GRUENDEL, J., dissenting. The case that the majority decides today is not the case that the parties tried or appealed, and it is not the case that the trial court decided. In its effort to graft new standards for the enforcement of marital contracts, the majority departs from centuries of binding precedent and seeks to create new yet unworkable decisional law. Accordingly, I respectfully dissent.

One of the most fundamental principles of the law of contracts is that courts will not enforce penalties—even when they are agreed to by the parties, even when they are disguised as something else. "[T]he parties to a contract are not free to provide a penalty for its breach." 3 Restatement (Second), Contracts § 356, comment (a), p. 157 (1981). Both the majority and concurring opinions recognize this principle. The majority opinion concludes that it does not apply to this particular contract because of other, overriding policy considerations, while the concurrence concludes that in a commercial case it would find the relevant provision an unenforceable penalty, but not in this marital case. I disagree with each. The provision at issue cannot be characterized as anything but a penalty, and there is no controlling case that says a penalty is permitted in a marital contract. As such, I would affirm the well reasoned opinion of the trial court declining to enforce the clause at issue because it was an improper penalty.

The facts at issue are not in dispute, and the only facts relevant to the appeal by the defendant, Tomoko Hamada Dougan, are as follows. The marriage of the plaintiff husband, Brady Dougan, to the defendant wife was dissolved on June 17, 2005. In its judgment of dissolution, the court incorporated by reference the parties' stipulation for judgment. That stipulation included a provision, paragraph 4.2 (b), which provided in relevant part: "The [plaintiff] shall pay the [defendant] the sum of . . . [s]even million five hundred thousand ($7,500,000) dollars on or before June 16, 2006. . . . In the event payment is not made when due, interest at ten [percent] (10%) per annum shall accrue from the date *hereof* until fully paid . . . ." (Emphasis added.) The plaintiff paid the defendant $7.5 million on June 28, 2006. On July 12, 2006, the plaintiff made a further payment of $24,999.96, representing interest on the $7.5 million sum for the twelve days between June 16 and June 28.[1]

On September 7, 2006, the defendant filed a motion for contempt, seeking payment of interest on the full sum from June 16, 2005, the date that the court rendered judgment, to June 28, 2006, the date that payment was made. She later filed a motion for enforcement of the judgment of dissolution, seeking the same substantive relief, and withdrew her motion for contempt. The court

denied the defendant's motion, holding that the provision at issue was a penalty and thus invalid as against public policy. The defendant appealed from that judgment.

The only issue on appeal is whether the clause at issue is a valid provision for liquidated damages or a penalty in violation of public policy and centuries of established contract doctrine.[2] To reach the conclusions that I have, however, it is necessary first to review the law of stipulated judgments as it relates to that of contracts.

I

STIPULATED JUDGMENT AS CONTRACT

The law in Connecticut is well established: a stipulated judgment is a contract and must be analyzed in accordance with the law of contracts. See *Davis* v. *Davis*, 112 Conn. App. 56, 63, 962 A.2d 140 (2009); *Town Close Associates* v. *Planning & Zoning Commission*, 42 Conn. App. 94, 107–108, 679 A.2d 378, cert. denied, 239 Conn. 914, 682 A.2d 1014 (1996); *Zadravecz* v. *Zadravecz*, 39 Conn. App. 28, 30–31, 664 A.2d 303 (1995). "A stipulated judgment is not a judicial determination of any litigated right. . . . It may be defined as a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction." (Citations omitted; internal quotation marks omitted.) *Gillis* v. *Gillis*, 214 Conn. 336, 339–40, 572 A.2d 323 (1990), citing *Owsiejko* v. *American Hardware Corp.*, 137 Conn. 185, 187, 75 A.2d 404 (1950); *New York Central & Hudson River Railroad Co.* v. *T. Stuart & Son Co.*, 260 Mass. 242, 248, 157 N.E. 540 (1927); *In re Director of Ins.*, 141 Neb. 488, 496, 3 N.W.2d 922 (1942); *Dulles* v. *Dulles*, 369 Pa. 101, 107, 85 A.2d 134 (1952); see also *Bryan* v. *Reynolds*, 143 Conn. 456, 460–61, 123 A.2d 192 (1956). "A judgment rendered in accordance with such a stipulation of the parties is to be regarded and construed as a contract. See *Kenworthy* v. *Kenworthy*, 180 Conn. 129, 131, 429 A.2d 837 (1980); *Albrecht* v. *Albrecht*, 19 Conn. App. 146, 152, 562 A.2d 528, cert. denied, 212 Conn. 813, 565 A.2d 534 (1989)."[3] (Internal quotation marks omitted.) *Issler* v. *Issler*, 250 Conn. 226, 235, 737 A.2d 383 (1999), quoting *Barnard* v. *Barnard*, 214 Conn. 99, 109, 570 A.2d 690 (1990); see also, e.g., *Hi-Desert County Water District* v. *Blue Skies Country Club, Inc.*, 23 Cal. App. 4th 1723, 1732, 28 Cal. Rptr. 2d 909 (1994), review denied, Docket No. SO39673, 1994 Cal. LEXIS 3408 (Cal. June 23, 1994); *19th Street Associates* v. *State*, 79 N.Y.2d 434, 442, 593 N.E.2d 265, 583 N.Y.S.2d 811 (1992); *Lower Frederick Township* v. *Clemmer*, 518 Pa. 313, 328–29, 543 A.2d 502 (1988). By declining to treat the stipulated judgment in this case as a contract to be interpreted under contract law, my colleagues depart from that binding precedent.

Because stipulated judgments are regarded as con-

tracts, this court's standard of review and the principles that govern our disposition of the present appeal must be gleaned from contract law. *Issler* v. *Issler*, supra, 250 Conn. 235. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) *Allstate Life Ins. Co.* v. *BFA Ltd. Partnership*, 287 Conn. 307, 313, 948 A.2d 318 (2008). "If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms." (Internal quotation marks omitted.) *O'Connor* v. *Waterbury*, 286 Conn. 732, 744, 945 A.2d 936 (2008). Because there is no question that the language of the stipulated judgment is clear and unambiguous, and was so found by the trial court, the plenary standard of review applies to its construction. In addition, whether a contract provision violates public policy is a question of law subject to plenary review. *LaSalla* v. *Doctor's Associates*, *Inc.*, 278 Conn. 578, 586, 898 A.2d 803 (2006); *Texaco*, *Inc.* v. *Golart*, 206 Conn. 454, 461, 538 A.2d 1017 (1988); *Joyner* v. *Simkins Industries*, *Inc.*, 111 Conn. App. 93, 97, 957 A.2d 882 (2008).

II

UNENFORCEABLE PENALTY

The purpose of contract damages is to put the parties in the position they would have occupied had the contract been performed according to its terms. *Sablosky* v. *Sablosky*, 72 Conn. App. 408, 416, 805 A.2d 745 (2002). "The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy." 3 Restatement (Second), supra, § 356, comment (a), p. 157. "Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, there had been no breach. . . . It is sometimes said to give the injured party the 'benefit of the bargain.' " Id., § 344, comment (a), p. 103. "It is axiomatic that the sum of damages awarded as compensation in a breach of contract action 'should place the injured party in the same position as he would have been had the contract been performed.' *Rametta* v. *Stella*, 214 Conn. 484, 492, 572 A.2d 978 (1990). The injured party, however, 'is entitled to retain nothing in excess of that sum which compensates him for the loss of his bargain.' *Vines* v. *Orchard Hills*, *Inc.*,

181 Conn. 501, 507, 435 A.2d 1022 (1980). Guarding against excessive compensation, the law of contract damages limits the injured party 'to damages based on his actual loss caused by the breach.' " *Argentinis* v. *Gould*, 219 Conn. 151, 157–58, 592 A.2d 378 (1991).

It is true that "[t]he parties to a contract may effectively provide in advance the damages that are to be payable in the event of a breach as long as the provision does not disregard the principle of compensation. The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties and witnesses and reduces the expense of litigation." 3 Restatement (Second), supra, § 356, comment (a), p. 157. That ability of the parties to provide for damages in advance of breach, however, is limited. "[T]he law is well established in this jurisdiction, as well as elsewhere, that a term in a contract calling for the imposition of a penalty for the breach of the contract is contrary to public policy and invalid . . . ." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 203, 931 A.2d 916 (2007), citing *American Car Rental, Inc.* v. *Commissioner of Consumer Protection*, 273 Conn. 296, 306, 869 A.2d 1198 (2005). The majority opinion suggests that it is nevertheless possible for a contract to contain an *enforceable* clause calling for the payment of a penalty. There is simply no support for this proposition anywhere in our case law or the Restatement. Cf. *Berger* v. *Shanahan*, 142 Conn. 726, 731–32, 118 A.2d 311 (1955) (contract term calling for imposition of penalty invalid).

Thus, our courts will not enforce a provision that provides the nonbreaching party with a greater benefit than that which reasonably was expected from performance of the contract at the time the contract was entered into. See *American Car Rental, Inc.* v. *Commissioner of Consumer Protection*, supra, 273 Conn. 306–307. Such a provision violates the economic purposes of contracts and, as such, is unenforceable. Id. This remains so even when a contract or stipulated judgment containing such a provision is negotiated at arms length and freely entered into by the parties, and it is so regardless of what the provision is called by the parties. *New Britain* v. *New Britain Telephone Co.*, 74 Conn. 326, 332, 50 A. 881 (1902). Conversely, when a provision is intended "to fix fair compensation to the injured party for a breach of the contract," it will be enforced by our courts as a liquidated damages clause. *American Car Rental, Inc.* v. *Commissioner of Consumer Protection*, supra, 306.

Our Supreme Court has set forth a test for determining whether a contract provision calls for payment of an impermissible penalty. "In determining whether any particular provision is for liquidated damages or for a penalty . . . that which is determinative of the question is the intention of the parties to the contract.

Accordingly, such a provision is ordinarily to be construed as one for liquidated damages if three conditions are satisfied: (1) The damage which was to be expected as a result of a breach of the contract was uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of the contract." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 284 Conn. 203, quoting *American Car Rental, Inc.* v. *Commissioner of Consumer Protection*, supra, 273 Conn. 306–307; accord *Banta* v. *Stamford Motor Co.*, 89 Conn. 51, 55, 92 A. 665 (1914).[4]

In applying this test, it is important to note the fundamental and long-standing precept of contract law that, in the event of a breach of a contract for a sum certain, interest on that sum is calculated from the date of breach. *West Haven Sound Development Corp.* v. *West Haven*, 207 Conn. 308, 321–22, 541 A.2d 858 (1988); *Wells* v. *Abernethy*, 5 Conn. 222, 228 (1824) ("[I]nterest from the date of the contract, was entirely inadmissible. The cause of action originated sometime posterior to the entering into the agreement, upon demand made by the plaintiff, succeeded by the defendant's non-performance; and from this period only could the interest be allowed."); 3 Restatement (Second), supra, § 354 (1), p. 150 ("[i]f the breach consists of a failure to pay a definite sum in money . . . interest is recoverable from the time for performance on the amount due"); id., comment (b), p. 151 ("Interest is not payable as damages for non-performance until performance is due. If there is a period of time before performance is due, such as a definite or indefinite period of credit, interest does not begin to run until the period is over.").[5] The provision at issue called for the payment of a sum certain on a date certain: "The [plaintiff] shall pay the [defendant] the sum of . . . [s]even million five hundred thousand ($7,500,000) dollars on or before June 16, 2006." Even at the time that the parties entered into the contract, the defendant's potential damages resulting from the plaintiff's failure to perform in a timely manner would have been in no way uncertain or difficult to prove. The formula for the damages to the defendant would be interest[6] on $7.5 million for the time between the date payment was due to the defendant and the date actually paid.[7] This formula would have been as simple to contrive and as easy to calculate on the date of the stipulated judgment as it is today. I therefore conclude that the provision is a penalty under the first prong of the *Bellemare* and *American Car Rental, Inc.*, test in that the expected damages were neither uncertain in amount nor difficult

to prove.

Nonetheless, the provision went on to state: "In the event payment is not made when due, interest at ten [percent] (10%) per annum shall accrue from the date *hereof* until fully paid . . . ." (Emphasis added.) That provision is the very epitome of a penalty. In the words *American Car Rental, Inc.*, it is "[a] contractual provision . . . the prime purpose of which is to prevent a breach of the contract by holding over the head of a contracting party the threat of punishment for a breach." (Internal quotation marks omitted.) *American Car Rental, Inc.* v. *Commissioner of Consumer Protection*, supra, 273 Conn. 306; accord 24 S. Williston, Contracts (4th Ed. Lord 2002) § 65:1, pp. 216–23 ("a liquidated damages provision will be held to violate public policy, and hence will not be enforced, when it is intended to punish, or has the effect of punishing, a party for breaching the contract, or [creates] a large disparity between the amount payable under the provision and the actual damages likely to be caused by a breach, so that it in effect seeks to coerce performance of the underlying agreement by penalizing non-performance and making a breach prohibitively and unreasonably costly"). Consequently, it is my view that the provision also constitutes a penalty under the third prong of the *Bellemare* and *American Car Rental, Inc.*, test. Because the damages set forth in the stipulated judgment are so grossly disproportionate to the defendant's actual damages, they are wholly unreasonable in violation of public policy.

The majority opinion correctly points out that parties to a contract may bargain for a discount under certain circumstances.[8] Majority opinion, 386. Such bargains must, nonetheless, meet the three requirements set forth in *American Car Rental, Inc.*, to be enforceable. The clause at issue may indeed have the effect of encouraging prompt performance, as the majority opinion suggests. "But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well settled contract law that courts do not give their imprimatur to such agreements." *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 413, 68 S. Ct. 123, 92 L. Ed. 32 (1947).

The potential damages resulting from a breach of the agreement to pay $7.5 million on a specified date could be neither uncertain nor difficult to prove. In my view, the trial court properly refused to enforce the clause calling for payment of 10 percent interest on the $7.5 million from the date the stipulation was executed on the ground that it violated the rule against the enforcement of penalties.

III

PUBLIC POLICY

A

Policy Propounded by the Majority Opinion

The majority opinion does not reveal either the legal or factual basis for its implicit conclusion that the contract provision is not an unenforceable penalty—although that question was the only issue presented on appeal. Rather, it focuses on certain public policy considerations favoring stipulated judgments in family cases.[9] Regarding the first of these public policies, the majority opinion states: "[T]he government has an interest in preserving and enforcing orders that were entered by the courts in dissolution proceedings after a determination that the judgment is fair and equitable. . . . This conserves judicial resources because the courts are not forced to rework decrees to account for newly raised postjudgment arguments that are based on public policy." (Citation omitted.) Majority opinion, 385. Although that statement standing alone is irrefutable, it is not sufficient to overrule the well established principle that stipulated judgments are contracts and are to be interpreted in accordance with the established principles of contract law. See *Davis* v. *Davis*, supra, 112 Conn. App. 63; see also part I of this opinion.

The analysis of a stipulated judgment in accordance with such principles is mandated, even when something arises that is, in the majority's view, as insignificant as the public policy against the enforcement of contract penalties. Only when the public has confidence that the judiciary will resolve conflicts in accordance with established principles of relevant law, will the public have confidence that their contracts and stipulated judgments will be treated appropriately and their transactions governed with predictability. If parties cannot be certain that their separation agreements will be interpreted in the same way as other contracts, they will not enter into them. Preserving judicial resources is not a sufficient reason for abandoning the long-standing principles of contract law.

In its public policy analysis, the majority opinion also reasons that "[t]he rendering of a judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other. *Ehrenkranz* v. *Ehrenkranz*, 2 Conn. App. 416, 424, 479 A.2d 826 (1984) . . . ." (Citations omitted; internal quotation marks omitted.) Majority opinion, 386. The mosaic rule, however, is *not* a principle governing the interpretation of contracts or stipulated judgments. Rather, it is a standard of appellate review in dissolution cases. Cf., e.g., *Chyung* v. *Chyung*, 86 Conn. App. 665, 668, 862 A.2d 374 (2004), cert. denied, 273 Conn. 904, 868 A.2d 744 (2005). Its purpose is to help appellate courts determine the scope of a trial court's error—whether an error in crafting a single provision in a dissolution judgment renders the entirety of the judg-

ment or financial orders improper. Sometimes an entire case must be retried because this court has determined that the orders are so intertwined that one cannot be changed without consideration being given to changing others. See, e.g., *Dietter* v. *Dietter*, 54 Conn. App. 481, 496–97, 737 A.2d 926, cert. denied, 252 Conn. 906, 743 A.2d 617 (1999). At other times, the order that an appellate court has determined to be improper is not so intertwined with other orders as to require a retrial of all financial issues. See, e.g., *Cuneo* v. *Cuneo*, 12 Conn. App. 702, 710–11, 533 A.2d 1226 (1987). To make the mosaic rule into a principle of contract interpretation eviscerates the law of contracts. Moreover, by applying the mosaic rule to the facts of the present case, the majority opinion would create new law that will soon give way to a judicially recognized presumption that stipulated judgments in family cases never can be reviewed. That is not the law, and it should not become the law.

B

Policy Propounded by the Concurring Opinion

The concurring opinion concludes that the general rule disallowing penalty clauses in contracts may be relaxed or completely abandoned in dissolution of marriage cases. I fail to see why, and I fail to see how. As recently as last year, our Supreme Court reaffirmed the proposition that when separation agreements are incorporated into dissolution decrees, they are "guided by the general principles governing the construction of contracts." (Internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008). And as recently as two weeks ago, this court again held that in family cases, "[a] judgment rendered in accordance with [a] stipulation of the parties is to be regarded and construed as a contract." (Internal quotation marks omitted.) *Barber* v. *Barber*, 114 Conn. App. 164, 168, A.2d (2009). I do not believe it is wise, nor do I believe we are empowered, to alter or depart from that long-standing rule.

In support of its conclusion that stipulated judgments in dissolution cases may be regarded differently from other contracts, the concurring opinion cites *Billington* v. *Billington*, 220 Conn. 212, 595 A.2d 1377 (1991). The issue in that case was: "To prevail on a motion to open a judgment based on fraud, must the movant in a marital case establish diligence in attempting to discover fraud?" (Internal quotation marks omitted.) Id., 214 n.1. The court based its decision not to require a showing of diligence on the "special relationship between fiduciary and beneficiary [that] compels full disclosure by the fiduciary. . . . Although marital parties are not necessarily in the relationship of fiduciary to beneficiary, we believe that no less disclosure is required of such parties when they come to court seeking to terminate their marriage." (Citation omitted.) Id., 221. Similarly, in

Monroe v. *Monroe*, 177 Conn. 173, 183, 413 A.2d 819, cert. denied, 444 U.S. 801, 100 S. Ct. 20, 62 L. Ed. 2d 14 (1979), also cited in the concurring opinion, the court's holding was based on a similar unique duty imposed on attorneys in matrimonial dissolutions for "full and fair disclosure . . . ."

These cases resolved issues unique to marriage dissolutions on the basis of the unique nature of the marital relationship and the unique duties between parties. On the other hand, in the present case, there is no claim that the unique duties between the plaintiff and the defendant were implicated or breached. The only distinction that the concurring opinion claims exists between the present case and a commercial contract action is "our strong policy that the private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine." (Internal quotation marks omitted.) Concurring opinion, 396, quoting *Billington* v. *Billington*, *supra*, 220 Conn. 221. No such distinction exists at all. Indeed, both our statutes and case law demonstrate a preference for encouraging settlement in *all* civil cases. See General Statutes § 52-192a; *Alexson* v. *Foss*, 276 Conn. 599, 606–607, 887 A.2d 872 (2006) ("well-defined public policies . . . favor arbitration as an alternate dispute mechanism, as well as the settlement of disputes"); *McCullough* v. *Waterside Associates*, 102 Conn. App. 23, 32, 925 A.2d 352 ("[t]he purpose of § 52-192a is to encourage pretrial settlements . . . in any civil action based upon contract or seeking the recovery of money damages" [internal quotation marks omitted]), cert. denied, 284 Conn. 905, 931 A.2d 264 (2007). Consequently, I see no reason why the clause at issue in the present case should be treated differently from that in any other civil action, which the concurrence aptly notes "would be unenforceable as a matter of public policy."[10] Concurring opinion, 395.

C

Countervailing Policy

I do not believe that this court should be in the business of crafting public policy. Rather, I believe that our function is more narrow: to apply controlling law to the facts found by the trial court. Nevertheless, the result that the majority reaches flows directly from the policy determinations set forth in the majority and concurring opinions. Thus, despite some reluctance, I am compelled to briefly note the policy considerations that inform my own differing view.

The parties that utilize our courts to resolve their marital differences are not merely litigants—they are citizens. They do not work for us, but we for them. Our courts do not and should not serve as their parents, their therapists or their counselors. We are charged with applying the law to their cases uniformly and in

the same manner in which we apply it to cases involving corporations, the government and those individuals accused of crimes. The concurring opinion states that were this case one involving corporations, it would find the relevant clause to be a penalty, but not in a marital case. Concurring opinion, 395. I cannot disagree more. The law of interpretation of contracts is as binding on courts deciding marital cases as it is on courts hearing corporate cases. See *Issler* v. *Issler*, supra, 250 Conn. 235. If we begin to undermine the application of contract law in family cases, it sets a dangerous precedent, inviting a similar erosion of established contract principles in other areas of the law.

In my view, the approach taken in the majority and concurring opinions will serve to increase the level of uncertainty associated with marital dissolution judgments and decrease the citizenry's confidence in its judiciary. Parties in marital dissolution cases will no longer be assured that our courts are courts of law, bound by predictable and consistently applied precedent. Rather, parties to family cases will be subject to judgments bereft of any guidance from controlling legal principles. Litigants will understand that if their stipulated judgments must later be litigated, the interpretation and enforceability of such judgments will not be determined according to established tenants of contract law, but instead by the day's idea of what constitutes "the special concerns that arise in the context of family cases." See concurring opinion, 395. The majority's decision will also cause matrimonial attorneys to question the predictability of the settlements they negotiate on behalf of clients if later subjected to judicial scrutiny. To hope that the decision reached today by the majority will have the effect of "conserv[ing] judicial resources and encourage[ing] private resolution of family issues"; Majority opinion, 385; is futile. Instead, it will lead to an increase in litigation and less certain outcomes.

IV

CONCLUSION

The present case is controlled by immutable principles of contract law. Those principles compel the conclusion that payment of three quarters of $1 million in damages for a twelve day delay in the payment of $7.5 million is a penalty.[11] It should not be enforced because it is in contravention of centuries of binding precedent. Accordingly, I would affirm the judgment of the trial court.

[1] The majority opinion makes the following finding of fact: "The plaintiff, as a result of his bargain, had the use of $7.5 million for one year. . . . It would appear that the plaintiff could have made that payment at the time of the judgment. Instead, the plaintiff, an investment banker, had the use of the money with the knowledge that he would lose the benefit of no interest for that year if he failed to pay the defendant on time." Majority opinion, 388. I am at a loss to explain how this court can determine the "knowledge" that the plaintiff possessed as he "used" the money, or even whether he "used" it at all. The trial court did not find any such fact in its thorough memorandum of decision. The defendant did not argue that fact

in her briefs to the trial court or this court, and neither party testified at the postjudgment hearing before Judge Novack. There simply is no evidence anywhere in the record to support the factual conclusions reached in the majority opinion. It is elemental that as an appellate court, we "cannot find facts or draw conclusions from primary facts found, but may only review such findings to see whether they might be legally, logically and reasonably found. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court." (Citations omitted; internal quotation marks omitted.) *Gerber & Hurley, Inc.* v. *CCC Corp.*, 36 Conn. App. 539, 543, 651 A.2d 1302 (1995).

In addition, the majority opinion makes much of the fact that the plaintiff testified at the original dissolution hearing that time was of the essence. The plaintiff's testimony, however, is entirely immaterial. No time is of the essence clause was inserted into the contract. The intentions of the parties not expressed in the four corners of the written agreement are not admissible to vary the terms of an unambiguous contract, as this one was found to be. "Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . [I]n determining the intent of the parties to the agreement, we are limited to the language of the contract and the parties' intent as expressed therein." (Internal quotation marks omitted.) *Davis* v. *Davis*, supra, 112 Conn. App. 64. If, however, the majority insists upon looking outside of the four corners of the agreement, it should represent the plaintiff's testimony in its entirety. At the original dissolution hearing, the plaintiff was questioned by his attorney:

"[The Plaintiff's Counsel]: And further, you understand that time is of the essence. If there is a default in the timeliness of the payments, at that point, interest can be imposed?

"[The Plaintiff]: That's right."

This exchange illustrates that the plaintiff's understanding of the date from which interest would run may not be as clear as the majority opinion implies.

The plaintiff's testimony regarding his understanding that time was of the essence is irrelevant to our consideration of the present appeal for another reason. Even if we assume arguendo that a time is of the essence clause was integrated into the stipulated judgment, such clauses affect only whether failure to perform within the specified time constitutes a material breach, i.e., whether failure of one party to perform by a date certain wholly relieves the other party from the duty to perform under the agreement. *Banks Building Co., LLC* v. *Malanga Family Real Estate Holding, LLC*, 102 Conn. App. 231, 238, 926 A.2d 1 (2007); see also 15 S. Williston, Contracts (4th Ed. Lord 2000) §§ 46:1 through 46:3, pp. 390–405. There is no question regarding the parties' duties to perform in the present case; the only issue is the amount of damages for failure to do so. Consequently, whether time was of the essence has no bearing on the disposition of the case.

[2] I remain convinced it is the latter, while the majority opinion does not address the issue.

[3] The defendant argues, and the majority opinion suggests; see majority opinion, 387 n.10; that the contract should be afforded deference because the court previously determined that it was "fair and equitable." This is simply not the case. The law is clear that a stipulated judgment does not constitute a judicial determination of litigated rights. See, e.g., *Reichenbach* v. *Kraska Enterprises, LLC*, 105 Conn. App. 461, 475, 938 A.2d 1238 (2008). There is no support for the proposition that simply because a judge found the agreement to be fair and equitable, it should be treated as anything other than a contract between the parties and interpreted as such. Stipulated judgments are approved by our courts on a regular basis; that does not affect the fact that they are construed and applied according to the principles of contract law. Indeed, our Supreme Court has recognized that the trial court is not necessarily in the best position to determine that a stipulated judgment is fair and equitable, and that such determinations are fallible. See, e.g., *Grayson* v. *Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 176, 646 A.2d 195 (1994) ("the dissolution court may be unable to elicit the information necessary to make a fully informed evaluation of the settlement agreement").

[4] It is interesting to note that this test dates back to 1914 when our Supreme Court decided *Banta* v. *Stamford Motor Co.*, supra, 89 Conn. 51. That opinion was among the first (if not *the* first) delineating the specific test used today for determining whether a contractual provision provided an unenforceable penalty. See 3 E. Farnsworth, Contracts (3d Ed. 2004) § 12.18, p. 305.

[5] The majority opinion cites § 354 of the Restatement (Second) of Contracts with apparent approval. The majority opinion's citation of comment (a), however, has little bearing on the dispute at issue. Rather, the text of the section itself and comment (b) make very clear that interest accrues

not from the date that the contract is entered into, but rather from the date that performance is due. See majority opinion, 388 n.11.

[6] The rate of interest is not at issue in the present case because it is the same as that set forth in General Statutes §§ 37-3a (a) and 52-350f—10 percent.

[7] I reiterate that the plaintiff paid this amount ($24,999.96) to the defendant.

[8] The majority opinion finds support for this proposition in General Statutes § 36a-771, which applies to retail installment contracts. This stipulated judgment is not a retail installment contract and has not been characterized as one by the parties or the trial court. I therefore question whether reference to that statute is relevant to this case.

[9] The majority opinion notes that it focuses on public policy considerations because the trial court's judgment was based on its determination that the provision at issue was "void against public policy." Majority opinion, n.11. The trial court's invocation of public policy was not, however, based on a generic policy consideration that it was entitled to weigh against other policy considerations. Rather, it was based on a specific policy that has been a hallmark of binding contract law for centuries. See, e.g., *New Britain* v. *New Britain Telephone Co.*, supra, 74 Conn. 332 (decided in 1902); *Tayloe* v. *Sandiford*, 20 U.S. (7 Wheat.) 13, 17, 5 L. Ed. 384 (1822); *Davis* v. *Freeman*, 10 Mich. 188 (1862); *Orr* v. *Churchill*, 126 Eng. Rep. 131, 1 Blackstone (H.) 227 (C.P. 1789).

[10] I find it interesting that the concurring opinion bases its reasoning, in part, on evidence that "the plaintiff is a highly educated and financially sophisticated person," and that "both parties were represented by sophisticated and experienced domestic relations attorneys . . . ." Concurring opinion, 394. It seems counterintuitive that our courts would permit such individuals to enforce contract clauses that violate well established principles of law because they are sufficiently sophisticated while at the same time refusing to enforce the similar clauses entered into by sophisticated business entities in agreements involving huge sums of money. See, e.g., *In re Dow Corning Corp.*, 419 F.3d 543 (6th Cir. 2005) (in action by Bear Stearns against Dow Corning Corporation to enforce terms of settlement agreement calling for payment of $17 million, court held that clause calling for payment $8.75 million in "liquidated damages" for failure to pay timely was unenforceable penalty); *In re Northwest Airlines Corp.*, 393 B.R. 352 (Bankr. S.D.N.Y. 2008) (clause in contract between commercial airline and airplane lessor calling for payment of $7.5 million in "liquidated damages" for value of airplane was unenforceable).

[11] This represents an interest rate of 304 percent per annum.