conflict between the parties' statements and the marshal's return.' " *Romprey* v. *Safeco Ins. Co. of America*, supra, 129 Conn. App. 484 n.1.

[3] In the Appellate Court, the plaintiffs contested the validity of the second prong of the insurance policy's tolling provision, arguing that the policy requirement that an underinsured policyholder must "commenc[e] suit or arbitration proceedings" within 180 days of the policy's exhaustion is more restrictive than permissible by the statutory provision that an underinsured policyholder may toll the limitation period by "commencing suit or *demanding* arbitration under the terms of the policy . . . ." (Emphasis added.) General Statutes § 38a-336 (g) (1) (B); *Romprey* v. *Safeco Ins. Co. of America*, supra, 129 Conn. App. 495; see *Tracy* v. *Allstate Ins. Co.*, 76 Conn. App. 329, 336–37, 819 A.2d 859 (2003) (claims on policies with limitation period of less than authorized three year period governed by six year statute of limitations for regular contract action), aff'd, 268 Conn. 281, 842 A.2d 1123 (2004). For the purposes of this appeal, we assume that the policy's provisions are consistent with the underinsured motorist statute.

[4] With respect to the evidence submitted by the plaintiffs, the trial court concluded that the unauthenticated settlement statement was insufficient to resolve the threshold question of whether Kempton's policy limits had been exhausted because the settlement statement did not specify whether the $25,000 paid to the plaintiffs exhausted Kempton's policy's limits of liability. *Romprey* v. *Safeco Ins. Co. of America*, supra, 129 Conn. App. 491. The trial court also concluded that a separate letter to the defendant from the plaintiffs' counsel's office was unauthenticated and inadmissible. Id., 492. On appeal, the Appellate Court concluded that the trial court had not abused its discretion in rejecting the unauthenticated documents submitted by the plaintiffs. Id., 494. Because, as we explain later in this opinion, the Appellate Court erred in affirming the trial court's granting of the motion for summary judgment on an issue that the defendants conceded was contested, the Appellate Court's affirmance of the trial court's evidentiary ruling is not pertinent to the resolution of this question.

[5] We note, however, that the Appellate Court opinion is not entirely consistent in this respect. In one footnote, the Appellate Court stated: "Because we have determined that the plaintiffs have offered no competent evidence to establish that the claim is one involving an underinsured motor vehicle, we need not address whether the plaintiffs have submitted evidence to establish whether the two prongs of the tolling provision have been satisfied." *Romprey* v. *Safeco Ins. Co. of America*, supra, 129 Conn. App. 490 n.5. Later in the opinion, however, the Appellate Court stated: "[T]he plaintiffs did not demonstrate the existence of any genuine issue of material fact about whether [a] suit or arbitration proceedings were commenced not more than

180 days after the alleged exhaustion of Kempton's coverage and that they had satisfied the second tolling provision." Id., 494 n.8.

[6] The supplemental briefing after oral argument addressed the following question: "Irrespective of the requirements set forth in . . . § 38a-336 (g) (1), did the [defendant] assume the burden of proving that there was no genuine issue of material fact that the plaintiff[s] failed to bring the action within 180 days from the date of exhaustion of [Kempton's] limits of insurance by pleading this as its fourth special defense?"

[7] The defendant's third special defense alleged: "This action is time barred pursuant to the policy of insurance . . . ."

The defendant's fourth special defense alleged: "This action is time barred pursuant to . . . § 38a-336 (g) (1) by reason of [the] plaintiffs' failure to bring this action within 180 days from the date of exhaustion of [Kempton's] limits of insurance."

For the purposes of deciding this appeal, we assume that the policy's provisions are consistent with § 38a-336 (g) (1). See footnote 3 of this opinion.

[8] We note that pursuant to the rules of practice, a "[m]atter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply." Practice Book § 10-57. In the present case, however, the plaintiffs, in their reply, denied the truth of each and every allegation contained in the defendant's special defenses, without expressly raising the tolling provisions in the insurance policy and the statute.

In *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 688, 974 A.2d 764, cert. denied, 293 Conn. 916, 979 A.2d 488 (2009), the Appellate Court held that "the continuing course of conduct doctrine is a matter that must be pleaded in avoidance of a statute of limitations special defense." Even if we were to assume that the plaintiffs in the present case violated the rules of practice by not specifically denying the defendant's special defenses and asserting compliance with the statutory tolling provisions, however, we note that the defendant did not raise a timely objection to this procedural deficiency. See *Schilberg Integrated Metals Corp.* v. *Continental Casualty Co.*, 263 Conn. 245, 273, 819 A.2d 773 (2003) (trial court had discretion to consider merits of claims not raised in avoidance when opposing party did not timely object). Moreover, in *Mollica* v. *Toohey*, 134 Conn. App. 607, 610–11 n.3, 39 A.3d 1202 (2012), the Appellate Court reviewed the merits of the plaintiffs' appeal from a summary judgment rendered in favor of the defendant on the basis of a statute of limitations, even though the plaintiffs had not pleaded the continuing course of conduct doctrine in avoidance of the defendant's special defenses, when the defendant had not timely objected to the failure to plead the tolling doctrine.

More important for our analysis, however, are the differences between the traditional tolling doctrines and the statutory tolling provisions included in § 38a-336 (g) (1) at issue in the present case. As we explain later in this opinion, the inclusion of the tolling provisions in § 38a-336 (g) (1) puts the burden to show the action was untimely with respect to both the limitation period and the mandatory tolling provision on the defendant in a motion for summary judgment.

[9] The defendant's memorandum of law in support of its motion for summary judgment asserted: "The following facts pertain and determine the issue: (1) the date of the accident, November 16, 2004; (2) the date [the] plaintiffs brought suit in this case, February 15, 2008." See footnote 2 of this opinion. Although the defendant's memorandum of law quotes the entire text of § 38a-336 (g) (1), including both prongs of the compulsory tolling provision, there is nothing in the defendant's motion or supporting memorandum purporting to establish that there was no genuine issue of material fact that the plaintiffs did not meet the tolling provisions included in the statute. Instead, the memorandum of law asserts: "The simple fact is [that] the plaintiffs failed to bring suit within three years from the date of the accident."

[10] We have recognized that statutes of limitations "are the result of a legitimate legislative determination which balances the rights and duties of competing groups." (Internal quotation marks omitted.) *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 809, 12 A.3d 852 (2011). The language of § 38a-336 (g) (1) makes clear that, unlike common-law tolling doctrines modifying statutes of limitations promulgated by the legislature, the statutory tolling provisions at issue in the present case are an integral part of the legislative balancing to determine the timeliness of an action for underinsured motorist benefits in the first instance.

[11] By contrast, in a common-law equitable tolling case, it would be impracti-

cal and unfair to place the burden of denying every hypothetical factual scenario that could give rise to equitable tolling on the party seeking to raise a statute of limitations defense.

The dissenting justices contend that "the insured clearly has readier access to proof of the affirmative act of sending written notice of a potential claim following an automobile accident than the insurer has to proof of the negative. With respect to the requirement of commencing an action or demanding arbitration within 180 days of exhausting the tortfeasor's coverage, the insurer has no direct access to evidence of: whether the tortfeasor is insured; what the limits are of any such policies; whether the insured has exhausted those limits; and when such exhaustion was finalized through settlement, judgment or appeal. The fact of the insured's superior knowledge as to these affirmative matters, in combination with the text providing that the *insured* may *toll*, weighs strongly in favor of a conclusion that the so-called tolling provision should be treated in conformity with the general rules applicable to tolling." We do not find this persuasive because, if the insurer has no notice from the insured in its files, it can claim in good faith that no such notice was submitted and leave the presentation of evidence to the contrary to the insured. We also disagree with the dissenting justices' claim that the insurer has no means to obtain access to information as to whether the tortfeasor is insured, the limits of any applicable policies, whether the limits were exhausted and when exhaustion was finalized. First, we note that, in the present case, the *defendant* pleaded as an affirmative defense that the plaintiffs had failed to bring the action within 180 days from the date that Kempton's limits of insurance were exhausted. The burden of proving an affirmative defense is, of course, on the party raising it, and we must presume that the defendant had a good faith basis to raise this defense. Second, as a general matter, even if we were to assume that an insurer is not required to raise the insured's failure to bring an action within 180 days of exhausting applicable policy limits as an affirmative defense, the insurer would be entitled to conduct discovery to obtain the answers to these questions before filing its motion for summary judgment.

[12] "[T]he party moving for summary judgment . . . is required to support its motion with supporting documentation, including affidavits." *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, 231 Conn. 756, 796, 653 A.2d 122 (1995). Practice Book § 17-45 provides in relevant part: "A motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and the like. . . ." Practice Book § 17-46 provides in relevant part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ." In the present case, the defendant failed to submit, in support of its motion for summary judgment, affidavits or any other evidence showing that there was no genuine issue of material fact that the plaintiffs had not met the statute's tolling provisions. Although § 17-45 does not require affidavits when the relevant facts are available to the court and unchallenged by the nonmoving party; see *Davis* v. *Family Dollar Store*, 78 Conn. App. 235, 238 n.3, 826 A.2d 262 (2003); in the present case the plaintiffs' compliance with the statutory tolling provisions is dispositive and contested.

[13] Because the plaintiffs' complaint alleged a date of the accident that was more than three years before the commencement of the action, and asserted that the plaintiffs had complied with all of the obligations of the policy, it is reasonable to assume that they were proceeding under the tolling provisions of § 38a-336 (g) (1), and included in the policy. By contrast, in light of the defendant's fourth special defense, it is difficult to explain the defendant's omission of any mention of the statute's tolling provision in its motion for summary judgment and supporting memorandum of law.

[14] The defendant contends that "[w]hen a defendant pleads failure to comply with the terms of an insurance policy as a special defense, the usual presumption of compliance is extinguished, and the insured carries the burden of proving compliance with an insurance contract, including the conditions precedent to coverage." *National Publishing Co.* v. *Hartford Fire Ins. Co.*, 287 Conn. 664, 674, 949 A.2d 1203 (2008). In *National Publishing Co.*, we concluded that, because the defendant insurer pleaded late notice as a special defense, the plaintiff bore the burden of showing that notice was timely and sufficient pursuant to the requirements of the policy. Id. The "uncommon system of burden allocation" described in *National Publishing Co.*, however, relates to the burden of proof at trial, a question

of substantive law, not the allocation of the burden applicable to motions for summary judgment. Id., 672–73 (requested charge informing jury of special defense warranted).

[15] The court in *Dorchinsky* v. *Windsor Ins. Co.*, supra, 90 Conn. App. 560–61, noted: "In its motion, [the defendant] asserted that the first notice to the defendant of the plaintiff's underinsured motorist claim was made on November 6, 2000, more than four years after the accident. . . . Nowhere in her affidavit did the plaintiff state that she sent written notice of a claim for underinsured motorist benefits prior to the letter of November 6, 2000."