Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-312

MARCH TERM, 2019

Paul Bremel* v. Burr & Burton Seminary aka Burr & Burton Academy	}	APPEALED FROM:
	}	Superior Court, Bennington Unit, Civil Division
	}	DOCKET NO. 27-1-18 Bncv
	}	Trial Judge: David A. Barra

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the superior court's order granting defendant judgment on the pleadings with respect to plaintiff's civil lawsuit alleging that defendant terminated plaintiff's employment for unlawful reasons. The superior court ruled that the lawsuit was foreclosed by plaintiff's initial election to proceed under the grievance procedure set forth in the governing collective bargaining agreement (CBA). We affirm.

Plaintiff was a teacher employed by defendant Burr & Burton Academy between 2011 and 2017. A CBA negotiated by the school's board of trustees and the teacher's association governed the parties' employment relationship and provided standards for contract renewal and teacher discipline. Under the CBA, a grievance is defined as any claim by a teacher or the association that there has been a violation or misinterpretation of the terms of the CBA. The CBA prohibits reprisals against those involved in grievance procedures. The CBA provides that if a teacher is dismissed or suspended or the teacher's contract will not be renewed for the following year, the teacher may submit the matter to binding arbitration as the final step of a three-step grievance procedure set forth under the CBA. The CBA further provides that a teacher's election to pursue a grievance procedure, as opposed to an action at law, "shall constitute an absolute bar to the pursuit of the other." Under the CBA, "[i]f a teacher elects to institute an action at law, the Association shall have no right to file a grievance hereunder, or, if one shall have previously been filed by it, the same shall be deemed to have been withdrawn."

In 2016, the parties underwent a grievance procedure that resulted in the denial of plaintiff's appeal from his dismissal as track and field coach and his placement on an improvement placement plan. In March 2017, defendant issued a nonrenewal letter to plaintiff. Plaintiff grieved the nonrenewal. In April 2017, defendant terminated plaintiff. Plaintiff grieved the termination.

In January 2019, before completing either of the latter grievances, plaintiff withdrew from the process and filed a civil complaint against defendant, alleging breach of his employment contract by retaliation related to an earlier grievance, illegal retaliation based on leave he had taken under the Vermont Parental and Family Leave Act (VPFLA), and wrongful termination without just cause. Defendant moved for judgment on the pleadings, arguing that, even assuming the

allegations in the complaint were true, plaintiff's claims were barred as a matter of law because of his election to seek the remedies provided by the CBA's grievance procedure. Defendant asserted that, under the explicit terms of the CBA, plaintiff was required to elect between the CBA's grievance procedure or an action at law, and he chose the latter, thereby foreclosing an action at law.

Relying on the language of the CBA and this Court's decision in Morton v. Essex Town School District, the superior court ruled that plaintiff could not pursue his civil lawsuit against defendant because he elected to proceed with the CBA's grievance procedure and then failed to exhaust that remedy. See 140 Vt. 345, 348-49 (1981) ("This Court has recognized that most grievance and arbitration agreements are entered into for the precise purpose of providing an alternative to judicial remedies, and grievance procedures have been referred to as the quid pro quo of collective bargaining agreements because they provide a reasonably amicable method of resolving disputes in the least expensive and most expeditious manner." (citation omitted)). The court rejected plaintiff's argument that the latter CBA provision quoted above authorized plaintiff to withdraw from the grievance procedure and file an action at law. The court stated that the provision plaintiff relied upon barred only the association from filing or continuing with a grievance if a teacher elected to file an action at law. Noting that all three of plaintiff's counts could have been the subject of the CBA grievance process, the court ruled that defendant was entitled to judgment as a matter of law because plaintiff initially elected to pursue that process but then failed to exhaust his elected remedy.

On appeal, plaintiff challenges the dismissal of his claim alleging a violation of the VPFLA, which expressly protects employees from retaliation for taking leave under the Act. See 21 V.S.A. § 473 (providing that "employer shall not discharge or in any other manner retaliate against an employee who exercises or attempts to exercise his or her rights under" act). He points out that the CBA provides various categories of leave rights but does not specifically protect teachers from retaliation for taking leave. He argues that, given the CBA's silence concerning his retaliation claim under the VPFLA, the superior court erred in dismissing that claim because contract provisions cannot negate statutorily granted rights unless the provisions encompass those rights. See Potvin v. Champlain Cable Corp., 165 Vt. 504, 515 (1996) (rejecting argument that plaintiff failed to exhaust her administrative remedies under CBA because CBA did not protect against discrimination on basis of disability). He requests that we reverse the superior court's dismissal of that claim and remand the matter for further discovery and factfinding by a jury.

Defendant responds that plaintiff failed to preserve the argument that the VPFLA rather than the CBA governed his retaliation claim. As to the argument's merits, defendant responds that the CBA allowed plaintiff to elect an action at law, in which he could have raised his VPFLA claim, but that he chose the grievance process and then failed to exhaust that remedy. See Richardson v. Comm'n on Human Rights & Opportunities, 532 F.3d 114, 122 (2d Cir. 2008) (stating that election-of-remedies provision in that case did not waive right to judicial forum for statutory cause of action because worker was free to pursue court action).

We decline to address the merits of plaintiff's appellate argument because he failed to preserve it by raising it before the superior court. This Court "has repeatedly stressed that [it] will not address arguments not properly preserved for appeal." In re White, 172 Vt. 335, 343 (2001) (quotation omitted). "To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it." State v. Ben-Mont Corp., 163 Vt. 53, 61 (1994) (citation omitted); see In re Entergy Nuclear Vt. Yankee, LLC, 2007 VT 103, ¶ 9, 182 Vt. 340 ("The purpose of the rule is to ensure that the original forum is given an opportunity to rule on an issue prior to [the Supreme Court's] review." (quotation

omitted)). We have applied this rule in situations in which the trial court granted defendants' motion to dismiss a claim. See Gilman v. Maine Mut. Fire Ins. Co., 2003 VT 55, ¶ 12 n.2, 175 Vt. 554 (mem.) (refusing to consider whether violation of safety statute was negligence per se because appellants failed to present argument before superior court).

We reject plaintiff's contention that he need only to appeal the superior court's decision because the court failed to analyze his retaliation claim and he objected to its dismissal in his memorandum in opposition to defendant's motion to dismiss. The superior court dismissed plaintiff's three claims on the basis argued by defendant in its motion to dismiss—that plaintiff elected to proceed with all of his claims under the CBA's grievance procedure, which made that his exclusive remedy, and he failed to exhaust that remedy. Nonetheless, in his opposition to defendant's motion to dismiss, plaintiff did not argue, for the reasons he states here, that his VPFLA claim should survive notwithstanding his election to proceed under the grievance procedure.

Affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice