McDONALD, J., with whom ZARELLA, J., joins, dissenting. The text of General Statutes § 38a-336 (g) (1) and the historical treatment of tolling periods of limitation compel the conclusion that the insured bears the burden of proving tolling in accordance with the dual requirements of § 38a-336 (g) (1) if the insured chooses to assert tolling to avoid judgment in the insurer's favor on the ground that the claim for underinsured motorist benefits has not been made within the time period prescribed under the policy. Therefore, in the present case, the trial court properly determined that, once the defendant, Safeco Insurance Company of America, successfully met its burden of proving that there was no material issue of fact as to whether the plaintiffs, Dolly Romprey and Peter Romprey, had commenced an action after the three year limitations period prescribed under the policy, the plaintiffs bore the burden of establishing an issue of material fact as to whether they had satisfied the requirements for tolling that period under § 38a-336 (g) (1). Accordingly, I disagree with the majority and would affirm the Appellate Court's judgment affirming the trial court's judgment in favor of the defendant, albeit for different reasons than those relied upon by the Appellate Court.[1]

The majority opinion sets forth our well established rules on summary judgment, which I need not repeat in full. Simply put, under those rules, the defendant, as the moving party, bore the burden of establishing that it was entitled to judgment as a matter of law. *Marinos* v. *Poirot*, 308 Conn. 706, 712, 66 A.3d 860 (2013). The defendant sought summary judgment on the ground that the plaintiffs had failed to bring an action within the period prescribed under their underinsured motorist policy, three years from the date of the accident, a limitation period consistent with § 38a-336 (g) (1). In their objection to the motion, the plaintiffs interposed, inter alia, a claim that their action was not time barred because: "(1) [t]he defendant had sufficient notice prior to the expiration of the three year time limit imposed by the applicable insurance policy and . . . § 38a-336 (g) (1); [and] (2) [t]he plaintiffs made a demand for arbitration prior to the running of the statute . . . [t]herefore tolling [the] three year time limit imposed by the applicable insurance policy and . . . § 38a-336 (g) (1) . . . ." The trial court concluded that the defendant had established that the plaintiffs failed to bring an action within the three year limitations period and that the plaintiffs had failed to proffer evidence that established a material issue of fact supporting their tolling claim. The question before us is whether this allocation of proof is consistent with the posture of the parties and their obligations under the statute.

Section 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." (Emphasis added.) Thus, under the statute, an insured may timely initiate an underinsured motorist claim through two avenues. The first is by commencing an action or demanding arbitration within the limitations period prescribed under the policy, which cannot be less than three years from the date of the accident. The plaintiffs do not dispute that the action in the present case was commenced after that period expired. The second is by compliance with the two-pronged proviso to this limitations period, what this court has called the "compulsory tolling mechanism . . . ." *Voris* v. *Middlesex Mutual Assurance Co.*, 297 Conn. 589, 606, 999 A.2d 741 (2010).

Certain consequences flow from the question of whether this proviso is treated as an alternative limitations period to the specific time limit prescribed under the policy in accordance with § 38a-336 (g) (1), as the majority effectively concludes, or whether it is treated as a means to "toll" that limitations period. A limitations period is generally treated as a special defense that the defendant bears the burden of pleading and proving. Practice Book § 10-50; *State* v. *Ward*, 306 Conn. 698, 706, 52 A.3d 591 (2012). Tolling, whether under common-law doctrines or statutes, consistently has been viewed as a matter in avoidance of a limitations period that the plaintiff bears the burden of pleading and proving. See, e.g., *State* v. *Ward*, supra, 707; *DeLeo* v. *Nusbaum*, 263 Conn. 588, 597, 821 A.2d 744 (2003); *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 150, 163, 464 A.2d 18 (1983); *Mocarski* v. *United Services Automobile Assn.*, 3 Conn. App. 250, 251–52, 487 A.2d 206 (1985); see also Practice Book § 10-57 (matter in avoidance of answer); *Ross Realty Corp.* v. *Surkis*, 163 Conn. 388, 392, 311 A.2d 74 (1972) ("matters in avoidance of the [s]tatute of [l]imitations need not be pleaded in the complaint but only in response to such a defense properly raised").

The text of § 38a-336 (g) (1) does not yield a plain

and unambiguous answer to this question. On the one hand, the operation and effect of the proviso does not appear to be consistent with the usual effect of a tolling statute. A "tolling statute" is defined as "[a] law that interrupts the running of a statute of limitations in certain circumstances . . . ." Black's Law Dictionary (9th Ed. 2009). In other words, tolling suspends the limitations period. *State* v. *Ali*, 233 Conn. 403, 413 n.8, 660 A.2d 337 (1995) (noting "the traditional meaning of the term 'toll' within the parlance of statutes of limitations, namely as a synonym for 'suspend' "). The limitations period is not enlarged; it simply is interrupted or delayed while certain activity takes place.[2] Tolling under § 38a-336 (g) (1) does not, however, appear to operate in this manner. If written notice of a potential underinsured motorist claim is provided to the insurer within the three year (or longer) period prescribed under the policy, the time remaining in that period may become irrelevant.[3] The insured can take advantage of a different limitations period, under which the insured has 180 days from the date of exhausting the tortfeasor's coverage to commence an action or demand arbitration under the terms of the policy.

On the other hand, there are many other indications that this proviso should be characterized for purposes of allocation of burden of proof as a tolling provision. The legislature chose to characterize the effect of the prescribed mechanism as tolling, a term that has long been understood to be a matter in avoidance of a special defense that the plaintiff bears the burden of proving. See General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly"). Had the legislature intended to depart from the usual allocation of proof, one would expect some expression to that effect. Indeed, to the contrary, the legislature's choice of language providing that "the *insured* may toll"; (emphasis added) General Statutes § 38a-336 (g) (1); suggests it intended the insured to bear the burden of proof in accordance with this usual allocation.

In addition, the requirements that must be met for the insured to toll the policy's limitation period relate to affirmative matters principally within the knowledge or control of the insured, factors that have been deemed significant in allocation of proof. See *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 203, 39 A.3d 712 (2012) (considering both difficulty of proving negative and inferiority of access to information when overruling case law imposing burden on party to prove lack of prejudice); *Slack* v. *Greene*, 294 Conn. 418, 435, 984 A.2d 734 (2009) ("[I]t is not the plaintiff's burden to establish that an otherwise apparently adverse use of

the defendant's property was conducted without the defendant's permission or license. . . . Indeed, a contrary rule would unfairly charge a party with proving a negative." [Citation omitted; footnote omitted; internal quotation marks omitted.]); *Albert Mendel & Son, Inc.* v. *Krogh*, 4 Conn. App. 117, 124, 492 A.2d 536 (1985) ("The proper allocation of the burden of proof may be distilled to a question of policy and fairness based on experience in different situations. . . . A number of variables are considered in determining where the burden properly lies. One consideration is which party has readier access to knowledge about the fact in question." [Citations omitted; footnote omitted.]); see also *Murphy* v. *Wakelee*, 247 Conn. 396, 401, 721 A.2d 1181 (1998) ("[A] fiduciary claiming a benefit from his dealing with his cestui que trust . . . should be made to prove that he dealt in fairness and under the conditions prescribed by law. The full knowledge of the transaction is within his possession; he can and he must assume the burden of its proof." [Internal quotation marks omitted.]). With respect to timely written notice of an underinsured motorist claim, 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. Moreover, placing this burden on the insured would be consistent with the fact that exhaustion of the tortfeasor's policy limits, the fact of which must be established for tolling, also is an element of the insured's prima facie case of entitlement to underinsured motorist benefits. See General Statutes § 38a-336 (b); *Fiallo* v. *Allstate Ins. Co.*, 138 Conn. App. 325, 337 n.5, 51 A.3d 1193 (2012).

Although a textual analysis weighs heavily in favor of a conclusion that the insured bears the burden of establishing tolling as a matter in avoidance of a limitations period special defense, I would not conclude that this imbalance is sufficient to render the statute plain and unambiguous. Therefore, it is appropriate to consult extratextual sources, such as pertinent legislative history. See General Statutes § 1-2z (plain meaning rule). As this court has previously recognized; see *Bayusik* v. *Nationwide Mutual Ins. Co.*, 233 Conn. 474, 478 n.2, 659 A.2d 1188 (1995); that history reflects that § 38a-

336 (g) (1) was enacted in response to a pair of decisions by this court. In *Hotkowski* v. *Aetna Life & Casualty Co.*, 224 Conn. 145, 617 A.2d 451 (1992), and *McGlinchey* v. *Aetna Casualty & Surety Co.*, 224 Conn. 133, 617 A.2d 445 (1992), this court held that an insurer properly could impose a two year limit from the date of the accident to file a claim for underinsured motorist benefits, deeming applicable the minimum two year period prescribed by statute for "uninsured" motorist claims. The court rejected the proposition that the two year period commences upon, or is tolled until, the date on which the tortfeasor's policy limits are exhausted. *Hotkowski* v. *Aetna Life & Casualty Co.*, supra, 149–50; *McGlinchey* v. *Aetna Casualty & Surety Co.*, supra, 138–40. This court reasoned that, even though exhaustion of those limits was a precondition to recovery of underinsured motorist's benefits, an insured could commence an action and hold litigation in abeyance pending the outcome of recovery from the tortfeasor. *Hotkowski* v. *Aetna Life & Casualty Co.*, supra, 150 n.6. In response, a bill initially was proposed to preclude insurers from imposing a time limit for bringing underinsured and uninsured motorist claims to a period of less than two years from the date of exhaustion of the tortfeasor's policy limits. Raised House Bill No. 6853, 1993 Sess. In committee hearings on that bill, a board member of the Connecticut Trial Lawyers Association, William F. Gallagher, underscored that the exhaustion problem arises specifically in the underinsured context. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1993 Sess., pp. 541–46 (summary of testimony). The Insurance Association of Connecticut submitted a written statement proposing substantial changes to Raised House Bill No. 6853 in which it explained: "[W]e believe that the [two year after exhaustion] limitation period . . . is overly broad. It could lead to cases where an insurer is first notified of a claim seeking hundred[s] of thousands of dollars ten years or more after the injury was sustained. We respectfully suggest that the committee consider a less open-ended approach which could include permitting the use of a limitation[s] period of three years from the date of the accident. We believe that this gives claimants ample opportunity to determine whether an uninsured or underinsured claim will be made upon an insurer. To accommodate those situations in which the uninsured/underinsured claim may be reasonably anticipated but is nonetheless not 'ripe' because of unresolved liability and damage issues in the claim against the negligent party, the statute could provide for a notification procedure by which a claimant could place the uninsured/underinsured motorist insurer on notice of an anticipated claim under the policy. Such a notice would serve to preserve that claim until final resolution of the underlying claim against the negligent party. Once that underlying claim is finally resolved and a[n] uninsured/underinsured motorist claim is available to an insured,

prompt institution of a formal demand for arbitration or lawsuit should be required." Id., p. 538. Although the raised bill was reported favorably out of committee without addressing these concerns and suggestions, a substitute bill subsequently was proposed and adopted that reflected the current statutory language: (1) barring *insurers* from limiting the time to bring an action or demand arbitration for underinsured and uninsured claims to a period of less than three years from the date of the accident; and (2) permitting an *insured* to toll that period for underinsured claims subject to (a) written notice within the prescribed period that the insured "may" have such a claim and (b) commencement of an action or demand of arbitration within 180 days of exhausting the tortfeasor's coverage. Substitute House Bill No. 6853, 1993 Sess., § 2, as amended by House Amendment Schedule A. In statements during debate on Substitute House Bill No. 6853, legislators consistently described the second part as resulting in an "extension" of the limitations period. 36 S. Proc., Pt. 5, 1993 Sess., p. 1708, remarks of Senator Donald E. Williams, Jr.; see also 36 H.R. Proc., Pt. 8, 1993 Sess., p. 2751, remarks of Representative Cameron Staples ("this [bill] extends beyond the time period within which the suit may be brought"); 36 H.R. Proc., supra, p. 2753, remarks of Representative Dominic Mazzoccoli ("this provision is going to extend the period for which litigation can be filed").

Although not conclusive, the characterization of the tolling provision as intending to extend the three year (or more) limitations period is consistent with the effect of tolling as that term usually is understood. Moreover, allocating the burden between the parties is consistent with the balancing of interests that the substitute bill struck.[4] Accordingly, I would conclude that the evidence overwhelmingly supports the conclusion that § 38a-336 (g) (1) is intended to operate such that the insurer may assert the three year (or longer) period of limitation under the policy as a special defense, and the insured may plead satisfaction with both prongs of the tolling provision as a matter in avoidance of that special defense if applicable.[5] The mere fact that these issues may arise in the posture of a motion for summary judgment does not necessarily change this allocation of proof. See *Voris* v. *Middlesex Mutual Assurance Co.*, supra, 297 Conn. 600–604 (in insurer's motion for summary judgment on ground that insured's claim was time barred, once insurer established that fact, insured bore burden of establishing existence of material issue of fact as to claim that insurer had misled them to believe that their notice was sufficient); *Flannery* v. *Singer Asset Finance Co., LLC*, 128 Conn. App. 507, 516–17, 17 A.3d 509 (in insurer's motion for summary judgment on its special defense that insured's claim was filed outside limitations period, insured bore burden of establishing material issue of fact as to tolling theory

pleaded as matter in avoidance of special defense), cert. granted, 302 Conn. 902, 23 A.3d 1242 (2011).

I respectfully dissent.

[1] I agree with the majority that the defendant's concession in its motion for summary judgment that the issue of whether the tortfeasor was underinsured was in dispute necessarily would raise a genuine issue of material fact as to whether the plaintiffs had a colorable claim for underinsured motorist benefits. Nonetheless, in light of my conclusion that the trial court properly determined that the plaintiffs had failed to meet their burden of proving that tolling saved their otherwise untimely claim, this disputed issue ultimately is immaterial.

In addition, it is important to emphasize what this court is not deciding in this certified appeal. The plaintiffs make no claim that, even if the trial court properly placed the burden on them to establish a material issue of fact as to whether they met the tolling requirements, they submitted evidence to meet this burden. Therefore, I express no opinion on the merits of the trial court's conclusion that the plaintiffs failed to meet their burden of proof as to either prong of the tolling requirements of § 38a-336 (g) (1) and the policy. In their reply brief, the plaintiffs do claim that, even if the defendant met *its* threshold burden of establishing the inapplicability of the tolling requirement, they submitted documentation that created an issue of fact warranting denial of the defendant's motion for summary judgment *if the evidence is viewed in the light most favorable to them as the nonmoving party*. This contention, however, is predicated on the defendant bearing the burden of proving tolling, a proposition that I reject. In addition, the plaintiffs raise for the first time in their reply brief a claim that the policy is invalid because it conflicts with § 38a-336 (g), thus making the six year limitations period for contract actions under General Statutes § 52-576 applicable. I do not reach this claim because it is outside the scope of both the certified question and the additional issue that this court sua sponte granted the parties permission to brief; see *State* v. *Rose*, 305 Conn. 594, 604 n.9, 46 A.3d 146 (2012); and because it is well settled that a claim cannot be raised for the first time in a reply brief. See *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 59, 12 A.3d 885 (2011). Accordingly, I treat the policy and the statute as one.

[2] See, e.g., *Lagassey* v. *State*, 281 Conn. 1, 2–3, 914 A.2d 509 (2007) (concluding that trial court properly concluded that tolling provision of General Statutes § 4-160 [d] operates only to suspend running of two year limitations period under wrongful death statute and does not cause that limitations period to begin running anew after Claims Commissioner has granted permission to sue); *State* v. *Gibson*, 114 Conn. App. 295, 317, 969 A.2d 784 (2009) ("The plain language of [General Statutes] § 53a-31 [b] provides that the period of the sentence is interrupted by the issuance of a warrant, referring to a tolling of the time remaining on a defendant's sentence. This ensures that if a defendant has a six month suspended sentence, for example, and a violation of probation warrant is issued and the violation hearing is not concluded for one year that the defendant still has six months remaining on the sentence." [Internal quotation marks omitted.]), rev'd in part on other grounds, 302 Conn. 653, 31 A.3d 346 (2011).

[3] As I later explain, the tolling provision in § 38a-336 (g) (1) was enacted to address the situation in which exhaustion of the tortfeasor's coverage cannot be established until after the time limit prescribed under the policy for bringing an action expires. When exhaustion occurs well before the policy's limitation period expires, however, as the plaintiffs claim occurred in the present case, the 180 day period under the tolling provision may lapse before the three year period expires. In such cases, the insured still may benefit from the three year period. Thus, in the present case, the accident occurred on November 16, 2004, and the three year period to bring an action or demand arbitration expired on November 16, 2007. If exhaustion of the tortfeasor's coverage occurred on December 12, 2005, as the plaintiffs contend, the 180 day period to bring an action or demand arbitration would have expired on June 9, 2006, more than one year before the three year limitation period under the policy lapsed.

[4] I do not view as material to the allocation of proof question the fact that the legislature prescribed the permissible limitations period and the means to "toll" that period in the same statute. Indeed, it is not uncommon for the legislature to address both subjects in the same statute. See General Statutes §§ 4-160 (d), 47-277 (a) and 52-596. Moreover, it is more accurate to characterize this provision as a tolling statute because the insurance

policy actually sets the time limitation, as long as that limitation meets the statutory minimum, whereas the statute specifically dictates the tolling period.

[5] In the present case, the plaintiffs did not plead tolling as a matter in avoidance of the defendant's special defense that the claim was time barred under the policy and § 38a-336 (g) (1). Rather, they filed a general denial to all of the defendant's special defenses. Nonetheless, the trial court had discretion to consider this issue in connection with the plaintiffs' objection to the defendant's motion for summary judgment. See *Zatakia* v. *Ecoair Corp.*, 128 Conn. App. 362, 369, 18 A.3d 604 (concluding that trial court did not abuse its discretion in considering matter in avoidance of defendant's statute of limitations special defenses that was not pleaded by plaintiff when issue was squarely before court, defendant was given ample opportunity to respond to plaintiff's claim, and plaintiff could have amended her pleadings to conform to evidence at trial), cert. denied, 301 Conn. 936, 23 A.3d 729 (2011).