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AMMAR I. *v.* DEPARTMENT OF CHILDREN AND FAMILIES*
(AC 45265)

Moll, Clark and Lavine, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court denying in part its motion to dismiss the plaintiff's complaint. In his complaint, the plaintiff, a Muslim, alleged that the defendant discriminated against him on the basis of his religion in violation of the applicable statutes (§§ 46a-58 (a) and 46a-71 (a)) during proceedings related to the neglect and custody of his three children and the termination of his parental rights. The trial court granted in part the defendant's motion to dismiss, determining that the majority of the claimed discriminatory conduct was time barred pursuant to the applicable statute ((Rev. to 2019) § 46a-82 (f)). Any claims arising during or after the plaintiff's termination of parental rights trial, however, were not time barred, and the trial court determined, inter alia, that the plaintiff had standing to bring his claims and that his claims for money damages were not barred by sovereign immunity. Thereafter, the defendant filed a motion to reargue, raising, for the first time, a claim that the trial court lacked jurisdiction on the basis of the litigation privilege. The trial court denied the motion and concluded that the litigation privilege did not bar the plaintiff's discrimination claims. *Held* that the trial court erred in denying in part the defendant's motion to dismiss because, on the basis of a review of all of the public policy concerns raised by the parties, this court concluded that the plaintiff's claims were barred by the absolute immunity afforded by the litigation privilege: the discriminatory conduct alleged by the plaintiff did not subvert the underlying purpose of a judicial proceeding because the elements of §§ 46a-58 (a) and 46a-71 (a) do not contemplate a claim based on the improper use of a judicial proceeding but, rather, focus on discriminatory treatment based on membership in a protected class, §§ 46a-58 (a) and 46a-71 (a) do not provide the sort of safeguards against inappropriate retaliatory litigation that were built into the elements of vexatious litigation and abuse of process claims, the allegations in the plaintiff's complaint challenged the defendant's participation in a properly brought legal proceeding, and the complaint did not allege that the defendant initiated the termination proceedings or that it did so for an improper purpose, as the termination petitions were filed by the attorneys for the plaintiff's children and the defendant became involved in the underlying proceedings only because the plaintiff filed an emergency ex parte order of temporary custody against the children's mother, which resulted in the trial court sua sponte removing the children from both parents' care and vesting custody with the Commissioner of Children and Families; moreover, contrary to the plaintiff's assertions, his claims were predicated on conduct similar in essential respects to defamatory statements, namely, the alleged communication of false or misleading statements by the defendant's attorneys and witnesses during the termination of parental rights proceedings, and, unlike in *MacDermid, Inc.* v. *Leonetti* (310 Conn. 616), the plaintiff in the present case did not allege in his complaint that the defendant brought a claim or commenced proceedings solely because the plaintiff exercised the rights afforded to him by statute or that it did so solely because of the plaintiff's religion, as the complaint made clear that the defendant did not initiate the termination proceedings and did not become involved until after the plaintiff filed an emergency ex parte order of temporary custody; furthermore, eliminating the litigation privilege for this type of discrimination claim risked a wave of retaliatory litigation against the defendant and its employees by disgruntled parents who have had their children removed from their care or who have had their parental rights terminated, and could interfere significantly with the defendant's general statutory (§ 17a-90) obligation of assuring the adequate care, health and safety of children who require the protection of the state, and, although this court recognized the important remedial

purposes that §§ 46a-58 (a) and 46a-71 (a) serve, it could not presume, in the absence of a clear statement of intent by the legislature, that the legislature intended to eliminate the important protections afforded by the litigation privilege in all instances in which a plaintiff asserted a discrimination claim; additionally, other remedies existed for addressing and disincentivizing the alleged conduct, as the allegations that the defendant handled the case inappropriately were litigated during the child protection proceedings and, to the extent that the plaintiff believed that the defendant's participation in the proceedings was vexatious or constituted an abuse of process, he could have sought authorization from the claims commissioner to bring those claims in court for monetary damages.

Argued March 1—officially released June 20, 2023

Procedural History

Action to recover damages for the defendant's alleged discrimination, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Morgan*, *J.*, denied the defendant's motion to dismiss, and the defendant appealed to this court; subsequently, this court granted the motion to intervene as an appellee filed by the Commission on Human Rights and Opportunities. *Reversed*; *judgment directed.*

Colleen B. Valentine, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Matthew Larock*, assistant attorney general, for the appellant (defendant).

Ammar I., self-represented, the appellee (plaintiff).

Michael E. Roberts, human rights attorney, for the appellee (intervenor Commission on Human Rights and Opportunities).

Opinion

CLARK, J. In this discrimination action, the defendant, the Department of Children and Families, appeals from the judgment of the trial court denying its motion to dismiss the complaint filed by the self-represented plaintiff, Ammar I., and from the court's denials of two of its motions to reargue.[1] On appeal, the defendant claims that the court erred in concluding that (1) the litigation privilege did not bar the plaintiff's claims, (2) sovereign immunity did not bar the plaintiff's claim for money damages brought pursuant to General Statutes §§ 46a-58 (a) and 46a-71 (a), and (3) the plaintiff had standing to maintain this action following the termination of his parental rights. For the reasons that follow, we agree with the defendant on its first claim and, therefore, reverse the judgment of the trial court.[2]

We begin by setting forth the relevant procedural history of the case. On or about July 11, 2019, the plaintiff filed a complaint against the defendant with the Commission on Human Rights and Opportunities (commission) alleging that the defendant subjected him to a continuous course of religious discrimination during his ongoing child protection cases. On October 17, 2019, the plaintiff obtained a release of jurisdiction from the commission, and he commenced this action against the defendant by complaint dated January 10, 2020. The one count complaint alleged that the defendant discriminated against him on the basis of his religion in violation of §§ 46a-58 (a) and 46a-71 (a),[3] and was predicated on a series of events, including a court order placing the plaintiff's three children in the temporary custody of the Commissioner of Children and Families (commissioner), the filing of neglect petitions against the plaintiff after the children's mother reported that he had assaulted her, the defendant's placement of the children with a practicing Christian couple instead of a Muslim family, and a court order terminating the plaintiff's parental rights. He sought damages in the amount of $65 million and such other relief as the court deemed just and proper.

On March 19, 2020, the defendant filed a motion to dismiss the plaintiff's complaint in its entirety on a host of different grounds, including that the plaintiff's claims were an impermissible collateral attack on multiple final judgments of the Superior Court, certain claims were barred by res judicata and collateral estoppel, the plaintiff lacked standing to assert claims pertaining to his parental rights or his biological children because his parental rights had been terminated, sovereign immunity barred the claims, and the claims were time barred pursuant to General Statutes (Rev. to 2019) § 46a-82 (f) because they arose from conduct that allegedly occurred more than 180 days before the plaintiff filed his complaint with the commission.[4] On April 14, 2020, the plaintiff filed an objection to the defendant's

motion to dismiss.

On February 18, 2021, the court, *Morgan, J.*, issued an order directing the parties to submit supplemental briefs on various issues the defendant raised in its motion to dismiss. The parties submitted their supplemental briefs to the court on May 3, 2021.

On August 24, 2021, the court issued a memorandum of decision granting in part and denying in part the defendant's motion to dismiss. The court agreed with the defendant that "the vast majority of the claimed discriminatory conduct the plaintiff relies upon in his [commission] complaint is time barred." Specifically, the court explained that "[t]he actions cited by [the defendant] as untimely allegations or claims—the placement of the plaintiff's children with a non-Muslim foster family in July, 2015, the court's August 7, 2015 order sustaining temporary custody of the children in [the commissioner], the neglect decision, and the three permanency plans granted by the court—are all discrete acts which occurred outside the 180 day time period allowed under § 46a-82 (f)." The court therefore concluded that, "to the extent the plaintiff's discrimination claim is based on events arising prior to January 12, 2019, the court finds that it is time barred."

The court, however, was not persuaded by the defendant's other jurisdictional claims. It found that, on the basis of the record before it, the present action was not a collateral attack on any prior judgment because no other court had adjudicated the issue of whether the defendant discriminated against the plaintiff solely on the basis of his religious creed. The court also disagreed with the defendant that its defenses of res judicata and collateral estoppel were properly raised by way of a motion to dismiss. The court also rejected the defendant's argument that sovereign immunity barred the plaintiff's claim for money damages under §§ 46a-58 and 46a-71. Lastly, the court concluded that the plaintiff had standing to bring his claim because, in the court's view, the plaintiff's claim was not premised on the termination of his parental rights. Rather, the court construed the plaintiff's allegations as a claim that the defendant discriminated against him personally because he is Muslim.

On September 3, 2021, the defendant filed a motion to reargue, directing the court to areas in which it believed the court had erred in applying the law or had overlooked relevant legal authority. The defendant also raised, for the first time, a claim that the court lacked jurisdiction on the basis of the litigation privilege. On September 14, 2021, the court denied the defendant's motion to reargue in all respects except as to its claim that the litigation privilege applied and indicated that it would schedule a hearing concerning the applicability of the litigation privilege.

In an order dated November 24, 2021, the court concluded that the litigation privilege did not bar the plaintiff's discrimination claims. The court explained that, "while the plaintiff's complaint contains numerous allegations about [the defendant] and its attorneys' conduct in connection with the neglect, custody and termination of parental rights proceedings, both before and after January 12, 2019 (events prior to which the court has found time barred . . .), the plaintiff's complaint in this action claims that [the defendant] mistreated him throughout his interaction with the agency and used the legal process in an improper manner in order to discriminate against him because he is Muslim. Accordingly, the court finds that the plaintiff's discrimination claim is more akin to a claim of vexatious litigation or abuse of process (where the litigation privilege does not apply), as opposed to a claim for defamation or fraud (where the litigation privilege would apply)." (Citation omitted.)

Dissatisfied with the court's ruling, the defendant filed a motion to reargue on December 14, 2021, claiming that the court "overlooked legal authority and/or made an error in applying the law with respect to its holding that the plaintiff's claims in this case are not barred by [the] litigation privilege." On January 10, 2022, the court summarily denied the defendant's motion to reargue. This appeal followed.

We begin by setting forth our standard of review. We review the trial court's ultimate legal conclusions and its resulting denial of a motion for dismissal de novo. See *Rioux* v. *Barry*, 283 Conn. 338, 343, 927 A.2d 304 (2007). In conducting this review, "we take the facts to be those alleged in the complaint, construing them in a manner most favorable to the pleader." *Beecher* v. *Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 132, 918 A.2d 880 (2007). We are mindful that the doctrine of absolute immunity, also referred to as the litigation privilege,[5] "implicates the court's subject matter jurisdiction"; *Dorfman* v. *Smith*, 342 Conn. 582, 594, 271 A.3d 53 (2022); and that "every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Tyler* v. *Tatoian*, 164 Conn. App. 82, 87, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016).[6]

Before turning to the merits of the appeal, we begin with a general overview of the litigation privilege. The immunity of parties and witnesses from subsequent liability, in the form of damages, for their participation in judicial proceedings is well established in both English and Connecticut common law. See, e.g., *Charles W. Blakeslee & Sons* v. *Carroll*, 64 Conn. 223, 232, 29 A. 473 (1894), overruled in part on other grounds by *Petyan* v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986); *Dawkins* v. *Lord Rokeby*, 176 Eng. Rep. 800, 812 (L.R.C.P. 1866); *Henderson* v. *Broomhead*, 157 Eng.

Rep. 964, 968 (L.R. Exch. 1859). "In its most basic form, the litigation privilege provides that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. . . . *Hopkins* v. *O'Connor*, [282 Conn. 821, 830–31, 925 A.2d 1030 (2007)]. This includes statements made in pleadings or other documents prepared in connection with a court proceeding. . . . *Scholz* v. *Epstein*, [341 Conn. 1, 28–29, 266 A.3d 127 (2021)]." (Internal quotation marks omitted.) *Deutsche Bank AG* v. *Vik*, 214 Conn. App. 487, 497, 281 A.3d 12, cert. granted, 345 Conn. 964, 285 A.3d 388 (2022).

The litigation privilege "is grounded [on] the proper and efficient administration of justice. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of [actions seeking damages for statements made by such participants in the course of the judicial proceeding]." (Internal quotation marks omitted.) *Priore* v. *Haig*, 344 Conn. 636, 646, 280 A.3d 402 (2022). "Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial . . . proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit." *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005); see also *Scholz* v. *Epstein*, supra, 341 Conn. 10 (setting forth policy rationales underlying litigation privilege).

The litigation privilege, which was first recognized to bar persons accused of crimes from suing their accusers for defamation, has been widely extended to causes of action beyond claims of defamation. See *Deutsche Bank AG* v. *Vik*, supra, 214 Conn. App. 497. For example, our courts have applied the privilege to various other torts, including claims of intentional interference with contractual or beneficial relations arising from statements made during judicial proceedings; see *Rioux* v. *Barry*, supra, 283 Conn. 343; and claims brought under remedial statutes, such as the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., which broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. See, e.g., General Statutes § 42-110b (a); *Dorfman* v. *Smith*, supra, 342 Conn. 585; *Tyler* v. *Tatoian*, supra, 164 Conn. App. 84.

The litigation privilege is not without limitations, however. "Specifically, the litigation privilege does not bar claims for abuse of process, vexatious litigation, and malicious prosecution. . . . This is because whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests . . . ." (Citation omitted; internal quotation marks omitted.) *Dorfman* v. *Smith*, supra, 342 Conn.

592.

In determining whether absolute immunity should apply to a particular cause of action, we generally look at "(1) whether the alleged conduct subverts the underlying purpose of a judicial proceeding, in a similar way to how conduct constituting abuse of process and vexatious litigation does; (2) whether the alleged conduct is similar in essential respects to defamatory statements, inasmuch as a defamation action is barred by the privilege; and (3) whether the alleged conduct may be adequately addressed by other available remedies." *Scholz* v. *Epstein*, supra, 341 Conn. 10–11, citing *Simms* v. *Seaman*, 308 Conn. 523, 545, 552, 69 A.3d 880 (2013). Of course, these factors are " 'simply instructive' . . . ." *Dorfman* v. *Smith*, supra, 342 Conn. 593. "We are not required to rely exclusively or entirely on these factors, but, instead, they are useful when undertaking a careful balancing of all competing public policies implicated by the specific claim at issue and determining whether affording parties this common-law immunity . . . is warranted." Id., 593–94.

The plaintiff's complaint alleges that the defendant discriminated against him on the basis of his religion in violation of §§ 46a-58 (a) and 46a-71 (a), predicated on a series of events, including a court order placing the plaintiff's three children in the temporary custody of the commissioner, the filing of neglect petitions against the plaintiff, the placement of the children with a practicing Christian couple, and the termination of the plaintiff's parental rights. Significantly, the trial court determined that all claims arising earlier than January 12, 2019, were time barred.

On appeal, the defendant claims that the court erred when it concluded that the plaintiff's action is not barred by absolute immunity arising from the litigation privilege. It argues that the only allegations in the plaintiff's complaint that are not time barred concern the defendant's communications, conduct, and legal positions asserted during the proceedings for the termination of the plaintiff's parental rights. The defendant contends that the alleged conduct is precisely the sort of conduct that the litigation privilege is intended to protect. In its view, the defendant's brief makes clear that the plaintiff's purpose for bringing this action is to relitigate the termination of his parental rights and to retaliate against the defendant for its in-court advocacy throughout the long-standing child protection litigation involving the plaintiff.

The plaintiff and the commission disagree. The plaintiff argues generally that the defendant "primarily used the legal system against [him to] accomplish a purpose that it was not designed for" and that the court "correctly construed the pleadings as being akin to an abuse of process claim or vexatious litigation claim, where absolute immunity does not apply." (Emphasis omit-

ted.) The commission elaborates on the plaintiff's point, arguing that the "closest authority" for why the litigation privilege should not apply in the present case is our Supreme Court's decision in *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 79 A.3d 60 (2013). In that case, our Supreme Court held that the litigation privilege did not apply to a retaliation claim brought by an employee pursuant to the Workers' Compensation Act (act), General Statutes § 31-275 et seq., in violation of General Statutes (Rev. to 2009) § 31-290a,[7] predicated on allegations that the employer's action against the employee for civil theft, fraud, unjust enrichment, and conversion was brought solely to retaliate against the employee for exercising his rights under the act. Id., 617, 622, 626. The commission contends that the court determined in *MacDermid, Inc.*, that the employee's claim of retaliation was sufficiently similar to vexatious litigation or abuse of process to avoid the litigation privilege and that the court's analysis "may be readily adapted to the claims at issue" in the present case.

We have found no appellate authority addressing directly whether the litigation privilege applies to the particular claims before us. As a result, we must undertake "a careful balancing of all competing public policies implicated by the specific claim at issue" and determine whether affording the defendant absolute immunity is warranted in this case. *Dorfman* v. *Smith*, supra, 342 Conn. 593–94. In making that determination, we consider all of the public policy concerns raised by the parties—including those raised in *Simms* and the others that are unique to the present case. See *Scholz* v. *Epstein*, supra, 341 Conn. 27.

First, we consider whether the plaintiff's claims are the kinds that subvert the underlying purpose of a judicial proceeding. We begin with a review of the statutes under which the plaintiff's claims are brought.[8] See id., 18–19 (reviewing language of statutory theft statute). Section 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability, status as a veteran or status as a victim of domestic violence." Section 46a-71 (a) provides: "All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence."

Unlike claims for vexatious litigation[9] and abuse of process,[10] the elements of these discrimination statutes do not, on their face, contemplate a claim based on the improper use of a judicial proceeding. Rather, their clear focus is on discriminatory treatment based on membership in a protected class. See *Scholz* v. *Epstein*, supra, 341 Conn. 15–16 (explaining that focus is on *cause of action* rather than on *allegations* in complaint). Nor do these statutes provide the sort of safeguards against inappropriate retaliatory litigation that are built into the elements of vexatious litigation and abuse of process claims. To prevail on a vexatious litigation claim, for instance, a plaintiff must prove that the prior action terminated in the plaintiff's favor. See *Simms* v. *Seaman*, supra, 308 Conn. 542. This requirement "provide[s] adequate room for both appropriate incentives to report wrongdoing and protection of the injured party's interest in being free from unwarranted litigation." (Internal quotation marks omitted.) Id. And to prevail on an abuse of process claim, a plaintiff must prove that the defendant used the legal process "*primarily* to accomplish a purpose for which it [was] not designed . . . ." (Emphasis in original.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987). Our courts have observed that "the [use] of 'primarily' is meant to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." (Internal quotation marks omitted.) Id. The plaintiff's claims do not by their nature include such protections against potential abuse.

Our Supreme Court has " 'refused to apply absolute immunity to causes of action alleging the improper use of the judicial system' but ha[s] applied immunity to claims premised on factual allegations that challenge the defendant's participation in a properly brought judicial proceeding. . . . The former involves the improper use of the courts 'to accomplish a purpose for which [the courts were] not designed' and is therefore not protected by the litigation privilege. . . . The latter does not involve consideration of whether the underlying purpose of the litigation was improper and, thus, is entitled to absolute immunity, even if the plaintiff alleges that the attorney's conduct constituted an improper use of the courts.' " (Citations omitted.) *Scholz* v. *Epstein*, supra, 341 Conn. 14.

When we go beyond the face of the statute and look at the allegations that remain in the plaintiff's complaint—the ones that are not time barred—we find that they challenge the defendant's participation in a properly brought judicial proceeding. Indeed, by January 12, 2019, the earliest date that the plaintiff could use to support his discrimination claim, the plaintiff's termination of parental rights trial had just commenced. See *In re Omar I.*, 197 Conn. App. 499, 506, 231 A.3d 1196

("[t]he court, *Burgdorff*, *J.*, conducted a trial on the petitions over the course of fifteen days between January and April, 2019"), cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020). The complaint does not allege that the defendant initiated those termination proceedings at all, let alone for an improper purpose. Rather, it is clear from the allegations in the complaint that the termination petitions were filed by the attorneys for the plaintiff's own children and that the defendant's participation stemmed from those properly brought and ultimately successful petitions.[11] See id., 505 ("[i]n November, 2018, attorneys representing the children filed petitions to terminate the parental rights of the [plaintiff] and the mother" (footnote omitted)). As the defendant points out, its involvement in the proceedings was compelled by state law, as "[t]he department is a party to *any* order of temporary custody petition, neglect petition, and termination of parental rights petition filed with the Connecticut juvenile court—even where, as here, the department did not file the petition." (Emphasis in original.) See, e.g., General Statutes §§ 17a-112 and 46b-129. It also is clear from the complaint that the defendant became involved in the underlying child protection proceedings in the first instance only because the plaintiff himself filed an emergency ex parte order of temporary custody against the children's mother, which ultimately resulted in the trial court, sua sponte, removing the children from both parents' care and vesting custody with the defendant.[12] See *In re Omar I.*, supra, 508 ("[t]he court, *Abery-Wetstone*, *J.*, issued a bench order of temporary custody removing the children from [their] parents' care, and vested their care and custody with [the commissioner] based on the allegations contained in [the plaintiff's] affidavit" (internal quotation marks omitted)).

Furthermore, contrary to the contentions of the plaintiff and the commission on appeal, the plaintiff's claim, like a defamation claim, is predicated on the alleged communication of false or misleading statements by the defendant's attorneys and witnesses during the termination of parental rights proceeding. See *Simms* v. *Seaman*, supra, 308 Conn. 545, 548 (considering whether plaintiff's fraud claim was premised on communication of false statement, like defamation claim). For example, the allegations in the complaint that are not time barred allege, inter alia, that, "[a]s of the date of this complaint, the defendant continues to take the position that the plaintiff is physically violent, that the plaintiff committed domestic violence around the children and that the plaintiff assaulted the mother. The defendant reiterated that position in writing in its September 30, 2019 response to the plaintiff's [commission] complaint and in its brief to the Appellate Court filed on November 14, 2019." The plaintiff's complaint further

alleges that the "[d]efendant wilfully, wantonly and unlawfully submitted false evidence to the Superior Court to advocate for termination of the plaintiff's parental rights in order to unlawfully deprive the plaintiff of his parental rights"; that the "[d]efendant wilfully, wantonly and unlawfully through its agent acting in his official capacity . . . testified falsely in trial to advocate for terminating the plaintiff's parental rights"; that the "[d]efendant through its counsel . . . submitted to the Superior Court false material evidence while being aware of its falsity in order to unlawfully deprive the plaintiff of his right to the integrity of his family and to deprive the plaintiff of his constitutional right to raise his own children"; and that the "[d]efendant through its counsel . . . submitted to the Appellate Court a brief containing several misrepresentations unlawfully advocating for termination of the plaintiff's parental rights."

Our courts repeatedly have held that communications such as these, that "are uttered or published in the course of judicial proceedings, even if they are published *falsely and maliciously* . . . nevertheless are absolutely privileged provided they are pertinent to the subject of the controversy." (Emphasis added.) *Hopkins* v. *O'Connor*, supra, 282 Conn. 838. On that point, our Supreme Court has stated that "the privilege clearly applies" to a plaintiff's claim "premised on false statements contained in pleadings and documents related to the litigation—such as the allegedly false statements contained in the defendant's answer, special defense, and discovery responses . . . ." *Dorfman* v. *Smith*, supra, 342 Conn. 602. It also has made clear that, aside from a few exceptions, the litigation privilege generally bars claims against attorneys for their communications and conduct during judicial proceedings. See *Scholz* v. *Epstein*, supra, 341 Conn. 10 ("the privilege protects the rights of clients who should not be imperiled by subjecting their legal advisors to the constant fear of lawsuits arising out of their conduct in the course of legal representation" (internal quotation marks omitted)).

The commission gives short shrift to these authorities and focuses primarily on our Supreme Court's decision in *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 616. The commission argues that the defendant cannot identify a basis on which to distinguish the retaliation claim at issue in this case from the claims at issue in *MacDermid, Inc.* It contends that the claims in the present case, like those in *MacDermid, Inc.*, all "assert that an individual subject to a particular remedial statute initiated or used litigation for reasons or in a manner that subverts the purposes of the judicial system." The commission further argues that the same remedial policy goals discussed in *MacDermid, Inc.*, apply to most claims of discrimination brought under the statutes over which the commission has jurisdiction. We are not per-

suaded.

The plaintiff's claims differ from the claim at issue in *MacDermid, Inc.*, in multiple respects and in ways that, on balance, lead us to conclude that the plaintiff's claims are barred by absolute immunity. First, the narrow issue in *MacDermid, Inc.*, was whether absolute immunity applied to a retaliatory discrimination claim brought pursuant to § 31-290a that was predicated on allegations that an employer had sued its employee *solely* because the employee exercised his rights under the act. *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 617, 622. The court ultimately determined that, like claims for vexatious litigation and abuse of process, which explicitly hold individuals liable for using the judicial process for an illegitimate purpose, "§ 31-290a is designed to prevent, or hold the employer liable for, the improper use of the judicial process for the illegitimate purpose of retaliating against an employee for his exercise of his rights under the act." Id., 631. In concluding that the employee's claim under the act was not barred by the litigation privilege, the court observed that the specific allegations the employee made in support of his § 31-290a claim arguably included even more stringent safeguards against abuse than the safeguards that are built into an abuse of process claim because he pleaded in his complaint, and therefore was required to prove, "that the plaintiff filed its claims against him '*solely* because [the employee] exercised his rights under the [act].' " (Emphasis in original.) Id., 634–35.

In contrast, the plaintiff's claims in this case that are not time barred are predicated on the alleged communication of false or misleading statements by the defendant's attorneys and witnesses during the plaintiff's termination of parental rights proceedings. Notably, there is no allegation in the plaintiff's complaint, like there was in *MacDermid, Inc.*, that the defendant brought a claim or commenced proceedings *solely* because the plaintiff exercised rights afforded to him by statute. Nor are there allegations that the defendant brought a claim or commenced proceedings *solely* because of the plaintiff's religion. As previously explained, the complaint makes clear that the defendant in this case did not initiate the termination proceedings against the plaintiff and that the defendant became involved with the plaintiff and his family in the first instance only after the plaintiff himself filed an emergency ex parte order of temporary custody against the children's mother, which resulted in the trial court, sua sponte, vesting custody of the children with the commissioner. Although there is no question that the plaintiff in this case makes allegations concerning judicial proceedings, unlike the plaintiff in *MacDermid, Inc.*, he does not allege that the defendant used the judicial proceedings for a purpose for which the courts were not designed. See *Dorfman* v. *Smith*, supra, 342 Conn. 599 ("Rather than subverting the purpose of the proceedings, the alleged conduct

would have rendered the proceeding unfair. As with claims of fraud, although we do not condone such conduct, such unfairness does not bar absolute immunity . . . .").

Second, our Supreme Court made clear in *MacDermid, Inc.*, that the claim therein arose from a "somewhat unique confluence of circumstances . . . ." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 636. In determining that the interests weighed against applying the privilege, the court found it significant that the vast majority of retaliation claims under the act did not involve litigation related conduct of an employer and that any chilling effect on employers would be de minimis. Id., 635–36. The court emphasized that "the potential for a retaliation claim as is brought [in the present case] is *extremely limited* in type and circumstance" and agreed with the trial court that "[t]his limited potential for a § 31-290a claim brought in response to an employer's initiation of litigation against an employee weighs against applying absolute immunity to bar the defendant's counterclaim . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 636.

The same cannot be said with respect to the claims the plaintiff asserts in the present case against the defendant. Eliminating the litigation privilege for these types of discrimination claims—which are easy to allege but hard to prove—could open the floodgates to a wave of retaliatory litigation against the defendant and its employees by disgruntled parents who have had their children removed from their care or who have had their parental rights terminated. See *Simms* v. *Seaman*, supra, 308 Conn. 568 ("[A]brogation of the litigation privilege to permit claims of fraud could open the floodgates to a wave of litigation in this state's courts challenging an attorney's representation, especially in foreclosure and marital dissolution actions in which emotions run high and there may be a strong motivation on the part of the losing party to file a retaliatory lawsuit. Abrogation of the privilege also would apply to the claims of pro se litigants who do not understand the boundaries of the adversarial process, which could give rise to much unnecessary and harassing litigation."). Indeed, eliminating the privilege for claims like those asserted in this case could interfere significantly with the defendant's general statutory obligation of assuring the adequate care, health, and safety of children that require the protection of the state; see General Statutes § 17a-90; as the fear of future retaliatory litigation by parents could inhibit the conduct of the defendant and its agents during the course of litigation necessary to fulfill its statutory charge.

The commission nevertheless contends that, in light of the remedial nature of our antidiscrimination laws, there are strong public policy reasons for not applying

the litigation privilege to the plaintiff's claim of discrimination. It goes further, arguing that the litigation privilege should not apply to most claims of discrimination and appears to suggest that our discrimination statutes have, in effect, abrogated the litigation privilege. But the commission has not cited, and we have not found, any provision in § 46a-58 or § 46a-71 (or elsewhere) that explicitly abrogates the common-law litigation privilege. See *Hopkins* v. *O'Connor*, supra, 282 Conn. 843 ("[a]lthough the legislature may eliminate a [common-law] right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed" (internal quotation marks omitted)); see also *Dorfman* v. *Smith*, supra, 342 Conn. 620 (concluding that plaintiff's remedial claim pursuant to Connecticut Unfair Insurance Practices Act was barred by litigation privilege and noting that legislature did not explicitly abrogate privilege). Although we recognize the important remedial purposes that our antidiscrimination statutes serve, this court cannot presume, in the absence of a clear statement of intent by our legislature, that it intended to go so far as to eliminate the important protections afforded by the litigation privilege in all instances in which a plaintiff asserts a discrimination claim.

Moreover, other remedies exist for addressing and disincentivizing the alleged conduct. The plaintiff's claims in this case stem from his involvement in long-standing child protection litigation and the eventual termination of his parental rights. The allegations that the defendant handled his case inappropriately can be, and in fact were, litigated during the child protection proceedings. See *In re Omar I.*, supra, 197 Conn. App. 503–504. As the defendant points out, the plaintiff was free to raise his claims that the department's reunification services were inadequate due to his religion or that the department's positions were factually incorrect or simply pretext for discrimination. He similarly was free to raise his claim that the termination of his parental rights was not in the children's best interests.

To the extent the plaintiff believed that the defendant's participation in the proceedings was vexatious or constituted an abuse of process, he could have sought authorization from the claims commissioner to bring those claims in court for monetary damages. See General Statutes § 4-160 (a) ("[w]henever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable"); see also *Morneau* v. *State*, 150 Conn. App. 237, 248, 90 A.3d 1003 (discussing procedure claimant must follow to obtain permission to sue state for monetary damages), cert. denied, 312 Conn. 926, 95 A.3d 522 (2014).

We note that a number of federal courts also have held that absolute immunity extends in certain circumstances to attorneys and employees who are responsible for initiating or participating in juvenile dependency or termination of parental rights proceedings. In *Frazier* v. *Bailey*, 957 F.2d 920, 931–32 n.12 (1st Cir. 1992), for instance, the United States Court of Appeals for the First Circuit—in dismissing the plaintiff's claims of negligence, gross negligence, defamation, intentional infliction of emotional distress, and pursuant to the Massachusetts Civil Rights Act—observed that "courts have provided social workers and other public officials with absolute immunity for actions involving the initiation and prosecution of child custody or dependency proceedings. See *Millspaugh* v. *County Dept. of Public Welfare*, 937 F.2d 1172, 1176 (7th Cir.) (social worker immune from suit for failure to furnish information to the court and pursuing litigation after parents were clearly entitled to custody), cert. denied, [502 U.S. 1004], 112 S. Ct. 638, 116 L. Ed. 2d 656 (1991); *Stem* v. *Ahearn*, [908 F.2d 1, 6 (5th Cir. 1990)] (social worker possesses absolute immunity when testifying at a child-custody hearing) [cert. denied, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991)]; *Meyers* v. *Contra Costa County Dept. of Social* [*Services*], 812 F.2d 1154, 1156–57 (9th Cir.) (social workers immune as quasi-prosecutorial officers when initiating child dependency proceedings), cert. denied, 484 U.S. 829, 108 S. Ct. 98, 98 L. Ed. 2d 59 (1987); *Malachowski* v. [*Keene*], 787 F.2d 704, 712–13 (1st Cir.) (juvenile officer is immune from damages when initiating juvenile delinquency proceeding), cert. denied, 479 U.S. 828, 107 S. Ct. 107, 93 L. Ed. 2d 56 (1986); *Kurzawa* v. *Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (guardian ad litem retains absolute immunity to enable him to act in the best interest of the child; psychiatrists providing information to court entitled to absolute immunity as functionally analogous to witnesses)." The United States Court of Appeals for the Second Circuit similarly has held that an attorney for a county department of social services who "initiates and prosecutes child protective orders and represents the interests of the [d]epartment [of social services] and the [c]ounty in [f]amily [c]ourt" is entitled to absolute immunity. *Walden* v. *Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984). In *Walden*, the court concluded that, given "the importance of the . . . activities [of the department of social services], the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims," the attorney must be accorded absolute immunity from claims for damages brought under 42 U.S.C. § 1983, the primary remedial statute for asserting federal civil rights claims against local public entities, officers, and employees. Id.; see also *Cornejo* v. *Bell*, 592 F.3d 121, 128 (2d Cir.) ("[w]e conclude that the lawyer defendants in the instant case were fulfilling similar functions [as those described in

Walden], and that the district court thus properly extended to those defendants absolute immunity from the § 1983 claims"), cert. denied, 562 U.S. 948, 131 S. Ct. 158, 178 L. Ed. 2d 243 (2010).

In addition, at least one other state with a litigation privilege similar to ours has held that its privilege extends to claims of discrimination. For example, in *Peterson* v. *Ballard*, 292 N.J. Super. 575, 579–80, 679 A.2d 657 (App. Div.), cert. denied, 147 N.J. 260, 686 A.2d 761 (1996), the New Jersey Appellate Division considered whether the litigation privilege applied to a plaintiff's claim under New Jersey's Law Against Discrimination, New Jersey Statutes Annotated §§ 10:5-5 (a) and 10:5-12 (d), arising from an attorney's interview of a witness in anticipation of trial. During the interview, the plaintiff alleged that the attorney used threats and intimidation to discourage her from testifying for a coworker in a sexual harassment case against their employer and from filing her own harassment claim. Id. In affirming the dismissal of the plaintiff's claims, the court held that "the litigation privilege attaches to [a lawyer's] pre-trial communications with witnesses even though they are alleged to have been conducted in a tortious manner." Id., 589. The court also concluded that the Law Against Discrimination did not abrogate the well established privilege, noting that "implied abrogation of the litigation privilege is not favored." Id., 586. More recently, in *Loigman* v. *Township Committee*, 185 N.J. 566, 584, 588, 889 A.2d 426 (2006), the New Jersey Supreme Court, citing approvingly to *Peterson*, concluded that the litigation privilege also applies to a federal claim under 42 U.S.C. § 1983.

On the basis of our review of all of the public policy concerns raised by the parties—including those raised in *Simms* and the others unique to the present case—we conclude that the plaintiff's claims are barred by the absolute immunity afforded by the litigation privilege.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss the complaint in its entirety.

In this opinion the other judges concurred.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

[1] On October 6, 2022, after the defendant filed its principal brief in this appeal but before the plaintiff filed his appellee brief, the Commission on Human Rights and Opportunities (commission) filed a motion to intervene in the appeal as an additional appellee pursuant to General Statutes § 46a-103. General Statutes § 46a-103 provides in relevant part that "[t]he commission, through its counsel or the Attorney General, may intervene as a matter of right in any action brought in accordance with section 46a-100." The commission argued that intervention was appropriate because it had a strong interest in the issues presented and its interests were not properly represented. It argued that the defendant's claim that sovereign immunity bars claims under General Statutes §§ 46a-58 (a) and 46a-71 "poses a risk to the commission's interest, mission, and authority that extends far beyond the

limits of the individual case." This court granted the commission's motion on October 19, 2022, and the commission filed its appellate brief on November 30, 2022.

[2] In light of our conclusion, we need not reach the defendant's sovereign immunity or standing claims.

[3] General Statutes § 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability, status as a veteran or status as a victim of domestic violence."

Although § 46a-58 (a) was amended by No. 22-82, § 11, of the 2022 Public Acts, that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

General Statutes § 46a-71 (a) provides: "All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence."

Although § 46a-71 (a) was amended by No. 22-82, § 17, of the 2022 Public Acts, that amendment has no bearing on the merits of this appeal. For convenience, we refer to the current revision of the statute.

[4] General Statutes (Rev. to 2019) § 46a-82 (f) provides: "Any complaint filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination, except that any complaint by a person claiming to be aggrieved by a violation of subsection (a) of section 46a-80 must be filed within thirty days of the alleged act of discrimination."

[5] The terms "litigation privilege" and "absolute immunity" are used interchangeably throughout this opinion.

[6] The commission argues that de novo review of the defendant's jurisdictional argument is not available because, in its view, the only decision properly before this court is the denial of the defendant's second motion to reargue. It therefore argues that we should review on appeal only whether the court's denial of the defendant's second motion to reargue was an abuse of its discretion. We disagree. It is clear from the defendant's first motion to reargue, and from the court's action on that motion, that the court treated the defendant's litigation privilege argument as a new motion to dismiss. Indeed, in the court's November 24, 2021 order, it explicitly stated that "[t]he defendant's *motion to dismiss* on the ground of absolute immunity is therefore denied." (Emphasis added.) Moreover, "[t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005). Accordingly, our review of the jurisdictional question before us is de novo. See *Dorfman* v. *Smith*, supra, 342 Conn. 594 ("applicability of absolute immunity implicates the court's subject matter jurisdiction").

[7] General Statutes (Rev. to 2009) § 31-290a (a) provides in relevant part: "No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter."

All references to § 31-290a in this opinion are to the 2009 revision of the statute.

[8] We take no position on the legal sufficiency of the plaintiff's claims, including whether § 46a-58 (a) grants substantive rights or provides a private cause of action.

[9] A claim for common-law "[v]exatious litigation requires a plaintiff to establish that: (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice; (3) the defendant acted without probable cause; and (4) the proceeding terminated in the plaintiff's favor." *Rioux* v. *Barry*, supra, 283 Conn. 347.

[10] "An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. . . . Because the tort arises out of the

accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987).

[11] In his complaint, the plaintiff asserted that "[t]he children's attorneys filed termination of parental rights petitions on behalf of the three children as the three children expressed a desire to be adopted by the foster mothers."

[12] The plaintiff's complaint stated: "On or around July 29, 2015, the plaintiff filed an emergency custody application with the family court alleging serious concerns regarding the children's safety in the mother's care and the mother's ability to parent the children. Due to the seriousness of the allegations, the court . . . issued an order of temporary custody . . . to the defendant."