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ZARELLA, J., dissenting. I respectfully disagree with the majority and, accordingly, I dissent. The central issue in this case is whether the defendants are employers for the purposes of General Statutes § 31-72 and therefore are liable for wages due employees that were earned prior to the defendants’ involvement with the defendant Specialty Publishers, Inc. (Specialty).

The seminal case involving actions commenced pursuant to § 31-72 is *Butler v. Hartford Technical Institute, Inc.*, 243 Conn. 454, 704 A.2d 222 (1997). In *Butler*, our Supreme Court established the test to determine who is an employer for purposes of the statute. “[T]he term employer as used in § 31-72 encompasses an individual who possesses the ultimate authority and control within a corporate employer to set the hours of employment and pay wages and therefore is the specific or exclusive cause of improperly failing to do so.” *Id.*, 462. In this case, the trial court found that the defendants had the authority to pay wages and to control the hours of employment. That, however, is only one part of the test.

The plaintiff also has the burden of demonstrating that the persons to be held liable have the ultimate

authority and are the “specific or exclusive cause” of improperly failing to pay wages. *Id.* The undisputed facts in this case are that the wage claims were for the period from August through October, 1992. Thus, the wages were earned prior to the defendants’ execution of a contract with Specialty on October 30, 1992, and prior to beginning their engagement to assist Specialty with its financial and management problems. The employees received their wages for the entire period that the defendants were active in the management of Specialty.

Upon the execution of the contract, the defendants immediately commenced work for Specialty. The defendants discovered the company in such a state of disarray that they were unable to determine the financial status of the business. The defendants immediately hired an outside accountant to help reconstruct the financial records. It was at this point that the defendants learned that back wages were owed to the employees. As of the date that the defendants commenced operating Specialty, the company was insolvent and it never regained solvency.¹ The defendants, who had operational control of an insolvent company for a little more than two months, reasonably cannot be said to be the specific or exclusive cause of failing to pay wages that accrued in the months prior to their involvement with the company.

The majority correctly points out that the trial court is the ultimate assessor of the credibility of witnesses. The majority further points out that the trial court accepted the version of the facts proffered by the plaintiffs rather than that of the defendants, and that those facts were sufficient to support the conclusion that the defendants were employers for the purpose of the statute. I disagree not with the facts, but with the conclusion that they are sufficient to support the finding that the defendants were employers.

The wage claimants’ testimony was limited to their observations during November and December, 1992. Those observations were limited by the very nature of the jobs they held with Specialty. Accepting as true the facts found by the trial court, they are insufficient, in my view, to establish the actual authority of the defendants. The wage claimants testified that they had no knowledge of Specialty’s board of directors’ meetings, the contract between Specialty and the defendants or the letters from the defendants seeking authorization from Specialty’s chief executive officer to make payments. All of this evidence was documentary in nature and was not rebutted or questioned by the plaintiff. Even if the trial court chose to disbelieve the defendants’ testimony, the plaintiff failed to establish the defendants’ actual authority.

It is not the wage claimants’ subjective understanding that is the determining factor as to whether an

employer-employee relationship exists. If that were the determinative factor, then the wage claims of various employees would be treated differently on the basis of their individual understandings. Rather, as previously noted, it is a question of whether the defendants had actual authority to determine the hours of employment and to pay wages to the point where they are determined to be the specific or exclusive cause of the wage claimants not being paid. The trial court has, in effect, transferred the burden of proof to the defendants in this case.

For the foregoing reasons, I respectfully disagree with the conclusion of the majority that the defendants were the employers of the wage claimants for purposes of § 31-72. I would reverse the judgment of the trial court.

¹ The evidence established that the company lost \$4 million in the eighteen months prior to October 30, 1992.
