****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the advance release version of an opinion and the latest version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest version is to be considered authoritative.

****

DICKIE K. MURCHISON, JR., ET AL.
v. CITY OF WATERBURY
(AC 45050)

Prescott, Moll and Cradle, Js.

Syllabus

The defendant city of Waterbury appealed to this court from the judgment of the trial court awarding the plaintiffs, two former firefighters employed by the city, terminal leave pay pursuant to the city's collective bargaining agreement with the firefighters' union. Subsequent to the termination of their employment with the city, the plaintiffs reached their normal retirement age under the agreement and began collecting pension benefits under a city ordinance that governed the distribution of retirement benefits for firefighters. The city then informed the plaintiffs that they would not receive terminal leave pay for accumulated and unused sick time, which, under the agreement, was to commence at the time of their retirement or death. The city claimed that the plaintiffs had resigned from their employment, rather than retired, and were therefore ineligible for terminal leave pay. The trial court denied the parties' motions for summary judgment on the plaintiffs' claims for breach of contract, concluding that the term retirement was ambiguous, as it was not defined in the terminal leave pay provision or anywhere else in the parties' agreement. The court reasoned that, on the one hand, because the pension benefits the plaintiffs were receiving must necessarily constitute a retirement benefit, it was reasonable to infer under one provision of the ordinance that they had entered retirement when they began collecting pensions benefits. On the other hand, the court determined, other provisions of the ordinance could be read to imply that only those who left their employment after reaching their retirement age could be deemed retired. The case was tried to the court, which determined that the testimony of the witnesses did not support the city's claim that the plaintiffs' rights to receive terminal leave pay were contingent on their continued employment until the time when terminal leave pay became due and payable. Relying on the contra proferentem rule, which applies only if extrinsic evidence does not resolve a contractual ambiguity, the court construed the ambiguity as to the meaning of the word retirement against the city and concluded that, regardless of when the plaintiffs retired, they had a vested interest in terminal leave pay, which became due and payable when they reached their respective retirement ages. *Held*:

1. The trial court improperly found that the plaintiffs were entitled to terminal leave pay because the term retirement as used in the terminal leave pay provision was ambiguous, and the court failed to resolve that ambiguity: the term retirement was not defined in the terminal leave pay provision or elsewhere in the agreement, the express language of the ordinance rendered unclear the intent of the negotiating or drafting parties, and the parties offered reasonable interpretations in the use of that term, thus, the use of "retirement" in the terminal leave pay provision created an ambiguity as to whether the drafters intended a firefighter to be retired under that provision and entitled to receive terminal leave pay if he terminated employment with the city before reaching retirement age; accordingly, because the trial court failed to resolve the ambiguous nature of the word retirement, it failed to determine whether the plaintiffs had retired under the terminal leave pay provision and, thus, could not have properly found that the plaintiffs were entitled to terminal leave pay.
2. The trial court improperly applied the contra proferentem rule to resolve the ambiguity in the word retirement in the terminal leave pay provision of the parties' agreement against the city: there was no extrinsic evidence before that court as to the meaning of the word retirement, the record contained no evidence that the city had drafted the agreement, and no witness testified regarding the drafting or negotiation process so as to illuminate the parties' intent regarding the language at issue; moreover, even if such extrinsic evidence were before the court and failed to

resolve the ambiguity, there was no evidence to support the proposition that the city had drafted the agreement.

Argued January 9—officially released March 28, 2023

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, denied the parties' motions for summary judgment; thereafter, the case was tried to the court, *Gordon*, *J.*; judgment for the plaintiffs, from which the defendant appealed to this court. *Reversed*; *new trial.*

Daniel J. Foster, for the appellant (defendant).

Robert W. Smith, for the appellees (plaintiffs).

Opinion

MOLL, J. The defendant, the city of Waterbury, appeals from the judgment of the trial court awarding the plaintiffs, Dickie K. Murchison, Jr., and John J. Bigham, firefighters formerly employed by the defendant, terminal leave pay pursuant to their collective bargaining agreement (agreement).[1] On appeal, the defendant claims that the court improperly concluded that the plaintiffs were entitled to terminal leave pay because (1) the plaintiffs "retired" within the meaning of the terminal leave pay provision of the agreement and (2) any ambiguity in the agreement should be construed against the defendant.[2] We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. Murchison was employed as a firefighter by the defendant between July 11, 1988, and November 18, 2008, and Bigham was employed as a firefighter by the defendant between September 11, 1989, and August 13, 2012. Each plaintiff's employment was governed by the terms of an agreement between the defendant and Local 1339, International Association of Firefighters, AFL-CIO (union).[3] Subsequent to the termination of his employment, on July 11, 2013, Murchison reached his "normal retirement age" (retirement age) and began collecting his pension benefits on his "normal retirement date" (retirement date), August 1, 2013, pursuant to article thirty-three of the agreement (pension provision) and the Final Amended Ordinance Regarding the Pension and Retirement System (ordinance), which govern the calculation and distribution of retirement and survivor benefits for firefighters.[4] On September 11, 2014, Bigham reached his retirement age and began collecting his pension benefits on his retirement date, October 1, 2014, pursuant to the same terms.

The defendant informed each plaintiff by letter, after pension benefit payments had commenced, that he would not receive terminal leave pay under article eleven of the agreement. Article eleven, § 2, of the agreement (terminal leave pay provision)[5] provides in relevant part: "Upon the *retirement* or death of any employee who was actively employed as of June 30, 2004, such employee, or the employee's dependent survivors, as the case may be, shall receive terminal leave pay . . . [for] accumulated and unused sick [time][6] . . . at the time of his *retirement* or death . . . . Terminal leave pay shall be payable in four (4) equal installments on or about the *date of retirement* or death and the first three anniversaries thereof." (Emphasis added; footnote added.)

On April 29, 2015, the plaintiffs commenced this action by way of a two count complaint against the defendant, alleging breach of contract as to Murchison

in count one, and alleging breach of contract as to Bigham in count two, on the basis of the defendant's failure to begin distribution of each plaintiff's terminal leave pay when he began collecting his pension benefits pursuant to the agreement. On January 8, 2018, the parties filed motions for summary judgment, accompanied by supporting memoranda of law, exhibits, and affidavits. On February 21, 2018, the defendant filed an objection to the plaintiffs' motion for summary judgment, accompanied by exhibits and affidavits. On that same day, the plaintiffs filed an objection to the defendant's motion for summary judgment.

On August 14, 2018, the trial court, *Brazzel-Massaro*, *J.*, issued a memorandum of decision denying the parties' motions for summary judgment. The court concluded that judgment on either of the motions could not be rendered because it could not determine, based on the record before it, whether the plaintiffs had " 'retired' for purposes of the terminal leave pay provision." The court explained that the terminal leave pay provision, specifically its use of the term "retirement," and the ordinance were "susceptible to more than one reasonable interpretation and are therefore ambiguous." On November 7, 2019, the court, *Gordon*, *J.*, conducted a bench trial to, inter alia, determine the meaning of the term "retirement" as used in the terminal leave pay provision.[7] On October 1, 2021, the court issued a memorandum of decision rendering judgment in favor of the plaintiffs, awarding terminal leave pay in the amounts of $28,307.98 to Murchison and $33,451.55 to Bigham. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court erred in awarding the plaintiffs terminal leave pay, arguing that the plaintiffs only *resigned* from employment with the defendant, and did not "retire," for purposes of the terminal leave pay provision. The plaintiffs counter that the word "retirement" as used in the terminal leave pay provision refers to the dates on which the plaintiffs became eligible to begin collecting their pension benefits and/or the dates on which they began collecting those benefits, and, therefore, the court did not err in awarding them terminal leave pay. We conclude that the court erred in awarding the plaintiffs terminal leave pay because (1) the term "retirement" as used in the terminal leave pay provision is ambiguous, and, (2) as the defendant correctly states in its appellate briefs, the court failed to resolve that ambiguity in its decision awarding the plaintiffs terminal leave pay.[8]

We begin by setting forth the relevant sections of the ordinance, which, as noted previously, are part of the pension provision and thus govern the retirement system and distribution of pension benefits under the agreement. See footnote 4 of this opinion. Under § 35.01

of the ordinance, a firefighter reaches retirement age when he or she completes "[twenty-five] [y]ears of [s]ervice as a [f]ull-[t]ime [f]irefighter . . . with the [defendant], regardless of age" and reaches his or her retirement date on "the first day of the month following the later of a [p]articipant's[9] . . . [r]etirement [a]ge or the [p]articipant's termination of service with the [defendant]." (Footnote added.) Under § 35.03, a firefighter who is a participant in the retirement system[10] becomes vested in his or her pension benefit "only after completion of [ten] [y]ears of [s]ervice . . . ."[11] Under § 35.04, a participant who terminates employment with the defendant *before* reaching his or her retirement date, but *after* those benefits have vested after the completion of ten years of service under § 35.03, is entitled to receive his or her pension benefits "commencing on the first day of the month following the date such [p]articipant would have attained his or her . . . [r]etirement [a]ge if the [p]articipant had remained employed by the [defendant] . . . ." Alternatively, under § 35.11, a participant "who has attained . . . [r]etirement [a]ge shall be eligible to retire and receive a [p]ension benefit commencing on or after the [f]irefighter['s] . . . [r]etirement [d]ate." Section 35.18 states that a participant who is eligible to collect his or her pension benefits upon retirement age may "retire from service with the [defendant]" by filing "a written statement in the form prescribed" with the retirement board.

The following additional facts and procedural history are relevant to the disposition of the defendant's claim. In moving for summary judgment, the plaintiffs argued that the terminal leave pay provision unambiguously provides, in relevant part, that the plaintiffs are entitled to such pay "[u]pon . . . *retirement*," which is "payable in four (4) equal installments on or about [the respective plaintiff's] *date of retirement*," and that, because they "retired" when they had reached their respective retirement ages, and began collecting their pension benefits on their respective retirement dates, they are also entitled to receive terminal leave pay. (Emphasis added.) The defendant, however, argued that the plaintiffs would have been eligible to "retire" for terminal leave pay purposes only if they had remained employed by the defendant until their retirement age. The defendant further argued that, because the plaintiffs had terminated their employment *before* reaching such age, they "resigned" rather than retired from their positions and are considered only to be "pensioners," and are, therefore, not eligible to receive terminal leave pay.

The summary judgment court, *Brazzel-Massaro*, *J.*, concluded that the terms of the terminal leave pay provision are ambiguous and denied the parties' motions for summary judgment. The court explained that "[t]he cross motions before the court center around whether the plaintiffs effectively retired for purposes of the ter-

minal leave pay provision. According to the plaintiffs, retirement occurs when a participant begins receiving a pension, regardless of whether such pension is deferred. In contrast, the defendant appears to construe retirement as occurring only when the departing participant is eligible to begin receiving a pension immediately upon his or her separation from employment. The defendant thus contends that, although the plaintiffs are pensioners, they are not retirees and are therefore not entitled to terminal [leave] pay. Resolution of the parties' motions requires the court to interpret the bargaining agreement and ordinance. . . . Because it is undisputed that the plaintiffs are receiving vested benefit pensions pursuant to the ordinance, such a pension must necessarily constitute a retirement benefit, and it is therefore reasonable to infer [from § 35.18] that the plaintiffs entered retirement when they began receiving such pensions. . . . Elsewhere in the ordinance, however [in §§ 35.04 and 35.11], it is implied that only participants who leave after reaching their . . . retirement age can be deemed retire[d]." (Citations omitted; emphasis omitted; internal quotation marks omitted.) In sum, the court concluded that the term "retirement" as used in that provision was ambiguous[12] and, therefore, "the . . . agreement and ordinance are susceptible to more than one reasonable interpretation . . . . As a matter of law, summary judgment is inappropriate when the language of a contract as to the parties' intent is ambiguous. . . . Consequently, summary judgment is not appropriate in the present case." (Citations omitted; internal quotation marks omitted.)

The matter was tried to the court, *Gordon*, *J.*, on November 7, 2019, to determine principally whether the plaintiffs had "retired" for purposes of the terminal leave pay provision[13] and, consequently, were entitled to receive terminal leave pay. The plaintiffs presented the testimony of five witnesses, the first three of whom listed here, at the time of trial, were employees of the defendant.[14] First, Karen Lang, the pension and benefits manager, testified that, under the ordinance, the pension benefits available to participants vary based on years of service. Second, Mari Kenney, an administrative assistant in the fire chief's office, testified that she prepared the plaintiffs' employment termination documents, which included her calculation of what she believed to be the terminal leave pay each plaintiff was entitled to receive, and that those documents were given to the payroll and the human resources departments. She also testified that employees in the fire department, but not necessarily the defendant, considered the plaintiffs retired. Third, Nadine Watton, the payroll manager, testified that "retirement date" refers to the date that a participant is eligible to collect his or her pension benefits. She also testified that she would describe the plaintiffs as pensioners, but not retirees. Finally, each plaintiff testified that he began receiving

his pension benefits on his retirement date, after he reached his retirement age, or twenty-five years after his initial date of hire. Kenney and Watton testified that they did not participate in the negotiation of or the drafting of the agreement, and no other witness testified to participating in the same.

On October 1, 2021, the court issued a memorandum of decision rendering judgment in favor of the plaintiffs, awarding terminal leave pay in the amounts of $28,307.98 to Murchison and $33,451.55 to Bigham. The court explained that, "[a]lthough the testimony of the witnesses varied slightly regarding *when* retirement begins (some witnesses testified that retirement begins upon separation from employment, while others testified that retirement begins once the employee starts receiving retirement benefits), none of the witnesses testified, as the defendant contends, that terminal [leave] pay is only available to those employees who are actively employed by the [defendant] at the time of their retirement. In other words, although there was conflicting testimony regarding the *timing* of retirement, no witness supported the proposition advanced by the [defendant] that the plaintiffs' vested right to receive terminal [leave] pay was contingent upon the plaintiffs' continued employment with the [defendant] until the moment the terminal [leave] pay became due *and payable*." (Emphasis in original.) The court concluded, "based on the testimony provided, and . . . fair and reasonable interpretations of the [agreement] and the ordinance, that *regardless of when the plaintiffs 'retired*,' both plaintiffs had a vested interest in terminal [leave] pay that became due and payable when the plaintiffs reached their respective . . . retirement ages." (Emphasis altered.)

The court emphasized that its conclusion that "the plaintiffs are entitled to receive terminal [leave] pay is buttressed by the fact that to conclude otherwise would deprive the plaintiffs of significant rights and benefits they acquired based on their years of service to the [defendant]. Moreover, if the [defendant] intended to make continued employment a condition precedent to receiving terminal [leave] pay, the [defendant] could and should have insisted that the [agreement] be amended to state that requirement explicitly. For example, in addition to requiring that an employee be 'actively employed as of June 30, 2004,' the [defendant] could have insisted that [the terminal leave pay provision] be revised to clarify that, in order to receive terminal [leave] pay, the employee must be actively employed with the [defendant] up until . . . '[r]etirement [a]ge.' Alternatively, the [defendant] could have insisted that the definition of . . . '[r]etirement [a]ge' in § 35.11 . . . be amended to clarify that continued employment was a prerequisite to 'retirement.' More fundamentally, the [defendant] could have insisted that the [agreement] and/or the ordinance contain a definition of the term

'retire,' making it clear that continued employment with the [defendant] was a condition precedent to receiving terminal [leave] pay." The court explained that, in considering the testimony of the witnesses, the relevant portions of the agreement and the ordinance, and the evidence in the record, it concluded "that the plaintiffs are entitled to receive terminal [leave] pay based on their years of service to the [defendant] and the express terms of the [agreement] and ordinance."

We next set forth the applicable standard of review and legal principles. "Resolution of the [defendant's] claim involves interpretation of the bargaining agreement and the ordinance as incorporated into the bargaining agreement. It is axiomatic that a . . . bargaining agreement is a contract. . . . Like any other contract, a . . . bargaining agreement may incorporate by reference other documents, statutes or ordinances to be included within the terms of its provisions. . . . When a contract expressly incorporates a [municipal ordinance] by reference, that [ordinance] becomes part of a contract for the indicated purposes just as though the words of that [ordinance] were set out in full in the contract. . . . Accordingly, our interpretation of the bargaining agreement, as well as the ordinance incorporated therein, is guided by principles of contract law." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Greene* v. *Waterbury*, 126 Conn. App. 746, 750–51, 12 A.3d 623 (2011).

"[If] a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . [If] the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Johnson* v. *Vita Built, LLC*, 217 Conn. App. 71, 84, 287 A.3d 197 (2022).

"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.) *C & H Shoreline, LLC* v. *Rubino*, 203 Conn. App. 351, 356–57, 248 A.3d 77 (2021). "Accordingly, our review is twofold. First, we must determine de novo whether the contractual language is ambiguous. If we conclude that it is, we must determine whether the trial court's factual findings are clearly erroneous." *Perez* v. *Carlevaro*, 158 Conn. App. 716, 722, 120 A.3d 1265 (2015).

The language at issue in the present case is found in the terminal leave pay provision of the agreement, the relevant text of which previously has been set forth in full in this opinion. That provision details that firefighter employees become eligible for terminal leave pay "[u]pon . . . retirement," where the first of four installments is due, as is relevant here, on the "date of retirement." The term "retirement" is not defined in the terminal leave pay provision or anywhere else in the agreement. In the absence of such a definition and in order to interpret the use of that term in the terminal leave pay provision, the parties have turned to the various uses and definitions of the term "retirement" in the ordinance, the relevant text of which also has been set forth previously in this opinion.

On the one hand, under § 35.11 of the ordinance, once a participant "has attained" retirement age, he or she is "eligible to *retire and receive*" pension benefits on or after his or her retirement date. (Emphasis added.) Under § 35.11, calculation of a participant's pension is computed on the basis of 2 percent for each year of service completed after June 30, 2003, multiplied by the participant's final average base pay. Notably, the final average base pay calculation for those participants who retire under § 35.11 also includes, if applicable, holiday pay and drivers' pay. In that regard, we infer from the express language of § 35.11 that only those participants who terminate employment upon reaching retirement age—and not before—can retire and receive a full pension. This inference is bolstered by § 35.04, under which a participant "with a [v]ested [b]enefit who terminates service with the [defendant] prior to" his or her retirement date is entitled to pension benefits; indeed, under § 35.04, a participant is still entitled to receive pension benefits—when he or she "*would have* attained" normal retirement age had he or she "remained employed" by the defendant—as long as he or she has become vested in such benefits after the completion of ten years of service under § 35.03. (Emphasis added.) But such a participant does not appear to be entitled to a full pension. Although the final average base pay calculation is substantially similar to that in § 35.11, it does not include holiday pay or drivers' pay. The express language of § 35.04 suggests that those participants become pensioners for purposes of the pension provision of the agreement. The ordinance can be read, how-

ever, to consider all participants who are eligible to collect pension benefits to be retired; § 35.18 states that a participant who is eligible to collect his or her pension benefits upon retirement age may "*retire* from service with the [defendant]" by filing "a written statement in the form prescribed" with the retirement board, "setting forth at what time subsequent to such date a [p]articipant desires to be retired."[15] (Emphasis added.) Section 35.18 does not contain any express language that indicates that a participant who terminates employment *before* reaching retirement age is not considered "retired" once he or she does reach such age and files a written statement with the retirement board pursuant to that section.

Because (1) the term "retirement" is defined neither in the terminal leave pay provision nor elsewhere in the agreement, (2) the express language of the ordinance renders unclear the intent of the negotiating or drafting parties, and (3) the parties have offered reasonable interpretations in the use of that term, "retirement" as used in that provision creates an ambiguity as to whether the drafting parties intended a firefighter to be considered "retired" under that provision—and entitled to receive terminal leave pay—if he or she terminates employment with the defendant before reaching retirement age. Resolving the ambiguity of the use of the term "retirement" in the terminal leave pay provision to determine whether the plaintiffs are entitled to such pay necessitates looking beyond the four corners of the agreement to discern the intent of the drafting parties.[16]

The court, although tasked with resolving that ambiguity, did not do so; instead, it concluded, in a somewhat circular fashion, that the plaintiffs were entitled to terminal leave pay "regardless of *when* [they] 'retired,' " because "both plaintiffs had a vested interest in terminal [leave] pay that became due and payable when [they] reached their . . . retirement ages." (Emphasis in original.) Regarding the testimony of the witnesses, the court noted only that "the testimony of the witnesses varied slightly regarding *when* retirement begins" and that "there was conflicting testimony regarding the *timing* of retirement . . . ." (Emphasis in original.) Put simply, the court did not resolve the crux of the dispute, i.e., resolving the ambiguity as to whether the plaintiffs "retired" under the provision. The court concluded only that the plaintiffs are entitled to such pay because they would otherwise be deprived of the "significant rights and benefits they acquired based on their years of service to the [defendant]" if denied such pay.[17]

In sum, we conclude that the term "retirement" as used in the terminal leave pay provision is ambiguous because it is susceptible to more than one reasonable interpretation. Because the court failed to resolve that ambiguity, it could not have properly found that the plaintiffs were entitled to terminal leave pay.

II

The defendant next claims that, because there was no evidence in the record that it drafted the agreement, the trial court erred in construing any ambiguity in the terminal leave pay provision against it. The plaintiffs counter that, regardless of any ambiguity in the provision, the evidence established that the term "retirement" refers to the date that they became eligible to collect, and/or began collecting, their pension benefits. We agree with the defendant. We note that, although our resolution of the defendant's first claim is dispositive of this appeal, because it is sufficiently likely to arise on remand, we will also address the defendant's second claim. See *Budlong & Budlong, LLC* v. *Zakko*, 213 Conn. App. 697, 714 n.14, 278 A.3d 1122 (2022) ("[a]lthough our resolution of the defendant's first claim is dispositive of this appeal, we also address the defendant's second claim because it is likely to arise on remand").

We begin by setting forth the applicable standard of review and legal principles. "[W]hen the words used in the contract are uncertain or unambiguous, parol evidence of conversations between the parties or other circumstances antedating the contract may be used as an aid in the determination of the intent of the parties which was expressed by the written words." (Internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 324, 186 A.3d 771, cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018). "Because the parol evidence rule is not an exclusionary rule of evidence . . . but a rule of substantive contract law . . . the [defendant's] claim involves a question of law to which we afford plenary review. . . . [I]t is well established that the parol evidence rule is . . . a substantive rule of contract law that bars the use of extrinsic evidence to vary the terms of an otherwise plain and unambiguous contract. . . . The rule does not prohibit the use of extrinsic evidence for other purposes, however, such as to prove mistake, fraud or misrepresentation in the inducement of the contract." (Citation omitted; internal quotation marks omitted.) *Paniccia* v. *Success Village Apartments, Inc.*, 215 Conn. App. 705, 727, 284 A.3d 341 (2022).

"[E]xtrinsic evidence may be considered in determining contractual intent only if a contract is ambiguous." (Internal quotation marks omitted.) *Konover* v. *Kolakowski*, 186 Conn. App. 706, 720, 200 A.3d 1177 (2018), cert. denied, 330 Conn. 970, 200 A.3d 1151 (2019). "Where the language is ambiguous . . . we must construe those ambiguities against the drafter [sometimes referred to as the contra proferentem rule]." (Internal quotation marks omitted.) *C & H Shoreline, LLC* v. *Rubino*, supra, 203 Conn. App. 356. Applying the contra proferentem rule is appropriate only "[i]n the event that review of extrinsic evidence of the parties' intent fails to resolve a contractual ambiguity . . . ." *Gold* v. *Row-*

land, 325 Conn. 146, 160, 156 A.3d 477 (2017).

In the present case, in awarding the plaintiffs terminal leave pay, the court stated that, if the defendant had "intended to make continued employment a condition precedent to receiving terminal [leave] pay, the [defendant] could and should have insisted that the [agreement] be amended to state that requirement explicitly." The court further explained that the defendant could have "insisted" that (1) "[the terminal leave pay provision] be revised to clarify that, in order to receive terminal [leave] pay, the employee must be actively employed with the [defendant]" until retirement age, (2) § 35.11 be amended to clarify "that continued employment was a prerequisite to 'retirement,' " or (3) a definition be provided for the term "retire."

By construing any ambiguity in the agreement against the defendant, the court improperly applied the contra proferentem rule. First, the contra proferentem rule applies only if extrinsic evidence does not resolve the contractual ambiguity. *Gold* v. *Rowland*, supra, 325 Conn. 160 ("the application of contra proferentem is premature in situations [in which] there has not yet been any attempt to resolve the ambiguity through the ordinary interpretive guides—namely, a consideration of the extrinsic evidence" (internal quotation marks omitted)); *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 108, 84 A.3d 828 (2014) (contra proferentem rule is last resort if court is unable to resolve ambiguity in contractual language by considering extrinsic evidence). On the basis of our review of the record, we conclude that the court did not have proper extrinsic evidence before it with which to resolve the ambiguity in the terminal leave pay provision. That is, no witness testified as to the drafting or negotiation process to illuminate the parties' intent as to the language at issue. Therefore, in construing against the defendant any purported ambiguity that it implicitly found in the language of the agreement without proper extrinsic evidence before it, the court improperly applied the contra proferentem rule.[18] Second, even if such extrinsic evidence were before the court and failed to resolve the ambiguity in the agreement, there is no evidence in the record to support the proposition that the defendant drafted the agreement. Kenney and Watton both testified that they did not participate in the negotiation or drafting of the agreement, and no other witness testified to such participation. Therefore, the contra proferentem rule could not be properly applied in the present case. See *C & H Shoreline, LLC* v. *Rubino*, supra, 203 Conn. App. 359 (discussing when contra proferentem rule applies against contract drafters).

In sum, because the court failed to resolve the ambiguity of the use of the term "retirement" in the terminal leave pay provision, we conclude that it could not have found, on the basis of the record before it, that the

plaintiffs were entitled to terminal leave pay. As a result of the court's error, the judgment must be reversed and the case is remanded for a new trial.[19]

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

[1] Each plaintiff's employment was governed by a separate agreement. Murchison's employment was governed by the terms of an agreement for the years 2008 to 2011 between the defendant and Local 1339, International Association of Firefighters, AFL-CIO (union), and Bigham's employment was governed by the terms of an agreement for the years 2011 to 2014 between the defendant and the union. For purposes of this appeal, any differences between the agreements are immaterial, and, therefore, in the interest of simplicity, we refer to a single "agreement."

[2] In its principal appellate brief, the defendant also claims that the trial court erred in denying its motion for summary judgment. During oral argument before this court, the defendant's counsel acknowledged that this claim is not reviewable and, therefore, we need not discuss it further.

[3] See footnote 1 of this opinion.

[4] The pension provision governs the calculation and distribution of the plaintiffs' pension benefits and provides that "[e]mployees shall be entitled to retirement and survivor benefits pursuant to the terms and conditions of the ordinance . . . ." We therefore consider the ordinance as part of the pension provision. See part I of this opinion.

[5] The terminal leave pay provision that governed Murchison's employment is in article eleven, § 2c, of the agreement, and that same provision that governed Bigham's employment is in article eleven, § 2b, of the agreement. For ease of reference, we refer only to § 2 of the agreement and provide only the relevant language of that provision.

[6] We pause to note that the terminal leave pay provision of the 2008–2011 agreement, which governed Murchison's employment, uses the term "sick days," while the same provision of the 2011–2014 agreement, which governed Bigham's employment, uses the term "sick hours." This distinction is immaterial, in that the amount of sick time that each plaintiff accumulated during his employment with the defendant is neither in dispute nor germane to this appeal. The terminal leave pay provision of each agreement is the same in all other relevant respects. See footnote 1 of this opinion.

[7] Both trial courts, as well as the parties, have used the terms "retirement" and "retirement date" in addressing the ambiguity in the terminal leave pay provision. For ease of reference, we generally refer to whether the plaintiffs have "retired" or the definition of the term "retirement" for purposes of that provision.

[8] The defendant also claims that the court did not identify any evidence in the record to support its conclusion that the plaintiffs were entitled to such pay. In light of our conclusion that the court did not resolve the question of whether the plaintiffs "retired" for purposes of the terminal leave pay provision, there are no findings for this court to review, and, thus, we do not discuss this aspect of the defendant's claim.

[9] "Participant" is defined as "any person in the service of the [defendant] who is eligible to participate in the [r]etirement [s]ystem . . . and who is actually participating thereunder." For purposes of this opinion, any reference to a "participant" in the retirement system specifically refers to any firefighter participant.

[10] Each plaintiff was a participant in the retirement system during his employment with the defendant, and each terminated his employment before reaching his retirement age, but after his pension benefits had vested, such that he became eligible to begin collecting pension benefits upon reaching his retirement date.

[11] Under § 35.01, "[p]ension" is defined as "the payments made by reason of the retirement or termination of service of a [p]articipant, including pension benefits for service . . . ." In that regard, a "[p]ensioner" is defined as "a recipient of [p]ension [b]enefits" under the retirement system.

[12] We pause to note that, although the ordinance is part of the pension provision, it is not part of the terminal leave pay provision. See footnote 4 of this opinion.

[13] Prior to trial, on November 4, 2019, the parties filed a joint trial management report, stating that the sole issue to be resolved at trial would be the interpretation of the term "retire" or, alternatively, "date of retirement" as

used in the terminal leave pay provision.

[14] The defendant did not call any witnesses at trial.

[15] The record reflects that Murchison filed such a written statement with the retirement board, and there is no evidence suggesting that Bigham did not file the same.

[16] See part II of this opinion.

[17] This court gleans from its review of the record, including the trial transcripts, the trial record, and the memorandum of decision, that the trial court implicitly concluded that the phrase "actively employed as of June 30, 2004," as used in the terminal leave pay provision, and not the term "retirement," is ambiguous, and necessarily relied on that conclusion. Because we conclude that the term "retirement" is the ambiguous language in the provision, any purported ambiguity on which the court may have relied with respect to the phrase "actively employed as of June 30, 2004," is immaterial.

[18] See footnote 17 of this opinion.

[19] We recognize, of course, that none of the parties on remand has an obligation to present extrinsic evidence, whether testimonial or documentary, to resolve this ambiguity. Nor does any party have an obligation to present evidence as to who drafted the agreement, such that, in the event that extrinsic evidence did not resolve the ambiguity, the contra proferentem rule could properly be applied. We simply note that a plaintiff who fails to present any evidence that would permit the fact finder to resolve a material ambiguity risks failing to satisfy his burden of proof.